Regulating Corporate Social Responsibility in the UK and India: An Analysis from the Perspective of Stakeholder Protection

Snehita Singh

Submitted in the fulfilment of the requirement for the Degree of Doctor of Philosophy in Law
(PhD in Law)

School of Law
College of Social Sciences
University of Glasgow
August 2022

Abstract

The notion of corporate social responsibility (CSR) emphasises the way directors manage the companies. It focuses on how a company takes responsibility for its impact on the various stakeholders, extending the corporate purpose beyond the narrow shareholder-primacy framework. This thesis explores how CSR should be regulated from a legal perspective by analysing the current legal framework for CSR in the United Kingdom (UK) and that of India. The reform of directors' duties and disclosure are methods for protecting stakeholders in the two jurisdictions. Disclosure is identified to be crucial but not sufficient to safeguard stakeholders fully. While it creates some level playing field in the UK by giving information to the stakeholders about the company, in India, the lack of enforcement of the reporting requirements and inadequate verification of the information provided by companies lead to a tick-box approach.

The implication of the comparative research on the legal framework demonstrates the differences in the approach to regulating CSR. The UK gives flexibility to its directors to manage the affairs of the company. The enlightened-shareholder-value (ESV) approach of the UK Companies Act 2006 (CA 2006) prioritises shareholder's interests over stakeholders. India adopts a pluralist approach but gives importance to the philanthropic approach under section 135 of the Indian Companies Act 2013 (CA 2013), and overall, the framework is prescriptive and more towards hard law. However, in both countries, the substantive duty under section 172(1) of CA 2006 and section 166(2) of CA 2013 gives directors a wide discretion to integrate stakeholder interests without telling them how to do it. Stakeholder interests have been largely marginalised due to the black-box method of decision-making, and therefore, the question arises as to how to secure accountability for stakeholders.

This thesis identifies several potential techniques to protect stakeholders. The substantive duty of directors must be implemented through process-based regulation. Stakeholders must be empowered to be able to influence director's decisions. The key legal reform identified is the 'purpose provision', which should also be reflected in the director's incentive plans. The implementation of a broader purpose should be supported by a due diligence process implemented by a mandatory approach. A provision for stakeholder engagement such as Provision 5 of the UK Corporate Governance Code will have a preventive or precautionary effect on the decision-making process, thus, potentially improving the quality of decisions. Such process-focused mechanisms control the factors that contribute to decision-making by establishing a process that incorporates good techniques and incentives in each corporate governance system to protect stakeholders.

Key words: Corporate social responsibility, stakeholder interests, director's duty, decision-making, disclosure, stakeholder engagement, due diligence.

Table of Contents

List of Tables

List of Legislation

United Kingdom

Statutes

Bribery Act 2010

Companies Act 1948

Companies Act 2006

Company Directors Disqualification Act 1986

Enterprise and Regulatory Reform Act 2013

Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008

Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013

Modern Slavery Act 2015

Self-Regulatory Rules

The Companies (Miscellaneous Reporting) Regulations 2018

The Companies (Model Articles) Regulations 2008 (Articles 2008)

The Corporate Governance Code 2014

The Corporate Governance Code 2016

The Corporate Governance Code 2018

The Stewardship Code 2020

India
Statutes

Companies (Amendment) Act 2019

Companies (Corporate Social Responsibility Policy) Amendment Rules 2021

Companies Act 1956

Companies Act 2013

SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015

Self-Regulatory Rules

Code of Independent Director

Companies (Corporate Social Responsibility Policy) Rules 2014

Corporate Social Responsibility Voluntary Guidelines 2009

National Guidelines on Responsible Business Conduct 2018

National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011

Stewardship Code for all Mutual Funds and all Categories of AIFs, in Relation to their Investment in Listed Equities (2019) CIR/CFD/CMD1/ 168 /2019 (Stewardship Code 2019)

Other Countries – South Africa

Companies Act 61 of 1973

Companies Act 71 of 2008

Other Official Publications
The European Union

Commission of the European Communities, Promoting a European Framework for Corporate Social Responsibility (Green Paper 01/9 2001)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: A renewed EU Strategy 2011–2014 for Corporate Social Responsibility COM (2011) 681

Corporate due diligence and corporate accountability, European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

Directive of The European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937

EFRAG, 'Proposals for a Relevant and Dynamic Eu Sustainability Reporting Standard Setting' (Final Report 2021)

European Commission, Directorate-General for Justice and Consumers, Study on directors' duties and sustainable corporate governance: final report, Publications Office, 2020

Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting

Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088

List of Cases

The United Kingdom

Aberdeen Railway Co v Blaikie Brothers (1854) 1 Macq 461

Ashbury Railway Carriage & Iron Co Ltd v Riche (1874-75) LR 7 HL 653

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 35

Bell Houses Ltd v City Wall Properties Ltd (No1) [1966] 2 QB 656

Borland's Trustee v Steel Brothers & Co Ltd [1901] 1 Ch 279

Cobden Investments Ltd v RWM Langport Ltd & Ors [2008] EWHC 2810 (Ch)

Colin Gwyer& Associates Ltd v London Wharf (Limehouse) Ltd [202] EWHC [2748] (Ch)

Cullen Investments Limited v Brown 2015 EWHC 473 (Ch)

Extrasure Travel Insurances Ltd v Scattergood [2002] EWHC 3093

Foss v Harbottle (1843) 67 ER 189

Hampson v Price's Patent Candle Co (1876) 45 LJ Ch 437

Her Majesty's Commissioners of Inland Revenue V Laird Group Plc [2003] UKHL 54

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821

Hughes v Weiss [2012] EWHC 2363 (Ch)

Hutton v West Cork Railway Co (1883) 23 Ch D 654

Item Software (UK) Ltd v Fassihi (2004) EWCA Civ 1244 (CA)

John Shaw & Sons (Salford) Ltd v Shaw [1935] 2KB 113

Lee Behrens & Co Ltd, Re [1932] 2 Ch 46

Macaura v Northern Assurance Co Ltd [1925] AC 619 633

Parke v Daily News Ltd [1962] 2 All ER 929

Parry v Guy Bartlett [2011] EWHC 3146 (Ch)

Phillips v Fryer [2013] BCC 176

R (on the application of People & Planet) v HM Treasury 2009 WL 3829362

Re W & M Roith Ltd [1967] 1 All ER 427

Regentcrest Plc (In Liquidation) v Cohen [2001] BCC 494

Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324

Smith & Fawcett, Re [1942] Ch 304

University of Nottingham v Fishel [2000] EWHC 221 (QB)

India

Albert Judah Judah v Rampada Gupta and Anr AIR 1959 Cal 715 35-A

Bharatiya Kamgar Sena v Geoffrey Manners and Co Ltd (1992) 73 Comp Cas 122 (Bom)

Chiranjit Lal Chowdhuri v The Union Of India And Others 1951 AIR 41, 1950 SCR 869

Dikshit and Co Ltd v Mathura Prasad AIR 1925 All 71 7

Harish Bansal Etc v Moti Films (P) Ltd 25 (1984) DLT 92

MK Ranjitsinh v Union Of India 2021 SCC OnLine SC 326

National Textile Workers v PR Ramkrishnan and Ors 1983 AIR 75

TS Arumugham v Lakshmi Vilas Bank Ltd and Ors 1994 80 CompCas 814 Mad 22–26

Acknowledgement

There are so many people who have helped me through my studies and am truly grateful for all their encouragement, help and support.

Firstly, I would like to express my sincerest thanks to my supervisors, Professor Irene-marie Esser and Professor Iain G. MacNeil. Their help with this thesis has been invaluable and the instrumental comments given have helped shape the quality of this work. They have guided me on this wonderful journey with their constant support through all the ups and downs and all their encouragement has helped me with this PhD thesis. I would never have got this far without them.

I would also like to thank all the members of the Law School within the University of Glasgow. In particular to Dr Katarzyna Chałaczkiewicz-Ładna for her help and thought provoking ideas. Also, to Mrs. Susan Holmes, I am very grateful for all the assistance she has given to me.

The past few years have been very stressful for a variety of reasons, and I would like to express my gratitude to my family for their support. I would like to thank my husband Runveer Singh for being so patient with me. Thankyou also to my parents and parents-in-law for all their love and support and a special thanks to my beloved dog Scotch for always wanting to be by my side.

Finally, my life in Glasgow would not have been what it was without the love and kindness of my wonderful friends. Michelle May, Fei Deng, Methinee Suwannakit and Jiarong Zhang, thank you for always being there for me.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Snehita Singh

Signature:

Abbreviations

BRR	Business responsibility report
BRSR	Business Responsibility and Sustainability Report
BSE	Bombay Stock Exchange
CA 1948	Companies Act 1948
CA 2006	Companies Act 2006
CA 2013	Companies Act 2013
CFP	Corporate financial performance
CLRSG	Company Law Review Steering Group
CSDDD	Directive on Corporate Sustainability Due Diligence
CSP	Corporate social performance
CSR	Corporate social responsibility
CSR Guidelines, 2009	Corporate Social Responsibility Voluntary Guidelines 2009
CSR Rules	(Corporate Social Responsibility Policy) Rules 2014
CSR Rules 2021	Companies (Corporate Social Responsibility Policy) Amendment Rules 2021
CSRD	Corporate Sustainability Reporting Directive
EC	European Commission
ESG	Environmental, social and governance
ESV	Enlightened shareholder value
EU	European Union
FRC	Financial Reporting Council
FSB	Financial Stability Board
FTSE	Financial Times Stock Exchange
GFC	Global Financial Crisis
GHG	Greenhouse gas
GRI	Global Reporting Initiative
GSP	Global stewardship principles (2020)
HLC	High Level Committee
ICGN	International Corporate Governance Network
ICSA	Institute of Chartered Secretaries and Administrators
IIMB	Indian Institute of Management and Business
IIRC	Integrated Reporting Council
ILO	International Labour Organization
KPIs	Key performance indicators

KPMG	Klynveld Peat Marwick Goerdeler
MCA	Ministry of Corporate Affairs
NAP	National Action Plan on Business and Human Rights
NCP	National Contact Point
NFRD	Non-Financial Reporting
NGRBC	National Guidelines on Responsible Business Conduct
NSE	National Stock Exchange
NVG	National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business
OECD	Organisation for Economic Co-operation and Development
P&P	People and planet
PRI	Principles for responsible investment
RBS	Royal Bank of Scotland
SASB	Sustainability Accounting Standards Board
SDGs	Sustainable development goals
SEBI	Securities and Exchange Board of India
SRAs	Sustainability rating agencies
SRI	Socially responsible investment
SSE	Sustainable Stock Exchange
TCFD	Task Force on Climate-Related Financial Disclosures
TCS	Tata Consultancy Services
UCC	Union Carbide Corporation
UCIL	Union Carbide India Ltd
UK	United Kingdom
UKCGC	UK Corporate Governance Code
UKFI	UK Financial Investment Ltd
UN	United Nations
UNGC	United Nations Global Compact
UNGP	United Nations Guiding Principles on Business and Human Rights

INTRODUCTION

1. THESIS OBJECTIVE AND RESEACH QUESTION

Corporate social responsibility (CSR) is an approach to decision making where the emphasis falls on how companies are managed by the directors and involves taking responsibility for the company's impact on stakeholders such as society and the environment.[1] CSR conduct relates to the recognition and integration of stakeholder interests in corporate decisions. CSR's moral and ethical dimensions are considered to be of intrinsic value to the concept. At the system level, it is also a normative exercise in setting standards or legitimate expectations of what companies should be doing, ie, acting for the long-term benefit of all stakeholders.[2]

Traditionally, shareholders have been prioritised in the management of the company. However, there has been a shift in public opinion towards recognising various stakeholder interests and a healthy corporate culture serving the needs of the wider society. The main objective of this thesis is to examine how CSR should be regulated from a legal perspective to achieve effective and sustainable corporate conduct. Regulation of CSR can be viewed from two distinct but interrelated dimensions: 'substance' and 'process'.[3] As described in this thesis, substance deals with directors' duty and is linked to the goals set for the company. It allows directors a wide discretion in applying their judgement to realise these goals. The process is concerned with 'how' to achieve that goal, ie, by focusing on the internal decision-making process of directors. Disclosure has been the primary tool for protecting stakeholder interests but it does not give them an entry point to participate in decision making.[4] Hence, although it is a

---

[1] For a discussion on the meaning of CSR see Ch1 Pt 3.1.

[2] Archie Carroll, 'Ethical Challenges for Business in the New Millennium: Corporate Social Responsibility and Models of Management Morality' (2000) 10 Business Ethics Quarterly 33, 36.

[3] In Ch 3 a table (table 1) is presented which outlines the differences between the two aspects. The thesis is based on the theme 'substance v process', which is in line with the approach taken by Ladna *et al* and adapted for the purpose of this thesis. They conducted their analysis in the context of 'outcome v control' and 'process v disclosure' themes to evaluate the early stages of the implementation of Provision 5 of the UK Corporate Governance Code (UKCGC). While their analysis was based on limited set of stakeholders (workforce) in the UK, this thesis is much broader in the application with evaluation of various potential techniques for protection of stakeholders in the UK and India. See the discussion in Ch3 Pt 1 and Katarzyna-Chalaczkiewicz-Ladna, Irene-Marie Esser and Iain MacNeil, 'Workforce Engagement and the UK Corporate Governance Code' (2021) Thomson Reuters Aranzadi, II International Conference of Corporate Governance proceedings.

[4] Discussed in Ch4 Pt 1.

procedural mechanism that facilitates the process, it is not categorised as 'process' in this thesis. Directors' duties – eg, as in section 172(1) of Companies Act 2006[5] (CA 2006) in the UK and section 166(2) of Companies Act 2013[6] (CA 2013) in India – allow directors a wide discretion to integrate stakeholder interests in the decision-making process but do not tell them how to do this. There is, therefore, no more than an expectation that directors will consider stakeholder interests. The UK has introduced stakeholder engagement mechanisms through Provision 5 of the UK Corporate Governance Code[7] (UKCGC) which addresses engagement with stakeholders (the workforce) in the decision-making process. This is a step in the right direction as it will alert directors to stakeholder concerns and to the need to integrate them. While this will better enable the UK to protect stakeholders, India's perspective on safeguarding stakeholders is still limited to the philanthropic approach.[8]

The thesis evaluates various complimentary mechanisms by which to render directors accountable and align the regulatory framework with social outcomes. This is done by assessing the national regulatory frameworks of India and the UK to identify possible solutions for better stakeholder protection by allowing them a voice in decision making and ensuring that the process is more transparent and 'stakeholder interests' friendly. The topic of this thesis is analysed in terms of three research questions:

* How is CSR regulated in the UK and India?[9] To what extent do the regulatory approaches differ and what is the role of hard law and soft law in this arena? [10]

---

[5] The Companies Act 2006 came into force in 2009. Some parts of the Act came into force on different dates. The reason behind this is the length of the act. The CA 2006 is the largest Act in the UK legislative history and many parts of it had to accommodate changes. Hence, some sections came into effect on different dates. See: Andrew R Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 82–83.
[6] CA 2013, along with the rules, circulars and orders were notified in the Official Gazette on 30 August 2013. It was passed by the Indian parliament and received the assent of the president of India on 29 August 2013.
[7] The Code is applicable to all companies with a premium listing of equity shares. The 2018 Code took effect from 1 January 2019. See The UK Corporate Governance Code 2018.
[8] The philanthropic approach to CSR is discussed in Ch1 Pt 2.1.
[9] See discussion in Ch2 Pts 3 and 4.
[10] See discussion in Ch2 Pt 5.

* Following on from this, the thesis evaluates the potential role of process-based regulation as a way of achieving the desired outcomes in the two jurisdictions and the value of flexibility in this regulatory approach.[11]

* What are the possible reform proposals for improving the current regulation in the UK and India?[12]

To provide answers to these research questions, the thesis is divided into four chapters. Chapter 1 is an introduction and opens with an overview of the history and evolution of CSR showing the rationale behind its emergence.[13] It examines how business standards evolved and social expectations changed. It defines CSR and its relevance today and performs a gap-filling function especially in India where hard law does not currently offer much guidance regarding CSR's meaning, content, and scope. The thesis offers more detailed and uniform guidance on the meaning of CSR; the clarification of the content and scope of CSR is vital for its wider acceptance and embedding it in a governance system.[14] It also distinguishes the concepts of CSR and Environmental, Social and Governance (ESG) issues. ESG is evaluated by investors to manage risks and opportunities and make investment decisions. The chapter highlights the remarkable rise of ESG which points to a global shift from CSR to ESG.[15]

In Chapter 2, the role of hard law and soft law and their suitability in different jurisdictions are discussed on three levels: global, regional (EU), and national (the UK and India), to evaluate the scope of CSR.[16] This is followed by an evaluation of the key provisions relating to stakeholder protection in the UK and India. The thesis presents an holistic view of CSR through a detailed analysis of relevant legislation, case law, and soft law. At a foundational level, it examines whether the two legal systems' underlying approaches to company law and corporate governance impact on stakeholder protection. Thus, it aims to foster the national regulatory frameworks in the UK and India through

---

[11] See discussion in Ch3 Pt 1.
[12] See discussion in Ch3 Pts 2.2 and 5 and Ch4 Pts 4.3 and 6.3.
[13] See discussion Ch1 Pt 2.
[14] See discussion in Ch1 Pt 3.
[15] See discussion Ch1 Pt 4.
[16] See discussion in Ch2 Pt 2.

its recommendations. Significant differences in the scope, legislative frameworks, and enforcement of the laws are outlined and the conclusions reached form the basis for discussion in the next two chapters.[17]

The next two chapters address the various ways by which stakeholder interests can be protected. The focus here is on the board's decision-making process and disclosure and the interplay between these two elements which impact on stakeholders' position in the corporate governance framework. Chapter 3 argues in favour of governing corporate behaviour through putting in place various process-based regulations to achieve the broader purpose and accord stakeholders prominence in the corporate governance framework. From a CSR perspective, the desired outcome is achieved when directors consider and properly balance the interests of all stakeholders during the decision-making process. However, there is currently a high level of uncertainty in this process. The question arising is how to tackle this uncertainty in the decision-making process to ensure better outcomes. Process- based regulations will offer a more realistic and better informed view of stakeholders concerns while enhancing the role of stakeholders in governance.

The thesis aims to contribute positively to the debate on 'substance v process' from a company-law perspective.[18] The discussion on the different approaches to regulation is currently new to the CSR field, despite their long-standing prevalence in legal thinking.[19] Therefore, the thesis has the potential to offer valuable insights by mapping a table distinguishing between the two aspects of regulation and what they mean in the context of stakeholder protection. It further explains the main benefits and opportunities which can be derived from each aspect.

The chapter further considers the different variables that influence a director's discretion when making decisions for the company.[20] There is a general tendency for directors to favour shareholders over stakeholders. Consequently, the thesis proposes several

[17] See discussion in Ch1 Pt 5.
[18] See discussion in Ch3 Pt 1.1.
[19] For example, see discussion of 'Goals-Based and Rules-Based Approaches to Regulation' BEIS 67; Colleen George and Maureen G Reed, 'Revealing Inadvertent Elitism in Stakeholder Models of Environmental Governance: Assessing Procedural Justice in Sustainability Organizations' (2017) 60 Journal of Environmental Planning and Management 158; Iris HY Chiu and Roger Barker, 'Submission to The Business Skills and Innovation Commons Select Committee: Corporate Governance Inquiry' [2016] Centre for ethics and law; Lori Snyder Bennear, 'Are Management-Based Regulations Effective? Evidence from State Pollution Prevention Programs' (2007) 26 Journal of Policy Analysis and Management 327.
[20] See discussion in Ch3 Pts 3 and 4.

reforms that should be undertaken in both jurisdictions and identifies various regulatory techniques to protect stakeholder interests through a significant shift towards process and participation in decision making.[21] The impact of the regulatory mechanisms on transparency in the context of stakeholder protection is also examined. The mechanisms must be compatible and work in harmony for implementation of substance-based regulation to establish greater explication on the purpose. For example, stakeholder engagement and disclosure or stakeholder engagement and due diligence influence one another. A due diligence process implemented by a mandatory approach is identified as a mechanism to drive awareness of the potentially harmful impact of the company and take mitigating actions to manage those impacts so that better outcomes can be achieved.

Chapter 4 seeks to reinforce the conclusions reached in Chapter 3 by highlighting stakeholder engagement as an essential mechanism in empowering stakeholders by giving them voice in the decision-making process. It evaluates non-financial disclosure and stakeholder engagement mechanisms to protect stakeholder interests under the theme of ‘disclosure v process’.[22] For effective engagement, stakeholders need information which they can understand and on which they can base their decisions. The extent to which disclosure practices facilitate stakeholder engagement and participation in the decision-making process is analysed on the basis of various empirical studies already conducted by academics and organisations.[23] The empirical studies focus on the coverage and quality of explanations given by companies in their reports. They highlight the limitations of disclosure by evaluating the current disclosure obligations in the UK and India. The conclusion drawn here shapes the discussion in the next section focused on stakeholder engagement and participation in the process. Provision 5 of UKCGC prescribes a process of engagement which is evaluated with the aid of several empirical studies. These empirical studies focus on stakeholder engagement at board level and the effect of engagement on the board’s decision-making process. The empirical research on the effectiveness of process-based regulation is measured in the context of both hard and soft law.[24] From the evaluation several recommendations are made for possible reforms in both jurisdiction.[25] The recommendations in this thesis

[21] See discussion in Ch3 Pt 5 and Ch4 Pt 2.
[22] See discussion in Ch 4.
[23] See discussion in Ch4 Pt 4.
[24] See discussion in Ch4 Pt 6.
[25] See discussion in Ch4 Pt 7.

focus on how to compel directors to consider stakeholder interests in the process of making decisions which is characterised by complexity and uncertainty.

2. METHODOLOGY

This thesis is based on theoretical analysis (doctrinal), underpinned by a comparative approach. It evaluates whether the current legal framework for CSR in the two countries is conducive to good corporate behaviour and adequately protects stakeholders from the impact of a company's operations. By comparing the unique regulatory methods of both jurisdictions in their institutional settings, the thesis aims to provide a comprehensive set of factors that can help or hinder CSR in a given jurisdiction and emphasises the need for process-based regulations in both jurisdictions.

I look at two specific jurisdictions, the United Kingdom and India, and draw on experiences from the debates and developments relating to CSR in these two countries. Traditional comparative lawyers generally favour legal systems which are neither too similar nor too different.[26] They are hesitant to compare two radically different countries and claim that accuracy results only from comparing similar legal jurisdictions.[27] For example, Gutteridge argues that comparing two legal systems not at the same legal, political, and economic stage of development results in an 'illusory comparison'.[28] A few scholars, Dannemann for example, highlight that comparing legal systems involves, at least to some degree, exploring both similarities and differences.[29] Orucu states that 'in comparative law research, the obvious method is a comparison, that is, juxtaposing, contrasting and comparing'.[30] Ancel develops a 'comparison contrastee' and argues that comparing radically different legal systems might yield more significant results than comparing similar legal systems**.**[31]

---

[26] Mathias M Siems, *Comparative Law* (Second edition, CUP 2018) 18.
[27] Andreas Cahn and David C Donald, 'Approaching Comparative Company Law' in *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (2nd edn, CUP 2018) 7.
[28] Harold C Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP 1946) 73.
[29] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), Gerhard Dannemann, *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 390.
[30] Jan M Smits, *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing Limited 2012) 565.
[31] Dannemann (n 29) 396.

There is a good mix of similarities and differences between the UK and Indian legal systems making this comparison attractive. India inherited the common-law tradition from the UK during colonisation and, therefore, shows similarities to the UK legal system, distinguishing the two jurisdictions from other legal systems.[32] Although the Indian legal system departed from the UK style after independence to suit its different social, cultural, and economic conditions, it is still influenced by the various corporate governance developments in the UK.[33] For example, both countries regulate and codify company law despite their common-law roots.[34] CA 2006 is the leading source of company law, whereas CA 2013 is India's primary legislation on company law. CA 2013 is strongly influenced by CA 2006 and most of the rules have been borrowed from CA 2006 despite the significant differences in the ownership structures and governance in the two countries.[35]

Further, both countries have codified directors' duties.[36] Codification of the duties is said to have clarified the scope and provided directors with clear and effective guidelines on what they are required to do.[37] CA 2006 introduced the enlightened-shareholder-value

---

[32]Entire legal systems, or at least large parts of them (notably: private law), are placed in different groups which are called 'families'. See ibid 393. However, Roe argues that the distinction between the common-law and civil-law countries is currently eroding because of the influence between the legal systems. See Mark J Roe, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120 Harvard Law Review 460.

[33] Citing English cases and laws were common in Indian courts. The judges frequently quoted several decisions from the English courts. For instance, in *New Fleming Spinning & Weaving Co Ltd v Kessowji Naik & Ors*[33] the judge stated: 'In laying down any general rule for India as to the duties which ought properly to be imposed on the directors of joint-stock companies, which are an institution of purely English origin, we should, I think, be guided by a consideration of English commercial rules and by the current of English decisions so far.' See *The New Fleming Spinning v Kessowji Naik And Ors* (1885) ILR 9 Bom 373.

[34] Common law is a body of unwritten law based on legal precedent established by the courts. Common law influences the decision-making process in unusual cases where the outcome cannot be determined based on existing statutes or written rules of law. Codification is generally an important and widespread product of the civilian legal tradition while the doctrine of binding precedent is attributed to the common-law tradition. See Investopedia, 'Common Law' 2019 <https://www.investopedia.com/terms/c/common-law.asp> accessed 7 July 2019; Eva Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach-A Bridge Too Far?' (2004) 25 OUP 209, 210; Roe (n 32) 475.

[35] Discussed in Ch3 Pt 3. Other similarities in the company law area include unitary board structure and the concept of independent directors (transplanted in India from the UK, where the concept originated).

[36] Under the common-law tradition, the law is viewed through a line of cases, but codification is not uncommon in this tradition too. The body of case law can sometimes become complicated, fragmented, and may need modernisation and rationalisation. Codification will make law more accessible, certain, and adapted to the current needs of the society. See Eva Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach-A Bridge Too Far?' (2004) 25 OUP 209, 218–219.

[37] The Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Final Report, vol 1 (DTI 2001) para 3.7; The Company Law Review Steering Group, Modern Company Law for a Competitive Economy, The Strategic Framework (1999) para 5.1.1; Lord Goldsmith, 'Grand Committee' (6 February 2006) col 254 <https://publications.parliament.uk/pa/ld200506/ldhansrd/vo060206/text/60206-24.htm#60206-24_cmtee0> accessed 8 September 2019.

(ESV) approach, which is sourced primarily in directors' fiduciary duty under section 172(1). In contrast, a pluralist approach is adopted under section 166(2) of CA 2013. The discussion of these topics will help to understand the impact of different theories of corporate governance on the legitimate scope of managerial discretion. This discussion will allow a better understanding of CSR in the context of the 'stakeholder v shareholder' debate and whether the models have been able to change how directors make decisions.

Although there is no direct provision on CSR in the UK, there is a rich discussion on stakeholder protection. On the other hand, India's CSR model evolved organically and is rooted in the philanthropic traditions of the Indian family businesses. Section 135 of CA 2013 is a specific provision on CSR which requires certain companies to spend 2% of their net profit on CSR activities. This approach focuses on the mandatory profit sharing of the companies to help India in its socio-economic challenges. Regulating CSR through hard law is a comparatively new field of study.[38] Therefore, the study of mandated CSR from a developing country's perspective[39] will add a body of knowledge to the literature on hard law v soft law in the CSR context.

The specific comparisons drawn from the above discussion will help to explain the possible reasons behind these different regulatory approaches. Today, every country in the world is faced with common problems such as climate change, growing inequality, human rights issues, etcetera. Therefore, it is crucial to regulate companies in that they form the fabric of contemporary economy and these complex challenges cannot be addressed by governments or civil society alone.[40] But these challenges are felt differently in different countries. Social and environmental challenges are more acutely felt in developing countries than in developed countries.[41] The two jurisdictions chosen for this thesis face different social and environmental dilemmas and their levels of economic development differ, as do their social institutions and cultural backgrounds. Orucu points out that in pure theoretical research it is beneficial to compare diverse

[38] Bhaskar Chatterjee and Nayan Mitra, 'CSR Should Contribute to the National Agenda in Emerging Economies - The "Chatterjee Model"' (2017) 2 International Journal of Corporate Social Responsibility 1, 2.
[39] According to the United Nations (UN) country classification, India is a developing country whereas the UK is categorised as a highly developed country. See United Nations, 'World Economic Situation and Prospects 2020' (Department of Economic and Social Affairs Economic Analysis 2020).
[40] Jeroen Veldman, Filip Gregor and Paige Morrow, 'Purpose of the Corporation Project. (2016). Corporate Governance for a Changing World' [2016] Frank Bold and Cass Business School. 10.
[41] WRI, *World Resources 2005—The Wealth of the Poor: Managing Ecosystems to Fight Poverty* (World Resources Institute, UNDP, UNEP, World Bank 2005).

systems in order to enhance understanding of legal phenomena and create knowledge.[42] The more diverse the systems, the more problems will be encountered and hence the findings will be of greater value.[43] Similarly, the comparative analysis of CSR regulation in a developed as opposed to a developing country, will throw light on the nature and extent of CSR and offer a more critical perspective on regulatory methods. This applies equally to questions such as why India followed a mandatory approach to CSR and the reason behind the success or failure of the regulatory methods. Thus, a meaningful comparison of different regulatory approaches will help identify the factors which make a hard or soft law approach to CSR appropriate in a specific country.

Sound comparative research will generally seek to explain the reason for and significance of the similarities and differences in legal systems.[44] Deeper inquiry into law includes examining established practices, traditions, and implicit assumptions or preconceptions that colour how rules are understood and applied.[45] Effective company governance depends not only on hard or soft law mechanisms but also on various other social and political factors such as legal and business culture, customer sentiment, and corruption levels.[46] The understanding of CSR changes in accordance with the circumstances and preconditions in a country.[47] Therefore, the meaning of CSR will likely differ in line with social or cultural backgrounds, each of which tends to emphasise different aspects of CSR.[48] Given the divergence in law and culture between the UK and India, the comparison will present a clearer picture of how the regulation of CSR is contextualised and shaped by different factors.

---

[42] Smits (n 30) 572.
[43] ibid.
[44] According to Reitz, 'since law is but a part of seamless whole of human culture, there is in principle scarcely any field of study that might not shed some light on the reasons for or significance of similarities and differences among legal systems.' See John C Reitz, 'How to Do Comparative Law' (1998) 46 The American Journal of Comparative Law 617, 627.
[45] Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), Roger Cotterrell, *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 712; David Nelken, 'Defining and Using the Concept of Legal Culture', *Comparative law: A Handbook* (Oxford: Hart 2007) 114.
[46] Patricia Rinwigati Waagstein, 'The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications' (2011) 98 JBE 455, 462.
[47] Hans De Geer *et al*, 'Reconciling CSR with the Role of the Corporation in Welfare States: The Problematic Swedish Example' (2009) 89 JBE 269, 270
[48] Michael Blowfield and Jedrzej George Frynas, 'EditorialSetting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81 International Affairs 499.

The focus of the thesis is limited to company law. CSR potentially overlaps with the law in various other ways. There are other means by which to hold companies accountable to the broader society, such as environmental, consumer protection, contract, and tort laws. This thesis does not deal with these but rather focuses on company law. Company law has a pivotal role to play in how companies conduct their business. It offers a comprehensive CSR scope by providing the legal framework for its internal working, including the decision-making process. It is the core area of law that regulates directors' duties and their decision-making process which are critical in the regulation of CSR. Regulating CSR through company law can be the most efficient way of achieving the desired outcome by enabling companies to incorporate norms of stakeholder protection in their internal governance systems rather than through environmental or consumer-protection law which are essentially external regulations. For CSR to be embedded in corporate governance its substantive provisions must be implemented in practice so as to change organisational behaviour by providing greater procedural clarity in achieving the desired outcomes.

CHAPTER 1: THE NATURE AND EVOLUTION OF CORPORATE SOCIAL RESPONSIBILITY

1. INTRODUCTION

This chapter deals with the inputs to and evolution of corporate social responsibility (CSR) and the context in which it developed. The discussion will enable us to establish the meaning of CSR and highlight how business standards evolved and social expectations changed over time. It traces the evolution of CSR to the current period so as to clarify this complex concept. The concept of CSR means different things to different people and so to have a clear and unbiased understanding of it, the chapter presents a snapshot of the theories of CSR which have developed over time.[1] This clarification of the concepts is crucial to understanding how and the extent to which CSR should be regulated. Over the years the link between CSR and profitability has emerged clearly; financial risks are no longer the only risk faced by corporations.[2] A remarkable rise in ESG investment was noted[3] which focuses on the impact of social, environmental, and governance issues on the financial performance of companies. Therefore, the relationship between CSR and ESG is evaluated in Part 4. It is noted that ESG has replaced CSR on a global level and today dominates the investment chain.[4] Unlike CSR, which is reflected in the national systems of countries[5] and deals with stakeholder protection, the term ESG has a financial connotation and is more closely aligned with a

---

[1] See discussion in Pt 2.
[2] The global economy is facing an increased risk to human health, unemployment, and geopolitical fragmentation due to the pandemic. The effect of COVID-19 has brought short-term and long-term damage throughout the world. Additionally, failure to tackle climate change and environmental degradation is a big challenge which is striking harder than expected. Such risks demand urgent collective action, especially in emerging countries where there is a greater need to strengthen the public health systems and implement reforms that help the growth of a sustainable community globally. See Marsh McLennan and SK Group, 'The Global Risks Report 2021' 16th edn, 97; World Bank, 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World' <https://www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world> accessed 25 April 2021.
[3] See discussion in Pt 2.3.
[4] See discussions in Pts 2.3 and 2.1.
[5] Dirk Matten and Jeremy Moon, '"Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 33 Academy of Management Review 404, 406.

global perspective.[6] The chapter argues that ESG has introduced elements (mainly instrumental) of CSR in the mainstream of shareholder-focused corporate governance and explains how this limits an understanding of the scope of CSR and complicates its regulation.

2. HISTORY OF CSR

The term CSR can be defined in many ways and there is no general consensus on its definition. There is a great deal of variation amongst the scholars as to how to define CSR because there are a variety of different conceptions and viewpoints concerning the subject that overlap, compete, and contradict each other.[7] Horrigan explains that different definitions of CSR are grounded in the many different perspectives from which it can be approached.[8] CSR is understood differently in developing and developed countries[9] and is therefore regulated differently by these two countries . For example, India adopted a philanthropic approach to CSR which complements the features unique to India such as its culture of 'giving back to the society'.[10] This section reviews the history of CSR but focuses primarily on its development in the UK.[11] For purposes of this study it is important to have a clear understanding of CSR and its related concepts so as to fill the gaps in the regulatory environment and ensure that companies behave in a socially responsible manner. This is discussed in detail below.

2.1. Prior to 1950

The roots of modern CSR in the UK can be traced back to the nineteenth century concept of business philanthropy.[12] The period prior to 1900 is referred to as the 'philanthropic era' which emerged in the late 1800s in western countries, and is one of the earliest

---

[6] Iain MacNeil and Irene-Marie Esser, 'From a Financial to an Entity Model of ESG' (2022) 23 EBOLR 9.
[7] Nina Boeger *et al, Perspectives on Corporate Social Responsibility* (Edward Elgar 2008) 86.
[8] Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business* (Edward Elgar Publishing 2010) 34.
[9] ibid 37.
[10] Matten and Moon identify differences in financial systems, education, and labour systems, cultural systems, nature of the firms, and organisation of market processes to be the reasons for national differences in understanding of CSR. See Matten and Moon (n 5) 407.
[11] The institutionalisation of CSR in the UK has paralleled that in the other developed countries.
[12] Jeremy Moon, *United Kingdom - An Explicit Model of Business-Society Relations: Corporate social responsibility across Europe* (Springer 2005).

manifestations of a social responsibility for companies.[13] This concept is understood as a business practice that involves participating in initiatives that benefit society, ie, 'giving back', especially when companies are perceived to be prospering at the expense of the broader community.[14] It is described as a form of altruistic giving and is a planned use of wealth to transform society for the good of all.[15] The underlying idea behind philanthropy is that companies have a tacit responsibility to use their wealth for the betterment of society.[16] It also has a long and honourable history in many Asian countries such as India, Indonesia, and Nepal. In India, for example, one can trace practices from Hindu, Mughal (Muslim), British Raj, and Gandhian traditions.[17] The socio-cultural variables,[18] such as the concept of *dharma*[19] in Indian society, have been ingrained in these countries' cultural and religious tradition[20] and were major drivers in the acknowledgment of social responsibility.

The1920s and 1930s saw the period known as the 'trusteeship management'[21] phase during which corporate managers were viewed as 'trustees' and not merely agents of the company.[22] In this concept, 'corporate managers were responsible not simply for

---

[13] Andrew Crane *et al*, *The Oxford Handbook of Corporate Social Responsibility*, vol 1 (OUP 2009) 21–23.

[14] Doreen J McBarnet *et al*, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2007) ix.

[15] Pushpa Sundar, *Giving with a Thousand Hands: The Changing Face of Indian Philanthropy* (OUP 2017) 2.

[16] It focuses on bringing transformative change such as undertaking social projects with large-scale impact, either geographically or qualitatively. See ibid 3. Section 135 of CA 2013 is based on the philanthropic approach to CSR where companies are required to spend a part of their profit for the upliftment of the society and the environment.

[17] John Godfrey *et al*, 'Old and New Forms of Giving: Understanding Corporate Philanthropy in India' (2017) 28 Voluntas:Int J of Voluntary and NPO 672, 672.

[18] Ganga S Dhanesh, 'Why Corporate Social Responsibility? An Analysis of Drivers of CSR in India' (2015) 29 Management Communication Quarterly 114, 116.

[19] Dharma, or righteous duty (proper behaviour, right conduct, right endeavour), is derived from the root dhr which means to uphold, maintain, sustain and keep in balance. It is the right way to maintain order and balance in the universe. As long as every element in the cosmos, the sun, rain, animals, plants, and humans act according to their dharma, the order and balance is maintained See: Edwina Pio, 'Eastern Karma: Perspectives on Corporate Citizenship' (2005) The Journal of Corporate Citizenship 65, 68.

[20] Dhanesh (n 18) 115.

[21] A similar idea was being expounded in India by MK Gandhi in 1931. In his model, the owners of the wealth would be allowed to retain the stewardship of their possessions and use their talents to increase the wealth, not for their own sake, but for the sake of the nation and, therefore, without exploitation. Gandhi described it as 'India's gift to the World'. The concept was embraced by various Indian business leaders of the time such as GD Birla and Jamnala Bajaj. See Nayan Mitra and René Schmidpeter (eds), *Corporate Social Responsibility in India* (Springer International Publishing 2017) 2; Leah Renold M, 'Gandhi: Patron Saint of the Industrialist' (1994) 1 Sagar: South Asia Graduate Research Journal 16, 27.

[22] Hay and Gray point out two reasons for the emergence of this approach: (1) diffusion of ownership of the shares; and (2) development of pluralistic society. A pluralistic society has been defined as 'one which has many semi-autonomous and autonomous groups through which power is diffused. No one group has

maximising stockholders' wealth but also for maintaining an equitable balance among the competing claims of customers, employees, suppliers, creditors, and the community as well as the stockholders.'[23] Business leaders were very generous in giving money for various community projects, but the doctrine of *ultra vires* confined companies to the object stated in their Memoranda of Association, (the Charter of the company) so limiting directors' discretion to spend money for the benefit of stakeholders other than those holding shares. In the landmark 1875 case of *Ashbury Railway Carriage & Iron Co v Riche* the court held that any act by the directors had to fall within the company's objects clause and that any acts outside of the clause would be *ultra vires* the powers of the directors and would not bind the company even if ratified by the shareholders.[24] Later the scope of the doctrine was narrowed by the courts, and in *Hutton v West Cork Railway*[25] it was held that the directors could spend money if the purpose was reasonably incidental to the company's business, and that this was a decision for the directors. Bowen LJ stated that 'the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company'.[26] Consequently, the directors could use the corporate funds for the benefit of other stakeholders if their actions were reasonably incidental to carrying on the business of the company. This gave directors greater discretion to promote the welfare of the other stakeholders. It was very difficult for the shareholders to challenge the managerial decision unless it was *ultra vires* because there were procedural restrictions on the availability of derivative action and the court believed that the directors knew how to conduct the affairs of the business and should be allowed to decide whether their decision would be advantageous for the company.[27]

During the first half of the twentieth century the directors had some discretion to advance the interests of stakeholders. Later, with the increase in the size of corporations and the diffusion of share ownership, concerns arose as to the accountability of directors. There

---

overwhelming power over all others, and each has direct or indirect impact on all others.' See Crane *et al,* (n 13) 23; Robert Hay and Ed Gray, 'Social Responsibilities of Business Managers' (1974) 17 The Academy of Management Journal 135, 136. The authors discuss the debates on role of management in the US but such debates had occurred simultaneously in the UK. See Andrew Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' (2017) 74 Washington and Lee Law Review 1001, 1012.

[23] Hay and Gray (n 22) 136.

[24] *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1874-75) LR 7 HL 653.

[25] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

[26] ibid 645. Similarly, in *Bell Houses Ltd v City Wall Properties Ltd* (No1) [1966] 2 QB 656 it was held that if directors *bona fide* believed that any transaction could be advantageous or ancillary to the main business such acts or contracts were *intra vires*.

[27] Johnston (n 22) 1008–1009.

was a shift in power from the shareholders to the managers of a company resulting in the 'separation of ownership and control' of the company. Berle and Means base their argument on the doctrine that managerial powers are held in trust for shareholders as the sole beneficiaries of the corporate enterprise.[28] In response, Dodd (whose views are compatible with the modern view of corporate governance) argued that the corporation is an economic institution with both a social service and a profit-making function. This, he argued, had already had an effect on legal theory which was likely to increase exponentially in the near future.[29] However, in 1943 after the establishment of Cohen Committee in the UK, the scope of CSR was narrowed[30] in that the Committee's main focus was on giving shareholders greater power so that they could exercise effective general control over management.[31] In the UK the Companies Act 1948 (CA 1948) was a significant factor in shifting the focus to shareholders by allowing them a right to remove directors by simple majority.[32] Berle concludes his article by stating that:

> [Y]ou cannot abandon emphasis on the view that business corporations exist for the sole purpose of making profits for their stockholders until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.[33]

---

[28] Adolf A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049.

[29] For Dodd, there is a connection between personhood and responsibility – what he refers to as 'social service'. Dodd argues companies should perform a 'social service' and act as a good citizen. The term corporate citizen was used to 'connect business activity to broader social accountability and service for mutual benefit'. The concept of corporate citizenship refers to philanthropic activities and business participation in society. See, E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145, 1148, 1154; David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012) 369; Jeremy Moon *et al*, 'Can Corporations Be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society' (2005) 15 Business Ethics Quarterly 429.

[30] Report of the Committee on company law amendment, best known as the 'Cohen Committee' after its chairman Mr Justice Cohen was appointed. The committee reviewed the CA 1929 and made several recommendations that focused mainly on empowering the shareholders. 'Report of the Committee on Company Law Amendment' (1943) Cmd 6659 <http://reports.mca.gov.in/Reports/17-Justice%20Cohen%20committee%20report%20of%20the%20committee%20on%20company%20law%20amendment,%201943.pdf> accessed 16 January 2021.

[31] ibid 8.

[32] Johnston considers CA 1948 to be a significant factor in limiting CSR in the UK. He states that before 1948 directors had a broad discretion to balance the interests of various stakeholders but the reforms in 1948 and thereafter limited the consideration of stakeholders' interests by transferring major powers to shareholder. See Johnston (n 22).

[33] Adolf A Berle, 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 Harvard Law Review 1365, 1367.

Although public opinion appeared to favour Dodd's approach, these wider social responsibilities were not enshrined in the law.[34]

2.2. After 1950

As interest in CSR grew the number of companies subscribing to the concept increased leading to an evolution in the definition of CSR. Bowen enquired: 'What responsibilities to society may businessman reasonably be expected to assume?' and continued to define CSR by explaining social responsibility[35] as the 'obligation of the businessman to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society'.[36] Davis considers CSR a nebulous idea but explains that the concept goes beyond legal requirements and involves business people evaluating the external impact of the company on society and considering those issues in a way that takes societal benefits on board alongside the traditional economic gains which firms seek.[37] He came up with the idea of equating the social power of the businessman with his or her social responsibility. He explained that companies that fail to live up to the expectations of the society in which they operate – ie, do not assume social responsibility for their actions – will eventually lose their power.[38] Fredrick expresses a similar view when he states that: 'the social responsibility of the businessman means that businessmen should oversee the operation of an economic system that fulfils the expectations of the public'.[39] Walton links CSR and the idea that

---

[34] LCB Gower, 'Corporate Control: The Battle for the Berkeley' (1955) 68 Harvard Law Review 1176, 1190; Johnston (n 22) 1013.

[35] CSR was mentioned as social responsibility for many years. Crane *et al* (n 13) 25.

[36] Bowen is one of the most notable contributors to the theory of CSR. His contribution to the early definition of CSR was of great importance and he is often called 'The father of CSR'. See Archie B Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38 Sage Journals 268, 270.

[37] Davis is another influential contributor who is regarded as the runner-up to Bowen. He argued that avoidance of social responsibility by companies may result in a gradual erosion of their social power to the extent businessmen do not accept social-responsibility obligations as they arise, other groups will eventually step in to assume those responsibilities and the power will go with them. This is known as the 'Iron Law of Responsibility'. See Keith Davis, 'Can Business Afford to Ignore Social Responsibilities?' (1960) 2 California Management Review 70; Keith Davis, 'The Case for and Against Business Assumption of Social Responsibilities' (1973) 16 Academy of Management Journal 312, 314.

[38] Davis, 'The Case for and Against Business Assumption of Social Responsibilities'' (n 37) 314.

[39] This, in turn, means that the economy's means of production should be used in such a way that production and distribution enhance total socio-economic welfare. See William C Frederick, 'The Growing Concern over Business Responsibility' (1960) 2 California Management Review 54, 60.

companies need voluntarily to acknowledge and accept that they have relationships of responsibility beyond the corporate fortress.[40] For Carroll, social responsibility embodies four basic expectations of business performance: economic (the company should strive to make a profit); legal (it should abide by law the laws of society); ethical (companies should do what is right, just, and fair); and discretionary/philanthropic (they should act as good corporate citizens).[41] The latter two responsibilities of the business are practices that are beyond what is required by law.[42] Until this time, CSR was driven by socially conscious businessmen who were not specifically looking for anything in return for engaging in CSR practices.

After incidents like the Bhopal gas tragedy[43] and the Coca-Cola conflict[44] in India, the Rana Plaza disaster in Bangladesh,[45] the divestment campaign against the apartheid regime in South Africa, environmental issues in Nigeria,[46] or the Khian Sea waste

---

[40] Commenting on the role of company and the businessperson in modern society, he explained ‘managers are judged by the way they handle relationships with other people, including many they shall never see, and by the reasonableness with which they conduct those relations so that businesses will be useful to all whose lives are affected’. See Clarence C Walton, ‘Corporate Social Responsibility: The Debate Revisited’ (1982) 34 Journal of Economics and Business 173, 175; ‘The Evolution of CSR’ (*ThinkingShift*, 27 March 2007) <https://thinkingshift.wordpress.com/2007/03/27/the-evolution-of-csr/> accessed 12 March 2019.

[41] Archie B Carroll, ‘A Three-Dimensional Conceptual Model of Corporate Performance’ (1979) 4 The Academy of Management Review 497.

[42] Carroll ‘1999’ (n 36).

[43] On 3 December 1984 an explosion resulted in 47 tons of MIC leaking from the Union Carbide Corporation (UCC) and Union Carbide India Ltd (UCIL) factory/plant located in a densely populated area in Bhopal. UCC had chosen systematically to ignore early-warning signals of the potential for massive toxic release. The Supreme Court passed brief settlement orders in 1989 fixing UCC liability at USD 470 million against the Union of India’s damage claims of over USD 3 billion. See Upendra Baxi, ‘Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?’ (2016) 1 Business and Human Rights Journal 21.

[44] After the conflict involving Coca-Cola in India, the company was seen as a corporate villain and suffered a great amount of consumer distrust and reputational damage and saw a drop of 40% in its overall sales. See Cristina A Cedillo Torres *et al.* ‘Four Case Studies on Corporate Social Responsibility: Do Conflicts Affect a Company’s Corporate Social Responsibility Policy?’ (2012) 8 Utrecht Law Review 51, 55.

[45] Tansy Hoskins, ‘Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings, Day 22’ The Guardian (23 April 2015) <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings> accessed 6 January 2022.

[46] *Kiobel v Royal Dutch Shell* (environmental degradation and complicity in unlawful killings in Ogoniland, Nigeria); *Bodo v Shell* (environmental degradation in Ogoniland, Nigeria). See Kamil Omoteso and Hakeem Yusuf, ‘Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism’ (2017) 13 Critical Perspectives on International Business 54.

disposal issue,[47] stakeholders such as consumers,[48] the media, and NGOs[49] became aware of the impact of corporations on human rights and demanded greater transparency and accountability from the companies by exerting pressure via campaigns and boycotts.[50] Taking the lead in social and environmental issues became key sources of reputation[51] by which companies could build goodwill in society. Corporate reputation has the capacity to change corporate behaviour as it arouses customers' emotional perceptions of the companies they deal with. This leads them to associate themselves with the brands they intend to purchase. This promotes brand equity and enhances corporate reputation.[52] Shareholders, too, benefit from brand building in that it can be reflected as goodwill in the company's accounts which makes companies more resilient to volatile market conditions – eg, during a global financial crisis.[53] CSR can,

---

[47] European governments began exporting the hazardous waste to developing countries where environmental and workplace legislation is either inadequate or not enforced. On 31 August 1986, the cargo ship *Khian Sea* loaded 14,000 tons of toxic waste, left behind a large pile of loose ash in Haiti, and dumped the toxic waste in the Atlantic and Indian Oceans. See 'The Toxic Ships' (2010) Greenpeace Italy report <https://www.greenpeace.org/archive-italy/Global/italy/report/2010/inquinamento/Report-The-toxic-ship.pdf> accessed 11 March 2019.

[48] A consumer may refuse to purchase a product because of the company's failure to incorporate CSR in its business actions. An increasing percentage of companies are citing customer demand as a key driver for CSR – 85% in India and 62% in the UK cite customer demand as their major driver. See Grant Thornton International Business Report, (2014) 'Corporate social responsibility: Beyond financials' <https://www.grantthornton.co.uk/ globalassets/1.-member-firms/global/insights/article-pdfs/2014/ibr2014_ibr_csr_web.pdf> accessed 9 December 2019.

[49] NGOs are often considered as representatives of civil society. They use various strategies such as boycott, 'naming and shaming', petition, demonstration (negative propaganda), and different entities like media to influence a company's sustainability practice. Media has the capacity to mobilise public opinion in favour of, or in opposition to, a corporation's performance as shown in the cases of the recall of Tylenol by Johnson &Johnson (favourable) and the Exxon Valdez oil spill (unfavourable). See Max BE Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 The Academy of Management Review 92, 107.

[50] 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (Human Rights Council 2011) A/HRC/17/31 3 <https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 3 May 2019.

[51] McBarnet (n 14) 17.

[52] Chi-Shiun Lai *et al*, 'The Effects of Corporate Social Responsibility on Brand Performance: The Mediating Effect of Industrial Brand Equity and Corporate Reputation' (2010) 95 Journal of Business Ethics 457, 459.

[53] A reference could also be made to Shell and the threat to its global brand image after the much-publicised event in Nigeria. In 1995, activists, including Saro-Wiwa, challenged Shell to clean up pollution from its wells. It was an *annus horribilis* ('horrible year') for Shell, which saw a sharp drop in its share price, a fierce response from consumers, and an exodus of staff. See Andrew Johnston, 'Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility' (2011) 20 Griffith Law Review 221, 236; Andrew Pendleton, 'Behind the Mask The Real Face of Corporate Social Responsibility' (Christain Aid 2003) <https://www.st-andrews.ac.uk/media/csear/app2practice-docs/CSEAR_behind-the-mask.pdf> accessed 4 July 2019

consequently, no longer be seen as merely voluntary because market and other external forces have pushed companies to adopt policies on CSR.[54]

By the 1990s, the core concerns of CSR began to be recast as complementary concepts,[55] but the concept of CSR remained the 'building block' or 'point of departure' for these concepts such as, stakeholder theory, corporate social performance (CSP), and socially responsible investment (SRI[56]) that had absorbed CSR thinking.[57] Over the years there was also a change in demand among some investors who started viewing CSR as a long-term investment and included a combination of ethical, religious, social, and environmental concerns in their investment decisions.[58] They looked to non-financial disclosure in order to assess the company's risk profile. Many scholars examined the relationship between CSP and corporate financial performance (CFP).[59] CSP attempts to model and measure CSR in terms of performance and draw analogies between social and financial performance.[60] A CSP model relies on an expanded version of social responsibility by integrating social responsibilities, social responsiveness, and social issues. It provides a valuable framework for overall analyses of business and society. Various studies have found a positive correlation between CSR and CFP.[61] Wood *et al* suggest there can be substantive business benefits from being socially and

---

[54] Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' [2009] SSRN Electronic Journal 4 <http://www.ssrn.com/abstract=1369305> accessed 24 July 2020.
[55] Crane et al(n 6) 34.
[56] SRI focused on the exclusion of certain stocks from portfolios such as tobacco, alcohol, and weapons. See John G Ruggie, *Corporate Purpose in Play: Sustainable Investing: A Path to a New Horizon* (Routledge 2020) 178.
[57] Archie B Carroll, *A History of Corporate Social Responsibility* vol 1 (Andrew Crane *et al* eds, OUP 2009) 37.
[58] Crane *et al* (n 13) 250.
[59] Gunnar Friede *et al*, 'ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies' (2015) 5 Journal of Sustainable Finance & Investment 210.
[60] Steven L Wartick and Philip L Cochran, 'The Evolution of the Corporate Social Performance Model' (1985) 10 Academy of Management Review 758, 758; S Prakash Sethi, 'Dimensions of Corporate Social Performance: An Analytical Framework' (1975) 17 California Management Review 58.
[61] For example, in 1997 Preston and O' Bannon analysed the relationship between indicators of CSP and CFP within a comprehensive theoretical framework and found strong positive correlations in both contemporaneous and lead-lag formulations. See Lee E Preston and Douglas P O'Bannon, 'The Corporate Social-Financial Performance Relationship: A Typology and Analysis' (1997) 36 Business & Society 419. Orlitzky *et al* conducted a meta-analysis integrating 30 years of research and found a generally positive relation between CSP and CFP. See Marc Orlitzky, *et a*l, 'Corporate Social and Financial Performance: A Meta-Analysis' (2003) 24 Organization Studies 403; Gerald Keim, 'Corporate Social Responsibility: An Assessment of the Enlightened Self-Interest Model.' (1978) 3 AMR 32, 32; Kenneth E Aupperle, 'An Empirical Examination of the Relationship between Corporate Social Responsibility and Profitability' (1985) 28 Academy of Management 446.

environmentally responsible, though firms need to be informed that such benefits exist.[62] As the compatibility of profit and CSR became clear, investors started embracing the 'business case' for CSR.[63] However, at this time the debate around CSR in the UK focused, in the main, on employees and their interests. In 1998 an independent steering group known as the Company Law Review Steering Group[64] (CLRSG), was formed to carry out a comprehensive and coherent review of company law and set an overall framework of director's duties.[65] The reform process led to the enactment of the Companies Act 2006 (CA 2006) and introduced the ESV approach[66] to provide a broader framework which enabled directors to be more inclusive in their decision-making processes. The new approach was based on generating maximum value for shareholders and was considered the best means of securing overall prosperity and welfare.[67]

2.3. Globalisation and the Move from CSR to ESG

By the 2000s, CSR had become a global phenomenon as intense CSR activities were noted across the globe.[68] Many companies in western countries had built good CSR reputations and continued to grow while embracing CSR practices. Even in developing countries like India, CSR gradually gained exposure as the impact of globalisation and the rise in transnational economic activity were felt. Many reforms were adopted to meet

---

[62] Gary Lynch-Wood *et al*, 'The Over-Reliance on Self-Regulation in CSR Policy' (2009) 18 Business Ethics: A European Review 52.

[63] Benefits of CSR include cost and risk reduction, competitive advantage, reputation and legitimacy, and synergistic value creation. The business case refers to the underlying arguments or rationales supporting or documenting why the business community should accept and advance the CSR 'cause'. See Archie B Carroll and Kareem M Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12 International Journal of Management Reviews 85.

[64] A series of consultation documents were released by the CLRSG comprising of four main consultation documents. The important consultation documents released by CLRSG are-Modern Company Law for a Competitive Economy, The Strategic Framework (CLRSG, DTI 1999). CLRSG, 'Modern Company Law for a Competitive Economy: Developing the Framework' (2000). The Company Law Review Steering Group (ed), 'Modern Company Law for a Competitive Economy: Completing the Structure' (DTI, 2000); Modern Company Law for a Competitive Economy: Final Report Volume 1 and 2 (2001).

[65] The CLRSG wanted the companies to recognise their obligations to the other stakeholders which was particularly important with regard to the overall competitiveness of the economy as it reflected modern business practice. See 'The Strategic Framework' (n 64) para 2.2. and 'Modern Company Law for a Competitive Economy' (n 64) paras 2.10 and 2.11.)

[66] For detailed discussion on ESV approach, see Pt 3.3.3

[67] The Strategic Framework (n 64) para 5.1.12.

[68] Crane *et al* (n 13) 41.

the international standards of trade.[69] The theme of sustainability[70] and ESG (environmental, social, and governance) criteria were becoming part of all CSR discussions.[71] With globalisation came a change in the public's demands and expectations, and the environment in which business operated also changed. Many global reporting frameworks,[72] for example, the OECD Guidelines on Multinational Enterprises[73] (MNEs), the G20/OECD Principles of Corporate Governance,[74] the Global Reporting Initiative[75] (GRI), the Integrated Reporting Council[76] (IIRC), and the Sustainability Accounting Standards Board[77] (SASB) required companies to disclose their non-financial reporting focusing on social and environmental issues. A move from a voluntary CSR report to a standardised practice of ESG metrics and reporting was observed. It became prominent after the landmark study document, 'Who Cares Wins',[78] issued by the Global Compact. The document declared that embedding ESG issues in

---

[69] The trend was more visible and strategically incorporated in private companies so as to improve their international reputation and fulfil social expectations.

[70] OECD describes CSR as 'business's contribution to sustainable development' and explains that the concept of CSR entails that companies must not only ensure returns for shareholders, wages for employees, and products and services for consumers, but must also respond to societal and environmental concerns and value. See OECD (ed), *Corporate Social Responsibility: Partners for Progress* (OECD 2001) 13.

[71] Crane *et al* (n 13) 37. MacNeil et and Esser highlight that in recent years sustainability, CSR, and ESG have co-existed and been used interchangeably. The authors regard sustainability as an overarching concept and CSR and ESG as two subsets operating in the corporate and financial model respectively. See MacNeil and Esser (n 6).

[72] Global instrument refers to a code or standard that provides guidance to international business in relation to non-financial performance and practices. Companies use these instruments as guidance in understanding their responsibilities and to formulate public commitments. See Kathryn Gordon, 'The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison' (2001) OECD Working Papers on International Investment 2001/05 2 <https://www.oecd-ilibrary.org/finance-and-investment/the-oecd-guidelines-and-other-corporate-responsibility-instruments_302255465771> accessed 11 March 2019.

[73] OECD, Guidelines for Multinational Enterprises (2011).

[74] OECD, 'G20/OECD Principles of Corporate Governance' (2015) OECD Report to G20 Finance Ministers and Central Bank Governors 41 <https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> accessed 13 March 2019.

[75] GRI is an international independent standards organisation that helps companies communicate their impact on ESG issues in a comprehensive and effective way. The GRI standards are the most widely used standards for sustainability reporting. See 'Global Reporting Initiative' <https://www.globalreporting.org/> accessed 6 December 2020.

[76] International Integrated Reporting Council <https://integratedreporting.org>.

[77] SAAB is an independent NPO founded in 2011 to connect business and investors on the financial impact of sustainability issues. It provides industry-specific standards and communicates ESG information to investors. See Sustainability Accounting Standards Board <https://www.sasb.org>

[78] This report is the result of a joint effort by financial institutions and United Nations Secretary-General Kofi Annan to develop guidelines and recommendations on how better to integrate ESG issues in asset management, securities brokerage services and associated research functions. See Ivo Knoepfel, 'Who Cares Wins Connecting Financial Markets to a Changing World' <https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf> accessed 6 December 2020.

the capital market makes good business sense and leads to more sustainable markets and better outcomes for all. It also highlighted the importance of actively managing risks and opportunities and anticipatory regulatory actions related to ESG factors while at the same time contributing to the sustainable development of the society in which they operate.[79] The evolution of ESG from the concept of CSR was driven by a greater interest in the business case for CSR.[80] The interest and growth of ESG issues have been most evident in Europe and also impacted CSR developments in the UK.[81]

3. CSR and CORPORATE GOVERNANCE

3.1. Meaning of CSR

Understanding CSR has been influenced by academic publications, government decisions (such as the creation of legislation and entities), social movements, public figures, and international movements, including ‘the sustainable development agenda’.[82] The concept of CSR has undergone a pragmatic shift from a concept embraced by a few stakeholders to what has today become a part of business practice and of directors’ fiduciary duties towards stakeholders with the aim of fostering the relationship between stakeholders and the company. While there is no single definition of CSR, a clear and consistent definition would be helpful in promoting its correct application. The absence of a clear definition makes it difficult to assess whether a particular mechanism will promote CSR and if not, why not.

In this thesis CSR is defined as an approach to decision making which emphasises how companies are managed by the directors who must assume responsibility for the company’s impact on the stakeholders. There is general consensus on the following set of core principles of CSR.

---

[79] ibid 1.
[80] Benjamin van Rooij and D Daniel Sokol (eds), *The Cambridge Handbook of Compliance* (CUP 2021) 664 <https://www.cambridge.org/core/books/cambridge-handbook-of-compliance/A7A803D987C9C001C6569395BEE5051C> accessed 31 March 2022.
[81] The European initiative in this context is further discussed in Ch2 Pt 2.2.
[82] Mauricio Andrés Latapí Agudelo *et al*, ‘A Literature Review of the History and Evolution of Corporate Social Responsibility’ (2019) 4 International Journal of Corporate Social Responsibility 1, 16.

1. CSR is not merely about philanthropy. While traditional philanthropy is a temporary action that depends on the whims of a company, CSR is a part of a company's long-term management policy.[83] Philanthropy involves the distribution of 'gifts' from profits, while CSR involves the exercise of social responsibility in how profits are made and distributed.[84] The emphasis is on 'how' enterprises perform their daily work – how they treat employees or produce their goods. This impacts positively on the corporate purpose which includes both social and profit goals.[85] CSR is not so much about what enterprises do with their profits, but rather how they make that profit.[86] It is not an optional 'add-on' to a business's core activities but the way in which businesses are managed.[87]

2. CSR conduct relates to the recognition and integration of stakeholder interests in the decision-making process of directors in close collaboration with stakeholders. It is a normative exercise to set standards or legitimate expectations of what companies should be doing – ie, CSR reflects what stakeholders regard as fair or just. True internalisation as a moral norm is followed unconditionally by a company even when unobserved by others and when ethics may conflict with profit, ie, not supported by business case of CSR- ie, integrating stakeholders' interests in the process of decision making regardless of its benefits to the company's financial performance.

3. Although CSR is often perceived as voluntary, ie, corporate actions above and beyond legal obligations,[88] there are various legal requirements that overlap with CSR. CSR is behaviour by business which is related to law. Complying with CSR-related rules and regulations entails complying with the spirit of law not merely the letter of law. While some elements of CSR fall within the ambit of law, there are

---

[83] Mia Mahmudur Rahim, 'Corporate Social Responsibility, Corporate Governance and Corporate Regulation' in Mia Mahmudur Rahim (ed), *Legal Regulation of Corporate Social Responsibility* (Springer 2013).
[84] McBarnet, et at., (n 14) 9.
[85] William A Pettigrew, *Corporate Responsibility in Strategy: Mainstreaming Corporate Responsibility* (John Wiley and Sons Ltd 2009) 12.
[86] European Commission, 'European Competitiveness Report: 2008' (OOPEC 2009) 107.
[87] Horrigan (n 8) 42.
[88] For example, the European Commission which defined CSR as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'. However, the word voluntary has been removed from the new definition and it now describes CSR as the responsibility of enterprises for their impacts on society. See Commission Of The European Communities (2001) 'Promoting a European Framework for Corporate Social Responsibility' <http://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-366-EN-1-0.Pdf> accessed 6 August 2019.

several aspects which go beyond legal compliance.[89] The CSR regulatory framework will be more effective if companies inculcate a good corporate culture which is integrated within the organisation, leading to a paradigm shift in their behaviour.

4. Commitment to CSR should be a part of strategic management of a company resulting not only from pressure placed on the company by stakeholders and the market but also on the basis of the moral or ethical dimension of CSR. This aspect of CSR is considered to be of intrinsic value to the concept and goes beyond the 'business case' for CSR. It is also a normative exercise in terms of setting standards or legitimate expectations of what companies should be doing and reflects what stakeholders regard as fair or just.[90] The social dimension of CSR is frequently overlooked in favour of instrumental motives linked to risk mitigation and corporate reputation.

3.2. Overlap of CSR and Corporate Governance

Corporate governance is described as the system by which companies are directed and controlled and deals largely with the relationship between the constituent parts of a company – the directors, the board (and its sub-committees), and the shareholders.[91] Transparency and accountability are the two most important elements of corporate governance.[92] Transparency refers to 'a situation in which business and financial activities are done in an open way without secrets, so that people can trust that they are fair and honest.'[93] It includes willingness of the business to communicate complete and timely information to its stakeholders because companies are responsible for their actions and should provide explanations to those affected. Accountability refers to 'a situation in which someone is responsible for things

---

[89] Law cannot keep up with everything companies do and or the way it impacts the stakeholders. There are limits to what it can achieve because of the several shortcomings. Law has several shortcomings such as loopholes, tick-box behaviour, creative compliance or boilerplates. See: Discussion in para 2.4 .

[90] Archie Carroll, 'Ethical Challenges for Business in the New Millennium: Corporate Social Responsibility and Models of Management Morality' (2000) 10 Business Ethics Quarterly 33, 36.

[91] 'Corporate Governance' (BIS, 29 August 2009), Even with this traditional view, corporate governance would be an important instrument for regulation of CSR as it deals with the regulation of board of directors (BOD) which is directly responsible for managing the affairs of the company. See: 'Report of the Committee on the Financial Aspects of Corporate Governance (The Cadbury Report).' (1992) 20.

[92] 'Corporate Governance' (n 91).

[93] See *Cambridge Dictionary*, meaning of transparency < https://dictionary.cambridge.org/dictionary/english/transparency > accessed 15 April 2021.

that happen and can give a satisfactory reason for them.' [94] The definition of corporate governance is drawn from the UK Corporate Governance Code published in 1992 by the Cadbury Committee and is often criticised for its narrow perspective focusing only on the internal aspect of corporate activity.[95] Corporate governance has evolved from this limited perspective and is no longer restricted simply to the relationship between the company and its capital providers.[96] The new and broader perspective of corporate governance recognises that companies cannot exist in isolation and to succeed in the long-term, directors need to build and maintain successful relationships with a wide range of stakeholders.[97]

The latest version of the Code is the 'UK Corporate Governance Code 2018' (UKCGC) which promotes a positive relationship between companies, shareholders, and stakeholders.[98] It focuses on companies being socially responsible and considering the interests of other stakeholders. It stresses the need for the board of directors (Board) to balance the interests of shareholders with those of other stakeholders such as employees, customers, suppliers, investors, and communities, in order to achieve long-term sustained value for the company.[99] Intrinsic to the concept of CSR is the recognition and integration of stakeholder interests in corporate decision making.[100] This explanation of corporate governance aligns its scope with CSR as it broadly involves a set of relationships between a company's management, its board, shareholders, and other stakeholders.[101] Horrigan explains, how different approaches to corporate governance can affect the promotion of CSR:

---

[94] See Cambridge Dictionary, meaning of accountability <https://dictionary.cambridge.org/dictionary/english/ accountability > accessed 15 April 2021.

[95] Shleifer and Vishny state that corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment. See Andrei lkjkl Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52 Journal of Finance 737.

[96] Horrigan (n 8) 175.

[97] The corporate governance code has been amended many times and the latest version is the UK Corporate Governance Code 2018 (UKCGC).

[98] 'Revised UK Corporate Governance Code 2018: Highlights' (FRC) <https://www.frc.org.uk/getattachment/ 524d4f4b-62df-4c76-926a-66e223ca0893/2018-UK-Corporate-Governance-Code-highlights.pdf>.

[99] Magdi Iskander and Naderah Chamlou, *Corporate Governance: A Framework for Implementation* (World Bank 2000) 4. Good corporate governance helps to ensure that corporations consider the interests of a wide range of constituencies, as well as of the communities within which they operate and that their boards are accountable to the company and the shareholders. This, in turn, helps to assure that corporations operate for the benefit of society as a whole. See OECD, 'OECD Principles of Corporate Governance, Meeting of the OECD Council at Ministerial Level, 1999' 5.

[100] See discussion in Pt 3.1.

[101] OECD, 'G20/OECD Principles of Corporate Governance' (n 74) 9.

The variety of standpoints from which we might conceive the point of corporate governance from the outset inevitably affects the approach we take to define what corporate governance means. In turn, this affects how we characterize the relation (if any) between corporate governance and CSR. [102]

This clarifies the relationship and interdependence of corporate governance, corporate theory, and CSR. Corporate theory deals with the issue of the corporate objective which is the 'ultimate objective of the company that determines to a larger extent what kind of corporate governance operates in relation to a company'.[103] The two dominant theories of corporate objective have traditionally been the shareholder-value theory and the stakeholder theory.[104] The former requires directors to generate maximum value for shareholders, whereas the latter requires companies to have a broader purpose and serve a wide range of interests, eg, those of their employees, the community, and the environment. The corporate objective is, therefore, necessarily linked to in whose interests the directors should manage a company and this, in turn, affects the company's capacity to further stakeholder interests.

3.3. Theories of Corporate Governance

In the following section three models of corporate governance are discussed: the shareholder- value theory; the stakeholder theory; and the enlightened-shareholder-value theory.

3.3.1. Shareholder-Value Theory

The shareholder-value theory essentially means that company directors run their companies so as to maximise the interests of the shareholders giving them primacy over all other stakeholders in the company. The supreme goal of this theory is to increase economic value for the shareholders. Hence, under this theory the directors' sole duty is

---

[102] Horrigan (n 8) 175.
[103] Andrew R Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 14.
[104] The Strategic Framework (n 64) para 5.1.12-5.1.33.

to protect and improve the investment of shareholders in the company.[105] Friedman, the main protagonist of this view, argues that the responsibility of the business is to increase profits.[106] He considers shareholders the owners of the company and, therefore, the manger's responsibility is to conduct the business in accordance with their wishes which generally will be to make as much money as possible while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom.[107] Another argument in favour of this theory is that shareholders are 'residual claimants' and so cannot be adequately protected by contract unlike the employees, suppliers, or other stakeholders who are assumed to be fixed claimants.[108] Shareholders have the greatest claim or stake in the outcome of the company, and if the company is successful, they gain the most. Therefore, they have an incentive to monitor the directors closely and should be given the right to control the firm.[109] Proponents of the shareholder-value theory consider this approach to be efficient as directors are focused on a single objective and on one type of stakeholder.[110] If director were to owe a duty to multiple stakeholders it would be impossible for them to balance all the divergent interests when making a corporate decision, resulting in poor decisions and lack of accountability. By maximising shareholder return, investors are encouraged to invest their wealth in value-generating projects which leads, in turn, to job creation, the generation of tax revenue, and stimulates local economies.[111] Therefore, apart from creating wealth, the shareholder-value approach also benefits the overall welfare.[112] However, the proponents of this

---

[105] Andrew Keay, 'Getting to Grips with the Shareholder Value Theory in Corporate Law' (2010) 39 Common Law World Review 358, 362.

[106] Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' [1970] *The New York Times Magazine* <http://link.springer.com/10.1007/978-3-540-70818-6_14> accessed 12 March 2019.

[107] ibid. Berle and Means used a trust and property analogy to conclude that directors (trustee) must act for the benefit of the shareholder (equitable owner). Directors must devote all their attention to the benefit of shareholders. See Adolf A Jr Berle and Gardiner C Means, *Modern Corporation and Private Property* (Macmillan Co 1992) 275.

[108] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2000) 89 Georgetown Law Journal 439, 449; Eugene F Fama and Michael C Jensen, 'Agency Problems and Residual Claims' (1983) 26 The Journal of Law & Economics 327. Bainbridge considered companies as a nexus of contracts that is an aggregate of various inputs acting together to produce goods or services. But he highlights that the shareholders' interests should receive priority in corporate governance as they are the residual claimants and other parties are able to protect themselves through various other approaches. See Stephen M Bainbridge, 'In Defense Of The Shareholder Wealth Maximization Norm: A Reply To Professor Green' (1993) 50 WLLR 1423.

[109] Hansmann and Kraakman, (n 108) 449.

[110] The Committee on Corporate Law, 'Other Constituency Statutes: Potential for Confusion' (1990) 45(4) The Business Lawyer 2253, 2269.

[111] Kershaw (n 29) 374.

[112] Furthermore, if companies do not follow the profit maximising norm, they may be too slow to adjust to changing economic circumstances, putting their longer-term survival at risk. See ibid.

theory argue that the public character of social responsibility issues makes it inappropriate for companies to resolve such issues which fall within the remit of the state.[113] The theory rejects any notion of management's power to engage in socially responsive activities.[114] It is believed that when managers use corporate resources to promote socially responsible activities, they are 'stealing' from owners' dividends, from customers' wealth, or from employees' wages.[115] Hence, CSR is regarded as a breach of managerial duty in that the directors are acting beyond their legal powers (acting *ultra vires*).[116] The 'shareholders'-money' argument claims that shareholders' moral and legal rights will be infringed if the company's profits are used to safeguard the interests of other stakeholders. [117] Therefore, only activities which increase shareholder value (within the legal framework) are acceptable. Levitt argues that welfare and society are not corporation business and sentiment can confuse the role of businessmen just as much as the profit motive could confuse the role of a government official.[118] He considers social responsibility to be potentially dangerous as it can 'distort the market by deflecting business form its primary role of profit generation'.[119]

However, directors may take the interests of other stakeholders into account if they are of benefit to the shareholders. The economic functions of businesses are primary and company directors may assume social responsibility only because it is important for long-term self-interest, public image, and the viability of the business;[120] in short, only if it may result in increased wealth for shareholders. In this vein it may be correct to say that under the shareholder model, CSR has evolved from being seen as detrimental to shareholder interests to a source of competitive advantage. It must also be noted that directors may refrain from doing anything which may damage shareholder interests. Moving away from shareholder primacy to reduce negative externalities is seen as

---

[113] Government can make companies limit the negative effects on the society by taking a variety of forms of regulations through pollution taxes or offering companies incentives to minimise the externalities. JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP 1995) 307, 312.

[114] David Millon, 'Theories of the Corporation' (1990) 1990 Duke Law Journal 201, 223.

[115] Wartick and Cochran (n 60) 760.

[116] McBarnet (n 54) 19.

[117] Parkinson (n 116) 309.

[118] Levitt does not argue that there is no welfare obligation at all on society. He says corporate welfare makes good sense if it makes good economic sense – and not infrequently it does. But if it sometimes does not make economic sense, sentiment or idealism ought not to be let in the door. See: Theodore Levitt, 'The Dangers of Social Responsibility' (1958) 36 Harvard Business Review 41, 47–48.

[119] ibid 44. David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2005) 2.

[120] Davis, 'The Case for and Against Business Assumption of Social Responsibilities' (n 37) 313.

increasing the agency cost.[121] The theory entails boosting the value of shares or increasing dividends which may 'involve transferring benefits from stakeholders to shareholders by prejudicing the interest of the former.'[122] Beate and Mark explain that the original purpose of establishing a company was to advance social welfare but that this has been replaced by the idea of shareholder primacy.[123] They differentiate between shareholder primacy as a social norm and shareholder value as a legal norm.[124] They further explain that in the process of maximising return for shareholders, the social justification of this purpose is often overlooked by companies.[125] The negative externalities[126] generated by the companies' unsustainable practices are also not internalised as these are transferred to the other stakeholders while retaining the resulting benefits to the shareholders.[127] Shareholder theory has been widely accepted by many theorists and is well established in many common-law countries. The theory is also perceived as a basis for corporate law in the UK where the ultimate control of a company's undertaking lies with its shareholders.[128] After the substantial review of the company law, the new Act implements the ESV approach which differs from the shareholder-value theory. The ESV approach is discussed below in Part 3.3.3.

---

[121] Ian B Lee, 'Efficiency and Ethics in the Debate about Shareholder Primacy' (2006) 31 The Delaware Journal of Corporate Law 533, 539.
[122] Keay, 'Getting to Grips with the Shareholder Value Theory in Corporate Law' (n 108) 367–368.
[123] Beate Sjåfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3444050 47, 48 <https://papers.ssrn. com/abstract=3444050> accessed 23 February 2021.
[124] ibid 47.
[125] ibid.
[126] Externalities are harmful effects produced by companies (such as air or water pollution in the surrounding area) because of economic activity, and directly affect stakeholders. See Andrew Johnston, 'Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility' (2011) 20 Griffith Law Review 221, 221.
[127] Companies often do not incorporate the cost of compensation of externalities as it leads to lower production cost. From a CSR perspective, companies must take full responsibility of the harmful impact of their activities and, therefore, internalisation of externalities is crucial. See Beate Sjåfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs Sustainable Corporate Purpose' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3444050 47 <https://papers.ssrn.com/abstract=3444050> accessed 23 February 2021; Ian B Lee, 'Efficiency and Ethics in the Debate about Shareholder Primacy' (2006) 31 The Delaware Journal of Corporate Law 533; Andrew Johnston, 'Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility' (2011) 20 Griffith Law Review 221, 222.
[128] The Strategic Framework (n 64) 34.

3.3.2. Stakeholder Theory

The stakeholder theory requires that companies look beyond profit maximisation for shareholders.[129] The theory postulates that all stakeholders contribute value to the company and have an interest in the affairs of the company endeavour.[130] For supporters of this theory stakeholders should be seen as 'ends' in themselves and a company should be manged in such a way that the interests of all stakeholders can be maximised in due course, even if this will not result in the advancement of shareholder interests.[131] Therefore, the managers must be aware of the effects of their decisions on all stakeholders and act accordingly.[132] The theory sees profit as a critical feature of a company's activity, but concern for profits is the result rather than the driver in the process of value creation.[133] This is in contrast to the shareholder-value model which generally maintains that it is inappropriate to use business resources to meet social objectives as this is considered to be the role of the government.[134]

The term stakeholder can encompass a wide range of interests and includes general references to customers, employees, suppliers, investors, the environment, and the community. Clarkson defines stakeholders as 'persons or groups that have or claim, ownership, rights, or interests in a corporation and its activities, past, present, or future'.[135] He classifies stakeholders in primary and secondary groups. The primary group is the one without whose continuing participation the corporation could not survive and includes shareholders together with investors, employees, customers, suppliers, and the public stakeholder group (government and community).[136] The secondary group are those who influence or affect, or are influenced or affected by, the corporation but who are not engaged in transactions with the corporation and are not essential for its survival.[137] Examples include the media and special interest groups who

---

[129] Deva Prasad M, 'Companies Act, 2013: Incorporating Stakeholder Theory Approach into the Indian Corporate Law' (2018) 39 Statute Law Review 292, 294.
[130] Andrew Keay, 'Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little?' (2011) 22 European Business Law Review 1, 6.
[131] Andrew R Keay, 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?' [2010] SSRN Electronic Journal 254. 257 <http://www.ssrn.com/abstract=1531065> accessed 29 April 2021.
[132] Carroll, '1999' (n 36) 273.
[133] R Edward Freeman *et al*, 'Stakeholder Theory and "The Corporate Objective Revisited' (2004) 15 Organization Science 364, 364.
[134] Benn Bolton and Suzzanne Dianne, *Key Concepts in Corporate Social Responsibility* (Sage 2011) 202.
[135] Clarkson (n 49) 106.
[136] ibid.
[137] ibid 107.

have the capacity to mobilise public opinion in favour of or against the company. It is important to gain the support of those who directly affect the company's achievements, but also to understand how the company will affect others, as these may take longer-term retaliatory action.[138]

Corporate executives have always had to wrestle with how to balance their commitments to the company's shareholders and their obligations to an ever-broadening group of stakeholders who claim both legal and ethical rights.[139] However, the director of a company should act in the best interest of the company as a separate legal entity and must be able to balance the competing interests of stakeholders.[140] The theory focuses on managerial decision making[141] and the company's perceptions of stakeholders is seen as a crucial variable in determining organisational resource allocation in response to stakeholder claims.[142] Clarkson proposes that a company's survival and continuing success depend upon the ability of its managers to create sufficient wealth, value, or satisfaction for those who belong to each stakeholder group so as to ensure that each group continues as a part of the company's stakeholder system.[143] However, it is also argued that because this theory makes managers accountable to various stakeholders whose interests are not aligned, it may lead to confusion and managers not knowing to whom they are accountable.[144] Thus, it renders them immune and enables them to shirk their duties more easily leading to poor outcomes.[145] However, trade-offs and judgements are essential parts of any decision that directors are required to make. Mayer argues that these trade-offs are also part of shareholder governance given the diverse financial preferences of shareholders such as their degree of risk aversion, their time horizons, investment analyses, and their views about relevant risk classes and

---

[138] Laura Dunham *et al*, 'Enhancing Stakeholder Practice: A Particularized Exploration of Community' (2006) 16 Business Ethics Quarterly 23, 25.
[139] Archie B Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) 34 Business Horizons 39.
[140] Irene-Marie Esser, 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 SA Mercantile LJ 317, 324.
[141] Thomas Donaldson and Lee E Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 The Academy of Management Review 65, 67.
[142] Ronald K Mitchell *et al*, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22 The Academy of Management Review 853, 873.
[143] Clarkson (n 49) 107.
[144] Michael C Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2001) 14 Journal of Applied Corporate Finance 8.
[145] Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 Legal Studies 252.

unquantifiable uncertainties.[146] Such diverse needs also require directors to have a wide discretion to balance all the conflicting interests and make judgement calls. [147]

Donaldson and Preston justify the theory on the basis of three distinct aspects: empirical/descriptive; instrumental; and normative.[148] The descriptive aspect presents a model describing what a corporation is and can serve as a framework for testing any empirical claims. The instrumental aspect proposes that companies that practice stakeholder management will perform better than those which do not.[149] Jones explains that firms that contract on the basis of trust and cooperation will have a competitive advantage over those that do not use such criteria.[150] He also links the instrumental stakeholder theory with the shareholder model in the following terms:

This instrumental theory of stakeholder management essentially turns the neo- classical theory of the firm upside down. It implies that behaviour that is trusting, trustworthy, and cooperative, not opportunistic, will give the firm a competitive advantage. In the process, it may help explain why certain 'irrational' or altruistic behaviours turn out to be productive and why firms that engage in these behaviours survive and often thrive.[151]

However, one of the major differences between the theories is that the proponents of the shareholder-value theory 'distinguish between economic and ethical consequences and values and see business as an amoral economic activity'.[152] On the other hand, the stakeholder theory 'begins with the assumption that values are necessarily and explicitly a part of doing business'[153] – ie, it is clearly seen as 'infused or embedded with ethical assumptions, implications, and overtones'.[154] The third normative aspect is considered to be fundamental to stakeholder theory and essentially involves two ideas: (a) 'stakeholders are identified by their legitimate interests in the corporation, whether the

---

146 Colin Mayer, 'Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita' [2020] SSRN Electronic Journal 5–6 <https://www.ssrn.com/abstract=3617847> accessed 24 April 2022.
147 ibid 6.
148 Donaldson and Preston (n 146).
149 ibid 67.
150 Thomas M Jones, 'Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics' (1995) 20 The Academy of Management Review 404, 432.
151 ibid.
152 Manuel Castelo Branco and Lúcia Lima Rodrigues, 'Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility' (2007) 12 E-Journal of Business Ethics and Organization Studies 5, 8.
153 Freeman *et al,* (n 122) 364.
154 Carroll, 'Ethical Challenges for Business in the New Millennium' (n 90) 35.

corporation has any corresponding functional interest in them';[155] and (b) the interests of all legitimate stakeholders have intrinsic value and their interests must be considered not merely because of their ability to further the interests of some other group, such as the shareholders.[156] As pointed out by Branco and Rodrigues, CSR should be based on a stakeholder view and should be capable of addressing both its normative and instrumental aspects.[157] Stakeholder theory and CSR are not synonymous but their goals do overlap to a great extent. CSR aims to define what responsibilities business ought to fulfil, while stakeholder theory is regarded as a 'necessary process in the operationalisation of CSR, as a complementary rather than conflicting body of literature'.[158] The theory identifies the identities to whom the companies are, or should be, accountable.[159] As the two concepts are interrelated, advancing the stakeholder perspective in the functioning of companies will also promote CSR goals.[160]

Various scholars have advocated this type of model and it is increasingly gaining recognition in many countries such as Germany, the UK, Australia, and India. It is generally believed that common-law countries tend to embrace the stakeholder theory to varying degrees. India has done so in section 166(2) of the Companies Act 2013 (CA 2013) which requires directors to accord equal importance to all the stakeholders when making decisions for the success of the company. The critics, however, claim that the stakeholder theory results in an accountability vacuum as it allows directors to serve their own agendas, thus undermining the economic performance of the company and leading

---

[155] Donaldson and Preston differentiate between the instrumental and normative aspects of the theory. They explain the instrumental aspect to establish a connection between the stakeholder approaches and profitability and the normative aspect to be based on moral and philosophical principle. Much of the literature on stakeholder theory focuses on the normative aspect which says: 'Do (Don't do) this because it is the right (wrong) thing to do.' This aspect is also more consistent with CSR. See Donaldson and Preston (n 143) 72.

[156] ibid 67. Support for the normative themes also comes from many who also consider stakeholders as having intrinsic value. See Thomas M Jones and Andrew C Wicks, 'Convergent Stakeholder Theory' (1999) 24 The Academy of Management Review 206.

[157] Branco and Rodrigues (n 154).

[158] Dirk Matten *et al*, 'Behind the Mask: Revealing the True Face of Corporate Citizenship' (2003) 45 Journal of Business Ethics 109, 111.

[159] N Kakabase *et al*, 'Corporate Social Responsibility and Stakeholder Approach: A Conceptual Review' (2005) International Journal of Business Governance and Ethics 1, 277, 289

[160] In legal context the promotion of CSR could mean: 'requiring, facilitating, enabling, incorporating and enforcing CSR'. The aspect of 'requiring' means that company law through various techniques such as directors' duties, requires directors to pursue CSR goals, or through the disclosure requirement enforces companies to incorporate CSR commitments. See Andreas Rühmkorf, 'The Promotion of Corporate Social Responsibility in English Private Law' (University of Sheffield, School of Law 2013) 8 <http://www.elgaronline.com/view/9781783477494.00013.xml> accessed 24 December 2020.

to managerial slack.[161] They believe that focusing on multiple objectives and balancing several interests which are often competing, establishes diffused and ineffective accountability.[162] Further, privileged stakeholders, such as the employees who may be the most vocal and powerful, may reap the benefits. As a consequence of power grabbing, other stakeholders such as the vulnerable workers in the global supply chain or the indigenous community, may remain unheard in the decision-making process. [163]

The UK also considered the pluralist approach during the reform process of its company law. But it was rejected as it necessitated extensive and fundamental reform of the law of directors' duties, changes in shareholders' control over the company, and changes to the composition of company boards.[164] The review body considered the wider obligations of directors in other European countries and concluded that the stakeholder model of directors' duties would not be appropriate as the |UK operates within a very different cultural and politico-economic environment.[165] The pluralist approach was therefore rejected[166] and the CLRSG introduced the ESV approach[167] to provide a broader framework to enable the directors to be more inclusive in the decision-making process but which is ultimately based on generating maximum value for shareholders.[168] In the UK, although shareholders are accorded primacy in corporate decision making, stakeholder interests are recognised in the management of the company.

[161]When managers put little effort into managing the company and extract private benefits, it leads to managerial slack. See Lucian A Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 Cornell Law Review 91, 101, 167.
[162] Stuart M Cooper and David L Owen, 'Corporate Social Reporting and Stakeholder Accountability: The Missing Link' (2007) 32 Accounting, Organizations and Society 649, 665.
[163] Beate Sjafjell and Jukka Mähönen, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (Blogging for Sustainability, 2021) <https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/corporate-purpose--sjafjell-mahonen.html> accessed 21 January 2022.
[164] The ESV approach places a strong emphasis on shareholder value. See The Strategic Framework (n 64) para 5.1.30-5.1.31.
[165] The CLRSG proceeded by addressing the question of 'scope' and 'purpose' of company law and identified two possible approaches to guide directors in the decision-making process – 'shareholder value' and the 'pluralist approach'. The CLRSG noted in its strategic framework that 'the review is essentially concerned with law reform, not with wider ethical or managerial issues about the behaviour and standards of participants in companies, except to the extent that it is appropriate to reflect them in company law'. See ibid 5.1.11 and 5.1.2.
[166] The majority were in favour of retaining the shareholder value theory but also strongly supported the fact that the approach should be framed in a more inclusive way. See CLRSG, 'Modern Company Law for a Competitive Economy' (n 64) 2.11.
[167] The Strategic Framework (n 71) para 5.1.11.
[168] ibid para 5.1.12.

3.3.3. Enlightened-Shareholder-Value

The enlightened-shareholder-value (ESV) approach is generally described as a harmonisation of the two extreme concepts discussed above – it serves as a middle ground merging elements of both concepts.[169] This is a new corporate governance model which evolved during the UK company law reform process and is encapsulated in section 172 of CA 2006. Under this approach, the director's primary duty is to focus on long-term shareholder value as the goal of the company.[170] The director is, however, required honestly to take account of stakeholders' interests (ie, employees, suppliers, the environment, and local communities) in addition to standard financial analysis when making corporate decisions.[171] While going beyond a narrow focus on shareholders and profitability, this approach is a form of enlightened self-interest where economic goals can be served by recognising wider responsibilities.[172] Such stakeholders are likely to be relevant in a well-managed company as they 'can impact, positively or negatively, upon a company's success'.[173] It is considered to drive long-term company performance and maximise overall competitiveness, wealth, and welfare for all.[174]

Contrary to the traditional shareholder primacy in the UK – as in most Anglo-American jurisdictions – the ESV approach 'requires directors to justify their decisions in terms of stakeholder interests and to disclose risks impacting stakeholders'.[175] This approach is seen as clearer than the stakeholder approach in that it creates a hierarchy, keeping shareholders' interests as predominant with the interests of other stakeholders following.[176] In case of a conflict of interests between shareholders and other

---

[169] Cynthia A Williams and John M Conley, 'An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct' [2004] SSRN Electronic Journal 496 <http://www.ssrn.com/abstract=632347> accessed 8 January 2021.

[170]DTI, Modernising Company Law, vol II, 12; Williams and Conley (n 171) 515.

[171] The Strategic Framework (n 64) para 5.1.19; DTI (n 172) 12; *Smith & Fawcett, Re* [1942] Ch 304.

[172] Andrew Crane *et al* (eds), *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Routledge 2014) 163.

[173] The Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Final Report, vol 1 (DTI 2001) para 1.24.

[174] Modernising Company Law: The White Paper (March 2005). pp 20–21.

[175] Virginia Harper Ho, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 59, 79.

[176] It is one of the main reasons why this approach was preferred over the stakeholder approach. Adopting this approach would not be dependent on any change in the ultimate objective of companies, that is, shareholder wealth maximisation and there would be no need to reform the fundamentals of director's duties. A pluralist approach advances the interests of a number of groups without the interests of a single group (shareholders) being overriding. It envisages circumstances in which some sacrifice of the interests of shareholders will be needed in favour of some other interest. The CLRSG noted in its strategic framework that 'the review is essentially concerned with law reform, not with wider ethical or managerial issues about

stakeholders, the directors must promote the long-term benefit of shareholders. Directors are not directly accountable to the 'other' stakeholders as the theory is grounded squarely within the shareholder-primacy paradigm.[177] Thus, unlike the stakeholder theory, the ESV approach regards stakeholder interests as a means of maximising shareholder wealth and not as an end in itself.

During the reform process of the UK Companies Act, the CLRSG concluded that managing social and environmental risk and good standing in the eye of the public are important for long-term shareholder value.[178] Therefore, directors are encouraged to manage such risks for the overall increase in portfolio returns and to ensure competitiveness.[179] This has parallels in the PRI which urges institutional investors to integrate aspects of ESG[180] in investment analysis and decision-making processes that can create shareholder value.[181] Therefore, the ESV approach is strengthened by institutional investors who 'identify stakeholders' interests as key to long-term firm financial performance and effective risk management'.[182] Williams and Conley explain that the UK's goal in adopting this approach 'appears to be to maintain its corporation's financial accountability to a constituency of dispersed, independent shareholders while simultaneously using market forces to nudge companies in the direction of greater social responsibility'.[183]

The ESV addresses CSR as it seeks the long-term, sustainable growth of the company while acknowledging the interests of the stakeholders. The directors may also engage in corporate philanthropy under this approach provided that it results in benefit to the shareholders.[184] However, unlike the stakeholder approach, there is no 'readiness on the

---

the behaviour and standards of participants in companies, except to the extent that it is appropriate to reflect them in company law'. See The Strategic Framework (n 64) para 5.1.11, 5.1.17, 5.1.2.

177 Ho (n 177) 79.

178 DTI (n 172) 12; Jay G Martin, 'Implementing Effective Corporate Legal Compliance Programs' (1997) 11 Natural Resources & Environment 14, 16; Williams and Conley (n 171) 515.

179 She explains 'that stakeholder issues have an economic impact on firms' long-term profitability and risk profile and, therefore, on the long-term value of investor portfolios'. See: Ho (n 177) 80–81, 96.

180 Section 172 of CA 2006 gives some recognition to stakeholders by requiring directors to 'have regard' to their various interests when making decisions for the company. Further discussed below in Ch2 Pt 3.1.

181 Principles for Responsible Investment, 'How ESG Engagement Creates Value For Investors and Companies' <https://www.unpri.org/download?ac=4637> accessed 1 October 2020. ESG benefits shareholders as it makes companies identify the various potential risks to their business.

182 Ho (n 177) 60.

183 Williams and Conley (n 171) 500.

184 The Strategic Framework (n 64) para 5.1.43.

part of companies to sacrifice their own self-interest in appropriate cases'.[185] In terms of Babcock's argument, such an approach does little to change a company's mindset about its responsibilities to society at large.[186]

The ESV approach is considered to be more inclusive than the shareholder value approach, because it makes directors aware about the importance of the stakeholders for advancing the goal of long-term shareholder value maximisation. But the extent to which directors may consider stakeholder interests under this approach is also limited. The ESV approach does not support sacrificing shareholder value for stakeholder welfare, thereby limiting the scope of CSR. Like the shareholder value approach, in case of significant trade-offs between shareholder and stakeholder interests, shareholder interest will always win. Thus, in practice, replacing shareholder value with the ESV may not bring about any significant difference in the position of the stakeholders.

4. EVOLUTION OF ESG FACTORS

The term CSR is often used interchangeably with ESG but the terms are not synonymous.[187] ESG factors are used as indicators to evaluate a potential investment based on sustainable, ethical, and corporate governance criteria. An ESG strategy emphasises a company's environmental (E), social (S), and governance (G) structure and the impacts of the company's products or practices.[188] The 'E' dimension focusses on the environment and includes factors such as climate change impact, energy conservation measures, plastics, and greenhouse gas (GHG) emissions. The 'S' dimension, or the social angle, includes human rights issues, labour practices, and supply-chain management. Finally, the 'G' dimension relates to 'how' an organisation makes decisions or operates to achieve its objectives and how stakeholders make their voices heard in the internal processes.[189] Matters such as stakeholder engagement, anti-corruption, bribery, community involvement, board diversity, board structure, directorial independence, risk management, and whistle-blowing schemes are included. ESG issues

---

[185] ibid para 5.1.42.

[186] Hope M Babcock, 'Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?' (2010) 21 Fordham Envtl L Rev 1, 63.

[187] MacNeil and Esser (n 6)10; Hao Liang and Luc Renneboog, 'Corporate Social Responsibility and Sustainable Finance: A Review of the Literature' 43, 2.

[188] Max M Schanzenbach and Robert H Sitkoff, 'Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee' (2020) 72 Stanford Law Review 381, 388.

[189] National Guidelines on Responsible Business Conduct 2018, 8.

remain pivotal to any discussion of CSR and are rapidly becoming mainstream in many countries.[190] It is now common practice to look beyond the traditional bottom line and evaluate how companies are attending to these risk factors and disclosing sustainability strategies.[191]

4.1.ESG v CSR

Although the terms are related and an overlap can be seen in their meaning, CSR could be understood as the precursor to ESG, and both promote practices that have a positive influence on the world.[192] However, each has different characteristics and goals. While CSR aims to make a business accountable to its stakeholders, ESG is primarily a financial technique for portfolio selection and engagement by investors[193] and refers to the elements of CSR which have financial relevance in investment decisions. ESG issues are focused on enhancing shareholder returns and mitigating their risks and thus are more compatible with the shareholder-primacy theory. It supports shareholder primacy as it reinforces the perception that shareholder interests come first when there is a contest between social or environmental interests and those of the shareholders. CSR is more closely aligned with companies' internal decision -making – ie, how directors consider stakeholder interests when making their decisions and is linked to their fiduciary duty. Implications of CSR go beyond the value maximisation for shareholders and deal with stakeholder protection.[194] It is a broader concept which includes ethical and moral issues surrounding corporate decision making, whereas ESG is deeply entangled in economic forces.

---

[190] Goldman Sachs, 'ESG Report: "What Is Powering the ESG Investing Surge?' (2016) 4 <https://www.goldmansachs.com/citizenship/sustainability-reporting/esg-content/esg-report-2016-highlights.pdf> accessed 4 April 2021

[191] 'The Corporate Social Responsibility Report and Effective Stakeholder Engagement' (Harvard Law School Forum on Corporate Governance, 2020) <https://corpgov.law.harvard.edu/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement/> accessed 4 May 2020 and 'The Age of ESG' (Harvard Law School Forum on Corporate Governance) <https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/> accessed 12 March 2020.

[192] Elizabeth Pollman, 'Corporate Social Responsibility, ESG, and Compliance' [2019] Loyola Law School, Los Angeles Legal Studies Research Paper No 2019-35 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479723> accessed 22 October 2020.

[193] Jessica Strine, *et al,*, 'The Age of ESG' (*Harvard Law School Forum on Corporate Governance*) <https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/> accessed 12 March 2020.

[194] For example, see discussion on directors' fiduciary duty – s 172(1) of CA 2006 and s 166(2) of CA 2013 in Ch2 Pts 3.1 and 4.2.

Although the two concepts have fundamental differences, they do overlap at the level of implementation which addresses the common concerns of the two approaches to some extent.[195] While CSR is more closely linked to moral and ethical values and accountability to stakeholders, ESG makes its effects measurable though metrics and key performance indicators (KPIs) and is evaluated by sustainability rating agencies (SRAs).[196] Being quantifiable and criteria-led, ESG factors allow companies to embed them within their businesses. ESG is increasingly used by investors to make informed decisions regarding risk assessments and for a better understanding of the long-term performance of companies. The informal and rhetoric CSR reporting which was mainly used by companies to improve their reputations, has been replaced by ESG reporting on a global level. Consequently, the focus has shifted from the external impact of the companies and the protection stakeholder interests to the risk and returns implications for investors.[197] It is important to note that ESG links shareholder influence over boards' decision making and fiduciary duties owed to the underlying investors. Applied to board decision making, ESG is a necessary but inadequate condition for the integration of CSR as it lacks the moral norm and the overarching view of all externalities. Often, the differences between ESG and CSR are overlooked in favour of more convenient ways of adopting CSR in practice. Bias is created towards ESG whose data is quantitative and can be measured to demonstrate compliance with performance measures.[198] Thus, it is easy to neglect CSR with its emphasis on values and ethics which are difficult to measure. Emphasis should be placed on constructive engagement on issues to support long-term performance and responsible behaviour by the company. CSR was driven largely by socially conscious business people who were not seeking returns from their engagement with CSR practices.

---

195 MacNeil and Esser (n 6) 11.

196 Ester Clementino and Richard Perkins, 'How Do Companies Respond to Environmental, Social and Governance (ESG) Ratings? Evidence from Italy' [2020] Journal of Business Ethics; RHTLaw Asia LLP; Piyush Gupta, 'The Evolution of ESG from CSR | Lexology' (Lexology) <https://www.lexology.com/library/detail.aspx?g=80bbe258-a1df-4d4c-88f0-6b7a2d2cbd6a> accessed 30 April 2021.

197 MacNeil and Esser (n 6) 16.

198 This is also one of the reasons why the 'E' and 'G' dimensions of ESG have progressed more than the 'S' dimension globally. The 'S' dimension is also the most important dimension of CSR which is not fully integrated in ESG. This is further discussed in Ch3 Pt 4.3.

4.2. ESG Integration in the Investment Chain

The role of shareholders in corporate governance is increasing and requires shareholder engagement which no longer considers investment as purely financial but rather as strategic.[199] It has evolved dramatically in the last decade placing greater emphasis on sustainable business practice.[200] Shareholder activism is the way in which shareholders use their rights in conjunction with investment strategies for profit maximisation.[201] They use a range of measures such as exit, voice, or loyalty options to influence the board and management of the company.[202] Institutional investors[203] are seen as a dominant market player in that their impact on investment strategies has grown significantly in recent years along with deregulation and globalisation of financial markets.[204] Large shareholders such as institutional investors are more interested in the company affairs and have specialised expertise in monitoring the company. Because of the large number of shares they hold they have more power and a greater incentive actively to monitor the affairs of the company.[205] Traditionally, institutional investors made decisions based solely on financial factors, but increasingly ESG factors are becoming part of the investment chain as they impact on the way businesses operate. The principles for responsible investment[206] (PRI) launched by the UN, is the world's leading source regarding responsible investment and offers a framework for investors to incorporate

---

[199] Wolf-Georg Ringe, 'Shareholder Activism: A Renaissance' in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance*, vol 1 (OUP 2015) 388.
[200] Crane *et al,* (n 13) 251.
[201] *Her Majesty's Commissioners of Inland Revenue v Laird Group Plc* [2003] UKHL 54 [35] (Lord Millet).
[202] Albert O Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and *States* (HUP 1972).
[203] Institutional investors are the major collectors of savings and suppliers of funds to financial markets. They are known as 'stewards' of the company which means 'active ownership' and are both entitled and expected to oversee the affairs of the company in which they invest. The different types of institutional investor include mutual funds, insurance companies, pension funds, and hedge funds. OECD, *OECD Institutional Investors Statistics 2020* (OECD 2020) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-institutional-investors-statistics-2020_9a827fb7-en> accessed 20 January 2021; Christopher M Bruner, 'The Corporate Governance Role of Shareholders in Common-Law Jurisdictions', *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (CUP 2013) 31; OECD (2017), 'Investment Governance and the Integration of Environmental, Social and Governance Factors' 17.
[204] OECD, *OECD Institutional Investors Statistics 2020* (n 205).
[205] Unlike shareholders who hold a small number of shares in a company, large institutional investors would not prefer selling the large blocks of shares as this brings down the share price. See Stephen M Bainbridge, 'Shareholder Activism and Institutional Investors' (2005) UCLA School of Law, Law-Econ Research Paper No. 05-20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=796227> accessed 7 July 2019.
[206] Currently it is the largest global network of institutional investors with 3 879 signatories committed to considering ESG issues in their investment decisions. See UN, 'Principles for Responsible Investment' (PRI, 2006) <https://www.unpri.org> accessed 6 December 2020.

ESG factors in their investment processes.[207] They operate to help understand the investment implications of ESG factors and encourage inventors to use investment to improve returns and better manage risks.[208] The PRI defines ESG integration as 'the systematic and explicit inclusion of material ESG factors into investment analysis and investment decisions'. They regard attention to ESG consideration as a part of the investor's fiduciary duty towards their underlying investors.[209] Another investor-led organisation, the International Corporate Governance Network (ICGN) established in 1995, is a leading authority on global standards of corporate governance and investor stewardship.[210] Its global stewardship principles (GSP 2020) were recently amended and compromise of seven high-level principles which can also serve as a point of reference for regulators, companies, and standard-setters.[211] The GSP 2020 provides a framework for the implementation of stewardship practices in fulfilling an investor's fiduciary obligations to beneficiaries. It focuses on motivating investors to integrate ESG factors in their decision making and engage with the investee company for adequate ESG disclosure.[212]

There are also several regulatory changes in corporate governance on regional[213] and national level which aim to develop the quality of shareholder engagement and steer investors towards long-term corporate success and consideration of ESG criteria. For example, the 2014 UK Law Commission's 'Consultation on Fiduciary Duties of Investment Intermediaries' advances a similar view. 'The report concludes that trustees should consider factors which are financially material to the performance of an investment. Where trustees think ethical or environmental, social, or governance (ESG) issues are financially material they should take them into account.'[214] The Stewardship Codes[215] of the UK, India, South Africa, Canada, and Thailand have also made ESG

---

[207] ibid.
[208] ibid.
[209] PRI & UNEP, 'Fiduciary Duty in the 21st Century' 9.
[210] ICGN, 'About' <https://www.icgn.org/about> accessed 15 December 2020
[211] ICGN (2020), Global Stewardship Principles 2020, 5.
[212] ibid Principle 6.
[213] For example, the Sustainable Finance Disclosure Regulation and the Taxonomy Regulation. See Regulation (EU) 2019/2088 (Sustainable Finance Disclosure Regulation) and Regulation (EU) 2020/852 (Taxonomy Regulation).
[214]Fiduciary Duties of Investment Intermediaries, Law Commission <https://www.lawcom.gov.uk/project/fiduciary-duties-of-investment-intermediaries/> accessed 18 December 2021.
[215] Stewardship, as described by the FRC, 'is the responsible allocation, management and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society'. See FRC, UK Stewardship Code: <https://www.frc.org.uk/investors/uk-stewardship-code> accessed 15 December 2020.

integration central to stewardship.[216] The recent release of the UK Stewardship Code 2020[217] is important evidence of growing institutional investor interest in monitoring companies. It encourages investors to engage in corporate governance by using their legal rights.[218] The Code explicitly mentions section 172(1) of CA 2006 and makes several references to the importance of ESG factors in the decision-making process and investment chain. The latest version of the Code encourages shareholders to assess the company's stewardship report based on how the factors listed in section 172(1) of CA 2006, such as workforce interests and environmental and social issues, have been addressed by the company.[219] Following the global trend, India has in recent years been integrating ESG factors in the investment chain.[220] The growing equity share of institutional investors in the Indian capital market led to the release of the Stewardship Code 2020.[221] The Code encourages investors to monitor and actively engage in the decision-making process in investee companies on matters such as the company's strategy, corporate governance, and ESG issues. Investors are encouraged to monitor these factors as regards their investments on a continuous basis.[222] Monitoring by investors is limited due to concentrated shareholding pattern in Indian companies.[223]

---

[216] ICGN, Global Stewardship Codes Network <https://www.icgn.org/policy/global-stewardship-codes-network> accessed 15 December 2020.

[217] The UK Stewardship Code 2020. The 2020 Code is a soft law and contains a set of Principles which work on an 'apply and explain' basis for asset managers and asset owners, and a separate set of Principles for service providers. It was published on 24 October 2019 and has been effective from 1 January 2020.

[218] The most common form of engagement practices in UK companies involve informal communications such as between the directors and professional market analysts, or harder engagement practices which may include 'Dear CEO' letters, the exercise of legal voting rights by shareholders against the board, or reputational damage as a sanction. See Marc Moore and Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Bloomsbury Publishing 2017) 112–117. Shareholder's rights are discussed in Ch2 Pt 3.

[219] Code 2020 5. However, for the shareholders to consider ESG issues in their investment decisions, companies must disclose enough information in their reports and the institutional investors must clearly understand them. This is further discussed in Ch3 Pt 2.1.

[220] It gathered pace in 2018 when climate change increasingly came to be seen as crucial to companies' long-term growth prospects. See 'Environmental, Social and Governance (ESG) Agenda - KPMG India' (KPMG, 8 July 2020) <https://home.kpmg/in/en/home/insights/2020/07/environmental-social-and-governance-agenda.html> accessed 23 February 2021.

[221] It is a set of six Principles to be adopted by the mutual funds and all categories of AIFs with their investment in listed equities from April 2020 on a mandatory basis. See SEBI, 'Stewardship Code for All Mutual Funds and All Categories of AIFs, in Relation to Their Investment in Listed Equities' (2019) CIR/CFD/CMD1/ 168 /2019 2 <https://www.sebi.gov.in/legal/circulars/dec-2019/stewardship-code-for-all-mutual-funds-and-all-categories-of-aifs-in-relation-to-their-investment-in-listed-equities_45451.html> accessed 28 September 2020.

[222] The Stewardship Code, 2019 Principles 1 and 3.

[223] Shareholding patterns and their influence on the decision-making process is discussed in Ch2 Pt 4.

Apart from legal regulation, investors are motivated to incorporate ESG issues for financial reasons. The integration of ESG improves returns, creates value for investors, and possibly reduces a firm's risks.[224] For example, a confectionery company sourcing cocoa from South Africa with a clear strategic view on the likely impact of drought, will be more resilient than a company that may not have incorporated that risk in its strategy.[225] Such climate-related risk is not only an environmental concern but also economic as companies may be impacted by climate-related risks and opportunities. Costs related to environmental issues will come back into portfolios as insurance premiums, taxes, inflated input prices, and physical cost associated with disasters.[226] Similarly, the 'S' and 'G' dimensions of ESG can also create an unexpected return outcome.[227] Investors would want companies to demonstrate operational hardiness and reputational resilience by addressing stakeholders' concerns and maintaining a positive relationship with the community in which they operate. The pandemic is also one of the risks which investors would want to avoid and those investors who failed to diversify their supply chain did not make a safe investment.[228] Thus, companies that assess and address the ESG risks and opportunities are in a better position in that their businesses are exposed to fewer risks. Promoting ESG will also improve stakeholder protection to some extent although stakeholder interests will still be ranked below those of shareholders.

---

[224] Principles for Responsible Investment (n 181) 7; Knoepfel (n 78) 9. But it is not a simple proposition that ESG always improves returns. Boffo and Patalano found the predictive value of ESG scores inconsistent. While many high scoring ESG portfolios underperformed, a number of low performing ESG portfolios outperformed the market. They also found that asset concentration associated with tilting portfolios toward high scoring ESG issuers can, depending on the conditions, affect volatility, risk-adjusted returns, and drawdown risk. See R Boffo, and R Patalano, 'ESG Investing: Practices, Progress and Challenges' (2020) 8 <www.oecd.org/finance/ ESG-Investing-Practices-Progress-and-Challenges.pdf> accessed 12 February 2021

[225] 'Your Guide to ESG Reporting' (LSEG 2018) 10 <https://www.lseg.com/sites/default/files/content/ images/Green_Finance/ESG/2018/February/LSEG_ESG_report_January_2018.pdf> accessed 20 April 2020.

[226] 'In Focus: Addressing Investor Needs in Business Reporting on the SDGs' (GRI, PRI and UNGC) 8 <https://www.globalreporting.org/media/sphmq4r0/addressing-investor-needs-sdgs-reporting.pdf> accessed 12 February 2021.

[227] Gordon Clarke *et al*, 'From the Stockholder to the Stakeholder' (University of Oxford 2014) 26–28 <https://www.smithschool.ox.ac.uk/publications/reports/SSEE_Arabesque_Paper_16Sept14.pdf> accessed 25 April 2021.

[228] There is evidence which shows that ESG investing outperformed the broader market. See Will Feuer, 'Here's More Evidence That ESG Funds Outperformed During the Pandemic' (Institutional Investor, 2021) <https://www.institutionalinvestor.com/article/b1r9gb5p9k10b4/Here-s-More-Evidence-That-ESG-Funds-Outperformed-During-the-Pandemic> accessed 12 February 2021 and Esther Whieldon and Robert Clark, 'ESG funds beat out S&P 500 in 1st year of COVID-19; how 1 fund shot to the top' (S&P Global 2021) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/esg-funds-beat-out-s-p-500-in-1st-year-of-covid-19-how-1-fund-shot-to-the-top-63224550> accessed 27 April 2021.

Understanding ESG issues and their potential impact on investment strategy and the broader operating environment is an integral part of good governance of institutional investors.[229] Investors can no longer ignore ESG issues as they are increasingly relevant and seen as potentially important drivers of portfolio risk and return.[230] Because of several benefits associated with ESG integration and increasing ESG regulation, investors consider integration of ESG factors a necessary and important part of fulfilling their fiduciary duty towards their clients or beneficiaries.[231] This requires them to put their client's interests first and act in their best interests and in doing so, to take into account the ESG factors that can provide better short- and long-term risk-adjusted returns.[232] A company's performance is increasingly assessed on ESG factors rather than on financial indicators alone.[233] Therefore, boards are under pressure to provide high quality reporting as a reassurance of risk mitigation and by doing so they attract and retain long-term investors.

Within the national framework of company law, directors' fiduciary duty requires them to act in the interest of long-term success of the company, whereas the fiduciary duty of asset managers requires them to prioritise their clients' financial interests. This complicates the regulation of CSR and could be a barrier to achieving better outcomes through CSR.[234] Moreover, measuring CSR is difficult as one cannot estimate the cost of many of the actions involved. CSR outcomes, such as creating value for society, strengthening the stakeholder relationship, or building trust with employees are difficult to quantify. Such outcomes are less tangible, more uncertain, and inherently difficult to measure. Sometimes the companies may be able to reap long-term benefits, but these may be difficult to estimate at the time of investment. Therefore, in the regulation of CSR it is important to clarify the meaning of the two overlapping terms so that the regulatory framework itself does not limit the promotion of CSR.

[229] OECD, 'OECD (2017)' (n 205) 9.
[230] ibid; 'Your Guide to ESG Reporting' (n 101); Strine (n 193).
[231] Peter Knight *et al*, 'Fiduciary Duty in the 21st Century: UK Roadmap' [2016] PRI 18, 21.
[232] Department for Business, Innovation and Skills, 'The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report' 112, 65; GRI, PRI and UNGC (n 228) 7.
[233] Nina Boeger *et al*, 'Companies, Shareholders and Sustainability' (Law Research Paper Series Paper #007 2020 2020) 35, 10 < bristol.ac.uk/law/research/legal-research -papers>.
[234] This is further discussed in Ch3.

5. CONCLUSION

This chapter has addressed CSR within the history of company law and its rise to global prominence in recent decades. Some of the driving factors for evolution of CSR noted in this thesis are religious practice, concern for the environment, social equity, and investor pressure to enhance corporate financial performance.[235] It is noted that CSR can no longer be termed 'voluntary' in that social and market forces have come to expect companies to behave more responsibly.[236] Over the years CSR has become subject to law and legal enforcement such as the disclosure and reporting on non-financial issues. After elaborating the essential characteristics of the CSR concept, the meaning of CSR was clarified.[237] CSR is an approach to decision making that emphasises how companies are managed by their directors. CSR conduct relates to the recognition and integration of stakeholder interests in the decision-making process of directors in close collaboration with stakeholders. Companies should ensure that they consider stakeholder interests and internalise the adverse environmental and social effects generated by the company in the process of making decisions.

The relationship between CSR and various theories of corporate governance regarding the purpose of the company was also discussed. While the goal of the shareholder-value theory is to increase the economic value of the shareholders' investment,[238] the goal of the stakeholder theory coincides with the goal of CSR.[239] The stakeholder model adopts a broader approach to corporate purpose and emphasises that various stakeholders have a legitimate interest in the success of the company and are affected by the way a company is managed by the directors. Therefore, directors must consider their interests in a balanced way to achieve the correct outcome. The weakness identified in this model is that it leaves directors unaccountable. The ESV model was also discussed in the context of the reform process of the UK Companies Act.[240] It incorporates certain features of the stakeholder model by recognising the importance of stakeholders to the long-term success of the company. It requires directors to consider stakeholder interests in the process, but essentially retains shareholder primacy by placing their interests above those of the other stakeholders.

---

[235] See discussion in Pt 2.2 and 2.3.

[236] See discussion in Pt 2.

[237] See discussion in Pt 3.1.

[238] See discussion in Pt 3.3.1.

[239] See discussion in Pt 3.3.2.

[240] See discussion in Pt 3.3.3.

The relation between or intersection of CSR with ESG was also discussed[241]. While the theories discussed above focus on directors' duties towards the company, ESG is closely linked to financial decisions in the investment chain which rose to prominence after the 'business case' for CSR became clear to investors. The discussion of the differences between CSR and ESG showed ESG as a hindrance in the regulation of CSR. Over time, various global and regional frameworks for non-financial disclosure which required companies to disclose their social and environmental strategies developed.[242] There is now a general expectation among institutional investors that ESG risks will be considered as these practices make good business sense and offer several potential rewards, such as risk and reputation management.[243] Investors engage with companies to consider ESG issues that can affect the performance of investment portfolios and shareholder value. Consideration of stakeholder interests is an essential part of ESG risk management to reduce potential regulatory sanctions, litigation, and reputational damage. But investors may not be interested in integrating ESG issues beyond 'the business case for CSR' or where they have to compromise on the returns on their investments. The ESG frameworks overlap with the CSR agenda to some extent, but they differ when it comes to prioritising portfolio risks and returns. The fiduciary duty of directors implemented at national level, requires them to act in the interests of the long-term success of the company whereas the fiduciary duties of asset managers require them to prioritise their clients' financial interests. This complicates the regulation of CSR and could present a barrier to achieving the desired outcome. The primary aim of ESG integration is the delivery of a financial return whereas the CSR agenda seeks to achieve a result which reaches beyond pure financial returns. The ethical and moral aspects of CSR are marginalised in the ESG perspective and only those elements of CSR which increase the long-term value of the company and its shareholders are integrated in the business.

As CSR is concerned with how business impacts on stakeholders and making companies accountable to them, it is important for the regulation of CSR that the focus is first, on directors' duties and how they make decisions for the success of the company,[244] and second, on increasing transparency and accountability. Directors must disclose

[241] See discussion in Pt 4.1.
[242] See discussion in Pt 2.3.
[243] See discussion in Pt 4.2.
[244] This is discussed in the next two chapters.

information relevant to stakeholders.[245] The next chapter addresses the regulation of CSR and evaluates the legal and regulatory framework on three levels: global, regional, and national with the focus on hard law versus soft law. At national level, the UK and India are discussed and the overall framework for CSR is analysed by evaluating various provisions relating to stakeholder protection.

[245] Disclosure as a technique to protect stakeholders is discussed in Ch4. However, the limitation of disclosure makes it crucial to go beyond it and engage with stakeholders in the decision-making process, also discussed in Ch4.

CHAPTER 2: REGULATION OF CORPORATE SOCIAL RESPONSIBILITY

1. INTRODUCTION

This chapter deals with the regulation of CSR from a company-law perspective with the focus on hard law versus soft law in this context. The regulatory framework of CSR is reviewed on three levels: global, regional (EU), and national (the UK and India).[1] The chapter examines several international initiatives and pinpoints inadequacies that present specific challenges for the regulation of CSR. The role of 'hard law' and 'soft law' in the context of CSR is discussed[2] and approaches to the topic in the UK and India are compared. Various provisions relating to stakeholder protection are evaluated.[3] The generally accepted view in the UK and India has traditionally been that directors should act in the best interests of the shareholders collectively.[4]

During the company law reform process in both the UK and India, the issue of to whom the directors owe their duties was debated.[5] Both jurisdictions have made changes to the statutory duty of directors and have included stakeholder interests when promoting the interest of the company. The chapter evaluates the extent to which corporate law in the two jurisdictions imposes an obligation on the directors of a company to consider stakeholder interests when making business decisions. For this thesis, section 172(1) of the UK Companies Act and sections 135 and 166(2) of the Indian Companies Act are extremely important and are, therefore, discussed in detail. This chapter includes the background to the provisions, their aims, nature, and the content of directors' duties. It outlines perceived gaps or shortcomings in and of the legal framework of CSR in the UK and India. It assesses the extent to which company law in the UK and India promote CSR

---

[1] See discussion in Pt 2 and for a discussion of the reasons for choosing the UK and India as case studies for this thesis, see Introduction, Pt 2.1.

[2] See discussion in Pt 2.4.

[3] See discussion in Pts 3 and 4.

[4] The interest of the shareholders was paramount, and the interests of stakeholders were considered provided they brought some benefits to the shareholders. See *Lee Behrens & Co Ltd, Re* [1932] 2 Ch 46; *Parke v Daily News Ltd* [1962] 2 All ER 929, 942.; *Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 437; *Re W & M Roith Ltd* [1967] 1 All ER 427.

[5] See on company law reform process in the UK: Company Law Review Steering Group, Modern Company Law for a Competitive Economy: The Strategic Framework (1999); Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (2000); Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Completing the Structure (2000); Company Law Review Steering Group, Modern Company Law for a Competitive Economy: The Final Report, vols I and II (2001);, Company Law Reform White Paper, (March 2005) Cm 6456.

and what improvements are needed in this context. The discussion contributes to an understanding of corporate law in facilitating or hindering CSR by analysing the various provisions and their impact in regulating corporate behaviour. Conclusions are drawn and the way forward is indicated.[6]

2. THE REGULATORY FRAMEWORK FOR CSR

The thesis adopts a broad understanding of regulation that encompasses 'all mechanisms of social control or influence affecting behaviour from whatever source, whether intentional or not.'[7] Beate and Taylor explain that 'social norms[8] and market forces can either promote respect for a rule or encourage non-compliance.'[9] From this perspective, regulation is a concept that includes, but is not limited to, law.[10] Various non-legal sources such as economic or social sanction or incentives may have a regulatory effect.[11] The term 'regulation' refers to social phenomena broader than 'law' – it encompasses other means of exercising social control or techniques that influence or affect behaviour, including unintentional and non-state processes.[12] It potentially includes different forms of regulation such as governmental or non-governmental, jurisdiction-specific, transnational, or even global.[13] This broad understanding of regulation is important for the purpose of this thesis as it moves between transnational and national law within the scope of CSR.

2.1. CSR at Global Level

The various CSR instruments generated by international governing bodies are predominantly soft law recommendations and guidelines. Soft law is generally referred

[6] See discussion in Pt 5.
[7] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 Current Legal Problems 103, 129.
[8] A social norm is a constraint on individual behaviour enforced by the community as opposed to legal sanctions which are imposed by state. See Lawrence Lessig, 'The New Chicago School' (1998) 27 The Journal of Legal Studies 661, 662.
[9] Beate Sjåfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3444050 42 <https://papers.ssrn.com/abstract=3444050> accessed 23 February 2021.
[10] Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business* (Edward Elgar Publishing 2010) 59.
[11] Sjåfjell and Taylor (n 9) 42.
[12] Robert Baldwin and M Cave, 'Understanding Regulation: Theory, Strategy and Practice' (OUP 1999) 2.
[13] Horrigan (n 10) 60.

to as a non-legally binding instrument[14] found in a variety of instruments including treaties, codes of conduct, voluntary resolutions, and joint declarations.[15] It is enforced through voluntary, market-orientated means.[16] Generally, the realm of soft law lacks one or more dimension that is normally ascribed to law such as lack of precision, exact obligation, or enforceability.[17] In the international law context, it refers to principles and policies which have been negotiated and agreed between states or promulgated by international institutions, but which are not mandated by law or subject to any formal enforcement mechanisms.[18] Examples of influential instruments of responsible business conduct include the OECD Guidelines for Multinational Enterprises (OECD 2011), Global Reporting Initiative (GRI), the United Nations Global Compact (UNGC), the United Nations Guiding Principles on Business and Human Rights (UNGP), and the Task Force on Climate-Related Financial Disclosures (TCFD). These are discussed further below.

The OECD 2011 consists of broad, non-binding principles and standards for responsible business conduct which aims to make a positive contribution to economic and social progress.[19] It aims to promote transparency and accountability, specifically by addressing disclosure of non-financial issues such as employment relations, environment, bribery, consumer interests, etc.[20] Countries adhering to OECD guidelines are required to set up a state-based mechanism termed a National Contact Point (NCP) whose main role is to encourage implementation of the principles and to settle any issues

---

[14] Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291.

[15] CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850, 852; Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 International and Comparative Law Quarterly 961, 964.

[16] Umakanth Varottil, 'Corporate Governance in India: The Transition from Code to Statute' in Jean J du Plessis and Chee Keong Low (eds), *Corporate Governance Codes for the 21st Century* (Springer International Publishing 2017) 97 <http://link.springer.com/10.1007/978-3-319-51868-8_5> accessed 6 April 2019.

[17] Chinkin (n 15) 851; Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 3.

[18] Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 70.

[19] A large number of countries adhere to the OECD Guidelines for Multinational Enterprises. It has 38 members countries and promotes responsible business conduct in 48 countries See OECD, *Guidelines for Multinational Enterprises* (OECD 2011) 3.

[20] ibid.

through mediation and conciliation.[21] The UK has set up an NCP which is a non-judicial mechanism but has no authority to impose sanctions.[22]

The United Nations (UN) is a key player in implementing global standards for non-financial disclosure via the Global Compact[23] (UNGC 2000) and PRI (2006).[24] UNGC, a non-binding initiative, was launched by Secretary-General Kofi Annan in 2000 and reflects the latest international standard for corporate responsibility.[25] It implements universal principles in business with the primary goal of mainstreaming the ten principles in business activities around the world to encourage companies to adopt sustainable and responsible business practices.[26] It advocates good practices in the ESG areas such as human rights, labour, environment, and anti-corruption.[27] One hundred and sixty countries, including the UK, India, and many European countries are signatories to the UNGC.[28] Critics believe that although UNGC is widely accepted, its ten principles are vague and lack effective monitoring mechanisms or third-party oversight.[29] Developing economies like Bangladesh,[30] Africa,[31] and India,[32] are also signatories to the UNGC.

GRI is the first international multi-stakeholder effort to address reporting on ESG issues. It was originally launched in 2000 after the public outcry over the environmental damage resulting from the Exxon Valdez oil spill.[33] It seeks to help companies with the management and reporting phases of their corporate responsibility initiatives in the hope

[21] 'National Contact Points for the OECD Guidelines for Multinational Enterprises - OECD' <https://www.oecd.org/corporate/mne/ncps.htm> accessed 7 May 2022.
[22] 'UK National Contact Point' (*GOV.UK*) <https://www.gov.uk/government/organisations/uk-national-contact-point> accessed 15 May 2022.
[23] United Nation Global Compact' <https://www.unglobalcompact.org/> accessed 13 March 2019.
[24] The PRI is discussed in Ch1 Pt 4.2.
[25] Choudhury (n 15), 966.
[26] UNGC, 'The Ten Principles of the UN Global Compact' <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 8 December 2020.
[27] ibid.
[28] UNGC, 'Explore our Participants'<https://www.unglobalcompact.org/interactive> accessed 8 December 2020.
[29] Andreas Rasche, 'A Necessary Supplement' – What the United Nations Global Compact Is and Is Not' (2009) 48(4) Business Society 511.
[30] 'Bangladesh UN Global Compact' <https://www.unglobalcompact.org/engage-locally/asia/bangladesh> accessed 10 April 2019.
[31] 'Africa UN Global Compact' <https://www.unglobalcompact.org/engage-locally/africa> accessed 10 April 2019.
[32] 'Global Compact Network India' <https://www.globalcompact.in/about> accessed 12 March 2019.
[33] GRI, 'Mission & History' <https://www.globalreporting.org/about-gri/mission-history/> accessed 12 March 2019; OECD (ed), *Corporate Social Responsibility: Partners for Progress* (OECD 2001) 15.

of improving the credibility of individual company initiatives.[34] Soon after the 2008 Global Financial Crisis (GFC), the Financial Stability Board (FSB) was established. In 2015 it created the Task Force on Climate-Related Financial Disclosures (TCFD), a multi-sector agreement for international financial stability,[35] with its latest report appearing in October 2021.[36] Its reporting framework is focused on disclosing the impact of climate-related risks and opportunities for investors and is the global standard for disclosure on climate-related risks and opportunities.[37] The UK has introduced new climate related disclosure in the strategic report with the aim of aligning disclosures with TCFD across the economy.[38]

The current global initiatives for CSR are characterised by soft law since the frameworks discussed above are voluntary and non-binding. Despite their voluntary nature, certain of the initiatives in fact exhibit some hard law characteristics.[39] For example, the OECD uses characteristics associated with hard law. The authority of the OECD Guidelines, as well as the precision with which they set out the standard of conduct for companies, are indicative of hard law.[40] Further, the task of enforcement is vested in local NCPs. In contrast, the UNGC and UNGP lack precision in setting standards[41] and, unlike the OECD, fail to provide any monitoring and or third-party oversight.[42] The need for reporting on ESG has also increased through standards for sustainability reporting such as GRI and TCFD. Although countries from most regions rely on disclosure to an

[34] Kathryn Gordon, 'The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison' (2001) OECD Working Papers on International Investment 2001/05 6 <https://www.oecd-ilibrary.org/finance-and-investment/the-oecd-guidelines-and-other-corporate-responsibility-instruments_302255465771> accessed 11 March 2019.

[35] 'Task Force on Climate-Related Financial Disclosures' (*Task Force on Climate-Related Financial Disclosures*) <https://www.fsb-tcfd.org/> accessed 2 April 2022.

[36] TCFD, 'Task Force on Climate-Related Financial Disclosures 2021 Status Report' (October 2021) <https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Status_Report.pdf> accessed 12 July 2022.

[37] *Comparative Corporate Governance* (2021) 102 <https://www-elgaronline-com.ezproxy.lib.gla.ac.uk/view/edcoll/9781788975322/9781788975322.xml> accessed 10 April 2022.

[38] Also discussed in Ch3 Pt 3.1. See The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022.

[39] Choudhury (n 15) 967–969.

[40] ibid 968.

[41] For example, responsibilities relating to anti-bribery and corruption are summarised in one principle requiring businesses to 'work against corruption in all its forms, including extortion and bribery'. See UNGC (n 26) Principle 10; Choudhury (n 15) 968.

[42] Choudhury (n 15) 969.

increasing extent,[43] the global interest in ESG reporting has achieved limited success in spurring correct corporate behaviour.[44]

2.2.CSR from a Regional Perspective: The EU

The European Union (EU) is one of the most powerful players in a number of international regulatory regimes. The thesis covers the EU aspect mainly because of its impact on the UK's regulatory framework[45] and the exponential growth of policy requirements in the region due to its willingness to promote sustainability as is evident from several recent initiatives. In a Green Paper entitled 'Promoting a European Framework for Corporate Social Responsibility' published in 2001, the European Commission (EC) explained CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[46] Its focus was on the business case of CSR linking it to long-term strategy and risk management.[47] It recommended that companies follow the international CSR standards and expected them to observe national and international legislation. With the release of the new CSR Communication in the EU in 2011, a number of factors were addressed which improved social and environmental disclosure.[48] The EU Directive on Non-Financial Reporting 2014 (NFRD) released new reporting rules that require companies to disclose information on policies, risks, and outcomes regarding various ESG issues.[49] The NFRD follows 'double materiality' which means that it requires companies to report on how sustainability issues affect their

---

[43] Barnali Choudhury, 'Social Disclosure' (2015) 13 Berkeley Business Law Journal 185, 190.
[44] Limitations of disclosure in protecting stakeholder interests is further discussed in detail in Ch4.
[45] Post Brexit, the UK is no longer a member of the European Union. EU legislation as it applied to the UK on 31 December 2020 is now a part of UK domestic legislation. See <https://www.legislation.gov.uk/eu-legislation-and-uk-law> accessed 2 April 2021. The UK's relationship with the EU is now governed by European Union (Withdrawal) Act 2018 (EU(W)A 2018) passed on 23 January 2020.
[46] 'Promoting a European Framework for Corporate Social Responsibility' (Commission Of The European Communities 2001) <http://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-366-EN-1-0.Pdf> accessed 20 January 2020.
[47] ibid 5–6.
[48] 'European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility" COM (2011) 681' para 2 <https://ec.europa.eu/growth /industry/sustainability/corporate-social-responsibility_en> accessed 20 January 2021.
[49] Directive 2014/95/EU of the European Parliament as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> accessed 20 April 2021.

performance, position, and development and their impact on stakeholders.[50] The directive is a part of a general trend to increase transparency in non-financial reporting and advises companies to follow the relevant international reporting frameworks such as the GRI, the IIRC, and the SASB.[51] Since the NFRD has not been able to improve the quality of information disclosed by the companies, the EC intends to replace it with the Corporate Sustainability Reporting Directive (CSRD).[52] While the NFRD follows a double materiality approach, the CSRD is inclined towards ESG as it is in line with the 'Green Deal' which is an integral part of EU's strategy for the implementation of the UN's 2030 Agenda and sustainable development goals (SDGs).[53] The Green Deal is focused on tackling climate and related environmental challenges such as no net emission of greenhouse gases by 2050.[54] The EU's initiatives are mainly financial and focus principally on ESG issues. It introduced the EU sustainability strategy in 2018 which was a major step in the EU's commitment to ESG investment.[55] After that, the EU also issued its Sustainability Related Disclosure for Financial Firms (Reg 2019/2088)[56] and the EU Taxonomy and Related Measures (Reg 2020/852),[57] EU Directive 2017/828,[58] and the EU Action Plan on Sustainable Finance[59] (2018). In order to create

---

[50] Commission, 'Proposal for a Directive of the European Parliament and of the Council, as Regards Corporate Sustainability Reporting' COM(2021) 189 final 2021 1 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN> accessed 5 April 2022.

[51] 'Compliance and Reporting under the EU Non-Financial Reporting Directive' <http://www.purposeofcorporation.org/documents/project_outputs/briefing-eu-non-financial-reporting-directive.pdf> accessed 20 January 2021.

[52] 'Proposals for a Relevant and Dynamic Eu Sustainability Reporting Standard Setting (Final Report)' [2021] EFRAG <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/210308-report-efrag-sustainability-reporting-standard-setting_en.pdf> accessed 20 January 2022.

[53] 'Corporate Sustainability Reporting Directive Proposal' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_1806> accessed 18 August 2021.

[54] Commission, 'Communication from the Commission on the European Green Deal', COM(2019)640 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN>.

[55] See: Commission, 'Action Plan: Financing Sustainable Growth', COM(2018) 97 final 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN> accessed 18 August 2021.

[56] EU, 'Sustainability-related Disclosures in the Financial Services Sector, Reg 2019/2088' <https://eur-lex.europa.eu/eli/reg/2019/2088/oj> accessed 6 December 2020.

[57] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 2020 (OJ L) 852. The EU Taxonomy, which is an investment tool, is linked to NFRD (art 8 of the taxonomy) that requires publication of information on how and to what extent companies' activities are associated with economic activities that qualify as environmentally sustainable under the Taxonomy Regulation.

[58] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement 2017 [32017L0828] 828.

[59] Action Plan: Financing Sustainable Growth 2018 [COM/2018/097].

a more inclusive and sustainable society, CSR Europe's[60] 2020 manifesto calls on companies – small, medium, and large – to contribute to the movement and be the agents of change by embracing transparency and respect of human rights as standard company practice, accelerating the adoption of new technologies to foster inclusive and sustainable business models and engaging with all stakeholders in support of societal and economic changes.[61] The EU also acknowledges the importance and potential of the Europe's Enterprise 2020 initiative. Further, the EU's recent proposal on ESG Due Diligence[62] will push companies towards sustainable business practice in the EU and beyond.[63] This ESG due diligence is aligned with various global instruments and EU initiatives. The European parliament adopted a resolution on 10 March 2021 providing that once the directive has been adopted, all members will be compelled to adopt it at national level.[64] Key features of this new proposal cover ESG in substance (human rights, the environment, and governance), value-chain due diligence strategy, stakeholder engagement, and grievance mechanisms. The Union considered urgently adopting binding due diligence requirements as voluntary standards have limitations and are inadequate in preventing human rights violations, environmental harm, or in enabling justice.[65] On 23 February 2022, the EC introduced a proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD) [66] which overlaps with the

---

[60] CSR Europe is the leading European business network for CSR. Through its network of corporate members and 42 National CSR organisations, it gathers over 10,000 companies and acts as a platform for those businesses looking to enhance sustainable growth and contribute positively to society. 'CSR Europe The European Business Network for Corporate Social Responsibility' <https://www.csreurope.org/> accessed 13 March 2019.

[61] 'The Future For Europe We Need' (CSR Europe Enterprise 2020, 2015) <https://www.csreurope.org/sites/default/files/publications/Enterprise2020_manifesto.pdf> accessed 12 March 2019.

[62] Due diligence as a mechanism to protect stakeholders is discussed in Ch3 Pt 5.

[63] Richard Sterneberg *et al*, 'The European Commission's New Approach to ESG Due Diligence and Corporate Accountability | Insights | DLA Piper Global Law Firm' (DLA Piper, 25 March 2021) <https://www. dlapiper.com/en/belgium/insights/publications/2021/03/the-european-commissions-new-approach-to-esg/> accessed 26 April 2021.

[64] Corporate due diligence and corporate accountability, European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf> accessed 27 May 2021.

[65] European Parliament. Directorate General for Parliamentary Research Services, 'Corporate Due Diligence and Corporate Accountability: European Added Value Assessment' (Publications Office 2020) <https://data.europa.eu/doi/10.2861/594198> accessed 30 April 2021. ESG Due diligence is discussed in detail in Ch3 Pt 5.

[66] CSDDD is discussed in detail in Ch 3 Pt 5. 'Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' 4 <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 15 May 2022.

planned CSRD and aims to achieve the goals set by the European Green Deal and the Paris Agreement.[67]

To summarise, at both global and EU levels the approach is aligned with ESG[68] but compared to the global level, the EU has a distinct strategy focused on managing financial risks stemming from the 'E' dimension of ESG to foster transparency in financial and economic activities. For the last five years the 'E' dimension of ESG has been a particular focus of investors all around the world with a strong strategic approach on climate-change issues which represent one of the most serious financial risks to investors.[69] This may be because social issues are generally local and attributed to a nation, for example, poverty or education which can be regulated according to the needs of a particular country. This allows greater scope for innovation as regards regulatory technique. The 'E' dimension relates to issues such as climate change and pollution which have cross-border effects and a major impact on financial outcomes. The EU investors are leaders in acting on environmental risks,[70] and this trend of focusing on such risks is also reflected in their various initiatives. For example, EU taxonomy is focused on a systemic and forward-looking approach to environmental sustainability. This has also impacted on the UK regulatory framework[71] due to the relationship between the EU and the UK, while India's approach is rooted in its tradition and culture of giving back to society. However, the UK's national framework also focuses strongly on protecting its internal stakeholders, eg, its workforce.[72] After discussing the global and the regional perspectives of CSR, the next section focuses on the national level with the UK and India as case studies.

[67] The Proposal will now pass to the European Parliament and Council for adoption. CSDDD is discussed in detail in Ch3 Pt 5.

[68] Iain MacNeil and Irene-Marie Esser, 'From a Financial to an Entity Model of ESG' (2022) 23 EBOLR 9, 19.

[69] Attracta Mooney and Patrick Temple-West, 'Climate Change: Asset Managers Join Forces with the Eco-Warriors' *Financial Times* (26 July 2020) <https://www.ft.com/content/78167e0b-fdc5-461b-9d95-d8e068971364> accessed 10 April 2022.

[70] ibid.

[71] For example, the NFRD implemented in the UK under s 414CB of CA 2006 which follows a double materiality, but the updated version is focused more on the financial side of decision making. See further Ch4 Pt 3.1.

[72] See discussion of Provision 5 of UKCGC in Ch4 Pt 5.

2.3.CSR at National Level

There are strong differences across countries in terms of CSR regulation.[73] What CSR means in the context of developed economies differs from the way it is perceived in developing economies.[74] Attempts have been made in the UK to deal with stakeholder issues through legislation. Section 172(1) of CA 2006 requires directors to promote the success of the company for the benefit of its members as a whole, with reference to matters such as the interests of employees, suppliers, customers, and the environment. The UK emphasises the idea of enlightened-self-interest by adopting the ESV approach.[75] The UK also has extensive reporting requirements which offer some form of protection to stakeholders but are often criticised as an inadequate tool on their own to provide sufficient protection for stakeholders.[76] The UK Corporate Governance Code 2018[77] (UKCGC) – a soft law instrument – also sets out the clear expectation that the board will promote a corporate culture of responsiveness to the views of wider stakeholders and align this culture with the company's purpose, values, and strategies.[78]

On the other hand, the Indian Companies Act 2013 (CA 2013) has provided for a 'public' character of a corporation,[79] primarily in the form of a philanthropic approach to CSR and non-financial disclosure. The Indian CA makes provisions for 'mandatory CSR' under section135 which requires certain companies to spend 2% of their net profit on

---

[73] Hao Liang and Luc Renneboog, 'On the Foundations of Corporate Social Responsibility: On the Foundations of Corporate Social Responsibility' (2017) 72 The Journal of Finance 853.
[74] Horrigan (n 10) 37.
[75] For discussion on ESV approach, see Ch1 Pt 3.3.3.
[76] See discussion in Ch4 Pt 4.
[77] The UKCGC is soft law which operates on a 'comply or explain' basis. The 'comply or explain' approach is the trademark of corporate governance in the UK and is often preferred over the traditional hard law instrument because it provides flexibility and softens the intensity of statutory provisions. It has been in operation since the Code's beginning (ie, since the Cadbury Report of 1992) and is the basis of its flexibility. It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally, See: See: The UK Corporate Governance Code 2018; The UK Corporate Governance Code 2014 4.
[78] See discussion in Pt 3.2.
[79] There is an increasing pressure on companies to realise social and environmental aims which were traditionally the role of government. Many countries are now using corporate governance as a mechanism to regulate social and environmental issues. For example, mechanisms such as board committees (South Africa and India), CSR due diligence (France), directors' duty (the UK, India, and China), corporate philanthropy (India and Mauritius), and disclosure (the UK, India and South Africa) are the various approaches taken by governments to regulate companies in pursuit of public goals. See Barnali Choudhury and Martin Petrin, 'Corporate Governance That "Works for Everyone": Promoting Public Policies through Corporate Governance Mechanisms' (2018) 18 Journal of Corporate Law Studies 381; Li-Wen Lin, 'Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences' (2021) 23 University of Pennsylvania Journal of Business Law 429.

society and the environment. This philanthropic approach to CSR is regarded as ingrained within India's business system. India has adopted a pluralist approach[80] which means that reason why companies engage in CSR differs from that under the ESV approach and focuses on both normative and instrumental aspects of CSR. The government also released the National Guidelines on Responsible Business Conduct 2018 (NGRBC),[81] a set of nine principles which require directors to adopt an inclusive approach on a voluntary basis.[82] However, the Securities and Exchange Board of India[83] (SEBI) – the country's market regulator – mandated a business responsibility report (BRR) on the guidelines for the top 1000 listed companies. The key areas on which reporting is required are ESG issues and stakeholder relationships.

There appears to be a fundamental difference between the two approaches; while the UK's approach is more in line with global standards of ESG investing, India appears to prefer the philanthropic approach to CSR. However, the emerging consensus in favour of the ESG approach as the standard model has encouraged India, too, to adhere to the international standards.[84] For example, the reporting required under BRR has recently been updated to a Business Responsibility and Sustainability Report (BRSR) to establish a link between financial performance and ESG issues. However, this thesis focuses on how CSR is dealt with – ie, how stakeholders are considered during the decision-making process in a company and not on the decision-making process of the investment track. But an investor's decisions do have some influence on decision making by directors and, therefore, these provisions or guidelines will be analysed from a CSR perspective. The

---

[80] The pluralist approach advances the interests of a number of groups without the interests of a single group (shareholders) taking precedence. It envisages circumstances in which some sacrifice of the interests of shareholders in favour of some other interests may be needed. The CLRSG noted in its strategic framework that 'the review is essentially concerned with law reform, not with wider ethical or managerial issues about the behavior and standards of participants in companies, except to the extent that it is appropriate to reflect them in company law'. See *The Strategic Framework* (n 5) para 5.1.2. See discussion in Ch1 Pt 3.3.2 and Ch 2 Pt 4.2.

[81] National Guidelines on Responsible Business Conduct 2018, available at: <https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf> accessed 7 September 2019.

[82] For discussion on the NGRBC see Pt 4.3.

[83] SEBI was established on 12 April 1992. It applies to listed companies and governs their disclosure requirements. 'Listed company' means a company which has any of its securities listed on any recognised stock exchange. The basic function of SEBI is to protect the interests of investors in securities and to promote the development, and regulate the securities market and matters connected therewith or incidental thereto. See 'About SEBI' (SEBI) < https://www.sebi.gov.in/about-sebi.html>. See also Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 ss 3 and Ch2; The Companies Act 2013 s 2 (52).

[84] The NGRBC is aligned with the global instruments such as the UNGPs, the SDG, and the Paris Agreement on Climate Change.

next section considers the regulation of CSR from hard law (eg, the Companies Act) versus soft law (eg, Codes of Best Practice) perspectives.

2.4.Hard Law v Soft Law

From the legal perspective, debate around CSR is strongly influenced by whether CSR should be regulated by hard law or soft law; ie, whether CSR should be mandatory or voluntary. This debate continues to divide CSR professionals.[85] Those who argue for soft law regulation of CSR point out that soft law is designed to guide behaviour; it has behaviour-influencing capacity.[86] It can be very effective in influencing corporate practice as it is flexible which makes it easier for companies to respond to different problems and circumstances and is especially desirable in an area where government is reluctant to make a binding commitment.[87] Adopting soft law may be beneficial for corporate reputation as it is designed for corporations and professional bodies with a higher moral commitment, while hard law is designed for ordinary corporations and business people with an average moral commitment.[88] Soft law can also resolve ambiguities in binding texts or fill gaps so as to regulate behaviour within a rule of law framework.[89] It has an informative and educative role[90] and provides for the shaping and sharing of values.[91]

State regulation is considered burdensome and is suggested that it stifles innovation.[92] It is seen as unnecessary in that research on the business case for CSR has shown that companies which adopt socially responsible policies are better run, more attractive to investors, employees, and consumers, more efficient and, consequently, more profitable.[93] However, the mandatory approach to CSR is seen as largely ineffective in

---

[85] Zerk (n 18) 32.
[86] Shelton (n 14) 322; Chinkin (n 15) 861.
[87] Shelton (n 14) 322.
[88] Saumitra N Bhaduri and Ekta Selarka, 'Corporate Social Responsibility Around the World—An Overview of Theoretical Framework, and Evolution' in Saumitra N Bhaduri and Ekta Selarka (eds), *Corporate Governance and Corporate Social Responsibility of Indian Companies* (Springer Singapore 2016) <http://link.springer.com/10.1007/978-981-10-0925-9_2> accessed 11 March 2019.
[89] Shelton (n 14) 320.
[90] Chinkin (n 15) 862.
[91] ibid 865.
[92] Zerk (n 18) 33.
[93] ibid.

influencing human behaviour.[94] The rigidity of mandatory corporate governance, companies have to bear excessive costs of compliance due to limited choice regarding the content of rules.[95] This notwithstanding, there are many instances in which recourse to hard law is preferred to soft law. Hard law establishes the minimum standards to which corporations must adhere. For example, in many developing countries a voluntary code of conduct is regarded as inadequate as their moral commitment is generally low. For example, in India hard law is often preferred over soft law, especially in regulating CSR, as the voluntary approach has not been able to achieve an acceptable level of corporate governance.[96] Two principal risks associated with soft law are: (1) non-compliance due to the absence of formal enforcement mechanisms; and (2) symbolic or creative compliance.[97] When full corporate compliance is difficult to secure or non-compliance is difficult to detect, binding legal obligations should be used.[98] Certain scholars see the distinction between binding hard law and soft law as illusory.[99] They focus on the effectiveness of law at the implementation stage, ie, they consider its impact on behaviour. For example, where the legal consequences of both performance and breach are vague or cannot be established with certainty the provision is in all likelihood 'soft law'. [100]

The discussion in this section indicates that it is difficult to analyse which 'law' better regulates CSR in corporate practice. In Zerk's view, voluntary CSR commitment and the hard law CSR approach are not complete opposites but are linked.[101] Various techniques have been developed to regulate CSR, including the director's duty, due diligence, and non-financial disclosure, which make it doubtful whether CSR can be regarded as entirely voluntary. It is important to analyse how a combination of the hard law and soft law approaches might best promote CSR.

---

[94] Nina Boeger, Rachel Murray and Charlotte Villiers, *Perspectives on Corporate Social Responsibility* (Edward Elgar 2008) 173, 174.
[95] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 The MIT Press 421.
[96] For example, see discussion in Pt 4.3.
[97] Choudhury (n 15) 975.
[98] Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 Utrecht Journal of International and European Law 7, 156.
[99] Lagoutte, Gammeltoft-Hansen and Cerone (n 17) 257.
[100] Chinkin (n 15) 859.
[101] Zerk (n 18) 32.

3. REGULATION OF CSR: THE UK

This section focuses on the extent to which the directors' duty in the two jurisdictions promotes CSR and analyses whether company law enables or makes it difficult for decision makers to consider various stakeholders' interests. The generally accepted view in the UK has traditionally been that directors should act in the best interests of their shareholders as a collective.[102] Similarly, in India the Companies Act was initially based on the principle that directors are mere agents of their shareholders as emerges clearly from several judicial decisions during colonial and post-colonial times.[103] During the company law reform process in both the UK and India, the issue of to whom directors owe their duties was debated.[104] Both jurisdictions have revised directors' statutory duty to include stakeholder interests as a factor in promoting the interests of the company. The section assesses the extent to which company law in the UK and India promotes CSR and what improvements are required. It outlines the perceived gaps or shortcomings in and of the legal framework of CSR in the UK and India. After considering the position in both jurisdictions various conclusions are drawn on the different approaches, focusing on the method of regulation and whether either of the approaches is 'better' in promoting CSR.

3.1. Hard Law: Section 172(1) of Companies Act 2006

In the UK section 172(1|) of CA 2006 is the key provision governing stakeholder protection.[105] Section 172(1) requires directors to promote the success of the company for the benefit of its members as a whole. This involves a consideration of various matters such as the interests of employees, suppliers, customers, and the environment. The nature of the duty owed by a director is fiduciary and recognises the position of trust

---

[102] The interest of the shareholders was paramount, and the interests of stakeholders were considered provided they brought some benefits to the shareholders. See *Lee Behrens & Co Ltd, Re* [1932] 2 Ch 46 (n 4); *Parke v Daily News Ltd* (n 4); *Hampson v Price's Patent Candle Co* (n 4); *Re W & M Roith Ltd* [1967] 1 All ER 427 (n 4).

[103] For example, see *Dikshit And Co Ltd v Mathura Prasad* AIR 1925 All 71 7; *Albert Judah Judah v Rampada Gupta And Anr* AIR 1959 Cal 715 35-A.

[104] Ibid (n 5).

[105] CA 2006 came into operation on 1 October 2007. Some parts of the Act came into force on different dates. The reason behind this is the length of the act. The CA 2006 is the largest Act in the UK legislative history and many parts of it had to accommodate changes. Hence, some sections came into effect on different dates. See: Andrew R Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 82–83.

that a director holds and the need for him or her to act in good faith and avoid self-serving behaviour in carrying out his or her duties.[106] The duty to promote the success of the company is generally seen as harking back to the common-law duty to act *bona fide* and in the best interests of the company. The courts have stated that the duty of directors is to do their best to promote the company's business and to act with complete good faith towards the company.[107] Section 172(1) replaced section 309 of the 1985 Act[108] and is now more inclusive as the list of factors to be considered by directors has been expanded to include a broader range of stakeholder such as suppliers, customers, the community, and the environment.

3.1.1. Promotion of CSR

Section 172(1) is significant in the CSR regulatory framework as the factors mentioned in subsection (1) overlap with the concept of CSR, making CSR implicit in the section.[109] The ESV approach adopted by the Act requires directors to be more inclusive in their decision-making role as it places a positive duty on them to consider the various stakeholder interests. Lian considers that the concept of CSR lies behind the ESV principle as the section signals the importance of CSR in underlining the fact that companies do not exist in a vacuum and that corporate decisions impact a wide variety of stakeholders.[110] The section emphasises the importance of stakeholder interests by expressly mentioning them in CA 2006 with the intention of pointing directors to the desired behaviour and culture. The inclusion of the factors indicates a step forward in

---

[106] 'GC 100, Guidance on Directors' Duties Section 172 and Stakeholder Considerations' (2018) 15 <https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I59d0a3ddd47f11e8a5b3e3d9e23d7429.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=141b73f1-6534-4691-bce0-e77d8bdfd07c&contextData=%28sc.Default%29&comp=pluk> accessed 26 July 2020.

[107] *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471 (Lord Cranworth LC); *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; and *Cobden Investments Ltd v RWM Langport Ltd & Ors* [2008] EWHC 2810 (Ch). In *Cobden Investments Ltd*, Justice O'Neill explains as follows: 'These duties now appear as part of the general duties imposed by the CA 2006. The perhaps old-fashioned phrase acting "bona fide in the interests of the company" is reflected in the statutory words acting "in good faith in a way most likely to promote the success of the company for the benefit of its members as a whole". They come to the same thing with the modern formulation giving a more readily understood definition of the scope of the duty.'

[108] Explanatory Notes to Companies Act 2006 par 329.

[109] Yap, J. Lian, 'Considering the Enlightened Shareholder Value Principle' (2010) 31 Company Lawyer 35, 37.

[110] ibid.

protecting stakeholder interests. Although the list is non-exhaustive,[111] it gives an indication of wider expectations from the companies and the increasing importance of the various non-financial issues in the corporate world. It underlines the importance of non-shareholder stakeholder interests and encourages directors to think about them when making long-term corporate decisions.[112] The explanatory note to the section mentions that it will not be sufficient to pay lip service to the factors, and, in many cases, directors will need to take action to comply with this aspect of the duty.[113] The extent to which the directors must consider the factors is unclear but the UKCGC and guidance documents[114]require some form of engagement with stakeholders.[115] The overall duty under section 172(1) requires directors to consider the relationship between corporate vision and goals, the strategy to achieve the vision and goals, and stakeholder interests.[116] One of the over-arching themes of the section is to promote good corporate culture which includes considering stakeholder interests through corporate strategies and engagement.[117] It recognises the fact that a company is also dependent on stakeholders and reinforces their interests by linking them to the strategic report as a means of improving transparency in the decision-making process. The CA 2006 requires the directors of all companies (other than small companies[118]) to prepare a strategic report

---

[111]Companies Act 2006 note 326.

[112]Irene-Marié Esser and Iain MacNeil, 'Disclosure and Engagement: Stakeholder Participation Mechanisms' (2019) 30 European Business Law Review 201, 205.

[113]Explanatory Notes to Companies Act 2006 note 328.

[114] There are various guidance documents to facilitate the good governance of the companies. There is no legal requirement to follow them. For example, the CG Code 2018 is supported by the 'Guidance on Board Effectiveness', which is a non-mandatory guidance document to encourage board's thinking on how best to apply the Code principles. See 'Guidance on Board Effectiveness' (FRC 2018) <https://www.frc.org.uk /getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF> accessed 17 September 2019. There are various other guidance documents released such asibid; FRC, 'Guidance on the Strategic Report' (2018) <https://www.frc.org.uk/accountants/accounting-and-reporting-policy/clear-and-concise-and-wider-corporate-reporting/narrative-reporting/guidance-on-the-strategic-report>; 'ICSA and the Investment Association, The Stakeholder Voice in Board Decision Making Strengthening the Business, Promoting Long-Term Success' (2017) <https://www.icsa.org.uk/assets/files/free-guidance-notes/the-stakeholder-voice-in-Board-Decision-Making-09-2017.pdf>; 'GC 100, Guidance on Directors' Duties Section 172 and Stakeholder Considerations' (2018) 1 <https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I59d0a3ddd47f11e8a5b3e3d9e23d7429.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=141b73f1-6534-4691-bce0-e77d8bdfd07c&contextData=%28sc.Default%29&comp=pluk>.

[115]FRC, 'Guidance on the Strategic Report' (2018) para 8.20; GC 100 Guidance 6; The UKCGC Principle D and Provision 5.

[116]'GC 100' (n 114) 8.

[117]ibid 6.

[118] Section 414B of CA 2006

for the company each financial year.[119] The strategic report refers expressly to section172 and requires directors to include a statement setting out how they have had regard to the matters in section 172(1)(a) to (f) when performing their duty under section 172.[120] This further increases accountability and compels directors to consider stakeholder interests in the company's policy.

CA 2006, therefore, enables directors to make an effective business choice for the members of the company and those affected by its operations. In the ministerial statements, Hodge stated that section 172 would mark a radical departure in articulating the connection between what is good for a company and what is good for society at large.[121] She continued to say that 'CSR has developed and evolved over time',[122] signalling a correlation between section 172 and CSR. It also implies that directors are ready to enforce responsibilities other than achieving economic goals.[123] The section below interprets whether section 172 is a help or a hindrance in promoting CSR.

3.1.2. Interpretation

The section provides that directors are required to act in the way they 'consider', 'in good faith', will promote the success of the company. Good faith is seen as the heart of section 172 because it is of immense importance when directors make decisions for the company. Directors have been given a wide discretion to make decisions for managing the company and even if the decisions made are not successful, the directors will not be in breach of their duty if they acted in good faith.[124] The section attracts the same approach as the duty to act *bona fide* in the best interests of the company. The courts are generally unwilling to second-guess a director's decision unless it is blatantly

---

[119] Companies Act 2006 ss 414A(1), (2) and 414B. In 2013, the CA 2006 was amended to introduce certain disclosure requirements to the annual report. The requirement to prepare a strategic report applies from 30 September 2013. The FRC issued non-mandatory guidance on strategic reporting to encourage directors to follow best practice rather than compelling them to do so. See FRC (n 114).
[120] ibid 414CZA.. The Strategic report is discussed in Ch 4 Pts 3.1 and 4.
[121] See the introduction to the Ministerial Statements of June 2007, <https://webarchive.nationalarchives.gov.uk/ukgwa/20070603164510/http://www.dti.gov.uk/files/file40139.pdf> accessed 8 September 2019
[122] Ibid.
[123] Yap J Lian (n 108).
[124] *Smith & Fawcett, Re* [1942] Ch. 304 306, 360. *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093.*Item Software (UK) Ltd v Fassihi* (2004) EWCA Civ 1244 (CA).; *Regentcrest Plc (In Liquidation) v Cohen* [2001] BCC 494.

improper.[125] Therefore, it can at times be difficult to establish whether directors are in breach of their duties under section172(1) if they can convince the judge that they acted in good faith.[126]

There are not many cases which deal directly with the elements of section 172.[127] An important case in which the High Court had an opportunity to consider the scope of the section in the context of 'having regard to' is *R (on the application of People & Planet) v HM Treasury*.[128] This is the only case on breach of duty under section 172(1) which illustrates the limitation of this section as regards the promotion of CSR. In this case, People and Planet (P&P) sought judicial review of the policy adopted by a government company run by the Treasury through UK Financial Investment Ltd (UKFI), the government company that represents the government's interest in the Royal Bank of Scotland (RBS). Seventy per cent of the bank's equity was owned by the government and was run by the HM Treasury. P&P had a problem with how climate change and human rights issues were handled by the company. The court did not grant permission for judicial review as the Treasury had paid some attention to environmental and human rights issues. The court stated that the climate change and human rights issues had been considered and it was unnecessary for the Treasury to analyse the matter further.[129] The directors had already considered the environmental and human rights issues to the extent necessary for the benefit of the company. The case upheld the enforcement of the consideration of the list of factors but limited it to the promotion of shareholder value. This limited the usefulness of section 172(1) for stakeholder protection. The promotion of CSR includes actions even beyond legal compliance and involves integration of

---

[125]*Extrasure Travel Insurances Ltd v Scattergood* (n 124); Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (n 104) 92. Also discussed in Ch2 Pt 1.1.1.

[126]*Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 830 .The government was of the view that it will be for the directors to determine and it is their good faith judgement that will matter. They will need to look to the company's constitution, shareholder decisions, and anything else that they consider relevant in helping them to reach that judgement. See Lord Goldsmith, 'Grand Committee' (6 February 2006) col 256 <https://publications.parliament.uk/pa/ld200506/ldhansrd/vo060206/text/60206-24.htm#60206-24_cmtee0> accessed 8 September 2019.

[127] In a few cases, judges have just mentioned them without explaining the meaning or their application. In the rest of the cases, only one or two factors have been mentioned mostly dealing with derivative action issues. In *Cullen Investments*, the judge only mentioned the factors without discussing them. The deputy judge said: 'Of the six specific matters mentioned in sub-paragraphs (a) to (f) of s.172(1), only (a) and (f) are of potential relevance to the facts of this case.' See *Cullen Investments Limited v Brown* 2015 EWHC 473 (Ch). Other derivative action cases where factor (f) was mentioned are *Hughes v Weiss* [2012] EWHC 2363 (Ch) [30]; and *Parry v Guy Bartlett* [2011] EWHC 3146 (Ch) [76–77].

[128]*R (on the application of People & Planet) v HM Treasury* 2009 WL 3829362.

[129]ibid.

stakeholders' interests in the business (such as environmental and human rights issues in *People & Planet*), leading to an internalisation of externalities.[130] Integration of stakeholder interests involves considering the impact of the company's decisions on the stakeholders and acting to address those issues. It involves going beyond the narrow responsibility of furthering shareholder interests and balancing the interests of various stakeholders in the process of decision making. Clearly, the directors' approach in this case pointed to a narrow approach to the consideration of stakeholder interests and the directors were not held responsible for this. The wide discretion of directors to make decisions was restricted to the business case of CSR showing clearly that section172(1) has a limited effect on the promotion of CSR.

The process of balancing the interests of different stakeholders is subjective. Where different stakeholders do not have homogenous interests, balancing different interests can be problematic and may delay decision making. Therefore, guidance on how to balance the interests of the different stakeholders will be helpful. The substantive duty of directors under section 172(1) is exercised 'having regard to' but there is no clarity on 'how' these different stakeholder interests must be considered.[131] The Guidance Note on Directors' General Duties[132] states that:

[A]t times these six factors, and any others that are being considered, may be in conflict but the key issue for decision-making is that the directors should choose the action that will promote the success of the company for the benefit of members as a whole, even if that may sometimes have a negative impact on one or more of the six factors.[133]

---

[130]Externalities are defined as the external costs of an exchange in the market, eg, environmental pollution. Unless these externalities are internalised by the companies (either by law or voluntarily) they will continue to spread pollution. See Beate Sjafjell, 'Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers' (2008) 40 The George Washington International Law Review 977.

[131] For a discussion of the question of 'how' see Ch3 Pt 1.

[132] This guidance is prepared by the Institute of Chartered Secretaries and Administrators (ICSA). ICSA is now known as the Chartered Governance Institute in the UK. It provides professional development and guidance to champion good governance and develop the value, skills, and effectiveness of company secretaries and governance professional. See ICSA, 'The Chartered Governance Institute' <https://www.icsa.org.uk/about-us> accessed 2 September 2019.

[133]'Guidance Note: Directors General Duties' para 2.2 <https://www.icsa.org.uk/assets/files/free-guidance-notes/directors-general-duties(1).pdf> accessed 12 September 2019.

Keay regards this ‘a fact-sensitive matter’.[134] The circumstances and priorities of every company differ. For instance, fossil fuel companies must internalise environmental externalities in their business plan because the nature of their business causes enormous environmental damage. Because of the nature, size, and power of their industry, they have a significant responsibility to minimise environmental damage and be conscious of how they conduct their business. Therefore, in some companies certain factors may be more important than others in the process of ‘having regard to the factors’. The degree of importance accorded each factor is in the directors’ discretion and good-faith judgement. The list of factors is not exhaustive and the directors must also consider any other relevant factors.[135]

3.1.3. Section 172(1): Promoter of or Barrier to CSR?

One of the major barriers to CSR is that shareholder primacy is retained in the UK through the ESV approach. The ultimate beneficiaries of the directors’ duties remain the shareholders. Therefore, the section is heavily criticised in that it creates a hierarchy with shareholder interests ranking above those of other stakeholders. The directors are expected to act in good faith to promote the success of the company for the benefit of its members and stakeholder interests and shareholder value often do not coincide. It is also consistent with the corporate objective in the UK as the interests of shareholders are paramount.[136]

Further, how section 172(1) interacts with the legal standing of the stakeholders listed in subsections (a)-(f) is unclear. Esser considers that the practical application of the section in the context of protecting stakeholders is unclear as the stakeholders are not entitled to take any legal action against the directors.[137] Under the proper plaintiff rule, where the

[134]Andrew Keay, ‘Having Regard for Stakeholders in Practising Enlightened Shareholder Value’ (2019) 19 Oxford University Commonwealth Law Journal 118, 127.
[135]‘Guidance on Director’s Duties, Section 172 and Stakeholder’s Consideration.’ (October 2018) 5.
[136] Such short-term focus on the share price may be detrimental to the company’s long-term interests See Katarzyna- Chalaczkiewicz-Ladna, ‘The Relevance of Long-Term Interests in the Decision-Making Processes of Company Directors in the UK, Delaware and Germany: A Critical Evaluation’ (PhD Thesis, University of Edinburgh 2015) 116.
[137]Irene-marié Esser, ‘The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom’s Enlightened Shareholder Value Approach: Part 2’ (2017) 50 De Jure 221, 236. However, in many countries, eg, Canada, stakeholder interest groups are granted standing to sue to obtain an oppression remedy or statutory derivative action. See Jeroen Veldman, Filip Gregor and Paige Morrow, ‘Purpose of the Corporation Project (2016) Corporate Governance for a Changing World’ [2016] Frank Bold and Cass Business School 50. In South Africa trade unions and employees have a right to bring a statutory

company has suffered a 'wrong' the proper claimant is the company itself.[138] A shareholder can also bring a derivative action[139] in case of breach of section 172. Unlike other stakeholders, shareholders have a remedy for a perceived failure by a director to carry out his or her duty under section 172(1). The shareholder may bring a derivate claim for an alleged breach of any of the general duties of a director.[140] A significant feature of bringing a derivative claim is that the shareholders must satisfy certain conditions before they may seek the permission of the court to commence with proceedings. However, shareholders prefer to engage positively with companies, with regular communication being high on their agenda and not always via the annual general meeting.[141]

Cases relating to section 172 are not of much assistance as in most of the cases the judges have not had the opportunity to interpret the meaning or application of section 172. Litigation is uncommon because, given the wide discretionary powers accorded directors in making decisions, proving their guilt is often problematic. However, the courts will have to examine the reason behind the director's decision as well as the various issues which he or she considered in reaching the decision. Where the act or omission under challenge resulted in substantial detriment to the company, the director will have a more difficult task persuading the court that he or she honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.[142] However, if directors act in good faith in the interests of the company and for proper purposes, they will not be liable for breach of fiduciary duty if they make a mistake and act unreasonably.[143] Thus, there are no direct consequences for directors who fail to consider stakeholder interests in achieving a desired outcome. However, these safeguards do not eliminate the risk of poor decision making by directors. This points clearly to a need for greater transparency and accountability in the decision-making

---

derivative action on behalf of the company. See: Companies Act 61 of 2008 and Jean J Du Plessis, 'Company law developments in South Africa : Modernisation and some salient features of the Companies Act 71 of 2008' (2012) 27(1) Australian Journal of Corporate Law 46–72.

[138]According to the rule established in this cases, if a wrong is alleged to have been done to a company, the proper claimant will be the company itself See *Foss v Harbottle* (1843) 67 ER 189.

[139]CA 2006, s 260.

[140] Companies Act 2006 Ch 2, Pt 10, ss 170-181.

[141] Deborah Allcock, 'The "Invisible" Hand: Views from UK Institutional Investors' (2018) 18 Corporate Governance: The International Journal of Business in Society 1074.

[142]*Regentcrest Plc (In Liquidation) v Cohen* (n 123) para 514.

[143] But may be liable for breach of their duty of care under s.174. See *Colin Gwyer& Associates Ltd v London Wharf (Limehouse*) Ltd [202] EWHC [2748] (Ch).

process.[144] Ruhmkorf doubts whether the subjective nature of good faith can facilitate the promotion of CSR.[145] The directors have wide discretionary powers with regard to how they balance the interests of the various stakeholders and how heavily they should weigh in the decision-making process. Section 172 has limitations in the context of stakeholder protection as directors' wide discretion may not always result in the integration of stakeholder interests in the process of decision making. The directors have been given an unfettered discretion but with no objective criteria to indicate how they should exercise it. If directors do not consider the interests of all stakeholders when deciding for the success of the company, they will escape liability and there is no way of knowing whether the interests of the stakeholders have been considered. The duty merely recognises the rights of 'other stakeholders' in section172(1)(a)-(f) but without providing a proper remedy. The fact that there is no mechanism by which to hold directors accountable is problematic.[146] During the parliamentary debate, there was a discussion on the formulation of 'have regard to' rather than the 'duty to.'[147] This implies that the government had no intention of mandating this requirement, leaving stakeholders without any legal tool to enforce this right when directors fail to consider their interests. It is to be noted that section 309 faced similar problems and section172, which has a similar effect, is criticised for the same reasons.[148] The government had no intention of amending section 172 as any change to the enforceability of the section will result in a redefinition of how the interests of a company are to be established. In the view of the

---

[144] However, directors should not be held liable for poor decision making as it may deter risk taking and discourage people from taking up directorial roles. Keay and Loughrey explain that legal accountability is considered to be one form of accountability. Where legal accountability is not desirable, directors can be subject to other accountability mechanisms. See: Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 Legal Studies 252; Melvin Aron Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law' (1993) 62 Fordham Law Review 437, 444; CA Riley, 'The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard' (1999) 62 The Modern Law Review 697, 712;.

[145]Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar Publishing 2015) 43–44.

[146]Georgina Tsagas, 'Section 172 of the UK Companies Act 2006: Desperate Times Call for Soft Law Measures' (2017) 137 <https://www.law.ox.ac.uk/business-law-blog/blog/2017/09/section-172-uk-companies-act-2006-desperate-times-call-soft-law> accessed 7 December 2019.

[147]Hansard, HC Vol 447, cols 125, 126 (June 6, 2006). During the parliamentary discussion the main reason given was to save directors from litigation which could result in it not having any effect at all should the company choose not to act.

[148]Andrew R Keay, 'The Duty to Promote the Success of the Company: Is It Fit for Purpose?' [2010] Centre for Business Law and Practice Working Paper 27 <https://papers.ssrn.com/abstract=1662411> accessed 28 March 2019.

Company Law Review Steering Group (CLRSG),[149] the benefit of section 309 was that it provided directors with immunity against any potential claim by the shareholders for neglecting their fiduciary duty to them.[150]

3.1.4. Impact of Section172(1) and the ESV Approach the Board's Decision-making Process.

The sceptical assessment above – that section172 has a limiting effect on protecting stakeholder interests – is further supported by various studies conducted by scholars. Keay and Iqbal reviewed selected reports from all of the retail companies listed on the FTSE 100 in order to establish the impact of ESV on UK corporate governance.[151] The study revealed that only one company clearly stated its aim as to deliver long-term returns for shareholders, while seven companies had aims or goals that focused, directly or indirectly, on stakeholders although this was not specifically stated in their reports. The study showed that companies were practising shareholder value and that there was some focus on the key stakeholders, such as customers, employees, suppliers, the environment and the community. However, Keay and Iqbal also concluded that the ESV principle made no major difference in the way boards made decisions with a slight variation in the wording of the primary goal.[152] A different study conducted by Iqbal and Keay provided empirical insights into how large listed British companies (16 companies) are addressing sustainability and their efforts in terms of that companies are trying to integrate sustainability in their business strategies even though their efforts vary.[153] However, all sixteen companies failed to make any reference to the concept of ESV or section 172 of the CA 2006;[154] they rather identified key stakeholders and mentioned some form of stakeholder engagement.[155] From the above studies it can be said that ESV

---

[149] CLRSG is an independent steering group which conducted the comprehensive and coherent review of company law, setting an overall framework of director's duties.

[150] Peter Neil Taylor, 'Enlightened Shareholder Value and the Companies Act 2006' (PhD Thesis, Birkbeck College 2010) 162.

[151] The results of the study are based on an examination of what was published in the annual reports, CSR reports, sustainability reports, and other documents on websites. See: Andrew Keay and Iqbal Taskin, 'The Impact of Enlightened Shareholder Value' [2019] Journal of Business Law.

[152] This was concluded after analysing the aims, goals, mission statements, and strategies of all the companies for the years 2006, 2008, 2010, 2012 and 2015. See ibid 13, 14.

[153] Their study is based on analysis of each company's annual and sustainability reports. Taskin Iqbal and Andrew Keay, 'An Evaluation of Sustainability in Large British Companies' (2019) 48 Common Law World Review 39.

[154] ibid 54.

[155] ibid 54, 55.

does not have a meaningful impact on how boards make decisions. This means that the boards do not accord it undue weight and begs the question of how it differs from shareholder value. By and large, companies continued to operate as they always have but with a measure of lip service to disclosure.

3.2. Soft Law: The Corporate Governance Code 2018

The UKCGC adopts a broader approach to stakeholder protection and encourages companies to adopt policies and practices that generate value for shareholders while at the same time benefitting society. The UKCGC, which came into operation of 1 January 2019, is the primary governance code and consists of a set of principles supported by provisions.[156] It is a soft law and works on a 'comply or explain' basis.[157] The Cadbury Report states: 'We believe our approach, based on compliance with a voluntary code coupled with disclosure will prove more effective than a statutory code. It is directed at establishing best practice, and at allowing some flexibility in implementation.'[158] Taking a similar view, the Greenbury Committee also considered statutory controls unnecessary.[159] The 'comply or explain' approach of the code assists companies to be flexible in their strategy without setting a rigid set of rules. It also allows room for judgement calls and common-sense application.[160]

The UKCGC reflects the changing business environment and is shorter and sharper than the previous Code. It has also shifted the focus of accountability from a more *ex post* to a more *ex ante* check on decision making, such as regulating board structure and composition and, in particular, by strengthening the role of independent non-executive directors in making key decisions.[161] It makes the board accountable to a broader range of stakeholders[162] and introduces a process of integration of their interests in corporate

---

[156]The Code's principles apply to all companies with a premium listing of equity shares on the London Stock Exchange, which is maintained by the FCA. The Listing Rules require companies to make a statement of how they have applied the Principles as well as details on whether a company has complied or failed to comply with the provisions set out in the Code. See Listing Rules 2020 rl 9.8.6; UKCGC 2018 (n 77) 2.
[157] The 'comply or explain' method was first initiated in the Cadbury Report and is a trademark of the UK Corporate Governance Code. See 'Report of the Committee on the Financial Aspects of Corporate Governance (The Cadbury Report)' (1992); UKCGC 2014 (n 77) 4.
[158] ibid para 1.10.
[159] 'Greenbury Report (Study Group on Directors' Remuneration)' (CBI 1995) para 1.13.
[160] Iain MacNeil and Irene-Marie Esser, 'The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes.' [2021] European Business Law Review (Forthcoming, 2022) 9.
[161] ibid.
[162] Accountability to other stakeholders is based on the rationale that a company is powerful and capable of causing harm or breach to another's rights and therefore is accountable to them. In the case of stakeholders, accountability is even more important as they cannot monitor the board or have a say in decision making.

decisions, allowing them an opportunity to engage with the board's decisions. It also promotes a positive relationship between companies, shareholders, and stakeholders[163] and focuses on companies being socially responsible and considering the interests of stakeholders other than shareholders. It stresses the need for the board of directors to balance the interests of shareholders with those of other stakeholders – eg, employees, customers, suppliers, investors, and communities – in order to achieve long-term sustained value for the companies.[164]

Provision 5 of the UKCGC expressly details methods of integrating workforce (limited number of stakeholders) interests by stating that one or a combination of the following methods should be used to ensure their engagement: (1) a director appointed from the workforce; (2) a formal workforce advisory panel; and/or (3) a designated non-executive director. Making the board accountable to stakeholders promotes transparency in the company's dealings and renders the board accountable to stakeholders. This, in turn, promotes public trust which is of utmost importance for the success of the company. It is pertinent to note that among relevant stakeholders, the UKCGC prioritises the workforce even recommending the establishment of a workforce engagement mechanism to promote their interests.

For the Code to succeed, it is important that companies act on principle and avoid tick-box behaviour. In the FRC's annual review of the Code 2020 in 100 companies, 58 (including 29 FTSE100 companies) reported full compliance with all provisions of the Code.[165] But the review also found that many companies declared full compliance with the Code despite not in fact being in full compliance. For example, 43 had not complied with provision 38 (alignment of pension contributions) and 4 had not complied with

---

See Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 Legal Studies 252, 259.

[163] 'Revised UK Corporate Governance Code 2018 Highlights' (FRC) <https://www.frc.org.uk/getattachment/ 524d4f4b-62df-4c76-926a-66e223ca0893/2018-UK-Corporate-Governance-Code-highlights.pdf> accessed 7 May 2019.

[164] *Magdi Iskander and Naderah Chamlou, Corporate Governance: A Framework for Implementation* (World Bank 2000) 4. Good corporate governance helps to ensure that corporations take into account the interests of a wide range of constituencies, as well as of the communities within which they operate and that their boards are accountable to the company and the shareholders. This, in turn, helps to assure that corporations operate for the benefit of society as a whole. See OECD, 'OECD Principles of Corporate Governance, Meeting of the OECD Council at Ministerial Level, 1999' 5.

[165] FRC, 'Annual Review of the UK Corporate Governance Code' (2020) 4 <https://www.frc.org.uk/ getattachment/53799a2d-824e-4e15-9325-33eb6a30f063/Annual-Review-of-the-UK-Corporate-Governance-Code,-Jan-2020_Final-Corrected.pdf> accessed 24 February 2021.

provision 36 but failed to declare their non-compliance.[166] Grant Thornton's FTSE 350 annual reports found 59% of the companies UKCGC compliant, the 60% which did comply offered detailed explanations for their non-compliance.[167] It is unlikely that full compliance with the Code can ever be achieved given its 'comply or explain' nature which allows companies flexibility. It is crucial that they must honestly provide detailed and rational explanations for their non-compliance and not attempt to conceal their shortcomings behind boilerplate statements. The extent to which the soft-law approach taken by the UKCGC will be able to protect stakeholders is difficult to assess at this stage and is evaluated more fully in the next two chapters. However, mandating the processes that directors must follow may lead to a more balanced approach to decision making.

4. REGULATION OF CSR: INDIA

4.1. Hard Law: Section 135 of the Companies Act 2013

The Indian government has enacted substantive legislation explicitly directed at CSR under section 135 of CA 2013. [168] CSR awareness and consciousness in India has grown tremendously in the last decade. With the enactment of section 135 of CA 2013, India became the first country to oblige companies by statute to spend 2% of their net profit on CSR activities. The unique implementation of section 135 makes CSR an integral part of Indian business. The government's intention in mandating CSR it is to increase efficiency and competitiveness[169] in the corporate system. This revolutionary step was taken due to the dissatisfaction with the way in which corporate philanthropy was

---

[166] ibid 5.

[167] Grant Thornton UK, 'Corporate Governance Review 2020' (2020) 9 <https://www2.grantthornton.co.uk/rs/445-UIT-144/images/Corporate_Governance_Review_2020.pdf?utm_ source=mkto&utm _medium=email&utm_campaign=2020-11-00-Download-Gov-CGR-1322> accessed 12 February 2021.

[168] This revolutionary step was taken due to dissatisfaction with the way corporate philanthropy was practised. The spirit of corporate philanthropy was strong in only some companies but did not necessarily translate into widespread CSR practices among Indian companies. Other reasons for making CSR rules strict were a lack of sufficient pressure from consumers on the company to behave responsibly, poor governance, lack of trust of the companies, their growing size, etc. See Jean J du Plessis, Umakanth Varottil and Jeroen Veldman (eds), *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance* (Springer International Publishing 2018) 10

[169] Investment and funding in developing countries are increasingly based on the recipients meeting accepted benchmarks for good governance and responsible business behaviour. See Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business* (Edward Elgar Publishing 2010) 307.

applied. Although the spirit of corporate philanthropy was strong in India, it did not necessarily translate into widespread CSR practices among Indian companies.[170]

The section states that every company having net worth of INR 500 Crore ($65.5 million) or more, or a turnover of INR 1,000 Crore ($131 million) or more, or a net profit of INR 5 Crore ($655,168) or more during any financial year, is required to establish a CSR Committee[171] of the board and undertake CSR activities.[172] All companies under the threshold of the section are required to spend a minimum 2% of their average net profits during the three immediately preceding financial years on its CSR policy. The primary objective of section 135 is to promote responsible and sustainable business philosophy on a broad level and encourage companies to address social and environmental concerns.[173] Any company covered under s.135(1) of CA 2013, including its holding or subsidiary and foreign companies (defined under section 2(46) of Ca 2013) with a branch or project office in India need to comply with the requirements of section 135.[174] The CSR Committee is the governing body which will set out the scope of CSR activities. This is a welcome step in that having a separate CSR Committee is associated with better quality and quantity of CSR reporting.[175] A separate CSR Committee will also lead to concentrated efforts on CSR issues and the directors will be able to devote enough time to preparing and implementing CSR programmes. The composition of the board and details of CSR policy are disclosed in the board's report.[176] The CSR Committee is also responsible for: (1) formulating and recommending an annual action plan for CSR policy

[170]Other reasons for making CSR rules strict were a lack of sufficient pressure from consumers on the company to behave responsibly, poor governance, lack of trust of the companies, their growing size, etc. See Jean J du Plessis, Umakanth Varottil and Jeroen Veldman (eds), *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance* (Springer International Publishing 2018) 10.

[171]Every company under the threshold of s135 must have a CSR Committee of the board comprising of three or more directors of whom at least one must be independent. See CA 2013 s 135(1).

[172]CSR Committee means the CSR Committee of the board referred to in s135. See CA 2013 s 135; Companies (Corporate Social Responsibility Policy) Rules 2014.

[173]'Report of The High-Level Committee on Corporate Social Responsibility 2018' (MCA 2019) 21–22 <http://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf> accessed 21 September 2019.

[174] CSR Rules 2014, rl 3. However, other companies not covered under section 135 may contribute to bona fide charitable and other funds under section 181 of CA 2013. For contributions exceeding 5% of the company's average profits for the three immediately preceding financial year, the board needs shareholder approval, see: CA 2013 s 181.

[175]Shayuti Mohamed Adnan *et al*, 'The Influence of Culture and Corporate Governance on Corporate Social Responsibility Disclosure: A Cross Country Analysis' (2018) 198 Journal of Cleaner Production 820.

[176]CA 2013, ss 135(2) and 134(3)(o). However, an unlisted public company or private company covered under s 135(1) is not required to have an independent director.

to the board;[177] (2) indicating activities or programs to be undertaken by a company which must be aligned with Schedule VII to the Act[178] and undertaken by the companies in project or programme mode;[179] (3) reviewing and recommending the annual CSR plan to the board; (4) regularly monitoring CSR activities as well as compliance with the CSR policy; and (5) reviewing and implementing any other matter related to CSR. The board is responsible for reviewing and approving the CSR policy and activities based on the inputs by the CSR Committee. Both the CSR Committee and the board must monitor the progress of the activities continuously.[180]

The policy is based on the potential list of activities which is to be considered broadly so as to capture the essence of the subjects listed in the Schedule and are intended to cover a wide range of activities.[181] The list of CSR activities has been aligned with sustainable development goals (SDGs),[182] and focuses on external stakeholders such as the community and the environment. CSR activities exclude activities undertaken in pursuance of the company's normal course of business.[183] The CSR Rules 2014 have recently been amended through a notification dated 22 January 2021 to address the

---

[177] 'CSR Policy' means a statement containing the approach and direction given by the board of a company, taking into account the recommendations of its CSR Committee, and includes guiding principles for selection, implementation, and monitoring of activities, as well as formulation of the annual action plan. See: The Companies (Corporate Social Responsibility Policy) Amendment Rules 2021, rls 2(f) and 5(2).

[178] CA 2013 s 135(3)(a).

[179] CSR Rules 2014, rl 4 (1).

[180] The activities which may be included by companies in their CSR policies are: eradicating hunger and poverty and promoting health care; promotion of education; promoting gender equality and empowering women; ensuring environmental sustainability including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga); protection of national heritage, art, and culture; measures for the benefit of armed forces veterans, war widows, and their dependants; training to promote sports; contribution to the prime minister's national relief fund or any other fund set up by the Central Government or the State Governments for socio-economic development; contribution to incubators funded by Central Government or State Government or any agency or Public Sector Undertaking of Central Government or State Government, aimed at promoting Sustainable Development Goals; rural development projects; slum area development; and disaster management, including relief, rehabilitation, and reconstruction activities. See Companies Act, 2013, Sch VII.

[181] Clarifications with regard to provisions of Corporate Social Responsibility under s 135 of the Companies Act, 2013.

[182] SDG is a multilateral initiative with 17 interrelated goals that address the global challenges of poverty, inequality, climate change, environmental degradation, peace, and justice. India signed the Declaration on 2030 Agenda for Sustainable Development on 25 September 2015. The SDG goals overlap with CSR goals in India. See 'Voluntary National Review Report on Implementation of Sustainable Development Goals' (United Nations High Level Political Forum, 2017) <https://sustainabledevelopment.un.org/content/documents/15836India.pdf> accessed 13 February 2020 accessed 14 August 2021; UN, 'Sustainable Development Goals (2020) <https://www.un.org/en/academic-impact/page/sustainable-development-goals>accessed 14 August 2021.

[183] CSR Rules 2014, rl 2(e).

Covid-19 pandemic.[184] Under the new Companies (CSR Policy) Amendment Rules 2021 (CSR Rules 2021), any company engaged in research and development activity involving new vaccines, drugs, and medical devices in their normal course of business may classify research and development activity of new vaccines, drugs, and medical devices related to COVID-19 for the financial years 2020-21, 2021-22, 2022-23 as CSR.[185] Any expenditure for the benefit of employees and the welfare of their family members does not qualify as a CSR expenditure. CSR expenditure[186] and any CSR activity outside India is also not covered under section135.

4.1.1. Penalties

The expenditure requirement under section 135 of CA 2013 was on a 'comply or explain' basis and there was no penalty for not spending 2% of net profit on CSR activities. However, after the 2021 amendment, the unspent CSR amount, if any, must be transferred by the company to any fund listed in Schedule VII to the Act.[187] If the company fails to report on CSR activities it is liable to a penalty ranging from 50 000 rupees to 25 lakh rupees.[188] Additionally, every officer in default is punishable with up to three years' imprisonment, a fine, or both.[189] Section 135 does not explicitly provide for a penalty.

Before its amendment, section 135 did not have an adequate check on the 2% net profit spending or on its non-disclosure. Because the of 2% net profit spending was based on the 'comply or explain' principle, many companies under the threshold set in section135 were not spending money and merely disclosing their non-compliance. To correct this and monitor the compliance of companies, MCA has finally amended the CSR rules. One of the major problems with the amendment is that the unspent amount must be transferred to a fund operated and managed by the government. Transferring the money

---

[184] CSR Rules 2021.
[185] It further clarifies that any activity undertaken by the company outside India shall not be considered as CSR unless it pertains to training of Indian sports personnel representing the country at an international level or representing any state or union territory at a national level. See ibid rl 2(d); Clarification on spending of CSR funds for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants' etc, reg 2021.
[186] Sum of the amount spent by the company in all its projects related to areas or subjects mentioned in Schedule VII for that particular year. CSR Rules 2014 rl 7.
[187] CSR Rules 2021 rl 10 .
[188]CA 2013 s 134(8).
[189]ibid.

to government-operated funds may encourage compliance with the letter rather than the spirit of the law. The companies can transfer the funds mechanically without contributing anything other than money.[190] This can be compared to charity which was prevalent in earlier times as part of India's business culture.

4.1.2. Section 135 and its Effect on the Promotion of CSR

The overall framework in section 135 has the potential of imposing a higher level of board accountability to stakeholders in that it places a positive duty on the board to improve social and environmental conditions in India. It opens up wide options to plan and implement CSR activities which preserves the company's autonomy to choose how its funds are used. Zile highlights this as a major advantage of mandating CSR spending as it 'frees' companies to invest their funds in the community directly or in a local non-profit or national NGO.[191] He further states that companies could use the money to minimise externalities, beyond the requirements of environmental law, or they could choose to create positive externalities by building schools or providing stakeholders with more comprehensive benefits.[192] Many companies are now prioritising strategic CSR rather than donating money as a form of charity. For example, less than 4% of CSR funds spent by top Indian companies were donated as charity.[193] Many forward-looking companies are looking for an opportunity to build strategies with an external impact rather than merely mitigate internal impact.[194] For example, Infosys Ltd founded the Infosys Foundation which works with many social development projects including rural development, alleviation of hunger and poverty, and the restoration of water bodies.[195] Similarly, as a part of its CSR programmes Nestle India has been improving farm economics which will provide long-term benefit for the company through the provision

[190] UmakanthVarottil, 'New CSR Rules in Companies Act Amendments: The Risks of Greater Rigidity' (BloombergQuint) <https://www.bloombergquint.com/opinion/new-csr-rules-the-risks-of-greater-rigidity> accessed 3 January 2020.
[191] Caroline Van Zile, 'India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market' (2012) 13 Asian-Pacific Law & Policy Journal, 269, 299.
[192] ibid 299–300.
[193] Namrata Rana and Utkarsh Majumdar, 'Sustainability and CSR Trends for India in 2017' (Economic Times Blog, 2 January 2017) <https://economictimes.indiatimes.com/blogs/ResponsibleFuture/sustainability-and-csr-trends-for-india-in-2017/> accessed 3 January 2020.
[194] ibid.
[195] Kasmin Fernandes, 'Top 20 Indian Companies for CSR in 2019' (The CSR Journal, 20 December 2019) <https://thecsrjournal.in/top-indian-companies-for-csr-2019/> accessed 3 January 2020.

of safe and quality raw materials.[196] After the new amendment, companies will also be encouraged to spend their funds on promoting awareness on COVID-19. Although, it can also be argued that the overall approach has become prescriptive and rigid, if the companies fail to spend the target amount, any unspent amount must be transferred to one of the funds listed in Schedule VII.

However, some merit is seen in the CSR board committee as when programmes are managed at board level they are more likely to lead to real change in corporate behaviour, especially when the regulation constitutes hard law.[197] By giving directors the duty of formulating, implementing, and monitoring the CSR activities, the legislators have elevated the status of CSR and also made it prescriptive. However, so rigid an approach leaves little room for moral and ethical behaviour,[198] which is why this study favours a balance between discretion and control so that the substance of law is not compromised by companies merely 'ticking the boxes'.

A major disadvantage inherent in section 135 is the danger that companies will simply adopt a philanthropic model and in the process restrict the meaning of CSR and not address the impact of their operations on their stakeholders. The section does not involve a strategy for stakeholder engagement which is key for successful CSR. This approach can be misleading and directors may equate CSR with making donations for the upliftment of society. This represents a narrow view in that it limits CSR to the use of a portion of company profits for a project prescribed by the government. CSR is in fact far broader and includes how companies can profit by assessing their impact on the community and the environment and integrating these issues in their business models.[199] This is seen as a central component of all decision making which results in the companies internalising externalities;[200] it is about making companies more responsible and conducting their operations along socially and environmentally friendly lines. This approach encourages good corporate behaviour which could be threatened by a purely

---

[196]Nestle, delivering impact through Farmer Connect <https://www.nestle.in/csv/rural-livelihoods/farm-economics> accessed 3 January 2020.
[197]Dustin Voss, 'Government Regulation of Corporate Social Responsibility: What Are the Implications for Corporate Governance?' (LSE, 13 September 2018) <https://blogs.lse.ac.uk/netuf/2018/09/13/government-regulation-of-corporate-social-responsibility-what-are-the-implications-for-corporate-governance/> accessed 3 January 2020.
[198]Jean J du Plessis *et al* (eds), *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance* (Springer International Publishing 2018) 212.
[199]ibid 98.
[200]Sjafjell (n 129).

philanthropic approach to CSR by distracting business leaders who are ready to act strategically.[201] In developing countries such as India where commitment to CSR has been honoured in the word rather than the deed, integration of CSR in the core business policy cannot be sufficiently emphasised.

For example, Coca Cola's CSR policy and reporting in India look impressive and the company appears committed to CSR.[202] In reality, however, Coca Cola's way of conducting operations was shown to be both unsustainable and unethical. In 2003, samples of Coca-Cola were found to contain a high pesticide content and were alleged to have polluted the water, making it unfit for human consumption. Also, due to over-extraction by Coca-Cola the groundwater levels were depleted resulting in water shortages in the village and areas near which the company operated. After initial denials, Coca Cola subsequently turned to CSR to repair its reputational damage by initiating and investing in numerous CSR programs. A company's responsibility to its stakeholders includes a positive duty to contribute in some way to the stakeholders' quality of life or, more broadly still, 'to further some social good'. Coca Cola's irresponsible behaviour was not limited to its Kerala plant; in 2014 the government ordered the closure of one of the company's plants in the northeast state of Uttar Pradesh for its continued and irresponsible practice of excessive groundwater extraction.[203] This reflects a blinkered culture in a company which failed to change its business model and continued to exploit the water resources so committing a grave injustice against people in nearby areas. Interestingly, in its 2013 sustainability report Coca-Cola stated that it understood the value of water and believes in replenishing 100% of the water used in its finished products.[204] They were also investing in many of the CSR activities listed in Schedule VII to CA 2013.[205]

---

[201]ChavviGhuliani, 'India Companies Act 2013: Five Key Points About India's "CSR Mandate"' (BSR) <https://www.bsr.org/en/our-insights/blog-view/india-companies-act-2013-five-key-points-about-indias-csr-mandate> accessed 13 March 2020.

[202] Coca-Cola, 'A better World' <https://www.coca-colaindia.com/a-better-world> accessed 13 March 2020.

[203]Fatima Hansia, 'Coca-Cola Forced To Shut Bottling Plant in India' (CorpWatch, 2014) <https://corpwatch.org/article/coca-cola-forced-shut-bottling-plant-india> accessed 13 March 2020.

[204] This further raises a question about the reliability of such reports. See 'Sustainability Report 2013' (Coca-Cola India) <https://www.coca-colaindia.com/content/dam/journey/in/en/private/pdfs/reports/Final-India-Sustainability-Report-2013.pdf> accessed 13 March 2020.

[205] The company had already set up a foundation for carrying out social projects in the underdeveloped regions of India. They also started project 'Unnati' to help the farmers, worked for women's empowerment, climate protection, sustainable agriculture, etc. See ibid.

Certainly, conducting such activities is of great importance to society and is an important part of CSR, but it is equally important to integrate safety concerns into the core of the business. Considerable discussion has focused on section 135 but the Act also adopts a pluralist approach in section166(2) which requires directors to balance the needs of all stakeholders without prioritising any single dominant interest. This is an effort by the government to nudge companies to be socially responsible while seeking to maximise profits.[206] The board is undoubtedly the key to unlocking companies' potential to contribute to sustainable development[207] and make CSR a part of India's corporate culture.

4.2.Hard Law: Section 166(2) of the Companies Act 2013

This section evaluates the relevance of section 166(2) of CA 2013 in the context of CSR and compares it with section 172(1) of CA 2006. The discussion is important because it will help in examining the position of the various stakeholders in the decision-making process and whether their interests are being integrated into the business strategy. In answering the question 'in whose interest should the directors run the company?', section 166(2) of CA 2013 provides that a director of a company must consider stakeholder interests while conducting the affairs of the company. The stakeholders recognised by the section are employees, shareholders, the community, and the environment. The directors must believe, subjectively and in good faith, that they are acting in the interests of all stakeholders.[208] The approach adopted by the CA 2013 is pluralist[209] and requires directors to balance the interests of the shareholders and other stakeholders. This reaffirms the concept of the company as a means of achieving economic and social benefit. The stakeholder model has become ingrained as part of Indian business culture

---

[206] ibid (n 81) 5.

[207]BeateSjåfjell and Linn Anker-Sørensen, 'The Duties of the Board and Corporate Social Responsibility (CSR)' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2322680 15 <https://papers.ssrn.com/abstract=2322680> accessed 13 March 2020.

[208] Applying an objective test for this duty can be problematic as it is difficult to consider the interest of all the stakeholders objectively. See Mihir Naniwadekar and Umakanth Varottil, *The Indian Yearbook of Comparative Law 2016* (OUP 2018) 111.

[209]The pluralist approach is a type of stakeholder theory which places the interests of all stakeholders (shareholders and other stakeholders) equally and valid in their own right without creating a hierarchy. Under the pluralist theory not all decisions taken by directors necessarily enhance shareholder value. See discussion in Ch1 Pt 5.2.2.

and the importance of CSR has been recognised in several cases.[210] For example, in 1950 the Supreme Court of India stated that: 'We should bear in mind that a corporation, which is engaged in production of commodities vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it.' [211]

The intention behind this section is to complement the CSR laws in India, especially section 135[212] which receives considerable attention from the government. The legislators could easily have chosen a different phrasing – eg, 'having regard to' – for section 172(1) of CA 2006 if their intention was to make this section a mere 'enabling' provision for CSR.[213] Instead, they accepted the changes recommended by ICSI that CSR to be included in the statute.[214] This indicates that the government approaches CSR as an important element of its overarching governance and has acted proactively in creating a regulatory framework which is inclusive of all stakeholder interests. This view is also supported by India's judiciary. For example, upholding the principle of sustainable development in a recent case, the Supreme Court ordered measures to mitigate the environmental impact of all power transmission lines by requiring the lines to be laid underground or the installation of divertors to protect certain bird species.[215] The Supreme Court, clearly stated: 'Irrespective of the cost factor the priority shall be to save the near extinct birds.' The court further drew attention to section 135 to mobilise resources for the cost incurred in that process. It interpreted the meaning of the 'environment' in section 166(2) and held that the section casts a positive duty on

[210] *TS Arumugham vs Lakshmi Vilas Bank Ltd And Others* 1994 80 CompCas 814 Mad 22–26; *National Textile Workers vs PR Ramkrishnan And Others* 1983 AIR 75; *Harish Bansal Etc vs Moti Films (P) Ltd* 25 (1984) DLT 92; *Bharatiya Kamgar Sena vs Geoffrey Manners And Co Ltd* (1992) 73 Comp Cas 122 (Bom).
[211] *Chiranjit Lal Chowdhuri vs The Union Of India And Others* 1951 AIR 41, 1950 SCR 869. Similarly, in the1980s the Supreme Court noted 'a company is now looked upon as a socio-economic institution wielding economic power and influence on the life of the people….The traditional view that the company is the property of the shareholders is now an exploded myth.' See *National Textile Workers vs P.R. Ramkrishnan And Others* (n 209).
[212] *Twenty-First Report, Standing Committee on Finance (2009-2010) (Fifteenth Lok Sabha), The Companies Bill, 2009, MCA, Lok Sabha Secretariat, New Delhi, August 31, 2010.*, para 11.80 <http://prsindia.org/uploads/media/Companies%20Bill%202009.pdf>.
[213] Naniwadekar and Varottil (n 207) 102. Reference was made to various international practices, especially in the UK, to clarify certain duties in the Act. See '*Report of the Expert Committee on Company Law* (MCA 2005) para 18.2-18.3. The Irani Committee was set up to make recommendations on the reform process of CA 1956.
[214] *Twenty-First Report, Standing Committee on Finance (2009-2010) (Fifteenth Lok Sabha), The Companies Bill, 2009, MCA, Lok Sabha Secretariat, New Delhi, August 31, 2010.* (n 211) para 11.80.
[215] *MK Ranjitsinh vs Union Of India* 2021 SCC OnLine SC 326.

directors to consider the non- financial risks and interests of other stakeholders despite a short-term loss for the company. The court found the protection of 'near extinct' birds of cardinal importance and ranked their safety above the financial interests of the company. This appears to be a step forward in situating CSR in that stakeholder interests now form an integral part of directors' fiduciary duties within India's judicial system.

4.2.1. Problems of Interpretation

There are several criticisms of section 166(2). First are concerns with the language used in the section. Although stakeholder interests are acknowledged there is no clear definition of stakeholder in the Act. The categories of stakeholder in the section are also broadly classified which makes it difficult to identify them clearly. Further, unlike section170(1) of CA 2006,[216] it is not clear whether the duties are owed to the company and not to the stakeholders. If the duties are owed to the stakeholders, litigation would increase as there would be nothing to bar stakeholders from bringing civil claims. If we look at the judicial decisions before the enactment of CA 2013, the judges made it clear that the duties were owed to the company. But, unlike the the traditional position in the UK and India, directors now have to give an equal measure of importance to all the stakeholders in the decision-making process. The interest of the company takes precedence over the interests of the stakeholders; the duty is owed to the company and not directly to shareholders.[217] This gives directors wide discretionary powers to make decisions even when the decisions do not benefit one or some of the stakeholders provided that they promote the objects of the company.

4.2.2. Effect of Section 166(2) on CSR

Section 166(2) has been criticised as being superficial and paying lip service to the pluralist approach. As with section 172(1) of CA 2006, the practical importance of this section for stakeholders is unclear as they have not been given any formal remedy by which to address abuse by the directors. The derivative action is not available to

[216]The section states that the general duties are owed by a director of a company to the company.

[217]Umakanth Varottil, 'India' in Bruce Aronson and Joongi Kim (eds), *Corporate Governance in Asia* (1st edn, Cambridge University Press 2019) 186.

stakeholders in India.[218] The directors can claim protection under section 463 of the CA 2013 which gives courts the power to grant relief to the officers of companies in certain cases where it appears that they could be liable but have acted honestly and reasonably having regard to all the circumstances to the case.[219] The courts have this power in cases of negligence, default, breach of duty, misfeasance, or breach of trust.[220] This is considered to be a safe harbour provision which directors may invoke to mitigate any possible liability.[221] Hence, section 166(2) has several short comings in protecting stakeholders and they cannot legally enforce their rights against breaches committed by directors. The government has failed to provide any guidance on the enforcement of this provision and to what extent directors must go for their actions to be considered socially responsible. The legislators have left the decision making in such conflicting situations to the directors. Whether the wide discretion given to directors to balance the various conflicting interests and to decide in good faith what is good for the promotion of the objects of the company will qualify as the consideration of stakeholder interests, is doubtful at this stage. The next section considers the National Guidelines for Responsible Business Conduct which is essentially a soft law provision and a good example of the evolution of ESG from CSR.

4.3. Soft Law: The National Guidelines on Responsible Business Conduct (NGRBC)

The substantive laws have been complemented by the NGRBC which is a set of nine principles to encourage all companies to adopt a practice which is social and environmentally responsible. The first major step towards mainstreaming CSR was taken in 2009 when the Ministry of Corporate Affairs (MCA)[222] constituted the Corporate

---

[218] Another option which could be available is a class action. Class action suits under s 245 of CA 2013 can be brought by members or depositors to file a class action in the tribunal if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors. However, the stakeholders are not mentioned in the section and the availability of the class action remedy is limited to members and depositors. Gopalan and Kamalnath state that the intent of the provision is to give small investors easy access to immediate relief and, therefore, it is unlikely that this provision will be helpful in promoting CSR. See CA 2013 s 245; Sandeep Gopalan and Akshaya Kamalnath, 'Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials' (2015) 10 Northwestern Journal of Law and Social Policy 36, 74.

[219]CA 2013 s 463. A similar provision was appeared in CA 1956, s 633.

[220]ibid.

[221]Gopalan and Kamalnath, (n 217) 71.

[222] Corporate law in India is governed, in the main, by two regulatory bodies – the Ministry of Corporate Affairs, Government of India (MCA) and the SEBI. The MCA regulates and administers the corporate affairs

Social Responsibility Voluntary Guidelines 2009 (CSR Guidelines 2009)[223] which adopted the triple bottom-line approach.[224] The guidelines distinguished between CSR and philanthropy and classified CSR activities as voluntary.[225] It recognised the fact that India has evolved from simple philanthropic activities to integrating the interests of the business with those of the communities in which it operates.[226] The government aimed to compel companies to conduct their business responsibly and to allocate a percentage of their profits to CSR activities for the development of the nation.[227] The idea was to make India 'inclusive' because issues such as illiteracy, poverty, and corruption have excluded a large section of population from the mainstream.[228] The guidelines were soon revised to further strengthen the Indian tradition of corporate responsibility.[229]

The National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011 (NVG 2011) – the updated version of CSR Guidelines 2009 – were promulgated[230] as a government response to the increasing concern of all stakeholders who were demanding companies of all sizes and nature be more responsible.[231] They also addressed the numerous violations of human rights and environmental mishaps arising from the irresponsible behaviour of companies, and transnational companies in particular. The Bhopal catastrophe and Enron-Dhabol are two examples of irresponsible conduct by the transnational companies.[232]

---

in India mainly through the CA 2013. See 'New to MCA' (*MCA*) <http://www.mca.gov.in/MinistryV2/homepage.html>.

[223] MCA. 'Corporate Social Responsibility Voluntary Guidelines, 2009' 2009.

[224] The triple-bottom-line approach to CSR was formulated by Elkington for instances where companies focus not only on the economic value that they add but also on the environmental and social value that they add – or destroy. See discussion in Ch1 Pt 2.

[225] CSR Guidelines 2009 10.

[226] ibid 7.

[227] ibid 12–13. The idea of investing a part of profit for the social development of the nation later took shape in s 135 of the CA 2013. The guidelines mentioned CSR activities for social and inclusive development. These activities are now a part of Schedule VII to CA 2013. ibid 12–13.

[228] ibid 7.

[229] MCA, 'National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business' 2011 3.

[230] Ibid.

[231] ibid 3.

[232] Due to the liberal policy adopted in India several foreign investors provided capital and there was a rapid growth in wealth but also an increase in the gap between rich and poor. The dramatic growth, coupled with unregulated market structure, led to several cases of human rights violations and environmental disasters. These disasters also led to an increase in the regulation of companies. See Mohamed Adnan, Hay and van Staden (n 173) 822; Nandini Deo, 'A Brief History of Indian CSR' (*Gateway House: Indian Council on Global Relations.*, 2015) <https://www.gatewayhouse.in/a-brief-history-of-indian-csr/>.

NVG 2011 is also voluntary and articulates in the form of nine principles with core elements which every company, irrespective of its size, sector, or location, is expected to follow. It encourages companies to conduct their affairs responsibly so that India can meet its ambitious goal of inclusive and sustainable all-round development.[233] Similar to the CSR guidelines 2009, the principles of NVG 2011 emphasise inclusive growth, development, stakeholder engagement, and protection of human rights and the environment. Since the regulation was based on the soft-law approach, it was strengthened by Securities and Exchange Board of India[234] (SEBI) requiring top 100 listed companies to submit a business responsibility report (BRR) as a part of their mandatory annual reports. Further, NGRBC 2018 was released in December 2018 by the MCA to compel companies to perform beyond the legal requirement when conducting business. It imposed no enforceable obligation on the companies to adopt the principles but was designed to encourage them to perform above and beyond the requirements of regulatory compliance.[235] The guideline is an updated version of NVG 2011 and is based on the Gandhian principles of trusteeship (directors as trustees) and again contains nine principles.[236] The guidelines are based on the philosophy of giving back to society which has been an integral part of Indian culture since time immemorial.[237] Directors are expected to make it a part of their duties and responsibilities. Despite being non-binding soft law regulations which are recommendatory the guidelines are intricately linked to mandatory disclosure in the form of the BRR. All companies are required disclose how they have applied the nine principles but the top 1000 listed companies are legally obliged to do so.[238] The BRR is a disclosure of adoption of responsible business practices by a listed company to all its stakeholders. It forms part of the companies' annual reports and sets out a company's ESG initiatives. The BRR has recently been replaced by Business Responsibility and Sustainability Reporting (BRSR).

On a global level, India has committed to the United Nations Guiding Principles on Business and Human Rights (UNGPs),[239] SDG, and the International Labour

---

[233] NVG guidelines 4.
[234] SEBI regulates the corporate governance framework for listed companies in India.
[235] All companies irrespective of their ownership, size, sector, structure, or location are expected to follow the guidelines. See NGRBC, (n 81) 11.
[236] ibid 1.
[237] ibid 5.
[238] Extension of applicability of Business Responsibility Reporting (BRRs) to top 1000 listed entities from present requirement to 500 listed entities, based on market capitalization.
[239] The National Action Plan on Business and Human Rights (NAP) reaffirms India's commitments to the realisation of human rights and the promotion of socially responsible businesses. *National Action Plan on*

Organization (ILO) Core Conventions 138 (minimum employment age for children) and 182 (worst forms of child labour). These have been aligned nationally with the NGRBC 2018. The NGRBC raised ESG reporting to a mainstream phenomenon in India which can be ascribed to an increasing focus on the growing stock exchange requirements for ESG reporting. There is a growing demand for more and improved ESG reporting in India.[240] Therefore, SEBI has made it mandatory for the top 1000 listed companies to publish their compliance with the principles of the NGRBC, while the other companies in India are encouraged to publish BRSR as a self-assessment tool for responsible business conduct.[241] Although the guidelines are linked to mandatory disclosure, the approach adopted is 'comply or explain' which means that companies can still elect not to apply the guidelines and rather offer an explanation for their non-compliance. It is difficult to say whether the NGRBC will be successful in such circumstance as the Indian business and the legal cultures are accustomed to relying on government regulation through a mandatory approach, because of the presence of controlling shareholders (also termed promoters in India) in India.[242] They are very powerful and control the affairs of the company, directly or indirectly. As a result, overall implementation of the NGRBC principles is left to the discretion of the directors. The lack of sophisticated market players allows decision makers a discretion to choose between a line of action from a set of viable options as stakeholders are unable to block objectionable acts.[243] This lack of proper enforcement action for breaches – even of hard law – has hampered enforcement which makes it questionable whether the 'softer' comply-or-explain approach will have any greater success. For this reason, a softer approach to stakeholder protection is regarded as an inadequate mechanism. Change in the regulation of CSR in India has been on-going to ensure it meets the needs of current reality. Starting from a voluntary soft approach, India moved slowly towards hard law to regulate CSR. There is strong momentum for continuing reform in India which can help the country achieve adequate

---

Business and Human Rights: Zero Draft (MCA 2018) 5. The UN has also welcomed India's development of the NGRBC and NAPs to advance the business and human rights agenda. 'UN Expert Group Welcomes India's Plan to Promote Corporate Respect for Human Rights' (*OHCHR*, 22 March 2019) <https://www.ohchr.org/en/press-releases/2019/03/un-expert-group-welcomes-indias-plan-promote-corporate-respect-human-rights> accessed 25 March 2022.

[240] Extension of applicability of Business Responsibility Reporting (BRRs) to top 1000 listed entities from present requirement to 500 listed entities, based on market capitalization (n 237).

[241] NGRBC 2018 (n 81) Annex 6.

[242] Umakanth Varottil, 'India's Corporate Governance Voluntary Guidelines 2009: Rhetoric or Reality?' (2010) 22 National Law School of India Review 1, 19. Promoters in India can be shareholders, directors, or otherwise. See further discussion in Ch3 Pt 4.1.2

[243] Amir N Licht, 'Culture and Law in Corporate Governance' [2014] SSRN Electronic Journal 35 <http://www.ssrn.com/abstract=2405538> accessed 4 January 2020.

regulation of stakeholder protection by integrating stakeholder interests as part of the decision-making process.

5. CONCLUSION

Having discussed the CSR regulatory framework at the global, EU, and national levels (the UK and India), it is observed that standard setting in the field of CSR on the global level is achieved through soft law. The global frameworks such as the UNGC and the OECD Guidelines on MNEs focus on getting companies to behave responsibly. On the other hand, the EU's framework shifts the focus to the growing concern of the impact of ESG issues on economic activities.[244] This approach adopted by the EU aligns more closely with ESG and has also influenced the UK's framework. In the UK, CSR has virtually been 'replaced' by ESG. The main reason for this is the influence of the EU regulations on the UK. India's philanthropic approach to CSR can be attributed to its long history and has received considerable attention from the government.

The chapter evaluated the key provisions for stakeholder protection in the UK and India.[245] It identified fundamental differences between the two approaches and highlighted the difference in the quality and stringency of the legislative models. It was concluded that the UK focuses on disclosure and decision making by directors. The regulatory regime adopted is hybrid and incorporates elements of both hard law and soft law. It has extensive reporting requirements which offer some form of protection to stakeholders.[246] The directors have been provided with a flexible framework giving them a wide discretion in achieving the outcome. It sets a path for directors to establish a long-term and sustainable culture of better understanding and protecting stakeholders' needs and expectations. Nonetheless, the approach does not appear adequate to achieve the integration of stakeholders' interests in that section 172(1) reflects the concept of enlightened-self-interest by adopting the ESV approach. The practical importance of section172(1) with regard to stakeholders is unclear as only shareholders can enforce it. The ESV approach has not had a notable impact on the way businesses are run and the

---

[244] See discussion in Pts 2.1 and 2.2.

[245] See discussion in Pts 3 and 4.

[246] The next two chapter analyse decision making and disclosure. The reporting requirement in the UK includes strategic reporting (s 414C of CA 2006) and non-financial reporting (s 414CB of CA 2006). However, whether this gives sufficient protection to their interests in debateable. This further discussed in detail in Ch 4.

interests of stakeholders other than shareholders are used as a means for promoting shareholder value. However, UKCGC adopts a broader approach to stakeholder protection by prescribing a process for integrating stakeholder interests in the board's decision making which is also linked to mandatory disclosure.[247]

In contrast to this, India's approach is prescriptive and outcome orientated in the sense that it should assist and contribute to the country's national agenda of inclusive development and help address India's various developmental challenges. The CA 2013 has provided for the 'public' nature of companies primarily in the form of explicit provision for CSR and disclosure. The philanthropic approach is seen to be ingrained in India's business system. The pluralist approach adopted by the Act means that the incentive for the companies to engage in CSR differs from that under the ESV approach. It focuses on both the normative and the instrumental aspects of CSR. However, as with section 172(1) of CA 2006, the practical importance of section 166(2) of CA 2013 is unclear as regards stakeholders. The overall framework of CSR in India is robust and pushes companies to a minimum level of compliance. The activities in Schedule VII to CA 2013 actively support socio-economic development in India and enable large numbers of people to take part in and draw benefit from India's economic progress. Although the framework is limited to profit sharing by companies, countries like India are desperately in need of funding for development.[248] The recent amendments have also made the spending of 2% profit mandatory. However, rather than further mandating CSR, incentives should be instituted to nudge directors to achieve the desired outcomes which can be more productive in the long run.

In conclusion, the comparative discussion shows that assuming directors are acting in good faith in the best interests of the company, the discretionary powers they have in both jurisdictions under review are sufficiently broad to enable them to promote CSR goals. Overall, the regulatory frameworks, despite their differences, do not prevent directors from considering stakeholder interests and integrating the externalities. Although, the UK's approach via ESG is aligned more with shareholder value, and India's approach via CSR more aligned with stakeholder protection, the UK's framework appears to be more effective in promoting CSR at this stage. Section 135 does not appear

---

[247] See discussion in Pt 3.2.

[248] With liberal and competitive global economy, it is difficult to impose steep taxes or comprehensive regulation. Increasing the tax rate will surely not make India an attractive place for foreign investment. Zile (n 189) 301.

to encourage good corporate behaviour and the function and scope of CSR appears to be independent of the legal framing of directors' managerial discretion. Thus, India has only shifted its approach to the stakeholder view of corporate governance in theory. There is considerable focus on section 135, which implies a traditional understanding of CSR and restricts its meaning to the philanthropic approach. There is also a failure on part of the government to offer a holistic view of CSR. For effective implementation of the CSR laws, it is crucial to consider the impact of a company's operations on stakeholders and to focus on how decisions are made – ie, whether directors consider the interests of all stakeholders when making decisions for the success of the company.

Several reforms are required in both countries to establish an accountable framework for better stakeholder protection. The next two chapters analyse the various potential techniques to protect stakeholder interests. Chapter 3 offers an analysis under the theme of 'process v substance'; while Chapter 4 evaluates disclosure and stakeholder engagement as techniques to protect stakeholders under the theme of 'process v disclosure'. Process deals with the internal decision-making process – ie, how directors integrate stakeholder interests and how they are allowed to participate meaningfully in the board's decision making. Substance focuses on the duty of directors and what one seeks to achieve. Disclosure is distinguished from process as it does not offer stakeholders an entry point in the process of decision making. The thesis argues that the wide discretion afforded directors under the substantive duty (s 172(1) of CA 2006 and s 166(2) of CA 2013), has marginalised stakeholder interests. For a more transparent and accountable framework, there is a need to implement the substantive duty through complementary mechanisms focusing on the process of decision making.

CHAPTER 3: DECISION MAKING AND THE BOARD OF DIRECTORS

1. INTRODUCTION

In the previous chapter the regulatory frameworks in the context of CSR[1] were evaluated in the UK and India. Stakeholder interests have been recognised as important in both jurisdictions but there is no mechanism through which stakeholders can enforce their rights and reform is needed to protect their interests. This chapter deals with the potential techniques for stakeholder protection and increasing accountability towards stakeholders. The notion of CSR deals with how a company's business is conducted and how a company takes responsibility for its impact on the various stakeholders. This is crucial to the concept of CSR and directors play a central role in the process. The CSR debate is closely related to the duties and responsibilities of directors, especially their duties to various stakeholders such as the employees, customers, the environment, and society. In both countries, the reform of directors' duties and disclosure are methods for protecting stakeholders.[2] The key provisions for the integration of stakeholder interests are section172(1) of CA 2006 in the UK and section166(2) of CA 2013 in India which state 'what' directors are required to do – ie, consider the interests of stakeholders in the decision-making process. But it fails to tell them 'how' to consider those interests. To date, disclosure as a transparency mechanism is the primary technique for CSR regulation,[3] especially in the UK, and creates some space for the stakeholders to make an informed decision. However, it does not lead to integration of their interests or necessarily give them an opportunity to engage with or influence the board's decision. The limitations inherent in this approach make it necessary to explore and adopt other regulatory techniques.[4]

---

[1] CSR is a method of decision making in which the emphasis is on the way companies are managed by the directors and taking responsibility for companies' impact on the society and the environment. CSR conduct relates to the recognition and integration of stakeholder interests in corporate decisions. For detailed discussion on the meaning of CSR see Ch1 Pt 3.1.

[2] This chapter focuses on the decision-making process and Ch 4 analyses disclosure as a technique to protect stakeholders.

[3] Steve Hedley, 'Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences' (*Private Law Theory*, 18 November 2020) 5 <https://private-law-theory.org/?p=27182> accessed 20 February 2021.

[4] Ladna *et al*, 'Workforce Engagement and the UK Corporate Governance Code' [2021] Thomson Reuters Aranzadi, II International Conference of Corporate Governance proceedings.

The chapter is structured as follows. Part 1 deals with how to protect the stakeholders and discusses the meaning of 'substance' and 'process' as understood in this thesis. It also evaluates the importance of each aspect in the context of stakeholder protection. Part 2 of the chapter discusses corporate purpose and sets out the importance of articulating and embedding it in the regulation of CSR to shield the broader purpose from the norm of shareholder primacy. Parts 3 and 4 discuss shareholders' influence on board decision making in the two countries. The powers of shareholders and the role of the board are discussed to evaluate the balance of power and the extent to which shareholders can influence decisions by companies. Part 5 evaluates due diligence as an effective mechanism for the development of more process-based regulation to make the board accountable to stakeholders and address the pressure of shareholder primacy. Part 6 concludes, and the way forward is indicated.

1.1. Substance v Process

There are various ways by which stakeholder interests can be protected – ie, the focus can be on the substantive aspect or the procedural aspect (process). These two terms may represent two distinct but related categories.[5] The chapter evaluates the various mechanisms through which stakeholder interests can be protected and analyses these under the theme '*process v substance*'.[6] Therefore, first, it is important to understand the meaning and advantages and disadvantages of both aspects. The table below summaries the differences.

---

[5] Albert Kocourek, 'Substance and Procedure' (1941) 10 Fordham Law Review 157, 160.

[6] This theme is inspired by Ladna *et al*'s analysis in the context of the 'outcome v control' and 'process v disclosure' themes. See Chalaczkiewicz-Ladna *et al*, (n 4).

Table 1: Differences between substance and process

Substance (director's duties)	(Decision-making) Process
'what' goals are to be achieved	'how' to achieve those goals
Outcome oriented – sets goals	Focus on the internal system and process
Flexibility – Directors have room to use their discretion	Prescriptive[7] – constrains or controls on discretion
Application – where directors are generally more responsible	Can be applied where change in behaviour is required
Black-box method of decision making	Increases transparency in board's decision making
Certainty of outcome is unknown	Certainty of outcome is unknown
Enforceable	Cannot be enforced

The substance-focused provisions are concerned with 'what' goals are to be achieved whereas the process is concerned with 'how' to achieve those goals.[8] The substantive aspect aims at achieving the right outcomes and allows directors space to apply their judgement in doing so. The desired outcome in the CSR context is a balanced consideration of the interests of all stakeholders in the decision-making process. If their interests are to be considered, stakeholders must be allowed an opportunity to take part in the process so that directors can engage with them to learn about their concerns The substantive aspect relies on broadly stated rules when setting the standards by which directors must conduct their business[9] and is concerned with producing the desired outcomes by focusing more on the letter than on the intention or spirit of law.[10] It defines what directors must do and gives them flexibility to act in what they believe to be the

[7]Cristie L Ford, 'New Governance, Compliance, and Principles-Based Securities Regulation' (2008) 45 American Business Law Journal 1, 5.
[8] As pointed out by Panagopoulos, 'the matters of procedure are concerned with manner, whereas matters of substance are concerned with matter'. See George Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1(1) Journal of Private International Law 69 71.
[9] Julia Black *et al*, 'Making a Success of Principles-Based Regulation' (2007) 1 Law and Financial Markets Review 191, 191.
[10] Chalaczkiewicz-Ladna *et al*, (n 4)2; Julian Agyeman and Bob Evans, '"Just Sustainability": The Emerging Discourse of Environmental Justice in Britain?' (2004) 170 The Geographical Journal 155, 162.

best interests of the company as a separate entity. It places greater reliance on the directors by giving them the responsibility and discretion to ensure that the outcome is achieved. Discretion implies the possibility of choice, which in turn calls for the exercise of judgement.[11] A fiduciary must have some scope to exercise discretion in making tactical decisions which is one of the key elements of decision-making power.[12] Decision-making power does not mean coercion or that directors have direct control over others. [13] Control means 'having power over' and involves proactive means of directing conduct, for example, through financial incentives or laws and regulations.[14] Decision-making power means that directors have a choice in making decisions the consequences of which affect others significantly. This type of power gives rise to a need for justification and forms the basis for companies acting in the public interest. [15] However, these powers are constrained in various ways – eg, government, consumer, and community pressure that limits and shapes the decision making.[16] Several non-legal constraints such as market forces, reputational concerns, and social or moral norms can influence the exercise of a discretion.[17] Giving too wide a discretion can create an opportunity for directors to be biased towards shareholders or advance their own interests at the expense of stakeholders. There is a need to extend recognition[18] and its importance to different types of stakeholders on which companies depend for their wealth creation, and to move away from the narrow shareholder-primacy frames. The narrow legal and ideological construct of the modern corporation has resulted in undue emphasis on the importance of managerial talent and shareholder investment which impacts negatively on stakeholders and companies' performance.[19] While it is important that directors have

---

[11] HLA Hart, 'Discretion' (2013) 127 Harvard L Rev 652, 656.

[12] JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP 1995) 10.

[13] ibid.

[14] But these mechanisms are not mechanisms of accountability per se, because they do not in themselves operate through procedures in which actors are required to explain and justify their conduct to forums. Accountability is a form of control, but not all forms of control are accountability mechanisms. See Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447, 453,454.

[15] Parkinson (n 12) 10.

[16] ibid.

[17] D Gordon Smith and Jordan C Lee, 'Fiduciary Discretion' (2014) 75 Ohio State Law Journal 609, 613. Social norms are often a product of values system shaped by many influences across time. See: Angus Young, 'Frameworks in Regulating Company Directors: Rethinking the Philosophical Foundations to Enhance Accountability' (2009) 13(12) Company Lawyer 355, 359.

[18] Recognition means right to participate in the director's decision making. See discussion in Ch4 Pt 2.2.

[19] For discussion of the legal frameworks in UK and Indian company law, see Ch2 Pts 3 and 4. Ideological construct here refers to contractarian ideology (law and economics theory) of the corporation which underlies shareholder primacy. See Stephen Bottomley, 'From contractualism to constitutionalism: A framework for corporate governance' (1997) 19(3) The Sydney Law Review 277; Iris HY Chiu and Roger Barker,

a measure of discretion in making corporate decisions, there is a need for greater transparency as regards how directors make decisions. The board's decision making can be compared to a black box where the process of how a decision is actually made is opaque and whether directors integrate the relevant interests is unknown. The process-focused provisions consider how the board makes decisions, ie, the steps and the way board make its corporate decisions as opposed to the substantive aspect which is linked to the duties of directors. It deals with the internal decision-making process, ie, how directors integrate stakeholder interests, and how they are allowed to participate meaningfully in board decision making.[20] Thus, it brings greater clarity to the process of decision making that will address the asymmetries in the power dynamins in the governance of company.[21]

Giving stakeholders express recognition in the process will empower them to participate effectively and influence directors to be more inclusive of social and environmental concerns. The meaning of 'process' in this thesis is the 'process of decision making' which is distinct from the procedural mechanisms, such as disclosure, which do not give a voice to stakeholders in the decision-making process. For example, section 135 of CA 2013 is a key substantive provision in India which prescribes certain procedural mechanisms such as the CSR Committee and disclosure but does not give stakeholders a voice in the decision-making process. The approach to CSR in section 135 is largely instrumental with the outcome defined as 'spending 2% of the net profit' on CSR. It may on occasion be difficult to distinguish between the two aspects. An example is section 172 of CA 2006 as substantive duties are enforced by the beneficiaries but only shareholders can enforce the duties and stakeholders can institute no legal action against the directors. .[22] Provision 5 of UKCGC, is an explicit process for stakeholder (workforce) engagement in decision making which can help shape directors' decision-making process.[23] It implies that the reform of directors' duties under section172 has not been sufficient for stakeholder protection.

'Submission to the Business Skills and Innovation Commons Select Committee: Corporate Governance Inquiry' [2016] Centre for Ethics and Law 6.

[20] While this chapter focuses on the integration of stakeholder interests in the decision-making process, the next chapter includes a detailed discussion of stakeholder engagement and participation.

[21] The power structure in both jurisdictions is discussed below in Pt 3 and 4.

[22] See discussion in Ch2 Pt 3.1.3.

[23] Provision 5 is discussed in Ch4 Pts 5.1, 6.1 and 6.3.

Although in both countries directors are allowed a wide discretion in managing the affairs of the company, the overall Indian approach can be said to be prescriptive and outcome oriented. The focus is on company profit sharing and for stakeholders to be able to benefit from such projects. The regulatory framework is geared more towards hard law leaving directors with little discretion or room for innovation in achieving the set outcomes. The UK's approach differs from that of India as directors have a far wider discretion as regards how to achieve the outcomes. The overall focus is on decision making and disclosure of the 'comply or explain' nature. The framework is less prescriptive and places greater reliance on directors in that they have greater flexibility in achieving the outcomes. This helps them to tailor the approach according to the needs or requirements of the company.[24] Directors may also misuse the discretion given to them as in theory they must consider all interests but there is no way to check whether they have done so in achieving the outcome. Prescribing process may be preferred especially where there is a need to reduce uncertainty in the way decisions are made. This may promote compliance by elaborating on factors or conditions that must be taken into account so promoting certainty by reducing the likelihood of bias towards shareholders. However, a prescriptive approach may lead directors to focus only on compliance rather than exercising sound judgement in the best interests of the company.

But no changes are suggested to the substantive aspect as the current framework in both jurisdictions has sufficient scope to promote CSR.[25] Reforming directors' duties can be problematic as it will require fundamental changes to company law and give rise to enforcement problems in that breach of fiduciary duties is difficult to establish.[26] On the other hand, process-based regulation will lead to a controlled framework with clear indicators for compliance with the rules so ensuring that stakeholder interests are integrated.

---

[24] For example, every company has key stakeholders who are impacted by the company's operation more than the others. In such situations, flexibility will be helpful as directors will be able to identify the key stakeholders and give them more attention.

[25] The reform proposals of the SMART project, recommend reform of company law and a redefinition of the duty of directors as necessary to make companies shift to sustainable business. See Beate Sjåfjell and Mark B Taylor, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2610583 25 <https://papers.ssrn.com/ abstract=2610583> accessed 13 May 2021; Beate Sjåfjell *et al*, 'Securing the Future of European Business: SMART Reform Proposals' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3595048 <https://papers.ssrn.com/abstract=3595048> accessed 18 March 2021.

[26] If the duties are owed to the stakeholders, there would be a rise in litigation as there would be nothing to bar the civil claims of the stakeholders. Furthermore, the problem of balancing several diverging interests of stakeholders would also rise. See Ch1 Pt 3.3.2.

Against this background, the chapter evaluates the various potential techniques in the context of hard v soft law. The focus is on the link between directors' duties (substance) and the decision-making (process) of the company and their effect on the regulation of CSR. It argues that to better protect stakeholders, both aspects – substance and process – must be addressed. The substantive aspect must be complemented with process-based regulation that institutionalises the capacity to make decisions for the desired outcomes. To foster better regulatory compliance and transparent decision making, the correct blend of control and discretion must be ensured.

2. CORPORATE PURPOSE AND THE BOARD

2.1. Introduction

This section addresses how a broader corporate purpose can assist companies to deliver better outcomes for all stakeholders. The concept of corporate purpose is tied to directors' duties and functions. The functions of the board are constrained by the dominant thinking of shareholder primacy which requires directors to make decision to maximise returns for shareholders.[27] Although shareholders are not owners of the company, market forces and economic incentives under company law lead directors to focus excessively on shareholder interests.[28] Mayer argues that it is wrong for shareholders to reap all the benefits by emphasising their power over the company.[29] He disregards the 'stakeholder v shareholder' debate and insists on focusing on directors' duty to stakeholders and extending accountability beyond shareholders.[30] Therefore, corporate governance should not simply be about aligning managerial interests with those of shareholders but with the purpose of the company that extends beyond profit maximisation and to a wider body of beneficiaries in line with company's overall impact.[31]

---

[27] Beate Sjåfjell *et al*, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell and BJ Richardson (eds), *Company Law and Sustainability* (CUP 2015)79–147; CM Bruner, *Corporate Governance in the Common-Law World: The Po Foundations of Shareholder Power* (CUP 2013).

[28] Beate Sjafjell and Jukka Mähönen, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (*Blogging for Sustainability*, 2021) <https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/corporate-purpose--sjafjell-mahonen.html> accessed 21 January 2022.

[29] For a discussion of shareholder's powers and rights in the two jurisdictions, see Pts 3 and 4.

[30] Colin Mayer, 'The Governance of Corporate Purpose' (Social Science Research Network 2021) SSRN Scholarly Paper ID 3928613 8 <https://papers.ssrn.com/abstract=3928613> accessed 5 October 2021.

[31] Colin Mayer, 'The Future of the Corporation and the Economics of Purpose' [2020] Journal of Management Studies 16 <https://onlinelibrary.wiley.com/doi/10.1111/joms.12660> accessed 24 March 2021.

2.2. Articulating Corporate Purpose

Defining broader corporate purpose can be a starting point for directors to embed CSR within the business.[32] Henderson argues that organisational purpose is a key to change.[33] 'It aligns everyone in the organisation around a common mission. It gives everyone a reason to work towards the goals of the organisation as a whole.'[34] She further explains that a deep commitment to purpose creates a psychological effect that drives high performance and creativity.[35] Adams explains that companies should define their purpose; explain why it exists and the role it plays in the world.[36] It should then be aligned with the business model and the companies' strategies. Purpose can be explained as 'a concrete goal or objective for the firm that reaches beyond profit maximisation'.[37] It is described it as the aspirational vision of 'solving problems profitably'.[38]

One of the most important roles of directors is to define and embed the purpose of the company within the business system.[39] The directors are collectively responsible for managing the company and setting its goals and objectives. For CSR to be effectively embedded in the corporate policy, it is important that the board ensures that the consequences of the company's operations have been considered in determining its policies and practices. It has a vital part to play in the development of responsible companies[40] and ensure that their purpose extends beyond shareholder value. The

[32] 'Principles for Purposeful Business' 17 <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> accessed 20 May 2021.
[33] Rebecca Henderson, *Reimagining Capitalism In a World on Fire* (Penguin Business 2020) 83.
[34] ibid 92.
[35] ibid 93.
[36] Alex Edmans, 'How Great Companies Deliver Both Purpose and Profit' (*London Business School*, 2019) <https://www.london.edu/think/how-great-companies-deliver-both-purpose-and-profit> accessed XXX; 'Guidance on Board Effectiveness' (FRC 2018) 3 <https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF> accessed 20 May 2021.
[37] Rebecca Henderson and Eric Van den Steen, 'Why Do Firms Have "Purpose"? The Firm's Role as a Carrier of Identity and Reputation' (2015) 105 The American Economic Review 326, 327.
[38] He further states that purpose is associated with creating shared value for all and profits are legitimate only when earned without harming anyone. See Mayer (n 31) 7.
[39] Jeroen Veldman, *et al*, 'Corporate Governance for a Changing World Report of a Global Roundtable Series' [2016] Frank Bold and Cass Business School. 24; The British Academy, Future of the Corporation 'Principles for Purposeful Business' (2020) 23 <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> accessed 20 May 2021; Blacksun 'Corporate Culture- A Thought Piece on Reporting' (2016) 2.
[40] Communication from the Commission to the European Parliament, the Council, the European Economic and
Social Committee and the Committee of the Regions, 'A renewed EU strategy 2011–2014 for Corporate Social

substantive provision must be articulated and implemented in practice and, therefore, focus should be on how to adopt and deliver on the broader purpose.[41] The board should take responsibility for defining the company's purpose and demonstrate commitment to shaping, monitoring, and overseeing the culture that supports long-term sustainability and limits unethical business practices.[42] To safeguard the purpose, it should be clarified and embedded in the governance or constituting documents of a company.[43] MacNeil and Esser propose a broadly drafted purpose provision which states that directors should act in a sustainable manner.[44] This provision should also be linked to section 172 which requires more than a purely subjective consideration of stakeholder interests. A 'say on purpose'[45] by shareholders can be achieved through majority voting. These two changes will promote the implementation of a broader purpose in the business and be shielded from any inconsistent shareholder proposal.[46] The broader purpose should also be reflected in the director's remuneration and incentive plan which currently does not encourage directors to promote long- term sustainability.[47] Further, the overarching purpose should be supported by a mandatory due diligence duty to open up the scope for stakeholders to participate in the process of decision making.[48]

The UK's approach is more closely aligned with ESG investing, as the ESV approach adopted by the UK Companies Act also considers shareholder interests to be a priority in the process of decision making. But the UKCGC adopts a broader approach and situates corporate purpose at the heart of the code by linking the role of the board with the broader purpose of promoting stakeholder interests.[49] It states: 'The board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned.'[50] While the UKCGC has broadened the scope, in the 2021 FRC survey 86% of companies disclosed a purpose statement, of which 11% was found to

---

Responsibility' COM (2011) 681 final 5–6.

[41] 'Principles for Purposeful Business' (n 32) 17.

[42] Veldman *et al*, (n 39) 11. f

[43] ibid 24.

[44] Iain MacNeil and Irene-Marie Esser, 'From a Financial to an Entity Model of ESG' (2022) 23 EBOLR 9, 36. The discussion in Ch1 Pt 2 highlights that directors had some discretion to further the CSR goals but that it was limited to the object clause. After the enactment of CA 1948 in the UK, the CSR scope was further narrowed down especially due to increase in the powers of shareholders.

[45] Ibid.

[46] Veldman *et al*, (n 39) 24.

[47] See discussion in Pt 4.3.

[48] See discussion in Pt 5.

[49] The UK Corporate Governance Code 2018, Principle A.

[50] ibid Principle B.

have used purpose statements as marketing slogans or conflated vision and values.[51] In Deloitte's 2021 survey, of 50 companies with more than 500 employees from among FTSE 350, 86% of companies (2020: 78%) clearly disclosed their companies' purpose despite there being no compulsory disclosure of purpose.[52] However, while 77% (2020: 90%) explicitly referred to stakeholders, 30% did not disclose any KPIs for stakeholders which raises questions as to the companies' impact on and outcomes relating to stakeholders. Cleary, there is a lot of room for improvement in this area. Purpose statements can be a powerful tool for companies to demonstrate their commitment to sustainable and ethical business systems, but it appears that many companies are neither clear nor transparent in their disclosures most probably because their success is evaluated from the shareholders' perspective. The UKCGC is the leading example of linking corporate purpose with corporate governance, but the overall performance as regards corporate purpose needs to go beyond the 'shareholder norm'.

Compared to the UK, India has adopted a broader corporate purpose under section 166(2)[53] but similar to company law in the UK, Indian company law includes no express statement of corporate purpose. Consequently, the determination of corporate purpose falls to directors who have a wide discretion to embed a broader corporate purpose although it appears highly unlikely that the pluralist approach of CA 2013 is implemented in practice. This points to the need for changes in the Indian position too. A potential change to the 'objects clause' of the company could be linked to a 'say on purpose' for shareholder voting.[54] Purpose can be made explicit in an objects clause so that directors are then under a duty to comply.[55]

---

[51] The FRC's annual review of the UKCGC 2020 reported half of the companies providing purpose statements and many restricted their purpose to achieving shareholder value or use it as a slogan or marketing line. It was also felt that there is a need for companies to focus on the activities and outcomes of implementing the Principles, particularly on how board's decision making has led to sustainable benefits for stakeholders. However, this survey was based on the early adoption of the Code and implementation has increased in the coming years. See FRC, 'Annual Review of the UK Corporate Governance Code' (2020) 6, 9 <https://www.frc. org.uk/getattachment/53799a2d-824e-4e15-9325-33eb6a30f063/Annual-Review-of-the-UK-Corporate-Governance-Code,-Jan-2020_Final-Corrected.pdf> accessed 23 February 2021.

[52] 'Annual Report Insights 2021: Surveying FTSE Reporting' (*Deloitte United Kingdom*) <https://www2. deloitte.com/uk/en/pages/audit/articles/annual-report-insights-2021.html> accessed 21 February 2022.

[53] It states that directors are required to act in good faith in order to promote the objects of the company for the benefit of its members as a whole and in the best interests of the company and its stakeholders. See discussion on s 166(2) in Ch2 Pt 4.2.

[54] In UK company law s 31(1) CA 2006 allows companies to have an objects clause.

[55] MacNeil and Esser (n 44, 29) recommend the objects clause to be entrenched so that shareholders cannot create a hurdle for future changes. See too Companies Act 2006 s 22(1).

3. BOARD DECISION MAKING

As highlighted earlier, the board in both jurisdictions has a wide enough discretion to integrate stakeholder interests and internalise the externalities, but there are several factors that affect boards' decisions. The effectiveness of the laws relating to stakeholder protection can only be evaluated by taking into account various corporate governance variables that influence corporate decision making. It is necessary to scrutinise the formal corporate laws and regulations, as well as pay due regard to the corporate culture of the two jurisdictions. The board is a key decision making body, hence, it is crucial to assess its attitudes toward CSR. But directors do not make decisions in a vacuum, making it necessary to assess the environment surrounding the company. This section examines the role and structure of the board which offers useful insights and a broader context to the discussion of CSR. The division of power between the board and the shareholders is briefly evaluated. The discussion also points out the differences in shareholding pattern and control arrangements between the UK and India which highlights how various types of shareholding structure can influence the decision making of directors and ultimately have an impact on stakeholder protection.

3.1. The UK

3.1.1. Board's Decision-making Powers

For the division of powers, the Companies Act 2006 (CA 2006) is the principal company law legislation in the UK. The power in companies is divided between the board and the shareholders[56] subject to the Companies Act and the memorandum and the articles.[57] Every company must have Articles of Association where the general distribution of powers is set out.[58] It is a part of company's constitution and a core governance document that prescribes regulations for the company along with various resolutions and agreements.[59] It sets up the basic management structure of the company and may regulate substantive matters which are central to the company's operations such as the division

---

[56] *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2KB 113 (Greer LJ).
[57] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 35. The directors could not be compelled to follow the resolution passed by simple majority in the general meeting as under the Articles general management and control of the company were vested in the directors.
[58] Companies Act 2006 s 18.
[59] The Companies (Model Articles) Regulations 2008 (Articles 2008). Under art 3 of the Articles (subject to the articles) directors have been given wide powers to manage the company. See CA 2006 ss 17, 18.

of powers between the shareholders and board, and the composition, structure, and operations of board.[60]

The board has a central role to play in the day-to-day management of the company. The UKCGC further confirms that the board is responsible for the governance of the company.[61] Principle A states that ‘a successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society’.[62] The UK has a unitary board system[63] led by the chair who is responsible for the overall effectiveness in directing the company.[64] The board is free to make decisions for the success of their company and generally does not take part in day-to-day management.[65] The process of decision making in a company is implemented through a division of functions in the board. The board is involved in very significant decisions of the company while delegating the management powers to senior full-time managers of the company who are required to meet certain behaviour and performance expectations.[66] Generally, a decision-making process includes decision management (initiation and implementation) allocated to the top managers and decision control (ratification ad monitoring) allocated to independent agents who are not involved in decision making.[67] Thus, the responsibility of the board can be broadly divided between executive and non-executive directors (NEDs).[68] The executive directors are employed full time and manage the day-to-day affairs of the company while the NEDs are in charge of supervisory functions, particularly for providing constructive challenges, strategic guidance, and specialist advice. They also hold management to account[69] and offer a more detached and objective view of the affairs of the company.[70] However, for the

---

[60] Paul L Davies and Sarah Worthington, *Gower’s Principles of Modern Company Law* (Sweet & Maxwell 2021) 64.
[61] The UK Corporate Governance Code 2018, 4.
[62] ibid Principle A.
[63] ibid 1. This is a matter of practice rather than law as the CA 2006 nowhere explicitly mentions that the UK has a unitary board system.
[64] The UKCGC sets out that the roles of chair and chief executive should not be exercised by the same individual. See the UKCGC Principal F and Provision 9.
[65] David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012) 236.
[66] ibid 236, 239.
[67] Eugene F Fama and Michael C Jensen, ‘Separation of Ownership and Control’ (1983) 26 Journal of Law & Economics 301, 303–304.
[68] The UK Corporate Governance Code (n 49) Principal G.
[69] ibid Principal H.
[70] John Davies, ‘A Guide to Directors: Responsibilities under the Companies Act 2006’ (2007) ACCA 131, 2.9.

NEDs to be able monitor executive directors, they must not be psychologically or economically dependent on the managers.[71]

3.1.2. Shareholder's Powers

The role of the board depends, in the main, on the company's constitution which is controlled by the shareholders. Shareholders are the residual claimants and retain the ultimate power of governance.[72] Under article 3 of the Articles (and subject to the articles),[73] directors have been given wide powers to manage the company.[74] Powers exercised by the board are believed to be derivatives of the shareholders' governance powers.[75] These rights are exercisable in the annual shareholder meeting.[76] Additionally, shareholders (representing 5% of the paid-up capital) can ask the board to convene an interim meeting to exercise those rights.[77]

A wide range of decision-making rights are reserved for the shareholders, including the power to amend the Articles (2008),[78] intervention rights, and approval or veto rights. 'The shareholders may direct the directors to take, or refrain from taking, specified action' by passing a special resolution.[79] Shareholder's intervention rights provide them with a mechanism to challenge the views of board and include the right to request a general meeting[80] and to propose resolutions at an annual general meeting.[81] Further, members' approval is required in various matters affecting their rights such as alterations to the class rights attached to shares;[82] alteration of the type of company;[83] decisions to

---

[71] Barry D Baysinger and Henry N Butler, 'Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition' (1985) 1 Journal of Law, Economics, & Organization 101, 109–110.

[72] Daniel Attenborough, 'The Vacuous Concept of Shareholder Voting Rights' (2013) 14 EBOLR 147, 163.

[73] Companies Act 2006 ss 17 and 18.

[74] Model Articles art 3.

[75] Paul L Davies, *Gower's Principles of Modern Company Law* (Sarah Worthington ed, 10th edn, Sweet & Maxwell 2016) 709; Attenborough (n 72) 164; Christopher M Bruner, 'The Corporate Governance Role of Shareholders in Common-Law Jurisdictions' in Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (CUP 2013) 29.

[76] CA 2006 s 336.

[77] The expense of such meetings are borne by the company. See ibid 303, 304, 305.

[78] CA 2006 s 283(1). A special resolution of the members (or of a class of members) of a company means a resolution passed by a majority of not less than 75%.

[79] Model Articles art 4.

[80] CA 2006 ss 303and 304.

[81] CA 2006 s 338

[82] CA 2006 s 630ff.

[83] CA 2006 s 90.

allot and issue shares;[84] or to disapply pre-emption rights on the allotment and issuing of shares.[85] The shareholders also have a right to add items to the AGM agenda other than through the process of proposing a resolution,[86] and the company is obliged to respond to question posed by them at the general meeting.[87] The UK framework has generally facilitated intervention by shareholders and encourages them to make use of their rights to contest the views or proposals of the board. These rights also place limits on the extent to which the articles may authorise the board to proceed solely on its own initiative. This reflects that shareholders' interests are potentially involved in decision making. Most interventions by shareholders happen privately between them and the board, and shareholders will take the public route to intervention only if private pressures have been unsuccessful.[88] Their intervention rights may act as a warning to back them up when engaging privately with the board.[89]

Shareholders also have a 'say-on-pay' (SOP) voting on executives' remuneration packages. The board is required to prepare a detailed remuneration report for each financial year and present it at the annual general meeting for approval by the shareholders.[90] Additionally, shareholders have rights in relation to the appointment and removal of directors.[91] Section 160(1) of CA 2006 provides for the appointment of directors of a public company to be voted on individually. The Model Articles prescribe two ways of appointing directors. It states that any person who is willing to act as a director and is permitted by law to do so, may be appointed as a director by: (a) ordinary resolution; or (b) a decision of the directors.[92] The CA 2006 contains a mandatory provision for the removal of a director. Section 168 of CA 2006 states that a director can be removed at any time by ordinary resolution at a meeting.[93] The power to remove a

---

[84] CA 2006 s 549.
[85] CA 2006 ss 420 and 439.
[86] CA 2006 s 338A.
[87] CA 2006 s 319A.
[88] Davies and Worthington (n 169) 423.
[89] ibid.
[90] CA 2006 ss 420, 439. However, even the SOP has not been able to control the increasing rise in executives' remuneration. This is further discussed below in s 4.3.
[91] This is also a core strategy for addressing the agency problems of shareholders in relation to managers. See Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 37.
[92] Model Articles art 17(1).
[93] CA 2006 s 168(1). Section 169 of CA 2006 discusses a director's right to protest against removal. In the *Bentley Stevens* case the court had waived the formality of giving proper notice of a board meeting and proper notice of the extraordinary meeting to remove the director, but he was nonetheless removed. See *Bentley Stevens v Jones* [1974] 1 WLR 638.

director by a simple majority can be a powerful inducement to the directors to follow the directions of the shareholders.[94] In the UK, shareholders can collectively amend the Articles, giving shareholders control over the company's core governance arrangements.[95] Consequently the procedure for the appointment of directors can differ which gives shareholders a wide range of powers in relation to the appointment and removal of directors.[96]

3.2. India

3.2.1. Board's Decision-making Powers

Turning to India, in terms of division of powers the board is entrusted with all the powers of the company subject to CA 2013, the memorandum, and the Articles.[97] Every company operating in India is required to have a board of directors[98] which is the governing body responsible for the day-to-day management the company. It can delegate certain duties and powers to a committee of directors.[99] As in the UK, India has a unitary system and every listed company in India is required to have a combination of executive, non-executive directors, and there must be at least one woman on the board.[100] The day-to-day activities are manged by the managing director or a full-time director.[101] Generally, the responsibilities of different directors are divided within the company as an internal arrangement made by the members of the board. Each director must perform

---

[94] Davies (n 75) paras 14–8.

[95] Bruner (n 75) 29.

[96] However, in reality, it is not easy to obtain a majority to remove directors from their position. See Andrew R Keay, *Directors' Duties* (3rd edn, LexisNexis 2016) .

[97]The board, subject to the articles, has extensive authority to manage the affairs of the company in the most effective way. CA 2013, Schedule I contains model articles for various types of company. Articles contain the regulations for the internal management of the company and provide for matters such as director's qualifications, appointment, powers and duties of auditors, procedure for transfer and transmission of shares, and debentures. See CA 2013 ss 5, 166(1) and 179.

[98]ibid 149.

[99] For example, the CSR committee has powers to formulate CSR policy and implement and monitor it after it has been approved by the board. This has brought CSR to the forefront in the boardroom discussion. This will be a good start for the companies which did not make CSR a part of their business because they now have to act as the law prescribes.

[100] It is mandatory to have a woman director on the board of some companies (listed and some unlisted public companies). See CA 2013 s 149; Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 reg 17.

[101] At least half of the board members are required to be NEDs. If the chairman is also a NED, then only one third of the members are required to be independent. However, where the chairman is the promoter or a relative of the promoter of the company, at least half the members are required to be independent. But the top 500 listed entities must ensure that the chairperson of the board of such listed entity must be a NED. See SEBI (LODR) 2015 reg 17(1B).

his or her role in managing the company keeping in mind any associated duties. The CA 2013 provides details on the role and functions of independent directors[102] in its Schedule IV.[103] Independent directors are expected to bring independent judgement and an objective view on the performance of the board.[104] With regard to CSR, independent directors have a special role to play as the CA 2013 explicitly mentions that independent directors should safeguard the interests of all stakeholders and balance any conflicting interests of the stakeholders.[105]

3.2.2. Shareholder's Powers

Shareholders in India also have the power to alter the Articles.[106] Any actions undertaken by directors beyond the scope of the articles can be ratified by the shareholders provided that the action is not in contravention of the Memorandum or CA 2013.[107] The CA 2013 contains an entrenchment clause which means that it can only be altered if certain conditions or procedures are met or complied with.[108] Under section 179 of CA 2013, shareholders also have a vote in determining directors' remuneration (including that of the managing director,[109] full-time director,[110] and the company manager).[111] In a public company, the remuneration of its directors is limited to no more than 11% of the net profits. This limit can be exceeded only with the prior approval of the members of the company by special resolution.[112] In relation to the shareholder's right in appointment

[102]An independent director means a NED other than a managing director, a full-time director, or a nominee director and who fulfils certain other criteria, eg, relevant expertise, experience, integrity, no pecuniary relationship with the company, etc. CA 2013 s 149 (6).

[103] It is a guide to professional conduct for independent directors. They are expected to adhere the code of conduct for independent directors and uphold ethical standards of integrity and probity.CA 2013 schedule IV Pt II.

[104]ibid Schedule IV, Pt II (1) and (2).

[105]ibid Schedule IV, Pt II (5) and (6).

[106] Approval from all shareholders in the case of a private company and a special resolution in the case of a public company is required to amend the Articles. ibid 14.

[107] ibid 6.

[108] ibid 5(3).

[109] A director who, by virtue of the articles of a company, an agreement with the company, or a resolution passed at general meeting or by its board of directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called. See CA 2013, s 2(54).

[110]This includes a director in the full-time employment of the company. See CA 2013, s 2(94).

[111] CA 2013 s 197.

[112] ibid 197(1). Directors can be paid up to 5% or 10% of net profits as remuneration for any financial year. This can be made up of different forms of remuneration such as salary, allowances, perquisites, other benefits, etc. However, the aggregate remuneration may not exceed 11 % save with the approval of shareholders.

and removal of directors, the CA 2013 provides that every director shall be appointed by the company in general meeting[113] – in other words, the shareholders have the power to appoint directors. All directors of a public company are appointed by passing individual resolutions so that members get a chance to vote according to their preference.[114] Removal of a director before the expiry of his or her term can also take place by ordinary resolution at a general meeting.[115] Other important shareholder powers include the right to call for general meetings,[116] to approval certain decisions,[117] to appoint and remove auditors,[118] and to dispose of a company's undertaking.[119]

3.3.Who is better equipped to make decisions?

It is clear from the above discussion that in both jurisdictions different types of decisions are distributed between the board and the shareholders. Shareholders have some power to intervene in management's decision making as well as approval (veto) rights. Essentially, this means that certain decisions by the board will not be put into effect until approved by the shareholders. Generally, the board is free to make decision for the company and has a wide enough discretion to manage it. Boards are also regarded as better decision makers than shareholders[120] but certain actions, such as decisions related to the value of the company and investment-like decisions, require shareholder approval. Directors have access to information and can monitor the managers effectively.[121] Managers have day-to-day knowledge of the company and are well aware of the opportunities, risks, and challenges it faces.[122] Thus, directors and managers are better placed than shareholders to manage the affairs of the company.

---

[113] Except under a few circumstances, the board can appoint a director. ibid 152(2).
[114] ibid 162.
[115] ibid 169. A director appointed by a Tribunal under s 42 of CA 2013 and on the principle of proportional representation cannot be removed by shareholders. See: ibid 242.
[116] CA 2013 s 100.
[117] For example, to call on shareholders with regard to monies unpaid on their shares; authorise buyback of securities under s 68; issue securities, debentures in or outside India; to borrow monies; to invest the funds of the company; to grant loans, issue guarantees, or provide security in respect of loans; approve financial statements and board reports; to diversify the business of the meeting; approve amalgamation, merger, and reconstruction; take over a company or acquire control or substantial stake in other companies. ibid 179(3).
[118] ibid 139, 140.
[119] ibid 180.
[120] Kershaw (n 65) 206.
[121] William W Bratton and Michael L Wachter, 'The Case Against Shareholder Empowerment' (2010) 158 University of Pennsylvania Law Review 653, 659.
[122] ibid 660.

Although the board has the capability and knowledge to make decisions, shareholders have incentives to pay attention to the decisions taken to ensure they are in the best interests of the company. Directors may, on occasion, be inclined to pursue their own selfish interests, and since their decisions significantly affect the shareholders, the shareholders have the right incentive to keeping a check on the directors to ensure they are not abusing their powers or pursuing their selfish interests at the expense of shareholders and the best interests of the company.[123] Bratton and Watcher, however, argue that empowering shareholders can have negative implications on reducing externalities as they are not better equipped than directors to manage the company.[124] It is also important to note that contrary to popular belief, shareholders are not the 'owners' of the company and have no proprietary interests in the company's assets.[125] Apart from the capital which shareholders provide, companies also depend and impact on their workers, society, and the environment in which they operate – none of which is 'owned' by the shareholders.[126] As a matter of law, directors are not regarded as the agents of the shareholders and do not serve shareholders as their principals.[127] Shareholders are bound by and subject to the company's constitution.[128] Their shares are their personal property and only denote their proportionate financial stake and interest in the company as an association and allow them voting rights.[129] Shareholder's rights in the company denote the bundle of rights which should to some extent counterbalance the board's primary decision making.[130] Shareholders are expected to take decisions in the interests of the company and its stakeholders. However, they are generally biased and tend to further their own interests which may not necessarily correspond to those of the company. In both India and the UK shareholders do not owe any fiduciary duty to the company and

---

[123] Kershaw (n 65) 205.

[124] Bratton and Wachter (n 121) 659.

[125] Lord Wrenbury stated that 'the corporator even if he holds all the shares is not the corporation… neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation'. See: *Macaura v Northern Assurance Co Ltd* [1925] AC 619 633.

[126] 'Principles for Purposeful Business' (n 32) 22.

[127] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* (n 57); *Gramophone and Typewriter Co Ltd v Stanley* [1908] 2 KB 89.

[128] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* (n 57).

[129] CA 2006 s 541. In *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279 Farwell J noted that: 'A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders.'

[130] Marc Moore and Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Bloomsbury Publishing 2017) 79.

are therefore free to use their right for their own benefit.[131] Shareholders have some power to intervene in management's decision making and must act within the framework of accountability to ensure effective governance.[132] Accountability is considered to be the cornerstone of good corporate governance and is best achieved by holding directors accountable for their behaviour and decisions.[133] Therefore, in most jurisdictions the board is held accountable to the general meeting and shareholders act on behalf of the company (the accountee) to review what the board has done or not done – their rights are more akin to 'intervention rights' than actual 'decision-making' rights. However, the nature of shareholding pattern will influence the role of the board as it dramatically affects the internal governance of companies and the way managers behave.[134] When a single or a few shareholders own a large percentage of a company's shares, they hold a strong position in the company, whereas, if large numbers of shareholders own a small number of shares in a company, they may collectively influence the decision-making process of the board. This is further discussed in the sections below.

4. SHAREHOLDERS AND THE BALANCE OF POWER

4.1. Shareholding Pattern

4.1.1. The UK

Traditionally, the UK has had dispersed shareholdings.[135] More recently, institutional investors in the UK have become active in monitoring the company due to increase in their shareholding and demands from the government that they engage more actively

---

[131] Keay, however, argues that shareholders do owe duty towards the company as when exercising their voting right on the motion to alter company's constitution, they must act in good faith for the benefit of the company and, secondly, they must not commit fraud on the minority shareholders. So, although shareholders do not owe fiduciary duty to company, they cannot act freely in all situations. See Andrew Keay, 'Board Accountability and the Entity Maximization and Sustainability Approach' in Barnali Choudhury and Martin Petrin (eds), *Understanding the Company* (CUP 2017) 286–289.

[132] According to Cadbury, 'this is the essence of any system of good corporate governance'. See 'Report of the Committee on the Financial Aspects of Corporate Governance (The Cadbury Report)' (1992) para 1.1.

[133] Keay (n 131) 272–273.

[134] Paul L Davies and Klaus Hopt, 'Boards in Europe - Accountability and Convergence' (2013) ECGI 4.

[135] The UK is an outsider model, also known as the 'Berle and Means Corporation'. The recent OECD report (2019) which also describes the UK as generally having dispersed shareholdings. See OECD, (2019) 'OECD Corporate Governance Factbook 2019' 17 <www.oecd.org/corporate/corporate-governance-factbook.htm> accessed 17 March 2020; Adolf A Berle, 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 Harvard Law Review 1365; AA Jr Sommer, 'Whom Should the Corporation Serve: The Berle-Dodd Debate Revisited Sixty Years Later' (1991) 16 Delaware Journal of Corporate Law 33.

with portfolio companies.[136] Cheffins points out that by 1969 retail investors no longer owned a majority of the shares in UK public companies,[137] and by the early 1990s, individual (ie, non-institutional) shareholding accounted for only 18% of UK public companies' aggregate ownership base.[138] Currently, institutional investors hold around 63% of outstanding shares on the stock markets in the UK.[139] While ownership is still widely held by individuals, institutional investors collectively account for a large percentage of shares by value.[140] Therefore, they have greater power and a stronger incentive actively to monitor the affairs of the company and have the specialised expertise to do so.[141] The recent release of the UK Stewardship Code 2020[142] is important evidence of institutional investors' growing interest in monitoring companies.

4.1.2. India

The Indian economy, by contrast, is dominated by a concentrated shareholding structure and family-owned businesses.[143] While 67% of companies are family businesses, more than 90% are 'controlled companies' with promoters having dominant ownership and

[136] By 1969 retail investors no longer owned a majority of shares in UK public companies, and by the early 1990s, individual (ie, non-institutional) shareholding accounted for 18% of UK public companies' aggregate ownership base. See: Paul L Davies and Klaus Hopt, 'Boards in Europe - Accountability and Convergence' [2013] ECGI 716; Brian R Cheffins; *Corporate Ownership and Control* (OUP 2008) 344; and Brian R Cheffins, 'The Stewardship Code's Achilles' Heel' (2010) 73 The Modern Law Review 1004, 1017.
[137] Cheffins (n 136 *Corporate Ownership and Control*) 344.
[138] Cheffins (n 136) 'Stewardship Code') 1017.
[139] Pedro Matos, *ESG and Responsible Institutional Investing Around the World A Critical Review* (CFA Institute Research Foundation 2020) 15.
[140] MacNeil explains that there are several ways in which collective action can occur. In the UK the corporate governance code, and the stewardship code are forms of collective standard setting by institutional investors. However, this can only work when a standard solution can be set for all companies that can be applied in a flexible manner. He further explains that when a specific form of engagement or intervention is required, shareholders may form a coalition to intervene in a manner that is not addressed by the form of collective action. See Iain MacNeil, 'Activism and Collaboration among Shareholders in UK Listed Companies' (2010) 5 Capital Markets Law Journal 419, 423,424.
[141] Unlike shareholders who hold a small number of shares in a company, large institutional investors would not prefer selling their large blocks of shares as it lowers the share price. See Stephen M Bainbridge, 'Shareholder Activism and Institutional Investors' (2005) UCLA School of Law, Law-Econ Research Paper No. 05-20.
[142] The UK Stewardship Code 2020. The 2020 Code is a soft law and contains a set of principles that work on the 'apply and explain' basis for asset managers and asset owners, and a separate set of principles for service providers. It was published on 24 October 2019 and has been effective from 1 January 2020.
[143] Post liberalisation, a substantial portion of the companies in India remained family-managed and promoted. Some of these business families also existed and flourished during British rule. See 'Family Businesses Raise Corporate Governance Concerns, Says Moody's - Indian Express' (*The Indian Express*, 2007) <http://archive.indianexpress.com/news/family-businesses-raise-corporate-governance-concerns-says-moodys/231282> accessed 17 March 2020.

management control.[144] At this time it is important to clarify the meaning of 'promoter' as understood in Indian company law. The term 'promoter' has specific significance. Promoters typically manage to secure an effective control[145] over the affairs of the company, directly or indirectly, whether as a shareholder, director, or otherwise. The boards of companies are accustomed to act in accordance with the advice, directions, or instructions of these promoters.[146] This is a very broad interpretation of 'promoter' which includes shareholders, directors, and even an outsider who controls the company. However, fiduciary duties are only imposed on the directors of the company and not on shareholders. Therefore, when a promoter is a controlling shareholder of the company, he or she must ensure that the company has an independent board[147] as the board is expected to protect the interests of minority shareholders and other stakeholders of the company. But the controlling shareholders show a general tendency to engage in self-interested transactions based on their considerable control rights and the advantage of the inside information. Therefore, the state has a major role to play in regulating corporate activity. To do so it must rely, in the main, on mandatory laws in that a developing country like India lacks the robust capital market and sophisticated market players found in the UK.[148]

4.2. Agency Problems

As noted above, the UK and India differ regarding the company's share-ownership structure. A discussion of shareholding structure is inevitably connected to the debate on the separation of ownership and control and problems surrounding the concept of

---

[144] Although it may not be necessary for the controlling family or promoter to hold a major portion of shares in the company. Generally, it is sufficient to control companies with roughly 20% of the voting equity. See CA 2013 s 2(6) and 'Board and Director Independence in Controlled Companies' 1.

[145] '[C]ontrol shall include the right to appoint a majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.' See CA 2013 s 2(27).

[146] ibid s 2(69).

[147] Harpreet Kaur, 'Promoters and Corporate Governance under the Companies Act, 2013' (2015) 3 Journal of National Law University, Delhi 53, 68.

[148] Most Asian countries like India and China follow the insider model where a single shareholder has dominant control over the company. It should be noted that in a company controlled by a state there may be different government bodies trying to advance their own interests, resulting in no coherence in approach. From a governance perspective, these companies are more difficult to control. See Umakanth Varottil, 'India's Corporate Governance Voluntary Guidelines 2009: Rhetoric or Reality?' (2010) 22 National Law School of India Review 1, 15; Umakanth Varottil and Richa Naujoks, 'Corporate Governance' in Linda Spedding (ed), *India: The Business Opportunity* (Eastern Book Company 2016) 53.

agency. The kind of agency problems generated in the UK and India are vertical (shareholder v management) and horizontal (majority shareholder v minority shareholder) respectively.[149] In the UK, the relation between shareholders and directors is a crucial in that it is difficult for a dispersed group of shareholders to control the behaviour of management which gives rise to problems of agency between shareholders and management.[150] Minority shareholders in such countries will struggle to influence the decision-making process and need to act collectively. They prefer to resort to the exit strategy (ie, selling of the shares to ensure their own interests) rather than monitoring management.[151] Their attitude is generally termed a 'hands off' approach to corporate governance in terms of which they avoid actively controlling or getting involved in the affairs of the companies.[152] However, the loss of investment by shareholders sends signals of weak corporate governance and lack of capability of the board to enhance shareholders' residual claim.

There are various procedures to prevent directors from deviating from pursuing the interests of shareholders and reducing agency costs.[153] These strategies can be either *ex ante* or *ex post.* Obvious examples of *ex post* strategies include disclosure and enforcement actions against dishonest or negligent agents. [154] The trusteeship strategy, which seeks to exclude conflicts of interest *ex ante* to ensure the directors will not gain personally from failing to act in the interests of the shareholders.[155] Independent directors act as representatives so that directors do not fetter their discretion and protect the interests of shareholders.[156]

---

[149] Kraakman *et al*, identify three types of agency problem: (1) the conflict between managers (agent) and shareholders (principal); (2) the conflict between controlling shareholders (agent) and minority shareholders (principal); and (3) the conflict between the company (agent) and other stakeholders. See Kraakman *et al*., (n 92) 29–30.

[150] See John C Coffee Jr, 'The Rise of Dispersed Ownership: The Role of Law in the Separation of Ownership and Control' [2001] Columbia Law School The Center for Law and Economic Studies 2 <http://www.ssrn.com/abstract=254097> accessed 21 June 2020.

[151] Attenborough (n 72) 164.

[152] Company Law Review, The White Paper: Modernising Company Law (DTI 2002, Cm 5553-I and Cm 5553-II) 36, Cheffins (n 139) 1004, 1005; MacNeil (n 143).

[153] Agency costs include the costs of structuring, monitoring, and bonding a set of contracts among agents with conflicting interests., Fama and Jensen (n 67) 304.

[154] Kraakman et al (n 92) 30.

[155] ibid 35.

[156] Andrew R Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013).

Indian companies face agency problems between controlling (promoters) and minority shareholders due to the concentrated ownership structure. The decision-making process is more likely to be aligned with the promoter's interests than with the wishes of the directors who are in a weaker position. Therefore, the central agency problems in India involves crossholding, pyramiding, and tunnelling which may be detrimental to other stakeholders' interests.[157] As the agency problems vary in jurisdictions based on the ownership structures which apply, the corporate governance mechanisms aimed at reducing agency costs are, understandably, different.[158] Despite the different nature of the agency problem in India and UK, legal principles regulating the exercise of discretionary powers by directors are similar.[159] To reduce agency costs the Indian legal system borrowed the concept of independent directors from UK and US corporate governance where the ownership structure is diffused. The independent directors are appointed directly or indirectly by the promoters and this raises doubts as to whether they are in a position to make independent suggestions regarding effectiveness.[160] Thus, in Indian business culture the board is not as empowered as in the UK and very often is subordinate to the promoters in the company hierarchy.[161] Thus, controlling shareholders' influence over company strategy is not uncommon.

To achieve a balance of power, various suggestions have been made including an alternative appointment mechanism, transparent/detailed disclosure of the reason for the removal or resignation of directors,[162] and the election of independent directors by a majority of non-controlling shareholders (to neutralise the voting advantage of

---

[157] Pyramid is a structure in business groups in which an apex shareholder (usually a very wealthy family) controls a single company which may or may not be listed. This company then holds or control the shares in other companies. This way they have the potential to influence decision making in substantial number of companies. See Asish K Bhattacharyya (ed), *Corporate Governance in India: Change and Continuity* (OUP 2016) 45.

[158] Kraakman *et al* (n 92) 27 ; Bala N Balasubramanian and RV Anand, 'Ownership Trends in Corporate India 2001-2011: Evidence and Implications' [2013] SSRN Electronic Journal 6 <http://www.ssrn.com/abstract=2303684> accessed 26 February 2020.

[159] Ernest Lim, 'Controlling Shareholders and Fiduciary Duties in Asia' (2018) 18 Journal of Corporate Law Studies 113, 114.

[160] The SEBI chairman has himself said that 'independent directors are not independent'. See: TOI, 'Sebi plans stricter norms for independent directors' (2017) <http://timesofindia.indiatimes.com/articleshow/59155541. cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 7 February 2019 and Vikramaditya Khanna and Umakanth Varottil, 'Board Independence in India: From Form to Function?' in Dan W Puchniak, Harald Baum and Luke Nottage (eds), *Independent Directors in Asia* (CUP 2017) 356.

[161] Bhattacharyya (n 157) 51.

[162] Khanna and Varottil (n 160) 362.

controlling shareholders).[163] However, by the virtue of their voting rights controlling shareholders are able to appoint and replace the entire board and so influence the management strategy and operational affairs of the company.[164] They also have several opportunities to extract personal benefits such as excessive dividends at the expense of a wide range of stakeholders. Therefore, subjecting controlling shareholders to some kind of duty or restraining the excessive transfer of funds can be considered. Recently, investors have also started using their powers to keep the promoters in check. For example, in May 2018 investors ousted a director of Fortis Healthcare who was an ally of the founders of the company.[165] Shareholders have also used their power to reject compensation for the managing director and the promoter of the Apollo Group, and proposed a reduction of 30% in their overall compensation.[166] Further, the promoters may lose control over the firms through the liberalised Foreign Direct Investment norms in India.[167] These examples show that investors who have traditionally been passive are now becoming active in the management of the companies in which they invest and can, when the need arises, use their powers to remove the directors. Therefore, promoters need to be wary of them.[168]

---

[163]Thus, safeguarding independent directors from the influence and power of the promoter. see: 'Board and Director Independence in Controlled Companies' (n 144) 4.

[164] Umakanth Varottil, 'A Cautionary Tale of the Transplant Effect on Indian Corporate Governance' (2009) 21 National Law School of India Review 14.

[165] Kiran Stacey, 'Fortis Loses Fourth Board Member in Blow to Founders' *Financial Times* (23 May 2018) <https://www.ft.com/content/41b3479a-5e68-11e8-9334-2218e7146b04> accessed 2 February 2022.

[166] Ajay Modi, 'Shareholders Force Head Honchos of Apollo Tyres to Take Pay Cut' (*Rediff*, 14 November 2018) <https://www.rediff.com/business/report/shareholders-force-head-honchos-of-apollo-tyres-to-take-pay-cut/20181114.htm> accessed 4 February 2022.

[167] Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019) 466; Abhishek Sinha, 'Key Promoter Considerations: Foreign Investment in Indian Startups' (*SME Futures*, 17 October 2020) <https://smefutures.com/key-promoter-considerations-foreign-investment-in-indian-startups/> accessed 24 May 2022.

[168] Additionally, shareholders have been empowered with legal remedies under s 244 of CA 2013 which states that shareholders may approach the National Company Law Tribunal (NCLT) for redressal of their grievances on the grounds of oppression and mismanagement. The concept of class action suits has also been introduced in Indian law but it is likely to be of limited value. See Vikramaditya Khanna, 'Enforcement of Corporate and Securities Laws in India: The Arrival of the Class Action?' in Robin Hui Huang and Nicholas Calcina Howson (eds), *Enforcement of Corporate and Securities Law* (CUP 2017) <https://www.cambridge.org/core/product/ identifier/9781316691397%23CN-bp-16/type/book_part> accessed 25 March 2022. Further, derivative action can also be initiated by shareholders but again it has substantial limitations because such methods of enforcement are more suited to dispersed shareholding, a strong capital market, and stronger institutional framework. See Vikramaditya Khanna and Umakanth Varottil, 'The Rarity of Derivative Actions In India: Reasons and Consequences' in Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (CUP 2012) <https://www.cambridge.org/core/ books/derivative-action-in-asia/rarity-of-derivative-actions-inindia/1C3A4414647587249E0A9F3F19BB54A8> accessed 25 March 2022.

4.3.Remuneration and Incentives

The ideology of shareholder primacy also underlies the remuneration practice. The executive's remuneration is generally understood in the context of the principal/agent relationship in terms of which remuneration is paid to the directors for the services they render to the company. Generally, a director's remuneration is made up of different components including a basic salary, commission on profits, allowances, long-term incentive schemes, stock options, and annual bonuses.[169] In most countries incentives and bonuses form the major source of income for directors[170] The incentive policy motivates directors and managers to pursue desirable goals by giving them a personal interest in those opportunities which increase shareholder wealth.[171]

In a dispersed shareholding structure such as the UK, economic scholars see executive remuneration arrangements as a partial solution to the agency problem,[172] in that shareholders are given control through the right to oversee the management and hold directors accountable. The incentive schemes for the directors are seen as effective mechanisms by which to maximise shareholder value.[173] The executives share the rewards with shareholders in the form of dividends, and with senior managements in the form of multi-million pound pay packages.[174] In concentrated shareholding country like India remuneration cannot be viewed in the same context. Nevertheless, both countries suffer from the rapid increase in executive remuneration. In India, there is a great

---

[169] In the UK directors are required to prepare a directors' remuneration report for each financial year of the company which includes details of directors' compensation, share options, and any interests in long-term incentive schemes, statement of the company's policy on directors' remuneration, and details of the directors' service contracts. See CA 2006 s 412(2); Paul L Davies and Sarah Worthington, *Gower's Principles of Modern Company Law.* (Sweet & Maxwell - MUA 2016) 725; Ashish Makhija, *Corporate Directors: Roles, Responsibilities, Powers and Duties of Directors* (LexisNexis 2016) 260.

[170] CA 2006 s 412(2).

[171] Andreas Cahn and David C Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (2nd edn, CUP 2018) 502; Katarzyna- Chalaczkiewicz-Ladna, 'The Relevance of Long-Term Interests in the Decision-Making Processes of Company Directors in the UK, Delaware and Germany: A Critical Evaluation' (PhD Thesis, The University of Edinburgh 2015) 177; Michael C Jensen and Kevin J Murphy, 'Performance Pay and Top-Management Incentives' (1990) 98 Journal of Political Economy 225, 226.

[172] Lucian Arye Bebchuk and Jesse M Fried, 'Executive Compensation as an Agency Problem' (2003) 17 Journal of Economic Perspectives 71, 71.

[173] ibid 72.

[174] BEIS, *Executive Rewards: Paying for Success: Eighteen Report of Session 2017–19* (2019) 11 <https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/2018/2018.pdf> accessed 9 October 2020.

difference in the rise of pay between a promoter CEO and a professional CEO.[175] Overall for professional CEOs compensation has increased by 1.5%, while promoter compensation has risen by 3% excluding dividends which the promoters may earn as shareholders.[176] This indicates the promoter's greater monitoring influence over decision making and the tendency to reward themselves more generously. Nevertheless, the question which arises in both countries is how to facilitate congruence between the goals of the managers and the stakeholders? This section seeks to determine how governance and remuneration arrangements can assist in promoting stakeholder interests in the UK and India.

There is a need to focus on a pay-setting process which reflects the interest of all stakeholders. The practices in relation to variable remuneration have been acknowledged to encourage short-term shareholder value.[177] 'Short termism' is also known as 'quarterly capitalism'.[178] Focus on excessive short term horizons by both corporate managers and financial markets is believed to be detrimental to the interests of stakeholders.[179] 'It

---

[175] For example, even during the COVID-19 pandemic while a number of employees were losing their jobs, the professional CEOs received a raise of 6.5% in FY 2019-20 whereas the promoter CEOs, on average, took home a 62% higher remuneration package than the professional CEOs despite having the same responsibilities. The study is based on a sample of BSE 200 companies and does not include stock options. See Namrata Singh, 'Professional CEOs See Average Pay Rise by 7% to Rs 13 Crore in FY20 - Times of India' (*The Times of India*, 2020) <https://timesofindia.indiatimes.com/business/india-business/professional-ceos-see-avg-pay-rise-by-7-to-rs-13-crore-in-fy20/articleshow/79454379.cms> accessed 9 October 2021.

[176] ibid.

[177] 'Implementing Sustainable Corporate Governance in Europe: A New Vision of Corporate Purpose', *Session 13: Corporate Governance and Capital Markets* (Frank Bold) <http://www.purposeofcorporation.org/corporate-governance-in-europe.pdf> accessed 14 September 2021.

[178] Short-termism indicates a thinking of 'how our corporations operate because of these CEOs' concerns about quarterly reports end up taking precedence over long-term concerns about investment and jobs and environmental sustainability'. See Senators Tammy Baldwin and Jeff Merkley, 'The Brokaw Act: Strengthening Oversight of Activist Hedge Funds' <https://www.baldwin.senate.gov/imo/media/doc/3.7.16%20-%20Brokaw%20Act%201.pdf> accessed 10 May 2022; Jonathan Chait, 'In Conversation With Barack Obama' (*Intelligencer*, 9 December 2020) <https://nymag.com/intelligencer/2020/12/in-conversation-with-barack-obama.html> accessed 10 May 2022.

[179] For example, see Bainbridge (n 144); Amanda Blackett*et al*, 'It's Time to Adopt the New Paradigm' (*The Harvard Law School Forum on Corporate Governance*, 11 February 2019) <https://corpgov.law.harvard.edu/ 2019/02/11/its-time-to-adopt-the-new-paradigm/> accessed 16 May 2022; Directorate-General for Justice and Consumers (European Commission) and EY, *Study on Directors' Duties and Sustainable Corporate Governance: Final Report* (Publications Office of the European Union 2020) <https://data.europa.eu/ doi/10.2838/472901> accessed 18 June 2021. Contra, in Roe's view 'attributing too many societal problems to a stock market time horizon problem as misdiagnosis. It gives more power and autonomy to directors that may lead to less accountability for performance'. He argues that misdiagnosis can lead to failure to cure the real problems of improving performance for equitable society. See Mark J Roe, *Missing the Target: Why Stock-Market Short-Termism Is Not the Problem* (OUP 2022) <https://oxford.universitypressscholarship.com/ 10.1093/oso/9780197625620.001.0001/oso-9780197625620> accessed 10 May 2022.

results in corporate funds being used for payouts to shareholders in the form of dividends and buy-backs rather than investment in workers, R&D, infrastructure, and long-term success.'[180] Directors should be incentivised to engage with ESG issues and have regard to longer-term consequences for sustainable value creation. For example, a reduction in the company's Co2 carbon footprint can be parameter of directors' remuneration. How those incentives are linked to the goals and objectives one wishes to achieve can be crucial in achieving the desired outcomes as a competent director will generally aim to work for a goal for which he or she is paid. Many companies in the UK are now linking ESG objectives and executive pay as a means of realising outcomes which reflect meaningful change in the way directors make decisions. In India, there is still a huge gap in understanding how to link directors' remuneration policy with such aspects to achieve the desired outcomes. This is discussed in detail below.

4.3.1. Linking ESG Targets to Remuneration

Including ESG metrics in the long-term incentives can influence director's behaviour and ensure that they integrate social and environmental concerns in their decision making.[181] This process of linking remuneration and ESG issues is considered to have a positive impact on stakeholders as directors' interests would be aligned with theirs.[182] The trend in the pay levels of the executives is often criticised as a factor influencing directors to take a short-term approach and excessive risk which contribute to the externalisation of social and environmental costs.[183] The combination of share options and incentive plans linked to share prices, together with a decrease in the average tenure for executives, has put pressure on executives to use strategies to increase the value of shares and share options in the short term.[184] In the UK, it has been highlighted that the structure of executive pay (which is dominated by incentive-based elements) and the weakness of remuneration committees work against a company's long-term sustainability.[185]

---

[180] Baldwin and Merkley (n 180).
[181] ICGN, 'ICGN Viewpoint Integrating ESG in Executive Compensation' (2020) 5 <https://www.icgn.org/sites/default/files/ICGN%20Viewpoint%20Integrating%20ESG%20in%20Executive%20Compensation.pdf> accessed 9 October 2021.
[182] Directorate-General for Justice and Consumers (European Commission) and EY (n 181) xi.
[183] Sjåfjell and Taylor (n 26) 22.
[184] Veldman *et al* (n 39) 44.
[185] BEIS (n 174) 3.

Variable remuneration has been used as a tool to align management and shareholder interests. More recently, board members and remuneration committees are increasingly recognising the importance of tying executive's pay to ESG objectives. The regulators have extended control over director's remuneration structure in the hope of providing suitable incentives for individual behavioural change.[186] The UKCGC states: 'Executive remuneration should be aligned to company purpose and values and be linked clearly to the successful delivery of the company's long-term strategy.'[187] It continues that the determination of remuneration policy should address issues such as clarity, simplicity, risk (eg, reputational risk from excessive rewards), predictability, proportionality, and cultural alignment.[188] The Investment Association's remuneration principles emphasise that to promote sustainability, ESG objectives should primarily be linked to the structure of LTIPs and performance measures.[189] Linking ESG issues and the incentive structure can be relevant but it is also important to focus on stakeholder outcomes and the company's impact on society and the environment.[190] It is also crucial to identify the appropriate ESG metrics for a company by engaging with all the stakeholders.

Given the growing importance of ESG factors for investors, it is hardly surprising that there has been an increase in proposals which focus on linking executive compensation to sustainability metrics.[191] In a survey conducted by the London Business School, it was found that 45% of FTSE 100 companies have linked ESG targets to variable pay, and 37% have included one ESG target in their bonus plans.[192] The PwC survey showed that 40% of the FTSE 100 companies have an ESG performance measure or basis (or

---

[186] It is argued this will interfere with the shareholder's control over remuneration and makes it more difficult for them to oversee and control management. See: Erik Lidman, 'The Role of Corporate Governance in Sustainability and Why the Commission's CSDDD Proposal Might Do More Harm than Good' (*Oxford Law Faculty*, 27 April 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/role-corporate-governance-sustainability-and-why-commissions-csddd>.
[187] The UK Corporate Governance Code (n 49) Principle P.
[188] ibid Provision 40.
[189] 'The Investment Association Principles of Remuneration' (November 2019) 4 <https://www.ivis.co.uk/media/13877/principles-of-remuneration-2020-final.pdf> accessed 9 November 2021.
[190] The focus of ESG is more on the way social and environmental risks affect company's performance, but CSR focuses on the impact of company's operations on the stakeholders. For stakeholder protection it is crucial to keep this difference between CSR and ESG in mind. See the discussion in Ch2 Pt 3.1. for the differences between CSR and ESG.
[191] For example, shareholders revolting on the basis of executives' excessive pay. See BEIS (n 176) 9–10;. ICGN (n 181) 6.
[192] Clifford Chance, 'ESG: Sustainable Corporate Governance and New Due Diligence Duties in Europe' 12, 3; Gautam Naik, 'Nearly Half of UK's 100 Biggest Companies Link Executive Pay to ESG Measures' <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/nearly-half-of-uk-s-100-biggest-companies-link-executive-pay-to-esg-measures-63248983> accessed 9 November 2021

both).[193] On average, 20% of the overall incentive have linked ESG measures to LTIP and 18% to bonus.[194] The survey found that bonuses focuses more on governance issues (85%) such as health and safety measures and risks. In contrast, 85% of companies with ESG elements in LTIPs have included some form of environmental measure, while 54% include social measures and 23% governance measures.[195] Looking at the recent annual reports of 50 companies, Deloitte found no clear correlation between remuneration and the consideration of broader ESG issues. However, 80% of the companies ((2020: 76%) included ESG factors in directors' variable remuneration, and 46% included environmental considerations (up from 24% the previous year)[196] Out of these 40 companies, 32 (2020: 31) included employee-related factors (commonly health and safety, engagement or diversity), 23 (2020: 12) included environmental matters, 21(2020: 23) included other matters (largely relating to customer-related metrics).[197] In the Grant Thornton report of FTSE 350, while 77% gave valid explanations on environmental matters, only 10% used environmental metrics in executive long-term incentive plans and when it comes to using aligning remuneration with the 'S' dimension, the percentage is even lower. Only 5% of companies remunerate executives on social metrics.[198] This could be because the social dimension is not easy to quantify and so aligning social targets to remuneration can be difficult. While more companies are following this trend, shareholder value still underpins performance- related CEO pay.[199] Pension elements have declined in the last decade and pay has become more incentive based with the overall culture favouring the shareholder value.[200] On the global level, however, the gap is even greater. Research conducted by Sustainalytics in April 2020 found that only 9% of companies in the FTSE All World Stock Index linked executive pay to ESG criteria.[201]

---

[193] 'Bringing ESG into Executive Pay' (PWC 2020) 3 <https://www.pwc.co.uk/human-resource-services/pdf/bringing-esg-into-executive-pay-v3.pdf> accessed 17 May 2021.
[194] ibid 4.
[195] ibid.
[196] 'Annual Report Insights 2021: Surveying FTSE Reporting' (n 53).
[197] ibid.
[198] Grant Thornton UK, 'Corporate Governance Review 2020' (2020) 36 <https://www2.grantthornton.co.uk/rs/445-UIT-144/images/Corporate_Governance_Review_2020.pdf?utm_source=mkto&utm_medium=email&utm_campaign=2020-11-00-Download-Gov-CGR-1322> accessed 17 May 2021.
[199] HighPayCentre, 'CEO Pay Incentives Reflect Board Priorities—and It's Still Shareholder Returns, High Pay Centre' (*High Pay Centre*, 14 January 2021) <https://highpaycentre.org/ceo-pay-incentives-reflect-board-priorities-and-its-still-shareholder-returns/>.
[200] BEIS (n 176) 6.
[201] Naik (n 192).

In Asian countries, ESG metrics in incentive plans vary greatly in their maturity level but more companies are recognising their importance.[202] This notwithstanding, governing directors' incentives through remuneration remain a challenge in India with a study by Refinitiv showing that only 8% of Indian firms have a policy on ESG-related executive remuneration.[203] Lack of regulation in this area limits ESG integration metrics to minority companies which slows down the business transition to long-term sustainability.[204] In many instances directors' remuneration does not include variable or performance-based payments.[205] As a starting point in India, regulators should make linking LTIP and ESG issues mandatory and provide guidance in understanding the provisions in the interests of stakeholder protection.

To promote long-term shareholdings by executive directors the UKCGC has extended the holding periods for share options from a minimum of three years to five years.[206] Further, the UK director's remuneration report quoted or registered companies with more than 250 UK employees must contain pay ratio (CEO pay to the average pay of their UK workforce) information annually.[207] Giving directors long-term incentives – eg, allowing them to own a long-term share in the business to ensure their horizons extend beyond their tenure – can be appealing in this context. The long-term goals should be supplemented by annual incentive objectives as intermediate milestones to acknowledge progress toward the long-term outcomes.[208] Targets and incentive pay-outs should be related to the purpose of the company.[209] Aligning managerial interests with companies'

---

202 Mint Kang and People Matters Pte Ltd, 'APAC Companies Adding ESG to Executive Pay: Survey' (*People Matters*, 14 December 2020) <https://www.peoplemattersglobal.com/news/compensation-benefits/apac-companies-adding-esg-to-executive-pay-survey-27886> accessed 17 May 2021.
203 Ashley Coutinho, 'Only 8% Indian Firms Have ESG-Related Compensation Policy: Refinitiv' *Business Standard India* (14 October 2020) <https://www.business-standard.com/article/markets/only-8-indian-firms-have-esg-related-compensation-policy-refinitiv-120101400060_1.html> accessed 17 May 2021.
204 Directorate-General for Justice and Consumers (European Commission) and EY (n 181) 109.
205 For example, in the NSE and SES studies of 50 companies for FY 2018-19, only 37% of the total EDs' remuneration consisted of variable performance-based remuneration. See 'ESG Analysis on 50 Listed Companies in India 2020' (SES, NSE 2020) 57 <https://www.sesgovernance.com/pdf/home-reports/1594458276_ESG-Analysis-on-50-Listed-Companies-in-India_2020.pdf> accessed 29 September 2021.
206 The UK Corporate Governance Code (n 49) Provision 36.
207 The Companies (Miscellaneous Reporting) Regulations 2018, reg 17.
208 Seymour Burchman, 'A New Framework for Executive Compensation' (*The Harvard Law School Forum on Corporate Governance*, 13 March 2020) <https://corpgov.law.harvard.edu/2020/03/13/a-new-framework-for-executive-compensation/> accessed 30 May 2021.
209 ibid.

purposes can establish accountability to a range of stakeholders.[210] This will send a signal about the company's priorities both within the business system and to all the stakeholders and ensure that the CSR culture drives the company.[211] To have a strategic approach towards this process, the ICGN recommends linking environmental or social responsibility pay metrics to the ESG goals already prioritised by the company. The reporting frameworks that provide ESG metrics can be used as targets for this purpose.

4.4. Board Leadership and Culture

The board plays an important leadership role in setting the tone of the corporate culture.[212] Directors' culture and leadership are identified as key elements in achieving the change desired.[213] Culture can be described as the totality of socially transmitted behaviour, beliefs, attitudes, and human thoughts.[214] It has a pervasive impact on business practices and organisational behaviour.[215] For stakeholder interests to be integrated in the business a shift in the mindset of directors is required to change and the change must also be able to disseminate those cultures and belief throughout the company. This is a crucial step as only the directors bear fiduciary duties towards the company while senior managers, employees, and controlling shareholders are not subject to the general duties.[216] A cultural change is extremely important in making a company truly embrace the spirit of the law. The UK government is trying to further both stakeholder interests and long-term value creation by focusing on values, behaviour, and corporate culture.[217] Aligning culture with the purpose of the company will help companies to carry out their business in an ethical and responsible manner. While the

---

[210] 'Principles for Purposeful Business' (The British Academy, Future of the Corporation, 2020) 23 <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf>.
[211] 'Bringing ESG into Executive Pay' (n 193) 5.
[212] Veldman *et al*(n 39) 38.
[213] ibid 22; 'Corporate Culture -A Thought Piece on Reporting' (n 40) 2.
[214] Paul Wong, 'Lessons from the Enron Debacle: Corporate Culture Matters!' in Nasreen Taher (eds), *Organizational culture: An introduction* (ICFAI University Press 2005).
[215] ibid.
[216] Fiduciary duty is a general duty of directors. The duties of directors set out in ss 171–177 of the Act are the general duties owed to the company. The general duties form a code of conduct, which sets out how directors are expected to behave. General duties include fiduciary duties, other non-fiduciary equitable duties, and common-law duties (eg, the duty of care). See CA 2006, ch 2. Under certain circumstances, fiduciary duty may arise during an employment relationship. *University of Nottingham v Fishel* [2000] EWHC 221 (QB); Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (n 159) 176.
[217] The UKCGC, Principle B and Provision 2.

purpose will drive the strategies and policy of the business, culture will guide directors to balance all stakeholders' needs during decision making. The FRC's annual report shows that culture was the most discussed topic in 2020 but only a few companies disclosed that they received reports on culture, and overall, there was limited discussion of assessing and monitoring culture.[218] Some of these companies identified culture as a key risk and recognised the importance of ensuring the correct culture in the context of stakeholder engagement.[219]

The Indian business culture differs from that of the UK due to the shareholding structure, weaker legal system, and the financial market which is not as advanced as in the developed countries. In India, it is more difficult to control whether the board has included stakeholder interests and there is also no guarantee that the achievement of CSR has been considered by the IDs as they are not independent.[220]

The role of corporate culture has not yet been considered in Indian corporate governance. The board and the company leaders can shape culture at all levels of the business for an efficient and sustainable business in place. In Indian business culture the board is not as empowered as in other countries like the UK and US, and very often the board is subordinate to the promoters in the company hierarchy.[221] The role of management is often assumed by a family member of the founder of the company and hence the shareholders significantly influence the management and the board.

Zaid *et al* argue that shareholding structure has a vital role in shaping a company's CSR attitude and culture as different shareholders offer a diverse social and environmental orientation.[222] Therefore, they can affect the decision-making process in the CSR context either positively or negatively. The greater number of shares held by a shareholder the greater his or her power and incentive to intervene and influence the decision-making process. Thus, ownership structure and organisational decision-making are inevitably linked and, in this vein, may also affect the company's CSR and its relationship with its

---

[218] FRC (n 51) 10.
[219] ibid.
[220] Balancing of stakeholders' interests and monitoring the board's decision making and performance falls to independent directors who, given promoter dominance in India, may or may not be fully independent due to promoter dominance.
[221] Bhattacharyya (n 159) 51.
[222] Mohammad AA Zaid *et al*, 'Ownership Structure, Stakeholder Engagement, and Corporate Social Responsibility Policies: The Moderating Effect of Board Independence' (2020) 27 CSR and Environmental Management 1344, 1345.

stakeholders. The concentrated shareholding pattern may be associated with higher CSR spending.[223] This is because the promoters have a keen interest in the affairs of the companies and will often prefer to have strategies for its long-term sustainability[224] because of their longer ties with the company. But where CSR goals can be pursued at the expense of shareholder interests, the board is often reluctant to pursue such goals due to the dominance of the controlling shareholders. Because of the dominance of promoters, and the wide discretion given to directors, directors will attach considerable importance to the interests and views of the promoters when formulating and implementing CSR policies.[225] Moreover, as the promoters have all the inside information, they can engage in self-dealing which can substantially impede CSR goals. Promoters' control and hinderance may make decision making by the boards less efficient and create dilemmas in the promotion of CSR.

But in India the promoters are generally well accepted and have a positive and significant influence on a firm's performance.[226] Wong argues that a hierarchical culture is not always bad, but that hierarchies without accountability tend to have a corrupting influence on autocratic leaders.[227] Regulating culture can work well in India as Indian businesses are often very hierarchically structured. The board and the company leaders can shape culture on all levels of the business for an efficient and sustainable business.

4.5. Balance of Power

In both jurisdictions, company law largely reflects shareholder primacy and operates for the benefit of shareholders who are protected by a variety of legal measures. The strong shareholder ideology in the company law framework sees shareholders as the accountees. There are exclusive shareholder powers such as power to dismiss directors, to alter the division of powers between themselves and directors, their say on pay, and

---

[223] An empirical study was conducted to establish the impact of corporate governance on CSR in the 500 largest Indian companies using both quantitative and qualitative information on CSR activities. The sample period was 2009–10 to 2011–12. See Saumitra N Bhaduri and Ekta Selarka, *Corporate Governance and Corporate Social Responsibility of Indian Companies* (Springer Singapore 2016) 87, 88, 93.

[224] Balasubramanian and Anand (n 158) 32.

[225] Jean J Du Plessis, *et al,* (eds), *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance* (Springer International Publishing 2018) 11.

[226] Naveen Kumar and J P Singh, 'Effect of board size and promoter ownership on firm value: Some empirical findings from India' (2013) 13(1) Corporate Governance: The International Journal of Business in Society, 88.

[227] Wong (n 214).

capital-related decisions, that constrain any inclination on the part of boards to act in the interest of stakeholders. The framework is further strengthened by aligning managers' remuneration with short-term profit maximisation. The collective effect of these influences has created an organisational culture which directs the board to pursue financial objectives and in particular, its own short-term orientation to obtain shareholder value.

This pattern is evident in both the UK and India, although different influences appear to have been at work and may explain the common outcome in the two systems. It is strongly entrenched in both legislation and practice. It is crucial to recognise the fact that a company is constituted with different types of capital on which the company can draw for its business success. Therefore, to establish accountability towards wider society, steps must be carefully designed. The chapter argues in favour of a process in which stakeholders' voices are heard and integrated. Directors' duty has not had a significant practical impact on their behaviour and changes are required to support a corporate governance framework of stakeholder inclusivity where a balance in the distribution of wealth and power is established. It is important to establish an accountable framework while maintaining a balance between directors' discretion and transparency in decision making. The thesis argues that there is no single method of achieving the CSR goals but it is suggested that the substantive duties must be supplemented by mechanisms that aid in achieving the desired outcome. A mandatory due diligence mechanism emphasises the identification, assessment, and mitigation of the ESG risks posed by the companies' operations. This would not only empower stakeholders but also build trust so enhancing companies' reputation and promoting responsible business conduct.

5. ADJUSTING BOARD DECISION MAKING TO PROTECT STAKEHOLDERS

5.1. Due Diligence: Regulatory Framework

This section analyses due diligence as a mechanism to protect stakeholder interests in the context of 'process v substance'. Due diligence aims to promote responsible business practice and is a 'bundle of interrelated processes to identify actual and potential adverse impacts with respect to the companies' operations on workers, the environment, human rights, their supply chains and other business relationships'.[228] The directors should

[228] 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD 2018) 15 <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-

assume responsibility for conducting due diligence to mitigate the potential and actual risk in implementing the broader purpose and continuously identify and internalise the externalities. This process cannot be carried out in isolation and requires constant engagement with the stakeholders and communication on how the impact of the company's operations is addressed.[229] The OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance) explains that an effective due diligence process aims to enable companies to remediate adverse impacts caused by their operations, ie, it focuses on the external impact of the companies' operations on the environment and the society and not on the risk to the companies from such issues.[230] Other globally recognised instruments which encourage companies to put due diligence mechanisms in place are the OECD Guidelines for Multinational Enterprises,[231] the UNGP on Business and Human Rights,[232] and the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy introduced by the ILO.[233] The OECD guidance helps companies to operationalise these frameworks.[234] These guidelines set a baseline expectation for the companies to avoid causing harm or an adverse impact, and engage in the due diligence process.[235] It recommends tracking implementation and results, communicating how impacts are addressed and providing for or cooperate in remediation when appropriate.[236] The UNGP expects companies to make due diligence a part of their framework to become aware of, prevent, and address human rights impacts in their entire global value chains (GVC). These initiatives are an important part of the regulatory framework but they remain ineffective in holding multinational companies responsible for violations of environmental and human

---

Conduct.pdf?_ga=2.37488864.1343405047.1620926589-1678981573.1620926589> accessed 2 February 2021; OECD, *Guidelines for Multinational Enterprises* (2011) 20.

[229] ibid 21-20. Stakeholder engagement is also discussed in detail in Ch3 Pt 2.2.

[230] ibid 15.

[231]OECD, *Guidelines for Multinational Enterprises,* (2011).

[232]'UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (HR/PUB/11/04, 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 16 July 2019.

[233]'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 16 July 2019.

[234] OECD (n 228 'Due Diligence') 3.

[235]Ibid 20; OECD, *Guidelines for Multinational Enterprises,* (2011) 20; 'UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,' 14 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 3 July 2020.

[236] OECD 2011 (n 230) Pt II.

rights.[237] The continuing reports about violations of social and environmental standards set by these frameworks, signal voluntary due diligence progress in preventing and mitigating the adverse impact on stakeholders as inadequate.[238] The weak implementation of due diligence frameworks does little to protect the interests of stakeholders and there is a need to move from voluntary to mandatory due diligence to improve CSR standards.

Recognising the limitations of voluntary due diligence, the EU parliament voted for mandatory due diligence that will potentially increase compliance with responsible business conduct in Europe and beyond.[239] The EU has recently proposed a corporate due diligence and corporate accountability initiative (ESG Due Diligence Law) which will require companies to have an ongoing dynamic due diligence process covering the adverse impacts on the ESG areas.[240] The draft adheres to the international instruments of responsible business conduct mentioned above, but is step forward as companies will need to apply mandatory due diligence that will push them towards a consideration of stakeholder interests in decision making.[241] It stresses transparency, the need to establish procedures for stakeholder engagement, and the imposition of sanctions depending on the severity of the case, and the establishment of a grievance mechanism that can provide effective early-stage recourse.[242] The recommendations, if implemented, will require directors to focus on the various processes such as risk assessment, due diligence strategy implementation, annual evaluation, internal grievance mechanism, and the remediation

[237] 'European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2020/2129(INL))' 10 <https://www.europarl.europa.eu/doceo/ document/TA-9-2021-0073_EN.pdf> accessed 3 August 2021.
[238] The Global Estimates of Modern Slavery and Child Labour 2017 found that over the five-year period from 2012 to 2016, 89 million people were victims of modern slavery, largely in private companies. See ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2017) 25 <https://www.alliance87.org/ global_estimates_of_modern_slavery-forced_labour_and_forced_marriage.pdf> accessed 3 August 2021.
[239] 'European Parliament Resolution of 10 March 2021 (n 237) 13.
[240] Richard Sterneberg *et al*, 'The European Commission's New Approach to ESG Due Diligence and Corporate Accountability | Insights | DLA Piper Global Law Firm' (*DLA Piper*, 25 March 2021) <https://www.dlapiper. com/en/belgium/insights/publications/2021/03/the-european-commissions-new-approach-to-esg/> accessed 3 August 2021.
[241] It is said that the French 'Loi de Vigilance', the UK's Modern Slavery Act 2015 (MSA), and the recent proposal for a Supply Chain Due Diligence law in Germany have been the leading examples for the EU in setting the ESG due diligence standards. See Sterneberg *et al*, (n 242).
[242] 'European Parliament Resolution of 10 March (n 237) 14–15. Stakeholder engagement is arguably the key to effective due diligence. See OECD, 'Due Diligence Guidance for Responsible Business Conduct' (2018) 16–19.

process. It has the potential to set due diligence standards across the EU and beyond.[243] The proposal on the Directive on Corporate Sustainability Due Diligence (CSDDD), released in February 2022, aims to make due diligence mandatory and introduces duties for directors to set up and oversee the implementation of the due diligence processes and integrate the process in their corporate strategy.[244] The directors must take human rights, climate change, and the environmental consequences of their decisions into account when fulfilling the duty to act in the best interest of the company. The enforcement is through administrative supervision and civil liability.[245] It also mandates disclosure in line with the Paris Agreement's 1.5°C limit on global warming.[246] The proposal introduces control over remuneration which requires linking the variable remuneration and the contribution of a director to the company's business strategy and long-term interests and sustainability.[247] This effort may shelter directors from shareholders' influence and bring a change in the balance of power between the shareholders, other stakeholders and directors.[248] The proposal aims to translate soft recommendations of the international organisations such as the UN and the OECD into hard law requirements – but it lacks precision. [249] This notwithstanding, when implemented at national level the proposals may indeed be more specific and include relevant rules.[250] The mandatory disclosure requirement may enable standardisation and comparability. It is believed that mandatory due diligence would be consistent with creating a corporate culture that facilitates stakeholder relations.

It is expected that with the implementation of mandatory due diligence the cost of compliance will increase depending on several factors such as sector, type of activity,

---

[243] Sterneberg *et al*, (n 242).
[244] 'Directive of The European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' 4 <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 15 May 2022.
[245] ibid 41.
[246] ibid art 15.
[247] ibid art 41.
[248] This will lead to changes in the shareholders' say over director's remuneration. This is further discussed in Ch 3 Pt 4.3
[249] Wolf-Georg Ringe, 'Net-Zero Plans under the Proposed CSDD' (*Oxford Law Faculty*, 28 April 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/net-zero-plans-under-proposed-csdd> accessed 10 May 2022.
[250] Guido Ferrarini, 'Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU' (*Oxford Law Faculty*, 22 April 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between> accessed 11 May 2022.

and the risk that the company generates.[251] However, it would also increase a company's performance potentially leading to increased profitability across Europe and positive outcomes for stakeholders.[252] It is believed that ESG accountability through due diligence will lead to an increase in transparency, a reduction in human rights violations and negative environmental impact, increased reputation, and greater incentives to innovate.[253] Where the cost of compliance materially increases, ICGN recommends that companies develop a strategic view to address these issues and to maintain transparency and disclose information to shareholders. In its response to the EU, the ICGN recommends due diligence be regulated through a principle-based approach and discourages a mandatory due diligence duty.[254]

Implementation through hard law regulation may become prescriptive and lead to tick-box compliance.[255] However, as is clear from the discussion above, the voluntary approach to due diligence has been ineffective and has failed guarantee a level playing field. This has impacted negatively to those companies which practise due diligence. Further, the efficacy of disclosure as a regulatory approach is questioned.[256] It is often considered to be a weaker option in regulating the issue, especially when targeting social issues.[257] For example, on national level section 54 of UK's Modern Slavery Act 2015 (MSA) which is based on mandatory disclosure is considered to be unsuccessful and to highlighting tick-box compliance and the weakness of voluntary due diligence. The next section focuses on the relevant due diligence laws in the UK and India in the context of hard law v soft law. Apart from the patchy implementation of the international instruments which promote good corporate behaviour, the UK and India have limited due diligence regulations. This is further discussed below.

---

[251]European Parliament. Directorate General for Parliamentary Research Services., 'Corporate Due Diligence and Corporate Accountability: European Added Value Assessment.' (Publications Office 2020) 62 <https://data. europa.eu/doi/10.2861/594198> accessed 30 April 2021.

[252] 'European Parliament Resolution of 10 March' (n 237) 64.

[253] A study was conducted by analysing a sample of EU companies and positive correlation was confirmed between the extent to which companies implement environmental and social policies and their economic performance, see: European Parliament. Directorate General for Parliamentary Research Services. (n 253) 62,63.

[254] ICGN, 'ICGN Comment Letter-European Union (EU) Sustainable Corporate Governance Consultation' (8 February 2021) 10 <https://www.icgn.org/sites/default/files/3.%20ICGN%20 response%20to%20 Sustainable%20Governance%20EU%20Consultation%202021.pdf> accessed 30 April 2021

[255] ibid 4–5.

[256] See discussion in Ch 3 for evaluation of disclosure as a technique to protect stakeholders.

[257] Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (CUP 2018) 85.

5.1.1. The UK

The UK's Modern Slavery Act 2015 (MSA) addresses the role of business in preventing, mitigating, and providing a remedy for human rights violations in the global supply chain.[258] 'Modern slavery' refers to forced labour or exploitation of people at work such as serious human rights abuse.[259] The Act aims to increase transparency and accountability of companies, in the main, through mandatory disclosure. It addresses issues of labour exploitation such as child labour, unsafe working conditions, or discrimination based on gender, religion, etcetera in the supply chain operations. The disclosure *may* include information on the company's due diligence processes in relation to slavery and human trafficking in its business and supply chains and the steps taken to assess and manage those risks.[260] The Act has created a level playing field by setting the standards and focusing on risk mitigation and prevention which pushes the agenda into the boardroom.[261] The board has been given the responsibility of approving the company's statements.[262] However, no specific duty to apply due diligence is created and there is no obligation to carry out a due diligence process – regulation is mainly in the form of reporting duties. It is not clear which companies are covered by the provision and this may also create confusion in effective compliance monitoring with the MSA requirements.[263] It is criticised as non-stringent, vague, and generic[264] with no strong enforcement mechanism. The companies are merely required to provide statements in relating to slavery and human trafficking and not much detail about the steps taken to

---

[258] Home Office, 'Transparency in Supply Chains Etc. A Practical Guide' 3, 4, https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide/transparency-in-supply-chains-a-practical-guide> accessed 10 February 2022.

[259] 'Section 54 of the Modern Slavery Act – Transparency in Supply Chains' (*Freshfields Bruckhaus Deringer*, 2015) <http://knowledge.freshfields.com/en/global/r/1314/section_54_of_the_modern_slavery_act___transparency_in> accessed 30 April 2021.

[260] Modern Slavery Act 2015 s 54(5).

[261] Quintin Lake *et al*, *Corporate Leadership on Modern Slavery: How Have Companies Responded to the UK Modern Slavery Act One Year On?* (2016) 7 < https://www.ethicaltrade.org/sites/default/files/shared_resources/corporate_leadership_on_modern_slavery_full_report_2016.pdf> accessed 15 January 2020.

[262] Modern Slavery Act 2015 s 54(6).

[263] 'Written Evidence from Anti-Slavery International (HRB0021)' <http://data.parliament.uk/writtenevidence/ committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/ 35067.html> accessed 30 April 2022.

[264] Genevieve LeBaron and Andreas Rühmkorf, 'The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act' (2019) 17 Socio-Economic Review 709, 728.

tackle modern slavery is provided.[265] In FRC's report on the reporting practice under section 54, it was found that around one in ten companies provide no modern slavery statement and, consequently, fail to comply with the section 54 reporting requirement.[266] Overall, the reporting lacked the information needed for stakeholders to be in a position to make informed decisions.[267]

In case of non-compliance, the duties are enforceable by the state which must seek an injunction against the company in the High Court.[268] In an independent review of the Act published in 2019,[269] it was noted that state has not exercised its power and no penalties have to date been imposed on non-compliant organisations.[270] In the same review it was found that 'a number of companies are approaching their obligations as a mere tick-box exercise', and that around '40 percent of eligible companies are not complying with the legislation at all'.[271] All these factors reduce the efficacy of this legislation in encouraging the expected behaviour.[272] The weak reporting requirements on transparency in supply chains make it difficult to hold companies accountable.[273]

To address these criticisms the government has proposed substantive compliance requirements to section 54 of the MSA.[274] It is believed that the new proposals will

---

[265] UK Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability, Sixth Report of Session 2016–17' (2017) 38 <https://publications. parliament.uk/pa/ jt201617/jtselect/jtrights/443/443.pdf> accessed 9 May 2022.

[266] The evidence was based on sample of 100 companies comprising FTSE 100, FTSE 250, and Small Caps. See FRC, 'Modern Slavery Reporting Practices in the UK Evidence from Modern Slavery Statements and Annual Reports' (2022) <https://www.frc.org.uk/getattachment/77c053d9-fe30-42c6-8236-d9821c8a1e2b/FRC-Modern-Slavery-Reporting-Practices-in-the-UK-2022.pdf> accessed 11 May 2022.

[267]FRC ibid.

[268]Modern Slavery Act 2015 s 54(11).

[269] Great Britain and Home Office, 'Independent Review of the Modern Slavery Act 2015: Final Report' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 11 May 2022.

[270] ibid 15.

[271] ibid.

[272] Numerous reports of gross human rights abuses in the factories are reported. For example, labour rights abuses in the East Midlands garment industry was reported where labours were paid £3 an hour for making clothes for high street giants. See Ashley Armstrong, 'British Factory Workers Paid £3 an Hour Making Clothes for High Street Giants' *The Telegraph* (23 January 2017) <https://www.telegraph.co.uk/business/2017/01/23/ british-factory-workers-paid-3-hour-making-clothes-high-street/> accessed 11 May 2022.

[273] UK Joint Committee on Human Rights (n 265) 42.

[274] 'Transparency in Supply Chains Consultation: Government Response' (2020) 21 <https://assets.publishing. service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf> accessed 30 April 2021

strengthen the transparency requirement in the Act and make it a criminal offence to supply a false statement on modern slavery and human trafficking or to continue to use supply chains which fail to demonstrate minimum standards of transparency.[275] However, this is a private member's bill and may not become law.[276] It may, nonetheless, still influence companies to be more responsible in the fear that enforcement for non-compliance may become more rigorous, driving the 'S' in ESG to achieve better CSR standards.[277]

The UK also has the Bribery Act 2010[278] (UKBA) which establishes extraterritorial corporate criminal liability for bribery in global supply chains. Section 7 creates a corporate offence of 'failure to prevent' bribery and establishes strict liability[279] for companies and partnerships which fail to prevent bribery. Companies can be found guilty of the offence if the bribery is carried out by an associated person such as an employee or an agent.[280] This applies to all companies incorporated under the law of any part of the UK and which carry on business whether there or elsewhere.[281] The Bribery Act provides for both corporate and individual criminal liability.[282] Under the UKBA, criminal liability, including fines, can be imposed on a director even where he or she was unaware of the bribery. Further, a director may even be disqualified for up to 15 years under section 2 of the Company Directors Disqualification Act 1986.

The UKBA requires companies to have adequate procedures designed to prevent associated persons from undertaking such conduct. Companies have a statutory defence

. These intended changes also reflect the recommendations of the Independent Review of the Modern Slavery Act 2015 conducted at the request of the Prime Minister. See Great Britain and Home Office (n 273).

[275] Modern Slavery (Amendment) Bill [HL] 2021,https://bills.parliament.uk/publications/41860/documents/390 accessed 30 April 2022.

[276] 'Talking out: How MPs Block Private Members' Bills' *BBC News* (7 November 2016) <https://www.bbc.com/news/uk-politics-37845980> accessed 20 April 2022.

[277] The 'S' dimension has not received attention or progressed as much the 'E' and 'G' dimensions in the UK see discussion in Ch3 Pt 4.3.

[278] The Bribery Act 2010 came into force on 1 July 2011. See 'Bribery Act Guidance' (*Serious Fraud Office*) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/> accessed 12 May 2022.

[279] Strict liability exists when 'defendant is liable for committing an action, regardless of what his/her intent or mental state was when committing the action'. See Strict Liability <https://www.law.cornell.edu/wex/strict_liability> accessed 30 April 2022

[280] Associated person in terms of s 8 of the UKBA includes employees (who are presumed to be performing services for their employer), agents, and subsidiaries.Section.8(4) is wide enough to include the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf. Bribery Act 2010 s 8(4); 'The Bribery Act 2010 - Guidance' 45, para 37.

[281]Bribery Act 2010 note 48.

[282] ibid s 11.

if they have adequate procedures.[283] The burden of proof falls on the companies to show that they have adequate procedures in place to prevent bribery. Adequate procedures, according to the UKBA Guidance,[284] is based on six flexible and outcome-focussed principles.[285] These principles are: (1) proportionate procedures (based on type of risk faced by companies and the nature and scale of operations);[286] (2) top-level commitment (directors should be committed to fostering a culture where bribery is unacceptable);[287] (3) risk assessment (based on exposure to potential external and internal risks of bribery);[288] (4) due diligence (will often form part of a wider due diligence framework as a part of risk assessment and mitigation);[289] (5) communication (policies and procedures should be embedded throughout the organisation);[290] and (6) monitoring and reviewing the procedures designed to prevent bribery.[291] As the 'failure to prevent' is paired with the statutory defence of adequate procedure, it creates an incentive for directors to monitor it carefully.

Compared to the MSA, UKBA is considered a stricter form of legislation to fight corruption and to create a good corporate culture. The UKBA includes binding public standards and provides a sanction for non-compliance.[292] The 'failure to prevent' model is currently under consideration together with 'failure to prevent' liability for due diligence. This was first proposed in 2017 by the parliamentary Joint Committee on Human Rights (JCHR).[293] It is expected to bring legal certainty, clarity in human rights obligations, and a level playing field to align the current legal landscape with standards set by the UNGP.[294] Introduction of a failure-to-prevent mechanism for human rights harm as a form of strict liability may be considered as progress in the scope and sanctioning of the MSA and potentially increase accountability of directors and senior managers by making them more vigilant of the due diligence process in that they can be

---

[283]ibid s 7(2).
[284] The guidance is issued by the Ministry of Justice. See ibid s9; 'The Bribery Act 2010 - Guidance' (n 284).
[285] 'The Bribery Act 2010 - Guidance' (n 280) 20.
[286] ibid 21.
[287] ibid 23.
[288] ibid 25.
[289] ibid 27.
[290] ibid 29.
[291] ibid 31.
[292]Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15, 16.
[293] UK Joint Committee on Human Rights (n 265) 6.
[294] Irene Pietropaoli *et al,* 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms' (BIICL 2020), 68.

held liable for the offences by the company's employees, agents, or other connected parties. Together with the due diligence requirement, the 'failure to prevent' mechanism is likely to affect the decision making of directors as well as the reporting requirements of the company.[295] The understanding of the material risk is likely to include risks to rights-holders and not just to the companies.[296]

5.1.2. India

The National Guidelines for Responsible Business Conduct[297] (NGRBC) 2018 is aligned with the international initiatives like the UNGP, the SDG, and the International Labour Organization (ILO) Core Conventions 138 (minimum age for employment of children) and 182 (worst forms of child labour). The NGRBC explains that companies should carry out due diligence on human rights to identify, prevent, and mitigate impact on human rights and provide access to effective grievance redressal mechanisms. The guideline is principle-based and does not focus on the implementation of due diligence.

The need for due diligence is emphasised in section 135 of CA 2013. The section is currently riddled with implementation and governance problems and therefore, it is recommended to apply a due diligence mechanism to the company's CSR activities and to the Implementation Agencies (IAs). Rule 4 of CSR Rules states that companies can implement their CSR policies by engaging IAs but such IAs should have established track records of at least three financial years in undertaking similar activities. IAs effectively execute the CSR programs as they have the necessary skills and in-depth knowledge of the social conditions in the local area. In the past three years approximately 60% of all CSR expenditure has been done through IAs.[298] The KPMG 2019 survey also suggests that a large number of companies (approximately 75%) are implementing their

[295] ibid 34.
[296] According to Principle 17 of the UNGP, 'Human rights due diligence can be included within broader enterprise risk- management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders'.
[297] NGRBC implements the UNGP on national level which recommends companies to carry out due diligence. See National Guidelines on Responsible Business Conduct 2018, Principle 5: Businesses should respect and promote human rights. This is further discussed below.
[298] '60% of Total CSR Expenditure Done through Implementing Agencies, Data of NGOs Not Maintained by MCA' (*India CSR Network*, 6 April 2021) <https://indiacsr.in/60-of-total-csr-expenditure-done-through-implementing-agencies-data-of-ngos-not-maintained-by-mca/> accessed 30 April 2022.

CSR programs through partnerships.[299] However, there are a number of fraud and money-making organisations indulging in unethical practices. Hence, it is important to identify the correct IAs if companies wish to engage with them for CSR programmes. It was noted by the High-level Committee on CSR (HLC) that it is the responsibility of the board to conduct a due diligence of IAs.[300] However, the EY conducted a survey of 100 CSR executives in India and found that only 45% of companies had taken any steps to check their past records.[301] The survey also revealed fraud and unethical practices in CSR programmes and found financial misrepresentation of CSR funds (33%), fraud in procurement of goods and services (34%), and the diversion of funds (30%).[302] To help companies identify the appropriate IAs and put a suitable check on the CSR activities in place, the HLC said that the MCA can maintain a register of IAs.[303] Currently, the MCA does not maintain the data of IAs involved in CSR activities but the recent amendment of CSR rules makes registration of IAs mandatory.[304] This is a welcome step as it may help companies to stop fraud or unsuitable IAs. Making a wrong choice of IAs can significantly affect the stakeholders as they may not be able to access the benefits of the CSR programs. But for the success of section 135, conducting a due diligence process is crucial to assess the ability of the IA to execute the CSR programs. The CSR Committee should move beyond tick-box compliance and actively monitor so as to identify and mitigate risks and assess their impact on stakeholders. This may shift the focus from the prescriptive and outcome-based approach of section 135 and potentially fill the governance gap in that section.

From the above discussion it can be said that in both India and the UK there is a need to establish a higher standard for companies to prevent corporate abuse and irresponsible behaviour. The impact of shareholder primacy is exacerbated by a loophole in the

---

[299] 'India's CSR Reporting Survey 2019 - KPMG India' (*KPMG*, 5 March 2020) 35 <https://home.kpmg/in/en/ home/insights/2020/02/india-s-csr-reporting-survey-2019.html> accessed 30 April 2021.

[300] MCA, *The Report of the High-Level Committee on Corporate Social Responsibility* (2019) 77; 'The Report of the High-Level Committee' (2015) 25 <https://www.mca.gov.in/Ministry/pdf/HLC_report_05102015.pdf> accessed 30 April 2021.

[301] EY, 'Corporate Social Responsibility in India: Re-Engineering Compliance and Fraud Mitigation Strategies-Forensic & Integrity Services' (2020) 5 <https://www.ey.com/en_in/forensic-integrity-services/how-can-companies-integrate-ethics-in-corporate-social-responsibility-programs-to-mitigate-fraud-risks> accessed 30 April 2021.

[302] 'Weak Governance and Lack of Due Diligence Pose a Grave Risk to CSR Programs: EY Survey' <https://www.ey.com/en_in/news/2020/05/weak-governance-and-lack-of-due-diligence-pose-a-grave-risk-to-csr-programs> accessed 24 April 2022.

[303] MCA (n 300) 77.

[304] ibid (n 298).

regulation of transnational corporate groups and the limited capacity of traditional corporate control mechanisms.[305] Therefore, there is a need to move from a theme-based approach to due diligence and put in place comprehensive ESG due diligence.[306] The existing regime in the two jurisdiction is limited in scope and clearly not able to achieve the desired outcomes for stakeholders and there is a need to reform the regulatory framework and rely more heavily on a mandatory approach in this context. This will overcome the tendency of directors to priorities shareholder value in absence of a legal requirement to do so.

The duty to conduct due diligence can be implemented either through the substantive aspect or the procedural aspect. If a substantive duty is created in relation to the due diligence mechanism, potential difficulties may arise in relation to enforcement by stakeholders. Due diligence, however, may be regulated similarly to section 172 of CA 2006 so that it can only be enforced by shareholders to the exclusion of other stakeholders.[307] Due diligence, coupled with a failure-to-prevent mechanism's requirements will potentially broaden the scope of consideration of stakeholder interests and engagement. Implementing the due diligence duty will provide legal certainty as regards directors' duties and assist in addressing the shareholder primacy norms.[308] As an initial step companies should be asked to undertake a risk assessment and implement a due diligence strategy.[309] External verification of the process is also recommended along with the audit of annual report on the strategy.

---

[305] Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 Utrecht Journal of International and European Law 7, 7; Kamil Omoteso and Hakeem Yusuf, 'Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism' (2017) 13 Critical Perspectives on International Business 54.
[306] John Gerard Ruggie and Emily K Middleton, 'Money, Millennials and Human Rights: Sustaining "Sustainable Investing"' (2019) 10 Global Policy 144, 144.
[307] Methods of enforcement can be through public monitoring, a non-judicial body with a right of review over corporate acts, an ombudsman, or OECD's NCP. See Choudhury and Petrin (n 261) 238.
[308] Beate Sjafjell, 'Company Law: The Corporate Board and Mandatory Sustainability Due Diligence' (*Human Rights and the Environment Blog*, 24 May 2021) <https://novabhre.novalaw.unl.pt/company-law-corporate-board-mandatory-due-diligence/> accessed 8 March 2022.
[309] 'Mandatory Corporate Human Rights Due Diligence: What Now and What Next? An International Perspective' [2021] Gibson Dunn 3 <https://www.gibsondunn.com/wp-content/uploads/2021/02/mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international-perspective.pdf> accessed 18 June 2021.

6. CONCLUSION

This chapter has dealt with the potential techniques for stakeholder protection under the theme of 'substance v process'. Substance deals with the outcomes or goals to be achieved, whereas process relates to the director's decision-making process which focuses on how to achieve those goals.[310] The substantive duty under section 172(1) of CA 2006 and section 166(2) of CA 2013 requires directors to consider stakeholder interests in the process of decision making without guiding them on how this is to be done. There is a lack of transparency in decision making and a lack of enforcement mechanisms effectively to ensure the protection of their legitimate interests in corporate activity. Directors have a wide discretion to conduct the affairs of the company, but so wide a discretion may not always lead to the integration of stakeholder interests. Disclosure can increase transparency in the decision making, but it has its own limitations. While a wide discretion has been provided to directors under the substantive duty in both jurisdictions, the UK has also introduced a process for engaging with stakeholders under Provision 5 of UKCGC.[311] India still focuses on 2% spending on CSR activities and on disclosure making the overall approach to stakeholder protection rigid and inadequate. Changes are needed in both countries to ensure better stakeholder protection and engagement.

Corporate purpose in the two countries already allows integration of stakeholders. Nevertheless, the fact that directors are permitted to consider various social and environmental factors in their decision-making process, is not necessarily an adequate way of promoting CSR. Having a clear purpose statement and embedding it in the articles of the company is suggested.[312] This should be accompanied by shareholder's input to shield it from inconsistent shareholder proposals. Parts 3 and 4 of the chapter discussed shareholder rights and their power to influence the decision-making process. Company law apportions powers between the board and the shareholders where the day-to-day decision making is entrusted to the management and shareholders act as monitors. Shareholders have several intervention rights and voting rights in relation to directors' remuneration, appointment, and dismissal, which collectively have a considerable influence on how directors make decisions. Because of the shareholding structure, collective action by shareholders can influence the directors to pursue shareholders'

---

[310] See discussion in Pt 1.
[311] See discussion in Ch4 Pt 2.2.
[312] See discussion in Pt 2.

selfish interests.[313] The UK has generally facilitated active involvement of shareholders. In India, due to its concentrated shareholding structure, the promoters are powerful and have great influence over corporate decision making. The inclination of directors to favour promoters, the lack of any enforcement mechanisms for stakeholders, and the lack of practical guidance on directors' duties may reduce the efficacy of the stakeholder approach and thereby negatively affect CSR.[314]

Thus, in both jurisdictions company law largely reflects shareholder primacy which is further strengthened by aligning directors' remuneration with shareholders' short-term interests.[315] The chapter argued in favour of establishing a process where stakeholders' voice is heard and integrated in the decision-making process. Due diligence as a mechanism for identifying and mitigating environmental and social risks through a mandatory approach was suggested.[316] Advantages of mandating a process is that directors must take certain steps to achieve the outcome. The outcome is based on the board's decisions which makes it a sound decision-making process which will deliver a positive outcome. It can address directors' inclination to make decisions to maximise shareholder returns. It will also open up the opportunity for stakeholders to engage in the process and influence the decisions. Thus, the outcomes are more likely to be relevant to stakeholders' needs and priorities. Due diligence has only been regulated through disclosure which has not resulted in a change in directors' practice.[317] In India fraud and unethical CSR practices have been reported and, therefore, having a mandatory due diligence process will increase transparency by giving directors exposure to the critical aspects that need to be considered into in performing CSR activities.[318] However, the due diligence process must be subject to external verification and audited disclosure if it is to be appropriately implemented.

The next chapter further deals with the techniques to protect stakeholders under the theme 'process v disclosure'. Disclosure plays a major role in both counties in holding companies accountable for identifying and addressing ESG concerns. However, disclosure is limited solely to informing the stakeholders. Stakeholders need an opportunity to take part in the decision-making process so as to influence strategy and

---

[313] See discussion in Pt 4.1.
[314] See discussion in Pt 4.5.
[315] See discussion in Pt 4.3.
[316] See discussion in Pt 5.
[317] See discussion in Pt 5.1.1.
[318] See discussion in Pt 5.1.2.

desired outcomes. Thus, the next section evaluates disclosure and stakeholder engagement as techniques to protect stakeholders and the interaction between both mechanisms in the contexts of stakeholder protection.

CHAPTER 4: DISCLOSURE AND STAKEHOLDER ENGAGEMENT

1. INTRODUCTION

Disclosure is a fundamental concept in company law and has been a popular regulatory tool around the world to protect the interests of stakeholders by creating a level playing field for them to make informed decisions.[1] While stakeholders receive some protection through non-financial disclosure and reporting, it does not necessarily lead to integration of their interests in the process of decision making. 'Process' refers to the decision-making process of the board which focuses on 'how' to achieve the desired goals or outcomes.[2] While disclosure is a procedural mechanism, it is distinguished from the 'process' as explained in this thesis in that it does not allow stakeholders an entry point in the decision-making process. The main aim of disclosure is to increase transparency by providing information once decisions have been made.[3] It, therefore, does not necessarily form a part of the decision-making process. And often there is limited transparency as it is common for directors to greenwash their reports.[4] Thus, there is no way of knowing how directors arrive at a particular decision. Directors have been given flexibility under their substantive duty to make decisions for the success of the company, but there is no way of knowing how directors act and, more importantly from the stakeholders' perspective, what they do not do. Stakeholder interests have been marginalised by the flexibility afforded directors to make decisions. This means that for greater transparency and board accountability, the 'black-box' of decision making must be opened[5] to allow control over the factors which contribute to effective decision making.

This will encourage directors to hear and integrate different stakeholders' voices in the process. If the decisions are made effectively there are greater chances of achieving an effective outcome. The thesis recognises the importance of stakeholder engagement for stakeholder empowerment, ie, to give voice to stakeholders to be able to influence

---

[1] Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019) 521; Beate Sjafjell, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board' (2018) 23 Deakin L Rev 41, 51.
[2] See discussion in Ch3 Pt 1.1.
[3] Sjåfjell and Bruner (n 1) 551.
[4] See discussion in Pt 4 for an analysis of disclosure practice in the UK and India.
[5] Katarzyna- Chalaczkiewicz-Ladna, Irene-Marie Esser and Iain MacNeil, 'Workforce Engagement and the UK Corporate Governance Code' (2021) Thomson Reuters Aranzadi, II International Conference of Corporate Governance proceedings 2.

decisions. Companies are being called upon to work in collaboration with their stakeholders to understand their perspectives and concerns on ESG issues. A move in this direction can be seen in the UK with the introduction of Provision 5 of UKCGC which prescribes a process of engagement. The UKCGC provides for explicit workforce engagement mechanisms which also link to disclosure.[6] In India, disclosure is one of the main regulatory tools to protect the stakeholder interests, especially if one considers the mandatory CSR reporting under section 135 of CA 2013 and the mandated Business Responsibility Report (BRR) on the National Guidelines for Responsible Business Conduct (NGRBC) for listed companies. The NGRBC identifies disclosure and stakeholder engagement as the key concepts,[7] but the softer approach towards stakeholder engagement has proved inadequate in ensuring the companies will behave responsibly.

Against this background, this chapter conducts an analysis in the context of a 'disclosure v process' theme with focus on the techniques to protect stakeholders. In the previous chapter the analysis was conducted under the 'substance v process' theme and it was concluded that process-focused regulation needs to be emphasised in both the UK and India to ensure improved stakeholder protection. The aim of this chapter is to evaluate disclosure as a technique in both countries and its impact on board decision making in the context of CSR. The chapter emphasises the limitations of disclosure and highlights stakeholder engagement as an important mechanism in stakeholder protection. It argues that process-based regulation should be emphasised to bring change in corporate behaviour in that CSR is about how a business is conducted and its impact on stakeholders, and thus, is closely aligned with the day-to-day functions in companies.

This chapter is divided into theoretical (Parts 2, 3, and 5) and empirical (Parts 4 and 6) parts. Part 2 discusses disclosure and stakeholder engagement as mechanisms to protect stakeholders. The importance and benefits of the two mechanisms are discussed followed by the link between them. Part 3 provides the background to the current disclosure obligations relevant in the context of stakeholder protection in the UK and India. The disclosure obligations in the UK are discussed first, followed by a discussion of the Indian position. The discussion of each country is then supported by various empirical studies in Part 4. The focus here is on whether disclosure as a technique is able to inform

---

[6] For detailed discussion of Provision 5 of UKCGC, see Pt 5.1.
[7] National Guidelines on Responsible Business Conduct 2018, 33.

stakeholders and so ensure them meaningful engagement in the decision-making process. Part 5 addresses provisions relating to stakeholder engagement in the UK and India followed by empirical studies in Part 6. Conclusions are drawn based on the theme 'process v disclosure' in the context of achieving better outcomes for stakeholder protection. The way forward is indicated.

2. MECHANISMS TO PROTECT STAKEHOLDER INTERESTS

2.1. Non-financial Disclosure

Non-financial disclosure includes disclosure relating to matters such as human rights, supply- chain management, climate change, and GHG emissions. Gray *et al,* describe social reporting as the process of communicating the social and environmental effects of a company's economic actions to particular interest groups within society and to society at large.[8] It involves extending the accountability of companies beyond the traditional role of providing a financial account to the shareholders.[9] This assumes that companies have responsibilities which extend to the wider society. The primary use of disclosure has been to protect investors to enable them to engage in the process and make well-informed decisions.[10] This is the traditional justification for disclosure which directly or indirectly favours shareholders by identifying the risks and acts as an information tool. It reduces information asymmetries between companies and investors and improves efficiency in the market.[11] An important and persuasive justification for disclosure has been that it improves corporate governance, ie, how managers make decisions.[12] It is considered a key safeguard in corporate governance[13] and helps managers identify key issues and assess their performance and its impact on society.[14] Disclosure affects managers' behaviour;[15] it encourages 'good' behaviour in that managers tend to pay closer attention to their corporate affairs in the knowledge that the figures will be there

---

[8] Rob Gray *et al*, *Corporate Social Reporting: Accounting and Accountability* (Englewood Cliffs 1987) ix.
[9] ibid.
[10] Irene-Marié Esser and Iain MacNeil, 'Disclosure and Engagement: Stakeholder Participation Mechanisms' (2019) 30 European Business Law Review 201, 202.
[11] 'Future of Narrative Reporting Consultation' (Department for Business, Innovation & Skills 2010) 5; Merritt B Fox, 'Required Disclosure and Corporate Governance' (1999) 62 Law and Contemporary Problems 113, 113–114.
[12] Fox (n 11) 114.
[13] 'Report of the Committee on the Financial Aspects of Corporate Governance (The Cadbury Report).' (1992) para 7.2.
[14] 'Guidelines on Non-Financial Reporting' (EU) (2017/C 215/01) para 3.1.
[15] Louis Loss, *Fundamentals of Securities Regulation* (2nd edn, Aspen Publishers 1988) 33.

for all to see. This information is open to all interested parties and forms the basis for their actions. This encourages the managers to 'toe the line' – a positive spin-off from the framework for better disclosure.[16] This is equally true of non-financial disclosures.

Non-financial disclosure also improves transparency in how decisions are made and leads to improved non-financial performance. It gives directors a chance to explain their actions and exposes any false perceptions the public may harbour about the company.[17] Overall corporate transparency is improved by effecting behavioural change in companies' approach to all their stakeholders.[18] The information is available for public scrutiny and can be accessed by any interested party and potentially be used against the company. Stakeholders can use the information to assess the performance of the company and whether it is an entity with which they are comfortable to transact.[19] For example, a customer's decision on whether or not to buy a product can be based on the information available. This increases the pressure on companies to meet social expectations which often extend beyond purely economic goals. If the stakeholders have easy access to this information, it may encourage the directors to adopt higher standards of CSR. In short, disclosure assists directors to build trust and long-term relationships with their company stakeholders.

Interest in non-financial issues increasingly comes from investors who see ESG factors as a part of their portfolio risks and returns.[20] ESG disclosure compels companies to address and strengthen their risk management;[21] it reflects a company's values and shows the link between its strategy and its commitment to sustainable development.[22] This, in turn, strengthens the company's brand value and reputation. However, ESG disclosure is focused on information which is material to the investor – ie, social and environmental harm that potentially affects long-term investment performance.[23] Because of the overlap between CSR and ESG, especially techniques such as metrics or KPIs that may address concerns common to both concepts,[24] stakeholders will benefit indirectly from ESG

---

[16] 'The Sharman Inquiry: Final Report and Recommendations of The Panel of Inquiry' (2012) 13.
[17] Charlotte Villiers, *Corporate Reporting and Company Law* vol 5 (CUP 2006) 31.
[18] Barnali Choudhury, 'Social Disclosure' (2015) 13 Berkeley Business Law Journal 185, 188.
[19] ibid 189.
[20] See Ch1 Pt 4.
[21] 'Guidance Document on ESG Disclosure' 5 <https://www.bseindia.com/downloads1/BSEs_Guidance_doc_on_ESG.pdf> accessed 7 March 2021.
[22] National Guidelines on Responsible Business Conduct 2018 7.
[23] Iain MacNeil and Irene-Marie Esser, 'From a Financial to an Entity Model of ESG' (2022) 23 EBOLR 9.
[24] ibid 3.

outcomes.[25] ESG disclosure helps in the global expansion and implementation of CSR but is limited in that stakeholder interests are secondary to shareholder interests.

2.2.Stakeholder Engagement

Stakeholders are also extremely important for companies as they affect or can potentially affect a company's success or failure. It is consequently important for companies to strengthen their relationships with stakeholders.[26] Stakeholder engagement sensitises directors to the key concerns and issues facing stakeholders and allows the directors access to more comprehensive information. This information should then be used to change company's strategy in a way that benefits all stakeholders and allows directors to act proactively to address any issues and risks.

A stakeholder engagement mechanism is an *ex-ante* form of accountability as it has a preventive or precautionary effect on decision making.[27] It shapes the content of decisions, which is important for stakeholder protection especially when it is difficult to evaluate the outcome which may only emerge in the long term or where the decisions are not easy to assess given their complexity. In such instances imputing responsibility to the directors can be problematic.[28] Here stakeholder engagement may be useful to ensure that directors not only explain their decisions but also take the interests of their stakeholders into account

George and Reed explain that recognition, participation, and strengthening the capabilities of stakeholders are important elements in addressing sustainability issues.[29] 'Recognition' refers to the 'formal acknowledgement of the right to participate in decision-making processes'[30] through various mechanisms such as board committees or

---

[25] ibid 12.

[26] 'The Corporate Social Responsibility Report and Effective Stakeholder Engagement' (*Harvard Law School Forum on Corporate Governance* 2020) <https://corpgov.law.harvard.edu/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement/> accessed 7 March 2021.

[27] Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 Legal Studies 252, 269.

[28] Such as in s172(1) of CA 2006 or s 166(2) of CA 2013 where directors have a wide discretion and are not generally held liable for honest mistakes.

[29] Colleen George and Maureen G Reed, 'Revealing Inadvertent Elitism in Stakeholder Models of Environmental Governance: Assessing Procedural Justice in Sustainability Organizations' (2017) 60 Journal of Environmental Planning and Management 158.

[30] ibid 160.

appointment of a director from a key stakeholder group.[31] 'Participation' refers to active involvement of stakeholders in decision making by providing them with opportunities to influence outcomes by their ideas, feedback, perspectives, and values.[32] Participation opportunities must be provided in all the different stages of decision making.[33] This builds trust between a company and its key stakeholders by improving communication and transparency.[34] Esser and MacNeil highlight that participation mechanisms should be put in place to ensure that stakeholders take part in the decision-making process and then provide them with feedback on the outcome of the decisions made.[35] 'Capability' refers to the knowledge, skill, and ability of an individual or community to contribute to the realisation of a goal or the accomplishment of what is required.[36] Stakeholders must be empowered to take part in the process. This step is especially crucial in developing countries where stakeholders are not active enough as regards issues of CSR due to their lack of awareness or education.[37]

Scholars are of the view that the value of key stakeholders should be recognised and they should participate in the decision-making process.[38] This will give stakeholders the opportunity to advance their interests by influencing the directors in the process while at the same time empowering directors to understand the impact of their decisions on key stakeholders. The complex and dynamic nature of CSR issues demands transparent decision making which acknowledges and engages the various stakeholders in the process. Non-financial disclosure will help in informing the stakeholders by providing them with adequate information which forms the basis for stakeholder engagement. However, this is contingent upon: first, regulators facilitating disclosure of non-financial issues on a mandatory basis to reduce the information asymmetry; second, companies

---

[31] For example, Provision 5 of the UKCGC further explained in detail in Pt 5.1.

[32] Mark S Reed, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 Biological Conservation 2417, 2419; Gregg B Walker *et al*, 'From the Forest to the River: Citizens' Views of Stakeholder Engagement' (2006) 13 Human Ecology Review 193, 194.

[33] Magnus Boström, 'A Missing Pillar? Challenges in Theorizing and Practicing Social Sustainability: Introduction to the Special Issue' (2012) 8 Sustainability: Science, Practice and Policy 3, 6.

[34] Reed (n 32) 2420.

[35] It is important for stakeholders to know how their concerns affected the decision of the board. Esser and MacNeil (n 10) 202.

[36] George and Reed (n 29) 161–162.

[37] Reference here could be made to s 135 of CA 2013 where companies are required to contribute to the social and environmental issues for the stakeholders to be able to benefit from the overall community development.

[38] Iris HY Chiu and Roger Barker, 'Submission to The Business Skills and Innovation Commons Select Committee: Corporate Governance Inquiry' [2016] SSRN Electronic Journal 9 <https://www.ssrn.com/abstract=2858903>accessed 7 March 2021.

disclosing sufficient relevant information on which stakeholders are able to perceive and act; and third, auditing reports to ensure reliability and transparency. The following section discusses the various disclosure provisions in the UK and India and analyses the scope of stakeholder protection.

3. NON-FINANCIAL DISCLOSURE AND DIRECTORS' DUTIES

3.1. The UK

In the UK disclosure has been seen as the underlying principle of company law ever since companies have had the privileges of incorporation and limited liability.[39] The UK has extensive reporting requirements which offer stakeholders some form of protection. The main sources of non-financial disclosure and reporting in the UK are the Companies Act 2006,[40] the UKCGC, the Modern Slavery Act 2015,[41] the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008,[42] and the Bribery Act 2010.[43] Some parts of these sources overlap with the Directives of European Parliament[44] and the Council. These aside, a company may voluntarily choose to disclose any other information.

The CA 2006 requires the directors of all companies (except small companies[45]) to prepare a strategic report for the company each financial year.[46] This strategic report is mandatory and is the most significant legislation in the disclosure regime as regards CSR. It came in force on 1 October 2013 and replaced the business review.[47] The strategic report along with corporate governance report,[48] directors' remuneration report

---

[39] Villiers (n 17).
[40] Companies Act 2006 ss 414A-C, 414CZA, 414CA, 414CB.
[41] Modern Slavery Act 2015 s 54.
[42] The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (SI) Sch7 pt 4.
[43] Bribery Act 2010.
[44] Directive 2014/95/EU of the European Parliament and of the Council.
[45] CA 2006, s 414B.
[46] Companies Act 2006 s 414A(1), (2) and 414B. In 2013, the CA 2006 was amended to introduce some disclosure requirements to the annual report. The requirement of preparing a strategic report applied from 30 September 2013. The FRC issued non-mandatory guidance on strategic reporting to encourage directors to follow the best practice rather than a mandatory force. See FRC, 'Guidance on the Strategic Report' (2018) <https://www.frc.org.uk/accountants/accounting-and-reporting-policy/clear-and-concise-and-wider-corporate-reporting/narrative-reporting/guidance-on-the-strategic-report> accessed 17 March 2020.
[47] It was formerly regulated in CA 2006, s 417. See Andrew R Keay, 'The Duty to Promote the Success of the Company: Is It Fit for Purpose?' [2010] Centre for Business Law and Practice Working Paper <https://papers. ssrn.com/abstract=1662411> accessed 7 May 2019.
[48] FCA, Listing Rules, r 9.8.6(5) and s 419A CA 2006.

and financial statements,[49] and the directors' report[50] form the annual report.[51] The strategic report must contain a fair review of the company's business and a description of the principal risks and uncertainties it faces.[52] Quoted companies must further include information on environmental matters (including the impact of the company's business on the environment), the company's employees, and social, community and human rights issues on a 'comply or explain' basis.[53] Further, quoted companies must also provide a description of the company's strategy, business model, and gender diversity.[54] The requirement of the disclosure of ESG matters in the content of the strategic report is based on 'comply or explain' which indicates that such matters are not regarded as important as financial matters.[55] The main purpose of strategic report is to inform shareholders and facilitate their participation. It refers directly to section 172 of the Act through the phrase 'section 172 statement' which is a recent addition to the strategic report.[56] Companies are required to issue a section 172 statement as a part of the strategic report – ie, a statement describing how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under the section.[57] The statement is prepared by the directors and requires them to provide information on how they had regard to the factors in subsections (a)-(f). It also requires a website publication by both quoted and unquoted companies.[58] In addition to these requirements, the UKCGC requires boards to discuss how the matters set out in section 172 of CA 2006 have been taken into account.[59]

Additionally, a non-financial statement must be issued by certain companies.[60] The relevant provisions for non-financial reporting in the UK, which are also in line with the

---

[49] CA 2006 ss 420-422A, ss 439-439A (after the changes made by ss 79-82 of the Enterprise and Regulatory Reform Act 2013 c24) and the Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013 (SI 2013/1981)).
[50] CA 2006, ss 415-419A.
[51] CA 2006, s 423.
[52] CA 2006, s.414C(2).
[53] CA 2006, s 414(C)(7)(b).
[54] CA 2006, s 414(8)(a), (b), (c).
[55] Esser and MacNeil (n 10) 206.
[56] In June 2018 the Companies (Miscellaneous Reporting) Regulations 2018/860 was published which inserted the requirement of a 'section 172 statement' in the strategic report. (Pt 2, reg 4). The requirement is effective from 1 January 2019.
[57] CA 2006, s 414CZA.
[58] CA 2006, s 426B.
[59] The UK Corporate Governance Code 2018, Provision 1.
[60] Certain large companies (a traded company, a banking company, and a company carrying on insurance market activity) and groups which are not small or medium-sized and which exceed on their balance sheet date the criterion of the average number of 500 employees, are required to issue a non-financial statement.

EU Directive 2014/95/EU (also termed the Non-Financial Reporting Directive (NFRD)) came into effect on 26 December 2016. Section 414CB(1) and (4) of CA 2006 requires directors to disclose information relating to environmental matters (including the impact of the company's business on the environment), the company's employees, social matters, respect for human rights, and anti-corruption and anti-bribery matters on a 'comply or explain' basis. Further, section 414CB (2) of CA 2006 requires disclosure of the company's business model,[61] policies pursued by the company in relation to the matters listed in subsections (1)(a) to (e), any due diligence processes implemented by the company in pursuance of those policies,[62] and the outcome of those policies.[63] Directors must also provide a description of the principal risks relating to non-financial matters, how the company manages these risks,[64] and a description of the non-financial key performance indicators relevant to the company's business.[65] The European Commission has recently published a proposal to amend the EU directive with Corporate Sustainability Reporting Directive (CSRD) which would amend the existing reporting requirements of the NFRD and extend the scope to all large companies and all companies listed on regulated markets.[66] Apart from the CA 2006, the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, require all registered companies with more than 250 employees to include in their directors' report, a statement describing and summarising how their directors have engaged with employees, how they have had regard to employee interests, and the effect this has had on the principal decisions taken by the company during the financial year.[67]

To promote sustainability, government has provided additional climate-related disclosures that companies are required to make. These disclosures are based on the TCFD and in 2017, the UK was one of the first countries to endorse the TCFD.[68] The

---

[61] CA 2006, s 414CB (2)(a).
[62] CA 2006, s 414CB (2)(b).
[63] CA 2006, s 414CB (2)(c).
[64] CA 2006, s 414CB (2)(d).
[65] CA 2006, s 414CB (2)(e).
[66] 'Corporate Sustainability Reporting' (*European Commission - European Commission*) <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en> accessed 7 March 2021. . Although the UK is not a member of EU, it cannot be said that EU law will not affect the UK law indirectly such as through investor pressure and competitive advantage. Both parties agree on bilateral exchanges of views without prejudice to the unilateral and autonomous decision making process of each side. See <https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/com_2020_855_final_annexe3_v1.pdf> accessed on 25 July 2022.
[67] The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 pt 4.
[68] TCFD < https://www.fsb-tcfd.org/about/> accessed 1 December 2019

UK introduced mandatory TCFD-aligned disclosures which apply to financial years starting on or after 6 April 2022. Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 SI 2022/31)[69] amend the CA 2006 and require companies to provide relevant non-financial and sustainability information in the strategic reports.[70] Section 414CB sets out the content of the non-financial and sustainability information statement. Section 414CB (7) of the Act provides exemptions from overlapping disclosure requirements. The requirements are aligned with the UKCGC and FRC has also released a guidance document 'Guidance on the Strategic Report' to assist directors to apply the relevant legal requirement.[71] The aim of the TCFD is to ensure that climate-related risks and opportunities are priced into investment decisions.[72] The core elements of climate-related financial disclosure identified by the TCFD are: governance; strategy; risk management; metric; and target.[73] Many companies are already disclosing climate-related information through CDP (a global disclosure system for investors) in a way that is aligned with the TCFD recommendations.[74] The downside of this from CSR perspective, is that there is limited discussion on risks of climate change on the stakeholders.[75] In its recently released three-year plan, the FRC aims to strengthen the reporting framework further by aligning it with ESG with improved investor engagement especially on climate-related matters.[76]

---

[69] The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022.

[70] In terms of s 414 CA of CA 2006, traded, banking, authorised insurance and high-turnover companies that have more than 500 employees (or, if it is a parent company, that it together with its subsidiaries has more than 500 employees), are required to include a non-financial and sustainability information statement.

[71] FRC, 'Guidance on the Strategic Report' (2022) <https://www.frc.org.uk/getattachment/343656e8-d9f5-4dc3-aa8e-97507bb4f2ee/Strategic-Report-Guidance_2022.pdf> accessed 25 July 2022.

[72] HM Treasury, 'Interim Report of the UK's Joint Government-Regulator TCFD Taskforce' 2 <https://www.webarchive.org.uk/access/resolve/20201110001724/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933782/FINAL_TCFD_REPORT.pdf> accessed 5 June 2021.

[73] TCFD, 'Final Report Recommendations of the Task Force on Climate-Related Financial Disclosures' (2017) v.

[74] Mark Segal, 'UK Becomes First Country in the World to Make TCFD-aligned Disclosure Mandatory' (*ESG Today*, 9 November 2020) <https://www.esgtoday.com/uk-becomes-first-country-in-the-world-to-make-tcfd-aligned-disclosure-mandatory/> accessed 7 June 2021.

[75] Impact on the workforce is mentioned briefly under acute physical risk. See TCFD (n 73) 10.

[76] FRC, 'Financial Reporting Council: 3-Year Plan, 2022-2025' (2022) 12 <https://www.frc.org.uk/getattachment/50d6616f-e43d-49ad-9916-a9f03f0e49a9/FRC-3-Year-Plan-2022-25.pdf> accessed 11 April 2022.

3.2. India

Reporting and disclosure norms in India have been substantially improved in tandem with significant improvements in the governance of listed corporations. Non-financial reporting is wide-ranging with a clear focus on stakeholder interests. The current approach to stakeholder protection is largely disclosure-based and requires companies to publish a Business Responsibility Report (BRR) as a part of their annual reports. Section 134(3)(o) also mandates all companies under the threshold in section 135 to disclose their CSR activities in the board's report. CSR and BRR disclosures are discussed further below.

3.2.1. Mandatory Disclosure - Section 135 of Companies Act 2013

Section 134(3) of CA 2013 requires companies to disclose the composition of their CSR Committees. All companies with a net worth of INR 500 Crore ($65,5 million) or more, or a turnover of INR 1,000 Crore ($131 million) or more, or a net profit of INR 5 Crore ($655,168) or more in a given fiscal year must establish a CSR Committee of the board consisting of three or more directors, of whom at least one director must be an independent director.[77] Section 135(4) mandates every company qualifying under section 135 to make a statutory disclosure of its CSR policy approved by the board, the content of the policy, and the composition of the CSR Committee**.**[78] If the company failed to spend the 2% of its average net profit, the directors must give reasons for not spending the amount in the report unless the unspent amount relates to any ongoing project. The unspent amount must be transferred to a fund as required by Schedule VII to the Act, within a period of six months from the close of the financial year.[79] The section has now been amended and companies must transfer any unspent amount to the Unspent CSR Account within 30 days of the financial year-end, or if unspent within three financial years from the date of the original transfer, transfer it to the Schedule VII-fund.[80]

---

[77] CA s 135(1).
[78] CSR Policy means a 'statement containing the approach and direction given by the board of a company, taking into account the recommendations of its CSR Committee, and includes guiding principles for selection, implementation and monitoring of activities as well as formulation of the annual action plan'. See The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 r 2(f).
[79] CA 2013, s 135(5) proviso.
[80] Inserted by The Companies (Amendment) Act 2019 effective from 22.01.2021.

Rule 8 of the CSR Rules 2021 requires companies having average CSR obligation of ten Crore rupees or more in pursuance of subsection (5) of section 135 of the Act, in the three immediately preceding financial years, to conduct an impact assessment and annex the report to the following annual report on CSR. Annex II prescribes the format in which such disclosure is to be made. Directors are also required to provide a responsibility statement of the CSR Committee, stating that the implementation and monitoring of CSR policy complies with both CSR objectives and company policy.[81] The government monitors compliance on the basis of such disclosures and can institute action against non-compliance or violation of the provisions.[82]

3.2.2. The Business Responsibility Report

BRR is the disclosure of adoption of the NGRBC by listed companies and forms part of the annual reports published by companies describing their social and environmental initiatives. The first step towards compelling companies to disclose their ESG reporting was in 2011 with the promulgation of NVG 2011 which required companies to publish a BRR on a voluntary basis. In 2012, the SEBI mandated BRR for the top 100 listed companies based on market capitalisation to describe the ESG initiatives.[83] The 100 listed companies are based on market capitalisation on the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE) on 31 March 2012. Subsequently, the LODR 2015 amendment (with effect from April 2016), expanded the application of BRR from the top 100 to the top 500 hundred listed entities.[84] The government imposed these requirements gradually to increase pressure and was cautious in its approach to avoid a knee-jerk reaction. Thereafter, NRRBC 2018 was released. On the basis of a decision at the 2011 board meeting and an increase in demand for ESG reporting, the SEBI extended the application of BRR to top the 1000 companies on the BSE and NSE based on market capitalization as from FY 2019-2020.[85] Currently, while it is mandatory for

---

[81] ibid.

[82] Non- compliance with CSR provisions has been notified as a civil wrong as from 22 January 2021. See MCA, 'Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR), General Circular No 14 /2021' (25 August 2021) <https://www.mca.gov.in/Ministry/pdf/FAQ_CSR.pdf> accessed 3 March 2022.

[83] SEBI Circular CIR/CFD/DIL/8/2012, 13 August 2012 <https://www.sebi.gov.in/sebi_data/attachdocs/1344915990072.pdf> accessed 7 June 2019

[84] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 s reg 34(2)(f)).

[85] Extension of applicability of Business Responsibility Reporting (BRRs) to top 1000 listed entities from present requirement to 500 listed entities, based on market capitalization.

the top 1000 listed companies, the NGRBC encourages other companies to publish BRR as a self-assessment tool for responsible business conduct.[86] Companies have been given an option to either follow the SEBI prescribed framework or to map the nine principles of NGRBC in their sustainability reports. This ensures that companies remain flexible as regards how they disclose their ESG issues. All companies which publish sustainability reports based on internationally accepted reporting frameworks are permitted to map the principles within the framework and need not publish a separate report.[87]

For listed companies, reporting is mandatory as these companies access funds from the public, involve an element of public interest, and are obliged to make regular and exhaustive disclosures.[88] Other companies are encouraged to publish on a voluntary basis as small and medium sized companies may not be in a position to meet the rigorous disclosure requirements or the benefits may not be commensurate with the disadvantages such as ease of compliance, time consumption, and burden on management. A tool termed the 'Business Case Matrix', helps companies to map the business benefits of integrating the guidelines and to determine which principle is of relatively higher priority.[89] Since different companies conduct different business, they may need to priorities certain stakeholders over others. For example, environment will be a relatively high priority for mining companies which may therefore have their own matrix reflecting their individual contexts to assist directors to balance the needs according to their impact.

The BRR is important in the CSR context as the BRR framework allows companies to show their commitment to the NGRBC.[90] These principles are aligned with the international regulatory standards such as the UNGPs, SDGs, the Paris Agreement on Climate Change (2015), and the Core International Labour Organisation (ILO) Conventions 138 and 182 on Child Labour.[91] It requires companies to disclose about stakeholder issues, acting as an internal tool to help companies align their business with the principles and core elements of the NGRBC.[92] The key areas of disclosure relate to

---

[86] NGRBC 2018 (n 22) Annex 6.

[87] SEBI Circular, Integrated Reporting by Listed Entities, 6 Feb, 2017 <https://www.sebi.gov.in/sebi_data/attachdocs/1486375066836.pdf> accessed 31 July 2019.

[88] BSE, 'Business Responsibility Reports - Frequently Asked Questions (FAQs)' <https://www.bseindia.com/downloads1/BRR_FAQs%2010052013.pdf> accessed 31 July 2019.

[89] Although the 9 principles of NGRBC are interdependent, interrelated, and nonvisible. See NGRBC 2018 (n 22) Annex 5.

[90] NGRBC 2018 (n 22) Annex 6.

[91] ibid 11.

[92] ibid, Annex 6.

transparency and accountability, employee well-being, respect and responsiveness to all stakeholders, environment, stakeholder relationships, consumer responsibility, human rights issues, and gender equality. Companies are encouraged to design their products or services to include social or environmental concerns and disclose details in BRR as well as details on stakeholder engagement. Stakeholder engagement is the basis for any successful implementation of CSR programmes or activities.[93] The NGRBC recommends that companies define the purpose and scope of stakeholder engagement, consult with stakeholders in developing policies, and commit to resolving any differences and redressing grievances in a just, fair, and constructive manner.[94] However the guidelines do not recommend a process for integrating stakeholder interests.

Recently, the SEBI has amended certain provisions of the SEBI (LODR) 2015. The first relates to discontinuing the requirement of submitting BRR by listed companies after FY2021-22; and the second requires the top 1000 listed companies[95] to submit a new report on ESG parameters, ie, the Business Responsibility and Sustainability Report (BRSR). The companies can report on a voluntary basis for the FY2021-22, but from FY2022-23 reporting is compulsory for the top 1000 listed companies. This allows companies time to prepare for the change. The BRSR is considered to be more comprehensive and outcome-oriented and focuses on both environmental and social issues which enables companies to be more transparent about the risks and opportunities they face. It is also based on the NGRBC but that aim to establish link between the financial performance and ESG issues in line with the global trend in ESG reporting. The BRSR is very focused on materiality to ensure legitimacy with foreign investors and gain competitive advantage. Like BRR, external verification and an independent audit of the disclosures is not compulsory which means that it will be difficult to assess the quality of information released by the companies. The fact that external verification of ESG issues is not required by law indicates that government does not regard ESG disclosure as important as financial disclosure.

---

[93] 'Stakeholder Engagement Services' (*CSR India*) <http://www.csrindia.com/stake-holder.php> accessed 17 February 2020.

[94] NGRBC 2018 (n 22) 21.

[95] Based on market capitalisation calculated as at 31 March of every financial year.

4. EMPIRICAL STUDIES

This section presents several empirical studies to illustrate how companies in the UK and India perform their non-financial disclosure. It first evaluates the UK position followed by that in India. The results of various studies are consulted to:

Test compliance by companies – ie, whether or not they disclose information.

Establish the form and quality of explanations offered for non-compliance – ie, is the information sufficiently detailed and rational to allow stakeholders to make informed decisions.

The comparison and evaluation of ESG disclosures are based on existing empirical studies conducted by professionals and academics. The UK data is drawn, in the main, from studies conducted by the FRC,[96] Deloitte,[97] and academics. For data on Indian companies, studies conducted by the KPMG,[98] and MCA's High-Level Committee are assessed, and for BRR studies conducted by SEBI, NSE,[99] and GRI are consulted. The analysis is based solely on the information provided by the empirical studies that test compliance. Based on these studies, various conclusions are drawn on the effectiveness of decision-making rules and disclosure obligations in both jurisdictions. It is believed that the aggregation of these empirical studies provides a useful perspective on the aim of the chapter and enables some relevant observations to be made in the context of the extent and quality of reporting on ESG disclosure. The evaluation of the empirical studies allows us to gather information on stakeholder engagement which is discussed in the following part. In summary, the analysis of the empirical studies at both stages will assist in the analysis of the mechanisms relevant to stakeholder protection under the theme 'process v disclosure'. It is accepted that all information provided by the

---

[96] FRC is an independent regulator in the UK responsible for setting standards of corporate governance, reporting, and audit. See FRC, 'Acting in the Public Interest to Increase Market Confidence' <https://www.frc.org.uk/getattachment/d5139624-9459-43d1-8e1a-935db13458ec/FRC-Who-we-are-2021.pdf> accessed 27 February 2022.
[97] It is one of the global leaders in providing audit and assurance, consulting, financial advisory, risk advisory, tax, and related services, see: 'Deloitte' (*Deloitte*) <https://www2.deloitte.com/global/en.html> accessed 27 February 2022.
[98] It is a multinational professional services network, spread over 145 countries with audit and tax services. It is one of the four big accounting organisations in the world, see: 'Home - KPMG Global' (*KPMG*, 11 February 2022) <https://home.kpmg/xx/en/home.html> accessed 27 February 2022.
[99] National Stock Exchange of India Limited is the leading stock exchange of India, located in Mumbai, Maharashtra.

companies is authentic and reflects their actual practice. The chapter closes with conclusions, including an analysis of the two research questions posed above.

4.1. The UK

FRC's 'Review of Corporate Governance Reporting' (2021) contains a random sample of 100 FTSE 350 and small companies.[100] Compared to their 2020 review which contained a large number of boilerplate or declaratory statements by companies,[101] there has been a clear improvement in the quality of explanations. As regards ESG issues, better quality information was submitted explaining how these issues were considered at board level. FRC noted that although more companies are identifying their key stakeholders and their issues, the majority are still not reporting on companies' impact on stakeholders.[102]

In Deloitte's survey (2021) of 50 companies with more than 500 employees drawn from the FTSE 350,[103] the result was slightly different. There is a clear improvement in the board's description of the long-term consequences of company decisions in the section 172 statement.[104] Companies are providing insights into how they balance the needs of several stakeholders in the short term while considering the longer-term impact and sustainability of their companies. Examples of decision-making in the section 172 disclosure statement were provided by 92% of the companies surveyed. For example, in explaining their section 172 statement the Serco Group plc clearly identified their key stakeholders, the engagement process undertaken with each of them, and their concerns.[105] The report further included a description of how the engagement affected

---

[100] FRC, 'Review of Corporate Governance Reporting, 2021' <https://www.frc.org.uk/getattachment/b0a0959e-d7fe-4bcd-b842-353f705462c3/FRC-Review-of-Corporate-Governance-Reporting_November-2021.pdf> accessed.

[101] FRC assessed a sample of up to 100 companies from both the FTSE100 and 250 companies, as well as Small Cap companies, FRC, 'Review of Corporate Governance Reporting 2020' (2020) 22 <https://www.frc.org.uk/ getattachment/c22f7296-0839-420e-ae03-bdce3e157702/Governance-Report-2020-2611.pdf> accessed 23 February 2022.

[102] ibid.

[103] 'Annual Report Insights 2021: Surveying FTSE Reporting' (*Deloitte United Kingdom*) <https://www2.deloitte.com/uk/en/pages/audit/articles/annual-report-insights-2021.html> accessed 21 February 2022.

[104] Stakeholders are the central focus of this requirement and provide opportunities for the company to explain how they have considered their interests in the decisions.

[105] 'Serco: Annual Report and Accounts 2020' (2020) 50–55 <https://www.serco.com/media/6077/serco-annual-report-accounts-2020.pdf> accessed 22 February 2022.

the board's discussions and principal decisions. The Evraaz (also included in the 50 companies) clearly explained in their survey how stakeholder interests were considered.[106] For example, when explaining how they assessed the impact of COVID-19 on their employees and broader stakeholders, they stated that they had opened a COVID-19 treatment facility for their employees which had treated over 40 employees.[107] They also provided clear cross references to issues explained elsewhere and included examples of decisions where details of the impact of their decisions on several stakeholders were available. In a non-routine decision regarding the construction of a new rail plant, they explained how they had considered and balanced stakeholder interests in their decision making and the impact of those decisions on the long-term success of the company.[108] With regard to ESG issues, 28% identified climate change as a standalone principal risk, with a further 46% identifying climate change as part of a broader principal or emerging risks. Furthermore, 96% referred to consideration of employee wellbeing; 64% discussed how they had maintained their customer relationships; but only 30% covered suppliers. Overall, it is noted that companies need to improve their signposting and information on engagement, especially with suppliers.

The Grant Thornton 2020 analysis of the annual reports of the companies in the FTSE 350 – which covers 281 FTSE 350 companies – assessed the narrative reporting requirements set out in section 414(c) of the Companies Act 2006.[109] Of the companies involved, 77% provided information as required by the section 172 statement, with 38% including detailed information. Although only 4% indicated how that information impacted on their long-term decision making.[110] Companies' practices were identified as rhetoric in ESG areas as there was limited evidence to show how aspects of ESG are embedded in wider business thinking.[111] However, the number of companies that drew

---

[106] 'Evraaz: Annual Report & Accounts 2020' <https://www.evraz.com/upload/iblock/f81/EVRAZ_AR2020_ final_pages_lowres.pdf> accessed 23 February 2022.

[107] ibid 30.

[108] ibid 108, 109.

[109] Grant Thornton UK, 'Corporate Governance Review 2020' (2020) 3 <https://www2.grantthornton.co.uk/rs/445-UIT-144/images/Corporate_ Governance_Review_2020.pdf?utm_source=mkto&utm_medium=email&utm_campaign=2020-11-00-Download-Gov-CGR-1322> accessed 15 July 2021.

[110] 'Corporate Governance Review 2020' (Grant Thornton, 2020) <https://www2.grantthornton.co.uk/corporate-governance-review-2020.html?_ga=2.219568793.1858315815.1605520465-221054369.1602605107> accessed 24 February 2022.

[111]A limited number of companies are using ESG metrics in executive long-term incentive plans and bonuses. For example, 44% of companies have an employee KPI, but 14% use employee metrics in

a link between KPIs and strategic priorities rose from 68% in 2019 to 71% in 2020.[112] Companies cited an average of nine KPIs – five financial and four non-financial.

The EY's research assessment of TCFD disclosures by the largest public companies in high-risk sectors (2021),[113] revealed that the companies based in the UK have the most advance reporting, came out on top scoring 94% on coverage and 66% on quality of reports.[114] The EY linked the high performance of the UK in climate change disclosure to the maturity of the UK market and active shareholders and investors.[115] However, even in the UK where the coverage is near universal, there is still scope for improvement in the quality of disclosures.

The study conducted by Esser *et al*, provides empirical evidence on the practical implications and relevance of strategic reporting on FTSE 100 companies for 2015-2016. The first part of their study sheds light on the how companies considered ESG issues when making decisions.[116] Their study concluded that the quality and transparency of non-financial reporting in the UK is impressive despite its 'comply or explain' nature, but that there is still room for improvement. In Part 2, they analysed whether such high compliance with the strategic report led to stakeholder engagement and participation in boards' decision making.[117] The methodology applied in this empirical study was qualitative research in the form of one-to-one interviews. They concluded that strategic reports assist in understanding the organisation as a whole and in finding the specific

---

executive long-term incentives and bonuses. While of 14% societal KPI only 5% is used in the LTIP. See Grant Thornton UK (n 110) 7.

[112] ibid 17.

[113] The study on Global Climate Risk Disclosure includes more than 1,100 companies across 42 jurisdictions (including the UK, India) in the assessment so broadening the size and geographical scope of the sample (as identified by the TCFD recommendations). See 'Climate Risk Disclosure Barometer' (Ernst & Young 2021) <https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/assurance/ey-if-the-climate-disclosures-are-improving-why-isnt-decarbonization-accerlerating.pdf> accessed 14 December 2021.

[114] ibid 7.

[115] ibid.

[116] The research is of great significance as the results are based on a collection of 2600 observations and the analysis of strategic reports and other sustainability reports of the FTSE 100 companies in 2015 and 2016. Irene-Marie Esser, Iain MacNeil, Chalaczkiewicz-Ladna K, 'Engaging Stakeholders in Corporate Decision-Making through Strategic Reporting: An Empirical Study of FTSE 100 Companies' (2018) 29 European Business Law Review <http://eprints.gla.ac.uk/151965/7/151965.pdf> accessed 13 March 2019.

[117] The study is very significant for three reasons: (1) stakeholders will be able to access this information and exert influence over board decision making; (2) it may assist regulator to effect policy changes to the CSR regulatory framework by understanding the practical implications of ESG reporting; and (3) it may assist private sector actors to understand how CSR can generate improvements in markets and institutions. See: Irene-Marié Esser, Iain MacNeil and Katarzyna- Chalaczkiewicz-Ladna, 'Engaging Stakeholders in Corporate Decision-Making through Strategic Reporting: An Empirical Study of FTSE 100 Companies (Part 2)' (2020) 31 European Business Law Review 209.

information, but also highlighted that structure and content of non-financial reporting must be improved for fuller stakeholder engagement. In their analysis, the purpose of disclosure and genuine interest in ESG issues came in last whereas compliance was the top reason for disclosure. Profitability (the fact that ESG considerations create financial returns), creating a positive image, and pressure form stakeholders were also mentioned by the interviewees.[118] The researchers concluded that the interviewees did not believe that stakeholder interests matter in the context of strategic reporting and in decision making more broadly.[119] Companies are not explaining how they understand the key concerns of their stakeholders which may account for their inability to explain its relevance in their strategy. The study concluded that compliance with the statutory strategic report requirement does not always result in a better informed stakeholder base, but it does to some extent form a basis for stakeholder engagement.[120]

4.2. India

4.2.1. Section 135 - Empirical Study

This section evaluates disclosure relating to the CSR policy as mandated under section 134(3)(o) of CA 2013.[121] The section evaluates:

- whether the companies are publishing the details of CSR policy and CSR committee;
- actual spending of 2% of the average net profit;
- the type of explanation for non-compliance with the 2% requirement.[122]

The analysis will help in anticipating trends spanning the five years of implementation of section 135 and its overall impact. The first year of implementation was FY 2014-15 and FY 2018-19 is the fifth year since companies started reporting in terms of section

---

[118] ibid 231.
[119]The Interviewees felt that the relevance of the strategic report for stakeholders should be clarified to ensure better implementation of s 172. They also noted that the engagement mechanisms should refer to all stakeholders and not concentrate only on the workforce. ibid 234.
[120] ibid 233.
[121] It is also worth noting that the empirical studies do not include data on the recent updates to s 135 as the first year of implementation of the amendments was 2021.
[122] Before the Companies Amendment Acts of 2019, CSR spending was based on the ‘comply or explain’ method of mandatory disclosure. See the discussion in Ch2 Pt 4.1.

135. This section analyses CSR spending and disclosure on the basis of several existing empirical studies.

KPMG has conducted a CSR reporting survey in India annually since 2014-15. Their latest report is based on FY 2018-19. Their surveys are based on section 135 of CA 2013 and inform the readers about India's CSR practice. For the survey they collect the CSR reports published by the top 100 listed companies as per market capital. Their survey is based on the availability of information and is limited to the top 100 companies. For the latest year, 100% of the companies published their annual reports, 98 companies' CSR policy was publicly available, and 95 reports contained CSR disclosure in the prescribed format.[123] The surveys for the FYs 2017-18 and 2018-19 show a high level of compliance.[124] In FY 2018-19 the study showed all 100 companies had a CSR Committee – with 92% having a standalone CSR Committee and 60% having more than one independent director on their CSR Committee[125] suggesting that CSR is a serious concern in board-level decision making.

Table 2: The table shows the number of companies disclosing the amount spent on CSR. The period covered is from FY2014-15 to FY2018-19 which helps in tracking the earlier and the current reports and drawing conclusions based on the data provided.[126]

Disclosure (%)	2014-15	2015-16	2016-17	2017-18	2018-19
Disclosure of the amount spent on CSR	36	49	47	69	99

[123] *India's CSR Reporting Survey 2019* (KPMG 2020) 2 <https://assets.kpmg/content/dam/kpmg/in/pdf/2020/02/india-s-csr-reporting-survey-2019.pdf> accessed 7 April 2020.

[124] The survey brings together findings from CSR reporting of the top 100 (N100) listed companies as per market capital. *India's CSR Reporting Survey 2018* (KPMG 2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/01/India_CSR_Reporting_Survey_2018.pdf> and *India's CSR Reporting Survey 2019* (n 124) 6.

[125] *India's CSR Reporting Survey 2019* (n 124) 14.

[126] The information provided in the table has been taken from the KPMG's CSR survey. See ibid 21 and 23.

Table 2 above shows that there has been a dramatic improvement in disclosure of the amount spent on CSR activities and suggests an improvement in company's accountability and transparency.[127]

[127] *India's CSR Reporting Survey 2018* (n 124) 18.

Table 3: Column 1 shows the first five financial years of the section 135 disclosure. Columns 2 and 3 set out the CSR amount prescribed versus the actual CSR spend of all the companies under the threshold of section 135. Column 4 represents the total unspent amount each year. The information provided in the table has been taken from the KPMG CSR survey 2019.[128]

FY	Prescribed CSR amount (in USD millions)	Actual CSR spent (in USD millions)	Total unspent amount (in USD millions)
2014-15	851.9	671.5	227.9
2015-16	949.7	854.6	176.6
2016-17	972.8	946.1	140.6
2017-18	945.5	988.0	129.8
2018-19	1122.0	1139.4	92.0

Table 3 shows that against the prescribed CSR amount in the FY 2018-19, the actual spend exceeded the prescribed amount and the total amount unspent decreased. The number of companies spending 2% has increased since FY 2014-15. The rise in total CSR expenditure by companies suggests that companies have familiarised themselves with the CSR laws and have started integrating CSR in their business plans. Disclosure in the directors' reports[129] showed an impressive increase from 2014 which suggests that CSR is considered important at board level.[130] It was also noted that the culture of responsibility to society is being incorporated by a greater number of companies.[131]

A survey by the High Level Committee 2018 (HLC 2018) which uses a different analysis base is also reviewed. The Committee's comparison is based on data drawn from filings by the companies up to 31 March 2019.[132] The analysis is limited to the first four years,

---

[128] Ibid.

[129] A directors' report is intended to explain the company's affairs, scope, and nature of business to shareholders, For the content of the director's report see s 134(3) of CA 2013.

[130] *India's CSR Reporting Survey 2018* (n 124) 16.

[131] MCA, *The Report of the High-Level Committee on Corporate Social Responsibility* (2019) 27.

[132] The data is available for the financial years 2014-15 to 2017-18. The analysis is based on the reported figures reflected by the companies in their filings on MCA 21. ibid 2.

but the survey is on a far larger scale than that of KPMG and includes all companies required to have a CSR policy.[133] For FY 2017-18, of 14 318 companies eligible for CSR only 6 326 have a CSR policy in place.[134] The survey noted that the total CSR expenditure by companies increased by 44% from FY 2014-15 to FY 2015-16 but showed a marginal decline in FY 2016-17. It has dipped further by 6.9% in FY 2017-18.[135] The number of reporting companies that have CSR obligations increased steadily from FY 2014-15 (10 418 companies) to FY 2016-17 (13 182 companies) and then declined in 2017-18 (11 584 companies).[136]

Table 4 below shows the number of companies contributing to total CSR expenditure.[137]

Financial Year	% of companies having positive CSR expenditure	Total CSR expenditure in the year (in USD billions)
2014-15	45	1.321
2015-16	58	1.903
2016-17	67	1.878
2017-18	71	1.749

Total CSR expenditure declined in FY 2017-18 from FY 2016-17 levels, but more companies are now making a positive contribution to CSR. Many companies opted to disclose non-compliance rather than spend money.[138] Most companies who failed to spend the mandatory 2% offered explanations, but there were concerns about the nature of the explanations. Companies used standard statements with severely limited content and scope – ie, boilerplate statements. The most common reasons offered for non-compliance were: suitable project not found; delay in project identification; suitable

[133] MCA, *The Report of the High-Level Committee on Corporate Social Responsibility* (2019) ch 2.
[134] ibid 31.
[135] ibid 24.
[136] ibid.
[137] ibid 28.
[138] The second proviso to s 135(5) states 'if a company fails to spend such amount, the board shall in its report made under clause (o) of s.134(3), specify the reasons for not spending the amount'.

implementing agency not found; lack of prior expertise; long implementation period; and the inability of the company to formulate a well-conceived CSR policy.[139] The most common explanation in FY 2018-19 was 'long term project' (38% of N100 companies in the KPMG survey), while the second most common reason given was 'other reasons'.[140] While some of these explanations may be genuine, others are generic and dismissive pointing to a tick-box approach. For example, Bharat Petroleum Corporation Ltd carried its unspent CSR fund for FY 2017-18 forward to the next financial year because the majority of its projects span one to five years.[141] It also shows that there are enforcement problems in India. Overall, CSR funds have had a positive impact on society by improving the living conditions of the people in various ways.[142] Education, healthcare, and sanitation received maximum funds for all four years. Improving the state of education is one of India's national priorities and over the next six years 100 million Indian youths are expected to join the workforce.

Section 135 recommends that companies prioritise local areas in which they operate and their surrounds. This proviso has led to an unequal distribution of CSR funds. The proviso aimed to ensure that companies (mainly core and extractive industries) that use natural resources irresponsibly should at least meet the needs of their local community.[143] The spending trend shows little contribution to backward areas and maximum CSR activities in developed regions. For example, the 2017 KPMG report (for N100 companies) notes that six states with 60% of backward districts received only 15% of the total CSR spend, whereas five states with 15% of backward districts received 70% of the CSR funds. This may have a negative effect on the SDG goals which the government is hoping to achieve through section 135. The government should establish the high priority needs of society and target public expenditure in those areas.[144]

A related concern is the lack of innovative ideas and expenditure on internal capacities and the survey indicates repetitive CSR activities.[145] Those companies wishing to introduce innovations in their businesses are more likely to seek realistic and even

[139] HCL 2018 (n 133) 29–30.
[140] *India's CSR Reporting Survey 2019* (n 124) 32.
[141] Kasmin Fernandes, 'Top 20 Indian Companies for CSR in 2019' (*The CSR Journal*, 20 December 2019) <https://thecsrjournal.in/top-indian-companies-for-csr-2019/> accessed 12 March 2020.
[142] OECD, 'Active with India' (2017) 57.
[143] HCL 2018 (n 133) 67.
[144] Aneel Karnani, 'Mandatory CSR in India: A Bad Proposal' (*SSIR*, 2013) <https://ssir.org/articles/entry/mandatory_csr_in_india_a_bad_proposal> accessed 26 February 2020.
[145] HCL 2018 (n 133) 41.

aggressive disclosure practices.[146] These companies monitor their CSR activities regularly are more likely to adopt appropriate reporting practices.[147] However, practice shows their interest lies in measuring their CSR impact and using it as a PR tool rather than focusing on the outcomes of their activities. This may also explain why education and health care receive maximum funding in that the results are tangible and companies prefer to invest in these areas as it will increase their reputation in society.[148]

4.2.2. Business Responsibility Report- Empirical Studies

This section analyses various extant empirical studies on BRR to determine the efficacy of mandatory disclosure applied on a 'comply or explain' basis. The empirical studies cast light on the way in which directors consider ESG issues when making corporate decisions. Although BRR has been replaced by BRSR, the empirical studies are based on BRR as BRSR is compulsory only from FY 2022-23 – although companies may report voluntarily from FY 2021-22. Studies on the type and quality of explanations for non-compliance with ESG issues will also be considered to verify the quality of decision made by directors which will, in turn, assist in analysing whether disclosure facilitates stakeholder engagement which may ultimately lead to the integration of their interests in the decision-making process.

The MCA published the 'Report of the Committee on Business Responsibility Reporting' covering 490 listed companies in the year 2020. They included information on how complete, accurate, and clear the information disclosed in BRR was.[149] The study revealed that companies provided information on all the principles, but the information provided was not entirely relevant to the principle it purported to support. This points to inadequate accuracy and clarity. The quality and utility of BRR, too, need to be improved. For example, on disclosure regarding the number of stakeholder complaints received and resolved, most companies only reported on the number of complaints with

---

[146] CV Baxi and Rupamanjari Sinha Ray, 'Corporate Social & Environmental Disclosures & Reporting' (2009) 44 Indian Journal of Industrial Relations 355, 361.
[147] ibid.
[148] For example, when companies build schools and hospitals.
[149] Completeness referred to whether information on all the nine NVG principles was provided; accuracy related to whether the information provided was of relevance to the principle; and clarity refers to comprehensibility of information provided. See MCA, 'Report of the Committee on Business Responsibility Reporting' (2020) 24 <https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf> accessed 12 July 2021.

very few addressing resolution.[150] There was a great deal of variance in the disclosures made across the different principles with disclosures on supply chains and contract labour faring worst.[151]

The National Stock Exchange (NSE) and Stakeholder Engagement Services conducted empirical research to analyse the disclosure practice of the top 100 listed companies based on their non-financial parameters in FYs 2016-17 and 2017-18.[152] The study found that all 100 companies met their reporting obligations, and 50 of the 100 published an additional voluntary sustainability report.[153] This shows that BRR is widely accepted by the companies which are in fact publishing multiple reports to show their commitment to CSR. Of 99 companies, 10 companies in FY 2016-17, and 22 in FY 2017-18 followed integrated reporting.[154] Most of these followed either an internationally accepted reporting format, such as GRI[155] or the International Integrated Reporting Council[156] (IIRC) regarding disclosure. This can lead to the lack of harmony and difficulty in comparing the reports. On occasion, the publication of several reports can lead to information overload which can negatively affect stakeholder decision making. The information provided in the additional reports covers diverse issues but may not be accurate or be of a quality generally lower than the information required by law.[157] In short, additional reports run the risk of focusing on the process of disclosure rather than the quality of the information disclosed.[158]

A different study conducted GRI, TCS, and IIMB suggests that there is a varying level of maturity with regard to non-financial issues in different companies and non-financial issues are gradually being integrated into business plans due to the commitment of senior

---

[150] ibid 25.
[151] ibid 24.
[152] 'Business Responsibility Reporting in India: Disclosures and Practices' i <https://www1.nseindia.com/content/equities/bbr_2017_18.pdf> accessed 24 March 2020.
[153] ibid 12.
[154] ibid 15.
[155] GRI standards are the first global standard of sustainability reporting and represent the global best practice for reporting on a range of economic, environmental, and social impacts and caters to the information need of multi stakeholders. It is the dominant global standard for sustainability reporting. See GRI Standards <https://www.globalreporting.org/standards/> accessed 12 July 2021.
[156] Like GRI, it is also one of the leading ESG frameworks, but this framework helps companies prepare a more investor-focused report. See IIRC, https://integratedreporting.org/the-iirc-2/ accessed 12 July 2021.
[157] Villiers (n 17) 14.
[158] For example, 90% of the companies had disclosure on identified environmental risks but only 40% stated that they have projects related to clean development mechanisms. Companies have clearly identified their internal and external stakeholders but disclosure on stakeholder complaints varied. See 'Business Responsibility Reporting in India: Disclosures and Practices' (n 152) 10, 11.

managers.[159] Although, non-financial reporting standards are evolving rapidly in India, reporting frequently lacks clarity[160] as companies are cautious in revealing all the details.[161] One reason could be the absence of an express requirement to publish an in-depth disclosure on stakeholder issues and how companies are managing stakeholder concerns. The directors are expected to disclose honestly and to be transparent as regards their decisions on stakeholder issues. The study concluded that very few companies evidenced the involvement and leadership of senior management in sustainability reporting, there was an absence of reference to stakeholder interests in the reports, and the companies depended on a regulatory regime.[162] In this regard, the active involvement of senior managers and stakeholder awareness may be helpful. The challenge is to ensure that all companies present sufficient reliable information which can form a basis for stakeholder engagement. In India voluntary disclosure on ESG issues will not lead to an engaged-stakeholder base.

As regards coverage, it can be concluded that Indian companies disclose information on the NGRBC principles but this needs to be clearer and more accurate. Companies frequently provide irrelevant detail or insufficient information. Both the MCA and NSE studies agree on the coverage, quality, and clarity of information disclosed by companies in BRR. ESG disclosure is still in a developmental stage in India which means that it is neither comprehensive nor clear. The BSE has taken the lead in harmonising reporting practice by becoming the first Asian stock exchange to join the Sustainable Stock Exchange Initiative (SSE).[163] The GRI and the BSE have released a document linking the GRI Standards and the SEBI BRR Framework. When compared with the disclosure requirements under the GRI guidelines, the BRR framework was found to be rigid. Since the GRI framework is sector specific, it increases transparency so making disclosure more meaningful and comparable.[164]

---

[159] The study conducted by GRI, Tata Consultancy Services, and the Indian Institute of Management and Business was based on sustainability reports from 46 Indian reporting organisations listed in GRI's Sustainability Disclosure Database from May 2013 to December 2015. See 'Sustainability Integration: Corporate Reporting Practices in India' (GRI, IIM, TCS 2016) 5 <https://www.globalreporting.org/resourcelibrary/GRI-IIMB-TCS%20Study%202016.pdf> accessed 12 July 2021.

[160] 'Environmental and Social Reporting by Indian Companies' (NSE 2019) Quarterly briefing 24 9.

[161] 'Sustainability Integration: Corporate Reporting Practices in India' (n 159) 9.

[162] ibid 21.

[163] 'Linking the GRI Standards and the SEBI BRR Framework' 4.

[164] 'Business Responsibility Reporting in India: Disclosures and Practices' (n 152) IX.

4.3. Disclosure Analysis

In the UK the overall conclusion with regard to the level of disclosure in general is adequate but the quality of disclosure can be improved to some extent. Compliance with the reporting requirement is high and companies are producing vast amounts of non-financial information. Reports show an improvement over time in the quality of the section 172 statement and ESG considerations at board level. The introduction of the section 172 statement has ensured a stronger emphasis on the consideration of stakeholder interests in the strategic report. This allows companies better to understand the relevance of stakeholders in their decision making. The FRC has also released several guidance documents indicating how companies can improve their disclosure practice.[165]

In India compliance with the relevant statutory reporting requirements is high.[166] For section 135, disclosure on total annual spending has increased showing an upward trend in the quality of reporting. Similarly, in the case of BRR, most companies are disclosing what is required. However, unlike the BRR, the format of CSR disclosure is standardised as most of the companies disclose their CSR policy in the prescribed format. This makes it easier for stakeholders to compare performance between companies. By contrast, BRR reporting is not comprehensive and lacks relevant detail. This creates the impression of greenwashing or that reporting is being used as a marketing tool. There is considerable scope for improvement in the quality and depth of disclosure. Many companies are often not transparent in disclosing the reason for their non-compliance with the NGRBC or they hide their non-compliance behind boiler-plate statements. Furthermore, companies concentrate on only certain of the principles while ignoring the others. Clarity is lacking and the reporting requirement uncoordinated – notwithstanding efforts to link GRI

---

[165] For example, see| FRC, 'Improving the Quality of "Comply or Explain" Reporting 2021' (February 2021) <https://www.frc.org.uk/getattachment/6a4c93cf-cf93-4b33-89e9-4c42ae36b594/Improving-the-Quality-of-Comply-or-Explain-Reporting.pdf> accessed 3 March 2022; FRC, 'Workforce Engagement and the UK Corporate Governance Code: A Review of Company Reporting and Practice' <https://www.frc.org.uk/ getattachment/56bdd5ed-3b2d-4a6f-a62b-979910a90a10/FRC-Workforce-Engagement-Report_May-2021.pdf>; FRC, 'Workforce-Related Corporate Reporting-Where to Next?' (2020) <https://www.frc.org.uk /getattachment/59871f9b-df44-4af4-ba1c-260e45b2aa3b/LAB-Workforce-v8.pdf>. Although releasing several documents may be confusing for the companies.

[166] In terms of coverage of sustainability reporting, India is among the top 10 in the Asia Pacific area with 98% score in 2020 in KPMG annual report. KPMG, 'The Time Has Come: The KPMG Survey of Sustainability Reporting 2020' (2020) 11 <https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/11/the-time-has-come.pdf> accessed 14 July 2021.

standards and the BRR framework.[167] The information disclosed does not actually result in an informed stakeholder base. Because the information required of companies lacks detail, substantial mandatory reporting requirements are suggested for India. For example, for Principle 3 – 'Business should promote the well-being of all employees' – companies are required only to indicate the total number of employees and permanent women employees.[168] BRR is a standalone report on ESG issues which should be considered critically by Indian companies when discloses information aimed at serving the interests of all stakeholders. However, the empirical results reveal that, in the main, companies approach it as a tick-box exercise.

With the introduction of BRSR companies will be expected to show an overall improvement in their ESG disclosure through better quality reporting. However, as the focus is on ESG and materiality, a reduction in information asymmetry from stakeholders' point of view is far from certain as these reports target investors. This is all the truer of reports that fail to emphasise the impact of company policy on society and the environment. Auditing or external assurance is also not mandated again suggesting that government does not see non-financial disclosure playing a central role in the governance framework. The government must mandate auditing to improve sustainable business practices in India. Transparency in disclosure will increase with the quality of the information disclosed; but quality will only improve once companies start measuring the value of the company in terms that transcend traditional financial metrics.

Another reason why India has no standard explanation for non-compliance is the lack of strong, market-based enforcement in the country. Generally, disclosure-based policy goals are better achieved in a country where there is well-established market enforcement[169] as directors fear adverse market reaction and are wary of the strong criticism they may face if they deviate from their commitments. They may consequently be reluctant to offer explanations which cannot be justified. At this stage of development in India, there is a lack of sophisticated market players[170] and little public pressure that

---

[167] Unlike the BRR, the format of CSR disclosure is unified as most of the companies disclose their CSR policy in the prescribes format. For example, 97% of the companies in the 2019 KPMG report made CSR disclosure in the prescribed format. This makes it easy to compare the reports of one company to other.
[168] NGRBC 2018 39.
[169] Jean J Du Plessis *et al* (eds), *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance* (Springer International Publishing 2018) 171.
[170] The market players in India are currently at an early stage of evolution and are rapidly attracting a greater number of foreign investors. See Umakanth Varottil, 'A Cautionary Tale of the Transplant Effect on Indian Corporate Governance' (2009) 21 National Law School of India Review 15.

could give rise to reputational concerns.[171] Companies are generally wary of disclosing all the information at their disposal for fear of stakeholders using it against them to launch investigations, complaints, or even litigation. They are unwilling to accept stricter regulation or laws to regulate their businesses, and therefore, attempt to strike the correct balance between the hard and soft law initiatives which could lead to an improvement in their CSR conduct.

The reporting language used in disclosures was also found to make it difficult for stakeholders to understand the companies' performance, development, and impact.[172] The reports use technical terms which may be difficult for a layman to understand. Stakeholders in a developed country such as the UK face a similar language problem. However, India's poor education system, which is also the reason for the lack of stakeholder awareness, exacerbates the situation. As a large percentage of the Indian population is uneducated, they are unable to evaluate the reports or understand the technical terms used. As the companies' principal target audience is investors, other stakeholders are not in a position to make full use of the information disclosed. Overall, the conclusion to our analysis of disclosure is that reporting is rhetoric and the information provided by the companies contains very little to substantiate claims of enhanced transparency.

In the UK, some areas of ESG reporting are better developed than others. For instance, a clear trend towards the 'E' dimension of ESG has been in the spotlight for some time. The predominant reporting requirements – eg, TCFD and SASB – are the main drivers of this trend. They are highly focused on certain areas in the 'E dimension' (such as climate change) and disclosure is directed at investors rather than other stakeholders.[173]

---

[171] Du Plessis *et al*, (n 169) 171.

[172] WBCSD, 'Sustainability Reporting Landscape in India' 12 <https://www.wbcsd.org/xczbr> accessed 10 February 2020.

[173] There are various channels through which companies in the UK disclose information and most channels focus on providing information to investors and stakeholders are not the primary targets for such disclosure. Investors are also involved in the formulation of many global reporting frameworks. The ESG reporting standard setters such as CDP, CDSB, GRI, IIRC, and SASB focus on disclosing information material for investors. The five framework and standard-setting institutions have issued a statement to release common metrics for better comparability and transparency. See 'Statement of Intent to Work Together Towards Comprehensive Corporate Reporting' <https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf> accessed 21 April 2022.

The UK is also a global leader on the ‘G’ dimension,[174] while the ‘S’ dimension has been the least prevalent. Although there are enough frameworks on the global level[175] that focus on social issues, a lack of implementation at the national level can be noted in the UK. This may be attributed to how companies are asked to disclose, or to the complexity of regulating social issues or challenges in the regulatory dimension. The ‘S’ dimension is difficult to assess, whereas the ‘E’ and ‘G’ are more easily defined, have a robust framework, and are driven by investors with global reach. Because the ‘S’ dimension is difficult to quantify it is also easier to mislead stakeholders through boilerplate statements. Environmental issues such as climate emergencies are information material to many investors and can potentially impact on financial decisions by the company. In 2021 the UN Climate Change Summit (COP 26) was hosted by the UK and reflected growing expectations among both governments and stakeholders for urgent action on climate challenges. The tightening of regulations and escalating related physical risks (eg, the impact of floods, cyclones, fires, and drought), litigation, and transition risks (impact of changing policy and regulation),[176] push companies to commit to manage their environmental practices responsibly. Consequently, the ‘E dimension’ is the core of ESG issues.[177] The pandemic has shifted some focus to the ‘S dimension’ and has created an opportunity for companies to show genuine efforts to address the social challenges currently prevailing around the world.

In India, the inclination is towards ‘S’ dimension which can be attributed to s.135. Based on the India’s CSR reporting, companies spend a lot more on the education, health, and sanitation and less on the environment.[178] But, the focus on ‘S’ is limited to the

---

[174] This is bolstered by the EU’s proactive position on governance issues. See ‘Insights from the Reporting Exchange: ESG Reporting Trend’ 7 <https://docs.wbcsd.org/2018/02/Reporting_Exchange_Report_ ESG_reporting_trends_2017.pdf> accessed 14 December 2021.

[175] For discussion of the global principles and frameworks see Ch2 Pt 2.

[176] For example, the transition to a low carbon economy will potentially have a significant impact on the world economy. It is important that the financial markets in the UK and India are ready and support such transitions. FRC, ‘FRC Climate Thematic Governance – How Are Boards Taking Account of Climate-Related Challenges?’ (2020) 4 <https://www.frc.org.uk/getattachment/1b770484-d81e-4dca-8565-2c88415e801d/Governance-FINAL.pdf> accessed 10 February 2022.

[177] According to the FCA, terms such as ‘climate’, ‘environment’, ‘sustainable’, and ‘ESG’ are often used loosely across the financial sector and sometimes interchangeably. Climate change is a core focus of environmental work, which is itself one pillar of ESG. See ‘A Strategy for Positive Change: Our ESG Priorities’ <https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities> accessed 15 December 2021.

[178] ‘India’s CSR Reporting Survey 2019 - KPMG India’ (*KPMG*, 5 March 2020) 33 <https://home.kpmg/in/en/ home/insights/2020/02/india-s-csr-reporting-survey-2019.html> accessed 24 March 2020.

development of the nation and issues such as human rights or employee welfare have received little attention. However, since 2017 there has been a remarkable increase in integrated reporting in India due mainly to investor demand and the requirement to publish BRR for Indian companies.[179] Such demands may in time result in companies disclosing more reliable and detailed information for all stakeholders. The global trajectory towards ESG reporting is a trend also reflecting in Indian business, especially with the introduction of BRSR. It aims to align NGRBC with ESG disclosure. Further, with regard to the 'G dimension', there is significant room for improvement in India.[180] There is need for better trained directors to ensure better decision making. Directors need certain skills, knowledge, and leadership qualities to run their companies effectively.[181] Poorly trained directors are often unable to comprehend the space the law allows them to be more inclusive in their strategic decision making. A further problem is that the stakeholders are not empowered to use the information provided in the reports effectively.

In conclusion, disclosure in India does not inform stakeholders or constitute the basis of stakeholder engagement. Things are better in the UK where disclosure indeed informs stakeholders and to some extent constitutes a basis for stakeholder engagement. Making non-financial disclosure mandatory in both countries appears to be a step in the right direction in that it creates a level playing field for stakeholders to make an informed decision. However, for disclosure to be an effective tool in protecting stakeholder interests, companies must avoid vague and boilerplate statements.

To advance stakeholder interests, changes are needed to the Indian position. A provision mandating reporting as part of directors' duty to strengthen stakeholder interests is

---

[179] KPMG (n 166) 5.

[180] Corruption is another pressing problem which creates a workplace environment in which employees consider self-serving behaviour acceptable. Thus, corruption gives rise to unethical behaviour which can be an impediment to promotion of CSR. Improved transparency in disclosure may increase the corporate governance standards and reduce the incentive to accept bribes and engage in corrupt practices. Philip M Nichols, 'The Business Case for Complying with Bribery Laws: The Business Case for Complying with Bribery Laws' (2012) 49 American Business Law Journal 325; Umakanth Varottil, 'Corporate Governance in India's Infrastructure Sector: Issues and Perspectives' (Social Science Research Network 2011) SSRN Scholarly Paper ID 1962383 11; and Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (CUP 2018) 307.

[181] Only 20 companies have disclosed specific information regarding their training or programmes for directors/ (40% – communication/training for directors & employees). See 'ESG Analysis on 50 Listed Companies in India 2020' (SES, NSE 2020) 62 <https://www.sesgovernance.com/pdf/home-reports/1594458276_ESG-Analysis-on-50-Listed-Companies-in-India_2020.pdf> accessed 29 September 2021.

required. This can be compared with the 'section 172 statement' under the UK CA and UKCGC. This should be accompanied by guidance for directors to raise awareness regarding how they should balance the various interests and integrate them in their strategy. Further, it is suggested that the BRSR framework be improved by focusing on comprehensiveness, granularity, and completeness of information from a stakeholders' perspective. Directors must be asked how they have addressed stakeholder concerns. Informed decision making, participation in corporate governance, and transparency will also be well served by the introduction of an improved disclosure monitoring system. The auditing and external verification of reports is also necessary to improve the quality of company reporting on non-financial issues.

5. STAKEHOLDER ENGAGEMENT DURING BOARD DECISION MAKING

This section considers the relevant provisions on stakeholder engagement and participation. First, Provision 5 is discussed in the context of Principle D of the UKCGC. This is followed by a discussion of the lack of focus on stakeholder engagement in corporate decision making in the Indian context.

5.1. The UK

In the UK, non-financial disclosure is an effective strategy for stakeholder engagement. The type and quality of disclosure have also improved but remain inadequate to explain and justify what the board has done in terms of section 172. There is need to further strengthen the voice of stakeholders by giving them an entry point to the decision-making process. In line with the suggestions in the 2016 Green Paper[182] and the government's response in 2017,[183] the FRC revised the UKCGC substantively. The code goes beyond non-financial disclosure and promotes stakeholder engagement and participation by stakeholders. Principle D of the UKCGC requires the board to engage effectively with its stakeholders and ensure their participation in decisions.[184] The code

---

[182] BEIS, 'Corporate Governance Reform: Green Paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf> accessed 12 July 2021.
[183] BEIS, 'Corporate Governance Reform: The Government Response to the Green Paper Consultation' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf> accessed 17 July 2021.
[184] The UK Corporate Governance Code 2018, Principle D which applies to all listed companies.

is supplemented by the FRC's Guidance on Board Effectiveness, which is non-mandatory and contains suggestions of good practice to support directors and their advisors in applying the code.[185] It states that engagement with the company's key stakeholders will help build and maintain relationships with suppliers, customers, and others in the long-term.[186] Provision 5 works on the 'comply or explain' basis and recommends that engagement mechanisms be reviewed regularly to ensure that they remain effective. It further recommends at least one of the following three methods for workforce engagement: a director appointed from the workforce; a formal workforce advisory panel; and a designated non-executive director. The board should choose one or more of the above methods or explain an alternative method of engagement and why it perceives it as effective.[187] For the first time the code prescribes engagement mechanisms for stakeholders (workforce) which until the UKCGC 2018 was limited to shareholders.[188] However, the limitation in Provision 5 is notable in that it refers to only one specific stakeholder, the workforce. The provision should be used to promote the interests of all stakeholders and reflect the aim of balancing the interests of all stakeholders. Nonetheless, Principle D and Provision 5 of the UKCGC, if read together, appear to suggest that the participation mechanism should be developed and kept under regular review for all key stakeholders. This is also suggested by the FRC Guidance on Board Effectiveness which 'promotes a more inclusive approach to stakeholder engagement and encourages boards to reflect on the way in which decisions are taken and how that might affect the quality of those decisions.'[189] To further strengthen the engagement provisions in the code, the ICSA and the Investment Association jointly issued the Stakeholder Voice in Board Decision Making which sets out core principles for stakeholder identification and engagement.[190] The guidance recommends that boards provide stakeholders with feedback so that stakeholders are aware of how they impact on board decisions. This will also assist in building trust and demonstrate transparency and accountability.[191] Both guidance documents provide sources for stakeholder

---

[185] 'Guidance on Board Effectiveness' (FRC 2018) <https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF> accessed 11 July 2021.
[186] ibid 12.
[187] The UKCGC, Provision 5.
[188] For example, independent directors and board committees representing shareholder interests. See Chalaczkiewicz-Ladna *et al*, (n 5) 2.
[189] 'Guidance on Board Effectiveness' (n 187) 1.
[190] 'ICSA and the Investment Association, The Stakeholder Voice in Board Decision-Making Strengthening the Business, Promoting Long-Term Success' (2017) <https://www.icsa.org.uk/assets/files/free-guidance-notes/the-stakeholder-voice-in-Board-Decision-Making-09-2017.pdf> accessed 1 August 2020.
[191] ibid 27.

feedback such as contacts with key customers, customer complaints and satisfaction data, supplier feedback, surveys, social media, and bespoke engagement activities on specific issues.[192]

Stakeholder engagement should be a key stage in the consideration of stakeholder interests in the decision-making process under section 172 of CA 2006. In order to consider stakeholders' interests and comply with the directors' duty, directors must facilitate this process of engagement.[193] This represents a step forward from relying on disclosure as a primary tool and focusing more closely on an the specific process of integrating stakeholder interests in decision making.[194] The introduction of the engagement mechanism may highlight the need to control directors' discretion and encourage them to follow the proper process of integrating and consulting stakeholders so leading to fairness and transparency. This approach will ensure that the management acts in accordance with the interests of its stakeholders and bring certainty as to what is expected of directors.

India shows a general commitment to stakeholder engagement but there remains considerable scope for improvement. Principles 3, 4, and 9 of the National Guidelines of Responsible Business Conduct (NGRBC) refer to engagement with employees and other stakeholders. Principle 3 (core elements 8 and 9)[195] recommends engagement and consultation with employees as well as providing them with access to necessary learning opportunities. Principle 4 (core element 2) recommends that companies understand stakeholder expectations and concerns, consult them in developing policies and processes that impact on them and commit to resolving any differences and redressing grievances in a just, fair, and constructive manner. Principle 9 recommends responsible engagement with consumers. The guideline expects top management to map out its stakeholders and engage and build strong relationships with them proactively on a consistent and continuous basis.[196]

The overall regulation of stakeholder engagement and participation in India is unsatisfactory. Although there is a recognition of stakeholder engagement, no

---

[192] 'Guidance on Board Effectiveness' (n 187) 12; ICSA (n 192) 25.
[193] Esser and MacNeil (n 9) 204.
[194] Chalaczkiewicz-Ladna *et al,* (n 5) 2–3.
[195] Core elements are material sustainability issues and are mapped with Laws and regulations of global covenants and good practices.
[196] NGRBC 2018 33.

mechanism has been put in place to acknowledge it formally. Overall participation by stakeholders in the decision-making process is questionable given the soft nature of the NGRBC. Indian business culture works more efficiently when companies are regulated by hard law.[197] Although the guideline is linked to the BRR, the discussion in the section below shows that the framework for stakeholder engagement is in fact weak.

6. EMPIRICAL STUDIES - STAKEHOLDER ENGAGEMENT

This section discusses various empirical studies already conducted by professionals and academics in the UK and India. This is a critical step in understanding the potential of process-based regulation. The empirical studies below focus on:

- the engagement of stakeholders at board level;
- effect of engagement on board decision-making process

6.1. The UK

All empirical studies referred to here concentrate on workforce participation and engagement. The empirical studies focus on Provision 5 and Principle D of UKCGC which is based on stakeholder engagement and participation in board decision making. This analysis of the various empirical studies will help in evaluating whether an explicit provision on workforce engagement affects the outcome of decision making.

In 2021 the FRC released a research report on workforce engagement to establish how Principle D and Provision 5 are applied in practice and their effects on the decision-making process of the boards.[198] A survey of FTSE 350 companies was conducted to explore the approach they adopt and how effective it has been to giving voice to workforce interests in the boardroom. The annual reports of 280 companies were included as the remaining 70 companies had no or very few employees.[199] Of the companies with annual reports, 32% (89 companies) chose the 'explain' option and

---

[197] See discussion in Ch2 Pt 4.3.
[198] FRC, 'Workforce Engagement and the UK Corporate Governance Code: A Review of Company Reporting and Practice' (n 165).
[199] ibid 10.

provided details of alternative or existing arrangements.[200] The other 68% of the companies adopted one or more of the three options in Provision 5 as a direct consequence of the UKCGC. Of these, 40% appointed a designated NED; 12% established an advisory panel; and 16% combined an advisory panel with a designated NED. Only 1% of the companies appointed a workforce director. While a designated NED is the most popular mechanism the FRC regards it as the weakest and least substantive form of practice.[201] It mentioned that most FTSE 350 companies are currently demonstrating good practice in workforce engagement but there is room for improvement in many companies in terms of their reporting and practice.[202] Currently there are gaps in the reporting on outcomes and the impact of workforce engagement.[203] Discussion on workforce engagement in board meetings did not lead to changes in the decision-making process in many companies with 42% identifying only one or two occasions in the past year.[204] But the provision did help companies to develop their workforce engagement practices which they had put in place before the UKCGC. With time they will be able to embed these practices in their cultures and processes.[205] There are several reasons for engagement with the workforce including 'greater diversity of viewpoints, a channel to raise workforce concerns, or to shift the purpose and values of the company in a new direction'.[206] The purpose of the engagement is clear – to effect a shift to long-term, stakeholder-oriented business models. The FRC recommends focusing on the substance of the provision and avoiding a tick-box approach.[207]

In 2020 the FRC's review of corporate governance reported that most companies had identified and engaged with stakeholders but many of them had engaged on an *ad hoc* basis. It was unclear why some companies had not engaged with all their stakeholders and most of the engagement was one-sided[208] which cannot be categorised as meaningful engagement. Further, while most companies were still reporting on engagement with

[200] ibid.
[201] ibid 30.
[202] ibid 9.
[203] ibid 6.
[204] ibid 33.
[205] ibid 11.
[206] ibid 6.
[207] ibid 47.
[208] FRC 'Review of Corporate Governance Reporting 2020' (2020) 24 <https://www.frc.org.uk/getattachment/ c22f7296-0839-420e-ae03-bdce3e157702/Governance-Report-2020-2611.pdf> accessed 23 February 2022.

stakeholders they were failing to report on the outcomes of that engagement. Compared to this, a clear improvement was seen in this regard in the FRC's 2021 report. [209]

Another important piece of work is the empirical study by Ladna *et al* conducted in the form of document analysis (annual reports published by the FTSE 100) to evaluate the implementation of workforce engagement mechanisms in FTSE100 companies during 2019.[210] They first evaluated the disclosure aspect of Provision 5 working on the 'comply or explain' basis. Of 100 companies, 95 had introduced some form of workforce participation mechanism and there were no instances of simple non-compliance.[211] Sixty-one of the 95 companies complied with Provision 5 while the other 34 provided well justified explanations and opted for an alternative.[212] Alternative workforce participation tools included Board Committees, day-to-day engagement within teams, direct engagement during plant visits, and employee surveys. None of the companies appointed a workforce director, while option 2 – a formal workforce advisory panel – was implemented in 21 companies, and option 3 – a designated NED – was the choice of 25 companies. Fifteen companies combined options 2 and 3. The researchers argue that Provision 5 tools are not yet fully integrated within a company, indicating a tick-box approach. Overall, the report concluded that some evidence of good practice regarding the information disclosed by companies on workforce engagement tools was evident, but the standard of disclosure could be more consistent and companies should avoid boilerplate statements.

The study also considered the nature and operation of process and the implications for the decision-making process. It concluded that there was limited evidence of meaningful two-way engagement between board and workforce.[213] The impact of the process was also difficult to assess as companies are remiss in their reporting on the effectiveness of their stakeholder-engagement processes. Consequently, the link between workforce engagement and board decision making is not readily apparent.[214]

---

[209] FRC, 'Review of Corporate Governance Reporting, 2021' <https://www.frc.org.uk/getattachment/b0a0959e-d7fe-4bcd-b842-353f705462c3/FRC-Review-of-Corporate-Governance-Reporting_November-2021.pdf>accessed accessed 11 July 2021.

[210] Chalaczkiewicz-Ladna *et al*, (n 5).

[211] The data on workforce participation tools are available for 96 FTSE100 companies.

[212] Chalaczkiewicz-Ladna *et al*, (n 5) 12, 17.

[213] ibid 25.

[214] ibid 26.

In Grant Thornton's 2020 survey it was found that companies provide good disclosures on the workforce provision with only ten companies (4%) not disclosing some form of interaction.[215] One or combination of the three methods listed in the code were adopted by 74% of the companies reviewed (56%: NEDs; 28% formal workforce advisory panel; 3% employee directors; and 17% a combination).[216] It concluded that determining how companies engage with the employees is a challenge. This conclusion is consistent with both the FRC and Ladna *et al*'s conclusion on disclosure of engagement and outcomes of such engagement. All three studies reported that companies need to focus on two-way communication with stakeholders. Companies not only need to engage with their stakeholders but also detail how the engagement process has affected their decisions and how the company responds to risks and opportunities related to the workforce. Despite the regulatory requirement, there is still a gap in this area. This notwithstanding, the FRC's recent report shows a clear improvement in the statistics which suggests that with time workforce engagement should improve further.

6.2. India

India currently has no specific stakeholder engagement provision and, therefore, this research is necessarily limited in terms of the empirical studies it was possible to cover. However, empirical studies on BRR are discussed here briefly. Principle 4 of the NGRBC requires companies to disclose their stakeholder engagement on a voluntary basis. Companies are asked to list their key stakeholder groups and with how many of these groups they formally engaged on environment and social issues.[217] In the MCA's Report of the Committee on BRR 2020, 95% of the companies responded as regards mapping of stakeholders and identification of the disadvantaged, marginalised, and vulnerable among them, but there was no information on stakeholder engagement.[218] Similarly, in the NSE's report on BRR, from a sample of 100 companies in FY 2017-18, 94 disclosed on mapping of stakeholders and 88 disclosed whether they had identified the disadvantaged, vulnerable, and marginalised stakeholders. There was no information on the engagement or identification of stakeholder concerns or plans to address these.

In the following section the reforms needed in this area in both jurisdictions are analysed.

---

[215] Grant Thornton UK (n 110) 7.
[216] ibid 8.
[217] Section C of BRR, Essential disclosure on Principle 4
[218] MCA, 'Report of the Committee on Business Responsibility Reporting' (n 149) 25.

6.3. Assessment

To sum up, the link between disclosure, stakeholder engagement, and board decision making cannot be assessed in India due to an inadequate regulatory framework. It can be stated that stakeholder engagement and participation is not currently embedded. Disclosure of non-financial information is inadequate and stakeholder engagement and participation methods are required. The soft approach of the NGRBC is not suited to the Indian business culture. Although the guideline is linked to mandatory disclosure through BRR, companies are not required to apply the principles on a mandatory basis or to disclose on the efficacy of their stakeholder engagement. Thus, the overall standard is limited by the lack of a detailed and granular approach to disclosure which also poses a challenge for stakeholder engagement. Therefore, reforms must be introduced to empower stakeholders through participation mechanisms which will provide room for dialogue and the expression of concerns.

The governments need to identify stakeholder engagement as a core policy and legislate mechanisms for some form of structured stakeholder participation. The directors must fulfil their function of engaging with the stakeholders through a formal participation mechanism or rely on *ad hoc* engagement. A mandatory engagement provision is suggested with a choice of participatory mechanisms to maintain flexibility. Directors can select what method to follow depending on the engagement objectives, type of participants, and the appropriate level of engagement required.

For a more advanced approach to section 135, stakeholder engagement is suggested through different channels such as site visits to hear the stakeholders' opinions, or through surveys or feedback to provide local solutions to the stakeholders' problems. Since India has adopted an approach based on problem solving to regulate CSR, relying on mandatory disclosure can be beneficial for transparency but disclosure alone will not be sufficient for meaningful implementation of the CSR programmes. Engaging with stakeholders in the process is vital for an understanding of their needs and views which will influence the CSR programme decisions. Currently in India, companies are required by law to establish a CSR Committee.[219] Although these Committees' responsibility is

---

[219] Companies must set up a CSR committee of the board of directors, consisting of two or three directors. The board considers the recommendations of the CSR Committee and approves the CSR policy of the company. See CA 2013, s 135(1)

restricted to formulating and recommending CSR policy to the board, it might be appropriate to broaden their responsibility to represent the companies' wider stakeholder community on the board. Having a separate committee can be beneficial for all stakeholders. The functions or responsibilities of committee as recommended in this thesis is much broader than under s.135 of CA 2013. A dedicated CSR committee can influence directors' decision-making by regularly identifying social and environmental issues relevant from a stakeholder perspective. Moreover, it can enhance CSR performance by working on innovation, different strategies, and policies to further the interests of all stakeholders. Because such committees can closely and regularly monitor stakeholder issues, it can advise the board in solving controversies between different stakeholders or in case of trade-offs between shareholders and stakeholders. Together with the stakeholder participation mechanism, it can provide a level playing field for stakeholder engagement and thus, empower them in the governance of the company. However, it may be difficult to achieve a collective view of the directors without creating a conflict of interest in the context of directors' duties.[220] Therefore, clear guidance should also be provided on what is expected of these Committees. A CSR Committee can appropriately address the problems identified above which can lead to integration of CSR in its company's strategy.

It is also important that disclosure requirements are accompanied by stakeholder engagement and participation mechanisms so that directors can hear the concerns from the key stakeholders and evaluate and feed them into the decision-making process. Since disclosure results fall below the desired level in India, this will directly affect the level of stakeholder participation at board level. Stakeholders will not have sufficient information to enable them to participate meaningfully in decision making.[221] Companies need to scale up their performance and, to achieve this, it is equally important to introduce reforms focused on process. Further, it is important that stakeholders are capable of contributing to the process and influencing the directors.

The UK position is considerably more positive as regards both disclosure and engagement, but not all reports are of an equal standard. Most companies are fulling the requirement of Provision 5[222] but fewer companies are disclosing on the outcomes or how the engagement has resulted in changes in their decision making. As highlighted

[220] Esser and MacNeil (n 10) 218

[221] ibid 203.

[222] Provision 5 obliges the relevant companies to indicate a type of workforce engagement they adopted.

above, the importance of Provision 5 from a stakeholder's perspective is that it brings control and certainty to how decisions are made which is lacking in the substance-focused provision under directors' duties. However, the provision cannot yet be said to be successful as compliance has not changed how directors make decisions. In this light, an 'apply and explain' approach to disclosure may be more successful in increasing regulatory intensity than the current 'comply or explain' approach.[223] This will still give directors flexibility in choosing the most suitable arrangements.

It is also suggested that in the UKCGC, an advisory panel, or a CSR Committee should be established to represent the wider stakeholder cohort. Provision 5 of the UKCGC may lead to friction between the interests of the various stakeholders and raise questions as to why only the workforce deserves a seat on the board. A CSR Committee, representing all stakeholders, will be better able to manage the complex and multi-layered disclosure requirements and allocate sufficient time to discharging its duties effectively.[224] Having a separate committee for CSR may lead to an increase in regulatory intensity which could prove more beneficial than the current framework for CSR which falls within the realm of soft law.

7. CONCLUSION

The aim of this chapter was to evaluate disclosure and stakeholder engagement as techniques to protect stakeholders in the UK and India.[225] The evaluation was under the theme of 'disclosure v process' where process is defined as the decision-making process of the board which is distinct from procedural mechanisms such as disclosure. Disclosure, although it can facilitate stakeholder engagement, does not provide an entry point for stakeholders in the decision-making process. The decision-making process is typically complex, uncertain, and affects various stakeholders. Directors need the discretion to make decisions that reflect the changing needs of the company. The substantive duty of directors in both jurisdictions is subject to a wide discretion to make decisions for the success of the company and also to consider stakeholder interests. But

---

[223] Chalaczkiewicz-Ladna, *et al* (n 5) 27.

[224] The presence of a CSR Committee improves the quality and quantity of CSR reporting in a country. See Shayuti Mohamed Adnan, David Hay and Chris J van Staden 'The Influence of Culture and Corporate Governance on Corporate Social Responsibility Disclosure: A Cross Country Analysis' (2018) 198 Journal of Cleaner Production 820, 821.

[225] See discussion in Pt 2.1.

it is very difficult to evaluate how directors arrive at a particular decision, especially in India with its concentrated shareholding and widespread pyramiding and crossholding.[226] This demands transparency in the process and certainty that stakeholder interests have been integrated. Disclosure increases transparency by informing stakeholders on various social and environmental issues and can form the basis for stakeholder participation in decision making. But this is generally after directors have made their decisions. To secure greater control in the way decisions are made in a company, a mandatory stakeholder engagement provision was suggested.[227] This provision, if carefully designed and internalised, can facilitate stakeholder empowerment and lead to a fairer outcome. Advantages of stakeholder engagement include awareness among directors of the concerns felt by stakeholders though engagement in the decision-making process. Directors can then take mitigating or preventive action to address those concerns[228] so improving the quality of decisions which have been adapted to meet the needs of stakeholders and which are likely to produce positive outcomes. Under Provision 5 of UKCGC, the UK has prescribed a specific process provision for workforce engagement but no such move can be seen in India.[229] Stakeholder engagement and participation must be embedded in national legislation while bearing in mind that the quality of engagement is strongly dependent on an improvement in the quality of information.

The evaluation of disclosure based on several empirical studies revealed a clear disconnect between what directors do and what they say.[230] Although in the UK the high compliance with the disclosure provisions does inform stakeholders to some extent there is room for improvement. In Indian companies information disclosure is incomplete in most of the CSR and BRR reports. Companies provide only brief statements or short sentences to illustrate the application of the NGRBC principle, rather than offering a detailed and relevant description in their reports. This shortcoming can be ascribed to India's limited regulation, lack of stakeholder awareness, and the lack of audit or verification of information. There is, therefore, an urgent need to increase transparency in terms of how directors make decisions which disclosure alone is unable to meet. Stakeholder interests are largely marginalised, and disclosure is not able to allow them

---

[226] See discussion in Ch3 Pt 4.5.
[227] See discussion in Pt 2.2.
[228] This can be done through a due diligence process discussed in detail in Ch3 Pt 5.
[229] See discussion in Pt 6.
[230] See discussion in Pt 4.3.

an entry point to decision making by which they can influence how directors make decisions. Thus, the chapter emphasised engagement and participation as a process that embraces the views and values of all stakeholders. A good decision-making process will likely include the interests of all stakeholders. This requires engaging with and allowing all stakeholders an opportunity to participate. Hence, having control over the process will increase transparency and promote quality decision making by being able to judge director's conduct on their compliance with a defined process. This will increase directors' accountability to all stakeholders.

The chapter further tested the success of Provision 5 based on extant empirical studies conducted by organisations and academics.[231] It was concluded that the provision cannot yet be said to be successful as it has not resulted in changes in the strategies or outcomes. Therefore, it was further suggested[232] that the efficacy of the provision be increased. Several suggestions were also made regarding the Indian position. Most notably, that stakeholder engagement and participation need to be underpinned by hard law**.** As a starting point, that stakeholders are actually able to influence the decisions must be ensured. This, however, depends on their awareness, education, and the quality of disclosure.

[231] See discussion in Pt 6.1.
[232] See discussion in Pt 6.3.

CONCLUSION

The thesis deals with CSR regulation from a company law perspective. It considers mechanisms for better protection of stakeholder interests in the context of both hard and soft law by evaluating the extant frameworks in the UK and India. The lack of proper consideration of stakeholder interests in companies' decision-making processes emphasises how to secure accountability for stakeholders. Unequal access to information and a lack of mechanisms for participation in board decision making means that stakeholders do not have the same opportunity as shareholders to influence board decisions. Therefore, the principal question is how to regulate CSR to protect stakeholder interests and compel companies to behave ethically and responsibly.

Chapter 1 observed what has happened with CSR over time in the different models of corporate governance in the UK (following the enlightened shareholder value approach) and India (following the pluralist approach). For this, the history of CSR was examined to illustrate the paradigm shift in the understanding of CSR from philanthropy to stakeholder protection.[1] It was noted that over the years the understanding of CSR has been influenced by government regulation, academics, social movements, and several regional and international bodies. It was shown that ESG replaced CSR on the international level and the reason for this change was explored.[2] The EU has been the pacesetter in ESG regulation, and the UK's position is more aligned with it because of the influence of EU law on the UK. The primary purpose of ESG integration is the delivery of financial returns.[3] Ultimately, it links shareholder influence and board decision making. On the other hand, from a CSR perspective directors' decisions and actions are guided by ethical and moral considerations intrinsic to the concept; its implications extend beyond shareholder primacy and link to the board's accountability to stakeholders. The distinction between the two concepts assists in an understanding of both the desirability of CSR and the extent to which it should be regulated.[4]

The idea of stakeholder protection is currently implemented in the national regulatory framework through directors' fiduciary duty and non-financial disclosure in both the UK

---

[1] See discussion in Ch2 Pt 4.
[2] See discussion in Ch1 Pt 2.3.
[3] See discussion in Ch1 Pt 4.
[4] See discussion in Ch1 Pt 4.2.

and India.[5] The fiduciary duty gives directors the power and discretion to take reasonable steps for the company's purposes, which has generally been understood as achieving financial outcomes for shareholders. The reform of the fiduciary duty by section 172(1) of CA 2006 in the UK and section 166(2) of CA 2013 in India, allows directors a wider discretion in integrating stakeholder interests by stating 'what' directors are required to do – ie, consider the interests of stakeholders in their decision-making processes.[6] In addition to the pluralist approach adopted under section 166(2), the Indian Act introduced a code for independent directors which stresses the need for them to safeguard and balance the diverse and often competing interests of all stakeholders – but without guiding them on how to do so. However, the Indian CA makes provision for 'mandatory CSR' under section 135, requiring certain companies to spend 2% of their net profits on CSR activities.[7] The government has robustly supported this section and released the CSR Rules 2014 (amended in 2021) as supporting company guidelines. India has seen an increase in CSR activity in compliance with the mandatory 2% profit spending on CSR activities. However, this has not resulted in the integration of stakeholder interests in board decision making or addressed the impact of a company's operations on stakeholders. Rather, it points to a failure by government to adopt a holistic view of CSR. Although section 135 suggests a narrow view, a wider approach to CSR has merit in a country like India which allows stakeholders to benefit from the country's overall development – eg, companies providing education and healthcare. However, the section is currently riddled with implementation and enforcement problems which exclude the realisation of the desired sustainable development goals (SDGs). The government issued the National Guidelines on Responsible Business Conduct in 2018 (NGRBC) which embody SDG and UNGP and require directors to adopt an inclusive approach.[8] The Guidelines are linked to the 'comply or explain' approach to disclosure to foster transparency, which is analysed in Chapter 3 of this research. The key areas on which reporting is required are issues of ESG and stakeholder relationships. While the disclosure is mandatory, application of the principles is, in the main, left to directors' discretion and is targeted principally at shareholders.

The stakeholders have a measure of protection through non-financial disclosure which provides information necessary to make decisions about a company. This is a technique

---

[5] See discussion in Ch2 Pts 3 and 4.
[6] See discussion in Ch 2 Pts 3.1 and 4.2.
[7] See discussion in Ch2 Pt 4.1.
[8] See discussion in Ch 2 Pt 4.3.

favoured in both countries and is discussed in Chapter 4 and supported by selected empirical studies conducted in recent years.[9] To further strengthen the voice of stakeholders in the UK, Provision 5 of the UKCGC offers them an entry point to the decision-making process[10] by prescribing stakeholder engagement mechanisms on a ‘comply or explain’ basis. This is a welcome step but one that is still lacking in the Indian framework.

After evaluating the legal provisions, Chapter 2 drew conclusion on the overall approach in the two jurisdictions and on the role of hard law and soft law in this regard.[11] It emerges clearly from the discussion in Chapter 2 that the protection of stakeholders is approached differently in the UK and India. Assuming directors are acting in good faith and in the company's best interest, the discretionary powers in each of the jurisdictions under review are sufficiently broad to enable them to integrate stakeholder interests during decision making. The overall approach in India leans towards hard law and instrumental with the outcome defined as the use of profits for CSR purposes which is implemented through a board committee and reporting under section 135 of CA 2013. The overall framework is rigid, especially after the recent amendment of section 135, which makes the spending of the 2% compulsory. This approach concentrates on the country's socio-economic development to enable stakeholders to take part in and benefit from India’s economic progress. The focus is on protecting companies’ external stakeholders, such as society and the community, through the traditional philanthropic approach to CSR. Thus, the understanding of CSR in India is limited and does not include stakeholder engagement or focus on internal decision making by directors. Moreover, the conventional understanding of CSR is no longer adequate and a profound transformation is required in the way companies conduct their business by implementing an inclusive approach in practice. India’s approach is already aligned to CSR via the pluralist approach with section 135 further complementing the overall strategy.

In contrast, the UK’s framework is hybrid with the ‘comply or explain’ principle central to the framework. The framework is focused on decision making and disclosure as techniques to protect the internal stakeholders, such as employees, especially if one considers Provision 5 of the UKCGC where employee engagement mechanisms are detailed. Greater reliance is placed on directors by allowing them flexibility in making

---

[9] See discussion in Ch 4 Pts 2 and 3.
[10] See discussion in Ch 4 Pt 5.1.
[11] See discussion in Ch2 Pt 5.

strategic decisions. In addition, the provision sets a direction for directors to establish a culture of long-term sustainability to understand better and protect stakeholder needs and expectations. However, the UK also emphasises the idea of enlightened self-interest by adopting the ESV approach which guides directors to prioritise the long-term interests of shareholders and is more consistent with ESG investing. Both ESV and ESG acknowledge the importance of stakeholders as a part of the risk-based management for the benefits associated with these approaches. Thus, in practice ESG investing aligns with the fiduciary duty of directors under section 172(1) of CA 2006 as both support shareholder interests.

The following two chapters evaluated various techniques to protect stakeholders under the theme of 'substance v process'.[12] 'Substance', as understood in this thesis, deals with the ends one wishes to achieve and grants directors a wide discretion to achieve those outcomes. 'Process' is explained as an internal decision-making process followed by the board and focuses on how directors manage the company's operations. It is distinguished from the procedural mechanisms such as disclosure which does not give a voice to stakeholders in the decision-making process.

Chapter 3 discussed the board's decision-making process and its link to the substantive duty of directors. Firstly, it illustrated the key attributes and differences between substance and process from a regulatory perspective.[13] Following on from Chapter 2, Chapter 3 further emphasised how the two jurisdictions focus on outcomes. The wide discretion to directors under the substantive duty in section 172(1) of CA 2006 and section 166(2) of the CA 2013 has largely marginalised stakeholder interests and gives directors no indication of 'how' they are to integrate their interests. Directors tend to favour shareholders even in the face of the Indian Act which adopts a pluralist approach that requires directors to give equal importance to all stakeholders. Despite considerable scope for integrating their interests, stakeholders are afforded little protection under the frameworks. It is challenging to hold directors accountable for not considering stakeholder interests because of the complexity of the decision making. Board decisions are often difficult to evaluate and there is no way of knowing how directors arrived at a particular decision. This creates a risk of artificial compliance. Moreover, affording

[12] See discussion on 'substance v process' in Ch2 Pt 1.
[13] See Table 1 in Ch3 Pt 1.1.

directors a discretion to make judgement calls provides the necessary flexibility to take strategic decisions based on the needs of their company.

Consequently, changes are required in both jurisdictions. Accordingly, this thesis argued for controlling the factors that contribute to decision making and establishing a process that prescribes complementary mechanisms that reinforce one another. For example, a process-focused approach may be more likely to level the playing field for the stakeholders and control the discretion of directors which is generally exercised to promote shareholder value. This will lead to board accountability and guide directors on the question of 'how' for better outcomes, leading to transparency in decision making. Such process-based regulation will give voice to stakeholders and empower them to influence the decision-making process.

However, whether this is the best form of regulation can be questioned in that controlling their discretion nullifies the flexibility afforded directors. But an overly prescriptive approach such as that in India is also not suggested. Finding a balance between discretion and maintaining transparency in the decision-making process is the key. Central to this process should be how decisions are made in a company, ie, whether stakeholders have a say in decision making and whether their interests are integrated. As CSR is more concerned with a company's internal system and accounting for the impact of its operation on society, process-based regulations will help bring more transparency than an outcome-oriented approach where one cannot be sure whether or not stakeholders have been consulted in the process. Controlling the process means not being entirely dependent on the directors' discretion for stakeholder engagement and participation. Moreover, when decisions are made effectively there is a greater chance of achieving an effective outcome.

Part 2 of the chapter addressed corporate purpose by focusing on the UK and India as two key jurisdictions in which this topic has been debated.[14] In both countries the responsibility of shaping, monitoring, and overseeing the corporate purpose falls to the board. The legal framework in both countries relies on directors to define and implement a broader corporate purpose. Still, shareholders constrain directors' discretion to pursue broader interests because of the control rights given to them by law. A direct way of addressing this is to specify the process of explicitly defining the corporate purpose and

---

[14] See discussion on corporate purpose in Ch3 Pt 2.

embedding it in the Articles of Association. This should be linked to majority voting by shareholders ('say on purpose') so that they are not able to block any CSR strategy. The narrow shareholder maximisation view is also supported by executives' share-based remuneration. This should be corrected by linking directors' remuneration to a broader purpose and ESG incentives.[15]

Having discussed several factors that affect the board's decisions in this section, the chapter continues by highlighting the corporate governance challenges facing the two jurisdictions which reduce the board's ability to integrate stakeholder interests adequately. Directors are driven to promoting shareholder interests by several dominant factors such as shareholder's rights in the appointment and removal of director, their reserved rights, and their right to propose a resolution.[16] These shareholder powers can pressurise directors into making decisions in their favour. Thus, shareholder primacy is strongly entrenched in the corporate governance frameworks. These shortcomings in company law need to be addressed. In India, despite having a pluralist approach, stakeholder interests are still not integrated in decision making as the concentrated shareholding structure leads to the dominance of promoters and a lack of independence for the NEDs. Thus, stakeholder involvement in corporate decision making is somewhat limited in both jurisdictions.

Stakeholders have negligible enforcement rights and no opportunity to influence how boards make decisions. To better protect stakeholder interests it is crucial to sufficiently focus on the 'process' to limit the *de facto* norm of shareholder primacy which has a significant influence on the behaviour of directors. Moreover, the inadequate coverage of stakeholder interests must be addressed by establishing formal mechanisms to integrate their interests through a mandatory approach. There is no recommendation for a radical overhaul of the substantive aspect of company law in either jurisdiction. Opening the option of litigation or giving all stakeholders access to litigation as a way of enforcing their legitimate rights against their companies is not a practical option and leads to legal uncertainty and poor outcomes. True acceptance of CSR will require implementing the substantive duty together with a process that controls the factors that contribute to effective decision making. This will result in a transparent and accountable framework for better stakeholder protection.

---

[15] See discussion on remuneration and incentives in Ch2 Pt 4.3.
[16] See discussion on shareholder's powers in Ch3 Pts 3.1.2 and 3.2.2.

Therefore, the following section discussed how introducing a duty of due diligence would improve the board's decision-making process and complement the director's fiduciary duty.[17] Conducting a due diligence process will influence the decisions as it aids in identifying relevant factors before decisions are made thus potentially improving the decision-making process. Instituting a due diligence process is not a legal requirement in India, and Principle 5 of the NGRBC only recommends carrying out a human rights due diligence process. Traditionally, Indian business culture does not work effectively in the soft law sphere. The UK MSA does not impose an obligation to undertake a due diligence process or include a process for the prevention of adverse impact and provide a remedy for affected parties. The section only requires publication of an annual statement on slavery. However, this has not proved notably successful and the enactment of a statutory due diligence duty is recommended which will compel directors to implement and maintain a process of identifying and mitigating commercial risks and avoiding or controlling harm to stakeholders. This will resolve the current uncertainty in the decision-making process highlighted earlier in this chapter. It will also open the door for directors to consult their stakeholders and make a genuine effort to monitor the stakeholders' concerns closely and find ways of mitigating them. The next chapter highlighted low-levels of stakeholder engagement in the decision-making process.

Chapter 4 evaluated disclosure and stakeholder engagement as techniques to protect the interests of stakeholders. Disclosure aims to increase transparency by requiring directors to disclose information about the stakeholders' non-financial issues.[18] Directors get a chance to explain their decisions which provides a more level playing field for stakeholders to make an informed decision while also facilitating stakeholder engagement. This enables effective stakeholder participation in decision making in that the information is available to them to act upon. The growing interest in non-financial disclosure also comes from investors who pressure directors to address the various ESG risks affecting the company's financial position. Stakeholders can draw some benefit from ESG reporting despite the priority accorded to shareholders. If directors are honest in their disclosure and avoid greenwashing, disclosure will lead to transparency. However, information is currently provided after the decisions have been taken which allows stakeholders no point of access to the board's decision-making process.

[17] See discussion on due diligence in Ch3 Pt 5.

[18] See discussion on disclosure in Ch4 Pt 2.1.

Consequently, although disclosure is necessary for stakeholder protection, it must be complemented by stakeholder engagement and participation mechanisms.[19]

Various empirical studies on the disclosure requirements in the UK and India were analysed to test compliance by companies and evaluate the type and quality of explanations offered for non-compliance. The primary sources of non-financial disclosure[20] in the UK are Strategic Report (s 414C) linked to section 172 CA 2006 through the 'section 172 statement', and non-financial reporting (s 414 CB CA 2006) which overlap with European requirements through the NFRD. Furthermore, new legislation under the TCFD requires firms to disclose climate-related financial information as from April 2022. The Indian disclosure framework includes section 135(4) of CA 2013 and Rule 9 of the CSR Rules 2014 which require large companies to give a brief outline of their CSR policy, the composition of the CSR Committee, and details of CSR spending. The reporting requirement is also based on the NGRBC which requires the top 1000 listed companies on the NSE and BSE to publish a report explaining how the companies have applied the nine principles of the NGRBC 2018 in practice by publishing a BRR. It was noted that the BRR has recently been updated to align with the global standard of ESG reporting.

It was concluded that companies do not always provide complete and meaningful information to stakeholders which would allow them to participate in the decision-making process.[21] Although the UK has enjoyed some success with the 'comply or explain' approach, the quality of explanations can still be improved. The 'comply or explain' approach gives directors the option to either apply the principles or disclose non-compliance. Thus, information material to stakeholders is left mainly to the director's discretion. For example, environmental and social issues in the strategic report are based on a 'comply or explain' approach. In contrast, other disclosures related to principal risks affecting the company's performance are mandatory. In India, disclosure is associated with poor quality explanations which prioritise disclosure over compliance with the law. While disclosure in the UK does form the basis of stakeholder engagement, in India the lack of enforcement of the reporting requirements and inadequate verification of the information provided by companies leads to a tick-box approach. Therefore, a provision mandating reporting on the fulfilment of directors' duties to

[19] See discussion on stakeholder engagement Ch4 Pt 2.2.
[20] See discussion in Ch4 Pt 3.
[21] For the evaluation of the empirical studies on disclosure, see Ch4 Pt 4 .3.

strengthen the stakeholders' interests is needed. This can be compared with the 'section 172(1) statement' in the UK CA and the 2018 Code.

While the thesis acknowledges reporting and disclosure as essential elements in securing accountability, the information should also be relevant from the stakeholders' perspective, accessible to them, and must be verified for accuracy. This will enable stakeholder participation and engagement in decision making. However, to take part in the process it is equally vital that stakeholders are able to access to the information and act upon it. Hence, the thesis sees some merit in section 135 in which the aim is to empower stakeholders through the country's social development.

Nonetheless, this is not an adequate way to protect stakeholder, and emphasis must be shifted to implementing the substantive duty under section 166 through process-based regulation. The UKCGC provides expressly for stakeholder engagement under Provision 5, but no legal provision exists in the Indian framework.[22] The evaluation of Provision 5 revealed gaps in implementation, especially in relation to describing the engagement process and how engagement is affected the decisions.[23] Therefore, the 'apply and explain' approach to disclosure can be more successful than the 'comply or explain' approach in increasing the regulatory intensity. Further reforms are suggested in the UK and India relating to an advisory panel or CSR Committee to represent the wider stakeholder community. Reforms must also be introduced to facilitate two-way communications to empower stakeholders, one through participation mechanisms, and one to provide feedback on how the stakeholders' concerns were considered. In India, the ineffective disclosure requirement and stakeholder engagement framework present significant challenges that must be addressed through an enhanced disclosure monitoring system which will ensure transparency. A due diligence mechanism linked to the companies' substantive duty will further complement stakeholder engagement and require directors to take mitigating action to prevent harm to stakeholders.

The thesis argues for controlling the factors that contribute to decision making and establishing a process that prescribes complementary mechanisms which reinforce one another. This will result in board accountability, guide directors in the 'how' for better outcomes, and lead to transparency in decision making. This process-based regulation will give voice to stakeholders and empower them to influence the decision-making

[22] See discussion in Ch4 Pt 6.
[23] See discussion on evaluation of stakeholder engagement in Ch4 Pt 6.3.

process. As the director's duty cannot be backed up by effective enforcement for stakeholders when their interests are disregarded, embedding a process in several mechanisms which streamline the director's actions and decisions will promote quality decision making. This will not only allow stakeholders to influence the outcome of decisions but also establish a practice in decision making that is more transparent based on the underlying idea that a good decision-making process will lead to better outcomes.

In conclusion, the importance of this thesis lies in its capacity to fill a gap in comparative company law literature regarding the content and scope of CSR. In particular, it suggests a more meaningful and robust framework for stakeholder protection, hard law intervention, in particular as regards the duty of due diligence, stakeholder engagement, and participation mechanisms. The recommendations and proposals framed in the context of the two jurisdictions do not advocate for changes to the substantive aspects of company law. Rather, they see value in streamlining board actions and decisions through process-based regulation that effectively integrates stakeholder interests to achieve the desired outcome. They include some key legal reforms, most notably a 'purpose provision' linked to control on management's remuneration, the duty of due diligence, stakeholder engagement, and board committees. However, these mechanisms can only work if they are implemented in a way which will compel directors to pay adequate attention to and integrate stakeholder interests. At the same time, stakeholders must be vigilant and able to monitor conformity.

Whether such process-based mechanisms will bring about the desired change in corporate behaviour is a question that only the future can answer. The author is well aware of the shortcomings in empirical research on the effectiveness of this type of regulation. Therefore, future research in this area can be explored to examine the merits of this approach in practice. Provision 5 of the UKCGC is still in its infancy and it would be beneficial to investigate the effect on its outcomes in the coming years. Future researchers could further improve the current liability and enforcement regime involving dual-track due diligence mechanisms including disclosure and public enforcement. Because it is constantly changing, no research into CSR is ever complete. This means that continued development of the regulatory system is necessary to facilitate a framework which encourages innovation whilst simultaneously providing stakeholder protection.

BIBLIOGRAPHY

Literature

Abbott KW and Snidal D, ‘Hard and Soft Law in International Governance’ (2000) 54 The MIT Press 421

Adnan SM *et al*, ‘The Influence of Culture and Corporate Governance on Corporate Social Responsibility Disclosure: A Cross Country Analysis’ (2018) 198 Journal of Cleaner Production 820

Agudelo MAL *et al*, ‘A Literature Review of the History and Evolution of Corporate Social Responsibility’ (2019) 4 International Journal of Corporate Social Responsibility 1

Agyeman J and Evans B, ‘“Just Sustainability”: The Emerging Discourse of Environmental Justice in Britain?’ (2004) 170 The Geographical Journal 155

Allcock D, ‘The ““Invisible” Hand: Views from UK Institutional Investors’ (2018) 18 Corporate Governance: The International Journal of Business in Society 1074

Attenborough D, ‘The Vacuous Concept of Shareholder Voting Rights’ (2013) 14 EBOLR 147

Aupperle KE, ‘An Empirical Examination of the Relationship between Corporate Social Responsibility and Profitability’ (1985) 28 Academy of Management 446

Babcock HM, ‘Corporate Environmental Social Responsibility: Corporate “Greenwashing” or a Corporate Culture Game Changer?’ (2010) 21 Fordham Envtl L Rev 1

Bainbridge SM, ‘In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green’ (1993) 50 WLLR 1423

– – ‘Shareholder Activism and Institutional Investors’ (2005) UCLA School of Law, Law-Econ Research Paper No 05-20 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=796227>

Baldwin R and Cave M, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999)

Baxi CV and Ray RS, 'Corporate Social & Environmental Disclosures & Reporting' (2009) 44 Indian Journal of Industrial Relations 355

Baxi U, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2016) 1 Business and Human Rights Journal 21

Baysinger BD and Butler HN, 'Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition' (1985) 1 Journal of Law, Economics, & Organization 101

Bebchuk LA and Fried JM, 'Executive Compensation as an Agency Problem' (2003) 17(3) Journal of Economic Perspectives 71

Bebchuk LA and Tallarita R, 'The Illusory Promise of Stakeholder Governance' (2020) 106 Cornell Law Review 91

Bennear LS, 'Are Management-Based Regulations Effective? Evidence from State Pollution Prevention Programs' (2007) 26 Journal of Policy Analysis and Management 327

Berle AA and Means GC, *Modern Corporation and Private Property* (Macmillan 1992)

Berle AA, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049

– – 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 Harvard Law Review 1365

Bhaduri SN and Selarka E, 'Corporate Social Responsibility Around the World—An Overview of Theoretical Framework, and Evolution' in Saumitra N Bhaduri and Ekta Selarka (eds), *Corporate Governance and Corporate Social Responsibility of Indian Companies* (Springer 2016)

Bhattacharyya AK (ed), *Corporate Governance in India: Change and Continuity* (OUP 2016)

Black J, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World’ (2001) 54 Current Legal Problems 103

Black J *et al*, ‘Making a Success of Principles-Based Regulation’ (2007) 1 Law and Financial Markets Review 191

Blowfield M and Frynas JG, ‘Editorial Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World’ (2005) 81 International Affairs 499

Boeger N *et al*, ‘Companies, Shareholders and Sustainability’ (2020 Law Research Paper Series
Paper #007 2020 <https://www.bristol.ac.uk/media-library/sites/law/documents/Boeger%20Russell%20Villiers%20BLRP%20No.%207%202020%20Companies%20Shareholders%20Sustainability%20-%20MERGED.pdf>

–– *Perspectives on Corporate Social Responsibility* (Edward Elgar 2008)

Boffo R and Patalano R, ‘ESG Investing: Practices, Progress and Challenges’ (2020) <www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf>

Boström M, ‘A Missing Pillar? Challenges in Theorizing and Practicing Social Sustainability: Introduction to the Special Issue’ (2012) 8 Sustainability: Science, Practice and Policy 3

Bottomley S, ‘From contractualism to constitutionalism: A framework for corporate governance’ (1997) 19(3) Sydney Law Review 277

Bovens M, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 European Law Journal 447

Branco MC and Rodrigues LL, ‘Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility’ (2007) 12 E-Journal of Business Ethics and Organization Studies 5

Bratton WW and Wachter ML, ‘The Case Against Shareholder Empowerment’ (2010) 158 University of Pennsylvania Law Review 653

Bruner CM, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (CUP 2013)

Cahn A and Donald DC, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (2nd edn, CUP 2018)

Carroll AB and Shabana KM, ‘The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice’ (2010) 12 International Journal of Management Reviews 85

Carroll AB, ‘A Three-Dimensional Conceptual Model of Corporate Performance’ (1979) 4 The Academy of Management Review 497

–– ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ (1999) 38 Sage Journals 268

–– ‘Ethical Challenges for Business in the New Millennium: Corporate Social Responsibility and Models of Management Morality’ (2000) 10 Business Ethics Quarterly 33

–– ‘The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders’ (1991) 34 Business Horizons 39

–– *A History of Corporate Social Responsibility*, vol 1 (Andrew Crane & ors (eds), OUP 2009)

Chatterjee B and Mitra N, ‘CSR Should Contribute to the National Agenda in Emerging Economies – The “Chatterjee Model”' (2017) 2 International Journal of Corporate Social Responsibility 1

Cheffins BR, ‘The Stewardship Code’s Achilles’ Heel’ (2010) 73 The Modern Law Review 1004

– – *Corporate Ownership and Control* (OUP 2008)

Chinkin CM, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 International and Comparative Law Quarterly 850

Chiu I HY and Barker R, ‘Submission to The Business Skills and Innovation Commons Select Committee: Corporate Governance Inquiry’ (Centre for Ethics and Law 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858903>

Choudhury B and Petrin M, ‘Corporate Governance that “Works for Everyone”: Promoting Public Policies through Corporate Governance Mechanisms’ (2018) 18 Journal of Corporate Law Studies 381

– – *Corporate Duties to the Public* (CUP 2018)

Choudhury B, ‘Social Disclosure’ (2015) 13 Berkeley Business Law Journal 185

– – ‘Balancing Soft and Hard Law for Business and Human Rights’ (2018) 67 International and Comparative Law Quarterly 961

Clarke G *et al*, ‘From the Stockholder to the Stakeholder’ (University of Oxford March 2015) <https://arabesque.com/research/From_the_stockholder_to_the_stakeholder_web.pdf>

Clarkson MBE, ‘A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance’ (1995) 20 Academy of Management Review 92

Clementino E and Perkins R, ‘How Do Companies Respond to Environmental, Social and Governance (ESG) Ratings? Evidence from Italy’ (2021) Journal of Business Ethics 171

Coffee JC Jr, ‘The Rise of Dispersed Ownership: The Role of Law in the Separation of Ownership and Control’ (2001) Columbia Law School The Center for Law and Economic Studies 2 <http://www.ssrn.com/ abstract=254097>

Cooper SM and Owen DL, ‘Corporate Social Reporting and Stakeholder Accountability: The Missing Link’ (2007) 32 Accounting, Organizations and Society 649

Crane A *et al* (eds), *The Oxford Handbook of Corporate Social Responsibility*, vol 1 (OUP 2009)

– – *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Routledge 2014)

Dannemann G, ‘Comparative Law: Study of Similarities or Differences?’ in Mathias Reimann and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 390

Davies J, ‘A Guide to Directors’ Responsibilities under the Companies Act 2006’ (2007) ACCA 131

Davies PL and Hopt K, ‘Boards in Europe - Accountability and Convergence’ (2013) ECGI 4

Davies PL and Worthington S, *Gower’s Principles of Modern Company Law* (Sweet & Maxwell 2021)

– – *Gower’s Principles of Modern Company Law* (Sweet & Maxwell 2016)

Davis K, ‘Can Business Afford to Ignore Social Responsibilities?’ (1960) 2 California Management Review 70

– – ‘The Case for and Against Business Assumption of Social Responsibilities’ (1973) 16 Academy of Management Journal 312

Dhanesh GS, ‘Why Corporate Social Responsibility? An Analysis of Drivers of CSR in India’ (2015) 29 Management Communication Quarterly 114

Dodd EM, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145

Donaldson T and Preston LE, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 The Academy of Management Review 65

Du Plessis JJ *et al* (eds), *Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance* (Springer 2018)

Du Plessis JJ, 'Company Law Developments in South Africa: Modernisation and some Salient Features of the Companies Act 71 of 2008' (2012) 27(1) Australian Journal of Corporate Law 46

Dunham L *et al*, 'Enhancing Stakeholder Practice: A Particularized Exploration of Community' (2006) 16 Business Ethics Quarterly 23

Eisenberg MA, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law' (1993) 62 Fordham Law Review 437

Esser I-M and MacNeil I, 'Disclosure and Engagement: Stakeholder Participation Mechanisms' (2019) 30 European Business Law Review 201

Esser I-M *et al*, 'Engaging Stakeholders in Corporate Decision-Making through Strategic Reporting: An Empirical Study of FTSE 100 Companies (Part 2)*' (2020) 31 European Business Law Review 209

Esser I-M, 'The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 2' (2017) 50 De Jure 221

–– 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 S Afr Mercantile LJ 317

Fama EF and Jensen MC, 'Agency Problems and Residual Claims' (1983) 26 Journal of Law & Economics 327

–– ‘Separation of Ownership and Control’ (1983) 26 Journal of Law & Economics 301

Ford CL, ‘New Governance, Compliance, and Principles-Based Securities Regulation’ (2008) 45 American Business Law Journal 1

Fox MB, ‘Required Disclosure and Corporate Governance’ (1999) 62 Law and Contemporary Problems 113

Frederick WC, ‘The Growing Concern over Business Responsibility’ (1960) 2 California Management Review 54

Freeman ER *et al*, ‘Stakeholder Theory and “The Corporate Objective” Revisited’ (2004) 15 Organization Science 364

Friede G *et al*, ‘ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies’ (2015) 5 Journal of Sustainable Finance & Investment 210

Geer HD *et al*, ‘Reconciling CSR with the Role of the Corporation in Welfare States: The Problematic Swedish Example’ (2009) 89 JBE 269

George C and Reed MG, ‘Revealing Inadvertent Elitism in Stakeholder Models of Environmental Governance: Assessing Procedural Justice in Sustainability Organizations’ (2017) 60 Journal of Environmental Planning and Management 158

Godfrey J *et al*, ‘Old and New Forms of Giving: Understanding Corporate Philanthropy in India’ (2017) 28 Voluntas: Int J of Voluntary and NPO 672

Gopalan S and Kamalnath A, ‘Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials’ (2015) 10 Northwestern Journal of Law and Social Policy 36

Gordon K, ‘The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison’ (2001) OECD Working Papers on International Investment 2001/05 <https://www.oecd-ilibrary.org/finance-and-investment/the-oecd-guidelines-and-other-corporate-responsibility-instruments_302255465771>

Gower LCB, 'Corporate Control: The Battle for the Berkeley' (1955) 68 Harvard Law Review 1176

Gray R *et al*, *Corporate Social Reporting: Accounting and Accountability* (Englewood Cliffs 1987)

Gutteridge HC, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP 1946)

Hansmann H and Kraakman R, 'The End of History for Corporate Law' (2000) 89 Georgetown Law Journal 439

Hart HLA, 'Discretion' (2013) Harvard L Rev 652

Hay R and Gray ED, 'Social Responsibilities of Business Managers' (1974) 17 Academy of Management Journal 135

Henderson R and Steen EVD, 'Why Do Firms Have "Purpose"? The Firm's Role as a Carrier of Identity and Reputation' (2015) 105 American Economic Review 326

Henderson R, *Reimagining Capitalism in a World on Fire* (Penguin Business 2020)

Hirschman AO, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States* (HUP 1972)

Ho VH, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 59

Horrigan B, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business* (Edward Elgar 2010)

Iskander M and Chamlou N, *Corporate Governance: A Framework for Implementation* (World Bank 2000)

Jensen MC and Murphy KJ, ‘Performance Pay and Top-Management Incentives’ (1990) 98 Journal of Political Economy 225

– – ‘Value Maximization, Stakeholder Theory, and the Corporate Objective Function’ (2001) 14 Journal of Applied Corporate Finance 8

Johnston A, ‘Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility’ (2011) 20 Griffith Law Review 221

– – ‘The Shrinking Scope of CSR in UK Corporate Law’ (2017) 74 Washington and Lee Law Review 1001

Jones TM and Andrew C Wicks, ‘Convergent Stakeholder Theory’ (1999) 24 Academy of Management Review 206

Jones TM, ‘Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics’ (1995) 20 Academy of Management Review 404

Kaur H, ‘Promoters and Corporate Governance under the Companies Act, 2013’ (2015) 3 Journal of National Law University, Delhi 53

Keay A and Loughrey J, ‘The Framework for Board Accountability in Corporate Governance’ (2015) 35 Legal Studies 252

Keay A and Taskin I, ‘The Impact of Enlightened Shareholder Value’ (2019) Journal of Business Law 304

Keay A, ‘Board Accountability and the Entity Maximization and Sustainability Approach’ 286–289 in Barnali Choudhury and Martin Petrin (eds), *Understanding the Company* (CUP 2017)

– – ‘Getting to Grips with the Shareholder Value Theory in Corporate Law’ (2010) 39 Common Law World Review 358

– – ‘Having Regard for Stakeholders in Practising Enlightened Shareholder Value’ (2019) 19 Oxford University Commonwealth Law Journal 118

– – ‘Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little?’ (2011) 22 European Business Law Review 1

– – ‘Stakeholder Theory in Corporate Law: Has It Got What It Takes?’ (2010) SSRN Electronic Journal 254

– – ‘The Duty to Promote the Success of the Company: Is It Fit for Purpose?’ (2010) Centre for Business Law and Practice Working Paper 27

– – *Directors’ Duties* (3rd edn, LexisNexis 2016)

– – *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013)

Keim G, ‘Corporate Social Responsibility: An Assessment of the Enlightened Self-Interest Model’ (1978) 3 AMR 32

Kershaw D, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012)

Khanna V and Varottil U, ‘Board Independence in India: From Form to Function?’ in Dan W Puchniak, Harald Baum and Luke Nottage (eds), *Independent Directors in Asia* (CUP 2017)

– – ‘The Rarity of Derivative Actions in India: Reasons and Consequences’ in Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (CUP 2012)

Khanna V, ‘Enforcement of Corporate and Securities Laws in India: The Arrival of the Class Action?’ in Robin Hui Huang and Nicholas Calcina Howson (eds), *Enforcement of Corporate and Securities Law* (CUP 2017)

Kocourek A, ‘Substance and Procedure’ 10 Fordham Law Review 31

Kraakman R *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017)

Kumar N and Singh JP, ‘Effect of board size and promoter ownership on firm value: Some empirical findings from India’ (2013) 13(1) Corporate Governance: The International Journal of Business in Society 88

Ladna KC *et al*, 'Workforce Engagement and the UK Corporate Governance Code’ (2021) Thomson Reuters Aranzadi (Accepted for Publication) < https://eprints.gla.ac.uk/241423/>

Ladna KC, ‘The Relevance of Long-Term Interests in the Decision-Making Processes of Company Directors in the UK, Delaware and Germany: A Critical Evaluation’ (PhD Thesis, University of Edinburgh 2015)

Lagoutte S, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016)

Lai CS *et al*, ‘The Effects of Corporate Social Responsibility on Brand Performance: The Mediating Effect of Industrial Brand Equity and Corporate Reputation’ (2010) 95 Journal of Business Ethics 457

Lake Q *et al*, *Corporate Leadership on Modern Slavery: How Have Companies Responded to the UK Modern Slavery Act One Year On?* (Hult International Business School and The Ethical Trading Initiative 2016) <https://www.ethicaltrade.org/sites/default/files/shared_resources/corporate_leadership_on_modern_slavery_full_report_2016.pdf>

LeBaron G and Rühmkorf A, ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ (2017) 8 Global Policy 15

– – ‘The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act’ (2019) 17 Socio-Economic Review 709

Lee IB, ‘Efficiency and Ethics in the Debate about Shareholder Primacy’ (2006) 31 Delaware Journal of Corporate Law 533

Lessig L, ‘The New Chicago School’ (1998) 27 Journal of Legal Studies 661

Levitt T, ‘The Dangers of Social Responsibility’ (1958) 36 Harvard Business Review 41

Lian YJ, ‘Considering the Enlightened Shareholder Value Principle’ (2010) 31(2) Company lawyer 35

Liang H and Renneboog L, ‘Corporate Social Responsibility and Sustainable Finance: A Review of the Literature’ (2021) ECGI Finance Working Paper N° 701/2020 <https://ecgi.global/sites/default/files/working_papers/documents/liangrenneboogfinal.pdf >

– – ‘On the Foundations of Corporate Social Responsibility: On the Foundations of Corporate Social Responsibility’ (2017) 72 Journal of Finance 853

Licht AN, ‘Culture and Law in Corporate Governance’ (2014) SSRN Electronic Journal 35

Lim E, ‘Controlling Shareholders and Fiduciary Duties in Asia’ (2018) 18 Journal of Corporate Law Studies 113

Lin LW, ‘Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences’ (2021) 23 Journal of Business Law 429

Loss L, *Fundamentals of Securities Regulation* (2nd edn, Aspen Publishers 1988)

Macleod S and Lewis D, ‘Transnational Corporations: Power, Influence and Responsibility’ (2004) 4 Global Social Policy: An Interdisciplinary Journal of Public Policy and Social Development 77

MacNeil I and Esser IM, ‘From a Financial to an Entity Model of ESG’ (2022) 23 EBOLR 9

– – ‘The Emergence of “Comply or Explain” as a Global Model for Corporate Governance Codes’ 9

MacNeil I, ‘Activism and Collaboration among Shareholders in UK Listed Companies’ (2010) 5 Capital Markets Law Journal 419

Makhija A, *Corporate Directors: Roles, Responsibilities, Powers and Duties of Directors* (LexisNexis 2016)

Martin JG, 'Implementing Effective Corporate Legal Compliance Programs' (1997) 11 Natural Resources & Environment 14

Matos P, *ESG and Responsible Institutional Investing Around the World: A Critical Review* (CFA Institute Research Foundation 2020)

Matten D and Moon J, '"Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 33 Academy of Management Review 404

Matten D *et al*, 'Behind the Mask: Revealing the True Face of Corporate Citizenship' (2003) 45 Journal of Business Ethics 109

Mayer C, 'Shareholderism Versus Stakeholderism – A Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita' (2020) ECGI Law Working Paper No 522/2020 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617847>

– – '*Principles for Purposeful Business'* (The British Academy 2020)

– – 'The Future of the Corporation and the Economics of Purpose' (2020) Journal of Management Studies 16.

– – 'The Governance of Corporate Purpose' (2021) ECGI Law Working Paper No 609/2021 <https://ecgi.global/sites/default/files/working_papers/documents/mayerfinal_1.pdf>

McBarnet D *et al*, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2007)

McBarnet D, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' (2009) SSRN Electronic Journal 4

Millon D, ‘Theories of the Corporation’ (1990) 1990 Duke Law Journal 201

Mitchell RK *et al*, ‘Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts’ (1997) 22 The Academy of Management Review 853

Mitra N and Schmidpeter R (eds), *Corporate Social Responsibility in India* (Springer 2017)

Moon J *et al*, ‘Can Corporations Be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society’ (2005) 15 Business Ethics Quarterly 429

Moon J, ‘United Kingdom-An Explicit Model of Business-Society Relations’, Corporate Social Responsibility across Europe (Springer 2005)

Moore M and Petrin M, *Corporate Governance: Law, Regulation and Theory* (Bloomsbury Publishing 2017)

N’ Kakabase *et al*, ‘Corporate Social Responsibility and Stakeholder Approach: A Conceptual Review’ (2005) International Journal of Business Governance and Ethics 1

Naniwadekar M and Varottil U, ‘The Stakeholder Approach towards Directors’ Duties under Indian Company Law: A Comparative Analysis’ in Mihir Naniwadekar and Umakanth Varottil (eds), *The Indian Yearbook of Comparative Law* 2016 (OUP 2018)

Nelken D, ‘Defining and Using the Concept of Legal Culture’ in Orucu E and Nelken D (eds), *Comparative Law: A Handbook* (Hart 2007)

Nichols PM, ‘The Business Case for Complying with Bribery Laws’ (2012) 49 American Business Law Journal 325

Nolan J, ‘Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights’ (2014) 30 Utrecht Journal of International and European Law 7

OECD, *OECD Institutional Investors Statistics 2020* (OECD 2020)

Omoteso K and Yusuf H, ‘Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism’ (2017) 13 Critical Perspectives on International Business 54

Panagopoulos G, ‘Substance and Procedure in Private International Law’ (2005) 1(1) Journal of Private International Law 69

Parkinson JE, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP 1995)

Pendleton A, *Behind the Mask The Real Face of Corporate Social Responsibility* (Christain Aid 2003) <https://www.st-andrews.ac.uk/media/csear/app2practice-docs/CSEAR_behind-the-mask.pdf>

Pettigrew WA, *Corporate Responsibility in Strategy: Mainstreaming Corporate Responsibility* (John Wiley and Sons Ltd 2009)

Pietropaoli I *et al, A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (BIICL 2020/)

Pio E, ‘Eastern Karma: Perspectives on Corporate Citizenship’ (2005) The Journal of Corporate Citizenship 65

Pollman E, ‘Corporate Social Responsibility, ESG, and Compliance’ (2019) Loyola Law School, Los Angeles Legal Studies Research Paper No. 2019-35 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479723>

Prasad DM, ‘Companies Act, 2013: Incorporating Stakeholder Theory Approach into the Indian Corporate Law’ (2018) 39 Statute Law Review 292

Preston LE and O’Bannon DP, ‘The Corporate Social-Financial Performance Relationship: A Typology and Analysis’ (1997) 36 Business & Society 419

Rahim MM, 'Corporate Social Responsibility, Corporate Governance and Corporate Regulation' in Mia Mahmudur Rahim (ed), *Legal Regulation of Corporate Social Responsibility* (Springer 2013)

Rasche A, 'A Necessary Supplement – What the United Nations Global Compact Is and Is Not' (2009) 48(4) Business Society 511

Reed MS, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 Biological Conservation 2417

Reitz JC, 'How to Do Comparative Law' (1998) 46 American Journal of Comparative Law 617

Renold LM, 'Gandhi: Patron Saint of the Industrialist' (1994) 1 Sagar: South Asia Graduate Research Journal 16

Riley CA, 'The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard' (1999) 62 The Modern Law Review 697

Ringe WG, 'Shareholder Activism: A Renaissance' in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance*, vol 1 (OUP 2015)

Roe MJ, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120 Harvard Law Review 460

– *Missing the Target: Why Stock-Market Short-Termism Is Not the Problem* (OUP 2022) <https://oxford.universitypressscholarship.com/10.1093/oso/9780197625620.001.0001/oso-9780197625620>

Rooij BV and Sokol DD (eds), *The Cambridge Handbook of Compliance* (CUP 2021) 664

Ruggie JG and Middleton EK, 'Money, Millennials and Human Rights: Sustaining Sustainable Investing' (2019) 10 Global Policy 144

Ruggie JG, *Corporate Purpose in Play: Sustainable Investing: A Path to a New Horizon* (Routledge 2020)

Rühmkorf A, ‘The Promotion of Corporate Social Responsibility in English Private Law’ (PhD Thesis University of Sheffield, School of Law 2013)

– – Corporate *Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar 2015)

Schanzenbach MM and Sitkoff RH, ‘Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee’ (2020) 72 Stanford Law Review 381.

Sethi SP, ‘Dimensions of Corporate Social Performance: An Analytical Framework’ (1975) 17 California Management Review 58

Shelton D, ‘Normative Hierarchy in International Law’ (2006) 100 American Journal of International Law 291

Shleifer Al and Vishny RW, ‘A Survey of Corporate Governance’ (1997) 52 Journal of Finance 737

Siems MM, *Comparative Law* (2nd edn, CUP 2018)

Sjåfjell B et *al*, ‘Securing the Future of European Business: SMART Reform Proposals’ (2022) (University of Oslo Faculty of Law Research Paper No 2020-11, Nordic & European Company Law Working Paper No 20-08
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595048>

– – ‘Shareholder Primacy: The Main Barrier to Sustainable Companies’ in Beate Sjåfjell and BJ Richardson (eds), *Company Law and Sustainability* (CUP 2015)

Sjåfjell and Bruner CM (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019)

Sjåfjell B and Sørensen LA, ‘The Duties of the Board and Corporate Social Responsibility (CSR)’ (2013) University of Oslo Faculty of Law Legal Studies Research Paper Series No

2013-26, Nordic & European Company Law Working Paper No 10-40 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322680 >

Sjåfjell B and Taylor MB, 'Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (2019) 13(3) International and Comparative Corporate Law Journal 40

– – 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' (2015) University of Oslo Faculty of Law Research Paper No. 2015-11 < https://papers.ssrn.com/sol3/papers .cfm?abstract_id=2610583>

Sjafjell B, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board' (2018) 23 Deakin L Rev 41

– – 'Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers' (2008) 40 The George Washington International Law Review 977

Smith DG and Lee JC, 'Fiduciary Discretion' (2014) 75 Ohio State Law Journal 609

Smits JM, *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2012)

Sommer AA Jr, 'Whom Should the Corporation Serve – The Berle-Dodd Debate Revisited Sixty Years Later' (1991) 16 Delaware Journal of Corporate Law 33

Steiner E, 'Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge Too Far?' (2004) 25(3) Statute Law Review 209

Sterneberg R *et al*, 'The European Commission's New Approach to ESG Due Diligence and Corporate Accountability | Insights | DLA Piper Global Law Firm' (*DLA Piper*, 25 March 2021)

Sundar P, *Giving with a Thousand Hands: The Changing Face of Indian Philanthropy* (OUP 2017)

Taskin I and Keay A, 'An Evaluation of Sustainability in Large British Companies' (2019) 48 Common Law World Review 39

Taylor PN, 'Enlightened Shareholder Value and the Companies Act 2006' (PhD Thesis, Birkbeck College 2010)

The Committee on Corporate Law, 'Other Constituency Statutes: Potential for Confusion' (1990) 45(4) The Business Lawyer 2253

Torres CAC *et al*, 'Four Case Studies on Corporate Social Responsibility: Do Conflicts Affect a Company's Corporate Social Responsibility Policy?' (2012) 8 Utrecht Law Review 51

Varottil U and Naujoks R, 'Corporate Governance' in Linda Spedding (ed), *India: The Business Opportunity* (Eastern Book Company 2016)

Varottil U, 'A Cautionary Tale of the Transplant Effect on Indian Corporate Governance' (2009) 21 National Law School of India Review 14

– – 'Corporate Governance in India: The Transition from Code to Statute' in Jean J du Plessis and Chee Keong Low (eds), *Corporate Governance Codes for the 21st Century* (Springer International 2017)

– – 'Corporate Governance in India's Infrastructure Sector: Issues and Perspectives' (2011) IDFC Law Reporter, Third Anniversary Issue 93 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962383>

– – 'India' in Bruce Aronson and Joongi Kim (eds), *Corporate Governance in Asia* (CUP 2019)

– – 'India's Corporate Governance Voluntary Guidelines 2009: Rhetoric or Reality?' (2010) 22(2) National Law School of India Review 1

Villiers C, *Corporate Reporting and Company Law*, vol 5 (CUP 2006)

Vogel D, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2005)

Waagstein PR, ‘The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications’ (2011) 98 JBE 455

Walker GB *et al*, ‘From the Forest to the River: Citizens’ Views of Stakeholder Engagement’ (2006) 13 Human Ecology Review 193

Walton CC, ‘Corporate Social Responsibility: The Debate Revisited’ (1982) 34 Journal of Economics and Business 173

Wartick SL and Cochran PL, ‘The Evolution of the Corporate Social Performance Model’ (1985) 10 Academy of Management Review 758

Williams CA and Conley JM, ‘An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct’ (2004) SSRN Electronic Journal 496 <http://www.ssrn.com/abstract=632347>

Wong P, ‘Lessons from the Enron Debacle: Corporate Culture Matters!’ in Nasreen Taher(eds)*Organizational Culture: An Introduction* (ICFAI University Press 2005)
Wood GL *et al*, ‘The Over-Reliance on Self-Regulation in CSR Policy’ (2009) 18 Business Ethics: A European Review 52

Young A, ‘Frameworks in Regulating Company Directors: Rethinking the Philosophical Foundations to Enhance Accountability’ (2009) *30*(12) Company Lawyer 355

Zaid MAA *et al*, ‘Ownership Structure, Stakeholder Engagement, and Corporate Social Responsibility Policies: The Moderating Effect of Board Independence’ (2020) 27 CSR and Environmental Management 1344

Zerk JA, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006)

Zile CV, ‘India’s Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market’ (2012) 13(2) *Asian-Pacific Law & Policy Journal* 269

Reports and Documents

‘ESG: Sustainable Corporate Governance and New Due Diligence Duties in Europe' (Clifford Chance, 2021)

‘Mandatory Corporate Human Rights Due Diligence: What Now and What Next? An International Perspective’ (Gibson Dunn 2021) < https://www.gibsondunn.com/wp-content/uploads/2021/02/ mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international-perspective.pdf>

BEIS Committee, *Corporate Governance Reform* (The Government Response to the Green Paper Consultation, August 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf

BEIS, *Corporate Governance Reform* (Green Paper, November 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf>

BEIS, *Executive Rewards: Paying for Success: Eighteen Report of Session 2017–19* (HC 2018 17–19)

BIS, ‘Corporate law and Governance: Future of Narrative Reporting Consultation’ (August 2010)

Climate Risk Disclosure Barometer (Ernst & Young, 2021)

CLRSG, ‘Modern Company Law for a Competitive Economy: Completing the Structure’ (2000)

CLRSG, ‘Modern Company Law for a Competitive Economy: Developing the Framework’ (2000)

CLRSG, ‘Modern Company Law for a Competitive Economy: The Final Report’, vols I and II (2001)

CLRSG, 'Modern Company Law for a Competitive Economy: The Strategic Framework' (1999)

Company Law Review, *The White Paper: Modernising Company Law* (2002, Cm 5553-I and Cm 5553-II)

Compliance and Reporting under the EU Non-Financial Reporting Directive (Frank Bold, 2017) <https://en.frankbold.org/sites/default/files/zpravodaj/briefing_eu_nfr_directive.pdf>

Corporate Culture-A Thought Piece on Reporting (Blacksun, 2016)

Corporate Governance Review 2020' (Grant Thornton, 2020) <https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/2020/corporate-governance-review-2020.pdf>

Decker C, 'Goals-Based and Rules-Based Approaches to Regulation' (2018) BEIS Research Paper Number 8

Deloitte, 'Annual Report Insights 2021: Surveying FTSE Reporting' (October 2021) <https://www2.deloitte.com/uk/en/pages/audit/articles/annual-report-insights-2021.html.html/#>

Department for Business, Innovation and skills, 'The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report'(July 2012)

Environmental and Social Reporting by Indian Companies (NSE 2019) Quarterly briefing 24

ESG Analysis on 50 Listed Companies in India 2020' (SES, NSE 2020)

European Commission, Corporate Sustainability Reporting <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en>

European Commission, European Competitiveness Report: 2008 (OOPEC 2009)

European Parliament, Directorate General for Parliamentary Research Services, 'Corporate Due Diligence and Corporate Accountability: European Added Value Assessment.' (Publications Office 2020)

Evraaz: Annual Report & Accounts 2020 <https://www.evraz.com/upload/iblock/f81/EVRAZ_AR2020_final_pages_lowres.pdf>

EY, 'Corporate Social Responsibility in India: Re-Engineering Compliance and Fraud Mitigation Strategies-Forensic & Integrity Services' (2020) < https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/forensic/ey-csr-survey-2020.pdf>

FCA, 'A Strategy for Positive Change: Our ESG Priorities' (November 2021) <https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities>

FRC, 'Acting in the Public Interest to Increase Market Confidence' < https://www.frc.org.uk/ getattachment/d5139624-9459-43d1-8e1a-935db13458ec/FRC-Who-we-are-2021.pdf>

FRC, 'FRC Climate Thematic Governance – How Are Boards Taking Account of Climate-Related Challenges?' (November 2020)

FRC, 'Guidance on Board Effectiveness' (July 2018)

FRC, 'Guidance on the Strategic Report' (July 2018)

FRC, 'Guidance on the Strategic Report' (June 2022)

FRC, 'Improving the Quality of "Comply or Explain" Reporting 2021' (February 2021)

FRC, 'Review of Corporate Governance Reporting 2020' (November 2020)

FRC, 'Review of Corporate Governance Reporting 2021' (November 2021)

FRC, 'Workforce-Related Corporate Reporting-Where to Next?' (January 2020)

GC 100, Guidance on Directors' Duties Section 172 and Stakeholder Considerations' (October 2018)

Gordon K, 'The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison' (2001) OECD Working Papers on International Investment 2001/05 <https://www.oecd.org/industry /inv/mne/WP-2001_5.pdf>

Grant Thornton UK, 'Corporate Governance Review 2020' (2020) <https://www.grantthornton.co.uk/ globalassets/1.-member-firms/united-kingdom/pdf/publication/2020/corporate-governance-review-2020.pdf>

Greenbury Report (Study Group on Directors' Remuneration) (CBI July 1995)

Greenpeace,' The Toxic Ships: The Italian hub, the Mediterranean area and Africa' (Greenpeace Italy Report 2010)

GRI & BSE, '*Linking the GRI Standards and the SEBI BRR Framework'* (GRI 2022)

GRI, PRI and UNGC, 'In Focus: Addressing Investor Needs in Business Reporting on the SDGs' (2018) < https://www.unglobalcompact.org/library/5625>

Hansard, HC Vol 47, Col.125 (June 6, 2006)' col 125, 126

HM Treasury, 'Interim Report of the UK's Joint Government-Regulator TCFD Taskforce.' (Interim Report November 2020)

Home Office, 'Transparency in Supply Chains Consultation' (Government Response, September 2020)

How ESG Engagement Creates Value for Investors and Companies' (Principles for Responsible Investment 2018)

ICGN, '*ICGN Global Stewardship Principles'* (2020)

ICGN, 'ICGN Viewpoint: Integrating ESG in Executive Compensation' (November 2020) <https://www.icgn.org/sites/default/files/2021-06/ICGN%20Viewpoint%20Integrating%20ESG%20in%20Executive%20Compensation.pdf>

ICSA and the Investment Association, 'The Stakeholder Voice in Board Decision-Making Strengthening the Business, Promoting Long-Term Success' (2017)

ILO *et al,* '*Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*' (ILO 2017)

Implementing Sustainable Corporate Governance in Europe: A New Vision of Corporate Purpose', Conference on Business and Human Rights (Frank Bold) <http://www.purposeofcorporation. org/corporate-governance-in-europe.pdf>

India's CSR Reporting Survey 2018 (KPMG December 2018) <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/01/India_CSR_Reporting_Survey_2018.pdf>

India's CSR Reporting Survey 2019 (*KPMG* March 2020) <https://home.kpmg/in/en/home/insights/2020/02/india-s-csr-reporting-survey-2019.html>

Insights from the Reporting Exchange: ESG Reporting Trend' (WBCSD & CDSB 2018)

Iskander M and Chamlou N, Corporate Governance: A Framework for Implementation (The World Bank 2000)

Jayaram S, 'Environmental, Social and Governance (ESG) Agenda' (KPMG, July 2020)

John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UNHR 21 March 2011)
Jose P D and Haldar A, 'Sustainability Integration: Corporate Reporting Practices in India' (GRI, IIM, TCS 2016)

KPMG, 'The Time Has Come: The KPMG Survey of Sustainability Reporting 2020' (2020) <https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/11/the-time-has-come.pdf>

Lord Goldsmith, 'Grand Committee' (6 February 2006) col 254

MCA, '*Report of the Committee on Business Responsibility Reporting'* (2020)

MCA, *The Report of the High-Level Committee on Corporate Social Responsibility* (August 2019)

Modernising Company Law: The White Paper (March 2005)

NSE and SES, 'Business Responsibility Reporting in India: Disclosures and Practices' (NSE 2019)

OECD (ed*), Corporate Social Responsibility: Partners for Progress* (OECD 2001)

OECD Guidelines for Multinational Enterprises (OECD 2011)

OECD, '*Active with India'* (OECD 2017)

OECD, '*G20/OECD Principles of Corporate Governance'* (OECD 2015)

OECD, '*Investment Governance and the Integration of Environmental, Social and Governance Factors'* (OECD 2017)

OECD, '*OECD Corporate Governance Factbook 2019'* (OECD 2019)

OECD, '*OECD Principles of Corporate Governance*' (OECD 1999)

OECD, *OECD Due Diligence Guidance for Responsible Business Conduct'* (OECD 2018)
Paul Raleigh, 'Corporate social responsibility: beyond financials', (Grant Thornton International Business Report 2014) < https://www.grantthornton.global/en/insights/articles/Corporate-social-responsibility/>

PRI & UNEP, 'Fiduciary Duty in the 21st Century: Final Report (UNEP FI 2019)

PWC, 'Bringing ESG into Executive Pay' (2020)

Rees C and Brione P, 'Workforce Engagement and the UK Corporate Governance Code: A Review of Company Reporting and Practice' (FRC May 2021)

Report of the Committee on Company Law Amendment Cmd 6659 (Board of Trade 1945)

Report of the Committee on the Financial Aspects of Corporate Governance chaired by Sir Adrian Cadbury Gee and Co Ltd (1992)

Report of The High-Level Committee on Corporate Social Responsibility 2018 (MCA 2019)

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (Human Rights Council 2011) A/HRC/17/31 3

SEBI Circular, Business Responsibility Reports (13 August 2012) <https://www.sebi.gov.in/sebi_data/attachdocs/1344915990072.pdf>

SEBI Circular, Integrated Reporting by Listed Entities, (6 February 2017) https://www.sebi.gov.in/sebi_data/attachdocs/1486375066836.pdf

Secretary of State for the Home Department, 'Independent Review of the Modern Slavery Act 2015 (Final Report 2019).

Serco: Annual Report and Accounts 2020' (2020) <https://www.annualreports.com/HostedData/AnnualReportArchive/s/LSE_SRP_2020.pdf>

The Companies Bill 2009, Lok Sabha 59 of 2009

The Global Compact, '*Who Cares Wins: Connecting Financial Markets to a Changing World'* (IFC 2004)

The Investment Association Principles of Remuneration' (Investment Association November 2019)

The Sharman Inquiry: Final Report and Recommendations of The Panel of Inquiry' (FRC June 2012)

Tomilson B *et al*, 'Fiduciary Duty in the 21st Century: UK Roadmap' (UNPRI 2016)

UK Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability' (HL HC 2017 16–17)

Veldman J *et al*, 'Corporate Governance for a Changing World' (Frank Bold and Cass Business School 2016)

WBCSD, 'Sustainability Reporting Landscape in India' (2018)

World Resources Institute (WRI) in collaboration with United Nations Development Programme, United Nations Environment Programme, and World Bank 2005 *World Resources 2005: The Wealth of the Poor—Managing Ecosystems to Fight Poverty* Washington, DC: WRI

Young S & Gad M, 'Modern Slavery Reporting Practices in the UK: Evidence from Modern Slavery Statements and Annual Reports' (FRC April 2022)

News and Blogs

‘60% of Total CSR Expenditure Done through Implementing Agencies, Data of NGOs Not Maintained by MCA’ (*India CSR Network*, 6 April 2021)< https://indiacsr.in/60-of-total-csr-expenditure-done-through-implementing-agencies-data-of-ngos-not-maintained-by-mca/>

‘Family Businesses Raise Corporate Governance Concerns, Says Moody’s – Indian Express’ (*The Indian Express*, 2007) <http://archive.indianexpress.com/news/family-businesses-raise-corporate-governance-concerns-says-moodys/231282>

‘Home - KPMG Global’ (*KPMG*, 11 February 2022)

‘The Evolution of CSR’ (*ThinkingShift*, 27 March 2007) <https://thinkingshift.wordpress.com/2007/03/27/the-evolution-of-csr/>

‘UN Expert Group Welcomes India’s Plan to Promote Corporate Respect for Human Rights’ (*OHCHR*, 22 March 2019) <https://www.ohchr.org/en/press-releases/2019/03/un-expert-group-welcomes-indias-plan-promote-corporate-respect-human-right>

‘Voluntary National Review Report on Implementation of Sustainable Development Goals’ (United Nations High Level Political Forum, 2017) https://sustainabledevelopment.un.org/content/ documents/15836India.pdf

‘Your Guide to ESG Reporting’ (LSEG 2018) < https://www.lseg.com/esg>

Armstrong A, ‘British Factory Workers Paid £3 an Hour Making Clothes for High Street Giants’ *The Telegraph* (23 January 2017) <https://www.telegraph.co.uk/business/2017/01/23/british-factory-workers-paid-3-hour-making-clothes-high-street/>

Baldwin T and Merkley J, ‘The Brokaw Act: Strengthening Oversight of Activist Hedge Funds’ <https://www.baldwin.senate.gov/imo/media/doc/3.7.16%20-%20Brokaw%20Act%201.pdf>

Blackett A *et al*, ‘It’s Time to Adopt the New Paradigm’ (*The Harvard Law School Forum on Corporate Governance*, 11 February 2019) <https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm>

BSE, ‘Business Responsibility Reports - Frequently Asked Questions (FAQs) <https://www.bseindia.com/downloads1/BRR_FAQs%2010052013.pdf>

Burchman S, ‘A New Framework for Executive Compensation’ (*The Harvard Law School Forum on Corporate Governance*, 13 March 2020) <https://corpgov.law.harvard.edu/2020/03/13/a-new-framework-for-executive-compensation>

Chait J, ‘In Conversation with Barack Obama’ (*Intelligencer*, 9 December 2020) <https://nymag.com/intelligencer/2020/12/in-conversation-with-barack-obama.html>

Coutinho A, ‘Only 8% Indian Firms Have ESG-Related Compensation Policy: Refinitiv’ *Business Standard India* (14 October 2020) https://www.business-standard.com/article/markets/only-8-indian-firms-have-esg-related-compensation-policy-refinitiv-120101400060_1.html

Deloitte (*Deloitte*) < https://www2.deloitte.com/uk/en/explore/home.html>

Deo N, ‘A Brief History of Indian CSR’ (*Gateway House: Indian Council on Global Relations*, 2015) <https://www.gatewayhouse.in/a-brief-history-of-indian-csr>

Edmans A, ‘How Great Companies Deliver Both Purpose and Profit’ (*London Business School*, 31 October 2019) <https://www.london.edu/think/how-great-companies-deliver-both-purpose-and-profit>

EY, ‘Weak Governance and Lack of Due Diligence Pose a Grave Risk to CSR Programs: EY Survey’(2020) <https://www.ey.com/en_in/news/2020/05/weak-governance-and-lack-of-due-diligence-pose-a-grave-risk-to-csr-programs>

Fernandes K, ‘Top 20 Indian Companies for CSR in 2019’ (*The CSR Journal*, 20 December 2019) <https://thecsrjournal.in/top-indian-companies-for-csr-2019>

Fernandes K, ‘Top 20 Indian Companies for CSR in 2019’ (*The CSR Journal*, 20 December 2019) https://thecsrjournal.in/top-indian-companies-for-csr-2019/

Ferrarini G, ‘Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU’ (*Oxford Business Law Blog*, 22 April 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between>

Feuer W, ‘Here’s More Evidence That ESG Funds Outperformed During the Pandemic’ (*Institutional Investor*, 07 April 2021) https://www.institutionalinvestor.com/article/b1r9gb5p9k10b4/Here-s-More-Evidence-That-ESG-Funds-Outperformed-During-the-Pandemic

Friedman M, ‘The Social Responsibility of Business is to Increase its Profits’ (1970) *The New York Times Magazine* <http://link.springer.com/10.1007/978-3-540-70818-6_14>

Ghuliani C, ‘India Companies Act 2013: Five Key Points About India’s “CSR Mandate”’ (BSR) <https://www.bsr.org/en/our-insights/blog-view/india-companies-act-2013-five-key-points-about-indias-csr-mandate>

Goldman Sachs, ‘ESG Report, “What Is Powering the ESG Investing Surge?”’ (Reuters Plus 2016) <https://www.reuters.com/brandfeatures/goldman-sachs/what-is-powering-the-esg-investing-surge>

GRI Standards, available at < https://www.globalreporting.org/standards/>

Hansia F, ‘Coca-Cola Forced to Shut Bottling Plant in India’ (CorpWatch, 2014) <https://corpwatch.org/article/coca-cola-forced-shut-bottling-plant-india>

Hernandez A *et al,* ‘The Age of ESG’ (Harvard Law School Forum on Corporate Governance, 9 March 2020) < https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/>

Hoskins T, ‘Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings, Day 22’ *The Guardian* (23 April 2015)

<https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings>

ICGN, 'About' <https://www.icgn.org/about>

IIRC <https://integratedreporting.org/the-iirc-2/>

Kang M and People Matters Pte Ltd, 'APAC Companies Adding ESG to Executive Pay: Survey' (*People Matters*, 14 December 2020) <https://www.peoplemattersglobal.com/news/compensation-benefits/apac-companies-adding-esg-to-executive-pay-survey-27886>

Karnani A, 'Mandatory CSR in India: A Bad Proposal' (*SSIR* 20 May 2013) <https://ssir.org/articles/entry/mandatory_csr_in_india_a_bad_proposal#>

Libit B *et al,* 'The Corporate Social Responsibility Report and Effective Stakeholder Engagement' (*Harvard Law School Forum on Corporate Governance*, *28 December 2013*) <https://corpgov.law.harvard.edu/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement/>

Lidman E, 'The Role of Corporate Governance in Sustainability and Why the Commission's CSDDD Proposal Might Do More Harm than Good' (*Oxford Business Law Blog*, 27 April 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/role-corporate-governance-sustainability-and-why-commissions-csddd>

Marsh McLennan and SK Group, 'The Global Risks Report 2021 16th Edition' 97; 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World' (World Bank) <https://www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world>

Modi A, 'Shareholders Force Head Honchos of Apollo Tyres to Take Pay Cut' (*Rediff*, 14 November 2018) <https://www.rediff.com/business/report/shareholders-force-head-honchos-of-apollo-tyres-to-take-pay-cut/20181114.htm>

Mooney A and West PT, 'Climate Change: Asset Managers Join Forces with the Eco-Warriors' *Financial Times* (26 July 2020) <https://www.ft.com/content/78167e0b-fdc5-461b-9d95-d8e068971364>

Naik G, 'Nearly Half of UK's 100 Biggest Companies Link Executive Pay to ESG Measures' <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/nearly-half-of-uk-s-100-biggest-companies-link-executive-pay-to-esg-measures-63248983>

Rana N and Majumdar U, 'Sustainability and CSR Trends for India in 2017' (*Economic Times Blog*, 2 January 2017) <https://economictimes.indiatimes.com/blogs/ResponsibleFuture/sustainability-and-csr-trends-for-india-in-2017>

RHTLaw Asia LLP-Piyush Gupta, 'The Evolution of ESG from CSR| Lexology' (Lexology) <https://www.lexology.com/library/detail.aspx?g=80bbe258-a1df-4d4c->

Ringe WG, 'Net-Zero Plans under the Proposed CSDD' (*Oxford Business Law Blog*, 28 April 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/net-zero-plans-under-proposed-csdd>

Segal M, 'UK Becomes First Country in the World to make TCFD-Aligned Disclosure Mandatory' (*ESG Today*, 9 November 2020) <https://www.esgtoday.com/uk-becomes-first-country-in-the-world-to-make-tcfd-aligned-disclosure-mandatory/>

Singh N, 'Professional CEOs See Average Pay Rise by 7% to Rs 13 Crore in FY20 – Times of India' (*The Times of India*, 2020) <https://timesofindia.indiatimes.com/business/india-business/professional-ceos-see-avg-pay-rise-by-7-to-rs-13-crore-in-fy20/articleshow/79454379.cms>

Sinha A, 'Key Promoter Considerations: Foreign Investment in Indian Startups' (*SME Futures*, 17 October 2020) <https://smefutures.com/key-promoter-considerations-foreign-investment-in-indian-startups/>

Sjafjell B and Mähönen J, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (*Blogging for Sustainability*, 2021)

<https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/corporate-purpose--sjafjell-mahonen.html>

Sjafjell, 'Company Law: The Corporate Board and Mandatory Sustainability Due Diligence' (*Human Rights and the Environment Blog*, 24 May 2021) <https://novabhre.novalaw.unl.pt/company-law-corporate-board-mandatory-due-diligence>

Stacey K, 'Fortis Loses Fourth Board Member in Blow to Founders' (*Financial Times* 23 May 2018) <https://www.ft.com/content/41b3479a-5e68-11e8-9334-2218e7146b04>

Statement of Intent to Work Together Towards Comprehensive Corporate Reporting (Integrated Reporting < https://www.integratedreporting.org/resource/statement-of-intent-to-work-together-towards-comprehensive-corporate-reporting/>

Task Force on Climate-Related Financial Disclosures' (*Task Force on Climate-Related Financial Disclosures*) < https://www.fsb-tcfd.org>

TCFD, 'Task Force on Climate-Related Financial Disclosures 2021 Status Report' (Financial Stability Board 2021) < https://www.fsb.org/wp-content/uploads/P141021-1.pdf>

TOI, 'Sebi plans stricter norms for independent directors' (15 June 2017) <http://timesofindia.indiatimes.com/articleshow/59155541.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst>

Tsagas G, 'Section 172 of the UK Companies Act 2006: Desperate Times Call for Soft Law Measures' (*Oxford Business* Law Blog 01 Sep 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/09/section-172-uk-companies-act-2006-desperate-times-call-soft-law>

United Nations, World Economic Situation and Prospects (July 2020)<https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-2020/>

Varottil U, 'New CSR Rules in Companies Act Amendments: The Risks of Greater Rigidity' (BloombergQuint) <https://www.bloombergquint.com/opinion/new-csr-rules-the-risks-of-greater-rigidity>

Voss D, 'Government Regulation of Corporate Social Responsibility: What Are the Implications for Corporate Governance?' (LSE, 13 September 2018) <https://blogs.lse.ac.uk/netuf/2018/09/13/government-regulation-of-corporate-social-responsibility-what-are-the-implications-for-corporate-governance>

Whieldon E and Clark R, 'ESG funds beat out S&P 500 in 1st year of COVID-19; How 1 fund shot to the top' (S&P Global 2021) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/esg-funds-beat-out-s-p-500-in-1st-year-of-covid-19-how-1-fund-shot-to-the-top-63224550 >