Conference Paper

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Redde Rationem. Translating Human Rights from Law into the Fields of Accounting and Finance.

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Abstract

In the last few years, a number of jurisdictions across Europe and elsewhere have introduced for the first time the obligation for large corporations to include in their annual reports information about business respect of human rights (e.g. EU Directive on non-financial reporting; UK Strategic Report; UN 'Ruggie' Framework). This regulatory change is creating an unprecedented convergence between the 'parallel worlds' of human rights lawyers; international accountants; and financial analysts. However, these 'transnational communities' of professionals (Djelic and Quack 2012) deploy different – often competing – rationales, languages and tools to look at this issue. This situation requires a difficult translation between the transnational fields of human right law and the ones of business' accounting and finance. Through an extensive document analysis, the paper empirically investigates this strange encounter, exploring the role of these communities in shaping the regulatory debate at the national (UK) and supranational (EU and UN) levels.

1. Introduction. Requirements for Corporate Disclosure on Human Rights

During the last decade, the regulatory debate on business and human rights has seen significant developments through a number of initiatives that emerged at different levels of regulation and through varying modes of governance. In particular, this paper focuses on the area of transparency and disclosure by large corporations about human rights issues and related risks in their operations and supply chains. The scope of the research is limited to three levels of regulation: the United Kingdom (UK); the European Union (EU); and the United Nation (UN). However, it also considers private, transnational, standard-setters that are active across these different levels.

Possibly, the most consequential recent innovation in this field has taken place in 2011, with the unanimous endorsement of the 'Guiding Principles on Business and Human Rights' (from now on the UNGP) by the UN Human Rights Council. The UNGP have been developed by Harvard Professor John Ruggie, appointed in 2005 as UN Secretary-General's Special Representative for Business and Human Rights. Therefore, they are often referred to as the 'Ruggie Framework'. They have also been called 'Protect, Respect and Remedy Framework', because they encompass three pillars: the state duty to *protect* human rights; the corporate responsibility to *respect* human rights; access to *remedy* for victims of business-related abuses. Undeniably, the UNGPs have generally received a positive reception and have become a sort of reference point for any future development in this area. For the first time, a wider consensus has emerged that companies have the obligation to respect human rights throughout their operations and value chains. The merit of the UNGP has also been to bound states to develop adequate legal and judiciary infrastructures to enforce this obligation. However, they have also attracted a fair amount of criticism for their voluntary character and for 'bypassing smartly' many contentious issues in the area of business and human rights, seeking primarily the consensus and support of the business sector (Bilchitz and Deva 2016: 9). Rather than imposing direct obligations to businesses, the UNGPs give particular emphasis to a meta-regulatory approach that encourages them to demonstrate their commitment to human rights respect. Therefore, they underline the importance of corporate disclosure and transparency and the need for the state to strengthen corporate accountability making corporate reporting on human rights mandatory.

In 2011, in line with the UNGPs, the OECD strengthened its 'Guidelines for Multinational Enterprises', including a new chapter on human rights and a new approach to due diligence and responsible supply chain management. Building on this momentum, the European Union (EU) included in its 2014 Non-Financial Reporting Directive, 'EU Directive 2014/95/EU', a mandatory requirement to report on human rights, as well as social and environmental related matters and anti-corruption policies. In particular, large European companies are required to disclose information on the policies, the outcomes of those policies, principle risks and the due diligence process that companies have implemented in order to prevent human rights abuses. As a result it has been estimated that, starting from January 1, 2017, over 6,000 large enterprises will include such statement in their annual reports. However, companies are allowed to state that no policies or procedures are in place, although they should provide a

clear and detailed explanation of why this is the case ('report-or-explain'). Also the new EU Directive does not require these statements and associated performance indicators to be assured by a third party. The Directive is now in the process of being adopted by all the EU Member States.

Independently from the EU process, many European countries have recently adopted some forms of legal requirements that oblige large companies to disclose information on their human rights policies and performance. A prominent example is the 'Grenelle II Act', in France. It was passed in 2012 and includes mandatory reporting on the environmental and social consequences of the company's activities, including actions promoting human rights. On the contrary of the EU Directive, it requires a third party to verify the 'extra-financial' information that is included in the report. In the UK, the 'Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013' already requires listed companies to include information on their policies on human rights as well as the effectiveness of those policies. More recently, the UK Modern Slavery Act 2015 requires commercial organisations with a turnover of £ 36 million or more who do business in the UK to disclose, in an annual slavery and human trafficking statement, the steps they are taking to address modern slavery in their business and supply chain. Even if they haven't done anything in this respect, that must be stated. The act applies to over 12,000 firms in Britain. The Modern Slavery Act states that a person commits an offence if they know, or ought to have known, that a person is held in slavery or being forced to perform compulsory labour. If found guilty, offenders risk penalties that include imprisonment (up to life), seizure of assets which can be used to compensate the victims, and prevention orders.

Although they fall outside the scope of this paper, significant developments are taking place also outside the EU arena. For instance, in September 2010, the California Transparency in Supply Chains Act (SB 657) was signed into law requiring retail sellers and manufacturers that do business in California and have over $100 million in gross annual receipts to publicly disclose their efforts to eradicate slavery and human trafficking from their supply chains. The act came into effect in January 2012 and it is estimated to have impacted about 3,200 companies. Lastly, it is worth to mention that there are several prominent regulatory initiatives that are not state-driven. They rather belong to the burgeoning sphere of private standard-setting for corporate non-financial disclosure. These initiatives can be divided in two broad categories: stakeholder-oriented and shareholder-oriented. The latter are designed to respond to the growing interest of certain investors and financial institutions in having more and better non-financial information. That includes also information on human rights issues and related risks in the operations and supply chains of listed companies. Prominent examples of this approach are the Carbon Disclosure Project (CDP) and the International Integrated Reporting Council. The former regulatory approach, instead, considers a broader spectrum of actors and information needs, including these of employees, investors, NGOs and public authorities. Examples include the Global Reporting Initiative, the most widely used global framework for social and environmental reporting, as well as the ISO 26000, developed by the International Organization for Standardization (ISO).

The rapid emergence of a multi-level regime of human rights corporate disclosure can be explained in relation to a long-term, twofold, development in global governance and regulation. On the one side, it is rooted in the explosion of the discourse around individual rights that already characterised the 20th Century. They are civil, social and economic rights that are often presented (or claimed) as 'universal' but have been, *de facto*, mostly applied to a limited number of citizens in certain developed countries. While this phenomenon has been originated from within the world of law and courts, it has rapidly conquered the political sphere. The emergence of international NGOs, such as Amnesty International or Human Rights Watch, has been the main vehicle of this global explosion. On the other side, the demand for information on corporate human rights violation is related to the expansion of the discourse around disclosure, transparency and data that is leading to the rise of an 'audit society (Power 1999). Initially applied to the world of financial reports and accounting, disclosure has conquered every aspect of business regulation and beyond (Braithwaite and Drahos 2000).

Both human rights and disclosure 'universal' discourses have been widely criticised (cf. Garcia 1999; Henriques 2007), nonetheless they seem far from falling away. On the contrary, they appear to have infinite new applications to different fields. What is interesting for the scope of this article is to see the two overlapping in the emerging regime for corporate human rights disclosure. The original contribution of this paper lies in the attempt to make sense of the 'collision' of languages and professional skills conventionally belonging to distant universes. In particular, as we shall discuss in the following sections, the encounter between business reporting and human rights requires a difficult translation of the original discourse around human rights violations, elaborated mainly by jurists and lawyers, into a business' language, largely constructed by accountants and auditors. In particular, the paper main research question is:

What is the role of three transnational communities of professionals in shaping the emerging multi-level regime of corporate human rights disclosure: human rights lawyers; international accountants; financial analysts?

Drawing on Bilchitz and Deva (2016) critical account of business' human rights obligations, the main research question can be divided into four sub-questions:

a) How these transnational communities elaborate shared ideas on this regulatory issue and succeed in maintaining – or increasing – a certain 'consensus' around it.
b) How they position themselves in the continuum between voluntary and mandatory disclosure? Which rationale they adopt to justify their position?
c) How they define the obligations that corporations have in relation to human rights disclosure? In particular, what information should be disclosed and why?
d) How these transnational communities intend to verify this information? To what extent they could be used (e.g. in courts) against companies that violate human rights?

2. Transnational communities shaping the regulation of human rights corporate disclosure

The article originated from a fieldwork analysis made between 2011 and 2013 of the emerging European regulation of so-called non-financial disclosure. This is defined by the EU Commission as information about social and environmental matters, human rights and anti-corruption policies (EU Commission 2013). One of the key findings of this study regarded the crucial role played by three professional groups, particularly active in shaping this new regulatory field: financial analysts; international professional accountants; and environmental and human rights lawyers (Monciardini 2013). Building on these findings, the author is developing a follow-up research focused only on the area of human rights disclosure requirements that apply to large corporations. The research method deployed is based on a systematic analysis of the available secondary sources and documents concerning the activities of these actors, related to the regulatory and policy debate on human rights disclosure. The research considers the regulatory debate that is taking place at different level of regulation, national (UK), European and international (UN).

The current phase of the research is dealing with the content analysis of the main public documents and press releases the actors have issued between 2009 and 2014 on this issue. The analysis aims to provide a dense understanding of cumulative institutional changes and the interplay between different agents in shaping the emerging regulatory field of business' human rights reporting. In particular, this approach offers insights about the different language, arguments and ideas adopted by the three TCs of professionals. As for activist-lawyers, it emerged the important role played, in the UK, by the Corporate Responsibility Coalition (CORE), in connection, at the EU-level, with the European Coalition for Corporate Justice (ECCJ), a network of European NGOs assisted by national organisations. As for accountants, it emerged the role of the International Accounting Standard Board (IASB), in connection with the Federation of European Accountants (FEE), and the 'Big Four' (KPMG, Deloitte, Accenture, and Ernst & Young). A growing role is currently played also by the International Integrated Reporting Council (IIRC). Lastly, considering financial analysts, it emerged, in particular, the role played by Environmental Social and Governance (ESG) rating and analysts, such as MSCI, the UK Sustainable Investment & Finance association (UKSIF) and the European Federation of Financial Analysts (EFFAS). An active role is played also by the CDP (Carbon Disclosure Project) and the UN Principles for Responsible Investment (UNPRI).

This phase will be followed by three rounds of interviews in London and Brussels with key informants from the various institutions abovementioned, active at the three different levels of governance. This further step is aimed at strengthening our understanding of the multiple identities that key actors play at different levels of regulation. It also aims to clarify the internal struggles and dynamics that create consensus within the different TCs. Finally it will look at the coalitions and conflicts amongst different actors and their broader relations with different constituencies (investors, trade unions, NGOs, etc.) as well as law-makers and standard-setters.

The theoretical approach deployed by this study is drawing on different contributions from accounting, sociology and political economy. In particular, it builds on the work of Djelic and Quack (2012) on professions and transnational social networks. Namely, the study analyses professional accountants; activist-lawyers and financial analysts as Transnational Communities (TCs) of professionals. Adopting this theoretical framework, it attempts to go beyond most of the literature, overwhelmingly focused on the perspective of companies, NGOs, regulators and other stakeholders (cf. Mares 2012; Simons 2012; Bilchitz and Deva 2016), neglecting professional communities and their competing interests. Djelic and Quack (2012) define TCs as social groups that emerge from mutual interaction across national boundaries, oriented around a common project or 'imagined' identity. Such communities can overlap in different ways with formal organizations. However, in principle, they do not need formal organization to be sustained.

To explore the role of these TCs in the emerging regulation of CSR disclosure, the research applied a "process theory" perspective (cf. Langley 1999; Pierson, 2004). This research methodology gives particular attention to time ordering of the contributory events as a way of capturing the key factors that explain the role of different actors in shaping policy and regulatory changes.

3. A Difficult Translation. From Law to Accounting and Finance.

In order to understand the different definitions of human rights disclosure projected by financial analysts, activist-lawyers and international accountants, one should consider the underlying rationales that underpin them, relying on Finance, Law and Accountancy knowledge and values. In effect, according to Djelic and Quack (2012), the way transnational communities (TCs) affect governance is by creating transnational 'problem spaces', where individuals and organizations can meet and collaborate. Through discussion and, sometimes, conflict, preference transformations are framed and compromise solutions are found, leading to a continuous (re)elaboration of 'shared ideas'. Each TC has therefore elaborated a different view of human reporting's content, purpose and regulation. The task of these communities, particularly accountants and financial analysts, has been to translate human rights into a language that business can understand. As it has been pointed out (Buhmann 2016), this has been realised using strategically and even transplanting some terms, such as 'human rights due diligence' process, that are already familiar to business actors. On the other hand, this 'translation' has been criticised by human rights activists and scholars. They have seen it as a move that prize consensus over ambition that dilutes the human rights discourse, making legal obligations too 'soft' and risks corrupting the normative foundations of human rights using a non-legal language (Nolan 2016).

3.1 Mapping the Position of the Transnational Communities

How these transnational communities elaborate shared ideas on the regulation of human rights disclosure and succeed in maintaining – or increasing – a certain 'consensus' around it?

Starting from activist-lawyers, ideas come from clusters of legal experts, from which NGOs such as Amnesty International, ECCJ or CORE can distil legal drafts, reports and proposals. This is one way through which NGOs attempt to make a strong and sound argument and influence policy- and law-makers at different levels. For instance, ECCJ, at the EU-level, uses the strengths of its national members, exploiting its flexible, coalition-based and networked organisation. In addition to individual collaborations with legal experts and scholars from different parts of Europe, more structured collaborations have been developed with member organisations of activist-lawyers such as FIDH, the International Federation of Human, or SHERPA, a French lawyers organisation, or Frank Bold, an organisation composed of 30 lawyers engaged also in corporate legal accountability. They are the often 'invisible hands' that allow a small organisation like ECCJ (two full-time staff) to match, in terms of quality of its proposals, the power and activism of EU business lobbies.

Therefore, consensus and coordination within this TC is guaranteed by the network of NGOs and meetings amongst them. This is a rather 'light' and certainly fragile structure. However, if used effectively, it can exploit the advantage of being very reactive and mobile. The specific case of human rights disclosure and transparency regulation is a good example of how activist-lawyers – and coalitions of NGOs – are willing and able to exploit regulatory 'windows of opportunity', such as the momentum offered by the draft of the UNGP or the EU Directive on Non-Financial Reporting. Even when these opportunities are in fairly new 'places' for human rights lawyers, like accounting and reporting regulation. Nonetheless, there is a clear conflict or divide within the community of activist-lawyers. One component is more willing to size this kind of short-term windows of opportunity provided by the current consensus on mandating human rights disclosure. Another component maintains that 'soft law' is not the answer and reporting regulation is a weak regulatory approach that would just 'sell' human rights to business. The latter group claims that all the efforts should be channelled into a strong demand for a binding treaty (or treaties) on these issues to be achieved in the longer term.

International accountants are split into two approaches towards human rights disclosure and, more generally, reporting on what they would call CSR matters. As summarized by Gray, it is fair to say that "for the vast majority of teachers, students, researchers and practitioners in accounting management and organisational studies, social and environmental accounting is a matter of sublime irrelevance. They know little about it and care even less." (2006: 6) However, part of the profession – a well-established minority – has been working on social and environmental reporting for decades, indeed fighting within this professional community for the full recognition of the relevance of this broader approach to accounting. As the practice of reporting on non-financial matters has grown, combative team of international accountants working specifically on sustainability reporting were established within the 'Big Four' global accounting firms. They have produced a large number of studies, frameworks, researches and collaborations at different levels and with various stakeholders, playing a fundamental role in advancing the debate both within the community and outside it. Also accounting scholars and educators have been instrumental in keeping the social accounting debate alive. A long track record of this activism can be found in academic journals like

Accounting, Organisation and Society; *Accounting, Auditing and Accountability Journal*; *Critical Perspectives on Accounting*; and *Social and Environmental Accountability Journal* that have re-defined the intellectual landscape of accounting (cf. O'Dwyer and Unerman, 2015).

However, while reporting on environmental performance – particularly carbon disclosure – has been greatly advanced and generally accepted by the profession, social accounting and, specifically, human rights is widely recognised as underdeveloped and less attention has been given to it even by researchers. Like financial information, many elements of environmental accounting are quantifiable and can be clearly calculated and measured. Information on social matters are often more qualitative and narrative. Therefore, accountants face the difficulty – if not impossibility – of communicating it in a concise, reliable and comparable manner. This standing could be synthesized by the idea that 'this is not accounting'. Historically, professional accountants had a key role in keeping 'non-financial' elements out of the multi-level regulatory framework for business reporting (IAS, EU and national requirements). In the 1970s, across Europe, there was a vibrant legislative debate about social reporting, particularly employees-related information, which was sidelined starting from the 1980s as the focus shifted to financial accounting standards only and their harmonization, seen as a pre-condition for global markets' integration (Monciardini 2013). As financial accounting rule-making became increasingly privatized, transnational and complex, for international accountants became particularly important "the establishment of clearly limited jurisdictions in which professional dominance is exercised." (Botzem 2012:47) Social and environmental exclusion from accounting was functional to the establishment of this power strategy, aimed at the monopolization of responsibilities and competencies. Social closure then was achieved via education, internal control and professional norms and values strictly focused on financial information.

This position of the accounting hierarchy and profession (IASB, FEE) on social reporting regulation has been very consequential, as accountants firmly control the largely privatised production of accounting standards. The accountants' community is able to 'play' multiple identities within this regulatory field: independent external experts; private and public standard setters; and national or EU policy-makers, largely recruited from the 'Big Four'. As a consequence, 'extra-financial' information, including human rights, was left out of corporate disclosure standards and principles.

However, there is a third way to the regulation of human rights disclosure, outlined by financial analysts. They even use a vocabulary to address this area that differs from accountants. They would not refer to 'non-financial information' but to 'Environmental Social and Governance (ESG) information'. Likewise accountants, traditionally financial analysts have demonstrated, by and large, little interest in such information (ACCA 2008). However, there is a well-organised minority of analysts that recently pushed very strongly for mandatory disclosure on human rights and the environment. They have been arguing that the materiality of this information is no longer in question and that ESG analyses are rapidly becoming mainstream (UNPRI 2011). Their elaboration of Key Performance Indicators and frameworks for the financial analysis of such information comes from an established tradition

of Socially Responsible Investment (SRI) practices. For decades SRI has been a niche market, a small and relatively safe world of personal relations and strong – often religious-based – values, within the ocean of financial markets. Now this world is rapidly growing and changing, creating new opportunities and problems. Today, ESG data are distributed by Bloomberg on a global scale. There are sustainability indexes, such as MSCI ESG Indices, and global specialists in sustainable investment analysis, such as Sustainalytics. As regards asset managers, there are more and more players looking at ESG information and data. However, they are still doing so in a very diverse way. Some of them, like the largest UK insurer Aviva, have been strongly advocating for mandatory disclosure of ESG data, while many others are not really active on this issue. All the largest pension funds in Europe have progressively embraced or are already doing some form of SRI. They invested money, resources and their critical mass in demanding corporations for such information, through major initiatives such as Carbon Disclosure Project, the UN Principles for Responsible Investment or the Institutional Investors Group on Climate Change. On the contrary, smaller and medium funds have not even started looking at this issue. This rapid development allowed the EU Commission to present the Non-Financial Reporting Directive as a response to investors' growing demand for reliable information, including on human rights.

This new situation, strongly supported by legislative interventions making disclosure mandatory, demands financial analysts to develop detailed, meaningful and tailored frameworks for ESG disclosure. In effect, in 2009, drawing on a framework developed by the DVFA (the German Society of Investment Professionals), EFFAS (the European Federation of Financial Analysts) launched a set of KPIs for ESG information (DVFA/EFFAS 2009) that gained the status of an official EFFAS Standard. EFFAS 2009 Conference on ESG, significantly titled *ESG Mainstreaming: Looking for something that has already found us?*, testified this change of perspective. In the opening statement, it was claimed that: "Demanding proof for the effects of good ESG performance on the bottom line of corporates has been a volkssport in capital markets for many years." Now "we simply assume (or for agnostics: pretend) that a corporate managing, measuring and disclosing ESG is the default." (EFFAS 2009) The framework was then reviewed (Sept 2010) and repeatedly proposed to policy-makers as the first major framework tailored for the needs of investors. This has potentially set EFFAS in competition with international accountants and the big players in the sustainability reporting arena (e.g. GRI, CDP, ISO 26000).

3.2 Mandatory or voluntary corporate human rights disclosure?

How the transnational communities position themselves in the continuum between voluntary and mandatory disclosure? Which rationale they adopt to justify their position?

Activist-lawyers are strongly in favour of legally binding obligations for detailed human rights disclosure. The rationale they provide is related to transparency and the 'right to know' about the impact of corporations on the communities in which they operate. The raison d'être for this type of disclosure is related to corporate accountability and the concern over the power and influence of corporations on "every aspect of our lives: water, gas, news, environment, schools and even unborn babies." (Mitchell and Sikka 2005) As Gray pointed

out, "accountability is based on the principal of rights to information – rights which derive from a number of sources: legal, quasi-legal, moral and so on." (2005: 3) According to this view, corporations have been grated extensive rights, in particular related to the enforcement of property rights, but have very limited social responsibilities linked to their activities. Because of the limited liability of shareholders and their short-term approach, corporations could decide to maximise profits exploiting natural resources and workers, resulting in violations of (or complicity in violating) human rights. Transparency is vital in this perspective because it enables stakeholders to put pressure on corporations and to hold them to their pledges. According to activist-lawyers, law-makers should impose clear obligation on large firms to become fully transparent on their social impact and more active in defending human rights.

The use of legal arguments by activist-lawyers can be retrieved in several documents (e.g. FIDH 2010; ECCJ 2010; CORE 2011). In its reply to the Public Consultation launched in 2011 by the EU Commission, ECCJ argued: "It is frequently reported that core international labour rights are being abused in these factories. However, companies rarely disclose who are their suppliers which makes it difficult if not impossible to track the goods and for consumers to learn in what conditions the products have been manufactured. Likewise, claims of such companies to protect workers' rights are rendered meaningless when the workers themselves are unable to access such protection." (2011: 3)

Financial analysts do not see disclosure on human rights as a priority, as much as activist-lawyers do, but they are also in favour of mandatory and detailed disclosure. From their point of view, the more reliable and relevant information they can have, the better. However, they offer a completely different rationale for human rights disclosure. In their view the issue of human rights is related to the need to know about all the risks and opportunities that might affect the companies in which they have invested. Here we are not confronted with a moral or political argument but merely with a financial risk that need to be carefully assessed. As stated by the investor coalition (82 investors representing $4.8 trillion assets under management) supporting the UN Guiding Principles Reporting Framework: "Beyond ethical concerns, companies that do not proactively assess and manage human rights risks face potential legal, reputational, and other risks with financial implications. Meaningful disclosure of human rights performance can play a significant role in reducing a company's human rights risks, contributing to a company's competitive advantage, and strengthening its long-term financial stability." While relatively small asset managers and pension funds can still take the liberty of ignoring this issue, most of the largest institutional investors have now put in place, at least formally, a clear policy on this issue and are part of global initiatives, such as the UNPRI or the CDP, that are aimed to encourage companies to demonstrate how they meant to address these risks.

More articulated is the position of international accountants. Their professional bodies have maintained that companies should disclose information on social matters on a voluntary basis. They underline that companies can already choose amongst various existing reporting frameworks and there is no need for a prescriptive and detailed approach to the subject by the legislator. For instance, the letter prepared by the FEE for the 2011 EU public consultation on

Non-Financial Reporting advices against establishing requirements at the national or European level on social and environmental reporting. "Instead, the European Union should contribute to the development of global standards […]." In effect, the position of international accountants can be understood considering that accountants have little knowledge or understanding of human rights and other social reports, therefore a legally binding obligation to disclose on this area would challenge their position of monopoly and control.

When it appeared clear that some form of EU and national legal obligation for disclosing non-financials would appear anyway, international accountants responded with a twofold strategy. First of all, they insisted for a rather weak regulatory approach and something as similar as possible to what already exist for financial accounting law. In the case of the EU directive, that was clearly achieved. Law-makers decided for a rather modest, principle-based, report-or-explain approach. The EU Directive does not specify any reporting framework or set of KPIs that companies should follow to comply with the new EU Law. Therefore, it creates a gap that immediately attracted the attention of all the key players in the area of non-financial reporting. Second, the profession had a crucial role in setting up an ambitious, internationally accepted, framework for integrating financial and non-financial information that would fill this gap: the International <IR> Framework developed by the newly created IIRC. Accountants hope that the launch and establishment of this private and transnational global regulatory initiative would allow them to lead and control this transformation rather than being subject to it. The ambition they have in creating the IIRC is to develop, for integrated reporting, something similar to the IASB, for financial disclosure. Namely, a framework that companies are required to comply with but that the accounting profession has privately constructed to their needs.

3.3 Right-to-Know, Materiality and Salience of Human Rights Information

How the transnational communities define the obligations that corporations have in relation to human rights disclosure? In particular, what information should be disclosed and why?

In order to understand the key difference between the ideas of human rights disclosure which is projected by financial analysts and the one proposed by activist lawyers, one should first look at the difference between *transparency* and *materiality*. As it emerged by the documents of the first EU Workshop on the disclosure of ESG information (2009: 4), "Although they are not mutually exclusive, transparency and materiality correspond to different stakeholders with different constituencies and agendas, each legitimate in its own right, and they can sometimes be conflicting. Transparency values the disclosure of data for its own sake, sometimes as a question of principle. Materiality seeks to define which data is actually important in terms of influencing the decisions of the intended recipients of the information."

As mentioned above, lawyers underlying rationale for human rights disclosure is based on the *right to know* about business impact on society and the environment and the need to hold corporations accountable. Stressing transparency as a tool for corporate justice means bringing accounting standard-setting back into the domain of public law and state control. In

other words, reporting on human rights becomes part of a broader legal framework, which subordinates economic efficiency to the need of addressing urgent human and environmental challenges. In particular, human rights lawyers stress the need for more and better information on working conditions in MNEs' supply chains and the need for appropriate due diligence (ECCJ 2008; SOMO 2013; Augenstein 2010).

On the other hand, financial analysts' view is that references to human rights need to be subordinated to a *materiality constraint*. In the field of accounting and finance, information is said to be material if omitting it or misstating it could influence decisions that users make on the basis of the entity's financial statements. In practical terms, this means that to be considered financially material human rights should have a substantial impact on a company's core business value – that are growth, profitability, capital efficiency and risk exposure. This is often implicit in the KPIs adopted by major Sustainability Indexes, such as MSCI ESG ratings or RobecoSAM. However, only very rarely human rights have a significant impact on companies' value creation. Therefore, information on human rights is marginally considered by financial analysts. Furthermore, the way they are framed and analysed is not from the point of view of the victims of human rights abuses. Ironically, it is from the perspective of listed companies, the offenders or the accomplice of the violations. In effect, the materiality filter focuses on possible human rights risks that might affect the company's bottom line. Even as a basis for shareholders' activism, the financial materiality principle is a problematic ground. As pointed out by Jill Solomon, "materiality is such an intangible, abstract notion that it would in practice be extremely difficult to prosecute a director on a point of social and environmental materiality." (2007: 233)

As for accountants, they have developed for many years voluntary reporting framework, like the Global Reporting Initiatives, that have attempted to outline a broader, stakeholder-based, approach to materiality. These frameworks have been popularised by the sustainability teams of the Big Four global accounting firms, greatly advancing the debate on social accounting. However, the official position of accounting professional hierarchy and standard-setters is much closer to the one of financial analysts. They would also subordinate social reporting to a financial materiality constraint. For instance, the letter prepared by the FEE for the EU public consultation on Non-Financial Reporting calls the attention to the problem of avoiding "any risk of 'boilerplate' text in reports to investors, we should ensure that financial statements reflect the most relevant information." (FEE, 2011: 3) Similarly, after the publication of the EU Commission legislative proposal on Non-Financial Reporting, the President of ICAEW, Sleigh-Johnson, warned: "If the information is not bespoke and of relevance to investors, it will just lead to clutter and 'boilerplate'." (EurActive, 2013) The launch of the <IR> Framework confirmed this line. In fact, the <IR> Framework subordinates social and environmental issues to a materiality test, sacrificing stakeholders' instances to these of capital providers only. So doing, international professional accountants aim to 'conquer' new spaces in the emerging business of ESG reporting. They alienated NGOs and civil society but gained the crucial support of financial analysts and the financial community.

It is clear that any equilibrium between the two principles of materiality and transparency as outlined above will be also the outcome of struggles and asymmetric power relations.

However, the autonomous role of regulators and public authorities in finding a middle ground between the two principles should not be underestimated. Significantly, the UNGP offer a third way here, stating that companies should prioritize reporting on human rights on the basis of their *salience*. Salient human rights issues stand out because they are at risk of the most severe negative impact through the company's activities or business relationships. The concept of salience uses the idea of risk, familiar to business and financial analysts, but refers to risk to people, not the business, as a lens of analysis. The emphasis lies on those impacts that are most severe; are more likely to occur; avoiding harm rather than supporting or promoting human rights. Unfortunately, the UNGP did not provide a detailed and specific list of human rights violations that apply to business but it refers to the generic list stated in the Universal Declaration of Human Rights.

3.4. Third Party Verification

The position of activist-lawyers and financial analysts becomes closer again as regards to the need for third-party verification. Both transnational communities underline that, in order to be reliable, some form of external verification is needed. Otherwise, companies could state all sort of unsubstantiated information on their actions in favour of human rights even if incorrect and hide any negative impact. In the case of lawyers, the main rationale for verification is that information should be used to investigate abuses and violations. Therefore, it should be possible to use them in court to hold the company accountable for the harm provoked or for complicity with human rights violations. This use of information by activist-lawyers can be seen in several documents (e.g. FIDH 2010; ECCJ 2010; CORE 2011). For instance, "Information is essential to uphold human rights because it helps to prevent abuses, hold companies to account and seek remedies. 'Abuses always happen in the dark'. Disclosure can also prevent abuses by enhancing the participation of people whose rights might be affected. The right to know is also a human right. Courts need information in order to function, and in this way ESG disclosure is linked to provision of remedies." (Commission 2009a) In these documents, accountability becomes a means to redefine corporate responsibilities, often translating them into managers' liabilities. For instance, one of ECCJ publication highlights that, according to the Seventh Company Directive, Member States are required "to hold the management of companies liable for the fulfilment of reporting duties and to establish effective and dissuasive penalties." (ECCJ 2010) Financial analysts' interest in third party verification is much more narrow and limited to the accuracy and comparability of information.

Accountants – but even more auditors – are very interested in the issue of externally verify non-financials. Obviously, this could become a new area for them to develop. However, it would also require new skills and training that is largely absent at the moment. Most importantly, human rights disclosure – exactly for the use that activist-lawyers and SRI want to make of it – risks becoming the sources for litigation and legal actions. Certainly, companies do not want it and it might create substantial additional cost for them. Eventually, accountants and auditors are paid by the reporting issuers (companies) and often protect the interests of large companies much more than the one of reports' users, including financial analysts and investors.

4. Conclusion

The paper has provided an exploratory analysis of the competing professional claims and underlying rationales of international professional accountants, financial analysts and activist-lawyers as regards the emerging regulation of human rights reporting. Drawing on Djelic and Quack (2012), it has deployed a reflexive sociological approach to this subject matter, considering these three professional elites as 'transnational communities'. A reflexive sociological 'polycentric approach' contains untapped intellectual resources to explore undergoing transformations, not excluding any of the co-producers of these changes. This approach could be particularly relevant as it shows that adopting different rationales for human rights disclosure would have profound social, economic and environmental implications.

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