

**CORPORATE SOCIAL RESPONSIBILITY LEGAL ANALYSIS AND SOCIAL
TRANSFORMATION: THE SOUTH AFRICAN EXPERIENCE IN A
COMPARATIVE PERSPECTIVE.**

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ABSTRACT

This dissertation presents a legal and regulatory framework of corporate social responsibility (CSR) and the effect it has on social transformation in South Africa. It is premised on Dodds' theory¹ of stakeholder protection which is articulated with greater clarity by Jeff Smith. He states that directors are agents of all stakeholders. In other words, they have the responsibility to ensure that every stakeholder's rights and interests are protected and fulfilled. This, he further explains, should be carried out by means of a balancing exercise between each stakeholder interest in every transaction.² The dissertation demonstrates how the private sector can 'effectively' utilise principles of CRS to contribute towards and expedite social transformation. The significance of social transformation rests on it being a constitutional imperative as employed to redress the legacy of Apartheid.³ Lastly, the dissertation discusses CSR and how it affects social transformation in India and the United Kingdom (UK) with the aim of gleaning comparative insights. The dissertation then makes recommendations that the South African CSR legislation should embody objectives of our broader national interests similar to the Indian approach. In addition, it argues for a fully defined set of directors' duties which promotes compliance with CSR goals similar to the UK approach.

KEY WORDS

Corporate social responsibility (CSR), social transformation, corporate governance (CG), profit maximisation, shareholder value, stakeholder protection, triple-bottom-line, triple-context, King Reports.

¹ Dodd EM *For Whom are Corporate Managers Trustees?* (1932) 45 Harvard Law.

Review 1145–1163 and Ansie Ramalho *Corporate Governance and the call for Stakeholder Inclusivity: Do shareholders lose out?* (2009) The Corporate Report at 18.

² Jeff Smith *The Shareholders vs. Stakeholders debate* (2003) MIT Sloan Management Review at 85.

³ Justice Sisi Khampepe *Meaningful participation as transformative process: The challenges of institutional change in South Africa's constitutional democracy* (2016) Stell LR 441.

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TABLE OF CONTENTS:

PLAGIARISM DECLARATION.....	2
ABSTRACT.....	3
ACKNOWLEDGEMENTS.....	4
TABLE OF CONTENTS:.....	5
CHAPTER ONE: INTRODUCTION TO CSR AND SOCIAL TRANSFORMATION	7
1.1 INTRODUCTION AND BACKGROUND.....	7
1.2 PROBLEM STATEMENT.....	10
1.3 RESEARCH QUESTION.....	10
1.4 AIMS AND LIMITATIONS	11
1.5 METHODOLOGY:	11
1.6 DEFINITION OF TERMS.....	12
1.7 CHAPTER OUTLINE.....	18
CHAPTER TWO: CSR PHILOSOPHICAL PERSPECTIVES	19
2.1 INTRODUCTION	19
2.2 SHAREHOLDER PRIMACY VERSUS STAKEHOLDER PROTECTION	19
2.3 ENLIGHTENED SHAREHOLDER VALUE VERSUS PLURALIST THEORY	21
2.4 CSR AND OTHER ASSOCIATED TERMINOLOGY	22
2.4.1 CONCEPTS SYNONYMOUS WITH CSR	22
2.4.2 CONCEPTS THAT PARTLY COINCIDE WITH CSR	24
2.5 CONCLUSION.....	25
CHAPTER THREE: CSR LAWS AND REGULATIONS IN SA.....	26
3.1 INTRODUCTION	26
3.2 THE EVOLUTION OF CSR UNDER THE KING REPORTS	30
3.3JSE LISTING REQUIREMENTS OVERLAPPING WITH CSR	38
3.4 LEGALLY BINDING CSR MEASURES	40
3.4.1 A COMPANY LAW PERSPECTIVE OF CSR	40
3.4.2 PROMOTION OF CSR IN OTHER LEGISLATION.....	43
3.5 CSR IMPACT ON SOCIAL TRANSFORMATION	46
3.6 CONCLUSION.....	50
CHAPTER FOUR: CSR LAWS AND REGULATIONS IN INDIA AND THE UK.....	51
4.1 INTRODUCTION	51
4.2 CSR LEGAL AND REGULATORY FRAMEWORK IN INDIA.....	51

4.2.1 REGULATORY FRAMEWORK..... 51

4.2.2 LEGAL FRAMEWORK..... 54

4.3 THE IMPACT OF MANDATORY CSR IN INDIA..... 56

4.4 CSR LEGAL AND REGULATORY FRAMEWORK IN THE UK..... 58

4.4.1 REGULATORY FRAMEWORK..... 58

4.4.2 LEGAL FRAMEWORK..... 59

4.5 THE IMPACT OF VOLUNTARY CSR IN THE UK..... 61

4.6 CONCLUSION 62

CHAPTER FIVE: REVIEW, CONCLUSIONS AND RECOMMENDATIONS 63

5.1 REVIEW OF THE RESEARCH CONDUCTED..... 63

5.2 FINDINGS AND CONCLUSIONS 64

5.2.1 A PHILOSOPHICAL FOUNDATION OF THE 21ST CENTURY COMPANY..... 64

5.2.2 INDIAN LAW AND SOCIAL TRANSFORMATION 64

5.2.3 THE UK LAW AND SOCIAL TRANSFORMATION 65

5.2.4 THE SOUTH AFRICAN LAW AND SOCIAL TRANSFORMATION 66

5.3 RECOMMENDATIONS FOR SOUTH AFRICA 66

5.4 OVERALL CONCLUSION 68

BIBLIOGRAPGY 69

CHAPTER ONE: INTRODUCTION TO CSR AND SOCIAL TRANSFORMATION

1.1 INTRODUCTION AND BACKGROUND

*A well-managed company will be aware and respond to social issues, placing a high priority on ethical standards. Such company is increasingly seen as non-discriminatory, non-exploitative, and responsible with regard to human right issues. As a result, the company is likely to experience improved productivity and good corporate reputation which will translate to sustained economic benefit.*⁴

This dissertation provides a legal analysis of Corporate Social Responsibility (CSR) in South Africa, India and the UK. The primary focus is to investigate whether the CRS Legal framework of South Africa is robust enough to effectively influence corporations to promote social transformation?

The significance of the choice of countries rests in their commonality as having what the rest of the world deems advanced and unique CSR legal frameworks. Today, stated Prof Derick De Jong, "CSR in South Africa is amongst the most advanced in the world".⁵ This is attributed to the refinement of the CSR regulations in King I, II, III and other statutory provisions. Initially, the call was for companies to account for their conduct as corporate citizens, "not just for their financial performance but equally in terms of their social and environmental performance"⁶, a concept explicitly referred to as the "triple-bottom-line"⁷ approach for doing business. The current King IV has introduced the concept of "triple context"⁸ as an intensified means to highlight the "interconnectedness of economic, social and political, and environmental factors in the success of the company".⁹ Here King IV contends that profits, society and the environmental influence do not operate separately as was previously thought under King III but instead work together towards sustainability governance.

Section 72 read with Regulation 43 of Companies Act¹⁰ support the King reports by making it mandatory for specific companies to elect a social and ethics committee¹¹, for driving interests advanced by CSR. Most specific again are legislation such as the Black Economic

⁴ King Committee on Corporate Governance, *Executive Summary of the King Report (2002) South Africa: Institute of Directors in Southern Africa*.

⁵ Jess Schulschenk, *Corporate Governance Research Programme: Interview Summary Report (2012)* at 1.

⁶ Ramani Naidoo, *Corporate Governance: An Essential Guide for South African Companies* 3rd ed (2016) LexisNexis at 379.

⁷ King III Report on Governance (2009) Institute of Directors for Southern Africa at Principle 2.2.

⁸ King IV Report on Corporate Governance in South Africa (2016) Institute of Directors for Southern Africa, Part 1 at 8.

⁹ Naidoo op cit (n 8) 379.

¹⁰ Companies Act No. 71 of 2008 s72

¹¹ Ibid.

Empowerment (BEE) and the Mining Charter that address issues that are at the heart of CSR. The progression of the above laws and regulations allowed for a perfect advancement of CSR over time in South Africa.

India was already steeped in philanthropy and other social responsibility initiatives before CSR was even coined. In the 1920's, primitive forms of CSR emerged through religious basis by the practice of Zakat, donations by the elite organisations to the poor. The practice made it compulsory for Indian corporations to use 2.5% on their assets to assist the needy.¹² Later larger corporations such as TATA continued this long tradition of philanthropy owing to their desire to alleviate poverty in India.¹³

It was from this need to address mass poverty that the government of India decided in 2009 to codify the first “CSR Guidelines which set out a fundamental principle that each company ought to formulate a CSR policy to guide its strategic planning and provide a roadmap for its CSR initiatives, which should be an integral part of overall business policy and aligned with business goals”.¹⁴ The CSR Guidelines were further developed in 2011 and it was recommended that companies comply with them on a voluntary basis.¹⁵ The Guidelines were later supplemented by the 2009 Companies Bill, which became a source of major debate in Parliament.¹⁶

Ultimately, After the Standing Committee of Parliament on Finance examined the Companies Bill it resolved to enact a legally mandatory CSR expenditure. This was later adopted in section 135 of the Indian Companies Act in 2013.¹⁷ India’s long standing history of philanthropy and CSR shows a gradual effort to advance its CSR laws, particularly for driving social change.

India, like South Africa, is plagued with overwhelming poverty and large disparities of inequalities. These, amongst other factors, have influenced the government of India to adopt a legally mandatory CSR approach with the hope of accelerating social transformation.¹⁸ It is significant that both South Africa, although taking a largely voluntary approach to CSR, and India have a common motive for adopting CSR as a means to expedite social transformation.¹⁹

¹² Arjya B. Majumdar, *India’s Journey with Corporate Social Responsibility – What Next?* (2013) at 3.

¹³ *Ibid* at 4.

¹⁴ *Majumdar* op cit note 14 at 20.

¹⁵ *Ibid* at 21.

¹⁶ Indian Companies Bill of 2009.

¹⁷ Indian Companies Act of 2013.

¹⁸ *Majumdar* op cit note 14 at 2.

¹⁹ Michael Kerr, Richard Janda and Chip Pitts *Corporate Social Responsibility- A Legal Analysis* (2009) 9.

In this regard, the paper is concerned with investigating the impact that a voluntary CSR approach has in achieving social transformation versus the effectiveness of the legally mandatory CSR approach in the same breath.

Ward and Smith²⁰ argued that the UK acquired its world leadership role in the field of CSR as a result of a set of given factors, namely: The colonial past it enjoys, the country having large accounting firms with an impressive CSR drive, The Industrial revolution and privatisation processes being one of the earliest in the world, the NGO community engaging corporations, and the insurance industry, which was an important driver of change as asbestos claims impacted the City of London.²¹

The UK has been instrumental in launching several CSR-related initiatives. In 2000 it appointed the first ever CSR minister who championed the CSR Index of Business in Community.²² This created the necessary pressure for business to consider social responsibility issues in a serious manner.

In addition, the UK's Companies Act²³ further advanced CSR and integrated decision-making into the core duties for directors of UK companies.²⁴ These newly developed directors' duties are supplemented by the reporting requirements of section 415 of the UK Companies Act.²⁵ The government saw this as a means of advancing "modern business needs and wider expectations of responsible business behaviour" and was the approach "most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all".²⁶ The UK CSR has the comparative advantage to influence other jurisdictions to take CSR seriously for social change.

To facilitate a focused legal analysis, the dissertation will confine itself to the impact that the various CSR regulations have on expediting social transformation. The discussion will

²⁰ Ward, H and Smith C *Corporate Social Responsibility at a Crossroads: Future for CSR in the UK* (2015) 151.

²¹ Samuel O. Idowu *An exploratory study of the historical landscape of corporate social responsibility in the UK* (2011) *Corporate Governance: the international journal of business in society* 11(2) 151.

²² *Ibid.*

²³ The UK's Companies Act of 2006 s 172.

²⁴ Kerr et al *op cit* (n21) at 9.

²⁵ The UK's Companies Act of 2006 s 415.

²⁶ The UK, Department of Trade and Industry, *Company Law Reform: White Paper 2005* (2005) at 5.

permeate across different sectors.²⁷ Past discussions²⁸ about CRS in South Africa have been focused almost exclusively on the possibility of the country adopting mandatory CSR approach, particularly with regards to environmental imperatives. Although this remains an important area of concern especially with compelling evidence on climate change and global warming, it creates a knowledge gap in the area of investigating the real effects that CSR, whether voluntary or mandatory, has on social transformation.

With increasing burdens on the government to provide social services to the poor, CSR principles are important for influencing organisation to share this burden with the government to expedite social transformation. Social harmony is important for the survival of corporations and the sooner companies realize that they can become instrumental in playing a part to curb social upheavals, such as the “FeesMustFall” students’ protests for free higher education, the better for their continued operations within their respective communities.

1.2 PROBLEM STATEMENT

Various violent strikes, Fees protests and even Xenophobia are an expression of the general discontent about poverty and inequality in South Africa creating an urgent need to address this issue through the use of law. Failing which, South Africa is likely to be in a state of anarchy at the mercy of discontent citizens. Although the government has carried-out initiatives to address issues of poverty and inequality, its efforts have not resulted in a complete eradication thereof. There is an urgent need to join forces with the private sector to effect the necessary changes. A clearly detailed and outcome-based CSR legal and regulatory framework is necessary to achieve this objective. This will guide corporations on how to engage with CSR to drive social transformation. Corporations’ ultimate survival is inextricably linked to a fully functional and peaceful society.

1.3 RESEARCH QUESTION

The main question that falls for determination is whether current CRS Legal framework of South Africa effectively promotes social transformation?

²⁷ No reference will be made to environmental concerns.

²⁸ These include research conducted by LLM students within the field of Corporate Governance and specifically CSR in South Africa such as Hunma, Hemlata *Legally mandatory corporate social responsibility: rationale and implications with specific reference to South Africa* LLM (University of Cape Town) (2013).

1.4 AIMS AND LIMITATIONS

The study contend that South Africa's current CSR framework fails to promote social transformation to its fullest because it does not provide corporations with clearly defined objective of CSR compliance outcomes in their legislations and regulations. Reference will also be made to economic benefits that CSR compliant companies enjoy. Lastly, the paper identifies elements of effective CSR strategies which have a strong correlation to social transformation in India and the UK with an aim to recommend them for adoption in South Africa.

The discussion is limited to communal interests as one of the stakeholders of the business. No reference will be made to the environmental interest which is another sphere of CSR. Other limits of the study are that the paper is desktop based and does not provide empirical evidence of social transformation. Moreover, CSR applies in various ways for different sectors but the paper is assuming a general view of CSR across sectors in South Africa.

1.5 METHODOLOGY:

The paper is a desktop study involving a critical review of regulations, documents, legislative provisions, codes of CSR and academic articles from South Africa, India and the UK in order to determine whether the aforesaid legal frameworks are sufficiently detailed to provide guidance and motivate organisations to get involved in the drive for social transformation.

For the purpose of this study, India is selected for two reasons. Firstly, it is a developing country facing similar challenges of inequality and poverty like South Africa. Secondly for the uniqueness of its mandatory approach to CSR. The United Kingdom offers a more developed and praised voluntary CSR legal framework which assists organisation's competitiveness and profit maximization. The UK is also a developed country and offers an opportunity to study initiatives of CSR in a different context. An attempt is made to analyse CSR documents and practices of these three countries to identify and suggest cutting edge CSR laws and practises for South Africa.

1.6 DEFINITION OF TERMS

Due to the overwhelming evidence of small and mega corporation failure globally²⁹ contributing to unemployment and poverty, there has been a shift arising in the nature and purpose of a corporation: who they are, to whom they owe their obligation, how best they can be governed and the role of governance in favour of all stakeholders' interests.³⁰ This creates a need to define a corporation and other related terms guiding its existence such as corporate governance and CSR. The paper will, in addition, define its understanding of social transformation as a constitutional imperative.

A. COMPANY AND CORPORATIONS

For the purpose of this paper, the words 'company' and 'corporation' will be used interchangeably. A company is defined in section 1 of the Companies Act as a "juristic person" separate from its owners. This definition does very little to tell us about the functions and purpose of the company. It is only used to highlight that a company has a legal personality distinct from its owners. One useful purpose of a company is given in the *Communitaire theory*.³¹ In terms of this theory a company does not have an immediate commercial character but has become the tool for addressing wider stakeholder interests. This theory states that the company should have a social and economic dimension. This reflects a shift in the content of the shareholder value norm to that of an inclusive stakeholder concern with which the paper will confine its understanding of a corporation.

B. CONVERGENCE OF CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE

This part aims to define the above terms and debunk the position that CSR and corporate governance (CG) operate distinctly for purposes of conducting business. It does this by defining and describing the purpose of each concept. Thereafter, the paper discusses the convergence of CSR and CG. This argument will not be extensively expanded on, as this alone is considered as a study on its own. The point for introducing this approach is to highlight the business interest part in adopting and making CSR an integral part of their business strategies.

For years, corporate social responsibility (CSR) and corporate governance (CG) have been the issue of debate amongst academics and practitioners. Many initially held the view that "CG

²⁹ One example is the corporate failure in Enron and Parmalat see Rezart Dibra *Corporate Governance Failure: The Case of Enron and Parmalat* (2016) European Scientific Journal June edition (12) 16 1857 – 7881.

³⁰ Naidoo op cit (n8) 4.

³¹ Irene-Marie Esser *Recognition of Various Stakeholder Interests in Company Management* PhD thesis (University of South Africa) (2008) 30.

generally entails principals of business efficiency and CSR involves principles of social justice”.³² This meant that while CG was primarily concerned with internal affairs, CSR was focused on external issues which related to the relationship between the corporation and the community.³³ The two concepts, therefore, were understood to be distinct and separate.

Milton Friedman, a Nobel Laureate in Economics, famously stated that the only social responsibility of business is to increase its profits, a position now known as the shareholder model of corporations.³⁴ He posited that issues of community development can be destructive because they are not directly related to the core purpose of business, which is profit maximization for shareholders, and should, therefore, be left to the government and other charitable organizations.³⁵

For many, like Friedman, who emphatically argued that the primary purpose of business was to increase profits for its shareholders, CG was significant for enhancing the “practise by which corporations are managed and controlled”³⁶ in order to achieve that objective. In this regard, CG would regulate the exercise of power, that is the authority, direction, and control, within a company in order to ensure that the company's purpose is achieved, namely the creation of shareholder value.³⁷

However, over time the increased attention on CG has also led to the broadening of the concept. CG gradually started to cover aspects that were traditionally seen to be part of CSR. According to Lorenzo Sacconi, CSR is a model of extended corporate governance whereby the directors and managers have responsibilities that range from fulfilling fiduciary duties towards the owners to fulfilling analogous fiduciary duties towards all the firm’s stakeholders.³⁸ Such evolution was specifically influenced by the CSR movement on the socio-legal views of corporations, which impacted the approach of CG. The concept of CG was then developed as a vehicle for encouraging management to consider broader ethical considerations. This reform

³² Mia Mahmudur Rahim and Shawkat Alam *Convergence of Corporate Social Responsibility and Corporate Governance in Weak Economies: The case of Bangladesh* (2013) *Journal of Business Ethics* (12) 14.

³³ *Ibid.*

³⁴ Ferrero, Ignacio and Michael Hoffman, W. and McNulty, Robert E. *Must Milton Friedman Embrace Stakeholder Theory?* (2014) *Business and Society Review* 119 (1) at 37-59 Available at SSRN: <https://ssrn.com/abstract=2404123>.

³⁵ *Ibid.*

³⁶ Milton Friedman *The Social Responsibility of Business is to Increase its Profits* (1970) *New York Times Magazine*, September 13, 1970. Copyright © 1970 by the New York Times Company. Accessed on 12/ 09/ 2017 on <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>

³⁷ Naidoo op cit (n8) 4.

³⁸ Lorenzo Sacconi *Corporate social responsibility as a model of extended corporate governance: an explanation based on the economic theories of social contract, reputation and reciprocal conformism* (2004) 6.

was meant to transform CG from the shareholder-centric governance to the stakeholder-oriented governance.³⁹ The renowned UK Sir Adrian Cadbury says:

Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources.

The aim is to align as nearly as possible the interests of individuals, corporations and society.⁴⁰

Naturally, the spirit of CSR started to permeate throughout the regulations of many CG laws to encourage corporations to be more attuned to the public, environment and social needs.⁴¹

The synergy between CG and CSR has united the two concepts to assist corporations to reach out from within the company to the outside society in order to benefit both the corporation and the society in which the corporation operates.

Therefore, CG and CSR work effectively together to "connect governance issues and social interests, and it is this coupling that makes CSR different from mere corporate philanthropy, as we know it".⁴² CSR involves the myriad ways corporations integrate society, environment and profit concerns into the daily scope of carrying out business. In this regard, CSR differs greatly from corporate charity initiatives. These involve a mere donation of money to communities instead of integrating systems of social help within the DNA of the business strategy.

Therefore, CSR has been recently re-defined as "a way of doing business which contributes to sustainable development, reinforcing competitiveness, social cohesion, and environmental protection; CSR is a business firm's obligation, beyond that required by the law and economics, to pursue long-term goals that are good for sustainable society and business success".⁴³ Philanthropy is not enough for this purpose; the paper will later discuss in detail why mere philanthropy cannot be used synonymously with the term CSR. Instead, CSR is the whole manner in which the corporation, its products, and services interact with society.⁴⁴

³⁹ Naidoo op cit (n8) 4.

⁴⁰ Sir Adrian Cadbury *Corporate governance overview: World Bank Report* (1999).

⁴¹ Ibid.

⁴² Verma Abhimanyu and Tanwar Ritika *Corporate Social Responsibility: The Next Level* (2013) International Journal of Management Sciences and Business Research 3 (1).

⁴³ Dominique B's Foreword to *Corporate social responsibility across Europe* (2005); D A L Coldwell 'Perceptions and expectations of corporate social responsibility: theoretical issues and Empirical findings' (2001) *SAJBM* 32(1) 49.

⁴⁴ John Hancock *Investing in Corporate Social Responsibility* (2005).

Michael Hopkins argued that CSR is sustainable and that philanthropy is whimsical.⁴⁵ He further contends that CSR has a stakeholder focused definition: "CSR is concerned with treating the stakeholders of the corporation ethically or in a socially responsible manner. Stakeholders exist both within the corporation (employees, shareholders and investors) and outside (customers, local community and the environment). The aim of social responsibility is to create higher standards of living while preserving the profitability of the corporation".⁴⁶ In terms of the South African King Report (2002) "company stakeholders are those whose relations to the enterprise cannot be completely contracted for, but upon whose cooperation and creativity it depends for its survival and prosperity".⁴⁷

Most people believe that CSR issues will increasingly permeate the board room whether as a risk management issue or as a more fundamental issue pertaining to the nature and purpose of the company.⁴⁸ Although one may argue for the use of CSR as risk management, this is above the scope of this paper and will not be discussed. The paper will be preoccupied with how CSR may play a primary role into the nature and purpose of the company.

C. SOCIAL TRANSFORMATION

The Constitution of the Republic of South Africa, 1996 has been said to be the most progressive constitution in the history of the world at large.⁴⁹ This is due to the fact that it explicitly seeks to be socially transformative by entrenching a range of socio- economic rights: environment and the rights to land, housing, health care, food, water, social assistance and education.⁵⁰

These rights seek to address major consequences of Apartheid such as the deliberate exclusion of black people from meaningful participation in the economy which culminated in limited access to quality education, skills development and employment opportunities for black people. By 2005 it was determined that whites (although they make up 10% of the population) still controlled more than two-thirds of the companies listed on JSE limited, 30% were owned by foreigners and only 4% were controlled by black people. Almost 60% of black were still regarded as poor. These disparities needed to be addressed through constitutional means.⁵¹

⁴⁵ Michael Hopkins *Corporate Social Responsibility and International Development: Is Business the Solution* (2006) at 9.

⁴⁶ Ibid at 7.

⁴⁷ *King II Report on Corporate Governance for South Africa* (2002) 103.

⁴⁸ Coro Strandberg *The convergence of corporate governance and corporate social responsibility* www.corostrandberg.com (2005) 15.

⁴⁹ Justice Khampempe op cit (n3).

⁵⁰ Constitution of the Republic of South Africa Act 108 of 1996 at chapter 2.

⁵¹ StatsSA Poverty Report 2017 accessed on 10/ 08/ 2017 on <http://www.statssa.gov.za/?s=poverity>.

Furthermore, the 2017 Statistics South Africa report showed that employment, or employability is dependent on education levels According to the report, 79.2% of those without formal education were poor in 2015 – down from 86.4% in 2006, but up by four percentage points from 2011 – compared to 8.4% of those with a post-matric qualification in 2015.⁵²

In addition, the Constitution is grounded on the Preamble of "recognizing the injustices of our past" which give a solid foundation for interpreting it as a whole. The motive to include this part, as further stated in the preamble, is to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. The objective of our Constitution, and by implication all other legislation which, must be consistent with constitution, is to "improve the quality of life of all citizens and free the potential of each person".⁵³

Danie Brand stated that the above mentioned "rights together with the other features of the Constitution such as the preamble indicate that our constitution differs from a traditional liberal model in that it is transformative by requesting that collective power is used to advance ideals of freedom, equality, dignity and social transformation".⁵⁴ By these efforts, ‘social transformation’ as a concept can be understood to be a constitutional imperative for the state and private persons and/ or juristic persons.

According to the Constitution social-economic rights play two roles. The first is in terms of section 8 (1) of the Constitution which places a duty on the legislature, the executive, the judiciary and all organs of state to actively implement socio-economic rights. This means that not only are they bound by the duty to refrain from violating basic human rights, all constituencies must act positively in making the fulfilment of "an improved life for all" realized. For example, section 39 (9) places a duty on the judiciary to promote the spirit, purpose and object of the Bill of Rights when interpreting all legislation. This was confirmed by the Constitutional Court as follows:

All statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the

⁵² Ibid.

⁵³ Constitution of the Republic of South Africa Act 108 of 1996 at The Preamble.

⁵⁴ Danie Brand and Christof HH *Socio-economic rights in South Africa* (2005) 25.

Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole⁵⁵ and all other legislation that are subject to the Constitution.

In terms of private individuals or corporations section, 8 (2) creates a direct and indirect horizontal application of the rights in the Bill of Rights. In terms of the direct application, the Bill of Rights binds corporations in certain circumstances. According to section 8(2), a provision of the Bill of Rights applies to the conduct of a private person or a corporation only to the extent that the provision is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. It binds a private or juristic person, in other words, if it is applicable to a private or juristic person.⁵⁶

Indirect application means that the Constitution and the Bill of Rights do not directly bind actors. Instead, the influence of the Bill of Rights is mediated through other law: statutory or common law. In principle, and where possible, a legal dispute should be decided in terms of the existing principles or rules of ordinary law, properly interpreted or developed with reference to the values contained in the Bill of Rights, prior to any direct application of the Bill of Rights to the dispute. When it comes to statutory law, the principle simply means that a court must first attempt to interpret legislation in conformity with the Bill of Rights (indirect application) before considering a declaration that the legislation is in conflict with the Bill of Rights and invalid (direct application).

The spirit and purport of the Constitution advocate for a collective effort in addressing issues of social transformation. This, therefore, must be realized within all legislation, the Companies Act and its Regulations being no exception, to ensure that issues arising from the commercial industry promote ideals of redress and social upliftment too.

⁵⁵ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC).*

⁵⁶ Constitution of the Republic of South Africa Act 108 of 1996 at s8.

1.7 CHAPTER OUTLINE

A well-managed company will be aware and respond to social issues, placing a high priority on ethical standards. As a result, the company is likely to experience improved productivity and good corporate reputation which will translate to sustained profits. The main question that falls for determination is whether current CRS Legal framework of South Africa effectively promotes social transformation?

Chapter one reflected on a brief history of CSR in South Africa, India and the UK. It also contents that social transformation, certainly in a South African context, is a matter of constitutional imperative. It also states the dissertation's problem statement, research question and aims and limits of the study. A case is made for the synergy between CSR and corporate governance.

Chapter two reviews the theoretical foundation of CSR which will inform the scope of the paper. The evolution of CSR from various conceptual terms is also advanced. The chapter will also highlight the unique functional nature of CSR against preceding ideas of social responsibility.

Chapter three provides a detailed discussion of the CSR laws and regulations in South Africa. It refers to the JSE listing requirements and other binding statutes which show the integration which CSR has enjoyed thus far. The chapter also discusses specific legislation that have a mandatory CSR approach.

Chapter four describes the evolution of CSR in India. It outlines the transition from a voluntary CSR to a mandatory CSR approach in India. Evidence of the effect of mandatory CSR on investors and social transformation will be given. It also outlines the evolution of CSR in the UK and its influential nature to the CSR legal initiatives in South Africa. It discusses the voluntary nature of CSR in the UK and gives evidence on the effect it has on investors and social transformation.

Chapter five provides a summary of the important findings of the research conducted. It also highlights possible recommendations that could be made to refine the CSR legal framework in South Africa. Further, it gives a general overview of the research and investigations provided above. Recommendations are made according to the findings of the research to enhance the South African CSR legal framework.

CHAPTER TWO: CSR PHILOSOPHICAL PERSPECTIVES

2.1 INTRODUCTION

Chapter one tabled the introduction of CSR and how it influences social transformation. It was stated that CSR should form an integral part of the core strategy of corporate governance. In other words, the nature of CSR exists in its most correct form when it is embedded into the primary scope of conducting business. This factor distinguishes CSR from other similarly related concepts. To explain this premise, a sound theoretical foundation concerning shareholder primacy versus stakeholder theory will be explained. Thereafter, the enlightened shareholder value and the pluralist approach will be discussed. Lastly, terminologies that are associated with CSR either correctly or incorrectly will be analysed.

2.2 SHAREHOLDER PRIMACY VERSUS STAKEHOLDER PROTECTION

Infamous corporate failure at Enron, Global Crossing and Tyco International, just to name a few, provide compelling evidence against the premise of shareholder primacy advanced by Berle in 1931⁵⁷ He argued that “directors hold the property of shareholders in the trust for the sole benefit of the shareholder. Their duties are confined to maximising shareholder property”.⁵⁸ According to Berle’s logic, the fact that the shareholders are also investors to the company obliges the manager to use the capital in the way the shareholders would authorise it, which will inevitably lead to an increased shareholder value or profits.⁵⁹

Milton Friedman stated that “there is one and only one social responsibility of business- to use its resources and engage in activities designed to increase its profits”.⁶⁰ In other words, where a director is challenged with competing interests from different stakeholders, he must prefer a position that will maximise shareholder interests notwithstanding other interests.

On the other hand, Dodd argued that directors serve as trustees for the entire community rather than individual shareholders.⁶¹ This means that the directors have a “duty to both the corporation’s shareholders and the individuals and constituencies that contribute directly or indirectly to a company’s wealth-creation capacity and activities, and who are therefore its potential beneficiaries and/ or risk bearers”.⁶² These include the employees, creditors, clients,

⁵⁷ Berle AA. *Corporate powers as powers in trust* (1931) Harvard Law Rev (44) 1049-1074.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Matthew Lester *Did Milton Friedman Get it Wrong?* (2016) CR (2) 13.

⁶¹ Ramalho op cit (n1) at 18; and Dodd op cit (n1).

⁶² Smith op cit (n2) 85-86.

suppliers, environment and community at large. Therefore, directors must deliberately use the company's resources to address the broader interests of various stakeholders. In the words of Jeff Smith "directors are agents of all stakeholders and have two major responsibilities: to ensure that the ethical rights of no stakeholders are violated and to balance the legitimate interests of various stakeholders when making decisions".⁶³

The reasons advanced by Jeff Smith that directors should aim to balance short-term profit maximisation with the long-term goals of the corporation to remain as a going concern.⁶⁴ This means the focus of directors should shift from short-term profit maximisation for immediate shareholders to long-term profit maximisation for present and future shareholders. The effect of this is that other stakeholders will be taken care of.

For example, unlike above stated corporate failures when corporations are managed from a longevity perspective employees retain their jobs for longer, there is a good flow in the supply and demand chain and current and future shareholders benefit from the corporation's success, amongst other stakeholders.⁶⁵

The fundamental distinction between the shareholder primacy and the stakeholder theory is that in the latter directors must consider interests of all relevant stakeholders even if it reduces company's immediate profitability.⁶⁶ Directors are encouraged to take into consideration all relevant stakeholders as equally important to achieving the end objective of making profits. Such initiative would enable directors to a long-term approach and instead act in a manner that strengthens the corporation's sustainability as opposed to short term profits at the expense of other stakeholders.

Therefore, the stakeholder theory does not remove from corporations their primary objective of making a profit. Instead, it adopts a long-term approach to making sustainable profits while investing in the interests of an all-inclusive stakeholder.⁶⁷

⁶³ Smith op cit (n2) 85-86.

⁶⁴ Ibid.

⁶⁵ Eunsup Daniel Shim *Sustainability, Stakeholder Perspective and Corporate Success: A Paradigm Shift* (2014) International Journal of Business, Humanities and Technology 4 (5) at 64.

⁶⁶ Ibid at 86.

⁶⁷ Ramalho op cit (n1) 22.

2.3 ENLIGHTENED SHAREHOLDER VALUE VERSUS PLURALIST THEORY

The South African corporate law reform indicated that the enlightened shareholder value (ESV) approach and the pluralist approach are important for the management of a company and direct the nature with which directors ought to prioritise their duties.⁶⁸ Both approaches have a shareholder element but do not advocate for shareholder supremacy as stated above by Berle.

On the one hand, the ESV approach is concerned with the maximum protection of shareholders.⁶⁹ Although other stakeholder interests should be considered in terms of the ESV approach, they should not override those of the shareholders. In other words, other stakeholder's interests must always be secondary to those of shareholders.⁷⁰ The stakeholder's interests are only relevant to an extent that they contribute to the maximisation of shareholder value. Therefore, the directors in terms of this theory must still prioritise the interests of shareholders and only consider interests of other stakeholders only if they increase the value of shareholders. Esser states that "in the ESV, the primary role of the directors is seen to promote the success of the company for the benefit of maximising value for shareholders".⁷¹

On the other hand, the pluralist theory posits that directors owe a fiduciary duty to different stakeholders. For example, interests of employees may become primary and those of shareholders secondary in transactions that would ultimately benefit the company. The logic behind this is that all interests of various stakeholders are equally important and directors are expected to consider them on an equal basis. Unlike the ESV approach, other stakeholder interests are not only relevant to the extent that they advance those of the shareholders but can become the focus of attention. Therefore, "the pluralism sees shareholders as one constituency among many and recognises the interests of various stakeholders equally. Thus, the company's existence and success are seen as intertwined with considerations of interests of all potentially qualifying stakeholders in the business of the corporation".⁷²

In the early stages of corporate law reform in South Africa ESV approach was preferred.⁷³ However, evidence under the 2008 Companies Act and the latest King reports suggests that a

⁶⁸ Policy Document Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century (2004).

⁶⁹ Kerr et al op cit (n27) 15.

⁷⁰ Ibid at 17.

⁷¹ Irene-marie Esser and Adriette Dekker *The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles* (2008) Journal of International Commercial Law and Technology 3 (3) at 159.

⁷² Kerr et al op cit (n27) 160.

⁷³ Policy Document Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century (2004).

preferred approach is currently the pluralist approach.⁷⁴ The rest of the paper will be influenced and informed by the pluralism theory and in addition show the link to this theory in the current legislations.

2.4 CSR AND OTHER ASSOCIATED TERMINOLOGY

CSR has been used synonymously with other terms either correctly or incorrectly in other instances. This section aims to distinguish CSR from other similar terms in order to narrow its meaning for the purpose of this paper.

2.4.1 CONCEPTS SYNONYMOUS WITH CSR

This paper will consider those terms incorporated into the South African context to carry the same meaning as CSR. These include the following: ‘corporate citizenship’, ‘corporate responsibility’, ‘triple-bottom-line’, ‘triple-context’ and ‘stakeholder protection’.

The concept of ‘corporate citizenship’ is better viewed synonymously with CSR. Naidoo states that the term corporate citizen relates to “the legal fiction of a company as a person in its own right”.⁷⁵ Companies can therefore either be good or bad corporate citizens. However, Ben Schiller's argues that the concept of corporate citizenship is inseparable from the activities of the reputational building and good public relations.⁷⁶

He continues to capture the essence of corporate citizenship as follow: “these days we have high expectations of what companies should be. It is not enough that they make good products. They also need to be good citizens. We expect them to minimise their social and environmental harm and to report on their impacts and act in social awareness. And we expect them to do more than simply follow the law”,⁷⁷ meaning they should actively act to bring about this social transformation.

To paraphrase King IV, corporate citizenship is an inevitable consequence of being an integral part of society. As a corporate citizen, a company has rights but also has responsibilities towards society and environment on which society depends. Corporate citizenship, therefore, involves how the company uses its resources and how it balances its needs with those of society

⁷⁴ Companies Act No. 71 of 2008 at s 75 and King IV Principle 2.

⁷⁵ Naidoo op cit (n8) 379.

⁷⁶ Ben Shiller *The Future of Progressive Business in Companies that are good, Not just doing good*. FastCompany March 2016 accessed on 21 August 2017 at <https://www.fastcompany.com/3056482/the-future-of-progressive-business-is-companies-that-are-good-not-just-doing-good>.

⁷⁷ Ibid.

to achieve positive lasting outcomes for all spheres concerned. As King IV puts it, "companies must give direct rather than incidental consideration to the legitimate interests and expectations of all stakeholders".⁷⁸

In the same fashion, CSR focuses on the good that companies are expected to do to the social, environment and business. The World Bank defines CSR as the "commitment of business to managing and improving the economic, environmental and social implications of its activities at the firm, and local levels".⁷⁹ This definition corresponds with the understanding of corporate governance as employed by the King reports in South Africa.

The concept of 'corporate responsibility' is also indistinguishable from CSR. According to Michael Kerr, "corporate responsibility is usually described in terms of a company considering, managing and balancing the economic, social and environmental impacts of its activities. It is about companies assessing and managing risks, pursuing opportunities and creating corporate value, in areas beyond what would traditionally be regarded as a company's core business. It is also about companies taking an enlightened self-interests approach to considering the legitimate interests of a company's stakeholders".⁸⁰ This definition shares many similarities with the above-stated definition of CSR.

The triple-bottom-line concept was initially introduced as an accounting framework that incorporated and measured three dimensions of performance: social, environment and finance.⁸¹ This differed greatly from the previous form of measure which was confined to finances. For example, the social measures would consider for instance variables such as unemployment rates, female employees, poverty, inequality, education levels and so on within the company's location. However, this concept has been developed to take on a wider meaning than featuring in merely reporting and accounting records to an integration of the entire business strategy. This approach intensified under King II and III which called for companies to govern in terms of the triple-bottom-line approach.

King IV presents an intensified approach termed the 'triple context' incorporating a reference to the United Nations Sustainability Development Goals. It suggests that the boards need to embrace a broader vision of sustainability to achieve developmental aims.⁸² It has been argued

⁷⁸ King III Report on Governance (2009) Institute of Directors for Southern Africa at chapter 2.

⁷⁹ Naidoo op cit (n8) 376.

⁸⁰ Kerr et al op cit (n21) 23.

⁸¹ King III Report on Governance (2009) Institute of Directors for Southern Africa at Principle 2.2.

⁸² Naidoo op cit (n8) at 399.

that the triple-context referred to in King IV "goes further to emphasise the interconnectedness of economic, social and environmental factors in the success of the company".⁸³ It is for these reasons that the triple- context approach has been adopted to carry the same meaning as CSR under King IV.

Lastly, stakeholder protection is a term that is used widely in the South African legal framework to refer to issues of CSR. Stakeholder protection involves a growing acknowledgement that governing a corporation has moved from the narrow narrative to the protection of wider or multiple stakeholders encompassing elements of long terms risks, overseeing ethical performance and sustainable business practices.

2.4.2 CONCEPTS THAT PARTLY COINCIDE WITH CSR

This section includes all terms that are incorrectly used interchangeably with CSR. They include the following: 'corporate social investment' and 'corporate philanthropy/-corporate giving'.

The term CSR and corporate social investment (CSI) have in the past been used interchangeably. Recent trends have however recognised CSI as one element of a company's CSR activities.⁸⁴ CSR is concerned with broader solutions to the social, environmental and corporates profit maximisation. CSI, on the other hand, is one sub-component of CSR which aims to uplift the community and is therefore limited to the social dimension of CSR. This is evident in the globally accepted definition of CSI as "encompassing projects that are external to the normal business activities of the company and not directly for the purpose of increasing the company's profits".⁸⁵ CSR, on the other hand, must be internalised in the primary scope of business.

Some have argued that the word "investment" in CSI has been suggesting some type of return for the business.⁸⁶ Even though this may be true in the sense that the company's credibility and reputation will inevitably be enhanced, this is only a side issue or incidental consequence. The primary return is in terms of social uplifting for broader transformational agenda of the social contexts of each business. For these reasons, CSR and CSI may not be used interchangeably

⁸³ Ibid at 379.

⁸⁴ Ibid at 377.

⁸⁵ Corporate Social Investments Solutions at <http://www.csisolutions.co.za/why-csi.php> accessed on 21 August 2017.

⁸⁶ Robert Hinson and Tidings Ndhlovu *Conceptualising corporate social responsibility (CSR) and corporate social investment (CSI): The South African context* (2011) *Social Responsibility Journal* (1) 73.

because the latter is concerned with broader issues and must be embedded into the primary scope of business whereas the former is only concerned with social issues and operates external to the business.

Corporate philanthropy, also known as corporate giving, is a mere charitable donation of profits and resources given by companies to a non-profit organisation.⁸⁷ Corporate philanthropy generally consists of monetary donations, which may be handled directly by the company or by a foundation created or linked to the company, but can take the form of utilisation of the corporation's facilities by members of the public or employees volunteering their time to render their services for no charge. Again here, corporate philanthropy is distinguishable from CSR in that it is only concerned with one sphere of society, namely charitable donations to society, While CSR is concerned with broader issues within community, the environment and profit maximisation. The charitable donations operate outside the scope of the business but rendering corporate facilitate and employee skills to the public are integral to the primary scope of business. According to Daile “CSR is not the same as corporate philanthropy; it is a situation when companies are judged not just by the product and profits they make, but also by how those profits are made”.⁸⁸ This means that CSR or the social aspect of CSR must be embedded into the primary scope of doing business and not only operate in the periphery.

2.5 CONCLUSION

This chapter has shown that there have been various philosophical foundations to which corporate governance has been based over the years. Despite this, it shows a progression of the philosophy to the current century where corporations must be managed in the interests of all stakeholders instead of a single bottom line which is profit maximisation for the shareholders. The logic of this philosophy is that corporates can achieve sustainability and long-term profits while assisting the government achieve community development and address environmental concerns. Lastly, the chapter distinguished the concept of CSR from other related terms in terms of its functionality. It was shown that CSR is concerned with much broader issues than merely social responsibility: it operates for the benefit of the social, environmental and corporate's profits. In addition, it was argued that CSR can only operate in its most correct sense when it is embedded into the primary scope of business.

⁸⁷ Kerr et al op cit (n21) 22.

⁸⁸ Abel J. Diale *Corporate social responsibility in the South African mining industry: necessity, conformity or convenience?* (2014) (2) 1 International Journal of Business and Economic Development 19.

CHAPTER THREE: CSR LAWS AND REGULATIONS IN SA

3.1 INTRODUCTION

In 1994, the ANC-led government inherited a society plagued with various substantive inequalities marked by race. This has been a result of social and historical effects of colonialism and apartheid. As a result, black people have disproportionately suffered the indignity of poor education, poverty, and landlessness. White people, on the other hand, benefited from the previous systems and continue to benefit and pass their resources and privileges to the current generation, perpetuating the cycle of racial inequality.

Although the ANC-led government has made commendable strides to limit the above social and economic inequalities, it has failed to ameliorate the racially classed socio-economic imbalances at the desired speed. This is made evident by the recent strikes and protests for better living conditions, higher wages, service delivery, and university fee subsidies demands, amongst other things.

To achieve better progress the government has called for a public-private relationship to assist the public sector in advancing an economically inclusive future for all, specifically the previously disadvantaged black people. In 2004 Mandisi Mpahlwa, the then minister of Trade and Industry stated that “in the last ten years corporate legislative framework has undergone massive reforms which placed the private sector at the centre of economic development and its prosperity- for wealth creation and social renewal”.⁸⁹ The fact that the reform was driven by the government places a high emphasis on there being a desire to address the social and historical issues through corporate law.

The Department of Trade and Industry (Dti) issued a policy document with guidelines for a comprehensive review of the South African corporate law. Fundamental to this process of review was introducing protection of the interests of different stakeholders.⁹⁰ It stated in clear terms that “a company should have as its objective the conduct of 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”.⁹¹ A common theme in corporate law reform has been the need for integration. There have to be a carefully thought out business

⁸⁹ Policy Document *Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century* (2004) at 6.

⁹⁰ Ibid.

⁹¹ Policy Document *Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century* (2004) 8.

approach that brings together the economic considerations, with the environmental and social imperatives.⁹² The company is, therefore, tasked with the responsibility to address and balance the needs of its stakeholders, a much broader range of persons than mere shareholders.⁹³ Stakeholders include the community, clients, employees, suppliers, the environment and any other person or groups standing to contribute from the functions of the corporation or alternatively vulnerable to corporate conduct.⁹⁴ This was reflected in the King reports under the phrase triple-bottom-line,⁹⁵ which meant that companies must govern their corporation to the best interest of the social, environmental and profit maximisation.⁹⁶

The protection of stakeholder interests was later reflected in the in the Companies Act and various other statutes.⁹⁷ The previous Companies Act had no express reference to CSR and the legislature was of the opinion that it was time to integrate it into the governance structure and decision making of the business in the new Act.⁹⁸ This form of legislated CSR suggests the seriousness with which businesses should consider stakeholder protection.

Section 72 of the Companies Act, without employing the term ‘CSR’, makes “an attempt to ensure that CSR becomes infused and embedded in a company’s governing structure”.⁹⁹ It is important to note that the legislature did not advocate for a widely incorrect view of CSR as being a charity scheme or some stand-alone philanthropy that is separate from the primary scope of business. By integrating it into the governing structure of business strategies, the legislature used the correct approach of making CSR part of the fundamental strategy of the business. This approach will be expanded on below.

Likewise, the other above cited legislation employs CSR in a similar fashion, as will be shown fully below. These Acts are not merely focused on correcting racial imbalances in the employment market. Instead, they strive to create corporations rich with diversity that increases the productivity of ideas and therefore business while promoting social investments. For example, the Employment Equity Act aims to achieve equity in the workplace by:

⁹² Kerr et al op cit (n21) 5.

⁹³ Ibid at 13.

⁹⁴ Ibid at 13.

⁹⁵ King III Report on Governance (2009) Institute of Directors for Southern Africa at chapter 2.

⁹⁶ Kerr et al op cit (n17) 5.

⁹⁷ Companies Act 71 of 2008; Labour Relations Act 66 of 1995; Broad Based Black Economic Empowerment Act 53 of 2003, and Employment Equity Act 55 of 1998.

⁹⁸ HJ Kloppers *Driving Corporate Social Responsibility (CSR) Through the Companies Act: An Overview of the Role of the Social and Ethics Committee* (2013) 1 PER/ PELJ 166.

⁹⁹ Ibid at 167.

- (a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.¹⁰⁰

In addition, stakeholder protection and CSR are addressed by the governance framework contained in the King Reports.¹⁰¹ The Reports all follow a voluntary basis of governance compliance. This means that the Reports operate on a non-legislative basis. King III adopts an “apply or explain” approach which developed from King II’s “comply or explain” approach. Where King II’s approach of “comply or explain” denoted a mindless response to the Code and its recommendations King III’s ‘apply or explain’ approach meant that the board of directors, in its collective decision making, could conclude that to follow a recommendation would not, in the particular circumstances, be in the best interests of the company. “The board could decide to apply the recommendation differently or apply another practice and still achieve the objective of overarching corporate governance principles of fairness, accountability, responsibility and transparency”.¹⁰² The King Committee argued that the latter approach needed refinement on the ground that it denoted a mindless response to the principles and recommendations in the King Report. The former approach was said to “show an appreciation for the fact that it is often not a case of whether to comply or not, but rather to consider how the principles and recommendations can be applied”.¹⁰³

This has highlighted the need for directors to apply their minds and put effort behind ensuring that the principles are adopted into their business rather than having a checklist comply attitude. This motive inevitably contributes to the nature of CSR as having an inextricable requirement of conscious engagement to ensure that it works within the scope of the business and not operating separately.¹⁰⁴ The introduction of King III state that "in reality, the ultimate compliance officer is not the company's compliance officer ensuring compliance with statutory

¹⁰⁰ Employment Equity Act 55 of 1998 at section 2.

¹⁰¹ *King II Report on Corporate Governance for South Africa, Institute of Directors in Southern Africa* (2002).

¹⁰² Bowman Gilfillan Attorneys *Quick Guide to Corporate Governance* at <http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf> accessed on 21 August 2017.

¹⁰³ *Ibid.*

¹⁰⁴ Bowman Gilfillan Attorneys *Quick Guide to Corporate Governance* at <http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf> accessed on 21 August 2017.

provisions but the stakeholders”.¹⁰⁵ In other words, compliance will not be measured on tick-box or compliance basis but through real measures of pragmatic impacts of all relevant stakeholders.

However, the “triple bottom line” referred to in King II and King III, have been subject to criticism for having “an accounting framework which measures, separate and distinct elements, the financial, social and environmental impacts of the company”.¹⁰⁶ Ramani Naidoo stated that this implies a compartmentalization rather than an integration of the different impacts of the company.¹⁰⁷ This may be problematic on the ground that it contradicts the basic nature of CSR which is that it has to be embedded within the primary scope of conducting business. Naidoo further states that “as an accounting framework, the triple bottom line does not give an indication of sustainability of the entity or of the social and ecological systems on which it relies”.¹⁰⁸ The approach adopted in King IV deals with the aforesaid shortcomings.

King IV advances the idea of a conscious application of the codes by adopting an “apply and explain” approach. In other words an organisation is assumed to have applied the principles and recommendations but also to explain measures and their results.¹⁰⁹ The “apply and explain” approach should, by giving stakeholders more information in respect of the corporate governance of organisations, facilitate meaningful stakeholder participation”.¹¹⁰ There is an assumption of application which enhances stakeholder protection. This approach is founded on what is termed the “triple context” in King IV, replacing the former triple bottom line.

The triple context has been said to go further to “emphasise the interconnectedness of economic, social and political and the environmental factors in the success of the company”.¹¹¹ In other words, the triple context approach goes a step further to argue that profit maximisation is directly dependent on the well-being of the social and environmental issues.

The above-described compliance methods ceased to affect the Johannesburg Stock Exchange's (JSE), now JSE Limited, listed public companies that were prescribed to comply with King II through the JSE Listing Requirements. The JSE updated its listing requirements when King IV

¹⁰⁵ King III Report on Governance (2009) Institute of Directors for Southern Africa at chapter one.

¹⁰⁶ Naidoo op cit (n8) 379.

¹⁰⁷ Ibid.

¹⁰⁸ *ibid.*

¹⁰⁹ King IV Report on Corporate Governance in South Africa (2016) Institute of Directors for Southern Africa.

¹¹⁰ <http://www.polity.org.za/article/the-key-differences-between-king-iii-and-king-iv-2017-01-11> accessed on 8 May 2017.

¹¹¹ Naidoo op cit note 379.

report was published. The amendments contained in the listing requirements now require listed companies to comply with all King Code principles, including those on IT Governance. Listed companies now have to “provide an explanation, in their pre-listing statements, about which practices they have in place, which help them comply with all the King Code principles”.¹¹²

In addition, the JSE also launched a Socially Responsible Investment Index (SRI Index) in May 2004. In terms of the Index, the JSE developed criterion to measure the CSR performance of the FTSE/ JSE all share index. The criteria measures how companies have integrated principles into existing frameworks of governance across four areas: Policy, strategies, management and performance and reporting.¹¹³ Compared to the much earlier King reports, the directors of the JSE listed companies find it easier to comply with the current approach in King IV than that in previous King reports which failed to provide clear objectives for each principle.

The evolution of stakeholder protection in King I, II, III and IV codes has no doubt enhanced the CSR effectiveness. Below, the paper will expand on this with primary attention given to the director’s duties and principles for stakeholder considerations under the aforementioned codes. The paper will only focus on the duties and principles for the benefit of the business and community development.

3.2 THE EVOLUTION OF CSR UNDER THE KING REPORTS

King I was issued in 1994.¹¹⁴ The report was the first globally to talk about interests of stakeholders and about accountability beyond that of shareholders. In this regard, the code adopts an inclusive approach to managing a company.¹¹⁵ In other words, the purpose of the company must be defined and its value identified broadly. Thereafter, directors should be tasked with the responsibility to manage the company in the broad interests of all stakeholders.¹¹⁶

The main purpose of King I was to create the highest standard of corporate governance in South Africa by recommending various principles. A considerable volume of the code dealt with financial and regulatory principles for good corporate governance. King, I applied to all companies, strictly so to companies listed on the Johannesburg Stock Exchange, as it then was,

¹¹² <https://www.michalsons.com/blog/jse-listing-requirements-king-iii-iv/11545> accessed on 5 June 2017.

¹¹³ Esser op cit note 27 at 38.

¹¹⁴ *King I Report on Corporate Governance for South Africa, Institute of Directors in Southern Africa* (1994).

¹¹⁵ *Ibid.*

¹¹⁶ Irene-Marie Esser *The Protection of Stakeholder Interests in Terms of the South African King III Report on Corporate Governance: An Improvement on King II* (2009) 21 SA Merc LJ 193.

large public entities as defined in the Public Entities Act 93 of 1992, banks, financial and insurance entities as defined in the various Financial Services Act.¹¹⁷

King, I was widely criticised for lacking clarity on the preferred approach regarding stakeholder protection.¹¹⁸ For example, the code fails to provide directors with practical guidelines on how to act in the interest of the company by taking the interests of various stakeholders into account.¹¹⁹ Botha suggests that “King I created confusion regarding the recognition of stakeholder interests.¹²⁰ He motivates this view by stating that it could have been advisable for the code to “state the philosophy with regards to the nature and the role of corporations”. The absence of this philosophy in King I create confusion amongst directors. This, in addition to evolving policy documents on company law, resulted in an updated code in 2002.

King, I was replaced by King II in 2002. The latter code was preoccupied with principles of good governance which related mainly to the board of directors¹²¹; risk management¹²²; internal audit¹²³; integrated sustainability reporting¹²⁴ and accounting and enforcement.¹²⁵ The essential corporate governance principles in King II are discipline, transparency, independence, accountability, responsibility, fairness and social responsibility.¹²⁶ This code became exceptional amongst others in the world in that it was the first to include a section on integrated sustainability reporting. This motivated companies to report on an annual basis about nature and extent of its social transformation, ethics, safety and health issues, and environmental management policies and practices.¹²⁷

The above reporting patterns contributed significantly to enhancing the codes interests of various stakeholders' considerations or its triple-bottom-line approach.¹²⁸ According to Irene-Marie Esser, this style of report encouraged companies to “embrace various factors when

¹¹⁷ King I Report on Corporate Governance for South Africa (1994) Institute of Directors in Southern Africa at Chapter 20 in para 1.1.

¹¹⁸ Esser op cit (n33) 192.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ *King II Report on Corporate Governance for South Africa, Institute of Directors in Southern Africa* (2002). Principle 21-30; 46-76.

¹²² Ibid Principle 30-31; 76-92.

¹²³ Ibid Principle 34-35; 90- 96.

¹²⁴ Ibid Principle 30-31; 76-92.

¹²⁵ Ibid Principle 38-41; 153-171.

¹²⁶ Ibid Principle 10- 11.

¹²⁷ Esser op cit (n33) 16.

¹²⁸ *King II Report on Corporate Governance for South Africa, Institute of Directors in Southern Africa* (2002). at par 17.1, *Executive Summary* in par 5.1.

applied in respect of the management of the company: the social, economic and environmental concerns".¹²⁹ Perhaps this was because such disclosure exposed the CSR compliance, which most companies want to be in compliant with.

King II's triple-bottom-line approach or its recognition of stakeholder interests follows an enlightened shareholder value approach.¹³⁰ According to this approach, "the primary role of directors is to promote the success of the company for the benefit of the company as a whole and to generate an increased shareholders value".¹³¹ Therefore, although other stakeholders ought to be considered their interests are subordinated to those of shareholders.¹³² In terms of King II, "collective shareholders are still the most important beneficiary of directors' fiduciary duties, but social and environmental matters should also be considered".¹³³

The above creates a fallacy of consideration for the social and environmental matters because their interests are only important when it benefits the shareholder value. This creates a hierarchy of considerations. It is clear that should it happen that the interests of shareholder are become outweighed by that of other stakeholders, the former must be considered supreme by the directors and therefore prevail. This means that while social and environmental concerns may be of importance for consideration in a particular transaction but fail to support or increase the interests of shareholders, directors must not condone them. For example, while restructuring a company by a merger could result in a possibility of job losses but increase the shareholder value, the enlightened shareholder approach adopted in terms of King II would encourage directors to continue with the merger because it will maximise shareholder value.

For the above reasons many argue that the concept that corporations should be accountable to all legitimate stakeholders must be rejected for "the simple reason that to ask boards to be accountable to everyone would result in their being accountable to no one but mere shareholders".¹³⁴

King II does not provide guidelines on how directors need to advance issues of stakeholder protection. It also fails to deal with stakeholder protection in an orderly fashion. Stakeholders are referred to throughout the report. This creates confusion amongst directors and could result

¹²⁹ Esser op cit (n33) 192.

¹³⁰ Ibid at 193.

¹³¹ Ibid at 193.

¹³² Ibid at 193.

¹³³ *King II Report on Corporate Governance for South Africa, Institute of Directors in Southern Africa (2002);* and Esser op cit (n33) at 193.

¹³⁴ Esser op cit (n33) 193.

in significant sections on stakeholder protection being missed. Alternatively, the United Kingdom code of 2003 adopts a much clearer approach in a specific section.¹³⁵

Lastly, King II fails to provide directors with practical guidelines on the manner with which they can maintain a balanced consideration of all stakeholders' interests.¹³⁶ The report merely states that directors have to act in terms of an inclusive approach and that a balance is needed between the financial interests of the shareholders and the collective good of the company in which their interests converge.¹³⁷ The only clarity provided is that the inclusive approach is explained as an approach where the purpose of the company must be defined and the values by which it will carry out its functions identified and communicated to its stakeholders.¹³⁸ In terms of paragraph sixteen, directors must be aware of other legislation, which promote other stakeholder interests. They are meant to keep such legislation in mind when developing stakeholder policies. Such ambiguous guidelines fall short for providing the director with clear duties and their responsibility towards stakeholders. The King Committee tried to rectify these shortcomings in 2009.

King III replaced King II in 2009. King III pays a more focused attention to issues of CSR or stakeholder protection. Stakeholder protection is dealt with in chapter one which deals with ethical leadership and boards of directors, chapter two dealing with corporate citizenship, leadership, integrity and responsibility, chapter eight that deals with managing stakeholder relations and in chapter nine which deals with integrated reporting and disclosure.¹³⁹

Compared to its predecessor reports, King III deals with stakeholders or issues of CSR in "a much more organised and structured manner. It now also provides clarity as to which model King III prefers regarding stakeholder protection".¹⁴⁰

In terms of King III, corporations are an integral part of society and for this reason, they should be considered as citizens like any natural person with rights and responsibilities.¹⁴¹ Perhaps it is important at this point to answer the question that an eighteenth-century lawyer Baron Thurlow famously asked: "how can we expect a corporation to have a conscience when it has

¹³⁵ Ibid.

¹³⁶ Ibid 196.

¹³⁷ *King II Report on Corporate Governance for South Africa, Institute of Directors in Southern Africa* (2002) chapter 2.

¹³⁸ Ibid at chapter 2.

¹³⁹ *King III Report on Governance* (2009) Institute of Directors for Southern Africa.

¹⁴⁰ Esser op cit (n33) 196.

¹⁴¹ Irene-Marie Esser *Corporate Social Responsibility: A Company law perspective* (2011) SA MercLJ 317.

no soul to be damned and no body to be kicked"?¹⁴² Without thinking of the question in a literal sense, the paper submits that Thurlow is actually concerned with motives for encouraging the behaviour. Asked in a different way, he is really asking whether corporation's social responsibility will lead to some sort of increased advantage for them or mere bankruptcy and time-wasting for corporations that are compliant. If the answer is mere bankruptcy or a waste of time, then corporations would be justified in being irresponsible and focusing only on increasing shareholder value.¹⁴³

In attempting to answer Thurlow's question William Shaw stated that "although corporations are not people, they are collective entities that in some sense really exist, with an identity above and beyond the people whom they compromise at any given time".¹⁴⁴ In the same fashion, as people may be identified by their identity number, corporations have registration numbers. They also wield much influence and public influence than individuals and even collective people. They may all be attributed to their financial muscle, which for some such as multinational corporations far exceeds the revenue of other countries Growth Domestic Product (GDP).

For these reasons, King III indicates that a corporation must act as a responsible citizen.¹⁴⁵ This speaks to the promotion of CSR in that corporations are encouraged to follow the triple-bottom line approach by considering social, environmental and economic factors when managing the company. In the above regard, King III states that the board's paramount responsibility is to create value for its shareholders. While carrying out the aforesaid responsibility, the directors have to consider the interests of other stakeholders.¹⁴⁶ The principle¹⁴⁷ states that directors are accountable to the company and they should take account of the legitimate expectations of all stakeholders. This creates a broader value for companies based on the triple-bottom-line.¹⁴⁸

King III report opted "for the so called inclusive stakeholder value approach".¹⁴⁹ This is an approach where various interests of different stakeholders are determined on a case by case basis to act in the best interests of the company. In other words, a certain stakeholder may get

¹⁴² Stephen Bainbridge *New Corporate Governance in Theory and Practice* (2008) Oxford University Press at 26.

¹⁴³ William H. Shaw *Business Ethics 9th ed* (2016) San Jose State University Press.

¹⁴⁴ Ibid.

¹⁴⁵ King III Report on Governance (2009) Institute of Directors for Southern Africa

¹⁴⁶ King III Report on Governance (2009) Institute of Directors for Southern Africa at Chapter 1 Principle 1.1 para 3.

¹⁴⁷ Ibid at Chapter 1 Principle 1.1 para 5.

¹⁴⁸ Ibid at Chapter 1 Principle 1.1 para 5.

¹⁴⁹ Esser op cit (n118) 38.

preferential treatment if that serves to the increase of the company. This approach is different from King II in that other stakeholder's interests are not made important by the mere gain of shareholders. Interests of other stakeholders may trump that of the shareholders in a particular transaction if the balance of convenience is in favour of the former.

It is also recommended that corporations have an integrated sustainability performance report. Such disclosure relates to a holistic representation of a company's performance in terms of its finance and sustainability.¹⁵⁰ By looking beyond the immediate financial gains for shareholders, a company ensures that it operates its organisation in a sustainable manner for the ultimate benefit of its brand or its reputations' protection.¹⁵¹

Chapter 8 of King III offers practical guidelines on how directors should manage their relations with broader stakeholders. A stakeholder-inclusive approach recognises that a company has many stakeholders and that they can have an important effect on the long-term growth or sustainability of the corporation.¹⁵² The code identifies specific stakeholders and recognises that they may change from time to time. Principle 8.2 places a duty on directors to recognise stakeholder changes and re-examine the strategic scope of business to cater for relevant stakeholders.¹⁵³ Furthermore, Principle 8.4 suggests that the board of directors should achieve a correct balance between relevant stakeholders to advance the interest of the company.¹⁵⁴ These are important improvements from King II.

King III applies to all entities and it was meant to be a voluntary and self-regulatory code. However, the court in *Minister of Water Affairs and Forestry v Stilfontering Gold Mining Company*¹⁵⁵ referred to the recommended principles of the King report in its judgement. This may have far reaching consequences for all companies in that there could be an impression created that the King report is the standard to measure the corporate governance and CSR issues of the company, which implies that companies are indirectly prescribed to follow King's recommendations.

In his judgement, Hussain J confirms that "the application of sound Corporate Governance is essential for the well-being of a company as indicated in the king report".¹⁵⁶ He further held

¹⁵⁰ King III Report on Governance (2009) Institute of Directors for Southern Africa.

¹⁵¹ Ibid at Principle 1.1 para 2.

¹⁵² Essaer op cit (n33) 197.

¹⁵³ Ibid.

¹⁵⁴ King III Report on Governance (2009) Institute of Directors for Southern Africa at Principle 8.4.

¹⁵⁵ *Minister of Water Affairs and Forestry v Stilfontering Gold Mining Company* 2006 (47) SA 7655 (SGC).

¹⁵⁶ Ibid at para 16.

that directors of the company acted against every recommendation in the report.¹⁵⁷ Hussain J specifically quoted the section in that King report which states that:

A well-managed company will be aware of and respond to social issues, placing a high priority on the ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative and responsible with regards to the environmental and human rights issue. A company is likely to experience indirect economic benefits, such as improved productivity and good corporate reputation if considering broader factors of all stakeholders in their scope of business.¹⁵⁸

Therefore, although the King report is a voluntary tool of corporate governance and CSR initiatives, the emphasis of the codes' principles by the court or the codes' standard of governance that the court utilises in practice seems to be suggesting the seriousness with which corporations have to implement recommended principles.¹⁵⁹

The Institute of Directors in Southern Africa NPC (IoDSA) published a draft of the king IV report for public comment on 15 March 2016. The report has replaced King III as of 2017. The report sets out a clear philosophy, principles, practices and outcome which serve as the benchmark for corporate governance in South Africa.¹⁶⁰

Unlike the King III report which adopted a rule-based approach, King IV was upgraded to follow a practical outcome-based approach. The main purpose for this was to make King IV more accessible, easier to interpret and apply than King III.¹⁶¹ Hopefully, directors will now have a vivid understanding of the code's expectations of satisfactory compliance. In addition, the IoDSA has said that it will make available sector supplements that will support King IV to assist directors in different sectors to become more able to interpret the report. The outcome based approach conforms to the current international sentiment which promotes greater accountability and transparency.

King III's 75 principles have been consolidated to 17 principles each linked to a distinct outcome under King IV report.¹⁶² It is clear that the intention of the code is to stress the application to achieve set outcomes than merely encouraging compliance. Although King III was not drafted to be a mere compliance based instrument, corporations in practice adopted a

¹⁵⁷ Ibid at para 16.

¹⁵⁸ *Stilfontering* Supra (n157) para 16.

¹⁵⁹ Irene-Marie Esser *The Protection of Stakeholder Interests in Terms of the South African King III Report on Corporate Governance: An Improvement on King II (2009) 21 Merc LJ 188-201.*

¹⁶⁰ <https://www2.deloitte.com/za/en/pages/africa-centre-for-corporate-governance/articles/kingiv-report-on-corporate-governance.html> accessed on 25 May 2017.

¹⁶¹ King IV Report on Corporate Governance in South Africa (2016) at Part 2.

¹⁶² Ibid.

tick-box mentality to it.¹⁶³ Their widely-cited reasons for this was that the report was difficult to interpret, particularly in knowing exactly what the legislator expected from directors. Perhaps the current report will ameliorate director confusions through the use of outcomes linked to each principle and inspire greater application in practice. This is further stressed by the “apply and explain” approach discussed above.¹⁶⁴

The fact that King IV has fewer principles and distinct outcomes attached to them make it much more reader friendly and easier to follow. Issues that relate to stakeholder protection or CSR are now easy to locate in the report: Principle 3 dealing with corporate citizenship; Principle 5 dealing with stakeholders making informed assessments; Principle 14 deals with remuneration policy; Principle 15 deals with reporting standards and principle 16 deals with stakeholder inclusive approach. Although the aforesaid principles form the core of stakeholder protection, they should not be interpreted in isolation from the rest of the principles.¹⁶⁵

King IV goes further to recommend the establishment of the social and ethics committee (SEC) with a role that is beyond that of the Companies Act to promote greater integration between the role and the function of the SEC and other board committees. In terms of the report, SEC should ensure, monitor and report in respect of organisational ethics, responsible corporate citizenship, sustainable development and stakeholder inclusivity. In essence, the SEC primary function is to act in social conscience of the business.¹⁶⁶

In addition, King IV highlights the critical role of stakeholder protection which ought to be an integral part of the of the governance strategy of the corporation. Accordingly, “not only must the board of directors consider the legitimate and reasonable needs, interests and expectations of the stakeholders as a matter that enjoys intrinsic value, but King IV now specifically recognises the role and responsibilities of all stakeholders. In this regard, active stakeholders are required to hold the board and the company accountable for their actions”.¹⁶⁷ King IV recommends further that the board should oversee the effective management of stakeholder relationships that affect value creation and the achievement of the company’s strategic objective. The report identified that to achieve this goal an important element that needs to be

¹⁶³ Esser op cit (n33) 277.

¹⁶⁴ Ibid.

¹⁶⁵ King IV Report on Corporate Governance in South Africa (2016) Institute of Directors for Southern Africa.

¹⁶⁶ King IV Report on Corporate Governance in South Africa (2016) Institute of Directors for Southern Africa at 25.

¹⁶⁷ Ibid at 25.

prioritised is effective communication plan amongst committees and different structures in the organisation.¹⁶⁸

Like its predecessors, King IV will not be a legally binding tool when it comes into effect and if it contravenes any legislation, the latter should prevail. However, the fact that the report is not binding does not mean that there are no legal consequences arising from non-compliance. As has been demonstrated in cases such as the *Stilfontein* above, a court will consider King IV when evaluating what is regarded as proper practice in certain circumstances, especially where governance duties are involved. Failure to meet the corporate governance practices as recommended in King IV may result in liability imposed on such directors.

3.3 JSE LISTING REQUIREMENTS OVERLAPPING WITH CSR

The JSE Listing Requirements have a commendable track record of being at the forefront of promoting good corporate governance, stakeholder inclusivity and disclosure on the aforesaid issues by listed companies on the JSE. Company's disclosure must include the extent to which they comply with the principles of the King III report.¹⁶⁹

On 22 May 2017, the Johannesburg Stock Exchange ("JSE") amended the JSE Listings Requirements to harmonise them with the King IV Report on Corporate Governance and other governance arrangements, including a race diversity policy and the publication of a compliance report pursuant to the Broad-Based Black Economic Empowerment ("B-BBEE") Amendment Act, 2013. It has also circulated a letter confirming the implementation dates of certain amendments, notwithstanding an effective date of 19 June 2017.¹⁷⁰ Under the amended Listings Requirements, the specific corporate governance requirements that issuers are obliged to implement are expressly stated to be mandatory.¹⁷¹

In addition, "in respect of their application of King IV, issuers are required to disclose, in their annual reports, the implementation of King IV through the application of the King IV disclosure and application regime. In this regard, King IV follows an "apply-and-explain" approach in that a company is required to explain (in the form of a narrative account) which recommended practices have been implemented and how these achieve or give effect to a King

¹⁶⁸ Ibid at 23-25.

¹⁶⁹ *JSE Securities Exchange's Listing Requirements* at <https://www.jse.co.za/about/sustainability/regulator-influencer-advocate> accessed on 30 May 2017.

¹⁷⁰ <https://www.ensafrica.com/news/King-IV-JSE-Listings-Requirements-update-and-implementation-dates-announced?Id=2638&STitle=corporate%20commercial%20ENSight> accessed on 20 May 2017.

¹⁷¹ Ibid.

IV principle, to reveal how judgement was exercised when considering the recommended practices”.¹⁷²

The specific CSR requirements under the amended Listings Requirements include the following:

- all issues, in accordance with King IV, must appoint (i) an audit committee; (ii) a committee responsible for remuneration; and (iii) a social and ethics committee, and
 - the composition of such committees must comply with the Companies Act, 2008 and should be considered in accordance with the recommended practices in King IV on an apply-and-explain basis, provided that each committee must comprise at least three members;
 - a brief description of the committee mandates, the number of meetings held and other relevant information must be disclosed in the annual report.
 - the board or the nomination committee of the issuer must have a policy on the promotion of racial diversity at board level.
 - the issuer's remuneration policy and implementation report must be tabled every year for separate nonbinding advisory votes by shareholders at the annual general meeting.
 - the remuneration policy must record the measures that the board commits to take if either the remuneration policy or the implementation report, or both, are voted against by 25% or more of the votes exercised.¹⁷³

The JSE approach is an important contribution towards creating awareness and encouraging the private sector to regard highly issues of King Reports. The JSE is a significant space for companies to attract investors, build a reputation, grow their networks and allow the listing board to facilitate broad-based economic empowerment deals with other companies, the state or public entities alike. Companies will in numbers be attracted to list with the JSE and this will, therefore, require them to infuse CSR issues into their governance structure.

¹⁷² *Ibid.*

¹⁷³ King IV Report on Corporate Governance in South Africa (2016) Institute of Directors for Southern Africa.

3.4 LEGALLY BINDING CSR MEASURES

3.4.1 A COMPANY LAW PERSPECTIVE OF CSR

The *Policy Document* issued to guide the reformation process of Company Act was a result of a debate about CSR and stakeholder protection forming an integral part of the business in South Africa.¹⁷⁴ This was motivated by the goal to involve the private sector in the initiatives to achieve social transformation and eradicate the legacy of Apartheid at an accelerated rate. In addition, such CSR issues introduced methods to improve the corporate governance. This resulted in CSR being featured in the 2008 Companies Act and its supplementary Regulations issued in May 2011.¹⁷⁵ This shows the seriousness with which the legislature regards issues of CSR.

As a point of departure, the purpose of the Act in section 7 (d) indicates that the concept of a company is to achieve economic and social benefit.¹⁷⁶ The two are inextricably linked, which means that the business strategy should be tailored to achieve both benefits with equal efforts. It is significant to remind ourselves at this point about the importance of the purpose of the Act. The legislature includes this to make apparent the intention that legislation is meant to achieve.

Therefore, every provision of the legislation ought to give effect to the purpose of the Act. In this case, the purpose is suggestive of the broader aspects that need to be considered to give effect to CSR issues when governing a business. The Act on section 5 (1) states that it must be interpreted in such a way that it gives the best effect for the purpose listed in section 7.¹⁷⁷

Section 76 (3) (b) also addresses the issue of stakeholder protection.¹⁷⁸ It is further complemented by section 72 (4) which provides for the establishment of the social and ethics committee (SEC).¹⁷⁹ The Minister of Trade and Industry is authorised by the Company Regulations, inter alia, to mandate companies that fall within a certain category or threshold to introduce a SEC.¹⁸⁰ HJ Kloppers argues that "the introduction of these measures could be

¹⁷⁴ Policy Document Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century (2004).

¹⁷⁵ Ibid at 8-9.

¹⁷⁶ Companies Act No. 71 of 2008 s7 (d).

¹⁷⁷ Company Act No. 71 of 2008 at s5.

¹⁷⁸ Ibid at section 73 (3) (b).

¹⁷⁹ Ibid at section 72.

¹⁸⁰ Ibid at section 72.

regarded as an attempt by the government from an external position to place pressure on the private sector to operate in a socially responsible fashion, to enhance its social legitimacy".¹⁸¹

Section 76 (3) (b) places a legally binding duty on directors to "act in the best interest of the company".¹⁸² The latter phrase was translated to mean the best interest of investors or shareholders in the corporation. As a result, directors, notwithstanding other relevant stakeholders, believed that their sole duty was confined to maximising profits for the shareholders.

However, with the introduction of the *Policy Document* and a reformation of the Companies Act, it was widely submitted that the above phrase meant that directors had to manage the company with clear interests of various stakeholders such as the employees, consumers, shareholders, environment and the general public.¹⁸³ Support for this submission can be found in the *Policy Document*: "A company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of the other stakeholder constituencies".¹⁸⁴

Irene-Marie Esser states that the above is an example of an inclusive approach which is in line with the recommendation of the King III report.¹⁸⁵ According to her, this approach "could result in a situation where the interests of other groups will have value independent of the interests of the shareholders".¹⁸⁶ She argued that "directors ought to be aware of the protection offered to stakeholders in other legislation in order to properly balance competing interests of stakeholders".¹⁸⁷ For example, directors may be compelled to disclose information to employees as required in the right to access information in the Constitution and Promotion of Access to Information Act, even if this lead to compromising the confidentiality of shareholder's information.¹⁸⁸

Furthermore, Esser stresses that there is a high duty on directors to take all stakeholders duties into account because of the provided punitive consequence if they fail at this duty.¹⁸⁹ She argues

¹⁸¹ HJ Kloppers Driving Corporate Social Responsibility (CSR) Through the Companies Act: An Overview of the Role of the Social and Ethics Committee (2013) 1 PER/ PELJ 166 at 168.

¹⁸² Companies Act No. 71 of 2008 at s76.

¹⁸³ Policy Document Department of Trade and Industry The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century (2004)..

¹⁸⁴ Ibid at 8-9.

¹⁸⁵ Irene-Marie Esser *Corporate Social Responsibility: A company law perspective* 2011 SA Merc LJ 319.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

that stakeholders have recourse in terms of the Act to hold directors accountable to this duty.¹⁹⁰ According to her, section 218 (2) of the Act, which reads that “any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention”,¹⁹¹ is an option that aggrieved stakeholders can utilise to force directors to act in consideration of their interests.¹⁹²

Section 72 (4) (a) of the Act, without specifically referring to the term CSR, made an attempt to incorporate the idea of CSR in the company’s governance structure.¹⁹³ Section 72 (4) (a) authorises the Minister of Trade and Industry to prescribe in terms of their annual turnover, the size of their workforce and the nature and extent of their activities to have social and ethics committee,¹⁹⁴ otherwise known as CSR committee.¹⁹⁵ HJ Kloppers states that “the introduction of these measures could be regarded as an attempt by the government from an external position to put pressure on the private sector to operate in a socially responsible fashion”.¹⁹⁶

The *Companies Regulation* 43 (1) sets out prerequisites for setting up a SEC. These requirements apply to all state-owned companies, public companies that are listed or any other company that has, in any two of the previous five years, scored 500 points in terms of *Regulations* 26 (2) or would have so scored if the Act had been in effect at that time. The number of employees and turn over are amongst factors that will determine whether or not a corporation should have a SEC. A minimum of three directors must serve on the company's SEC. One must, at least for the previous three financial years, not have been involved in the day-to-day management of the business of the corporation.¹⁹⁷

The functions of the SEC are as follows: they have to monitor the corporation’s activities, having regard to any legislation, other legal requirements or prevailing codes of best practice. For example, principles were adopted from the *OECD Principles* and the *Global Compact Principles* as well as record of sponsorship, consumer relationships, consumer relationship and labour and employment.

¹⁹⁰ Ibid.

¹⁹¹ Companies Act No. 71 of 2008 at s218.

¹⁹² Esser Op cit (n161) 322.

¹⁹³ Kloppers Op cit (n183) 167.

¹⁹⁴ *Companies Act 71 of 2008*.

¹⁹⁵ HJ Kloppers Op cit (n183) 167.

¹⁹⁶ Ibid.

¹⁹⁷ HJ Kloppers Op cit (n183) 320.

When monitoring and reporting on social and economic development, the Regulations make express reference to the BBBEE Act and the Employment Equity Act- "two pieces of legislation expressly aimed at improving the social and economic standing of black South African and addressing inequalities brought about by the past racially discriminatory laws and practices"¹⁹⁸ of Apartheid.

The main objective of companies remains to be the increase in share value and profiteering. However, the Act has shifted the director's duties from that of a mere consideration of the Shareholders exclusive value to that of much broader stakeholder constituencies. This does not mean that businesses are now becoming a mere drive to social transformation. Corporate reputation has become important to the companies share value. This has resulted in the need to broaden the context of the company's focus. The fact that there are some companies that are now legally required to include a SEC in their governance structure is a welcomed move towards institutional CSR and driving social transformation initiatives through the private sector.

3.4.2 PROMOTION OF CSR IN OTHER LEGISLATION

Specific legislation exist in South Africa that compels directors to take the interest of certain stakeholders into accounts such as the Broad Based Black Economic Empowerment Act 53 of 2003 (hereafter the BBBEE Act)¹⁹⁹ and the Mining Charter 2016. The aforementioned Acts do not only aim to correct the racial imbalances, in light of past discrimination under Apartheid but strive to encourage social investment and to promote community development through various means involving socio-economic growth. This section will show how through the aforesaid Acts, directors are compelled to consider the community as a stakeholder and to manage the company to its benefit too.

The BBBEE is founded in the equality clause of the Constitution which provides that everyone is equal before the law and has the right to equal protection and the benefit of the law.²⁰⁰ The BBBEE is a "necessary government intervention to address the systematic exclusion of the majority of South Africans from participation in the economy".²⁰¹ Ultimately, corporations will

¹⁹⁸ Ibid.

¹⁹⁹ Broad-Based Black Economic Empowerment Amendment Act No. 46 of 2013.

²⁰⁰ Irene- Marie Esser and Adriette Dekker *The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles* (2008) *Journal of International Commercial Law and Technology* (3) 3 at 168

²⁰¹ Ibid at 169.

become drivers of BBBEE in businesses of their suppliers and other stakeholders. BBBEE Act binds the public sector to the extents that which they would like to interact with the state and other public entities.

There are eight Codes of Good Practice containing detailed measures of BBBEE compliance. These include a score sheet of seven elements which are important to CSR.²⁰²

BBBEE ensures that each company takes responsibility for its efforts on society in which it operates.²⁰³ Directors are bound by above cited statutory duties if they want to do business with the state or other public entities. BBBEE is a tool to promoting CSR initiative because it encourages directors to govern the corporation in the interest of the entire stakeholders and not merely for increasing shareholder value. BBBEE Act is an important tool for providing directors with a greater clarity on how they can contribute towards social transformation through business in South Africa. In addition, compliance with BBBEE will indirectly benefit directors in that a high score compliance with the above-stated points will result in easier offers to do business in South Africa and particularly with public entities and the state.

The direct benefits of society associated with corporates utilisation of BBBEE are evident. It will result in an increase of black ownership and control of enterprise and assets, increase black management at senior level, human resource development, employment equity and skills development which will ultimately benefit the community at large. The direct empowerment of the community makes up 60% of the generic score card.²⁰⁴ The other 40% is the indirect empowerment of the community through social economic development.

The BBBEE Act is one example that illustrates how the state, through legislative means, can compel corporations to act in a socially conscious manner. Other examples can be seen in a range of other statutes such as the Mining Charter.

In terms of section 24:²⁰⁵

²⁰² Broad-Based Black Economic Empowerment Amendment Act No. 46 of 2013. and Gazette Number 38764 these includes ownership (20 points), management and control (10 points), employment equity (15 points), skills development (15 points), preferential procurement (20 points), enterprise development (15 points) and socio-economic development (5 points). Not that practices that promote these elements must be fitted with the primary scope of business. This will translate, of course, to the transformation of the culture and the nature of the business.

²⁰³ Ibid.

²⁰⁴ Esser et al op cit (n202) 164.

²⁰⁵ Constitution of the Republic of South Africa Act 108 of 1996 at s 24 (b) (iii).

Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. It is this section that paved the path for the promulgation of Mineral and Petroleum Resources Development Act (MPRDA). In a nutshell, the MPRDA has the following, among others, as Objects of the Act contained section 2. They are;²⁰⁶

- (c) “to promote equitable access to the nation’s minerals and petroleum resources to all the people of South Africa,*
- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation’s minerals and petroleum resources,*
- (e) promote economic growth and minerals and petroleum resources development in the Republic,*
- (f) promote employment and advance the social and economic welfare of all South Africans,*
- (i)ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they operate”.*

One of the objectives of MPRDA is to promote social and economic development making the Mining charter much broader than merely being concerned with the mining industry goals. It includes the fact that previously disadvantaged people should benefit from the mining industry too, not just a selected few. For example, the “two most prominent social aims of the charter are mine community development and the improved housing and the living conditions of mine workers”.²⁰⁷ These objectives are directly linked to the nature of the mining industry as they operate within underdeveloped communities, from which they secure their labour.

In addition, the Charter currently under scrutiny and will be revised. It previously provided that 26% of the ownership of the mines must be vested in black people to spread influence and wealth distribution. In 2016 and currently as this paper is written, the revised charter contents that the percentage of ownership must be increased to 30%. Mines will be given 12 months to comply with this provision, should the changes be implemented.²⁰⁸

It is evident from this legislative framework that the new South African democratic system envisages a socially responsible mining industry, while recognising the rationale for business to pursue profitable growth and development pathway, it also pronounce on both moral and

²⁰⁶ Mineral and Petroleum Resources Development Act, No 28 of 2002 at Chapter 2

²⁰⁷ http://www.werksmans.com/virt_media/the-mining-charter-and-social-responsibility/ accessed on 21 May 2017.

²⁰⁸ Business Day <https://www.businesslive.co.za/bd/business-and-economy/2017-06-15-mining-charter-calls-for-30-black-ownership2/> accessed on 15 August 2017.

legal accountability for ensuring sustainability for all the stakeholders such as the shareholders, employees, local communities, general public and the environment.²⁰⁹

CSR is embedded in the Charter and the BBBEE in a mandatory approach. Here “CSR is not only about dedicating small percentages after tax to improving social development”.²¹⁰ “Most paramount, instead, it is about how profits are made in the first place. It is integrated into core activities and decision making of industries to embrace social, environmental and economic sustainability”.²¹¹

3.5 CSR IMPACT ON SOCIAL TRANSFORMATION

Various companies in South Africa have commendably engaged with social responsibility in varied ways.²¹² Results from *KPMG International Survey on Corporate Responsibility 2015* highlighted South Africa as being placed fourth behind India, Indonesia and Malaysia respectively for having the highest corporate responsibility growth globally. Most cited reasons for this growth is that “companies are beginning to see that integrated reporting can assist them to unlock value, through identifying and strategically responding to the most material impacts on their business that threaten or enhance value creation into the long term”.²¹³ Such analysis is in support of the purpose of inclusive reporting which is to "enable the business to make informed timely decisions and ensure that the underlying processes are fit for the intended purpose".²¹⁴

One leading example of a corporation that is CSR complaint is BHP Billiton.²¹⁵ This company has integrated CSR initiatives into the core structure of their daily business dealings. In terms of their “CSR Zero Tolerance” policy,²¹⁶ BHP has identified material CSR risk requirements, such as zero tolerance on child labour, minimum wages and corruption amongst other things.²¹⁷ Apart from the BHP itself following these requirements, they have a strict policy on only

²⁰⁹ Abel op cit note 76 at 18.

²¹⁰ Ibid at 18.

²¹¹ Ibid at 18.

²¹² <http://www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12> accessed on 21 May 2017.

²¹³ <https://home.kpmg.com/za/en/home/insights/2016/03/corporate-responsibility-reporting-survey-2015--south-african-fi.html> accessed on 22 May 2017.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ BHP Billiton Petroleum Supply *Corporate Social Responsibility Policy Version 1.0* (2010)

²¹⁷ Ibid.

conducting business with suppliers that are compliant with the same policy.²¹⁸ This is highly effective especially because many entities would enjoy having business relations with a global corporation such as BHP Billiton. In addition, the corporation relies on “BHP Billiton Development Trust South Africa to implement, coordinate and manage various sustainable development initiatives in the area of education and training, capacity building, socio economic development and health care”.²¹⁹

Another example is the Coal mining and development company Coal of Africa (CoAL). They have also engaged in different initiatives to demonstrate their commitment to local communities in South Africa and with the protection of the environment. In 2009, "CoAL committed to spend R500 m (over USD 70m) over thirty years in social and environmental projects, and to promote local employment through its Vele coking coal project (expected to generate 30,000 direct and indirect jobs)".²²⁰

Furthermore, "As part of their social responsibility global policy, SAB Miller and its South African subsidiary SAM Ltd – the largest brewing company in the country, have set 10 sustainable development priorities (including communities, HIV/AIDS, human rights, waste, packaging, responsible drinking, water, energy and carbon, enterprise development and, transparency and ethics) that they pay special attention to and periodically monitor in every one of their affiliates. In South Africa, for example, they have made important improvements in the areas of waste management, communities and, transparency and ethics over the years. They still are progressing in the areas of responsible drinking and, energy and carbon emissions".²²¹

Lastly, "Standard Bank, one of the country's leading financial institutions, has also made important contributions in the area of CSR. The Group's annual social investment expenditure is funded by not less than 1% of prior year after-tax income from its South African operations. In 2010, the Group's corporate social investment amounted to ZAR 132,3m (approximately USD 20m), a 31% increase with respect to 2009. The breakdown in South Africa indicates that 36.4% went to education programs and 35.5% to enterprise development, which reflects the bank's focus on empowering individuals and creating economic wealth, among other relevant

²¹⁸ <https://home.kpmg.com/za/en/home/insights/2016/03/corporate-responsibility-reporting-survey-2015--south-african-fi.html> accessed on 22 May 2017.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

socioeconomic goals. It is interesting to note that South Africans consider financial institutions as the most socially responsible among 12 sectors, according to a survey by Globe Scan Incorporated".²²²

Other example of companies listed in the in the *Sustainability Handbook* for adding value to social aspects are *Mondi, Anglo American, Pick n Pay and Rand Merchant Bank*.²²³ To illustrate this, Anglo-American and CareWorks are initiating the widest peer education project on HIV/Aids by storytelling in order to overcome challenges of low literacy. Mondi has improved the efficiency of its production process. Pick n Pay have now shifted to using eco-friendly bags that are made by previously disadvantaged women. Rand Merchant Bank employee are given time off so that they may be able to participate in community projects. In addition, they have a Maths Leadership Initiative allied to the Department of Science and Technology which they fund to the value of R30 Million.²²⁴

Research shows that the motives behind corporate social responsibility (CSR) are driven more by a desire to contribute to the country's development than racking up government broad-based black economic empowerment (B-BBEE) scorecard points. CSR consultancy Tshikululu survey of 2015/ 2016 found that 41 senior executives at 39 companies, mostly large and global firms listed on the Johannesburg Stock Exchange, are concerned with reputation as a positive and proactive contributor to society appears to be becoming the de facto standard in South Africa, particularly in sectors dealing with consumers.²²⁵ This is because companies understand clearly that their success and vitality is intrinsically linked to the success and vitality of the society around them," she said.²²⁶ This confirms what the King reports have stated with regards to the benefits attributed to compliance.

Many voices have spoken to stress reasons for compliance with social responsibility by corporations in South Africa. "While respondents indicated that they feel significant pressure from the government to invest in social responsibility programmes, regulatory compliance is not, in and of itself, cited as a primary motivating factor," One director said. The viewpoint of organisations on this was not homogenous, however. More than half of respondents in "non-consumer-facing" sectors, including mining, energy, engineering, and industrial services,

²²² <https://home.kpmg.com/za/en/home/insights/2016/03/corporate-responsibility-reporting-survey-2015--south-african-fi.html> accessed on 22 May 2017

²²³ Esser op cit (n118) 325.

²²⁴ Ibid at 325-326.

²²⁵ Esser op cit (n118) 325.

²²⁶ <https://mg.co.za/article/2014-04-10-what-drives-corporate-social-responsibility> accessed on 12 May 2017.

reported that compliance motivated them to a "very large degree". In contrast, fewer than 10% of respondents in the retail and financial services reported that B-BBEE or industry regulations drove their social responsibility programmes".²²⁷

While Milton Friedman suggests that corporate decisions involve a trade-off between shareholder value and other stakeholder benefits, other scholars such as Bagnoli and Watts believe that CSR initiatives increase financial performance.²²⁸ In an article that measures shareholder performance and CSR compliance in South Africa through the vehicle of Black Economic Empowerment (BEE)²²⁹ results showed a positive improvement for shareholder value in examining the share performance of 125 BEE transactions involving 95 companies during the period January 2002 to July 2006. The results indicate a positive relation between BEE transaction announcements and shareholder wealth creation.

The performance of corporations in its CSR initiative may not be noticed immediately, but in the long run, the values created by the business through its CSR initiative become evident for all to see. The aim of every business irrespective of its size; is to remain competitive which means that the long term goal of the business is also to stay in business, grow and make a profit. A well designed CSR campaign can do all of that for the small, medium or macro business. CSR is not the same as philanthropy; a one-time huge financial donation or contribution to a charity. It must be seen as a long term corporate strategy built into your business.²³⁰

Businesses need to understand that certain returns on CSR are not measurable; this is because they may not be quantitative in nature, but qualitative. Therefore, do not as a rule base the success or otherwise of your CSR initiative on a direct financial return on investment. There are many ways a small business can measure its performance which include; enhanced reputation in the industry, customer loyalty, motivated employees, reduced staff turnover.²³¹

²²⁷ MG Op cit note 197.

²²⁸ Sukanya Chetty, Rebekah Naidoo, Yudhvir Seetharam *The Impact of Corporate Social Responsibility on Firms' Financial Performance in South Africa* (2015) 9 *Contemporary economics* at 3.

²²⁹ Hendrik Wolmarans and Kurt Sartorius *Corporate social responsibility: The financial impact of black economic empowerment transactions in South Africa* (2009) 12 SAJEMS NS at 180.

²³⁰ *Corporate Social Responsibility Course Handbook* (2012) Facilitated by Goldengate Consulting at 19.

²³¹ *Ibid* at 20.

3.6 CONCLUSION

This chapter has given a detailed account of the progression of South Africa's CSR as contained in the King reports, the JSE listing requirements, the Company Act and other legislations and within case law. It has shown how the regulations and legislations have advanced, easier to read and understand, especially under the current King IV which has ameliorated previous confusion that directors have been having with regards to adequately complying with the previous reports. The legislated CSR under the Act and other legislation is perhaps important to show the gradual progression of adopting CSR in a mandatory fashion in South Africa. It has also been stated that the adoption of CSR principles in the JSE listing requirements is a good step to encouraging compliance. Although the paper has drawn reference to corporations that are eagerly compliant to CSR it must be noted that only large corporation is actively involved in community development. This highlights the perception that most businesses, especially small and medium size, still have with regards to CSR, that it is a charitable initiative that merely reduces their profits. However, the correct adoption of CSR is to be embedded into their primary scope of business for long term sustainability and good CG principles.

CHAPTER FOUR: CSR LAWS AND REGULATIONS IN INDIA AND THE UK

4.1 INTRODUCTION

In this chapter, CSR laws and regulations in India and the UK are discussed and analysed to determine if they have a positive impact on social transformation. Chapter one provided a detailed explanation for the paper's particular interests in these two countries. Although each country, including South Africa, may have varying CSR legal frameworks and social circumstances it remains important to analyse the foreign law. This is because across different context today "the progress of a society depends on the corporation's that thrive in their environment while the success of the corporations to depends on the stability of the society".²³² In other words, the prosperity of one is inextricably linked to the prosperity of the other without exception to the context of the country concerned.²³³

4.2 CSR LEGAL AND REGULATORY FRAMEWORK IN INDIA

4.2.1 REGULATORY FRAMEWORK

Primitive forms of CSR existed in various religions and the Gandhian Principles of Trusteeship (GPT). GPT was drawn from writings and speeches by Mohandas Gandhi which espoused a socioeconomic philosophy that encouraged the wealthy to retain the equivalent of an 'honourable livelihood' and to make use of the surplus of their wealth to uplift the less fortunate.²³⁴ This meant that whatever wealth one holds beyond his needs (to be judged by an average person) one holds as a trustee for the people and should, therefore, spend it for their benefit.²³⁵

A more formal expression of CSR was released in 2009 by the Minister of Corporate Affairs: *The Corporate Social Responsibility Voluntary Guideline*.²³⁶ Two important factors influenced the Guideline. The first factor was comprehensively written in the Guidelines forward by Salman Khurshid, The Minister, citing the widening wealth gap in India by contrasting business

²³² Dr Priyanka Verma and Anupam Singh *From Philanthropy to Mandatory CSR: A Journey towards Mandatory Corporate Social Responsibility in India* (2014) *European Journal of Business and Management* 6 (14) 146

²³³ Ibid 146.

²³⁴ Arjya Op cit (n14) 20.

²³⁵ Ibid at 20.

²³⁶ Ministry of Corporate Affairs, Government of India, *Corporate Social Responsibility Voluntary Guidelines* (2009) available at http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

wealth against problems of “poverty, unemployment, illiteracy and malnutrition, etc”.²³⁷ Khurshid stated further that corporations must “take the responsibility of exhibiting socially responsible business practices that ensure the distribution of wealth and well-being of the communities in which the business operates”.²³⁸ The second factor was the 2008 global financial crisis which resulted in Indian corporate sector becoming unstable and threatened business sustainability.²³⁹ According to Sukanya Narain, the period created a “need for inclusive growth”.²⁴⁰ This meant the growth of companies had to be stewarded with the interests of all stakeholders in mind, particularly of those communities and individuals that may have a direct or are themselves directly influenced by the corporation. This was an acceptable measure to complement the developmental initiatives of the government.

The Guidelines explicitly recognised CSR as a voluntary tool for corporations. Narain states that the intention of a voluntary Guideline is to provide companies with the guidance of how they could work closely with broader frameworks of national development and policies.²⁴¹ This allowed companies to venture into unique initiatives that complimented their business scope. In other words, the Guidelines “encouraged CSR initiatives to be an integral part of the overall business policy, aligned with the business goals”.²⁴²

Therefore, the main points of the Guideline can be summarised as in twofold: firstly, the fundamental principle is that each company should formulate a CSR policy unique to the goals of its business. Secondly, the CSR policy should cover core elements of care for stakeholders, ethical functioning, respect for worker’s rights and welfare, respect for human rights, respect for the environment, and activities for social and inclusive development.²⁴³

The implementation guidelines were separately outlined as follows: CSR policies of companies should provide implementation strategies with identifiable physical targets and time frames for completion. Companies are also encouraged, where possible, to partner with local authorities, business associations of NGO’s. Companies should allocate the specific amount in their

²³⁷ Ministry of Corporate Affairs, Government of India, *Corporate Social Responsibility Voluntary Guidelines* (2009) available at http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

²³⁸ Ibid at 6.

²³⁹ Sukanya Narain *Legal Framework Governing Social Responsibility in India* (2015) 3.

²⁴⁰ Ibid.

²⁴¹ Ibid at 4.

²⁴² Sandeep Gopalan and Akshaya Kamalnath (2015) *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution For Piketty and the Millennials* Northwestern Journal of Law and Social Policy vol 10.1 at 60.

²⁴³ Ibid.

budgets for CSR activities. The company should engage with well-established programmes which encourage responsible business practices. Companies should further make available their CSR policy and reports to all stakeholders and the society annually via their websites.²⁴⁴

In 2011, the Minister of Corporate Affairs produced a *National Voluntary Guideline on Social, Environment and Economic Responsibilities of Business*.²⁴⁵ The Guideline was grounded by nine main points as follows.²⁴⁶ In addition, the guidelines contained reporting formats that required corporations to make disclosures regarding steps taken to implement these principles.²⁴⁷

The last measure of promoting the Voluntary Guidelines was represented in the *Security and Exchange Board of India (SEBI) Circular on Business Responsibility Reports* in 2012. The SEBI amended its listing requirements in 2011 by introducing Clause 55.²⁴⁸ The clause required the top 100 listed corporations to include business responsibility reports along with their annual reports. The general manager of SEBI, Sunil Kadam, noted that corporations are increasingly becoming part of social change. He further stated that because listed companies have “accessed funds from the public, they have an element of public interests obligation to make exhaustive continuous disclosures on a regular basis”.²⁴⁹ In addition, Clause 55 required companies to report the total amount they spend on CSR.²⁵⁰

²⁴⁴ Ibid.

²⁴⁵ Press Release, Press Information Bureau, Government of India, National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business Released (July 8, 2011, 4:53 PM) (on file with author); see MINISTRY OF CORPORATE AFFAIRS, GOV'T OF INDIA, NAT'L VOLUNTARY GUIDELINES ON SOCIAL, ENVTL & ECON. RESPONSIBILITIES OF BUS. (2011) available at http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

²⁴⁶ Ibid at 60.

²⁴⁷ ibid at 60:

Principle 1: Businesses should conduct and govern themselves with ethics, transparency and accountability.

Principle 2: Businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle.

Principle 3: Businesses should promote the well-being of all employees.

Principle 4: Businesses should respect the interests of, and be responsive toward all stakeholders, especially those who are disadvantaged, vulnerable and marginalized.

Principle 5: Businesses should respect and promote human rights.

Principle 6: Business should respect, protect, and make efforts to restore the environment.

Principle 8: Businesses should support inclusive growth and equitable development.

Principle 9: Businesses should engage with and provide value to their customers and consumers in a responsible manner.

²⁴⁸ Circular from the Sunil Kadam, General Manager, Securities and Exchange Board of India, to All Stock Exchanges (Aug. 13, 2012), available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf.

²⁴⁹ Op cit note 219.

²⁵⁰ Ibid.

The above CSR Guidelines provided a firm foundation for CSR in India. Currently, India has become one of the first countries in the world to legally mandate CSR expenditure for companies that satisfy a set criterion from the Companies Act, 2013.²⁵¹ Some of the notifiable changes from the 2009 draft which required the board to “make every endeavour to ensure” that CSR expenditure is carried out, was amended in 2011 version of the Bill to “the board shall ensure”, making it a mandatory for the board to have CSR spending.²⁵²

4.2.2 LEGAL FRAMEWORK

The possibility of a mandatory CSR spending for companies was first introduced in the Companies Bill 2011. The Standing Committee of Parliament on Finance made recommendations to have CSR in the final Act. After a lengthy process, the mandatory CSR expenditure was enacted under section 135 of the Companies Act 2013. The clause is a verbatim adoption of the Companies Bill except for additional provision and explanations.²⁵³ The clause requires companies to comply with the Act on a “comply-or-explain” basis. Firms must satisfy specific size or profit thresholds to qualify for the mandatory spending of a minimum of 2% of their net profit on CSR.²⁵⁴ The following companies will be affected by the s 135: "companies that have a net worth of at least rupees 500 crores or those that have an annual turnover of at least rupees 1000 crore or more in a financial year to develop a CSR policy. The provision mandates that such companies must spend at least two percent of its average net profit in the preceding three financial years on CSR activities annually in pursuit of the CSR policy".²⁵⁵

The procedural requirements in terms of section 135 make it obligatory for a company to establish a CSR committee with at least three members and one independent director in addition to the main board of the company. The committee is tasked with the responsibility to create a company's CSR policy which outlines CSR expenditure and activities which this money will go into. The committee must report to the board the policy it has envisaged and they will have the final say in terms of approving or declining it. The committee will thereafter, assuming the policy becomes approved by the board of the company, monitor the CSR policy

²⁵¹ Ibid.

²⁵² Gopalan et al Op cit (n244) at 63.

²⁵³ Anupam Sing and Priyanka Verma *From Philanthropy to Mandatory CSR: A Journey Towards Mandatory Corporate Social Responsibility in India* (2014) European Journal of Business and Management at 146.

²⁵⁴ Dhammika Dharmapala and Vikramaditya Khanna (2016) *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013* The Social Science Research at 1.

²⁵⁵ Companies Act Op cit note 15 at section 135 (1).

and its implementation from time to time. In addition, the committee must report its policy in the annual board report and also display it on the company's website.

Once the above is completed, the responsibility shifts to the board of the company. They must ensure that the money is directed towards CSR activities as per the policy recommendations. It is also their responsibility to prioritise implementation within surrounding communities. CSR policy Rules,²⁵⁶ adopted in 2014 to supplement section 135, clearly state that CSR programmes and activities that are solely for the benefit of employees and their families will not qualify under section 135. Although this extension of responsibility is good for extending the acknowledgement scope of all stakeholders, one may argue that it undermines employee's position as a credible stakeholder.²⁵⁷ In addition, the Rules state that any CSR activity done outside the jurisdiction of India will not satisfy the requirements of section 135.²⁵⁸

Schedule VII of the Companies Act, 2013 provides an illustrative list of activities which qualify as CSR activities for the purpose of section 135. These are integral to the social injustices that affect India and include the following: Reducing child mortality, eradicating hunger and poverty, promoting education, gender equality, contributing to Prime Minister's relief fund and other state funds, supporting social business projects, employment enhancing vocational skills and environmental sustainability.²⁵⁹ However, section 135 has no penalty for failing to spend on CSR activities. Penalties only exist for failing to report on CSR activities done or failing to give reasons for noncompliance under section 134 (8).

Apparently, the above list is not a closed list. This is important particularly for the nature and functionality of CSR, which is that it must be embedded in the primary scope of business. Reducing CSR activities to a closed list would undermine this fundamental function resulting in CSR being reduced to mere corporate philanthropy for predetermined outcomes. A further point in the Act which undermines the function of CSR as aforesaid could be that the Act permits the company to carry-out the CSR programme through other means other than directly through the company, such as through its own profit foundation, independent NGO or collaboratively with other companies. This could divorce CSR from the primary scope of business and dress mere corporate philanthropy as CSR.

²⁵⁶ Companies Act Op cit note 15.

²⁵⁷ Arjya Op cit note 10 at 20.

²⁵⁸ Companies Act Op cit note 15.

²⁵⁹ Companies Act Op cit note 15 at Schedule VII.

The CSR policy Rules introduced in 2014 was meant to clarify s135 but failed to do so. They instead became mere tools for extension of requirements in s135. For example, the Rules added that foreign companies with an office in India which qualify under the CSR expenditure section must also comply with s135. However, in the realisation of this, the Minister of Corporate Affairs in June 2014 provided further clarification in what was known as the General Circular, 2014.

Although the Rationale behind making CSR mandatory in India may make sense at first glance it fails on various grounds. CSR is reduced to corporate giving in a form of money and far divorced from the primary scope of business in each corporation. This means there will be fewer guarantees for sustainability of the social grants in a form of 2% contributed by above-described firms and even for the companies providing them. Charities extract money from the financial flow of the company, and although it may indirectly influence their returns through reputational and other means, it has a less direct benefit for the immediate company because it is not embedded into the scope of business. This will, therefore, result in high resistance from corporations due to the fact that there are no returns for them on a direct nature than when it was to be applied within the scope of business.

4.3 THE IMPACT OF MANDATORY CSR IN INDIA

Mandatory CSR expenditure has been an issue of wide debate in India before and after the promulgation of s135 in the Companies Act, 2013 mainly due to the implications it will, or ought to have in India.²⁶⁰ While it may be too early to evaluate the full impact of s135, some researchers have relied on the CSR reports of different firms to establish corporate engagement with s135. Most company's websites have a CSR page dedicated to their views about CSR. The majority of them view CSR from a "philanthropic lens stemming from an obligation towards contributing to the development of the country by virtue of being a corporate citizen".²⁶¹ As result companies invest in education initiatives, women empowerment, rural development, sanitation, environmental protection and so on.²⁶² All these are in line with Schedule VII recommendation.

²⁶⁰ Akanksha Jain (2014) *The Mandatory CSR in India: A Boon or Bane* Indian Journal of Applied Research 4 (1) at 301.

²⁶¹ Gopalan et al Op cit (n244) 81

²⁶² Ibid.

Although compliance satisfies the recommendations in the Act, "business and CSR strategies appear to be on a convergent path and companies have started to view CSR as a distinct or a side function".²⁶³ One may argue that the structure and emphasis of the Act influence this behaviour. The Act itself places less emphasis on integrating CSR activities into the primary scope of business. Instead, more emphasis is placed on Schedule VII which stands as a universal CSR activity instrument and the 2% CSR spending requirement. As result companies are less concerned with embedding CSR activities into their business strategy.

Fewer companies which attempt embedding CSR into their business scopes such as Tata Motors and Bajaj Auto's by using "affirmative action" or "positive discrimination" in favour of the historically disadvantaged communities of employment policies are not recognised under the Act. Although these activities are equally important in acting against social inequalities and uplifting the lower communities, they, unfortunately, will not qualify as CSR under the new Act since there is not resulting expenditure in terms of s135.²⁶⁴ In addition, the Act explicitly excludes CSR that only benefits employees and their families.²⁶⁵

In 2016 Dhammika Dharmapala and Vikramaditya Khanna conducted an empirical study on CSR policies, activities and reporting patterns for the financial year ending 2014 of the top 50 companies listed on the National Stock Exchange of India (NSE). They found that s135 created a negative and substantial effect on firm value. They have in addition suggested that additional compliance and disclosure required by s135 exceeds the 2% CSR expenditure.²⁶⁶ This is corroborated by the 2015 study of Hariom Manchiraju and Shivaram Rajgopal which found that "Mandatory CSR Expenditure in terms of s135 can impose social burdens on business activities at the expense of shareholder value".²⁶⁷ This is perhaps resultant to the apparent disconnect of CSR expenditure and the primary business scope of each corporation, in other words, companies view of CSR through philanthropic lenses.

Nonetheless, the study finds a significant increase in CSR activity among firms after the enactment of s135. On the contrary, they also found that "for a subset of large firms (the top

²⁶³ Ibid at 82.

²⁶⁴ Ibid 86

²⁶⁵ Companies Act Op cit note 15

²⁶⁶ Dharmapala et al Op cit (n256) 37.

²⁶⁷ Hariom Manchiraju and Shivaram Rajgopal (2015) *Does corporate social responsibility (CSR) create shareholder value? Exogenous shock-based evidence from the Indian Companies Act 2013* at 34.

100), while firms initially spending less than 2% increased their CSR activity, firms initially spending more than 2% reduced their CSR expenditure after s135 was introduced".²⁶⁸

To complete the picture of CSR impact one question remains desperate for an answer: has mandatory CSR spending achieves the objective of social transformation in India thus far? In a study conducted in 2016 which explores the impact of mandatory CSR on human development, they found the consistent allocation of funds across economic, personal, social and environmental factors.²⁶⁹ The simultaneous engagements of companies across all these factors have the potential to improve the well-being of people and improving various human development indices.²⁷⁰

4.4 CSR LEGAL AND REGULATORY FRAMEWORK IN THE UK

4.4.1 REGULATORY FRAMEWORK

Even before the company law review which eventually resulted in the enactment of the Company Law Act 2008, the UK found it difficult to conceptualise and codify directors' duties, specifically the issue of whose interest's directors ought to manage the company.²⁷¹ This is evident from the various governance reports produced under the Cadbury committee (1992), the Greenburg committee (1995) and the Hampel committee (1998). All codes were intended to be self-regulatory and voluntary in nature. Today the codes remain relevant even in the dawn of the newly codified director's duties in section 172 of the Company's Act 2006.²⁷² They may be used to assist interpreting and explaining the Act for greater clarity.²⁷³

The UK government first established the above committees named under their respective chairs in response to the financial scandals and deteriorating standards of corporate governance.²⁷⁴ The main issues forming the bulk of the work in the Cadbury and Greenburg committees were the remuneration of directors, establishing remuneration committee and enhancing

²⁶⁸ Ibid at 37.

²⁶⁹ Harikrishnan T (2016) *IMPACT OF MANDATORY CSR ON INDIA'S HUMAN DEVELOPMENT PARAMETERS* CRISIL YOUNG THOUGHT LEADER 2016 at 8.

²⁷⁰ See 'Annexure A'.

²⁷¹ Esser Op cit (n33) 73.

²⁷² Companies Act Op cit note 21.

²⁷³ Esser Op cit (n33) 75.

²⁷⁴ Ibid.

disclosure.²⁷⁵ Needless to state, not much time or emphasis was placed on the director's duty in relation to governing the company with the interests of all stakeholders in mind.

The Hampel committee, on the other hand, was established for the purpose of all issues relating to corporate governance as opposed to a narrowed approach assumed by its predecessors. Their particular mandate was to analyse the role of directors in relation to whose interests directors are meant to manage the company. According to the committee "their next step was to consider the aims of those who direct and control the companies. They must develop a relationship relevant to its success. These will depend on the nature of the company's business; but they will include those with employees, customers, suppliers, local communities and the government".²⁷⁶

In Chapter 2 of the Hampel code, it was expressly comprehended that directors must align their duties for the protection of all stakeholders. What informed this understanding was that for a successful appreciation of the interests of stakeholder's, directors must have detailed knowledge of the protection that stakeholder's receive in other legislations.²⁷⁷ The Hampel committee came to a conclusion on this matter that the board of directors are ultimately "responsible for relations with stakeholders, but they are accountable to the shareholders".²⁷⁸ This approach is suggestive of the enlightened shareholder value: where the interests of other stakeholders are relevant only to the extent maximise shareholder value.

4.4.2 LEGAL FRAMEWORK

From 1998 it was clear that the company law in the UK was no longer in line with modern business practices. It was upon this realisation that the Secretary of State for Trade and Industry announced a 3 years fundamental review of core company law through an independent "Steering Group".²⁷⁹ The group creation amounted to a "framework of company law which promoted the competitiveness of British companies, strike a perfect balance between the interests of those concerned with the companies (different stakeholders), in the context of straightforward, cost-effective and fair regulation, and promoted consistency, predictability

²⁷⁵ Esser Op cit (n33) 75.

²⁷⁶ Ibid at 80.

²⁷⁷ Ibid at 74.

²⁷⁸ Ibid at 80.

²⁷⁹ Ibid at 81.

and transparency in the law”.²⁸⁰ This paper limits its scope to the stakeholder debate which formed part of the mandate of the steering group.

The steering group referred to the basic approaches for enhancing the company’s interests and engaging the stakeholder debate, namely the enlightened shareholder approach and the pluralist approach.²⁸¹ Their summary of the two approaches is that the enlightened shareholder approach assert that productive relationships and company’s success can only be guaranteed when directors pursue shareholder interests in an enlightened and inclusive manner; and that the pluralist approach assert that productive relation and company’s success can only be achieved if directors are allowed to balance interests of shareholders with those of other stakeholder’s. As it will be shown in the Companies Act, the group favoured the former approach.

The UK Companies Act 2006 currently contains an exhaustive codification of director’s duties in section 172. Director’s duties are therefore no longer self-regulated in terms of the UK company law. However, the previous documents containing issues relevant to director’s duties, such as the codes, can (and must) still apply to provide directors with guidance concerning the exercise of their duties as contemplated by the Act to create high standards of corporate governance.

Section 172 further promotes the enlightened shareholder view by stating that directors must manage the company in the best interest of the shareholder collectively. An exhaustive list of factors is, however, included to indicate the inclusive nature with which shareholders value must be maximised. These factors include that “directors should have regard to the likely consequence of any decision in the long-term; the interests of the employees; the need to foster the company’s business relationships with suppliers, customers and others; the impact of the company’s operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as towards various members of the company”.²⁸² Section 172(1) seems to “provide different stakeholders with extensive protection. The Act is very clear on the preferred approach relating to the stakeholder debate but how it will be applied practically is still uncertain”.²⁸³

²⁸⁰ Esser Op cit (n33) 82.

²⁸¹ Ibid at 83.

²⁸² Companies Act Op cite note 15 at section 172 .

²⁸³ Esser Op cit note 27 at 69.

The director's duties as contained in s172 are supplemented by the reporting requirements as set out in s 417 of the Company's Act, which requires directors to prepare "a directors report for each financial year of the company". In terms of s 417 (2), a director report must contain a business review, the purpose of which is to inform shareholders of the company and assist them in assessing whether or not directors are meeting the requirements of as set in s 172 of the Companies Act.²⁸⁴

Lastly, new environmental and social requirements have been introduced for UK based public companies. In terms of the Act, these new directors reporting requirements are underpinned by penalties for non-compliance.²⁸⁵ This requirement serves an important deterrence against ignoring the environment and social issues when governing the company. Some commentator has argued that this is a move from voluntary CSR regulation to mandatory CSR regulations for public companies.²⁸⁶ However interpreted, a penalty remains a good legislative strategy to encourage compliance with the law.

4.5 THE IMPACT OF VOLUNTARY CSR IN THE UK

As a result of the changes in the UK's Company Act as stipulated above, "Some 6,000 large public companies will be required to report on their policies on diversity, social issues and on corruption, as well as the risks they pose to human rights and to the environment, including through their supply chains. As such they will be making themselves accountable not just to their shareholders, but to stakeholders as well".²⁸⁷ "A recent study by PWC showed that three in four CEOs agreed that it contributed to their long-term success. Identifying risks to a business – whether financial, social or environmental – has long been recognised as crucial for investors, and more progressive companies recognise that their relationship with other stakeholders is also important".²⁸⁸

There is very little information on CSR impact in the United Kingdom. Perhaps this is an area that is in need of further exploration for future researchers.

²⁸⁴ Kerr et al op cit (n21) 130

²⁸⁵ Companies Act at section 415 (5).

²⁸⁶ <https://www.theguardian.com/sustainable-business/eu-reform-listed-companies-report-environmental-social-impact> accessed on 15 May 2017.

²⁸⁷ Companies Act.

²⁸⁸ Ibid.

4.6 CONCLUSION

This chapter has given a detailed analysis of the CSR regulations and laws in the India and the UK. In both countries, it was shown that a correlation exists between these CSR legal frameworks and social transformation. The issue of introducing penalties for non-compliance in both countries stands out and could perhaps be an important factor for increased compliance. Strength in both countries is that their legislation clearly defines expected outcomes and manner of compliance. For example, India clearly quantifies the expected CSR expenditure and describes in clear terms the manner in which the expenditure ought to be used in Schedule VII. Likewise, the UK sets out a detailed guidance on directors' duties in section 172 of the Act. Such defined objectives and duties increase the chances of compliance because practitioners are clear about what is expected in their process of compliance.

CHAPTER FIVE: REVIEW, CONCLUSIONS AND RECOMMENDATIONS

“In a more globalized, interconnected and competitive world, the way that environmental, social and corporate governance issues are managed is part of companies’ overall management quality needed to compete successfully. Companies that perform better with regard to these issues can increase shareholder value by, for example, properly managing risks, anticipating regulatory action or accessing new markets while at the same time contributing to the sustainable development of the societies in which they operate...”

Who Cares Wins: Connecting Financial Markets to a Changing World, UN Global Compact, 2004.

5.1 REVIEW OF THE RESEARCH CONDUCTED

This dissertation investigated whether there is a correlation between CSR legal frameworks and social transformation. The focus has been placed on director's duties and in particular their duty in relation to governing the company in the best interests of all stakeholders' which are directly or indirectly influenced by the operations of the corporation. The issue of stakeholder protection was discussed and evaluated in relation to its effect on social transformation. Codification of director's duties, particularly in relation to CSR Principles, in the legislation and regulation, was considered in an effort to understand whether or not the CSR legal framework plays influencing role on director's motivation to be CSR compliant.

The purpose of this research was two-fold: First the purpose of a corporation in relation to whose interest's directors has to manage the company. Secondly, investigate if CSR legal framework has an impact on social transformation.

In an attempt to answer these questions, chapter one provided a useful definition of the role and purpose of a company. Chapter two discussed a philosophical foundation on shareholder primacy, stakeholder protection, enlightened shareholder value and pluralist theory. The Berle-Dodd debate on directors' roles, particularly in relation to stakeholder protection was discussed. A full understanding of CSR and its correct functionalities within a corporation was also provided. In addition, CSR was also distinguished from terms that denote mere corporate philanthropy. The idea that efforts of corporate social responsibility negate shareholder value has also been debunked.

Chapter three provided a domestic overview of CSR legal framework in South Africa. Evidence provides that the current legislation is well written and effective in persuading more companies to develop CSR policies. Not much evidence, unfortunately, is available to measure the direct influence of CSR on social transformation. The fact that CSR is becoming widely adopted, however, may be an indicator of the substantial increase in social development.

Chapter four gives a foreign CSR law study in India, which is selected due to its newly implemented mandatory CSR spending for companies which meet the legislated criteria. India adopted this approach to address the socio-economic disparities that exist between the rich and poor. Evidence provides that there is an increase in general CSR spending. However, there is also contrary evidence showing that the capped 2% expenditure requirement in terms of s135 has brought down multinational corporations initial CSR initiatives that previously dedicated more than 2% to CSR. The CSR law in the UK was also considered due to the fact that South Africa's company law has been largely influenced by the English system. Therefore, their legal developments, such as their s173 which codifies a detailed list of director's duties and mandatory reporting in s417 of their Act, may provide useful guidance within the SA context too.

5.2 FINDINGS AND CONCLUSIONS

5.2.1 A PHILOSOPHICAL FOUNDATION OF THE 21ST CENTURY COMPANY

Chapter two discussed theories which are fundamental for managing a corporation and the position taken was that interests of all stakeholders must be taken to account. As a result, the stakeholder protection theory and the pluralist theory provide the most compelling arguments for managing the company to the interests of all stakeholders. In terms of the aforesaid theories, the paper was persuaded by the idea that all stakeholder interests are equally important when governing a corporation.

5.2.2 INDIAN LAW AND SOCIAL TRANSFORMATION

The Indian CSR legal framework has a rich in depth history of CSR which developed over time under the Voluntary Guidelines. These earlier guidelines were not binding but merely "encouraged CSR initiatives to be an integral part of the overall business policy, aligned with the primary scope of business".²⁸⁹ When reverting to chapter two of this paper, it will be noted that CSR functions at its best when it is voluntary because of its innate need to be embedded in the primary scope of each business which varies in each sector. An umbrella approach, such as the current 2% CSR spending for all companies on a closed list of activities can reduce CSR to mere corporate philanthropy.

²⁸⁹ Rajesh Timane and Tushar Tale *A study of Corporate Social Responsibility in India* (2012) IJRIM 2 (12) 334.

Notwithstanding, it is evident that CSR expenditure has been on an increase in India ever since the enactment of s135. In other words, more corporations are developing CSR policies and addressing societal issues through CSR initiative. However, some larger companies which previously spent more money on CSR are reducing their spending to fit the 2% percentage legislated expenditure.

This, on the contrary, is not a material difference considering that more companies are getting themselves involved in CSR spending. More than ever, companies fall under the criterion provided under s135 which means that there are more resources accessible for community development. The fact that Schedule VII of the Company Act provides a closed list of issues that qualify CSR activity make it effective to the extent that companies have certainty as to what they are expected to implement their CSR expenditure. This makes it easy for all corporations to work towards a common national goal of social transformation. As a result, KPMG CSR report in India has noted a positive impact on social transformation as a result of the mandatory CSR expenditure under s135.

5.2.3 THE UK LAW AND SOCIAL TRANSFORMATION

The South African company law has been influenced and shaped by the UK legal system; it is for this reason that reference may be drawn from the UK to further develop South African CSR legal system. The UK CSR reform has been influenced by the Cadbury Committee in 1992 and the Hampel Committee in 1998 with its compliance based on a voluntary basis. These committees have been especially successful in regulating director's remuneration and shifting perceptions of the purpose of a company from a shareholder centric to an all-inclusive stakeholder value. In addition, s173 of the UK's Company Act of 2006 emphasised the idea that directors must manage the company in the interests of all stakeholders, listing possible stakeholders that directors ought to consider when they make a decision. The effect of s173 is enhanced by s417 which make it mandatory for corporate reports to be in line with listed director's duties under s173. Most significantly, the reporting requirements are accompanied by penalties for non-compliance. As a result of this penalty, there has been an increase of stakeholder protection across sectors in the UK.

5.2.4 THE SOUTH AFRICAN LAW AND SOCIAL TRANSFORMATION

The South African CSR regulatory and legal frameworks have undergone various developments over the years. These developments have been debated and influenced by various stakeholders in business, government and other sectors. Throughout CSR development in SA, many changes in the legal framework have had to be made to improve the condition with which the legal framework apply and affect the business work. For these reasons, amongst others, South Africa has developed a comprehensive CSR legal framework to regulate and guide issues of stakeholder protection.

As a result, positive impact on social transformation has been on the increase within our communities due to the private sector's contributions. The problem that remains with the context of South Africa is that CSR policy development and implementation is limited to larger and most established corporations. In addition, the South African CSR legal framework fails to guide corporations as to whose interests they ought to be managed. In other words, a creation of director's duties that is stakeholder conscious would be effective in guiding directors. Defined director's duties, which include stakeholder protection requirements, have created a positive influence within the context of South Africa and the UK. This is because smaller and medium sized business is still of the opinion that CSR is reserved for multi-million Rand corporations instead of them.

5.3 RECOMMENDATIONS FOR SOUTH AFRICA

As a point of departure, it is significant to note that CSR in the South African regulatory and legislative framework is amongst the world class and needs very little improvement. Yet South Africa remains one of the most unequal societies in the world, perhaps showing that more can be done, legislatively, to improve the laws and regulations for greater compliance purposes. To ossify this assertion, recently many practitioners have welcomed the development of King IV to which they have said give greater clarity as to the expectations of compliance. For this reason, it can be argued that the South African CSR legislative is not where the problem of non-adoption or non-compliance for small and medium size businesses lies. The problem rests, perhaps, more with the mystified and misunderstood idea of what CSR really is and its functionality with business. Many directors, as noted above, still have an incorrect perception that CSR is merely there to force corporations to spend money for community development from their profits with little return for their expenditure. However, this is, of course, an incorrect understanding of CSR and its functionalities. Perhaps, South Africa needs educational

initiatives educating directors and managers of the significance of adopting CSR at all level of business. They need to be informed about the advantages that CSR compliance has, not only for external stakeholders but for the internal ones, particularly the shareholders too. A shift in perception from seeing CSR as a mere corporate philanthropy to an integrated source in business is an important one. One other advantage, as mentioned in chapter two, is that CSR compliance enhances good corporate governance within a corporation.

However, with a greater assessment of the Indian and UK framework, it is clear that some of their legislative frameworks which encouraged greater compliance may be adopted for guides' in improving the legislative position in South African. To increase corporation compliance with CSR laws in South Africa, firstly, there has to be a clearly defined approach as to what is the national policy behind CSR. This has been instrumental in giving clarity to corporations in India. Indian corporations are now clear of what qualifies under CSR activities and resulting impacts upon implementation. This all has been legislated under Schedule VII of the Indian Act. In addition, like that of India, the CSR policy needs to be clear on what qualifies as CSR activity and what doesn't qualify as CSR activity. The paper strongly believes that same stance will have a lasting impact on director's clarity as to the usefulness of CSR policy development within their corporation to improve social development.

One may argue that it is not a good idea to adopt CSR expenditure similar to India on various fundamental grounds. Firstly, as it has been stated above, this creates a uniform approach to CSR which will not necessarily create the desired flexibility to encourage CSR activity within the primary scope of every business uniquely. CSR be left to corporations to embed into their scope of everyday business so that it can operate naturally. The only guidance that could be given to business, legislatively, could perhaps be the fact that communal developments must result from activities of CSR adopted by each corporation. These need to clearly define similar to Schedule VII in the context of India.

Furthermore, the above national policies which influence CSR may also be adopted within the context of codifying a greater defined and detailed list of directors' duties. This has greatly assisted directors in the context of the UK to understand which stakeholder's interests they need considers when managing their corporation. Perhaps a well South Africa may also need to adopt similar legislation to demystify expectations of directors within corporations, particularly with regards to stakeholder protection.

5.4 OVERALL CONCLUSION

To conclude, the paper has discussed a legal analysis of CSR in South Africa, India and the UK and how these affect compliance for the betterment of social transformation. Chapter one provided the paper's problem statement and the road map. A theoretical foundation for the understanding of stakeholder protection was also detailed in chapter two. A correlation between CSR legal framework and social transform was shown in all countries of the study, particularly in South Africa at chapter three. However, it was suggested that CSR compliance in South Africa can be enhanced, particularly within the small and medium sized corporations. This could be done by introducing some of the good CSR foreign legislations that have been identified within chapter four, such as having clearly defined national objectives with for CSR policy, detail codification of directors' duties and introduction of penalties for non-compliance are some of the imperatives that could be introduced to encourage compliance.

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