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# **Promoting More Socially Responsible Corporations through a Corporate Law Regulatory Framework**

**Jingchen Zhao**

## Abstract

This paper aims to lay the foundations for a more critical approach to the relationship between Corporate Social Responsibility (CSR) and corporate law. Limitations on legislative approaches including directors' duties, information disclosure, sustainable decisions, direct promotion and corporate internal management structure are critically analysed, trying to find well thought-out and effectively implemented adjudication that provides meaningful instruction for regulating CSR. The article explores the manner in which corporate law may contribute to accommodating CSR principles within corporate strategies, in order to establish a transformative legal regulatory framework within corporate law by using the authoritative legal mode to promote corporate regulatory mechanisms. The article critically studies a few legislative measures supported by the relevant legislative experiences from various jurisdictions as examples of currently enforced CSR-laws at national level, in order to offer comprehensive and potentially effective legislative suggestions for accommodating CSR elements. However, a 'one size fits all' approach is clearly not desirable, and these suggestions should be interpreted and implemented in a locally relevant manner, according to path dependence theory.

## Key words

CSR, Corporate Law, Corporate Governance, Regulation, Stakeholders

# 1. Introduction

The concept of Corporate Social Responsibility (CSR), once known as “*noblesse oblige*”, has experienced a vigorous resurgence since the 1950s.<sup>1</sup> The term took shape and gathered momentum during the 1950s and 1960s, developing out of a time when the sole corporate motive had been to ensure business success via profits.<sup>2</sup> Perhaps because of its wide-ranging coverage, there is no universally accepted definition of CSR. The topic has been widely discussed among academics from various disciplines, including philosophy, business management, law, politics, sociology and economics, as well as pragmatically by businessmen and politically by public representatives.<sup>3</sup> CSR functions as a built-in, self-regulating mechanism whereby businesses monitor and ensure their adherence to law, ethical standards and international norms. Social responsibility encompasses the obligation of managers to choose and act in ways that benefit both the interests of the organisation and those of society as a whole.

In the modernised economy, adherents of the CSR movement recognise the tri-partite relationship between government, corporations and society to achieve a combination of economic, social, environmentally friendly and philanthropic goals. The dynamic nature of CSR implies that it is sometimes necessary to redefine the boundaries of what is acceptable, feasible and profitable, and to relate these boundaries to corporate decisions and strategies.<sup>4</sup> CSR is a complicated and multi-dimensional organisational phenomenon, requiring a business organisation to be consciously responsible for its corporate behaviour and actions or non-actions and their impact on various stakeholders. Despite the fact that CSR has traditionally been regarded as a voluntary responsibility of corporations, the emphasis on corporations’ attention to CSR has not been entirely voluntary in practice.<sup>5</sup> The debate surrounding CSR is closely related to the responsibilities of boards of directors, and especially their duties towards various stakeholders including employees, customers,

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<sup>1</sup> H. Mintzerberg, ‘The Case for Corporate Social Responsibility’ (1983) 4 *Journal of Business Strategy* 3 at 3.

<sup>2</sup> T. Levitt, ‘The Danger of Social Responsibility’ (1958) *Harvard Business Review* 41.

<sup>3</sup> A. Elbing, ‘The Value Issue of Business: The Responsibility of the Businessman’ (1970) *Academy of Management Journal* 79; D. Jamali & R. Mirshak, ‘Corporate Social Responsibility (CSR) Theory and Practice in a Developing Country Context’ (2007) 72 *Journal of Business Ethics* 243; S. Vallentin, ‘Governmentality and the Politics of CSR’ (2012) 23 *Organization* 1; A. O’Rourke, ‘A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility’ (2003) 12 *Business Strategy and Environment* 227; T. Besley & M. Ghatak, ‘Retailing Public Goods: The Economics of Corporate Social Responsibility’ (2007) 91 *Journal of Public Economics* 1645; D. McBarnet, A. Voiculescu & T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press (2007); S.J. Padfield, ‘Corporate Social Responsibility & Concession Theory’ (2015) 6 *William & Mary Business Law Review* 1; R.S. Avi-Yonah, ‘Corporate Taxation and Corporate Social Responsibility’ (2014) 11 *New York University Journal of Law & Business* 1.

<sup>4</sup> U. Baxi, ‘Market Fundamentalisms: Business Ethics at the Altar of Human Rights’ (2005) 5 *Human Rights Law Review* 1.

<sup>5</sup> M.E. Porter & M.R. Kramer, ‘Strategy and Society: The Link between Competition Advantage and Corporate Social Responsibility’ (2006) *Harvard Business Review* 78 at 78.

suppliers, creditors, the environment, government and local communities. CSR is not an isolated term; it overlaps with some policies and is synonymous with others. Discussions about CSR lie both within and beyond law.<sup>6</sup>

The paper examines CSR as a concept, as a challenge to corporations and as an area of practice within the field of law and business. It endeavours to lay the foundations for a more critical approach to the relationship between CSR and corporate law. At first blush these two terms might seem to be contradictory due to the traditionally voluntary nature of CSR, conceived as a matter of going the extra mile beyond what is required under the law. However, lessons learned from financial crises and corporate scandals have prompted legislators to reconsider the functions of CSR, as well as other related issues such as short-termism and transparency, in attempts to make these notions relevant or embed them within corporate law legislation.<sup>7</sup> This paper aims to address these matters in order to discuss the increasing trend towards intervention by corporate law, so that CSR may no longer be seen as voluntary. Rather than focusing on the effectiveness and efficiency of legislative approaches, the paper conceptualises the developing interaction between CSR and corporate law. A variety of legislative approaches have been used, either in a direct and mandatory manner or in indirect and subtle ways.

Despite a large and growing body of literature on CSR, there is a lack of research on the links between CSR and corporate law, particularly in terms of the validity and nature of existing legislative approaches to foster more socially responsible companies. The article seeks to fill this gap in the literature by evaluating legislative approaches, supported by critical analyses of legislative experiences as examples in order to identify limitations in corporate law as to how to promote CSR and produce a facilitative regulatory framework that improves the effectiveness of corporate law-related initiatives. The paper aims to address matters related to CSR and corporate law legislation in order to ascertain where corporate law stands on promoting CSR, and what it should do to facilitate it. It aims to offer guidance for governments interested in potential legislative reform opportunities to embed CSR within the corporate law reform agenda. It may be argued that countries need to ensure that companies sustainably incorporate CSR principles at the core of their self-regulatory mechanisms, while suitable strategies must be proposed to allow them to fulfil their social responsibilities without incurring substantial costs or hindering their business practice.

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<sup>6</sup> D. Matten & J. Moon, 'A Conceptual Framework for Understanding CSR' in A. Habisch, J. Jonker, M. Wegner & R. Chidpeter (Eds.), *Corporate Social Responsibility Across Europe*, Heidelberg: Springer (2005); see also D. Matten & J. Moon, "'Implicit' and 'Explicit' CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility" (2008) 33 *Academy of Management Review* 404.

<sup>7</sup> See Section 3 of the Article.

Despite the fact of the prevailing voluntary nature of CSR, a legal regulatory framework within corporate law may link two contradictory disciplines by using the authoritative legal mode to promote corporate regulatory mechanisms. While the trends within legislative experiences from selected jurisdictions, in terms of their approaches to accommodating ethical norms in corporate law, indicate that CSR has achieved a place within corporate law legislation, this place is deeply contested, in both theory and practice. The legitimacy and future of merging CSR and corporate law is subject to challenge. The article categorises these in terms of various legislative measures in order to answer questions related to how accommodating ethical notions in corporate law can produce optimum enforceability. If legal regulation is to have a systematic impact on CSR, the article aims to present a pragmatic view of the role played by corporate law with suggestions for legislators and directors for embedding and enforcement. A 'one size fits all' approach, resulting in a regulatory framework that is effective and efficient for every single jurisdiction, is clearly not possible or desirable; rather, regulation should be implemented in such a way that it is aligned with an enabling business environment and corporate law and governance regimes with characteristics that are unique to that jurisdiction.<sup>8</sup>

After the introduction, the remainder of the article proceeds as follows. Part 2 provides an overview of the definition and character of CSR. Part 3 conceptualises three categories of legislative approaches to identify the limitations in corporate law in prompting and facilitating CSR-related regulation. An additional assessment of these regulatory approaches will be presented in Part 4, and a regulatory framework will be proposed that employs a mix of soft and hard law together with other extra-legal mechanisms, as well as a discussion of path dependence theory, in order to evaluate and justify the uniqueness of legislative approaches if they were to be incorporated in national corporate law. Within the discussions in Parts 3 and 4, current legislations in a selected group of jurisdictions, not only from countries with mature markets but also from those with emerging markets, and from both common law and civil law legal systems, will be discussed. Finally there will be some concluding remarks with suggestions for legislators on enforcing legislative approaches to promote CSR.

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<sup>8</sup> See also C. Villiers, 'Corporate Law, Corporate Power and Corporate Social Reasonability' in N. Boeger, R. Murray & C. Villiers (Eds.), *Perspectives on Corporate Social Responsibility*, Cheltenham: Edward Elgar (2008) 87.

## 2. CSR: Definition, Characteristics and Relevant Theory

In this section, the definition and main characteristics of CSR will be discussed along with related theories that normally accompany CSR, particularly stakeholder theory.

### 2.1 Definition and Characteristics of CSR

So far a consensus regarding the definition of CSR has yet to be reached, because the expectations and demands of various stakeholders in corporate practices are constantly adjusting to rapid changes in the business world. CSR has been described as a myth, a luxury and sometimes a must-have.<sup>9</sup> Despite the lack of a conclusive definition, with different approaches to and many dimensions of CSR, a number of common characteristics can be drawn from the various definitions. First, CSR states that responsible behaviour on the part of corporations can help achieve corporate and wider goals, in particular the general good of society. Second, the scope of CSR mainly focuses on social, environmental and human rights dimensions, in addition to the traditional economic goals of corporations.<sup>10</sup> The CSR movement asserts that a more expansive mission for corporations is an urgent need of alarming proportions, in a context where social and environmental issues threaten the sustainability of life on the planet.<sup>11</sup> Third, CSR plays a dual role – on the one hand, it deals with minimising the impacts of corporate misconduct in the sphere in which a business operates, and on the other hand, it encompasses a vast array of philanthropic corporate activities which are important.<sup>12</sup> Fourth, CSR accommodates and introduces a number of complementary ideas and terms such as sustainability, business ethics, corporate citizenship, corporate social performance and stakeholder theory, where stakeholder theory is closely related to a particular area of legal research literature.<sup>13</sup> The CSR rooted in it is interchangeable and overlapping in character with a number of other terminologies.<sup>14</sup> Last but not least, despite the fact that many definitions emphasise the voluntary characteristics of CSR beyond enforceable legal

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<sup>9</sup> E.K.B. Tan, 'Corporate Social Responsibility as Corporate Soft Law: Mainstreaming Ethical and Responsible Conduct in Corporate Governance' (2013) 31 *Singapore Law Review* 227 at 231.

<sup>10</sup> These dimensions include a more natural and cleaner environment, environmental stewardship, integrated social concerns, and the full scope of business impacts on communities and human rights.

<sup>11</sup> D.J. Morrissey, 'The Riddle of Shareholders' Rights and Corporate Social Responsibility' (2015) 80 *Brooklyn Law Review* 353 at 354.

<sup>12</sup> This is especially the case in developing countries, to enhance corporate reputation, culture and image.

<sup>13</sup> A.B. Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38 *Business and Society* 268; S.P. Sethi, 'Dimensions of Corporate Social Performance: An Analytic Framework' (1975) 17 *California Management Review* 58; C. Frederick, 'Corporate Social Responsibility: Deep Roots, Flourishing Growth, Promising Future', in A. Crane, A. McWilliams, D. Matten, J. Moon & D. Siegel (Eds.) *The Oxford Handbook of Corporate Social Responsibility*, Oxford: Oxford University Press (2008) p.522.

<sup>14</sup> See D. Matten & J. Moon, "'Implicit' and 'Explicit' CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility" (2008) 32 *Academy of Management Review* 404.

requirements, the practice of CSR is established on the basis of the fulfilment of traditional economic and legal responsibilities.<sup>15</sup>

Legal awareness of the need for CSR requires us to define the term in a manner that integrates both mandatory and voluntary behaviours.<sup>16</sup> CSR as a concept covers many issues, encompassing sustainability development, corporate governance advancement and corporate objectives, employment rights, consumer protection rights, occupational health and safety, local taxation law and socially responsible investments from shareholders, especially institutional shareholders. Corporate practices are typically influenced by an array of legal domains.<sup>17</sup> When they manage their businesses, directors will find “their decision tree considerably trimmed and their discretion decidedly diminished by mandatory legal rules enacted in the name of protecting stakeholders”.<sup>18</sup> While CSR is worthy of study from multiple disciplinary perspectives, it is also fundamentally affected by how law and other forms of regulation treat it.<sup>19</sup> Apart from behaviours that are legally prescribed or prohibited, legal responsibility also includes what is legally permissible.<sup>20</sup> Therefore, the scope of legal responsibilities is not just limited to that strand of responsibility in which legal compulsion and sanctions apply towards legal outcomes.<sup>21</sup> The interaction between law and CSR will embrace a “minimum position of legal compliance and harm-avoidance where the law is lacking, a mid-way position of facilitating corporate contributions to sustainable development and

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<sup>15</sup> See W. Vandekerckhove & M.S.R. Commers, ‘Beyond Voluntary/Mandatory Juxtaposition: Towards a European Framework on CSR as Network Governance’ (2005) 1 *Social Responsibility Journal* 98; M. Blowfield, ‘Corporate Social Responsibility: Reinventing the Meaning of Development’ (2005) 81 *International Affairs* 515; A.B. Carroll, ‘The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders’ (1991) 34 *Business Horizons* 39; O. Aiyegbayo & C. Villers, ‘The Enhanced Business Review: Has it Made Corporate Governance More Effective’ (2011) *Journal of Business Law* 699; K. Campbell & D. Vick, ‘Disclosures Law and the Market for Corporate Social Responsibility’, in D. McBarnet, A. Voiculescu & T. Campbell (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press (2007) p. 241; A. Johnson, ‘After the OFR: Can UK Shareholder Value Still Be Enlightened?’ (2006) 7 *European Business Organization Law Review* 817; K. Buhmann, ‘Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR’ (2006) 6 *Corporate Governance: The International Journal of Business in Society* 188.

<sup>16</sup> J.A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge: Cambridge University Press (2006).

<sup>17</sup> These legal domains include securities regulations, taxation law, contract law, employment law, environmental law, consumer protection law and insolvency law G20/OECD, *OECD Principles of Corporate Governance* (2015), available via the OECD website [www.oecd.org](http://www.oecd.org) (assessed 30<sup>th</sup> September 2015), 15.

<sup>18</sup> A. Winkler, ‘Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History’ (2004) 67 *Law & Contemporary Problems* 109 at 111; see also S.J. Haymore, ‘Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma’ (2011) 64 *Vanderbilt Law Review* 1311; B. Becker & P. Stromberg, ‘Fiduciary Duties and Equity-debtholder Conflicts’ (2012) 25 *The Review of Financial Studies* 1931; H. Huang, ‘Directors’ Roles in Corporate Social Responsibility: A Stakeholder Perspective’ (2011) 103 *Journal of Business Ethics* 385; L. Johnson, ‘Pluralism in Corporate Form: Corporate Law and Benefit Corps.’ (2012–2013) 25 *Regent University Law Review* 269.

<sup>19</sup> B. Horrigan, *Corporate Social Responsibility in the 21<sup>st</sup> Century: Debates, Models and Practices across Government, Law and Business*, Cheltenham: Edward Elgar (2010) p. 26.

<sup>20</sup> *Ibid.*, p. 26.

<sup>21</sup> P. Cane, *Responsibility in Law and Morality*, Oxford: Hart Publishing (2003) p. 30.

other forms of community investment where the business case warrants it, and a more expansive position”<sup>22</sup> with the “active alignment of internal business goals with externally set societal goals”.<sup>23</sup>

## 2.2 Voluntary versus Mandatory Juxtaposition

The role that the law plays or should play in the CSR area is debatable. This debate leads to legitimisation problems for CSR activities and the nature of CSR as a voluntary or mandatory responsibility. On the one hand, companies and business industry organisations argue that CSR should not be regulated because regulation would stifle innovation and damage national competitiveness.<sup>24</sup> The European Commission initially proposed the voluntary character of CSR in its 2001 Green Paper, stating that the corporations will be keen to develop their strategic management policy and collectively raise the bar for industry in general, instead of being regulated.<sup>25</sup> Voluntary initiatives towards CSR are described as business strategies which benefit corporations in the long term and create respectful relationships with corporate stakeholders. Furthermore, companies’ awareness of the financial benefits of being socially responsible will make it unnecessary to regulate CSR in law.<sup>26</sup>

However, arguments for the voluntary character of CSR do not convince a significant proportion of campaigners and critics, who argue that an explicit recognition of the interests of stakeholders is necessary.<sup>27</sup> First, in “a renewed EU strategy” the European Commission agreed that CSR

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<sup>22</sup> B. Horrigan, *Corporate Social Responsibility in the 21<sup>st</sup> Century: Debates, Models and Practices Across Government, Law and Business*, Cheltenham: Edward Elgar (2010) p. 26.

<sup>23</sup> H.E. Ward, E. Wilson, L. Zarsky & T. Fox, ‘CSR and Developing Countries: What Scope for Government Action?’, United Nations Sustainable Development Innovation Briefs, Issue 1; available via <http://www.un.org/esa/sustdev/publications/innovationbriefs/no1.pdf> (accessed 20<sup>th</sup> February 2016).

<sup>24</sup> J.A. Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge: Cambridge University Press (2006) p.33.

<sup>25</sup> European Commission ‘Promoting a European Framework for Corporate Social Responsibility’, Green Paper and COM 366, Brussels (2001).

<sup>26</sup> For example, CSR law has been criticised as being a “stealth tax”, an investment barrier suffering from a lack of legislative clarity over where moral responsibility should lie ‘Do Good – or Else’, editorial, Wall Street Journal Asia (9<sup>th</sup> August 2007) available via <http://www.wsj.com/articles/SB118660718952492128> (accessed 11<sup>th</sup> June 2015).

<sup>27</sup> For example, see D. McBarnet, A. Voiculescu & T. Campbell (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press (2007); B. Horrigan, *Corporate Social Responsibility in the 21<sup>st</sup> Century: Debates, Models and Practices Across Government, Law and Business*, Cheltenham: Edward Elgar (2010); K. Buhmann, ‘Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR’ (2006) *Corporate Governance* 188; C. Villiers, ‘Corporate Law, Corporate Power and Corporate Social Responsibility’, in N. Boeger, R. Murray & C. Villiers, *Perspectives on Corporate Social Responsibility*, Cheltenham: Edward Elgar (2010); J. Zhao, ‘The Emerging Third Way in the Corporate Objective Debate in Company Law’ (2011) 62 *Northern Ireland Legal Quarterly* 361; J. Zhao, ‘Promoting More Socially Responsible Corporations through UK Company Law after the 2008 Financial Crisis: Turning of the Crisis Compass’ (2011) 22 *International Company and Commercial Law Review* 275; P. Puri, ‘The Future of Stakeholder Interests in Corporate Governance’ (2010) 48 *Canadian Business Law Journal* 427; J.E. Kerr, ‘Sustainability Meet Profitability: The Convenient Truth of How the Business Judgement Rule Protects a Board’s Decision to Engage in Social Entrepreneurship’ (2007) *Cardozo Law Review* 623; R.I. Patel, ‘Facilitating Stakeholder-Interest Maximization: Accommodating Beneficial Corporations in the Model Business Corporation Act’ (2010) 23 *St. Thomas Law Review* 135; A. Mickels, ‘Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the US and Europe’ (2009) *Hastings International and Comparative*

“concerns action by companies over and above their legal obligations towards society and environment”, and “certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility”.<sup>28</sup>

Despite the validity of the debate, many CSR-related problems call for co-ordinated actions from different levels, including regulation at both national and international levels and from government and self-regulatory approaches.<sup>29</sup> It is important to establish an “architecture” of normative arrangements that can combine and integrate the various categories of regulations in the most efficient and fruitful manner.<sup>30</sup> It was argued by Buhmann that normative legislation for CSR may constitute pre-formal law, guidance that is commonly recognised and complied with before it is introduced formally as legislation.<sup>31</sup> A regulatory focus on CSR, in a positive and progressive manner, will make corporations “want to do what they should do”.<sup>32</sup> Bendall observed a shift in CSR thinking away from voluntarism, or a “growing up” trend towards a greater appreciation of the manner in which the law helps to understand and promote CSR.<sup>33</sup> The legal adoption of regulating CSR within corporate law will enable boards of directors to consider ethical issues on their compulsory lists in order to avoid corporate scandals and misconduct. The converging focus on the impact of the business triple bottom line<sup>34</sup> has produced a platform of international and regional agreements, which has encouraged governments to enforce them in national legislations. It is getting increasingly popular for corporations to publish their codes of conduct, corporate responsibility reports, and ethical codes to make sure they are held accountable for what they say they have done and what they will do.<sup>35</sup>

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*Law Review* 271; M. Scheltema, ‘An Assessment of Effectiveness of International Private Regulation in the Corporate Social Responsibility Arena: A Legal Perspective’ (2014) 21 *Maastricht Journal of European and Comparative Law* 383; G. Bevivino, ‘Corporate Social Responsibility and Duties of Directors’ (2014) 25 *European Business Law Review* 923.

<sup>28</sup> 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, Brussels 2011 COM (2011), 681 final.

<sup>29</sup> *Ibid.* at 146.

<sup>30</sup> *Ibid.* at 146–147.

<sup>31</sup> K. Buhmann, ‘Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR’ (2004) 4 *Corporate Governance* 188 at. 192.

<sup>32</sup> P. Selznick, *The Communitarian Persuasion*, Washington, DC: Woodrow Wilson Centre Press (2002) p. 102.

<sup>33</sup> J. Bendall, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, Technology, Business and Society Programme Paper No.1 3. Geneva: UN Research Institute for Social Development (2004) p.30.

<sup>34</sup> J. Elkington, *Cannibals with Forks: The Triple Bottom Line of the 21st Century Business*, Gabriola Island: New Society Publishers (1998); see also A. Henriques & J. Richardson, *The Triple Bottom Line, Does it All Add Up? Assessing the Sustainability of Business and CSR*, London: Earthscan (2004).

<sup>35</sup> Based on the “KPMG International Survey of Corporate Responsibility Reporting” of the G250 companies, 95% report on their corporate responsibility activities. Corporate responsibility is not entirely subjective, and society and global communities have established norms for corporate behaviours. There are legal minimums beyond the voluntary norms and practices that society defines as responsible or irresponsible, through numerous associations and as a whole.; see KPMG, *KPMG International Survey of Corporate Responsibility Reporting 2011* (2011) p.7.

The necessities of linking CSR and corporate law are also discussed in terms of difficulties in influencing the behaviour of an artificial entity like a company.<sup>36</sup> These are laws that directly regulate various stakeholders,<sup>37</sup> influence corporate actions externally and focus on the outcomes that companies should achieve as well as specifying a range of penalties to be applied, and such regulations are definitely useful. However, these external regulations are inadequate in promoting corporate behaviour towards the desired goals, in the absence of an approach that could have an internal influence on corporate behaviour. It is clear that law and litigation have become an important part of CSR, but it is time to go beyond the tired dogma of voluntary versus mandatory in order to focus on the actual task of promoting a good environment and responsible social performance among companies.<sup>38</sup> Therefore, CSR is regarded as, or partly as, the result of a decision-making process regulated by corporate law and penetrating the governance structure.

### 2.3 The Business Case for CSR

Due to the heavy reliance on voluntary CSR efforts in terms of decision making in the article, the business case for CSR will be discussed in the section, suggesting that reluctant companies should or will engage in CSR activities due to the fact they will be rewarded by the market in economic and financial terms. The case for CSR can be divided into two perspectives, namely the normative case and the business case. The normative case focuses on morally justified CSR, while the business case places emphasis on the idea of enlightened-self-interest, which means companies exploring the possibility of increasing profitability by being socially responsible.<sup>39</sup> Even though there is a fundamental difference between the two outlooks, the motivation for a company to engage in CSR activities always contains a combination of both.<sup>40</sup> It is argued by Ireland and Pillay that contemporary CSR is “not, and does not purport to be, transformative in nature. It is, and purports to be, only ameliorative”.<sup>41</sup> The search for a business case for CSR has been accelerated by the fact that specific benefits to companies in an economic and financial sense should flow from CSR

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<sup>36</sup> B. Stephens, ‘Corporate Liability: Enforcing Human Rights through Domestic Litigation’ (2001) 24 *Hastings International and Comparative Law Review* 401.

<sup>37</sup> Such as contract law, insolvency law, employment law, environmental law and consumer protection law.

<sup>38</sup> H. Ward, *Legal Issues in Corporate Citizenship* (International Institute for Environment and Development: London, 2003) at v; available via <http://pubs.iied.org/pdfs/16000IIED.pdf> (assessed 16th February 2016).

<sup>39</sup> M.C. Branco & L.L. Rodrigues, ‘Corporate Social Responsibility and Resource-Based Perspectives’ (2006) 69 *Journal of Business Ethics* 111; this differentiation can also be termed extrinsic (financial) and intrinsic (ethical and altruistic) motives; see J. Graafland & C. Mazereeuw-Van der Duijn Schouten, ‘Motives for Corporate Social Responsibility’ (2012) 160 *De Economist* 377.

<sup>40</sup> N.C. Smith, ‘Corporate Social Responsibility: Whether or How?’ (2003) 45 *California Management Review* 52.

<sup>41</sup> P. Ireland & R.G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’, in P. Utting & J.C. Marques (Edn). *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan (2010) 77 at 82.

activities and initiatives,<sup>42</sup> in order to ensure that CSR is consistent with companies' strategies to be financially sustainable.<sup>43</sup> A tight coupling between CSR and the financial goals of companies has been identified with a shifted focus from an ethical orientation to a performance orientation,<sup>44</sup> while the link between CSR initiatives and the financial performance of the companies is labelled "doing good by doing well".<sup>45</sup> Financially sound corporate performance is largely dependent on a "business case" for responsibility<sup>46</sup> due to the interrelated and complicated nature of CSR, depending on "mediating variables and situational contingencies"<sup>47</sup> in order to achieve convergence between economic and social goals.<sup>48</sup> In practice, CSR activities will reduce cost and risks to the company and may be used by companies to set themselves apart from their competitors.<sup>49</sup> Besides this, companies may strengthen their legitimacy and promote their reputation by engaging in CSR and seeking win-win outcomes.<sup>50</sup> It is obvious that the business case for CSR puts emphasis on strategic aspects of the internal decision making process in order to maximise corporate wealth as a separate entity. In the next Section, the foundation of modern corporate law for regulating CSR will be discussed together with critical analysis on dimension of existing approaches in various jurisdictions.

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<sup>42</sup> A.B. Carroll & K.M. Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12 *International Journal of Management Review* 85 at 92.

<sup>43</sup> K. O'Sullivan, 'Virtue Rewarded: Companies are Suddenly Discovering the Profit Potential of Social Responsibility' (2006) CFO 47.

<sup>44</sup> M.P. Lee, 'A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead' (2008) 10 *International Journal of Management Reviews* 53 at 53.

<sup>45</sup> D.J. Vogel, 'Is There a Market for Virtue? The Business Case for Corporate Social Responsibility' (2005) 47 *California Management Review* 19 at 20–21.

<sup>46</sup> B. Horrigan, *Corporate Social Responsibility in the 21<sup>st</sup> Century: Debate, Models and Practice across Government, Law and Business*, Cheltenham: Edward Elgar (2010) p.269–270.

<sup>47</sup> A.B. Carroll & K.M. Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12 *International Journal of Management Review* 85 at 101.

<sup>48</sup> M.E. Porter & M.R. Kramer, 'The Competitive Advantage of Corporate Philanthropy' (2002) 80 *Harvard Business Review* 56.

<sup>49</sup> E. Kurucz, B. Colbert & D. Wheeler, 'The Business Case for Corporate Social Responsibility' in A. Crane, A. McWilliams, D. Matten, J. Moon & D. Siegel (Eds.), *The Oxford Handbook of Corporate Social Responsibility* Oxford: Oxford University Press (2008) 83 at 88.

<sup>50</sup> *Ibid.* at 90–92; see also J.C. Chen, D.M. Patten & R. Roberts, 'Corporate Charitable Contributions: a Corporate Social Performance or Legitimacy Strategy?' (2008) 82 *Journal of Business Ethics* 131.

### 3. Regulating CSR in Corporate Law

During the past decade or so, CSR and corporate law have come together as two traditionally disparate areas due to the critical role of corporate law in promoting socially responsible companies.<sup>51</sup> The allocation of responsibilities between the private sectors, including companies, and the government, as well as the pattern of distribution of profits, has changed significantly over the years. These changes in the role and place of companies in society require a proactive, progressive and correspondent change in the corporate law which sets the rules for corporate behaviour. In this section, the foundation of modern corporate law for CSR will be examined in order to clarify the possibilities of embedding CSR-related obligations and requirements within corporate law. CSR-related regulatory measures within the scope of corporate law will be discussed with reference to their legal foundations.

#### 3.1 Foundations of Modern Corporate Law for CSR

Most of the main complaints made by advocates of CSR concern corporate law's failure to regulate corporations' negative externalities, including pollution, failure to provide competitive working environments, and other unethical corporate actions that harm their stakeholders' interests.<sup>52</sup> It is argued that corporate codes are just a "black box" containing a series of rules governing the technical operation of corporations, but with no real effect on what public corporations actually do or should do.<sup>53</sup> Despite the fact that corporate law prescribes no goals for corporations and contains no detailed requirements for how businesses should behave, the necessity and advantages of regulating CSR are based on three main principles of corporate law which are closely related to corporate law's failure to regulate the externalities of companies. First, corporate law established and confirmed the separate legal entity principle.<sup>54</sup> Corporate law also allows and facilitates humans to engage in different roles in corporations, including insiders such as directors and shareholders and various stakeholders who contract with companies. It makes the corporation an organic product and enables this artificial legal entity to be controlled by human brains. This doctrine, as a cornerstone of modern corporate law, distinguishes between companies and their shareholders. This distinction is described as "fundamental" and "[lying] at the root of many of the most

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<sup>51</sup> J. McConvill & M. Joy, 'The Interaction of Directors' Duties and Sustainable Development in Australia: Setting off on the Uncharted Road' (2003) 27 *Melbourne University Law Review* 116; L. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, San Francisco: Berrett-Koehler (2012).

<sup>52</sup> See D.C. Korten, *When Corporations Rule the World*, Bloomfield: Kumarian Press & San Francisco: Berrett-Koehler (2001); J.A. Scholte, *Globalization: A Critical Introduction*, 2<sup>nd</sup> edn., Basingstoke: Palgrave Macmillan (2005).

<sup>53</sup> R.J. Gilson, 'Corporate Governance and Economic Efficiency: When Do Institutions Matter?' (1996) 74 *Washington University Law Quarterly* 327.

<sup>54</sup> This is confirmed by long-standing cases such as *Salomon v A. Saloman & Co. Ltd.* [1897]AC 22 and *Santa Clara County v Southern Pacific Railroad Company* 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118.

perplexing questions that beset company law”.<sup>55</sup> In this sense, corporate law enables us to distinguish the corporation’s property from that of its shareholders. It is confirmed that the nature of the company’s shares as property depends on the nature of the company’s assets and “the nature of the interest which each shareholder is to have”,<sup>56</sup> and the shares are property irrespective of the nature of the company’s property.<sup>57</sup>

The principle also entitles shareholders to limited liability.<sup>58</sup> It is argued that this could be regarded as a privilege that constitutes a tax on other stakeholders without their direct consent, which violates the voluntary nature of the exchange and makes these stakeholders into the bearers of business risk.<sup>59</sup> Ownership logic implies that shareholders can receive the benefit, but they should also bear all the costs.<sup>60</sup> Therefore, stakeholders who have no choice<sup>61</sup> but to bear the costs when a company goes into insolvency should also enjoy a proportional measure of consideration from the board when it is well-run, in order to avoid an unbalanced distribution whereby profit is privatised while losses need to be socialised.<sup>62</sup> It is claimed that limited liability demonstrates the contradiction between the exclusive claim on profits by corporations and the potential risks borne by various stakeholders.<sup>63</sup> Accepting limited liability will normally lead to the acceptance of private property and voluntary exchange; these are embedded within a context of social interdependency,

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<sup>55</sup> F.B. Palmer (edited by Clive Maximillian Schmitthoff and James Herbert Thompson), *Company Law*, 21<sup>st</sup> edn., (1968), p. 134.

<sup>56</sup> *Bligh v Brent* (1837) 2 Y & C Ex. 268; see also S. Williston, ‘History of the Law of Business Corporations before 1800. I’ (1888) 2 *Harvard Law Review* 105; S. Williston, ‘History of the Law of Business Corporations before 1800. II’ (1888) 2 *Harvard Law Review* 149; P. Ireland, ‘Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality’ (1996) 17 *The Journal of Legal History* 41; C. Stebbings, ‘The Legal Nature of Shares in Landowning Joint Stock Companies in the Nineteenth Century’ (1987) 8 *The Journal of Legal History* 25; A.A. Berle & G.C. Means, *The Modern Corporation and Private Property*, New York: The Macmillan Corporation (1932).

<sup>57</sup> *Bligh v Brent* (1837) 2 Y & C Ex. 268; *Short v Treasury Commissioners* [1948]; *Borland’s Trustee v Steel* [1901] 1 Ch.279; *IRC v Crossman* [1937] A.C. 26; see also P. Ireland, I. Gigg-Spall & D. Kelly, ‘The Conceptual Foundations of Modern Company Law’ (1987) 14 *Journal of Law and Society* 149.

<sup>58</sup> This is a fundamental and essential aspect of the free market arrangement that allows companies to “socialise” or externalise their losses while privatising their profits; see *Rayner (Mincing Lane) Ltd v Department of Trade* (1989) Ch 72; *Sea Fire and Life Insurance Co. Re* (1854) 3 De G.M. & G 459; *Hallett v Dowdall* (1852) 21 L.J.Q.B. 98.

<sup>59</sup> I. Ferrero, W.M. Hoffman & R.E. McNulty, ‘Must Milton Friedman Embrace Stakeholder Theory’ (2014) *Business and Society Review* 37 at 54–55; see D. Harvey, *The Enigma of Capital and the Crisis of Capitalism*, London: Profile Books Ltd (2010); E.K.B. Tan, ‘Corporate Social Responsibility as Corporate Soft Law: Mainstreaming Ethical and Responsible Conduct in Corporate Governance’ (2013) 31 *Singapore Law Review* 227.

<sup>60</sup> See M.W. Hoffman & J.V. Fisher, ‘Corporate Responsibility: Property and Liability’ in M.W. Hoffman & J.M Moore (Eds.), *Business Ethics: Readings and Cases in Corporate Morality*, 2<sup>nd</sup> edn. (Chichester: John Wiley & Sons); A.A. Alchian, ‘Some Economics of Property Rights’ (1965) *II Politico* 816.

<sup>61</sup> For example, suppliers lose money they are owed and lose their future business, the community and government lose tax revenue, employees lose their jobs or customers lose the product they have paid for.

<sup>62</sup> M. Fabrizi, C. Mallin & G. Michelon, ‘The Role of CEO’s Personal Incentives in Driving Corporate Social Responsibility’ (2014) 124 *Journal of Business Ethics* 311.

<sup>63</sup> I. Ferrero, W.M. Hoffman & R.E. McNulty, ‘Must Milton Friedman Embrace Stakeholder Theory’ (2014) *Business and Society Review* 37 at 54; see also R.J. Daniels, ‘Must Boards Go Overboard? An Economic Analyses of the Effects of Burgeoning Statutory Liability on the Role of Directors in Corporate Governance’ (1994-1995) *Canadian Business Law Review* 229.

which serves as the global and moral foundation for CSR.<sup>64</sup> The legal recognition of corporations as personalities will give companies “licences to operate”, including a formal grant of licence to operate by the government authorities in a particular jurisdiction, and social approval or cognisance of corporate action and impact that is deemed to be acceptable.<sup>65</sup>

The doctrine of separate legal entity also supports the argument against convergence towards the shareholder model,<sup>66</sup> which rests heavily on the presumption that shareholders are owners of the company.<sup>67</sup> However, it is clear that what shareholders, consisting of many thousands and millions of pension funds or insurance policies managed by financial directors who are paid and trained to manage a portfolio of shares,<sup>68</sup> actually own is merely some proportion of the company’s shares.<sup>69</sup> Legally defining the company as the property of these parties who are not even aware of where their shares are held simply does not make any sense.<sup>70</sup> In fact, after the Second World War, when more and more scholars began to be sceptical of the idea that shareholders were the corporate owners, the belief that corporations should be more socially responsible became more commonly accepted.<sup>71</sup>

Second, corporate law identifies the rights and duties of directors who represent companies as their fiduciaries,<sup>72</sup> described as “someone who has undertaken to act for or on behalf of another

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<sup>64</sup> I. Ferrero, W.M. Hoffman & R.E. McNulty, ‘Must Milton Friedman Embrace Stakeholder Theory’ (2014) *Business and Society Review* 37 at 54.

<sup>65</sup> E.W. Oat, *Business Persons: A Legal Theory of the Firm*, Oxford: Oxford University Press (2013) pp.21–27; see also S.J. Padfield, ‘Corporate Social Responsibility & Concession Theory’ (2015) *William & Mary Business Law Review* 1.

<sup>66</sup> J. Zhao, ‘Modernising Corporate Objective Debate towards a Hybrid model’ (2011) 62 *Northern Ireland Legal Quarterly* 361.

<sup>67</sup> H. Hansmann & K. Reinier, ‘The End of History for Corporate Law’ (2000-2001) 89 *Georgetown Law Journal* 439; see also H. Hansmann & K. Reinier, ‘Reflections on the End of History for Corporate Law’ in A. Rasheed & T. Yoshikawa (Eds.), *Convergence of Corporate Governance: Promise and Prospects*, London: Palgrave Macmillan (2012) p.32.

<sup>68</sup> J. Williamson, ‘A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997’ (2003) 41 *British Journal of Industrial Relations* 511 at 514.

<sup>69</sup> Some of the shareholders have barely seen any tangible part of what would usually be understood and regarded as the corporation.

<sup>70</sup> J. Williamson, ‘A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997’ (2003) 41 *British Journal of Industrial Relations* 511 at 514–515.

<sup>71</sup> P. Ireland & R.G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in P. Utting & J.C. Marques (Eds.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan, 77 at 82.

<sup>72</sup> See *Keech v Sandford* (1726) Sel Cas Ch 61; *Parks of Hamilton Holdings Ltd v Campbell* [2014] CSIH 36, [2014] SC 726; *Miller v Stonier* [2015] EWHC 2796 (Ch); *Allfiled UK Ltd v Eltis* [2015] EWHC 1300 (Ch); *Bretenfled UK Ltd v Harrison* [2015] EWHC 399 (Ch); *Freeman and Lockyer v Buckbursrst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (Court of Appeal); *Parker v McKenna* (1874) 10; *Newgate Stud Co v Penfold* [2008] 1 BCLC 46; *Bray v Ford* [1896] A.C. 44; *Boardman v Phipps* [1967] 2 A.C. 46, *Boardman v Phipps* [1967] 2 AC 46, HL, *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 A.C. 134n, *Murad v Al-Saraj* [2005] EWCA Civ 959; [2005] All ER (D) 503, *Bhullar v Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711, *Industrial Development Consultants Ltd v Cooley* [1972] 1 W.L.R. 443 and *O’Donnell v Shanahan* [2009] EWCA Civ 751; [2009] B.C.C. 822; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638; see also L. Smith, ‘Fiduciary Relationship: Ensuring the Loyal Exercise of Judgment on Behalf of Another’ (2014) 130 *Law Quarterly Review* 608; Justice J.T. Walsh, ‘The Fiduciary Foundation of Corporate Law’ (2001–2002) 27 *Journal of Corporation Law* 333; D.D. Prentice, ‘Directors’ Fiduciary Duties – The Corporate Opportunity Doctrine’ (1972) 50 *Canadian Bar Review* 623.

in particular matters or circumstances which give rise to a relationship of trust and confidence”, where a fiduciary must “act in good faith; he must not make a profit out of this trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or for the benefit of a third person”.<sup>73</sup> The rules are based on a “pessimistic but realistic appraisal of human nature, and are directed to the avoidance of temptation”.<sup>74</sup> As there is no single set of fiduciary duties which applies to all fiduciaries,<sup>75</sup> the fiduciary duties applicable to company directors are well developed and revolve essentially around the core fiduciary obligation of loyalty.<sup>76</sup>

Third, corporate law creates the rules that regulate actors among the corporate constituencies. The law tries to balance the controlling power between the board of directors and the shareholders, stipulating how these powers are to be exercised.<sup>77</sup> In fact, the influences of this legal protection for various stakeholders from sources outside corporate law are powerful forces directing the decisions of directors. Despite these legal protection are from a wide varieties of legations focusing on a particular stakeholder group, regulatory gaps are still unavoidable. Although in theory external regulations may play a key role in controlling externalisation by imposing negative externalities upon the company, its effectiveness is largely questionable. The political and normative dimensions of corporate law include social privileges of members, rights to externalise costs, and the political power that comes with the economic power of concentrated wealth.<sup>78</sup> Therefore, corporate law, could work by stopping corporate misconducts that lead to irreversible damage to stakeholders and ecosystems, including our future.

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<sup>73</sup> *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461; *Bristol & West BS v Mothew* [1998] Ch 1, 18; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988; *Re Allied Business and Financial Consultants Ltd*, *O'Donnell v Shanahan* [2009] 2 BCLC 666; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 2 BCLC 145; section 175 and 176 of Companies Act 2006; see also J. Edelman ‘When Do Fiduciary Duties Arise’ (2010) 126 *Law Quarterly Review* 302; A. Keay, ‘The Authorising of Directors’ Conflicts of Interest: Getting a Balance’ (2012) 12 *Journal of Corporate Law Studies* 129; B. Hannigan, ‘Reconfiguring the No Conflict Rule – Judicial Stricture, a Statutory Restatement and The Opportunistic Director’ (2011) 23 *Singapore Academy of Law Journal* 714.

<sup>74</sup> *Bribes and Secret Commission Again* [1021] CLJ 583 at 590.

<sup>75</sup> See *Henderson v Merrett Syndicates Ltd* [1995] 2AC 145 at 206; per Lord Browne-Wilkinson; see also L.S. Sealy, ‘Fiduciary Relationships’ (1962) *Cambridge Law Review* 69.

<sup>76</sup> B. Hannigan, *Company Law*, 2<sup>nd</sup> edn., Oxford: Oxford University Press (2009) pp.170–172. Sections 172, 173 and 175 of the Companies Act 2006 also address the true fiduciary duties of loyalty owed by directors to their companies; for more discussion on fiduciary duties and the Companies Act see E. Lim, ‘Directors’ Fiduciary Duties: A New Analytical Framework’ (2013) 129 *Law Quarterly Review* 242; D. Ahern, ‘Guiding Principles for Directorial Conflicts of Interest: *Re Allied Business and Financial Consultants Ltd.*; *O'Donnell v Shanahan*’ (2011) 74 *Modern Law Review* 596.

<sup>77</sup> B. Sheehy, ‘Directors’ Legal Duties and CSR: Prohibited, Permitted or Prescribed?’ (2014) 37 *Dalbousie Law Journal* 345. For example, in the US, from securities and labour law reforms in the New Deal to the social welfare laws of the 1960s and 1970s, progressives have advocated a diverse and broad array of mandatory legal rules designed to limit corporate conduct which is perceived to be harmful to non-shareholder constituencies.

<sup>78</sup> See B. Sheehy, ‘Corporations and Social Costs: The Wal-Mart Case Study’ (2004) 24 *Journal of Law and Commerce* 1; see also L. Wexler, ‘Wal-Mart Matters’ (2011) 46 *Wake Forest Law Review* 95.

During the past decade or so, CSR and corporate law have come together as two traditionally regarded opposites due to the critical role of corporate law in promoting socially responsible companies.<sup>79</sup> The allocation of responsibilities between the private sector, including companies, and the government, as well as the pattern of distribution of profits, has changed significantly over the years. These changes in the role and place of companies in society require a proactive, progressive, and correspondent change in corporate law as it sets the rules for corporate behaviour. Therefore, the changes also have an impact and reflection in corporate law.

## 3.2 Dimensions and Limitations on the Current Legislative Approaches to Regulating CSR

Corporations are now facing greater scrutiny regarding their social, human rights, environmental and economic activities. The discussion in Section 3 on the hard and soft corporate law that underpins CSR shows that socially responsible corporate behaviour has become a matter of important legal concern globally. The legislative approaches can be divided into three categories: decision making, information disclosure, and explicit direct promotion. The elements, characteristics and limitations of these three categories will be introduced before they are critically analysed in Section 4 and 5, with the purpose of developing a workable and sustainable approach.

### 3.2.1 Sustainable Decision Making

The fiduciary duties to which directors are generally subject across many jurisdictions include the duty to act *bona fide*<sup>80</sup> for the interest of the company and not for other collateral purposes.<sup>81</sup> But to whom are these duties owed? In general, directors' duties are owed to the company as a whole and not to individual members.<sup>82</sup> However, doing business is complicated and there may be many legal and commercial relationships between corporations and other related parties. Therefore, directors' duties could be enlarged and extended beyond general principles in certain circumstances

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<sup>79</sup> J. McConville & M. Joy, 'The Interaction of Directors' Duties and Sustainable Development in Australia: Setting off on the Uncharted Road' (2003) 27 *Melbourne University Law Review* 116; L. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, San Francisco: Berrett-Koehler (2012).

<sup>80</sup> *Re Smith & Fawcett Ltd* [1942] Ch 304 CA; *Re W & M Roith Ltd* [1967] 1 All ER 427; *JJ Harrison (Properties Ltd) v Harrison* [2001] BCLC 158..

<sup>81</sup> For directors using their power to raise capital for other purposes, see *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Hogg v Cramphorn Ltd* [1967] Ch 254. For the requirement that a director must not put himself in a position where there is an actual or potential conflict between his personal interests and his duty to the company, see Section 175 Companies Act 2006 on avoiding conflict of interests; see also *Aberdeen Rly Co. v Blacikie Bros* (1854) 2 Eq Rep 1281; *Knight v Frost* [1999] 1BCLC 364; *Jonathan Bell v Eden Project Ltd* (11 April 2001, unreported); *Bhullar v Bhullar, Re Bhullar Bros Limited* [2003] EWCA Civ 424, [2003] 2 BCLC 241, and the duty not to make secret personal profit from any opportunity resulting from their position, even if they are acting honestly and for the good of the company: see *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, HL; *Gencor ACP Ltd and Others* [2000] 2 BCLC 834..

<sup>82</sup> See *Percival v Wright* [1902] 2 Ch 421 & *Peskin v Anderson* [2000] BCC 1110. .

when considering the interests of wider audiences such as employees,<sup>83</sup> creditors,<sup>84</sup> individual shareholders<sup>85</sup> and so forth. As long as boards of directors are “honestly endeavouring to decide what will be for the benefit of the company and to act accordingly, it does not matter whether the Court would or would not come to the same decision or a different decision.”<sup>86</sup>

For example, the enlightened shareholder value principle (ESVP),<sup>87</sup> adopted in the UK Companies Act 2006 as the “duty to promote the success of the company” embodied in Section 172, is worth discussing as an example of a legislative approach to sustainable decision making. This section makes it clear that the purpose of promoting the success of the company is for the benefit of its members as a whole.<sup>88</sup> According to the section, the directors are required to create value for shareholders when considering the long-term interests of the corporation, and also to foster relationships with suppliers, employees and communities. The result of this definition is that the ESVP maintains the shareholder-centred paradigm favoured by those advocating the shareholder value principle. However, in appropriate circumstances it requires that consideration must be given to a wider range of interests.<sup>89</sup> The adoption of the principle makes it legitimate for directors to look after the interests of stakeholders in order to maintain companies in the long term and maximise shareholders’ interests.<sup>90</sup> Despite these progressive attempts in company law legislation,

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<sup>83</sup> See *Hutton v. West Cork Rwy. Co. Ltd.* [1883] 23 Ch. D. 654; *Saul D. Harrison & Son Plc, Re* [1995] 1 B.C.L.C 14, CA.

<sup>84</sup> See *Lombard Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1980] 1 WLR 627; *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch); [2003] B.C.C. 885 (Ch D); *Bilta (UK) Ltd (In Liquidation) v Nazir* [2012] EWHC 2163 (Ch); [2013] 2 W.L.R. 825; *Winkworth v Edward Baron Development Co Ltd* [1986] 1 W.L.R. 1512; [1987] 1 All E.R. 114; *Liquidator of West Meria Safetywear Ltd v Dodd* (1988) 4 B.C.C. 30; *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1998] 2 BCLC 485; *Facia Footwear Ltd (In Administration) v Hinchliffe* [1998] 1 B.C.L.C. 218; *Kinsela v Russel Kinsela Pty Ltd* (1986) 4 ACLC 215; *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch); [2003] B.C.C. 885; *Re Idessa (UK) Ltd (In Liquidation)* [2011] EWHC 804 (Ch); [2012] B.C.C. 315.

<sup>85</sup> See *Allen v Hyatt* (1914) 30 TLR 444..

<sup>86</sup> *Shuttleworth v Cox Bros and Co (Maidenhead)* [1927] 1 Ch 154; see also *Peskin v Anderson* [2000] All ER (D) 2278; *Coleman v Myers* [1977] 2 NZLR 225; *Brunninghausen v Glavanics* [1999] 46 NSWLR 538; also, it was made clear by the Supreme Court of Canada that formal directors’ duties as established under Canadian law can involve consideration of a broad set of social, environmental and stakeholder concerns in appropriate circumstances in *Peoples Department Store Inc. (Trustee of) v Wise* [2004] S.C.J. No. 64, 2004 SCC 68. [2004] 3 S.C.R. 461 at para 42 (S.C.C.).

<sup>87</sup> ESVP is the idea, described by Millon, that corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests. See D. Millon, ‘Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law’ in P.M. Vasudev & S. Watson (Eds.), *Corporate Governance after the Financial Crisis*, Cheltenham: Edward Elgar p.68; see also A. Keay, *The Enlightened Shareholder Value Principle and Corporate Governance*, Abingdon: Routledge (2013).

<sup>88</sup> Members are in most cases the shareholders; section 172 does this to cater for the situation of all companies, including guarantee companies that do not have shareholders.

<sup>89</sup> J. Loughrey, A. Keay & L. Cerioni, ‘Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance’ (2008) 8 *Journal of Corporate Law Studies* 79 at 86.

<sup>90</sup> A. Keay, ‘Tackling the Issues of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’ (2007) 29 *Sydney Law Review* 599.

a lack of enforcement is a significant problem, and the section has not brought any behavioural change from directors.<sup>91</sup>

The Government of India has also created provisions and corresponding rules pertaining to CSR under its Companies Act 2013. Three types of target companies must constitute a CSR Committee of the Board consisting of three or more directors, of whom at least one must be an independent director.<sup>92</sup> It is argued that the introduction of CSR provision in the Companies Act in India<sup>93</sup> is a welcome step, but companies should see it as an opportunity rather than a burden because of its positive impact in the communities they are engaging in.<sup>94</sup> In addition, the Indian and Mauritian legal systems have adopted a mandatory percentage of corporate profits as a CSR contribution, with a focus on diverting annual profits to CSR activities.<sup>95</sup>

It is important to discuss the nature of CSR in these two jurisdictions to assess the effectiveness of their CSR legislation, considering how likely these legislations are to promote sustainable decision making.<sup>96</sup> It has been suggested that CSR in India “has traditionally been seen as a philanthropic activity as those that were performed but not deliberated”,<sup>97</sup> and the practice of CSR

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<sup>91</sup> The non-member stakeholders listed under the section cannot initiate any proceedings against the directors when there is a breach of the duty. Hence, in the event of a breach of duties towards stakeholders, they are toothless in confronting the directors. See J. Kay, ‘The Kay Review of UK Equity Markets and Long-term Decision Making: Final Report’ (July 2012) pp.57–76; this review delivered a wide-ranging report in 2012 on the reforms needed to embed a long-term focus in UK companies and equity markets. Kay found that a number of directors actually believed that they had a legal obligation “to achieve the highest possible share price in the short-term”; see also BIS, ‘Building a Culture of Long-Term Equity Investment, Implementation of the Kay Review, a Progress Report’ (October 2014); A. Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* Abingdon: Routledge (2013) Chapters 4 and 7; E. Lynch, ‘Section 172: A Ground-breaking Reform of Director’s Duties, or the Emperor’s New Clothes?’ (2012) 33 *Company Lawyer* 196; V. Ho, ‘Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide’ (2010) 36 *Journal of Corporation Law* 59; A. Keay, ‘The Duty to Promote the Success of the Company: Is It Fit for Purpose in a Post-Financial Crises World?’ in J. Loughrey (Eds.) *Directors’ Duties and Shareholder Litigation in the Wake of Financial Crisis*, Cheltenham: Edward Elgar (2014).

<sup>92</sup> Section 135 (1) Indian Companies Act 2013; the committee has three tasks, including formulating and recommending CSR policy, recommending the amount of expenditure to be incurred on related activities, and monitoring the CSR policy of the company accordingly to Section 135 (3) Indian Companies Act 2013.

<sup>93</sup> The term CSR is not defined in the Act. Schedule VII of the Act lists CSR activities and suggests communities as the focal point.

<sup>94</sup> C.S.N. Kumar, ‘A Study of CSR Rules under Companies Act 2013’ (2014) *Asian Journal of Multidisciplinary Studies* 142 at 145.

<sup>95</sup> This is further discussed in Section 4.2.

<sup>96</sup> Majumdar argued that the new legislation embedded in Companies Act 2013 did not reflect the intent and spirit of CSR, which is including CSR in the core strategies of the company. A.B. Majumdar, ‘India’s journey with Corporate Social Responsibility – What Next’ (2015) 33 *Journal of Law and Commerce* 165 at 204.

<sup>97</sup> A. Singh & P. Verma, ‘From Philanthropy to Mandatory CSR: A Journey towards Mandatory Corporate Social Responsibility in India’ (2014) 6 *European Journal of Business and Management* 146 at 147. Religious practices (including Zakat, the Islamic practice of giving and consequent self-purification, or Dana, the practice of giving in Hindusim) and philosophical texts make it clear that individuals must engage in charitable activities that provide social and soul acceptance, and behaviours that give rise to the Gandhian principle of trusteeship; see A.B. Majumdar, ‘India’s journey with Corporate Social Responsibility – What Next’ (2015) 33 *Journal of Law and Commerce* 165; A.B. Majumdar, ‘Zakat, Dana and Corporate Social Responsibility’, available via [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2421001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2421001) (assessed 15<sup>th</sup> February 2016).

in India still remains within the philanthropic space.<sup>98</sup> CSR in India was born out of the Gandhian model, including a voluntary commitment to public welfare and an ethical awareness from the Board of social needs and charitable donations by corporations and entrepreneurs.<sup>99</sup> Therefore, it tends to focus on what is done with profits after they are made.<sup>100</sup> As such, CSR may not internalise socially responsible behaviours.<sup>101</sup> This slows the development of CSR in India, although it is argued that contemporary CSR tends to effect community development through various projects, becoming more strategic in nature<sup>102</sup> from the stakeholder perspective.<sup>103</sup>

An insightful study on the nature of CSR in Mauritius was conducted by Pillay utilising an empirical interview approach, arguing that “the majority of corporate executives either directly equated it (CSR) with philanthropy and simple charitable donations or saw it in baldly philanthropic terms”.<sup>104</sup> It is important that CSR discussions do not only occur just after profits have been made; they should also make enquiries about how those profits are made, if the profits have been made in a socially responsible manner, and whether the core business activities contribute to sustainable development in order to achieve the main aim of CSR law, implementing CSR programmes in the reform of multi-stakeholder partnerships and embedding the notion in corporate culture.<sup>105</sup> The government should view CSR as something coming from within the internal culture and practice, rather than as an externality imposed by legal regulation in order to contribute to a more accountable decision making process.<sup>106</sup> Therefore, regarding the nature of CSR in Mauritius and India, it is crucial to embed the notion into corporate visions and strategies in order to evaluate and improve corporate behaviours and decisions and achieve a shift from the philanthropy-based model to a multi-stakeholder approach to CSR.

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<sup>98</sup> PricewaterhouseCoopers India, *Handbook on Corporate Social Responsibility in India* (Haryanan PwC India 2013) p.7.

<sup>99</sup> S. Sangle, ‘Critical Success Factors for Corporate Social Responsibility: a Public Sector Perspective’ (2010) 17 *Corporate Social Responsibility and Environmental Management* 205 at 205–206; see also S.G. Sharma, ‘Corporate Social Responsibility in India: An Overview’ (2009) 43 *The International Lawyer* 1515.

<sup>100</sup> M. Pavan & S. Neeti, ‘Expanding Dimensions of CSR – The Indian Way’ (2015) *Asian Journal of Management* 229 at 230.

<sup>101</sup> R. Jenkin, ‘Globalisation, Corporate Social Responsibility and Poverty’ (2005) 81 *International Affairs* 525.

<sup>102</sup> PricewaterhouseCoopers India, *Handbook on Corporate Social Responsibility in India* (Haryanan PwC India 2013) p.7.

<sup>103</sup> J.A. Arevalo & D. Aravind, ‘Corporate Social Responsibility Practices in India: Approach, Drivers and Barriers’ (2011) 11 *Corporate Governance: The International Journal of Business in Society* 399; S.G. Sharma, ‘Corporate Social Responsibility in India: An Overview’ (2009) 43 *The International Lawyer* 1515.

<sup>104</sup> R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) p.243.

<sup>105</sup> *Ibid.* p.254; see also R.D. Gokulsing, ‘CSR Matters in the Development of Mauritius’ (2011) 7 *Social Responsibility Journal* 218; R. Pillay, ‘Mauritius’ in W. Visser & N. Tolhurst, *CSR: A Country-by Country Analysis of Corporate Sustainability and Responsibility*, Shuffled: Greenleaf Publishing (2010) p.257; J.D. Mahadeo & T. Soobaroyen, ‘A Longitudinal Study of the Implementation of the Corporate Governance Code in a Developing Country: The Case of Mauritius’ (2013) *Business Society*, published online before print available via <http://bas.sagepub.com/content/early/2013/08/13/0007650313501838.abstract> (accessed 10<sup>th</sup> February 2016).

<sup>106</sup> R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) p.265.

Apart from advancements made in the statutes, CSR has also been recognised in common law. The court emphasised the importance of considering the interests of employees in *Commissioner of Income Tax v Modi Industries Ltd*<sup>107</sup> by claiming that their interests are “now treated as an important fact and part of CSR”.<sup>108</sup> It is held in *The Tata Power Company Ltd (Transmission) v Maharashtra Electricity Regulatory State Commission & Ors*<sup>109</sup> that “CSR expenditure was the responsibility of the company and that such expenses could not be passed on to consumers”.<sup>110</sup> The Delhi High Court also decided that “corporate social responsibility and donations need to be made particularly attractive for pharmaceutical and other companies involved in this sector”.<sup>111</sup> It is reported in *Aam Janta v. State of Mp. Ors*<sup>112</sup> that companies “should not just limit their activities to increasing their profits but strive to fulfil their corporate social responsibility on a continuous basis as long as the unit is under operation”, and should “maintain a good relationship with all the stakeholders particularly with the local villagers”.<sup>113</sup> Despite the fact that emphasis has been given to certain stakeholder groups such as employees, local villagers (local communities) or customers, the judiciary has recognised the notion of CSR explicitly.<sup>114</sup>

### 3.2.2 Information Disclosure

Disclosure assists in making the securities market more transparent, and it is effective in maintaining the confidence of investors and various stakeholders by giving them access to relevant, sufficient and reliable information on a timely and regular basis<sup>115</sup> in order to raise corporate governance standards and enhance accountability.<sup>116</sup> Information disclosure requirements in relation to social, environmental and human rights-related issues for listed companies are a frequently adopted way of enforcing CSR-related legal requirements<sup>117</sup> and enabling stakeholders

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<sup>107</sup> [2010] 320 I.T.R. 546 (SC).

<sup>108</sup> [2010] 327 I.T.R. (570).

<sup>109</sup> MANU/ET/0150/2013.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Mohd. Ahmed (Minor) v. Union of India & Ors.*, W.P.(C) 7279/2013 (Del.).

<sup>112</sup> C.S., No. 35 of 2013, N.G.T., 21 Feb. 2014.

<sup>113</sup> *Ibid.*

<sup>114</sup> A provision that is similar to ESVP, also introduced in the new Companies Act, states that “A director of a company shall 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, its employees, the shareholders, the community and for the protection of environment” (Section 166 (2) of Indian Companies Act 2013).

<sup>115</sup> Principle IV. D, Chinese Securities Regulatory Committee, *OECD-China Policy Dialogue on Corporate Governance: Corporate Governance of Listed Companies in China; Self-Assessment by the China Chinese Securities Regulatory Committee*, (2011) OECD).

<sup>116</sup> A. Cadbury & I.M. Millstein, *The New Agenda for ICGN*, Discussion Paper No. 1 for the ICGN Tenth Anniversary Conference, London, July 2005, 13; available via <https://www.icgn.org/403>.

<sup>117</sup> Apart from jurisdictions discussed in Section 3, the regulatory initiatives were made in Canada (Continuous Disclosure Obligation NI51-102), Norway (Accounting Act (Regnskapsloven) 1999), Denmark (Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998), South Africa (Code of Corporate Practice and Conduct/the King’s Code 2002) and the United States (see Notice of SEC Registrants’ Duty to Disclose Legal Proceedings 2001); according a 2015 report by the Initiative for

to remain informed about socially responsible corporate actions and decisions.<sup>118</sup> Companies are becoming increasingly open about the social and environmental impacts of their business activities, especially with the growing number of multinational corporations and their acceptance and awareness of global CSR reporting standards.<sup>119</sup> The requirement for information disclosure was introduced as part of corporate law to inform shareholders, or sometimes other stakeholders depending on jurisdictions, and help them assess how directors have performed their CSR-related duties. The information disclosure process may be regarded as a framework that allows two important aspects of accountability, namely completeness and comprehensiveness, to be easily, directly and simultaneously assessed.<sup>120</sup>

The following section will move on to look at relevant legislations in the UK. The strategic report, a corporate disclosure requirement that has long been regarded as an important way of enhancing corporate accountability and improving the transparency of corporate activities,<sup>121</sup> was introduced in the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, which amended the Companies Act 2006 regarding issues of information disclosure. Companies must now produce a "strategic report" pursuant to the new Sections 414A-D of the Companies Act 2006. Apart from environmental matters, company employees and social and community issues,<sup>122</sup> quoted companies will also have to include, "to the extent necessary for an understanding of the development, performance or position of their business", information about human rights issues, including information on any related policy and its effectiveness.<sup>123</sup> In the author's opinion, the new strategic report has not substantially changed the requirements embedded in the previously required business review.<sup>124</sup> However, it is positive to see more detailed requirements regarding

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Responsible Investment at the Hauser Institute for Civil Society at the Kennedy School, twenty-three countries have enacted legislation requiring public companies to issue reports on social and environmental issues including, apart from the countries that have been mentioned here, Argentina, China, the EU, Ecuador, Finland, Germany, Greece, Hungary, Ireland, Italy, Japan, Malaysia, the Netherlands, Spain and Taiwan; see Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts by National Government and Stock Exchanges* (March 12, 2015).

<sup>118</sup> For example, KPMG believes, from a practical point of view, that corporate responsibility reporting has established its position as the de facto law for business, delivering a compelling insight into the expectations that companies face; see KPMG, *KPMG International Survey of Corporate Responsibility Reporting 2011* (2011) p.2.

<sup>119</sup> S. Chen & P. Bouvain, 'Is Corporate Responsibility Converging? A Comparison of Corporate Responsibility Reporting in the USA, UK, Australia and Germany' (2009) 87 *Journal of Business Ethics* 299 at 300.

<sup>120</sup> L. Bouten, P. Everaet, L.V. Liedekerke, L.D. Moor & J. Christiaens, 'Corporate Social Responsibility Reporting: A Comprehensive Picture' (2011) 35 *Accounting Forum* 187 at 202.

<sup>121</sup> For example, see Chapter 5 of "G20/OECD Principles of Corporate Governance 2015".

<sup>122</sup> Section 414C (7)(b) Companies Act 2006.

<sup>123</sup> Section 414C(7)(b) Companies Act 2006 (Strategic Report and Directors' Report) Regulation 2013.

<sup>124</sup> The Business Review was the previous legal requirement before the enforcement of the Companies Act 2006 (Strategic Report and Directors' Report) Regulation 2013. Legislatively, under Section 417 of the Companies Act 2006, directors are obliged to include in the Business Review "a fair review of the company's business and a description of the principal risks and uncertainties facing the company". The purpose of the Business Review was "to inform members of the company and help them assess how the directors have performed their duty under Section 172". The obligations imposed on quoted companies are more onerous in comparison. Their Business Review must "to the extent necessary for an understanding of the development, performance or position of the company's business",

employees' and environmental issues, as well as a recognition of human rights issues and links with corporate governance codes and information disclosure for quoted companies. Nevertheless, the purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under Section 172,<sup>125</sup> and it is suggested that two-way communication, via a system under which information can be transferred between the company and its shareholders and stakeholders in a bidirectional manner, should be established to make the CSR information disclosure system more efficient.<sup>126</sup> Therefore, it is worth reconsidering the purpose of the strategic report by possibly addressing the report to both shareholders and stakeholders.

### 3.2.3 Explicit Promotion of CSR or Primary Stakeholder(s)

There are jurisdictions, such as China and India,<sup>127</sup> which adopt terms such as “CSR” and “business ethics” explicitly as a general corporate objective stipulation.<sup>128</sup> These overlapping terms are introduced in the general provisions of corporate law to clarify that corporate responsibility goes beyond the economic and legal responsibility towards social and philanthropic concerns. This is a positive and progressive step for legislators to realise the importance of ethical and social responsibilities at the primary stage of corporate governance.<sup>129</sup> It is hoped that the adoption of CSR in corporate law will change the voluntary character of CSR and encourage corporations to engage with internal self-governance, rather than relying on external contracts and regulations.

Apart from the generalised terms mentioned in the last paragraph, certain stakeholder group(s) may be explicitly mentioned in corporate law legislation due to their importance. They are normally primary stakeholders,<sup>130</sup> i.e. the parties who have a real, direct and tangible interest in a company.<sup>131</sup> They interact with the company as input providers and are always ultimately affected by the state

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include “the main trends and factors likely to affect the future development, performance and position of the company’s business and information about environmental matter, the company’s employees, social and community issues.”

<sup>125</sup> Section 414C (1) Companies Act 2006.

<sup>126</sup> *Ibid.* at 442.

<sup>127</sup> See Article 5 of Chinese Company Law, Section 134–135 of the Indian Companies Act 2013.

<sup>128</sup> This implies that the controlling bodies of companies, when pursuing the interests of their shareholders, have to be socially responsible, and responsible to internal and external stakeholders.

<sup>129</sup> The abstract provision could act as a guidance principle for future provisions, such as: detailed corporate responsibilities at different levels; enforcement measures for these responsibilities; directors’ duties towards stakeholders in realising these responsibilities, and corporate liability and directors’ liability in breach of these responsibilities.

<sup>130</sup> Typical primary stakeholders are employees or creditors who input human capital and loan capital to companies, while shareholders inject equity capital.

<sup>131</sup> A. Darling, ‘A Political Perspective’ in G. Kelly, D. Kelly & A. Gamble (Eds.) *Stakeholder Capitalism*, Basingstoke: Palgrave (1996) p.17.

of the company; these effects could be either beneficial or adverse. They also count in “strictly business” terms<sup>132</sup>; without them the business simply could not function. For example, directors’ duties towards creditors are widely discussed in corporate law when companies are subject to certain circumstances.<sup>133</sup> Moreover, employees’ participation in corporate decisions enables them to have their voices heard, including via possible co-determination measures such as employee representation on the corporate board, employee representation through works councils, collective bargaining arrangements or employee share ownership. German companies are a typical example; they are regarded as institutions, as communities in themselves – “an organisation in turn embedded in a community” characterised by employee participation in the form of employee representatives on the board of directors and the work council.<sup>134</sup>

Chinese legislators have tried to promote CSR in a fairly explicit manner. China started paying attention to CSR comparatively late, as a result of external and internal pressures.<sup>135</sup> Since China opened its doors to the outside world, a legal system regulating the corporate and financial markets has been established based heavily on Chinese Company Law. From the perspective of

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<sup>132</sup> See J. Dean, *Directing Public Companies: Company Law and the Stakeholder Society*, London: Cavendish Publishing Limited (2001) p.103.

<sup>133</sup> Companies in an insolvent condition, near or in the vicinity of insolvency, doubtfully solvent, or at risk of insolvency or financial instability; the common law discussion in this area is vast. See Section 172 (3) Companies Act 2006; *Re New World Alliance Pty Ltd*, [1994] 51 FCR; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258; *Re MDA Investment Management Ltd* [2004] BPIR 75 at 102; [2003] EWHC 227 (Ch) at [70]. *Nicholson v Permakraft (NZ) Ltd* [1985] 3 ACLC 453; *Re Horsley & Weight Ltd* [1982] 1 Ch 442 at 455; *Geyer v Ingersoll Publications Co* 621 A 2d 784; *Facia Footwear Ltd (in administration) v Hinchliffe* [1998] 1 BCLC 218; *HLC Environmental Projects Ltd*, *Re* [2013] EWHC 2876 (Ch) (Ch D (Companies Ct)); *Moulin Global Eyecare Holdings Ltd v Lee* [2012] HKCFI 989 (CFI (HK)). For academic discussion of the field see A. Keay, ‘Directors’ Duties and Creditors’ Interests’ (2014) 130 *Law Quarterly Review* 443; A. Keay, *Company Directors’ Responsibilities to Creditors*, London: Routledge-Cavendish, (2007); D. Milman, *Governance of Distressed Firms*, Cheltenham: Edward Elgar (2013); J. Zhao & S. Wen, ‘Improving the Disadvantaged Position of Unsecured Creditors through Law and Corporate Social Responsibility’ (2013) *Journal of Business Law* 868.

<sup>134</sup> J. Kay & A. Silberston, ‘Corporate Governance’ (1995) 153 *National Institute Economic Review* 84; see also R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) pp.88–91; the *Aktiengesetz* mandates a two-tier board with a supervisory board (Aufsichtsrat in §100 AktG) and a management board (Vorstand in §76 (3) AktG); see also §1, 7, 27, 31 MitbestG; three co-determination regimes are currently enforced under German Law, including co-determination pursuant to the Montan Co-Determination Act, co-determination pursuant to the DrittelbG 2004, and co-determination under the Co-Determination Act 1976. Historically, there has been voluntary formation of labour councils at the factory level by an amendment to the Business Practice Act in 1890 (*Gewerbeordnung* or GewO); Article 165 of the Weimar Constitution of 1919 guaranteed employees the right to cooperate with employers on an equal basis in the regulation of wages and working conditions; and the Labour Management Relationship Act 1952 (*Betriebsverfassungsgesetz* 1952, or BetrVG 1952) introduced the principle of one third representation of the management board for all other industries. See also G. Cromme, ‘Corporate Governance in German and the German Corporate Governance Code’ (2005) 13 *Corporate Governance: An International Review* 362; M. Goergen, M.C. Manjoi & L. Renneboog, ‘Corporate Governance in Germany’ in K. Keasey, S. Thompson & M. Wright (Eds.) *Corporate Governance: Accountability, Enterprise and International Comparisons*, Chichester: John Wiley & Sons (2005) 285.

<sup>135</sup> See J. Zhao, *Corporate Social Responsibility in Contemporary China*, Cheltenham: Edward Elgar (2014) pp.69–87; L. Zu, *Corporate Social Responsibility, Corporate Restructuring and Firm’s Performance*, Berlin: Springer-Verlag (2009) p.44–50.

corporations, the emphasis on “building a harmonised society”<sup>136</sup> has symbolic importance for advancing CSR in China.<sup>137</sup> Regulating corporate behaviour through politically legitimate measures is arguably an effective way to achieve these goals. Article 5 of Chinese Company Law 2006 states that “a company must, when engaging in business activities, abide by the laws and administrative regulations, observe social morals and business ethics, be in integrity and good faith, accept regulation of the government and the public, and undertake social responsibilities”. Companies are required to abide by the law and regulations when they aim to make profits by taking advantage of limited liability. It is also to the benefit of modernised corporations as a new type of corporation, designed to engage in ‘for profit’ undertakings but which also wish to be accountable for social and environmental concerns.<sup>138</sup> The explicit use of the term CSR gives boards legitimacy in considering stakeholders’ interests. However, the legal effects and interpretation of the Article are unclear: is it legally binding or simply advisory? Should it be regarded as an exhortatory rather than a mandatory provision, or is it part of the company’s fiduciary duties?<sup>139</sup> Despite the fact that suggestions on how to enforce this Article have been made by both academic and government documents, attempts have focused on possible collaboration with international standards, the legal transplant of other CSR legislative approaches, and interference by administrative and government power,<sup>140</sup> all of which have limitations and have failed to deal with social problems such as human right abuses.<sup>141</sup> While China’s human rights activists may “face imprisonment, detention, torture, commitment to psychiatric facilities, house arrest, and intimidation”,<sup>142</sup> it is important for

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<sup>136</sup> Since the Sixth Plenary Session of the Sixteenth Central Committee of the Chinese Communist Party in 2006, the policy has been adopted as the long-term goal of Chinese socialism; see G. Long, S. Zadek & J. Wickerham, ‘Advancing Sustainable Competitiveness of China’s Transnational Corporations’, *AccountAbility*, London (2009) p.35.

<sup>137</sup> L.W. Lin, ‘Corporate Social Responsibility in China: Window Dressing or Structural Change’ (2010) *Berkeley Journal of International Law* 64 at 88.

<sup>138</sup> J. Blount & K. Offei-Danso, ‘The Benefit Corporation: A Questionable Solution to a Non-Existent Problem’ (2013) 44 *St. Mary’s Law Journal* 617.

<sup>139</sup> L.W. Lin, ‘Corporate Social Responsibility in China: Window Dressing or Structural Change’ (2010) *Berkeley Journal of International Law* 64 at 96.

<sup>140</sup> The State-owned Assets Supervision and Administration Commission of the State Council (SASAC) issued the “Guidelines to the State-Owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities”; the Chinese Academy of International Trade and Economic Cooperation, a subsidiary of the Ministry of Commerce, issued “Guidelines on Corporate Social Responsibility Compliance by Foreign Invested Enterprises”; the Shanghai Stock Exchange issued “Notice on Strengthening Listed Companies’ Assumption of Social Responsibility and Guidelines on Shanghai Stock Exchange Listed Companies’ Environmental Information Disclosure”; see also J. Zhao, *Corporate Social Responsibility in Contemporary China*, Cheltenham: Edward Elgar (2014) pp.136–141; J. Sarkis, N. Li & Q. Zhu, ‘Winds of Change: Corporate Social Responsibility in China’ (2011 January–February) *Ivey Business Journal* 1.

<sup>141</sup> Human rights issues have been largely ignored by corporations in their corporate report based on empirical research by Li and Cui in Z. Li, X.N. Cui, *Corporate Social Responsibility in China*, Beijing: China Economic Publishing House (2011). It may be a useful opportunity for the UN to introduce human rights law and jurisprudence developed by the UN treaty bodies to the Chinese legal and constitutional system. See S.P. Subedi, ‘China’s Approach to Human Rights and the UN Human Rights Agenda’ (2015) 14 *Chinese Journal of International Law* 437.

<sup>142</sup> Human Rights Watch, World Report 2014: Chinese Events of 2013; for example, Zhao Lianhai, a Chinese activist who campaigned for better compensation for victims of the Sanlu baby milk scandal, was jailed for two-and-a-half years on charge of “causing a serious disturbance” under Section 293, Chinese Criminal Law 1997.

legislators and corporate directors to reconsider the nature, scope and priorities of CSR and the effectiveness of Article 5 of Chinese Company Law. Treating human right issues more seriously also fits into the business case for CSR, since Western countries may harbour concerns about Chinese investment due to the country's poor human rights record.<sup>143</sup>

#### 4. Legislative Components for A Realistic Approach

Finding the most appropriate regulatory framework, which is efficient, enforceable, and fits with a country's unique legislative environment, seems much more sensible than arguing about whether the nature of CSR is truly voluntary. As part of the domestic legal and financial framework a corporate law system has significant sources of path dependence,<sup>144</sup> which include historical accidents as well as economic and political particulars of the domestic system.<sup>145</sup> The persistence of these sources significantly contributes to the stability of the domestic corporate governance system in any local socio-economic environment. It is recognised that a "one size fits all" approach will not work because of the existence of path dependence.<sup>146</sup> Path dependence assumes that there is no ideal solution, but equilibrium can be achieved within a jurisdiction between the role of law and that of other social institutions, so as to assist government to draft a piece of CSR legislation with unique characteristics.<sup>147,148</sup> Changes in individual legal rules and related reforms, typically in

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<sup>143</sup> For example see O. Lui, 'Mining Companies Explain their Operations Abroad – and So Do Their Problems', *CSR Asia*, 7<sup>th</sup> October 2008. However, it is argued that the settlement of human rights related issues still has a long way to go in China: see H. Zhang & C. Qian, 'Merging Business and Human Rights in China: Still A Long Way to Go' (2014) 76 *Focus*, available via <http://www.hurights.or.jp/archives/focus/section3/2014/06/merging-business-and-human-rights-in-china-still-a-long-way-to-go.html> (accessed 22<sup>nd</sup> February 2016); see also R.J. Hanlon, *Corporate Social Responsibility and Human Rights in Asia*, Abingdon: Routledge (2014) pp.91–116.

<sup>144</sup> According to path dependence theory, an outcome or decision is shaped in specific and systematic ways by the historical path leading to it, as well as by other factors within the socio-economic context; see O.A. Hathaway, 'The Course and Pattern of Legal Change in a Common Law System' (2001) *Iowa Law Review* 1, 103–104.

<sup>145</sup> L. Bebchuk & M.J. Roe, 'A Theory of Path Dependence in Corporate Governance and Ownership' (2000) 52 *Stanford Law Review* 127.

<sup>146</sup> See A. Anderson and P.P. Gupta, 'Corporate Governance: Does One Size Fit All' (2013) 24 *Journal of Corporate Accounting & Finance* 51; R. Gilson, 'Controlling Shareholders and Corporate Governance: Complicating Corporate Taxonomy', (2006) *Harvard Law Review* 1641; M.J. Roe, 'Explaining Western Securities Markets' in M.J. Roe (Ed.), *Corporate Governance: Political and Legal Perspectives* Colchester, Edward Elgar (2005) at 279. See also J. Buchanan, D.H. Chai & S. Deakin, 'Empirical Analysis of Legal Institutions and Institutional Change: Multiple-Methods Approaches and their Application to Corporate Governance Research', Centre for Business Research, University of Cambridge Working Paper No. 445; R.H. Schmidt & G. Spindler, 'Path Dependence and Complementarity in Corporate Governance', in N. Gordon & M.J. Roe (Eds.), *Convergence and Persistence in Corporate Governance*, Cambridge: Cambridge University Press (2004) 114; M. Aoki, *Corporation in Evolving Diversity: Cognition, Governance and Institutions*, New York: Oxford University Press (2012).

<sup>147</sup> Of course, taking into account a nation's corporate law, enforcement processes, shareholder structure, civil procedures, stage of economic development, and other aspects including the culture, history and traditions that are embedded within a particular jurisdiction.

<sup>148</sup> J. Bell, 'Path Dependence and Legal Development' (2013) 87 *Tulane Law Review* 787 at 787.

ways which are consistent with the prevailing legal tradition and other factors,<sup>149</sup> will be applicable for reforms to corporate law in order to promote CSR. While individual companies are faced with complex unique situations, and there is no single perfect system to which all legal system should try to converge, the author believes that there are a number of coherent sets of principles and rules that can deal with the same social problems. These suggestions may act as reasons for reform or as guidance for minor adjustments for government to restructure or revolutionise their CSR law as appropriate.<sup>150</sup>

#### 4.1 Corporate Law Supported and Enriched by Soft Laws

CSR legislation is normally embedded in national law through decision making, disclosure, profit distribution and direct promotion. These may be classic command-and-control state regulation standards, along with penalties for breaches of duties aimed at correcting market failure. These are punitive mechanisms designed to secure compliance. However, compliance with regulation is not always effective and guaranteed because of business evasion, inadequate sanctions and limited enforcement resources, or political interference.<sup>151</sup> The advantages of hard legalisation are that it is precise and enforceable, and it gives authority for interpreting and implementing the law.<sup>152</sup> However, these advantages have not been effectively reflected in CSR laws because enforcement is one of the key problems of the current legislative approaches adopted in various jurisdictions. The realm of soft law is invoked once hard law arrangements have been weakened along the dimensions of obligation, precision and delegation.<sup>153</sup> Within the corporate law domain, soft laws aim to change corporate behaviours by encouraging “voluntary” certification or other schemes that may influence government rewards or penalties of various sorts.<sup>154</sup>

Due to the ineffectiveness of both hard and soft laws, it may be worth considering integrating an efficient CSR legislative system with different policy approaches, taking advantage of regulatory power from corporate law and flexibility in soft laws and allowing a role for individual autonomy

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<sup>149</sup> R. La Porta, F. Lopez-de-Silanes & A. Sheifer, ‘The Economic Consequences of Legal Origins’ (2008) 46 *Journal of Economic Literature* 285; see also J. Bendall, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, Technology, Business and Society Programme Paper No.1 3. (Geneva: UN Research Institute for Social Development, 2004).

<sup>150</sup> See M. Roe, ‘Commentary, Chaos and Evolution in Law and Economics’ (1996) 109 *Harvard Law Review* 641.

<sup>151</sup> M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis*, Ontario: LexisNexis (2009) p.101; see also I. Filatotchev & C. Nakajima, ‘Corporate Governance, Responsible Managerial Behaviour, and CSR: Organizational Efficiency versus Organizational Legitimacy’ (2014) 28 *Academy of Management Perspectives* 289; S. Benn, D. Dunphy & A. Griffiths, *Organizational Change for Corporate Sustainability*, 3<sup>rd</sup> edn., Abington: Routledge (2014).

<sup>152</sup> K.W. Abbott & D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421 at 421.

<sup>153</sup> *Ibid.* at 422.

<sup>154</sup> KPMG’s Global Sustainability Services & United Nation Environment Programme, *Carrots and Sticks for Starters: Current Trends and Approaches in Voluntary and Mandatory Stands for Sustainability Reporting* (South Africa: UNEP 2006) p.9.

and circumstances in shaping an appropriate compliance response.<sup>155</sup> While corporate law could impose duties on boards of directors or give them legitimacy to be able to engage with CSR-related activities, principles of “comply or explain”<sup>156</sup> could be effectively adopted through soft law to meet the unique needs of each jurisdiction.<sup>157</sup> In other words, corporate law has an important function in fostering active participation in CSR-oriented corporate decisions and actions. This regulatory approach could be employed to establish a clearer, more predictable and more consistent standard of conduct that may potentially reduce transaction costs for businesses.<sup>158</sup> Soft laws in place for dealing with corporate governance-related issues have been useful in a number of situations, especially for issues concerning corporate accountability, corporate transparency and CSR.<sup>159</sup> Pillay argued that soft law has many advantages, including “timely action when governments are stalemated, bottom-up initiatives that bring additional legitimacy, expertise and other resources for making and enforcing new norms and standards and an effective means for direct civil society participation in global governance”.<sup>160</sup> However, soft law, in the form of quasi- or non-legal instruments, has been criticised for lack of or weaker binding force comparing to hard law, and an inability to mandate uniform minimum standards.<sup>161</sup> In terms of CSR soft law, its

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<sup>155</sup> A ‘comply or explain’ approach reduces reporting costs for companies by not requiring companies to report on matters which are not relevant in practice; see European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, 18.

<sup>156</sup> This concept of ‘comply or explain’ originated in the UK with the Cadbury Report in 1992, which provided the first serious code, and states that a company should comply with a set code of practice, but if it does not then it must state this in the annual directors’ report and explain why; see A. Keay, ‘Comply or Explain in Corporate Governance Code: In Need of Greater Regulatory Oversight’ (2014) 34 *Legal Studies* 279; I. MacNeil & X. Li, “‘Comply or Explain’: Market Discipline and Non-Compliance with the Combined Code’ (2006) 14 *Corporate Governance: An International Review* 486; C. Andres & E. Theissen, ‘Setting a Fox to Keep the Geese – Does the Comply-or-Explain Principle Work?’ (2008) 14 *Journal of Corporate Finance* 289; S. Arcota, V. Brunob & A. Faure-Grimaud, ‘Corporate Governance in the UK: Is the Comply or Explain Approach Working?’ (2010) 30 *International Review of Law and Economics* 193; D. Seidl, P. Sanderson & J. Roberts, ‘Applying the ‘Comply-or-Explain’ Principle: Discursive Legitimacy Tactics with Regard to Code of Corporate Governance’ (2012) 17 *Journal of Management and Governance* 791.

<sup>157</sup> For example, it is suggested by Horrigan that new rules are needed, with governments, companies and the community all playing a part and proposing a framework of international agreement focusing on CSR; see Horrigan, *Corporate Social Responsibility in the 21<sup>st</sup> Century: Debates, Models and Practices Across Government, Law and Business*, Cheltenham: Edward Elgar (2010) pp.269–270.

<sup>158</sup> M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis* Ontario: LexisNexis (2009) p.100; see also B.E. Olsen & K.E. Sorensen, ‘Strengthening the Enforcement of CSR Guidelines: Finding a New Balance between Hard Law and Soft Law’ (2014) 41 *Legal Issues of Economic Integration* 9.

<sup>159</sup> For example, corporate governance codes to which listed companies should adhere could be one of the legal documents that help to promote CSR. They are useful in the context of voluntary principles that acquire recognition by companies, international financial institutions and civil societies as the result of an industry drive towards self-regulation, globally re-enforcing norms that have received multi-lateral and international acceptance; see B. Nwete, ‘Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?’ (2007) 8 *German Law Journal* 311 at 327. As another example, stock exchanges require social and environmental disclosure as part of their listing requirements: Australia’s ASX, Brazil’s Bovespa, India’s Securities and Exchange Board, and the London Stock Exchange; see Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts by National Government and Stock Exchange* (March 12, 2015)

<sup>160</sup> R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSE and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) p.136.

<sup>161</sup> P. Ireland & R.G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in P. Utting & J.C. Marques (Eds.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan

effectiveness is seriously challenged by the “ruthlessly shareholder-oriented, Anglo-American model of the corporations which is antithetical to [which] meaningful CSR is being entrenched around the world by legal and other means”.<sup>162</sup> From a practical perspective, soft law could leave companies with leeway for them to edit their CSR report to exaggerate their degree of compliance in order to demonstrate their adherence to the principles.<sup>163</sup> This is unsurprising in the context of the financial crisis of 2008; self-regulation through soft law and voluntary codes such as corporate governance codes, which are already prevalent in the area, has not stopped companies from performing badly and even collapsing, and companies have failed to act responsibly towards various corporate constituencies.<sup>164</sup>

A third approach consisting of a combinative CSR regulatory framework, dominated by corporate law and supported by soft law, will help corporations to achieve aims in line with their stated business goals, legal requirements and social expectations, and ultimately to maintain their accountability.<sup>165</sup> The role played by soft law is seen as a supporting role to enrich and strengthen the traditional legal instruments in the context of today’s globalised economies, dynamic and the complicated nature of CSR and constant but variable social needs.<sup>166</sup> The complementary roles played by soft and hard law will help corporations in understanding and implementing legal norms for CSR gradually and smoothly through corporate strategy and internal management policies. A positive characteristic of soft law is that it is blurred around the edges and thus facilitates the evolution of accepted market norms rather than imposing rigid standards, which is particularly suitable for CSR legislations where values and corporate culture are at the root of the issue.<sup>167</sup>

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(2010) 77 at 91; R.V. Aguilera, I. Filatotchev, H. Gospel & G. Jackson, ‘An Organizational Approach to Comparative Corporate Governance: Costs, Contingencies, and Complementarities’ (2008) 19 *Organization Science* 475 at 488; see also I. Esser, ‘Corporate Social Responsibility: A Company Law Perspective’ (2011) 232 *South African Mercantile Law Journal* 317.

<sup>162</sup> P. Ireland & R.G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in P. Utting & J.C. Marques (Eds.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan 77 at 91; see also D. Ronnegard & N.G. Smith, ‘Shareholder Primacy as an Impediment to Corporate Social Responsibility’ in M.C. Coutinho de Arruda & B. Rok, *Understanding Ethics and Responsibilities in a Globalizing World*, Heidelberg: Springer (2016) 43; B. Sjäffell, A. Johnston, L. Anker-Sørensen & D. Millon, ‘Shareholder Primacy: the Main Barrier to Sustainable Companies’ in B. Sjäffell & B. Richardson (Eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, Cambridge: Cambridge University Press (2015) 79; R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSE and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) pp.32–67.

<sup>163</sup> K. Sahlin-Anderson, ‘Corporate Social Responsibility: A Trend and A Movement, but of What and for What’ (2006) 6 *Corporate Governance: The International Journal of Business in Society* 595 at 597.

<sup>164</sup> E. Emeseh, R. Ako, P. Okonmah, L. Ogechuku, ‘Corporations, CSR and Self Regulation: What Lessons from Global Financial Crisis?’ (2010) 2 *German Law Journal* 230 at 243.

<sup>165</sup> M. Kerr, R. Janda & C Pitts, *Corporate Social Responsibility: A Legal Analysis*, Ontario: LexisNexis (2009) p.29.

<sup>166</sup> J.B. Skjaereth, O.S. Stokke & J. Wettestad, ‘Soft Law, Hard Law, and Effective Implementation of International Environmental Norms’ (2006) 6 *Global Environmental Politics* 104.

<sup>167</sup> E.K.B. Tan, ‘Corporate Social Responsibility as Corporate Soft Law: Mainstreaming Ethical and Responsible Conduct in Corporate Governance’ (2013) 31 *Singapore Law Review* 227 at 250.

Following this logic, soft law may influence the development of hard law.<sup>168</sup> The inherent flexibility from soft law governance will facilitate companies in being able to buy in to the ‘spirit’ of the code as well as the letter.<sup>169</sup>

## 4.2 Percentage Requirement on Corporate Profits for the Purposes of CSR

The idea of a mandatory contribution based on a certain percentage requirement of net profit was first proposed by Sithanen,<sup>170</sup> the Minister of Finance of Mauritius at the time, who suggested that all new legislation should require “all profitable firms to either spend 2 percent of their profit on CSR activities approved by Government or to transfer these funds to Government to be used in the fight against poverty”.<sup>171</sup> The Mauritian Government amended this; instead of company law, they used the Income Tax Act 1995 by virtue of the Finance Act 2015 to make CSR mandatory. Mauritian companies must “set up a CSR Fund equivalent to 2 per cent of its chargeable income of the preceding year to implement a CSR Programme in accordance with its own CSR framework”.<sup>172</sup> Directly transplanted from the Mauritian legislation, this 2 percent requirement was also introduced in the Indian Companies Act 2013.<sup>173</sup> The legislative recognition of CSR in Mauritius and India is more advanced than in most Western countries<sup>174</sup> because of this codification of CSR spending for targeted companies. CSR law in both jurisdictions recognises the potential for using corporate strength to fulfil the social objectives of the state. In the case of

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<sup>168</sup> J.J. Kirton & M.J. Trebilcock, “Introduction: Hard Choices and Soft Law in Sustainable Global Governance” in Kirton and Trebilcock (eds) *Hard Choices, Soft Law* (Aldershot, Ashgate, 2004) 3 at 12.

<sup>169</sup> S. Arcot & V. Bruno, ‘In Letter but Not in Spirit, An Analysis of Corporate Governance in the UK’ LSE RICAPE2 Working Paper No.31 [www.lse.ac.uk/fmg/research/RICAPE/pdf/RICAPE2-WP31-Arcot.pdf](http://www.lse.ac.uk/fmg/research/RICAPE/pdf/RICAPE2-WP31-Arcot.pdf)

<sup>170</sup> The Minister of Finance of Mauritius at the time.

<sup>171</sup> R. Sithanen ‘Riding out the Global Crisis: Saving Jobs, Protecting People, Preparing for Recovery’ (2009) 4 para 16, cited by R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) 227; see also N. J.F. Ragadoo, ‘CSR as a Tool to Fight against Poverty: the Case of Mauritius’ (2009) 5 *Social Responsibility Journal* 19.,

<sup>172</sup> Section 50 L (1) Income Tax Act 1995; “CSR programme”, according to 2 (iv) means “a programme having as its objects the alleviation of poverty, the relief of sickness or disability, the advancement of education of vulnerable persons or the promotion of any other public object beneficial to the Mauritian community”.

<sup>173</sup> Section 135 Indian Companies Act 2013; The government shifted responsibility to corporate sectors, and it is estimated that the law will cover about 3,000 companies in India and about \$2 billion per annum of expenditure on CSR activities related to social welfare initiatives. See Ernst and Young, ‘Understanding the Company Bill 2012’ (2013) available via [http://www.ey.com/publication/vwLUAssets/ey\\_understanding\\_companies\\_bill\\_2012/\\$file/ey-understanding-companies-bill-2012.pdf](http://www.ey.com/publication/vwLUAssets/ey_understanding_companies_bill_2012/$file/ey-understanding-companies-bill-2012.pdf); Ernst and Young, *Corporate Social Responsibility in India: Potential to Contribute towards Inclusive Social Development: Global CSR Summit 2013, An Agenda for Inclusive Growth* (2013) available via [http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Corporate-Social-Responsibility-in-India/\\$File/EY-Corporate-Social-Responsibility-in-India.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Corporate-Social-Responsibility-in-India/$File/EY-Corporate-Social-Responsibility-in-India.pdf) (assessed 20 February 2016).

<sup>174</sup> It is argued that since time immemorial CSR has had its origins in *Dural, The Great Book of Tiru Valluvar's Verses*; see C. Raja Gopalachari, *Kural, The Great Book of Tiru Valluvar*, Hindu Books Universe (2003), available at: [www.hindubooks.org/dynamic/modules.php?name¼Content&pa¼showpage&pid¼44](http://www.hindubooks.org/dynamic/modules.php?name¼Content&pa¼showpage&pid¼44) (assessed 20 January 2016).

Mauritius, it is argued that the purpose of embracing CSR in its philanthropic form by making it mandatory is to encourage business to take a more active role in development.<sup>175</sup> In Indian law, Jain thinks that CSR law is a novel solution to social problems and economic justice in India, introducing a system in which each industry should contribute in a manner commensurate with its expertise.<sup>176</sup>

Not surprisingly, many people cast doubt on these new CSR laws that try to integrate the objectives of the enterprise with the socioeconomic objectives of the state. The possibilities and difficulties of creating a well-organised, professionally capable and independent team are questioned.<sup>177</sup> A ‘comply or explain’ approach<sup>178</sup> is adopted in Indian law. When the principle was adopted in the Companies Act as a legislation to regulate private and public companies, the author believes it was a mismatch. It makes people question the validity and justification of introducing CSR-related provisions in the Companies Act. Moreover, there are obvious problems in the enforcement of CSR law.<sup>179</sup>

A quantitative requirement is a mandatory regulation that requires corporations to sacrifice a certain percentage of their corporate profit for the purposes of CSR. The obvious advantage of a quantitative requirement is guaranteed compliance with substantial and measurable contributions from corporations in using a slice of their profit for CSR-related actions. It unifies and codifies a common minimum for companies to initiate CSR activities and maintain them at an adequate level. One arguable advantage of a percentage requirement within corporate law is that it may lead to a significant increase in the number of CSR activities.<sup>180</sup> It is a direct way in which companies can have a positive and continuous impact on communities, culture, societies and the environment. The percentage requirement enables engagement between government and the private sector to collectively address moral, social and economic problems, and “spawns enormous grassroots

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<sup>175</sup> R. Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – the Case of Mauritius*, Abingdon: Routledge (2015) 228.

<sup>176</sup> A. Jain, ‘The Mandatory CSR in India: A Boon or Bane’ (2014) 4 *Indian Journal of Applied Research* 301.

<sup>177</sup> C.A. Sanjay & K. Sharma, ‘A 360 Degree Analysis of Corporate Social Responsibility (CSR) Mandate of the New Companies Act 2013’ (2013) 3 *Global Journal of Management and Business Studies* 757 at 761.

<sup>178</sup> That is to say that if the company fails to spend the required minimum of 2 percent of its average net profit over the previous three financial years on its CSR initiatives, the board must provide reasons for not spending this amount in its Board Report, based on Section 135 (5) of the Indian Companies Act 2013. The ‘comply or explain’ principle was first introduced in the Cadbury Report to accommodate the need for flexibility and experimentation in corporate governance, and it has had a profound impact on corporate governance worldwide; see I.M. Millstein, ‘Sir Adrian Cadbury’ in FRC, *Comply or Explain: 20<sup>th</sup> Anniversary of the UK Corporate Governance Code, London Stock Exchange* (2012).

<sup>179</sup> For example, the 2 percent requirement will result in a reluctance to comply for loss-making companies, and it is not clear whether the list of CSR activities provided in schedule VII is an inclusive or exhaustive list.

<sup>180</sup> Comments of Venkateshwaran, partner and head of accounting advisory services at KMPG India, *India Now Only Country with Legislated CSR* (Business Standard, April 3<sup>rd</sup>, 2014) available via [http://www.business-standard.com/article/companies/india-now-only-country-with-legislated-csr-114040300862\\_1.html](http://www.business-standard.com/article/companies/india-now-only-country-with-legislated-csr-114040300862_1.html).

entrepreneurial activity funded by the mandatory CSR provisions' injection of resources",<sup>181</sup> bringing corporate law into line with stakeholders' expectations.

Difficulties in enforcing quantitative requirements result from the wide range of corporate actions that can be described as CSR, and the different priorities that companies will give to them. Therefore, it is uncertain how much each stakeholder group will be entitled to expect in terms of a prescribed minimum percentage of the profit to maintain an appropriate fair share. Following this logic, the directors still have discretion within the percentage constraint. It is important that broad language should be used for this piece of legislation in order to generate incentives for creative compliance.<sup>182</sup> Furthermore, the absence of an independent agent to assess companies that have failed to undertake expenditures and penalise those who are accountable for the failure or for unsatisfactory explanations for non-expenditure is worrying, and makes the enforcement of the provision far from systematic.<sup>183</sup>

The quantitative requirement is a direct and effective legislative approach to enable a unified mandatory attitude, requiring all "capable" companies to contribute towards social development activities. By allowing corporations to invest in their own strategic CSR plans, based on their unique stakeholder groups and without increasing tax, the governments that adopt a quantitative percentage CSR law transfer some of their tasks to corporations to enhance efficiency in the economy, while companies are arguably in a better position to provide social goods in terms of their technical, local and information capability. This could be regarded as a novel solution to social problems in order to achieve social and economic justice and work towards a more harmonious society. Because detailed strategies for profit contribution are decided by boards of directors or an independent CSR board, each industry would therefore contribute in a manner commensurate with its expertise, which would make their contributions more effective and efficient in protecting various stakeholders' interests. CSR law is likely to transfer profit towards social causes and environmental management, which has been proved to be a vital catalyst.<sup>184</sup> The stipulated percentage for a CSR contribution within corporate law will lead to more structure and a systematic approach to social initiatives. This law also provides a predictable example and guidance for companies that are becoming increasingly profitable and who may become liable for mandatory CSR contributions in the future. A mandatory requirement in terms of percentage of profit will

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<sup>181</sup> S. Gopalan & A. 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* 34 at 44.

<sup>182</sup> *Ibid.*, at 103.

<sup>183</sup> A.B. Majumdar, 'Indian's journey with Corporate Social Responsibility – What Next' (2015) 33 *Journal of Law and Commerce* 165 at 196.

<sup>184</sup> S. Singh, 'Compulsory CSR in India; Understanding Clause 135' (2014) 5 *International Research Journal of Management Sociology & Humanity* 206 at 210.

also enhance professional awareness and understanding of the nature and scope of CSR among lawyers, accountants or auditors who help companies or give them advice on CSR-related issues.

### 4.3 Giving Legitimacy to Directors and Integrated Decision Making

Another legislative approach aimed at promoting CSR gives legitimacy<sup>185</sup> to directors to consider and include the interests of non-shareholder constituencies when they discharge their directors' duties. If directors are given this option, a generalised assumption could be made by shareholders that sustainable actions are at least recognised, based on the current system of norms and values to do with being a good corporate citizen. Although this approach is not as strong and is not directly enforceable,<sup>186</sup> it does encourage directors to use their discretion in a more sustainable manner by having regard to other stakeholders' interests in order to enhance the long-term interests of their companies, within business judgement rules<sup>187</sup> and the subjective nature of directors' fiduciary duties.<sup>188</sup> This legislative approach also integrates social and environmental concerns in the decision making of the company, in such a way as to lead to an internalisation of externalities.<sup>189</sup> Directors' enlarged duties in relation to economic goals are consistent with the logic of a business case for CSR. This legislative approach confirms the powers possessed by stakeholders, including the legitimacy of stakeholder relationships, the power to influence

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<sup>185</sup> Legitimacy is defined as "a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions"; see M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571 at 574; see also T. Kostova & S. Zaheer, 'Organizational Legitimacy Under Conditions of Complexity: The Case of the Multinational Enterprise' (1999) 24 *Academy of Management Review* 64; see also M. Joutsenvirta & E. Vaara, 'Legitimacy Struggles and Political Corporate Social Responsibility in an International Setting: A Comparative Discursive Analysis of a Contested Investment in Latin America' (2015) 40 *Organization Studies* 1; A. Acquier & F. Aggeri, 'The Development of a CSR Industry: Legitimacy and Feasibility as the Two Pillars of the Institutionalization Process' in F. Den Hond, F. De Bakker & P. Neergard, *Managing Corporate Social Responsibility in Action: Talking, Doing and Measuring*, Ashgate (2007); J.D. Rendtorff, *Responsibility, Ethics and Legitimacy of Corporations*, Copenhagen: Copenhagen Business School Press (2009); M.L. Pava & J. Kransz, 'Criteria for Evaluating the Legitimacy of Corporate Social Responsibility' (1997) 16 *Journal of Business Ethics* 337; for discussion on developing countries see R. Barkermeyer, 'Legitimacy as a Key Driver and Determinant of CSR in Developing Countries', Research Paper from the University of St Andrews and Sustainable Development Research Centre (SDRC) School of Management (2007).

<sup>186</sup> The approach does not lead to compulsory CSR-related corporate actions and decisions.

<sup>187</sup> See *Gimbel v. Signal Cos.* 316 A.2d 599, 608 (Del. Ch. 1974); *In re The Walt Disney Co. Derivative Litigation* 906 A.2d 27 (Del. June 8, 2006); *Aronson v. Lewis* 473 A.2d 805, 812 (Del. 1984); *Sinclair Oil Corp. v. Levien* 280 A.2d 717, 720 (Del. 1971); see also K. B. Davis, 'Once More, The Business Judgment Rule' (2000) *Wisconsin Law Review* 573; L. Johnson, 'The Modest Business Judgement Rule' (1999–2000) 44 *Business Lawyer* 625.

<sup>188</sup> For example see Section 172 of Companies Act 2006; see also *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch); *Smith & Fawcett Ltd, Re* [1942] Ch.304.

<sup>189</sup> B. Sjäfjell, 'Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers' (2008) 40 *George Washington International Law Review* 977; A. Johnston, 'Governing Externalities: The Potential of Reflexive Corporate Social Responsibility', Centre for Business Research, University of Cambridge, Working Paper No. 436, 3, <http://ssrn.com/abstract=2165616>.

companies, and the urgency of stakeholders' claims on the firm.<sup>190</sup> Apart from attempts in statutes,<sup>191</sup> a recent US Supreme Court decision in *Burwell v Hobby Lobby*<sup>192</sup> stated that “modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so ... and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives”.<sup>193</sup> The Supreme Court of Canada interpreted integrated decision making progressively by stating that “in determining whether they are acting with a view to the best interests of the corporation it may be legitimate ... for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment”,<sup>194</sup> and “it is clear that the phrase ‘best interests of the corporation’ should not be read as implying the ‘best interests of shareholders’”.<sup>195</sup> The courts have started to accept the fact that directors may benefit non-shareholders' interests when making decisions. The legitimacies given to directors in this broader delimitation of their duties provide an added sense of security against the threat of litigation.

It may also be valuable to attend to the reasonableness of considering effectiveness and fairness by including a Chief Sustainability Officer, and forming a CSR committee within the board of directors but with some level of membership that is independent from the corporation, probably gatekeepers or CSR consultants. This committee will normally have two tasks, including helping the board of directors to make the most strategic CSR-related decisions for the long-term interests of the corporation, as well as producing CSR and sustainability reports for better shareholder and stakeholder communication and achieving transparency through information disclosure – this will be discussed in the next section. The CSR committee will remind the board that CSR policies,

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<sup>190</sup> R.K. Mitchell, B.R. Agle & D.J. Wood, ‘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 at 854–858; for more discussions on guidance related to enforcing directors' duties to make integrated decisions by giving directors legitimacy to have regard to stakeholders' interests, see Section 6.

<sup>191</sup> This legislative approach may be traced not only to the ESVP in the UK Companies Act 2006 as discussed in the last section, but also to Article 1174 of the Italian Civil Code which provides that performance can also correspond to non-monetary interests of the creditors, and Article 1141 of the Code whereby an agreement in favour of a third party may be considered admissible if it is relevant to the interests of the stipulans (the contracting party).

<sup>192</sup> 134 S. Ct. 2751 (2014).

<sup>193</sup> *Ibid.*, at 2771.

<sup>194</sup> *People's Department Store Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64, 2004 SCC 68, 2004 3 S.C.R. 461 (S.C.C.) at paras 42 (S.C.C.); see also *BCE Inc v 1976 Debentureholders* 2008 SCC 69 (CanLII), [2008] 3 S.C.R. 560. For discussion of the case and integrated decision-making, see C. Francis, ‘People's Department Stores Inc. v Wise: The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duties of Care’ (2005) 41 *Canada Business Law Journal* 175; S. Rousseau, ‘Director's Duties of Care after People's: Would it Be Wise to Start Worrying About Liability?’ (2005) 41 *Canada Business Law Journal* 236; W.D. Gray, ‘A Solicitor's Perspective on *People's v. Wise*’ (2005) 41 *Canada Business Law Journal* 184; I.B. Lee, ‘People's Department Stores v. Wise and the ‘Best Interests of the Corporation’ (2005) 41 *Canada Business Law Journal* 212; E. Waitzer & J. Jaswal, ‘People's, BCE, and the Good Corporate ‘Citizen’ (2009) 47 *Osgoode Hall Law Journal* 439; J.G. MacIntosh, ‘BCE and the People's Corporate Law: Learning to Live on Quicksand’ (2009) 48 *Canada Business Law Journal* 255.

<sup>195</sup> *People's Department Store Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64, 2004 SCC 68, 2004 3 S.C.R. 461 (S.C.C.) at paras 42–43 (S.C.C.).

decisions and programmes can be significant strategic assets. The legal requirement of the committee is enforceable and measurable. The committee will support the board to oversee CSR measures for more accountable decisions.<sup>196</sup>

#### 4.4 **Mandatory Information Disclosure**

It is almost impossible to maximise companies' value and financial performance if they are not socially responsible and do not share their CSR information with the public.<sup>197</sup> CSR-related information disclosure reports will address public and legislative concerns and project an image of companies' social awareness.<sup>198</sup> Minimum requirements for listed companies within corporate law will be helpful to promote transparency through corporate information disclosure on social, environmental and human rights issues, in order to mitigate negative impacts such as corporate scandals and to promote and establish a centrally-planned harmonious society. Legal requirements will also be of value to society more generally, either to better gauge the development of policy or to supplement the enforcement of policy by regulatory organisations.<sup>199</sup> These rules will help to produce narrative disclosures of a higher quality, which will lead to an increase in the amount of disclosure and reduce variability by an absolute amount attributable to the size of the company. However, it is indicated in empirical research that CSR reports are not always reliable or relevant, and the "ugliest" companies tend to use the most make-up.<sup>200</sup> CSR-related information should be verified through auditing by independent third parties in non-financial reporting, adhering to legal and regulatory requirements with sanctions in cases of non-compliance in order to create new and/or sustainable growth, as suggested by the EU.<sup>201</sup>

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<sup>196</sup> It was found in a 2010 report by Calvert Asset Management and the Corporate Library that 65 percent of S&P 100 companies have board committees at varying levels for the oversight of corporate social and environmental responsibility concerns; see Calvert Asset Management and the Corporate Library, 'Board Oversight of Environmental and Social Issues: An Analysis of Current North American Practice' (2010) pp.14–16. This implies that having a CSR committee is possible, necessary and fits with practice, and could be beneficial if it was made mandatory.

<sup>197</sup> M.L. Pava, & J. Krausz, 'The Association between Corporate Social Responsibility and Financial Performance: The Paradox of Social Cost' (1996) 15 *Journal of Business Ethics* 321.

<sup>198</sup> D.M. Patten, 'Intra-industry Environmental Disclosures in Response to the Alaskan Oil Spill: A Note on Legitimacy Theory' (1992) 17 *Accounting, Organization and Society* 471.

<sup>199</sup> M.J. Rhodes, 'Information Asymmetry and Socially Responsible Investment' (2010) 95 *Journal of Business Ethics* 145 at 148.

<sup>200</sup> See S. Berthelot, D. Cormier & M. Magnan, 'Environmental Disclosure Research: Review and Synthesis' (2003) 22 *Journal of Accounting Literature* 1; W.S. Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43 *Journal of Business Ethics* 253; D. Graham & N. Woods, 'Making Corporate Self-Regulation Effective in Developing Countries' (2006) 34 *World Development* 868.

<sup>201</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014. From a regulatory perspective, it is positive that the EU has embraced indirect encouragement in the form of a non-financial reporting requirement applicable to large-scale undertakings in 2014. It had initially shied away from mandatory regulation in relation to CSR.

Future trends for information disclosure could rely on national or international frameworks<sup>202</sup> for more detailed requirements about the nature and scope of information disclosure on CSR-related issues. Such legal requirements will unify and standardise common commitments to information disclosure on CSR-related issues. It is argued that legislation for normative CSR may constitute pre-formal law.<sup>203</sup> With the addition of supplementary enforcement measures such as quantitative information requirements, corporate accounting standards and recruitment reporting for annual reports and legislative experiences,<sup>204</sup> companies will have an instant and broader influence on both society and community. Moreover, listed companies will always play an active role in social activities, and will be closely followed by the public and regulated by the government with associated high political costs and attention.<sup>205</sup> This engagement is likely to produce better buy-in, less resistance and more comprehensible information for all parties. As for the audience for information disclosure, companies should be accountable for their CSR reports, and should make them available to society or least society's representatives and not just to shareholders, which is a disadvantage in the current legislation.<sup>206</sup>

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<sup>202</sup> Such as the UN Global Compact, the Ruggie Principle, the OECD Guidelines, or international standards such as ISO 26000.

<sup>203</sup> K. Buhmann, 'Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR' (2004) 4 *Corporate Governance* 188 at 192.

<sup>204</sup> For example, the strategic report from the UK Companies Act could be helpful for other jurisdictions (Section 414C (7)(b) Companies Act 2006 (Strategic Report and Directors' Report) Regulation 2013).

<sup>205</sup> R. Watt & J. Zimmerman, 'Towards a Positive Theory of the Determination of Accounting Standards' (1978) 53 *The Accounting Review* 112 at 115–116.

<sup>206</sup> For example, Section 414(C)(1) of the UK Companies Act 2006 states that "the purpose of the strategic report is to inform members of the company".

## 5 Suggestions for Legislators and Directors with Concluding Comments

Concerns about CSR in business decisions have grown significantly during the last two decades and this trend should not be ignored by lawyers, especially corporate lawyers. CSR has become one of the benefits and hopes of the new millennium, “embraced by corporations, touted by academics, and advanced by non-governmental organizations and policies making as a potential mechanism for achieving social objectives and furthering economic development”.<sup>207</sup> Regulatory endeavours and corporate governance reforms in the past decade or so have increasingly intersected with mainstream CSR motivations.<sup>208</sup> The integration of non-financial issues into corporate law seems desirable, sustainable and workable. Lack of commitment by the private sectors could possibly lead to government regulations, and legislations should therefore be regarded as an effective instrument enabling the government to address the private sectors’ social, environmental and economic impact.<sup>209</sup> Connecting CSR with public policy and law and finding ways in which “voluntary and legalistic approaches can be mutually reinforcing” could be a more meaningful form of participation.<sup>210</sup> This paper explores the possibilities of using corporate law as an effective tool to structure economic activities, and it makes sense to discuss the quality and relevance of regulatory frameworks and the role of the government and supranational authorities in reconstructing economic and financial norms. The author agrees with the proposal that best regulatory practice should involve a mix of regulatory styles and strategies to improve the implementation of CSR in companies, rather than relying on any single strategy.<sup>211</sup> The hybrid approach dominated by hard law enriched and supported by soft law seems to have the greatest potential for applying controls to corporations, employing both legal requirements and voluntary suggestions and encouragement, where each complements the other in order to enable both of these mechanisms to enhance social standards and promote CSR as a goal.<sup>212</sup> Regulation is

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P. Ireland & R.G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’, in P. Utting & J.C. Marques (Eds.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan 77 at 77.

<sup>208</sup> E.K.B. Tan, ‘Corporate Social Responsibility as Corporate Soft Law: Mainstreaming Ethical and Responsible Conduct in Corporate Governance’ (2013) 31 *Singapore Law Review* 227 at 250.

<sup>209</sup> See also I. Esser, ‘Corporate Social Responsibility: A Company Law Perspective’ (2011) 232 *South African Mercantile Law Journal* 317 at 334.

<sup>210</sup> P.P. Utting & J.C. Marques, ‘Introduction: The Intellectual Crisis of CSR’, in P.P. Utting & J.C. Marques (Eds.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan 1 at 5–6.

<sup>211</sup> See P. May, ‘Compliance Motivation: Perspectives of Farmers, Homebuilders, and Marine Facilities’ (2005) 27 *Law and Policy* 317; V. Nagarajan, ‘From “Command-and-Control” to “Open Method Coordination”’: Theorising the Practice of Regulatory Agencies’ (2008) *Macquarie Law Journal* 6.

<sup>212</sup> K. Thirarungrueang, Rethinking CSR in Australia: Time for Binding Regulation? (2013) 55 *International Journal of Law & Management* 173 at 177.

regarded as a more effective approach in terms of accountability and enforcement without relying too heavily on market and social forces, since CSR cannot be regarded as an alternative to well-functioning public policy and legislation.<sup>213</sup>

CSR has been a comparative newcomer in the marketplace since corporate governance started emphasising issues that go beyond the traditional focus to touch on corporate ethics, accountability and transparency.<sup>214</sup> Corporate actions can be monitored through multi-party involvement, while law and rules or policies act as core dimensions in the convergence between CSR and corporate governance.<sup>215</sup> Beyond the financial crisis at large, “the interrelated financial, economic, climate, energy, food water, political and security crises affecting the global economy highlight the historically unprecedented degree of interconnectivity and interdependence”.<sup>216</sup> The award-winning journalist Kidder argues that “what started as an economic recession has become an ethics recession – a full-blown collapse of integrity and responsibility”.<sup>217</sup> It is argued that the financial crisis of 2008 is not over, and the impact of the debt crisis on the Eurozone has weakened the legitimacy of businesses.<sup>218</sup> Short-termism, poor accountability and the lack of an ethical decision-making atmosphere are considered to be the main reasons for the financial crisis.<sup>219</sup> The ‘Global Green New Deal’ produced by the United Nations proposed turning the financial crisis into an opportunity for a necessary change to a green economy.<sup>220</sup>

It is argued by Nobel Laureate economist Joseph Stiglitz that “modern economics has shown ... that social welfare is not maximized if corporations single-mindedly maximize profits. For the economy to achieve efficiency, corporations must take into account the impact of their actions on

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<sup>213</sup> Friends of the Earth, ‘Submission on the European Commission’s Green Paper on CSR’, Friends of the Earth, Amsterdam, December (2001) p. 2.

<sup>214</sup> M.M. Rahim, ‘Corporate Governance as Social Responsibility A Meta-Regulation Approach to Raise Social Reusability of Corporate Governance a Weak Economy’, in S. Boubaker & D.K. Nguyen (Eds.) *Board of Directors and Corporate Social Responsibility*, Palgrave Macmillan, Basingstoke (2012) 145 at 146.

<sup>215</sup> *Ibid.*, at 151–152.

<sup>216</sup> M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis*, Ontario: LexisNexis (2009) p.531.

<sup>217</sup> R.M. Kidder, *The Ethics Recession: Reflections on the Moral Underpinnings of the Current Economic Crisis*, Institute for Global Ethics (2009).

<sup>218</sup> B. Sjäfjell & L. Anker-Sørensen, ‘Directors’ Duties and Corporate Social Responsibility’, in H. Birkmose, M. Neville & K.E. Sørensen (Eds.), *Boards of Directors in European Companies – Reshaping and Harmonising their Organisation and Duties*, Alphen aan den Rijn: Wolters Kluwer Law & Business (2013).

<sup>219</sup> See J.C. Coffee, ‘What Went Wrong? An Initial Inquiry into the Causes of the 2008 Financial Crisis’ (2009) 9 *Journal of Corporate Law Studies* 1; E. Avgouleas, ‘The Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy’ (2009) 9 *Journal of Corporate Law Studies* 23; C. Gentle, ‘How the Credit Crunch has its Roots in the Lack of Integrated Governance and Control Systems’ (2008) 9 *The Journal of Risk Finance* 206; The Association of Chartered Certified Accountants (ACCA), ‘Climbing Out of the Credit Crunch’ ACCA Policy Paper (2008); N. Robins & C. Krosinsky, ‘After the Credit Crunch: The Future of Sustainable Investing’ (2009) *Public Policy Research* 192.

<sup>220</sup> United Nations Environment Programme, *Global Green New Deal*, Policy Brief, March 2009.

their employees, on the environment, and on communities in which they operate”.<sup>221</sup> However, Stiglitz’ book, focusing on globalisation and multinational corporations, did not engage with the debate about corporate purpose in detail. Ireland and Pillay explicitly claimed that the corporate objective “is a much more modest one of trying to ensure that maximization of shareholder value is not pursued by corporations without their having some regard to the impact of their activities on society at large”.<sup>222</sup> We should not talk about shareholder primacy and shareholder value maximisation without a clear awareness what shareholders really value.<sup>223</sup> Policies should also contribute by giving corporations opportunities, in a mandatory format, to be responsible to society at large. The damage that corporations may possibly cause to various stakeholders due to irresponsible behaviours is not repairable or reversible. If all regulatory approaches are composed of a normative core and a positive structure,<sup>224</sup> CSR will have a clear and distinctive normative foundation by focusing on internalising or ameliorating negative results related to corporate actions, in order to prevent these harms and generate positive public good.<sup>225</sup>

Apart from international private business self-regulation, legislative approaches to promote CSR within corporate law have been discussed in this article. The author has argued that the formal recognition of CSR through directors’ duties, information disclosure and quantitative requirements under a combined regulatory framework involving corporate soft law and hard law will promote the alignment of internal business goals with externally set societal goals. Social and environmental sustainability are regarded as issues that are too important to be left to the directors’ discretion and voluntary endeavour, while regulatory pressure could act as a deterrent to corporate misconduct and as a promoter of sustainable innovation.<sup>226</sup> CSR legislations in corporate law will work as cost-effective internal precautionary measures for companies to avoid non-reversible damage to environment and society. These legislations will install and enforce a system of self-regulation that not only meets but also exceeds the minimum standards that are consistent with law. This

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<sup>221</sup> J.E. Stiglitz, *Making Globalisation Work*, New York: W.W. Norton & Company (2007) 190.

<sup>222</sup> P. Ireland & R.G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in P. Utting & J.C. Marques (Eds.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan (2010) 77 at 89.

<sup>223</sup> This is particularly important in Anglo-American jurisdictions where the quasi-legal shareholder primacy norm is regarded as unchallengeable. See L. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, San Francisco: Berrett-Koehler (2012); L.A. Stout, ‘Killing Conscience: The Unintended Behavioural Consequences of Pay for Performance’ (2014) 39 *Journal of Corporation Law* 525; L.A. Stout, ‘The Toxic Side Effects of Shareholder Primacy (2013)161 *University of Pennsylvania Law Review* 2003; L.A. Stout, ‘Why We Should Stop Teaching Dodge v Ford’ (2008) 3 *Virginia Law and Business Review* 163.

<sup>224</sup> I. Copi, *Introduction to Logic*, New York: Macmillan (1982).

<sup>225</sup> B. Sheehy, ‘Defining CSR: Problems and Solutions’ (2015) 131 *Journal of Business Ethics* 625 at 640; see also B. Sheehy, & D.P. Feaver, ‘Directors’ Legal Duties and CSR: Prohibited, Permitted or Prescribed?’ (2014) 37 *Dalhousie Law Journal* 148.

<sup>226</sup> A.P. Kakabadse & N.K. Kakabadse, ‘CSR in the Boardroom: Myth or Mindfulness’, in A.P. Kakabadse & N.K. Kakabadse, *CSR in Practice, Delving Deep*, London: Palgrave Macmillan (2007) p.180.

regulatory framework for CSR-related issues could function in a way that is guided by the spirit rather than the letter of the law.<sup>227</sup> Such an approach enables the board to manage corporations so as to realise long-term profitability without sacrificing social justice, human rights and environmental protection, achieving corporate governance goals including sustainability, accountability, effectiveness and efficacy along with enhanced standards of social and environmental human rights.<sup>228</sup>

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<sup>227</sup> J. Gobert & M. Punch, *Rethinking Corporate Crime*, Cambridge: Cambridge University Press (2003) pp. 309–310.

<sup>228</sup> This is particularly the case after the introduction of Ruggie Principle; see Section 414 (C)(7)(b)(iii). See also K. Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Judaification of CSR' (2015) *Journal of Business Ethics*, available online first via <http://link.springer.com/article/10.1007/s10551-015-2869-9> (assessed 14<sup>th</sup> February 2016); A. Ramasatry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) *Business and Human Rights* 237; for a historical review see M.A. Santoro, 'Business and Human Rights in Historical Perspective' (2015) 14 *Business and Human Rights* 155; J.G. Ruggie & T. Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' Corporate Social Responsibility Initiative Working Paper No. 66. Cambridge, MA: John F. Kennedy School of Government, Harvard University (2015); R. McCorquodale, 'Corporate Social Responsibility and International Human Rights Law'.