

RESPONSABILIDADE SOCIAL CORPORATIVA: IMPULSIONANDO METAS ÉTICAS ATRAVÉS DA RESPONSABILIDADE DA ADMINISTRAÇÃO

企業社會問責制：通過董事會
問責實現道德目標

*Corporate Social Accountability:
Enforcing Ethical Goals through Board Accountability*

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Resumo: Embora o conceito de Responsabilidade Social das Empresas (RSE) tenha já surgido na legislação societária de várias jurisdições, a ideia de concretizar a RSE através de regulação tem sido criticada por ser fundamentalmente falaciosa ou mero cosmético, pelo menos no domínio do direito das sociedades. Este artigo visa contribuir para este debate intenso, abordando os problemas decorrentes da implementação da RSE no domínio do direito societário e avaliando como o termo RSE poderia ser refinado e elevado através da lente da “responsabilização dos órgãos de administração”, de modo a facilitar vias legislativas rumo ao desenvolvimento sustentável. O conceito de RSA (Responsabilidade Social de “Accountability”) será introduzido como uma vertente muito mais refinada da RSE e avaliado com o objetivo de aprimorar a latitude regulatória da RSE. Em particular, a responsabilização dos órgãos de

administração será “articulada e analisada” histórica e teoricamente, apoiada pela discussão da sua natureza, âmbito e trajetória comuns, de forma a permitir que a RSE seja aplicada de forma mais adequada e eficaz no direito societário. O conceito de Responsabilidade Social de “Accountability” (RSA) será introduzido e avaliado com o objetivo de alargar a sua latitude para além da mera divulgação. Ao fornecer um novo paradigma para definir as relações entre empresas e sociedade e identificar vias pragmáticas correspondentes para implementar a RSE, propomos que a introdução da RSA reduzirá a atual contestabilidade através da sistematização, comparação e progressão neste campo de investigação complexo.

Palavras-chave: Responsabilidade Social das Empresas; responsabilização dos órgãos de administração; responsabilidade social de accountability; desenvolvimento sustentável; direito de sociedade; fiscalização.

摘要：雖然企業社會責任（CSR）概念已納入許多司法管轄區的公司立法，但通過監管實現企業社會責任的做法被批評為根本缺陷或僅僅是表面功夫，至少在公司法領域如此。本文旨在解決公司法領域實施企業社會責任所產生的問題，為這一激烈討論做出貢獻，並評估如何通過董事會問責制的視角來完善和提升企業社會責任概念，以推進可持續發展的立法路徑。

本文將企業社會問責制（CSA）作為更加精細化的CSR分支進行介紹和評估，以提高CSR的監管靈活性。特別的是，本文將從歷史和理論角度對董事會問責制進行關聯研究，並討論其共同性質、範圍和發展軌跡，使企業社會責任在公司法中得到更恰當、更有效的應用。文章將引入和評估企業社會問責制（CSA）概念，旨在將其範圍擴展到信息披露之外。通過提供定義商業社會關係的新範式並確定實施企業社會責任的相應實用路徑，我們認為CSA的引入將通過分類、比較和推進這一複雜研究領域來減少當前的爭議性。

關鍵字：企業社會責任、董事會問責、企業問責制、可持續發展、公司法、執法

Abstract: While the notion of Corporate Social Responsibility (CSR) has now appeared in company law legislations in a number of jurisdictions, the idea of realising CSR via regulation has been criticised for being fundamentally flawed or else merely window-dressing, at least in the domain of corporate law. This article aims to contribute to this heated discussion, by way of address the problems that arise from implementing CSR in the corporate law domain, and

assess how the term CSR could be refined and elevated through the lens of board accountability to facilitate legislative routes of moving towards sustainable development. The concept of CSA will be introduced as a much more refined stream of CSR, and evaluated with the aim of sharpening the regulatory latitude of CSR. In particular, board accountability will be linked and investigated historically and theoretically, supported by discussion of their common nature, scope and trajectory, so as to enable CSR to be more appropriately and effectively applied in corporate law. The concept of Corporate Social Accountability (CSA) will be introduced and evaluated with the aim of broadening its latitude beyond disclosure. By providing a new paradigm in defining business society relationships and identifying corresponding pragmatic routes for implementing CSR, we propose that the introduction of CSA will reduce current contestability through sorting, comparing and advancing this complex field of enquiry.

Keywords: Corporate social responsibility; board accountability; corporate social accountability; sustainable development; corporate law; enforcement.

1. Introduction

Corporate social responsibility (CSR), as a major contemporary focus for companies, governments, NGOs and communities, has been discussed from a multi-disciplinary perspective, including the disciplines of philosophy, business management, law, politics, sociology and economics, as well as pragmatically by businessmen and politically by public representatives. Despite the multi-disciplinary and wide recognition, there is no consensus about the definition, nature and future of CSR. The definitional ambiguity make it difficult not only for stakeholders seeking to hold companies accountable but also leave companies open to considerable risks, including corporate lawsuits, protest and criticism from media and the public. The dynamic nature of CSR implies that it is sometimes necessary to redefine the boundaries of what is acceptable, feasible and profitable, and to relate these boundaries to corporate decisions and strategies.¹ Notwithstanding its positive social and environmental impacts, the notion has come in for its share of criticism over the years for being ill-defined

1 R.C. Kim & J. Moon, 'Dynamics of Corporate Social Responsibility in Asia: Knowledge and Norms' (2015) 14 *Asia Business & Management* 349; O. Ertuna & B. Ertuna, 'How Globalization is Affecting Corporate Social Responsibility: Dynamics of the Interaction between Corporate Social Responsibility and Globalization' in G. Aras & D. Growther, *A Handbook of Corporate Governance and Social Responsibility*, London & New York: Routledge (2016) p.265.

and fundamentally flawed. The cures in the existing literature have been focusing on a specific group of stakeholders. Rather than focusing on specific issues of CSR such as employee satisfaction,² customer satisfaction,³ creditor protection,⁴ environmental protection⁵ or reputation supply chain,⁶ the article aims to provide indiscriminate argument on promoting stakeholders' interests in a collective manner and explore the possibilities of using the notion of accountability to make CSR more solid, convincing and rational and widely applicable in various jurisdictions regardless of their legal system.

In respondent to social and environmental challenges and civil society and public expectations of good corporate citizenship, it is important for us to find ways to enhance notion CSR, in terms of its enforceability and effectiveness under corporate law. A critical assessment of the appropriateness of using CSR, a vague and sometimes self-contradictory word, in company law legislation. Therefore, the question arises that if CSR is not the appropriate word for company law legislations, could a new terminology be proposed with multi-dimensions that accommodates various magnitudes on the current legislative approaches to regulating CSR? On the ground that responsibility without subsequent accountability would engender dysfunctional outcomes,⁷ could an elevated notion be developed through the lens of accountability, particularly the notion of board accountability?

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- 2 P. Turnbull, *The Dynamics of Employee Relations* London: Macmillan (1994); A. Edmans, L. Li & C. Zhang, 'Employee Satisfaction, Labour Market Flexibility, and Stock Return around the World' NBER Working Paper No. 20300 (2014).
 - 3 H. Servaes & A. Tamayo, 'The Impact of Corporate Social Responsibility on Firm Value: the Role of Consumer Awareness' (2013) 59 *Management Science* 1045.
 - 4 J. Zhao & S. Wen, 'Improving the Disadvantaged Position of Unsecured Creditors through Law and Corporate Social Responsibility' [2014] *Journal of Business Law* 868; H. Anderson, 'Corporate Social Responsibility – The Case for Unsecured Creditors' (2007) *Oxford University Commonwealth Law Journal* 93.
 - 5 G. Dowell, S Hart & B. Yeung, 'Do Corporate Global Environmental Stands Create or Destroy Market Value?' (2000) 46 *Management Science* 1059; B.W. Husted, I. Motiel & P. Christmann, 'Effects of Local Legitimacy on Certification Decisions to Global and National CSR Standards by Multinational Subsidiaries and Domestic Firms' (2016) 47 *Journal of International Business Studies* 382.
 - 6 M. Mueller, V. Gomes dos Santos & S. Seuring, 'The Contribution of Environmental and Social Standards Towards Ensuring Legitimacy in Supply Chain Governance' (2009) 89 *Journal of Business Ethics* 509; C. R. Carter, P. L. Easton, 'Sustainable Supply Chain Management: Evolution and Future Directions' (2011) 41 *International Journal of Physical Distribution & Logistics Management* 46.
 - 7 P.E. Tetlock, 'The Impact of Accountability on Judgment and Choice: toward a Social Contingency Model' in Zanna, M. (Ed.), *Advances in Experimental Social Psychology*, Vol. 25 (New York Academic Press 1992) p. 331.

The research should be an essential primer for legal practitioners, in-house counsel who have to deal with CSR and suitability issues on a regular basis, and legal and business theorists who should realise that CSR and law are *de facto* intrinsically interconnected rather than mutually exclusive concepts. The research outcome will be also helpful for legislators, particularly pertinent to those who are accountable for legal reforms in jurisdictions proactive for CSR law. This question becomes particularly important, for example in the UK, with the publication of Government green paper 2016.⁸

This article is an original attempt to link these two notions together to generate coherent arguments about the regulation of CSR in the domain of corporate law, referencing the current literature on board accountability and existing legislations for enforcing CSR. The article purposes to bring theoretical, rigour, structure, consistency and parsimony to the field of regulating CSR. In a systematic manner, the nature, scope and enforcement of the concept of corporate social accountability (CSA) will be evaluated, with the aim of broadening its latitude beyond disclosure.⁹ Ethical Corporation's report illustrates that "60% of respondents agreed that too much time is being spent on the reporting process".¹⁰ In this fashion, instead of getting number fatigue, the article proposed a change of emphasis in the direction of ensuring that CSR disclosure is closely linked with the need of stakeholders and subsequently the impact that they have brought to stakeholders.

In order to offer a comprehensive arguments for enforcing CSA in company law, a rigorous assessment of the process of fulfilling directors' duties, and imposing social embeddedness by giving constituencies the means to claim the enforcement of socially responsible decisions will be offered in order address the issue of their social, environmental and human rights externalities. In order to link the various aspects of CSA, including discourse, stakeholder quires, boards'

8 Department of Business Innovation and Skills (now Department of Business, Energy and Industrial Strategy), 'Corporate Governance Reform: Green Paper' November 2016; particularly see pp. 34-42.

9 The notion of corporate social accountability has, based on the current literature, been closely connected with information disclosure; for example, O. Owoeye, 'Corporate Social Accountability in Developing Countries: A Recipe for the Socially Responsible Corporation' (2015) 1 *International Journal of Accounting, Business and Management* 1; S. Watts, 'Corporate Social Responsibility Reporting Platforms: Enabling Transparency for Accountability' (2015) 16 *Information Technology and Management* 19; D.U. Gilbert & A. Rasche, 'Discourse Ethics and Social Accountability: The Ethics of SA 8000' (2007) 17 *Business Ethics Quarterly* 187; R. Gray, D. Owen & C. Adams, *Accounting & Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (Upper Saddle River: Prentice Hall 1996).

10 Ethical Corporation, '4 CR reporting and communication trends for 2017' available via <http://www.ethicalcorp.com/4-cr-reporting-and-communication-trends-2017>

explanation, liabilities or rewards, stakeholder policies including stakeholder participation, engagement and scrutiny will be discussed as a thread to establish a coherent case. The feasibility of imposing appropriate punishments for misconduct or ignorant behaviour by boards as well as rewarding for well-balanced and integrated CSR-related successes will also be discoursed. As a result, boards of directors will not only be accountable to their shareholders, but will also be able to balance a multiplicity of various stakeholders' interests. The innovative development and analysis of CSA will be helpful to lower the level of uncertainty in CSR as a theoretically challenging and under-valued field of legal study.

The article proceeds as follows. Section 2 critically reviews literature of CSR and board accountability to illustrate the reasons for upgrading CSR notion and possibilities of referring the notion of board accountability. Section 3 is concerned with the challenges of developing an effective CSR policy and the necessity of developing a new notion that is systemic, original and company law-friendly. Section 4 looks at the links between CSR and board accountability and tries to explore the possibilities of collaboration and lay a logical background for a new notion. Section 5 builds on Section 4 by engendering a regulatory framework for a more inclusive approach by making CSA as a notion that is closely related to mandatory features and the regulatory framework currently embedded within company law legislations, operating at multiple scales including locally, nationally, regionally and internationally. Section 6 will develop the CSA further: the stages and enforcement of the notion will be deliberated in the lens of stakeholder policies to identify opportunities to popularise the notion of CSA. Finally there will be some concluding remarks.

2. Defining CSR and board accountability: preparing for the possible collaboration

A. CSR: current understanding and trajectory for advancement

CSR is defined and understood in diverse ways by different people, which is not least owing to the constantly adjusting expectations and demands of stakeholders in rapid-changing corporate practices. The nature and scope that the term is interpreted and implemented varies significantly for each corporation and jurisdiction. Carroll has a very optimistic attitude towards future of CSR and think it will continue to grow on a steady to slightly increasing trajectory.¹¹ CSR definition is variable at the level of corporation and jurisdiction. Rather

11 A.B. Carroll, 'Carroll's Pyramid of CSR: Taking another Look' (2016) 1 *International Journal of Corporate Social Responsibility* 1 at 8.

than subject to a fixed definition,¹² it is a dynamic notion that changes in line with economic advancement, and legal and cultural development. There is no universal path for the development of CSR while its development and enforcement depends on factors such as culture, history, political systems, economic policies and priorities, and social commitments. The concept of CSR has been provoked in great measure by environmental challenges and bolstered by the financial crisis and its effect on economies and stakeholders as a wake-up call to the blind pursuit of self-interest and short-term gain without regard to the interests of wider communities.¹³

Definitions of CSR have always been closely related to companies' stakeholders, their rights and interests. Werther & Chandler defined CSR as a way of maintaining legitimacy of corporate actions in the larger society by bringing concerns of various stakeholders to the foreground.¹⁴ CSR acknowledges and incorporates the concerns of social, environmental and human right externalities to promote the sustainability of wider society at large. International institutions and government also attempted to define CSR by linking CSR to board's responsibilities beyond voluntary responsibilities. The European Commission defined CSR as the company led "responsibility of enterprises for their impact on society" while "public authority can play a supporting role through a smart *mix of voluntary policy measures* and, where necessary, *complementary regulation*".¹⁵ United Nations considers CSR as directors' *responsibility* which aims both to examine the role of business in society, and to maximise the positive societal outcomes of business activity.¹⁶ Canadian Business for Social Responsibility defined CSR as a *company's commitment* to operating in an economically, socially and environmentally sustainable manner, while recognising the interests of its stakeholders. International Organization for Standardization defines CSR as "the responsibility of an organization for the *impacts* of its decisions and activities on society and the environment, through *transparent and ethical behaviour*".¹⁷

12 M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis*, Ontario: LexisNexis (2009) p. 1.

13 Hon Chares Doherty Gonthier, 'Forward' in M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis*, Ontario: LexisNexis (2009)

14 W.B. Werther & D. Chandler, *Strategic Corporate Social Responsibility: Stakeholder in a Global Environment*, Thousand: Sage (2006) p. 8.

15 European Commission, 'Corporate Social Responsibility' available via <http://ec.europa.eu/growth/industry/corporate-social-responsibility/>

16 H.E. Ward, E. Wilson, L. Zarsky & T. Fox, 'CSR and Developing Countries: What Scope for Government Action?', United Nations Sustainable Development Innovation Briefs, Issue 1; available via <http://www.un.org/esa/sustdev/publications/innovationbriefs/no1.pdf>

17 International Organisation for Standardization, ISO Standard 26000 (2010).

Commentators sometimes link the CSR to other related responsibilities, mostly famously by Carroll *et al.* who further expand on the scale of CSR, advocating that it encompasses the economic, legal, ethical, and philanthropic expectations placed on organisations by society at a given point in time.¹⁸ It is obviously hard to offer CSR a well-rounded definition.¹⁹ However, the trends of CSR definition seems quite clear which are closely stakeholder-oriented and obligation-reinforced.

CSR has spent the last few decades developing, progressing and reimagining its purpose and value within the company and in the boarder society.²⁰ The efforts have particularly been made in terms of the position, acceptance, earnestness and enforcement of CSR in the company law arena. The traditionally commonly-established voluntary nature of CSR, as strategy or contribution, seems to start losing its fame. Instead, the CSR is speak of as a business commitment despite of its dynamic and variable future. The discussion on the topic have been enriched by an explosion of rigorous research on the topics across disciplines and is on the route of growth trajectory due to companies' acceptance, profit-driven enthusiasm and literature proliferation²¹. This orbit and dynamic nature of CSR make it rational and significant to explore the link between CSR and board accountability and possibilities of elevating CSR as a value and norm when applied in the company law legislation.

B. Delineation and stages of board accountability

The accountability, as a term in the litterateur of corporate governance, is notoriously hard to articulate as a complicated and elusive concept.²² The term is multi-faceted as a 'murky' term that does not lend itself to precise definition.²³ The notion of board accountability is central to literature and debates on corporate

18 For example see A.B. Carroll, 'The Pyramid of Social Responsibility: Towards the Moral Management of Organizational Stakeholders' (1991) 34 *Business Horizons* 39; A.B. Carroll & A.K. Buchholtz, *Business and Society: Ethics and Stakeholder Management*. 5th edn. (Thomson South-Western, 2003).

19 Dahlsrud identified and analysed 37 different definitions of CSR and his study has not captured all; see A. Dahlsrud, 'How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions' (2006) 15 *Corporate Social Responsibility and Environmental Management*, 1.

20 C. Hackett, *Development in an Era of Capital Control: Embedding Corporate Social Responsibility within a Transnational Regulatory Framework* (London: Palgrave 2017) p. 6.

21 A.B. Carroll, 'Carroll's Pyramid of CSR: Taking another Look' (2016) 1 *International Journal of Corporate Social Responsibility* 1 at 8

22 R. Behn, *Rethinking Democratic Accountability* (Washington, DC, Brookings Institution Press, 2001) at 221.

23 A. Sinclair, 'The chameleon of accountability: forms and discourses' *Accounting, Organizations and Society*, 20 (2/3) (1995), pp. 219

governance.²⁴ The perception is quintessence of corporate governance debate with, however, no unified doctrine what accountability consists of.²⁵ Board accountability is regarded as an important term by government and international organisations. According to UK corporate governance code 2016, together with “transparency, probity and focus on the sustainable success of an entity over the longer term”, accountability was indicated as one of the underlying principles of all good governance.²⁶ The G20/OECD indicated that “the corporate governance framework should ensure ... the board’s accountability to the company and the shareholders.”²⁷ Reviewers have said that it is critical to foster the effectiveness and board accountability in order to improve corporate governance practices.²⁸ In addition to corporate governance code, boards are also legally required to meet basic stands of accountability derived from the law of trust and company law which required the boards members to uphold the duties such as fiduciary duties, duties of care and obedience.²⁹ A sense of what accountability actually involves in a precise way has been lacking.³⁰

Instead of a simple single meaning, accountability in the context of corporate governance entails a process involving four stages, all of which contribute to the meaning of the word.³¹ The first stage is the board providing accurate information concerning its decisions and actions, so that shareholders are informed as to what has been done by it on behalf of the company. A part

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- 24 M.T. Moore. ‘The (Neglected) Value of Board Accountability in Corporate Governance’ University of Cambridge Faculty of Law Research Paper No. 9/2015.
- 25 N. Mosunova, ‘The Content of Accountability in Corporate Governances’ (2014) 2 *Russian Law Journal* 117 at 117.
- 26 See Financial Reporting Council, The UK Corporate Governance Code, April 2016, p. 1.
- 27 G20/OECD, *Principles of Corporate Governance 2015*.
- 28 See J. Roberts, T. McNulty and Philip Stiles, ‘Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom’ (2005) 15 *British Journal of Management* S6; M. Huse, ‘Accountability and Creating Accountability: A Framework for Exploring Behavioural Perspectives of Corporate Governance’ (2005) 16 *British Journal of Management* S65.
- 29 F. Ostrower, ‘Boards as an Accountability Mechanism’ (2014) available via www.urban.org/sites/default/.../413146-Boards-as-an-Accountability-Mechanism.PDF
- 30 M. Dubnick & K. Yang, ‘The Pursuit of Accountability: Promise, Problems, and Prospects’ in D.C. Menzel & H.L. White, *The State of Public Administration: Issues, Challenges, and Opportunities* (Abington: Routledge 2015) p.171 at 180-185.
- 31 See A. Keay and J. Loughrey, ‘The Framework for Board Accountability in Corporate Governance’ (2015) 35 *Legal Studies* 252; for discussions on board accountability in China see A. Keay & J. Zhao, ‘Ascertaining the Notion of Board Accountability in Chinese Listed Companies’ (2016) 46 *Hong Kong Law Journal* 671.

of this is transparency, which involves making disclosure and providing reports concerning the work of the board.³² The second stage enquires the board to justify and explain what it has done (or not done), and why, which is always seen as the predominant aspect of accountability, involving the board being answerable for what it has done, and it is the stage that is often focused on by elements of the accountability literature dealing with other areas of society and law. The third stage is constituted by the questioning and evaluating of the board's reasons given for what has been done. And the final stage is that there is the possibility, but not the requirement, of the imposition of consequences, including simply entailing the provision of feedback to the board. It might, but it need not, constitute negative consequences or positive consequences. The former could involve some sort of sanction, perhaps involving the removal of one or more directors or the decision not to re-elect a director while the latter could involve positive in effect, comprising promotions and other rewards for success and achievements.³³

In the broad sense, board accountability involves externally imposed and internally incorporated legal obligations towards companies, together with their shareholders and stakeholders. Enhancing board accountability also involves more participation and monitoring from stakeholders, which may reduce agency cost and encouragement to identify and pursue value-generating opportunities and give signals to stakeholders when the board is not acting in an accountable manner.³⁴

3. The necessity of new notion to take regulation of CSR further

A key question that is linked to the theme of the article will be to whom the board itself is accountable. Board have been argued to be accountable to shareholders in relation to performance of the board in Anglo-American countries.³⁵ The noticeable problem is shareholders themselves are not accountable to anyone.³⁶ Mover, there are voices go beyond the Anglo-American approach.

32 A. Licht, 'Accountability and Corporate Governance' p. 24, 32, at <http://ssrn.com/abstract=328401> (last accessed on 26th February 2017) (2002).

33 A. Keay and J. Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 *Legal Studies* 252 at 267; see also C Harlow and R Rawlings 'Promoting Accountability in Multilevel governance: a network approach' (2007) 13 *European Law Journal* 542 at 545.

34 M.M. Harner, 'Corporate Control and the Need for Meaningful Board Accountability' (2010) 94 *Minnesota Law Review* 541 at 552.

35 For example, see Financial Reporting Council, The UK Corporate Governance Code, April 2016, p.3; see also Section 172 of Companies Act 2006.

36 A. Keay, *Board Accountability in Corporate Governance* (Abingdon: Routledge, 2015) at 134.

Nobel Laureate Joseph Stiglitz argued that “corporation must *take into account* the impact of their employees, on the environment, and on the communities in which they operate”.³⁷ Some governing bodies believe shareholders are not only constituent to whom board should be accountable.³⁸ Federal Court of Australia stated in *ASIC v. Healey & Ors*³⁹ financial reporting is perceived wider than just accountability to shareholders. Moreover, with increasingly number of corporations stepping up to drive social impact – both internally and externally, the role of CSR leaders continue to become more and more sophisticated.⁴⁰ This does lead to higher competitiveness requirement for directors while the rewards and punishment of being or not being accountable to stakeholder are substantial incentive to drive the trend towards the CSR friendly practice and codifying these practices in regulations and legislations.

Furthermore, in the last few decades, a third way began to emerge as part of company law reform the UK and the US, adopting a flexible and pluralist approach.⁴¹ Taking the of enlightened shareholder value principle as an example, the enforcement in the principle in the Companies Act does not change traditional shareholder-oriented board accountability since non-shareholder stakeholders are not able to make directors accountable, question directors, require justification for their decisions, or impose consequences on board.⁴² Therefore, if the progressive corporate law elements are going to be introduced in order to make the company law developed towards a more enforceable stakeholder-friendly direction rather as examples of “moral law”, it is important to give stakeholders, or probably selective group of stakeholders depending on the relevance to each companies in an individualised level, more rights and remedies. The legislative proposed to implant and codify social norms in the company law since these norms do influence directors’ behaviours. However, such norms are susceptible to erosion without an accountability mechanisms⁴³ and could make the CSR legal approaches

37 J.E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton & Company, 2007) at 190.

38 P. M. Collier, ‘Stakeholder Accountability: A Field Study of the Implementation of a Governance Improvement Plan’ (2008) 21 *Auditing & Accountability Journal* 933 at 936.

39 *ASIC v. Healey & Ors.* (2011) ALR 618.

40 S. McPherson, ‘6 CSR Trends to Watch n 2017’ January 19 2017, available via <https://www.forbes.com/sites/susanmcperson/2017/01/19/6-csr-trends-to-watch-in-2017/2/#62437d3b52ae>

41 C. A. Williams & J. M. Conley, ‘An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct’ (2005) 38 *Cornell International Law Journal* 493.

42 A. Keay, *Board Accountability in Corporate Governance* (Abingdon: Routledge, 2015) at 134; see sect. 717(b) New York Business Corporation Law.

43 R.M. Jones, ‘Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance’ (2006) 92 *Iowa Law Review* 105 at 145.

in corporate law purposeless. The terminology including explicit words such as “CSR” and “business ethics”⁴⁴, “have regards to”⁴⁵, “consider”⁴⁶ does not seem to work. These terms in the legislations imply that stakeholder consideration have evolved into social issues and thus make attention and action by CSR policy legitimate. A new notion is therefore needed to make CSR law has a substantial impact instead of window-dressing or green wash.

Liang and Renneboog claimed that, by using CSR rating for 23,000 companies from 114 countries, CSR rating and the country’s legal origin are closely and strongly correlated.⁴⁷ They argued that, comparing with business case of CSR and other factors such as ownership, political institutions and globalisation, legal origin is a strong explanation for CSR rating.⁴⁸ It is found that Scandinavian civil law firms rank the highest in terms of their CSR ratings.⁴⁹ Linking the research outcome to board accountability, it is observed, through empirical analysis, that the board members of Finnish listed companies view themselves “accountable” to shareholders and to other stakeholders, including society and future generations.⁵⁰ Referencing the best practices in countries with Scandinavian civil law, it may be worthwhile to produce an integrative new notion which encourage stakeholder engagement, stakeholder communication, stakeholder scrutiny and stakeholder participation in relation to enforceability and effectiveness of CSR law. This notion should make the board accountable to stakeholders and this process could be studied as a system that accommodate these elements and will enable and persuade companies address social, environmental and human right problems with more assorted voices and challenges from various constituencies, considering the earnestness and the complication of certifying greater level of financial, social

44 See Article 5 Chinese Company Law 2006; Section 414C Companies Act 2006

45 See Section 172 (1) UK Companies Act 2006.

46 See *People’s Department Store Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64, 2004 SCC 68, 2004 3 S.C.R. 461 (S.C.C.) at paras 42 (S.C.C.); Pennsylvania Consolidated Statutes, Corporations and Unincorporated Associates 414 (b).

47 H. Liang & L. Renneboog, ‘On the Foundations of Corporate Social Responsibility’ (2017) *Journal of Finance* forthcoming available via <http://onlinelibrary.wiley.com/doi/10.1111/jofi.12487/full>

48 H. Liang & L. Renneboog, ‘On the Foundations of Corporate Social Responsibility’ (2017) *Journal of Finance* forthcoming available via <http://onlinelibrary.wiley.com/doi/10.1111/jofi.12487/full>

49 H. Liang & L. Renneboog, ‘On the Foundations of Corporate Social Responsibility’ (2017) *Journal of Finance* forthcoming available via <http://onlinelibrary.wiley.com/doi/10.1111/jofi.12487/full>

50 A. Virtanen & T. Takala, ‘Accountability of Corporate Boards in Finland’ (2016) 8 *Management Research and Practice* 5 at 18-19.

and corporate accountability *post* financial crisis 2008.

4. Possibilities of linking CSR with board accountability

Porter and Kramer explored the necessity for companies to bring business and society together for the purpose of creating “shared value”—generating economic value in a way that also produces value for society by addressing its challenges.⁵¹ The notion of creating shareholder value has gained credibility, legitimacy and momentum as a new approach of doing business globally.⁵² Board accountability is associated with creation of certain value.⁵³ Logically, the value created by the board accountability should also be “shared value”. The shared value approach rewires company success with social progress. The board accountability would therefore help in promoting how core business operates in order deliver sustainable return through strategy, disclosure, engagement, communication, punishment and reward in order to promote long-term success of the companies.

In addition to the link through the notion of “shared value”, the two notions can be linked under the concept of stakeholder accountability, which recognises that “social and environmental transparency, verification and accountability may be equally important for the long-term sustainability of companies”.⁵⁴ Focusing on procedure of procedure and components of accountability, Crane & Matten defined “organisational accountability” as the “readiness or preparedness of an organization to give an explanation and a justification to relevant stakeholders for its judgments, intentions, acts, and omissions when appropriately called upon to do so”.⁵⁵ Therefore, agents (board members) of corporations, as business organisations, should be make themselves ready to offer explanation and

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- 51 M.E. Porter & M.R. Kramer, ‘Creating Shared Value’ (2011) January-February *Harvard Business Review*; see also A. Crane, G. Palazzo, L.J. Spence & D. Matten, ‘Contesting the Value of “Creating Shared Value”’ (2014) 56 *California Management Review* 130.
- 52 C. Moore, ‘Corporate Social Responsibility and Creating Shared Value: What’s the Difference’ Global Alliances and Strategic Initiatives Heifer International
- 53 A. Cadbury and Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance* (London: Gee Publishing 1992); R. Leblanc, ‘Forty Proposals to Strengthen: The Public Company Board of Director’s Role in Value Creation; Management Accountability to the Board; and Board Accountability to Shareholders’ (2013) 10 *International Journal of Disclosure and Governances* 295.
- 54 D. McLaren, ‘Global Stakeholders: Corporate Accountability and Investor Engagement’ (2004) 12 *Corporate Governance: International Review* 191 at 192.
- 55 A. Crane & D. Matten, *Business Ethics: A European Perspective* (Oxford University Press, Oxford 2004) p. 55

justification of what their behaviour, regarding their stakeholders as important audience. Roberts described that the process of accountability as “liberating” in the sense of allowing participants to become more involved in a formal and informal progression of sharing information and establishing more interdependence amongst board members.⁵⁶ Consequently, board members and stakeholders will be involved in the process of non-financial information disclosure and successively enable board members to work collaboratively, probably within a committee, to produce CSR policies for the enforcement of these ethical issues at corporate level. The involvement and partnership of stakeholders groups has been used for years in Germany and Japan where employees and banks send their representatives in the board which gives additional incentives for development of governance systems.⁵⁷ These corporation and participation make the stakeholder accountability as a two-way dialogue and the some power has been passed from the board to stakeholders and action needs to be backed up through additional and effective mechanism including explanation and imposition liability.⁵⁸

Another fundamental link will be the arguments that boards are accountable to stakeholders. It is claimed by Grey & Eisenberg that board should be accountable to stakeholders and should the board should stay in control of the process.⁵⁹ Leader, in a more exhaustive manner, set out sets of interests where boards could be held accountable along three distinct lines, including sovereign stakeholders, which embrace the state, other or supreme authorities; strategic stakeholders whose interests are considered in order to further corporate objectives in favour of optimal functional results for the company; and equitable stakeholders, whose basic interests – health, job security, property, right to privacy and human rights

56 J. Roberts, ‘Trust and Control in Anglo-American Systems of Corporate Governance: the Individualising and Socializing Effects of Processes of Accountability’ (2001) 54 *Human Relations* 1547.

57 This involves co-determination measures such as employee representation on the corporate board, employee representation through works councils, collective bargaining arrangements or employee share ownership. Large companies generally have one bank – e.g. the main bank in Japan, and a universal bank in Germany which owns a certain amount of shares in the company. From legislative perspectives, the Aktiengesetz mandates a two-tier board with a supervisory board (Aufsichtsrat in §100 AktG) and a management board (Vorstand in §76 (3) AktG).

58 A. Rasche & D.E. Esser, ‘From Stakeholder Management to Stakeholder Accountability: Applying Habermasian Discourse Ethics to Accountability Research’ (2006) 65 *Journal of Business Ethics* 251 at 264.

59 D.E. Grey & R.E. Eisenberg, ‘Making Critical Decisions and Monitoring Performance during a Restructuring: A Field-guide for Boards’ in J.W. Bulter, edn. *Navigating Today’s Environment: The Directors’ and Officers’ Guide to Restructuring* (Globe White Page Ltd 2010) 72 at 75.

– should not be injured.⁶⁰ The recognition of stakeholder accountability at these three levels enables directors to be held accountable to accountees along social, environmental and human rights-related dimensions, which echoes the scope of CSR.⁶¹ Shearer and Messner present arguments in favour of broadening the scope of corporate accountability beyond purely economic and financial ends in order to embrace social and non-economic goals.⁶² Sinclair suggested that such accountability that addresses wider issues should be reinforced by organisational culture and become a way of being.⁶³ This “way of being” accountability is advocated in the form of public accountability, through the accountors’ concerns that exceed accountability exclusively to shareholders, and by discharging the accountors’ duty to serve the CSR agenda of the board.⁶⁴ This will facilitate the pursuit of the social acknowledgement of companies, as well as the efforts of accountors to accommodate social changes and development.

Lastly, the trajectory of goals of CSR and board accountability seems to be on the same direction. It is claimed by Corbett that the goal of CSR “is to develop particular decision-making capacities within organisations that will allow the corporation to take those interests into account in a rational and legitimate way”.⁶⁵ Therefore, companies may develop the capacity to accommodate a multi-dimensional environment to integrate long-term economic and non-economic aspects in corporate strategies while maintaining competitiveness at national and international levels. CSR enables boards to embrace opportunities and manage risks deriving from social and economic encroachment, in order to produce an overall positive effect on society. The goal of CSR is also sometimes narrowed

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- 60 S. Leader, ‘Accountable Corporate Governance’ in M. Bovens, R.E. Goodin & T. Schillemans, *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press 2016) 354 at 359. The scopes of directors’ decisions in terms of being strategically, ultimately and equitably accountable may overlap, since they may all serve the purpose of promoting the success of the company in the long term.
- 61 J. Zhao, ‘Promoting More Socially Responsible Corporations through a Corporate Law Regulatory Framework’ (2017) *37 Legal Studies* 103 at 106. There are also legislative attempts at defining scope of CSR; for example, see Schedule VII of Companies Act 2013.
- 62 T. Shearer, ‘Ethics and Accountability: From the for-itself to the for the-other’ (2002) *27 Accounting, Organizations and Society* 541; M. Messner, ‘The Limits of Accountability’ (2009) *34 Accounting, Organizations and Society* 918.
- 63 A. Sinclair, ‘The Chameleon of Accountability: Forms and Discourses’ (1995) *20 Accounting, Organizations and Society* 219.
- 64 L.D. Parker, ‘Corporate Social Accountability through Action: Contemporary Insights from British Industrial Pioneers’ (2014) *Accounting, Organizations and Society* 632 at 635.
- 65 A. Corbett, ‘Corporate Social Responsibility: Do We Have Good Cause to be Sceptical about it?’ (2008) *17 Griffith Law Review* 413 at 414.

down as a business approach (case) that creates long-term shareholder value while pursuing other values such as honesty, integrity and fairness.⁶⁶ The goal of regulating CSR in corporate law, which is the emphasis of the article, is to make these long-term ethical and philanthropic goals more than just symbolic window-dressing. The regulatory framework for CSR also indicates that government has a role in supporting a CSR culture among enterprises. As for the goal of board accountability, the primary and overarching goal of the notion is to ensure that there is an enhancement of good corporate governance.⁶⁷

5. Developing an appropriate mechanism for Corporate Law: CSA

Gray *et al.* identified the necessity and importance of “having an active mechanism to define and articulate responsibility and to purpose the attendant accountability” through mandated and regulated accountability on social and environmental issues.⁶⁸ Despite the fact that we have reached a consensus calling for better and more solid accountability,⁶⁹ the questions of to whom accountability should be addressed and the nature of board accountability are far from precisely enunciated and need further exploration.

Before exploring the linkage between board accountability and CSR in order to generate a new notion, it is worth looking existing attempts about the linkage between the two notions during the past two decades. The European Commission defined CSR as “the concept that an enterprise is accountable for its impact on all relevant stakeholders”.⁷⁰ Voluntary initiatives in favour of CSR

66 See P. Chiswick, ‘Business Case for CSR’ in S.O. Idowu, N. Capaldi, L. Zu & A. Das Gupta, *Encyclopedia of Corporate Social Responsibility* (New York: Springer 2013) 238; S. Hafenbrädl & D. Waeger, ‘Ideology and the Microfoundations of CSR: Why Executives Believe in the Business Case for CSR and how this Affects their CSR Engagements’ (2016) 59 *Academy of Management Journal* forthcoming; M.L. Barnett, ‘The Business Case for Corporate Social Responsibility A Critique and an Indirect Path Forward’ (2016) *Business & Society* 1.

67 Australian Parliamentary Joint Committee on Corporation and Finance Services, *Better Shareholders – Better Company*, June 2008. Canberra.

68 R. Gray, C.A. Adams & D. Owen, *Accountability, Social Responsibility and Sustainability: Accounting for Society and the Environment* (Harlow: Pearson 2014) p. 57.

69 See K.S. Cavalluzzo & C.D. Ittner, ‘Implementing Performance Measurement Innovations: Evidence from Government’ (2004) 29 *Accounting, Organizations and Society* 243; M. Bovens, T. Schillemans & R.E. Goodin, ‘Public Accountability’ in M. Bovens, R.E. Goodin & T. Schillemans, *The Oxford Handbook of Public Accountability* (Oxford: OUP 2014) 1.

70 European Commission, ‘Prompting a European Framework for Corporate Social Responsibility’, Green Paper and COM 366, Brussels (2001). However, the Commission also proposed the voluntary character of CSR in this Green Paper, stating that instead of being regulated, companies

do not take the term “accountable” any further than the need to create respectful relationships with corporate stakeholders. The Ethics in Action Award defined CSR as a term “describing a company’s obligation to be accountable to all its stakeholders in all its operations and activities”.⁷¹ CSR is therefore described in a strict manner as obligations according to which the board should be accountable to stakeholders. However, there is follow up explanation on what does accountable mean and entail. Another attempt to link the two notions was made by Göbbels, using the methodology of linguistics and claiming that the term CSR should be revisited, since it is more accurate to use the term ‘corporate societal accountability’.⁷² Valor uses ‘improving corporate accountability’ as a criterion for comparative research on the race between CSR and corporate citizenship.⁷³ Parker interpreted accountability in the context of CSA as the norms in seeking to exercise a responsibility for the common good.⁷⁴ However, he only testified the possibilities of going beyond traditional formal reports in terms of reframing the scope of CSA and failed to explore the link between CSA and regulation of CSR. These attempts are intended to ensure that CSR is linked with obligations and make the board’s accountability towards stakeholders into the goals or means to achieve sustainable CSR. However, this variation in the definition and scope of CSR and accountability makes these links far from systematic and sympathetic for the literature on CSR. While multinational enterprises trading in different jurisdictions are subject to different practical, legal and normative standards, it is key for companies to apply a commonly-applicable norm to corporate behaviours in order to attain genuine CSR.⁷⁵

Accountability has become a special word when it comes to debate and discussions about problems or the development of policy and governance.⁷⁶ The

will be keen to develop their strategic management policy and collectively raise the bar for industry in general.

- 71 Ethics in Action Awards, ‘What is Corporate Social Responsibility?’ 22 May 2003; available via <http://www.ethicsinaction.com/whatiscsr/qanda.html>
- 72 M. Göbbels, *Reframing Corporate Social Responsibility: The Contemporary Conception of a Fuzzy Notion* (Rotterdam: Erasmus University Rotterdam 2002).
- 73 C. Valor, ‘Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability’ (2005) 110 *Business and Society Review* 191 at 191–192.
- 74 L.D. Parker, ‘Corporate Social Accountability through Action: Contemporary Insights from British Industrial Pioneers’ (2014) *Accounting, Organizations and Society* 632 at 633.
- 75 D. Weissbrodt, ‘Book Review: Corporate Social Responsibility: A Legal Analysis, by Michael Kerr, Richard Janda & Chip Pitts (Chip Pitts ed., LexisNexis Canada 2009)’ (2010) 32 *Human Rights Quarterly* 207 at 212.
- 76 M. Dubnick & J. O’Brien, ‘Retrieving the Meaning of Accountability in Financial Market Regulation’ available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478865.

players in the CSR-relationship is composed of the accountors, who are companies' stakeholders, and accountee, who are board members that has to account to multiple accountors for their corporate decisions have caused positive or negative outcome. Rather than just focusing on the board members' active involvements in promoting ethical issues, primarily on the accountee, we argue that consideration of both accountors and accountees should be viewed as key participants in understanding accountability reckonings, in CSR-oriented issues.⁷⁷ The simple logic that board members are likely to behave more responsibly when they expect to be held accountable to their decisions and behaviours, in this scenario would be various stakeholders. Therefore, the board accountability mechanism would help to ensure that the performance and exercise of responsible and prevent the irresponsible decisions. All in all, CSA is a mechanism that solidifies an account within the public domain so that the boards could discharge their responsibilities that exceed accountability to the owners by extending them to humanity to serves a social accountability itinerary and facilitate the pursuit of social acknowledgement through accountors' positive and proactive actions.

In terms of the board members' attitudes, Bovens, when discussing type of responsibilities, categorised responsibilities into *active responsibilities* which consider the responsibilities as virtue and *passive responsibilities* which is the responsibilities in the sense of accountability.⁷⁸ However, the author feels, at least in terms of discussions on CSA, board members should go beyond the passive responsibilities, in the sense that accountability should involve active participation from board members and stakeholders: for the former, to be ethically and philanthropically responsible with subsequently possibilities being awarded and active involvements from stakeholders in challenging the boards' decisions enhanced by communication between stakeholders and the boards, together with their potential participation in the process of decision making.

With reference this action-oriented, accountability, it is key to be aware that board accountability means being "answerable" in the sense of responding to questions on how well or how badly the board has carried out its responsibilities. There is a strong emphasis on this with a clear goal of imposing sanctions for corporate misbehaviour and irresponsibility.⁷⁹ The accountant should be able to improve the performance of companies to ensure they are progressing in a

77 H. Bergsteiner & G. C. Avery, 'A Theoretical Responsibility and Accountability Framework for CSR and Global Responsibility' (2010) 1 *Journal of Global Responsibility* 8 at 11.

78 M. Bovens, *The Quest for Responsibility*, Cambridge: Cambridge University Press (1998).

79 J. Kaler, 'Responsibility, Accountability and Governance' (2002) 11 *Business Ethics: A European Review* 327 at 328.

positive manner.⁸⁰ Failure and inefficiency should be detected and remedied, with enhanced economic results which could also be beneficial in terms of social and environmental concerns.⁸¹ Logically, if social and ethical issues are also included, the notion of accountability obliges companies to identify, understand and respond to suitability issues and concerns, and to report, explain and be answerable to stakeholders for corporate decisions, actions and performance.⁸²

Using board accountability as a criterion and CSR as the rationale, CSA should be a mechanism that is systemically developed and enriched by the public communication of information and justification of corporate decisions, with output to, and hopefully having a positive impact on, various stakeholders.⁸³ All in all, the notion of CSA does generate functions on two fronts, including ensuring boards' compliance with regulations through hard law and soft law at multiple scales,⁸⁴ and enhancing boards' performance in relation to environmental and social issues. CSA could function in a creative way to operationalise the idea of CSR, in order to enhance government regulations with better monitoring and enforcement and push for a more integrated involvement of NGOs and companies, enabling them to work in a more cooperative way to reconnect with public policy. Proponents of board accountability have appeared to lean towards establishing, maintaining and enforcing laws to address the problems associated with corporate power beyond voluntarism or giving guidelines for socially responsible behaviours. The understanding and application of board accountability enables CSR to be reconnected with its radical roots and to challenge some of the tenets of the neoliberal consensus.⁸⁵ This shift towards CSA is consistent with arguments for a "growing up" CSR as described by Bendall, since it is increasingly clear that that law and litigation are key in promoting and defining CSR.⁸⁶ The wider scope

80 P. Aucoin & M. Javis, *Modernizing Government: A Framework for Reform* (Ottawa, Canada School of Public Service 2005) 52–54; P. Barberis, 'The New Public Management and a New Accountability' (1998) 76 *Public Administration* 451.

81 A. Keay, *Board Accountability in Corporate Governance* (Abingdon, Routledge, 2015) at 109.

82 AccountAbility, *Accountability Principles Standard 2008 (AA1000)* London & Washington: AccountAbility (2008) p. 6.

83 L.S. Shaw, *Sage Brief Guide to Corporate Social Responsibility* (London Sage 2012) p.48.

84 B.E. Olsen & K.E. Sørensen, 'Strengthening the Enforcement of CSR Guidelines: Finding a New Balance between Hard Law and Soft Law' (2014) 41 *Legal Issues of Economic Integration* 9.

85 P. Ireland & R.G. Pillay, 'Corporate Social Responsibility in a Neoliberal Age', in P. Utting & J.C. Marques (eds) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* Basingstoke: Palgrave Macmillan (2010) 77 at 96.

86 J. Bendall, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, Technology, Business and Society Programme Paper No.1 3. Geneva: UN Research

and goals of board accountability are consistent with the scope of CSR and the goals of regulating CSR. The notion of CSA, which uses board accountability elements and rationale for environmental and social goals, will promote CSR in a more genuine, enforceable, consistent, and fair manner.

While responsiveness is a commitment of accountability to stakeholders in relation to CSR policy, process and performance,⁸⁷ it is also important for stakeholders to have their voices heard when boards make decisions through stakeholder dialogues and stakeholder engagements. Stakeholders' voices may sometimes apply pressure and place an extra burden on the board. However, it is to a company's advantage to respond to pressure, needs and enquiries from stakeholders in promoting CSR and responding to a market for virtue, in order to maximise social and economic returns for the business executives.⁸⁸

6. Key elements, enforcement stages of CSA and stakeholder policies

The CSR concept has gone through the evolution from sharing to caring. But the degree of caring has not been practiced at the satisfactory level. As the result, irreversible damages have been made to stakeholders. The understanding of CSR need to go beyond philanthropic responsibilities in order to merge the notion with the board decisions, board competitiveness and strategic management policies. CSA is the mechanism that could help the enforcement of ethical matters in three inter-locked stages. Firstly the board will make the decisions by assessing the nature, power, rights, and necessity of each stakeholder's interests subsequently build a matrix of corporate responsibility towards various stakeholders. This matrix will have positive impact on encouraging socially responsible decisions and preventive impact due to the hazard that directors may face including queries from stakeholders and penalty that may impose on them. Secondly, the stakeholders will participate and communicate with the board and ultimately benefit from CSA mechanism if it is well enforced. Thirdly, the remedies may be introduced to explore the route by which boards members can be held accountable for their damaging activeness.

The enforcement of CSA is as important, if not more important, than the legitimacy and comprehensiveness of the notion itself. If CSA were to be adopted

Institute for Social Development (2004) p.30.

87 C. Mason & J. Simmons, 'Embedding Corporate Social Responsibility in Corporate Governance: A Stakeholder Systems Approach' (2014) 119 *Journal of Business Ethics* 77 at 84.

88 T. Dyllick & K. Hockerts, 'Beyond the Business Case for Corporate Sustainability' (2002) 11 *Business Strategy and the Environment* 130.

and become a term that was broadly accepted and implied in CSR-related corporate law legislation, the notion could, on the one hand, reaffirm and strengthen corporate obligations to address ethical issues through regulatory frameworks and via empowering groups that are affected by CSR-related policies and actions. On the other hand, the legal development of corporate law may be more closely associated with progression and accountability on social and environmental issues.⁸⁹ CSA will enable both companies and stakeholders to measure the impact of actions in addressing social challenges, rather than just informing the company and the wider community about CSR actions.

As well as an enabling environment for addressing CSR, the knowledge and leadership style of the board members⁹⁰ are crucial for the enforcement of CSA. In an effort to create a workable and efficient notion of CSA, one would need to investigate the actual behaviours of the board members and be familiar with important elements such as the decision-making culture, the formal and informal structure of the board, and the interactions between the board members and stakeholders of companies.⁹¹ Robert *et al.* pointed out that a positive boardroom climate or decision-making culture is significant for creating accountability.⁹² They described characteristics of positive board/decision-making cultures as informing, challenging, questioning, probing, testing, debating and the like. Communication and interactions should be carried out among board members and between board member and important stakeholders.⁹³ The company could organise and accommodate representatives, councils, committees, and even parts of the board⁹⁴ to explore, propose, discuss, debate and address CSR-related issues.

89 P. Utting, 'Social and Environmental Liabilities of Transnational Corporations: New Directions, Opportunities, and Constraints' in P. Utting & J. Clapp (eds), *Corporate Accountability and Sustainable Development* (Oxford: Oxford University Press 2008) 92 at 119–120.

90 See T. Angus-Leppan, L. Metcalf & S. Benn, 'Leadership Styles and CSR Practice: An Examination of Sensemaking, Institutional Drivers and CSR Leadership' (2010) *Journal of Business Ethics* 189.

91 M. Huse, 'Accountability and Creating Accountability: a Framework for Exploring Behavioural Perspectives of Corporate Governance' (2005) 16 *British Journal of Management* s65 at s72.

92 J. Roberts, T. McNulty & P. Stiles, 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom' (2005) 16 *British Journal of Management*, Special Issue S5–S26.

93 M. Huse, & V. Rindova, 'Stakeholders' Expectations of Boards of Directors: the Case of Subsidiary Boards' (2001) 5 *Journal of Management and Governance* 153.

94 For example, see S. Ayuso & A. Argandona, 'Responsible Corporate Governance: Towards a Stakeholder Board of Directors', available via http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349090.

A. Stakeholder, stakeholder theory and CSR(A)

The notion of stakeholder and stakeholder theory will be introduced in the subsection in order to make the argument in this on enforcement of CSA in this Section, which supported by various stakeholder policy, coherent and complete. The concept of stakeholders was defined as “those groups without whose support the organisation would cease to exist”.⁹⁵ They have legitimate interests in or claims on the operations of the firm.⁹⁶ These stakeholders are interrelated, and every company has their unique stakeholder groups. The discussions between CSR and stakeholder theory have permeated the literature while the most distinctly recognised one being Giddens’s “Third Way” in the middle of “hard capitalism” and “socialism”.⁹⁷ The theme of the arguments rest on the value of community, as an assurance to equal access to opportunities, a highlighting on responsibilities and a belief in accountability.⁹⁸ The complexity of characterisation of CSR and necessity of stakeholder involvement is partially regarded as a result of social problems and challenges that are differ from society to society. Therefore, what we could offer on possible enforcement measures is subject to limitation of path dependence factors. It is truly hard to change the business nature of making profits and complexities of business relationship with involvements of complicated stakeholder network which all make the arguments of regulating CSR with CSA suspicious, challenging and untenable. However, the notion CSA could help to offer stronger measures, steps, scope, and regulatory objectives of CSR, if the norm or related ethical customs were adopted in the company law legislations in order to make the CSR law more justifiable and legitimate.

As for the types of stakeholders, the stakeholder group can be divided into key stakeholders and secondary stakeholders according to the relationship between their interests and the company.⁹⁹ The key stakeholders are defined as the parties who have a real, direct and tangible interest in the company.¹⁰⁰ They interact

95 R.E. Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman 1984).pp. 31–32.

96 A.B. Carroll, *Business and Society: Ethics and Stakeholder Management* (Cincinnati: South-Western Publishing Co.1989) p. 57.

97 A. Giddens, *The Third Way The Renewal of Social Democracy* (Cambridge: Polity Press 1998).

98 A. Giddens, *The Third Way The Renewal of Social Democracy* (Cambridge: Polity Press 1998) see page 69-128.

99 The classification is also made by Goldenberg, in P. Goldenberg, ‘IALS Company Lecture-Shareholder v. Stakeholders: the Bogus Argument’ (1998) *The Company Lawyer* 33 at 37 when he spoke of “groups that have market relationship with a company” who are “on the inside track” and “public pressure” and “interest groups” to whom directors may feel it in the company’s interests to respond.

100 A. Darling, ‘A Political Perspective’ in G. Kelly, D. Kelly and A. Gamble (eds.) *Stakeholder*

with company as input providers and are always ultimately affected by the state of the company, and the effects could be either beneficial or adverse. They also count in “strictly business” terms¹⁰¹; without them the business simply could not function. Typical key stakeholders are investors, employees or the managers who are at the centre of the whole stakeholders network. The secondary stakeholders are described as the parties who have a remote or indirect interest such as the suppliers, local media, local government and business service providers.¹⁰²

B. Mandatory information disclosure and stakeholder communication

The function of disclosure has been traditionally focus on reducing information asymmetries and stilling confidence in the market.¹⁰³ However, it is the trend that disclosure start to be seen as a as precondition of stakeholder accountability.¹⁰⁴ Consistent with the first of the four stages described by Keay and Loughrey and also with conventional discussion of CSA, information disclosure on social, environmental and human rights issues will provide a solid base for the enforcement of CSA. As the essential element of the accountability approach to corporate law,¹⁰⁵ disclosure is designed to demonstrate corporate commitment, and to increase the public’s understanding and awareness of corporate social performance. Disclosure, including social reporting and social accounting systems, has been the focus of the existing literature on CSA.¹⁰⁶ Despite the fact that the necessity, rationale and theoretical background of mandatory CSR information disclosure have been broadly discussed,¹⁰⁷ the level and audience

Capitalism, Basingstoke: Palgrave (1996) p. 17.

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

102 *Ibid.*

103 G. S. Willemaers, *The EU Issuer-Disclosure Regime: Objectives and Proposals for Reform* (Kluwer Law International 2011) 21.

104 A. Rasche & D.E. Esser, ‘From Stakeholder Management to Stakeholder Accountability: Applying Habermasian Discourse Ethics to Accountability Research’ (2006) 65 *Journal of Business Ethics* 251 at 252.

105 K.Y. Testy, ‘Linking Progressive Corporate Law with Progressive Social Movement’ (2002) 76 *Tulane Law Review* 1227 at 1235.

106 V.P. Filios, ‘Assessment of Attitudes toward Corporate Social Accountability in Britain’ (1985) 4 *Journal of Business Ethics* 155; C.A. Adams, W. Hill & C.B. Roberts, ‘Corporate Social Reporting Practices in Western Europe: legitimating Corporate Behaviour’ (1998) 30 *British Accounting Review* 1; C.A. Williams, ‘The Securities and Exchange Commission and Corporate Social Transparency’ (1999) 112 *Harvard Law Review* 1197.

107 For example see D.G. Szabo, ‘Disclosure of Material CSR Information in the Periodic Report – Comparison of the Mandatory CSR Disclosure System for Listed Companies in the EU and

of the transparency requirement, especially considerations in relation to the promotion of accountability and the function of corporate laws, have been ignored or narrowly interpreted, i.e. the reports are designed for shareholders.

Zadek *et al.* disused the five stages of social and ethical disclosure, including: commentary (Stage 1, reporting on social missions, aims and descriptive elements); review (Stage 2: occasional decreative reporting covering different stakeholders); report (Stage 3: regular reports with stakeholder consultation, indicators and financial data, explicit policies); statement (Stage 4: regular external verified report with two-way stakeholder dialogue indicators, targets and benchmarks); and sustainability statement (Stage 5: statement with links to environmental, social and financial data).¹⁰⁸ The current terms used in company law legislations to make social and environmental information disclosure mandatory are at different stages including “reviews”,¹⁰⁹ “reports”¹¹⁰ or “statements”.¹¹¹ Despite the fact that these terms do not necessarily indicate the stage of the discourse process discussed by Zadek *et al.*, it is questionable whether the mandatory CSR information disclosure in this legislation reaches a satisfactory level to be regarded a solid information base – as the “accounting for verification”¹¹² for comprehensive enforcement of CSA. In order to satisfy stakeholders’ questions and justify the stages of CSA, it may be more sensible to codify the standards of CSR information disclosure towards to the level equivalent to “statements” which are both externally verified and consulted and communicated with stakeholders.¹¹³ This ongoing stakeholder

the US’ Nordic & European Company Law, LSN Research Paper Series No. 10–20 (2010); O. Aiyegbayo & C. Villers, ‘The Enhanced Business Review: Has It Made Corporate Governance More Effective?’ (2011) *Journal of Business Law* 699; D. Hess, ‘The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development’ (2008) 18 *Business Ethics Quarterly* 447; I. Ioannou, & G. Serafeim, The Consequences of Mandatory Corporate Sustainability Reporting, Working paper. Harvard Business School. 2011.

108 S. Zadek, P. Pruzan & R. Evans, *Building Corporate Accountability: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting* (London: Earthscan 1997) at 45.

109 Such as “Business Review”, Section 417 of UK Companies Act 2006 which is substituted by the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

110 Such as “Strategic Report”, Section 414C (1) UK Companies Act 2006; “directors’ report” Section 2 (3) Companies (Corporate Social Responsibility) General Order Pakistan, 2009; “board’s report” Section 135 (4) Indian Companies Act 2013; “annual report” Article 225 of the “Grenelle II” France.

111 Such as transparency in supply chain requirements with the preparation of a “salary and human trafficking statement”, Section 54 Modern Slavery Act 2015.

112 J. Uhr, ‘Redesigning Accountability: From Muddles to Maps’ (1993) 65 *Australian Quarterly* 1 at 4.

113 S. Zadek, P. Pruzan & R. Evans, *Building Corporate Accountability: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting* (London: Earthscan 1997) at 45.

dialogue that influence the decisions and behaviour of both the reporting business organisation and its stakeholders is key in ensure the real value of disclosure.¹¹⁴

Just as Brandeis claimed on the purpose of disclosure (publicity) “as a remedy for social and industrial diseases” as “sunlight is said to be the best of disinfectants.”¹¹⁵ UK Government Green paper prosed “strengthening reporting requirements related to stakeholder engagement”.¹¹⁶ In detail, more communication in a controlled process have been advised: disclosure in relation to “consulting employees”, “represent employee views or another stakeholder perspective”, “a clear articulation of their progress” and “introducing a dialogue between the board and its stakeholder advisory panel” so that companies “can be held to account” and “an individual at board level directly accountable for performance”.¹¹⁷ Consequently, stakeholder representatives could question directors’ decisions in a more informative and interactive manner, which may lead to more substantial and effective justifications from the board and supply the missing link between corporate social reporting and stakeholder accountability.¹¹⁸ The key element is the evaluation whether the “reporting organisation has responded to stakeholder concerns, policies and relevant standards and adequately communicated these responses in its report”.¹¹⁹

Corporate reporting currently has a strong emphasis on producing reports for capital providers including shareholders and creditors. However, the audience is growing as society is forcing corporations to assess corporate performance in ways that go beyond profit and capital, so that any development and expansion of corporate reporting should be premeditated to address the needs of other stakeholders.¹²⁰ Testy described the accountees as the world, which should include various stakeholders. CSA mechanisms will require corporations to inform the world about their decisions so that “the world will penalize them for bad deeds and reward them for good deeds”.¹²¹ The world here obviously also

114 Global Reporting initiative, Sustainability Reporting Guidelines, Amsterdam (2002) p. 9

115 L. D. Brandeis, *Other People’s Money and How the Bankers Use It* (Seven Treasures Publications 2009) p. 65.

116 Department of Business, Energy & Industrial Strategy, Corporate Governance Reform: Green Paper (November 2016) p. 40.

117 *Ibid* p.39-41.

118 See S.M. Cooper & D.L. Owen, ‘Corporate Social Reporting and Stakeholder Accountability: The Missing Link’ (2007) 32 *Accounting, Organizations and Society* 649.

119 AccountAbility, *AA 1000 Assurance Standard*, London (2003) p. 18.

120 Federation of European Accountants, ‘The Future of Corporate Reporting – Creating the Dynamics for Change’ (2015) p. 23

121 K.Y. Testy, ‘Linking Progressive Corporate Law with Progressive Social Movement’ (2002) 76

includes shareholders, and information on social and environmental disclosure will provide them with a better understanding so they can determine the extent to which they should vote for decisions made by the board on profit distribution, as well as the trade-offs the board has made between economic returns and social and environmental effects.¹²² The purpose of mandatory information disclosure on social and environmental issues through stakeholder communication provides a solid foundation for stakeholder participation, and stakeholder scrutiny.

C. Sustainable decisions marking through stakeholder participation and stakeholder scrutiny

The stakeholder directors will facilitate a better environment for the board to explain the rationale its decisions, based on the enquiries of accountees if this is required as a stage of board accountability, and considering that the stakeholders are closely aligned with key elements of CSR such as supply chains or the needs of the community at large.¹²³ If the participation in corporate governance of stakeholders such as employees or community representatives can be proposed as a formal mechanism to acknowledge the significance of the relationships between stakeholders and the company, it is more likely that the well-being of non-shareholder constituencies will also be included in board decision-making.¹²⁴ Therefore, boards with stakeholder directors may expedite more explicit recognition and appreciation of stakeholder concerns, with powerful and legitimate representation as a part of a company's "dominant coalition".¹²⁵ Ultimately this inclusion will realise the institutionalisation of stakeholder inclusion in favour of a more diverse structure, which is key for the enforcement of CSA. This inclusion could also lead to stakeholder malfeasance as a result of not being socially accountable and discriminating against other stakeholder groups or the rest of the stakeholders in the same group.

In terms of the UK Government's willingness to accept a proposal for stakeholder participation, at the launch of her campaign to become Leader of

Tulane Law Review 1227 at 1236.

122 C.A. Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 *Harvard Law Review* 1197 at 1294.

123 A. Keay & J. Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 *Legal Studies* 252.

124 R.K. Mitchell, B.R. Agle & D. Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22 *Academy of Management Review* 853 at 876.

125 R. Cyert & J. March, *The Behavioural Theory of the Firm* (Englewood Cliff, Prentice Hall, 1963).

the Conservative Party and Prime Minister of the United Kingdom Theresa May claimed that “I want to see changes in the way that big business is governed. The people who run big businesses are supposed to be accountable to outsiders, to non-executive directors, who are supposed to ask the difficult questions, think about the long-term and defend the interests of shareholders”. She promised that “...we’re going to have not just consumers represented on company boards, but employees as well”.¹²⁶ It seems positive that May uses the word “accountable” when addressing in increase in corporations’ responsibilities to outsiders, and she is an advocate of the notion of stakeholder participation for employees and customers to benefit the long-term interests of the corporations. However, this is not a new proposal, reviving a debate that hasn’t been aired seriously in mainstream British politics since the mid-1970s.¹²⁷ The following UK Green paper proposed “improving the diversity of boardrooms” so that the board composition better reflects the demographics of stakeholders so that “a broader range of social perspectives, talent and experience can be brought to bear on decision-making”.¹²⁸ In the Green paper, “appoint individual stakeholder representatives to company boards” was proposed as an option for reform to “bring a new perspective to board discussions, particularly adding a longer-term perspective”¹²⁹ whereas “creating stakeholder panels”, as another option, “for directors to hear directly from their key stakeholders and amplify voices with different backgrounds and perspectives” through participating board meeting or initiating discussions with board members.¹³⁰

126 Conservatives, ‘We can make Britain a country that works for everyone’ 11 July 2016 Birmingham, available via <http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for>.

127 Bullock Report (Report of the Committee of Inquiry on Industrial Democracy 1997 Cmnd 6706 at 84 by Lord Bullock, Chairman); and Companies Bill 1978, the employees’ interests were first recognised in government company law legislation in 1980 in Section 46 of the Companies Act, which was replaced by Section 309 of the 1985 Companies Act; see also J. Waddington & A. Conchon, *Board-Level Employee Representation in Europe: Priorities, Power and Articulation* (Abington: Routledge 2016); C. Casey, ‘Labour’s Interest in Corporate Governance in the UK: are Working on the Board Back on the Agenda?’ (2016) 47 *Industrial Relations Journal* 46. This proposal has not yet had a positive results, and based on a report in The Times in November 2016, it seems the Government has decided against compelling companies to appoint employees or consumers to the boardroom. F. Elliott, ‘Companies Will not be Forced to Put Workers in Boardrooms’ November 8 2016; available via <http://www.thetimes.co.uk/article/companies-will-not-be-forced-to-put-workers-in-boardrooms-wkz6xkgtq>

128 Department of Business, Energy & Industrial Strategy, Corporate Governance Reform: Green Paper (November 2016) p. 35.

129 Ibid p. 40.

130 Ibid p. 38.

D. CSR committees and stakeholder engagement

Related to stakeholder representatives, an independent sub-committee could be established to assess and address CSR issues for the enforcement of a CSA mechanism. The establishment of a sub-committee of representatives with different interests could address the choices of each stakeholder and make corporate decisions jointly.¹³¹ The establishment of sub-committees has been suggested to provide better board effectiveness, since the sub-committees play an active role in delegating tasks with fewer decisions to be made.¹³² This CSR committee¹³³ could be assigned tasks such as formulating CSR policy and spending patterns, drafting CSR reports, conducting investigations into cases where allegations are made in terms of social and environmental damage, communicating with wider stakeholders concerning their enquiries and needs, and most importantly for the enforcement of CSA, monitoring and coordinating sanctions of the board members as a consequence of irresponsible behaviour.¹³⁴ The CSR committee embraces the triple formulations of sub-committees in terms of corporate legitimacy, accountability and strategy,¹³⁵ which are all closely related to the efficiency of CSA. The committee will be accountable to the company, acting as the decision-maker, promoter and supervisor of the enforcement of CSA. Existing research has focused on the relationship between the committee and community performance,¹³⁶ the level of CSR and committees,¹³⁷ and the

131 D. Black, *The Theory of Committees and Election* (Cambridge: Cambridge University Press 2011).

132 L.F. Spira & R. Bender, 'Compare and Contrast: Perspectives on Board Committees' (2004) 12 *Corporate Governance: An International Review* 489.

133 This committee could be given different names such as the ethics, sustainable development, environment, health and safety, or public responsibility committee; see E. Ederhardt-Toth, 'Who Should be on a Board Corporate Social Responsibility Committee?' (2016) *Journal of Cleaner Production* available online first 1 at 1.

134 Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility* (2004) p. 52.

135 J.R. Harrison, 'The Strategic Use of Board Committees' (1987) 30 *California Management Review* 109.

136 R.G. Eccles, I. Ioannou & G. Serafeim, 'The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance', 2011 Working Paper 12-035 Harvard Business School, MA (2011).

137 C.A. Adams, 'Internal Organisational Factors Influencing Corporate Social and Ethical Reporting: Beyond Current Theorising' (2002) 15 *Accounting, Auditing & Accountability Journal* 223; P. Luoma & J. Goodstein, 'Stakeholders and Corporate Boards: Institutional Influences on Board Composition and Structure' (1999) 42 *The Academy of Management Journal* 553.

link between committees and a sustainability culture.¹³⁸ However, going beyond stakeholder engagement with local community and government and maintaining a sustainable culture, monitoring the enforcement of CSR policies and imposing liabilities if there were a breach of duty could act to promote the position of CSR and reflect the true legislative purpose of CSR law. As for the composition of this committee, the Indian Companies Act 2013, in which a CSR committee was embedded, suggests that the committee should be composed of three or more directors with at least one independent director.¹³⁹ Accommodating the notion of stakeholder participation discussed in the last section, the CSR committee would benefit from stakeholder representatives. These would mean the CSR committee was more likely to be exposed to stakeholder scrutiny and respond to expectations from stakeholders for more socially responsible corporate actions.¹⁴⁰ The issues of independence, size, power and social skill diversity have been highlighted as enhancing corporate social performance¹⁴¹, suggesting, for example, a CSR committee with female leadership.¹⁴²

E. Imposition of directors' liabilities for socially irresponsible behaviours through stakeholder litigation

In order to promote CSR through the norm of board accountability and make the notion of CSA workable, it is necessary to provide stakeholders with mechanisms for seeking redress, imposing social, environmental and human rights-oriented duties, based on the suggestion by committee and scrutinised by stakeholder representatives, on corporations and establishing sanctions for violations.¹⁴³ The current voluntary nature and weak enforcement of CSR law have left external communities and individual stakeholders with little prospect of redress or compensation.¹⁴⁴ McLaren argued that the main reason for irresponsible

138 C. Mallin, G. Michelon & D. Raggi, 'Monitoring Intensity and Stakeholders' Orientation: How does Governance Affect Social and Environmental Disclosure?' (2013) 114 *Journal Business Ethics* 114.

139 Section 135 (1) Indian Companies Act 2013.

140 J. Brower & V. Mahajan, 'Driven to be good: a stakeholder theory perspective on the drivers of corporate social performance' (2013) 117 *Journal of Business Ethics* 313.

141 E. Ederhardt-Toth, 'Who Should be on a Board Corporate Social Responsibility Committee?' (2016) *Journal of Cleaner Production* 1 at 5 need updating.

142 For example see J.Q. Zhang, H. Zhu & H. Ding, 'Board Composition and Corporate Social Responsibility: An Empirical Investigation in the Post Sarbanes-Oxley Era' (2013) 114 *Journal of Business Ethics* 381.

143 M. Phillips, 'Global Rules for Corporate Accountability: The Proposal to Establish a Corporate Accountability Convention' (2002) 23 (Number 10 & 11) *Multinational Monitor* 12 at 12.

144 Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility* (2004) 52.

corporate behaviours is the fact that the board has few direct legal responsibilities to stakeholders, especially those whose lives are blighted by the daily operation of companies within the letter of the law.¹⁴⁵ In order to enhance CSR practice, access to justice should be a key element for securing accountability, and stakeholders who represent various environmental or social interests should be able to pursue cases where necessary under an effective CSA mechanism.¹⁴⁶ The acceptance of the notion of CSA in the domain of corporate law is premised on addressing the issue of greenwashing and ensuring that CSR is truly sustainable.

Adoption of CSA will expand the fiduciary law owed to include certain stakeholders, probably starting with key stakeholder groups as fiduciaries. CSA does not only hold companies and boards to account through formal information disclosure, but requires accountors to be responsible for their actions and receive rewards or sanctions for responsible or irresponsible decisions. Board members need to discharge their duties in enforcing the CSR policies and spending plans generated by CSR committees, inspected and monitored by the committees themselves. The failure to discharge this duty could lead to the imposition of liability, which may be carried out either through individual action, for example through petition, or by collective organisational actions, for example using the disqualification process. On the other hand, rewards can be given to directors in the form of promotion, or to companies in the form of tax advantages and official recognition through corporate reputation promotion certificate or recognition via government official website.

In detail, the author proposes two new paradigms that could act as measures to make directors' duties more practically related to CSR before companies do irreversible harm to stakeholders, and which have more effective enforcement measures. At the same time these measures may help directors to engage in more sustainable decision-making around the promotion of social justice, environmental protection and financial responsibilities.¹⁴⁷ First, an additional directors' duty in terms of assessing, taking account of and reducing environmental and social risks should be proposed for future legislation.¹⁴⁸ Risks, including social and

145 D. McLaren, 'Global Stakeholders: Corporate Accountability and Investor Engagement' (2004) 12 *Corporate Governance: International Review* 191 at 192.

146 M. Phillips, 'Global Rules for Corporate Accountability: The Proposal to Establish a Corporate Accountability Convention' (2002) 23 (Number 10 & 11) *Multinational Monitor* 12 at 14.

147 The Final Report of the American Bar Association (ABA) Task Force on Sustainable Development: Lee A. (July 30, 2015), available at <http://www.americanbar.org/content/dam/>

148 For example, in terms of climate change, Carney claimed that physical risks, liability risks and transition risks should be taken into account where they have an impact on financial stability. M. Carney, Governor, Bank of England, Breaking the Tragedy of the Horizon-Climate Change and Financial Stability (Sept. 29, 2015), available at <http://www.bankofengland.co.uk/publications/>

environmental risks, arise when vulnerability exists in a company in the absence of effective controls and countermeasures to minimise or eliminate the disruption, loss or damage to business.¹⁴⁹ Social and environmental risks could be damaging to the long-term interests and profitability of companies, but they can be minimised early and predictably through effective control via directors' duties. These risks could be assessed and reported by the board, led by a CRO (Chief Risk Officer) who takes "positional priority" post the 2008 financial crisis and brings this "supporting role to the centre stage".¹⁵⁰ Uncontrolled damage will harm companies' performance and reputations, with higher legal costs, fines and costs of explanation, with responses to enquiries from shareholders and stakeholders required as a stage of CSA or as the result of breaching soft law based on the principle of comply or explain.

Second, directors' duties to address CSR-related issues may become more enforceable, with opportunities to impose liabilities on directors through increasing the scope of the legal rules for minority shareholder protection, including unfair prejudice claims.¹⁵¹ Thus, key stakeholders may apply to the court by petition for an order alleging that a company's affairs are being or have been conducted in a manner unfairly prejudicial to the interest of stakeholders generally, or of certain stakeholders in particular. The reason for giving stakeholders this right is because all stakeholders have a legitimate expectation that the company will behave in a socially responsible manner, and when directors make representation or promises to stakeholders to take account of them, there is a legitimate expectation that these declarations and assurances should be honest and enforceable.

F. B corps as legal form to take CSA forward?

New hybrid organisational forms that straddle the for-profit and non-profit sectors were developed in the US in the shape of "Benefit Corporations", a novel alternative legal form to the standard commercial corporations which are now

Pages/speeches/2015/844.aspx

149 B. Kytle & J.G. Ruggie, 'Corporate Social Responsibility as Risk Management: A Model for Multinationals' Working Paper No. 10, Corporate Social Responsibilities Initiative 2005 available via https://www.hks.harvard.edu/m-rcbg/CSRI/.../workingpaper_10_kytle_ruggie.pdf p.5; see also P. McConnell, 'Improving Risk Governance – A Proposal on Board Decisions-Making' (2016) 2 *Journal of Risk and Governance* 173.

150 B. Masters, 'Positional Priorities: Crisis Move Chief Risk Officers from Supporting Role to Centre Stage' (April 29, 2013) *Financial Times*; available via <https://www.ft.com/content/b4fc0c08-a678-11e2-bc0b-00144feabdc0>

151 For example, Section 994 Companies Act 2006; C. Moore, 'Let's Give Corporate Social Responsibility Some Teeth: Stakeholders, Derivative Claims and Unfair Prejudice' in SLS Conference, University of York September 2015.

available in thirty-two states in the US. The Benefit Corporation originates from its original pretext as the Certificated B Corporation.¹⁵² This could include the promotion of “general public benefit” or identifying a “specific public benefit” as purposes, a list of which is provided by the Benefit Corporation Information Centre.¹⁵³ Differing from a charitable non-profit organisation, B Corps still maintain the capacity of external finance on commercial terms by promising a future return to investors. The goal of B Corps is to use the power of business to solve social and environmental problems.¹⁵⁴ B Corps are structured like normal companies, but their constitutional documents make it clear in law that the directors and officers will consider specified stakeholders’ interests apart from maximising shareholder wealth.¹⁵⁵ From the perspective of investors, B Corps will attract investors who want to invest in companies that are well managed and which effectively advance non-economic missions.¹⁵⁶

Delaware, where 64% of Fortune 500 firms incorporate according to the state’s Division of Corporations, has made this hybrid legal form available in legislation, formally calling them “Public Benefit Corporations (PBCs)”.¹⁵⁷ According to Delaware company law, a PBC is, regarding their nature, a for-profit corporation that is intended to produce public benefit and to operate in a responsible and sustainable manner.¹⁵⁸ In terms of corporate objectives, a PBC is established to balance the interests of shareholders, the best interests of those materially affected by the corporations’ conduct, and public benefit,¹⁵⁹ with the objectives enforced

152 This is a pioneering corporate certification product organised by the B Lab whereas B Lab is a non-profit organization that serves a global movement of people using business as a force for good; see <https://www.bcorporation.net/what-are-b-corps/about-b-lab>

153 W.H. Clark, and L. Vranka, ‘The Need and Rationale for the Benefit Corporation: Why It is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public’ available via <http://benefitcorp.net/policymakers/benefit-corporation-white-paper> (version of January 18, 2013) p.16; this is quite similar to Schedule VII of the Indian Companies Act 2013.

154 B. Houlahan, ‘Remarks at AIGA Business and Design Conference 2008’ October 25th, 2008, available via http://www.aiga.org/resources/content/5/3/3/1/documents/aiga_gain08-houlahan.pdf

155 S.H. MacCormac, ‘The Emergence of New Corporate Forms: The Need for Alternative Corporate Designs Integrating Financial and Social Missions’ (2007) *Future of the Corporation, Paper Series on Corporate Design* 88 at 96.

156 T.H. Moody, ‘The Promise of the L3C’ (Sept. 2008) *Trusts & Estates* 16 at 18.

157 Delaware General Corporation Law, Subchapter XV, “Public Benefit Corporations”.

158 § 362 (a) Delaware General Corporation Law.

159 § 362 (a) Delaware General Corporation Law.

via directors' duties.¹⁶⁰ As far as constraints are concerned, the rights of non-PBC corporations as shareholders in amending their certificate of incorporation (in terms of corporate objectives) or merging or consolidating with another entity are limited.¹⁶¹ Thus, social and environmental goals of companies are codified into charters to make sure that new shareholders observe these goals before they become shareholders, and the original corporate goals of the founders would be maintained by the board even if there was a takeover.¹⁶² The objectives of PBCs are consistent with our goals of CSA in pursuing responsible and sustainable goals. Apart from the B Corp/PBC, "community interest companies" in the UK¹⁶³ or "social responsible corporations" in Minnesota¹⁶⁴ are organisations with similar functions in other jurisdictions.

The PBC addresses issues of corporate purpose, accountability, and transparency as key components of corporate governance and CSA. PBCs have a positive and progressive impact on society and the environment. They also extend the scope of directors' fiduciary duties to include consideration of stakeholders' interests, and a duty for the corporation to report on its overall social and environmental performance with a narrative describing how it has pursued its general and specific public interests as information disclosure requirement,¹⁶⁵ which is assessed against a comprehensive, trustworthy, independent and transparent standard provided by an appropriate private verification agency such as B Lab.¹⁶⁶ The legislative approach to PBCs can be seen as corresponding to the wider fiduciary directors' duty to multiple stakeholders, which is explicitly considered as an approach to broaden the legitimate focus of boards of PBCs beyond their conventionally-perceived fiduciary responsibility. The notion of CSA could be logically and easily used in these PBCs. However, the obvious disadvantage of addressing CSR issues via different corporate forms is its limitation in terms of the scope of the application of related legal requirements.

160 § 362 (c) Delaware General Corporation Law.

161 § 365 (a)-(c) Delaware General Corporation Law.

162 R.I. Patel, 'Facilitating Stakeholder-Interest Maximization: Accommodating Beneficial Corporations in the Model Business Corporation Act' (2010-2011) 23 *St. Thomas Law Review* 135 at 141.

163 Section 26, Companies (Audit, Investigations and Community Enterprise) Act 2004.

164 Section 304A Minnesota Statutes File: Minnesota Public Benefit Corporation Act.

165 § 401-02 Model Legislation; § 366(b) Delaware General Corporation Law.

166 § 401(a) Model legislation; W. H. Clark & L Vranka, 'White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public', January 18th 2013, 15; available via https://www.benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf

Moreover, the approach is particularly problematic in its application to small and medium enterprises, which need flexibility and adaptability in managerial decision making to achieve business goals in order to make themselves sustainable, while statutorily required socially responsible contributions seem overly demanding, onerous and unattractive.¹⁶⁷ As for the enforcement of directors duties and the imposition of directors' liability, in the model law a benefit enforcement proceeding may be commenced or maintained directly by a PBC or derivatively if the board has failed to pursue the stated general or specific public benefit purpose, has failed to consider the interests of stakeholders, or has failed to produce a report to meet transparency requirements.¹⁶⁸

7. Limitations of CSA

Despite the fact that we could move this task to the CSR committee, the greatest limitation of CSA rests in the directors' discretion in balancing various stakeholders' interests, the mission impossible of pleasing multiple masters with competing and conflicting interests. The board's CSA efforts may be limited by its predisposition to satisfy the needs of key stakeholders only.¹⁶⁹ The scope of social, environmental, and human rights-related problems is very wide, which makes it difficult and a sensitive issue to prioritise social problems. This unpoliced discretion makes CSA uncertain. It is neither realistic nor desirable to expect a court to sit in judgement on whether company directors have struck what the court considers to be an appropriate balance,¹⁷⁰ since the disadvantages of a process in which judges are required to review complex issues of business judgement¹⁷¹ in terms of uncertainty, disruption, and direct legal costs would undoubtedly outweigh the benefits.¹⁷²

167 T.A. Hemphill & F. Cullari, 'The Benefit Corporation: Corporate Governance and the For-profit Social Entrepreneur' (2014) 119 *Business and Society Review* 519 at 529.

168 § 305. Right of Action, Model Benefit Corporation Legislation 2016.

169 L.S. Oakes, & J.J. Young, 'Accountability Re-examined: Evidence from Hull House. (2008) 21 *Accounting, Auditing & Accountability Journal* 765.

170 J. Parkinson, 'Inclusive Company Law' in J. de Lacy, *The Reform of United Kingdom Company Law*, London: Cavendish Publishing Limited (2002) 43 at 50.

171 See S.S. Arshat, 'The Business Judgment Rule Revisited' (1979) 8 *Hofstra Law Review* 93; S.M. Bainbridge, 'The Business Judgment Rule as Abstention Doctrine' (2004) 57 *Vanderbilt Law Review* 83; D.G. Smith, 'The Modern Business Judgment Rule' BYU Law Research Paper Series No. 15-09 (2015) available via http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620536.

172 J. Parkinson, 'Reforming Directors' Duties', Policy Paper 12, Political Economy Research Centre, University of Sheffield (1998).

In order to avoid these consequences courts will only ask whether the directors honestly believed their decisions would achieve an appropriate balance, rather than asking whether a course of conduct was in the interests of the company.¹⁷³ When Evan and Freeman tried to explain how to balance the interests of various stakeholders, they argued that it is up to managers to decide which “normative core” they will use for their particular corporation.¹⁷⁴ It is assumed that all stakeholders benefit from being the subject of the corporate fiduciary duties owed by director since the law inevitably weakens the bargaining position of the other stakeholders by strengthening bargaining position of one specific group.¹⁷⁵ Directors are responsible for interpreting as well as implementing a balance in the interests of their stakeholders when enforcing CSA mechanisms, and they remain free to pursue their own arbitrary ends.¹⁷⁶

Directors lack guidance regarding the scope of their authority, principles and the values that they should follow in order to shape CSR and their decisions. The question of the extent to which the interests of the company as a separate legal entity may influence recognition and even resolve externally is very a dynamic one, to which it is extremely difficult to give a definitive answer. In terms of responding to these objections, the too many masters arguments is described as “overstated”¹⁷⁷ since even the interests of shareholders (different class, institutional vs minority). Additionally, CSR committee will positively influence the extent of CSR disclosure and play an active and beneficial role to mitigate the discretions vested in the board. Green paper suggested the prospects of enforcing ethical concerns in the company law by arguing that stakeholder interests “are not mutually exclusive, and could work in combination”.¹⁷⁸

173 Accordingly, as Lord Wilberforce has explained in *Howard Smith Ltd v Ampol Petroleum Ltd*, “there is no appeal on merits from management decisions to courts of law: nor will the courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at”; see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832, [1974] All ER 1126 at 1131.

174 W.M. Evan & R.E. Freeman, ‘A Stakeholder Theory of the Modern Corporation’ in M. Snoeyenbos, R. Almeder & J. Humber (eds.) *Business Ethics* 3rd edn. New York: Prometheus Books (2001) at 108–109.

175 J.R. Macey & G.P. Miller, ‘Part 2 Fiduciary Duties and Property Entitlement’ (1993) 43 *University of Toronto Law Journal* 401 at 401.

176 E. Sternberg, ‘The Defects of Stakeholder Theory’ (1997) 5 *Scholarly Research And Theory Papers* 3 at 5.

177 J.R. Macey & G.P. Miller, ‘Part 2 Fiduciary Duties and Property Entitlement’ (1993) 43 *University of Toronto Law Journal* 401 at 401.

178 Department of Business Innovation and Skills (now Department of Business, Energy and Industrial Strategy), ‘Corporate Governance Reform: Green Paper’ November 2016

8. Conclusion

The growth and globalisation of multinational companies make it harder for citizens and communities to seek redress, while companies consolidate their power with increasing corporate control over industries and services that were originally managed by government.¹⁷⁹ The financial crisis of 2008 also revealed an urgent call for binding standards when it comes to CSR.¹⁸⁰ Chandler sees voluntary CSR as a curse distracting from the necessity for effective external control.¹⁸¹ Mitchell contended that the best way to achieve CSR is to view the issue as one of corporate governance, with boards of directors potentially “the most effective pressure point” to pursue long-term interests and address social responsibilities.¹⁸² Growing pressure to give serious expression to stakeholder demands seems to offer the best chance for the development of an innovative and meaningful notion with well-designed components and effectively enforced measures. The Canadian Democracy and Corporate Accountability Commission defined CSR as a notion that means “being accountable to a broader range of stakeholders, rather than just shareholders”.¹⁸³ However, the term “accountable” is not further explained there. The article identified an original way to promote CSR through the lens of board accountability.

CSA is introduced as a more appropriate notion for addressing social, environmental and human rights problems in corporate law from both preventative and punitive orientation, by making CSR information variable, allowing stakeholders’ voices to be heard, enabling stakeholders to participate in decision-making, and imposing liabilities in the event of breaches of directors’ duties to stakeholders or irresponsible conduct that causes loss or damage. It is established as a mechanism to provide more accountability to CSR practice at the board level.

Current mechanisms, including codes of conduct, ethical trading initiatives and various certification schemes, are inadequate to improve the social and

179 D. McLaren, ‘Global Stakeholders: Corporate Accountability and Investor Engagement’ (2004) 12 *Corporate Governance: International Review* 191 at 199.

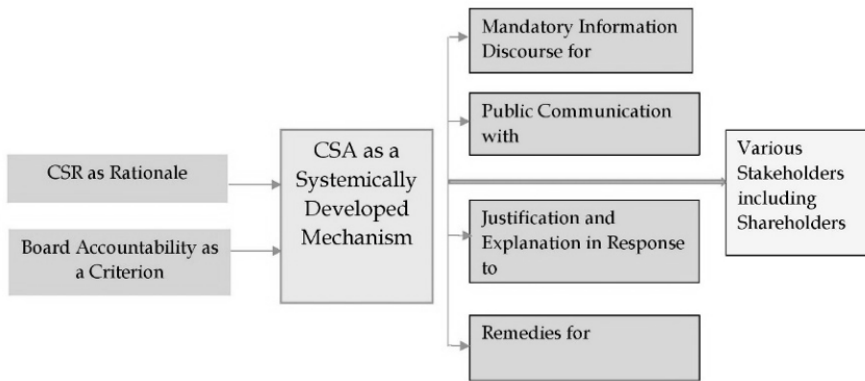
180 E. Emeseh, R. T. Ako, P. Okonmah & L.O. Obokoh, ‘Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?’ (2009) 11 *German Law Journal* 230.

181 G. Chandler, ‘The Curse of “Corporate Social Responsibility”’, (2003).2 *New Academy Review* 31.

182 L.E. Mitchell, ‘The Board as a Path towards Corporate Social Responsibilities’ in D. McBarnet, A. Voiculescu & T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press (2007) 279 at 28, 283.

183 The Canadian Democracy and Corporate Accountability Commission, ‘The New Balance Sheet: Corporate Profits and Responsibility in the 21st Century’ (2002) 5.

environmental conduct of companies.¹⁸⁴ The CSA mechanism is composed of elements such as transparency, stakeholder engagement, stakeholder scrutiny, stakeholder dialogue and stakeholder participation, and the imposition of rewards or liabilities in response to how well directors have discharged their duties as required by CSR policies generated by CSR committees. CSA, as a mechanism that is composed of different stages to enable companies to be discharge their social responsibilities in a systematic manner, will bring about a culture of genuine corporate accountability where corporations, governments and stakeholders pursue the strategic goals together. CSA could be illuminated from the following diagram, focusing on the stakeholder policies:



Enforcement measures, which also could be seen as stages of CSA, were also discussed in the article, including information disclosure, stakeholder representatives on the board, the establishment of CSR committees and the enforcement of CSR policy. They explicitly and seamlessly match the options for reform suggested by UK green paper. It is observed that having (key) stakeholders represented on boards would be logically associated with the performance of companies because of more comprehensive stakeholder scrutiny consistent with the stakeholder groups' interests.¹⁸⁵ Cast in a more optimistic light, stakeholder representatives already occupy seats on the board in certain jurisdictions in the form of employee participation. This article explores the problem of how the quest for accountability shapes a very different narrative of CSR, and tries to develop a globally applicable principle to connect CSR and board accountability,

184 P. Newell, 'Citizenship, Accountability and Community: the Limits of CSR Agenda' (2005) 81 *International Affairs* 541 at 541–542.

185 A.J. Hillman, G.D. Keim & R.A. Luce, 'Board Composition and Stakeholder Performance: Do Stakeholder Directors Make a Difference?' (2001) 40 *Business and Society* 295 at 309.

enforced by stakeholder participation in corporate decision-making processes. CSA advocates for and promotes the idea of ethical commitments at board level, to make sure companies do have a legal obligation at both national and international levels. CSA is a mechanism that is transparent but rigorous, with the purpose of disclosing, evaluating, monitoring and verifying the performance of companies against agreed corporate law standards, and which is able to apply penalties when the laws are breached. In order to make CSA enforceable and CSR sincere, a shift in attitudes towards social and environmental performance is key, this is a shift away from viewing them solely as ways of compliance and increasing profit and towards seeing them as sources of competitive advantage and social corporate control from multiple constituencies. This the reason the rewarding is as important, if not more important than punishment of irresponsibility. This reward is beyond what is supported by “the business case” school proponents who believe that companies will be rewarded in the market place if they are socially responsible. The enforcement of CSA from multiple company law mechanism can be vividly demonstrated from the following diagram:

