UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Corporate Social Responsibility in South Africa and India: A comparative analysis

Compiled by

Beverly Shiells

22272225

A mini dissertation submitted in accordance with the academic requirements for the degree (LLM) in Corporate Law

In the Faculty of Law
University of Pretoria
2019

Prepared under the supervision of
Prof Monray Marsellus Botha

DECLARATION OF PLAGIARISM

Full names: Beverly Shiells

Student number: 22272225

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this dissertation proposal is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I did not make use of another student's previous work and submitted it as my own.
4. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his or her own work.

(Signed electronically by Beverly Shiells)

ACKNOWLEDGEMENTS

I would like to express my gratitude to Adv Tebogo Morajane for your encouragement and motivation. I would also like to convey my sincere appreciation to my supervisor, Prof Monray Botha for your patience, guidance, knowledge and insight.

To my family for all your support, understanding and encouragement during this process. Your encouragement and love gave me the necessary inspiration to complete my goal.

This dissertation is dedicated to my mom, I know you would have been proud.

TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION

1.1 HISTORIC DEVELOPMENT AND BACKGROUND

The Fourth Industrial Revolution has seen the rise of a powerful corporate community – a community which is mostly concerned with only the bottom line (profit line).[1] It is argued that the relentless pursuit of the bottom line without having regard to the interest of all stakeholders have a negative impact on society as a whole.[2] For centuries business has been conducted without consideration for all stakeholders.[3] As a corporate citizen with rights and responsibilities a company has certain moral obligations towards society, the environment in which it operates and future generations. In South Africa the concept of *Ubuntu*, which means "I am because you are, you are because we are" encompasses the corporation's moral and ethical duties toward all stakeholders and not only to shareholders.[4]

Corporations, especially the private sector and multinational companies, are an integral piece of the puzzle to help solve poverty and protect the environment from pollution.[5] Government does not have enough resources to address all socio-economic challenges alone and relies on contributions from companies to assist in eradicating social issues.[6] In developing countries like South Africa and India there is a pressing need for companies to become part of the solution and it is now widely accepted that companies have an important role to play in addressing economic, social and environmental challenges as envisaged in the King IV *Report on Governance for South Africa 2016*.[7] The annual turnover of global companies like Microsoft and Apple far exceed the gross domestic product (GDP) of many countries and have more resources at their disposal than

---

[1] Bakan The Corporation: The Pathological Pursuit of Profit and Power (2004) 37.
[2] Crowther Jatana *Representations of Social Responsibility* (2005) 3.
[3] *Ibid.*
[4] *King III Report on Corporate Governance of South Africa* (2009) 23. Hereafter referred to as King III.
[5] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 712.
[6] *Ibid.*
[7] Hereafter referred to as King IV. King IV was launched on 1 November 2016 and came into effect for originations with financial years starting on 1 April 2017.

some governments do.[8] It has been proven that all parties can benefit from collaboration between governments and private companies.[9] This is evident from the famous quote: "no man is an island, entire of itself; every man is a piece of the continent…"[10] applies to all persons, whether natural or corporate.

Yet the mandate of profit companies is to increase its bottom line.[11] The objective of increasing profits is starkly juxtaposed with the objective of assisting with social problems. Corporate Social Responsibility (CSR) practices encourage corporations to embrace social concerns and consider all stakeholders when making decisions.[12] Hilton mentioned that capitalists and anti-capitalists of the world should unite.[13] Capitalists erroneously believe that in order to support CSR one must necessarily be an anti-capitalist but it has been proven that there is a profit link, however small, between a company's financial performance and its social responsibility strategy.[14] It is because of this very reason that capitalists should embrace CSR as part of their business structure. The fact that corporate social responsibility is a business strategy can no longer be denied.[15]

1.2 RESEARCH PROBLEM

Firstly, the study is a comparative analysis of CSR in South Africa and India. Secondly, the study questions whether the South African company law framework encourages or inhibits corporations to freely engage in CSR activities. The study analyses the Companies Act 71 of 2008[16] to establish to what extent the introduction of the social and ethics committee has changed the face of CSR participation in South Africa. The study further considers the CSR requirements of the King IV

[8] Belinchon and Moynhihan '25 giant companies that are bigger than entire countries', *Business Insider* 25 July 2018, available at *https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7?IR=T*, accessed on 16 June 2019.
[9] *Ibid.*
[10] 'No man is an Island' John Donne, 17th century English Poet.
[11] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[12] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 713.
[13] Hilton & Gibbons *Good Business-Your World Needs You* (2005) 238.
[14] Stoop 'Towards Greener Companies-Sustainability and the Social and Ethics Committee' (2013) 3 *STELL LR* 49.
[15] *Ibid*.
[16] Hereafter referred to as the Companies Act, 2008.

report and the JSE listing requirements. The King report is a voluntary code on good corporate governance, however, the Johannesburg Stock Exchange (JSE) makes the King IV report principles mandatory for all listed companies as per its listing requirements.[17] In South Africa directors have a fiduciary duty to act in the best interest of the company.[18] The word "company" is not defined in the Act and the common law meaning refers to the collective body of shareholders.[19] Directors cannot legally take the interest of any other stakeholders (environment, employees and anybody directly or indirectly impacted by the company's decisions) into account unless it is in the interest of the shareholders.[20] Despite the amendment of the Companies Act, 2008 there is still no express mention made of CSR. There is no legal obligation or mandate on South African companies to act socially responsible when making business decisions.[21] There is, however, an indirect reference to CSR in section 72(4)(a) of the 2008-Act.[22]

Regulation 43(1) of the Companies Regulations of 2011 state that certain companies must appoint a social and ethics committee comprised of three directors or prescribed officers of the company.[23] The introduction of the mandatory social and ethics committee shows that CSR is being taken seriously by the legislature.[24] However, the regulations pertaining to the committee are uncertain and fail to make reference to national instruments like the King Reports on Governance.[25] The foreword to King IV states that Milton Friedman's oft-quoted remark that "the social responsibility of business is to increase profits" should be interpreted against the background that corporations form part of society as a whole.[26] It cannot be interpreted in the narrow sense of the word that it

[17] Available at https://www.jse.co.za/content/JSERulesPoliciesRegulations/JSE%20Listings%20Requirements.pdf, accessed on 16 June 2019.
[18] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[19] *Ibid*.
[20] *Ibid*.
[21] Johannes *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016) 46.
[22] Botha 'Responsibilities of Companies towards employees' 2015 18(2) *PER* 47.
[23] *Ibid*.
[24] Kloppers 'Driving Corporate Social Responsibility (CSR) through the Companies Act: An overview of the role of the social and ethics committee' (2013) 16(1) *PER/PEL* 187.
[25] *Ibid*.
[26] King IV report on Corporate Governance for South Africa (2016) 4.

only operates for the benefit of the shareholders.[27] While King III made provision for a "comply or explain" basis, King IV provides for a "comply and explain" basis.[28]

Besides the Companies Act, 2008 there are other pieces of legislation that encourage social and economic transformation like *inter alia* the Broad-Based Black Economic Empowerment Act[29], Employment Equity Act[30], Labour Relations Act[31] and the Basic Conditions of Employment Act.[32] The Department of Trade and Industry (DTI) policy paper on the reform of corporate law mentioned that the interests of stakeholders should be protected by additional legislation and not merely through the Companies Act.[33] The policy paper states that if the protection of stakeholder interests occurred only through the Companies Act it will result in international companies, not incorporated in South African, escaping liability.[34] This will give international companies and undue advantage over South African incorporated companies.[35] The policy paper suggests that the goal of stakeholder protection pertaining to social, black economic empowerment and environmental issues can be achieved through separate legislation.[36] Since 1994 our country has experienced an array of complex socio-economic challenges resulting from the various policies and injustices of the apartheid government.[37] The government alone cannot address the social injustices of the past without a contribution from companies in both the private and public sector.[38] Esser and Dekker state that corporations are forced to take into account stakeholder interests through the Broad-Based Black Economic Empowerment Act (BBBEE Act).[39] Although the

---

[27] *Ibid*.
[28] *Idem* 7.
[29] Act 53 of 2003.
[30] Act 55 of 1998.
[31] Act 66 of 1995.
[32] Act 75 of 1997.
[33] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 27.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid*.
[37] Esser and Dekker 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) 3(3) *Journal of International Commercial Law and Technology* 166.
[38] *Ibid*.
[39] *Idem* 157.

legislation does not specifically refer to CSR, the BBBEE Act indirectly forces companies to act in a socially responsible manner.[40] The BBBEE Act's objective is to address the economic injustices of the past and to empower previously disadvantaged groups.[41] Kloppers states that although black economic empowerment has not achieved a significant change in the economic well-being of the most South Africans it remains an important tool in enforcing a CSR agenda.[42]

India, however, has since April 2014 become the first country in the world to require companies with an annual revenue of more than ten billion rupees to give two percent of their net profits for CSR causes.[43] Bimal Arora, chair of the Centre for Responsible business in Delhi states that "the so-called 2% law has brought CSR from the fringes to the boardroom".[44] India has also extended directors' fiduciary duties in section 166 (2) of the 2013 Companies Act by including the interests of the company's employees, the community and the environment.[45] The mandatory CSR position in India is in stark contrast to the voluntary nature of CSR in South Africa. South African incorporated companies may only engage in CSR activities if it ultimately benefits the shareholders.[46]

1.3 RESEARCH QUESTIONS

The study comparatively analyses the legal position, pertaining to CSR in India and South Africa and questions and analyses the following:

1.3.1 Primary Research Question:

---

[40] *Idem* 158.
[41] Johannes *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016) 31.
[42] Kloppers 'Driving CSR through Black Economic Empowerment' (2014) 18(1) *Law, Democracy & Development* 58. The discussion of the BBBEE act and other legislation referred to above is beyond the scope of this study.
[43] Section 135 of the India Companies Act 2013.
[44] Balch 'India law requires companies to give 2% of its profits to charity. Is it working?' *The Guardian* 55 April 2016, available at http://www.theguardian.com, accessed on 24 March 2019.
[45] Varottil 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis' NUS Law Working Paper 2016/006, August 2016, 2, available at http://law.nus.edu.sg/wps.
[46] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.

a) What is the legal framework of CSR in South Africa and India?
b) Are the legal requirements for CSR mandatory or not and are the requirements effective in ensuring adherence thereto?

1.3.2 Secondary Research Questions that will be investigated in this study and a follow-up study:

a) Are stakeholders' interests considered in the Companies Act, 2008?[47]
b) Can stakeholders compel a company to act socially responsible and does section 7(d) of the Act place a new fiduciary duty on directors?[48]
c) Is CSR considered a part of our South African statutory law?[49]
d) What is the role of the mandatory Social and Ethics Committee introduced by the Companies Act, 2008?
e) To what extent does the Johannesburg Stock Exchange (JSE) enforce listed companies to comply with the King requirements?
f) King IV provides for a "comply and explain" basis. Is the King IV report merely a self-regulatory code or is a director that does not comply with the code in breach of his fiduciary duties?[50]
g) What is the impact of the two percent law on modern companies in India?
h) Is the two percent law in India achieving what it set out to do?
i) What is the nature and extent of the duty under section 166(2) of the 2013 Indian Companies Act and does it adequately address the rights of stakeholders?
j) Can India's CSR model be used as an example for South Africa?

---

[47] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 324.
[48] *Ibid.*
[49] *Ibid.*
[50] *Idem* 330.

1.4 FOREIGN JURISDICTIONS

Historically South Africa and India were both colonised by Britain.[51] South Africa gained independence from Britain in 1961[52] while India gained independence in 1947.[53] Both South Africa and India's common law was influenced by British rule and both nations are member states of BRICS (the term used for the five emerging national economies namely, Brazil, Russia, India, China and South Africa).[54] South Africa and India are both developing countries with emerging economies that face tremendous social and economic challenges. South Africa, the second largest economy in Africa, is plagued by extensive poverty, unemployment, crime, illiteracy, economic inequality and corruption.[55] Burdened by a painful legacy of apartheid, downgraded by rating agencies to junk status[56] and recent scandalous allegations of state capture,[57] South Africa is no stranger to controversy. Statistics show that 55.5 percent of South Africans live in poverty and earn less than R992.00 per month.[58] The World Bank recently bestowed the infamous title of most unequal country in the world on South Africa.[59]

On the other hand, Transparency International ranks India as one of the most corrupt countries in the world.[60] With a GDP of 1.644 billion US dollars, India has one of the fastest growing economies in the world, yet two thirds (over 800 million people) of the population live in complete poverty, making India one of the poorest countries in the world.[61] Unemployment in rural areas

---

[51] Saunders 'Decolonisation in South Africa: Reflections on the Namibian and South African Cases' (2017) 42(1) *JCH* 104.
[52] *Ibid*.
[53] Singh 'Keeping India in the Commonwealth: British Political and Military Aims, 1947-49' (1985) 20(3) *Journal of contemporary History* 469-481.
[54] Available at *http://www.infobrics.org*, accessed on 17 March 2019.
[55]Anonymous 'The biggest economies in Africa' *World Finance* 10 July 2018, available at *https://businesstech.co.za/news/finance/257337/the-biggest-economies-in-africa/*, accessed on 16 June 2019.
[56] Donnelley 'Global credit rating agency has downgraded South Africa to junk status' *Mail &Guardian* 25 November 2017, available at *https://mg.co.za/article/2017-11-25-global-credit-ratings-agency-has-downgraded-south-africa-to-junk-status*, accessed on 27 July 2019.
[57] Available at *http://www.statecapture.org.za*, accessed on 27 July 2019.
[58] Gouws 'SA most unequal country in the world: Poverty shows Apartheid's enduring legacy' *Times Live* 4 April 2018, available at *http://www.timeslive.co.za*, accessed on 17 March 2019.
[59] *Ibid*.
[60] Deval 'India Continues to Rank amongst most Corrupt Countries in the World' *Forbes* 7 March 2018, available at *http://www.forbes.com*, accessed on 17 March 2019.
[61] Anonymous 'Poverty in India: Facts and Figures on the daily struggle for survival' available at

force citizens to move to the densely populated areas of Delhi, Bangalore, Calcutta and Bombay where they are forced to live in slums that are rife with crime, poor sanitation and hygiene problems which give rise to various deadly diseases.[62] India has one of the highest infant mortality rates globally with 1.4 million children dying before they reach their fifth birthday due to malnourishment and disease.[63] According to UNICEF twenty five percent of children in India do not have access to education and this places further strain on an already vulnerable economy.[64]

Sachs states that "there are no solutions to the problems of poverty, population and environment without the active engagement of the private sector, and especially the large multinational companies…"[65] In an emerging economy and developing country like South Africa, corporations can be an essential connection between government and socio-economic challenges.[66] India's Companies Act, 2013 has followed a unique approach to CSR, an approach that has broken ties with its colonial past.[67] India's stakeholder-centric model has the potential to influence corporate law in jurisdictions beyond India's borders.[68] Therefore it will be useful to compare India's progressive CSR model to our own shareholder-centric model.

1.5 MOTIVATION FOR STUDY

Corporations' traditional mandate is to only focus on profit, which is referred to as the single bottom line. Due to boycott groups and pressure from society, the global economy is forced to take into account the interest of stakeholders when making decisions.[69] Due to the emerging concept of CSR, corporations are now encouraged to depart from their narrow pursuit of profit and embrace

---

http://www.soschildrensvillages.ca/news/poverty-in-india-602, accessed on17 March 2019.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*.
[65] Sachs *The end of poverty and the Commonwealth: Economics for a crowded planet* (2008) 1.
[66] Ally *Corporate Social Responsibility: Practices, Trends and Developments* (LLM thesis, University of Cape Town, 2013) 73.
[67] Varottil 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' NUS Law Working Paper 2015/001, January 2015, 71, available at http://law.nus.edu.sg/wps.
[68] Afsharipour 'Redefying Corporate Purpose: An International Perspective' (2016) 40 *Seattle University Law Review* 496.
[69] Crowther & Jatana *Representations of Social Responsibility* (2005) 3.

the triple context as a new way to measure success. The triple context is a concept that includes profit, the environment and society as factors to consider when making decisions.[70] It departs from the profit goal as a single factor to include all stakeholders' interests. The legal position in South Africa does not legally allow a departure from the single bottom line unless it is in the interest of the company.[71] India has recently gone further than any other country by introducing the controversial two percent law in 2013 and by extending its fiduciary duties to include stakeholders' interests.[72] A comparison of the legal position of CSR in these two emerging markets, that share a history of British colonialism, common law and a myriad of socio-economic problems, will prove to be valuable.

1.6 SIGNIFICANCE OF STUDY

The Companies Act does not expressly refer to CSR but there are indirect references to CSR in the Act. Firstly, there is an indirect reference to CSR in section 72(4)(a) of the Act.[73] The Minister of Trade and Industry may prescribe through regulation that a company appoints a social and ethics committee.[74] Regulation 43(1) of the Companies Regulations of 2011 state that certain companies must appoint a social and ethics committee.[75] Secondly, another indirect reference to CSR can be found in section 7 of the Act. Section 7 clearly sets out the purposes of the Act and *inter alia* states at section 7(d) that one of the purposes of the act is to "reaffirm the concept of the company as a means of achieving economic and social benefits".[76] While King IV provides for a "comply and explain" basis it still remains a largely voluntary code on good corporate governance.[77] The objective of this study is to comparatively analyse the legal position of CSR in India and South Africa. The study aims to determine to what extent South African company law allows corporations to participate in CSR activities and if there is adequate enforcement and regulation

[70] *Idem* 297.
[71] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[72] Afsharipour 'Redefying Corporate Purpose: An International Perspective' (2016) 40 *Seattle University Law Review* 485.
[73] Botha 'Responsibilities of Companies towards employees' 2015 18(2) *PER* 47.
[74] *Ibid*.
[75] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[76] Delport *Henochsberg on the Companies Act 71 of 2008* (2018) 50.
[77] King IV report on Corporate Governance for South Africa (2016) 7.

thereof. The aim is to determine whether the mandatory enforcement of CSR in India is successful and whether South Africa can benefit from a similar mandatory requirement.

1.7 APPROACH AND METHODOLOGY

This investigation will mainly be a desktop mode of inquiry making use of literature within the current body of knowledge to delineate the gaps of CSR in India and to investigate the validity of applying the CSR objectives within a South African context. A non-empirical assessment and comparative legal analysis of the legal position in both South Africa and India will be undertaken.

Firstly, an in-depth literature review on the subject is required. As both countries have a shared British influence the study will comparatively analyse the legislative provisions in both countries and the British common law influence. The study is, however, limited by the different social, economic and political challenges that shaped both countries current political sphere. The South African Companies Act, 2008 and India's Companies Act of 2013, together with case law will be used as primary sources. Textbooks, books, articles from local and international accredited journals, theses and dissertations will be used as secondary sources. The JSE listing requirements, the King reports and codes will also be referred to and used as secondary sources. Internet sources from well-known publications and newspapers will be used as secondary sources to refer to topical events and corporate scandals. Thereafter, consideration will be given, and recommendations made, with reference to the results of the comparative study.

1.8 LITERATURE OVERVIEW

Mahatma Ghandi developed the socio-economic philosophy of trusteeship whereby wealth is managed for the benefit of society as a whole.[78] It is perhaps fitting that India is the first country in the world to impose a legal obligation on companies to invest back into the community by spending two percent of their net average annual profit on CSR causes. The Indian government

[78] Manish Kumar Jain 'Is the Companies Act 2013 forcing corporates to do Charity? A critical analysis of CSR regime of new Corporate Legislature of India' (2015) 2(2) *International Journal of Multidisciplinary Approach and Studies* 216.

has since the 1990s tried to reform the old Companies Act of 1956.[79] Prior to the enactment of the two percent law the Companies Act was shareholder centric and directors owed a duty to the members of the business as a whole.[80] Section 135 of the Companies Act of 2013 changed the face of company law in India by mandating public and private companies, including foreign-owned companies that are incorporated in India, that has a net worth exceeding INR 5 billion, a turnover exceeding INR 10 billion or net profits exceeding INR 50 million to comply with the CSR provisions of the Act.[81] Section 166(2) of the Act extended the fiduciary duties and changed India's Company Law from a shareholder-centric to stakeholder-centric model.[82] The Parliamentary Standing Committee played a crucial role in the reform of the Companies Act.[83] They insisted that directors owe a duty to not only shareholders but also to act in the best interest of the environment, employees and the community.[84]

In terms of section 135 of the Companies Act of 2013 a company that meets any of the thresholds mentioned above, must appoint a CSR committee with three directors, one of which can be independent.[85] The committee's mandate is to ensure that a CSR policy is in place and that the company spends at least two percent of its average net profits on CSR causes as envisaged in the

[79] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 6, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).
[80] *Ibid* 7.
[81] Dharmapala & Khanna 'The impact of mandated corporate social responsibility: Evidence from India's Company Act of 2013' (2016) No.783 Coase-Sandor Working Paper Series in Law and Economics 6.
[82] Afsharipour 'Redefying Corporate Purpose: An International Perspective' (2016) 40 *Seattle University Law Review* 481.
[83] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 7, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).
[84] *Ibid*.
[85] Dharmapala & Khanna 'The impact of mandated corporate social responsibility: Evidence from India's Company Act of 2013' (2016) No.783 *Coase-Sandor Working Paper Series in Law and Economics* 6.

CSR policy.[86] Prior to the enactment of section 135 the Ministry of Corporate Affairs released a voluntary code on CSR in 2009 to encourage corporations to participate in CSR activities.[87] The voluntary code did not have the desired effect and the Government started planning the amendment to the Companies Act to pave the road for mandatory CSR.[88] The proposed amendment was met with extreme resistance from India Inc (the collective term used for companies in India) and the Government capitulated by softening the enforcement element to a "comply or explain" basis.[89] Thus, although the spending requirement is not mandatory, the disclosure for non-compliance is.[90] The existing empirical data shows that while there was a marked increase in CSR spending after the enactment of the Companies Act of 2013, there seems to be enormous challenges facing the disclosure requirement.[91] Dharmapala and Khanna conducted one of the most extensive empirical analysis of CSR after the enactment of the Companies Act of 2013.[92] They found that large corporations that spent more than the required two percent prior to the enactment of section 135 decreased their CSR spending after the provision came into force.[93]

On the other hand, the South African Companies Act, 2008 is mostly shareholder-centric and does not expressly refer to CSR.[94] It remains the duty of the directors to act in the best interest of the collective body of shareholders as owners of the company.[95] The current corporate model allows

---

[86] *Ibid*.
[87] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 6, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).
[88] *Ibid* 6.
[89] *Idem* 8.
[90] *Ibid*.
[91] *Idem* 25.
[92] *Idem* 13.
[93] Dharmapala & Khanna 'The impact of mandated corporate social responsibility: Evidence from India's Company Act of 2013' (2016) No.783 *Coase-Sandor Working Paper Series in Law and Economics* 37.
[94] Johannes *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016) 46.
[95] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.

for expenditure that is connected to social goals but only as far as there is a direct benefit to the shareholders.[96] Corporate South Africa is therefore not legally obliged to act socially responsible.[97]

While the South African government has made a real effort to encourage CSR, many of the provisions are not mandatory and are solely reliant on application by company boards.[98] It is also a reality that our government simply does not have the means to monitor compliance thereof.[99] There is currently no research that comparatively analyses the CSR legal framework in South Africa and India. This study can potentially make a valuable contribution to the research already conducted on CSR in South Africa.

1.9 CHAPTER OUTLINE

Chapter 1 discusses the background, motivation, significance of the study, research questions and methodology used.

Chapter 2 provides a broad overview of CSR and discusses the arguments for and against CSR.

Chapter 3 provides an overview of CSR in South Africa and analyses its legal framework.

Chapter 4 analyses and evaluates the legal position of CSR in India.

Chapter 5 concludes the study and proposes certain amendments to South Africa's Companies Law Act, 2008.

---

[96] *Ibid*.
[97] Johannes *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016) 46.
[98] Ally *Corporate Social Responsibility: Practices, Trends and Developments* (LLM thesis, University of Cape Town, 2013) 73.
[99] *Ibid*.

CHAPTER 2 - THE LEGAL FRAMEWORK PERTAINING TO CORPORATE SOCIAL RESPONSIBILITY

2.1 INTRODUCTION

Economist, Milton Friedman, states that "only people have responsibilities, corporations are artificial persons, and in this sense, they may have artificial responsibilities…"[100] The incorporation of companies has bestowed on corporations' similar rights as individuals, with companies now widely regarded as corporate citizens. Section 19(1)(b) of the Companies Act, 2008[101] states that a juristic person has all the legal powers and capacity of an individual except to the extent that a juristic person is incapable of exercising any such power or having any such capacity. The company has "no soul to damn and no body to kick"[102] but are given the same fundamental rights as natural persons in terms of the Constitution.[103] Section 8(4) states that a "juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person". With rights come responsibilities but many corporations, and in particular the managers of those corporations, have lost sight of that. Too often one sees "the rights maintained, and the responsibilities discarded".[104]

Elizabeth Warren, senior state senator in the United States of America and 2020 democratic presidential favourite, has brought CSR into renewed international focus by introducing a bill called the Accountability Capitalism Act.[105] The bill requires that corporations (with more than $1 billion in annual revenue) obtain a federal charter as a "United States corporation", which requires directors to take into the account the interests of shareholders, employees, the environment and the

---

[100] Ally *Corporate Social Responsibility: Practices, Trends and Developments* (LLM thesis, University of Cape Town, 2013) 26.
[101] 71 of 2008.
[102] Lord Chancellor Baron Thurlow.
[103] The Constitution of the Republic of South Africa 1996.
[104] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 14.
[105] Yglesias 'Elizabeth Warren has a plan to save capitalism' 15 August 2018, available at https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations, accessed on 18 March 2019.

community.[106] A bill that will no doubt change the face of corporate law in the United States and perhaps even beyond its borders, if passed. This is juxtaposed to economist Milton Friedman's 1970 New York Magazine article entitled "The Social Responsibility of Business is to Increase its Profits".[107] Warren argues that because "corporations claim the legal rights attached to personhood they should also be legally obliged to accept the moral obligations of personhood".[108] The bill's explanatory papers state that "since the 1980s corporations adopted the belief that their only legitimate and legal purpose was maximising shareholder value".[109] Warren argues that capitalism today has moved away from the once "egalitarian area of American Capitalism post-World War II", also known as the Golden Age of Capitalism.[110] Back then, corporations focused on expansion and investment into the company and its employees (bigger pay cheques, better living standards and growth) as opposed to big pay cheques for directors and focusing on enriching shareholders.[111] Whether the bill will ever be passed or whether it will remain just a bill, Warren has identified and opened up a debate on a crucial global issue and her controversial bill could possibly pose as an example for other countries to steer corporations in a more socially acceptable direction. Warren has been accused of being a socialist, some even boldly stating that Warren's bill is not just about making corporate America more responsible, but perhaps its objective is to save capitalism altogether.[112]

Like Milton Friedman, Adam Smith claims that by pursuing enlightened self-interest the public will benefit simultaneously.[113]As a point of reminder, especially to "hard-nosed about profit"[114] directors, encouraging corporations to follow the triple context (people, planet and profit) is by no way suggesting that they abandon profit all-together. Instead, one should ask: Is there a way to

---

[106] Accountable Capitalism Act, available at https://warren.senate.gov, accessed on 24 March 2019.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] Yglesias 'Elizabeth Warren has a plan to save capitalism' 15 August 2018, available at https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations, accessed on 18 March 2019.
[111] *Ibid.*
[112] *Ibid.*
[113] Smith was a 18th century Scottish Philosopher and Economist.
[114] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 53.

ensure a free market but not at the expense of any of the stakeholders? There is an alternative to the parable of a free market and its alleged advantages. It is believed that CSR provides a substitute which eliminates the harmful effects of an unregulated free market.[115]

2.2 GLOBAL CORPORATE SCANDALS AND THE NEED FOR GOOD CORPORATE CITIZENS

The corporation's legal mandate is the relentless pursuit of profit, without any regard to the harm they cause to society or the environment in which they operate.[116] Bakan refers to a corporation as a "pathological institution", where its only mandate is to make profit, "profit over people".[117] History is a constant reminder of past corporate scandals that highlight the need for corporations to embrace strategies to become responsible corporate citizens. Enron, once a Fortune 500 energy company, declared bankruptcy in December 2002.[118] It is believed to be the biggest bankruptcy in the history of the United States.[119] The Enron collapse "is a story of people so shameless and greedy that literally as the bankruptcy papers were drawn up, executives were still passing what remained of the firm's cash out to themselves".[120] Enron faced bankruptcy due to its "obsession with profits and share prices, greed, lack of concern for others and a penchant for breaking the rules".[28] The example of Enron's collapse proves "the importance of openness, transparency and the need to embed the principles of social responsibility at every level of the corporate hierarchy".[121]

There is a plethora of case studies which prove the devastating consequences of corporate greed and the single-minded pursuit of the profit goal. It is not the study's objective to condemn capitalism to an insignificant theory, although research has proven that income per head has

---

[115] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 14.
[116] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 1.
[117] *Ibid* 2.
[118] Leblanc *et al* 'The coming revolution in corporate governance' (2003) *Ivey Business Journal* 184.
[119] *Ibid* 185.
[120] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 61.
[121] Hilton & Gibbons *Good Business: Your world needs you* (2004) 95.

declined and that quality of life has decreased dramatically.[122] The objective is rather to redefine capitalism in such a way as to eliminate the negative effects of corporate greed. The Western, Anglo-Saxon shareholder-driven capitalist system has been followed to date and Visser, the founder and director of CSR International, questions whether Karl Marx has been vindicated in his critique that capitalism creates wealth in the hands of few.[123] Charles Handy, an Irish philosopher and author, agrees with Visser, stating that "I've always had my doubts about shareholder capitalism, because we keep talking about the shareholders as owners of the business, but most of them haven't a clue what business they're in. They are basically punters with no particular interest in the horse that they're backing, as long as it wins".[124] Visser goes on to argue that CSR "will provide capitalism with the much-needed moral compass".[125]

It is in a corporation's nature to put profit above people and the environment. They have crept into every sphere of our lives and have influenced governments to the extent that they have become employees on corporate payrolls. Those in favour of CSR claim corporations know no boundaries when it comes to profit and in their ruthless pursuit of it, they harm the environment and cause social peril. In an article in the Economist, capitalists lash out at corporate social responsibility advocates, stating that "it is a perfectly reasonable line of argument, or it would be, if a narrow focus on profit really did endanger the environment, systematically infringe the rights of workers and stakeholders, and in general fail to serve the public interest".[126] The author mentions that, that is the world according to corporate social responsibility.[127] The question arises whether the world really is like this.

---

[122] Visser & Sunter *Beyond Reasonable Greed: Why sustainable Business is a Much Better Idea* (2002) 41.
[123] Visser 'Is greed still good' 13 October 2011, available at https://www.csrwire.com, accessed on 1 March 2019.
[124] *Ibid*.
[125] *Ibid*.
[126] Crook 'The good company-The world according to CSR' *The Economist* 22 January 2005, available at https://www.economist.com/special-report/2005/01/22/the-good-company, accessed on 24 March 2019.
[127] *Ibid*.

Corporations have become ruthless in their quest to dominate their respective markets while having no regard for the environment, their employees or the community. Profit is their number one priority irrespective of who they endanger in their race to the bottom line. On 3 December 1984, the Union Carbide Corporation leaked a poisonous gas into a slum neighbourhood next to its pesticide factory in Bhopal, India.[128] The effects were disastrous. Fifteen thousand people died and the explosion left thousands blinded, disabled and maimed for life.[37] It was a tragedy that could have been prevented if safety personnel and training were not cut back on to avoid profit decreases.[129] Union Carbide mirrors corporations' true nature- profits over people. Bob Questra, spokesperson for Union Carbide at the time, mentioned that they shared in the hurt and anger but that they couldn't accept responsibility because if they did, they would be required to depart with millions of dollars to clean up the environment and pay compensation.[130] Furthermore, this would lead to the public pointing fingers at Amoco, BP, Shell and Exxon, claiming that Union Carbide took responsibility and asking why the rest cannot do the same.[131] According to Questra this would only complicate those corporations' present problems.[132] In the words of Questra lies a new war, far more dangerous and discreet than the world has ever seen - the war for profit.

Bakan[133] tells of Patricia Anderson and her four children driving home on Christmas Day when a car crashed into the back of her Pinto.[134] The car burst into flames, causing horrible injuries to her and her children.[135] Once again this was an injury that could have and should have been prevented by General Motors. Yet another irresponsible decision taken by a corporation to maximise profits

---

[128] Cohen 'Bophal is more than just history' *Greenleft Weekly* 7 December 1994, available at https://www.greenleft.org.au/content/bhopal-more-history, accessed on 3 August 2019.
[129] *Ibid*.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.
[133] Bakan is a Professor of law at the University of British Columbia and an internationally renowned legal scholar. Bakan is also the screenwriter and co-creator of The Corporation, a documentary film and television miniseries based on his book.
[134] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 61.
[135] *Ibid*.

at the cost of human suffering. The decision of where to position the fuel tank was based on the following calculation:[136]

500 fatalities x $200,000/fatality
_____ = $2.40/ automobile
41,000,000 automobiles

By deciding not to position the fuel tank elsewhere, General Motors saved $6.19 per automobile by allowing people to die in the case of a fuel tank explosion.[137] The effects of corporate greed stretch far and is about to reach the Gwich'in Nation living in seventeen villages in the Arctic. British Petroleum (BP)[138] and other oil companies are looking to drill just below the coastal plains which will render huge profits. There will be great profits for shareholders, but it will be at the expense of the Gwiich'in people. Many scientists concur that the drilling would have enormous effects on the people and the Porcupine caribou.[139] The herd will most likely be wiped out.[140] Group Chief Executive, John Brown[141] at one point refused to discontinue the project if they get the go ahead as it is in their "direct business interest".[142]

British pharmaceutical company GlaxoSmithKline and U.S. Company Pfizer have been exposed conducting experiments with a cocktail of Aids drugs on human infants.[143] These companies chose to use orphaned Black and Hispanic babies as guinea pigs.[144] During these drug trials numerous experiments were conducted and at times the infants were drugged using a variety of prescription drugs simultaneously.[145] Shockingly, uncovering the toxicity of the Aids drugs was the main

[136] *Idem* 63.
[137] *Idem* 61.
[138] *Idem* 42.
[139] *Idem* 43.
[140] *Ibid*.
[141] Then CEO of BP.
[142] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 45.
[143]Barnett 'UK firm tried HIV drugs on Orphans' 4 April 2004, available at https://www.theguardian.com/world/2004/apr/04/usa.highereducation, accessed on 3 August 2019.
[144] *Ibid*.
[145] *Ibid*

objective during these drug trials.[146] This means the infants received an overdose of the drugs in order to observe the negative effects. Pharmaceutical companies defend themselves by stating that the babies received "state of the art therapy for free". [147] Apparently, "using orphan babies as lab rats is just standard practice in Western medicine, where ethics never gets in the way of making a good, healthy profit". [148]

The Ogoni people occupies a tiny piece in the Niger Delta which is known to be bursting with oil.[149] The Movement for the Survival of the Ogoni People (MOSOP) originated in 1990.[150] They have made numerous requests to Shell and the Nigerian government *inter alia* to clean up their environment from the oil spills.[151] When the water in Ogoni was tested, toxicity levels proved to be sixty times higher than the required average in the United States.[152] MOSOP spokesperson, Saro-Wiwa reported that "We have woken up to find our lands devastated by agents of death called oil companies. Our atmosphere has been polluted, our lands degraded, our waters contaminated, our trees poisoned, and so much of our flora and fauna have virtually disappeared".[153] However, their repeated requests to clean up their environment went unanswered. On 4 January 1993 MOSOP came together to make their voices heard in a peaceful demonstration.[154] Since then, Saro-Wiwa was executed and at least 2 000 people have died as a result of the protesting.[155] Shell feared that the MOSOP's propaganda will permeate throughout the Niger Delta, which consists of the other 75% of oil as well as their profit.[156] If protests spread, it could have brought Shell's production to its knees.

---

[146] *Ibid*.
[147] *Ibid*.
[148] *Ibid*.
[149] Lewis 'Blood and Oil: a special report after Nigeria represses, Shell defends its record' 13 February 1996, available at https://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html, accessed on 3 August 2019.
[150] Human Rights Watch report 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' January 1999, available at https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf, accessed on 3 August 2019.
[151] *Ibid*.
[152] *Ibid*.
[153] *Ibid*.
[154] *Ibid*.
[155] *Ibid*.
[156] *Ibid*.

Shell's charge sheet in the Niger Delta consists of not only environmental damage, but also violations of the Ogoni people's human rights, bribing witnesses and assault.[157] Shell even called in the assistance of the Rivers State Internal Security Task Force (ISTF) and its leader Lt. Col. Paul Okuntimo who once said that he "knew of over 200 ways to kill and that he wished that the Ogoni would come out of hiding so that he could practice his techniques".[158] Shell of course denies being associated with ISTF. Anita Roddick[159] is distraught over Shell's devastation of Ogoniland, where 500 000 people have been oppressed and money has been extracted from their natural resources without returning one, single penny.[160] When she walked through Ogoniland fires were raging unabated and villages were sunk in three inches of oil.[161] She observed how pipes would go marauding through the villages with children perched on them as if they were little ravens.[162] Her spirit is outraged that this is allowed simply because Shell is a big business.[163] Unfortunately, but as expected, Shell has still not cleaned up the environment or been held accountable for these grievous institutional sins.[164]

Trusted brand, Volkswagen (VW), was the centre of an environmental scandal in 2016 when the Environmental Protection Agency (EPA) found that some VW models were sold with a "defeat device".[165] Certain VW diesel models were being programmed to detect if it was being tested and if it was found to be tested the device was programmed to reduce nitrogen oxide emissions by up

---

[157] Lewis 'Blood and Oil: a special report after Nigeria represses, Shell defends its record' 13 February 1996, available at https://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html, accessed on 3 August 2019.
[158] *Ibid*.
[159] Founder of the Body Shop LLC.
[160]Duodu 'Adieu Dame Anita' 12 September 2007, available at https://www.theguardian.com/commentisfree/2007/sep/12/adieudameanita, accessed on 3 August 2019.
[161] *Ibid*.
[162] *Ibid*.
[163] *Ibid*.
[164] Human Rights Watch report 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' January 1999, available at https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf, accessed on 3 August 2019.
[165] Holmes 'VW fights to survive after emissions scandal, but it is business as usual in SA' 12 July 2016, available at https://mg.co.za/article/2016-07-11-vw-fights-to-survive-after-emissions-scandal-but-its-business-as-usual-in-sa, accessed on 7 April 2019.

to 40 times, resulting in a "clear test".[166] VW was at the time pushing diesel sales and had an aggressive marketing campaign that claimed low emission rates.[167] VW CEO, Martin Winterkorn, had known about the "cheat device" since 2014 and admitted guilt publicly in 2016. As many as 11 million cars were affected.[168]

A jury in California recently found that Monsanto (giant producer of pesticides and genetically modified crops that merged with German Pharmaceutical company Bayer in 2018) failed to warn consumers that its pesticide, Roundup, could cause cancer.[169] The plaintiff's attorney stated in court that "as demonstrated throughout the trial that since Roundup's inception over 40 years ago, Monsanto refuses to act responsibly".[170] He further submitted that "It is clear from Monsanto's actions that it does not care whether Roundup causes cancer, focusing instead on manipulating public opinion and undermining anyone that raises genuine and legitimate concern about Roundup".[171] Monsanto had influence with the Environmental Protection Agency (EPA), paid off scientists for favourable reports and influenced regulators' opinions on the safety of their products.[172] The judgment of the federal court was a clear victory against ruthless corporations and the legal team stated that "Today the jury resoundingly held Monsanto accountable for 40 years of corporate malfeasance and sent a message to Monsanto that it needs to change the way it does business".[173] Monsanto was also the producer of a growth hormone called rBST, which when injected into cows result in higher milk production at lower costs.[174] The hormone poses many health risks (including cancer) to both animals and humans and was banned in Europe and Canada.

---

[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid.*
[169] Unknown 'Scandals suggest standards have slipped in corporate America' 6 April 2019, available at https://www.economist.com/business/2019/04/06/scandals-suggest-standards-have-slipped-in-corporate-america, accessed on 6 April 2019.
[170] Levin 'Monsanto found liable for California man's cancer and ordered to pay $80 million in damages' 27 March 2019, available at https://www.theguardian.com/business/2019/mar/27/monsanto-trial-verdict-cancer-jury, accessed on 7 April 2019.
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] Escobar 'The tale of rBGH, Milk, Monsanto and the organic backlash' 25 May 2011, available at https://www.huffpost.com/entry/the-tale-of-rbgh-milk, accessed on 4 April 2019.

Monsanto went to great lengths to restrict dairy labelling, declaring the product rBST-free.[175] The US and Monsanto dominates genetically modified crops globally.[176] Monsanto has 80% of the market share in the US and the US is responsible for 40% of the genetically modified crops globally.[177] Statistics taken in 2013 show that worldwide 282 million acres are planted with Monsanto's genetically modified seeds, an irresponsible pesticide company that is responsible for millions of acres of food worldwide.[178]

Corporations have an inherent design flaw: continuously relying on and exploiting their environment.[96] One can only take so much from nature and its resources before it eventually has nothing left to give.[179] The unsustainable exploitation of the environment might be profitable immediately, however, every corporation, its CEO, shareholders, every person as well as future generations dependent on this planet will suffer long-term effects. The rate and scale at which corporations are exploiting and affecting the environment cannot be carried on indefinitely.[180] The price paid for such actions will greatly exceed their profit turnovers. It only takes a few corporations and their profit-only agendas for lasting effects on our planet and its people.

Bakan sums up the attitude of callous corporations when he says: "Cut. Cut the budget, cut the employee numbers, cut wages, cut spare parts, cut maintenance, cut supervision, we are a business, making money is the bottom line!"[181]

2.3 VARIOUS DEFINITIONS OF CORPORATE SOCIAL RESPONSIBILITY

Corporate Governance is by definition "simply the system by which companies are directed and controlled".[182] Besides legislation and the common law, directors' duties are also regulated by

---

[175] *Ibid.*
[176] Kaldveer 'U.S. and Mansanto Dominate Global Market for GM Seeds' 7 August 2013, available at https://www.organicconsumers.org/essays/us-and-monsanto-dominate-global-market-gm-seeds, accessed on 4 April 2019.
[177] *Ibid.*
[178] *Ibid.*
[179] Visser & Sunter *Beyond Reasonable Greed: Why sustainable Business is a Much Better Idea* (*2002*) 38.
[180] *Ibid.*
[181] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 83.
[182] Wixley & Everingham *Corporate Governance* (2005) 1.

global Codes of Best Practice.[183] The hypothesis of CSR emerged as a concept in the late 1960s as society's values underwent a metamorphosis.[184] Society believed that companies should not only focus its attention on its economic performance but also be actively involved in finding solutions to social problems.[185] The rise of CSR is related to the rise of globalisation and also correspond with the civil rights movement in western democracies as well as the anti-globalisation movement.[186] These movements demand better ethical behaviour from corporations, made even more powerful by the strong influence of social media in modern times.[187] CSR is being propelled forward by both regulatory and financial pressures on corporations.[188] Michelson, Waring and Naudè[189] mention that the upward movement of Socially Responsible Investments (SRI), shareholder activism and the United Nations' Global Compact and related Global Reporting Initiative (GRI) place financial pressure on corporations to take into account their social responsibilities. SRI, often referred to as "green" investing, sees corporations consider both the financial and environmental outcome.[190] The GRI was introduced in 1999 by the United Nations Secretary General, Kofi Annan to encourage companies to promote social and environmental goals and strive to be better corporate citizens.[191] Mervyn King SC, chair of the King Committee, stated in his foreword to King IV that global warming, financial uncertainties like Brexit, overpopulation, declining natural resources, social media, technology and the rise in social activism are all drivers for more morally conscious corporations.[192] He goes on to state that Millennials (born between

---

[183] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 318.
[184] Carroll 'Carroll's pyramid of CSR: taking another look' (2016) 1(3) *International Journal of Corporate Social Responsibility* 1.
[185] *Ibid* 2.
[186] Michelson, Waring, Naudè 'Dilemmas and challenges in corporate social responsibility' (2016) 41(3) *Journal of General Management* 3.
[187] *Ibid*.
[188] *Idem* 4.
[189] *Ibid*.
[190] *Idem* 5.
[191] Secretary General, Kofi Annan, press release 'Global Reporting Initiative Will Foster Corporate Transparency' United Nations official website 4 April 2002, available at https://www.un.org/press/en/2002/sgsm8186.doc.htm, accessed on 21 July 2019.
[192] King IV report on Corporate Governance for South Africa (2016).

1981 and 1996) are more concerned with the environment than the worldwide financial crisis and demand that corporations be good corporate citizens.[193]

Although there is no universal definition for CSR, its aim is to create a more ethical and morally responsible business community. CSR can be defined as a corporation's responsibility to respond to community sentiment.[194] CSR is also the legitimate concern for the overall well-being of society that prohibits corporations from destructive behaviour that causes harm to the community and environment, despite these activities being profitable to the company.[195] CSR implies that corporations' policies and decisions are in line with society's ethical values and moral beliefs and that decisions taken by corporations should not be prejudicial to society.[196] Companies that embrace the concept of CSR must take note of the effect that its decisions will have on the social well-being of society.[197] Matsaneng describes CSR as a concept that goes beyond profit maximisation, a concept which considers the effect decisions will have on all stakeholders.[198] There are many different definitions of CSR, with the most well-known international model, according to CSR expert, Visser, being the CSR pyramid by Carroll which has been widely used for decades.[199]

---

[193] *Ibid*.
[194] Carroll 'Carroll's pyramid of CSR: taking another look' (2016) 1(3) *International Journal of Corporate Social Responsibility* 2.
[195] *Ibid*.
[196] *Ibid*.
[197] *Ibid*.
[198] Matsaneng *The role and consequences of pure corporate control and corporate social responsibility in the Republic of South Africa and the Unites States of America* (2010) 168.
[199] Carroll 'Carroll's pyramid of CSR: taking another look' (2016) 1(3) *International Journal of* Corporate Social Responsibility 2. Carroll Model (1991) Figure, available at https://www.sketchbubble.com, accessed on 21 July 2019.

Stakeholders are *inter alia* defined by King IV as:[200]

"those groups or individuals that can reasonably be expected to be significantly affected by the organisation's business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organisations to create value over time. A person or group interested directly or indirectly in the outcome of a company's activities."

Stakeholders include both internal and external stakeholders.[201] On the one hand, internal stakeholders will *inter alia* include, but not be limited to, employees and individuals directly associated with the company.[202] On the other hand, external stakeholders are classified as consumers, government and the general society in which the organisation operates.[203] Crowther and Jatana state that it is not only the shareholders but also various stakeholders that have

[200] *King IV Report on Corporate Governance of South Africa* (2016) 18.
[201] Delport *Henochsberg on the Companies Act 71 of 2008* (2018) 52.
[202] *King IV Report on Corporate Governance of South Africa* (2016) 17.
[203] *Ibid.*

recognised interests in the success and activities of the company.[204] They argue that stakeholders' interests in company activities are so legitimate that it is tantamount to "quasi-ownership of the organisation".[205]

The CSR concept embodies *inter alia* the following values, which are fundamental to the doctrine:[206]

2.3.1 Sustainability

King IV defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their needs".[207] In addition to the rising threat of global warming, the earth cannot produce *ad infinitum* and therefore sustainability concisely requires that corporations use only what they need in order for resources like raw materials to be available for future generations.[208] Citizens (both corporate and natural) are depleting the earth's resources at an alarming rate and the Global Footprint Network estimates that it will take 1.75 planets to sustain the human population in future.[209] John McMurtry states that we have reached the "Cancer Stage of Capitalism" as we pillage the earth's natural resources beyond what the planet can regenerate.[210]

2.3.2 Accountability

The accountability concept implies that corporations must accept responsibility if their actions produce negative effects on the environment and society at large.[211] Briefly, it

---

[204] Crowther & Jatana Agency theory: a cause of failure in corporate governance (2005) 6.
[205] *Ibid*.
[206] *Idem* 4.
[207] *King IV Report on Corporate Governance of South Africa* (2016) 17.
[208] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 4.
[209] Asmalash & Ries 'As of today, Humans have used more resources than Planet Earth can regenerate in a year' 29 July 2019, available at https://edition.cnn.com/2019/07/29/us/earth-overshoot-day-trnd/index.html, accessed on 30 July 2019.
[210] Sjåfjell and Richardson *Company Law and Sustainability-Legal Barriers and Opportunities* (2015) 6.
[211] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 5.

requires corporations to accept responsibility concerning all stakeholders and not just their official shareholders.[212] King IV also states that even if responsibilities were delegated, the governing body members must still be held accountable.[213]

2.3.3 Transparency

This concept requires that corporations be transparent about the negative effects their actions cause.[214] This can be achieved through non-financial reporting.[215] King IV states that "members of the governance body should be transparent in the manner in which they exercise their governance roles and responsibilities".[216]

2.3.4 Ethical leadership

King IV also refers to "ethics" as one of the principles of corporate governance and states that the Board should lead ethically and effectively.[217] Ethical leadership *inter alia* refers to honesty, trust and integrity.[218] There is a correlation between ethical leadership and a company's reputation which can give a company a competitive edge over its competitors.[219]

Kloppers states that any endeavour to try and delineate the concept of CSR can be described as "terminology in turmoil".[220] The fact that there is no universally accepted definition for CSR is one of the many criticisms of the concept that will be discussed below.

---

[212] *Ibid*.
[213] *King IV Report on Corporate Governance of South Africa* (2016) 44.
[214] *Idem* 4.
[215] *Ibid*.
[216] *King IV Report on Corporate Governance of South Africa* (2016) 44.
[217] Delport *Henochsberg on the Companies Act 71 of 2008* (2018) 54.
[218] Ackers 'Ethical considerations of corporate social responsibility-A South African perspective' 46(1) *S.Afr.J.Bus.Manage* (2015) 14.
[219] *Ibid* 13.
[220] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 713.

2.4 ARGUMENTS IN FAVOUR OF CSR

Most arguments against CSR are that it involves substantial costs for corporations to be socially responsible and that the concept should be discarded.[221] There is, however, no evidence that enterprises that behave socially responsible are less successful in terms of profit turnover and shareholder wealth than companies that do not act socially responsible.[222] There is however, evidence that shows that profit turnovers of CSR corporations achieve higher percentages compared to corporations that do not practice CSR.[223] Scholars have done numerous studies from the 1970s to determine if CSR is profitable.[224] Eccles, Ioannou and Serafeim extensively investigated 90 companies (coined the "high sustainability group") that embraced CSR from the 1990s and found that they notably outperformed the "low sustainability" companies over a period of eighteen years.[225]

The biggest advantage to CSR is that it makes business sense for corporations to embrace the concept of CSR. There are many advantages connected to an exceptional reputation which includes charging premium prices for products, beneficial arrangements with financial institutions and attracting top graduates as potential employees.[226] The general assumption is that your reputation is part and parcel of your trademark and that in future, competition in international markets will be between company reputations.[227] The Opinion Research Corporation (ORC) proved that a good reputation leads to a higher number of investors.[228] Potential investors do not view a company's financial performance in isolation and Merwyn King SC states that Millennials are more attracted to investing in corporations that embrace the concept of six capitals into their business.[229] The International Integrated Reporting Council sets out the six capitals which include financial,

---

[221] *Ibid* 9.
[222] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 15.
[223] *Ibid*.
[224]Sjåfjell and Richardson *Company Law and Sustainability-Legal Barriers and Opportunities* (2015) 69.
[225] *Ibid* 70.
[226] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 24.
[227] *Ibid*.
[228] *Idem* 25.
[229] Foreword to King IV report on Corporate Governance for South Africa (2016).

manufactured, human, intellectual, natural and social and relationship capital.[230] It naturally follows that a company will benefit from a CSR strategy.

Consumers play a huge role in determining the success of a company and they have become increasingly aware of environmental damage and ethical concerns within corporations. It is imperative that companies establish and maintain a solid CSR reputation.[231] There is a mutually beneficial relationship between corporations and consumers. On the one hand society benefits in the sense that companies engage in activities that assist with social problems. On the other hand there is a clear commercial gain for companies as this strategy offers them the opportunity to increase their profit simultaneously.[232] Kloppers states that the business case for CSR is simply found in the positive effect that a good reputation will have on the company's bottom line.[233] He further states that scholars in CSR are *ad idem* that the market will compensate companies that act socially responsible.[234] Companies do not operate in isolation but within the same environment and community as their customers. It is only a logical conclusion that if the environment in which they operate deteriorates, that deterioration will spill over to the company's financial performance.[235] Kloppers also states that employee retention, cost savings, revenue increase and business-legitimacy in society are other important advantages of CSR.[236]

Many global companies engage in CSR simply because it makes business sense to do so, and perhaps companies are starting to move beyond "capitalism without a conscience".[237]

---

[230] *Ibid*.
[231] Crowther & Jatana *Agency theory: a cause of failure in corporate governance* (2005) 36.
[232] *Ibid* 37.
[233] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 714.
[234] *Ibid* 6.
[235] *Ibid*.
[236] *Idem* 7.
[237] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 32.

2.5 ARGUMENTS AGAINST CSR

As there are so many different definitions and interpretations of CSR, it is often criticised for being an incoherent concept that lacks clarity.[238] Capitalists criticise the validity of the notion of CSR and argue that the main objective (as per the *Dodge* matter discussed in Chapter 3) of a company is to make profits for its shareholders and that any deviation from this objective is the equivalent of socialism.[239] They argue that companies that engage in CSR divert funds that ultimately belong to the shareholders in favour of the undue enrichment of others.[240] The familiar tale of Robin Hood, the unorthodox hero who steals money from the rich and gives to the poor, comes to mind. Capitalists perceive donating money to charity, spending on the environment and other social causes, as effectively stealing money from the shareholders, despite *bona fide* intentions.[241] The argument against the Robin Hood analogy is similar in nature to what has been discussed above, concerning the relationship between a good CSR reputation and business success.[242]

CSR is furthermore criticised for being merely "corporate greenwash", a clever marketing strategy that attempts to hoodwink the public.[243] The term "corporate greenwash" refers to companies that create the false impression of engaging in CSR activities, while it is in reality, merely a deceitful corporate move to gain a better reputation.[244] Milton Friedman remarked that advertisements that create the impression that oil companies protect the environment (for instance, BP's "Beyond Petroleum" campaign) make his stomach turn.[245] But if they did not participate in such marketing it would jeopardise their competitiveness in the market.[246]

---

[238] Michelson, Waring, Naudè 'Dilemmas and challenges in corporate social responsibility' (2016) 41(3) *Journal of General Management* 3.
[239] *Ibid*.
[240] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 718.
[241] *Ibid*.
[242] *Ibid*.
[243] *Ibid*.
[244] Michelson, Waring, Naudè 'Dilemmas and challenges in corporate social responsibility' (2016) 41(3) Journal of General Management 3.
[245] Mares *The Dynamics of Corporate Social Responsibility* (2008) 79.
[246] *Ibid*.

The voluntary nature of CSR is another criticism of the concept.[247] CSR is by definition a system that begins where the law ends.[248] However, can we trust that corporations will regulate themselves?[249] Communities require legislative rules and subsequent enforcement to co-exist peacefully. The same holds true for the corporate world. The law is ultimately able to reach where self-regulation is unable to. CSR also creates an unnecessary conflict of interest for directors and managers of companies as they are faced with conflicting goals of profit maximisation at the one end of the spectrum and social goals at the other end.[250] Also, as the definition of stakeholders encompasses a wide range of interests, it is nearly impossible for directors to act in everyone's best interest.[251] It is furthermore argued that company executives lack the necessary skills and are ill-equipped to deal with social woes.[252]

2.6 CONCLUSION

Despite the ambitious and commendable ideologies contained in the concept of CSR, it remains largely voluntary in nature. Sjåfjell and Richardson state that words like "fiduciary duty" and "shareholder supremacy" restrict corporations from acting socially responsible and are enormous barriers to environmental sustainability, as will be discussed at length in chapter 3.[253] They argue that global environmental protection laws are inadequate to address the tremendous challenges faced by global warming and that corporations are major role players in the cause, but could also be the potential solution.[254] Chapter 3 analyses the legal framework of CSR in South Africa. It will determine to what extent South African company law allows corporations to participate in CSR activities and if there is adequate enforcement and regulation thereof.

---

[247] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 717.
[248] *Ibid*.
[249] *Ibid*.
[250] Michelson, Waring, Naudè 'Dilemmas and challenges in corporate social responsibility' (2016) 41(3) *Journal of General Management* 9.
[251] Ally *Corporate Social Responsibility: Practices, Trends and Developments* (LLM thesis, University of Cape Town, 2013) 29.
[252] Johannes *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016) 26.
[253] Sjåfjell and Richardson Company Law and Sustainability-Legal Barriers and Opportunities (2015) xiii.
[254] *Ibid* 77.

CHAPTER 3 - THE LEGAL FRAMEWORK OF CORPORATE SOCIAL RESPONSIBILITY IN SOUTH AFRICA

3.1 INTRODUCTION

South Africa's painful history of institutionalised segregation makes corporations' moral obligation to give back to an impoverished society unique.[255] Franca states that corporations benefited from apartheid-induced "racial capitalism" for decades.[256] Franca explains that the primary objective of companies were to increase profits for the benefit of the shareholders, which were primarily white elitists.[257] Government alone cannot address the social and economic injustices of the past and corporations are able to make a valuable contribution to address some of South Africa's socio-economic problems.[258] Yet, the only legal mandate of companies is to increase its bottom line.[259] The current legal model does not allow a deviation from the profit objective, unless it is ultimately in the benefit of the shareholders.[260] South African company law as it currently stands, does not allow corporations to effectively address the grave social and economic injustices of the past.

3.2 THE HISTORY AND EVOLUTION OF THE COMPANIES ACT

The Department of Trade and Industry (DTI) was tasked with reforming corporate law in 2004.[261] The resulting policy document which sets out the reform guidelines states that there is a need for a better relationship between companies and the communities in which they operate.[262] The policy document states that every corporate law review process begins with the foundational question "in

---

[255] Franca 'A legal analysis of corporate social responsibility: A comparative approach' (2006) 12 *SAPR/PL* 297.
[256] *Ibid*.
[257] *Ibid*.
[258] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 712.
[259] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[260] Franca 'A legal analysis of corporate social responsibility: A comparative approach' (2006) 12 *SAPR/PL* 297.
[261] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 14.
[262] *Ibid*.

whose interest should the corporation be run".[263] South Africa follows the Neo-American model of capitalism which is an ideology that promotes the viewpoint that shareholders are essentially the "owners"' of the company (even though a share is in reality nothing more than a bundle of personal rights with merely a *spes* of dividends) and as such the company should be run for their benefit.[264] Berle and Dodd, scholars at prestigious Ivy league universities, engaged in a well-known debate in 1932.[265] While Berle submitted that corporate management must act in the interest of the shareholders, Dodd counter-argued that corporations have both an economic and social purpose.[266] This historic scholarly debate has still not been settled, and continues to be fiercely debated.[267]

After corporate governance became prevalent in the 1990s, the debate on the interpretation of the "interest of the company" and whether the interpretation should include other groups besides shareholders, was reignited.[268] There are essentially two schools of thought. One is the "enlightened shareholder value approach" and the other the "pluralist approach". The enlightened shareholder value approach allows directors to take stakeholders' interests into account only if it will ultimately benefit the shareholders, be it now or in the future.[269] The pluralist approach, however, allows directors to take stakeholders' interests into account as an end in itself without profit-maximisation as the end-goal.[270] The DTI policy paper on the reform of corporate law states that traditional company law prior to 1994 was strictly shareholder-centric where the interests of shareholders take preference above the interest of stakeholders, unless acting in the interest of

---

[263] *Idem* 20.
[264] Vettori 'Corporate Social Responsibility' (2005) 339, available at, https://repository.up.ac.za/bitstream/handle/2263/29308/09chapter9.pdf?sequence=10&isAllowed=y.
[265] Sommer Jr 'Whom Should the Corporation Serve? The Berlde-Dodd debate revisited sixty years later' (1991) 16 *Delaware Journal of Corporate Law* 37.
[266] *Ibid*.
[267] *Idem* 38.
[268] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 22.
[269] Esser & Dekker 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) 3(3) *Journal of International Commercial Law and Technology* 159.
[270]Vettori 'Corporate Social Responsibility' (2005) 369, available at, https://repository.up.ac.za/bitstream/handle/2263/29308/09chapter9.pdf?sequence=10&isAllowed=y.

stakeholders have a direct profit benefit for the shareholders.[271] The policy document further states that corporate law has to be reformed to also consider the best interest of stakeholders.[272] The policy document suggested the following approach:

> "a company should have as its objective the conduct of the business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies."[273]

The policy document proposed that the enlightened shareholder value approach be adopted with the inclusion of stakeholders in the codification of directors' duties.[274] It was proposed that this could be achieved by both legislation and voluntary means.[275] The policy paper further proposes that stakeholder and shareholders' interests should be balanced.[276] Rehana and Maleka Cassim is of the opinion that the policy paper goes beyond the enlightened shareholder value approach and that it lies somewhere in the middle of the enlightened shareholder value and pluralist models.[277] Delport, however, disagrees and states that the policy paper prefers the enlightened shareholder value approach.[278] It is, however, clear that the company law reform commission took note of stakeholders' interests and emphasised the need to reform our current model in line with international trends.[279] The policy papers also dealt with how the interests of stakeholders can be protected and proposed that stakeholders' interests be dealt with by other legislation than the Companies Act.[280] This solution would avoid excessive litigation and prevent loopholes for businesses that are not incorporated, such as partnerships.[281]

---

[271] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 25.
[272] *Ibid* 26.
[273] *Ibid*.
[274] *Idem* 27.
[275] *Idem* 28.
[276] Cassim & Cassim 'The Reform of Corporate Law in South Africa' (2005) *International Company and Commercial LR* 411.
[277] *Ibid*.
[278] Delport *Henochsberg on the Companies Act 71 of 2008* (2018) 52.
[279] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 2.
[280] Cassim & Cassim 'The Reform of Corporate Law in South Africa' (2005) *International Company and Commercial LR* 411.
[281] *Ibid*.

3.3 THE DUTY TO ACT IN THE BEST INTEREST OF THE COMPANY

Directors' duties were not partially codified in the Companies Act 61 of 1973 and reliance was placed on the common law. The lack of a statutory system created uncertainty about the nature and extent of directors' fiduciary duties and the policy document highlighted this as an area that needed to be addressed in the reform process.[282] Directors' fiduciary duties are mainly acquired from English law.[283] In common law there is a duty on directors to run the business in the best interest of the company.[284] However, to say that one has to benefit the company as an end in itself is futile, as an empty shell is incapable of experiencing welfare.[285] It cannot be said that a lifeless entity has an interest. This only makes sense when one measures these interests against the interests of human beings.[286] The company is used as a conduit to benefit the interest of certain groups. This is what is historically referred to as the duty towards shareholders, both present and future.[287] The legal position was explained in the 1883 oft-quoted English case of *Hutton v West Cork Railway* where it was stated that:

> "A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? A company, which always treated its employees with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted.[288] The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company…charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose."[289]

---

[282] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 18.
[283] Cassim et al *Contemporary Company Law* 7 ed (2011) 509.
[284] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 321.
[285] Wixley & Everingham *Corporate Governance* (2005) 77.
[286] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[287] Greenhalgh v Ardene Ltd (1950) 2 ALL ER 1120.
[288] Hutton v West Cork Railway (1883) 23 Ch 654, CA at 671.
[289] *Ibid*.

After the Hutton judgment, courts continued to understand the meaning of "in the interest of the company" as the welfare of the shareholders.[290] The shareholder-centric model as set out in the Hutton case was similarly accepted in South Africa in 1903.[291] The legal model does allow corporate social responsibility to some extent, as long as it is, as J.E. Parkinson calls it, enlightened self-interest.[292] Bakan uses an analogy in his book that illustrates how corporations can only undertake to be socially responsible when it is in the best interest of their shareholders.[293] The pharmaceutical giant, Pfizer, installed security systems in surrounding subway stations to help eradicate crime in the area. The company also erected yellow call boxes in the stations where you could call a Pfizer security guard at the nearby factory for assistance.[294] Bakan recounts that "One day someone pushed the button on the yellow call box and said: 'Hello, hello', but nobody answered".[295] This, according to Bakan, is the same with CSR.[296] Bakan uses the analogy to demonstrate that corporations will only be socially responsible when acting selfishly in their own interest.[297] Just like the yellow call boxes you can never fully rely on CSR because as soon as it is no longer profitable for a corporation to pursue a social undertaking you may call for help but you will get no answer.[298] By pursuing their own interest, they are making a profit for their shareholders, the only model currently allowed by law. CSR can be described as window dressing. Take for example BP's slogan, "Beyond Petroleum". With their new campaign, they are making the public aware that it is not just about profits but that they value the environment in addition to providing petroleum. Their campaign is a strategy to simultaneously express care about the environment and attract environmentally conscious customers to increase the bottom line. However, BP cannot undertake a social venture that does not generate a profit for the shareholders.[299] That is, according to Bakan, why Doctors without Borders decided to decline

---

[290] DTI policy document *South Africa company law for the 21st century, Guidelines for Corporate Law Reform* (May 2004) 21.
[291] *Ibid*.
[292] *Ibid*.
[293] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 29.
[294] *Ibid*.
[295] *Idem* 50.
[296] *Ibid*.
[297] *Ibid*.
[298] *Ibid*.
[299] Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 41.

Pfizer's offer of free Aids drugs to help with treatment in Africa and decided on a generic drug instead.[300] When it is no longer profitable for the shareholders, those handouts will disappear and the people who became reliant on it will be left to their own devices.

The 1919 Supreme Court of Michigan case of *Dodge et al v Ford Motor Company et al*[301] illustrates the shareholder primacy principle. Henry Ford paid his workers higher wages than the going rate at the time and he also gave his clients discount on the Model T cars. The Dodge brothers, two major shareholders, instituted action against the Ford Company submitting that the profits should be paid out as a dividend and that if Henry Ford wanted to pursue his social conscience, he can do so with his own money. The court agreed with the Dodge brothers and held that "a business corporation is organized and carried on primarily for the profit of the stockholders".[302] In the English case of *Greenhalgh v Ardene Cinemas Ltd and Others*[303] it was held that the meaning of "company as a whole does not mean the company as a commercial entity as distinct from its corporators. It refers to the corporators as the general body". In the matter of *South African Fabrics v Millman* it was held that interest of a company refers to the interests of the members thereof.[304] In the matter of *Parke v Daily News Ltd*[305] the company was about to be wound up and the directors paid surplus profits to employees of the company as a part of their pension benefits. They payments were made purely in the interests of the employees. The shareholders submitted that the directors' decision to allot the surplus funds to the employees' pension fund benefits was a breach of their fiduciary duties. The court held that the payments to the employees were not ultimately in the interests of the shareholders, and that the directors were in breach of their fiduciary duties. Cassim states that the inference drawn from the common law

[300] *Ibid* 48.
[301] Dodge v Ford Motor Co 170.NW. 668 (Michigan 1919).
[302] *Ibid*.
[303] (1950) 2 ALL ER 1120.
[304] Gwanyanya 'The South African *Companies Act* and the Realisation of Corporate Human Rights Responsibilities' (2015) 18(1) *PER/PERLJ* 3109.
[305] (1962) 2 ALL ER 929 (Chd).

principle is that directors' fiduciary duties are owed to the "company as a whole", and not to separate shareholders or stakeholders.[306]

This common law duty was partially codified in the Companies Act, 2008 together with other directors' duties of *inter alia*, acting in good faith and for the proper purpose.[307] Section 76(3)(b) of the Act states that a director of a company, when acting in that capacity, must exercise and perform the functions of a director in the best interest of the company. As directors' duties were only partially codified, the common law will still remain applicable for interpretation purposes and to supplement the Act where necessary.[308] The word "company" is unfortunately not defined in the Act and the common law meaning refers to the collective body of shareholders.[309] Directors cannot legally take the interest of any other stakeholders (environment, employees and anybody directly or indirectly impacted by the company's decisions) into account unless it is in the interest of the shareholders.[310] The Companies Act, 2008 does not expressly refer to CSR except for an indirect reference to CSR in section 72(4)(a).[311] As stakeholders are not included (as originally proposed in the law reform policy document) under directors' duties, as partially codified, there is no legal obligation or mandate on South African companies to act socially responsible when making business decisions.[312] As there is no mention of stakeholders in section 76(3)(b) the meaning of "company" must be interpreted in accordance with common law. The common law is, however, insufficient for this as the meaning of "company" is traditionally interpreted to mean the collective body of shareholders.[313] The common law meaning of "company" is too narrowly interpreted and effectively excuses directors from taking stakeholders interests into account unless there is a direct or indirect benefit for the "owners" of the company.[314] Cassim states that the Act

---

[306] Cassim et al *Contemporary Company Law* 7 ed (2011) 517.
[307]Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 8.
[308] *Ibid.*
[309] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[310] Cassim et al *The Law of Business Structures* (2012) 290.
[311] Botha 'Responsibilities of Companies towards employees' 2015 18(2) *PER* 47.
[312] Johannes *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016) 46.
[313] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[314] Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis,

places no mandatory or legal duty on directors to consider stakeholders' interests as the common law is still used to interpret the meaning of "company".[315] Franca states that without amending directors' fiduciary duties, the recommendations on stakeholders' interests as set out in the company law reform policy paper remains no more than an ideal.[316] Du Plessis and Esser further state that the only way of solving the problem is for the legislature to change the status quo.[317]

Having said that, section 7 clearly sets out the purposes of the new Act and *inter alia* states at section 7(d) that one of the purposes of the act is to "reaffirm the concept of the company as a means of achieving economic and social benefits". Section 7(b)(iii) further states that one of the purposes of the Act is to "encourage transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation." At first glance section 76(3)(b) together with the common law interpretation of "company" and section 7(d) seem to be polar opposites.[318] The former being more aligned with the enlightened shareholder value approach and the latter with the pluralist approach.[319] Section 5 of the Act is the general interpretation clause of the Act and states that "this Act must be interpreted and applied in a manner that gives effect to the purpose set out in section 7".[320] If the purpose of the Act has to be considered when interpreting the word "company" then it must necessarily mean that a company does not only have a wealth maximisation purpose but also a social purpose.[321] As such it can be deduced from the interpretation clause that the directors must also take the interests of stakeholders (the social purpose) into account when making decisions.[322] Nomadwayi states

---

University of Kwazulu-Natal, 2018) 12.

[315] Cassim et al *Contemporary Company Law* 7 ed (2011) 520.

[316] Franca 'A legal analysis of corporate social responsibility: A comparative approach' (2006) 12 *SAPR/PL* 297.

[317] Esser and du Plessis 'The Stakeholder Debate and Directors' Fiduciary Duties' (2007) 19 *SA Merc LJ* 360.

[318] Esser and Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 108.

[319] *Ibid*.

[320] *Ibid*.

[321] *Ibid*.

[322] Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 15.

that due to section 7 the narrow meaning of "company" is no longer applicable.[323] Esser, however, points out that it is uncertain whether section 7(d) creates a separate and distinct duty for directors.[324] Esser submits that it is rather something that directors should take cognisance of when making decisions.[325] Delport argues that if it was the legislator's intention to create a new, *sui generis*, duty on directors it would have expressly done so.[326] Esser further submits that even though section 7 does not create any rights for stakeholders they can still rely on section 218(2) of the Act which makes provision for third parties to institute a civil action and hold any person liable for any loss or damage suffered by that person as a result of that contravention.[327] According to Esser it will be difficult for the third party to discharge the onus of proof that the director, by not acting in the third party's best interest, also did not act in the best interest of the company.[328] Delport and Esser, however, point out further inconsistencies in the Act that is not aligned with the protection of stakeholders.[329] They mention that section 1 of the Act describes a profit company as a company incorporated for financial gain for its shareholders.[330] They further state that section 81(1)(d)(i)(bb) makes provision for the winding-up of a solvent company when "the company's business cannot be conducted to the advantage of shareholders generally…"[331] The aforesaid sections are more focused on shareholder primacy than stakeholder protection and not aligned with the dual purpose (economic and social) as set out in section 7 of the Act.[332] If it was indeed the intention of the legislature to include stakeholders' interests, it has done so in a confusing manner and directors will most probably still incorrectly interpret the meaning of "in the interest of the company" to mean the interest of shareholders.[333] The legislature had a golden opportunity with the 2008-Act to clarify the meaning of "company" and it is unfortunate that this was not done.[334]

---

[323] *Ibid* 16.
[324] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 324.
[325] *Ibid*.
[326] Delport *Henochsberg on the Companies Act 71 of 2008* (2018) 52.
[327] *Idem* 325.
[328] *Ibid*.
[329] Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 108.
[330] *Ibid*.
[331] *Ibid*.
[332] *Ibid*.
[333] *Ibid*.
[334]Gwanyanya 'The South African *Companies Act* and the Realisation of Corporate Human Rights

3.4 KING REPORTS ON CORPORATE GOVERNANCE

Corporate Governance refers to "the system by which companies are directed and controlled."[335] Corporate Governance encompasses both voluntary codes on good corporate governances as well as the common law and legislation.[336] The governance of corporations can be on a statutory or voluntary basis or a combination of the two. The statutory basis has legal sanctions for non-compliance ("comply or else") whereas the voluntary governance has a "comply or explain" basis.[337] In 1992 the Institute of Directors in South Africa formed the King Committee and published the King Report on Corporate Governance in 1994 which applied to listed companies, state-owned companies and banks.[338] The King Report contained a set of voluntary principles and guidelines for good governance.[339] After the collapse of corporate giant, Enron and other corporate scandals, compliance measures were put in place by America by codifying their corporate governance principles in the Sarbanes-Oxley Act (SOX) of 2002.[340] It is interesting to note that despite the codified governance principles in America's SOX's Act, it still did not prevent the 2008 financial crisis.[341] LeisureNet (Health and Racquet Club) was a South African public listed company that held over eighty-five Health and Racquet Clubs across the country and whose financial statements for 1999 was a gross misrepresentation of its actual financial position.[342] The collapse of LeisureNet is described by our courts as the biggest corporate collapse in our history (Steinhoff International has in recent times dethroned LeisureNet of the infamous title).[343] The LeisureNet collapse brought corporate governance into a renewed focus and the King Committee released the King II report in 2002.[344] King II encouraged a triple context (environment, social and

---

Responsibilities' (2015) 18(1) *PER/PERLJ* 3109.

[335] Cassim et al *Contemporary Company Law* 7 ed (2011) 473.

[336] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 449.

[337] *Ibid*.

[338] Cassim et al *Contemporary Company Law* 7 ed (2011) 473.

[339] *Ibid*.

[340] *Idem* 474.

[341] King III report on Corporate Governance for South Africa (2009) 9.

[342] Unreported judgment of Nel J in the *Ex parte* application of Robert John Walters N.O. and Gavin Cecil Gainsford N.O. under case number 843/02 in the Cape of Good Hope Provincial Division of the High Court dated 3 May 2002 at page 2 thereof.

[343]Lourens and Reddy 'Company Law: The importance of King IV's principles on Corporate Governance' 22 May 2018, available at https://www.straussdaily.co.za/2018, accessed on 7 September 2019.

[344] *Ibid*.

economic) and advised against the single bottom line (profit only) approach when running a company.[345]

Luiz and Taljaard submit that the 2008 global financial crisis once more placed good corporate governance in the spotlight and the King III report came into effect in March 2010.[346] A third King report also proved necessary after the enactment of the Companies Act, 2008[347] and the constant change in governance regulation.[348] The King report is applicable to all business forms whether incorporated, listed or not. King III operates on an "apply or explain" basis as opposed to the "comply or explain" approach followed in King II.[349] Stoop states that King III is a "stakeholder inclusive model" and that while the directors must act in the best interest of the company it must do so within the realms of being a good corporate citizen.[350]

The foreword to the King IV report on good corporate governance states that Milton Friedman's oft-quoted remark that "the social responsibility of business is to increase profits" should be interpreted against the background that corporations form part of society as a whole.[351] It cannot be interpreted in the narrow sense of the word that it only operates for the benefit of the shareholders.[352] Mervyn King states that the drafting of the King IV report was necessitated by the ever-evolving change in business and society in the twenty first century but that the philosophical foundation of King III was retained.[353] King IV was released on 1 November 2016 and replaced King III in its entirety.[354] King IV is also based on a "stakeholder inclusive model" like its

---

[345] Luiz and Taljaard 'Mass resignation of the Board and Social Responsibility of the Company: Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd' (2009) (21) *SA Merc LJ* 424.
[346] *Ibid*.
[347] 71 of 2008.
[348] King report on Governance for South Africa (2009).
[349] Cassim et al *Contemporary Company Law* 7 ed (2011) 475.
[350] Stoop 'Towards Greener Companies-Sustainability and the Social and Ethics Committee' (2013) 3 *STELL LR* 566.
[351] King IV report on Corporate Governance for South Africa (2016) 4.
[352] *Ibid*.
[353] *Idem* 2.
[354] Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 106.

predecessor and came into effect from 1 April 2017.[355] King IV substantially reduced the principles contained in King III from seventy five principles to sixteen principles.[356] Principle 16 of King IV states that "in the execution of its governance role and responsibilities, the governance body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time".[357] While King III made provision for an "apply or explain" basis, King IV applies to all types of entities and provides for an "apply and explain" basis.[358] The King reports is a voluntary code on good corporate governance, however, the Johannesburg Stock Exchange (JSE) makes the King IV report principles mandatory for all listed companies as per its listing requirements.[359] Failure to comply can lead to a suspension of the listing.[360] While this is a good enforcement measure it only applies to large public companies listed on the JSE and not all corporations.

Our courts have recently given the King reports and codes on corporate governance legal legitimacy. In the matter of *Stilfontein Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[361] the Court had to determine if the five directors of the first Respondent were in contempt of court. The Applicant, Stilfontein Minister of Water Affairs, brought an application for contempt of court against the first Respondent, Stilfontein Gold Mining Co Ltd and its five directors. The first Respondent was unrepresented as its five directors resigned simultaneously, prior to the application being issued. The Applicant issued certain directives in terms of the National Water Act of 36 of 1998. The directives were aimed at preventing water pollution in the KOSH (Klerksdorp, Orkney, Stilfontein and Hartbeesfontein) area where the first Respondent conducted its mining activities. Despite a previous court order making the directives an order of court, the first to fifth Respondents still failed to comply with same which resulted in the current

[355] *Ibid*.
[356] Lourens and Reddy 'Company Law: The importance of King IV's principles on Corporate Governance' 22 May 2018, available at https://www.straussdaily.co.za/2018, accessed on 7 September 2019.
[357] *Ibid*.
[358] King IV report on Corporate Governance for South Africa (2016) 7.
[359]Available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf*, accessed on 16 June 2019.
[360] *Ibid*.
[361] 2006(5) SA 333 (W).

contempt application before Hussain J. The Court seems to effectively address two pertinent issues pertaining to the conduct of the second to fifth Respondents.[362] Firstly, their simultaneous resignation and abandonment of the company and secondly the issue of CSR and the fact that directors must act socially responsible.[363] Hussain J held that the directors failed to act in the best interest of the company by abandoning the company after they resigned simultaneously.[364] The directors left the company without a captain at the helm and Hussain J states that:[365]

> "Practising sound corporate governance is essential for the well-being of a company and is in the best interest of the growth of a country's economy especially in attracting new investments. To this end, the corporate community within South Africa has widely, and almost uniformly, accepted the findings and recommendations of the King Committee on Corporate Governance…"

Hussain J held that the directors' conduct "flies in the face of everything recommended in the code of corporate practices and conduct recommended by the King Committee and that they should be held responsible for abandoning the company".[366] They are held liable for breaching their fiduciary duty of not acting in the best interest of the company by their simultaneous resignation.[367] Hussain J then seems to address the second issue without linking same to the first issue of resignation.[368] He states that "the King Committee, correctly, in my view, stressed that one of the characteristics of good corporate governance is social responsibility".[369] He proceeds to remark that the King Committee states in King II that:[370]

> "A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative,

---

[362] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 449.
[363] *Ibid*.
[364] *Idem* 451.
[365] 2006 (5) SA 333 (W) at 351.
[366] *Ibid*.
[367] Luiz and Taljaard 'Mass resignation of the Board and Social Responsibility of the Company: Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd' (2009) (21) *SA Merc LJ 423.*
[368] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 451.
[369] 2006 (5) SA 333 (W) at 352.
[370] *Ibid*.

> and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits, such as improved productivity and corporate reputation, by taking those factors into consideration."

Hussain J then seems to hold the five directors liable for the second CSR issue without expressly stating so. He states that:[371]

> "The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation. For this *reason too* (author's emphasis), the second to fifth respondents cannot be permitted to merely walk away from the company, conveniently turning their backs on their duties and obligations as directors. I am persuaded that the second to fifth respondents, *notwithstanding their sudden resignation* (author's emphasis), must be held responsible for the first respondent's failure to comply with an order of court."

Delport and Esser remark that the *Stilfontein* judgment may have profound and overarching implications for directors of all corporations to which King III applies.[372] Esser states that if the directors did not resign simultaneously but only failed to comply with the environmental directives, the Court would still have hold them liable based on the second issue of CSR.[373] This is evident from Hussain J's use of the words "for this reason too" and "notwithstanding their sudden resignation". Hussain J thus used the King report to determine the extent of directors' fiduciary duties and duties of care and skill and whether they were in breach thereof.[374] Luiz and Taljaard submit that although the King reports are not legally binding *per se*, non-compliance may

---

[371] *Ibid*.
[372] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 450.
[373] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 329.
[374] *Ibid*.

be construed by our courts as a failure to act in the best interest of the company.[375] Esser and Delport agree that the failure by directors to adhere to the principles in King will possibly result in a Court making an adverse finding against directors based on a breach of their duty of care and skill.[376] Third parties can hold the director liable through section 218(2) of the Act which makes provision for third parties to institute a civil action and hold any person liable for any loss or damage suffered by that person as a result of that contravention.[377] A director may also be held liable for a breach of his fiduciary duties in terms of section 77 of the Act.[378] Other judgments have also referred to the King reports. In the full bench appeal matter of the *South African Broadcasting Corporation Ltd v Mpofu and another*[379] which involved an impugned board resolution by the SABC, Victor J expressly referred to King III by stating that:[380]

> "…Companies and their Boards are required to measure up to the principles set out in the Code. King recommends that public enterprise should try and apply the appropriate principles set out in the Code. The Code sets out principles and does not determine detailed conduct. The conduct of public enterprises must be measured against the relevant principles of the Code and must adhere to best practices. The Code regulates directors and their conduct not only with a view of complying with the minimum statutory standard but also to seek to adhere to the best available practice that may be relevant to the company in its particular circumstances."

In the Supreme Court of Appeal matter of *De Villiers v Boe Bank Ltd*[381], Navsa JA also refers to the principles of good corporate governance.[382] The *Stilfontein* judgment sets a precedent for a third party to hold a director of a company liable for breach of fiduciary duties or duties of care and skill for not complying with King IV.[383] *Stilfontein* was based on King II, which at the time

---

[375] Luiz and Taljaard 'Mass resignation of the Board and Social Responsibility of the Company: Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd' (2009) (21) *SA Merc LJ 425*.
[376] Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 106.
[377] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 454.
[378] *Ibid*.
[379] 2009 (4) ALL SA 169 (GSJ).
[380] *Ibid* 176.
[381] 2004 (2) ALL SA 457 (SCA).
[382] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 330.
[383] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act'

was only applicable to listed companies whereas King IV is applicable to all entities.[384] The net is thus cast wider than before and the *Stilfontein* judgment has given the King IV report and codes on corporate governance legal clout despite its voluntary nature. It will be interesting to see how the common law on this aspect develops in future and if the *Stilfontein* judgment will be overturned by the Supreme Court of Appeal.

3.5 THE SOCIAL AND ETHICS COMMITTEE

The legislature has, through the introduction of the Social and Ethics Committee (SEC), taken cognisance of CSR without expressly referring to the term.[385] It can be seen as a legitimate attempt by the Government to force corporations to be good corporate citizens.[386] Section 72(4) of the Companies Act, 2008 makes provision for the Minister, by regulation, to prescribe that certain categories of companies must have a SEC if it is in the public interest.[387] The categories of companies are dependent on the annual turnover, workforce size or the nature and extent of the activities of such companies.[388] The Minister may by regulation prescribe the duties and rules of the SEC.[389] Companies that fall within the categories requiring a SEC may apply to the Tribunal for exemption if the company has another mechanism (for instance if the holding company has a SEC then it is not necessary for the subsidiary to also have a SEC) that performs the same functions as the SEC or if it is not reasonably necessary in the public interest to require a company to have a SEC.[390] Any exemption granted by the Tribunal is valid for a period of five years or less, as determined by the Tribunal at the time of granting the exemption.[391] If the board fails to appoint a SEC the committee can convene a shareholders meeting for the purpose of such appointment.[392]

(2011) (74) *THRHR* 455.
[384] *Ibid*.
[385] Botha 'Evaluating the Social and Ethics Committee: Is Labour the Missing Link (1)' (2016) 79 *THRHR* 588.
[386] Kloppers 'Driving Corporate Social Responsibility (CSR) through the *Companies Act*: An Overview of the Role of the Social and Ethics Committee' (2013) 16(1) *PER/PERLJ* 168/536.
[387] Act 71 of 2008.
[388] S 72(2)(4)(a) of Act 71 of 2008.
[389] S 72(2)(4)(b).
[390] S 72(2)(5).
[391] S 72(2)(6).
[392] S 84(6) and (7).

The company regulations were published on 26 April 2011 and Regulation 43(1) of the Act states that the regulations pertaining to the SEC applies to every state-owned company, listed public company and any other company that has in two of the previous five years, scored above 500 points in terms of regulation 26(2) (public interest score). Regulation 43(4) further states that the SEC must consist of no fewer than three directors or prescribed officers and that at least one of the directors must not be a director that takes part in the day-to-day running of the company and must not have been so involved within the previous three financial years. Regulation 43(5) sets out the SEC's functions and states that the function of the committee is to monitor the company's activities with regards to legislation and codes of good corporate practice with regards to:

(i) Social and economic development;
(ii) Good corporate citizenship;
(iii) The environment, health and public safety, including the impact of the company's activities, products and services;
(iv) Consumer and public relations as well as compliance with consumer protection laws;
(v) Labour and employment relations;
(vi) Draw matters within the SEC's mandate to the company Board; and
(vii) Report to the shareholders at the annual general meeting on matters within its mandate.

The SEC has a dual function of both monitoring the company's activities as well as reporting their findings to the Board and shareholders.[393] Botha proposes that the SEC Committee must be given more authority and should not only fulfil a monitoring and reporting role.[394] Delport states that the SEC is not a board committee but a committee appointed by the shareholders of the company and it is as such a "separate organ of the company".[395] Stoop argues that if this is indeed the case, then

[393] Havenga 'The Social and Ethics Committee in South African Company Law' (2015) 78 *THRHR* 288.
[394] Botha 'Evaluating the Social and Ethics Committee: Is Labour the Missing Link (2)' (2017) 80 *THRHR* 17.
[395] Delport *The New Companies Act Manual* (2011) 88.

it is uncertain whether the board must comply with instructions from the SEC.[396] Esser, however, points out that it is not clear if the board or the shareholders appoint the SEC.[397] Botha further states that the SEC is a "troublesome organ" of the company due to the uncertainty surrounding the relationship between the Board and the SEC.[398] It is, however, essential to determine whether the SEC is a board or company committee as it has various consequences and will determine the liability of the members of the committee.[399] If the SEC is a board committee then the members thereof will also be subject to directors' fiduciary duties as set out in section 76 of the Companies Act, 2008.[400] However, if the SEC is a company committee then the members are not subject to fiduciary duties.[401] Esser and Delport state that this essentially means that the SEC can report on matters to the shareholders that are not in the interest of the company as they are not subject to fiduciary duties and don't have to act in the best interests of the company.[402] Should the board, who are bound by fiduciary duties, then fail to implement the SEC's recommendations because it is not in the interest of the company, then the committee can report back to the shareholders and the shareholders can then effectively remove the board in terms of section 71.[403] The board can therefore implement recommendations from the SEC that are not ultimately in the interest of the company for fear of being removed from the board by the shareholders.[404] The shareholders can thus indirectly enforce CSR as they have the ultimate power of election and removal of the board.[405] This can potentially cause enormous strain between the board, SEC and the shareholders.[406] Esser and Delport submit that the SEC is not a board committee as they can report back to shareholders which is wider than simply assisting the board by reporting back to them on

---

[396] Stoop 'Towards Greener Companies-Sustainability and the Social and Ethics Committee' (2013) 3 *STELL LR* 577.
[397] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 326.
[398] Botha 'Evaluating the Social and Ethics Committee: Is Labour the Missing Link (1)' (2016) 79 *THRHR* 590.
[399] Esser and Delport 'The protection of shareholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2' (2017) 50(2) *De Jure* 232.
[400] *Ibid* 224.
[401] *Idem* 229.
[402] *Idem* 230.
[403] *Idem* 231.
[404] *Ibid.*
[405] *Idem* 251.
[406] *Idem* 232.

certain matters.[407] Botha also submits that the SEC is not a board committee and functions as a "separate organ" of the company.[408] Botha further argues that it is unfortunate that no provision is made in the Companies Act, 2008 for employees to be representatives of the SEC Committee.[409] Employees are particularly well placed to provide meaningful input on health, public safety, labour and employment issues.[410] Botha submits that the legislature missed out on a golden opportunity to expand on employees' participation rights.[411] He further proposes an amendment to the Act by including employees as members of the SEC Committee, similar to the position in Germany.[412]

Havenga draws an interesting comparison between the SEC and the audit committee. She points out that the membership requirements of the audit committee is prescribed by the Act whereas the membership of the SEC is prescribed by regulation.[413] Delport recently commented that the Minister uses regulations to make primary law and that the regulations are probably *ultra vires.*[414] Furthermore, each and every member of the audit committee must be a director that is not involved in the day-to-day running of the company to ensure that the committee is unbiased and transparent, whereas only one member of the SEC must be a non-executive director.[415] The members of the audit committee must also have certain minimum qualifications as prescribed by regulation from time to time, to ensure that they are adequately qualified to fulfil their functions in terms of the Act.[416] On the other hand, members of the SEC do not have to have any qualifications, yet they are tasked with having to have extensive knowledge of various statutes and codes that may potentially have an impact on the social and environmental activities of a company.[417]

---

[407] *Idem* 229.
[408] Botha 'Responsibilities of Companies Towards Employees' (2015) 18(2) *PER* 47.
[409] *Ibid* 48.
[410] *Ibid.*
[411] *Ibid.*
[412] Botha 'Evaluating the Social and Ethics Committee: Is Labour the Missing Link (2)' (2017) 80 *THRHR* 17.
[413] Havenga 'The Social and Ethics Committee in South African Company Law' (2015) 78 *THRHR* 287.
[414] Public LLM lecture by Professor P Delport at the University of Pretoria on Mergers and Acquisitions during October 2018.
[415] *Ibid.*
[416] Havenga 'The Social and Ethics Committee in South African Company Law' (2015) 78 *THRHR* 287.
[417] *Ibid.*

Stoop points out that the regulations do not advise in which manner the SEC must report to the shareholders at the AGM and that there is no external auditing of the report.[418] When monitoring the company's activities, the SEC must have regard to two international instruments, the principles set out in the United Nations Global Compact Principles and the OECD recommendations regarding corruption.[419] Kloppers states that it is unfortunate that the legislature failed and/or neglected to refer to national codes of good corporate governance such as the Guidance of Social Responsibility and the King reports.[420] He goes on to state that the legislature missed out on an opportunity to incorporate the King reports in the regulations, thereby effectively giving legitimacy to soft law by way of incorporation through reference.[421] Kloppers added that the regulations are vague and that the legislature failed to provide more unambiguous requirements.[422] Stoop further points out that the unclear terms of reference is further complicated by the fact that CSR has various definitions.[423] Kloppers further states that neither the Act nor the Regulations provide stakeholders with the right to compel companies to act socially responsible.[424] Cassim states that regulation 43(5) provides no legal duty or legal recourse to stakeholders unless stakeholders institute a claim by way of a derivative action in terms of section 165.[425] Section 165(5)(b) states that a court may grant leave to an applicant to institute a claim if the court is satisfied that it is in the best interest of the company that leave be granted to commence the proceedings.[426] A successful derivative action, even if the applicant has the necessary legal standing to institute same, is doubtful, due to the hurdle of the "best interest of the company" requirement.[427] Gwanyanya also states that neither the regulations nor the Act provides for

---

[418] Stoop 'Towards Greener Companies-Sustainability and the Social and Ethics Committee' (2013) 3 *STELL LR* 577.
[419] Regulation 43(5)(a)(i)(aa) and (bb).
[420] Kloppers 'Driving Corporate Social Responsibility (CSR) through the *Companies Act*: An Overview of the Role of the Social and Ethics Committee' (2013) 16(1) *PER/PERLJ* 172/536.
[421] *Ibid* 173/536.
[422] *Idem* 187/536.
[423] Stoop 'Towards Greener Companies-Sustainability and the Social and Ethics Committee' (2013) 3 *STELL LR* 577.
[424] Kloppers 'Driving Corporate Social Responsibility (CSR) through the *Companies Act*: An Overview of the Role of the Social and Ethics Committee' (2013) 16(1) *PER/PERLJ* 188/536.
[425] Cassim et al *Contemporary Company Law* 7 ed (2011) 523.
[426] Cassim *The New Derivative Action under the Companies Act* (2016) 74.
[427] *Ibid*.

sufficient enforcement measures of the SEC.[428] Esser and Delport also identify further shortcomings of the SEC and state that the functions provided to the committee members are too vast and unclear, there is an overlapping nature of functions between different boards, terms of reference is not provided, the SEC is more suited to a pluralist approach and not an enlightened shareholder value approach as adopted by the Act and there is uncertainty around whether the SEC is a company or board committee.[429] While the SEC is indeed a step in the right direction to embrace CSR there are various issues, as discussed above, that will affect the successful implementation thereof.[430] The Minister of Trade and Industry delivered a keynote address at the Symposium on the Companies Act, 2008 where he commented that corporations should embrace the triple context and that the SEC was a crucial factor in determining the success of the Act.[431] There is currently no empirical data available to determine the impact of this committee.[432]

3.6 CONCLUSION

The current South African CSR model does not adequately consider or protect the rights of stakeholders. The Companies Act, 2008 places no mandatory or legal duty on directors to consider stakeholders interests as the common law is still used to interpret the meaning of "company".[433] If it was indeed the intention of the legislature to include stakeholders' interests, it has done so in a confusing manner and directors will most probably still incorrectly interpret the meaning of "in the interest of the company" to mean the interest of shareholders.[434] The legislature had a golden opportunity with the Companies Act, 2008 to clarify the meaning of "company" and it is unfortunate that this was not done.[435] While the SEC is indeed a step in the right direction to

[428]Gwanyanya 'The South African *Companies Act* and the Realisation of Corporate Human Rights Responsibilities' (2015) 18(1) *PER/PERLJ* 3114.
[429] Esser and Delport 'The protection of shareholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2' (2017) 50(2) *De Jure* 232.
[430] *Ibid*.
[431] Havenga 'The Social and Ethics Committee in South African Company Law' (2015) 78 *THRHR* 292.
[432] *Ibid*.
[433] Farouk HI Cassim, Maleka F Cassim & Rehana Cassim et al *Contemporary Company Law* 7 ed (2011) 520
[434] Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 108.
[435]Gwanyanya 'The South African *Companies Act* and the Realisation of Corporate Human Rights Responsibilities' (2015) 18(1) *PER/PERLJ* 3109.

embrace CSR there are various issues, as discussed above, that will affect the successful implementation thereof.[436] Esser and Delport also identify further shortcomings of the SEC and state that the functions provided to the committee members are too vast and unclear, there is an, overlapping nature of functions between different boards, terms of reference is not provided, the SEC is more suited to a pluralist approach and not an enlightened shareholder value approach as adopted by the Act and there is uncertainty around whether the SEC is a company or board committee.[437] Delport and Esser remark that the *Stilfontein* judgement may have profound and overarching implications for directors of all corporations to which the King III (replaced by King IV) report and codes apply.[438] The *Stilfontein* judgment has given the King IV report and codes on corporate governance legal clout despite its voluntary nature. Only time will tell how the common law on this aspect will develop in future.

The mandatory pluralist model of CSR in India is in stark contrast to the largely voluntary shareholder-centric model of CSR in South Africa. Chapter 4 analyses the legal framework of CSR in India. It will determine to what extent Indian company law allows corporations to participate in CSR activities and if there is adequate enforcement and regulation thereof.

---

[436] Esser and Delport 'The protection of shareholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2' (2017) 50(2) *De Jure* 232.
[437] *Ibid.*
[438] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 450.

CHAPTER 4-THE LEGAL CONTOURS OF CORPORATE SOCIAL RESPONSIBILITY IN INDIA

4.1 INTRODUCTION

India's Companies Act of 2013[439] is a unique piece of legislation that challenges the Neo-American model of capitalism which is an ideology that promotes the viewpoint that the company should only be run for the benefit of the shareholders.[440] Most countries with emerging markets are battling to overcome similar challenges of poverty and economic inequality and India's controversial two percent law poses a unique solution to assist the state in addressing their socio-economic obstacles.[441] India's innovative CSR legislation is no doubt the first of its kind and BRICS member countries should closely monitor the development and impact of the two percent law in future.[442] Prior to enactment of the Act, the then-Minister of Corporate Affairs commented that there was a growing economic divide between India Inc. (the collective term for corporations in India) and Bharat (rural India) and that the corporate sector should also accept responsibility and assist government in bridging the income gap.[443] The progressive legislation can potentially contribute to the upliftment of 1.2 billion people in the most populated country in the world and make a valuable contribution to corporate law reform beyond its borders.[444]

4.2 THE HISTORY AND EVOLUTION OF INDIA'S COMPANIES ACT

Historically India's company law is a transfer of English Company Law, staying true to its colonial roots as a British colony.[445] The English corporate law system has always been based on a

---

[439] Hereafter referred to as Companies Act, 2013.
[440]Vettori 'Corporate Social Responsibility' (2005) 339, available at, https://repository.up.ac.za/bitstream/handle/2263/29308/09chapter9.pdf?sequence=10&isAllowed=y.
[441] van Zile 'India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market.' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 302.
[442] Afsharipour and Rana 'Corporate Social Responsibility in India' 2 US Davis Legal Research Paper Series, research paper No. 399, October 2014 available at http://ssrn.com/abstract=2517601.
[443] *Ibid* 4.
[444] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 467.
[445] Varottil 'The evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony'

shareholder-centric or enlightened shareholder value approach which India continued to adopt even after its decolonisation in 1947.[446] After India's decolonisation the country was plagued by poverty and an ailing economy.[447] The government and policy-makers became increasingly sceptical of capitalism and the unregulated free-market.[448] Despite their general mistrust of *laissez faire* policies, the Companies Act of 1956 was unexpectedly and entirely based on the English Companies Act of 1948.[449] Only from the 1960s did India start breaking ties with its colonial past and socialistic ideals were weaved into the fabric of the almost thirty amendments to the Companies Act of 1956.[450] The judiciary supported this notion and in the Supreme Court ruling of *National Textile Workers' Union v P.R. Ramakrishnan*, Bhagwati J stated that:

> "The traditional view of a company was that it was a convenient mechanical device for carrying on trade and industry, a mere legal frame work (sic) providing a convenient institutional container for holding and using the powers of company management…But, one thing is certain that the old nineteenth century view which regarded a company merely as a legal device adopted by shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socio-economic institution wielding economic power and influencing the life of the people."[451]

An expert committee chaired by Mr JJ Irani (Irani Committee) was mostly responsible for the reform of the Companies Act of 1956.[452] The committee suggested strict governance principles but made no provision for CSR or stakeholders' interests except a brief mention of employees.[453] The Companies Bill of 2008 was submitted to parliament but subsequently lapsed. During this

working paper (2015/001) 7 available at http://law.nus/edu/sg/wps.
[446] *Ibid*.
[447] *Ibid*.
[448] *Idem* 22.
[449] *Ibid*.
[450] *Idem* 28.
[451] *Idem* 30.
[452] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 7, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).
[453] *Ibid*.

period India was affected by the biggest corporate scandal in its history, akin to America's Enron and South Africa's Steinhoff scandals.[454] The CEO of Satyam Systems, a global information technology company, committed accounting fraud in excess of US$1 billion.[455] In a letter to the Board he describes his actions "like riding a tiger, not knowing how to get off without getting eaten".[456] The Satyam scandal tarnished India's corporate image and left extensive socio-economic damages in its corporate wake.[457] The Parliamentary Standing Committee re-assessed the newly submitted Companies Bill of 2009 in light of the recent Satyam scandal and made extensive recommendations which included incorporating voluntary corporate governance codes into statute.[458] The Standing Committee also redefined the purpose of the company to be aligned with a pluralist model and finally severed ties with the enlightened shareholder value approach preferred by its colonial past.[459] The report by the Standing Committee made provision for stakeholder interests under directors' fiduciary duties and also paved the way for the controversial two percent law.[460] The Companies Bill of 2011, largely based on the Standing Committee's suggestions, was reintroduced to parliament following which the Companies Act, 2013 was passed by Parliament and assented into law on 31 August 2013.[461] The corporate law reform process replaced the shareholder-centric Companies Act of 1956 which existed for nearly 60 years and

---

[454] *Ibid.*
[455]Balachandran 'The Satyam Scandal' 7 January 2009, available at https://www.forbes.com/2009/01/07/satyam-raju-governance-oped cx_sb_0107balachandran.html#4482f6413044, accessed on 15 September 2019.
[456] *Ibid.*
[457] Varottil 'Corporate Governance in India: The Transition from Code to Statute' (2016) 14, a paper presented at the 2016 ICGL Forum on 'Reflections on Voluntary Corporate Governance Codes: Is it now time to move on from a 'soft law' approach to a 'hard law' approach?' on 25-26 April in Hong Kong. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analysis* (Switzerland: Springer International Publishing, 2017).
[458] *Ibid.*
[459] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 7, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).
[460] *Ibid.*
[461] *Idem* 9.

represents the dawn of a new corporate social responsible era in India.[462] The Companies Act, 2013 has been hailed the "single most important development in India's history of corporate legislation".[463] The Act is unique to India and pays tribute to Mahatma Ghandi's socio-economic philosophy of trusteeship whereby wealth is managed for the benefit of society as a whole.[464]

4.3 DIRECTORS' DUTIES THROUGH THE LENS OF SECTION 166(2) OF THE COMPANIES ACT

The Companies Act, 2013 does not specifically state what the purpose of a company is except to say that it can be formed for any lawful purpose[465] whereas in South African section 1 of the Companies Act, 2008 specifically describes a profit company as a company incorporated for financial gain for its shareholders.[466] Afsharipour submits that while the Companies Act, 2013 does not clearly define the purpose of the company it is clear from the provisions and wording in the Act that the single bottom line of profit-maximisation is no longer the preferred approach.[467] Already in 1977, prior to the enactment of the Companies Act, 2013 the Supreme Court in India held in the matter of *Shahzada Nand & Sons v CIT* that:[468]

> "…It is obvious that no business can prosper unless the employees engaged in it are satisfied and contented and they feel a sense of involvement and identification and this can be best secured by giving them a stake in the business and allowing them to share in the profits…What is the requirement of commercial expediency must be judged not in the light of the 19th Century *laissez faire* doctrine which regarded man as an economic being concerned only to protect and advance his self-interest but in the context of current socio-economic

---

[462] Singh and Verma 'CSR@2%: A New Model of Corporate Social Responsibility in India' 2014 4(10) *International Journal of Academic Research in Business and Social Sciences* 457.
[463] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 466.
[464] Manish Kumar Jain 'Is the Companies Act 2013 forcing corporates to do Charity? A critical analysis of CSR regime of new Corporate Legislature of India' (2015) 2(2) *International Journal of Multidisciplinary Approach and Studies* 216.
[465] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 467.
[466] Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 108.
[467] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 467.
[468] Naniwadekar and Varottil 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis" (2016) NUS Centre for Law and Business Working Paper 16/3 6.

> thinking which places the general interests of the community above the personal interests of the individual and believes that a business or undertaking is the product of the combined efforts of the employer and employees…"

As such company law in India acknowledged stakeholders' interests even before the codification of directors' duties in the 2013 Act, which is consistent with the English common law approach of the enlightened shareholder value model.[469] Similar to South Africa's partial codification of directors' fiduciary duties in the Companies Act, 2008, India's common law directors' duties were also codified in the Companies Act, 2013. Section 166(2) of the 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 the environment".[470] Clause 147 of the Companies Bills of 2008 and 2009 was vastly different from section 1662(2) of the Companies Act, 2013 and made no express mention of any stakeholders' interests.[471] This approach was more in line with the South African (part of the common law family) and English enlightened shareholder value approach. The inclusion of stakeholders' interests is due to the Standing Committee's report after the re-assessment of the Companies Bill of 2009.[472] The Ministry of Corporate Affairs supported this suggestion and commented that the proposed changes were welcomed, specifically in the realm of CSR.[473] The insertion of stakeholders' interests shows the legislature's intent to change the colonial corporate law model from the enlightened shareholder value approach to a pluralist model.[474] Naniwadikar and Varottil argue that the Companies Act, 2013 does not create two separate and independent duties to act in the best interest of the stakeholders and shareholders, but a positive duty is placed on directors to act in the best interests of stakeholders and shareholders in proportionate degrees.[475] This is juxtaposed to the South African legal position where directors

---

[469] *Ibid* 5.
[470] Indian Companies Act, 2013.
[471] Naniwadekar and Varottil 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis" (2016) NUS Centre for Law and Business Working Paper 16/3 8.
[472] *Ibid*.
[473] *Idem* 9.
[474] *Ibid*.
[475] *Idem* 12.

do not have to take stakeholders' interests into account unless there is a direct or indirect benefit for the "owners" of the company.[476] Naniwadekar and Varottil argue that stakeholders are not clearly defined in the Act except for employees.[477] The Act fails to provide any guidance as to who is included under "community" and "the environment". The Act's visionary inclusion of stakeholders' interests fails at the implementation stage thereof and is not without criticism.[478] Many of the remedies provided to shareholders for breach of fiduciary duties are unfortunately not available to stakeholders.[479] Naniwadikar and Varottil question the benefit of the pluralist approach if the Act fails to provide adequate remedies to stakeholders.[480] Remedies such as the derivative action and class actions fail to adequately protect stakeholders.[481] The lack of sufficient remedies available to stakeholders in India is comparable to the lack of remedies available to stakeholders under the South African enlightened shareholder value approach.[482] Afsharipour, however, points out that despite the lack of sufficient enforcement remedies the Board will still take the duties of the Companies Act, 2013 seriously to avoid damage to their reputation.[483] Directors are furthermore not provided with any proper guidance on how to balance the myriad of interests of both stakeholders and shareholders.[484] Varottil and Naujoks also point out the conundrum caused by the Companies Act, 2013 which includes both stakeholder and shareholder interests without indicating a primacy to either.[485] Afsharipour poses the question: "If the board is accountable to everyone, could it then not be accountable to anyone?"[486] Despite South Africa and India following

---

[476] Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 12.
[477] Naniwadekar and Varottil 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis' (2016) NUS Centre for Law and Business Working Paper 16/3 14.
[478] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 470.
[479] *Ibid*.
[480] Naniwadekar and Varottil 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis" (2016) NUS Centre for Law and Business Working Paper 16/3 16.
[481] Ibid 20.
[482] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 492.
[483] *Ibid* 494.
[484] *Idem* 484.
[485] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 19. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.
[486] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University*

two distinct models, both countries struggle to adequately protect stakeholders due to the unavailability of enforcement remedies.[487] While India's inclusion of stakeholders under the umbrella of fiduciary duties is commendable the legislature will have to make certain amendments to the Companies Act, 2013 to rectify the implementation issues.[488]

4.4 THE HISTORY OF CORPORATE GOVERNANCE CODES IN INDIA

Similar to South Africa's voluntary King reports and codes on good corporate governance, India also introduced a voluntary code for "Desirable Corporate Governance" in 1998.[489] The code was based on the United Kingdom's Cadbury Code.[490] Unfortunately only a few of India's big corporations embraced the code and in 2000 a committee was formed to develop a more stringent governance system for listed companies.[491] The introduction of Clause 49 of the Listing Agreement, applicable to certain sizes of companies listed on the stock exchange, was derived from the committee's efforts to reform the voluntary governance codes.[492] Failure to comply with Clause 49 of the Listing Agreement would potentially result in a company being delisted from the stock exchange.[493] Varottil argues that security exchanges are normally cautious to delist

---

Law Review 490.

[487] Naniwadekar and Varottil 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis" (2016) NUS Centre for Law and Business Working Paper 16/3 21.

[488] *Ibid.*

[489] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 6. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.

[490] Varottil 'Corporate Governance in India: The Transition from Code to Statute' (2016) 4, a paper presented at the 2016 ICGL Forum on 'Reflections on Voluntary Corporate Governance Codes: Is it now time to move on from a 'soft law' approach to a 'hard law' approach?' on 25-26 April in Hong Kong. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analysis* (Switzerland: Springer International Publishing, 2017).

[491] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 6. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.

[492] *Ibid.*

[493] Varottil 'Corporate Governance in India: The Transition from Code to Statute' (2016) 4, a paper presented at the 2016 ICGL Forum on 'Reflections on Voluntary Corporate Governance Codes: Is it now time to move on from a 'soft law' approach to a 'hard law' approach?' on 25-26 April in Hong Kong. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analysis* (Switzerland: Springer International Publishing, 2017).

companies as minority shareholders would be stripped of liquidity in the shares.[494] The government subsequently introduced penalties of up to 250 million Indian Rupees (approximately one million Rand) for any company that was in breach of Clause 49 of the Listing Agreement.[495] Similarly, the South African King IV report is a voluntary code on good corporate governance, however, the Johannesburg Stock Exchange (JSE) also makes the King IV report principles mandatory for all listed companies as per its listing requirements.[496] Failure to comply can also lead to a suspension of the listing.[497] After various global corporate scandals and America's subsequent enactment of codifying their corporate governance principles in the Sarbanes-Oxley Act (SOX) of 2002, the Securities and Exchange Board of India[498] appointed another committee to propose changes to Clause 49 of the Listing Agreement.[499] The committee's recommendation resulted in Clause 49 becoming mandatory for all companies listed on the stock exchange except for a few small companies.[500] Following the Satyam Computer scandal and various other scandals, the Indian Government prioritised a reform of the corporate governance system and company law legislation.[501] A considerable part of the corporate governance codes was included in the Companies Act, 2013 similar to America's codification of their corporate governance principles in the SOX Act.[502] India's governance codes developed from a voluntary code on the basis of "comply or explain" in 1998, to a mandatory listing requirement in 2000, to a penalty clause in

---

[494] *Ibid 4.*
[495] *Ibid.*
[496] Available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf*, accessed on 16 June 2019.
[497] *Ibid.*
[498] Hereafter referred to as SEBI.
[499] Varottil 'The evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' working paper (2015/001) 6 available at http://law.nus/edu/sg/wps.
[500] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 6. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.
[501] Varottil 'Corporate Governance in India: The Transition from Code to Statute' (2016) 5, a paper presented at the 2016 ICGL Forum on 'Reflections on Voluntary Corporate Governance Codes: Is it now time to move on from a 'soft law' approach to a 'hard law' approach?' on 25-26 April in Hong Kong. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analysis* (Switzerland: Springer International Publishing, 2017).
[502] Varottil 'The evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' working paper (2015/001) 70 available at http://law.nus/edu/sg/wps.

2004 and finally a codification of their corporate governance principles in the Companies Act, 2013.[503] Varotill argues that India's securities market is not suited to a voluntary approach for corporate governance.[504] He firstly points out that it is only viable if enough institutional investors exert the necessary pressure to ensure that governance principles are successfully implemented and in India this is not the case within the investing community.[505] Secondly there is not enough shareholder activism in India.[506] Thirdly, India has also historically placed more reliance on government regulation.[507] Varotill, however, also criticises the mandatory approach and argues that incorporating governance principles in primary legislation is too dictatorial and rigid as well as time-consuming and costly to amend.[508] He mentions that his critique is similar in nature to the critique on America's SOX Act.[509] Despite Varotill's criticism he goes on to state that voluntary codes are still best suited to countries like the United Kingdom and he suggests that the Companies Act, 2013 be amended to only include the broad governance provisions while the comprehensive rules should be excluded from legislation and be left to the discretion of the Securities and Exchange Board of India (SEBI).[510] While South Africa's King IV is still regarded as soft law, India has gone further by incorporating their governance principles in primary company legislation.

---

[503] Varottil 'Corporate Governance in India: The Transition from Code to Statute' (2016) 10, a paper presented at the 2016 ICGL Forum on 'Reflections on Voluntary Corporate Governance Codes: Is it now time to move on from a 'soft law' approach to a 'hard law' approach?' on 25-26 April in Hong Kong. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analysis* (Switzerland: Springer International Publishing, 2017).
[504] *Ibid*.
[505] *Ibid*.
[506] *Ibid.*
[507] *Idem* 9.
[508] *Idem* 16.
[509] *Ibid*.
[510] *Idem* 18.

4.5 ANALYSIS OF THE TWO PERCENT LAW UNDER SECTION 135 OF THE COMPANIES ACT

The two percent law is an innovative concept born from India's need to rein in corporate powers to meet socio-economic objectives.[511] Varottil states that CSR has obtained more legal standing in India than in any other jurisdiction.[512] While India initially introduced voluntary CSR guidelines in 2009 the overhaul of the Companies Act saw the introduction of mandatory CSR provisions.[513] Initially there was extensive push-back from India Inc. (the collective term for corporations in India) regarding the mandatory CSR provisions. Government subsequently capitulated and softened their approach to a "comply or explain" basis.[514] India Inc. submitted that "the people on the board are sufficiently conscious regarding the matter and corporate social responsibility cannot be created with statutory requirements".[515] Varottil states that the negotiations led to a "quasi-mandatory approach".[516] While there is no duty on companies to spend two percent of their average net profit there is a mandatory requirement to explain and furnish reasons for non-compliance with the provision.[517] The legislature in section 135(5) uses the words "shall ensure that the company

---

[511] Sharma 'A 360-degree analysis of Corporate Social Responsibility (CSR) Mandate of the New Companies Act, 2013' (2013) 3(7) *Global Journal of Management and Business Studies* 758.

[512] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 7, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[513] Majumdar 'India's Journey with Corporate Social Responsibility' (2015) 33(2) Journal *of Law and Commerce* 188.

[514] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 50. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.

[515] Singh and Verma 'CSR@2%: A New Model of Corporate Social Responsibility in India' (2014) 4(10) *International Journal of Academic Research in Business and Social Sciences* 460.

[516] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 8, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[517] *Ibid* 8.

[517] Majumdar 'India's Journey with Corporate Social Responsibility' (2015) 33(2) Journal *of Law and Commerce* 188.

spends" and Varottil and Naujoks argue that the wording of section 135 functions as a mandate.[518] The criticism against section 135 are firstly that expenditure on CSR activities is akin to corporate philanthropy and not CSR, secondly that it smacks of disguised corporate tax and thirdly that corporations are burdened with the state's responsibilities to society.[519] Kabi, Mukuddem-Petersen and Petersen argue that philanthropic contributions is one of the quickest methods used to grow societies in developing countries.[520] Van Zile argues that one of the advantages of mandating CSR spending instead of levying additional taxes is that companies have *carte blanche* (although restricted to the activities in Schedule VII discussed below) to decide on which activities they will spend their money.[521]

Section 135 of the Companies Act, 2013 requires certain companies to appoint a CSR Committee of the Board which must consists of at least three directors, one of which must be an independent director.[522] This is similar to South Africa's Companies Act, 2008 where Regulation 43(4) states that the SEC must consist of no fewer than three directors or prescribed officers and that at least one of the directors must not be a director that takes part in the day-to-day running of the company and must not have been so involved within the previous three financial years. The Committee's duties are to submit a board report which recommends a CSR Policy that includes prescribed activities, recommended expenditure amount and monitoring thereof.[523] The legislature has cast its net wide and Afsharipour estimates that approximately six thousand companies will have to comply with the two percent law.[524] Section 135 applies to companies with:[525]

---

[518] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 50. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.
[519] *Ibid* 50.
[520] Kabir, Mukuddem-Petersen & Petersen 'Corporate social responsibility evolution in South Africa' (2015) 13(4) *Problems and Perspectives in Management* 287.
[521] van Zile 'India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market.' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 299.
[522] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 49. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.
[523] *Ibid.*
[524] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 485.
[525] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 49. The final version of

4.5.1 A net worth of Rs.5 billion or more per financial year;

4.5.2 A turnover of Rs.10 billion or more per financial year;

4.5.3 A net profit of Rs.50 million or more per financial year.

Schedule VII of the Companies Act, 2013 prescribes the CSR activities which include:

(i) "eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and making available safe drinking water;

(ii) promoting education, including special education and employment enhancing vocation skill especially among children, women, elderly, and the differently abled and livelihood enhancement projects;

(iii) promoting gender equality, empowering women, setting up homes and hostels for women and orphans, setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;

(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water;

(v) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;

(vi) measures for the benefit of armed forces veterans, war widows and their dependents;

(vii) training to promote rural sports, nationally recognised sports, Paralympic sports and Olympic sports;

(viii) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socioeconomic development and relief and welfare of the Scheduled Tribes, other backward classes, minorities and women;

(ix) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;

(x) rural development projects."

---

this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.

Section 135(5) provides that the companies referred to above must spend at least two percent of their average net profit (calculated over three subsequent financial years) on CSR activities.[526] The activities referred to in Schedule VII are peremptory.[527] In 2014 the Minister of Corporate Affairs published the CSR rules which state that CSR activities as defined do include activities that exclusively benefit employees and their families.[528] Majumbar argues that this is juxtaposed to the fact that employees are stakeholders and that this provision diminishes that principle.[529] The CSR rules furthermore state that only CSR spending within the borders of India will qualify as CSR spending within the meaning of section 135.[530] Non-compliance with section 135 and failure to provide reasons for non-spending will result in penalties under section 460 of the Companies Act, 2013, however, Varottil argues that the quantum of the penalty amounts (ranging from $900-$46 000.00) are scant.[531] The directors responsible for non-compliance can also be sentenced to imprisonment for a maximum term of three years and/or a fine of no more than approximately $9 200.00.[532] The Companies Act, 2013 does not state what will be accepted as a valid reason for non-compliance.[533]

---

[526] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 50. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.

[527] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 10, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[528] Majumdar 'India's Journey with Corporate Social Responsibility' (2015) 33(2) Journal *of Law and Commerce* 190.

[529] *Ibid*.

[530] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 49. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705.

[531] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 11, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[532] Afsharipour and Rana 'Corporate Social Responsibility in India' 6 US Davis Legal Research Paper Series, research paper No. 399, October 2014 available at http://ssrn.com/abstract=2517601.

[533] *Ibid.*

Dharmapala and Khanna have done what is considered the most extensive empirical assessment of the impact of Section 135 of the Companies Act, 2013.[534] They find a considerable increase in CSR spending resulting from section 135.[535] They find that large corporations that spent more than the required two percent prior to the enactment of section 135 decreased their CSR spending after the provision came into force.[536] They also found that reasons provided for non-compliance were neither transparent nor persuasive.[537] The Indian Government also released its own statistics in the first year of implementation and found that approximately 70% of the applicable companies complied with the compliance provisions and out of those companies only 30% incurred a two percent CSR spend.[538] The Ministry of Corporate Affairs appointed a committee in 2015 to conduct an investigation into improved implementation measures. The Committee was generally satisfied with the implementation of section 135 and did not suggest any amendments to the provisions.[539] The Committee also submitted that an investigation was perhaps premature and that the investigation should be conducted after a couple of years when more extensive evidence is available.[540] Varottil submits that evidence suggests that the overall impact of section 135 has yielded positive results and has led to an increase in CSR activity and spending.[541] Varottil further submits that the empirical and hand-collected data of CSR spending and disclosures by Nifty 100 companies show that there has been a noteworthy rise of CSR spending.[542] The Achilles heel of

---

[534] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 13, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[535] Dharmapala & Khanna 'The impact of mandated corporate social responsibility: Evidence from India's Company Act of 2013' (2016) No.783 *Coase-Sandor Working Paper Series in Law and Economics* 37.

[536] *Ibid* 46.

[537] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 13, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[538] *Ibid* 14.

[539] *Ibid.*

[540] *Ibid*.

[541] *Ibid*.

[542] *Idem* 25.

section 135 seems to be the inadequate disclosure and enforcement requirements.[543] The government will have to step in and introduce other measures to ensure proper compliance as envisaged by the legislature.[544]

India has one of the fastest growing economies in the world, yet two thirds (over 800 million people) of the population live in complete poverty, making India one of the poorest countries in the world.[545] Van Zile states that the Indian government has promised its people that it will advance economic equality and the introduction of the two percent law is a serious attempt by the government to bridge the gap between India Inc. (the collective term for corporations in India) and Bharat (rural India).[546] Despite the various implementation and enforcement issues as well as objections, the two percent law should not be so readily rejected by the international community but rather closely monitored as a potential solution (albeit in its infancy) available to other developing countries.[547]

4.6 CONCLUSION

The quasi-mandatory CSR position in India is in stark contrast to the largely voluntary nature of CSR in South Africa. South African incorporated companies may only engage in CSR activities if it ultimately benefits the shareholders.[548] India's historic overhaul of the Companies Act is a noble and innovative step in transforming corporate law in India and potentially in other jurisdictions.[549] Chapter 5 concludes the study and proposes certain amendments to South Africa's Companies Act, 2008.

---

[543] *Ibid*.
[544] *Ibid*.
[545] Anonymous 'Poverty in India: Facts and Figures on the daily struggle for survival' available at *http://www.soschildrensvillages.ca/news/poverty-in-india-602*, accessed on17 March 2019.
[546] van Zile 'India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market.' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 274.
[547] *Ibid*.
[548] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[549] Afsharipour 'Redefining Corporate Purpose: An International Perspective' (2017) 40 *Seattle University Law Review* 496.

CHAPTER 5-A HYBRID APPROACH TO CORPORATE SOCIAL RESPONSIBILITY IN SOUTH AFRICA

5.1 INTRODUCTION

The purpose of the company, the role that it plays in society and the environment in which it operates, has been fiercely debated, particularly in the period after the global financial crisis.[550] CSR has become an essential connection for socio-economic change and development in developing countries where there is still an enormous divide between the wealthy and the poor.[551] Du Plessis, Varottil and Veldman submit that the behaviour of companies in the aftermath of global financial and economic hard times have led to questions regarding the effectiveness of the "soft law approach" in respect of CSR and have reignited the debate regarding an alternative "hard law approach".[552] Anwana argues that CSR has failed in South Africa.[553] The CSR measures currently in place in South Africa are inadequate and the study proposes amendments to reinvent the CSR wheel to fit our unique landscape.

5.2 PROPOSED AMENDMENTS TO THE COMPANIES ACT 71 OF 2008

The study concludes with the following proposed amendments to South Africa's Companies Act, 2008:

5.2.1 An amendment to directors' fiduciary duties;

5.2.2 A codification of our broad corporate governance principles in primary company legislation;

---

[550] Kabir, Mukuddem-Petersen & Petersen 'Corporate social responsibility evolution in South Africa' (2015) 13(4) *Problems and Perspectives in Management* 281.
[551] *Ibid.*
[552] du Plessis, Varottil and Veldman 'The Significance of Moving Beyond Corporate Social Responsibility (CSR)' (2018) 1, In Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance, Du Plessis *et al*. (eds), Springer.
[553] Anwana *Corporate Social Responsibility and Corporate Governance: Implementation and Challenges for Companies Listed on the Johannesburg Securities Exchange* (unpublished Phd thesis, Durban University of Technology, 2018) 57.

5.2.3 A complete overhaul of section 72(4) by inclusion of India's two percent CSR spending requirement.

Firstly, an amendment to directors' fiduciary duties is proposed. As directors' duties were only partially codified in the Act, the common law will remain applicable for interpretation purposes and to supplement the Act where necessary.[554] As there is no mention of stakeholders in section 76(3)(b), the meaning of "company" must be interpreted in accordance with common law. The common law is, however, insufficient for this as the meaning of "company" is traditionally interpreted to mean the collective body of shareholders.[555] The common law meaning of "company" is too narrowly interpreted and effectively excuses directors from taking stakeholders' interests into account unless there is a direct or indirect benefit for the "owners" of the company.[556] Nomadwayi argues that against the background of section 7 the narrow meaning of "company" is no longer applicable.[557] Esser, however, points out that it is uncertain whether section 7(d) creates a separate and distinct duty for directors.[558] Esser submits that it is rather something that directors should take cognisance of when making decisions.[559] Delport argues that if it was the legislator's intention to create a new, *sui generis*, duty on directors it would have expressly done so.[560] It is proposed that the Act be amended to make provision for stakeholders' interests similar to section 172 of the United Kingdom's Companies Act, 2006 which provides for:[561]

---

[554] Nomadwayi The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 8.
[555] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[556] Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 12.
[557] *Ibid* 16.
[558] Esser 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc LJ* 324.
[559] *Ibid*.
[560] Delport *Henochsberg on the Companies Act 71 of 2008* (2018) 52.
[561] Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 25.

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to-
   (a) the likely consequences of any decision in the long term;
   (b) the interests of the company's employees;
   (c) the need to foster the company's business relationships with suppliers, customers and others;
   (d) the impact of the company's operations on the community and environment;
   (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
   (f) the need to act fairly between members of the company.

Although it can be argued that an amendment to fiduciary duties is uncalled-for due to the stakeholder-inclusive approach recommended by King IV, it largely remains a voluntary code on good corporate governance and only becomes mandatory for listed companies as per the listing requirements of the Johannesburg Stock Exchange (JSE).[562] A statutory system will furthermore create legal certainty. Section 172 of the UK Act still follows the enlightened shareholder approach but obliges directors to also consider stakeholder interests. Directors are still ultimately required to act in good faith to promote the overall success of the company, but in making decisions they can and should have regard to other factors besides the bottom line. Botha remarks that the quintessence of the argument is that at any given time a specific stakeholder's interest will carry more weight than another and vice versa. Esser and du Plessis state that shareholder primacy has been preserved in the UK Act but directors may have regard to other interests.[563] On the other hand, Cassim states, that the South African Companies Act, 2008 places no mandatory or legal duty on directors to consider stakeholders interests as the common law is still used to interpret the meaning of "company".[564] The UK approach is preferred over India's approach that includes both stakeholder and shareholder interests without indicating a primacy to either.[565] Section 72 of the

[562]Available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf*, accessed on 16 June 2019.
[563] Esser and du Plessis 'The Stakeholder Debate and Directors' Fiduciary Duties' (2007) 19 *SA Merc LJ* 353.
[564] Cassim et al *Contemporary Company Law* 7 ed (2011) 520.
[565] Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 19. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705

UK Act is more consistent with South Africa's enlightened shareholder approach. The proposed amendment will be more aligned with the policy document which proposes that the enlightened shareholder value approach be adopted with the inclusion of stakeholders in the codification of directors' duties.[566] The specific inclusion of stakeholders' interests under fiduciary duties will also be more consistent with the purpose (economic and social) of the Companies Act, 2008 as envisaged by section 7. According to Esser it will be difficult for a third party to discharge the onus of proof that the director, by not acting in the third party's best interest, also did not act in the best interest of the company under section 218(2) of the Act.[567] The same hurdle will prevail even after an amendment has included stakeholders' interests under fiduciary duties. As such it is imperative that proper enforcement remedies are made available to stakeholders to ensure that the amendment does not create a "right without a remedy".[568] This discussion of suitable remedies is beyond the scope of this paper. A further research area is the development of appropriate enforcement remedies for stakeholders.

Secondly, a codification of our broad corporate governance principles in primary company legislation is recommended. The King IV report is a largely voluntary code of good corporate governance, however, the Johannesburg Stock Exchange (JSE) makes the King IV report principles mandatory for all listed companies as per its listing requirements.[569] Failure to comply can lead to a suspension of the listing.[570] While this is a good enforcement measure it only applies to large public companies listed on the JSE and not to all corporations. The *Stilfontein* judgment sets a precedent for a third party to hold a director of a company liable for breach of fiduciary

---

[566] Nomadwayi *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 27.
[567] *Ibid*.
[568] Fisher 'The enlightened shareholder-leaving stakeholders in the dark: will section 172(1) of the Companies Act 2006 make directors consider the impact of their decisions on third parties? (2009) 20(1) *I.C.C.L.R.* 6.
[569]Available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf*, accessed on 16 June 2019.
[570] *Ibid*.

duties or duties of care and skill for not complying with King IV.[571] Despite the *Stilfontein* judgment the common law on this aspect can still develop in future and the *Stilfontein* judgment can potentially be overturned by the Supreme Court of Appeal. A considerable part of the corporate governance codes was included in India's 2013 Act, similar to America's codification of their corporate governance principles in the Sarbanes-Oxley Act (SOX) of 2002.[572] Varotill argues that voluntary codes are still best suited to countries like the UK and he suggests that India's Companies Act, 2013 be amended to only include the broad governance provisions while the comprehensive rules should be excluded from legislation and be left to the discretion of the Securities and Exchange Board of India (SEBI).[573] While South Africa's King IV is still regarded as soft law India has gone further by incorporating their governance principles in primary company legislation. Section 72(4) of the Companies Act, 2008 makes provision for the Minister, by regulation, to prescribe that certain categories of companies must have a SEC if it is in the public interest.[574] When monitoring the company's activities, the Social and Ethics Committee (SEC) must have regard to two international instruments namely, the principles set out in the United Nations Global Compact Principles and the recommendations regarding corruption as set out by the Organisation for Economic Co-operation and Development (OECD).[575] The objectives of section 72(4), although commendable is limited in its application as it only applies to certain categories of companies which are dependent on the annual turnover, workforce size or the nature and extent of the activities of such companies.[576] Kloppers also states that it is unfortunate that the legislature failed and/or neglected to refer to national codes of good corporate governance such as the Guidance of Social Responsibility and the King reports.[577] He goes on to state that the legislature missed out on an opportunity to incorporate the King reports in the regulations thereby

---

[571] Esser and Delport 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) (74) *THRHR* 455.
[572] Varottil 'The evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' working paper (2015/001) 70 available at http://law.nus/edu/sg/wps.
[573] *Ibid* 18.
[574] Act 71 of 2008.
[575] Regulation 43(5)(a)(i)(aa) and (bb).
[576] S 72(2)(4)(a) of Act 71 of 2008.
[577] Kloppers 'Driving Corporate Social Responsibility (CSR) through the *Companies Act*: An Overview of the Role of the Social and Ethics Committee' (2013) 16(1) *PER/PERLJ* 172/536.

effectively giving legitimacy to soft law by way of incorporation through reference.[578] The voluntary nature of CSR is criticised.[579] CSR is by definition a system that begins where the law ends.[580] However, can we trust that corporations will regulate themselves?[581] Communities require legislative rules and subsequent enforcement to co-exist peacefully. The same holds true for the corporate world. The law is ultimately able to reach where self-regulation is unable to. It is proposed that South Africa's broad corporate governance principles as set out in King IV be incorporated in primary company legislation. The partial codification of King IV will give the voluntary governance code proper legal status, certainty and statutory enforcement measures.

Van Zile questions whether CSR should become law, given the vehement push-back from industry as seen in India.[582] She argues that India's innovative two percent law is a practical attempt at promoting expansion without levying ancillary taxes.[583] She continues to argue that the demand for equality could lead to manifestos that are a greater threat to India's stability than mandatory CSR spending.[584] Gandhi's principle of trusteeship is based on the philosophy that as long as there is a divide between rich and poor a peaceful regime is unattainable.[585] Economic equality is one of the essential requirements of his theory.[586] Ghandi's principle of trusteeship has been a moral compass for the development of India's CSR principles.[587] Friedman's ideology that "the social responsibility of business is to increase its profits" is juxtaposed to India's two percent law and Friedman would no doubt sneer at the idea of a quasi-mandatory CSR spending model.[588] Einstein said that "We shall require a substantially new way of thinking if mankind is to survive".[589]

---

[578] *Ibid* 173/536.
[579] Kloppers 'Introducing CSR-The missing ingredient in the land reform recipe?' (2014) 17(2) *PELJ* 717.
[580] *Ibid*.
[581] *Ibid*.
[582] van Zile 'India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market.' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 297.
[583] *Ibid.*
[584] *Ibid*.
[585] Majumdar 'India's Journey with Corporate Social Responsibility-What Next?' (2015) 33(2) *Journal of Law and Commerce* 185.
[586] *Ibid.*
[587] *Ibid.*
[588] Singh and Verma 'CSR@2%: A New Model of Corporate Social Responsibility in India' (2014) 4(10) *International Journal of Academic Research in Business and Social Sciences* 463.
[589] van Ham 'Einstein Said Survival Requires a "Substantially New Manner of Thinking"—Are We

Mandatory CSR spending starkly contrasts global trends of voluntary CSR requirements, but India's two percent law might ignite a new innovative way of thinking on how to harness corporate power for the greater good.[590]

The South African legislature has, through the introduction of the Social and Ethics committee (SEC), taken cognisance of CSR without expressly referring to the term.[591] It can be seen as a legitimate attempt by the Government to force corporations to be good corporate citizens.[592] Lastly, it is submitted that the current form and content of section 72(4) is inadequate and a complete overhaul of section 72(4) of the Companies Act, 2008 is proposed by inclusion of India's two percent CSR spending requirement. As opposed to the position in India, CSR activities as defined must also include activities that exclusively benefit employees and their families as employees are regarded as stakeholders. Varottil submits that evidence suggests that the overall impact of India's two percent law has yielded positive results and has led to an increase in CSR activity and spending.[593] The vulnerability of section 135 seem to lie in the inadequate disclosure and enforcement requirements.[594] Appropriate measures will have to be put in place to ensure proper compliance as envisaged by the legislature.[595] Future research will have to be conducted on disclosure and enforcement requirements of the proposed model to ensure proper implementation of the two percent law.

Getting There?' *The One Earth Project* dated 9 May 2016, available at http://theoneearthproject.com/blog/einstein-said-survival-requires-a-substantially-new-manner-o.html, accessed on 30 September 2019.

[590] van Zile 'India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market.' (2012) 13(2) *Asian-Pacific Law & Policy Journal* 303.

[591] Botha 'Evaluating the Social and Ethics Committee: Is Labour the Missing Link' (2016) 79 *THRHR* 588.

[592] Kloppers 'Driving Corporate Social Responsibility (CSR) through the *Companies Act*: An Overview of the Role of the Social and Ethics Committee' (2013) 16(1) *PER/PERLJ* 168/536.

[593] Varottil 'Analysing the CSR spending requirements under Indian Company Law' (2016) 13, a paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing on 14-15 December 2016. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Switzerland: Springer International Publishing, 2018).

[594] *Ibid*.

[595] *Ibid*.

5.3 CONCLUSION

South Africa and India share a history of British colonialism, common law ties and a myriad of socio-economic problems. As such a comparative analysis of the legal framework for CSR is a valuable contribution to the research already conducted on CSR in South Africa. The study comparatively analysed CSR in South Africa and India and questioned whether the South African company law framework encourages or inhibits corporations to freely engage in CSR activities. The study questioned the meaning of "in the interest of the company" and analysed directors' fiduciary duties towards stakeholders. The study shows that the legal position in South Africa does not legally allow a departure from the single bottom line unless it is in the interest of the shareholders.[596] The study further considered the corporate governance principles of King IV and the JSE listing requirements. In addition, the study questioned to what extent the introduction of the social and ethics committee has changed the face of CSR participation in South Africa.

India has recently gone further than any other country by introducing the controversial two percent law in 2013 and by extending its fiduciary duties to include stakeholders' interests.[597] India's avant-garde CSR model challenges the traditional notion and has the potential to influence corporate law in BRICS (Brazil, Russia, India, China and South Africa) member countries that face similar socio-economic challenges.[598] The study concludes that the CSR model in South Africa is inadequate for our *sui generis* landscape and proposes an innovative hybrid approach.

---

[596] Cassim et al *Contemporary Company Law* 7 ed (2011) 515.
[597] Afsharipour 'Redefying Corporate Purpose: An International Perspective' (2016) 40 *Seattle University Law Review* 485.
[598] *Ibid* 496.

BIBLIOGRAPHY

ACTS

Basic Conditions of Employment Act 75 of 1997

Broad-Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa Act 108 of 1996

Employment Equity Act 55 of 1998

India Companies Act of 1956

India Companies Act of 2013

Labour Relations Act 66 of 1995

South African Companies Act 61 of 1973

South African Companies Act 71 of 2008

The Constitution of the Republic of South Africa 1996

United Kingdom Companies Act 2006

ARTICLES

Ackers B ‘Ethical considerations of corporate social responsibility-A South African perspective’ 46(1) *S.Afr.J.Bus.Manage* (2015) 11

Afsharipour A ‘Redefying Corporate Purpose: An International Perspective’ (2016) 40 *Seattle University Law Review* 465

Afsharipour A and Rana S ‘Corporate Social Responsibility in India’ 1 US Davis Legal Research Paper Series, research paper No. 399, October 2014 available at http://ssrn.com/abstract=2517601

Blitchitz D ‘Corporate Law and the Constitution: Towards binding human rights responsibilities for corporation’ (2008) 125 *South African Law Journal* 754

Botha MM ‘Evaluating the Social and Ethics Committee: Is Labour the Missing Link (1)’ (2016) 79 *THRHR* 580

Botha MM ‘Evaluating the Social and Ethics Committee: Is Labour the Missing Link (2)’ (2017) 80 *THRHR* 1

Botha MM ‘Responsibilities of Companies towards employees’ 2015 18(2) *PER* 1

Carroll AB ‘Carroll’s pyramid of CSR: taking another look’ (2016) 1(3) *International Journal of Corporate Social Responsibility* 1

Cassim R & Cassim F ‘The Reform of Corporate Law in South Africa’ (2005) *International Company and Commercial LR* 411

Dekker A & Esser I 'The dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) 3(3) *Journal of International Commercial Law and Technology* 157

Dharmapala D & Khanna V 'The impact of mandated corporate social responsibility: Evidence from India's Company Act of 2013' (2016) No.783 *Coase-Sandor Working Paper Series in Law and Economics* 1

Dodd EM, Jr 'For Whom are Corporate Managers Trustees?' (1931-32) 45 *Harv LR* 1145

Du Plessis J, Varottil U and Veldman J 'The Significance of Moving Beyond Corporate Social Responsibility (CSR)' (2018) 1, In Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance, Du Plessis *et al*. (eds), Springer

Esser and Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* 97

Esser and Delport 'The protection of shareholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2' (2017) 50(2) *De Jure* 221

Esser I & Delport P 'The Duty of Care, Skill and Diligence: The King Report and the 2008 Companies Act' (2011) August *THRHR* 449

Esser I & du Plessis JJ 'The Stakeholder Debate and Fiduciary Duties' (2007) 19 *SA Merc LJ* 346

Esser I 'Corporate Social Responsibility: A Company Law Perspective' (2011) 23 *SA Merc*

LJ 317

Fisher D ‘The Enlightened Shareholder-Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of the Actions on Third Parties’ (2009) 20 *ICCLR* 10

Franca L ‘A legal analysis of corporate social responsibility: A comparative approach’ (2006) 12 *SAPR/PL* 286

Gwanyana M ‘The South African Companies Act and the realization of corporate human rights responsibilities’ (2015) 18(1) *Potchefstroom electronic law journal* 3101

Hamman & Kapelus ‘Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash?’ (2004) 47(3) *Development* 85

Havenga ‘The Social and Ethics Committee in South African Company Law’ (2015) 78 *THRHR* 285

Kabir MDH, Mukuddem-Petersen J & Petersen MA ‘Corporate social responsibility evolution in South Africa’ (2015) 13(4) *Problems and Perspectives in Management* 281

Kloppers HJ ‘Driving CSR through Black economic empowerment’ (2014) 18(1) *Law, Democracy & Development* 58

Kloppers HJ ‘Introducing CSR-The missing ingredient in the land reform recipe?’ (2014) 17(2) *Potchefstroom* 710

Kloppers HJ ‘Driving CSR though the Companies Act: An Overview of the role of the Social and Ethics Committee’ (2013) 16(1) *PELJ* 166

Leblanc R and Gillies J ‘The coming revolution in corporate governance’ (2003) *Ivey Business Journal* 184

Lombard S ‘Recognition of various stakeholder’s interest in the Company Management CSR and director’s duties’ (2010) 22 *SA Merc LJ* 142

Luiz and Taljaard ‘Mass resignation of the Board and Social Responsibility of the Company: Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd’ (2009) (21) *SA Merc LJ* 424

Maira A ‘India’s 2% CSR law: The First Country to Go Backwards’ (2013) 48(38) *Economic and Political Weekly* 23

Majumdar AB ‘India’s Journey with Corporate Social Responsibility’ (2015) 33(2) Journal *of Law and Commerce* 165

Manish Kumar Jain CA ‘Is the Companies Act 2013 forcing corporates to do Charity? A critical analysis of CSR regime of new Corporate Legislature of India’ (2015) 2(2) *International Journal of Multidisciplinary Approach and Studies* 208

Michelson G, Waring P, Naudè P ‘Dilemmas and challenges in corporate social responsibility’ (2016) 41(3) *Journal of General Management* 1

Naniwadekar M and Varottil U ‘The Stakeholder Approach Towards Directors’ Duties Under Indian Company Law: A Comparative Analysis” (2016) NUS Centre for Law and Business Working Paper 16/3 1

Sanjay Kumar Sharma CA ‘a 360-degree analysis of the Corporate Social Responsibility (CSR) Mandate of the New Companies Act, 2013’ (2013) 3(7) *Global Journal of Management and Business Studies* 757

Saunders C ‘Decolonisation in South Africa: Reflections on the Namibian and South African Cases’ (2017) 42(1) *JCH* 104

Sharma CA ‘A 360-degree analysis of Corporate Social Responsibility (CSR) Mandate of the New Companies Act, 2013’ (2013) 3(7) *Global Journal of Management and Business Studies* 757

Singh A & Verma P ‘From Philanthropy to Mandatory CSR: A Journey Towards Mandatory Corporate Social Responsibility in India’ (2014) 3(8) *International Journal of Business and Management Invention* 231

Singh AI ‘Keeping India in the Commonwealth: British Political and Military Aims, 1947-49’ (1985) 20(3) *Journal of contemporary History* 469

Sommer AA Jr, ‘Whom should the Corporation Serve? The Berle-Dodd Revisited Sixty years later’ (1991) 16 *Delaware J of Corporate Law* 33

Stoop HH ‘Towards Greener Companies-Sustainability and the Social and Ethics Committee’ (2013) 3 *STELL LR* 562

van Zile C ‘India’s Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market.’ (2012) 13(2) *Asian-Pacific Law & Policy Journal* 270

Varottil and Naujoks 'Corporate Governance in India: Law and Practice' (2016) 1. The final version of this paper has been published in Linda Spedding (ed.), *India: The Business Opportunity* (Lucknow: Eastern Book Company, 2016), pp. 289-342. Available at SSRN: https://ssrn.com/abstract=2951705

Varottil U 'Analysing the CSR spending requirements under Indian Company Law' Paper presented at the 2016 ICGL Forum on 'Globalisation of Corporate Social Responsibility and its impact on Corporate Governance: A Chinese Approach and International Experiences' held at Beijing (2016) 1

Varottil U 'Corporate Governance in India: The Transition from Code to Statute' (2016) 1, a paper presented at the 2016 ICGL Forum on 'Reflections on Voluntary Corporate Governance Codes: Is it now time to move on from a 'soft law' approach to a 'hard law' approach?' on 25-26 April in Hong Kong. The final version of this paper was also published as a chapter in Jean J. du Plessis, Umakanth Varottil and Jeroen Veldman (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analysis* (Switzerland: Springer International Publishing, 2017)

Varottil U 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' NUS Law Working Paper 2015/001, January 2015, 1, available at *http://law.nus.edu.sg/wps*

Varottil U 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis' NUS Law Working Paper 2016/006, August 2016, 2, available at *http://law.nus.edu.sg/wps*

BOOKS

Bakan J *The Corporation: The Pathological Pursuit of Profit and Power* (2004) Constable & Robinson Ltd, London

Cassim FHI, Cassim MF & Cassim R et al *Contemporary Company Law* 7 ed (2011) Juta Co Ltd, Cape Town

Cassim *The New Derivative Action under the Companies Act* (2016) Juta Co Ltd, Cape Town

Crowther D & Jatana R *Agency theory: a cause of failure in corporate governance* (2005) DGM Icfai Books, India

Crowther D & Jatana R *Representations of Social Responsibility* (2005) DGM Icfai Books, India

Delport P *et al Henochsberg on the Companies Act* 71 of 2008 Lexus Nexus, South Africa

Delport P *The new companies Act Manual including close corporations and partnerships* 2 ed (2011) Lexis Nexus, South Africa

Hilton S & Gibbons G *Good Business-Your World Needs You* 2 ed (2005) Texere, United Kingdom

Mares R *The Dynamics of Corporate Social Responsibility* (2008) Martinus Nijhoff Publishers, Leiden, The Netherlands

Matsaneng, ME 'South Africa on Corporate Control: Pure Corporate Control in South Africa' (2010) Transactions of the Centre for Business Law: The Role and Consequences of Pure Corporate Control and Corporate Social Responsibility in the Republic South Africa and the United States of America

Sachs J *The end of poverty and the Commonwealth: Economics for a crowded planet* (2008) Penguin Books Ltd, United Kingdom

Singh A and Verma P 'CSR@2%: A New Model of Corporate Social Responsibility in India' 2014 4(10) *International Journal of Academic Research in Business and Social Sciences* 455

Sjåfjell B and Richardson BJ *Company Law and Sustainability-Legal Barriers and Opportunities* (2015) Cambridge University Press, United Kingdom

Visser W & Sunter C *Beyond Reasonable Greed: Why sustainable Business is a Much Better Idea* (2002) Human & Rousseau, Cape Town

Wixley T & Everingham G *Corporate Governance* 2ed (2005) Siber Inc CC, South Africa

CASES

Dodge v Ford Motor Corp 170 NW 668 (Mich 1919)

Greenhalgh v Ardene Ltd (1950) 2 ALL ER 1120

Hutton v West Cork Railway Co 23 Ch D 654

Parke v Daily News Ltd 1962 2 ALL ER 292 (chd)

Shahzada Nand & Sons v CIT AIR 1977 SC 1182

South African Broadcasting Corporation Ltd v Mpofu and another 2009 (4) ALL SA 169 (GSJ)

Stilfontein Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd 2006 (5) SA 333 (W)

Unreported judgment of Nel J in the *Ex parte* application of Robert John Walters N.O. and Gavin Cecil Gainsford N.O. under case number 843/02 in the Cape of Good Hope Provincial Division of the High Court dated 3 May 2002

DISSERTATIONS AND THESES

Ally S *Corporate Social Responsibility: Practices, Trends and Developments* (unpublished LLM thesis, University of Cape Town, 2013)

Anwana *EO Corporate Social Responsibility and Corporate Governance: Implementation and Challenges for Companies Listed on the Johannesburg Securities Exchange* (unpublished Phd thesis, Durban University of Technology, 2018)

Fredericksz L *The Corporate Social Responsibility strategies and practices in South African Organisations* (unpublished LLM thesis, Wits Business School, 2015)

Johannes J *Corporate Social Responsibility in South Africa: How corporate partnerships can advance the sustainability agenda* (unpublished LLM thesis, University of the Western Cape, 2016)

Nomadwayi B *The directors' fiduciary duty to act in the best interest of the company: The possible development of common law by statute and how they affect human rights* (unpublished LLM thesis, University of Kwazulu-Natal, 2018)

Ntoi HL *The impact of corporate social responsibility on the corporate financial performance of companies listed on the Johannesburg Securities Exchange* (unpublished LLM thesis, University of Pretoria 2010)

INTERNET SOURCES

Accountable Capitalism Act, available at https://warren.senate.gov, accessed on 24 March 2019

Asmalash L & Ries B 'As of today, humans have used more resources than planet earth can regenerate in a year' 29 July 2019, available at https://edition.cnn.com/2019/07/29/us/earth-overshoot-day-trnd/index.html, accessed on 30 July 2019

Balachandran SV 'The Satyam Scandal' 7 January 2009, available at https://www.forbes.com/2009/01/07/satyam-raju-governance-oped cx_sb_0107balachandran.html#4482f6413044, accessed on 15 September 2019

Balch O 'India law requires companies to give 2% of its profits to charity. Is it working?' *The Guardian* 55 April 2016, available at http://www.theguardian.com, accessed on 24 March 2019

Barnett A 'UK firm tried HIV drugs on Orphans' 4 April 2004, available at https://www.theguardian.com/world/2004/apr/04/usa.highereducation, accessed on 3 August 2019

Belinchon F and Moynhihan R '25 giant companies that are bigger than entire countries', *Business Insider* 25 July 2018, available at https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7?IR=T, accessed on 16 June 2019

Cohen G 'Bophal is more than just history' *Greenleft Weekly* 7 December 1994, available at https://www.greenleft.org.au/content/bhopal-more-history, accessed on 3 August 2019

Crook C ‘The good company-The world according to CSR’ *The Economist* 22 January 2005, available at https://www.economist.com/special-report/2005/01/22/the-good-company, accessed on 24 March 2019

Deval RD ‘India Continues to Rank amongst most Corrupt Countries in the World’ *Forbes* 7 March 2018, available at http://www.forbes.com, accessed on 17 March 2019

Donnelley L ‘Global credit rating agency has downgraded South Africa to junk status’ *Mail &Guardian* 25 November 2017, available at *https://mg.co.za/article/2017-11-25-global-credit-ratings-agency-has-downgraded-south-africa-to-junk-status*, accessed on 27 July 2019

Duodu C ‘Adieu Dame Anita’ 12 September 2007, available at https://www.theguardian.com/commentisfree/2007/sep/12/adieudameanita, accessed on 3 August 2019

Escobar C ‘The tale of rBGH, Milk, Monsanto and the organic backlash’ 25 May 2011, available at https://www.huffpost.com/entry/the-tale-of-rbgh-milk, accessed on 4 April 2019

Gouws N ‘SA most unequal country in the world: Poverty shows Apartheid’s enduring legacy’ *Times Live* 4 April 2018, available at *http://www.timeslive.co.za*, accessed on 17 March 2019

Holmes T ‘VW fights to survive after emissions scandal, but it is business as usual in SA’ 12 July 2016, available at https://mg.co.za/article/2016-07-11-vw-fights-to-survive-after-emissions-scandal-but-its-business-as-usual-in-sa, accessed on 7 April 2019

http://www.infobrics.org, accessed on 17 March 2019

http://www.statecapture.org.za, accessed on 27 July 2019

Human Rights Watch report 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' January 1999, available at https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf, accessed on 3 August 2019

Kaldveer Z 'U.S. and Mansanto Dominate Global Market for GM Seeds' 7 August 2013, available at https://www.organicconsumers.org/essays/us-and-monsanto-dominate-global-market-gm-seeds, accessed on 4 April 2019

Levin ST 'Monsanto found liable for California man's cancer and ordered to pay $80 million in damages' 27 March 2019, available at https://www.theguardian.com/business/2019/mar/27/monsanto-trial-verdict-cancer-jury, accessed on 7 April 2019

Lewis P 'Blood and Oil: a special report after Nigeria represses, Shell defend its record' 13 February 1996, available at https://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html, accessed on 3 August 2019

Lourens S and Reddy T 'Company Law: The importance of King IV's principles on Corporate Governance' 22 May 2018, available at https://www.straussdaly.co.za/2018, accessed on 7 September 2019

Secretary General, Kofi Annan, press release 'Global Reporting Initiative Will Foster Corporate Transparency' United Nations official website 4 April 2002, available at https://www.un.org/press/en/2002/sgsm8186.doc.htm, accessed on 21 July 2019

Unknown 'Poverty in India: Facts and Figures on the daily struggle for survival' available at http://www.soschildrensvillages.ca/news/poverty-in-india-602, accessed on 17 March 2019

Unknown 'Scandals suggest standards have slipped in corporate America' 6 April 2019, available at https://www.economist.com/business/2019/04/06/scandals-suggest-standards-have-slipped-in-corporate-america, accessed on 6 April 2019

Unknown 'The biggest economies in Africa' *World Finance* 10 July 2018, available at https://businesstech.co.za/news/finance/257337/the-biggest-economies-in-africa/, accessed on 16 June 2019

Van Ham L 'Einstein Said Survival Requires a "Substantially New Manner of Thinking"-Are We Getting There?' *The One Earth Project* dated 9 May 2016, available at http://theoneearthproject.com/blog/einstein-said-survival-requires-a-substantially-new-manner-o.html, accessed on 30 September 2019

Vettori 'Corporate Social Responsibility' (2005) 329, available at https://repository.up.ac.za/bitstream/handle/2263/29308/09chapter9.pdf?sequence=10&isAllowed=y

Yglesias 'Elizabeth Warren has a plan to save capitalism' 15 August 2018, available at https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations, accessed on 18 March 2019

LAW COMMSSION PAPERS

South African company law for the 21st century guidelines for corporate law reform (May 2004) (http://www.gov.za/ccrdlawreview/guidelinesfororporate.pdf)

OTHER

Institute of Directors in Southern Africa *King III report on Corporate Governance for South Africa* (IoD Parklands 2009)

Institute of Directors in Southern Africa *King IV report on Corporate Governance for South Africa* (Lexis Nexis 2016)

JSE Listing Requirements (2011)

JSE Responsibility Investment Index (2015)

The Code for Responsible Investing in South Africa (2011)