Facilitating Corporate Social Responsibility through Company Law: A Middle-Ground Proposition for Kuwait

Abstract

This thesis investigates the question of whether mandatory compliance or voluntary ''comply or explain'' enforcement is a more effective regulatory approach to Corporate Social Responsibility (CSR) and whether regulation creates a hierarchy to enable prioritisation of stakeholder interests. There is a lack of consensus on whether corporations should be subject to CSR obligations. CSR concepts encourage the identification of specific core CSR categories such as ethical, legal, economic, social and environmental responsibilities and obligations. The Indian and UK contexts exemplify a variety of CSR-related legislative provisions enacted to underscore the importance of a company's stakeholder obligations and responsibilities that extend beyond its corporate constituencies. However, the current CSR jurisprudence is carefully evaluated in Kuwaiti company law given the lack of CSR-related legislative provisions in the country. There is a need to explore and analyse these areas in different contexts, such as CSR in UK and Indian company laws, to form the basis of potential CSR provisions and legal vision for Kuwaiti company law. The current study uses Kuwait as a case to determine the ideal regulatory model for the country, whether CSR adherence is more likely to be mandatory (prescriptive) as demonstrated in Indian company law or voluntary (self-regulation) as demonstrated in UK company law and which builds the foundation of a middle ground approach. This is further supported by middle ground components of contextualism, constructivism, legal transplants and institutional theory.

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Abbreviations

Annual General Meeting (AGM)

Association of British Insurers (ABI)

Behavioural Insight Team (BIT)

British Council (BC)

Bombay Stock Exchange (BSE)

Chief Executive Officer (CEO)

Companies of the Ministry of Commerce and Industry (MOCI)

Confederation of Indian Industry (CII)

Cooperation Council for the Arab States of the Gulf (CCASG)

Corporate Social Responsibility (CSR)

Central Public Sector Enterprises (CPSEs)

Director Identification Number (DIN)

East India Company (EIC)

Enlightened Shareholders Value (ESV)

Environmental Management and Audit Scheme (EMAS)

Financial Time Stock Exchange (FTSE)

Goods and Services Tax (GST)

Gross Domestic Product (GDP)

Hindu Undivided Family (HUF)

Institute of Chartered Accountants in England and Wales (ICAEW)

Millennium Development Goals (MDGs)

Multinational corporations (MNCs)

Non-governmental Organisations (NGOs)

Organisation for economic Co-operation and development (OECD)

Permanent Account Number (PAN)

Price Waterhouse Coopers (PWC)

Abbreviations

Public Authority for Civil Information (**PACI**)

Regulatory Impact Assessment/Analysis (**RIA**)

Sarbanes-Oxley Act (**SOX**)

Securities and Exchange Board of India (**SEBI**)

Sustainable Development Goals **(SDGs)**

Tax Account Number (**TAN**)

The Global Reporting Initiative (**GRI**)

The Monopolies and Restrictive Trade Practices Act (**MRTP**)

Total Corporate Social Disclosures (**TCSD**)

United Nations Global Compact (**UNGC**)

United Nations Development Program (**UNDP**)

United Nations Environment Programme (**UNEP**)

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Chapter One: Introduction

1.1 Overview

This chapter introduces the thesis topic by providing a background of the study and highlighting relevant issues associated with corporate social responsibility (CSR) in company law. The chapter also outlines the research problems, research questions, central arguments, research objectives and the statement of methodology. The chapter concludes by providing a structural plan of the thesis.

1.2 Background

CSR has acquired ever-greater importance in recent years. The success of a corporation is no longer measured solely by profit versus loss or shareholder return on investment benchmarks. Rather, how a particular enterprise's activities may impact company *stakeholders* are more important and compelling questions, owing to stakeholders having the most influence on a company.[1] Stakeholders are essentially individuals or groups who have an interest or concern in something, e.g., a company.[2] Stakeholders include company employees, suppliers, investors, the host community and the environment.[3]

Whilst some companies have been quick to promote their commitment to protecting broader societal interests, the precise impact of their actions on society is not always carefully scrutinised. One reason for this as-yet lesser-concerted CSR attention is the relative newness of CSR concepts as

[1] Katherina Glac, 'The influence of shareholders on corporate social responsibility' Center for Ethical Business Cultures (2010) 1.
[2] D. Chandler and W.B. Werther, *Strategic Corporate Social Responsibility: Stakeholders, Globalization, and Sustainable Value Creation* (SAGE Publications 2013), 53-56.
[3] AG Scherer & G Palazzo, 'Globalization and Corporate Social Responsibility' in *The Oxford Handbook of Corporate Social Responsibility* (A Crane, A McWilliams, D Matten, J Moon & D Siegel eds, OUP 2008) 421-422.

understood by companies, the boards and senior management and the public at large.[4] In the greater scheme of national and global corporate regulation, CSR does not enjoy the same familiarity as corporate profitability in examining whether a particular company is successful.[5] Whilst gaining ever-increasing interest in international company law scholarship, CSR still attracts labels such as "new" and "experimentalist governance".[6] It seems that calculated annual profits are easier for company executives and shareholders alike to understand than less quantifiable CSR benefits such as environmental impacts or suppliers' satisfaction with the business operations.[7]

With these observations aside, CSR is widely recognised as a set of principles that encourage companies to adopt policies and pursue corporate strategies that account for stakeholder interests. However, as the United Kingdom and India examples discussed in the Central Arguments section 1.5 below confirm (and crucial to the 'thesis' comparative analysis), CSR principles are not always clearly defined because there is no universal definition of CSR. Their circumstance-driven application may in fact hinder the development of precise definitions.[8] Uncertainty concerning how, or in what order stakeholder objectives ought to be pursued, demands a more robust and organised approach contemplated by this thesis.[9]

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[4] A point taken from A Kumar and P Tayal 'Corporate social responsibility under Companies Act 2013 - a critical analysis' (2015) 36(12) *Comp. Law*. 383, 385, citing the still-evolving Indian CSR approaches.
[5] O Osuji, 'Corporate social responsibility, juridification and globalisation: "inventive interventionism" for a "paradox"' (2015) 11(3) *Int. J.L.C.* 265, 267.
[6] Ibid, 267, 268.
[7] C Nyombi et al, 'Shareholder primacy and stakeholders' interests in the aftermath of a takeover: a review of empirical evidence' (2015) 2 *I.B.L.J.* 161, 165 re long term value creation for all stakeholders.
[8] As discussed in A Crane, D Matten & L Spence, 'Corporate Social Responsibility in a Global Context' (2013), in: *Corporate Social Responsibility: Readings and Cases in a Global Context*, 2nd edition, Crane, Matten, and Spence, eds., Abingdon: Routledge, 3-26.
[9] JMD Barroso, 'Putting Corporate Social Responsibility at the Heart of our Vision' (CSR Europe 2009) 12.

There is little doubt that CSR has been increasingly recognised, as the crucially important mechanisms by which societies have greater assurance that companies (especially multinational enterprises)[10] will operate lawfully and responsibly.[11] No issue is taken with the proposition that CSR has potential positive impacts, suggesting that it carries considerably "wider implications and is critical to economic and social wellbeing".[12]

To address these inter-related concerns, it is essential that regulation approaches are articulated and assessed, with particular attention directed to self-regulation, public and private regulation concepts.[13] This approach considers which method is best suited to enforcing CSR obligations in an effective manner. This is achieved by examining a series of regulatory theories to identify regulatory weaknesses, and provide solutions to such weaknesses. However, given the breadth of CSR and its implications for companies and stakeholders alike, conventional regulation theory principles are more effectively analysed where a range of different philosophies are explored. Therefore, it is ideal to look at regulation theories that provide philosophical support for the identification and resolution of fundamental problems, which in this case is enforcing CSR obligations in an effective manner.

Sunstein and Thaler's well-known "nudge" theory, with its preference for laws that encourage better corporate behaviour, as opposed to dictating how companies must adopt CSR standards, is one such philosophy.[14] As suggested above, CSR concepts have not yet been fully explored in various

[10] G Davis, M Whitman, & M Zald, 'The Responsibility Paradox: Multinational Firms and Global Corporate Social Responsibility' (2006) University of Michigan, Ross School of Business, 3-37; Peter Rodriguez, Donald S Siegel, Amy Hillman and Lorraine Eden, 'Three Lenses on the Multinational Enterprise: Politics, Corruption and Corporate Social Responsibility' (2006), 733–746.
[11] E Garriga & D Mele, 'Corporate Social Responsibility Theories: Mapping the Territory' [2004] 53 JBE 12, 59.
[12] T Clarke, *Theories of Corporate governance: The philosophical foundations* (Routledge 2004) 1.
[13] Bettina Lange, 'Socialising economic relationships: a critique of business regulation – introduction' (2011) 62(4) *NILQ* 393, 395.
[14] C Sunstein and R Thaler, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008), 4-8.

contexts, nor are they completely understood by academics, judges and corporate leaders. It is therefore helpful to find tools that will permit these still-emerging CSR concepts to undergo the most rigorous possible examination. Osuji[15] suggests that CSR is one such tool that is a type of company regulation existing in a continuum created between prescriptive regulation and pure voluntarism extremes, meaning that some companies in some countries are required to commit to CSR, while for others, it is completely optional.

These background observations give this research its important context, which in the case of this thesis is introducing CSR provisions in Kuwait Companies Law 2016. Kuwait Companies Law goes back to 1960 and is the regulatory basis of Kuwaiti companies. Amendments to the Kuwaiti Companies Law 1960 saw the replacement of Law No.15 for Law No.25 of the Kuwaiti Companies Law 2012.[16] The newly updated Companies Law 2012 clarified several areas that were not addressed in the Companies Law 1960, such as shareholders' agreements, holding companies and non-profit companies. This resulted in several practical challenges after the new Companies Law was enforced, leading to rapid changes in existing provisions. This led to further amendments to the enforced Law No.97 of 2013 and the 2016 Law No.1. The issuance of Law No.1 in Kuwait Companies Law 2016 was mostly down to the suspicion that Laws No.25 and No.97 were facing nullification owing to its unconstitutional nature.[17] With respect to CSR practice in Kuwait, there are no clear provisions that protect against malpractice in companies.

[15] Osuji (n 5), 4-5.
[16] Oxford Business Group, 'Kuwait introduces updated and amended laws' (2017). Available: https://oxfordbusinessgroup.com/overview/call-renewal-important-laws-have-been-recently-updated-and-amended. Accessed: 16th Aug 2019.
[17] Ibid.

Despite the lack of CSR provisions in existing Companies Law in Kuwait, the country is making the effort to incorporate some aspects of CSR, not necessarily in Companies Law, but in other laws. For example, Kuwait has recently imposed a new environmental law (Environmental Protection Law No.99 2015[18]) that aims to promote sustainable management of the environment through implementing new policies that will help to meet the country's vision of environmental sustainability across all sectors.[19] Although the new environmental law is not recognised as a CSR effort from Kuwait, it demonstrates that the country does incorporate elements of CSR into the legal system. This is because the environmental law shows that Kuwait is committed to at least one type of CSR, that is, environmental sustainability. Therefore, this thesis aims to delve deeper into the types of CSR that are potentially used in Kuwait that are not imposed in their existing Companies Law, and thus proposals for new CSR provisions in Kuwaiti Companies Law are considered as part of the contributions of this thesis.

The following examples (as further supported by the Research Problems and Central Argument sections below) underscore why effective, robust CSR promotion and enforcement depends on whether an intriguing and fundamental problem can first be overcome. This issue frames the problem: given CSR's broad potential scope, the question remains, will CSR compliance be more likely achieved by mandatory, legislated means, or through more voluntary, indirect national corporate regulatory encouragement. Since there is a lack of CSR provisions in Kuwaiti

[18] United Nations Development Program (UNDP). Support Kuwait Environmental Authority With the New Environmental Law. (2019) Available: http://www.kw.undp.org/content/kuwait/en/home/sustainable-development/ongoing-projects/support-kuwait-environmental-authority-with-the-new-environmenta.html. Accessed: 2nd Sept 2019.
[19] Ibid.

Companies Law 2016, there is a need to determine whether CSR compliance is mandatory or voluntary in Kuwait.

There are multiple reasons why CSR has attained its 21st century prominence amongst policy-makers and scholars alike. Corporate and related financial scandals that have erupted across the global commercial landscape in the late 20th and early 21st centuries illustrate the degree to which corporate malfeasance may go unnoticed, as well as the damage that it can inflict upon society, financial markets, the environment and other company stakeholders.[20]

A series of UK examples underscore why CSR principles have attracted usually supportive academic commentaries.[21] The mid 1990s Bank of Credit and Commerce International SA (BCCI) collapse brought into focus the question of whether banks were properly regulated with respect to protecting interests beyond those of shareholders and directors.[22] The 2008 *Northern Rock* liquidation and subsequent nationalisation also included consideration of the dangers associated with UK bank regulation that did not effectively compel financial institutions to consider stakeholder interests in its corporate decision-making processes.[23]

Other financial scandals that unfolded in the US and Europe during this period (such as Enron, and the post-2007 global crisis collapse of Wall Street giants, Bear Stearn and Lehman Brothers)[24] highlight the extent to which the corporate structure can be abused and this has sparked ‘‘heated

[20] CA Mallin, *Corporate Governance* (3rd edn, OUP 2010) 3; *Enron Europe Ltd (in administration) v Revenue and Customs Comrs* [2008] SWTI 390.
[21] Jette Steen Knudsen, ‘Bringing the State Back In? US and UK Government Regulation of Corporate Social Responsibility (CSR) in International Business’ (2014), 1.
[22] See as an example of the various claims filed against the BCCI bank leadership that centred on poor governance practices, *Three Rivers DC v Bank of England* (Amendments to Particulars of Claim) [2003] EWHC 1269 (Comm) (QBD (Comm)).
[23] *SRM Global Master Fund LP & Ors v HM Treasury* [2009] EWCA Civ 788 (CA (Civ)), [2]-[9]; see also Andreas Kokkinis, ‘Rethinking banking prudential regulation: why corporate governance rules matter’ (2012) 22 *Journal of Business Law* 611, 613.
[24] As chronicled by Lucian Bebchuk, Alma Cohen, and Holger Spamann, ‘The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000-2008’ (2010) 27 *Yale Journal on Regulation* 257, 260.

debate on corporate governance".[25] Environmental and social concerns have come to play an influential and important role in the way that corporations operate.[26] Amongst the reasons for their emergence is increasing global concern regarding how multinational corporations will often seek out jurisdictions with the least restrictive environmental, workplace or human rights regulations as a way to reduce their overall operational costs.[27] However, new CSR and corporate regulations have prevented companies from committing such malpractice, similar to restricting CSR practice in favour of profit maximisation. For example, the French Duty of Vigilance Law has recently imposed a new policy that expects companies to establish new mechanisms that aim to prevent human rights concerns and environmental issues in their production chain with the company also being obligated to submit an annual report regarding these mechanisms.[28] Therefore, this demonstrates that CSR related laws can hold companies liable for any malpractices, such as harming company constituents and personnel and failing to submit proposals to prevent damages for corporate negligence.

This role has become all the more prominent as cultural and geographical borders have been eroded in the business world due to globalisation forces.[29] Many commentators argue that corporations should not be free to pursue the greatest possible profits without having regard for the broader social impacts of such profit making.[30] The conceptual immaturity

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[25] AN Licht, 'Cross-listing and Corporate Governance: Bonding or avoiding?' [2003] 4 CJIL 141, 141-142.
[26] P Mirvis & B Googins, 'Stages of Corporate Citizenship' (2006) 48 CMR 2, 107.
[27] F de Graaf & A Mehrtens, 'SME Role Models on a Global Market: How International Entrepreneurs Can Thrive on Social Responsibility' (2011), 1.
[28] Sarah A. Altschuller and Amy K. Lehr. The French Duty of Vigilance Law: What You Need to Know. (2017). Available: https://www.csrandthelaw.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/. Accessed: 2nd Sept 2019.
[29] AG Scherer & G Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' [2011] 48 JMS 4, 892.
[30] A D'Amato, S Henderson & S Florence, *Corporate Social Responsibility and Sustainable Business: A Guide to Leadership* (Center for Creative Leadership 2009) 1-2.

of CSR concepts as noted above prompts another observation. That is, debates about which of the different corporate regulation theories (ranging from strict legislative controls to voluntary compliance),[31] are the most effective to impose CSR obligations upon companies.

1.3 Research Problems

CSR is a notion that is conceptually immature since there is no universal definition and no clear model. As a result, this has sparked debate in terms of not only CSR's role in the modern corporate world but also in terms of what it entails and how it may be defined. Bowen, for example, suggests that CSR can be defined by reference to corporate obligations: to "pursue those policies, to make those decisions, or to follow those lines of action, which are desirable in terms of the objectives and values of our society".[32] For Bowen, effective CSR promotion must include the need to identify the responsibilities of corporations as distinct from the need to pursue maximum profit.[33] Therefore, Bowen is suggesting that rather than striving only for profit maximisation, corporations should also bear responsibility for its employees, suppliers, local communities and nation.[34] Similarly, Carroll considers the relationship between CSR and profit, arguing that managers should seek to promote and be held responsible for shareholders, stakeholders and society as a whole.[35]

Much attention has been given in existing literature to the potential conflict between profit and CSR[36]. Others such as Matten and Moon argue that the lack of any concise definition of CSR has resulted in weaknesses in the way that it is imposed and regulated because it is ultimately difficult to

[31] Osuji (n 5), 4-5.
[32] HR Bowen, *Social Responsibilities of the Businessman* (Harper & Row 1953) 25-26.
[33] Ibid.
[34] Ibid.
[35] AB Carroll, 'In Search of the Moral Manager' [1987] 12 BH 7, 11.
[36] Osuji (n 5), 27-28

examine whether companies are fulfilling their CSR roles.[37] It is therefore necessary to search for a concise definition of CSR, the obligations that CSR entails and the role that it plays in the context of company activities. This concise definition could help countries like Kuwait because there are no clear provisions in its company law and such a definition could help to introduce CSR policies that prevent companies from committing malpractice.

Despite the advantages and importance of CSR, there is a notable lack of consensus on whether corporations should be subject to CSR obligations. Gunness, for example, argues that it is neither fair nor possible to impose upon companies the obligation to unilaterally address social issues.[38] He concludes that companies should not be held responsible for social issues because this imposes unrealistic and unfair obligations upon the corporate structure, which is not designed to address such concepts.[39] This view is shared by several scholars.

Smith, for example, claims that the very fact that CSR cannot be concisely defined evidences that a consistent standard of conduct does not exist.[40] Therefore, the role and value of CSR becomes lost because it is defined subjectively and this imposes unfair and inconsistent obligations on companies. Others argue that the subjective nature of CSR allows companies to exploit it as a marketing tool and to acquire a positive image by claiming to ascribe to ambiguous CSR practices.[41] These issues therefore necessitate analysis of the overall legitimacy and efficacy of CSR.

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[37] D Matten & J Moon, '"Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 33 AMR 2, 409.
[38] R Gunness, 'Social Responsibility: The Art of the Possible' Business and Society Review. (1986), 12:1974-1975.
[39] Ibid.
[40] R Smith, 'Social Responsibility: A Term We Can Do Without' [1988] 31 BSR 6, 12.
[41] KS Jahdi & G Acikdilli, 'Marketing Communications and Corporate Social Responsibility (CSR): Marriage of Convenience or Shotgun Wedding?' [2009] 88 JBE 1, 109.

CSR concepts also encourage the identification of specific core CSR categories such as ethical,[42] legal, economic and environmental responsibilities and obligations,[43] which are linked to stakeholder theory. These categories necessitate analysis in terms of what they require and how they are currently enforced in legislation and regulations. Whether they can also be applied in a manner that facilitates, or at least does not derogate from the profit-seeking goal of corporations, is also an important issue.[44] Some of the categories, such as ethical obligations, suggest the need for voluntary and discretionary,[45] rather than mandatory compliance[46] due to their extremely fluid and subjective nature.[47]

Which CSR mechanisms will best encourage a robust, dynamic internal CSR culture to emerge within any given corporations is a distinct issue that also needs to be resolved in this broader analysis. The same applies to Kuwait because despite the CSR activity in Kuwait, there are no legally enforced policies and provisions that show CSR activity is practised and that companies should be obligated to commit to the CSR effort for the sake of economic, social and environmental sustainability and well-being. It is recognised that it is one thing to declare that companies should be subject to laws reinforcing their broader social responsibilities and quite another to determine how they should be fulfilled.[48] This is to ensure that companies promote socially responsible behaviour, such as being more

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[42] S Benn & D Bolton, *Key Concepts in Corporate Social Responsibility* (Sage 2011) 9.
[43] AB Carroll (n 35), 13.
[44] X Luo & CB Bhattacharya, 'Corporate Social Responsibility, Customer Satisfaction, and Market Value' [2006] 70 JM 4, 12.
[45] The Combined Code on Good Corporate Governance is an example of voluntary compliance although it does require companies to explain why they have not complied with the Code. See D French, S Mason & C Ryan, *Company Law* (27th edn, OUP 2010) 470; MB Blowfield & A Murray, *Corporate Responsibility: A Critical Introduction* (OUP 2008) 342.
[46] PK Shum & SL Yam, 'Ethics and Law: Guiding the Invisible Hand to Correct Corporate Social Responsibility Externalities' [2011] 98 JBE 4, 552.
[47] AB Carroll & KM Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12 IJMR 1, 88.
[48] AB Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' [1991] 34 BH 4, 41; SB Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly' (2008) 34 CS 51, 58.

environmentally friendly, considering workers´ rights and promoting an ethical working environment, amongst others. The "triple bottom line concept" will be considered here,[49] since there is a need to study the significant economic, environmental and social benchmarks that measure how well companies actually fulfil their CSR obligations.[50]

Considerable attention in existing literature has also been given to the legal enforcement of corporate responsibilities and obligations. In the UK, the legislative enactments include the Companies Act 2006 (CA) which outlines directors' duties,[51] as well as the Corporate Manslaughter and Corporate Homicide Act 2007. The latter statute imposes criminal liability on corporations where the following offence elements are proven beyond reasonable doubt. Firstly, the way in which company activities are managed or organised causes a death. Secondly, these activities amounted to a gross breach of a relevant duty of care owed to the deceased. Thirdly, a substantial part of the breach arose from the manner in which such activities were managed by a senior manager.[52] Therefore, this particular piece of legislation is important as it promotes highly responsible legislative provisions that can lead to serious consequences if breached.

Debates do exist, however, in terms of whether legislation can effectively enforce corporate obligations and responsibilities.[53] Some argue that it is important to develop a legislative framework for the implementation of

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[49] GM Heal, When Principles Pay: Corporate Social Responsibility and the Bottom Line (Columbia University Press 2008) 62.
[50] I Freeman & A Hasnaoui, 'The Meaning of Corporate Social Responsibility: The Vision of Four Nations' [2011] 100 JBE 3, 426; A Henriques, 'CSR, Sustainability and the Triple Bottom Line' in The Triple Bottom Line: Does it All Add Up? (A Henriques & J Richardson eds, Earthscan 2013) 29.
[51] Under section 172(1)(d) CA 2006 directors must 'promote the success of the company for the benefit of the members as a whole', and in doing so consider, amongst many other factors, 'the impact of the company's operations on the community and the environment. A Keay, Directors' Duties (Jordans 2009) 124; R Goddard, 'Directors' Duties' [2008] 12 ELR 468, 470.
[52] Manslaughter and Corporate Homicide Act 2007, ss. 1(1), 1(3), and 1(4)(c).
[53] BE Joyner & D Payne, 'Evolution and Implementation: A Study of Values, Business Ethics and Corporate Social Responsibility' [2002] 41 JBE 4, 299.

CSR obligations.[54] Lyon and Maxwell specifically focus on environmental obligations, arguing that UK law clearly lacks legislative mechanisms that prevent environmentally damaging activities.[55] The need for CSR legislation has been addressed, with some commentators concluding that only through rigorous and strict legislation can companies be held responsible for breaching CSR policy.[56]

Much of the existing literature argues that effective CSR legislation should target senior company management, as these persons ultimately implement policies and make decisions that direct corporate activities.[57] From this perspective, unless senior managers are subject to direct regulation, company activities that are inconsistent with CSR values will not be subjected to precise scrutiny. Only where senior managers face personal liability are there incentives to comply, if this perspective is accepted.[58] In this respect, there appears to be a connection between CSR and directors' duties.[59] However, how the duties contained in the UK Companies Act 2006 (such as its s.172 (1) 'decisions in the company's best interests') contributes to CSR enforcement remains unclear.[60]

However, a careful reading of selected UK and Indian authorities, casts significant doubt on these claims. For example, based on an assessment of the 2013 Indian legislation, it suggests that the purported ''mandatory'' CSR compliance measures are anything but mandatory in practice, due to

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[54] AB Carroll, (n 48), 41; J Solomon, Corporate Governance and Accountability (3rd edn, John Wiley 2010), 51.
[55] TP Lyon & JW Maxwell, 'Corporate Social Responsibility and the Environment: A Theoretical Perspective' [2008] 2 REEP 2, 255; TR Chouhan, 'The Unfolding of Bhopal Disaster' [2005] 18 JLPPI 406, 12-14.
[56] P Griseri & N Seppala, Business Ethics and Corporate Social Responsibility (Cengage 2010) 14; S Zadek, The Civil Corporation: The New Economy of Corporate Citizenship (Earthscan 2011) 32.
[57] J Muncie, D Talbot & R Walters, *Crime: Local and Global* (Willan 2009) 120-123; HM Government, *The Coalition: Our Programme for Government* (Stationery Office 2010) 10; Financial Reporting Council, *Exposure Draft: Guidance on the Strategic Report* (FRC 2013) 6.44.
[58] Sarah Fields & Lucy Jones, 'Are directors getting away with manslaughter? Emerging trends in prosecutions for corporate manslaughter' (2014) 35(5)*, Bus. L.R.* 158, 160.
[59] House of Lords, *Company Law Reform Bill: The White Paper'*, *HL Bill 34* (Stationery Office 2005) ch. 3.
[60] I Carr & O Outhwaite, 'Controlling Corruption through Corporate Social Responsibility and Corporate Governance: Theory and Practice' [2011] 11 JCS 2, 235; M Jones, *Creative Accounting, Fraud and International Accounting Scandals* (Wiley 2011) 487-489; MM Blair, 'Directors' Duties in a Post-Enron World: Why Language Matters' [2003] 38 WFLR 885, 889.

their vague language.[61] The few UK cases that have considered the Companies Act 2006 s.172(1) stakeholder interests, suggest that given the powerful circumstance-driven nature of CSR applications, CSR objectives are more likely to be attained through encouragement, not compulsion.[62] An example is the 2008 *Re Southern Counties* decision.[63] The case stands for the proposition that a court must determine whether a company director alleged to have breached their s.172(1) duty honestly believed his relevant act or omission was in the best interests of the company.[64] Therefore, where the act or omission under challenge has led to a certain substantial detriment to the company, the director will find it more difficult to persuade the court that his/her actions were justly based on the company's best interests.

The Indian and UK contexts and examples suggest a variety of different CSR-related legislative provisions have been enacted to underscore the importance of a company's stakeholder obligations and responsibilities that extend beyond its shareholders.[65] However, the underlying issue identified above remains unresolved when the current CSR jurisprudence is carefully evaluated in Kuwaiti company law, given the lack of CSR-related legislative provisions in the country. In each jurisdiction, specific company law provisions identify CSR stakeholder objectives with reasonable clarity and precision.[66] Whether such regulation has (i) improved overall CSR compliance in the UK and India respectively, or (ii) what other measures

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[61] S Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9(2), *European Company Law, Kluwer Law International, Special Issue on CSR and SRI*, 2012, 10.
[62] A point taken from *Re HLC Environmental Projects Ltd, [*2013] EWHC 2876 (Ch) (Ch D (Companies Ct)), {131]-[133], *Re Southern Counties Fresh Foods Ltd*, [2008] EWHC 2810 (Ch), as supported by A Keay, 'The Duty to Promote the Success of the Company: Is it Fit for Purpose?' (2010) *University of Leeds School of Law, Centre for Business Law and Practice Working Paper*, 4-6.
[63] *Re Southern Counties Fresh Foods Ltd*, [2008] EWHC 2810 (Ch).
[64] Ibid, [53].
[65] As noted in the UK Companies Act 2006, Part 10 (ss. 171-181), and India's Companies Act 2013, ss. 134, 135, as augmented by the Companies (Corporate Social Responsibility Policy) Rules 2014.
[66] R Timane and T Tale, 'A Study of Corporate Social Responsibility in India' (2012; revised 2015) 2(12) *International Journal of Research in IT & Management*, 12, 15-16.

ought to be adopted to improve CSR compliance (and correspondingly better stakeholder interests' promotion and protection) lies at the heart of this research.

The various factors and obligations that arise from CSR promote a multi-faceted approach to the obligations that corporations may have to obey.[67] Bronn and Vrioni also pointed out that this particular approach determines what obligations a company ought to assume may be influential in terms of the most important social issue.[68] For these authors, an underlying problem remains unanswered since where it is not possible to define fundamental CSR obligations owed by every company, it may be equally impossible to enforce them.[69] This important issue requires careful scholarly research attention in terms of both how well existing regulations encourage CSR and what potential legislative reforms are needed. The central issue is whether CSR compliance should be *mandated* by legislative enactments, or is better CSR adherence more likely achieved through *voluntary* compliance measures ('comply or explain')?[70]

In order to bring about the aforementioned central issue, the current study uses Kuwait as a case to determine the ideal regulatory model for the country, whether CSR adherence is more likely to be mandatory (prescriptive), as demonstrated in Indian company law, or voluntary (self-regulation), as demonstrated in UK company law. This is based on the revelation that Kuwait has no CSR related provisions in its existing regulatory model. Although no CSR provision exists in Kuwaiti company law, the country has shown some promise to implement CSR in their

[67] A Dahlsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' [2008] 15 CSREM 1, 7.
[68] PS Bronn & AB Vrioni, 'Corporate Social Responsibility and Cause-Related Marketing: An Overview' [2001] 20 IJA 2, 213.
[69] Ibid.
[70] J Lewis, 'The "comply or explain" regime' (2012) 36(1) *C.S.R.* 6, 7

company law, having applied a combination of similar self-regulatory and prescriptive regularly approaches of UK and Indian company laws, respectively. This includes social, economic and environmental issues they raise in their existing provision, e.g., giving money to charity and supporting the development of family businesses. This helps to provide a middle ground to be adopted for Kuwait in terms of CSR adherence. Ultimately, existing literature raises several issues relevant to the research. These include: i) CSR principles identification and definition; (ii) mandatory (prescriptive) versus voluntary (self-regulation) CSR regulation, as examined through the regulatory theory lens; (iii) how (or whether it is even possible) to most effectively balance competing CSR stakeholder interests. Therefore, there is a need to explore and analyse these areas in different contexts, which in this case is CSR in the UK and Indian company laws, to form the basis of potential CSR provisions in the company law of Kuwait.

1.4 Research Questions

Due to the potentially broad nature of CSR issues identified in the section 1.2, it is essential that the project research scope is restricted. Effective CSR issue analysis demands a workable CSR definition. Research focus is directed to the role CSR plays in the 21st century corporate world, as well as problems identified in current legislation seeking to impose or encourage corporate responsibility. Stakeholder interests and the way company activities affect them (for good and ill) is a core research requirement, given the central importance the stakeholder theory enjoys in CSR understandings.[71]

The two core research questions that frame both the research scope and analytical directions of the thesis are:

[71] As discussed throughout the Background section.

1. Is either mandatory compliance or voluntary ‘‘comply or explain’’ enforcement a more effective regulatory approach to CSR?
2. Can regulation create a hierarchy to enable prioritisation of stakeholder interests?

The research questions address an important 21st century reality: modern corporate activity does not always strike an ideal balance between often conflicting stakeholder interests and accompanying CSR obligations, particularly where these undermine or seemingly compromise core business enterprise profit-seeking aspirations.[72] The conflicts, along with CSR's still-underdeveloped, ambiguous nature, has prompted some commentators such as Freeman[73] to argue that many, if not most companies, act with impunity concerning whether legitimate stakeholder interests are actually promoted or protected, [74]as presented in sections 4.5 and 5.5.3 below.

The main questions invite consideration of possible subsidiary questions. Firstly, what precise ‘‘stakeholder’’ categories should be defined to ensure that CSR objectives can be attained (see sections 4.5 and 5.5.3). Secondly, what does the UK and India comparative analysis (in terms of the Companies Act provisions, relevant case law, and related academic commentaries of both countries) suggest regarding the effectiveness of CSR approaches (as demonstrated throughout chapter 4). Thirdly, what specific legislative reforms might better advance CSR objectives? (see sections 4.7 and 5.5.5). The reason for these questions is to determine the current state of CSR in UK and Indian company laws and to then determine their suitability for Kuwait.

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[72] M Friedman, *Capitalism and Freedom* (University of Chicago Press 1962) 60-61.
[73] R. Edward Freeman and Robert A. Phillips. "Stakeholder theory: A libertarian defense." Business ethics quarterly 12.3 (2002): 331-349.
[74] J Minkes and L Minkes, *Corporate and White Collar Crime* (Sage 2008) 202.

1.5 Central Arguments

The central arguments for this thesis are directly connected to the two core research questions and the subsidiary questions outlined in section 1.3. Existing theory suggests that CSR concepts encourage the identification of specific core CSR categories. Such categories include ethical,[75] legal, economic and environmental responsibilities and obligations.[76] This thesis shows that since these categories have a direct and indirect influence on members of society, namely individuals (e.g. stakeholders), they are linked to the stakeholder theory and its stakeholder constituencies.

These observations lend support to the following central propositions and arguments. It is suggested that CSR theory is attractive, given that the wider-ranging stakeholder interests may be legitimately considered by company directors and managers in developing business strategies. Existing theory shows that profit should no longer be the sole standard by which company success or viability is measured, where communities and the environment deserve appropriate attention.[77] However, this thesis demonstrates strong preference for voluntary CSR adherence, as advanced through "comply or explain" mechanisms. This is because the findings of this thesis regarding CSR provisions in Kuwait found that the country is very much similar to India in terms of the socially responsible provisions applied to their company law with corporate philanthropy (promoting welfare of others, expressed through monetary donations to good causes) being the central theme. Over time, when consumers uniformly place greater trust in enterprises that value CSR principles, the legitimate corporate pursuit of profit and promotion of shareholder interests and broader CSR stakeholder

[75] S Benn and D Bolton, *Key Concepts in Corporate Social Responsibility* (Sage 2011) 9.
[76] AB Carroll (n 35), 13.
[77] ArthaMoney, 'People, Planet & Profit, Triple Bottom line, The Ethical Measure of Businesses' (2017): Available: https://arthamoney.com/people-planet-profit-triple-bottom-line-the-ethical-measure-of-businesses-53750035035f: Accessed 22nd July 2017.

concepts will more readily co-exist.[78] The marketplace will spur this onward CSR advance, if the courts and legislatures strive to most effectively encourage, but not compel CSR compliance.

Based on the above, a middle ground was defined that compares the legal and organisational contexts of CSR in the UK and India in order to establish new legal provisions for CSR in Kuwait. Therefore, the middle ground approach was conceptualised as a framework that contextualises the UK, Indian and Kuwaiti legal systems (company laws), as well as cultural and religious issues of these three countries with support from constructivism and institutional theory. A middle ground was established by comparing these areas, which in turn helped to unravel a link between them.

1.6 Research Objectives

The aim of this study is to determine whether legislation mandating CSR principles compliance is likely to be more effective than regulatory encouragement and voluntary company compliance, as captured by the phrase ‘‘comply or explain’’. The UK and India comparative analysis includes each nation’s relevant company law provisions.[79] In this way, the aim includes determining whether these current laws have been, or are likely to effectively promote CSR principles in their current form in another context that does not have such provisions in their company law, e.g., Kuwait. For that reason, this aim directly relates to regulatory theories, in that each must be examined in terms of how they overcome barriers and ease the conflict between profit and the fulfilment of CSR obligations. The Kuwait case (Kuwait Companies Law 2016) helps to highlight the ideal regulatory model for the country based on the analysis of CSR provisions of both the UK and India, since Kuwait has no CSR related provisions, and

[78] L Moir, ‘What do we Mean by Corporate Social Responsibility?’ (2001) 1 CG 2, 16.
[79] UK Companies Act 2006; India Companies Act 2013.

thus provides a middle ground as to which CSR regulatory model should be adopted for the country.

This is an important topic because corporate activity (especially by large or multinational enterprises) profoundly impacts many aspects of every society, such as environment, consumers, employees, communities, stakeholders and all other members in the public eye, as well as how they are treated by corporations. The potentially facilitative profit / CSR relationship needs to be fully appreciated, yet which regulatory approach is potentially more effective in realising this goal requires careful and nuanced research focus. The UK and India comparative study has assisted in identifying existing regulatory weaknesses and offers potential solutions.

The research objectives are thus summarised:

(i) To critically evaluate the nature, scope and impact of CSR principles in UK, Indian and Kuwait company laws;

(ii) To assess the regulatory model that best aligns with CSR principles by comparing different regulation theories;

(iii) To establish a suitable middle ground to address the regulatory deficiencies of CSR in the Kuwait Companies Law 2016;

(iv) To propose a legal vision for mandatory CSR compliance in the Kuwait Companies Law 2016.

In order to meet these objectives, a review of new and existing literature helped to identify gaps in the existing literature. Given the relative newness of CSR concepts in UK and Indian company laws, this work assumes greater importance. That is, determining whether CSR compliance can be integrated in contemporary Kuwaiti company law, given its success in UK and Indian contexts.

The stated philosophical preference for voluntary CSR compliance changed to mandatory compliance as the CSR research in this thesis advanced.[80] It was important to understand that this outline initially reflected a current bias favouring voluntary compliance. This bias was rooted in the belief that 21st century companies are more likely to respond to consumer pressure to honour CSR commitments, than any pressure applied by mandatory CSR rules, and thus the author had to bear in mind that this bias changed as the research advanced.

1.7 Statement of Methodology

The main methodology used in this research is doctrinal legal research. Doctrinal research concerns the development of legal "doctrines" via an analysis of legal rules.[81] Legal rules within statutes and cases or sources of law cannot offer a complete statement of the law in any given situation in the common law jurisdictions. This can only be determined by applying the appropriate legal rules to the facts of the situation in question. By using legal doctrines, this eases the process of selecting the rules to apply in a specific situation.[82] These are methodical constructions of the law in particular contexts, which clearly identifies any obscurities within rules. These rules are categorised and structured in a logical and coherent manner, and their relationship to other rules is explained. Therefore, doctrinal research methods are regarded as the study of legal texts, and thus are often described colloquially as black-letter law.[83] In short, doctrinal legal research focuses on how legal doctrines through the analysis of legal

[80] Faisal Fasih, 'An Introduction to Planning and Designing in Legal Research' (2010), 1-12.
[81] Terry Hutchinson and Nigel Duncan. "Defining and describing what we do: Doctrinal legal research." Deakin L. Rev. 17 (2012): 83.
[82] Paul Chynoweth, 'Legal research' Advanced Research Methods in the Built Environment, Wiley-Blackwell, (2008), 28-38.
[83] Morris Cohen and Kent Olson, *Legal research in a nutshell* (West Academic 2016), 26.

rules are formulated, and this reflects the focus of this research. The use of doctrinal legal research in this thesis is justified for the following reasons.

In answering the research questions, this thesis considered relevant company law and CSR provisions in the UK and India to determine whether these laws have been, or are likely to promote CSR principles for Kuwait (see chapters 2, 4 and 5), as well as examining regulatory theories in these respected countries to help identify regulatory weaknesses (see chapter 3), and provide solutions for Kuwait (see chapter 6).[84] This thesis has undertaken both doctrinal legal research and a comparative study. This research intends to systemise the relationship between a number of relevant rights, duties, obligations and responsibilities to answering the research questions. This systemisation is achieved by undertaking not only doctrinal legal research and a comparative study, but also adopting a conceptual analysis approach to a number of key concepts that are identified in the thesis.[85]

This research also employs a comparative methodology, since two or more things are compared with the aim of determining a given outcome based on what is being compared.[86] In the context of this research, a comparative methodology is used to compare relevant company law provisions in the UK and India to determine whether these laws have been, or are likely to promote CSR principles, as well as examining regulatory theories in these countries. Therefore, a series of literature from the UK and Indian context has been compared in order to answer the research questions. Since this

[84] Osuji. (n 5), 4-5
[85] Chynoweth. (n 82), 28-38.
[86] C.C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (University of California Press 1989), 1.

thesis examines UK and Indian company law provisions, the comparative methodology is justified.[87]

To provide an appropriate structure, focus and definitive research direction in this potentially wide-ranging CSR inquiry, a comparative UK – India Companies Act assessment is developed. Each Act makes specific reference to CSR stakeholder principles. For this reason, these different legislative approaches to CSR promotion are an excellent commencement point from which the research questions can be more effectively analysed. This ultimately supported the comparison of the Kuwait case with the analysed UK and Indian CSR provisions, in order to find a middle ground of the ideal CSR regulatory model to be adopted for the country.

This research uses inductive reasoning to answer the research questions since decided cases, statutes, commentaries, academic articles and other publications are considered to form a critical conceptual analysis of these particular sources. This reasoning is based on McKercher's[88] suggestion of a "concept-by-concept, proposition-by-proposition" approach. For that reason, this research critically examines UK and Indian law aligned with CSR principles, examining regulatory theories in both the UK and India to identify regulatory weaknesses, and provide solutions to such weaknesses using doctrinal legal research, comparative analysis and conceptual analysis.

Both primary and secondary sources have been investigated as part of this research. Given the analytical nature of the study, primary sources include legislation,[89] case law,[90] regulations and government reports. Primary

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[87] Ibid.
[88] M.A. McKerchar, *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters/Lawbook Company 2010), 360.
[89] *Companies Act 2006*, *Environment Act 1995*, *Corporate Manslaughter and Corporate Homicide Act 2007*, *Hazardous Waste (England & Wales) Regulations 2005*.
[90] *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch); *Regentcrest Plc v Cohen* [2001] 2 BCLC 80 (directors' duties). *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 HL*; R v Birmingham and Gloucester*

research provides the necessary facts and information required which may then be critically analysed. The study also relies on secondary sources, particularly journal articles and textbooks. This provides a variety of interpretations and views in relation to the topics raised which can then be compared and critically evaluated.

A difficulty in the research carried out for this thesis is the accessibility of Kuwaiti cases. The reports of the cases, some of which were known to have been decided, were difficult to find, which made it more difficult to obtain key information on those cases that are relevant to the thesis and its research contributions. Despite this limitation, this was expected owing to the lack of CSR provisions in Kuwaiti company law, and thus the author had to rely on cases that have some form of direct or indirect relevance to CSR and provisions of the Kuwaiti Companies Law 2016 that are suggestive of CSR relevance.

1.8 Structure

Chapter One: Introduction

This introduction chapter has set the background for the thesis and outlines the research problems, questions and objectives and the methodology adopted for the research.

Chapter Two: Companies and Corporate Social Responsibility: Principles and Concepts

This chapter defines the concept of CSR and why CSR principles are important in 21st century company law. It illustrates how CSR differs so dramatically from traditional company success standards that are largely (even exclusively) based on company profitability. It also explores the

Railway Company (1842) 3 QB 223 [1972] AC 153 HL; *A-G's Ref (No.2 of 1999)* [2000] QB 796; *R v Cotswold Geotechnical (Holdings) Ltd* [2001] ALL ER (D) 100 (May) (corporate criminal liability).

different ways that CSR has been conceptualised in the modern company law scholarship.

Chapter Three: Regulation Meaning, Theoretical Models and CSR

This chapter examines the meaning of regulation, the underlying principles and competing regulatory theories, as well as the different approaches to regulation and the existence of the narrow and broader views. This chapter looks at the different regulatory theories that commence with strict legislative enforcement. Thereafter, the identification and explanation of a continuum towards voluntary CSR compliance is provided. Particular attention is directed to Sunstein and Thayer's ''nudge'' theory, as a way to providing better understanding of whether companies are more likely to be ''better corporate citizens'' through rigorous enforcement, or ''comply or explain'' approaches.

Chapter Four: Corporate Social Responsibility Provisions in Company Law: Comparative Analysis of the UK and India

The aim of this chapter is to examine and compare the nature and role of CSR relevant to the Companies Acts of the UK and India. The respective Companies Acts of the UK and India provide a useful platform for a comparative study because CSR principles are expressly referenced in each enactment. This has helped to establish a middle ground for a CSR regulation model in Kuwait as discussed in Chapter Six.

Chapter Five: CSR Provisions in Company Law in Kuwait

The aim of this chapter is to examine the CSR-related provisions in Kuwaiti company law. The chapter starts by discussing institutional theory that forms the basis of CSR provisions in Kuwaiti Companies Law. Thereafter, the chapter examines the socio-economic and legal background of Kuwait.

The chapter also discusses CSR practices, as well as CSR and corporate governance in Kuwait in terms of the board of directors, CSR reporting/information disclosure, corporate constituencies, directors' duties and CSR objectives.

Chapter Six: CSR Middle Ground for Kuwait

This chapter builds on the previous chapters to propose a regulatory CSR model for Kuwait. The regulation model is based on the middle ground between the mandatory and voluntary CSR regulations adopted in the UK and India, respectively. This chapter first highlights the role of contextualism as one of the main contributions of this research, since it aims to develop a new CSR regulation model based on the findings, discussions and literature gaps identified from the contextual examples (existing CSR provisions in the UK and Indian company laws) examined in the previous chapters. The meaning and scope of the middle ground approach, together with the implications of this approach and its application to the Kuwaiti context are discussed with support from contextualist, legal transplant and institutional theories.

Chapter Seven: Conclusion

This chapter concludes the thesis by defining the legal vision for Kuwait and where the analyses of CSR approaches and practices in the UK, India and Kuwait (chapters 4, 5 and 6) are brought together to recommend new CSR provisions for Kuwait. There is firstly a reflection of the entire thesis, together with a summary of the research objectives. The chapter then moves to the legal vision for Kuwait and the final thoughts of the legal vision are deliberated.

Chapter Two: Companies and Corporate Social Responsibility: Principles and Concepts

2.1 Overview

This chapter examines Corporate Social Responsibility (CSR) and why CSR principles are important in 21st century company law. It demonstrates the existence of differences between CSR and traditional company success standards derived from company profitability. The chapter starts by providing a general discussion about companies as a business form and then moves to a discussion of company interests, which cover various models, including shareholder primacy, the enlightened shareholder principle and the stakeholder model. The chapter then moves to a discussion about the context of CSR in companies. This includes the meaning of CSR where a CSR definition is chosen based on a review of existing definitions of the concept, as well as the development of CSR. The chapter then discusses justification theories of CSR, including social permission theory, individual agreement theory, agency theory, stakeholder theory, stewardship theory, resource-based theory and firm theory. The chapter concludes by exploring the different ways that CSR has been conceptualised in the modern company law scholarship.

2.2 Companies as a Business Form

The advent of corporate governance from the stage of its weak beginning to becoming one of the primary subjects pertaining to the field of business management is closely tied up alongside the rise of both the corporate economy along with development of the industrial economic capitalism.[91] The industrial revolution helped in the complete transformation of the

[91] Paddy Ireland. "Corporate governance, stakeholding, and the company: towards a less degenerate capitalism." JL & Soc'y 23 (1996): 287-320.

industrial activity and scenario in England, which occurred in the early nineteenth century. The invention of new manufacturing technologies along with techniques in the form of steam power ensured that processing of raw materials in numerous industrial sectors increased manifold like the processing of raw materials between 1750 and 1850 for the cotton industry, which increased by two hundred times its original size during this period.[92]

The rapid expansion of markets in numerous industrial sectors enabled the small firms to gain from technological expansion and enabled them to co-exist along with big players in their segments. Furthermore, cheaper railway transport facilitation enabled the coming together of local markets to create a national market and promote urbanisation due to the tastes of individuals becoming standardised and guiding companies towards catering to the concept of mass production.[93] The market segment for the top hundred companies accounted for only ten per cent of the total market share indicating the advent, success and domination of the market via small firms in 1880.[94] This appears like an early example of self-regulation with apparent success. Therefore, this is a clear indication of the origins of economic sustainability through the establishment of small businesses working under the premise of mass production.

The end of the 19th century witnessed the promotion of standard consumer products in industries like tobacco, soap, flour, cotton, brewing and linoleum via the use of efficient marketing, which ensured that the local market tastes targeted via specialised and short productions could be

[92] L. Hannah, *The Rise of the Corporate Economy* (Taylor & Francis 2013), 9.
[93] Ibid.
[94] Ibid.

successfully replaced via longer, and capital intensive production, replacing small firms with large corporations.[95]

It was witnessed that in the late 19th century, this lengthy period for market expansion was ending and a great deal of companies who had invested in new technologies were witnessing continually falling demands along with overcapacity in their production.[96] The temptation to increase and attain more share in the market prompted companies to either reduce their prices or increase their production and both the methods were unstable and temporary measures. This raised a further economic sustainability issue since companies were forced to reduce their prices and production, which meant a loss of profit for companies that could contribute towards economic development. To tackle this problem, the merging of interests was an option, and it was carried out through merger of families by kinship or marriage for expansion or acquisition of the business capital and many business entities successfully grew via this method. In addition, taking public loans along with venturing new partnerships were other methods through which capital was raised. Hannah reflects that British corporations had to implement this concept (taking public loans along with venturing new partnerships), adopting either dilution of the ownership or using mergers for economic benefits.[97] Whilst the economic growth solution through mergers could improve the financial situation of companies, it raised another economic sustainability issue in regards to debts under the Limited Liability Act 1855.[98] This is because companies were forced to take out public loans in order to establish new business ventures, which could lead to bankruptcy and impact company shares owing to the company

[95] Ibid.
[96] K.P. Sauvant, *The Rise of Transnational Corporations from Emerging Markets: Threat Or Opportunity?* (Edward Elgar 2008), 3-15.
[97] Hannah (n 92), 1.
[98] Limited Liability Act 1855 (18 & 19 Vict c 133)

having no capital. This would not only impact shareholders' shares, but also the economy since it relies on thriving businesses to grow.

Initially, companies required parliamentary approval for setting up and they followed the ruling moral doctrine stating that the owners were completely accountable for the actions of the company.[99] The increase in the number of industries prompted the government to make exceptions for giving the parliamentary approval and it was evident that there was a need for extensive institutional development for producing stock exchange practices as well as the requisite legal infrastructure for the development of the different enterprises. The legal issue was the establishment of the 1844 and 1855 Acts, which enabled joint stocking options along with the limited liability company concept and it ensured continuous development for the manufacturing industry. This raised some issues related to corporate ethics. As is stated by Hannah,[100] both the state, along with the stock market, witnessed numerous fraudulent companies promising optimistic results by inflating prices. These ethical issues saw the birth of the speculative environment around the stock market due to new technologies as well as economies of scale.[101]

Public companies witnessed incorporation of numerous types of legal rights in the form of becoming a legal ''person'' capable of employing, contracting, suing and being sued.[102] It was evident from the 1844 Act that investors were liable for the debts towards the company if the company failed and this was a major disincentive. Therefore, the 1855 Act limited the liability of investors to the value pertaining to the made investments

[99] Rob McQueen. A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920. Routledge, (2016), 17-57.
[100] Hannah (n 92), 1.
[101] Ibid.
[102] RI Bob Tricker and Robert Ian Tricker. Corporate governance: Principles, policies, and practices. Oxford University Press, USA, (2015), 503.

and thus improved on the investor scenario making it more realistic and just.[103] This raised more ethical considerations as opposed to concerns as this was the early example of how mandatory compliance embedded in company legislation could incorporate elements of voluntary compliance through giving companies the legal right to engage in corporate activity freely, such as being able to employ workers.

The concept of limited liability for enforcing corporate action was greatly contested and was considered as a violation of the moral basis of the capital enterprise.[104] The limited liability argument was won in the courts because of the suggestion that it reassures small investors when investing in new industries, further stating it is the personal matter of an individual. This also ensures that the state cannot do anything if an individual is willing to contract with another based on limited liability with full knowledge.[105] However, Gamble and Kelly examined both arguments and found them in conflict with each other:

> ‘‘These two principles pulled in different directions. The first principle conceived the company as a little republic, a miniature political system in which its members, the shareholders, had rights to representation, information, and ultimate decision-making through the annual general meeting. The directors had to be accountable to those shareholders. The [second] laissez-faire principle by contrast was much less concerned with the rights of shareholders and much more with the possibilities provided for large-scale enterprise and

[103] Hannah (n 92), 1; Limited Liability Act 1855 (18 & 19 Vict c 133)
[104] Gamble, Andrew, and Gavin Kelly. "Shareholder value and the stakeholder debate in the UK." Corporate Governance: An International Review 9.2 (2001), 110-117.
[105] Ibid.

> managerial autonomy, and the rise of sites of economic power which were independent of the state ".[106]

As the shareholders are the owners in a company, the company therefore has a legal responsibility along with their directors possessing a fiduciary duty to act in favour and the interests of shareholders, but managers possess no such obligations being mere agents to shareholders.[107] This is one of the most important principles of governance, which is based on the shareholder model because the consideration of shareholder interests ensures that a company will maximise shareholder value to ensure the survival of the company.[108] Therefore, the shareholder model is the ideal strategy for good corporate governance since it promotes social responsibility in companies.

The development pertaining to the second principle involved developing the corporate economy to ensure that public investments possessed limited liability but it was also evident that it was completely reliant on managers for the development of the business owing to managerial autonomy, meaning that managers had the freedom and power to make company decisions. Thus, it was evident that establishing shareholder value was based on managerial autonomy and not on shareholder democracy, which in turn led to providing corporate governance in terms of public policy but it was non-existent for a majority of the 20th century.[109] It is further noticeable that the public policy as an issue only rose to its prominence when the concept of managerial autonomy was taken to excess and this highlighted that its consequences were against the

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[106] Ibid.
[107] Letza, Steve, and Xiuping Sun. "Philosophical and paradoxical issues in corporate governance." International Journal of Business Governance and Ethics 1.1 (2004), 27-44.
[108] Daniels Fund Ethics Initiative. The Debate over the Shareholder Model of Corporate Governance.(2013), 1-2.
[109] Gamble and Kelly (n 104), 110.

interests of the public.[110] This raised the issue of business ethics and limited liability because companies under the Limited Liability Act 1885[111] appeared to encourage and prioritise managerial autonomy over shareholder value, which in turn restricted shareholders' rights to express themselves in the company.

The way the financial system in England was structured weighed against the concept of share ownership. This raised a number of issues related to business ethics and regulation because the new legal framework for companies also included the advent of the market for corporate control as a tool for discipline management along with safeguarding shareholder interests, and thus demonstrated the reason behind the government adopting this route.[112] According to Gamble and Kelly[113], the concept of the shareholder model was not because of the new legal framework for companies or the separation of control from ownership, but it was because of the hostile takeover era in the UK. The embedding of the shareholder model in management, as well as organisational implications, clearly indicate that managers being the shareholders' agent has a fiduciary duty towards acting in their own interests. Therefore, this is an example of early voluntary compliance in the UK owing to the transition of mandatory managerial autonomy to the consideration of protecting shareholder interests and freedoms.

According to Charkham[114] the four primary points from the 1855 Act that are still validated for the corporations in existence today are that corporations can accumulate investments from a variety of investors. This owes to the limited liability of investors, ensuring the capping of their

[110] Ibid.
[111] Limited Liability Act 1855 (18 & 19 Vict c 133)
[112] Gamble and Kelly (n 104), 110.
[113] Ibid.
[114] J. Charkham, *Keeping Better Company: Corporate Governance Ten Years On* (OUP Oxford 2005).

losses along with ensuring that the corporations remain active even after the original founders had left the company. This provides a means for leadership and necessitating the advent of processes for holding the leadership accountable for steering company assets. According to Tricker, it is "one of the best designed systems ever",[115] since it is termed as one of the primary political and legal innovations of the 19th century.[116]

The concept of purchasing shares by the public leading to the restructuring and change in control of businesses was another concept apart from limited liability, along with expansion and technological possibilities, that gained prominence. Chandler[117] discusses such change and how this supported corporations in the US. Centralised companies replaced the multi-unit companies, and growth in population along with the technological advancement ensured complexity in the production processes increased and the existing methods were unable to control the increase of the flow of materials through them. The use of managers as an administrative control for tackling these issues was adopted but more expansions and growth in the business made the processes more complex, giving rise to control and management functions like "professional" managers for each class and resource for better functioning of the business. According to Chandler, their importance rose to a level that "they assumed command in the central sectors pertaining to the American economy".[118] By the 1950s, the concept of the managerial firm had gained prominence as a standard form of business. Chandler[119] further argues that Britain too witnessed similar changes but later, owing to relative backwardness and due to the conservative nature of British corporations

[115] Tricker and Tricker (n 102), 503.
[116] Gamble and Kelly (n 104), 1.
[117] Chandler Jr, Alfred D. The visible hand. Harvard University Press, (1993), 484.
[118] Ibid.
[119] Alfred D Chandler. "The growth of the transnational industrial firm in the United States and the United Kingdom: a comparative analysis." The Economic History Review 33.3 (1980): 396-410.

and their interests to ensure family representations on the boards of publicly listed corporations.[120] These legal developments in the UK further support the incorporation of voluntary compliance in the UK legal framework owing to business ethical considerations, such as shareholder democracy. Remaining with the idea of company interests, the next section discusses several theoretical approaches to company interests.

2.3 Company Interests

Theoretical approaches that seek to define interests in a company are important, as they provide the basis for the various theoretical debates as to the method and form of CSR to adopt later in the chapter. The goal of this analysis is to understand the foundation of company interests from the perspective shareholders who are also stakeholders of a company with their own personal interests and visions towards a company. There are three main theoretical approaches to interests in a company, including shareholder primacy, enlightened shareholder value and the stakeholder model.[121] Therefore, the purpose of analysing these models is to understand the philosophy behind company interests and the role of shareholders and their company interests.

2.3.1 Shareholder Primacy

The shareholder primacy theory holds that shareholders' interests should be prioritised and assigned first relative to other stakeholders, as this gives shareholders the power to mediate directly in corporate decision-making.[122] Berle, who was the first to develop the theory, argued that the management of a corporation could only be held accountable to

[120] Thomas Clarke. "Theories of corporate governance-the philosophical foundations of corporate governance." Routledge (2004): 355-357.
[121] Sabri Boubaker, Bang Dang Nguyen, and Duc Khuong Nguyen Editors, Corporate governance: Recent developments and new trends (Springer-Verlag Berlin and Heidelberg 2012), 416.
[122] Denise Wallace, Human rights and business: A policy-oriented perspective (Brill - Nijhoff 2014), 150.

shareholders.[123] Dodd responded that corporations as economic institutions have "a social service as well as a profit-making function", and directors "should concern themselves with the interests of employees, customers, and general public".[124] However, Berle responded by saying the problem with the managers being accountable could be resolved by giving them more discretion and also that it is not realistic to make managers accountable to stakeholders.[125] Therefore, the problem with the shareholder primacy theory is that it prioritises maximising shareholder profits over social responsibility and other legal obligations. This means that the company has no desire to consider the wider interests of stakeholders and only focus on their own personal interests, which in this case is maximising profits.[126] This in turn creates a negative image towards the company.

The shareholder primacy model is different from other models like team production and the director primacy theory since it argues that shareholders as opposed to the board of directors.[127] However, the shareholder primacy and director primacy theories do agree with the notion that the goal of corporate governance is to maximise shareholder wealth.[128] Lucian Bebchuk defended the notion of shareholder theory and addressed criticisms from other scholars who argued that insulating directors from shareholder power is the best course of action:

> "Although insulation advocates often lump them together, there are two different mechanisms by which shareholder pressure allegedly leads to long-term costs...I mean the first claim that short-term activists call for

[123] Adolph A. Berle, Corporate Powers as Powers in Trust, 44 Harvard Law Review 1049 (1931), 1148.
[124] E M Dodd, Jr., For Whom Are Corporate Managers Trustees? 45 Harvard Law Review 1145 (1932), 1156.
[125] Berle (n 123),1148-1150.
[126] S. Wen, *Shareholder Primacy and Corporate Governance: Legal Aspects, Practices and Future Directions* (Taylor & Francis 2013), n.p.
[127] Ibid.
[128] You Jeehye. Legal perspectives on corporate social responsibility: Lessons from the United States and Korea. Springer, (2015), 42-63.

> actions that bring profit in the short term but reduce value in the long term, as short-sighted activists claim...an additional claim that fear of shareholder intervention (or even removal by shareholders) in the event that management fails I call this requirement a counterproductive liability requirement"[129]

Bebchuk then proceeded to consider various empirical studies relevant to the claims and concluded that

> "In general, the analysis of publicly available share price data does not confirm the myopic activists who claim that the intervention of the activists worsens the long-term position of the shareholders of the target companies...Similarly, the claim of counterproductive accountability made by advocates of isolation is not supported by empirical evidence. On the contrary, available evidence supports the view that existing or higher levels of insulation of boards reduces their cost in both the short and long term"[130]

Thus, Bebchuk put forward a strong argument in favour of the primacy of shareholders as a better regulatory model than the theory of stakeholders controlling the corporation.[131] However, Usha Rodrigues noted that the shareholders themselves cannot run the corporation, otherwise they lose the advantages of separation of ownership and control.[132] Steven Bainbridge also noted that at the most basic level, the mechanical difficulties of reaching consensus among thousands of decision-makers prevents shareholders from playing an active role.[133] Thus, the priority goal

[129] Lucian A Bebchuk, 'Myth That Insulating Boards Serves Long-Term Value, The' 113 Colum L Rev (2013), 1637.
[130] Ibid.
[131] Margaret M. Blair and Lynn A. Stout. "A team production theory of corporate law." Corporate Governance. Gower, 2017. 169-250.
[132] Usha Rodrigues, 'Conflict Primacy Model of the Public Board' U Ill L Rev, (2013), 1051.
[133] Stephen M. Bainbridge, Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship, Cornell L. Rev. 856 (1997), 82.

of maximising shareholders' equity is subject to the same criticism as that of director primacy.[134] Moreover, according to the theory "Shareholder versus Stakeholder", the norm of maximisation of shareholder wealth reflects mandatory CSR in the regulatory plan. This is because a self-regulation or mandatory CSR model prioritises and reports shareholder interactions and interests, which affects the policymaking process through issues of corruption, social norms, injustice and integrity.[135] However, other theories such as the enlightened shareholder principle contradict this notion by stating that shareholder wealth should be prioritised above all else.

2.3.2 Enlightened Shareholder Principle

The enlightened shareholder value theory runs contrary to the view that shareholders' interests are the sole and most important interest in the company. It conceptualises that, "with a long-term orientated focus, firms can achieve sustained growth and profit, if they advocate attention to primary stakeholder interest."[136] The "enlightened shareholder value" approach to management responsibility and corporate purpose was endorsed by the British government in the UK Companies Act 2006[137] by introducing new statutory provisions concerning directors' duties to act in the best interests of their company.[138] One such provision is Section 172 of the UK Companies Act 2006.

The UK´s common law legal position was based on the primacy of the company's shareholder value,[139] what one might call the "primacy theory."

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[134] Lucian Arye Bebchuk, 'The case for increasing shareholder power' Harvard Law Review, (2004), 833.
[135] Mathis Arno. "Corporate social responsibility and policy making: what role does communication play?." Business Strategy and the Environment 16.5 (2007): 366-385.
[136] P. M. Vasudev and Susan Watson (eds), Corporate governance after the financial crisis (Edward Elgar Publishing 2012), 68.
[137] UK Companies Act 2006 (c.46).
[138] J. J. Du Plessis and others, Principles of contemporary corporate governance (2nd edn, Cambridge University Press 2014), 46; Victoria Krivogorsky, ed. Institutions and Accounting Practices After the Financial Crisis: International Perspective. Routledge, (2019), n.p.
[139] *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286; see also *Hutton v West Cork*

It is arguable that section 172(1), expressed as the "enlightened shareholder value", differs significantly from the common law position, since Section 172(1) promotes the success of a company for the benefit of all its members contrary to the duty of directors to act in good faith in the best interests of the company, which has an element of objectivity.[140] According to Gower and Davis, section 172 is an improvement on the common law, but it is rather modest.[141] However, it was found that this section only refers to the existence of a pre-existing law.[142] Although this decision was challenged as not reflecting the correct legal position, it points to the divergences underlying this area.[143] Nonetheless, it has been contended that section 172(1) is in line with the Organisation for Economic Co-operation and Development (OECD) Principles on Corporate Governance which emphasises, amongst other things, cooperation between the corporation and stakeholders in creating wealth, and that the full import of such accord will come into effect upon directors' internalisation of the section.[144] Therefore, Section 172(1) is considered a significant improvement, as among other things, the directors will now take into account the interests of a wider range of stakeholders than had been the case previously. However, it would be difficult to argue that this section fully replicates the "dual consideration theory" that characterises a large number of continental European countries, in particular the German model of joint decision-making, which takes into account the interests of both shareholders and stakeholders in management decisions.[145]

Rly Co [1883] 23 Ch D, 654.
[140] UK Companies Act 2006. S.172(1).
[141] Paul L Davies, Gower & Davies: the principles of modern company law, (Sweet & Maxwell 2008), 1108
[142] Ibid.
[143] Robert Goddard, 'Directors' Duties' (2008), 468.
[144] Luca Cerioni, 'The Success of the Company in s. 172 (1) of the UK Companies Act 2006: Towards an 'Enlightened Directors' Primacy?'' 4 Original Law Review, 8.
[145] Ibid.

Of course, directors who contribute to the success of the company for the benefit of all its members should consider: the possible consequences of any decision in the long term; the interests of employees; the interests of suppliers, customers and others; the impact of their activities on the environment; the need to maintain high standards of conduct; and the need for integrity among members of the company.[146] It has been established that the stakeholder interest reflected in this subsection does not correspond to the shareholder interest in any way. This is due to the fact that shareholders mainly seek to make a profit, while stakeholders go one step further and get along with other interests, such as the environment, employee welfare and other social norms, and not only profit.[147] Rather, directors should take into account the interests of stakeholders if such actions would contribute to the success of the company as a whole.

In accordance with the norms of common law, directors may take into account the interests of stakeholders if it is in the interests of the company in general. This was illustrated by the *Hutton v West Cork Railway Co*. case, which held that "the law does not provide that there should be no cakes and ale, but there should be no cakes and ale, other than those that are necessary in the best interests of the company."[148] Therefore, this goes back to the point that companies should not only consider profit, but rather other interests that benefit the organisation, and in the view of CSR, social interests, such as employees' well-being.

Stakeholders' interests may seem better protected under section 172, however, the shortcomings of section 172(1) becomes more apparent

[146] Companies Act 2006, s 172(1) (a-f).
[147] Davies (n 141), 1258.
[148] *Hutton v West Cork Rly* [1883] 23 Ch D 673 (per Bowen LJ).

when the question arises whether stakeholders can directly safeguard their interests. Consequently, it is assumed that, in addition to shareholders, other stakeholders are not able to safeguard their interests as set out in this section.[149] Similarly, shareholders who make claims on derivative financial instruments (investment tools), such as bonds, interest rates, stocks and currencies on behalf of the company must obtain court approval,[150] and face other (almost insurmountable) obstacles.[151] The above deficiencies have raised questions as to whether a large number of shareholders and stakeholders are better protected under section 172 than has been the case previously. It has been argued that the failure of interested parties to enforce the provisions of section 172(1) could directly result in the section being unlikely to be the subject of litigation.[152] It can be argued that the empowerment of direct stakeholders may lead to stressful and onerous actions against directors. However, an obligation is only useful under the law if it is enforceable.[153]

Encapsulating what is commonly referred to as CSR in section 172(1) is a giant step in law making. However, as already noted, shareholder-oriented corporate governance, as in the case of section 172(1), may not be fully compliant with CSR requirements.[154] It is argued that shareholders are considered to be enlightened and consider CSR issues.[155] This suggests that shareholders not only have financial interests, but non-financial interests as well, such as considerations for social well-being and protecting the environment.

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[149] Robert Goddard, 'Directors' Duties' 12 Edinburgh L Rev 468 (2008).
[150] Companies Act 2006, ss 261-262.
[151] Andrew Keay and Joan Loughrey, 'Derivative proceedings in a brave new world for company management and shareholders' Journal of business law, (2010), 151.
[152] Andrew R Keay, *Directors' duties* (2014), 1.
[153] Peter Loose, et al. The company director: powers, duties and liabilities. Jordans, (2000), 25-27.
[154] Amiram Gill. "Corporate governance as social responsibility: A research agenda." Berkeley J. Int'l L. 26 (2008), 452.
[155] Bill Perry and Lynne Gregory, 'The European Panorama: Directors' Economic and Social Responsibilities 20 International Company and Commercial Law Review, (2009), 25.

Perhaps as represented, group members will only file lawsuits if the directors do not act in good faith to promote the success of the company in the interests of all its members and if they do not act in good faith between them,[156] instead of filing lawsuits to protect the interests of stakeholders. If the above is possible, it means that Parliament has developed a right without a remedy that would be rejected by the law.[157] As one commentator noted, it appears that the legislators in section 172(1) mistakenly incorporated the principle of shareholder value into the purpose of companies.[158] This is inevitable, as the interests of stakeholders remain subordinate to the interests of shareholders.

Members of the company will be able to assess compliance by members of the board of directors with the provisions of Section 172(1) when applying for a review of the company's operations.[159] Although the business review has now become part of the financial statements, the contours of what constitutes an ideal business review remain vague and subject to manipulation by directors.[160] Indeed, there have been hypotheses that directors may adopt a cynical approach to the interests of stakeholders by adopting a mechanism to comply with the business review regime.[161]

In short, according to CA 2006, the sole responsibility of management is to protect the interest of shareholders, but they are required to pursue that interest whilst taking into account any long-term effects as well as considering the interests of employees, suppliers and other stakeholders

[156] Companies Act 2006, s 172(1)(f).
[157] Deryn Fisher, 'The Enlightened Shareholder: Leaving Stakeholders in the Dark- 20 International Company and Commercial Law Review, (2009), 10.
[158] D Attenborough. "How Directors Should Act When Owing Duties to the Companies." Shareholders: Why We Need to Stop Applying Greenhalgh 20.10 (2009), 339.
[159] UK Companies Act 2006 S.417(2).
[160] Michael Page. "Business models as a basis for regulation of financial reporting." Journal of Management & Governance 18.3 (2014): 683-695.
[161] Charles Wynn-Evans. "The Companies Act 2006 and the interests of employees." Industrial Law Journal 36.2 (2007): 188-193.

both externally and internally.[162] As per Section 172 of the UK Companies Act 2006, management have certain obligations, which require ‘‘high standards of business conduct”. [163] For example, a fundamental issue in corporate governance is the role of directors as trustees,[164] and the Dodd-Berle debate sheds some light on this issue. Dodd felt that directors must act for the community and Berle believed that they must act for shareholders. Despite Dodd winning the debate through Berle conceding to the idea that social fact and judicial decisions had gradually come to support Dodd's overall point of view against strict fiduciary duty, under Section 172 of the UK Companies Act 2006, the Act is viewed as a shareholder-driven approach in which directors are obliged to benefit its members through promoting corporate success.[165]

However, one cannot rule out other matters like employee interests,[166] in addition to the effects of corporate actions on the environment and society.[167] However, the interests of overall members or shareholders are primary in the event of promoting organisational success. Therefore, a director according to the CA 2006 acts as an agent for shareholders, and it is their individual responsibility to act on their own behalf.

The aim of the statute is to ensure short-term as well as long-term sustainability of the business and at the same time ensure that the corporations make a profit for the benefit of its shareholders.[168] The focus is on the pursuance of the shareholder interest but not at the expense of

[162] Virginia Harper Ho, "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder - Stakeholder Divide, 36 The Journal of Corporation Law 59-112 (Fall 2010), 62.
[163] Vasudev and Watson (n 136), 79.
[164] Berle (n 123),1148-1150.
[165] UK Companies Act 2006 s172(1).
[166] Ibid.
[167] Ibid.
[168] Berle (n 123), 1148-1150.

wider stakeholders.[169] To provide insight into the wider stakeholders, there is a need to explore the stakeholder model.

2.3.3 Stakeholder Model

The stakeholder model addresses the moral values of managing an organisation. The stakeholder theory argues that employees, customers, suppliers, financiers, communities and governmental bodies have an impact on the company and as such, their interests are important. Stakeholders are key assets to a company, and it is the company's duty to prioritise their needs to increase shareholder value. The stakeholder theory tries to define specific stakeholders of the company and examines how the executives assess these stakeholders.[170] Freeman[171] is generally considered the founding father of the stakeholder theory, owing to the many publications and books that have credited him with this title. However, more recently Donaldson and Preston[172] have contributed significantly to this theory. The authors state that the stakeholder theory has certain distinct features that are mutually supportive, such as "descriptive, instrumental, and normative".[173]

The descriptive approach reflects firms' characteristics and behaviours, including the nature of the firm, ways they are managed, how the board of directors deliberate organisational constituencies, and how managers think about managing.[174] The instrumental approach, on the other hand, aims to identify the existing connections between the management of stakeholder groups and the accomplishment of common corporate goals, such as

[169] Berle (n 123), 1148-1150.
[170] Mark Bevir, Encyclopedia of Governance (Sage Publications 2007), 873.
[171] R. Edward Freeman. Strategic management: A stakeholder approach. Cambridge university press (2010), 52-81.
[172] T *Donaldson & L Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications". Academy of Management Review (1995) 20 (1), 65–91.*
[173] Ibid.
[174] Ibid.

increasing profitability and organisational efficiency using empirical data. Lastly, the normative approach scrutinises corporate functionality and identifies the "moral or philosophical guidelines for the operation and management of the corporation".[175] In the view of Donaldson and Preston, the normative approach is the core of the stakeholder theory.

Despite the popularity of the stakeholder theory, as well as the above features helping to better examine the stakeholder theory and shed some light on its most prominent characteristics, there are distinct problems with the theory.[176] Key[177] argues that the theory lacks specificity, meaning that it cannot be operationalised to facilitate scientific examination. Another criticism is that the theory provides no decision-making criteria to support corporate governance, and is a vacuous theory that gives an unrealistic view of the way firms operate.[178] Despite the fact that some of these criticisms are to some extent correct, the real issue is that there are so many variations of the stakeholder theory, thus making it highly difficult to understand. Therefore, viewing stakeholder theory through a CSR lens may help to provide more insight into the theory. However, there is a need to first define CSR, and thus the next section provides insight into the term.

2.4 Meaning of CSR

At the root of CSR is the social contract between different players in a specific community, and in the case of CSR, business and society owing to the idea that social players, such as its stakeholders should be considered and treated accordingly, as opposed to merely focussing on profit.[179] This is important because the current study aims to compare the legal models

[175] Ibid.
[176] Susan Key. "Toward a new theory of the firm: a critique of stakeholder "theory"." Management decision 37.4 (1999): 317-328.
[177] Ibid.
[178] Ibid.
[179] Jean-Jacques Rousseau. "The new encyclopaedia britannica." (2003): 938-942.

of the UK and India with CSR, in an attempt to provide a more robust approach for the Kuwaiti legal model, which lacks CSR provisions. Rousseau, a French philosopher called this mutual relationship ''symbiosis'', meaning the co-existence of two parties in a mutually beneficial relationship.[180] The basis of this philosophy is that we co-exist in a society. There is generally a consensus about living freely but at the same time, pledging to do well for the benefit of the society we live in. This shows that CSR as a concept is not a modern-day phenomenon. It has existed for a long time and despite its long existence, the definition of CSR has long been the subject of debate.[181]

Balcerowicz argues that explaining and thus examining the meaning of CSR is problematic for two reasons: firstly, it is emotionally loaded and secondly, the vagueness of this expression given the lack of clear definitions of the CSR concept.[182] Bader explains that the lack of clear definitions has therefore led to companies creating their own definition of the CSR concept,[183] and thus the concept is perceived differently from company to company. In practice, this means that there are many different definitions of CSR.

However, the importance of CSR and its definition is more relevant than ever, as businesses are strong entities (given their ability to make profit, benefit its customer base via selling goods and services and providing employability) and some corporations are even wealthier compared to other countries they operate in and therefore are more powerful than the government itself. Thus, Anita Roddick stated, "in terms of power and

[180] Ibid.
[181] Dima Jamali (ed), Comparative perspectives on global corporate social responsibility (Business Science Reference 2016), 140.
[182] L Balcerowicz, 'Corporate Social Responsibility: Some Clarifications and Questions' in B Fryzel (ed) The True Value of CSR: Corporate Identity and Stakeholder Perceptions, (Palgrave Macmillan, 2015), 16.
[183] C H Bader, 'Why Corporations Fail to do the Right thing, 21 April (2014), 33.

influence, you can forget about the church, forget politics, sums up the importance of CSR. There is no more powerful institution in society than business... The business of business should not be about money; it should be about responsibility. It should be about public good, not private greed".[184] On the other hand, Holme and Watts used the following definition in the publication of "Making Good business" for the World Business Council for Sustainable Development:

> "Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."[185]

The above quotation reflects the quintessential aspects of CSR, such as social development, ethics, economic development and improving quality of life that all companies should consider in order to bring success and attract a positive company reputation. Bowen believes that the objective of the business is not to pursue profit but to further the values of the community or society they operate in.[186] Heald echoes this when he states that CSR is something that corporations recognise and that they have certain obligations to the society they serves, thus being socially responsible whilst focusing on making profit.[187]

Reflecting on the above definitions, the majority follow the same line of argument that corporations pursue the goal of profit maximisation while being socially responsible. The definition provided by the European

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[184] Roddick, A., Business as Usual: CSR quotes. Available: http://www.interpraxis.com/quotes.htm. Accessed: 30th Sept 2016.
[185] Philip Watts, Richard Holme and Development WBCFS. Corporate social responsibility: making good business sense. World Business Council for Sustainable Development, (2000). Available http://www.ceads.org.ar/downloads/Making%20good%20business%20sense.pdf Accessed: 30th Sept 2016.
[186] H Bowen, The social responsibilities of the businessman (New York, Harper1953) 6.
[187] M Heald, 'Management's Responsibility to Society: The Growth of an Idea' (1957) Business History Review, Vol 31, Issue 4, 375-378.

Commission CSR initiative includes social and economic concerns into the corporate strategy and the interaction with wider stakeholders on a voluntary basis.[188] In 2011, the European Commission provided a new and simpler definition of CSR as "the responsibility of enterprises for their impacts on society".[189] What these definitions indicate is that the key element behind the CSR initiatives is that corporations need to be responsible in terms of the impact their activity might have socially and environmentally in the community and therefore certain measures are undertaken voluntarily to reduce the long-term adverse impact.

There are certain key dimensions of CSR initiatives. According to Carroll, CSR "is composed of four parts: economic, legal, ethical and voluntary or philanthropic".[190] However, they have a common thread, which is the voluntary nature of CSR. Corporation also need to be socially responsible in conducting their business and agree that CSR initiatives should be done on a voluntary basis. Dahlsrud provided various definitions of CSR and found that there were 37 different definitions of CSR and 80% of these definitions have a voluntary dimension to them.[191] Therefore, there is little doubt as to the consensus that CSR needs to be voluntary.

Another term that also falls under the CSR umbrella is organisational responsibility.[192] Aguinis[193] defines organisational responsibility as the "context-specific organisational actions and policies that take into account stakeholders' expectations and the triple bottom line of economic, social,

[188] European Commission: Corporate social responsibility: A business contribution to sustainable development. (2002) Available at: http://ec.europa.eu/employment_social/soc-dial/csr/csr2002_col_en.pdf. Accessed on 30 September 2016.
[189] European Commission: Corporate social responsibility. What is CSR? (2016) Available at: https://ec.europa.eu/growth/industry/corporate-social-responsibility_en. Accessed: 30th Nov 2016.
[190] A Carroll, 'Corporate Social Responsibility: Will Industry Respond to Cut-backs in social program Funding? Vital Speeches of the Day, 49, 1983, 604-608.
[191] A Dahlsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions" (2006) Corporate Social Responsibility and Environmental Management Vol 15, Issue 1, 1-13.
[192] Herman Aguinis, *Organizational responsibility: Doing good and doing well* (Chapter 24) (2011), 855.
[193] Ibid.

and environmental performance." Enderle[194] argues that organisational responsibility is also possible, and more importantly, essential for start-ups, small, and medium-sized organisations if they wish to succeed in this modern globalised and hypercompetitive economy. Unlike the popular belief that only large and settled corporations should start CSR so that they can gain positive reception from the society and so that their investment in CSR pays them huge benefits in the form of tax exempt and goodwill, Enderle is a proponent of CSR from day one where organisations strive to make a positive contribution to society. Organisations with this determination will be less likely to engage in socially and environmentally damaging activities.

On reflection, Aguinis'[195] definition is preferred to others due to several reasons, one of which is the highly explicit nature of the definition. It specifically includes actions as well as policies into the concept of CSR while on the other hand, most of the definitions focused only on the actions. This definition includes CSR policies, which shows that CSR is a long-term phenomenon where policy makers ensure that in the future, CSR will not be neglected. The second reason for the selection of Aguinis' definition is that it categorically mentions all the key features of CSR, which are economic, social and environmental rather than narrating that CSR is only social in nature. While Carroll[196] also stated that CSR's nature is multidimensional, the focus was only on practices, not polices.

Narrating that CSR is a contextual approach clarifies a number of issues, for instance, that CSR may vary from case to case; i.e. in one case, opening a school may be considered a socially responsible deed, but in another

[194] Georges Enderle. "Global competition and corporate responsibilities of small and medium-sized enterprises." Business Ethics: A European Review 13.1 (2004): 50-63.
[195] Anguinis (n 192), 855.
[196] Carroll (n 190), 604-608.

context, opening a school could serve a means to merely generate profit. Despite this, there is a need to establish a definition of CSR. Therefore, Aguinis' definition ought to serve as a guideline which specifies what CSR can or cannot be. Without a definition, it would be difficult for organisations to run clear CSR campaigns and be even more difficult for society to appreciate an organisation's efforts, such as investing in charities, as well as investing in infrastructure improvements of roads, schools and smoke-free environments etc.

However, as a result of various corporate scandals as well human rights abuses, there have been more demands on governments as well as international organisations to have more regulatory frameworks dealing with CSR as not all companies have robust CSR initiatives in place.[197] For example, the 1984 Bhopal gas tragedy in India, which was a gas leak incident, claimed the lives of over 2,000 people. An additional 500,000 people in neighbouring shanty towns located near the plant in which the disaster occurred were exposed to high amounts methyl isocyanate (MIC) gas and other chemicals. This was considered the worst global industrial disaster in history.[198] Although there were dangerous amounts of MIC and chemicals in the atmosphere and around the shantytowns, very little effort was made by governmental bodies to address this environmental issue.[199] Because of the impact of negligence, the following laws were enacted: the Bhopal Gas Leak Disaster Act 1985 and the Environmental Protection Act 1986. However, the former Act resulted in the central government of India claiming the power to represent claimants in appropriate forums, and thus the end-result was not published until 20 years after the scandal. The

[197] Carroll (n 190), 604-608.
[198] Varma, Roli, and Daya R. Varma. "The Bhopal disaster of 1984." Bulletin of Science, Technology & Society 25.1 (2005): 37-45.
[199] Anand, Sandipa Lahiri. "Bhopal Gas Disaster and Dow Chemical: Need for CSR." (2005), 1-17.

company's motive was clear, they had no humanitarian feelings, and so a proper structured CSR approach was required to manage the case.[200]

Another example of a corporate scandal is the 2008 collapse of the investment bank Lehman Brothers, which caused financial terror and market meltdowns. Lehman had employed over 28,000 people from different parts of the world, including over 5,000 in the UK alone prior to its collapse. The failure of Lehman was down to high risk in a booming market, namely shifting from the safety of corporate finance, and mergers and acquisitions income to the risky world of proprietary trading. This proved to be its downfall.[201] A similar situation occurred with Northern Rock as two years prior to their downfall, they collaborated with Lehman Brothers to offer sub-prime loans for homeowners who could not afford the conventional mortgage. The same risk of investing in proprietary trading proved disastrous for the company when the credit crunch occurred in 2008. Since then, the property market has not been the same.[202] Therefore, this shows that any firm, irrespective of its power and size, can be easily reduced to the likes of losses and liquidity within a short period.

The Rana Plaza collapse is another corporate scandal, which involved the collapse of the Rana Plaza building in Dhaka, Bangladesh in 2013. The building was made up of five garment factories and the disaster killed over 1000 people and injured over 2000 people.[203] This is considered one of the worst industrial accidents ever recorded, and opened the world's eyes to the poor working conditions of Indian workers. The hazardous working

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[200] Ibid.
[201] Bavoso, V. *Explaining financial scandals: corporate governance, structured finance and the enlightened sovereign control paradigm*. (Cambridge Scholars Publishing 2015), 216-221.
[202] Ibid.
[203] International Labour Organisation. The Rana Plaza Accident and its aftermath. (2013). Available: https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm: Accessed: 23rd August 2019.

conditions and high risk of injury in the industrial sector of India, means that workers are likely to suffer owing to loss of earnings, which in turn will decrease their quality of life. Despite these losses from the victims of the collapse, no compensation was paid, which is in breach of the Indian labour code provisions on liability. However, small donations were given to the victims months after the disaster, albeit on a voluntary basis.[204] This is a good example of the Indian legal system failing to support its workers, in breach of not only labour law provisions, but also CSR provisions, since social well-being and philanthropic activity are key components of CSR.

Lastly, the 2015 Sports Direct labour scandal in the UK raised much controversy over workers being paid under the statutory national minimum wage (£6.70 per hr at the time).[205] Workers were only paid £6.50 per hour, as a means of increasing Sports Direct's profits. This meant that Sports Direct workers were among some of the poorest workers in the UK. This sparked further controversy over a string of criticisms at the company's warehouses where more than 80% of staff were on zero hours contracts. Workers receiving less than the minimum wage led to a significant number of redundancies.[206] This is another example of companies failing to commit to CSR, since the company had prioritised profit maximisation over the well-being of its workers, which projected a bad image for the company that led to many workers resigning and being made redundant.

In summary, there appears to be a clear imbalance between corporations who have good CSR initiatives and those who do not. This raises the

[204] Ibid.
[205] Simon Goodley and Jonathan Ashby. Revealed: how Sports Direct effectively pays below minimum wage (2015): Available: https://www.theguardian.com/business/2015/dec/09/how-sports-direct-effectively-pays-below-minimum-wage-pay: Accessed: 23rd August 2019.
[206] Ibid.

question as to whether CSR should be regulated or not. This requires a need to delve deeper into the development of CSR.

2.5 Development of CSR

The concept of CSR is by no means new and it has existed for centuries around the world albeit in a different guise.[207] The more established evidence of CSR can be seen in ancient Greece, which existed in the form of what was known as "Liturgy", which was a system where rich Greeks provided public service through providing finance to the state.[208] The idea was that the rich only acquired their wealth because the society around them facilitated it and therefore it was only fair to share their wealth with their society or community.[209] This is similar to the concept that corporations must consider their stakeholders when doing business. This concept came to the forefront and modern day CSR developed further in the 19th century when more and more businessmen began considering the impact their businesses had on society and started to think about social impact and not just profit.[210] Modern CSR can be attributed to the 19th century philanthropic activities of rich industrialists and entrepreneurs such as Robert Owen, Cadbury and the Lever brothers.[211] They provided facilities to improve their employees' standard of living, by setting up a worker village/manufacturing town where their workers were provided with improved housing and education for their children.[212] The logic was that happy people worked hard and therefore indirectly it benefited their company anyway in maximising profit. Brejning attributes this behaviour to

[207] Peter Utting and Jose Carlos Marques (eds), Corporate social responsibility and regulatory governance: Towards inclusive development? (Palgrave MacMillan, United Kingdom 2009), 106.
[208] Wayne Visser and Nick Tolhurst, The World Guide to CSR: A Country-By-Country Analysis of Corporate Sustainability and Responsibility (Greenleaf Publishing 2010), 45.
[209] Ibid.
[210] Güler Aras, and David Crowther, Global perspectives on corporate governance and CSR (Gower Publishing 2016) 132.
[211] Jo Littler, *Radical consumption: Shopping for change in contemporary culture* (Open University Press//McGraw-Hill Education 2007), 58.
[212] Tom Cannon, Corporate Responsibility – A textbook on business ethics, governance, environment, role and responsibilities, Pitman Publishing, London, 1994), 17.

distinct events that were taking place at the time: firstly, the UK was going through the industrial revolution and secondly, there was a rise in the religious values that contributed to the change in behaviour from these industrialists.[213]

The development of CSR in the USA stemmed from rather different circumstances to the UK, as it could be attributed to a sudden growth in capitalism. There was a general feeling that corporations were becoming rather powerful and as a result, they were carrying out their business practices in an anti-competitive manner, which was detrimental to society as a whole.[214] The demand on the government to limit the power of these corporations led to the enacting of certain regulatory measures such as banking regulations, consumer protection laws, child labour and workers' rights.[215] This also led to some industrialists changing their business strategy as social responsibility gained momentum. Industrialists such as John D. Rockefeller, Henry Ford and Andrew Carnegie took the decision to be more socially responsible and used their wealth for social purposes.[216] This was followed by many others, mainly due to the fear that failing to act in a socially responsible manner would result in the enactment of government regulation, which they wanted to avoid.

This trend continued and gained momentum until modern-day CSR began to appear in a recognisable form. J. M. Clark[217] wrote a paper where he claimed that "if men are responsible for the known result of their actions, business responsibilities must include the known results of the business

[213] Jeanette Brejning, Corporate Social Responsibility and the Welfare State: The Historical and Contemporary Role of CSR in the Mixed Economy of Welfare (Routledge, 13 May 2016), 2.
[214] Frederick WC and Post JE and Davis K, Business and society: corporate strategy, public policy, ethics. (McGraw-Hill, 1992), 56.
[215] R Farmer and D Hogue, Corporate Social Responsibility (Social Research Associates Inc, 1973), 110.
[216] Shashank Shah and VE Ramamoorthy, S*oulful corporations: A values-based perspective on corporate social responsibility* (Springer, India, Private 2014), 142.
[217] J.M Clark. (1916). The Changing Basis of Economic Responsibility. The Journal of Political Economy, 24, 209-229.

dealing, whether these have been recognised by law or not." What this means is that if individuals can be held responsible for their actions, so should businesses.[218]

However, a more comprehensive account of CSR came from Howard Bowen in 1953[219] when he outlined the five foundational ideas of CSR and referred to the "social responsibility of businessmen". In his writing, Bowen questions as to what expectations society can place upon businesses' social responsibility to society as a whole. In his definition of CSR, he refers to the obligation of businesses to be socially responsible and follow the values of society in pursuit of their profit.[220] Bowen appears to have a hybrid perspective on CSR since his definition incorporates both profit maximisation and social responsibility, which could be seen as paradoxical since companies often either prioritise profit maximisation or social responsibility.

Keith Davis followed a similar trend, he argued that businesses could not ignore their social responsibilities and that "with power came responsibility."[221] Davis observed that corporations have power and with power come certain responsibilities and when they are equal, any avoidance of social responsibility leads to the gradual erosion of social power.[222] He proposed that companies should involve themselves in actions, which are beyond the direct economic interests of the firm.[223] Walton confirmed this view when he stated that socially responsible behaviour might require the expenditure of resources without any guarantee of direct measurable economic return.[224] Walton's view

[218] Ibid.
[219] Bowen (n 186), 6.
[220] Ibid.
[221] K Davis, 'Can Business Afford to Ignore Social Responsibilities?' (1960) California Management Review 2, 70-76.
[222] Ibid.
[223] Ibid.
[224] Clarence Cyril Walton. Corporate social responsibilities. Wadsworth Publishing Company, (1967), 177.

therefore introduced into CSR one of its defining concepts, that it is voluntary in nature and for the first time there was some acknowledgement that although benefits of CSR might not be measurable, nonetheless it is important for businesses to be socially responsible.

In 1973 Davis[225] further extended the definition of CSR by setting out that the social responsibilities of business were those responsibilities that went beyond the direct economic obligations to shareholders or the legal responsibilities. Instead, he recognised that CSR was a responsibility distinct from those responsibilities arising directly from incorporation as a shareholder-owned corporation. The diversity of definition has meant that each definition stems from certain theories on why corporations need to have CSR. These theories are therefore examined below.

2.6 Justification Theories of CSR

There are several views on CSR, which are important to organisations as to why corporations have these socially responsible policies in the first place. CSR policies outline or show the world how a particular organisation conducts its business in a socially responsible manner and that it holds itself accountable to its stakeholders for any adverse effect it causes through its business activities to the community or the environment. The main issue of CSR policy is the measure of the impact of business on external stakeholders (individuals or groups who have interest or concern in something).[226] Interests include human resources, health and safety, environmental strategies, use of natural resources and impact on the external stakeholders such as the community they operate in, supply chain

[225] K Davis, 'The Case for and Against Business Assumption of Social Responsibilities, (1973) Academy of Management Journal 1, 312-322.
[226] Chandler and Werther (n 2), 1.

management, human rights practices and global environmental concerns.[227]

2.6.1 Social Permission Theory

The proponents of the social permission theory simply claim that corporations exist in society through permission of the society or permission of the state.[228] Den Uyl claims that because of this social permission, these corporations are obliged to consider the way they operate and the impact of their activities on possible stakeholders or "constituents" of the society.[229] Failure to carry out business according to stakeholders' wishes can mean that corporations may lose their societal acceptance and, therefore, it is in the stakeholders' best interests to ensure their business coincides with the interests of the society as a whole.[230] Adhering to society's best interests is essential to CSR as it demonstrates that a company has not only a financial obligation, but also a social obligation as well since it drives company success by listening to society or their customers and keeping their best interests at heart.

2.6.2 Individual Agreement Theory

Contrary to the social permission theory, Friedman[231] proposes the individual agreement theory, in which stakeholders voluntarily enter into exchange agreements rather than corporations seeking society's permission. As a result, these corporations only have to comply with the terms of the agreement with those particular stakeholders and do not have direct obligations to those who are not part of the agreement as long as

[227] Riley, J. Q&A - What are the main interests of business stakeholders? (2009). Available: https://www.tutor2u.net/business/blog/qa-what-are-the-main-interests-of-business-stakeholders. Accessed: 4th Sept 2019.
[228] James J Valone. "The New Crusaders: The Corporate Social Responsibility Debate." (1985): 384-424.
[229] Ibid.
[230] Taran, Zinaida, and Stephen Betts. "Corporate Social Responsibility and Conflicting Stakeholder Interests: Using Matching and Advocacy Approaches to Align Initiatives with Issues." Journal of Legal, Ethical & Regulatory Issues 18.2 (2015), 55-62.
[231] Milton Friedman. "The social responsibility of business is to increase its profits." Corporate ethics and corporate governance. Springer, Berlin, Heidelberg, (2007). 173-178.

no individual rights are violated in the course of business. According to Freidman, unlike human beings who have responsibilities, corporations do not as they are an artificial entity. The main responsibility of the managers of the corporations as employees is to the employer who are shareholders of the company and to the business as they wish whilst adhering to the rules and laws set by the state as well as society through ethical standards. According to Freidman, a corporate executive is an agent and shareholders are the principal, and like any agent, his duty is to follow the orders of the principal and act in the best interests of the principal.[232] Therefore if the corporate executive has his own moral views then they are "his moral views" and he spends his own money on such responsibilities and not that of his principal.[233] This view shows that CSR is at odds with profit maximisation.

Friedman states, "In a free society there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud." Friedman also urges caution in the event of executives of corporations as employees succumb to external pressure and dance to the whim of society, there is a danger that ultimately society will see that pursuit of profit by corporation is "wicked and immoral" therefore made to feel bad to do what they are set out do in the first place. This, he claims, should be avoided at all cost. It raises the question of whether Friedman's claims on social responsibility is detrimental to the interests of the shareholders because they are at odds with each other.[234]

[232] Ibid.
[233] Ibid.
[234] Friedman (n 231), 173-178.

The problem with Friedman's theory is that he fails to distinguish between moral responsibility and social responsibility. In addition, executives as agents are expected to obey the principal even if what they ask is questionable. Freidman's theory takes away the discretion from the executives, which may not be practical, and therefore his theory seems rather uncertain. Freidman does not say corporations should not take into account the moral views of society but only that it should not be at the expense of profit maximisation. The basis of his argument that corporations do not hold moral responsibilities is questionable in a modern society where the public are more astute than ever before about what they consume and buy, and where media actively scrutinises the actions of corporations. Failure to listen to society's views and failure to carry on business in a responsible manner may be highly detrimental to an organisation in terms of their survival. Therefore, in order to continue with the profit maximisation theory, it may be necessary to consider society's views and be socially responsible even if it means CSR is a strategic consideration for profit maximisation. The main tenet so far here is that corporations exist for profit and therefore these proponents are completely in opposition to any intervention by the state.

One of the foundations of this view is the idea that the impact of any framework that assigns managers responsibilities beyond simple profit maximisation has the effect of weakening the capacity of any group to ensure that the responsibilities of corporations are carried out efficiently and effectively. Friedman[235] argues that if managers' responsibilities are broadened beyond profit maximisation then they will undertake tasks for which they are not trained and this, according to Friedman, is socially and

[235] Friedman (n 231), 173-178.

politically corrosive and undermines the free market economy and the democratic values that CSR proposes to advance.

2.6.3 Profit Maximisation Theory/Agency Theory

The profit maximisation theory/agency theory is also crucial, since maximising profit is the main objective of all profit-based organisations. The proponents of this theory claim that corporations exist to make profit and therefore everything beyond that is secondary.[236] According to this view, the sole purpose of corporations is profit maximisation and this can be achieved despite the fact that there is separation of ownership and control of the corporation.[237] The profit maximisation is achieved through owners, i.e. shareholders ensuring that managers have a certain interest in making profit through offering share options etc. where shareholders interest and manager's interests coincide. The offering of shares does not have to be large but relative to their salaries and will mean that those who control the corporations' business care about profit just as much as shareholders do.[238] Therefore, this theory only focuses on profit and everything else seems secondary. Indeed, if the managers feel they need to carry out certain CSR policies, that should not be at the expense of the profit and instead only be considered if it helps them boost profit.

As explained in an influential book on the subject, the effort of corporate law is to control corporate constituencies and their conflicts of interest.[239] These conflicts are referred to in economic literature as "agency problems".[240] Corporate law and corporate governance literature define

[236] A C Fernandos, Corporate Governance: Principles, Policies and Practices? (Pearson Education, 2009), 46.
[237] Ibid.
[238] D. Begg, S. Fischer, R. Dornbusch, Economics, (5th Edition, McGraw-Hill, Maidenhead, 1997), 118.
[239] Reinier Kraakman. The anatomy of corporate law: A comparative and functional approach. Oxford University Press, (2017), 29.
[240] Michael C. Jensen, and William H. Meckling. "Theory of the firm: Managerial behavior, agency costs and ownership structure." Journal of financial economics 3.4 (1976), 305-360.

three generic agency problems.[241] The first agency problem relates to the conflict between the company's managers and its owners (being the shareholders).[242] Hereinafter referred to as the "manager-shareholder agency problem", such conflict exists largely in jurisdictions, which manifest diffused shareholding in companies. This is due to collective action problems and the resultant inability of shareholders to monitor the actions of managers. The second relates to the conflict between the majority or controlling shareholders on the one hand and minority shareholders on the other.[243] Such conflict, which is referred to hereinafter as the "majority-minority agency problem", is largely prevalent in jurisdictions that display concentrated shareholding where the interests of minority shareholders are significantly diluted. The third agency problem relates to the conflict between the owners and controllers of the firm (such as the shareholders and managers) and other stakeholders (such as creditors, employees, consumers and public), with many of whom the company may enter into a contractual arrangement governing their affairs inter se. This conflict, referred to hereinafter as the "controller-stakeholder agency problem" exists in both jurisdictions that have diffused shareholding as well as those that have concentrated shareholding, but its role is accentuated in those that have concentrated shareholding.[244]

The approach taken by agency theorists is that they claim that the sole obligation the corporations have is to their shareholders and as a result they have no other obligations but to ensure they maximise profit within

[241] Paul L Davies. "The board of directors: composition, structure, duties and powers." Paper on Company Law Reform in OECD Countries: A Comparative Outlook of Current Trends (2000), 1-29.
[242] Ibid.
[243] Ibid.
[244] Mark J Roe. "Political preconditions to separating ownership from corporate control." Stan. L. Rev. 53 (2000), 539.

the constraints of law. The key theorists of this view are Levitt and Friedman.

According to Levitt, corporations exist as they have certain functions but he does not view CSR as a moral obligation as he states that CSR is "morally neutral or amoral".[245] Levitt states that corporations, when they are carrying out their functions and following business strategy, are dictated to by their duty to society and do business within the constraint of law, which is itself considered as being socially responsible.[246] The premise of his argument is that state welfare, which includes people and the environment, is the obligation of society, not the corporations, and if the state wishes to protect certain aspects of the society, they need to have measures in place. Therefore, as long as corporations remain within the remit set by the state, they do not have any other responsibility than focusing on shareholder interests and profit maximisation. However, he also points out that the very integrity of corporations depends on how they respond to social climate and opinions and those which respond positively and embrace necessary change will survive and those who do not will not, due to the social backlash.[247] Therefore, if the changing society demands that corporations be "socially responsible" then that is what they need to do in order to survive.

However, Frederick,[248] Carroll[249] and Wood[250] have all sought to operationalise CSR and move it away from theoretical realms. Absent measurement tools, benchmarks, and methodological frameworks, the proposal that business enterprises have social responsibilities that are

[245] T Levitt. 1958, "The dangers of social responsibility", Harvard Business Review, 35(6), 41-50.
[246] Ibid.
[247] Ibid.
[248] W Frederick, 'From CSR1 to CSR2' (1994) Business and Society 33, 150-166.
[249] A Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct', 38 (Business & Society 1999), 268-295.
[250] D Wood, 'Corporate Social Performance Revisited' (1991) The Academy of Management Review, 16(4), 691-718.

integral to effective management cannot meet the challenge of profit maximisation orientations where actions are clear and measurable from a management perspective. The views of Frederick, Carroll and Wood seek to develop a concrete account of the nature, scope and source of the origin of CSR frameworks and methodologies, which are designed to facilitate the realisation of the values and principles defining the institutional organisational and individual management responsibilities.

Carroll[251] rejected the profit maximisation model and put forward a more inclusive view of CSR more akin to the earlier models, proposing that obligations to operate efficiently and profitably are a basic social responsibility, as is the obligation to obey the law. Carroll expressed CSR obligations not as matters that went beyond the basic obligations to shareholders but as including these obligations with a broader range of ethical, discretionary and voluntary responsibilities. This demonstrates a company's consideration for sustainability and philanthropic activity, such as donating to charity, which can be seen as a voluntary responsibility and looking out for the well-being and safety of employees as a discretionary and ethical responsibility.

Freeman[252] built on the concepts developed by Carroll. However, Freeman shifted the focus from shareholders to stakeholders, since corporations today refer to their non-shareholder stakeholders as anyone from employees and customers to governmental bodies and communities. The notion of stakeholder as developed by Freeman included not only shareholders, but also suppliers, customers, employees, their families, communities and the people that lived in them. This further demonstrates

[251] Archie B Carroll. "A three-dimensional conceptual model of corporate performance." Academy of management review 4.4 (1979), 497-505. .
[252] Freeman (n 171), 52-81.

a company's efforts towards the well-being of not only financial investors, but also other stakeholders who provide other incentives, such as product/service feedback, stock and community support.

2.6.4 Stakeholder Theory

Similar to the stakeholder model discussed in section 2.3.3, the stakeholder theory has contributed to the evolution of CSR in two very important ways. Firstly, it provided a theoretical framework for articulating the nature and the scope of the social responsibilities of corporations and, secondly, it identified ethics as an integral responsibility of management in aspects of corporate activity. Drucker[253] later developed the framework by arguing that CSR is not an appendage of management or a set of obligations that are obtained by virtue of acquired wealth, but rather an integral element of good management in its various dimensions.

In this view, CSR is a concept and function whereby corporations take into consideration the society's interests through being responsible for the impact of their activities on the likes of customers, suppliers, employees, shareholders, communities and other stakeholders, in addition to their environment.[254] This duty demonstrates the need for corporations to adhere to legislation and voluntarily take initiatives that will ultimately improve employees and their families, their local community and the overall well-being of society.[255] In short, CSR can now be seen as a function of the nature of the impacts that a given corporation's activities can have on the lives of those affected by such activities.

[253] P Drucker, 'The New Meaning of Corporate Social Responsibility' (1984) California Management Review 26 pp 53-63.
[254] Maimunah Ismail. "Corporate Social Responsibility and its role in community development: An international perspective." Journal of International Social Research 2.9 (2009), 199.
[255] Ibid.

The stakeholder theory moves away from the profit maximisation advocated by the agency theory by focussing more on corporate constituencies (stakeholders). Freeman[256] argues that executives need to consider their business strategies by taking into account other constituents such as employees, suppliers, the wider community and not just focus on shareholder interests.[257] The important tenet of the stakeholder theory is therefore that CSR goes beyond that prescribed by law and contract between the corporation and society and those corporations have obligations to wider stakeholders. The stakeholder theory has two key features, in that proponents believe that CSR measures adopted by corporations should be voluntary and therefore any policy that is required by law is not voluntary. The primary modus operandi of the stakeholder theory is thus to analyse those groups to whom a corporation should be responsible and embrace the notion that businesses should play an active role in the society in which they operate, and address the interests and concerns of parties who are affected by a firm's operation.[258] However, Donaldson and Preston[259] extend the stakeholder theory by including three mutually supportive dimensions (descriptive, instrumental and normative) to incorporate both the moral and ethical dimensions of the stakeholder theory to the profit maximisation theory as the basis for engaging in CSR as discussed in section 2.3.3. However, Jones[260] argues that corporations usually communicate with wider stakeholders that they trust and co-operate with and any business success is dependent on being honest and ethical. Practical examples of the stakeholder theory include promoting as

[256] Edward R Freeman and others, Stakeholder theory: The state of the art (Cambridge University Press 2010), 24.
[257] Ibid.
[258] R Wearing, Cases in Corporate Governance, (Sage Publications, 2005), 10.
[259] T Donaldson & L Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications' (1995) The Academy of Management Review, 20(1), 65-91.
[260] T M Jones, 'Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics' (1995) Academy of Management Review 20, 404-37.

much face-to-face interaction as possible among employees and governments maintaining goodwill for the future.

Owing to the varying perceptions in the previous empirical literature regarding CSR, stakeholder interests and corporate governance, there are a number of contrasting theories that attempt to justify the reasons for companies to engage in CSR and the relationship between CSR, corporate governance and stakeholders. [261] There are four key theories in the CSR and corporate governance literature, which are the principal-agent theory, strategic-choice hypothesis, conflict resolution hypothesis and product-signalling/differentiation hypothesis.[262]

The principal-agent theory refers to the over investment of CSR activities by company managers and directors as a means to establish their own personal reputation.[263] From the perspective of corporate representation in the stakeholder model, this demonstrates a lack of representation of stakeholders as directors use CSR investment for their personal gain as opposed to using the investment to benefit all stakeholders, e.g., profit maximisation.

The strategic-choice hypothesis theory can be seen as a situation in which a director chooses CSR activities as a means of garnering support from environmental and social activists.[264] From the perspective of the stakeholder theory, this is the opposite of the principal-agent theory in that directors make the corporate decision to prioritise social well-being and stakeholders' CSR interests (e.g. protecting the environment, investing in

[261] Maretno A. Harjoto and Hoje Jo. "Corporate governance and CSR nexus." Journal of business ethics 100.1 (2011): 45-46.
[262] Ibid.
[263] Amir Barnea and Amir Rubin. "Corporate social responsibility as a conflict between shareholders." Journal of business ethics 97.1 (2010): 71-86.
[264] Giovanni Cespa and Giacinta Cestone. "Corporate social responsibility and managerial entrenchment." Journal of Economics & Management Strategy 16.3 (2007): 741-771.

public services) over personal gain, such as enhancing their personal reputation or profit maximisation.

The conflict resolution hypothesis refers to companies using CSR activities to minimise conflict of interest between managers, directors, investing and non-investing stakeholders.[265] From the perspective of stakeholder theory, directors use CSR to make the corporate decision to resolve conflicts of interest among stakeholders in order to come to a middle-ground, e.g., some stakeholders may favour profit maximisation over social well-being and vice versa and CSR will be used to mediate between the two conflicts of interest that will satisfy both parties.

Finally, the product-signalling/differentiation hypothesis indicates that companies use CSR activities to demonstrate their product quality, particularly larger companies who operate in larger and more competitive markets.[266] From the perspective of the stakeholder model, this demonstrates that company directors will use CSR to project a positive brand image for the sake of the company and at the same time disregard other stakeholder interests. Although projecting a positive brand image is good, companies have to do this while considering the wider interests of their stakeholders who may also have similar interests to invest in brand recognition. This is another example of stakeholder misrepresentation as a result of directors using CSR to further their interests over others.

The above implications of CSR and stakeholder theory have raised several corporate governance issues regarding the relationship between CSR and stakeholders. These governance issues can be seen as examples of good

[265] Andreas Georg Scherer, Guido Palazzo and Dorothée Baumann. "Global rules and private actors: Toward a new role of the transnational corporation in global governance." Business Ethics Quarterly 16.4 (2006): 505-532.
[266] Oliver Falck and Stephan Heblich. "Corporate social responsibility: Doing well by doing good." Business Horizons 50.3 (2007): 247-254.

corporate governance or bad corporate governance, which have been identified in the aforementioned theories. Examples of good corporate governance were found in the strategic-choice and conflict resolution hypotheses. This is because these theories consider all stakeholder interests for the sake of organisational, social and even environmental well-being. Examples of bad corporate governance were identified in the principal-agency theory and the product-signalling/differentiation hypothesis because these theories were seen to protect the personal interests of only company mangers or directors as opposed to the wider stakeholder interests. Therefore, it can be deduced that the stakeholder theory incorporates both CSR and social irresponsibility from stakeholders, particularly directors who appear to abuse CSR activity for their own personal desires. This raises several criticisms of the stakeholder theory.

Criticisms of the stakeholder theory have been cited in several studies. However, Charles Blattberg, a political philosopher provides the most compelling criticism of the stakeholder theory owing to his nuanced approach to the theory. Blattberg[267] contended that various stakeholders' interests can either be "compromised or balanced against each other." He goes on to argue the stakeholder theory mostly focuses on negotiation as the main method of dialogue to deal with conflicts between stakeholder interests. As an alternative, Blattberg recommended conversation as this allowed him to defend what he referred to as a corporation's "patriotic conception" (the firms devotion to its stakeholders) in relation to the stakeholder theory.[268] Therefore, Blattberg's nuanced approach appears to give insight into the subtleties of stakeholder theory as opposed to the general issues of theory through criticising the art of negotiation as a

[267] Charles Blattberg. "Welfare: Towards the patriotic corporation." (2013), 1-12.
[268] Ibid.

mediating tool to resolving conflict between stakeholders, which helped him to devise this idea of patriotic conception.

2.6.5 Stewardship Theory

In contrast, the stewardship theory is another view put forward by Donaldson and Davis[269] as they claim that there is a moral obligation on the managers to "do the right thing" without regard to how such decisions affect firm performance. The theory is based on the idea that executives are not agents who just follow orders of shareholders. Instead, executives take on the collective responsibility for the good of both the organisation and society as a whole. Even if they do not have the ownership of the corporation, the stewardship theory argues that as stewards, managers take on the responsibility to carry out their obligations which is generally profit maximisation in a contentious manner. The equilibrium of that relationship is reached when managers' goals are in accordance with the interests of the stakeholders.[270] For example, a corporation may adopt a stewardship model for environmental reasons in which the corporation thinks that it should operate as a green-company in order to limit the environmental impact on the planet as much as possible. Other corporations could be keen supporters of animal welfare and animal rights by refusing to endorse any kind of product testing on live animals.[271]

In spite of the stewardship-based companies' consideration for social well-being, as well as moral and ethical considerations, they often find themselves under much scrutiny.[272] In the event of employees sensing that

[269] L Donaldson & J Davis, 'Stewardship Theory or Agency Theory: CEO Governance & Shareholder Returns' (1991) Australian Journal of Management 16, 1.
[270] A Krisnawati, G Yudoko and Y Bangun, 'Development Path of Corporate Social Responsibility Theories', (2014) World Applied Science Journals 30, 110-120.
[271] A Bondigas. Stewardship Theory of Corporate Governance. (2016) Available: http://smallbusiness.chron.com/stewardship-theory-corporate-governance-74073.html. Accessed: 2nd December 2016.
[272] Ibid.

the corporation is dishonest about their mission, it may lose trust or credibility, and ultimately damage its reputation.[273] A corporation might claim that it is socially responsible, but this could be merely an excuse to increase prices or promote inferior products. However, even those corporations who fulfil its mission may see a reduction in profits for the sake of engaging in CSR activities, such as corporate philanthropy. As soon as a corporation begins to grow, its stewardship may eventually decline if the founders are no longer present in the corporation to promote its mission.[274] Although a stewardship model appears to be highly subjective given that different corporations and their stakeholders will have differing moral and ethical standpoints, it can help to distinguish between those corporations that are socially responsible and those which are not.

In terms of CSR, the stewardship theory has demonstrated that managers are in favour of CSR and consider stakeholders' CSR interests, such as protecting the environment, donating to charity and animal welfare. Based on other CSR theories, there appears to be mixed perceptions of CSR among top management, such as directors and managers, each having their own perception of CSR, whether it be using CSR for personal gain or to protect the wider CSR interests of their stakeholders.

2.6.6 Resource-Based Theory

There is also a resource-based theory, in which the view of the firm differs from the previous theories of CSR in that this theory maintains that the organisation's distinctive resources, capacities and competences establish organisational performance and competitive advantage.[275] According to Hart, CSR policies that are environmentally friendly and focus on the

[273] Olivier Furrer. Corporate level strategy: Theory and applications. Routledge (2010), 264.
[274] Ibid.
[275] CK Prahalad & G Hamel, 'The Core Competence of the Corporation' (1990) Harvard Business Review 68(3), 79-91.

protection of environment show society that they are socially responsible which in return act as a resource to the corporation as it can give the corporation a competitive edge.[276] Similarly, McWilliams[277] argues that CSR policies working in conjunction with government policies could provide corporations a sustainable competitive advantage. Therefore, the resource-based theory refers to two types of CSR, which are environmental sustainability and economic responsibility. This is because governments and companies can work together and use CSR resources, not only for financial gain, but also for the sake of social well-being and protection of the environment, while generating profit and maintaining a good company image. This shows that the resource-based theory promotes collaborative CSR through governments and companies working together that share similar interests in sustaining social responsibility.

There has been some compelling academic debates about the resource-based view. The most prominent debate came from Priem and Butle[278] who critiqued Barney's[279,280] work on the resource-based view. Priem and Butle believe that the resource-based view is "tautological": in other words, redundant and self-verifying. This critique was based on Barney's definition of competitive advantage as a strategy that facilitates creating value according to resources that are considered valuable, and Priem and Butler argued that such a definition is "circular", and thus "operationally invalid".[281] Furthermore, Priem and Butler also argue that Barney's approach is not a theory directed towards a corporation, since different

[276] S L Hart, A Natural – Resource-Based View of the Firm, 1995. 4(5), 986-1014.
[277] A McWilliams & D Siegel, 'Corporate Social Responsibility: A Theory of the Firm Perspective' (2001) The Academy of Management Review 26(1), 117-127.
[278] Richard L. Priem and John E. Butler. "Is the resource-based "view" a useful perspective for strategic management research?." Academy of management review 26.1 (2001): 22-40.
[279] Ibid.
[280] Jay Barne. "Firm resources and sustained competitive advantage." Journal of management 17.1 (1991): 99-120.
[281] Priem and Butler (n 278), 22-40.

resource configurations can create the same value for not only corporations, but for its stakeholder as well, and in turn would not be a competitive advantage.[282] Other criticisms include a lack of focus on organisational capabilities, limited prescriptive implications in the theory (inflexibility) and retrospective causality issues, i.e., success potentially attributing to numerous reasons, such as unique resources, though the causality is often unclear.[283] In short, the resource-based view can be considered as a corporate network to explain the creation of superior individual corporate performance within that network. In terms of CSR, the perception of the resource-based theory promoting collaborative CSR and the creation of firm value through the use of CSR resources can be viewed as perhaps a CSR model that companies could follow to maintain company performance, while considering the wider interests of stakeholders and CSR activities that will project a positive image towards the company.

2.6.7 Firm Theory

Finally, the theory of the firm put forward by Baron claims that CSR as a strategy should be used to promote the corporation´s stance on being socially responsible, which in turn could be used to attract socially responsible consumers.[284] Therefore, CSR here is used as a strategy to gain competitive advantage. The theory thus assumes that managers try to maximise shareholder value and their outcomes are controlled by the stock market.[285] However, Feddersen and Gilligan[286] argue that activists and NGOs can play an important role in "reducing information asymmetry" in

[282] Ibid.
[283] Ibid.
[284] David P Baron. "Corporate social responsibility and social entrepreneurship." Journal of Economics & Management Strategy 16.3 (2007): 683-717.
[285] D Turker, H Toker & C Altuntas, (ed) Contemporary Issues in Corporate Social Responsibility (Lexington Books, 2013), 13.
[286] Timothy J. Feddersen and Thomas W. Gilligan. "Saints and markets: Activists and the supply of credence goods." Journal of Economics & Management Strategy 10.1 (2001): 149-171.

relation to ‘‘CSR”. McWilliams and Siegel[287] present a supply/demand perspective on CSR where they state that the best way to assess where CSR should be set at will depend on the cost-benefit analysis. Similarly, Waldman et al[288] also state that corporations need to consider the leadership of their corporations carefully, in that good leadership may mean prosperity of the corporation that is positively and actively engaging in CSR. Therefore, a pro-CSR CEO would be more beneficial to a firm than a leader who is sceptical about CSR. Therefore, CSR minded CEOs would project a better image towards the company as it demonstrates that they are in favour of social welfare and not merely there to make a profit or for some other personal gain.

2.7 CSR and Modern Legal Scholarship

In order to understand why CSR principles are so important in 21st century company law, it is useful to understand the development of CSR in a legal context. This helps to appreciate how CSR has been conceptualised in modern law scholarship, moving away from profit maximisation (self-regulation) theories to more inclusive stakeholder theories (regulation).

The CSR literature has focused on self-regulation to analyse the conditions that are vital to achieving successful CSR implementation.[289] In spite of the potential of modern CSR self-regulatory tools, such as collaboration, CSR can be used to drive profit maximisation. For example, companies may not put the collective interest of the company over their personal desires and will behave in an opportunistic manner when using CSR tools. However, empirical evidence demurs this position and suggests that a company’s

[287] A McWilliams and D Siegel, ‘Corporate Social Responsibility: A Theory of the Firm Perspective’ (2001) The Academy of Management Review, n.p.
[288] D Waldman, D Siegel & M Javidan, ‘CEO Transformational Leadership and Corporate Social Responsibility’ (2004) Working paper Rensselaer Polytechnic Institute.
[289] Moral Freda. "The Influence of Self-Regulation and Stakeholder Theories on Corporate Social Responsibility (CSR)." International Journal of Multicultural and Multireligious Understanding 4.3 (2017), 29-34.

opportunistic behaviour results in adverse selection, namely poor performing organisations will resort to self-regulatory measures.[290] Therefore, self-regulatory companies prefer CSR practices that protect their best interests and use them to advance these personal interests since they are effective as self-communication tools that reflect unethical performance to stakeholders for the sake of personal gain. However, the regulatory model is in direct opposition to the self-regulatory model.

The regulatory model, which reflects the stakeholder theory, is very common in CSR practice. Unlike a self-regulatory approach that favours top managements' personal interests over constituents' (stakeholders') interests, the regulatory model considers the wider interests of stakeholders, such as shareholders, employees, customers and the local community, who can influence company outcomes.[291] However, as opposed to just maximising shareholders' returns, companies have to consider non-financial groups, given the potential significance of returns from their behaviours and actions. Furthermore, by adopting various CSR policies that aim to satisfy non-financial stakeholders, the company gains the stakeholders' trust and acceptance, which in turn means they can resume their operations without being questioned by their stakeholders.[292] Therefore, adoption of a regulatory model suggests that companies can achieve their CSR objectives through adopting socially responsible practices, while considering the wider interests of stakeholders and ultimately gaining their trust. Hence, stakeholder awareness and trust plays a significant role in the implementation of CSR standards through the lens of a regulatory CSR model.

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[290] Ibid.
[291] Freeman (n 171), 52-81.
[292] Stuart Ogden and Robert Watson. "Corporate performance and stakeholder management: Balancing shareholder and customer interests in the UK privatized water industry." Academy of Management Journal 42.5 (1999), 526-538.

On reflection, regulation is a key theme in CSR, with scholars on both sides of the self-regulation versus regulation debate putting forward strong and convincing arguments.[293] As noted above, there are clearly differing views, as some believe that profit maximisation is the main objective of corporations,[294] whilst others argue that corporations need to be socially responsible and need to think of the society and environment when conducting business.[295] The perceived objective of business is important as it determines how CSR should be regulated. Therefore, the proponents of the former view associated with profit maximisation would argue for self-regulation whereas the latter, which favours social responsibility, would promote the concept of regulation.[296]

2.8 Conclusion

In summary, there is a plethora of literature pertaining to the meaning, scope and theories of CSR. By reflecting on the various definitions of CSR, this thesis chose Aguinis'[297] definition of CSR owing to its precise nature through considering not only the social aspect of CSR, but also the economic and environmental aspects of CSR. Another definition by Carroll[298] was considered, but given the multidimensional nature of CSR, which is emphasised in Aguinis' definition, and given the lack of emphasis on policy in CSR, Carroll's definition was rejected.

In terms of the theories pertaining to companies, CSR and stakeholders, there appears to be a consistent theme among these theories. The theme here is the regulation versus self-regulation debate. Many of the theories

[293] Bryan Horrigan, Corporate social responsibility in the 21st century: Debates, models and practices across government, law and business (Edward Elgar Publishing 2010), 65.
[294] Friedman (n 231), 173-178.
[295] O Amao, "Corporate social responsibility, multinational corporations and the law in Nigeria: controlling multinationals in host states", (2008) Journal of African Law, 52(1), 89-113.
[296] Ibid.
[297] Anguinis (n 192), 855.
[298] Carroll (n 190), 604-608.

presented in this chapter either agreed to the notion of self-regulation (profit maximisation or personal interest) or to the notion of regulation (stakeholder compliance). The self-regulation theory argued for the prioritisation of profit maximisation and self-interest over social responsibility, whereas regulation is in favour of considering the interests of corporate constituencies. This suggests an equilibrium between both self-regulation and regulation, since despite their clear differences, there is an equal balance between these competing influences on companies, and there will likely be stakeholders in a company that are for or against CSR policy.

Owing to the dominance of the self-regulation versus regulation debate, there is the need to debate between the notions of self-regulation and regulation of CSR. Therefore, there is a need to examine both company and regulatory theories through the lens of CSR, thus calling for a robust approach for enforcing corporate obligations. The next chapter builds on the self-regulation and regulation debate through the lens of CSR.

Chapter Three: Regulation Meaning, Theoretical Models and CSR

3.1 Overview

There are a number of theoretical debates that underpin this thesis, including theoretical approaches on regulation. These theories, in particular, are central to the evaluation of CSR as they underpin and determine its scope, direction and consequences. The discussions focus on two main schools of thought: the self-interest approach and normative stakeholder orientation in organisations. The aim of this chapter is to discuss the literature surrounding the meaning of regulation and the status and role of companies. The chapter also discusses organisational theories such as the contractarian theory, concession theory, aggregate theory and realist theory, organic theory and corporate theories and perspectives to CSR, as well as regulation theories such as the nudge theory, reflexive law, responsive regulation, better regulation and comply or explain. The chapter begins by examining relevant company theories before considering regulation theories.

3.2 Meaning of Regulation

There are a number of interpretations of "regulation" cited in the existing literature. A widely used definition by Cane and Tushnet[299] is functional, and suggests that regulation is "all systems of rules that secure order in economic activities, steer business behaviour and direct moral persuasions".[300] In other words, this means controlling particular forms of economic activity, e.g., public utilities for moral and ethical purposes. However, there is the issue of under-inclusiveness with Cane and Tushnet's definition as there could be other mechanisms carrying out closely

[299] P Cane, & M Tushnet, (Eds) The Oxford Handbook of Legal Studies, (Oxford University Press: 2003) 87.
[300] Ibid.

connected functions in non-economic areas.[301] These functions are often carried out by non-state actors, which appear to have little or no association with the term "regulation". Actually, the central point here is that regulation does not only reflect state control, but is also the function of social control carried out by other individuals or entities too, and the ultimate aim of control is not limited to only economic factors. Instead, regulation can branch out to other areas of control such as social control.[302] However, one could criticise the broadening rather than narrowing down of a clear definition of regulation. This because regulation can mean different rules in different contexts, e.g., company regulations will differ from health and safety regulations owing to the specific nature of these areas, and thus a narrow definition of regulation is needed for each area in which it is being applied.

When considering regulation in the CSR context, consideration is often given to the two types of regulation: self-regulation[303] and prescriptive regulation[304] as this helps to differentiate between those firms which are profit-driven and those firms which are socially responsible. Self-regulation refers to a situation where corporations have their own rules dealing with CSR as they think fit, which coincides with their business strategy, is a corporation's code of conduct to itself and which is non-binding in that nobody will hold it accountable if they fail to adhere to the codes.[305] Self-regulation therefore is simply a set of rules and standards not set by law, but set by the corporation or an association of businesses to behave in a certain way. Those who support self-regulated CSR argue that the

[301] Julia Black. "Critical reflections on regulation." Austl. J. Leg. Phil. 27 (2002), 1.
[302] Ibid.
[303] European Commission, Promoting a European framework for Corporate Social Responsibility: Green Paper, (2001) Office for Official Publication of the European Communities, Luxembourg.
[304] B Ihugba, "Compulsory regulation of CSR: a case study of Nigeria", (2012) Journal of Politics and Law, Vol. 5 No. 2, available at: www.ccsenet.org/journal/index.php/jpl/article/view/15639 (accessed 20 September 2016)
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[305] Wayne Visser and others, The A to Z of Corporate Social Responsibility: A Complete Reference Guide to Concepts, Codes and Organistaions, (John Wiley & Sons Ltd, 2007), 408.

voluntary nature of CSR means that corporations are free to conduct their business as they see fit, which promotes "creativity, discretion and adaptability" and permits the corporation to move with the times instead of adhering to rigid laws.[306] Paul and Garred argue that allowing corporations to have voluntary initiatives helps to build awareness about society's expectations and helps them to identify gaps, which can be avoided through careful strategy.[307] Although self-regulation may sound like a more flexible approach, in the context of CSR, this could suggest that companies are not obligated to commit to their social responsibilities, like in prescriptive approaches where the company has to mandatorily adhere to their social responsibilities and will face penalties for breaking their CSR rules.

Whilst it is accepted that there are a number of benefits to self-regulation, it is also recognised there are a number of limitations. Self-regulation is often very narrow in scope, has an exclusionary top-down approach and is introspective.[308] This limited coverage stems from participation being typically exclusive to multinational corporations (MNCs), as well as the lack of participation from small and medium-sized companies whose collective activities greatly affect the environment and society.[309] Additionally, it can be vague in commitment, and there can be a lack of monitoring and compliance mechanisms.[310] Furthermore, lack of regulation also means that any damage caused by corporations due to being irresponsible means

[306] Ibid.
[307] J Paul & J Garred, "Making corporations accountable: a background paper for the United Nations Financing for Development process", (2000). Available at: www.globalpolicy.org/component/content/article/213/45536.html. Accessed: 20th Sept 2016.
[308] P Utting, "Rethinking business regulation: from self-regulation to social control", (2005). Available: www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=F02AC3DB0ED406E0C12570A10029BEC8&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf: Accessed 20th September 2016.
[309] Ibid.
[310] Aneel Karnani, The Case Against Corporate Social Responsibility, The Wall Street Journal, 2010. Available at: http://www.wsj.com/articles/SB10001424052748703338004575230112664504890. Accessed on 10 Oct 2016.

victims do not get any compensation.[311] Voluntary codes are as good as their implementation and it is argued that not all companies have these codes integrated into their everyday activities, which simply means it is just there for the purpose of saying we have CSR in initiatives rather than really taking it seriously and making it part of their business strategy on a daily basis.[312] In most cases, corporations adopt CSR initiatives in order to avoid legal sanctions or avoid adverse publicity and, therefore, it is more a reactionary way of being socially responsible rather than proactive.[313] This is why having government legislation means there is uniformity in how corporations conduct business and if they do not comply, there will be sanctions and they will have little choice but to comply.[314]

Another issue that is identified with self-regulation is that it is seen as an exclusionary and top-down policy, which does not necessarily take into account all stakeholders, particularly those at the bottom end of the chain,[315] since they are not willing to participate in this movement. It has also been noted by the OECD, that if corporations are allowed to take action about environmental responsibility on a voluntary basis, there is little success, as lack of sanctions provides room for "regulatory capture" and not all corporations will take their responsibility seriously.[316] Regulatory capture is essentially a government failure caused by a regulatory agency

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[311] P Utting, "Rethinking business regulation: from self-regulation to social control", (2005). Available: www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=F02AC3DB0ED406E0C12570A10029BEC8&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf: Accessed 20th September 2016.
[312] B Ihugba, "CSR stakeholder engagement and Nigerian tobacco manufacturing sub-sector", (2012) African Journal of Economic and Management Studies, Vol. 3 No. 1, pp. 42-63.
[313] C Field, "Codes of conduct: the new face of consumer protection", (1999) Alternative Law Journal, Vol. 24 No. 3, available at: www.austlii.edu.au/au/journals/AltLawJl/1999/29.html (accessed 20 September 2016).
[314] P Utting, "Rethinking business regulation: from self-regulation to social control", (2005). Available: www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=F02AC3DB0ED406E0C12570A10029BEC8&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf: Accessed 20th September 2016.
[315] J. Bendell, (2004), "Barricades and boardrooms: a contemporary history of the corporate Page8 accountability movement", Programme on Technology, Business and Society, Paper No. 13, UNRISD, Geneva.
[316] OECD, 'Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes, 2002 OECD Publishing, Paris, available at: www.keepeek.com/Digital-Asset-Management/oecd/environment/voluntary-approaches-for-environmental-policy_9789264101784-en#page1 (accessed 20 September 2016) p62.

that prioritises the public's interest, and alternatively supports particular interest groups regarding their commercial or political concerns that dominate regulated industries.[317] Studies into self-regulation therefore do tend to suggest that self-regulation, without credible sanctions or reliable monitoring, is largely ineffective.[318]

Prescriptive regulation encompasses mandatory statutory law and judicial decision.[319] Those who propose regulatory CSR argue that incorporating regulatory CSR into corporations' strategies and their everyday business activity does not have to cost them money and therefore it is feasible to expect them to do so.[320] It will only cost the corporations when they do not comply with regulation. Therefore, there needs to be one set of straightforward and clear rules that everyone can understand and comply with in order to avoid such cost.

3.3 Status and Role of Companies

Theoretical approaches to the status and role of companies are important to our understanding of the regulation of companies and CSR as it contributes to the social good and a given organisation's interests.[321] Essentially, if an organisation wishes to be socially responsible, attaining this objective (ensuring social good and a given organisation's interests) by different methods will have unpredictable consequences for its financial performance. Legal perspectives of the firm (laws), on the other hand, focus on a company's personality and aim to answer questions such as ''What is a corporate entity?'' ''Is it real or imaginary? Natural or artificial?''.[322]

[317] Daniel Carpenter, David A. Moss. Preventing Regulatory Capture: Special Interest Influence and How to Limit it (2014). Cambridge University Press, 49.
[318] Susan Margaret Hart. "Self-regulation, corporate social responsibility, and the business case: Do they work in achieving workplace equality and safety?." Journal of Business Ethics 92.4 (2010), 585-600
[319] Ihugba (n 312) 42-63.
[320] A Kolk, R Tulder & C Welters, 'International codes of conduct and corporate social responsibility: can transnational corporations regulate themselves? (1999)Transnational Corporations, Vol. 8 No. 1.
[321] B Husted & D Allen, 'Strategic Corporate Social Responsibility and Value Creation: A Study of Multinational Enterprises in Mexico' (2001) 11.
[322] Ibid.

Therefore, it is essential to the understanding of CSR to explore these theoretical approaches to the status of the role of companies.

Corporate theories aim to express the nature of companies and create a basis for determining the rights and obligations of these companies in relation to the rest of society.[323] In addition, it can be difficult to compare corporate identity theories with corporate governance theories, since corporate governance theories are primarily concerned with the internal relations of a corporation (primarily between shareholders and managers). To some extent, however, the distinction between internal and external relations becomes artificial, as internal decision-making often involves external parties.[324] Therefore, the dominant theories of corporate governance or theories that address the status or role of companies are better aligned with corporate identity theories.[325] However, while none of the three main models of corporate governance support CSR in regulatory terms, this review of the existing literature is likely to demonstrate the concession theory owing to its similarity to the concept of CSR. This can be linked to the idea that the concession theory focuses on the corporation as a public entity designed to serve society as a whole under the auspices of an active and interested regulatory scheme, rather than market-oriented models and theories.

It is clear that the three main theories of corporate governance are private contract theory, the theory of aggregates, the theory of real/natural entities and the theory of concessions/artificial entities.[326] Risking a generalisation, the theory of aggregates and the theory of real entities proceed from the fact that corporations stand in the place of individuals (i.e., shareholders in

[323] Stefan J. Padfield. "Rehabilitating concession theory." Okla. L. Rev. 66 (2013), 327.
[324] Virginia Harper Ho. "Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights." Colum. J. Transnat'l L. 52 (2013), 113.
[325] Padfield (n 323), 327.
[326] Ibid.

the first case and the board of directors in the second) and thus have at their disposal the rights of individuals to resist government regulation.[327] However, the concession theory considers the corporation to be essentially a private entity and considers that the state has the right to regulate its establishment as it sees fit.[328] Thus, the concession theory, rather than a theory of real entities, is likely to have the greatest potential for mandatory CSR as conceived in this thesis.[329] Each of the three theories is explained in more detail below.

3.3.1 Contractarian theory

The contractarian theory, according to Michael Klausner, is the contractually binding relationship between managers and shareholders of public/private companies.[330] The modern contractarian theory is understood as the priority of shareholders or stakeholder primacy that is directly related to corporate governance due to the interests of stakeholders and the consideration of the wider social issues that companies take interest in.[331] It is important to note that contracting, which is based on theories explaining moral principles and political choices because of its social characteristics, avoids state regulation. Proponents of the contractual theory of the firm claim that corporations are born out of private contract[332] and therefore the state has a limited role or no role in enforcing that contract, as the state mandates a charter which recognises the existence of a "nexus of contracts" called a corporation.[333]

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[327] Padfield, Stefan J. "Citizens United, Concession Theory and Corporate Social Responsibility (CSR)." UCLA L. Rev. Discourse 62 (2014), 84.
[328] Ibid.
[329] Reuven S. Avi-Yonah. "The cyclical transformations of the corporate form: a historical perspective on corporate social responsibility." Del. J. Corp. l. 30 (2005), 767.
[330] Michael Klausner. The Contractarian Theory of Corporate Law: A Generation Later. The Journal of Corporation Law, (2007), 782.
[331] David Millon. "Theories of the Corporation." (2) Duke Lj (1990), 201.
[332] Henry N. Butler, The Contractual Theory of the Corporation, George Mason University Law Review, Vol. 11, No. 4, Summer 1989, 99-123.
[333] Derek French, Stephen Mayson, and Christopher Ryan, 'Mayson, French & Ryan on company law' , (31st Edn, Oxford University Press 2014) 38.

Stephen Bainbridge[334] stated that a contractual model comprises implications for various corporate law issues, with disputes over the proper role of binding legal rules being the most obvious. From a regulatory perspective, according to contractors, the preference for default rules should be the norm of contractarian theory.[335] Contractual theory also looks from the perspective of self-regulation, since corporate law is mostly made up of default rules, where shareholders have the freedom to depart from their mandatory rules, and thus move away from a prescriptive or mandatory regulation to self-regulation or voluntary regulation in the contractual relationship between company members.

3.3.2 Artificial Entity or Concession Theory

The ''artificial entity'' theory proposes that the corporation is a fictitious being.[336] Under this theory, a corporation is given the right to exist by a sovereign power and corporations are not considered citizens.[337] In modern times, this is more applicable to companies that are state-owned as these are often limited to a single country. For example, in 1819, Judge Marshall stated in the case of *Trustees of Dartmouth College v. Woodward* in the Supreme Court that:

> "A corporation is an artificial being, invisible, immaterial and exists only in contemplation of the law. Being a simple creature of law, it possesses only those properties, which directly or indirectly follow from the Charter of its creation. Those that are supposed to be best calculated to influence the object for which it was created...The objects for which the corporation is being established are universal, such as the fact that the government wants to promote. They are considered beneficial to the

[334] Bainbridge (n 133), 82.
[335] Ibid.
[336] A Machen, 'Corporate Personality' (1911) Harvard Law Review Vol 24 No 4, 2.
[337] P Coelho, J Mcclure & A Spry, 'The Social Responsibility of Corporate Management: A Classical Critique" (2003) Mid-American Journal of Business vol 18 No 1 pp 15-24.

country, and this benefit is compensation and, in most cases, the only reimbursement of the grant."[338]

Judge Marshall's beliefs are closely related to the theory of artificial entities or more commonly known as the concession theory.[339] According to the proponents of the concession theory, the state and human beings are on a par with each other as the state has the power to bestow rights on others as well as withdraw these rights and therefore a state possesses the attributes of sovereignty.[340] Therefore, the tenet of this theory is that corporations are a creation of the state and therefore must bow to state requirements and obligations.[341] Padfield argues, "of the corporation's three traditional theories of constitutional law...concession theory is the only one that legitimises the supposed respect for state regulation."[342] Interestingly, the concession theory has no good counterpart among other basic theories of corporate governance.[343] This may be related to the theory of corporate governance, which is more relevant to the internal affairs of a corporation. That is, the distribution of powers between the board of directors and shareholders[344] and so maybe more focused on private orders. However, the exclusion of the state from the analysis of internal corporate affairs can also be explained as a decisive step that takes the debate to the private side of the gap between the public and private sectors and promotes deregulation in accordance with the law and the economic movement of the late 1970s.[345] Simply put, the corporation is

[338] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636–37 (1819).
[339] Padfield (n 323), 327.
[340] Ben Pettet, Company Law, (2nd Edn Pearson Education Ltd 2005) 48.
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] Stephen M Bainbridge. "Director primacy: The means and ends of corporate governance." Nw. UL Rev. 97 (2002): 547.
[345] Padfield (n 323), 327.

the link between contracts, but does not see the state as one of the main contracting parties, assuming many potentially controversial obligations.[346]

The Hobby Lobby, described by Steven Bainbridge,[347] can help to provide some insight into the concession theory. The Hobby Lobby questions the mandate of the Affordable Care Act with regard to contraceptive insurance.[348] In particular, the commercial corporation "Hobby Lobby" demanded exemption from liability under the Law on the Restoration of Religious Freedom.[349] The court concluded that corporations have the right to freedom of religion.[350] Bainbridge was also one of the forty-four professors of corporate and criminal law who signed the memorandum, arguing that the rights of owners of religious freedom should not be reserved for the corporation.[351] He raised a number of challenges in relation to the brief, including the following:

> "…many of those who signed the agreement are linked to the corporate social responsibility movement. As advocates for this viewpoint, they argue that corporations should consider the public interest in corporate decision-making. Except when...Catholic and other religious shareholders want the corporation to address the social problem of abortion. I find all this more than just a little bit contradictory."[352]

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[346] Grant M. Hayden and Matthew T. Bodie. "The Uncorporation and the Unraveling of Nexus of Contracts Theory." Mich. L. Rev. 109 (2010): 1127.
[347] Stephen Bainbridge, *Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory*, (2014). Available: http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html. Accessed: Dec 14th 2016.
[348] Ibid.
[349] Ibid.
[350] Stefan J. Padfield. "The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases." U. Pa. J. Const. L. 15 (2012), 831.
[351] Lyman Johnson and David Millon. "Corporate Law After Hobby Lobby." Bus. Law. 70 (2014): 1.
[352] Stephen Bainbridge, *The Odd Inconsistencies in the Corporate Law Professor Brief in the Mandate Cases*. (2014), *Available:* http://www.professorbainbridge.com/professorbainbridgecom/2014/01/the-odd-inconsistencies-in-the-corporate-law-professor-brief-in-the-mandate-cases.html. Accessed: Dec 14th 2016.

Thus, the concession theory protects the notion that the above-mentioned positions are actually consistent with each other, rather than contradicting each other. In the United States, for example, this raises two fundamental questions: (1) The republican form of government created by the Constitution, of which the states are a part, is good and worthy of protection; (2) granting corporate status can be seen as a subsidy from the state for further economic growth. The rationale for granting corporate status as a subsidy is that without the limited liability protection provided by registration, investors/owners will be at risk of personal liability for the company's debts.[353] In fact, the owners are relieved of the burden of costs in specific lawsuits against businesses. Alternatively, this burden is often placed on whistle-blowers, and the reason for this is the total net profit generated by allowing the company to operate in a corporate form.[354] At the same time, there is a risk that the benefits of registration will contribute to the formation of powerful factions that can undermine the founding state itself.[355] As a result, the state justifies limiting the amount of corporate subsidies to economic activities.

When a shareholder group argues that not only should it be able to benefit economically from corporate ownership, but also to promote individual political and religious beliefs, the state can properly assert that this has never been part of the deal, and therefore shareholders exceed the limits.[356] In fact, for the state, subsidising the religious cult of shareholders

[353] Padfield (n 323), 327.
[354] Martin Petrin, *Reconceptualizing the Theory of the Firm – From Nature to Function* (October 26, 2013). 118 Penn State Law Review 1 (2013).
[355] Brett H. McDonnell. "The Liberal Case for Hobby Lobby." Ariz. L. Rev. 57 (2015): 777.
[356] Ian S. Speir. "Constitutional and Statutory Reservation Clauses and Constitutional Requirements of General Laws with Respect to Corporations: The Fifty States and the District of Columbia." (2011), 1-22.

at the expense of employees implies the separation of church and state and the risk of conflict with the establishment regulations.[357]

On the contrary, achieving the right balance between shareholder empowerment and management discretion, in addition to experimenting with secular corporate objectives to maximise overall returns, seems appropriate within the correct area of competence of public authorities. This perception of the state as the creator of the corporate form, which it then concludes contracts with founders for use in the interest of the general welfare, is representative of the concession theory.[358] Thus, of all the models and theories considered, only the theory of concessions can be argued to provide a regulatory framework for mandatory secular CSR, while at the same time limiting the ability of individuals to use corporate subsidies (which may have been provided solely for the further economic growth of society) for personal religious evangelism, and there is nothing "incompatible" with this linear scheme.[359]

Finally, it was suggested that the Hobby Lobby should significantly enhance the CSR capabilities of corporations. However, it would be better if any expansion in this area related to lobbying by the Hobby Lobby were limited to corporations in close ownership, without complaints from shareholders. Thus, although Lyman Johnson argued that in order to "consider closed corporations 'free' from contraceptive powers under the Affordable Care Act...The court should have determined that under state

[357] Frederick Mark Gedicks and Rebecca G.Van Tassell, , *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion* (June 19, 2014). 49 Harvard Civil Rights-Civil Liberties Law Review (CR-CL) 343 (2014).
[358] Padfield (n 323), 327.
[359] Ibid.

corporate law such companies are also `free´ from the imaginary state's legal mandate to maximise profits."[360]

Stephen Bainbridge said, "The Hobby ...is best understood as recognition of the generally accepted principle that shareholders of a closely-knit corporation may change the standard corporate law, including the question of corporate purposes, and that the Hobby should not be understood as a change in the general rule, especially with the help of rules that may dictate the rules."[361] Here Bainbridge is correct in what he argues, as at least the waste doctrine (corporate waste rules and regulations) should allow any shareholder who does not agree to challenge corporate conduct that is solely for religious or social responsibility purposes, without any perceived benefit to the well-being of shareholders,[362] and that the Hobby Lobby did not change that rule.[363] Thus, the rules for maximising shareholder wealth and meeting shareholder needs are best understood as the dominant default rules even after the Hobby Lobby.

Moreover, the challenges that this poses to mandatory CSR also remain with the concession theory owing to its ties with social responsibility and companies being obligated to follow CSR rules and regulations. Therefore, the concession theory is the most viable corporate identity or management theory to challenge the norm of mandatory CSR.[364]

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[360] Haskell Murray, Lyman Johnson—Hobby Lobby, a Landmark Corporate Law Decision (2016). Available: http://lawprofessors.typepad.com/business_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html. Accessed 14th Dec 2016.
[361] Stephen Bainbridge, Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co?, (2016). Available: http://www.professorbainbridge.com/professorbainbridgecom/2014/07/does-hobby-lobby-sound-a-death-knell-for-dodge-v-ford-motor-co.html. Accessed 14th Dec 2016.
[362] Jonathan Romiti . "Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-Citizens United." BCL Rev. 53 (2012), 737.
[363] Joshua Fershee, Does Hobby Lobby Create a First Amendment Out for Fiduciary Duties?, (2016), Available: http://lawprofessors.typepad.com/business_law/2014/07/does-hobby-lobby-make-pain-suffering-available-for-entities-.html. Accessed 14th Dec 2016.
[364] Padfield(n 327), 84.

3.3.3 Aggregate Theory

The aggregate entity theory argues that the company is not the property of a person or group of persons but instead, the company's person or group of persons.[365] It could be argued that corporations do not have a distinct existence separate from their owners. For example, in the 1886 Supreme Court case of *Santa Clara County v. South Pacific Railway*, the Court of Justice declared in some respects that:

> "The Court does not wish to hear arguments as to whether these corporations are subject to the Fourteenth Amendment to the Constitution, which prohibits the State from denying equal protection of the law to any person under its jurisdiction. We all believe that this is the case."[366]

Earlier, it was noted, "Morton Horvitz had convincingly argued that Santa Clara represented a shift towards corporate consensus."[367] The combined opinion rejects the fiction of the corporation as an artificial organisation that is promoted by the concession theory, but instead focuses on the property rights of its major shareholders to perceive the corporation as a simple association of individuals.[368] Thus, given that mandatory CSR is likely to require meaningful government regulation, and the aggregation theory is usually associated with a deregulatory agenda, advocates of mandatory CSR will again have to seek theoretical support elsewhere.[369]

3.3.4 Real or Natural Entity Theory

This concern about the theory of aggregates is that the main theoretical rationale for limited liability is the separation of ownership and control

[365] Millon, (n 331), 201.
[366] Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).
[367] Padfield (n 323), 327.
[368] Ibid.
[369] Ibid.

through legally appointed corporate officers who are members of the board of directors. If this separation is ignored and the corporation is reduced to shareholders then it goes back to a form of general partnership in which the owners are personally responsible for the debts of the enterprise. Therefore, there was a need for a different theory, and the theory of real or natural Entity has filled this need by bringing the corporation in line with the board of directors.[370]

Unlike the theory of aggregates, which is essentially a shareholders' association, the theory of real or natural entity puts the board of directors at the centre of the corporation's management.[371] Although this viewpoint is not devoid of criticism,[372] it is a useful way to distinguish the primacy of the shareholder from the primacy of the director in the context of corporate identity, as all three claims of contractors and agents have their roots.[373] Although the theory of real or natural entity provides more support for voluntary CSR than the aggregation theory (at least when the real-world theory is consistent with the team production theory), it still does not provide theoretical support for mandatory CSR, like the concession theory does. This is because, as in the case of the aggregation theory, the corporation is predominantly a private entity with concomitant rights against regulatory restrictions.[374]

3.3.5 Organic Theory

A more recent development in theoretical debate as to the role and status of the company is the organic theory, which is based on the notion that the actions and wills of the company's agents constitute that of the

[370] Ibid.
[371] Bainbridge (n 344), 547.
[372] Padfield (n 323), 327.
[373] Ibid.
[374] Ibid.

company.[375] This thereby argues that the company is a real person and not the aggregation of its members.[376]

According to the realist theorists, a corporation has a legal personality and therefore it is a real personality in an "extra-juridical and pre-juridical sense of the word".[377] They also claim that those who need protection and can have rights are not just human beings but also anything that possesses a will and has a life of its own.[378] As a result, they see corporations as having rights just like human beings. The only difference between human beings and corporations, according to this theory, is that the former is regarded as a physical organism and the latter is regarded as a social organism. In terms of CSR, organic theory could be argued as the closest model to reflect social responsibility owing to the theory treating companies as people as opposed to an entity where the members are aggregated. This view of the role and status of the company forms the basis of the stakeholder theories of CSR.

3.3.6 Corporate Theories and Perspectives to CSR

What is clear is that the above theories detailing how the role and current state of a given organisation is viewed shapes the CSR concept. In other words, such theories can determine how a company is formed and viewed in society and thus ultimately whom is responsible for shaping the company. From the discussion on the theories of corporate personality, it can be deduced that the main arguments lie between the artificial or fiction and realist theories. The artificial theory argues that a corporate entity in the form of a legal person is purely fictitious and merely exists within the

[375] Julie Cassidy, Concise corporations law (concise) (5th edn, Federation Press 2006) 45.
[376] G Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 American Journal of Comparative Law 130, 136 .
[377] John Frow, Character and Person, (Oxford University Press 2014) 80.
[378] Ibid.

intendment of the law.[379] However, under the realist theory, the corporate entity in the form of a legal person is indeed real and natural rather than fictitious.

Realists contend that the law has no power to create an entity and only has the power to identify or refuse to identify a legal entity. For example, English courts in most cases only adopt the artificial theory according to British company law. The *Salomon v A Salomon Co Ltd* case is a standout example.[380] This case embraces the House of Lords' rule to uphold the doctrine of corporate personality, as stated in the original UK Companies Act 1862, to prevent creditors of an insolvent company from suing a company's shareholders for their outstanding debts.[381] This is a good example of the artificial theory because *Salomon* held that companies are not an agent of its shareholders and that the agency between a corporation and its members relates to company contracts.

The artificial theory even justifies legal situations whereby courts raised the veil of corporation. In other words, in the event of the corporate entity being real, then the court has no power or authority to dictate such circumstances where a corporation is a separate legal entity.[382] Therefore, human beings cannot decide another human being's fate, and only the law has such a privilege. However, the realist argument is that a given firm can acquire its entity in the form of a legal person, not because law did grant it, but because it is formed through the entity's day-to-day transactions, which are later deemed acceptable by law.[383]

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[379] Frow (n 377), 80.
[380] Law Case Summaries. Salomon v A Salomon Co Ltd. [1987] (2018) Available: https://lawcasesummaries.com/knowledge-base/salomon-v-a-salomon-co-ltd-1897-ac-22/. Accessed: 4th Sept 2019.
[381] Ibid.
[382] Pettet (n 340), 48.
[383] Ibid.

Consequently, the artificial versus realist theory dictates the difference between voluntary and mandatory compliance, where voluntary compliance reflects the realist theory owing to the law having no power over a corporate entity, while mandatory compliance reflects the artificial theory owing to the law having such power over a corporate entity. From a CSR perspective, the artificial or concession theory would suggest that companies are obligated to commit to their CSR activities, whether it be donating money to charity, supporting environmental sustainability or looking out for the social well-being of the community. Although companies would be forced to commit to these CSR activities, mandatory compliance ensures that companies contribute to some degree of CSR, whether the company is in favour of it or not.

3.4 Regulation Theories

Major crises often result in the need for better regulation, as was the case with the recent financial crisis. As these clarifications are virtually unregulated, and thus potentially lack information for investors and other market participants, it makes sense to develop such regulations. These regulations should enable investors to clarify, rather than detract from the functions of the main corporate governance bodies. However, individual regulatory theories are arguably narrow and non-inclusive given their incapacity to deal with elements of CSR in their entirety owing to the confusion of each of these theories to reflect either mandatory or voluntary compliance. Therefore, this section engages in detailed critical discussion of relevant theories pertaining to CSR in order to better understand whether companies are more likely to be "better corporate citizens" through rigorous regulation as well as determining which theories follow mandatory compliance and voluntary compliance.

3.4.1 Nudge Theory

The nudge theory presents a series of statements and carefully selected case studies illustrating that people are not "econs" and that changes in "choice architecture" can help them improve their decisions about health, wealth, and happiness.[384] However, there is a need to define what a nudge is in order to understand the nudge theory. Thaler and Sunstein provide a somewhat flexible definition: "A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not."[385] Therefore, the nudge theory deals with giving choices without ruling out other choices that may be better or worse than the choice made. Thaler and Sunstein[386] further define a nudge as the use of behavioural economic experiences in public policy as a substitute for more traditional coercive interventions such as command and control regulation. This allows their work to be included in the wider governance literature, which is interested in new and innovative tools aimed at managing and guiding human behaviour towards desired goals.[387]

However, the nudge theory is not without criticism.[388] Some warn of its ability to "sow the seeds of the illiberal system of control" and that its effectiveness depends on factors that are difficult to predict.[389] In 2011, the

[384] Sherzod Abdukadirov, ed. Nudge Theory in Action: behavioral design in policy and markets. Springer, (2016), 159-196.
[385] R Thaler and C Sunstein, Nudge (revised edition) (London: Penguin. & Francesco Mureddu 2009), 6.
[386] Ibid.
[387] , Vasudha Chhotray and Gerry Stoker. Governance theory and practice: A cross-disciplinary approach. Springer, (2008), 24-30.
[388] Alice Bradbury, Ian McGimpsey, and Diego Santori. "Revising rationality: the use of 'Nudge'approaches in neoliberal education policy." Journal of Education Policy 28.2 (2013): 247-267.
[389] Robert Baldwin, Martin Cave, and Martin Lodge. Understanding regulation: theory, strategy, and practice. Oxford University Press on Demand (2012), 123-126.

UK Science and Technology Committee concluded that regulatory experiments, such as those piloted by the Behavioural Insight Team (BIT) or the "Rapid Response Unit", which was established by the British Government to apply behavioural economics and psychology research to public policies and services, were unlikely to be effective in isolation and would not be supported by relevant data.[390] In its 2014 follow-up report on BIT, the Committee notes that "it was impressed by their work in introducing randomised controlled trials to determine the effectiveness of behavioural interventions", but remains concerned that "reliable data on the effectiveness of such interventions are not always publicly available to support the Group's assertions of the success of such interventions."[391] BIT Director David Halpern noted that the initial resistance of the British bureaucracy and media to his work has weakened, but there are areas within the British government that do not support him.[392] Although the effectiveness of nudging as a managerial intervention is questioned, it appears that the nudge theory is most often criticised for its political position e.g. addressing the legitimacy, accountability and transparency of nudging. In view of CSR, nudging may involve companies choosing and prioritising profit maximisation as their main objective while others may go beyond that and choose to be more socially responsible. Just because other companies choose to be more socially responsible does not mean that other firms should stop focussing on profit maximisation. Firms could choose to maximise profit while aiming to be more socially responsible.

[390] Science and Technology Committee. Behaviour Change: Second Report. London: Authority of the House of Lords. (2011). Available: https://publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/179.pdf. Accessed 4th Sept 2019.
[391] Ibid.
[392] The British Psychological Society, Interview with David Halpern: An insight into 'nudge'. (2016). Available at: https://thepsychologist.bps.org.uk/volume-24/edition-6/interview-david-halpern-insight-nudge. Accessed 4th Sept 2019.

On reflection, the nudge theory argues that companies will comply without force through subtle and indirect suggestions made to the firm, as well as strategies linked to positive reinforcement. In other words, attempting to achieve non-forced compliance, which aims to prevent an individual's attitude through persuasion and authority from being altered. This can subsequently affect the motives, incentives and decisions of companies. This is arguably a less draconian and more fluid approach to regulation.[393] Baldwin[394] states that this approach combines freedom of choice with paternalism by allowing public authorities to manipulate choices. Although considered less draconian than other individual regulatory theories (e.g. reflexive theory), the nudge theory raises ethical issues about freedom of choice and whether there is a guiding (nudging) hand that is making it difficult to make certain choices. This is because the citizen is presented with what appears to be a fair choice between options but is in reality an intervention designed to produce a specific result or decision.

However, the nudge theory has been heavily criticised. Boyce[395] stated that there is a need to move away from short-term, politically motivated initiatives like the ‘‘nudging people’’ concept that has very little empirical support and fails to support those individuals who want to make long-term behaviour changes to a more long-term change. Other authors, such as van der Linen[396] have voiced similar concerns, predominantly regarding the need to understand the psychological factors that predict long-term behavioural changes. Therefore, the use of the nudging theory in isolation will often be ineffective in altering one’s behaviour. Instead, numerous measures are necessary to change behaviour in a way that will make a real

[393] R Thaler et al, ‘Choice Architecture’ (2010). Available. http://poseidon01.ssrn.com/delivery.php? Accessed: 23rd May 2016.
[394] John Braithwaite. "The essence of responsive regulation." UBCL Rev. 44 (2011): 475.
[395] Tammy Boyce, Ruth Robertson, and Anna Dixon. Commissioning and behaviour change: Kicking bad habits final report. King's Fund, (2008), 1-33.
[396] Sander van der Linden, ‘A response to Dolan’ (2013), 209-215.

difference. In relation to CSR, the nudge theory may involve behaviours exhibited by companies in choosing and prioritising its main objectives, whether it is profit maximisation or going beyond that and choosing to be more socially responsible without affecting their ability to make those choices even if it is the right one or not. Therefore, a company's choice to be more socially responsible will not prevent other firms from only focusing on profit maximisation, despite the fact other companies may see that as a socially irresponsible or bad choice.

Based on the above discussions, the nudge theory would partially align with the preferred definition (Aguinis' definition) of this thesis because despite it aligning well with the social, economic and environmental aspects of CSR, it is not purely CSR and Aguinis' definition advocates for pure CSR. This is because the nudge theory supports the idea that making choices is based on ruling out other choices that may be better or worse than the choice made, thus promoting the idea of both social responsibility and social irresponsibility. It is for that reason that the nudge theory does not entirely fit the preferred definition of this thesis.

3.4.2 Reflexive Law

The concept of responsiveness is developed further by the concept of reflexive law. The fundamental principles are important for the transition to ecological modernisation.[397] In other words, reflexive law represents an "evolutionary" shift in the direction of regulation and seeks to encourage companies to achieve the desired result by ensuring their "regulated autonomy."[398] In contrast to the focus on the dynamics of the relationship between the regulator and the regulated entity, with regard to the level of

[397] , Nicholas A. Ashford. "Government and environmental innovation in Europe and North America." American Behavioral Scientist 45.9 (2002): 1417-1434.
[398] Julia Black. "Constitutionalising self-regulation." The Modern Law Review 59.1 (1996): 24-55.

compliance, reflexive law requires organisations to be able to respond to the environment while maintaining their own integrity. Therefore, by passing on the ability to make decisions to the organisations themselves, reflexive mechanisms contribute to a more personalised response of regulatory authorities, relying on firms for self-regulation in response to complex problems.

Based on the concept of responsive law proposed by Nonet and Seltznik,[399] the premise is that reflexive methods use the law indirectly, establishing procedures that encourage critical and creative thinking within the firm itself, rather than directly using regulation to impose sanctions.[400] This not only allows firms to identify harmful behaviour, but also ensures that the necessary mechanisms are in place to address it, and then ensure that it is followed and/or evaluated and, if necessary, modified accordingly.[401] Theubner, who coined the term "reflexive" law, developed this concept based on the stimulation of self-reflection processes in educational institutions in order to achieve increasingly high standards. Therefore, Teubner recognised the reflexive law as a new "third way" that is more adequately adapted to the complex problems of modern business.[402]

It is obvious that the central principles of reflexive law go beyond Teubner's perception of the concept. The theoretical basis of reflexive law is not that, in a complex and pluralistic society, the only form of proper regulation is self-regulation, but rather that it is based on joint decision-making using a variety of regulatory instruments and non-state actors. The

[399] Philippe Nonet, Philip Selznick, and Robert A. Kagan. Law and society in transition: Toward responsive law. Routledge, (2017), 150.
[400] Orts, Eric W. "A reflexive model of environmental regulation." Business Ethics Quarterly 5.4 (1995): 779-794.
[401] Robert Baldwin, and Julia Black. "Really responsive regulation." The modern law review 71.1 (2008): 59-94.
[402] Gunther Teubner. "Substantive and reflexive elements in modern law." Law and society review (1983): 239-285.

desirability of mandatory self-regulation is a complex issue and beyond the scope of this thesis. Indeed, it is unclear whether previous concepts of environmental modernisation intend to complement or replace direct regulation.[403] However, this latter view does not seem to take into account the potential of companies with differing perceptions, nor the role of a range of regulatory practices, including command and control mechanisms. It may be understandable that, given the complex relationship between environmental issues and economic development, there is no consensus on the most appropriate way forward.[404] However, it is widely recognised that a correctly formulated legislative policy is a powerful regulator of organisational behaviour.

In relation to CSR, there has been little attention given in reflexive law in areas such as ''labour protection, consumer protection, business taxation, and financial regulation''.[405] Even linking both CSR and regulation to the theoretical insights appear modest owing to the relatively few scholars who have explored the law-CSR relationship and its impact on regulatory policy. For instance, Barnard et al[406] support the concept of ''enhanced competitiveness that promotes instrumental CSR, while assuming that CSR can be a tool of reflexive law by virtue of the expressed policies of EU institutions.'' Many scholars also support using reflexive law in CSR without exploring the conceptual framework and other linkages between the two[407] owing to a company's assumption that CSR is a reflexive law tool that can be used to promote self-regulation or voluntary compliance. This led to

[403] Ahjond S Garmestani, Craig R. Allen, and Melinda H. Benson. "Can law foster social-ecological resilience?." (2013), 37.
[404] Riley E. Dunlap, and Robert J. Brulle, eds. Climate change and society: Sociological perspectives. Oxford University Press, (2015), 384.
[405] Osuji (n 5), 4-5.
[406] Catherine Barnard, Simon Deakin and Richard Hobbs, *Reflexive law, corporate social responsibility and the evolution of labour standards: The case of working time* (ESRC Centre for Business Research, University of Cambridge Cambridge 2004).
[407] Osuji (n 5), 4-5.

attempts to link both CSR and reflexive law. Buhmann[408] attempted to link reflexive law and CSR and found that it largely reflects both the ''Multi-Stakeholder Forum'' and ''CSR Alliance'' initiatives. Buhmann concluded that CSR can be ''through non-enforceable responsibility based on law'' and has a narrow scope for ignoring potential ''enforceable responsibilities'' for regulatory CSR.

Reflexive theory has been proposed as an alternative to the divide between those promoting self-regulation and those who are suspicious of companies' ability and willingness to be transparent and to be monitored.[409] This theory is a divergence from the usual ''command and control'' theory of regulation. Instead it seeks to employ law not to give specific commands, but in an indirect manner to lessen harm and establish frameworks (through incentives) to make institutions think about the effect of their activities on wider stakeholders and society generally.[410] This is achieved as authorities retain control by establishing procedures that guide self-reflection, but leave companies the freedom and choice to determine their own norms of conduct.

However, studies have identified several problems with the reflexive theory that hinders the development of CSR.[411] Since the reflexive theory is based on a regulatory approach, it is faced with three main problems that have been deemed as the ''regulatory trilemma''. Simply put, the regulatory trilemma is essentially: ''law may be irrelevant to the other sub-systems and of no effect ('mutual indifference'), though creeping legalism may damage the other subsystems which are to be regulated through inhibiting its

[408] Karin Buhmann. "Integrating human rights in emerging regulation of Corporate Social Responsibility: The EU case." International Journal of Law in Context 7.2 (2011), 139-179.
[409] Olufemi Amao, Reflexive Law and the CSR Debate – Reflexive Law: Does It Have any Relevance to the Corporate Social Responsibility (CSR) Debate?, Cork Online Law Review 6, (2007), 55-64.
[410] Orts (n 400),779, 781.
[411] Colin Scott, Regulation in the age of governance: the rise of the post regulatory state (Edward Elgar Publishing 2004), 148.

capacity for self-reproduction; the self-reproductive capacity of the legal sub-system may be damaged through an 'over-socialisation of law".[412] For underdeveloped economies in particular, regulatory problems become more complex. In the view of Graham and Woods,[413] unlike developed countries, there is very little support in developing countries to explain why governments have little to no power to regulate.[414] Thus, these countries appear to be incapable of taking control and often unwilling to control the potential influences internal economic activities have on social objectives, like human rights, labour rights and environmental sustainability.[415]

Societal actors can therefore describe reflexive law as a form of public procedural law for regulation, which achieves substantive results through co-regulation and self-regulation.[416] An example of the use of reflexive regulatory theory in practice can be seen in the EU Commission's 2001 Green Paper on CSR,[417] which demonstrates an example of a functional relationship between a framework of legal controls, and voluntary action beyond compliance.[418] Here, the regulatory conception considers CSR as "mechanisms which respond to the negative externalities caused by corporate activities",[419] e.g., encouraging an incentive structure to reward socially responsible behaviour. This demonstrates the significance of comparing managerial or organisational, financial and regulatory conceptions of CSR, even though the downside is the exclusion of ethical CSR dimensions. Therefore, there is a possibility that CSR can incorporate

[412] Ibid.
[413] David Graham and Ngaire Woods, 'Making corporate self-regulation effective in developing countries' 126 Making global self-regulation effective in developing countries (2006), 6.
[414] Scott (n 411), 148
[415] Graham and Woods (n 413), 6.
[416] Karin Buhmann. "Reflexive regulation of CSR to promote sustainability: Understanding EU public-private regulation on CSR through the case of human rights." International and Comparative Corporate Law Journal, Forthcoming (2010), 1-32.
[417] Commission of the European Communities. Promoting a European framework for corporate social responsibility: Green Paper. Office for Official Publications of the European Communities (2001), 1-26.
[418] S Deakin& Richard Hobbs "False dawn for CSR? Shifts in regulatory policy and the response of the corporate and financial sectors in Britain", (2007) Corporate Governance, 15 68-76.
[419] Osuji (n 5), 4-5.

contributory and ethical goals, even though managerial and financial conceptions fail to grasp the importance of business ethics, and thus the regulatory perspective can combine both ethical foundations and goals.[420]

In short, like the nudge theory, reflexive law in the context of CSR aims to stimulate and affect the decision-making process of regulated entities by providing a framework of decisions that are deemed positive and rewarding. Reflexive law, unlike nudge law, is positive because it encourages desired behaviour through incentives and seeks to motivate firms to behave responsibly through these rather than using suggestive language.[421] Reflexive law is seen as a type of law for communicating norms and institutions to support self-regulation. Reflexive law in relation to CSR can therefore be a flexible moniker for various regulatory strategies, particularly self-regulation. For example, an industry self-regulatory code backed by law is considered a tool of reflexive law, since it involves monitoring and communicating a given organisation's adherence to legal, ethical, or safety standards. Reflexive law would therefore not align with this CSR definition in this thesis because it argues for mandatory compliance whereas reflexive law is more voluntary compliance that uses a self-regulatory approach.

3.4.3 Responsive Regulation

John Braithwaite views responsive regulation as "a regulation that responds to the steps taken by regulated actors in a sectoral context and from an environmental perspective."[422] The influential regulatory pyramids presented by Braithwaite show that regulatory policy should start with informal discussions about undesirable behaviour and end with severe

[420] Osuji (n 5), 4-5.
[421] Philip Selznick. "Self-regulation and the theory of institutions." Environmental Law and Ecological Responsibility. The Concept and Practice of Ecological Self-Organization (1994): 395-402.
[422] Braithwaite (n 394): 475.

penalties only if other respectful methods fail. Going through this process, if and when tight control will be exercised, it will be seen as more legitimate: "Reacting regulators will seek contextual, integrated, collaborative strategies that will work in synergy."[423] Corporate regulators have certainly tried to create such a system for listed companies that mandatorily "comply or explain" with disclosure requirements, backed by legal sanctions. Mandatory legal requirements are also met promptly, with the possibility of enforcement, ranging from the agreed decision and notification of violations requiring compliance to penalties.[424]

The aim of responsive regulation is access to justice, not access to the courts. It recognises that justice can best be achieved through self-regulation by civil society and that the law should allow for this in a flexible and context-specific manner[425] through a two-way rule-making process,[426] e.g., through both voluntary and mandatory compliance. Corporate governance structures, such as independent audit committees, have evolved from mandatory participation in the financial sector to voluntary participation in most public companies.[427] Developments of this theory allowed both business and society to express their opinion on the future of this theory. Thus, these principles represent a codification or strengthening of generally accepted corporate governance practices. [428]

Gunningham and Grabosky complement the theory of responsive regulation by "emphasising that different types of control can be imposed not only by the state, but also by quasi-regulators (such as trade

[423] Ibid.
[424] Ibid.
[425] John Braithwaite, 'Responsive regulation and developing economies' 34 World Development. (2006). 884.
[426] John Braithwaite and Christine Parker. The Oxford Handbook of Legal Studies (2003), 128.
[427] Ibid.
[428] Tom R Tyler, ed. Legitimacy and Criminal Justice: An International Perspective. Russell Sage Foundation. (2007), 30-59.

associations and professions) and corporations."[429] The interesting nature of regulatory principles (and most corporate governance codes) means that they bridge the gap between self-regulation, private regulation and government regulation. Therefore, most corporate governance norms can be attributed to new forms of governance or meta-regulation. Codes of corporate governance have also been described as reflexive regulation, specifically designed to initiate a learning process that will allow companies to implement achievements based on practice.[430]

Contrary to reflexive law, responsive regulation moved the regulatory debate on from a binary debate between compliance or deterrence approaches. Ayres and Braithwaite's work Responsive Regulation was instrumental in this shift[431] as it developed the ideas of earlier scholars such as the "benign big gun"[432] with economic theories of regulation. They posited a mixed approach where regulators use compliance strategies in the first instance and then escalate to using punitive sanctions and strategies if the regulated entity fails to comply.[433] The response element can be partly delegated to public interest groups or to firms under regulation, but remain monitored by the government with them intervening at different stages of the response matrix.

However, some studies have argued that responsive regulation is not the complete solution to the issues surrounding the different ways of designing and applying tools for regulatory purposes. Gunningham, Grabosky and Sinclair in Baldwin and Black[434] proposed their smart regulatory pyramid

[429] Neil Gunningham, Peter Grabosky, and Darren Sinclair. "Smart regulation: designing environmental policy." (1998): 1-17.
[430] Ibid.
[431] I Ayres and J Braithwaite, Responsive Regulation (OUP, 1992) 37.
[432] P Grabosky and J Braithwaite, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies (OUP, 1986), 34.
[433] Robert Baldwin, and Julia Black. "Really responsive regulation." The modern law review 71.1 (2008), 59-94.
[434] Neil Gunningham, Peter Grabosky, and Darren Sinclair. "Smart regulation: designing environmental policy." (1998), 1-17.

and noted that there could be potential arguments for failing to limit a regulatory response to an escalating punitive response. For example, focussing more on ex-ante controls like screening, as well as whether a reform of a given industry will deliver the desired results over regulation, whether falling back on non-state controls will be a better solution than state sanctioning or whether thinking outside of individual non-compliers to systemic difficulties in a given business sector is necessary.[435] Further, Gunningham and Sinclair claim that: "our pyramid conceives of the possibility of regulation using a number of different instruments implemented by a number of parties. It conceives of escalation to higher levels of coerciveness not only within a single instrument but also across several instruments".[436] Similarly, Braithwaite further elaborated on this own original model to suggest that a responsive approach to the growth and utilisation of regulatory tools which regards non-state actors as significant regulators in their own right could potentially improve the state's regulatory capacity.[437]

The idea behind responsive regulation is that most problems such as environmental problems can be solved by expanding the managerial capacity of the regulated entity to solve them.[438] In a corporate obligation and CSR context, this would mean expanding the managerial capacities of companies to recognise and achieve their corporate obligations beyond maximising shareholder value.

The relationship between responsive regulation and CSR mirrors the relationship between reflexive law and CSR in that responsive regulation is also seen as a type of law for communicating norms and institutions to

[435] Ibid.
[436] Ibid.
[437] Braithwaite (n 394), 475.
[438] Ibid.

support self-regulation. Responsive regulation in relation to CSR is therefore also seen as a flexible moniker for various regulatory strategies, particularly self-regulation. The same example can also be applied based on an industry self-regulatory code backed by law and this being a tool of responsive regulation, since it involves monitoring and communicating a given organisation's adherence to legal, ethical, or safety standards. Responsive regulation, which can be seen as a hybrid regulation model that may potentially be suitable for this thesis owing to the proposed middle ground approach (applying both voluntary and mandatory compliance), is incompatible with the chosen definition of this thesis. This is because although the legal model applied in this thesis argues for pure CSR which reflects mandatory compliance for all areas of CSR, responsive regulation mostly focuses on the environmental concerns, and for that reason is incompatible with the legal vision of this thesis.

3.4.4 Better Regulation Approach

The term "better regulation" is derived from the concept of Regulatory Impact Assessment/Analysis (RIA) and aims to ensure more efficient and effective regulation.[439] Better regulation also aims to assess the efforts of RIAs and collect and analyse best practices. Radaelli[440] argues that RIA research is descriptive and obsessed with "policy analysis." The main part of his research is devoted to the impact of regulatory impact assessment on the structure of political opportunities. He proposed to study "better regulation" as a dependent variable on the political, institutional and administrative context, and study the mechanisms of collective decision-making and macro trends in regulation management as independent

[439] Colin H Kirkpatrick, and David Parker, eds. Regulatory impact assessment: towards better regulation?. Edward Elgar Publishing, (2007), 286.
[440] Claudio M Radaelli. "Desperately seeking regulatory impact assessments: diary of a reflective researcher." Evaluation 15.1 (2009), 31-48.

variables. Radaelli[441] in another study paints a picture of RIA from a political economy perspective as an administrative control tool designed to address political uncertainty. He finds evidence of this hypothesis mainly in the United States and the United Kingdom. It should be noted that the literature on the importance of better regulation in RIA is rather insignificant, but it is an important contribution and should be developed as it has the potential to demonstrate the invisible issues behind RIA.

In 2005, a new and ambitious action plan was adopted to improve regulation. It began a major shift towards a more risk-based approach to regulatory assessment, which was aimed at further reducing the administrative burden on such regulation.[442] This means that regulation should only be carried out when necessary and should be proportionate to the risk of additional load. Furthermore, a new initiative had been launched under the plan, in which enterprises themselves could propose regulatory measures that they considered overly burdensome. The Better Regulation Framework consists of five principles as well as regulatory impact assessments, simplification plans and reviews.[443]

The Better Regulation Task Force originally identified the five principles of better regulation namely, proportionality, accountability, consistency, transparency and targeting.[444] Proportionality involves identifying and minimising cost. It also involves intervening when required, and solutions must be relevant to the risk posed. Accountability is the ability to justify decisions and be subject to public scrutiny. Consistency is about the need to implement the rules and standards in a fair and proper manner.

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[441] Ibid.
[442] Andrea Renda, Impact Assessment in the EU: The State of the Art and the Art of the State (Ceps 2006), 164.
[443] Ragnar E Löfstedt,. "The swing of the regulatory pendulum in Europe: From precautionary principle to (regulatory) impact analysis." Journal of Risk and Uncertainty 28.3 (2004): 237-260.
[444] D Arculus, Better Regulation Taskforce Report (2005) BRTF Report, 2, Available: http://www.eesc.europa.eu/resources/docs/designdelivery.pdf: Accessed on 25th May 2016.

Transparency involves being open, as well as promoting and maintaining clear and user-friendly regulations and the ways they are implemented. Finally, targeting is about focussing regulation on the current problem and minimising side effects.[445] Based on these principles of good regulation, the Legislative and Regulatory Reform Act 2006 was enacted. This can be seen in section 23 of the Act, which states that regulatory activities must be carried out transparently, proportionally, consistently and with accountability.[446] Therefore, this piece of legislation obliges regulatory bodies to pay attention to the principles and to a complementary code of practice under section 22 of the Act.[447]

As the OECD states, "the UK is very active in promoting the development of EU level Better Regulation".[448] In March 2005, there was a sea change with the release of the "Regulation - Less is More" report by the task force.[449] In this report and the Hampton Review[450] on "Reducing Administrative Burdens" the new approach was laid out as concentrating on reducing administrative cost to business and a requirement that new regulation should be accompanied by equal deregulation. This is problematic because reducing the burden, such as intelligence sharing with regulators on business, increases costs (due to the need for more resources) for regulators and makes them less effective in targeting problem areas. It makes them less effective because they have to devote more resources to intelligence gathering and the quality of that

[445] Gov.Scot. 5 principles of Better Regulation. (2016). Available: http://www.gov.scot/Topics/Business-Industry/support/better-regulation/5principlesofBetterRegulation. Accessed: 3rd December 2016.
[446] S23 Legislative and Regulatory Reform Act 2006. Available: http://www.legislation.gov.uk/ukpga/2006/51/pdfs/ukpga_20060051_en.pdf . Accessed: 25th September 2016.
[447] S22 of the Legislative and Regulatory Reform Act 2006. Available at: http://www.legislation.gov.uk/ukpga/2006/51/pdfs/ukpga_20060051_en.pdf . Accessed on 25th September 2016.
[448] OECD, Executive Summary – UK (2009) OECD Summary Paper, 13, Available: http://www.oecd.org/gov/regulatory-policy/44912232.pdf> Accessed: 25th May 2016.
[449] Better Regulation Task Force, Regulation – Less is More (Cabinet Office, 2005) 2. Available at: http://www.regulation.org.uk/library/2005_less_is_more.pdf. Accessed on 25th September 2016.
[450] P Hampton, Reducing Administrative Burdens: Effective Inspection and Enforcement (HM Treasury, 2005) 2. Available at: http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf. Accessed on 25th September 2016.

intelligence may be inferior to that which they received before or could have received directly from businesses.

Continuing the theme of better regulation, the UK combined corporate governance code is a voluntary code created with the support and input of regulated entities.[451] Its coercive power is derived from standard regulatory legislation, as s.100 Financial Services and Markets Act 2000 gave statutory authority to the Financial Conduct Authority's Listing Rules.[452] These require publicly listed companies to disclose their compliance with the code or explain why they have not, since the Combined Code is considered "a benchmark for good corporate governance practice."[453]

There are two main reasons why the code is considered a benchmark and is admired internationally. The first is its "comply or explain" approach. This makes it far more flexible than simple hard law (e.g. regulation through legislation), a cornerstone of smart regulation, and is more likely to make firms and companies obey it through its collaborative nature,[454] i.e., companies working together to provide engagement and implementation improvements. Companies are given the flexibility to justify why they have not complied with the code; indeed, the code expressly recognises that alternatives to its provisions may be acceptable if the reasons for it are explained clearly and carefully to shareholders.[455] Therefore, at its most

[451] P Sanderson et al, 'Flexible or not? The Comply or Explain Principle in UK and German Corporate Governance' (2010), Working paper No. 407. Available: http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp407.pdf. Accessed: 3rd October 2016.
[452] Financial Services and Markets Act 2000. S.100.
[453] S Arcot et al, 'Corporate Governance in the UK: Is the Comply or Explain Approach Working?" (2005) LSE Discussion Paper, 3. Available at: http://eprints.lse.ac.uk/24673/1/dp581_Corporate_Governance_at_LSE_001.pdf> Accessed on 23rd May 2016.
[454] F Snyder, Soft Law and Institutional Practice in the European Community (1993) Law Working Paper 93/5, 5 <. Available at: http://link.springer.com/chapter/10.1007%2F978-94-015-8368-8_10#page-1> Accessed on 3rd May 2016.
[455] FRC, The UK Corporate Governance Code (2016), Financial Reporting Council guidance, 3<. Available at https://frc.org.uk/Our-Work/Publications/Corporate-Governance/Final-Draft-UK-Corporate-Governance-Code-2016.pdf. Accessed on 3rd May 2016.

basic level, the ''comply or explain'' approach expects corporations to comply with the code unless good governance can be achieved by other means.[456] They must then explain this to regulators and to investors in a corporate governance statement.[457] There is an understanding that the ''one size fits all'' approach of hard law does not suit every firm or situation.[458] Thus, codes are prepared with the input of industry leaders to make adherence to them more likely.[459]

Key to the role of better regulation in CSR is the government's initiative to reduce the burden of regulation on businesses, particularly in the UK, to achieve lower costs, higher revenues and improved reputations.[460] This is fundamental to the discussion of the best ways to regulate CSR and assists in outlining the modern legal scholarship. The decision to reduce regulation centred on the premise that the total cost of regulation to the economy was around 10% of the UK's GDP.[461] Based on the above discussions, better regulation would not align with the chosen CSR definition of this thesis owing to its voluntary nature of corporate governance, while the chosen definition points to a more mandatory nature of corporate governance.

The key question is whether the regulator is able to take a robust approach when a corporation has not complied and is unable to explain why not. It can be argued that the codes are non-binding (something that cannot be made into law), however, this is not the case. This is because the ''comply or explain'' approach is predicated on the premise that knowledgeable and

[456] Ibid.
[457] Samuel O. Idowu, Nicholas Capaldi, and Matthias Fifka (eds), Dictionary of corporate social responsibility: CSR, sustainability, ethics and governance (Springer International Publishing AG 2015) 116.
[458] David Kershaw, Company law in context: Text and materials (Oxford University Press 2012) 254.
[459] Renginee Pillay, The changing nature of corporate social responsibility: CSR and development - the case of Mauritius (Routledge 2015) 55.
[460] BIS, Better Regulation Framework Manual (Gov, 2015) 4. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf. Accessed on 10 October 2016.
[461] Better Regulation Commission, Better Regulation – from Design to Delivery (Annual Report, 2005) 2 .

engaged investors will step in and discipline managers who do not comply with the code and do not present an alternative form of good governance. Therefore, this reinforces the need for a mixed approach for effective regulation. However, this may not be the case for companies as many investors may lack in-depth knowledge of the company's decision-making process or the ways it functions and thus are unable to counter directors' claims. Thus, this thesis reinforces the need for oversight from a more formal regulator. However, ''comply or explain'' approaches, if conducted properly, can form part of a successful regulatory ecosystem given its robust and flexible nature.

3.4.5 Comply or Explain Approach

The principle of "comply or explain" is one of the widely used principles in the corporate governance system and is mainly considered as a suitable tool for corporate governance.[462] To avoid a one-size-fits-all solution, comply or explain allows companies to choose between adhering to a particular rule or explaining why they do not meet the requirements. Typically, the provisions of the mandatory code are considered best practice; companies should strive to apply them all. However, because companies and their position can vary greatly, it is likely that the rule may have a positive impact on one company, but a negative impact on another.[463] Following the best practices should not be in itself an objective, but a system designed to be flexible. Since corporate governance is a means of empowering investors, it is ultimately up to them to decide whether they agree with the company's decision to comply or explain it.

[462] Jean Jacques Du Plessis, Anil Hargovan, and Jason Harris. Principles of contemporary corporate governance. Cambridge University Press, (2018), 452.
[463] Ibid.

Comply or explain comes in various forms. It should be noted that in fact both answers are in accordance with the requirements of the law; the choice of explanation is in accordance with the law, not the requirements of the law. Secondly, there is a distinction between deviating from a strict rule-based approach while respecting fundamental principles or completely deviating from established rules and principles. In other words, there are different degrees of compliance that are affected by the regulator's choice of rule or principle-based approach.[464] These degrees of compliance are reflected in both hard and soft law.

Hard law in the principle of "comply or explain" refers to the rules which must be followed, though hard law may contain elements of soft law, which are rules that should be followed with some elements of non-compliance.[465] While the term "soft law" implies more flexibility than the term "hard law", it is nevertheless a law and should not be ignored unless there is a compelling reason to do so. Soft law is not legally binding, so its application by companies is only based on goodwill or if it serves a specific purpose. This results in only a small percentage of companies fully complying with the applicable corporate governance codes.[466] There is a potential concern that companies appear to be making decisions mainly for reasons of personal interest, as described in the European Commission's Green Paper on Corporate Governance.[467] Therefore, it appears that different companies have differing perceptions of CSR and often apply it in a way that suits their agenda, whether it be for social well-being or for personal gain. Nevertheless, the hard law or mandatory

[464] Du Plessis and others (n 138), 195-206
[465] Economic and Social Research Council Shaping Society. Soft Regulation?: Conforming with the Principle of 'Comply or Explain' (2019). Available: https://www.researchcatalogue.esrc.ac.uk/grants/RES-000-23-1501/read/keyfindings Accessed: 4th Sept 2019.
[466] David Seidl, Paul Sanderson, and John Roberts. "Applying" comply-or-explain": Conformance with Codes of Corporate Governance in the UK and Germany." (2009), 1-33.
[467] EC–European Commission. "Green Paper on the EU corporate governance framework." European Commission Communication (2011), 1-23.

compliance side of CSR suggests that companies are obliged to follow CSR rules, irrespective of their perception of it.

The "comply or explain" approach does not work in all contexts since different companies have different governance needs, not to mention that companies come in different shapes and sizes. It works in corporate governance because London Stock Exchange-listed companies, which the UK code is aimed at, are under heavy scrutiny from perceptive investors and thus it makes sense for them to have to explain some of their decisions.[468] The relationship between investors and companies works in this context because the majority of investors in such companies are institutions, as described above, which can employ specialists to monitor the governance of their investments in companies. The UK combined code has high compliance levels, and this is one its strengths. In 2014, more than 90% of FTSE 350 companies complied with all but one or two provisions of the code.[469] However, it will not have those same levels if applied across all contexts because it suits the context in which it is currently applied.[470] This is because the companies in question recognise that their investors are perceptive and can challenge their failure to comply.

Debates do exist in terms of whether legislation can effectively enforce corporate obligations and responsibilities.[471] Many of these debates argue that it is important to develop a legislative framework for the implementation of CSR obligations.[472] For example, Lyon and Maxwell

[468] P Sanderson et al, 'Flexible or not? The Comply or Explain Principle in UK and German Corporate Governance' (2010), Working paper No. 407. Available at: http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp407.pdf. Accessed on 3rd October 2016.
[469] FRC, The UK Corporate Governance Code (2016), Financial Reporting Council guidance, 3<. Available at https://frc.org.uk/Our-Work/Publications/Corporate-Governance/Final-Draft-UK-Corporate-Governance-Code-2016.pdf. Accessed on 3rd October 2016.
[470] S Arcot and V Bruno,' In Letter but not in Spirit: An Analysis of Corporate Governance in the UK' (2006) Working Paper 31, 3< Available at: http://www.lse.ac.uk/fmg/research/RICAFE/pdf/RICAFE2-WP31-Arcot.pdf. Accessed on 3rd October 2016.
[471] BE Joyner & D Payne, 'Evolution and Implementation: A Study of Values, Business Ethics and Corporate Social Responsibility' [2002] 41 JBE 4, 299.
[472] Solomon (n 54), 51.

specifically focus on environmental obligations, arguing that UK law clearly lacks legislative mechanisms that prevent environmentally damaging activities.[473] The need for legislation to be preventative rather than reactive has also been addressed, with some commentators advancing the view that the only way to hold companies CSR-responsible is through rigorous and strict legislation.[474]

Based on the above discussion regarding comply or explain, this regulatory model appears to have the most potential to align with the proposed mandatory legal model of this thesis and aligns with the proposed definition. This is because while comply or explain contains hard law, which can be seen as mandatory CSR compliance, there is also soft law which to some degree is mandatory CSR, but at the same time includes elements of non-compliance or voluntary CSR compliance. Therefore, comply or explain provides a good balance for the proposed legal framework of this thesis because while Kuwaiti company law appears to follow mandatory compliance, it also includes elements of voluntary compliance, which supports the middle-ground approach adopted in this thesis. For example, Kuwaiti companies are obligated to donate 1% of their profits in the form of Zakat Tax, but at the same time have the freedom to choose where that Zakat Tax should be donated to, e.g., charities, environmental initiatives or public services (as discussed in detail in chapter 6).

3.5 Conclusion

The examination of the main regulatory theories presented in this chapter sets the foundation for analysis of how CSR objectives may best be achieved and enforced.[475] As shown in Chapter Two (see 2.4 and 2.5), CSR

[473] Lyon and Maxwell (n 55), 255; Chouhan (n 55), 12-14.
[474] P Griseri & N Seppala, Business Ethics and Corporate Social Responsibility (Cengage 2010) 14; S Zadek, The Civil Corporation: The New Economy of Corporate Citizenship (Earthscan 2011) 32.
[475] Luo and Bhattacharya (n 44), 12.

obligations are multifaceted and categories of obligations identified differ significantly from ethical obligations. This suggests the need for mandatory,[476] rather than voluntary compliance[477] to those corporate obligations and responsibilities that require the development of a legislative framework or the power to create laws. This also implies that a "one standard code of conduct" approach to CSR regulation will be unsatisfactory. Questions also arise over whether legislation or regulation should be reactive or preventative.[478] The Combined Code on Good Corporate Governance contains aspects of voluntary compliance despite companies needing to explain why they have not complied with the Code.

The analysis of existing regulatory theories related to CSR raised some interesting findings in regards to the regulatory models they apply. Some adopted voluntary compliance (e.g. better regulation, reflexive law and nudge theory), while others adopted mandatory compliance (e.g. responsive regulation and comply or explain). However, this thesis is more interested in the models that are predominantly mandatory focused since this regulatory model aligns with the focussed context, which is Kuwait. However, one particular regulatory theory known as "comply or explain" appeared to be the closest in terms of proposed definition and legal framework of CSR adopted in this thesis owing to its hybrid approach of applying mandatory compliance with elements of voluntary compliance. Although this thesis leans more towards mandatory CSR compliance, there needs to be a middle-ground between the CSR approaches and thus a hybrid approach would seem feasible. That said, in order to establish this middle-ground, there is a need to explore other contexts, such as the UK and India where voluntary and mandatory CSR compliance has been

[476] Carroll and Shabana (n 47), 88.
[477] French, Mason & Ryan (n 45), 470; Blowfield and Murray (n 45), 342.
[478] Griseri and Seppala (n 474), 14; Zadek (n 474), 32.

applied in their respective company law. This will assist in determining the feasibility of CSR compliance in Kuwait, where CSR compliance is absent in its company law provisions.

From the above discussions of key issues surrounding CSR, it would appear that the existing literature raises numerous issues relevant to the research. These include: (i) identification and definition of CSR principles, (ii) mandatory versus voluntary (discretionary) CSR regulation, as examined through the regulation theory lens; and (iii) how best (or whether it is ever possible) to most effectively balance competing CSR stakeholder interests. This calls for investigation of current CSR practices in order to address the above questions and eventually identify lessons for effective regulation of CSR. Therefore, the next chapter begins to address the above questions by examining and comparing the company law provisions in the UK and India through the lens of CSR principles.

Chapter Four: Corporate Social Responsibility Provisions in Company Law: Comparative Analysis of the UK and India

4.1 Overview

Thus far, it is understood that CSR is an organisation's ongoing commitment to behave ethically, as well as contributing towards national economic development and providing better quality of life to the workforce and the society.[479] This is a direct contradiction to Friedman's view in that the responsibility of organisations is solely to earn money.[480] Correspondingly, several benefits of being a socially responsible corporation have been demonstrated in the preceding chapters, such as enhanced reputation with the public and the business community, as well as a reduction in government regulation, thus saving time and energy.[481]

Chapter Two and Three have examined key issues surrounding CSR, including the identification and definition of CSR principles; mandatory versus voluntary CSR regulation and how best to most effectively balance competing CSR stakeholder interests. The Indian and UK contexts suggest that a variety of different CSR-related legislative provisions have been enacted to underscore the importance of a company's stakeholder obligations and responsibilities that extend beyond its shareholders. For that reason, this chapter examines and compares the company law legislation of the UK and India through the lens of CSR principles. The

[479] Watts and Holme (n 185).
[480] Richa Gautam, 'Integrating CSR into the Corporate Governance Framework: The Current State of Indian Law and Signposts for the Way Ahead' (2010). Available: https://www.nseindia.com/research/content/CG_12.pdf. Accessed: 14th March, 2018.
[481] S.N. Bhaduri and E. Selarka, *Corporate Governance and Corporate Social Responsibility of Indian Companies* (Springer Singapore 2016), 134.

chapter offers a historical analysis of company legislation and then moves to a discussion of pre-legislative interventions in CSR practices in the UK and India, together with discussions relating to corporate governance structures, directors' duties, corporate objectives and CSR reporting.

4.2 Historical Analysis of the UK and India's Company legislation

This section discusses the legal position of Indian corporate law and compares it with UK corporate law (Companies Act) before 1948, as well as the reform processes after 1948. The changes to the respective corporate laws after 1948 leading up to the 1970s, as well as other amendments after 1970 to modern day reforms are also discussed. Finally, a discussion of the current position of reforms to Indian and UK corporate law are presented (1991-2013 reforms). Moreover, the purpose of this section is to determine how far both the UK and Indian legislation has developed over time and to determine the extent of use in corporate environments.

4.2.1 UK Corporate Law History

For a while now, reformers from across the globe have faced various concerns relating to modern company law principles.[482] Such concerns include a lack of shareholder and delegated management, issues of minority shareholders versus majority shareholders, external stakeholder influences and concerns over capital, disclosure, creditors and other stakeholder groups.[483] Recently, company law activity in the UK and Europe has increased and much knowledge can be gained from studying corporate law in jurisdictions in which key reforms have come to fruition.

[482] Roman Tomasic. "The Modernization of Corporations Law: Corporate Law Reform in Australia and beyond." *Australian Journal of Corporate Law* 19.1 (2006), 2-34.
[483] Klaus J. Hopt,. "Modern company law problems: a European perspective keynote speech." (2000). Accessed: http://www.oecd.org/daf/ca/corporategovernanceprinciples/1857275. pdf. Accessed: Accessed: 14th March, 2018.

As well as efforts from internal reforms, the UK has been impacted by European law reforms owing to its EU membership, namely complying with the EU company law directives that have been recently embedded into UK law. This also includes miscellaneous EU policies associated with companies (e.g. EU Insolvency Regulation that focuses on Europe's cross-border insolvencies).[484]

In the UK government's 1998 consultation paper, Minister Margaret Beckett demanded a review of company law that would help to modernise the country and guarantee that the economy was prepared for any future challenges.[485] The paper further stated that the review concerned the modernisation of core company law and a new strategic framework was proposed to consider problems faced by not only larger firms, but also small businesses.[486] Around this period, there were concerns over human rights and labour standards, and as a result, several pieces of legislation were enacted, including the Employment Rights Act 1996 and Human Rights Act 1998. Employment rights law gives people the right to work and be given a fair dismissal from work,[487] while human rights law enables individuals to defend their human rights and compels companies to treat everyone with dignity and respect.[488] These pieces of legislation were the early signs of CSR in UK company law.

Moving forward to 2006, the enactment of the UK Companies Act 2006 was a major development in the history of Britain's company law. It was the largest single piece of legislation to be passed in the UK, comprising of

[484] Nicola de [VNV] Luca. European Company Law: Text, Cases and Materials. Cambridge University Press (2017), 530.
[485] Timothy Edmonds, The Company Law Reform Bill [HL] (2006). Available: http://researchbriefings.files.parliament.uk/documents/RP06-30/RP06-30.pdf. Accessed: 5th Sept 2019.
[486] Shawn Donnelly. The regimes of European integration: Constructing governance of the single market. Oxford University Press, (2010), 273.
[487] Employment Rights Act (1996), S.1.
[488] Human Rights Act (1998), A.3, A.4 and A.5.

1300 sections.[489] The legislation also adopted other significantly new principles that aimed to simplify company law and reduce regulation. Despite the consideration and introduction of some reforms by the UK Companies Act 2006, they have for various reasons lagged behind compared to other western nations such as the US and Australia with regard to statutory foothold i.e. power and influence. An example is the UK statutory statement of directors' duties, despite similar legislation that had already been enacted in countries like Australia for the past fifty years.[490]

Although this was a legislative reaffirmation of deep-rooted common law ideas, it also set out to be innovative in this area by promoting the enlightened shareholder value in the decisions made by company directors.[491] For example, one breakthrough was the reform objectives established by the UK government in this area in a 2005 white paper which stated that the government called for company decisions to be made not only based on immediate return, but also long-term goals.[492] This has been achieved by including the concept of shareholder value in the charter by making it clear to directors that they should contribute to the success of the company for the benefit of its shareholders as highlighted in section 2.3.2 in relation to the enlightened shareholder principle. This can only be achieved taking into account long-term and short-term goals, as well as other broad factors such as employees, environmental impact, suppliers and customers.[493]

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[489] Saleem Sheikh. A guide to the Companies Act 2006. Routledge-Cavendish, (2013), 1432.
[490] Adolfo Paolini, ed. Research Handbook on Directors Duties. Edward Elgar Publishing, (2014), 384.
[491] David Collison, et al. "Shareholder primacy in UK corporate law: an exploration of the rationale and evidence." (2011), 1-50.
[492] Ibid.
[493] DTI, 'Company Law Reform' (2005).Available: http://webarchive.nationalarchives.gov.uk/+/http:/www.dti.gov.uk/cld/WhitePaper.pdf. Accessed 26th June 2018.

The 2005 white paper also discussed the UK government's consideration for legislative reforms and the need for a statutory statement of directors' duties in the event of introducing such reforms.[494] For example, the company is owed the general duties provided by directors, which can be found in case law, namely decisions made in individual court cases that are not found in the Companies Act. Therefore, individuals who become company directors, as well as other company members, may undertake their respective roles without considering their obligations in addition to in whose interests the directors should be acting. The Law Commission believed it was required to ensure that the law in this domain was more consistent, absolute, accessible and logical, and further recommended that a statutory statement of directors' general duties should be in place. The government agreed that directors and their duties are vital to the success of company law and that these duties are brought to their attention and understood. Therefore, the bill included a statutory statement of the general duties company directors perform on a daily basis.[495]

Although the above were not new arguments in various other countries, for the UK, it was very significant. This is because UK legislation in 2006 built on the radical reform efforts of the previous ten years and reflected the growing frustration over non-legislative methods of corporate regulation.[496] Owing to the archaic nature of UK company law, this called for the UK government to modernise it. This was the case since the UK courts were unable to develop a set of rudimentary company law principles like updating directors´ duties that aligned with the reforms in business practices.[497] In addition, the UK markets had been dominated by the laissez

[494] Ibid.
[495] Ibid.
[496] Tomasic, Roman. "Raising corporate governance standards in response to corporate rescue and insolvency." Corporate Rescue & Insolvency 2.1 (2009), 5-9.
[497] Ibid.

faire approach because since the mid-1850s there was hardly any government involvement in establishing new corporate law rules like the ones that have recently emerged in contemporary legal systems. As a result, this led to the creation of a fertile ground that called for radical reforms to be made in this domain, particularly where new movements called for not only self-regulation, but also nuanced systems of corporate regulation. Moreover, a number of scholars have pointed out that the traditional dichotomy between government regulation and self-regulation had failed to develop a more effective system of corporate regulation.[498] Therefore, clearly more effort was needed for an integrated system of company regulation that included a combination of internal corporate compliance programs, external regulatory monitoring and control and self-control. In terms of CSR, this raises a number of ethical issues owing to the incorporation of mandatory regulation that places companies and its constituents under an authoritarian model where control and monitoring is encouraged.[499] Therefore, there has to be some elements of voluntary compliance embedded in company regulations in order to promote a fairer and ethical business environment.

4.2.2 India's Corporate Law During the Colonial Era (1850-1947)

India, as a country is not new to the concept of business organisations. The concept existed in ancient India as well in the form of guilds or groups comprising of artisans along with businessmen which engaged in business activities in a similar manner. They showcased similar features as that of modern corporations in their most basic form.[500] However, owing to the

[498] Doreen McBarnet, Aurora Voiculescu, and Tom Campbell. The new corporate accountability: Corporate social responsibility and the law. Cambridge University Press, (2007), 602.
[499] Ibid.
[500] Vikramaditya Khanna. "The Economic History of Corporate Form in Ancient India." (University of Michigan 2005), 1-46.

arrival of the European traders in India at the end of the 15th century, these business forms became obsolete.[501]

The rise of the contemporary business corporation in India can be traced back to the establishment of the UK East India Company (EIC) in the 1600s, which provided them with the royal charter for possessing a monopoly for trading in the country.[502] Similarly, the birth of the contemporary business corporation in the UK came around the same time as India, (1614 to be precise) when both the British East India Company and Dutch East India Company were competing trade monopolies.[503]

The UK corporations have been bestowed with nearly same amount of privileges from that time and have continued and commenced its businesses in India.[504] It is evident that for more than two and half centuries British companies have existed in India without the presence of any laws or regulatory authorities and companies had a freehold in terms operating themselves. There was no establishment of any companies in India specifically banking corporations owing to continued opposition from the EIC for granting them charters for operating in the country.[505] Therefore, this raised the regulatory issues of early company law in both the UK and India initially having no regulatory backing for socially responsible activity; however, this would eventually change with the introduction of company legislation in the 19th century.[506]

[501]Radhe Shyam Rungta. "The rise of business corporations in India.", 1851-1900. No. 8. CUP Archive, (1970), 320.
[502]Ron Harris. "The English East India Company and the history of company law." 6 VOC (2005), 1602-2002.
[503]Harwell Wells, ed. Research Handbook on the History of Corporate and Company Law. Edward Elgar Publishing, (2018), 656.
[504]Robert C. Rosen. "Myth of Self-Regulation or the Dangers of Securities Regulation without Administration: The Indian Experience." J. Comp. Corp. L. & Sec. Reg. 2 (1979), 261.
[505]Rungta (n 501), 36.
[506] Ibid.

4.2.2.1 Developments in the 19th Century

Before corporate governance became a prominent issue in the late 20th century, the contemporary business corporation was still in its infancy in the 19th century. Such companies even had no legislative or regulatory backing until the mid-19th century. The act pertaining to registration of Joint Stock Companies which passed in the year 1850 let to creation of specific company legislations along with regulations.[507] The formulated legislation was passed in the UK along the lines of Companies Act 1844 and it marked the beginning of the legislative as well as regulatory reforms and developments in the corporate field in India which was lagging and they began to match the pace of developments in the UK. [508] The UK companies Act, served as a guideline to be adhered for Indian corporate law for more than a century and all regulations incorporated and ratified in UK law were applied and followed in India.

The above aligns with the regulation models discussed in chapter three where India started briefly with a "comply-or-explain" approach, but seemed to eventually transition towards a mandatory approach pertaining to corporate governance and the model has continued since. The continuity was maintained and ensured owing to both the legal tradition as well as the enforcement culture in India in which after the end of the colonial period, there had been dependence government regulation of the corporate sector. Therefore, it can be said that India adopted the UK corporate model to support the development of modern business in India at the time. The oddity pertaining to the Joint Stock Companies Act of 1850 was led to providing a set of specific privileges and registration was

[507]P. Malarvizhi, and Sangeeta Yadav. "Corporate environmental disclosures on the internet: An empirical analysis of Indian companies." Issues in Social & Environmental Accounting 2.2 (2008), 211-232.
[508]P. M. Vasudev, "Capital Stock, its Shares and Their Holders: A Comparison of India and Delaware." Worldwide Junior Corporate Scholars Forum Conference. (2007), 1-36.

not mandatory.[509] The privilege of limited liability was not in the list of the acquired privileges as the concept of limited liability was not present in the UK law. However, the 1850 Act marked a prominent milestone to the Indian Corporate law history as it was the only legislation in the field which provided and enforced the main legislative provisions for effective management of the joint stock companies in India for the first time[510]. However, it was not effective as it did not contain any provisions for protection of the shareholders via the induction of the concept of limited liability.[511]

This raises the question as to what prompted the introduction of legislation and regulation. What prompted such regulation was the monopoly of trade where royal charters approved monopoly of trade to company members over a certain territory; these were referred to as regulated companies, which were operating in the UK around the 1600s, but were not established in India until the 19th century.[512] Therefore, it appears that India was following in the footsteps of, or was inspired by, the UK regulatory model and therefore incorporated a similar model. This can be observed in the types of UK regulation that was introduced in the 19th century and the nature of such regulation. For example, government regulation of UK railways in the 1840s stipulated that inspectors could not have any other connection with any other railway company. Despite the repeal of the ban in 1844, the features (e.g. simple registration procedure and limited liability) of the law remain unaltered.[513] Similarly, the East Indian Railway

[509]Rungta (n 501), 41.
[510]Umakanth Varottil. "The evolution of corporate law in post-colonial India: from transplant to Autochthony." Am. U. Int'l L. Rev. 31 (2016), 253.
[511] Ibid.
[512]Wells (n 503), 656.
[513]Iain McLean. "The history of regulation in the United Kingdom: Three case studies in search of a theory." The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance, Cheltenham, Edward Elgar (2004), 45-66.

Company introduced the joint stock company the following year, and was incorporated by Parliament in 1849. Therefore, both countries had similar laws around the same time and demonstrated inherent similarities between the two.[514]On reflection, there appears to be no CSR within this period. This could be down to issues such as human rights in India not being taken seriously until the early 1950s.[515]

4.2.2.2 Developments in the 20th Century

Later in the 19th century and nearing the dawn of the 20th century, after the enactment of Indian Companies Act of 1882, a few amendments were carried out.[516] Such amendments included the prioritisation of debts in liquidation in 1887, provision of power to change a memorandum of association in 1895 and the provision of branch registers in the UK in 1900. Similarly, in the UK, three significant statutes associated with companies were enacted: the UK Companies Act 1890, which offered the provision of powers to change a memorandum of association; the Winding Up Companies Act 1890; and the Directors Liability Act 1890 that held directors accountable for untrue statements in a prospectus.[517] Of the previously mentioned enactments, only the 1890 enactments were reproduced in the Indian legislation. These similarities could be down to the changes made in corporate governance structures, e.g., directors' responsibilities, which are common in business corporations. Therefore, specific changes in the enactments are not entirely due to the nature of legislation governing a specific country, rather they are corporate governance structures in business corporations that share the same

[514]Wells (n 503), 656.
[515]N. Madan, 'History & Development of Human Rights in Indian' IOSR Journal Of Humanities And Social Science (IOSR-JHSS) 22(6), (2017), 1-6.
[516]Robert L. Tignor. Colonial Transformation of Kenya: The Kamba, Kikuyu, and Maasai from 1900-1939. Princeton University Press, (2015), 386.
[517]Kenya Gazette, *Minutes of the Proceedings of the Legislative Council of East Africa Second Session 1917* (Kenya Gazette 1917), 9.

characteristics, regardless of the country in which they operate. Interestingly, both countries were engaging in some form of corporate governance even before its prominence in the late 20th century.

In the 20th century, following the UK Companies (Consolidation) Act 1908, another enactment was instituted in India as the Companies Act 1913.[518] It was nearly identical to the UK act in terms of its provisions, however in specific particulars the Indian Act had been amended as per the requirements and thereby those particulars differed from the UK Act.[519] Along these lines, following the establishment of the UK Companies Act of 1929, huge corrections were made to Indian law and were included in the newly enacted Companies (Amendment) Act 1936.

What was new about this legislative effort is that the Indian governing body chose to undergo an amendment procedure as opposed to a re-enactment keeping all legislations directly in synchronisation with the UK 1929 enactment. The reasons for the 1936 amendments suggest that India was not going to adopt all the UK legislations wholly without due diligence owing to some unfavourable backlash as well as criticism faced for directly copying them, and also the popularity of the view that issues which are exclusive to India need to be dealt with specifically without following the UK enactments blindly, particularly those with reference to the managing agency system.[520]

This trend also started to manifest within the judiciary. While it was common for courts to refer to UK decisions during the colonial period,[521] the courts had now started to recognise an important issue. That is, if

[518] Varottil (n 510), 253.
[519] Ibid.
[520] Ibid.
[521] G.P. Singh and India, *Principles of Statutory Interpretation* (Bharat Law House 1999): 1252.

Indian law is passed in a positive light, the appropriate course is to study the language of the law and determine its proper meaning without prejudice to any considerations arising from the previous state law or the law of the United Kingdom on which it may have been based.[522]

Until 1936 and India's independence, the 1913 Act underwent a number of further changes, primarily to address certain flaws in the legislation, as well as consideration of all the constitutional ratifications and changes in the form of enactment of the Government of India Act, 1935. This position continued until the independence of India, which required additional reforms.[523] Referring back to section 3.4.2 in chapter three, the link here is that the mandatory approach suggests that since India's independence, industrial sector in the country has been subject to strict supervision and control via the government of India through mandatory regulations.

In the early years, agency systems in the twentieth century, which were developed into partnerships or small corporations, were managed by entering into management contracts with businesses,[524] no legislation or regulation could prevent it. As the abuse of the system of management agencies was mainly a problem with the local Indian situation and did not attract the attention of UK legislators, the transplanted law only briefly addressed these issues at hand and they had no solution pertaining to protection of the shareholders of the companies which had been mismanaged under the management agency system. Due to the prevalence of British companies as managing agents, it is also possible that the required political resolve was lacking in India to rein them in.[525] Only at

[522]S. Shamimul Hasnat Azmi. "Judicial Review of Rights of a Nominee under the Insurance Act 1938." Journal of the Indian Law Institute 30.3 (1988), 355-367.
[523]Petra Mahy, and Ian Ramsay. "Legal transplants and adaptation in a colonial setting: Company Law in British Malaya." Sing. J. Legal Stud. (2014): 123.
[524]Rosen (n 504), 263.
[525]Misra, Maria. Business, race, and politics in British India, c. 1850-1960. Clarendon Press, (1999): 264.

the end of the colonial period was the managing agency system legally recognised. The Companies (Amendment) Act of 1936, which was the first to make at least some derogation from UK company law, took note of the abuses in the management agency system, and attempted the introduction of a variety of different checks as well as balances via limiting of the duration pertaining to management agency's contract and allowing the removal of the administrative representative for cause.[526] Therefore, CSR during this period would have been a serious matter owing to the lack of provisions that promote shareholder protection for mismanaged companies, which therefore would have left them financially vulnerable.

The following table shows the chronological evolution of legislation in the UK and India, clearly showing that the Indian legislator has only pursued the guidance of UK law through a transplantation process.

Table 4.1: Main historic developments in Corporate law in UK and India

UK	India
Companies Act 1844	Act for Registration of Joint Stock Companies 1850
Limited Liability Act, 1855 Joint Stock Companies Act 1856	Companies Act1857 Companies Act1860
Companies Act 1862	Companies Act 1866
Amendments to the Companies Act 1862	Companies Act 1882
Companies (Consolidation) Act 1908	Companies Act 1913
Companies Act 1929	Companies (Amendment) Act 1936

4.2.2.3 Effect of Corporate Law-Making in the Colonial Era

Any type of a chronological analysis regarding the development of the legislation in India is non-satisfactory in nature and such an analysis fails to

[526] Rosen (n 504), 264.

identify the underlying reasons for the introduction of the legislations via continued legal transplants and it fails to underline the prevalent contexts in the country as well in terms of the socio-economic factors which were in play for the amendments and developments.[527] This section seeks to incorporate these factors and conduct and analysis pertaining to the impact of the corporate legislation on both Indian and UK businesses during the colonial times and also understand the underlying reasons for the advent and introduction of such type of legislation.[528] From the analysis it is evident that there were two most prominent trends during the colonial period. The first was that the direct transplant of the UK corporate law to India was only done for catering to the British interests and not focused towards modernisation of the Indian corporate law. Secondly, the UK company law which was directly implanted and followed in India only focused on acting as an instrument of market regulation.[529]

The primary reason for the transplanting of the UK company law in India was the facilitation of effective trade between UK and India and this was feasible only when the regulations in both countries were similar and focused on the same agendas and guidelines.[530] Thus, it can be inferred that the similarity of laws in both countries was focused on the minimisation of the risk in trading via the British businesses with the Indian colony which they governed and ruled to eliminate any risks and biases.[531]

The primary reason for ensuring similarity in the laws between UK and India was evident as this motive was explicitly mentioned in the Statement of the

[527]Rob McQueen. A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920. Routledge, (2016), 374.
[528]Rungta (n 501), 25.
[529]Ritu Birla, *Stages of capital: Law, culture, and market governance in late colonial India* (Duke University Press 2008), 243
[530]McQueen (n 527), 17-57.
[531]Rungta (n 501), 68.

Objects and Reasons of the Joint Stock Company Act of 1856 and the Companies Act 1882.[532]

The direct transplant that occurred from the UK law to Indian Law for favouring the British businesses had a counterproductive impact on the local businesses and their interests.[533] No regard to any needs pertaining to the local businesses was paid and no recognition to indigenous and ancient business structures which existed in India for centuries such as Hindu Undivided Family (HUF) was provided.[534] For example, via the enforcement of the Companies Act of 1882, it became mandatory for local businesses which carry on trading comprising of more than twenty individuals in "partnership" to be registered as a company under the act.[535] This was rather than effective and it became evident that the transplantation of the UK corporate legislation to India had failed to take into account the traditional business forms of India and had acted in negative interests for them.

All the transplanted laws were primarily focused on the benefits of the British companies and traders and also for ensuring free business and trade in India from traditional and ancient customary codes towards a primarily free-market ideology.[536] All these changes were in consistency to the development in UK during that time.[537] It was also witnessed that in the colonial period the usage of law was done for the facilitation of trade in the form of an instrument.[538]

[532] Ibid.
[533] McQueen (n 527), 17-57.
[534] Birla (n 529), 51-52.
[535] Ibid.
[536] Ibid.
[537] Ibid.
[538] Ibid.

The adoption of a free-market approach by the British in India via continued transplantation of the UK laws in Indian laws dating from the time period of 1850 to decolonisation was a result of their focus on the facilitating of the British business interests and to ensure easy business and trade with India. This approach had a highly detrimental effect on the local business forms and companies. However, the colonial period in India marks the advent of an exclusive form of management technique in the form of usage of managing agents for effective management of companies. This concept of managing agency was a result of exclusive and specific local needs and it found acceptance in the Indian corporate legislation despite of close similarity being followed in the Indian developments by the UK in ensuring that both the business as well as the legislative spheres of both countries remain synchronised. Every historical account of any type of corporate law in India will not be deemed complete without proper analysis pertaining to the concept of managing agency as it further went on after the post-colonial timeframe to garner the attention from Indian legislators as well. In terms of CSR, there appears to be no significant CSR issues at the time due to the transplant of UK company law into India, which mostly concerned trade issues.

4.2.2.4 development and Evolution of the Managing Agency System

The 19th century India witnessed a unique managing agency system owing to its geographical, economical and historical necessities.[539] It is evident from the study of business history in India that the country was filled with a host of informal business structures which were based both on kinship as well as family relations.[540]

Despite this, the managing agencies were successful in becoming the driving force in the colonial India's business and corporate sphere. The managing agencies exercised control over cotton, teas as well as jute industries and the concept witnessed a sharp rise in the eastern part of India.[541] As per the findings by Maria Misra in her work on the business, race and politics in India she concluded that the managing agency system had majority of British firms and domestic firms found very less places in the system.[542] The presence of the British managing agencies ensured that they become dominant members of the colonial community in India.[543] The focus of creation of managing agencies was to ensure effectiveness but its functioning caused a great deal of controversy. For example, during its initial phase of operation the system did not have any regulations or legislations and this way it became completely free from the bounds of both legislative laws and regulatory authorities and it clearly showcases the flaws which can arise in transplanted legislations if the local conditions and circumstances are not taken into account.

Since the abuse pertaining to the managing agency was a localised problem, therefore it failed to capture any attention via the British

[539]Rungta (n 501), 220.
[540] Ibid.
[541]Omkar Goswami. "Sahibs, babus, and banias: Changes in industrial control in eastern India, 1918–50." The Journal of Asian Studies 48.2 (1989), 289-309.
[542]Misra, Maria. Business, race, and politics in British India, c. 1850-1960. Clarendon Press, (1999): 264.
[543] Ibid.

Lawmakers and they paid no attention to this issue and therefore did little from their end to ensure the protection of the shareholders of the companies that got adversely affected as a result of mismanagement via the managing agency system. The presence of mostly British firms as managing agents also was one of the reasons why there was the absence of the necessitated political by the British lawmakers on this issue.[544] The managing agency system was recognised via legislature at nearly the end of the colonial era by the British lawmakers. This recognition was done in the Companies (Amendment) Act of 1936 in which the lawmakers took notice of the continued abuse of the managing agency system and introduced numerous checks as well as balances. This was facilitated via limiting of the time of the managing agency contract along with providing permission for the removal of the managing agent in lieu of any causes.[545]

The managing agency system is symbolic of the failure of transplanting UK legislation to India via legislative instruments without paying proper attention to the needs and local along with social and economic circumstances prevalent in India during the colonial India by the British lawmakers. This was only done for providing preference to the British interests and showing zero concern for the local interests. This was continued for more than a century until some attention to the local socio-economic needs was paid and changes began to become evident in 1936. In terms of CSR, the agency system raised various issues with the lack of shareholder protection for investors being the most prominent, leaving them financially vulnerable.

[544]Ibid.
[545]Rosen (n 504), 264.

Having explored the transplants of the colonial period, it is now necessary to examine the implications for CSR and regulation of CSR that occurred through India's independence from the British in the late 1940s onwards.

4.2.3 Company Law Reforms (1948-1991)

This section examines whether India's independence has played any role pertaining to the development and evolution of its corporate law and considers whether India moved away from the UK corporate model, which they had previously adopted in the late 19th century. For this purpose, the developments which occurred in the first decade post the colonial rule in India i.e., until late 1950s has been analysed. The discussion pertaining to corporate laws in that period needs to be done along the lines of the economic policies as well as the political imperatives which were prevalent during that time and then they need to be compared with UK. Although India made a sharp shift towards socialism in terms of its economic policies after its independence, but the legislative processes pertaining to corporate law remained unchanged post-independence. The pre-existing legal transplants which was done during the colonial rule continued post-independence as well for the corporate law in India.

1947 saw the rise of decolonisation and the start of the cold war between socialist Russia (or formally known as the Soviet Union back then) and capitalist USA.[546] Around that period, the government in India was completely free for the determination of its own policies. However it was suffering from a poor economy crippled with extreme poverty, low life expectancy as well as low literacy rates throughout the country.[547] The economic policymaking for the country became a complex task as where

[546]Arvind Panagariya. India: The emerging giant. Oxford University Press, (2008), 546
[547]Nirmalya Kumar. "India unleashed." Business Strategy Review 20.1 (2009), 4-15.

was a huge distrust towards a completely capitalistic order as a result of colonial dispensation which occurred over centuries via the implementation of laissez faire policies.[548] They made both the Indian businesses as well as the Indian economy suffer and therefore post-independence the Indian policymakers were greatly divided pertaining to which economic policies need to be implemented. Therefore, by adopting the UK's capitalistic model, this placed India in a state of further poverty, thereby suggesting its incompatibility with the country's apparent socialistic model.

This also links to the notion that India's adoption of UK corporate law solely held one purpose which was facilitation of British business interests and not towards the modernisation of the Indian corporate law.

To support the aforesaid statements, the first Prime Minister of Independent India Jawaharlal Nehru advocated the "Fabian Socialism" model. This model was similar to the Soviet Union Model and it upheld the primary principle of state ownership along with regulation and control on the primary sectors of the economy for the improvement of productivity and also aimed at the reduction of economic concentration.[549] Other members of his congress party had dissimilar views in form of Sardar Vallabhbhai Patel who also went on to become the Home Minister of the country who favoured liberal economic policies and believed that private investment is important for ensuring maximum increase in the production.[550] The differences in the viewpoints pertaining to opposing economic reforms and policies led to tensions in the country which

[548] Rajesh Bhattacharya. "Dwijendra Tripathi and Jyoti Jumani, The Oxford History of Contemporary Indian Business." (2013), 269-271.
[549] Francine R Frankel. "India's Political Economy: The Gradual Revolution (1947-2004)." OUP Catalogue (2009), 408.
[550] Ibid.

continued through the initial years of India's independence. This resulted in the Indian government favouring the policy of "mixed economy" which became evident in the First Industrial Policy Resolution in the year 1948.[551]

In it, the prominence of private capital was stressed and during this time numerous Indian business groups began expanding and growing and the resolution's main focus was on ensuring maximum participation of the state in all the process pertaining to industrialisation. In terms of CSR, poverty seemed to be a huge concern in India owing to the adoption of UK capitalistic economic policies, which were later found to be incompatible with India's socialist model and ultimately led to the country adopting a mixed economic model in order to improve the poverty issue.

This economic along with the political context led to the facilitation of the 1st legislative exercise pertaining to the corporate laws in the post-independence India and also the enactment of the Companies Act of 1956 which is assumed to be the most pragmatically applicable piece of legislation for the independent India.

4.2.3.1 The First Companies' Legislation in the Post-Colonial Era

Keeping in mind the economic and political tensions in post independent India, it would be reasonable to assume that the Companies Act of 1956 would have led to the departure of the corporate laws from the colonial era. However, this was not the case despite of the economic compulsions pertaining to the adoption of a socialist approach by the Independent Indian government, these factors could not drive the corporate law in another direction and the post-independence corporate law followed the exact same path that was being adopted in the colonial era. The path was

[551]Brian Roger Tomlinson. The economy of modern India: From 1860 to the twenty-first century. Vol. 3. Cambridge University Press, (2013), 250.

to conduct legal transplant from the UK, but the only difference now was that it was not a mechanical exercise conducted by the British Colonisers but a well thought-out exercise by the Indian lawmakers. The primary inspiration pertaining to the post-independence new companies' legislation rose from the formulation of the Company Law Amendment Committee in UK which was also termed as the Cohen Committee. The committee deduced numerous changes pertaining to the UK company law and all the recommendations were then enacted via the UK Companies Act of 1948.[552]

The shift from decolonisation to independence also could not shift India's reliance and dependence on the UK laws as their model for the formulation of the Indian corporate laws.

This raises the question of whether the developments in UK company law were relevant to the different Indian context. For the purpose of gaining a better insight on the extent of dependence of the Indian lawmakers on the UK laws, a review of the Bhabha Committee Report clearly indicates that out of the 148 references from the UK Companies Act of 1948, 64 of its provisions were adopted by the Indian lawmakers and only 21 provisions were either modified or rejected.[553] The continued reliance to the UK laws was directly in contrast to the larger economic mindset of the time and also to other statutes which were being enacted pertaining to different fields by Indian lawmakers in the contemporary times.[554] The rationale pertaining to the adoption of such an approach towards company laws by the Indian parliament was incomprehensible.

[552]Christopher M Bruner. Corporate governance in the common-law world: the political foundations of shareholder power. Cambridge University Press, (2013), 300.
[553] Ibid.
[554] Ibid.

The rationale behind this can be attributed to both the development of inertia along with the inability of the Independent Indian government to break from their colonial mindset.[555] This however cannot explain the mindset of the government towards introducing socialist legislation pertaining to the area of law and also for avoiding a solely market based approach.[556] It can be adjudged that the primary cause for the adoption of such a mindset was because the government needed incorporation of both a socialist approach which ensures greater role of the state in the businesses and also to ensure that the preservation of the private sector can be effectively done.

Another study clearly in its findings indicates that the government did not want to curtail the freedom pertaining to the private sector and it was also clearly reflected in the new company law which was enacted in the year 1956.[557] The Corporate Law demonstrated a type of path dependence along with retention of free philosophy all the businesses were faced with government control via other legislation and not via Corporate Law. Indian parliament had the opportunity after independence to read the economic sentiments of the country and do not rely on UK laws in the field of company laws.

In all, even though India had the opportunity after independence to change the nature of company law it adopted the path followed by the colonial British lawmakers and adopted and followed company laws from UK. It can therefore be inferred that decolonisation could not provide any type of break to India from the past. It can however be witnessed that

[555]Rohit De. "'Commodities must be controlled': economic crimes and market discipline in India (1939–1955)." International Journal of Law in Context 10.3 (2014), 277-294.
[556] Ibid.
[557]Bhattacharya (n 548), 269-271.

changes became apparent in gradual and incremental manner in the later years.

In terms of CSR, businesses were going to face possible government control, despite business' freedom to conduct business without any interference from public organisations, such as government. This was the early days of government control of businesses as today the government has some degree of control over businesses through modern company legislation and taxation.

4.2.3.2 Rise of Socialism in Corporate Law (1960-1991)

It can however be seen that India's corporate law began to witness the demise of the colonial past from the early parts of 1960s. The socialist ideology which had not had any effect on the decolonisation was now slowly beginning to take its effect.[558] The Companies Act of 1956 proved to be an important piece of legislation owing to the effective socialist views it promoted, which were compatible with the law system in India. By the beginning of the 1960s, it had undergone amendments nearly 30 times during its life.[559]

A majority of the amendments were made by the government appointed committees from time to time.[560] During the initial 3 decades of independence the government was highly infused with socialistic ideals.

One of the major examples of larger influence by government pertaining to the operation of the companies is its stance pertaining to the departure of the previous market-oriented regulation which was light touch dating back to the colonial times. For example, all the provisions pertaining to

[558]Ibid.
[559]A. Ramaiya. "Ramaiya's Guide to the Companies Act." (7th edn, Butterworths 2011), 800.
[560]Vasudev (n 508), 1-36.

the audit along with investigation of the affairs of all the companies by the government were made stronger.[561] The concept pertaining to "Deemed Public Companies" was brought to light for the enhancement of the regulatory authorities on all the private companies as well.[562] By this provision, all the private companies that had share capital or any type of businesses that exceeded beyond specified limits set by the government were subsequently treated as public companies and they were regulated accordingly. This step clearly distinguished the lawmaker's approach which now moved away from the UK law and it aided in clearly demarcating the public companies from the private companies. It also subjected all the private companies for limited regulation and it also conferred considerable amount of freedom given the condition that they get treated as organisations similar to partnerships.[563] Also during this time frame, the concept of public interest entered in the field of company law. For example, the Companies Act of 1956 went on to get amended to state that any type of arrangement is permitted only if it is not prejudicial towards the interest of the public.[564] Also in the amendment, the shareholders were then entitled for seeking oppression remedy if the affairs pertaining to the company are done in such a manner that they are prejudicial to the public interest,[565] and this ensured that the company got rid of the prevailing socialist ideology.

The managing agency system too got caught in the rising tide of socialism and even after surviving the amendments pertaining to Companies Act of 1956, its turmoil began in the late 1960s[566]. With the implementation of the

[561]C.R. Datta, *C R Datta on the Company Law: Treatise on the Companies Act, 2013 with Legislative History, Committee Reports, Notes on the Companies Acts, 1956 & SEBI Regulations* (2017), n.p.
[562] Ibid.
[563]Vasudev (n 508): 1-36.
[564]Gulshan SS GK Kapoor. Business Law Including Company Law. New Age International, (2014), 756.
[565] Ibid.
[566] Ibid.

Companies (Amendment) Act 1969, the total managing agency system got abolished as it became evident that the system was only concentrated in the hands of a few wealthy individuals and groups and was detrimental to the well-being of the society.[567] This step pertaining to abolition is deemed to be highly important as this separated an institution which was continually dominated by the British business houses for centuries specifically in the colonial time period.[568] In this era numerous other statutes were also enacted for supplementing the company law for ensuring the solidification of the socialist tendencies pertaining to the government.

Two such statutes deserve a mention as they are the early signs of modern company law and the integration of CSR in its provisions.[569]

The 1st can be adjudged to be the Monopolies and Restrictive Practices Act of 1969 ("MRTP Act"), which was aimed towards prevention of any of concentration with respect to the economic power. The 2nd being the Foreign Exchange Regulation Act of 1973 which prohibited any foreign companies to hold more than 40 per cent shares of any Indian companies. Apart from changing the shape of company law, these statutes also worked towards curbing the private enterprises and ensuring greater control. Also it is evident that the legislative activity during this time frame was completely supported via the innovations pertaining to judicial decision making which further went on to stretch the contours pertaining to corporate law for fitting within the "socialist" ideology which was prevalent in India at that time.[570] In interpreting the provisions of the Companies Act, the Supreme Court gave its consent to leave all the provisions pertaining to its parallel UK law wherever needed as per the circumstances and

[567]Datta (n 561), 10.
[568]Misra (n 542), 264.
[569]Ibid.
[570]Constitution (Forty- second Amendment) Act, 1976, S. 2.

directed the lawmakers to assume a more dynamic role pertaining to the process of the social transformation.[571] In this time period, owing to the effective coupling of the legislative measures in the field of corporate law with the active interpretation conducted via the judiciary, a large number of changes were implemented regarding the manner in which the companies were perceived and monitored.[572]

However the socialist era witnessed severe strain in the 1980s as well as in the year 1990 specifically when India's foreign reserves got depleted to very low levels.[573] In the year 1991, the ruling government then transformed its socialist ideology and worked towards the path of economic liberalisation and it was then led to altering of the India's economic course in a large manner. It further had a cascading effect pertaining to the field of Indian corporate law subsequently.

For CSR, economic liberalisation saw the early integration of voluntary CSR into company law, which over time developed into mandatory CSR through the introduction of corporate philanthropy and good governance in companies.[574] This is the foundation of the integration of corporate philanthropy in Indian company law, which is now fully exercised in the 2013 amendments such as section 135.[575]

4.2.3.3 Corporate Law Following Economic Liberalisation (1991-2013)

The year 1991 witnessed the government of India introducing a variety of measures for addressing the failing economic situation and they adopted the path of economic liberalisation for boosting of economic activity along

[571]Ramaiya (n 559), 800.
[572]A. N. Oza. "Committee on Company Law and MRTP Act: Exercise in Futility." Economic and Political Weekly (1977): 1268-1271.
[573]Kumar (n 547), 4-15.
[574]Afra Afsharipour. "Corporate governance convergence: lessons from the Indian experience." Nw. J. Int'l L. & Bus. 29 (2009), 335: 208-209
[575] India Companies Act 2013 S.135

with opening up the avenues of foreign direct investment (FDI) in India. Furthermore, reduction pertaining to industrial licensing limiting it to only a small range of industrial companies as well as the provisioning of permitting companies for issuing capital without any type of restrictions was carried out along with opening different sectors for FDI.[576] This new way of working by the Indian government and its new outlook led to a string of changes pertaining to the field of corporate law in India in form of amendments to the Companies Act 1956 along with the introduction of securities legislation for the promotion of stock markets and lastly for the adoption of specific measures for effective enhancement of corporate governance.

The impact of each of these efforts are examined separately. In relation to CSR, the promotion of good corporate governance meant that companies were obliged to commit to more socially responsible activity with the intention to minimise socially irresponsible activity and promote social responsibility in terms of human rights, labour, the environment and anti-corruption.[577] Therefore, this demonstrated the early development of political, social and economic issues in modern Indian company law.[578]

4.2.3.3.1 1956 Amendments

This liberalisation period witnessed a variety of major changes in form of flexibility which was introduced in companies for raising as well as for restructuring their capital. This helped Indian companies to attract investments from foreign investors. For Example, Indian companies could

[576]Kumar (n 547), 4-15.
[577] Afsharipour (n 574), 188.
[578] Ibid, 229.

move forward with issuance of shares with differential rights pertaining to both dividend and voting.[579]

Other concepts in the form of employee stock options along with sweat equity also received recognition in the country which were only prevalent and accepted in US.[580] Also during this time, the capital maintenance regime which was highly strict got relaxed in order to facilitate buy back of their own securities by the companies.[581]

All these measures ensured that the dependence of Indian Corporate law shifted from UK law to laws from other countries such as Delaware law from US and other jurisdictions and reduces its cross referencing to the UK laws and provisions.[582] In terms of the theoretical models and CSR associated with the two sets of corporate law, this was around the time when India began moving away from the comply or explain model to a more mandatory approach. This can be demonstrated through the philanthropic influences on the Indian Companies Act 2013, e.g., the introduction of section 135, which is a mandatory provision that obliges companies to donate 2.5% of its profits to a charitable cause.[583] Therefore, it was around this period that India started moving away from UK corporate law and soon after there was the emergence of corporate governance in the UK and India.

4.2.3.3.2 Emergence of Corporate Governance

In the 1990s, the Securities and Exchange Board of India (SEBI) started conducting corporate governance reforms accompanied with measures for attracting FDI. The 1st government initiative was sponsored by the private

[579] Indian Companies (Amendment) Act, 2000.
[580] Indian Companies (Amendment) Act, 1999.
[581] Ibid.
[582] Indian Companies (Amendment) Act, 2000.
[583] Indian Companies Act 2013, S.135.

sector at that time which was a curious case. In the year 1998, Confederation of Indian Industry (CII) was formed which focused on recommending a code pertaining to "Desirable Corporate Governance" and it was voluntarily adopted by a large number of private companies.[584] Here, the re-emergence of the UK developments is seen as a motivating factor as the CII codes were primarily based on Cadbury Committee which was issued in UK.[585] Subsequently, a committee which was chaired by Mr. Kumar Mangalam Birla then went on to submit a report to SEBI for promoting and raising the standard of corporate governance pertaining to the listed companies.[586]

On the basis of K.M. Birla Committee recommendations in the year 2000, a new Clause 49 which comprised of specific norms pertaining to corporate governance was then inserted in the Listing agreement which then became applicable to all the listed companies comprising of a certain specific size.[587] It is to be noted that the matter contained in the corporate governance norms in Clause 49 was highly similar to the recommendations made in the Cadbury Committee report of UK which also found place later in the UK corporate governance code.[588] However there was one difference that the UK code operated on a voluntary basis but the Clause 49 was made mandatory for all large listed companies[589]. Therefore it can be adjudged that there was a clear recognition that what works in the case of UK will not necessarily work for India owing to different institutional

[584] Confederation of Indian Industry. Desirable Corporate Governance: A Code. Confederation of Indian Industry (1998): 1-4.
[585]Adrian Cadbury. "Report of the Committee on the financial aspects of Corporate Governance" (Gee & Co. Ltd. 1992), 91.
[586]Kumar Mangalam Birla. "Report of the Committee Appointed by the SEBI on Corporate Governance." Security and Exchange Board of India (SEBI) (2000), 1-28.
[587] Ibid.
[588]Seidl, Sanderson and Roberts (n 466), 1-33.
[589]Anita Indira Anand. "An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post-Sarbanes-Oxley." Del. J. Corp. L. 31 (2006), 229.

circumstances along with a host of local factors.[590] Therefore, this demonstrates why India began moving away from a comply or explain model to a more mandatory approach, since the capitalist ideology was incompatible with the more socialist ideology of India, and thus there was a move away from capitalism to socialism, as discussed in section 3.4.5 of chapter three.

Subsequently, after the Enron along with other global scandals related to corporate governance SEBI at the turn of the century then moved to further strengthen Indian corporate governance rules and guidelines. Keeping pace with the global changes on corporate governance, after the enactment of the Sarbanes-Oxley Act in US in the year 2002, another committee was formulated by SEBI under the chairmanship of Narayana Murthy for detailed examination of Clause 49 and recommend necessitated changes.[591]

Once the recommendations were provided by the Narayana Murthy Committee then a revised version of Clause 49 was provided by the government which got enforced from January 1, 2006. Thus, it can be observed that although there were a few references to UK's Cadbury Committee report during the formative stages of the CG norms in India, they were then influenced later by development in CG norms of the US. Therefore, the CG reforms in this era can be attributed to a mixed transplant from US as well as UK.

In sum, it can be seen that a shift occurred from the pre-existing socialist disposition by India to open market approach during the liberalisation era but in a gradual manner. Although there can be seen signs of guidance

[590]Bernard S Black and Vikramaditya S. Khanna. "Can corporate governance reforms increase firm market values? Event study evidence from India." Journal of Empirical Legal Studies 4.4 (2007), 749-796.
[591]Afsharipour (n 574), 335.

from the UK law but the era marked the beginning of another strong influence on the Indian law which is the US in various fields including corporate finance, security regulation and corporate governance.

Also, in the liberalisation phase numerous efforts were then made for reviewing the provisions pertaining to the Companies Act of 1956 as it had already gone tremendous changes in the years subsequently after its enactment and has also outlived its utility. Furthermore, there were calls for new companies' legislation and therefore after careful evaluation the new Companies Act of 2013 was formulated to cater to Indian Corporate industry and to the field of Indian Corporate law.

On reflection, it is evident that a lengthy historical analysis and narrative pertaining to the evolution of the corporate law in India was needed for a variety of reasons. The first reason being that the literature pertaining to the historical analysis of the companies' legislation for India was rare for pre and post independent India. This narrative would likely fill the literature gap that exists and also aid in gaining an understanding pertaining to host of other factors which were instrumental at the various points in time for providing the basis which led to the formation of the current legislative provisions.

Secondly, the historical explanation supports the process of commencement of transplantation which began in the colonial era and also continued for a short span of time post-independence for India. This then got converted into a detailed introspective process whereby some of the experiences were derived from jurisdictions of UK and US but not via complete adoption of UK law as was done previously in the colonial era in India.

It can be concluded that the Companies Act 2013 or also any other preceding legislation during the socialist era in India were not entirely different from their parallel UK legislation. There were several provisions pertaining to the Companies Act of 1956 which were directly transplanted from the UK Companies Act of 1948 and those statutes or provisions continue to remain the part of the present law as well. This can be attributed to the attitude whereby "if ain't broke, don't fix it" has been followed by Indian policymakers. The primary interest does not lie in the statutes and provisions that have not been amended or changed but on those which have undergone specific changes from time to time from their reference point being that of the UK laws to other jurisdictions like US or the focus on provisions which got amended or changed owing to the moving of inwards pertaining to the search of indigenous solution for resolving issues and problems that are unique to the Indian context. Thus, the shift is clear from transplant approach to autochthon.

Although good governance reinforces CSR activity in modern Indian company law through corporate philanthropy and the idea of giving back to society, there is some criticism about this CSR approach. Critics have argued that CSR in company law is rather limited since CSR activities are a privatisation of the government's role and responsibility.[592] For example, the Indian philanthropist Rohini Nilekani has stated that philanthropic provisions in Indian company law is merely an "outsourcing of governance" and that mandatory CSR forces companies to commit to doing the government's role. Therefore, companies are unable to substitute for the government in overcoming the massive social issues in

[592]Wharton, Corporate Social Responsibility in India: No Clear Definition, but Plenty of Debate (2011). Available: https://knowledge.wharton.upenn.edu/article/corporate-social-responsibility-in-india-no-clear-definition-but-plenty-of-debate/Accessed: 5thSept 2019.

India.[593] In response to this criticism, philanthropy has proved successful in India owing to the recent boosts in giving culture and amendments to the recent Indian Companies Act 2013, which promotes philanthropic activity,[594] e.g., Section 135.[595] In conclusion, CSR has both a positive and negative side, though the positives outweigh the negatives as CSR provisions have demonstrated that Indian companies are more charitable than ever before.

4.3 Pre-Legislative Intervention CSR Practices in the UK and India

In this section, some of the policy imperatives and tensions that were prevalent during the elongated process of enacting the Companies Act 2013 and before the introduction of CSR are discussed. The analysis pertaining to the identification of the factors which led to formulation of the new legislation is essential for determination of whether India broke from its colonial past and also to determine the present path of the UK company law. In terms of CSR, the new Indian legislation marks a further departure away from UK law that led to the transition from voluntary compliance to mandatory compliance with much emphasis on corporate philanthropy. The lesson for CSR is that while the liberalisation that initiated in the year 1991 focused on breaking the shackles of India's socialist approach in terms of its company laws the new legislation formulated has attempted to buck that trend and it has ensured reinforcement of some of the social aspects of corporate law in a more subtle manner.

[593] Ibid.
[594] Naazneen Karmali, Asia's 2018 Heroes Of Philanthropy: Charity Is New To India's New-Economy Titans. (2018): Available: https://www.forbes.com/sites/naazneenkarmali/2018/11/12/asias-2018-heroes-of-philanthropy-charity-is-new-to-new-economy-titans/#321734581cfc. Accessed: 20th August 2019.
[595] Indian Companies Act 2013, S.135.

The framework which was suggested by Ward and Smith[596] has been employed for the identification of the events pertaining to corporate activities in UK which can be recognised to have contributed for forming the complete historical landscape pertaining to CSR in the country. It has served as a barometer pertaining to some of the landmark events globally as they all relate to UK in between 1600s and the current timeframe and has affected the field of CSR. Events can effectively be traced from the timeframe ranging from 31st December 1600 when English East India Company was formulated to the timeline of 1980s when the interest pertaining to the field of modern CSR effectively heightened.[597] Furthermore in this study only UK-based and oriented events have been studied and any historical events with no UK origin have been left for further studies. Although CSR has a long tradition in India which dates back to the 19th[598] century the concept has seen continued evolvement in both its meaning as well as relevance with the country's changing socio-economic and political factors.[599]

Numerous companies in India which initially started as philanthropist companies have now gotten themselves engaged with different aspects of community as well as environmental welfare keeping in line with the global trends. Numerous findings from scholars concluded that Indian companies are now realising the importance and merits of responsible business

[596]Halina Ward and N. Craig Smith. Corporate Social Responsibility at a Crossroads: Futures for CSR in the UK to 2015. IIED, (2008), 41.
[597]Nick Robins. "The corporation that changed the world: how the East India Company shaped the modern multinational." Asian Affairs 43.1 (2012), 12-26.
[598] Vidhi Chaudhri and Jian Wang. "Communicating corporate social responsibility on the internet: A case study of the top 100 information technology companies in India." Management Communication Quarterly 21.2 (2007), 232-247.
[599] Ibid.

operations and are focusing on sustainability[600] accompanied with social development,[601] and nation building.[602]

Scholars often argue that the inception of CSR was in the 1950s, though some argue that this might not be true.[603] A number of acts of social responsibility via group of individuals have been done in the past centuries which can now be categorised as work done by NGOs in the present era. Example, the abolitionists which were led by Sir William Wilberforce in 1770s, their work can in present times be adjudged as altruistic CSR. Similarly, activities by Quakers which was a religious movement, socially responsible actions by industrialists during Industrial Revolution in form of Richard Arkwright, Joseph Rowntree and also by Titus Salt can all be adjudged as CSR. Their actions were socially responsible at a time when making profit was the only objective of conducting a business.[604] Also the English East India Company which describes itself as a corporation that shaped all modern MNCs played a pivotal role in facilitation of trade between Europe and Asia. Later in 1900, British manufacturing companies (e.g. Sheffield steelmakers) pioneered reporting on the non-financial aspects of enterprises (CSR reporting)[605] as discussed in section 4.8 of chapter 4.

Singh and Ahuja in Belal[606] conducted the first ever study pertaining to CSR on 40 Indian public sector companies in between 1975-76 and it concluded

[600] Ibid.
[601] Ganga S Dhanesh. "Better stay single? Public relations and CSR leadership in India." Public Relations Review 38.1 (2012), 141-143.
[602] Rahul Mitra. "Framing the corporate responsibility-reputation linkage: The case of Tata Motors in India." Public Relations Review 37.4 (2011), 392-398.
[603] Samuel O Idowu. "An exploratory study of the historical landscape of corporate social responsibility in the UK." Corporate Governance: The international journal of business in society 11.2 (2011), 149-160.
[604] Ibid.
[605] Josephine Maltby. "Hadfields Ltd: its annual general meetings 1903–1939 and their relevance for contemporary corporate social reporting." The British Accounting Review 36.4 (2004), 415-439.
[606] A.R. Belal, *Corporate Social Responsibility Reporting in Developing Countries: The Case of Bangladesh* (Taylor & Francis 2016),182.

that 40 per cent of the companies have disclosed more than thirty per cent of their complete disclosure items which were included in their survey.

Raman[607] used the content analysis procedure for examination of the chairman's message section which exists in the annual reports of the top fifty corporations based in India for identification of the extent as well as nature of social reporting. The study concluded by stating that Indian corporations focus heavily on human resource development along with product improvement.[608]

Gautam[609] further studied more than 600 corporations along with 20 CEOs for gaining insight into understanding corporate involvement in the social development of India. More than 85 per cent of respondents affirmed that Indian corporate need to be more socially responsible. 11 per cent of the respondents had their dedicated CSR policy and 60 per cent gave monetary donations and also provided support to health, education and other infrastructure initiatives. Therefore, the socialist model adopted in India was clear here since it adhered to the principle of people needing one another owing to the collective support companies provided in the form of donations to support public service developments in the country.

From the year 2000, four different surveys provided macro level conclusions regarding the Indian companies. The 1st and 2nd survey were conducted by the Business Community Foundation in the year 2001 and 2002 for Tata Energy Research Institute Europe. The surveys were aimed at gaining an understanding of the perception of workers along with the company executives. Also, an insight into the public pertaining to the

[607] Ibid.
[608] Ibid.
[609] Richa Gautam and Anju Singh. "Corporate social responsibility practices in India: A study of top 500 companies." Global Business and Management Research: An International Journal 2.1 (2010), 41-56.

socio-economic as well as environmental responsibilities was done[610]. It was analysed that companies with varied sizes of business and also companies from varied sectors had a thorough awareness pertaining to CSR as well as its intended benefits and a large number of them were serving society via collaborating with NGOs and also via detailed drafting of their labour as well as environmental policy guidelines.[611] Again, the points as mentioned above support the socialist model adopted by India via the principle of organisations or people working together as equals in order to achieve greater things.

The CII, along with United Nations Development Program (UNDP) accompanied with Price Water Coopers and also British Council (BC) collectively conducted a 3rd survey in the year 2002.[612] The most prominent features of the survey were that all respondents has agreed that CSR is a primary part of corporate action and also that the acts of passive philanthropy are insufficient. A majority of the respondents recognised CSR as the most important way to increase long-term stakeholder value. Therefore, the previously mentioned points also reflect the socialism aspect of CSR via the principle of governments ensuring that everyone's needs are being met (e.g. increasing long-term stakeholder value).

The 4th survey by Karmyog CSR rating of the year 2007- 08 included 500 companies and it is the most important survey of the non-profit sector that provides insight into the CSR activities pertaining to the Indian corporations.[613] The top 500 companies were rated based on Likert scale

[610] Richa Gautam, 'Integrating CSR into the Corporate Governance Framework: The Current State of Indian Law and Signposts for the Way Ahead' (2010). Available: https://www.nseindia.com/research/content/CG_12.pdf: Accessed 27th June 2019.
[611] Ibid.
[612]Mehran Nejati,. Global business and management research: An international journal Vol. 2 No. 1. Universal-Publishers, (2010), 139.
[613]Sateesh Gouda, A. G. Khan, and S. L. Hiremath. Corporate Social Responsibility in India. Trends, Issues and Strategies. Anchor Academic Publishing, (2017), 141-161.

of 0 to 5 on criteria such as their CSR activities, their expenditure of CSR along with the precautions they adopt for minimisation of the harmful processes in their organisations.

From the early 1990s numerous efforts have been made for revamping of the companies' legislation in India owing to the difficulties that are encountered owing to the implementation of Companies Act 1956 which had to be amended. A variety of proposals had been drafted as well as presented in the parliament over the course of the previous two decades in 1993, 1997 and 2003. [614] However the appointment of the expert committee pertaining to company law in the year 2004 under the guidance of J.J. Irani also termed as the Irani Committee led to the shaping of the present legislation. The Irani Committee formulated a concept paper and it conducted a public consultation pertaining to the issues and then issued a report for the drafting of the new legislation accordingly. Based on the recommendations pertaining to the Irani committee the Companies Bill 2008 was then presented before the parliament, but it lapsed owing to the dissolution of Lok Sabha which is one of the houses of parliament. [615]

In between this timeframe, India witnessed a massive corporate governance scandal to a tune of 1 billion USD involving Satyam computers in January 2009 where the chairman confessed to fraud.[616] This called for better and strengthened corporate law as well as governance norms in India. However, there were no such changes made in the Companies Bill 2009 from its older version of 2008 even after the massive scandal that was presented after the reformulation of Lok Sabha and it was highly surprising.

[614]Aparna Viswanathan. "Reinventing the Company in India: The Export Committee Report on Corporate Form and Governance." International Company and Commercial Law Review 17.1 (2006), 1.
[615]Jean J. Du Plessis, Umakanth Varottil, and Jeroen Veldman, eds. Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance. Springer, (2018), 253.
[616] Bhupesh Bhandari. The Satyam Saga. Business Standard Books, (2009), 186.

The new Companies bill 2009 was then referred to the parliamentary standing committee on finance and the standing committee undid the effects of ignoring the corporate scandal and recommended detailed provisions in the field of corporate law for prevention of such type of frauds and failures in the future. [617] Specific recommendations included improvement in the standards pertaining to corporate governance along with better measures for company management and also impose higher standards on the independent auditors and directors that act as gatekeepers for the company.

Another measure of high importance that redefined the role of corporations pertaining to the Indian Context via the Standing Committee was that while the Companies Bill 2009 was shareholder oriented, but in it was mentioned the director's duty towards the business of the company as the benefit of the members as a whole in detail.[618] They insisted on a broader stakeholder approach pertaining to corporate law and clearly highlighted that the directors have a duty for promoting the objectives of the company keeping in mind the best interests of the employees, shareholders, community as well as the environment.[619] The advent of the CSR provision that required all large companies to mandatorily spend a definite amount on social causes was the most important concept.[620] Lastly as per the standing committee report, the government then introduced the companies bill in the year 2011 in the parliament and it contained significant changes to the previous bill of 2009. It was then sent back to review to the standing committee as it had so many changes to the previous version and lastly another report was issued by the standing

[617] Sabha, India Parliament Lok. "Lok Sabha Debates." (Lok Sabha Secretariat 2010), 253-283.
[618] Companies Bill, 2009, S.147(2).
[619] Sabha (n 617), 253-283.
[620] Ibid.

committee[621] which led to the formulation of the Companies Act 2013. It was passed by both the houses and also got assent from the President of India on 31st August 2013. It is now being brought into action in stages and a large number of its provisions have already come into force.[622]

At the current stage, the consideration of the underlying reasons for the policy issues that led to the enactment of the Companies Act of 2013 is necessary. The Companies Bill 2009 (which was identical to its predecessor bill 2008) was largely based on the Irani Committee report and its recommendations and they were friendly in nature but the standing committee after its review transformed the complete document to make it possess stringent control via regulation along with ensuring social accountability of the corporations. The philosophical pressures were evident effectively as it was clear that the Irani Committee was primarily concerned with attracting greater investment as well as FDI and also focused on providing a simple and a concise regime for companies.[623]

On the other hand, the standing committee approached the legislation with a different ideology as it was operating in the shadow of a massive corporate fraud and smaller scandals that provoked outrage throughout the country against the corporate sector.[624] Therefore, by comparing India and UK legal systems, it clearly explains the Standing Committee's insistence pertaining to the adoption of a stakeholder approach to ensure that employees, customers as well as the environment are all beneficiaries in the corporate law sphere and not only shareholders which is also the

[621] Ibid.
[622] B Cave. Indian Companies Act 2013: The Story So Far (2013), 1-6.
[623]The Hindu Business Line, 'At 75, J.J. Irani bids adieu to Tata Steel' (2011): Available: https://www.thehindubusinessline.com/companies/At-75-J.J.-Irani-bids-adieu-to-Tata-Steel/article20252659.ece: Accessed 23rd Sept 2018.
[624]NRN Murthy, 'Nasscom announces formation of Corporate Governance and Ethics Committee' (2013). Available: https://www.business-standard.com/article/press-releases/nasscom-announces-formation-of-corporate-governance-and-ethics-committee-109021100123_1.html: Accessed 22nd Sept 2018.

approach adopted by a variety of developed jurisdictions such as UK. Thus in the light of such corporate scandals, a lighter response by the political class would have outraged the country and therefore the act was seen as the political counteraction for curbing the influence of the business sector and also to ensure proper checks along with balances via corporate law.[625]

The complete discussion clearly stresses that the current shape pertaining to the corporate law is the result of both the local issues along with concerns and it has no influence of its colonial past or its past legal regime. The complete law reformation process which lasted for more than two decades prior to the advent of the Companies Act 2013, there was no reference to the UK company law.[626] It is in a sharp contrast to the process for the enactment of the Companies Act of 1956 which was a direct transplant of the UK Companies Act 1948. Both the Irani Committee and the Parliamentary Standing Committee on Finance in the years 2010 as well as 2012 made any references to the UK position in their company law and it was done even after the UK law had evolved significantly after the decolonisation of India with its Companies Act 1985 and also the current Companies Act of 2006.

The current UK position remains the subject of consultation for a variety of other former British colonies but the Indian lawmakers have ignored it completely.[627] This is because even though there is no direct resistance coming from the law making process pertaining to embarking upon the colonial or initial post-colonial approach of direct transplantation of the UK law to Indian law but the focus has now shifted inwards and the attempt is now being made to identify solutions for all the identified issues that are

[625]Parliament of India, *Companies Act, 2013* (Amaze One Publications 2015).
[626]See Datta (n 561) on Companies Act, 2013.
[627] Singapore, 'Report of the Company Legislation and Regulatory Framework Committee' (2002). Available: http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan034487.pdf: Accessed 21st Sept 2018.

exclusive and specific to India via an autochthonous approach which demarcates a fundamental change in the previous attitude of the current Indian legislation and lawmakers. This leads on to the transition to CSR and current company laws of the UK and India.

The issues raised in chapters two and three dealt with a number of principles of CSR. These include thriving economies in society, successful communities, communal retention along with relocation. Also, the issues pertaining to human rights, social responsibility along with identification and meeting of the needs of the common good and lastly constituency of a community. The previously mentioned principles were also reflected in several models identified in sections 3.3 and 3.4 of chapter three, including the aggregated theory, natural entity theory, nudge theory, reflexive law, responsive regulation, better regulation and the comply or explain approach. In contrast, on a legislative level, the Companies Bill was finally passed by the Indian parliament in 2012 and later included in the updated legislation in August 2013 as the Companies Act 2013. This piece of legislation was passed to replace the outdated Companies Act 1956 and was inspired by some elements of UK corporate law, e.g., the need for freedom and the need to compete in thriving markets. The Act was a work in progress, which lasted almost 20 years[628] and aimed to encourage Indian companies to involve social, environmental and economic objectives with their development and operational activities.[629] For the above reasons, the proceeding sections reflect upon both UK and Indian corporate law through a CSR lens.

[628]S Singh, 'India's Companies Act: Legally Enforced Corporate Social Responsibility' (2013). Available: https://thediplomat.com/2013/08/indias-companies-act-legally-enforced-corporate-social-responsibility/: Accessed 26th June 2018.
[629]N.Mitra and R. Schmidpeter. "Cases and developments after the legal mandate." Corporate social responsibility in India. Basel: Springer International Publishing (2017), 180.

4.4 CSR Corporate Governance Structures in Company Legislation

In the structure of corporate governance, corporate law in India is strict and somewhat inflexible and bears the rigours of its colonial past, further supported by post-colonial measures. In contrast, the UK has gradually alleviated various structural barriers that have made it much easier for companies to be incorporated and better controlled. In this sense, Indian corporate law has moved in a very different direction from the path taken by its former coloniser. This section therefore seeks to explore this development.

While corporate governance has been an inherent part of corporate law since it was established, the concept has gained considerable momentum in India over the past two decades (and in Western jurisdictions for a longer period). India adopted corporate governance measures from other jurisdictions, especially the UK, during this period.[630]This is despite considerable differences between western and Indian jurisdictions. The UK, for example, follows the "outsider" model of corporate governance wherein the vast majority of companies have full control over its shareholders.[631] On the other hand, India follows the classic "insider" system wherein the vast majority of public companies are controlled (by virtue of dominant shareholding) by either the state or business families.[632]

There can be a variety of possible methods for conducting the analysis of the corporate governance issue in a legal system but "Agency Problem"

[630]Unmakanth Varottil. "A cautionary tale of the transplant effect on Indian corporate governance." Nat'l L. Sch. India Rev. 21 (2009), 1.
[631]Joseph McCahery, et al., eds. Corporate governance regimes: convergence and diversity. Oxford University Press on Demand, (2002), 696.
[632]Shaun J Mathew. "Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities." Colum. Bus. L. Rev. (2007), 800.

paradigm is the most suitable framework.[633] This is because the framework covers several key agency problems that relate to company stakeholders, namely conflict between the company's managers and its owners (being the shareholders), conflict between the majority or controlling shareholders and minority shareholders and conflict between the owners and controllers of the firm (see section 2.6.3).

On a variety of matters pertaining to the corporate governance structure in India, the corporate law in the country is stricter in comparison to UK corporate law. In UK there is a clear demarcation of the extent of regulation in between the private companies and the public companies and they have lighter and more exhaustive regulations respectively. However, this difference is less in India and the regulations are central in nature. Also in the present UK law, the incorporators of the company have a choice on whether to opt for a public company or a private company.[634] In India, the philosophy is exactly opposite and as per the Companies Act 2013, a private company which is a subsidiary of public company will be treated as a public company only.[635] Via this, the state is not only limiting the incorporators in terms of their choice of corporate form (which is available to them in most western jurisdictions) but it also is enhancing its scope pertaining to regulation for ensuring broader control over the corporate sector and it also is focusing on inducing more transparency for benefitting the different stakeholders.

For CSR, although a mandatory approach imposes stricter regulations that give government more control, it at the same time promotes social responsibility through the consideration of shareholder rights, e.g., Section

[633]Brian R Cheffins. "The trajectory of (corporate law) scholarship." The Cambridge Law Journal 63.2 (2004), 456-506.
[634]Davies, Gower and Davies (n 141), 1258.
[635] Indian Companies Act, 2013, S. 2(71).

48 of the Indian Companies Act 2013[636] and granting companies the power to choose where the fruits of their philanthropic activity will go in their local area, e.g., Section 135(5) of the Indian Companies Act 2013.[637]

Also, a variety of other measures in the Indian legislation showcase an interventionist approach of the state and not its previous market-oriented approach which it adopted in the colonial period. For example, the Indian corporate law has placed strict restraints on establishing and operating of corporate groups as per international standards, even though they are common in India.[638] The Companies Act 2013 has bestowed power on the government to control the number of layers pertaining to subsidiaries which a specific class of a company can have.[639] Furthermore a company cannot move ahead with investments via more than 2 layers of investment companies.[640] This requirement has arisen owing to specific cases in India specifically the stock market fraud where use of investment vehicles was done for routing of the funds back and forth from companies as well as their controlling shareholders.[641] Although this type of legislative response is targeted towards specific abuses pertaining to corporate group structures but it is also affecting the genuine business transactions along with the structures and are interfering with the ability of the companies to organise in a better manner. Also, in a variety of other matters pertaining to group structures, the approach adopted by India is highly restrictive in comparison to the colonial period and also in comparison to UK as well as

[636]Indian Companies Act 2013 S.48.
[637]Indian Companies Act 2013 S.135(5).
[638]Marianne Bertrand, Paras Mehta, and Sendhil Mullainathan. "Ferreting out tunneling: An application to Indian business groups." The Quarterly Journal of Economics 117.1 (2002), 121-148.
[639]Indian Companies Act 2013, S. 2(87).
[640] Ibid, S.186(1).
[641]Mihir Naniwadekar and Umakanth Varottil. "The stakeholder approach towards directors' duties under Indian Company Law: a comparative analysis." Mahendra Pal Singh, The Indian Yearbook of Comparative Law (2016), 95-120.

other western jurisdiction that have moved in the opposite direction which is liberal in their approach.

In terms of CSR, the new provisions in the Indian Companies Act 2013 and UK Companies Act 2006, have reformed the way companies conduct their business which in turn has minimised malpractice. This is supported by the idea that while the general method utilised in other countries is to prevent abusive activity in companies, the law in India proscribes such structures at the outset, while in the UK it does not. Furthermore, corporate law in India imposes severe restrictions on the movement of funds between group companies (such as holding companies and subsidiaries) whether by way of investment or loan transactions, while the UK takes a more lenient approach on this matter. Therefore, this makes transactions between group companies extremely onerous. Hence, on matters relating to corporate governance structure through the lens of CSR, both the Indian as well as the UK corporate laws have continued to hold onto some colonial vestiges in form of ultra vires doctrine even when the mother country as well as other former colonies have discarded them.

A top UK case on limited liability and social responsibility of groups is *Adams v Cape*. Cape Industries spearheaded a group of companies that mined and marketed asbestos. The court refused to 'pierce the veil', further distancing tort victims from compensation. As a result, the Court of Appeal strongly reiterated the strict application of limited liability to corporate groups, declining the various arguments made for imposing liability on a subsidiary company.[642] Therefore, this is a prime example of a socially irresponsible corporation, which completely goes against the social

[642]Adams V Cape Industries Plc: Ca 2 Jan 1990 Adams v Cape<https://swarb.co.uk/adams-v-cape-industries-plc-ca-2-jan-1990/>Accessed: 16th August 2019

principles they should be following under CSR. In addition, the concept of liability of the parent company pertaining to tort to the employees of their subsidiaries has now become important owing to the decision in *Chandler v Cape Plc.*[643] In the case it was held that a parent company is directly liable for negligence for the employees pertaining to its subsidiary companies as for those subsidiaries they have a direct duty of care even though there is a separate legal personality of the parent's subsidiary.[644] This decision was important for CSR promotion as usage of corporate group structures is a direct hurdle when adjudging of liability of a parent company in a tort. This is because corporate group structuring can be used to defeat liabilities through the separation of assets from risks and protects assets from creditors as the liability that is producing the entity's assets are exposed to such claims.[645]

As per the Section 135 of Companies Act 2013, during any financial year, it is mandatory for a company to constitute a CSR committee on the board whose purpose is approving the CSR policy of the corporation for every financial year. Also, under this section the company must spend at least 2 per cent of its average profits made during the 3 immediately preceding financial years in pursuance of the formulated CSR policy for the year. For example, under a CSR policy, CSR spending is allowed if the company is to engage in philanthropic activity, such as donating company profits to charity or the wider community.

The committee needs to comprise a minimum of three or more directors, out of which at least one director will be an independent director.[646] The

[643] Chandler v Cape Plc: https://www.linklaters.com/en/insights/publications/ecc/chandler-v-cape-plc: Accessed: 16th August 2019
[644] Julian Fulbrook, 'Chandler v Cape Plc: personal injury: liability: negligence' 2012 Journal of Personal Injury Law C135.
[645] P.Morgan. Vicarious liability for group companies: the final frontier of vicarious liability?, 2015, 279.
[646] Naniwadekar and Varottil (n 641), 95-120.

committee is responsible for both formulating and recommending a CSR policy to the board that will advise and disclose the content of all the CSR activities which need to be taken by the company and also the expenditure to be incurred in its CSR policy. Furthermore, the committee monitors the CSR policy from time to time and it prepares a monitoring mechanism which is transparent in nature for ensuring implementation of the proposed activities to be done by the company. Also, in case if company fails to spend the amount of CSR, the board of directors are then required to specify the reasons for the same in the disclosure made via the board of director's report. Thus the company must not accumulate the liability of the unspent amount on CSR unless in the event when the company has contractually incurred this type of liability pertaining to such expenditure of the CSR activities.[647] However, one has to question the CSR committee's capability to evaluate and monitor the non-compliance of the CSR provisions owing to their inability of fulfil these duties. Therefore, this further questions the committee's legal knowledge and skills that would be used in resolving such matters.

Companies with a net worth of rupees 5 billion (roughly $7 million) or more or with a turnover of rupees 10 billion (roughly $14 million) or more, or a net profit of rupees 50 million or more during any financial year are required to comprise a CSR committee on the board. Under section 135(5), the board need to mandatorily approve the CSR policy and also ensure that the company is spending at least 2 per cent of its average net profits made during its three preceding immediate financial years for pursuing its CSR policy. The company is mandatorily required to create a CSR policy and the board has the obligation to approve it after deeming it fit and then

[647]Deloitte, 'D'Prism A series on Companies Act 2013, Deloitte Touche Tohmatsu India Private Limited' (2014). Available: www2.deloitte.com/content/dam/Deloitte/in/Documents/tax: Accessed 22nd July2018.

place it on the website of the company. Furthermore as per the rules of the CSR, the net profit pertaining to the financial statements prepared under the Companies Act 1956 do not require recalculation according to section 198 of the 2013 Act.[648] Also Section 135 (1) of 2013 Act requires a company to consider its net worth pertaining to the immediately preceding financial year or for its current financial year. The estimation of CSR spend is based on profits before tax. Therefore, this further demonstrates the socialist model company law adopts owing to the principle of taking resources from one source and giving it to another for the greater good. Although this may sound philanthropic, it at the same time breaches CSR policy as the idea of taking without any legal basis would be considered socially irresponsible.

4.5 Corporate Constituencies in Company Legislation

This section looks at corporate constituencies that are important in company legislation, including the managers, minorities and other key stakeholders. Here, both stakeholder theory and CSR emphasise the significance of company responsibility toward communities and society.[649] Furthermore, the manager-shareholder problem does not hold significance in India owing to the general concentration of shareholding. However, the historical evaluation showcases that the use of legal instruments was done for solving the agency problem in India during the independence phase. The managing agents who had proliferated during the colonial era had given rise to the manager-shareholder agency problem and the managing agents during those times only held a small percentage of the shareholding in the companies which they were

[648] Ibid.
[649] R. Edward Freeman and Sergiy Dmytriyev. "Corporate social responsibility and stakeholder theory: Learning from each other." Symphonya. Emerging Issues in Management 1 (2017), 7-15.

managing. As the outside investors were large in their numbers and also not related to managers, there was no interest in them to participate in the management of the companies. Also the governance issues affecting companies in India which were governed and managed during the colonial times by the managing agents were similar to the ones faced by the classic Berle and Means Corporation in the US, which is essentially a structure of US corporate law that enforced the separation of ownership and control[650]. These similarities can be observed through the transplant of US law in early Indian law where investors and managers allocated rights and responsibilities.[651]

There was initial resistance as well as hesitation to confront the problem of agency towards the end of the colonial era and also during the immediate independence phase, but sufficient political courage as well as will was mustered to eliminate the institution pertaining to managing agencies completely in the late 1960s.[652]

India's experience pertaining to dealing with the problem of manager-shareholder agency until the 1960s was that, the country did not address this problem even though during the pre-independence, the UK law had initially began to take note of this problem in a general manner, but the problem required a target specific solution. For this purpose, the Indian parliament had to take note of this issue and completely abolish it altogether. Also, after the abolishment the agency problems prevailed in the country with respect to controlling shareholders along with minority shareholders wherein neither the colonial laws nor the country's corporate regime had any solution to it.

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[650]Gardiner Means, *The modern corporation and private property* (Routledge 2017), 9-11.
[651]Thomas W. Joo. Corporate Governance: Law, Theory and Policy (2010), 3.
[652]Gardiner (n 650), 9-11.

Owing to the concentration pertaining to shareholding in the Indian companies, the problem pertaining to majority-minority agency issue was widespread. Therefore, it became the role of the corporate law along with the governance norms to address the specific problem. Until the early 2000s India failed to effectively deal with this issue and after two decades following liberalisation numerous corporate governance reforms were introduced gradually in the Indian context for the issue. The efficiency of import of numerous corporate governance concepts in an emerging economy as that of India from other developed economies like the US or the UK is also open for debate.[653] It was observed that any issues pertaining to the transplantation of these corporate governance concepts are worsened via continued variation in the socio-economic as well as political considerations operating in two main jurisdictions specifically US and UK which are adjudged as the outsider system and also via the Indian insider system.[654] In support of this claim, several transplanted corporate governance concepts did not get implemented effectively in India leading to raising questions pertaining to the viability of the transplant.[655]

Just to illustrate this point further, board independence, for example, was transplanted from the US and UK to India.[656] As previously mentioned the controlling shareholders of any Indian corporations have considerable voting power both de jure as well as de facto which aids them in determination of the composition of the boards of the majority of the Indian public listed corporations via exercise of their voting power for director appointment or removal.

[653]Jairus Banaji, and Gautam Mody. "Corporate governance and the Indian private sector." (2001), 1073.
[654]Troy A Paredes. "A Systems Approach to Corporate Governance Reform: Why Importing US Corporate Law Isn't the Answer." Wm. & Mary L. Rev. 45 (2003), 1055.
[655]Umakanth Varottil. "Evolution and effectiveness of independent directors in Indian corporate governance." Hastings Bus. LJ 6 (2010), 281.
[656]Ibid.

Under CRS, all independent directors are vital towards corporate governance norms and they need to engage in roles that are socially responsible such as monitoring in a fair manner and working towards the general interests of the corporation along with the shareholder body. Consequently, any independently appointed directors can further have a tendency for approving actions that are taken via the shareholders having control and also action by the managers whose appointments are influenced and controlled via the controlling shareholders as well.

Although CSR compliance in terms of corporate governance in India serves to address the controller-minority agency problem by protecting the interests of the minority shareholders from actions of the controlling shareholders, independent directors have been appointed to solve this agency problem, which is subject to potential dominance by the controlling shareholders.[657]This portrayal of independent directors is riddled with problems when outsider systems are transplanted to insider systems without taking into account the differences in corporate structures. Recent corporate law reforms have, however, transitioned from a transplant-oriented approach to a more indigenous approach that considers local circumstances, particularly the concentration of shareholding in Indian companies or the majority-minority agency problem. For example, the Companies Act 2013 demonstrates significant reforms in terms of independence of the board and also introduces different measures in form of rules pertaining to other related party transactions which are all focused towards addressing of the issue pertaining to the majority-minority agency. The new legislation states that the independent directors need to be selected by the nomination

[657] Ibid.

committee pertaining to the board in a mandatory manner.[658] For CSR, monitoring the role of independent directors protects the interest of the minority shareholders, thus providing a clear solution to the agency problem prevalent in India.[659]Therefore, the purpose of the new role of independent directors under the contemporary legislation was to devise indigenous solutions as opposed to simply relying on existing transplants.

Furthermore, the Indian Companies Act 2013 had also focused on regulation of related party transactions. All such transactions are now required to have approval by the board of directors from the company and for the scenario of material transactions; approval of the shareholders is needed.[660]

In terms of CSR, the presence of objectivity along with independence pertaining to the decision making process will ensure that no unduly transfer can occur during transactions and they are not abusive in nature by transferring from the company to another related party such as the controlling shareholder of the company so as to adversely affect the interests of the minority shareholders. This can potentially deal with the risk of transfer of assets from one country to another company in a corporate group. This relationship can be found in the facts presented in both the UK *Adams v Cape Industries*[661] and the Australian *James Hardie industries*[662] cases. In both cases, it could not be deduced that the parent subsidiary actually controlled or was fully responsible for the daily operations of managing and transferring asbestos products. In *Adams v Cape*, this was

[658]Indian Companies Act 2013, S.178.
[659] Ibid.
[660]Indian Companies Act 2013, S. 188.
[661]See Adams v Cape.
[662]Tony De Govrik: James Hardie industries.The James Hardie case: risk, reputation, and business ethics(2012). Available:https://ethics.org.au/the-james-hardie-case-risk-reputation-and-business-ethics/.Accessed: 19th August 2019

not enough to trigger a duty of care on the part of the parent, but was in the judgment of the Australian Court of Appeal in *James Hardie*. They lacked the limited liability required to lift the corporate veil that was present in *Adams v Cape*, where the UK's Court of Appeal imposed such liability.[663] Therefore, the contrasting evidence presented in each case makes it difficult to establish a middle ground about the transfer of assets between different regions, and thus the socially responsible activities regarding the transfer of such assets is unclear as well.

The question of whether the corporation must work towards benefitting their shareholders or whether they need to work towards the interests of other stakeholders as well is a complex one and it directly stresses towards the controller-stakeholder agency issue. In the colonial law in India, stress was laid towards protection of the shareholders to ensure that companies are able to attract capital.[664] Furthermore the advent of the corporate law also did not take into account the interests of any non-shareholders and this stand continued following decolonisation until the change in perception began in the 1960s whereby amendments were made in the Companies Act 1956, and these changes were in line with the socialist sentiment of the country during that time.

The proceeding paragraphs effectively demonstrate that the legal position pertaining to the perception of the private company has changed in India post the colonial era by the emerging corporate laws whereby it is not viewed as a private matter and a company is viewed to be carrying a role towards society and also towards public interest. The changed vision is in stark contrast to both the UK stance on the issue where it still continues to

[663]Glen Wright. "The Case for Enterprise Analysis at the Intersection of Corporate Groups and Torts." (2011), 1-23.
[664]Martin Gelter. "Taming or Protecting the Modern Corporation-Shareholder-Stakeholder Debates in a Comparative Light." NYUJL & Bus. 7 (2010), 641.

view company as shareholder oriented and also from the colonial origin where no such obligation was present for any company. The role of company law after decolonisation has evolved from only protection of the shareholders[665] and now includes protection of the employees, creditors along with the consumers, society as well as environment. For example, employees have preferential right over other for payment of dues owed to them in case of winding up of a company owing to the special rights bestowed upon them by the company laws[666]. They further now also possess the right to be heard in case of scheme of arrangement particularly in mergers, demergers or any other type of restructuring[667] and also during winding up of the company.[668]

For the creditors, the company law provides them standard rights along with standard remedies, and other special laws enable them to convert their loans to equity in the company of the debtor. Also, they are bestowed with power to appoint nominee directors on the boards of any of their debtor companies as well.[669] These rights are given for protection of the interests of creditors. For the safeguarding of public interest, the affected parties can resort to remedies if any affairs of a company have been done in a manner detrimental to public interest or if any type of scheme of arrangement has been carried out via the company in a manner detrimental to public interest.[670] For example, in case of any restructuring via a scheme of arrangement it is the duty of the court to take into account that the transaction is not detrimental to public interest and this concept is

[665]Tarun Khanna and Krishna G. Palepu. "Globalization and convergence in corporate governance: Evidence from Infosys and the Indian software industry." Journal of International Business Studies 35.6 (2004), 484-507.
[666]Indian Companies Act 2013, S. 325.
[667] Indian Companies Act 2013, S.230-232.
[668]Indian Companies Act 2013, S. 282.
[669]S. Sinha, The Banking Laws of India (Bankers Book Evidence Act): Indian Law Series(2015), 32.
[670]Jennifer Payne. "Schemes of Arrangement, takeovers and minority shareholder protection." Journal of Corporate Law Studies 11.1 (2011), 67-97.

alien to the current UK law.[671] In the scenario if the Indian corporate law was stakeholder oriented in the socialist era, the current reforms in the form of Companies Act 2013 states that directors' duties plays a key role in such reforms.

It can be inferred that a broader mandate pertaining to considering sustainability in decision making,[672] accompanied with more power pertaining to appointment along with representation on the corporate boards will be one of the primary ways for directing the companies towards making sure they remain accountable towards the social and the environmental costs with regard to their activities. Therefore, one has to question the prospect of reforms in the UK that would steer companies towards greater social responsibility.

So far as the UK is concerned, there are some immediate signs pertaining to change, in line with the referendum decision of leaving the European Union. In a surprise move, even after continued opposition for widening the scope of corporate governance by the UK in EU, it is now considering widespread changes pertaining to its own approach in terms of dealing with corporate governance via reconstitution of the boards along with remuneration committees for including employee representatives as well. During the campaign for becoming the Prime Minister, after the Brexit decision, Theresa May had stressed that she would work towards ensuring the changes in the manner big businesses are governed to ensure satisfaction not only of the company boards but for the employees too.[673] For this purpose an initial parliamentary inquiry was launched in the month

[671] Ibid.
[672] Muhammed Zain Ul Abedin. "Company Law and Sustainability: Legal Barriers and Opportunities." (2017), 115.
[673] A Sparrow, J Elgot and R Davies, 'Theresa May to call for unity, equality and successful exit from EU' (2016) . Available: https://www.theguardian.com/politics/2016/jul/11/theresa-may-to-call-for-unity-equality-and-successful-exit-from-eu. Accessed 11th July 2019.

of September 2016 and also the new Prime Minister had announced various plans for ensuring that consumers along with workers are appointed to the boards before the commencement of the year.[674] The commitment was however withdrawn owing to resistance. A green paper pertaining to corporate governance reforms was later published that year in November of 2016 in which various possibilities pertaining to representation of the stakeholder interests in corporate governance was showcased including "stakeholder advisory panels" [675]which ensured designation of non-executive directors who would consider the interests of key interested groups at board level[676] and strengthening reporting requirements.[677] However, direct stakeholder representation on boards would remain a voluntary matter, with the government failing to propose a mandate that would lead to the appointment of key stakeholder groups.[678] Therefore, the voluntary nature of direct stakeholder representation hinders a company's ability to appoint the correct stakeholder groups.

4.6 Directors' Duties in Company Legislation

Until now, the directors of Indian companies had no effective guidance from the company law pertaining to their duties and liabilities. Also, the pre-existing Companies Act of 1956 did not effectively outline the director's duties and it was always a necessity to fall back on Common law principles for any decisions via the courts for specific matters. Furthermore, this uncertainty became manifold owing to lesser number of cases

[674]Benjamin Martill, and Uta Staiger, eds. Brexit and beyond: Rethinking the futures of Europe. UCL Press, (2018): 312.
[675]Department for Business Energy and Industrial Strategy, 'Corporate Governance Reform: Green Paper' (2016).
Available:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf. Accessed 11th July 2018.
[676] Ibid.
[677] Ibid.
[678] Ibid.

involving director duties as well as liabilities in the Indian courts. The situation has been improved via the Companies Act of 2013 pertaining to the director's duties. The provisions in the act provide better certainty along with line for their conduct as directors and their role in corporate governance, and therefore the law has now imposed additional duties along with liabilities on the directors.[679] The new provisions further made it easy for the courts as well as regulators and beneficiaries to judge the discharging of the director's duties in a better manner.

One of the more important aspects for the purpose of this thesis is that the Companies Act 2013 is responsible for extending the stakeholder principle in a further manner while also codifying the duties of a director. It states that a director shall act in good faith for promotion of the objects of a company along with ensuring benefits of its members as a whole and also work towards best interests of the company along with its employees, shareholders, society and the environment.[680]

Although the stakeholder approach was evaluated in the current English company law reforms, but the issue was resolved in a different manner. The review for UK came up with a proposal for catering to the stakeholder interests via two approaches. The first being the pluralist approach in which company law needs to be modified in a manner to include other objectives as well for the purpose of serving a broader range of interests which are not means of achieving shareholder value but are valid in their own right as well.[681] This approach focuses on the expansive conception pertaining to the stakeholder interests.

[679]Naniwadekar and Varottil (n 641), 95-120.
[680]Indian Companies Act, 2013, S. 166(2).
[681]John Armour, Simon Deakin, and Suzanne J. Konzelmann. "Shareholder primacy and the trajectory of UK corporate governance." British Journal of Industrial Relations 41.3 (2003), 531-555.

The second approach is the enlightened shareholder value (ESV) whereby the main objective of the company law will be generation of optimum shareholder value and which will be the best means for ensuring protection of all types of interests and will lead to overall prosperity and welfare.[682] This approach believes in merger of all interests of stakeholders along with the shareholders via focusing on a stand that if any company acts towards preserving of stakeholder interests then automatically leads to enhancement of the shareholder value. After a thorough debate the ESV model has moved ahead to receive statutory recognition in UK. It can be deemed to be a hybrid approach as it benefits shareholders through the consideration of their interests.[683] Despite this compromise, in the event of any type of conflicts pertaining to varied interests the directors have to fulfil their goal of prioritising shareholders' interests.[684]

On the other hand, based on the above comparison between UK and Indian company law, the Company Act of 2013 went on to adopt the pluralist approach via providing recognition to stakeholders and shareholders without any special preference to either of them. Even after the superficial similarities pertaining to the English as well as the Indian legal opinion pertaining to the director's duties there is a prominent distinction between the two whereby shareholders have a pivotal stand in UK and in India they are one of the numbers of constituencies that demand the attention of the directors.

Furthermore related to this, the concept of CSR has also gained momentum and this concept although is not new and it had been a part of

[682] Ibid.
[683] UK Companies Act, 2006, S.172(1).
[684] Bruner (n 552), 44.

indigenous thinking during the colonial period as well.[685] After much evaluation, CSR found its way in Companies Act of 2013 in India whereby large companies have to spend 2 per cent of their average net profits made during their three immediate preceding financial years has to be used for its formulated CSR policy towards specified CSR activities only.[686]Other countries, particularly Muslim countries, such as Indonesia, also follow the same philanthropic activity of donating 2.5% of their business profits to charity.[687]

During the legislative procedure a thorough debate occurred on whether it is needed to put a mandatory percentage on the spending requirements by a company on CSR but owing to a compromise the position then resulted in a preference towards the "comply-or-explain" approach as stated in section 3.4.5 of chapter three, although the wording of the statutory provision largely operates as a mandate.[688]

Although there are higher goals on stringent CSR standards on entities that are state controlled, evidence shows that more work is needed in this area. For instance, the Parliamentary Standing Committee on Industry in 2013 stated that various Central Public Sector Enterprises (CPSEs) had been neglecting their CSR funds. Other reports by the Comptroller and Auditor General of India found that a number of CPSEs had spent much less on CSR activities than expected.[689] These developments are very different as the position in the colonial period was highly different and shareholder

[685]Colin Mayer. Firm commitment: Why the corporation is failing us and how to restore trust in it. OUP Oxford, (2013), 192.
[686] Indian Companies Act, 2013, S.135 (5).
[687] Charity CSR Indonesia, Build East Indonesia And Donate 2.5% Of Profit For Charity, 2016: https://charitycsrindonesia.wordpress.com/2016/03/09/build-east-indonesia-and-donate-2-5-of-profit-for-charity/: Accessed 16th August 2019.
[688]Vikramaditya S Khanna and Dhammika Dharmapala. "The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013." 56 (International review of law and economics 2018), 1-36.
[689]Afra Afsharipour, and Shruti Rana. "The emergence of new corporate social responsibility regimes in China and India." UC Davis Bus. LJ 14 (2013), 175.

interest was the only priority. It further took India in a different and much evolved direction than UK where the primary focus remains on shareholder profiteering only. Although the corporation has acquired a public overtone in India, and this phenomenon has only increased with time, whereas in UK the stakeholder interest has remained subservient to only maximisation of the shareholder value. This is consistent with the enlightened shareholder principle outlined in chapter 2 (2.3.2). Although corporate governance, which is shareholder-centric, may not sufficiently cater to CSR, stakeholders want to be enlightened to take on board CSR principles.[690]

In all, there are diverging philosophies in corporate governance that operate in India and the UK, its former coloniser. From the viewpoint of agency problem paradigm, the manager-shareholder agency problem which is the focus of the UK corporate law does not exist in India, whereas the majority-minority agency problem which is existent in India and which has the focus of Indian legislators holds limited interest in the UK. It can lastly be inferred that shareholders have continued to grab the attention of the corporate law and corporate managements in the UK, whereas other stakeholders have become entitled for wider protection under the corporate law in India. The practice of transplant has changed to autochthony. In terms of CSR, social responsibility appears to be much stronger in Indian company law compared to UK company law as shareholders appear to have more protection in India, which is interesting since India has a stricter and mandatory CSR model compared to the UK. This could suggest that Indian company law may still adopt some of the early and more lenient transplants of UK company law given the

[690]Bill Perry and Lynne Gregory, 'The European Panorama: Directors' Economic and Social Responsibilities, 20 International Company and Commercial Law Review (2009): 25.

protections that are granted to shareholders under mandatory CSR compliance.

4.7 Corporate Objectives

With respect to corporate objectives, the Companies Act 2013 is administered by the Indian Ministry of Corporate Affairs and is split into 29 chapters, 470 sections and VII schedules. It obliges companies of particular sizes to donate a minimum of 2% of their three-year annual profit to support socially responsible efforts. For instance, all companies have to constitute a CSR committee of the board of directors and at least one independent director if they meet certain financial criteria (e.g. net worth of rupees 500 crore plus ($7 billion), turnover of rupees 1000 crore plus ($14 billion) or net profit of rupees five crore plus ($7 million)).

The CSR Committee is required to:

- Recommend and establish a CSR policy to the board, indicating the proposed activities the company will undertake as stated in Schedule VII;
- Recommend the incurred expenditure on the activities stated in the clause; and
- Monitor CSR Policy of a company on a frequent basis.[691]

These above points ensure that companies fulfil their mandatory CSR obligation as penalties will be incurred if they breach any of these obligations. It is interesting to know that no penalty is incurred by organisations that do not spend their two per cent surplus, providing they justify why they did this in their report. However, penalties are incurred

[691]S. Borad, Indian Companies Act 2013: Bare act (Sunil 1981).

when justifications are not reported.[692] This relates to responsive regulation as discussed in chapter three (section 3.4.3) in that companies have to quickly respond to any penalties they incur from failing to meet any of their mandatory CSR obligations.[693]Therefore, this is a matter of importance as it demonstrates a company's willingness to give away a small percentage of their surplus for a greater good and teaches them the moral of social responsibility. Without philanthropic CSR, corporations may resort to keeping their surplus for their own selfish gain.

Nevertheless, the India Companies Act 2013 made India one of the first countries to have social welfare spending included in the organisation's statute by law. Other countries to introduce social welfare spending include France and Saudi Arabia.[694] Sachin Pilot, India's Corporate Affairs Minister, made much effort to push through the Companies Act 2013 owing to its strong ties with promoting CSR.[695] Doordarshan News, which is an Indian news agency, posted a video where Pilot was interviewed about the Companies Act 2013, just after its passing. Pilot referred to the new Act as a "game changer" to support the Indian workforce in a more "global format".[696] The 2% of net profits that Indian organisations are expected to give is not a levy or tax to the Indian government, rather it is a socially responsible behaviour. Companies are therefore able to use their money for the things they consider significant, providing their socially responsible work adheres to the Act's guidelines and schedule VII.

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[692] Ana Cristina Marques and Padmini Srinivasan. "When Corporate Social Responsibility is an Obligation: The Unique Case of India." IIM Bangalore Research Paper 565 (2018), 1-40.
[693]Braithwaite (n 394), 884.
[694]Philip Nord "The welfare state in France, 1870-1914." French Historical Studies 18.3 (1994), 821-838; the Royal Embassy of Saudi Arabia. The Kingdom of Saudi Arabia – A Welfare State (2007): Available: https://web.archive.org/web/20070428001552/http://www.mofa.gov.sa/Detail.asp?InSectionID=1516&InNewsItemID=1746: Accessed 19th August 2018.
[695]S Singh, 'India's Companies Act: Legally Enforced Corporate Social Responsibility' (2013). Available: https://thediplomat.com/2013/08/indias-companies-act-legally-enforced-corporate-social-responsibility/: Accessed 26th June 2018.
[696]Doordarshan News, 'Companies bill passed. India, 09.08.2013,: Doordarshan News' (2013). Available: https://www.youtube.com/watch?v=7YAGgMjwcTU. Accessed 26th June 2018.

In an interview with the Doordarshan News,[697] Pilot argued that despite the big companies paying taxes, they have to contribute more to be seen as a "true responsible corporate citizen". Some companies should return their profits to society, not as a tax or levy on the government, but as a project that the company can vouch for. Although CSR activity in India is often mandatory, Pilot said that the government has left what socially responsible initiatives companies can participate in quite open[698]. This supports the stakeholder theory presented in chapter 2 (2.3.3), since this theory has contributed to the scope of the social responsibilities of corporations, as well as identifying ethics as an integral responsibility of management in all aspects of corporate activity, e.g., returning profits to society. Therefore, CSR is seen as an integral element of good management.

Companies must disclose which social responsibility initiative they support with their surplus, and the work must be in line with Schedule VII of the Companies Act 2013. In addition, Pilot has communicated that a socially responsible board must approve the projects in which the companies invest.[699] The Companies Act 2013 has therefore given more responsibility to corporate boards to perform certain socially responsible actions. For example, Pilot explained that the two per cent of socially responsible spending was derived after much discussion with everyone involved.[700] Therefore, this further supports the idea that socially responsible firms place a great deal of trust in their stakeholders, such as the board of directors supporting their CSR activities.

[697]Doordarshan News, 'Companies bill passed. India, 09.08.2013,: Doordarshan News' (2013). Available: https://www.youtube.com/watch?v=7YAGgMjwcTU. Accessed 26th June 2018.
[698]Ibid.
[699]Doordarshan News, 'Companies bill passed. India, 09.08.2013,: Doordarshan News' (2013). Available: https://www.youtube.com/watch?v=7YAGgMjwcTU. Accessed 26th June 2018.
[700] Ibid.

Schedule VII, which outlines which activities can involve companies in their social responsibility work, is the most criticised. One point of criticism is that the activities in the schedule, e.g., giving away profits are too broad.[701] Singh[702] interviewed a Delhi-based chief executive officer (CEO) who complained that the definition and scope of socially responsible behaviour in the law was vague and unspecified. Singh also points to the need for companies to see a definition of CSR in order to prioritise where the use of the surplus of two per cent is needed to prevent misappropriation of funds. In defence of the CSR clause, Pilot said that the idea behind Schedule VII is to give companies the opportunity to work with the social and environmental issues they care about, be it building hospitals, planting trees or protecting the wildlife, which is a form of CSR concerning environmental sustainability.[703] Therefore, engaging in CSR gives companies an opportunity to be big contributors in society on various levels ranging from environmental to political, which in turn would help to boost their reputation in the long-term. This promotes environmental sustainability initiatives as companies wish to sustain environmental protection, minimise pollution and build establishments that promote social well-being and protection, such as hospitals.

To maximise the impact of socially responsible behaviour on Indian companies, the companies need to look beyond the traditional view of charity and develop unique CSR strategies with the potential for great social and economic impact. For example, Singh[704] found that many of the CEOs he spoke to were satisfied with most of the parameters of the law.

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[701] Ibid.
[702] S Singh, 'India's Companies Act: Legally Enforced Corporate Social Responsibility' (2013). Available: https://thediplomat.com/2013/08/indias-companies-act-legally-enforced-corporate-social-responsibility/: Accessed 26th June 2018.
[703] Doordarshan News, 'Companies bill passed. India, 09.08.2013,: Doordarshan News' (2013). Available: https://www.youtube.com/watch?v=7YAGgMjwcTU. Accessed 26th June 2018.
[704] Ibid.

The CSR mandate is aimed at those who are financially able to contribute to society, and this therefore sends a much-needed signal to companies to take their social responsibility.[705]

However, Singh[706] pointed to some negative aspects of the Companies Act 2013. As per the criterion which is set under the section 135, the average size pertaining to the firms that are not engaging in CSR is very much higher in comparison to the minimum size which would come under the CSR net, and also median net profits for companies not reporting CSR. This clearly states that even though there are a large number of companies which are voluntarily taking up CSR in recent years, the low threshold which is described in section 135 will lead to bringing a huge chunk of the top listed companies under CSR obligation.[707] This is further supported via the analysis of the CSR spending of the top 27 companies for the years 2012-13 in which all the companies were under the section 135 but more than half spent less than 2 per cent and 11 of them spent even less than one per cent of their CSR activities.[708]This demonstrates that some countries are more lenient than others when it comes to CSR initiatives, since countries, such as India who engage in mandatory CSR, contribute considerably more to charity compared to countries such as the UK who adopt more of a voluntary approach. A stricter CSR approach therefore ensures that CSR initiatives are fully practised and never neglected, like in voluntary CSR.

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[705] Ibid.
[706]S Singh, 'India's Companies Act: Legally Enforced Corporate Social Responsibility' (2013). Available: https://thediplomat.com/2013/08/indias-companies-act-legally-enforced-corporate-social-responsibility/: Accessed 26th June 2018.
[707]Mitra and Schmidpeter (n 629), 180.
[708]Jayati Sarkar and Subrata Sarkar. "Corporate social responsibility in India—An effort to bridge the welfare gap." Review of Market Integration 7.1 (2015), 1-36.

The new provisions of section 135 will undoubtedly lead to a significant increase in CSR spending by Indian companies compared to their current level but they recognise that CSR can lead to economic costs for these companies and their shareholders. Accordingly, the provisions of section 135 seek to provide a number of flexibilities to ensure that these costs do not disproportionately harm CSRs and their shareholders in order to reduce net social gains.[709]For example, these flexibilities include, and as stated in section 135(3) of the Indian Companies Act 2013,[710] the CSR committee's openness of formulating and recommending a CSR policy to the board of directors which states the CSR activities that the company can undertake to promote social well-being.

A systematic evaluation of the arguments for and against the prescribed CSR seems to indicate that the new CSR rules set out in section 135 are conceptually strong and well designed. Firstly, under current rules, CSR spending is a benefit and avoids the relevant problem of multiple goals inherent in the stakeholder theory. For example, current CSR guidelines do not distort economic targets, as is typically the case with stakeholder optimisation.[711] This is because companies will still pursue shareholder value maximisation as a single goal from which two per cent of profits can be used for CSR activities.

Secondly, the amount of two per cent of corporate profits is not a huge demand for corporate resources. For example, considering the average turnover of the top 500 companies, the 2% rule seems rather modest in view of the turnover of non-CSR companies. However, this raises doubts that CSR spending, at least on domestic or international markets, at least

[709] Ibid.
[710] Indian Companies Act 2013 S.135(3).
[711]Satish Deodhar. "India's mandatory CSR, process of compliance and channels of spending." (2015), 1-13.

for the top 500 companies, could lead to a significant loss of competitive advantage. In fact, if there is a business case for CSR that tends to support empirical evidence, then international companies could also do CSR instead of losing competitive advantage.[712]

Thirdly, as stated in section 3.4.5 of chapter three, the CSR rules use a "comply or explain" approach rather than a "comply or else" approach, giving companies leeway to evaluate the opportunity cost of CSR. This is because a comply or explain approach is voluntary whereas comply or else is a mandatory approach. Those below the established thresholds, for which the opportunity cost of the internal capital is likely to be high, are primarily exempt from CSR. In addition, an entity that determines that CSR expenses of 2% may not be in its best interests may not spend or spend less than the amount required if the regulatory authority accepts its statement. In response to a request from the Parliament's Standing Committee on the Companies Bill 2009 regarding government oversight of CSR activities under the proposed scheme, the ministry spokesman responded that the law's "main focus" was to encourage companies to disclose their CSR related activities to the public so that everyone, including the ministry, can monitor. However, no formal monitoring is needed, as the government would monitor the CSR activities of a company.[713] Based on this position, it is therefore expected that by creating a social mandate through the law and the concomitant development of social expectations, the mandatory spending with justification for exceptions will generate more CSR spending than voluntary spending with mandated reporting.

[712] Sarkar and Sarkar (n 708), 1-36.
[713] Ibid.

Fourthly, companies may feel that they do not have sufficient expertise or core competencies to carry out CSR projects owing to a lack of internal trust among company stakeholders to perform socially responsible activities. Alleviating this problem can be achieved by appointing renowned trusts to either carry out the projects, or simply donate the specified amount to the Prime Minister's Relief Fund.[714] In this context, it should be noted that a large number of companies voluntarily carry out CSR before the rules come into force. These companies must evaluate that the benefits of CSR outweigh the costs.[715]This demonstrates a company's commitment to CSR and has a broader view of social responsibility that goes beyond cost and profit maximisation.

Finally, what about concerns that CSR mandates could reduce the spending of some companies that voluntarily spend more than two per cent of their net profit, as the financial performance of CSR would decrease if all companies spent on CSR, since increased philanthropic spending could reduce company profits. At the same level of spending, the CSR value of incumbents can increase through better selection of CSR projects by engaging in more socially responsible acts, e.g., supporting the environment or giving away profits.[716]

Notwithstanding all these arguments, most economists would like to consider the CSR provisions of section 135 as an implicit tax on companies as it seems that companies are expected to give away a small portion of their income, just like with any form of tax. However, one major difference is that the current CSR provisions operate as a centralised tax with decentralised use with private-project implementation. Under explicit

[714]Sarkar and Sarkar (n 708), 1-36.
[715]Ibid.
[716]Ibid.

taxation, there is no guarantee that government-sponsored money will be spent on CSR and not used for any other purpose. The implicit tax, on the other hand, gives companies additional control over the disbursement of their own funds in a targeted manner. This position clearly contradicted the more stringent position of the Standing Parliamentary Committee that without a "foreclosure mechanism", section 135 remains a "half-hearted attempt" to strengthen CSR.[717] There are twenty-one incentives to select the right projects that have synergies with their businesses (which the rules allow) and greater incentives to monitor their efficient use. The advantage of such a decentralised social spending mechanism is that it can lead to better project implementation and lower fund leakage, and thus demonstrates why socially responsible firms adopt stakeholder theory to support their CSR activities.

4.8 CSR Reporting in Company Legislation

Over the last few decades, issues in the field of CSR have been covered extensively in various countries around the globe, both in the literature and in the media.[718] There has been a significant increase pertaining to the number of advocates and supporters for this field and this has subsequently led to increase in corporate activities in the area. Furthermore, there is evidence in support of this claim. For instance, scholars and researchers suggest that there has been a prominent increase pertaining to socially responsible activities. In 2005, Vogel[719] was able to find 30,000 sites pertaining to CSR on Google along with another search by the same author revealed that there are over 1,790,000 sites pertaining

[717] Indian Companies Act 2013, S.135.
Samuel O Idowu and Walter Leal Filho. Professionals' perspectives of corporate social responsibility. Berlin: Springer, (2009), 445.
[719]David Vogel. The market for virtue: The potential and limits of corporate social responsibility. Brookings Institution Press, (2007), 222.

to CSR, and Vogel[720] further noted that there were more than 15,000,000 pages addressing the CSR issues on the world wide web along with more than 100,000 websites by companies.

Kotler and Lee[721] conducted a survey of the Global Fortune Top 250 companies and found that the number of American companies reporting on corporate responsibility is steadily increasing. Idowu[722] further noted that 81 per cent of all Financial Times Stock Exchange companies along with 100 of the UK's largest listed companies have now extensively begun to report their CSR activities and initiatives in their websites or their standalone CSR annual reports and more than 5 per cent of these companies now report their CSR based activities via related organisations.

This demonstrates significant progression in terms of companies´ efforts towards promoting CSR and being willing to advertise their efforts to the rest of the world. This reinforces the idea that CSR is a growing trend in the commercial sector and thus this could encourage other companies to potentially engage in CSR activity.

Grant Thornton,[723] in their annual corporate governance review, argued that that 94% of FTSE 350 companies included CSR in their annual reports. 84% of these companies claimed to have implemented a dedicated process to monitor CSR activities. 40% of FTSE 100 companies are now issuing standalone CSR reports, and some of these companies are trying to authenticate the validity of the information contained in the CSR reports by some form of external verification of the reports. This demonstrates that

[720] Ibid.
[721] Philip Kotler and Nancy Lee. Corporate social responsibility: Doing the most good for your company and your cause. John Wiley & Sons, (2008), 320.
[722] Idowu and Filho (n 718), 445.
[723] Samuel O Idowu and Céline Louche. Theory and practice of corporate social responsibility. Berlin: Springer, (2011): 284.

companies are serious about their CSR reporting and wish to promote their activities for the sake of reputation.

It is believed that the advent of CSR reporting in UK had begun in 1970s [724] owing to the evolving relationship between the limited companies and the society.[725] However according to different viewpoints this was a wrong belief and as per Maltby[726] in a study pertaining to reporting activity of various British Manufacturing companies with critical emphasis on Sheffield steelmakers Hadfields Limited, it was found that CSR reporting has begun from the early 1900s itself. Companies had begun to disclose their non-financial information as well to the general public apart from their annual financial reports at the Annual General Meetings. Hadsfield was incepted in 1872 and listed on the London Stock Exchange in the year 1904 and it was the 2nd largest employer in Sheffield steelmakers possessing employee strength of 5690 employees. Maltby[727] stresses that the various issues that were disclosed and addressed by Hadsfield included its social disclosures along with its industrial relations, the various government policies as well as armaments during the war time and lastly their activities of their directors in the field of health along with their professional and commercial responsibilities. John Brown which was another engineering company too disclosed all its information of the non-financial activities in all these similar areas.

It can however be noted that the quality of the information disclosure via these companies was inferior to the disclosures done by companies in the 21st century in their CSR reports. All these companies disclosed information

[724]Peter Jones, Daphne Comfort, and David Hillier. "Reporting and reflecting on corporate social responsibility in the hospitality industry: A case study of pub operators in the UK." International Journal of Contemporary Hospitality Management 18.4 (2006), 329-340.
[725]Maltby (n 605): 415-439.
[726] Ibid.
[727] Ibid.

pertaining to their non-financial aspects in 1904 was commendable as they were not obliged by the law to do so. Also, in present times the corporate companies are still not mandated for proving this information and such disclosures but Idowu and Papasolomou[728] note the motivations for disclosure as falling under six headings. The first involves adhering to the request of the current UK government. Secondly, is stressing the all-important non-financial issues to stakeholders and deriving CSR's positive public relations benefits. Thirdly, is to ensure that employees are aligned to the company's target and inform stakeholders. Fourthly, is fulfilling the best practice in company reporting and providing a more holistic picture of their activities. Fifthly, is reflecting the importance attached to CSR by the company and satisfying disclosure requirements of major shareholders. And sixthly, is responding to questionnaires to be completed for tenders and government departments. It also demonstrates that socially responsible firms adopt the stakeholder theory to support their CSR activities.

Section 166(2) of the Indian Companies Act 2013 states that a director should act in good faith to promote the best interests of the company, in addition to its stakeholders, such as the community, shareholders and employees and for the protection of the environment.[729] Similarly, section 172(1) of the UK Companies Act 2006 states that director of a company has to act in good faith to promote company's success for the benefit of their stakeholders, including their interests (1b), reporting on the impact of the company's operations on the community and environment (1d) and maintaining a good company reputation (1e).[730] Therefore, this

[728]Samuel O. Idowu and Ioanna Papasolomou. "Are the corporate social responsibility matters based on good intentions or false pretences? An empirical study of the motivations behind the issuing of CSR reports by UK companies." Corporate Governance: The international journal of business in society 7.2 (2007), 136-147.
[729] Indian Companies Act 2013 S.166(2).
[730] UK Companies Act 2006 S.172(1)(b, d, e).

demonstrates that both the UK and India are committed to reporting their CSR activity, not only for their own gain, but also for the well-being of their stakeholders.

Accounting researchers, in an attempt to understand what has encouraged the development of CSR reports, have classified the reasons under four perspectives. These are the agency theory (understanding the relationships between agents and principals),[731] legitimacy theory (an entity's actions are appropriate within some socially constructed system of norms, values, beliefs, and definitions),[732]the political economy of accounting theory (views that accounting is a method of sustaining and legitimising the current social, economic, and political arrangements)[733] and the stakeholder theory (sole responsibility of business is to increase profits through socially desirable actions).[734] Holland and Foo[735] noted that the unregulated nature of the disclosure in CSR reports could only allow the development of relationship between reporter and reportee, which provides a degree of accountability, and thus social responsibility. This shows that despite unregulated CSR reporting, companies are taking social responsibility through their own initiative, though CSR reporting still needs to be regulated to protect not only companies in general, but also the stakeholders associated with the companies in order to avoid inaccurate CSR reporting.

The recommendations provided in European Union's 5th Action Programme pertaining to environment which is embedded in the report

[731]Charles WL Hill and Thomas M. Jones. "Stakeholder-agency theory." Journal of management studies 29.2 (1992), 131-154.
[732]Seth Abrutyn, ed. Handbook of contemporary sociological theory. Springer, (2016), 578.
[733]Ahmed Riahi-Belkaoui. Accounting theory. Cengage Learning EMEA, (2004), 598.
[734]Andrew L. Friedman and Samantha Miles. Stakeholders: Theory and practice. Oxford University Press on Demand, (2006), 330.
[735]Leigh Holland and Yee Boon Foo. "Differences in environmental reporting practices in the UK and the US: the legal and regulatory context." The British Accounting Review 35.1 (2003), 1-18.

titled "Towards Sustainability" [736] has contributed largely to arouse interest in the area. This report highlighted the need for organisations to provide information pertaining to a host of areas including providing details pertaining to their environmental policy along with activities and also their effects in the annual reports along with all the expenses pertaining to their environmental programmes and also for making provisions pertaining to environmental risks as well as all their future environmental expenses.

Furthermore, EC's scheme in the year 1993 named the Environmental Management and Audit Scheme (EMAS)[737] further encouraged the companies for providing information pertaining to topics in terms of their objectives along with management of any problems pertaining to environmental performance, initiating a pattern of eco-auditing, making available to the public an environmental statement and showing their commitment towards externally validated progress in terms of meeting with their environmental objectives. The ICAEW has guidelines provided in a simple format which allows companies to track their performance in the area in a measurable manner. [738] Other accounting bodies in UK were not left out and the Association of British Insurers (ABI) also issued similar guidelines for ensuring setting of disclosures pertaining to the social, ethical as well as environmental matters, and all the institutional investors need to be complying with the issued guidelines in the annual reports of listed companies. [739] Any of the listed companies which will not comply to the guidelines will then have trouble in procuring institutional investors' votes for adopting their reports along with their funds and accounts as

[736]European Union, 'Towards Sustainability' (2005). Available: http://ec.europa.eu/environment/archives/action-programme/5th.htm: Accessed 19th July 2018.
[737] Michael S Wenk. The European Union's eco-management and audit scheme (EMAS). Vol. 16. Springer Science & Business Media, (2006), 278
[738]Andrew Higson. Corporate financial reporting: Theory and practice. Sage, (2003), 228.
[739]C. Mallin, *Corporate Governance* (6th edn, OUP 2018), 440.

institutional investors' may have ethical concerns while making any investment based decisions.

All the corporate stakeholders have the right to know about contributions different corporate entities are doing to the society and the provision pertaining to satisfying this need is termed as accountability, and according to Gray et al.[740] it is defined as the duty of providing an account of action pertaining to the actions for which any entity or person is held liable of responsible.

Hackston and Milne[741] also supported the view that corporate entities should be held responsible for their actions which affect society. In light of this, a survey of the Department of Trade and Industry of 45 global and large companies operating in the EU showed that over 90 per cent reported on their mission, vision and values, workplace climate, community involvement, local economic development, market place and environmental impact.[742] Thus it is pertinent to examine whether the new regulations as well as the guidelines have led to positive reforms in the way both the UK as well as Indian companies report their CSR activities and performances as the previous research had concluded that CSR reporting both in UK and India is still in its infancy.[743]

According to Chaudhri and Wang[744], the examination of the CSR disclosures of the top 100 IT companies it was found that, only a few companies included CSR based information on their corporate websites

[740]Rob Gray, Dave Owen, and Carol Adams. Accounting & accountability: changes and challenges in corporate social and environmental reporting. Prentice Hall, (1996), 332.
[741]D Hackston and M Milne. (1996). Some Determinants of Social and Environmental Disclosure in New Zealand Companies. Accounting, Auditing & Accountability Journal. 9, 77.
[742]R. Jain and M. De Moya. 'Global, Local, or glocal: Investigating CSR strategies of best corporate citezens in India' 7 International Journal of Strategic Communication (2013), 207-226; Chaudhri and Wang (n 598), 232-245; , David Williamson and Gary Lynch-Wood. "Social and environmental reporting in UK company law and the issue of legitimacy." Corporate Governance: The international journal of business in society 8.2 (2008), 128-140.
[743] Ibid.
[744]Chaudhri and Wang (n 598), 232-245.

inferring that the Indian IT companies are not proactive towards ensuring CSR communication and stakeholder engagement. Also, Jain and DeMoya[745] concluded in their analysis that MNCs have revealed much less pertaining to their CSR efforts on the Indian Specific websites in comparison to identical disclosures in their global/headquarter websites where such efforts were discussed in detail. However, Williamson and Lynch-Wood[746] stated that it is a mandatory obligation for UK companies to disclose their CSR reports. This could be down to the stricter laws in the UK regarding information disclosure and data protection compared to the India where this is more lenient.

In the Doordarshan interview,[747] Pilot said that companies could do socially responsible work as long as they publish it in reports and on websites, including the perceived role of corporate social reporting. One criticism is that obeying the official regulations that apply to "CSR money" from the government cannot be guaranteed. The Kordant Report[748] predicts that companies affected by the 2% CSR allocation are likely to re-classify current CSR activities to fall within the scope of the new law. Nevertheless, the Kordant Report[749] argues that if the CSR clause encourages more spending, it will force companies to take social responsibility seriously, or risk becoming a non-peer among peers who are already heavily investing in it. In addition, Singh[750] notes that, given India's social and developmental milestones, few companies in India are "vocalising the clause" and this would lead to bad publicity. As mentioned earlier, of the approximately 800,000 companies in India, around 8,000 private

[745] Jain and DeMoya (n 742), 207-226.
[746] Williamson and Lynch-Wood (n 742), 128-140.
[747] Jain and DeMoya (n 742), 207-226.
[748] Ibid.
[749] Ibid.
[750] Singh (n 695), n.p

companies are covered by the law's CSR mandate.[751] It has been found that 46% of companies got zero-rating (no reporting), around 8% scored 3/5 and 4/5 Karmayog rating. Around 49% of companies out of the 500 largest Indian companies are reporting on CSR. Most of the companies report on donations, renovating schools in villages, mid-day meals etc., as their CSR activities. This shows India's committed efforts to CSR through philanthropic, social and environmentally sustainable activities that promote the well-being of society.

Although India's commitment to CSR is strong, there is surprisingly very little CSR spending in the country. It is expected from a company to spend at least the minimum amount which has been decided via the government on their CSR activities every year[752]. It was witnessed that for a majority of the annual reports as well as their balance sheets there was no detailing of the spent amount on CSR as it was not necessitated and made mandatory during that time. Very few companies have showed well-defined expenditure on CSR. It is further evident that only 25 per cent of the CSR activities of the companies are for the employees and the remaining are focused towards both the vicinity as well as the society.[753] Therefore, there appears to be some bias towards certain stakeholder groups when it comes to CSR spending as they appear to focus more on macro CSR issues as opposed to micro CSR issues, since only a quarter of CSR spending is allocated to stakeholders, such as employees.

However, for the UK, there is no clear evidence to support the exact number of companies that are covered by the CSR mandate. There are

[751]Kordant Philathropy Advisors Report, 'The 2% CSR Clause: New Requirements for Companies in India' (2013): Available: https://www.issuelab.org/resource/the-2-csr-clause-new-requirements-for-companies-in-india.html: Accessed 26th June 2019.
[752]Gouda, Khan and Hiremath (n 613), 141-161.
[753]Ibid.

currently 4.2 million private companies in the UK, and one can only assume that a large proportion of these companies are under the CSR mandate.[754] This confirms that CSR reporting in the UK is unclear compared to India and confirms the voluntary nature of CSR in UK as it is difficult to determine which UK companies are actually committing to CSR in general and the extent of CSR practice, let alone CSR reporting.

Another criticism is that a new CSR clause will not affect companies, regardless if they are in the UK or India, since companies in general have varying degrees of responsibility and their objectives will also be different, and thus their socially responsible activities will reflect this. For example, large Indian corporations work closely along the sides of the government in a supplementary role in order to meet the developmental objectives of the country.[755] A majority of the company's focus only on a limited and very small number of activities and nearly one third of the company's focus only on a single activity and nearly two thirds are engaged in 3 or lesser activities. It clearly indicates that companies do not wish to get fragmented in their approach of CSR activities and want to select activities that are built around the core pertaining to their business activities and operations.[756] Therefore, Indian companies appear to focus on the critical activities that can help them to become a more socially responsible company, but in doing so, they are restricting themselves to broaden their CSR activities across various departments since it was identified that many companies only engage in a maximum of three activities. Furthermore, corporate philanthropy is more prevalent in India compared to the UK, e.g., Section

[754] GOV.UK. Number of companies in the UK from 2018 to 2019. (2019)Available: https://www.gov.uk/government/news/uk-company-statistics-2018-to-2019: Accessed: 19th August 2019.
[755] Satyajit Majumdar and Gordhan K. Saini. "CSR in India: Critical review and exploring entrepreneurial opportunities." Journal of Entrepreneurship and Innovation in Emerging Economies 2.1 (2016), 56-79.
[756] Ibid.

135 of the Indian Companies Act 2013.[757]Tamvada[758] can support this claim by stating that CSR is recognised by the Indian government as a socially responsible deed of giving back to the society, which has become a core responsibility of Indian companies. Tamvada concluded that western legal systems could learn from India regarding the regulation of CSR, which can result in "positive socio-economic outcomes by viewing firms, as part of the society, having a duty towards its advancement."[759]Therefore, the lesson learned is that a number of factors play a key role, such as cultural, legal, social and economic issues that shape CSR policy in companies.

Some companies even hesitate to give information about particular company processes, such as manufacturing and production owing to their fear of revealing the extent of damage they are causing to the environment as well as the society and the pollution caused by them will become public if they disclose such information.[760] Therefore, it is always important for socially responsible firms to be honest with anything that may affect society, regardless of its severity.

Now focusing on the different types of CSR activities in which the Indian companies have been engaging in and also the different variety and nature of their CSR engagement. The analysis of all the activities which have been reported for the last 9 years, the major areas in which the Indian companies have focused their CSR activities have been adjudged to be food, drinking water, health, sanitation along with imparting education, training, skill development as well as employment as the key areas for CSR

[757] Indian Companies Act 2013, S.135
[758]Tamvada (2019), "the Dynamics of CSR, Mandatory CSR Laws, and Corporate Social Performance in India" in O. Osuji, F. Ngwu and D. Jamali (eds.), Corporate Social Responsibility in Developing and Emerging Markets – Institutions, Actors and Sustainable Development (in press, Cambridge University Press), chapter 9, 168-190.
[759] Ibid, 33.
[760]Gouda, Khan and Hiremath (n 613), 141-161.

engagement.[761]This demonstrates the significance of the social implications of CSR in India as this relies on individual well-being through the provision of basic needs, such as food, water shelter and education. However, in the UK, the social implications of CSR are ignored since UK companies are reluctant to voluntarily take decisions to promote sustainability in society,[762] and thus there is a need to implement countervailing forces that will pressurise UK companies to promote and commit to social responsibility.

For examining in more detail, the primary motives pertaining to the engagement in CSR activities by both the UK and Indian companies have been evaluated. The concept of "greenwashing" which is a practice followed by companies which have business operations that negatively impact the environment and the society engage in CSR as an act of compensating for the loss caused by them via CSR.[763] As is widely recognised among policymakers as well as academia it is evident that organisations which are harming more are more likely to do more good for ensuring offsetting of their corporate social irresponsibility with CSR.[764] It is specifically true in the cases of industries which are major polluters and they proactively participate in CSR as an inherent part of their corporate strategy for ensuring that their brand value and reputation is not tarnished.

In India, the Central Pollution Control Board has identified seventeen industries as the major pollution contributors. As per this classification all the companies are categorically divided into two segments polluting and non-polluting industries. Each year about one in five comes from polluting

[761]Majumdar and Saini (n755), 56-79.
[762]Marc T. Jones. Missing the forest for the trees: a critique of the social responsibility concept and discourse, 35 BUS. & SOC'Y 7, 29 (1996).
[763]S. Siva Raju, ed. Corporate Social Responsibility in India: Some Empirical Evidence. Springer, (2017), 194..
[764]Matthew Kotchen and Jon J. Moon. "Corporate social responsibility for irresponsibility." The BE Journal of Economic Analysis & Policy 12.1 (2012), 1-21.

industries.[765] The early years have showcased a higher proportion of companies which belong to polluting industries take more CSR initiatives than the companies which belong to non-polluting category. In the UK, there are similar cases of greenwashing where UK companies have engaged in environmentally damaging and unsustainable practices which have been reported safe. For example, the 1960s advertisements that promoted the cleanliness and safety of nuclear power plants but which turned out to be environmentally damaging to wildlife, people and surrounding nature.[766]However, in the recent years, the CSR activities by the non-polluting industries has also seen a sharp increase and they are also adopting more CSR strategies and initiatives owing to the recognition that CSR spending makes business sense. This has led to narrowing down the wide gap which existed in terms of the CSR initiatives between the polluting and non-polluting industries. It has further been noticed that there is no noticeable difference pertaining to CSR for both the groups in last 2 years.[767] With the provisions in the UK (e.g. Section 172[768]) and Indian (e.g. Section 135[769]) Companies Act, this scenario will continue, as all corporations, apart from size considerations, will be mandatorily required to engage in CSR activities.

4.9 Conclusion

In conclusion, the Indian and UK contexts suggest a variety of different CSR-related legislative provisions that have been enacted to underscore the importance of a company's stakeholder obligations and responsibilities that extend beyond its shareholders. Corporate law in India has moved far

[765]Sarkar and Sarkar (2015), 1-36.
[766]B. Watson. The troubling evolution of corporate greenwashing. Available: https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies (2016): Accessed: 19th Aug 2019.
[767]Sarkar and Sarkar (n 708), 1-36.
[768] UK Companies Act (2006), S.172.
[769] Indian Companies Act (2013), S.135.

away from not only its colonial origins, but also from contemporary English law. English law still appears to show a preference for shareholder value, while India has moved away from the idea to consider the larger interests of all stakeholders. Therefore, socialism could be the reason why India has moved away from the previously mentioned phenomenon. However, India appears to take social responsibility more seriously compared to the UK. This is because the Indian Companies Act 2013 requires companies to dedicate 2% of their annual earnings towards socially responsible efforts, whilst the UK Companies Act 2006 states no such obligation and is voluntary as opposed to mandatory. Therefore, company law in the UK appears to be more lenient towards companies when it comes to contributing towards CSR efforts or related activities, whereas this is a strict obligation for Indian companies. This suggests that CSR in the UK law needs significant development and reform compared to India.

Although it can be argued that the extent of social norms fosters a conception of an organisation's social responsibility to society that go beyond shareholders, such developments in an international context of CSR, particularly in the Gulf region, appear troublesome owing to the lack of CSR provisions in their company laws. The next chapter examines the best approach for Kuwait and applies insights from this chapter and preceding ones to propose a CSR regulation model for the country with support of institutional theory. Kuwait was chosen because the country has its own company law, with no evidence of CSR provisions, but shows great potential in terms of promoting CSR. Therefore, the idea of promoting CSR in the Kuwaiti context aligns well with the institutional theory since it explores the deeper and more resilient aspects of social structure, which

in the context of companies would be the exploration of stakeholders and their rules, norms and routines.

Chapter Five: CSR Provisions in Company Law in Kuwait

5.1 Overview

This chapter examines the CSR-related provisions in Kuwaiti company law. Firstly, the chapter provides an introduction to institutional theory and its application to the research context by defining the theory and explaining the implications of the theory. Then, the chapter moves to the socioeconomic and legal background of Kuwait by discussing the demography, education and labour issues, economy and the political and legal system. The chapter then moves to a discussion of CSR practices and CSR in relation to the relevant provisions of Kuwaiti company law and corporate governance, including board of directors, CSR reporting and information disclosure, corporate constituencies, directors' duties and corporate objectives. The visions of CSR in the UK and Indian Companies Act and Kuwait are discussed and compared throughout the chapter in order to determine a middle ground for Kuwait with respect to adopting more socially responsible principles.

5.2 Institutional Theory

Institutional theory encompasses the wider and stronger aspects of social structure. Over many years, institutional theory has been used to justify the various elements of organisational systems, in addition to organisational changes in competitiveness and business strategy among international companies. Institutional theory captures the essence of institutional isomorphism, which refers to a process of companies following certain rules and beliefs of the current institutional setting in order to survive in a competitive market and ultimately bring legitimacy as a means to maintain

the company's reputation.[770] Bitektine[771] defines legitimacy as "actors' perceptions of the organisation, as a judgment with respect to the organisation, or as the behavioural consequences of perception and judgment manifested in actors' actions – acceptance, endorsement, and so forth." On the other hand, reputation refers to "expectations of some behaviour or behaviours based on past demonstrations of those same behaviours."[772] Therefore, institutional theory is an important topic of discussion in organisational management research.

In the 1970s, institutional theory was first introduced to management research from sociology and political science when applications to business and management were found useful.[773] The theory has also served to explore the wider socio-economic implications, such as culture, economy and legal structure. However, without a thorough analysis of the socio-cultural contexts and agency and how they implicate one another, it would be difficult to overcome the implications of actor-centric notions of agency and restore institutional theory's original notion of concerning the role of individual actors in companies.[774] This is because much emphasis is placed on the management of organisational actors or in the case of companies, stakeholders who have particular interests and roles within a company. However, research about organisational management has a limited emphasis on international management and even through a legal lens (e.g., consideration of laws, regulations and policies that govern companies). This has created the opportunity to apply institutional theory

[770] P. J. Dimaggio and W. W. Powell, (1983). The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. American Sociological Review, 48(2), pp. 147-160.
[771] A. Bitektine, (2011) Toward a theory of social judgments of organizations: the case of legitimacy, reputation, and status. The Academy of Management Review, 36, 151.
[772] J.M. Podolny, (2005) Status Signals: A Sociological Study of Market Competition, Princeton University Press, Princeton, NJ, n.p.
[773] Sheila M. Puffer and Daniel J. McCarthy. "Institutional Theory." Wiley Encyclopedia of Management (2015), 1-5.
[774] Samer Abdelnour, Hans Hasselbladh, and Jannis Kallinikos. "Agency and institutions in organization studies." Organization studies 38.12 (2017), 1775-1792.

across various contexts to raise awareness of the changing environment of international business.[775] However, since there is a need to introduce new CSR provisions in Kuwaiti company law, it is important to explore institutional theory through a legal lens owing to it ties with culture, norms and traditions.

Through the legal lens, institutional theory, particularly in relation to CSR, places much emphasis on state regulation.[776] Brammer[777] argued that research adopting the lens of institutional theory to justify CSR or socially responsible practices in companies places much emphasis on the diversity of CSR. Brammer goes on to mention that diversity through the legal lens in the institutional environment considers not only formal institutions, such as laws, trade unions and civil society among others, but also informal institutions, such as religious norms, culture, tribal traditions or customary norms.[778] Therefore, bringing together the definition and implications of institutional theory through a legal lens, institutional theory in the context of this thesis can be defined as a regulative (policies and work rules), normative (work norms and habits) and cognitive mechanisms (beliefs and values) that form stakeholders' identities and their wider interests in companies. Detailed justifications regarding the application of institutional theory through legal transplant theory in relation to CSR provisions in Kuwaiti companies law are presented in chapter 6. Since institutional theory through the legal lens and CSR regards the wider socio-economic implications and legal considerations of countries, it is important to explore the socio-economic background and legal structure of Kuwait.

[775] Ibid.
[776] S.Brammer, G. Jackson, and D. Matten (2012). Corporate social responsibility and institutional theory: New perspectives on private governance. Socio-Economic Review, 10(1), 3–28.
[777] Ibid.
[778] Ibid.

5.3 Socio-economic and Legal Background of Kuwait

This section discusses the socio-economic and legal background of Kuwait. It starts by looking into the demography and culture and the educational system that can help to recognise the cultural values of Kuwait in order to understand the characteristics of the population and allow a better understanding of the main problems and challenges of Kuwait. It then moves to an analysis of Kuwait's economy, as well as the main industries and employment rates in Kuwait. Finally, the section moves to an examination of Kuwait's history and general legal background, tracing its development up until the present day.

5.3.1 Demography & Culture

With respect to demography, the World Bank data predicted a population growth in Kuwait from 3.8 million in 2014 to 4.7 million in 2025.[779] The Kuwaiti population consists of Kuwaiti citizens and non-Kuwaiti citizens, who are residents of the State of Kuwait only. In 2009, the Kuwaiti population consisted of 70 per cent Kuwaiti nationals and 30 per cent non-Kuwaitis.[780]

Table 5.1: Distribution of Population in Kuwait by Gender and Nationality[781]

Kuwaitis		**Non-Kuwaitis**		**Total**	
Males	Females	Males	Females	Males	Females
571,076	593,369	1,612,590	854,971	2,183,666	1,448,340
1,164,445		**2,467,561**		**3,632,006**	

*(Public authority of civil information)

[779] World Bank. (2015). Data on health expenditure, public (% of GDP). Available: http://data.worldbank.org/indicator/SH.XPD.PUBL/countries/1W-KW-OM- SA?display=graph. Accessed Nov 19th 2018.
[780] Ibid.
[781] Ibid.

The majority of the population is between 15 and 64 years of age and represents 75 per cent of the total population, while only 2 per cent is 65 years of age or older.

Table 5.2: Population Distribution by age in percentage of the total in the State of Kuwait

Population distribution by Age (% of total)				
	2011	2012	2013	2014
0-14	23	23	23	22
15-64	75	75	75	76
65+	2	2	2	2
Population Total (Millions)	-	3.4	3.6	3.8

Source: World Bank, 2015

This high proportion of the adult labour force is due to the large number of non-Kuwaitis moving to Kuwait to work. The large number of non-Kuwaiti workers is due in part to the discovery of an oil field in 1952, which has made Kuwait one of the world's largest oil-producing countries. Since then, Kuwait has been a destination country for numerous foreign workers from around the world. In terms of ethical business practices of CSR, competition between Kuwaiti and non-Kuwaitis has been in favour of the latter owing to them taking less wages for a specific type of job such as administrative and non-executive positions.[782] In support of this claim, the majority of foreign nationals in Kuwait come from Asia and the Arab countries of North Africa (62 per cent of the total population). Indians and Egyptians are also large groups, accounting for 30 per cent and 21 per cent of the foreign population respectively. Foreign workers are generally

[782] Aisha Elgayar. Kuwait Worries Expat Workforce Is Taking Jobs from College Graduates. (2017): Available: https://www.al-fanarmedia.org/2017/04/kuwait-worries-expat-workforce-taking-jobs-college-graduates/. Accessed: 20th August 2019.

restricted to "worker" services and professions. Arab expatriates often occupy high-level positions (32 per cent of Arab workers are in managerial, professional and administrative positions), although Egyptian expatriates are also engaged in manual labour and maintenance.[783] Therefore, this limits job opportunities for Kuwaiti nationals, which presents an issue around labour standards in the country.

Discrimination in the labour force in Kuwait is a growing issue. For example, segregation in Kuwait has meant that men are paid 58% more than their female counterparts.[784] To combat the labour standards issue, Kuwait enacted a minimum wage law in 2016 for Kuwaiti workers, which gave both men and women equal and enforceable rights.[785] The minimum wage law in Kuwait sets out to improve the pay among both domestic and foreign workers (both male and female) where they have to be paid a minimum of 60 Kuwaiti Dinars each month. In comparison to the UK, they have a similar national minimum wage law. The National Minimum Wage Act 1998 protects workers by paying them a minimum of £7.83 per hour for over 25s, £7.38 for 21 to 24 year olds and £5.90 for 18 to 20 year olds.[786] Similarly, the UK has the Equal Opportunity Act 2010, which protects workers' rights, including from discrimination based on race, gender and age.[787]

In terms of culture, Islamic values go well beyond the social behaviour currently seen in today's era and provides a basis for social well-being,

[783] Gulf Labour Markets and Migration. (2013). the demographic and economic framework of migration in Kuwait. Available: from http://cadmus.eui.eu/bitstream/handle/1814/32155/GLMM%20ExpNote_01-2013.pdf?sequence=1: Accessed: 31st March 2019.
[784] Kuwait Times, 'Kuwait 129 of 144 in gender gap' (2017) Available: https://www.arabtimesonline.com/news/kuwait-129-144-gender-gap/: Accessed 31st March 2019.
[785] Minimum-Wage, 'Kuwait Minimum Wage, Labor Law, and Employment Data Sheet Kuwait Minimum Wage Rate 2019' (2019) Available: https://www.minimum-wage.org/international/kuwait: Accessed 31st March.
[786] Unison, 'Minimum wage and national living wage' (2018). Available: https://www.unison.org.uk/get-help/knowledge/pay/minimum-wage/: Accessed 31st March 2019.
[787] Human Rights Commission, 'The Equal Opportunity Act 2010' (2019) Available: https://www.humanrightscommission.vic.gov.au/the-law/equal-opportunity-act: Accessed 31st March 2019.

good deeds and welfare for those members of society who are less able. In terms of business, Islam has always measured corporations against two goals: financial and social goals. Hence, there is a harmonious zone of sustainability similar to the common notion of CSR. There is a great match between the Islamic approach to CSR and the ethical approach to CSR and, more specifically, the common good approach, as both focus on principles of doing the right thing and contributing to the common good to achieve a good society. Moreover, there is also a common ground between the Islamic approach to CSR and the stakeholder theory. A stakeholder in Islam is defined as the one whose property rights are at stake or at risk due to voluntary or involuntary actions of the firm.[788] This implies that the firm is expected to preserve the property rights of not only the shareholders but also those who have participated in the process of acquiring or earning the firm's property, and those who could be threatened because of the firm's operation.

Iqbal and Mirakhor[789] posit that any group or individuals with whom a firm has any explicit and implicit contractual obligations qualifies as a stakeholder, even though the firm may not have formal contracts with them through mutual bargaining. However, whether organisations in Islamic countries are realising this and are incorporating Islamic teachings on how to act towards the community in their CSR programmes is still not known. This could be down to a lack of knowledge of engaging in socially responsible activities in corporate contexts, which in turn could be down to the lack of CSR provisions in Kuwait.

[788] Zamir Iqbal and Abbas Mirakhor. "Stakeholders model of governance in Islamic economic system." Islamic Economic Studies 11.2 (2004), 21.
[789] Ibid.

In short, the increasing population and shift in demography and culture may present an economic and social challenge to Kuwait in the sense that resources may be constrained owing to a higher demand among the population, as well as discrimination that has a direct impact on the labour force due to gender wage gaps and favouritism.

5.3.2 Education and Labour Issues

The Kuwaiti education system is divided into three levels: elementary, intermediate and secondary. For Kuwaitis, education is free from primary school. Kuwaitis between 6 and 14 years of age also have a mandatory school attendance requirement.[790] This has enabled Kuwait to achieve a high level of education. In 2015, the literacy rate for adults aged 15 years was 96%, one of the highest in the Cooperation Council for the Arab States of the Gulf (CCASG - formally known as the GCC) region.[791]

The Ministry of Education monitors and regulates education, including public and private schools. In 2017, there were an estimated 382,000 students in public schools,[792] although private education is becoming increasingly popular, especially among non-Kuwaitis.[793] This aligns with trends in education spending in high-income countries such as the UK. Figure 5.1 illustrates the total daily spending on a number of educational elements (e.g. further education, adult skills, apprenticeships and work-based learning) in the UK from 2002-2018. In 2017-18, there was an

[790] Oxford Business Group. (2010).The Report: Kuwait 2010. (2010): Available: http://www.oxfordbusinessgroup.com/news/kuwait-year-review-2010. Accessed: 31st March 2019.
[791] World Bank. (2015). Data on health expenditure, public (% of GDP). Available: http://data.worldbank.org/indicator/SH.XPD.PUBL/countries/1W-KW-OM- SA?display=graph. Accessed Nov 19th 2018.
[792] Statista, 'Number of students in Kuwait in the academic year 2016/2017, by school type' (2019) Available: https://www.statista.com/statistics/654912/number-of-students-by-school-type-kuwait/: Accessed 31st March 2019.
[793] Oxford Business Group. (2010).The Report: Kuwait 2010. (2010): Available: http://www.oxfordbusinessgroup.com/news/kuwait-year-review-2010. Accessed: 31st March 2019

estimated £6.5 billion invested in the UK education system, particularly for higher education, e.g., colleges and universities.[794]

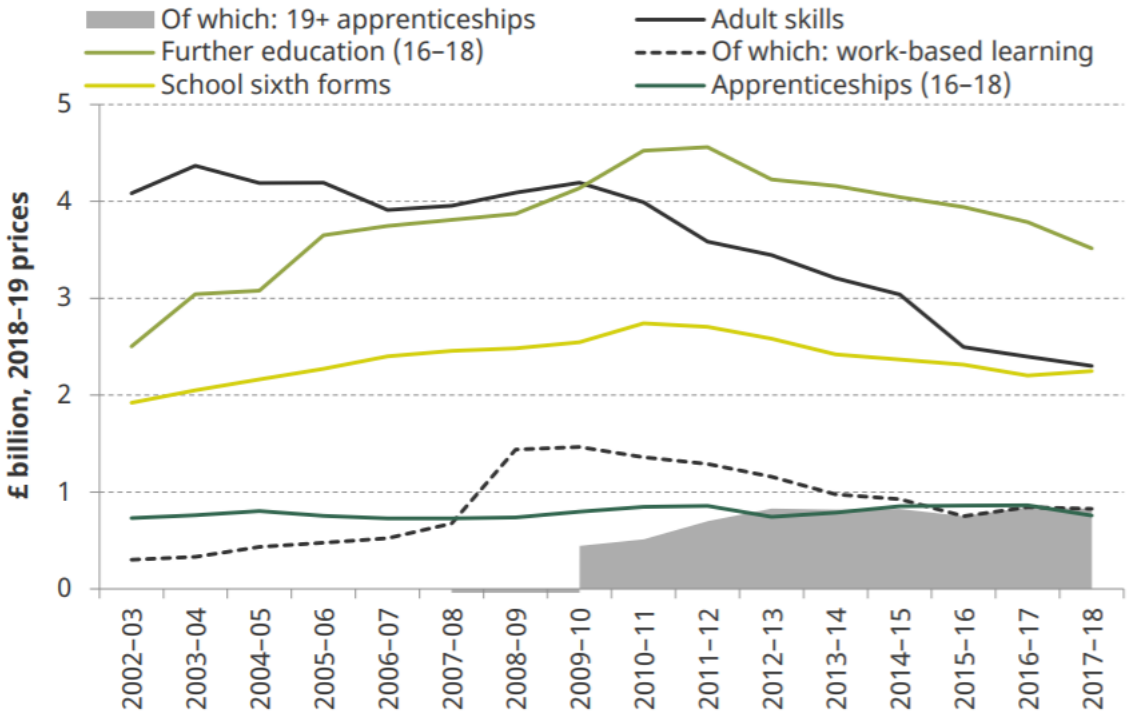

Figure 5.3: Total Spending on Education and Skills 2002-2018[795]

Kuwait has also achieved one of the sustainable development goals in the field of education, namely, improving women's education. Further, there is a growing number of women in primary education, and girls' enrolment rates in primary education were higher compared to boys.[796] In view of CSR, segregation of the genders in education is perceived as a serious challenge owing to the cultural and religious circumstances in Kuwait. This is because some males in Kuwait are in favour of gender segregation for a number of reasons. Some men perceive that co-education breaches Islamic beliefs and violates Kuwaiti moral values. Even though gender segregation is at the heart of Kuwaiti culture and the country's moral and value system,

[794] C Belfield, C Farquharson and L Sibieta, *2018 Annual Report on Education Spending in England* (2018), 46.
[795] Ibid.
[796] UNESCO. (2008). United Nations Educational, Scientific, and Cultural Organization, Institute for Statistics. Available: http://unesdoc.unesco.org/images/0022/002204/220416e.pdf . Accessed 5th Sept 2019.

a study found that it does not violate Islamic beliefs. Rather, Islam regulates gender integration as opposed to forbidding it.[797] Some males also feel that gender segregation has no impact on the education process and the separation of male and female students has no impact on the learning process.[798]

Similarly, in India, gender segregation in education is a growing issue in the country owing to the decline in the female labour force, despite high economic growth in India within the past 10 years.[799] Gender segregation in India is creating a disadvantage for the female labour force in the country's education system, for example, in the gender pay gap.[800] However, the idea of segregation could be perceived as a form of division between the genders, which in the UK is perceived as gender inequality. For education, segregation takes away the opportunity for the genders to engage in the sharing of ideas and encouraging new experiences by working with others that are not often in their usual circle of peers. Although the UK view would remedy this issue owing to the mixture of men and women in their society, the current cultural climate in Kuwait rejects this notion, thus making it difficult to resolve within the education sector.

In terms of labour issues, although the unemployment rate in Kuwait increased between 2006 and 2014, the proportion of women in employment and the labour force increased from 2005 (25.2 per cent) to 33.2 per cent in 2011.[801] Among women, there has been a significant

[797] Salah Al-Fadhli. "Students' Perceptions of E-learning in Arab Society: Kuwait University as a case study." E-Learning and Digital media 5.4 (2008): 418-428.
[798] J. Dinkha. 'The Dichotomy of Education: Public vs. Private' 2 Gender and Women's Studies. Available: http://riverapublications.com/article/the-dichotomy-of-education-public-vs-private. Accessed 5th Sept 2019.
[799] Stephan Klasen and Janneke Pieters, *What explains the stagnation of female labor force participation in urban India?* (The World Bank 2015), 449.
[800] Mary Borrowman and Stephan Klasen, *Drivers of gendered sectoral and occupational segregation in developing countries* (2017), 22-23.
[801] International Labour Organization (ILO). (2013). The Kuwaiti labour market and foreign workers: understanding the past and present to provide a way forward. Available: http://www.ilo.org/wcmsp5/groups/public/@arabstates/@ro-beirut/documents/meetingdocument/wcms_330314.pdf. Accessed: 1st April 2019.

increase in the employment rates and empowerment of women in society could play a crucial role in increasing women's employment in Kuwait.[802] This has been achieved by providing Kuwaiti women training that aims to boost confidence in the workplace and promote empowerment as part of the country's sustainable development initiative. Principles of the socially responsible initiative include the establishment of corporate leadership for gender equality, fair treatment of workers, respecting human rights, and promoting equal opportunity and non-discrimination. Other principles include health and well-being, education and training development, implementing enterprise development, marketing and supply chains that aim to empower women and reporting on gender equality in the workplace.[803]

5.3.3 Economy

An analysis of the impact of the discovery of oil on the general economy and wider society is presented as the development of the oil industry has transformed Kuwait economically. However, Kuwait's high dependence on oil has resulted in an economy that is reluctant to diversify its revenue streams. This has resulted in a slower rate of economic diversity in the country.[804] In terms of CSR, the high dependence of oil heavily restricts other revenue streams. Economic figures in Kuwait show that oil makes up over 90% of the country's revenue streams with the other 10% involving non-oil and private sector revenue streams.[805] Therefore, the monopoly of

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[802] UNDP. (2016). Economic empowerment of Kuwaiti women. available: http://www.kw.undp.org/content/kuwait/en/home/operations/projects/womens_empow erment/economic-empowerment-of-kuwaiti-women/: Accessed 1st April 2019.
[803] UN Women, 'Kuwaiti companies get ready to empower women' (2018) Available: http://arabstates.unwomen.org/en/news/stories/2018/10/kuwaiti-companies-get-ready-to-empower-women: Accessed 1st April 2019.
[804] Moody, 'Kuwait slower than peers in diversifying economy: Moody's' (2018) Available: http://www.oilreviewmiddleeast.com/industry/kuwait-slower-than-peers-in-diversifying-economy-moody-s: Accessed 31st March 2019.
[805] Hessah Al-Ojayan, 'Treating The Oil Addiction In Kuwait: Proposals For Economic Reform' (2016): Available: http://eprints.lse.ac.uk/67888/1/Hessah_Al_Ojayan_2016.pdf: Accessed 9th April 2019; Zakir Mir. The GCC Legal System and Islamic Law, a Marriage Between Past and Present. Available: https://medium.com/allegiance-international-legal-blog/the-gcc-legal-system-and-islamic-law-a-marriage-between-east-and-west-c7a50c5c4faf: Accessed: 20th August 2019.

oil owing to its lucrative nature has placed a heavy burden on other revenue streams to generate wealth for the country, which could be perceived as a socially irresponsible practice by oil firms.

Although small geographically, Kuwait is considered a high-income country and provides a high level of oil rent as a percentage of GDP among CCASG countries. Kuwait's economy, like most CCASG countries, represents an oil-based growth model. In terms of wealth, the GDP of Kuwait mostly includes oil commodities.[806] In addition to oil, which accounts for more than 6 per cent of the world's crude oil reserves, natural resources in Kuwait include shrimp, fish and natural gas.[807] Thus, industrialisation is crucial to the development and progress of the Kuwaiti economy, as the country is largely dependent on oil production and exports. According to Forbes magazine, Kuwait was ranked 15th in the world's wealthiest countries in 2012. Qatar was ranked first, followed by the UAE.[808] In Kuwait, there is an unequal distribution of wealth in the country owing to the unequal pay between Kuwaiti and non-Kuwaiti workers. For example, the country relies on foreign workers to take the low-paid and strenuous jobs, such as construction and services.[809] This can be perceived as a CSR issue since Kuwaiti companies are expecting non-Kuwaitis to perform jobs that the locals do not want to do.

[806] Central Intelligence Agency. The World Fact Book. (2010). Available: https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html: Accessed: 20th August 2019.
[807] Central Intelligence Agency. The World Fact Book. (2010). Available: https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html: Accessed: 20th August 2019.
[808] Forbes Magazine. (2012). The World"s richest countries. Available: http://www.forbes.com/sites/bethgreenfield/2012/02/22/the-worlds-richest-countries/. Accessed: 20th August 2019.
[809] S Westall and A Hagagy, 'Economic, social pressures behind Kuwait crackdown on foreign workers' (2013). Available: https://www.reuters.com/article/us-kuwait-labour/economic-social-pressures-behind-kuwait-crackdown-on-foreign-workers-idUSBRE95B0N620130612: Accessed 31st March 2019.

Table 5.4: Oil rents (% of GDP) in CCASG

Country	2011	2012	2013
Kuwait	**58.6**	**57.7**	**57.5**
Bahrain	21.2	17.9	17.1
Oman	40.1	36.1	34.5
Qatar	29.9	26.0	23.4
Saudi Arabia	48.1	45.8	43.6
United Arab Emirates	25.1	24.1	21.6

* *"Oil rents (% of GDP): Oil rents are the difference between the value of crude oil production at world prices and total costs of production."* (World Bank, 2015)

Although oil production is Kuwait's main industry, the diversification of its production base has always been an important issue for the Kuwaiti government.[810] This is because the government is trying to reduce the country's dependence on the oil sector and is constantly seeking to expand the sources of national income, such as the production of other goods. In 2010, a five-year economic development plan was adopted to diversify the economy away from the oil sector, encourage investment, support national production and encourage both private and national industry, although a significant portion of these funds have not yet been allocated.[811] Since the 2015-2016 oil price shock, which significantly affected the Kuwaiti economy, government agencies have now considered investing in alternative energy streams to strengthen renewable sectors and at the same time diversify its economy.[812] Based on the above, Kuwait's economy is driven by the government agencies, since the government controls the country's oil reserves.[813]

[810] Moody (n 804), n.p.
[811] Central Intelligence Agency. The World Fact Book. (2010). Available: https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html: Accessed: 20th August 2019.
[812] Manal Shehabi, 'Is energy subsidy reform in an oil-exporting small economy beneficial to trade? Illustrations from Kuwait' Oxford Institute for Energy Studies (2019), 4-5.
[813] Ibid.

In terms of the environmental sustainability and economic responsibility aspects of CSR, oil companies in Kuwait invest heavily in CSR and engage with local communities. However, oil companies in Kuwait have no intention to be involved in the diversification efforts of the government, since renewable energy sources, for instance, will greatly affect their companies in terms of profitability.[814] This is evidenced by the considerable growth of corporate codes of conduct and social reporting among Kuwait Petroleum[815], as well as reporting in UK initiatives, such as the UK government's Extractive Industries Transparency Initiative (EITI) and the United Nations Global Compact (UNGC). The UNGC is an initiative that aims to encourage businesses from all over the world to adopt sustainable and socially responsible policies, and report on their methods of how they implemented these policies.[816] The EITI is an initiative that aims to promote good governance of oil, gas and mineral resources, and aims to address key governance issues in corporate sectors.[817] These initiatives, together with investments in renewable sources from multinational oil companies, have generated an alternative means to produce income in the event of the inevitable depletion of oil and gas resources.[818] With the introduction of renewable energy sources, this provides potential opportunities in Kuwait that could address the unemployment problem in the country.

5.3.4 Political and Legal System

The setting up and development of the legal system in Kuwait is also considered, with particular emphasis on Shari'a Law, since this is a common

[814] Baker Institute, 'Why Oilmen Will Never Be Interested In Renewables' (2019). Available: https://www.forbes.com/sites/thebakersinstitute/2019/02/14/why-oilmen-will-never-be-interested-in-renewables/#7dee5b24d8c8: Accessed 1st April 2019.
[815] Jędrzej George Frynas. "Corporate social responsibility in the oil and gas sector." Journal of World Energy Law & Business 2.3 (2009), 178-195.
[816] United Nation Global Compact, 'United Nation Global Compact' (2019). Available: https://www.unglobalcompact.org/: Accessed 1st April 2019.
[817] Extractive Industries Transparency, 'Extractive Industries Transparency' (2019). Available: https://eiti.org/: Accessed 1st April 2019.
[818] Frynas. (n 815), 182.

law system implemented in Gulf countries.[819] This section examines the reasons underlying Kuwait's adoption of a civil law system followed by a discussion of its constitutional law and governance. It also focuses upon the effective implementation of the Constitution of Kuwait and carries out a discussion of how this relates to CSR.

The basis of the legal system of Kuwait would have originally been Shari'a (Islamic Law) owing to the major Islamic influences in the Gulf region with much of the customs, social behaviour and infrastructure needed for development of the legal system in Kuwait being based upon this law (and the remainder on pre-Islamic custom). This assumes that contract and commercial law are based on Shari'a Law in Kuwait. Article 1 of the Constitution of Kuwait provides that Kuwait is an Arab State, autonomous and fully sovereign.[820] The Kuwaiti people are a part of the Arab Nation, where its main religion is Islam and Shari'a Law (Islamic religious law) is the main source of its legislation and political systems, the latter being democratic with society freely able to vote for their governmental leader. The Arabic language is its official language.[821]

On the other hand, Kuwait's legal system comprises an unusual mixture of English common law, French civil law, Egyptian law and Islamic legal principles,[822] owing to its ties with the Ottoman Empire, with clear Islamic influences in personal affairs and family life. Article 2 of the Constitution of Kuwait provides that, "Islam forms a major source of law". This article has

[819] Zakir Mir. The GCC Legal System and Islamic Law, a Marriage Between Past and Present. Available: https://medium.com/allegiance-international-legal-blog/the-gcc-legal-system-and-islamic-law-a-marriage-between-east-and-west-c7a50c5c4faf: Accessed: 20th August 2019.
[820] World Intellectual Property Organisation, 'Kuwaiti Constitution' (1962): Available: https://www.wipo.int/edocs/lexdocs/laws/en/kw/kw004en.pdf: Accessed 6th Feb 2019; Constitution of Kuwait, A.1.
[821] USA International Business Publications, *Kuwait Energy Policy, Laws and Regulation Handbook* (International Business Publications USA 2008), 308.
[822] A Aly Khedr, 'Kuwait's Legal System and Legal Research ' (2010): Available: http://www.nyulawglobal.org/globalex/Kuwait.html: Accessed 7th Dec 2018.

given rise to much heated discussion.[823] However, it uses the word "major" (or "principal") and not "all" or "entire". Nor does it say "the" major source. This means that it provides space for other sources of law. However, the laws should not go against the ethos of Shari'a Law. The Kuwaiti legal system is a recent development from a historical point of view. Kuwait has been able to incorporate various international standards into its legal system, in addition to those arising from Egyptian law.

After Kuwait attained its independence in 1961 from the British protectorate, its aim was for a modern legal system that succinctly integrated its values and the current system is an expression of that hope. It merged its Islamic laws, Majallat al Ahkam al Adliya[824], which were based upon the Shari'a Law, with the Civil Code of France by drafting new legislation. This was a reflection of the need to accommodate an increasingly complex economic environment.

Custom plays a very interesting role in determining the legal system of a country. It can be influential directly, either as a named source, or by inference. Lawmakers do not exist in a vacuum but are a product of their time and environment. In relation to institutional theory, it identifies regulative (policies and work rules), normative (work norms and habits) and cognitive mechanisms (beliefs and values) that form stakeholders' identities and their wider interests.[825] Institutional theory has now shifted from how the law shapes agency conflicts to how wider cultural, social, and political factors form the diversity of actors and settings in corporate governance.[826] Therefore, in terms of the law system in Kuwait, this can be

[823] Ibid; Constitution of Kuwait, A.2.
[824] M.S. Casey, F.W. Thackeray and J.E. Findling, *The History of Kuwait* (Greenwood Press 2007), 184.
[825] Neil MacCormick and Ota Weinberger. An institutional theory of law: new approaches to legal positivism. Vol. 3. Springer Science & Business Media, (2013), 229.
[826] Ruth V. Aguilera and Gregory Jackson. "Comparative and international corporate governance." The Academy of Management Annals 4.1 (2010), 485-556.

equated to how cultural traditions and religion shape company law and the country's law system. In this regard, Kuwait is no exception. As such, the precepts of Islam are very much to the fore in the creation of new laws.

Kuwaiti law, however, has clear Islamic influences evident in relation to personal affairs and family life owing to the collective culture in the country. However, it is only in 1961 that Kuwait became a truly independent state, able to enact its own new legal system and be in control of its own financial affairs. As such, the Constitution of Kuwait was drafted, the rupee was replaced by the Kuwaiti dinar as the national currency and the discovery of vast quantities of oil in the Burgan and other fields laid the foundation for the economic growth of the country.[827]

The early drafting of Kuwait's laws was both complex and unusual in that the drafters were very wide-ranging in their formulation of the legal system of Kuwait. Other sources of law in Kuwait include legislation, custom and the principles of the law of nature and rules of justice. The articles in the civil codes of Kuwait neatly encapsulates the notion of admixture that gives expression to the entire legal system of Kuwait, noting that while Shari'a underpins and informs the legal code, it is not to the exclusion of other codes or registers. Indeed, Article 1(2)[828] of the Civil Code pointedly states that, in the event of having insufficient legislative provisions, a matter should be resolved based on Islamic jurisprudence and custom.[829] Nevertheless, Kuwait was keen to import foreign laws and support globalisation. Indeed, gender equality is protected under this constitution. Moreover, a number of these protective elements under this constitution have now been omitted and have been replaced by the decree of the Emir,

[827] Ibid.
[828] The Civil Code of Kuwait: Decree No. 76/1980 A.1(2).
[829] Ibid.

including protection of migrant workers, freedom of expression and women's rights.[830]

The Kuwaiti Constitution contains some 183 articles. It is divided into five sections, namely the Fundamental Constituents of Kuwaiti Society, General and Transitional Provisions, Powers, Public Rights and Duties and the State and System of Government.[831] Article 174 of the Kuwaiti Constitution states that the Emir or one-third of the members of the National Assembly are given the power to propose amendments to the Constitution by adding new provisions or even changing and/or omitting some of its provisions.[832] This article gives an absolute right to the Emir to amend the Constitution or indeed, delete any part of it. While a cursory reading would appear to favour the notion that the Emir exercises almost complete autonomy with respect to the Constitution, nonetheless, amendments or deletions require the approval of two-thirds of the members of the National Assembly or the Council. However, final approval of any amendment rests with the Emir. Since the Emir is the head of state and is the most powerful person in Kuwait, he can enforce CSR-related directions by, for example, changing parts of the constitution of Kuwait that best align with more socially responsible principles, like improving women's rights, freedom of expression and protection of migrant workers.[833] Accordingly, Kuwait's legal system and its system of governance do not fully conform to the European models.

In the National Assembly of Kuwait, some fifty members, democratically elected for a term of four years, enact the country laws. There are three

[830] Human Rights Watch, 'Kuwait' (2017): Available: https://www.hrw.org/sites/default/files/kuwait_2.pdf: Accessed 1st April 2019, 1-5
[831] Ibid.
[832] E.D.A.E. Al-Sabah, *Shari'ah, Democracy and the Kuwaiti Constitution* (Arabian Publishing, Limited 2018), 275.
[833] Human Rights Watch (n 830), 1-5.

principal constitutional and administrative authorities in Kuwait: legislative, executive and judicial. The Emir sits above all these state authorities.[834] According to the Constitution of Kuwait, no political parties can be formed even though parliamentary blocks may be available. The system of governance in Kuwait is monarchical as well as constitutional with some elements of democracy as well. The government of Kuwait derives its legitimacy from the Constitution, while the legislative branch is quite dependent upon the Emir: no rules, judgements and decrees can be passed unless approved by the Emir. The parliamentary and presidential system of governance in Kuwait enables the legislative authorities to enact the laws. However, the Emir has a one-month period within which to raise any concerns or objections to their content, following which they come into effect. In the event of objections being raised, the law must be amended.[835]

As stated previously, a country's legal system is a product of its customs and social practices because through the institutional theory lens, it demonstrates how the wider cultural, social, and political factors form the diversity of actors and settings in corporate governance.[836] In this regard, Kuwait's legal system does not differ. The laws are a reflection of past difficulties and problems, and often incorporate not just accepted principles, but provide solutions to particular cultural and historical problems.

The presence of Shari'a Law within Kuwait's legal system is a testament to this idea and is defined by the customs and practices of the land. However, from a historical standpoint, the legal corpus is not defined by Shari'a alone: Roman civil law codes have contributed to the development of the

[834] N.J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 2006), 280.
[835] Ibid.
[836] MacCormick and Weinberger (n 825), 207-208.

commercial legal sphere in Kuwait, while the Egyptian civil law and the French Napoleonic codes have also played an instrumental role in shaping a range of statutes.[837] The gradual acceptance of the need to reassess legal utility in respect of Shari'a mirrors a point made by Campbell in relation to the question of insolvency laws. Campbell stated that there comes a point where the wider practical aspects of commercial activity and engagement with other jurisdictions require a reassessment of rules, law and operational procedures, namely "most developing countries and those in transition have, in recent years, been introducing bank insolvency laws, either on their own or as part of their general banking laws".[838] Therefore, for CSR, this same principle applies to Kuwait as they could introduce new CSR provisions as part of their existing company law as a means to reshape the legal side of companies.

With regard to the make-up and structuring of the Kuwaiti judiciary and courts, the hierarchy of the court system in Kuwait follows a broadly recognisable pattern, with the Supreme Court as the court of final appeal. Below it comes the Court of Appeal and the Court of First Instance, which have three judges each; these courts are further divided into a number of circuit courts. The matters dealt with by these courts are mainly commercial law, family law, civil law and administrative matters.[839]

The strength of a country is strongly correlated to the success of its legislative, executive and judicial authorities and as regards the judiciary in particular, its function is to promote justice and equity via the correct application of laws and regulations as a means to give every person their

[837] Roger Halson. "Negotiation, Modification and the Structure of Contract Textbooks." Canterbury L. Rev. 11 (2005): 163.
[838] Paul Omar, *International insolvency law: Themes and perspectives* (Routledge 2016), 452.
[839] Ibid.

due.[840] Generally, Kuwait has demonstrated its interest in and commitment to the judiciary since the founding of the state through its setting up of courts and public prosecution departments throughout the country and facilitating the work of the judiciary in line with its goals and mission.

As mentioned previously, the Kuwaiti government controls the country's corporate network owing to its control over the oil industry, which is a significantly high contributor to the Kuwaiti economy. Law No. 15 of 1960 on commercial companies, as amended, and Law No. 68 of 1980 on commercial activities, regulate the various types of commercial organisations that may be established in Kuwait. Kuwaiti legislation provides for the following types of profit organisations: Limited Liability Company; Joint Stock Company; General Partnership; Limited Partnership; and Joint Venture.[841] Except for a joint venture, all these legal forms of incorporation have the status of an independent legal entity. As a rule, the Kuwaiti company law requires that Kuwaiti nationals must participate in all business activities with at least 51 per cent shareholding.[842] Therefore, CSR could help companies to meet their 51 per cent target by integrating new CSR activities and initiatives in existing Kuwaiti company laws. This will not only help Kuwaiti companies to meet this target, but also promote social responsibility which in turn may enhance their reputation.

When establishing a company in Kuwait, a number of factors have to be considered; business factors, religious factors and ethnic factors.[843] For business-related factors, between 2014 and 2015, Kuwait made it

[840] H Arab, 'The Development of the Judiciary -Challenges and Outlook' (2011): Available: https://www.tamimi.com/law-update-articles/the-development-of-the-judiciary-challenges-and-outlook/: Accessed 8th Dec 2018.
[841] IPR, 'Business Forms and Structures' (1999): Available: http://www.infoprod.co.il/country/kuwait2b.htm: Aaccessed 10th Feb 2019.
[842] WIPO, 'Kuwait: Law on Commercial Companies (as amended on October 19, 1960)' (1960). Available: https://wipolex.wipo.int/en/text/196117: Accessed 2nd March 2019.
[843] Shield Geo, 'Setting up a company in Kuwait' (2019): Available: https://shieldgeo.com/setting-up-a-company-in-kuwait/: Accessed 11th Feb 2019.

increasingly difficult to start a business, increasing the minimum capital requirements and the amount of the business license fee.[844] In 2016, Kuwait eased the burden of opening a business by minimising capital requirements.[845] However, this will depend on how committed the company is to Kuwait and the planned business activity. Therefore, there has to be a degree of loyalty to the country in order to have a chance of being accepted to establish a company owing to Kuwait's complex business environment that requires flexibility, patience and perseverance.[846] Many exporters and investors in Kuwait face inconsistencies and sometimes contradictory policies, lack of transparency in decision-making, cancellation of announced tenders and a judicial system that greatly favours the local population.[847] Furthermore, the government does not effectively enforce anti-corruption laws, and public officials are reportedly engaged in corrupt activities with impunity. For CSR, this goes against the social and moral principle of CSR activities. The UN Global Compact, for example, is a socially responsible initiative that aims to bring together both businesses and UN agencies, as well as governments, labour and civil society bodies to promote human rights and anti-corruption.[848] Some Kuwaiti companies are signatories to the UN Global Compact and they report on their sustainable development goals (SDGs).[849]

For religious-related factors, Islam is practised by the majority of Kuwaiti citizens and it regulates their personal, political, economic and legal life.

[844] IPR, 'Business Forms and Structures' (1999). Available: http://www.infoprod.co.il/country/kuwait2b.htm: Accessed 10th Feb 2019.
[845] Shield Geo (n 843), n.p.
[846] Ibid.
[847] Ibid.
[848] Gavin Power, 'United Nations Global Compact' (2019). Available: http://www.csrwire.com/members/12044-united-nations-global-compact: Accessed 1st April 2019.
[849] UN Global Impact. Activities to support advancing the SDGs in Kuwait: Companies are reporting on these SDGs (2019): Available: https://www.unglobalcompact.org/interactive/sdgs/countries/104: Accessed: 20th August 2019.

Although more than 95 per cent of the population are Muslim, Kuwait is known for its religious tolerance. For ethnic-related factors, various ethnic groups in Kuwait exist that need to be taken into account when doing business, such as Kuwaitis (45 per cent), other Arabs (35 per cent), South Asian (9 per cent), Iranian (4 per cent) and other (7 per cent).[850] Therefore, Islam has much influence over businesses as it is not only part of Kuwait's culture, but Sharia is also system of law that controls organisations.

The company law provides for the establishment of more companies in Kuwait, such as a limited liability company, a joint-stock company (public and private) and limited partnership. Each of these forms of business have different scale of activity, registration requirements and minimum amount of capital. In most cases, this will depend on the degree of commitment of the company to Kuwait and the planned business activity.

Company law provides for other types of company that can be established in Kuwait, such as non-profit companies. With regard to company registration procedures, it should be recognised that the process of starting a business in Kuwait is lengthy and complex, which makes it difficult to conduct business and establish new companies. To address this problem, the law has adopted a so-called "one-stop shop" system to complete company registration procedures. The company registration procedures should be completed through a special department of the Ministry of Trade and Industry, which includes representatives of the public authorities concerned, in order to ensure that the company registration procedure is completed as soon as possible. The purpose of the Companies Law 2016 is to facilitate the entire process and, at the same time, to encourage investors to establish companies in Kuwait. In light of

[850] Shield Geo (n 843), n.p.

the above, the law is a welcome reform that should have a positive impact on investment in Kuwait and the Kuwaiti economy as a whole. Despite the lack of CSR provisions in Kuwait, this process would be seen as a socially responsible deed owing to the proper legal requirements needed to start up a business. This can be evidenced by the steps needed to establish or register a company in Kuwait.

Registering a company requires a number of steps, which require time and capital investment. For example, setting up a limited company involves the following steps. The process first involves registering a company at the Department of Companies of the Ministry of Commerce and Industry (MOCI) in Kuwait. Thereafter, a unique company name has to be reserved and a letter drafted by MOCI will be issued to the business owner. The owner has to then deposit the capital at the bank and obtain proof thereof, and after that, the Municipality has to inspect the company premises. Lastly, a commercial registry has to be used to register the company and the commercial license has to be obtained from the Department of Companies, the Public Authority for Civil Information (PACI) and the Ministry of Labour and Social Affairs in order to finalise the registration process. Moreover, processing time takes roughly one month and the cost is around KWD 323 (Approx. USD 1,000). Therefore, establishing a company in Kuwait can be a very difficult, tedious and long process, since the processing alone can take up to a month.[851]

In comparison, the UK has a similar process to Kuwait, but under the following conditions. First, the name and address of the company has to be registered with Companies House. The business should have a minimum of one director and one shareholder, as well as an agreement

[851] Shield Geo (n 843), n.p.

stating the rules about running the business. Lastly, the company has to register its corporation tax because both countries have to pay a direct tax that is enforced by a jurisdiction on the future income they will receive.[852] India has a similar process to the UK and Kuwait of establishing a company, but under slightly different conditions. First, the Director Identification Number (DIN) has to be obtained. From there, the Digital Signature Certificate (DSC) has to be acquired, as well as reserving the company name online. Thereafter, the company documentation has to be stamped and the Certificate of Incorporation has to be obtained. Then the Permanent Account Number (PAN) and Tax Account Number (TAN) has to be acquired. Finally, the Goods and Services Tax (GST), Profession Tax at the Profession Tax Office (State), Employees' Provident Fund Organisation (National) and Medical Insurance all have to be registered.[853]

All three countries have a similar process of registering a company, but use slightly different approaches to execute the process. In relation to CSR, this raises a corporate regulation issue because when establishing businesses, owners have to consider the financial, legal and social aspects that impact their business start-up, e.g., taxation, employees to be hired and acquiring licences and permits to sell goods and services. However, these regulatory requirements may discourage potential business owners from establishing their business owing to the long and complicated process and the social, economic and legal requirements needed to create a successful start-up company.

Even though Kuwaiti law permits profit making for limited companies, they are expected to transfer at least 10% of net profits to the legal reserve until

[852] MyGov, 'Set up a business in the UK' (2019). Available: https://www.mygov.scot/start-business-uk/register-your-business-in-the-uk/: Accessed 1st April 2019.
[853] A. Ray, '13 steps to starting a business in India' (2017). Available: https://services.amazon.in/resources/seller-blog/steps-to-starting-a-business-in-india.html: Accessed 1st April 2019.

the reserves of the company's capital reaches 50%.[854] The goal of the capital reserve requirement is to set the minimum amount of reserves that a commercial bank must hold. This suggests that although limited companies are privately owned businesses, the government still has some influence over the private sector, as they are a body that sets out the rules in company law. Therefore, this supports the notion that government control in the Kuwaiti commercial sector is prominent, since they have control over the country's wealth, oil and gas reserves being the most lucrative.

In short, Kuwaiti law is supported by a legal ancestry, whose principles currently draw on the English common law system and a multiplicity of influences from both European and Arabic law, in particular that of the French and Egyptian legal systems owing to its influences in personal affairs and family life. However, recently, the Kuwaiti Parliament has taken a further positive step to reflect the changes that have taken place in recent years in trade and industry in the CCASG region and in various countries around the world. Kuwait has adopted a new company law, known as the Kuwait Companies Law 2016 to reform outdated practices and offered investors a more attractive investment climate that would have a positive impact on the Kuwaiti economy. The high level of revision of the Companies Law shows that such a new law contains more details and clarity than the previous one. In addition, it contains recommendations on certain issues, as the previous law did not refer to different areas (e.g., shareholders' agreement), and this lack of codification has often led to uncertainty for investors and thus to uncertainty about their investment in

[854] Deloitte, 'Doing business guide: Understanding Kuwait's tax position' (2017). Available: https://www2.deloitte.com/content/dam/Deloitte/xe/Documents/tax/me_tax_doing-business-guide-kuwait_19012017.pdf: Accessed: 11th Feb 2019.

Kuwait.[855] Despite the company law reforms in Kuwait, they fail to contain any CSR related provisions like the UK and Indian legislation.

This section has examined the socio-economic background of Kuwait, in addition to the general history of the Kuwaiti legal system followed by consideration of the concept of obligation within Kuwaiti law and related instruments. This background served to set the framework for a review of Kuwaiti company laws, its provenance, recent history, subsequent development and evolution. This section also sought to place the various legal institutions of the nation in context, and to describe in some detail their general functioning and roles within the broader apparatus of the state in comparison to UK and Indian company law. Thus far, the chapter has only touched upon some of the wider socio-economic and legal aspects of CSR and therefore the next section will delve deeper into the specific CSR practices in Kuwait.

5.4 CSR Practices in Kuwait

Kuwaiti society is cooperative in nature and has gained this attribute from labour relations and a productive era that prevailed before the age of oil. This era was based primarily on travel and maritime trade, where men left their homes and families for months, in the care of other relatives, acquaintances and neighbours, until their return.[856] With the emergence of CSR practices at the global level, the term started to grow at the local level from around 2004 and a strong interest began to emerge from local institutions and companies. Now, after over ten years of the depiction of CSR in Kuwait, many organisations have been acknowledged locally and internationally for their CSR initiatives. For example, the attention to social

[855] Deloitte, 'Doing business guide: Understanding Kuwait's tax position' (2017). Available: https://www2.deloitte.com/content/dam/Deloitte/xe/Documents/tax/me_tax_doing-business-guide-kuwait_19012017.pdf: Accessed: 11th Feb 2019.
[856] F. Al-Nakib, *Kuwait Transformed: A History of Oil and Urban Life* (Stanford University Press 2016) (2016), 296.

responsibility became evident through the launch of the "Kuwait CSR Conference and Exhibition" by Pro Media International Co., which was held in March 2016.[857] Several local and international CSR professionals showed their interest in participating in this event. Through a platform, which is dedicated to local and international professionals, the conference offered the most contemporary developments and optimal CSR practices, as well as sustainability and ways to transform organisations into becoming more socially responsible. The goals of the conference were to give academics in the CSR field a voice to demonstrate their research, provide a strong framework for creating a transparent CSR strategy and to promote successful CSR initiatives.[858]

The event provided the most current developments and best practices in CSR and sustainability, with practical tools, resources, and examples that companies can utilise to transform their own organisations with the intention to become more socially and economically responsible.[859] Business leaders and experts at the event in 2016 identified some of the key challenges and discussed solutions that integrate CSR into core business, build relationships with key partners and protect brands and reputation. Areas of concern include CSR policy and governance, strategies and initiatives, labour, communications and reporting and global trends and standards.[860] Therefore, the conference identified a need to promote CSR in Kuwait.

There appears to be a good understanding of CSR in Kuwait owing to the charitable and selfless acts they promote, e.g., charity and supporting

[857] ProMedia International Co, 'Kuwait CSR Conference & Exhibition' (2016): Available: https://www.nuwait.net.kw/events/kuwait-csr-conference-exhibition: Accessed 17th March 2019.
[858] Ibid.
[859] Ibid.
[860] Ibid.

others.[861] CSR is a concept that aims to "to provide back into society", and this is synonymous with other terms such as "donations", "positive contributions to society", "ethical standards of conduct in relation to stakeholders" and "responsible business." These terms have been demonstrated in Kuwaiti companies through the Zakat Tax. In short, CSR and its related practices can vary depending on the way in which one interacts with different groups in society. This is because CSR practices are a commitment to a society in which corporations operate. In order to establish how existing company law promotes social responsibility in Kuwait, it is important to first look at the pre-legislative intervention of CSR in Kuwait. This will help to establish what initiatives Kuwait was using prior to the introduction of CSR practices.

CSR practices in Kuwait have quickly become a topic of great interest among business leaders and government officials. This is because Kuwaiti companies have begun to engage in CSR activities via corporate philanthropy. There are an estimated 54 companies per 1million people in Kuwait[862], including limited companies, joint stock companies, general partnerships, limited partnerships and joint ventures.[863] These types of companies set out to fulfil the interests of a wider group of stakeholders via donations to local charities and interest groups.[864] This can be considered an "easy" form of CSR engagement in the sense that very little managerial effort is needed. However, the tradition of giving has been prominent for quite some time in Islamic societies permeated by religious values. Managers see CSR as a corporate form of Zakat, which simply

[861] Dima Jamali and Walaa El Safadi, 'Adaptations of CSR in the Context of Globalization' in *Globalization* (IntechOpen 2019) (2019), n.p.
[862] Trading Economics, 'Kuwait - Number of listed companies per 1,000,000 people' (2019). Available: https://tradingeconomics.com/kuwait/number-of-listed-companies-per-1000000-people-wb-data.html: Accessed 9th April 2019.
[863] IPR (n 844), n.p.
[864] D Ronnegard, 'CSR in the Gulf region: corporate philanthropy likely to remain key for now' (2009): Available: https://knowledge.insead.edu/csr/csr-in-the-gulf-region-2233: Accessed 11th Feb 2019.

means the percentage of charitable wealth that Muslims are expected to donate.

Therefore, companies in Kuwait are motivated by the religious aspect in order to promote a collective society through charitable activities.[865] Referring back to the definition of CSR in chapter 2 by Enderle[866] and the chosen definition of Aguinis[867] in this thesis, the idea of corporate philanthropy and CSR as a charitable activity aligns with these definitions as they both state that CSR involves organisations that aim to contribute to society. Therefore, organisations who engage in charitable activities, whether it be through the Zakat Tax in law (set at 1% and different from Zakat as the third pillar of Islam and does not refer to charitable activities)[868] will be less likely to engage in socially and environmentally damaging activities.

According to the Zakat Tax Law No. 46 2006 article 1,[869] shareholding companies are required to pay 1% of their annual net profits. Although the law was proposed in 2006, it was not enacted until 2007.[870] According to article 2, the Ministry of Finance is responsible for collecting the 1% of annual net profits as stated in article 1[871]. On the other hand, article 3 states that the Minister of Finance will pass an executive by-law for collecting the funds that must not exceed one year from the time the law was passed based on the legal systems of Zakat and Sharia after obtaining approval from the Fatwa Authority with regards to the rules stated in article 1.[872]

[865] Tareq Emtairah, Asya Al-Ashaikh, and Abdulmohsen Al-Badr. "Contexts and corporate social responsibility: the case of Saudi Arabia." International Journal of Sustainable Society 1.4 (2009): 325-346.
[866] Enderle (n 194): 50-63.
[867] Aguinis (n 192), 855.
[868] BBC, 'Zakat: charity' (2009): Available: http://www.bbc.co.uk/religion/religions/islam/practices/zakat.shtml: Accessed 1st April 2019.
[869] Zakat Tax Law No. 46, 2006 A.1.
[870] RSM, 'Zakat Law and Practices' (2019): Available: https://www.rsm.global/kuwait/service/zakat-law-and-practices: Accessed 1st April 2019.
[871] Zakat Tax Law No. 46 2006 A.2.
[872] Zakat Tax Law No. 46 2006 A.3.

Companies can also request to dedicate the Zakat tax to a public service of their choice, e.g., education or healthcare. Failure to pay the Zakat Tax or submission of false information about its contribution can make a company liable to a fine of up to KD 5,000 (approximately $16,000) and 3 years imprisonment.[873] The punishments under the Zakat Tax law appear justifiable since the tax is going towards a good cause and refusal to pay would be considered an act of greed.

Section 135 of the Indian Companies Act 2013[874] imposes similar punishments on companies as the Zakat Tax law for non-compliance to CSR provisions, such as failing to donate profit to charitable causes. Punishments include imprisonment of up to three years and a fine of up to 2.5 million rupees (approximately $30,000).[875] Although the term of imprisonment is the same across both laws, breaching section 135 of the Indian Companies Act 2013 incurs a greater fine, which suggests that India is potentially stricter and takes CSR practices such as corporate philanthropy more seriously.

This is similar to India's code as corporations are expected to give 2% of their profits to charity.[876] In support of this point, section 135 of India's Companies Act 2013 (as discussed in section 4.7 of chapter 4) states that companies are obligated to donate 2% of the average net profits that have been made over 3 years to meet its CSR policy.[877] Therefore, both India and Kuwaiti companies are obligated to pay a mandatory sum of money to support a given cause, such as investing in the public services of their

[873] Zakat Tax Law No. 46 2006 A.1.
[874] Indian Companies Act 2016, S.135.
[875] Cyril Amarchand Mangaldas. Corporate Social Responsibility - Less Carrot More Stick (2019): Available https://www.lexology.com/library/detail.aspx?g=1321ef7c-bc8a-47a6-8eeb-8c0fb141d75f: Accessed: 20th August 2019.
[876] Kordant Philathropy Advisors Report, 'The 2% CSR Clause: New Requirements for Companies in India' (2013): Available: https://www.issuelab.org/resource/the-2-csr-clause-new-requirements-for-companies-in-india.html: Accessed 26th June 2019.
[877] India Companies Act 2013, S.135.

respective countries, like education, healthcare and public infrastructure. However, in the UK, no such code states that UK corporations are expected to give a certain percentage of their annual profits to charity with UK companies donating only 0.4% of their pre-tax profits to charity.[878] This indicates that UK companies can voluntarily donate a proportion of their annual profits to charity.

Normative and institutional pressures resulting from belief systems have a great impact on CSR practices in the CCASG.[879] Before CSR, Islam viewed social responsibility as an obligation to business activity, namely through the Zakat, which has to be obligatory and given to the poor on an annual basis. It is a general requirement under Islam to enhance social welfare and preserve environmental ecosystems.[880] This longstanding socially responsible tradition has transformed through business development to an obligatory institutional Zakat tax, commonly labelled by corporations as a CSR activity in recent years.[881] Therefore, philanthropy has been practised in Kuwait through Zakat. However, some have argued against the effectiveness of a centralised Zakat collection practice; such system does little to better the living standards of the needy.[882] Therefore, Zakat has a spiritual end and CSR ought to be targeted towards social equality and sustainable development, thus making the two similar in nature.

Islamic religion in CCASG countries, such as Kuwait, views social responsibility as an obligation to business activity mainly through the Zakat tax. However, the Zakat tax was practised long before the CSR concept

[878] C. Walker, 'UK companies are failing to support charities (2014): Available: https://www.theguardian.com/sustainable-business/uk-companies-failing-support-charities: Accessed 17th March 2019.
[879] Emtairah, Al-Ashaikh and Al-Badr (n 865) 325.
[880] Ibid.
[881] Nisar Ahamad Nalband and Mohammed S. Al-Amri. "Corporate social responsibility: Perception, practices and performance of listed companies of Kingdom of Saudi Arabia." Competitiveness Review: An International Business Journal 23.3 (2013), 284-295.
[882] Yaprak Anadol, Mohamed A. Youssef, and Eappen Thiruvattal. "Consumer reaction towards corporate social responsibility in United Arab Emirates." Social Responsibility Journal 11.1 (2015), 19-35.

became known in the region and is considered as only one of the secondary pillars of CSR practices which is philanthropic.[883] However, small and medium sized enterprises face structural challenges in integrating CSR into their business operations; such companies do not create high employment nor do they follow a strategic developmental approach to CSR, rather they merely stick to paying the annually applicable Zakat tax.[884] By comparison, larger companies are also expected to pay the Zakat Tax, according to article 1 of the Zakat Tax Law No. 46 2006, which states that it applies to shareholding companies.[885] Therefore, Zakat Tax applies to all companies, just like the companies registered under Indian Companies Act 2013 that are obliged to follow the CSR provisions of section 135, regardless if they are smaller enterprises or larger corporations.

Referring back to the socio-economic issues raised in section 5.3, there are salient issues that relate to CSR practices in Kuwait. For example, Kuwait has one of the highest unemployment rates among the CCASG countries owing to youth unemployment.[886] However, due to the country's voluntary and philanthropic governance structure, corporations in Kuwait have become more socially responsible by providing job opportunities to not only Kuwaiti nationals, but also non-Kuwaiti nationals so as to boost the economy.[887] Kuwait's philanthropic nature also aligns with other activities the country is currently focussing on, such as supporting education and

[883] Mahammed Al-Ajmie, Abdullah Al-Mutairi, and Nabi Al-Duwaila. "Corporate social disclosure practices in Kuwait." International Journal of Economics and Finance 7.9 (2015), 244-254.
[884] H Abaza, N Saab and B Zeitoon, editors (2011). Arab forum for environment and development. In: Arab Environment: Green Economy: Sustainable Transition in a Changing Arab World. Beirut: Technical Publications and Environment & Development magazine, n.p.
[885] Zakat Tax Law No. 46 2006, A.1.
[886] International Labour Organization (ILO). (2013). The Kuwaiti labour market and foreign workers: understanding the past and present to provide a way forward. Available: http://www.ilo.org/wcmsp5/groups/public/@arabstates/@ro-beirut/documents/meetingdocument/wcms_330314.pdf. Accessed: 17th March 2019.
[887] Gulf Labour Markets and Migration. (2013). the demographic and economic framework of migration in Kuwait. Available: from http://cadmus.eui.eu/bitstream/handle/1814/32155/GLMM%20ExpNote_01-2013.pdf?sequence=1: Accessed: 31st March 2019.

building new schools, all of which fall to the responsibility of the state under Zakat, since it promotes such obligatory charitable deeds.

Kuwaiti corporations apply the religious philanthropic traditions of Zakat. It is required and collected by governmental bodies. However, corporations also show a high correlation between improved CSR disclosure and board independence and family ownership.[888] Indeed, family owned businesses tend to go beyond what is required by law (Zakat tax), and apply a broader Islamic view on business operations; Islamic provisions throughout the Quran encourages socially responsible deeds through charitable acts, e.g., Surah al baqarah (2:215), which emphasises the idea of giving charity for people in need.[889] Therefore, Islamic provisions are consistent with the notion of CSR owing to the socially responsible behaviours attached to the religious doctrine.

However, previously, the Kuwaiti Tax Authority accepted the exemption of sharing profits that are attributable to the government to charge Zakat Tax.[890] Today, under the reformed code, Zakat is levied on the entire income where companies are expected to pay the Zakat Tax to the government.[891] By looking at the reformed code in the Zakat Tax, it can be established that the government is spending taxes on public services, though according to the latest government spending figures, it is unclear on which specific public sector services. The total was approximately 9000 KWD Million in 2017 (approximately $29 billion).[892] In comparison to the UK, the latest government budget states that taxes are spent on education,

[888] Murya Habbash. "Corporate governance and corporate social responsibility disclosure: evidence from Saudi Arabia." Social Responsibility Journal 12.4 (2016), 740-754.
[889] Qura'n: Surah al baqarah (2:215).
[890] KPMG, *MESA Tax Guide* (2018), 20.
[891] Ibid.
[892] Trading Economics, 'Kuwait Government Spending' (2019): Available: https://tradingeconomics.com/kuwait/government-spending@ Accessed: 18th March 2019.

technology, business and the environment.[893] As for India, government taxes are allocated towards reducing poverty among the Indian working class in an attempt to boost economic growth.[894] Therefore, from this comparison, CSR practice is dependent on the place.

In short, Zakat helps to explain the current focus on corporate philanthropy.[895] This differs from the mainstream idea of CSR since philanthropic CSR involves companies offering a financial contribution for meaningful causes as a way to overcome societal and environmental issues. However, current philanthropic CSR practices differ from western practices. This is because corporates in the CCASG have primarily done this through corporate philanthropy and not through integrating mainstream CSR into corporate strategies and managerial practices. Such practices are achieved through financial contribution. However, it can be said that CSR in Kuwait began with the support of the communities in which organisations operated, then spread to various stakeholders in society, and then the last stage was the development of strategic CSR or value creation, which is an integral part of the overall organisational strategy and requires responsible business conduct in all aspects of transactions.[896] Stakeholders also perceive CSR activities as tactical PR activities rather than strategic ones. This suggests that there are no specific CSR activities under the Zakat Tax Law because the additions and amendments state no such activities.[897] Thus, despite the fact that the term "CSR" has existed for more than eight

[893] S Dawood, 'Spring statement 2019: how does it impact designers?' (2019): Available: https://www.designweek.co.uk/issues/11-17-march-2019/spring-statement-2019-how-it-impacts-designers/: Accessed: 18th March 2019.
[894] S O'Grady, 'India's 2018 budget aims to lift millions of rural farmers and workers out of poverty' (2018) <https://www.independent.co.uk/news/business/news/india-budget-2018-poverty-economy-help-farmers-bjp-arun-jaitley-trade-modi-china-a8189226.html> accessed 18th March 2019.
[895] Al-Ajmi, Al-Mutairi and Al-Duwaila (n 883), 244.
[896] Ibid.
[897] A Qassem, 'Additions and amendments to income tax' (2017): Available: http://www.alraimedia.com/Home/Details?id=f6ce7ece-4f03-44c1-a69b-a8d64e9f4d3e: Accessed 17th March 2019.

years, it is still perceived by stakeholders as socially responsible activities.[898]

In short, CSR practices in Kuwaiti company law have raised a number of economic, social and environmental issues, though corporate governance also plays a key role in CSR practices where companies are directed and controlled. Therefore, the next section discusses CSR in relation to Kuwaiti company law and corporate governance.

5.5 CSR in Kuwaiti Company Law and Corporate Governance

Company law can be seen as the backbone of the corporate governance system as it provides the framework for corporate governance mechanisms. It contains provisions that regulate the relationships of the parties involved in the corporation (i.e. the relations between the corporation's insiders, managers, employees and auditors on the one hand, and the relations between the corporation's insiders and the corporation's outsiders, customers, creditors and the community, on the other hand).[899] In other words, corporate law can include among its components, corporate governance principles, as well as CSR issues, such as social and environmental concerns. Further, the corporate governance system plays a major role in its success since the board of directors' role is to set the company's strategic plan.[900] In addition, the board of directors also monitors the management concerning strategic plan implementation. Accordingly, the following is an attempt to examine whether the Kuwaiti company law contains corporate governance tools or not and, if so, to what extent these tools are efficient.

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[898] Aly Khedr (n 822), n.p.
[899] Husam-Aldin N. Al-Malkawi, Rekha Pillai, and M. I. Bhatti. "Corporate governance practices in emerging markets: The case of GCC countries." Economic Modelling 38 (2014), 133-141.
[900] J. Solomon, *Corporate Governance and Accountability* (4th edn Wiley 2013), 386.

5.5.1 Board of Directors

Countries adopt either of two structures for the board of directors. A unitary board comprises of a single board and this involves electing directors at the company's Annual General Meeting. In addition, a unitary board structure comprises of executive, non-executive and non-executive independent directors and corporate affairs is the board's responsibility. Countries such as Germany, Netherlands and Denmark adopt more of a dual board structure. A dual board system occurs when there are two boards in one company, one is a management board and the other is a supervisory board. A supervisory board is responsible for supervising the management board. In other words, it controls how management boards conduct their daily management functions. This shows a clear distinction between the two boards from a composition standpoint, e.g., one board member is unable to be a member of another at the same time.[901] Similarly, companies under the French system have the freedom to select either a unitary or a dual board for its company structure although it is expected to provide the structure in its memorandum of association.[902] Therefore, directors play a key role in protecting shareholders given the high power they possess within the company.[903] For CSR, the corporate structure of Kuwaiti companies encourages the representation of stakeholders through the protection of shareholders via respective supervision by directors, since this is a social responsibility of Kuwaiti companies as stated in Article 186 of the Kuwaiti Companies Law 2016.[904]

Although it has not been explicitly stated in the Kuwait Companies Law 2016, Kuwait has adopted a unitary board of director structure, according

[901] Al-Malkawi, Pillai and Bhatti (n 899) ,133-141.
[901] Ibid.
[902] Benedicte Millet-Reyes and Ronald Zhao. "A comparison between one-tier and two-tier board structures in France." Journal of International Financial Management & Accounting 21.3 (2010): 279-310.
[903] Ibid.
[904] Kuwait Companies Law, 2016, A.186.

to Article 181.[905] This is due to the board of director's role of managing the company, as well as the number of members in the board structure, which will be included in the company contract or the memorandum of incorporation. The minimum number of directors has been stipulated in Article 181 of the company law as no less than five directors, but the law has allowed the determination of the maximum number of the directors to be provided for in the company's memorandum of association.[906] In terms of the qualifications of directors in Kuwait, no provision in the Kuwait Companies Law 2016 states such information. The same applies to the appointment of a professional body for directors, and the establishment of business schools in the country. However, Article 187 of the Kuwaiti Companies Law 2016 does state that directors are not required to be shareholders of the company,[907] but according to Article 193(3) the director can be an independent member.[908] In terms of CSR, the system demonstrates that effective boards consider and address the concerns and interests of shareholders including the rest of the company's stakeholders, which is a social obligation of directors to their stakeholders. In comparison to the UK[909] and India,[910] these countries follow the same idea that directors are not required to be shareholders of a company and it is voluntary for directors to be appointed by shareholders. Therefore, this aligns with the voluntary code adopted in both the UK and India because directors can also be shareholders but are not so required, and thus in terms of CSR,

[905] Kuwait Companies Law, 2016, A.181.
[906] Kuwait Companies Law, 2016, A.181.
[907] Kuwait Companies Law 2016, 2016, A.187.
[908] Kuwait Companies Law, 2016, A. 193 S.3.
[909] Atom Content Marketing Ltd, 'Directors' responsibilities' (2018): Available: https://www.business.hsbc.uk/en-gb/gb/article/directors-responsibilities: Accessed 17th March 2019.
[910] Parekh Hemang and others, 'Corporate governance and directors' duties in India: overview' (2018): Available: https://uk.practicallaw.thomsonreuters.com/0-506-6482?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1: Accessed: 17th March 2019.

effective boards are more transparent about stakeholder concerns and do not assert their power and authority over stakeholders.

Similar to Kuwait, the unitary board of directors is the predominant structure in India and the UK.[911] This is because all three countries share a similar one-tier board structure where meetings are held by the board of directors representing stakeholders.[912] For example, the UK adopts a unitary structure where non-executives are given a strong governance role and have the task of monitoring aspects of the executives' behaviour, but at the same time threatening the operation of the unitary board by giving stakeholders the power to overthrow the board's authority.[913] Therefore, the unitary board has a principle that all directors are expected to have the same legal responsibilities or duties. For CSR, the equal treatment of stakeholders and directors under a unitary system promotes social responsibility through granting power to stakeholders to criticise the actions of its board of directors, which is a good method of identifying any deficiencies in the board's actions.

5.5.2 CSR Reporting and Information Disclosure

Social and economic reporting in Kuwait seems to be about promoting good governance in the business environment.[914] Given the lack of specific provisions in Kuwait Companies Law 2016 concerning CSR reporting, companies there are free to report. This aligns with the voluntary CSR framework that is adopted in Kuwait. Therefore, since there are no provisions, the alternative is to look at what Kuwaiti companies are currently reporting in terms of social responsibility.

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[911] Ibid.
[912] Carsten Jungmann. "The effectiveness of corporate governance in one-tier and two-tier board systems–Evidence from the UK and Germany–." European Company and Financial Law Review 3.4 (2006): 426-474.
[913] A Belcher. The unitary board: fact or fiction? Corporate Ownership & Control, 1(1), (2003), 139.
[914] Markaz, 'Kuwait Financial Centre "Markaz": Corporate Social and Economic Responsibility Report' (2015): Available: https://www.markaz.com/getmedia/391a1b9d-e058-4378-baae-6a109afa41f9/CSER-Pillars-Report-ENGLISH.pdf.aspx: Accessed: 10th March 2019.

Several attempts have been made to establish a common global CSR reporting framework for Kuwait.[915] The Global Reporting Initiative (GRI), developed in collaboration with the United Nations Environment Programme (UNEP), has been particularly successful owing to the development of Sustainability Reporting Guidelines.[916] Currently, GRI is an independent organisation based in Amsterdam and its goal is to develop and disseminate Sustainability Reporting Guidelines that will allow organisations to voluntarily report on their social, environmental and economic activities. GRI provides a set of reporting principles and structured report content with indicators for these three areas.[917] According to the KPMG Global Corporate Responsibility Survey published in 2011, 95 per cent of the world's 250 largest companies report their sustainability performance, with 80 per cent using the GRI Guidelines.[918] In addition, according to the GRI database, more than 5,000 organisations from 60 countries use the guidelines to prepare their sustainability reports. Therefore, these reports strongly promote CSR by reinforcing socially responsible activities, economic and environmental well-being and sustainability in companies.

It should be noted that three Kuwaiti companies have voluntarily adhered to the GRI reporting principles when preparing their annual reports for 2012: Equatorial Petrochemical Company, Zain Telecommunications Company and Kuwaiti Financial House.[919] The aforementioned companies also adopted the AA1000 standard for the confirmation of reporting.[920] However, the AA1000 standard does not directly address the prescribed

[915] David L Owen. "Recent developments in European social and environmental reporting and auditing practice: a critical evaluation and tentative prognosis." (2003), 32.
[916] Ibid.
[917] Ibid.
[918] Yvo de Boyer and others. "The KPMG survey of corporate responsibility reporting 2013." (KPMG International 2013), 82.
[919] Ibid.
[920] Michael Hopkins, *The planetary bargain: Corporate social responsibility matters* (Routledge 2012), 12.

reporting formats and is therefore not as stringent in terms of reporting guidelines.[921] For example, according to a KPMG global trends in sustainability reporting regulation and policy report, there are less than five reporting instruments documented in Kuwait.[922] This confirms the scarcity of CSR reporting in Kuwait owing to the lack of provisions to support sustainable reporting in the country. Therefore, there is a need for CSR reporting provisions in Kuwaiti company law in order to give insight into the disclosure of socio-economic, environmental, political and social issues in Kuwaiti companies and to fairly punish companies who fail to meet their mandatory reporting requirements.

In contrast, the importance of stakeholder engagement is emphasised more in existing provisions of the Kuwaiti Companies Law 2016 through Articles 177-180 as stated under shareholder rights and obligations,[923] than in the GRI given the lack of CSR reporting frameworks in the country. Although it is suggested that Kuwait adopts a voluntary approach to reporting owing to the lack of provisions in the country, there is evidence to suggest that the GRI is an emerging CSR reporting framework that promotes mandatory reporting. Evidence suggests that between 2013 and 2016, the percentage of mandatory reporting instruments in the Middle-Eastern region had increased from 58% in 2013 to 79% in 2016 with a reduction in voluntary reporting from 42% in 2013 to 21% in 2016.[924] This suggests that countries like Kuwait are considering mandatory CSR reporting strategies.

[921] Urša Golob and Jennifer L. Bartlett. "Communicating about corporate social responsibility: A comparative study of CSR reporting in Australia and Slovenia." Public Relations Review 33.1 (2007): 1-9.
[922] KPMG, 'Carrots Sticks: Global trends in sustainability reporting regulation and policy' (2016): Available: https://www.globalreporting.org/resourcelibrary/Carrots%20and%20Sticks-2016.pdf: Accessed 9th April 2019.
[923] Kuwait Companies Law 2016, A.177-180.
[924] KPMG (n 922), 13.

This is the same for CSR reporting in India because non-profit organisations are providing research on the CSR activities conducted within Indian companies, including products and services, expenditure and other related CSR activities that promote economic sustainability and socially responsible business practices.[925] Therefore, social reporting in both Indian and Kuwaiti businesses are promoting socially responsible acts, but are doing it in different ways. While India[926] and the UK[927] require CSR reporting under the law, Kuwaiti companies are freer to report on what they like owing to the lack of provisions stated in the Kuwaiti Companies Law 2016. Thus, Kuwait promotes more freedom and flexibility to report in that sense. This means there is a need for CSR provisions to be explicitly stated in the Kuwaiti Companies Law 2016.

In terms of information disclosure, according to an annual directors' report, a large number of companies specifically presented the implementation of sustainability and CSR, so that the information disclosure of CSR in the directors' report would be verified under legal requirements.[928] In the UK, company information disclosure, including social and environmental information, is strictly required in regulations, as the main legal obligation and standard to evaluate whether companies were qualified in corporate governance through the reported information. Following the requirement of information disclosure in directors' reports, section 481 of the UK Companies Act 2006 requires directors to provide a statement on the purpose of the audit and section 496 requires auditors to confirm that the directors' reports for the financial year are consistent with those accounts.[929] The UK Companies Act 2006 regulates information disclosure

[925] Gouda, Khan, and Hiremath (n 613), 141-161.
[926] Ibid.
[927] Williamson and Lynch-Wood (n 742), 128-140.
[928] Ezekiel A.Chinyio and Akintola Akintoye. "Practical approaches for engaging stakeholders: findings from the UK." Construction Management and Economics 26.6 (2008), 591-599.
[929] UK Companies Act 2006, S. 481 (2) and S. 496.

in the form of the annual directors' report, including environmental and employee matters in business reviews, and refers to the notion of an audit of published reports. For CSR, UK company law appears to have a social responsibility of considering the concerns of their stakeholders, as well as looking after the environment by informing companies about these issues through the disclosure of information, thus demonstrating the UK's strong efforts towards promoting CSR in its companies.

However, under UK legislation regarding CSR information disclosure and monitoring, publishing information about environmental and social matters is valuable to the decision-making process and implementation of corporate governance. The UK has established the legal requirements related to information disclosure in companies' strategic reports that are not only limited to the regulations of financial reporting or business review in the UK Companies Act 2006, but have also been categorised into different areas, such as health and safety, human rights, and the environment,[930] through particular provisions, e.g., section 172 stating the consideration of shareholder interests and the environment.[931] This demonstrates that the UK legal system prioritises equal rights and ethics in its statute. However, in India, information disclosure accompanied by a valid audit is still a new concept that is being developed in both legislation and voluntary corporate governance among Indian domestic companies, which later transitioned to a mandatory approach post-colonial era. This could have been down to a lack of evidence on information disclosure

[930] Nick Gibbon, Giles Peel, Clive Garston and Bridget Salaman, DAC Beachcroft LLP. Corporate governance and directors' duties in the UK (England and Wales): overview, (2018): Available: https://uk.practicallaw.thomsonreuters.com/3-597-4626?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 : Accessed: 22nd August 2019.
[931] UK Companies Act 2006 S.172.

under the legislative and voluntary governance structure among Indian companies during the post-colonial era.[932]

In terms of CSR, and in comparison to the UK, the companies had shown relatively strong performance with respect to information disclosure and monitoring owing to their strong position as a regulator of information disclosure on social and environmental issues.[933] In practice, most other countries such as India had adopted an attitude of wait and see. In the specific provisions of Indian company law,[934] it requires a company, after the end of each fiscal year, to formulate a financial report that includes information on its balance sheet, profit and loss record, financial change, financial statement and allocation of profit, as well as to donate a small percentage of their profit to charity.[935] It only regulates companies that disclose financial information through their annual financial report without the further requirement of reporting in other fields, such as social or environmental issues, and relevant monitoring of reports. Compared with the UK, in Kuwait the requirement of information disclosure and auditing in CSR in employment is still at an elementary and state-directed step because there is a lack of evidence to support the disclosure of CSR in the Kuwaiti Companies Law 2016. However, CSR is exercised based on minimum legal standards and is voluntarily exercised by companies in corporate governance.

Kuwaiti companies cannot voluntarily develop the performance of information disclosure like UK and Indian companies can through the use

[932] Veerma Puri, and Manoj Kumar. "Factors influencing adoption and disclosure of voluntary corporate governance practices by the Indian listed firms." International Journal of Corporate Governance 9.1 (2018): 91-126.
[933] Gordon L. Clark, and Eric RW Knight. "Institutional investors, the political economy of corporate disclosure, and the market for corporate environmental and social responsibility: Implications from the UK Companies Act (2006)." 2008 Industry Studies Conference Paper, 1-44.
[934] India Companies Act 2013 S.135.
[935] Kordant Philathropy Advisors Report, 'The 2% CSR Clause: New Requirements for Companies in India' (2013): Available: https://www.issuelab.org/resource/the-2-csr-clause-new-requirements-for-companies-in-india.html: Accessed 26th June 2019.

of accurate statistics in reports, or reporting comprehensively on negative information to the public. This is because the Kuwaiti legal requirement of CSR information disclosure is not complete and is not as strict as the UK and Indian legislation regarding information disclosure. In addition, instead of administrative supervision, the third-party audit and verification, which was mostly adopted in UK private companies, made CSR reports persuasive and reliable to report users and public investors. The adoption of CSR information disclosure and auditing in the UK and India is a legal requirement and could potentially be applied in corporate governance by each Kuwaiti company. CSR information could potentially be disclosed owing to the promotion of company success through social and environmental considerations as stated in section 172 of the UK Companies Act 2006[936] and social well-being in section 135 of the Indian Companies Act 2013.[937] Therefore, provisions regarding the disclosure of information on CSR, to some extent, could be integrated in existing corporate governance provisions as an effective strategy to incorporate CSR compliance in Kuwaiti companies law.

5.5.3 Corporate Constituencies

The company's general meeting constitutes the supreme authority to make decisions in relation to the company's affairs, and this authority is usually provided by company law or the company's constitution. In addition, it has been suggested that due to the consideration of stakeholder interests from directors, company law should balance the shareholders' rights against the management's authority that is given by company law.[938] For example, Article 32 of the Kuwait Companies Law 2016 states that interested parties

[936] UK Companies Act 2006 S.172.
[937] Indian Companies Act 2013 S.135.
[938] Bernard S. Black. "Agents watching agents: The promise of institutional investor voice." UCIA l. reV. 39 (1991), 811.

are granted the right to view the company contract, general meeting minutes and other relevant information about the company.[939] This aligns with shareholders´ rights because of their capital contributions, including the right to sell, buy and transfer shares, receive returns from their investment in the company, receive information about the company to assist the shareholder in making the right decision in regards to the company and attend the general meeting of the company.[940] This branches out to several other shareholder rights, such as securing methods of ownership registration, as well as the right to convey or transfer shares, obtain relevant and material information, participate and vote in general shareholder meetings, remove members of the board and sharing company profits.[941] These principles could potentially promote CSR in Kuwait, e.g., sharing of profit, since the company is already obliged to donate 1% of their annual profits in the form of Zakat Tax,[942] and thus there could be a potential CSR provision in Kuwaiti company law that is similar to section 135 of the Indian Companies Act 2013.[943]

Other shareholders´ rights include the removal of directors. The provisions on director removal can be compared to those of the developed countries, such as the UK. According to section 168 of the UK Companies Act 2006, the shareholders can remove the directors by an ordinary resolution in the general meeting when they are not satisfied with their performance. Therefore, section 168, which allows the removal of directors who are deemed unfit to manage a company, reflects shareholder engagement

[939] Kuwaiti Companies Law 2016, A.32.
[940] OECD Corporate Governance Principles (2015), 20-21.
[941] OECD Corporate Governance Principles (2015), 20-21.
[942] Zakat Tax Law No.46 2006, A.1.
[943] Indian Companies Act 2013, S.135.

and communication, which in terms of CSR demonstrates the law taking into account shareholders´ rights and their say in company affairs.[944]

One of the protections that is available to the minority shareholders is the general meeting, where the shareholders can challenge the company management. It is considered one of the corporate governance tools that should be offered to the shareholders, specifically to minority shareholders; accordingly, the threshold to call for an extraordinary general meeting should be reasonable. But, according to Article 152[945] of the Kuwait Companies Law 2016, the threshold is set very high at 25% of the company's shares, whereas, in Saudi Arabia, the threshold to call an extraordinary general meeting is 5% of the company's capital pursuant to the Saudi Arabia Capital Market Corporate Governance Regulations 2006, Article (5), ss. B. Therefore, Kuwait sets a much more conservative threshold when it comes to company capital, which could be down to the wealth of each country, since Kuwait is the second richest country in the CCASG region.[946] This is a good opportunity for Kuwait to incorporate philanthropic activity in their company law provisions as shareholders could invest in charitable causes to support the social well-being of Kuwaiti citizens, and thus could be obliged to allocate a small percentage of their shares to support a good cause. This would be a great contribution towards the CSR effort in Kuwaiti companies law through the incorporation of corporate philanthropy.

The right to call an extraordinary general meeting has been given significant importance by the European Union as they issued a directive requiring that all member countries reduce the threshold to call the

[944] UK Companies Act 2006 S.168
[945] Kuwait Companies Law 2016, A.152.
[946] World Atlas, 'The Richest And Poorest Economies In The Middle East' (2017): Available: https://www.worldatlas.com/articles/the-richest-and-poorest-economies-in-the-middle-east.html: Accessed 11th Feb 2019.

extraordinary general meeting to 5%.[947] For example, the UK Companies Act 2006 stipulated for 10% as a threshold to call for a general meeting, but in accordance with the EU Directive, it has been amended to 5%.[948] Therefore, unlike the UK, the EU restricts the rights of shareholders to hold meetings, which in terms of CSR would restrict shareholders' rights to express their interests and concerns as a social obligation of companies. This is because by law, shareholders have a right to a 10% threshold as opposed to 5%.[949]

According to the Kuwait Companies Law 2016, section 212, the shareholders in a general meeting can relieve the board of directors from liability. In the event of a successful removal of the board of directors and when no director has been replaced, the general meeting has the power to appoint the existing board of directors to manage the company until a new director has been appointed.[950] This provision could be seen as shareholders challenging the director's liability in a general meeting even if the said director has been relieved. For example, the Kuwait Companies Law 2016 Article 304(1) states that the board of directors who commit fraudulent acts that would prevent shareholders from participating in general meetings.[951] In terms of CSR, the latter provision reflects a poor representation of stakeholders as it appears that shareholders are being punished for the wrongdoings of their board of directors, which could be perceived as a subversion of their rights to express their interests and concerns for the company.

[947] USA International Business Publications, *Kuwait Business Law Handbook: Strategic Information and Laws* (International Business Publications USA 2013), 300.
[948] UK Companies Act 2006 (c.46).
[949] Ibid.
[950] Kuwait Companies Law 2016, A.212.
[951] Kuwait Companies Law 2016, A.304(1).

With respect to Kuwaiti company law and shareholder relations, CSR principles promote socially responsible behaviour through the formation of limited liability to define its relationship with shareholders, not to mention that future shareholders who subscribe to its shares have and will have the same rights, including the rights to attend general meetings. For example, Article 208[952] of the Kuwait Companies Law 2016 states that each shareholder, irrespective of the amount of shares they have, can attend the general meeting. For CSR, this is a good representation of shareholders because it demonstrates that shareholders are able to express their interests and concerns in the meetings they attend, irrespective of their shares, which in turn promotes equal opportunity.

Sticking to the idea of equivalent treatment between the shareholders, as well as attending general meetings and voting rights, Article 208[953] of the Kuwait Companies Law 2016 provides for the principle of one share one vote. In other words, all shareholders can vote the number of times equivalent to the number of their shares. However, this demonstrates shareholder bias because shareholders can vote based on the number of shares they have and thus it would be unfair towards shareholders who have less shares compared to those who have more shares. For CSR, this is an unfair representation of shareholders as it appears that wealthier shareholders have more rights to vote, which is a subversion of shareholders' equal rights to vote on company interests and concerns.

In terms of shareholders' representation, shareholders' rights should be protected by the law as it has been argued that: "Legal rights are important because they protect economic rights and define the basic context for the exercise and transfer of rights. In particular, legal rules are the foundation

[952] Kuwait Companies Law 2016, A.208.
[953] Ibid.

of modern corporate governance, as the property rights of shareholders are created and defined by federal securities regulations and case law".[954] In this context, the legal framework of any corporate governance system differs from country to country depending upon the legal origins of each country.[955] Therefore, there are a number of social, political and economic factors that play a significant role in the formulation of a country's legal framework, e.g., Sharia influences some of the laws in Kuwait, such as gender segregation and the consumption of Halal. It has been claimed that a country's legal system crucially affects the ownership structure of the company.[956] Hence, the high ownership concentration in the French civil law countries resulted from poor protection of the shareholders.[957]

It has been stated that the family business could increase the agency cost if the managers are working for the interests of the family or the major shareholders only.[958] This shows the innovative and continuous nature of the family owned business, which is dominant in Kuwait.[959] In terms of economic responsibility of CSR, the continuous growth of the family business in Kuwait will contribute to societal wealth because of the significant number of regional workers that are employed in Kuwait, resulting in the reformation of the family business.[960] This is supported by the Kuwaiti National Labour Force Support Act No. 19 of 2000, which encourages Kuwaiti nationals to work in the private sector in order to reduce unemployment, diversify, and increase the country's wealth.[961]

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[954] David L. Kang, and Aage B. Sørensen. "Ownership organization and firm performance." Annual review of sociology 25.1 (1999), 121-144.
[955] Ibid.
[956] C. Mallin, *Corporate Governance* (6th edn,OUP 2018), 384.
[957] La Porta Rafael and others, 'Law and finance' 106 Journal of political economy 1113 (1998), 1113-1155.
[958] Morck, Randall, and Bernard Yeung. "Agency problems in large family business groups." Entrepreneurship theory and practice 27.4 (2003), 367-382.
[959] Dianne HB Welsh, and Peter Raven. "Family business in the Middle east: An exploratory study of retail management in Kuwait and Lebanon." Family Business Review 19.1 (2006), 29-48.
[960] SK Peter, 'Kuwaiti family business at key transitional stage' (2014): Available: http://news.kuwaittimes.net/kuwaiti-family-business-key-transitional-stage/: Accessed 17th March 2019.
[961] O Gulseven, 'Challenges to Employing Kuwaitis in the Private Sector' (2015): Available: https://www.oxgaps.org/files/analysis_gulseven.pdf: Accessed 5th April 2019.

Furthermore, Article 9 of the law No. 19 of 2000 concerning supporting national labour states that the Council of Ministers is required to dedicate a percentage of the national workforce in the non-government sector. In terms of ethical business practices of CSR, failure to comply with Article 9 can incur an additional annual fee on the company's work permit and grants non-Kuwaiti workers the power to increase the number of non-national employment.[962] Although fair penalties maybe incurred by businesses (e.g. family/private businesses) who breach Article 9, this can be detrimental to the national Kuwaiti workforce as the article also encourages foreign labour. For CSR, Article 9 encourages the representation of stakeholders through the Kuwaiti National Labour Force by imposing this provision on companies to support their labour force and impose penalties on companies who fail to comply with this provision.

Since Kuwaiti company law grants several rights to shareholders owing to their capital contributions,[963] shareholders should have the right to participate in, and to be sufficiently informed of, the decisions concerning fundamental corporate changes. These changes include a) amendments to the statutes, or articles of incorporation or similar governing documents of the company; b) the authorisation of additional shares; c) extraordinary transaction, including the transfer of all or substantially all assets that in effect result in the sale of the company. Therefore, Kuwaiti company law appears to grant special rights to shareholders who invest in family businesses, which in turn opens up to the aforementioned opportunities and rights. In terms of the economic sustainability of CSR, the development of family businesses relies on the next generation family

[962] GCC-Legal, 'The State of Kuwait Law No. 19 of 2000 Concerning Supporting National Labor and Encouraging it to Work in Non-Governmental Organizations (19/2000)' (2000): Available: http://gcc-legal.org/LawAsPDF.aspx?opt&country=1&LawID=1044#Section_1936: Accessed 5th April 2019.
[963] Peter (n 960), 20-21.

members to keep their family business legacy alive. Since shareholders are given special rights to invest in companies like family business, they can commit to socially responsible deeds by investing in these types of businesses to maintain the family business sector in Kuwait.[964] For CSR, this encourages stakeholder representation through the promotion of next generation Kuwaiti workers and business owners who will be huge contributors to the Kuwaiti economy, which in turn promotes future economic sustainability for the country.

Given the differences between the western and Indian jurisdictions, the UK, for example, follows the "outsider" model of corporate governance in which most shareholders take full control over the company.[965] However, India follows the classic "insider" system in which companies are controlled by either the state or business families.[966] Even though Kuwait has many family run businesses, the government has the majority control of companies since they own the country's oil reserve, which is a huge contributor to their economy.[967] Therefore, it seems that both India and Kuwait have a more state owned system. For CSR, this encourages stakeholder representation by enabling potential business owners to contribute to the Kuwaiti economy by establishing family businesses, thus contributing to the diversification of economic wealth to the country and helps them move away from their dependence on oil.

By comparing the India and UK law systems, the stakeholder approach differs in Kuwait from the developed jurisdictions of the UK and India, since Kuwait places more emphasis on stakeholder (e.g. shareholder) support and gives them more freedom to invest in family business ventures by

[964] Ibid.
[965] McCahery and others (n 631), 696.
[966] Mathew (n 632), 800.
[967] 2019 Index of Economic Freedom. Kuwait (2019): Available: https://www.heritage.org/index/country/kuwait: Accessed 22nd August 2019.

giving them the right to invest in family businesses to help develop and maintain its future growth. This adds to the socially responsible deeds committed by shareholders in contributing to the diversification of the Kuwaiti economy, which is currently an oil dependent country.[968] Interestingly, in the UK, however, more control and restrictions are placed on shareholders, e.g., shareholders are unable to request a general meeting from a government body or court nor can they intervene in a general meeting,[969] which could restrict their ability to voice their interests and concerns about the company. Therefore, the legal model of the UK might not entirely work in Kuwait, but could work in India owing to Kuwait and India having a more socially responsible approach to treating its shareholders. This appears to be down to the freedom and power Kuwaiti companies give their shareholders in terms of investment contributions that aim to diversify their economy.

Nevertheless, Bebchuk argued that increasing the shareholders' rights has resulted in minimising the agency cost and increasing the shareholders' investment value owing to the lack of corporate governance and CSR laws that give shareholders ability to express their rights.[970] Accordingly, as stated above, there must be a balance between the shareholders' rights and the managers' authority. The above suggests that Kuwait leans more towards the enlightened shareholder value (ESV) corporate governance model. This links to the two approaches stated in the ESV model as discussed in chapter four,[971] since it supports the idea of shareholder value, in addition to protecting all stakeholder interests. As stated above, ESV links to CSR in the sense that shareholders are free to commit to socially

[968] KPMG, *GCC Family Business Survey 2017* (2018), 18.
[969] Neal Watson and Beliz McKenzie, Smith LLP Travers. Shareholders' rights in private and public companies in the UK (England and Wales): overview (2019): Available: https://uk.practicallaw.thomsonreuters.com/5-613-3685?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1: Accessed 22nd August 2019.
[970] Bebchuk (n 134), 833.
[971] Armour, Deakin and Konzelmann (n 681), 531-555.

responsible deeds through investing in family businesses in order to diversify an oil dependent economy.[972]

In most of the jurisdictions around the world, company law usually provides for devices that are available to the shareholders to exercise supervision over their company.[973] Accordingly, it could be argued that the legislator in Kuwait has stipulated for the basic shareholder's rights and equivalent treatment between the shareholders as it transpired from Article 177 of the Kuwaiti Companies Law 2016.[974] Although the Kuwaiti Companies Law incorporated several provisions in favour of the minority shareholders, it failed to protect the minority shareholders in several other instances. For example, Article 133(4),[975] in the Kuwaiti Companies Law 1960 prohibits any restriction to the shareholders' right to seek a remedy for the damage they suffered against the board of directors whether the violation has been done collectively by the directors or solely by an individual director. Although this is stated in the outdated provisions of Kuwaiti company law, Article 133(4) has been omitted from the newly updated provisions in the 2016 law. This could be down to the developments in the family business sector in Kuwait, in addition to giving shareholders more freedom to invest in these businesses for the sake of economic development and sustainability. Therefore, the abovementioned article offers protection to shareholders owing to the freedoms that the updated law provides them.

Furthermore, Article 220[976] of the Kuwaiti Companies Law 2016 allows the minority shareholder to file a lawsuit against any decision rendered by the general meeting of the company, provided that some conditions are

[972] KPMG, (n 968), 18.
[973] USA International Business Publications, *Kuwait Business Law Handbook: Strategic Information and Laws* (International Business Publications 2013), 300.
[974] Kuwaiti Companies Law 2016, A.177.
[975] Kuwaiti Companies Law (1960), 133(4).
[976] Kuwaiti Companies Law 2016, A.220.

fulfilled, i.e., the plaintiff, who is the minority shareholder, must own shares constituting not less than 15% of the company's capital and they should have not approved the disputed decision.[977] Thus, this article offers protection to shareholders since it gives them the right to challenge the general meeting resolutions.

Nonetheless, it could be argued that shareholder protection is ineffective. For example, Article 220 of the Kuwaiti Companies Law 2016 allows the shareholders to challenge the general meeting resolutions but not the business decisions that are taken by the board of directors.[978] In terms of CSR, e.g., shareholder communication and engagement, this does promote socially responsible behaviour since the power of shareholders gives them the right to challenge the board of directors in addition to having the freedom to make investment decisions. For example, according to Article 212 of the Kuwaiti Companies Law 2016, shareholders have the right to remove the board of directors and the chairperson.[979]

Given the lack of CSR regulations, the provision still upholds stakeholder interests. This is because the current legal framework in Kuwait is weak, which therefore gives shareholders more freedom to make company decisions. However, the stronger legal framework in the UK and India places restrictions on shareholders, with directors' duties playing a key role in these restrictions. Therefore, the next section provides examples of directors' duties in Kuwait through the lens of CSR and comparison with the UK and Indian company laws.

[977] International Business Publications, *Kuwait Business Law Handbook: Strategic Information and Laws* (International Business Publication 2013), 300.
[978] Kuwaiti Companies Law 2016, A.220.
[979] Kuwaiti Companies Law 2016, A.212.

5.5.4 Directors' Duties

Director's duties are an important corporate governance issue, since the board of directors enjoy wide authority, such as having the power to make direct approaches to the shareholders as a means to encourage them to enter into a specific transaction,[980] including raising money from shareholders, issuing new share capital, paying dividends to shareholders and returning capital to shareholders.[981] Moreover, the director's legal responsibilities are subject to being increased due to their important role in the corporation's performance.[982] Furthermore, it has been argued that the corporate scandals that occurred in the last decade, such as Enron, WorldCom, and Adelphia, encouraged shareholders to cast a close eye upon their agent's behaviour, that is upon the behaviour of their managers.[983]

According to the wide authority that is vested in the company director's hand in order to manage the company, there is a chance for the director to diverge from the company's objectives and mismanage the company.[984] With respect to CSR, a divergence of company objectives will result in other stakeholder interests being neglected because directors will only focus on the objectives that are of personal interest as opposed to the company's interest. Therefore, corporate governance, as a system, imposes several duties upon the company's directors to ensure that they are managing the company properly, i.e., in accordance with its plan to achieve its objectives. In the UK and India,[985] the company's director is

[980] Carsten Gerner-Beuerle, Philipp Paech, and Edmund-Philipp Schuster. "Study on directors' duties and liability." (2013), 64.
[981] ICAEW, 'Directors' responsibilities for transactions with shareholders' (2019): Available: https://www.icaew.com/membership/regulations-standards-and-guidance/membership/icaews-guide-to-directors-responsibilities/directors-responsibilities-with-shareholders: Accessed 2nd April 2019.
[982] Yuwa Wei. "Directors' Duties under Chinese Law: A Comparative Review." (2008), 26.
[983] Nadelle Grossman. "Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform." Fordham J. Corp. & Fin. L. 12 (2007), 393.
[984] Gerner-Beuerle, Paech and Schuster (n 980), 64.
[985] Dr Rajesh Kumar Agrawal. "A Comparative Study of UK Companies Act, 2006 And Indian Companies Act, 2013." International Education & Research Journal [IERJ], Research Paper E-ISSN 2454-9916 (2015), 33.

considered an agent of the company. Companies can only act if an agent is present and it is their role to promote the company's interests[986]. This helps to clarify the relationship between the company and its directors. For CSR, a strong relationship between the company and the directors would also suggest a positive relationship between directors and shareholders which in turn will project a good image of the company as everyone is looking out for everyone's interests as opposed to their own.

In Kuwait, there are no provisions where the law explicitly states that the relationship between the company and its directors is a principal-agent relationship, although this relationship does exist, e.g., the introduction of a new agency law in 2016 that regulated commercial agencies in Kuwait.[987] Owing to the principal-agent relationship between the company and its directors, the directors owe the company the so-called fiduciary duties, which involves trust, particularly concerning the relationship between a trustee (director) and a beneficiary (company). Moreover, it has been argued that the notion of fiduciary duty is undeveloped in Kuwait owing to a lack of trust between trustees and beneficiaries due to the limited corporate laws that address fiduciary duties, e.g., corporate bonds, corporate governance and rules that regulate shares.[988] With respect to CSR, there is very little to no shareholder protection legislation that aims to protect shareholders in Kuwait because of the lack of explicit provisions that aim to promote social responsibility, and thus demonstrates the need for protective provisions for beneficiaries in Kuwaiti company law.

[986] Aberdeen Rlwy. Co. v Blaikie Bros. (1854) 1 Macq. 461 at p. 471 In A. Hudson, *Understanding Company Law* (Taylor & Francis 2017).
[987] T O'Regan and R Zayat, 'Kuwait introduces new Agency Law: franchisors take note' (2016): Available: https://www.dlapiper.com/en/us/insights/publications/2016/04/kuwait-introduces-new-agency-law/: Accessed 1st April 2019.
[988] Lu'ayy Minwer Al-Rimawi. "Emerging markets of the Middle East: A critique of selected issues in Arab securities regulation." Journal of Financial Regulation and Compliance 7.2 (1999), 149-176.

The role of a company's director is to act on a fully informed basis, in good faith, with due diligence and care in addition to working in the best interest of the company and shareholders.[989] Shareholders are the foundation of capitalism as they are the ones that provide the needed resources for all companies. In addition, shareholders' rights and the equal treatment between all shareholders are essential components that the corporate governance system aims at protecting.[990] Shareholders in Kuwait are typically profit-driven where they are not entirely motivated by social considerations owing to the lack of corporate governance and CSR laws in the country, as well as low accountability and responsibility standards.[991] Therefore, since stakeholders in Kuwait are profit-driven, this affects CSR objectives as profit minded companies will ignore any interests related to developing social responsibility for the sake of maximising profit. This would project a bad image for the company as this would suggest that the company is only obligated to generate profit as opposed to considering the wider social issues.

In comparison to Kuwait, India is not as wealthy. As stated in chapter 4, in India, the CSR provisions under the Companies Act 2013[992] state that they are expected to give at least 2 per cent of its profits after each financial year.[993] CSR provisions as stated in the Indian Companies Act 2013 ensure that Indian companies carry out these good deeds, whereas in Kuwait, there are no CSR provisions that expect them to conduct these socially responsible activities. Similarly, in the UK, despite the CSR provisions, such as economic efficiency and social justice, which are implemented not

[989] R.I. Tricker and R.I. Tricker, *Corporate Governance: Principles, Policies, and Practices* (Oxford University Press 2015) (2015), 431.
[990] Angualia Daniel. "Balance of Power between Shareholders and the Board in Corporate Governance." (2010), 28.
[991] Jamali and El Safadi (n 861), n.p.
[992] India Companies Act 2015 s.135.
[993] Gouda, Khan and Hiremath (n 613), 141-161.

merely to make a profit,[994] as stated in section 172(1) of the Companies Act 2006,[995] companies are not required under law to give any of its annual profits, and thus is purely voluntary. For those reasons, emphasis on shareholders' protection is reflected in the CSR provisions of the UK and Indian legislation, which are absent in the Kuwaiti company law. Accordingly, the next section examines the corporate objectives that are embedded in the Kuwaiti Companies Law 2016 in relation to CSR.

5.5.5 Corporate Objectives

A company's directors are primarily required to act in the best interests of the company through maximising value for the firm. Thus, to achieve this objective, the directors should consider the interests of several stakeholders, including the shareholders,[996] because the shareholders are the owners of the companies.[997] Hence, given this absence in the law in Kuwait, the provisions are more limited to economic matters, such as the creation of wealth and company investment. For example, Article 246(1-5) of the Kuwaiti Companies Law 2016 states that a holding company or shareholding company is able to invest shares in companies, manage property and establish patents, all of which enable companies to contribute to the economy.[998] Therefore, it can be established that a shareholding company's freedom gives shareholders their freedom to invest in companies to contribute to the economy, thereby helping to meet their economic objectives. For CSR, this promotes economic sustainability objectives as investment not only suggests a means to just make money, but also consider other companies and shareholders who have mutual

[994] Andrew Johnston, 'The shrinking scope of CSR in UK corporate law' 74 Wash & Lee L Rev (2017), 1036.
[995] UK Companies Act 2006, S.172(1).
[996] Remus D. Valsan, and Moin A. Yahya. "Shareholders, creditors, and directors' fiduciary duties: A law and finance approach." Va. L. & Bus. Rev. 2 (2007), 1.
[997] Thomas Lee Hazen. "Silencing the Shareholders' Voice." NCL Rev. 80 (2001): 1897.
[998] Kuwaiti Companies Law 2016, A.246(1-5).

interests, e.g., similar economic and social objectives, which in turn promotes collaboration and social cohesion between companies.

According to Kuwaiti Companies Law 2016, it has stipulated provisions that are prima facie in favour of the shareholders, whereas the application of these provisions seems to be difficult because the law requires a very high threshold (absolute majority), especially in Kuwait where the ownership is very concentrated. Therefore, the corporate governance model adopted in Kuwait leans more towards enlightened shareholder value (ESV), since it appears that companies place much emphasis on objectives concerning shareholder wealth based on responsible attention to relevant stakeholder interests.

The public sector plays a vital role in meeting economic sustainability objectives, such as the allocation and use of economic resources in Kuwait, given the importance of the government's expenditures and role in economic development. Efforts from government are also expected in order to promote the performance of the public sector to drive economic development, and thus meeting economic sustainability objectives. Within this context, Kuwaiti corporations collaborate with the Kuwait Economic Society, an independent non-governmental national organisation that focuses on the strengthening of governance principles in public institutions, which therefore helps to fulfil not only economic objectives, but also social objectives as well through companies working together.[999]

According to evidence in a 2015 Corporate Social and Economic Responsibility Report by the Kuwait Financial Centre Markaz, in their endeavour to actively participate in community service and contribute to

[999] Markaz, 'Kuwait Financial Centre "Markaz": Corporate Social and Economic Responsibility Report' (2015): Available: https://www.markaz.com/getmedia/391a1b9d-e058-4378-baae-6a109afa41f9/CSER-Pillars-Report-ENGLISH.pdf.aspx: Accessed: 10th March 2019.

meeting economic sustainability objectives, such as building a strong and sustainable national economy, Kuwait companies have adopted a corporate social and economic responsibility strategy aimed at fulfilling responsibilities to society and the national economy.[1000] The strategy is founded on three main pillars, namely building human capacity, aligning the business environment with the principles of sustainable development and promoting good governance in the business environment. Out of the belief that the sustainable future of Kuwait depends on individual skills and capabilities, evidence from the 2015 Corporate Social and Economic Responsibility Report suggests that organisations are keen to cooperate with viable non-profit organisations and contribute to human capacity building programmes, in order to provide for and maintain sustainable progress.[1001] Although CSR is stated in the law, it is not explicitly stated as a CSR provision, e.g., Article 224 states that a percentage of the company's profits shall be dedicated towards meeting the company's obligations under the labour and social security laws.[1002] Although this is a socially responsible deed of a company, it is not highlighted as a CSR provision, and thus future amendments of the law should explicitly state this.

Similarly, aligning business environments with the principles of sustainable development is another form of social and economic reporting in Kuwait that aims towards meeting environmental, social and economic objectives. In fulfilling their economic responsibility, companies in Kuwait are aiming to broaden their knowledge of economic policy in attempt to be more socially and economically responsible.[1003] Companies collaborate with a number of global research institutes and experts in the field of economic

[1000] Ibid.
[1001] Ibid.
[1002] Kuwaiti Companies Law 2016 A.224.
[1003] KPMG, *GCC Family Business Survey 2017*, 18.

policies to address practical policies that could potentially be implemented in Kuwait, which concerns energy, manpower, economic structuring and the public sector. This is evidenced through the attempts to diversify their revenue streams in the private sector owing to their high dependence on oil. For example, Kuwait has undergone economic restructuring within the past decade and the family business has played a significant role in achieving economic stability.[1004] This enables Kuwait to be both economically and socially responsible by investing in small family businesses through helping families generate wealth, in addition to investing in the Kuwaiti economy for economic growth through taxation and an increase in spending through disposable income. For CSR, investing in family businesses is not only in the interest of stakeholders, but also meets economic and social objectives through helping families to generate wealth, thus contributing to enhancing their quality of life.

Kuwaiti corporations have recently reported on meeting environmental objectives with possible solutions, such as powering Kuwait into the 21st Century. This is evidenced through Kuwait's attempts to adopt sustainable energy strategies, namely providing alternatives for power generation.[1005] For example, according to a 2019 report by the International Renewable Energy Agency, Kuwaiti companies are committed to minimising greenhouse gas emissions from oil-based commodities by 2030 through introducing policies that promote the use of renewable energy sources.[1006] This includes a reformation of oil prices, electricity and water costs and investments in environmentally cleaner transport systems that are less fuel intensive. Recently, Kuwait passed a new Environment Protection Law

[1004] Ibid.
[1005] IRENA, 'Renewable Energy Market Analysis' (2019): Available: https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/Jan/IRENA_Market_Analysis_GCC_2019.pdf: Accessed: 9th April 2019.
[1006] Ibid.

No.99 2015 (amended from No.42 2014) that aims to protect and sustain individual health, manage pollution, improve and increase the use of natural resources and promote clean energy, as well as energy efficiency and sustainability.[1007] Although there is no provisions in Kuwaiti company law to support environmental sustainability, Kuwaiti companies are making strong efforts towards CSR through supporting environmental development and promoting cleaner and more sustainable energy sources irrespective of the Environmental Protection Law.[1008] This shows that Kuwait is committed to CSR reporting in the future, not only on a social and economic level, but also on an environmental level.

In short, companies are still unclear about CSR activities. However, there are certain categories of initiatives that can be adopted by companies, such as education, health and employment to help meet their corporate objectives. Many CSR processes have been introduced, but have not been considered as part of the CSR programme, such as investor relations, risk management and corporate governance,[1009] since these processes were considered not part of CSR, but as part of compliance with external regulatory requirements. This further indicates that CSR in Kuwait is not yet fully understood. It was noted that the global financial crisis has had a positive impact on CSR, as it has encouraged companies to become more selective in their choice of initiatives. Although some Kuwaiti companies did not reduce their CSR budgets during the crisis, they became more selective in both spending and distribution. The focus was on transparency, accountability and governance. These terms were used by companies in Kuwait only after the financial crisis, as they realised that because of the

[1007] Ibid.
[1008] Kuwait oil Gulf Company. The success journey of oil pits remediation in WJO Area. (2017). Available: https://www.kgoc.com/news6.html. Accessed: 3rd Sept 2019; Shell. Towards a lower-carbon world. (2019). Available: https://www.shell.com.kw/en_kw/sustainability/environment.html. Accessed: 3rd Sept 2019.
[1009] P Hohnen and J Potts, *Corporate Social Responsibility: An Implementation Guide for Business* (2007), 4-5.

crisis, shareholders and the media began to pay more attention to responsible business conduct. This confirms that Kuwaiti companies are convinced that CSR is an investment rather than a cost and should therefore be taken seriously.

5.6 Conclusion

This chapter has analysed and compared the CSR provisions in Kuwaiti company law with Indian and UK company law in order to set the stage for the proposal in Chapter 6 for a middle ground for CSR provisions in Kuwait. This was achieved by first presenting a comparative analysis of corporate law in Kuwait, India and UK by comparing the law as it evolved and comparing the evolution of company law in Kuwait in relation to India and the UK, to determine the direction that Kuwait should take from its fellow-members of the "common law" family.

Although the Kuwaiti legal requirement for CSR is not complete and as strict as the UK and Indian legislation, Kuwaiti companies could still potentially develop this legal requirement, as do UK and Indian companies. The UK and Indian experience of CSR is not a legal requirement for Kuwaiti companies and may be freely applied in corporate governance by each Kuwaiti company. The findings presented herein take into account not only the legal evolution, but also places it in the context of historical, social, environmental, economic and political factors that were at play in determining the legal regime of Kuwait. This helps to establish a middle-ground for proposing provisions in Kuwaiti company law through the legal transplant of the UK and Indian Companies Acts. To support this proposition in chapter 6, the legal transplant of Indian and UK provisions into Kuwaiti company law is supported by institutional theory, which helps to propose a legal model for Kuwait and reflects the institutional context

of Kuwait, including the religion, culture and level of socio-economic development. Therefore, the middle-ground for Kuwaiti company law proposed in chapter 6 covers legal transplant in light of institutional theory.

Chapter Six: CSR Middle Ground for Kuwait

6.1 Overview

It has been established that Kuwaiti corporations are unrestricted institutions that legally owe no obligations to society that go beyond mere profit making. The corporations should therefore support CSR in their corporate agenda and demonstrate their commitment to economic, legal, ethical and social responsibility through the CSR provisions which they impose for the sake of social well-being and socially responsible activity. In Chapter 5, this thesis has established that CSR in the Kuwaiti company laws is limited and focuses only on the oil and gas industry, as it is the main source of revenue in Kuwait. At the environmental level, this poses a serious threat to the environment as a whole. Chapter 5 has sought to identify weaknesses in Kuwaiti company law, which does not contain any CSR provisions despite the fact the law contains references to articles that may be considered to promote socially responsible activities, for example, Article 212 of the Kuwaiti Companies Law 2016 which gives the freedom of shareholders to invest in companies and the power to remove directors who fail to perform their duties.[1010] Therefore, it is necessary to understand how CSR can be incorporated in Kuwaiti company law by coming up with a middle ground based on the UK and Indian Companies Act.

Chapter 5 also compares the CSR provisions in the company law of Kuwait with Indian and UK company laws in order to set the stage for a middle ground for CSR provisions in Kuwait, which is discussed in this chapter. The findings from the chapter show that the Kuwaiti legal requirement of CSR provisions are modest, and Kuwaiti companies could potentially act

[1010] Kuwaiti Companies Law 2016 A.212.

voluntarily, similar to UK companies who follow a self-regulatory approach. Therefore, the UK experience of CSR is not a legal requirement owing to the voluntary nature of CSR in UK company law. Although it was established that there is a lack of CSR provisions in the Kuwaiti Companies Law 2016, companies in Kuwait do exhibit socially responsible behaviour, e.g., through the Zakat tax to undertake charitable deeds and granting stakeholders the freedom to commit to socially responsible deeds like investing in family business to diversify the Kuwaiti economy. This chapter will therefore provide additional details concerning the middle ground of CSR to be adopted for Kuwait.

The middle ground approach for Kuwait adopted in this chapter is based on two models, constructivism and institutional theory. Constructivism in this thesis refers to a specific type of constructivism known as constructivist institutionalism. This refers to a dynamic approach that influences institutional change via political, social and policy considerations that aim to express ideas leading to social change.[1011] As stated in chapter 5 (section 5.2), institutional theory in line with this thesis refers to the regulative, normative and cognitive mechanisms that form stakeholders' identities and their wider interests. In the Kuwaiti context, these models are applied by using both constructivism and institutional theory in relation to CSR initiatives for Kuwait to establish a framework for the middle ground approach. In order to establish the middle ground for CSR provisions in Kuwaiti company law, the role of contextualism is required in order to emphasise the significance of the context (Kuwait) and bridge the gap between constructivism and institutional theory aligned with this context.

[1011] Colin Hay. "Constructivist institutionalism" in R.A.W. Rhodes, S.A. Binder and B.A. Rockman, *The Oxford Handbook of Political Institutions* (OUP Oxford 2008), 56-74.

6.2 Role of Contextualism

Contextualism is a theory developed by Stephen Pepper in 1942, which describes a research method to provide better insight into complex social phenomena in organisational contexts.[1012] Contextualism can be used to bring about organisational change and strategic approaches to resolving organisational issues across multiple contexts, e.g., legal and social implications of companies. In view of contextualism, understanding organisational change processes requires the capturing of interdependence among the process (how), the content (what) and the context (why) of change. Early theorists, such as Pettigrew[1013] argue that researchers should go beyond change and to instead theorise about changing. This dynamic framing aligns well with the topic of this thesis owing to the relation between CSR and its social context. For example, structures constrain organisational processes and individual action (embeddedness) and shape structures to either maintain or change them (agency). This is significant to CSR because stakeholder attitudes can impact the way CSR is implemented and practised in companies. Although contextualism is not as widely adopted in CSR research, it can be used in a number of ways across various social and legal contexts.[1014]

Given the legal and social contexts of this thesis, one such way to apply contextualism to the CSR phenomena is through the application of the legal transplant theory. The concept of "legal transplants" developed by the legal historian Alan Watson, refers to what he interprets as the phenomenon of "moving of a rule…from one country to another, or from one people to another"[1015] and claims that it is a popular method of legal

[1012] Anders Örtenblad. Research Handbook on Corporate Social Responsibility in Context (2016), 54-55.
[1013] Andrew M Pettigrew. "Context and action in the transformation of the firm." Journal of management studies 24.6 (1987), 657-658.
[1014] Anders Örtenblad (n 1012), 55.
[1015] Alan Watson, Legal Transplants: An Approach to Comparative Law (University of Georgia Press, 1993), 21.

change. Watson developed the legal transplant theory for the purpose of conducting comparative legal studies.[1016] In the context of this thesis, the existing CSR provisions of the UK and Indian Companies Acts were compared to determine the current state of CSR in countries that had already incorporated CSR provisions in their respective company laws. The legal transplant theory helps to determine which regulatory approach could potentially be transplanted or taken from existing UK and Indian Companies Acts in addition to their CSR provisions and apply them in the Kuwaiti company laws where no clear CSR compliance approach or provisions have been incorporated into the existing law.

With support from the institutional theory, legal transplants ultimately determined the need for a CSR middle-ground for Kuwait where the most suitable regulatory model and CSR provisions that align with the social (regulative, normative and cognitive mechanisms in relation to stakeholders' wider interests) and the proposed legal framework of Kuwait (mainly mandatory CSR compliance with elements of voluntary CSR compliance) are transplanted from UK and Indian company laws. This meant that whilst considering the legal transplant of suitable CSR provisions from the UK and Indian company laws for Kuwaiti law, they had to align with the social and legal circumstances of Kuwait, e.g. culture, socio-economic development, as well as political and legal issues. Coming back to contextualism, CSR through a legal lens can be used to compare different legal frameworks across multiple contexts, which can help to develop a new legal CSR framework in a context where that framework is lacking. Therefore, the importance of contextualism in this thesis stems from the identification of a legal deficiency in CSR provisions in Kuwaiti company law and the need to propose a legal CSR framework to fill this

[1016] Ibid.

legal void. For that reason, contextualism gives birth to the middle ground approach. The next section defines the SCR middle ground approach for Kuwaiti company law and its scope.

6.3 Meaning and Scope of the Middle Ground Approach

In order to define the scope of the middle ground approach, it is important to first look at the methodological and theoretical aspect of this approach, which is constructivism and institutional theory respectively.[1017] Constructivism is relevant to this thesis because it recognises that knowledge is constructed and reflects human perception and social experience. It considers different actors as active constructors of contexts and offers a standpoint from which a number of different interpretations and understandings of contexts are legitimised. From an ontological perspective (what things are made of), different contexts are constructed socially, and from an epistemological perspective (how do we know) interpretation of context is founded within a frame of reference.[1018] Constructivism can also be characterised as a theoretical position in which a middle ground can be established.[1019] In the context of this thesis, constructivist interpretations reflect legal and regulatory approaches, such as self-regulation and prescriptive approaches and finding an alternative approach, which helps to define the middle ground between the two former approaches to be applied in the Kuwaiti context. For example, this thesis aims to provide potential CSR initiatives for Kuwait to bring about institutional and social change to companies through policy changes in order to engage in more socially responsible practices. This is based on

[1017] Antti Oulasvirta, Sakari Tamminen and Kristina Höök, *Comparing two approaches to context: realism and constructivism* (ACM 2005), 195.
[1018] Ibid.
[1019] Antje Wiener. "Constructivism: the limits of bridging gaps." Journal of International Relations and Development 6.3 (2003), 252-275.

the findings of this thesis, which established a lack of CSR provisions in Kuwait that promote such socially responsible practices.

With respect to the institutional theory, it was shown in chapter 5 (see section 5.2) that the theory helps to identify any regulative, normative and cognitive mechanisms that shape stakeholders' identities and their wider interests.[1020] In other words, the theory has shifted from how the law shapes agency conflicts to how wider cultural, social, and political factors form the diversity of actors and settings in corporate governance. In the context of this thesis, institutional theory can refer to how cultural traditions and religion shape company law in the UK, India and Kuwait.[1021] This is evidenced by the charitable deeds Kuwaiti companies carry out through investing in small family businesses and donating tax through Zakat.[1022] In Kuwait, Zakat tax can be easily imposed and applied owing to the single religion that is practised in Kuwait, namely Islam. This places Kuwait in a different position from the UK and India with respect to religious provision, e.g. Zakat tax, because these countries have multiple religions where Islam is a minority religion (6.3% of UK population is Muslim[1023] and 14.2% in India[1024]). This proposition is different from the UK and India since Kuwait has one main religion according to Article 2 of the Kuwaiti Constitution, which states that Islam is the religion of the state and Islamic Sharia is part of the legal system of Kuwait.[1025] In terms of establishing a middle ground, institutional theory can be used to explore the legal system, cultural traditions and norms that shape Kuwaiti, UK and Indian company law and

[1020] MacCormick and Weinberger, (n 825), 207-208.
[1021] Ibid.
[1022] RSM, 'Zakat Law and Practices' (2019): Available: https://www.rsm.global/kuwait/service/zakat-law-and-practices: Accessed: 1st April 2019.
[1023] Statista, 'Islam in the United Kingdom (UK) - Statistics & Facts' (2019): Available: https://www.statista.com/topics/4765/islam-in-the-united-kingdom-uk/: Accessed: 15th June 2019.
[1024] G Pandey, 'The Indian schoolchildren who are bullied for being Muslim' (2018): Available: https://www.bbc.co.uk/news/world-asia-india-42650106: Accessed 15th June 2019.
[1025] Kuwaiti Constitution, A.2.

to adopt an effective approach that aligns with the proposed CSR provisions for Kuwait.

The above discussion aligns with the preferred definition of CSR of this thesis (see Aguinis in section 2.4) because it covers the specific actions and policies that reinforce CSR compliance in organisational contexts, including the aforementioned areas, such as culture, legal system, as well as social, environmental and economic issues. This definition also reflects pure CSR meaning that it looks at CSR through a wider social lens that incorporates all areas of CSR, such as environmental sustainability, corporate philanthropy, economic sustainability and business ethics. Based on the above, the middle ground can be defined as a process that brings together and compares both legal and organisational contexts of the UK and India through a CSR lens to define new legal provisions for CSR in Kuwait (see Figure 6.1 for graphical illustration of the middle ground approach).

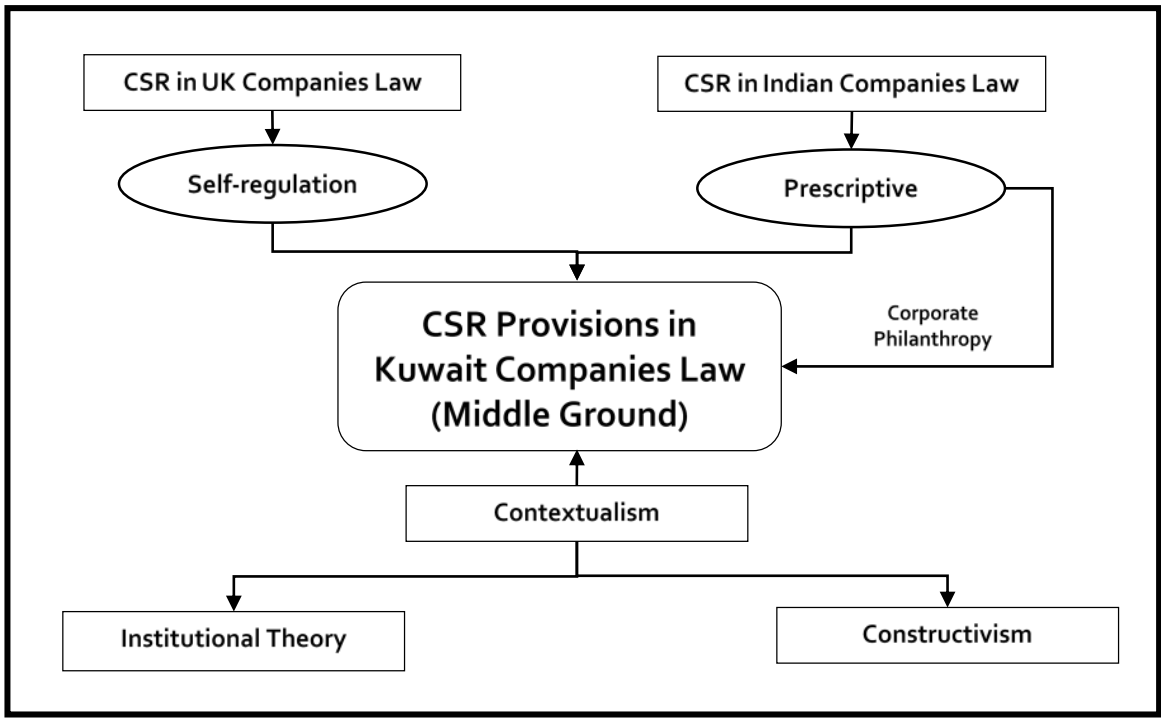

Figure 6.1: Conceptualisation of the Middle Ground Approach

The middle ground approach can be conceptualised as a framework that encompasses a process whereby the UK, Indian and Kuwaiti legal systems (company laws), cultural norms and religious affiliations are contextualised (contextualism) through the lens of constructivism and institutional theory. These areas are then compared to establish a middle ground that aims to establish a connection between them.

There are situations where defining and establishing the middle ground can be tricky since one has to find a way to respect and embrace different points of view in that situation. For this thesis, is there a middle ground which can be exploited for CSR provisions to be introduced to Kuwaiti company law based on the points of view of other corporate laws that include CSR provisions, e.g. Kuwaiti, UK and Indian company laws. A number of large companies who have a stronger spending power may decide to support CSR initiatives and take advantage of new opportunities.[1026] This action could be down to companies wanting to attract potential stakeholders, improve their reputation and attract innovative approaches as a developing country, such as placing the CSR agenda into Kuwaiti company law. Based on this, Kuwait should follow the Indian approach to CSR, as they are also a developing country that has imposed CSR provisions in their Companies Act 2013. However, the UK model would not be feasible in this context since the UK is a developed country that uses a flexible approach to CSR. This is because UK companies are given the freedom under the UK Companies Act 2006 to implement CSR however they see fit through the pure voluntary approach. As stated

[1026] du Plessis, Varottil and Veldman (n 615), 253.

in chapter 5 (see section 5.4), there are no codes that oblige UK companies to commit to charitable activity[1027] unlike India where this is mandatory.[1028]

With this mindset, companies will be encouraged to invest in CSR to support the wider society, economy and the environment at large and stakeholders will expect this. However, the UK and Indian regulatory models are different, where the UK adopts more of a self-regulatory approach,[1029] and India follows a more prescriptive approach.[1030] This calls for a middle ground to be established for Kuwait company law where both UK and Indian regulatory approaches are analysed and to adopt some of the most socially responsible provisions mentioned within their laws. Therefore, the scope or typology of demonstrating and applying the middle ground is threefold. First is to identify the CSR issue in Kuwait, as there are no CSR provisions in the Kuwaiti Companies Law 2016, then to look at the regulatory approaches of the UK and India and their respective CSR provisions and finally to adopt and apply potentially effective methods in those provisions that promote socially responsible deeds. This will provide a solid middle ground for which CSR provisions should be proposed and recommended for Kuwaiti company law and which will be presented in the form of actual provisions to be potentially included in future company laws in Kuwait. The implications of the middle-ground approach are discussed in the next section in order to determine the more suitable regulatory model for Kuwaiti company law.

[1027] C. Walker, 'UK companies are failing to support charities (2014): Available: https://www.theguardian.com/sustainable-business/uk-companies-failing-support-charities: Accessed 17th March 2019.
[1028] India Companies Act 2013 S.135.
[1029] Hart (n 318), 585-600.
[1030] Osuji (n 5), 4-5.

6.4 Implications of the Middle Ground Approach

As mentioned in the previous section, the middle ground reflects the application of a prescriptive or mandatory approach adopted by India and the self-regulation or voluntary approach of the UK and to find the suitable elements of each for each for Kuwait. This section aims to highlight the effects of these approaches so that a middle ground approach can be established.

The self-regulation approach adopted by the UK promotes laws that can encourage companies to achieve desired goals, such as CSR, by requiring appropriate corporate governance structures, management practices and corporate culture.[1031] Regulatory CSR may include a variety of substantive and procedural requirements that can be put into practice, but also includes stakeholder enforcement and other empowerment provisions for national and transnational regulatory spaces and the use of CSR as a governance tool for socio-economic development. On the other hand, an option for a governance approach is a prescriptive model, which implies that the essence of CSR may consist of mandatory obligations that emerging economies such as India recognises through legal obligations, including the obligation to donate a certain percentage of profit to charity as stated in section 135 of the Indian Companies Act 2013.[1032] A mandatory or prescriptive CSR approach therefore reflects a "comply or explain" and partially a "responsive regulation" model (owing to environmental constraints), which is characterised by a legal restraint.[1033] This restraint in the Indian context could be characterised by the obligation of companies

[1031] Christine Parker. "Meta-regulation: legal accountability for corporate social responsibility." (2007), 207-239.
[1032] Indian Companies Act 2013, S.135.
[1033] Seidl, Sanderson and Roberts (n 466), 1-33 ; Braithwaite (n 394), 475.

to engage in philanthropic activity on an annual basis as reflected in section 135 of the Indian Companies Act 2013.[1034]

Disclosure systems in the UK largely reflect the business case for CSR and consider ethical aspects. Consequently, section 172[1035] of the UK Companies Act 2006 establishes attractive procedural tools for mandatory disclosure that reflect reflexivity to the extent that directors are required to empirically investigate facts and results beyond the statutory narrative and instrumental rationale.[1036] This limited approach links CSR to financial performance and may hinder CSR in areas such as the environment, which cannot be financially assessed.[1037] Social irresponsibility is therefore seen as a fiscal risk factor and almost automatically leads to support for corporate self-regulation.[1038] However, Kuwait should also consider CSR in financial terms as this reflects the CSR areas of corporate philanthropy through financial donations to communities (e.g., building hospitals) and charitable causes,[1039] as well as economic sustainability through sustaining the country's wealth and promoting the setup of family businesses for creating wealth.[1040]

On the other hand, section 135 of the Indian Companies Act 2013[1041] requires companies with a certain net value, turnover or profit to appoint a CSR committee of three or more directors (one of whom must be an independent director) to make recommendations to the board of directors

[1034] Indian Companies Act 2013, S.135
[1035] UK Companies Act 2006, S.172.
[1036] Mark Stallworthy. "Sustainability, the Environment and the Role of UK Corporations." International Company and Commercial Law Review 17.6 (2006), 155.
[1037] Carrie Bradshaw. "The environmental business case and unenlightened shareholder value." Legal Studies 33.1 (2013): 141-161.
[1038] Ronen Shamir. "Socially Responsible Private Regulation: World-Culture or World-Capitalism?." Law & Society Review 45.2 (2011), 313-336.
[1039] Kuwait Oil Company. Social Responsibility: Ahmadi hospital. (2012). Available: https://www.kockw.com/sites/EN/Pages/We%20Care/Social%20Responsibility/Medical-Services.aspx. Accessed: 28th August 2019.
[1040] Kuwaiti Oil Company. Corporate Social Responsibility. Available: https://www.kockw.com/sites/EN/Other%20Publications/Corporate%20Social%20Responsibility.pdf. Accessed: 28th August 2019.
[1041] India Companies Act 2013, S.135.

on CSR policies and expenses and to monitor such policies. The board of directors should disclose information about the CSR policy in the directors' reports and on corporate websites, as well as ensure that activities within the framework of these policies are carried out. Companies should spend at least two per cent of the average net profit for the previous three financial years on CSR, giving preference to local regions of operation. No sanctions are provided for, although section 135(5)[1042] requires that directors report reasons for non-compliance. Section 9 of the by-laws requires that CSR policies approved by the board of directors be posted on corporate websites, assuming that negative publicity is a sufficient incentive for social responsibility.

In the UK, this could be defined as a narrow philanthropic view of CSR because UK companies are not obliged to make charitable financial contributions, although philanthropy reflects India's traditional understanding of CSR as a corporate response to social expectations and contribution to social and development initiatives.[1043] In the UK, the Companies (Corporate Social Responsibility Policy) Regulations 2014 exclude activities conducted in the ordinary course of the company's business (sections 2(e), 4(1), 6(1))[1044] or which benefit only employees and their families (section 4(5))[1045] and contributions to political parties (section 4(7)).[1046] Therefore, Kuwait should discard this version of philanthropy because it appears to favour only specific groups of stakeholders, while philanthropy is more about the art of giving which applies to all stakeholder groups, irrespective of individual features and positions of authority and power. Kuwait should therefore adopt India’s version of philanthropy as

[1042] India Companies Act 2013 S.135(5).
[1043] Meera Mitra, *It's only business!: India's corporate social responsiveness in a globalized world* (Oxford University Press, USA 2007), n.p.
[1044] Companies (Corporate Social Responsibility Policy) Regulations 2014 s.2(e), 4(1), 6(1).
[1045] Companies (Corporate Social Responsibility Policy) Regulations 2014 s.4(5).
[1046] Companies (Corporate Social Responsibility Policy) Regulations 2014 s.4(7).

this considers the interests of not only corporate constituents, but all the wider community and local areas as stipulated in section 135(5) of the Indian Companies Act 2013.[1047]

With respect to stakeholder representation, chapter 5 established differences between the jurisdictions of UK and Indian companies. The insider model adopted within India emphasises that companies are controlled by the state. This is supported by the nature of Indian companies in two key governance categories, including rights of shareholders and the role of stakeholders. Evidence from a 2018 Bombay Stock Exchange (BSE) report state that there is a low representation of shareholder's rights and a limited role of stakeholders within Indian companies.[1048] Therefore, this confirms that Indian companies are likely to be controlled by the government owing to the restrictions imposed on shareholders and stakeholders, as well as a lack of independent representation of shareholder and stakeholder management policies.[1049] However, this is the complete opposite of the outsider model in the UK, which emphasises that shareholders have the freedom to control the company.[1050] The state or government in Kuwait also control businesses, which reflects an insider model, and is thus consistent with the Indian model owing to the mandatory approach adopted in both countries.

Therefore, the middle ground approach could be to establish a code that moves away from the insider model Kuwait has adopted to an outsider model, which in turn gives families more flexibility and control in their business. Consequently, this will promote CSR in terms of community support, creativity (giving families more freedom to express business ideas)

[1047] Indian Companies Act 2013 S.135(5).
[1048] International Finance Corporation (IFC), *Corporate Governance Scores* (2018), 7.
[1049] Ibid, 8.
[1050] Roger M Barker, *Insiders, outsiders and change in European corporate governance* (2006), 4.

and ultimately economic sustainability through driving and creating wealth. However, to still maintain mandatory CSR compliance, family businesses should be obligated to give back to the community though charitable donations and supporting company sponsorships. This will provide a balance between the chosen mandatory CSR approach, while including some elements of voluntary compliance as part of meeting the needs of the middle-ground approach.

In short, the first issue arising from the Indian CSR law is the desirability of using CSR as a development tool and the second issue is the degree of command and control in the statutory structure of CSR. Although this approach would be desirable for Kuwait given the insider model and mandatory CSR compliance it has in common with India, it would not be desirable as a standalone CSR code owing to the restrictive nature of the insider model (e.g., state controlled businesses). In addition, the absence of sanctions (the nature of a restrictive mandatory approach), the lack of empowerment of stakeholders and representative public and private organisations, as discussed above, are likely to have an impact on the effectiveness of CSR legislation.

For the above reasons, the middle ground approach proposed in this thesis aims to maintain mandatory CSR compliance while incorporating some elements of voluntary compliance in order to remove some of the restrictions imposed by mandatory compliance by giving stakeholders more freedom to contribute to CSR activity. This provides a fine balance between the identified legal model for Kuwait (mandatory CSR compliance) and incorporating some elements of voluntary compliance that would unlikely be incorporated into the provisions. This in turn provides a fairer and more innovative outlook on new CSR provisions to be proposed in future Kuwaiti company law. Given the diverse regulatory

experience described above, the next section discusses how regulatory CSR can be effectively implemented through constructivism in Kuwait, which is a middle ground between self-regulation and prescriptive approaches.

6.5 Application of the Middle Ground Approach to Kuwait

CSR has become popular among business leaders and government officials, since Kuwaiti companies are starting to become more active in the CSR arena through corporate philanthropy. Companies in Kuwait aim to meet the interests of various stakeholders via socially responsible acts, such as donating to charity.[1051] However, the idea of giving has been instilled in Islamic societies through religious values. Managers view CSR through Zakat, which is a mandatory charitable activity for Muslims to donate, and thus Kuwaitis are influenced by the religious aspect of charity.[1052] Corporate philanthropy and CSR as a charitable activity aligns with the idea that CSR involves contributing to the wider society and the company will likely contribute less to socially and environmentally damaging activities. This aligns with Carroll's definition of CSR mentioned in chapter 2 (see Carroll in section 2.4) since the author refers to CSR in a philanthropic manner of doing good deeds by engaging in philanthropic activities.[1053] Such activities may include donating money to charities as required under section 135 of the Indian Companies Act 2013.[1054] Therefore, India and Kuwait apply a similar mandatory approach to CSR, though Kuwait might have more flexibility about the outcome of Zakat tax. This is because while India is unable to choose where the profits should

[1051] D Ronnegard, 'CSR in the Gulf region: corporate philanthropy likely to remain key for now' (2009): Available: https://knowledge.insead.edu/csr/csr-in-the-gulf-region-2233: Accessed 11th Feb 2019.
[1052] Emtairah, Al-Ashaikh and Al-Badr (n 865), 325.
[1053] Carroll (n 190), 604-608.
[1054] Indian Companies Act 2013 S.135.

go, Kuwait has the freedom to choose where the Zakat tax should be donated as stated in Article 1 of the Zakat Tax Law No. 46 of 2006.[1055]

Kuwaiti company freedom to donate their Zakat tax was established in chapter 5 (see section 5.4) where they could donate to either education, healthcare, infrastructure or other social matters.[1056] In the UK, however, the government makes the decision as to where the tax is going to be spent. Section 6(1) of the UK Tax Act 1988 states that companies are obliged to pay a certain percentage of corporation tax to parliament.[1057] This is a similar case in India where companies mandatorily have to pay corporation tax. Section 135(1) of the Indian Companies Act 2013 mentions that companies are expected to pay a certain amount of tax as part of their CSR initiative.[1058] Although Kuwait adopts a more relaxed approach to taxation as they have the flexibility to spend their taxes on a public service of their choice, it is still mandatory to pay that tax. Although this degree of flexibility could be positive, at the same time it could potentially be restricting other public sectors owing to companies' favouritism of one public service over another, which in turn could make other companies miss tax contributions through companies prioritising their favourite charity or organisation they are donating to over others, e.g., green companies are more likely to donate to environmental initiatives that promote green energy and environmental sustainability approaches. The Kuwaiti company law needs a CSR provision that imposes less flexibility on companies to choose to which public service they want to allocate their taxes. All public services should therefore be treated equally and be given the same opportunity to benefit from tax

[1055] Zakat Tax Law No. 46, 2006, A.1.
[1056] Ibid.
[1057] UK Tax Act 1988 S.6(1).
[1058] Indian Companies Act 2013, S.135(1).

contributions. Therefore, the new law could state that any tax contributions should be equally distributed across all public services as part of the CSR effort. The following sections follow the typology of the middle ground approach proposed in section 6.4.

6.5.1 CSR Provisions for Socio-economic Considerations

Stakeholders require Kuwaiti companies to be socially responsible and to demonstrate their commitment to ethical and social principles of responsibility. The Kuwaiti government has interfered excessively with the economy in general, and with corporations in particular by controlling the country's wealth and oil reserves, thereby demonstrating their insider approach through such control.[1059] Prior to the financial crisis, CSR was considered trivial, and thus the proposal to Kuwaiti corporations of CSR approaches and practices will help to reveal the ideal CSR for Kuwaiti corporations.

Aguilera et al[1060] argue that CSR differs by region, country, industry and company. This makes it even more difficult to develop a universally accepted and understandable definition and conceptualisation of CSR around the world. This CSR study defines CSR as doing business that ensures transparency and stakeholder satisfaction in meeting economic commitments and promises to integrate social and environmental aspects into business operations, thereby creating a shared value. This definition is inspired by Carroll[1061] who had developed a four-part definition of CSR, which states that to ensure proper CSR, four responsibilities need to be fulfilled, such as economic, legal, ethical and charitable responsibilities, and at least two of them need to be fulfilled in order for CSR to be

[1059] Kuwaiti Oil Company (KOC), 'Brief History of Kuwait Oil Company' (2012): Available: https://www.kockw.com/sites/EN/Pages/Profile/History/KOC-History.aspx: Accessed 16th June 2019.
[1060] Ruth V. Aguilera, et al. "Corporate governance and social responsibility: A comparative analysis of the UK and the US." Corporate Governance: an international review 14.3 (2006), 147-158.
[1061] Carroll (n 251), 497-505.

considered as such. In particular, philanthropic responsibility is a great responsibility to which corporations aspire and is the starting point of CSR.[1062] Charitable obligations are "expected" or "desired" by society and include the participation of corporations contributing to community development, community improvement programmes and youth development programmes.

In terms of philanthropic CSR activities, at the corporate level, the scale of CSR is influenced by various factors, such as internal conditions, strategic characteristics, unforeseen circumstances, stakeholder pressure and the size of the company.[1063] Thus, Kuwaiti companies need to adapt their CSR strategies to business needs.[1064] The law can facilitate company's needs by rewarding incentives for their philanthropic contributions. These incentives include, giving the company the capacity to employ more personnel by requesting more foreign labour from government owing to the existing restrictions on foreign labour, as well as expanding company capital as a means to grow the company and generate more profits that could potentially be invested in future philanthropic activity.

According to Friedman's[1065] theory of individual agreements described in Chapter 2 (see sections 2.6.1, 2.6.2 and 2.6.3), CSR creates an agency problem, as involvement in CSR can lead to the waste of the company's resources. In his opinion, the most profitable and responsible way to help society is to maximise profits. This seems to be the case in both the UK and India, where companies seek to maximise profits, although Indian companies are using some of their profits for charitable purposes under

[1062] Yukio Yotsumoto, *Americanizing Japanese firms: The institutionalization of corporate philanthropy and volunteerism in American communities* (University Press of America 2010).
[1063] Dror Etzion. "Research on organizations and the natural environment, 1992-present: A review." Journal of Management 33.4 (2007), 637-664.
[1064] Chitra Bhanu Bhattacharya and Sankar Sen. "Doing better at doing good: When, why, and how consumers respond to corporate social initiatives." California management review 47.1 (2004), 9-24.
[1065] Friedman (n 231), 173-178.

section 135 of the Companies Act 2013.[1066] While the idea of philanthropy can be seen through the Zakat tax in Kuwait, there is nothing in the corporate law that suggests that Kuwaiti companies would donate such a portion of their profits to philanthropy. Therefore, Kuwait should adopt both an individualistic and a charitable model, reflecting through Indian company law and Freidman's individual agreement theory by transplanting part of Sharia Law, such as the third pillar (Zakat), which revolves around philanthropic activity, like charitable donations and helping people in need. The individual agreement theory is linked to the idea that stakeholders should be encouraged to participate in society (e.g., social activity through participating in philanthropic programmes, such as charities and initiatives that support the environment and social well-being) and abide by the law. The next paragraph elaborates on this issue.[1067]

Chapter 5 (see section 5.3) discovered the link between Kuwaiti Islamic religion and social responsibility as a company activity, which was mostly influenced by the Zakat tax. While the Zakat tax existed before the emergence of the concept of CSR, from a CSR point of view, it can be considered as a charitable tax. This is because larger companies are required to pay the Zakat tax in accordance with article 1 of the Zakat Tax Law No. 46 of 2006.[1068] Similarly, section 135 of the Companies Act 2013[1069] of India provides that companies will engage in charitable activities by paying 2 per cent of annual profits to charity. In the UK, no code states that UK corporations are obliged to give a certain percentage of their annual profits to charity. Evidence shows that UK companies only

[1066] Indian Companies Act 2013 S.135.
[1067] Freidman (n 72), 13.
[1068] Zakat Tax Law 2006 No. 46, A.1.
[1069] Indian Companies Act 2013 S.135.

donate 0.4% of their pre-tax profits to charity,[1070] thereby indicating that UK companies can voluntarily donate some of their annual profits to charity. However, no such provisions regarding charitable activities exist in current Kuwaiti company law and only exist in Sharia.

A middle ground for Kuwait would be to take the Indian view of mandatorily donating a certain percentage of profits to charity (prescriptive), whilst making it voluntary as described in the UK self-regulatory approach, such as granting Kuwaiti companies the freedom to invest their donations in any CSR initiative they desire. Kuwait could impose a law that encourages companies to donate an amount of annual profits that they are comfortable with to any charity or social initiative of their choice. Here, companies are obligated to give to charity, but have the choice of designating their donations. This supports the idea that Kuwaiti companies can be highly charitable owing to cultural and religious influences, e.g., Surah al baqarah (2:215) as shown in chapter 5 (see section 5.4), which emphasises the idea of giving charity for people in need.[1071] Therefore, the proposed provision preserves the cultural and religious influences of charity, whilst granting companies the freedom of where their social giving will go. However, the religious incentive to CSR may not be realised owing to unforeseen financial issues that prevent companies from taking the opportunity to implement such CSR practices.

The global financial crisis has been found to have weakened Kuwaiti companies.[1072] Companies suffered from liquidity pressure and losses due to increased reserves. Despite positive signs of recovery, their results continue to be affected by the undiversified operating environment, which

[1070] C. Walker, 'UK companies are failing to support charities (2014): Available: https://www.theguardian.com/sustainable-business/uk-companies-failing-support-charities: Accessed 17th March 2019.
[1071] Qura'n: Surah al baqarah (2:215).
[1072] Vasudev and Watson (n 136), 79.

is heavily dependent on the oil sector.[1073] This has led to a lack of CSR in Kuwaiti companies owing to a reduction in the CSR budget, which has created difficult working conditions. It was established in chapter 5 (section 5.5.3) that Kuwaiti companies participate in socially beneficial activities such as investing shareholdings in family businesses for the purpose of economic diversification.[1074] This demonstrates the commitment of Kuwaiti companies to charitable, social and humanitarian initiatives. This is because Middle-Eastern countries like Kuwait pay special attention to risks when investing in family businesses,[1075] which can be seen as a starting point for CSR as it reflects philanthropic activity.

Based on the above discussion, it is necessary to introduce CSR programmes that allow sponsorships to promote CSR by including a provision in Kuwaiti company law that gives constituencies the power to invest and support these CSR programmes. The Indian Companies Act 2013 supports such sponsorship initiatives through section 135(5),[1076] which states that companies should sponsor their local communities when engaging in CSR activity. However, no such initiatives exist in the UK Companies Act 2006. Therefore, the middle-ground here is to adopt the Indian prescriptive approach of implementing sponsorship initiatives, whilst encouraging the idea of economic diversification since Kuwait is an oil dependent country that requires new revenue streams in the event of depleting oil reserves. Therefore, the new CSR provision could state that Kuwaiti companies are required to engage in sponsorship programmes that promote economic diversification in order to improve the revenue streams in Kuwait.

[1073] P. S Singh. "Kuwait Banking Industry: An industry Research." (2010): n.p.
[1074] O Gulseven, 'Challenges to Employing Kuwaitis in the Private Sector' (2015) Available: <https://www.oxgaps.org/files/analysis_gulseven.pdf> Accessed 30th August 2019.
[1075] PWC, *Keeping it in the family: Family firms in the Middle East* (2016), 6.
[1076] Indian Companies Act 2013, S.135(5).

With regard to CSR programmes and activities, there were similarities between companies in the UK and India in what was implemented as CSR. Education, employment programmes and health initiatives were three general directions for the companies.[1077] In terms of CSR processes, companies followed seven processes: public relations, philanthropy, corporate governance, risk management, health and safety programmes, employee participation and sponsorship.[1078] However, Kuwait's public awareness of environmental issues is relatively low since little attention has been paid to environmental initiatives, where most of the activities took the form of tactical campaigns rather than sustainable and long-term initiatives.[1079] It has been established in chapter 5 (see 5.3.3) that government agencies have control of the Kuwaiti economy as the country's oil reserves are controlled by the government.[1080] For CSR, there is nothing in place that restricts oil companies from monopolising the Kuwaiti economy and engaging in diversification efforts to boost the country's economy through alternative revenue streams,[1081] including investments in renewable sources to generate income in the event of the inevitable depletion of oil and gas resources.[1082]

The middle ground here is that Kuwait needs to invest in a similar movement as the UK and perhaps establish similar CSR initiatives that other Middle-Eastern countries are adopting. Kuwaiti company law could reinforce such CSR initiatives by obligating companies to meet certain CSR objectives, such as contributing to environmental sustainability, economic diversification and promoting social and community well-being by

[1077] Hohnen and Potts (n 1009) 4-5.
[1078] Ibid 7.
[1079] Ibid 7.
[1080] Shehabi (n 812) 4-5.
[1081] Baker Institute, 'Why Oilmen Will Never Be Interested In Renewables' (2019). Available: https://www.forbes.com/sites/thebakersinstitute/2019/02/14/why-oilmen-will-never-be-interested-in-renewables/#7dee5b24d8c8: Accessed 1st April 2019.
[1082] Frynas (n 815), 182.

investing in community projects. The new law could in turn enforce a provision where a supervisory board is elected to monitor a company's progression in meeting these CSR objectives and advise companies about how they can effectively meet them. For example, Vision 2030 in Saudi Arabia, which is an intervention that aims to promote economic diversification (e.g. diversifying the country's revenue streams since Saudi Arabia is an oil dependent country) and a fairer society through encouraging female entrepreneurship, education and employment among other policies[1083]. A similar initiative could be transplanted to new Kuwaiti company laws, to further ensure that companies meet their CSR objectives. These policies are of particular importance because both Kuwait and Saudi Arabia are situated in the Gulf area where both countries have similar religious, social and cultural systems. Therefore, the new Kuwaiti law should be amended to state that companies are required to invest in economically sustainable initiatives that promote environmental protection, economic diversity and social cohesion.

One of the more notable socio-economic issues in Kuwait and outlined in chapter 5 (see section 5.3.1) was the discrimination in the labour force. There is no provision in the Kuwaiti company law that protects against unequal pay. Looking at the UK model, the country sets a minimum wage and equal pay for all workers, irrespective of their gender.[1084] For India, there is a similar pay gap like in Kuwait.[1085] Here, the middle ground should be that Kuwait should adopt the UK model as it seems to be the more socially responsible means to provide equal pay for Kuwaiti workers owing to the equal pay legislation that protects people from receiving unequal

[1083] M.K. Khan, *Research, Innovation and Entrepreneurship in Saudi Arabia: Vision 2030* (Taylor & Francis Group 2018), n.p.
[1084] Unison, 'Minimum wage and national living wage' (2018) <https://www.unison.org.uk/get-help/knowledge/pay/minimum-wage/> accessed 31st March 2019.
[1085] Kuwait Minimum-Wage, Labor Law, and Employment Data Sheet Kuwait Minimum Wage Rate (2019): Available: https://www.minimum-wage.org/international/kuwait. Accessed: 31st March 2019.

pay because of their gender. This could be backed by existing constitution and Sharia Law principles regarding equal opportunity. For example, Article 8 of the Kuwait constitution stipulates that the state will guarantee that all citizens will receive security, tranquillity and equal opportunity.[1086] The Sharia law principles, namely gender equality and equal opportunity also support the constitution regarding this matter.[1087] Therefore, the law should be amended to include fairer wages for all people, irrespective of gender and promote equal opportunities across the board. A fairer society and the promotion of equal opportunity in Kuwaiti companies can also lead to economic prosperity.

As part of its ongoing efforts to actively participate in public works and promote a strong and sustainable Kuwaiti economy, the country has adopted a corporate social and economic responsibility strategy aimed at meeting the commitments of its industry to society and the national economy.[1088] The strategy is based on three pillars, namely (1) human development; (2) bringing the business environment into line with the principles of sustainable development; and (3) promoting good governance in the business environment. With regard to human capacity building, the sustainable future of Kuwait depends on individual skills and abilities, and it is therefore important that Kuwait contributes to human capacity-building programmes to ensure and maintain sustainable progress. With regard to bringing the business environment in line with the principles of sustainable development, it is important that Kuwaiti companies cooperate with a number of global research institutions and experts in the field of economic policy and ultimately publish studies on

[1086] Kuwait Constitution A.8.
[1087] Amira Mashhour. Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt. (2005), 562.
[1088] Markaz, 'Kuwait Financial Centre "Markaz": Corporate Social and Economic Responsibility Report' (2015): Available: https://www.markaz.com/getmedia/391a1b9d-e058-4378-baae-6a109afa41f9/CSER-Pillars-Report-ENGLISH.pdf.aspx: Accessed: 10th March 2019.

the practical implementation of energy, human resources, economic structure and public sector policies in Kuwait and the region.[1089] The Kuwaiti law could therefore facilitate business and research institutions by imposing a policy that obligates companies to invest in education by donating a small percentage of their profits to fund future education scholarship. Investing in future education scholarship could be perceived as a form of good governance as Kuwaiti companies are investing in education and thus in the development of Kuwait's future labour force and business environment which could help to drive the country's future economy.

With regard to the promotion of good governance in the business environment, the state plays an important role in the allocation and use of economic resources in Kuwait, given the importance of public expenditure and the role of the state in economic development. Kuwaiti companies are encouraged to promote the efficiency of the public sector in order to stimulate economic development. This could include cooperation with the Kuwait Economic Society, an independent non-governmental national organisation that aims to strengthen the principles of governance in public institutions. The Kuwait Times reported that the Kuwait Economic Society strives for economic development by developing governmental policies that aim to improve the economy through raising cultural, economic and financial awareness within the wider communities in Kuwait.[1090] Kuwaiti law could raise awareness about the aforementioned issues by imposing a provision where companies are obligated to pay an additional corporation tax that is dedicated to government policies and initiatives that reinforce

[1089] Ibid.
[1090] Kuwait Times, 'Kuwait Economic Society opens new headquarters' (2018): Available: https://news.kuwaittimes.net/website/kuwait-economic-society-opens-new-headquarters/: Accessed 16th June 2019.

community awareness regarding socio-economic issues. Therefore, this ties in with the Saudi 2030 vision in the sense that it promotes future economic and sustainable development by raising awareness to people as to how they can contribute to such developments[1091] as they would not be possible without corporate constituencies who operate under a specific corporate structure.

6.5.2 CSR Provisions for Corporate Structures

It was identified in chapter 5 that Kuwait has adopted a unitary board of director structure according to Article 181 of the Kuwaiti Companies Law.[1092] This aligns with the UK[1093] and India,[1094] as they appear to follow the same idea of directors not being required to be shareholders of a company and that it is voluntary for directors to be appointed by shareholders, and there is no CSR provision in Kuwait that highlights such activity. Therefore, Kuwait should implement this CSR code adopted in both the UK and India because directors can also be shareholders but are not required to be so. Therefore, the newly amended law should include a CSR code, which states that it should be voluntary to appoint directors and other corporate constituents as shareholders, such as employees, as this provides a constructive balance between self-regulation and prescription.

Concerning rights of the shareholder, removal of directors was identified as one such right. Chapter 5 (see section 5.5.3) found that the Kuwaiti provisions on director removal (section 212)[1095] are the same as the provisions in developed countries, such as the UK. In view of Section 168

[1091] Khan (n 1083), n.p.
[1092] Kuwaiti Companies law, 2016, S.181.
[1093] Atom Content Marketing Ltd, 'Directors' responsibilities' (2018): Available: https://www.business.hsbc.uk/en-gb/gb/article/directors-responsibilities: Accessed 17th March 2019.
[1094] Parekh Hemang and others. 'Corporate governance and directors' duties in India: overview' (2018): Available: https://uk.practicallaw.thomsonreuters.com/0-506-6482?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1: Accessed: 17th March 2019.
[1095] Kuwaiti Companies Law 2016, S.212.

of the UK Companies Act 2006, shareholders have the power to dismiss directors through an ordinary resolution in the general meeting in the event of the shareholder's dissatisfaction with the director's performance. So Section 168 encourages CSR through removing unfit directors who are not in favour of the wider social considerations of the company, and therefore aligns with the CSR aspect of shareholder engagement and communication.[1096] This could be a potential CSR provision for Kuwait, as this would be seen as a socially responsible deed that gives shareholders the freedom to voluntarily remove unfit directors from their position. Therefore, Kuwait could propose a CSR provision that could align with their existing laws regarding directors' removal as inspired by the UK vision. The newly amended law could include that unfit directors should be fairly forced to be removed from their position if shareholders are unhappy with how they are carrying out their duties or perhaps remove directors on the basis that they do not commit to their CSR obligations.

In terms of information disclosure through the lens of CSR, the UK Companies Act (section 814)[1097] has demonstrated good performance in terms of information disclosure and monitoring[1098] by punishing companies and individuals who wrongfully disclose information. Under the Indian Companies Act,[1099] a financial report has to be compiled by a company that includes a balance sheet, profit and loss record, financial change, financial statement and profit figures, as well as statements of their financial contributions.[1100] Kuwaiti companies cannot voluntarily disclose information unlike UK and Indian companies as Kuwaiti company law lacks

[1096] UK Companies Act 2006, (c.46).
[1097] UK Companies Act 2006, S.814.
[1098] Clark, and Knight, (n 933), 1-44.
[1099] India Companies Act 2013 S.135.
[1100] Kordant Philathropy Advisors Report, 'The 2% CSR Clause: New Requirements for Companies in India' (2013): Available: https://www.issuelab.org/resource/the-2-csr-clause-new-requirements-for-companies-in-india.html: Accessed 26th June 2019.

a code regarding the disclosure of reports. However, it is not a legal requirement in the UK and India to disclose information, it is voluntary. Therefore, the middle ground here is to make information disclosure mandatory to allow Kuwaiti companies to disclose potential information regarding their CSR activities, such as financial, economic and social contributions to maintain their reputation and remain competitive by attracting new customers. This is influenced by the idea that CSR is an innovative initiative which people are becoming aware of in Kuwait and therefore to recognise companies as socially responsible. The new law should state that information disclosure on CSR related issues should be obligatory, in order to promote CSR in Kuwaiti companies.

In terms of general meetings, these were identified as another shareholder protection in chapter 5 (see section 5.5.3) where shareholders can challenge the company management. Article 152 of the Kuwait Companies Law 2016 sets a 25% threshold of the company's shares owing to the country's vast wealth,[1101] while there is only a 5% threshold set in the UK Companies Act 2006 to call for an extraordinary meeting.[1102] Therefore, the UK grants the rights of shareholders to hold meetings, which aligns well with the CSR aspect of stakeholder engagement and communication.[1103] Therefore, this would be an ideal fit for Kuwait, as both the UK and Kuwaiti share a similar policy of protecting the rights and freedoms of stakeholders, which through a CSR lens would be a socially responsible deed. However, in order to realise stakeholder protection and freedom, directors' duties play a key role in reinforcing these forms of good governance practice.

[1101] World Atlas, 'The Richest And Poorest Economies In The Middle East' (2017): Available: https://www.worldatlas.com/articles/the-richest-and-poorest-economies-in-the-middle-east.html: Accessed 11th Feb 2019.
[1102] UK Companies Act 2006 (c.46).
[1103] Ibid.

6.5.3 CSR Provisions for Directors' Duties and Corporate Constituencies

It was established in chapter 5 (see section 5.5.4) that directors may ignore the company's objectives in favour of mismanaging the company to suit their own personal objectives.[1104] Several duties are imposed upon the company's directors to ensure that they are managing the company properly. The company's director is considered an agent of the company in both the UK and India,[1105] which gives little power to shareholders, while in Kuwait, no provision states a principal-agent relationship.[1106] There are also no provisions in place that provides stakeholder protection that aims to protect the rights of shareholders, employees, customers, suppliers and the general community. For example, Article 246(1-5) of the Kuwaiti Companies Law 2016[1107] states that shareholders who can be managers and directors are granted the freedom under the law to invest in companies. However, neither the UK nor Indian model grants freedom to invest in companies.[1108] For India, CSR provisions under the Companies Act 2013[1109] stipulate that companies should give at least 2 per cent of its profits to charity each year.[1110] Although the UK upholds economic efficiency and social justice,[1111] the voluntary CSR compliance model in the UK means that companies are not obligated to donate any of its annual profits to any charity. There is nothing in the Kuwaiti law which states that directors are expected to commit to these socially responsible deeds and thus the law should be closer to the Indian model, with perhaps elements

[1104] Gerner-Beuerle, Paech and Schuster (n 980), 64.
[1105] Agrawal (n 985), 33.
[1106] T O'Regan and R Zayat, 'Kuwait introduces new Agency Law: franchisors take note' (2016): Available: https://www.dlapiper.com/en/us/insights/publications/2016/04/kuwait-introduces-new-agency-law/: Accessed 1st April 2019.
[1107] Kuwaiti Companies Law S.246(1-5)
[1108] India Companies Act 2013 S.135; Gouda, Khan, and Hiremath (n 613): 141-161; Johnston (n 995), 1036.
[1109] India Companies Act 2013, S.135.
[1110] Gouda, Khan and Hiremath (n 613), 141-161.
[1111] Johnston (n 994), 1036

of the UK model as a middle ground, as this would not only promote mandatory CSR activity, but also allow some voluntary CSR activity, e.g., the choice of investing their mandatory CSR investment in any initiative that promotes social well-being and sustainability for the Kuwaiti community. This links to the provision proposed in section 6.5.2, which states that Kuwaiti companies are encouraged, but not expected, to donate a certain amount of profit to charity.

On the other hand, directors are supposed to consider the best interests of the company through maximising value, which comes under shareholder primacy as a means to promote good corporate governance. Directors therefore have to consider the interests of several stakeholders, such as shareholders,[1112] since they are important investors in a company.[1113] Therefore, Kuwait reflects an enlightened shareholder value (ESV) corporate governance model,[1114] since it supports the idea of shareholder value, in addition to protecting all stakeholders' interests. However, the Kuwaiti Companies Law 2016 still fails to uphold stakeholder interests, since the legal framework in Kuwait is weak through the lack of mandatory CSR provisions, and thus grants more freedom to shareholders to make company decisions.[1115] This links to section 166(2) of the Indian Companies Act 2013 because the provision states that directors protect the interest of shareholders.[1116] The provision also highly regards the wider interests of shareholders and other stakeholders as corporate goals without the need of enhancing shareholder value. Similarly, in the UK, directors are also required to protect the interests of shareholders.[1117] Therefore, the middle ground here would be to adopt both the UK and India's approach as both

[1112] Valsan and Yahya (n 996), 1.
[1113] Hazen (n 997), 1897.
[1114] Armour, Deakin and Konzelmann (n 681): 531-555.
[1115] Kuwaiti Companies Law 2016, S.246(1-5).
[1116] Indian Companies Act 2013, S.166(2).
[1117] UK Companies Act 2006, S.172(1-3).

aim to protect the rights of shareholders. Therefore, the amended law should state that protecting shareholders' rights is a top priority and directors have the final say on CSR issues, unless they are deemed unfit to make any such decisions.

Owing to the differences between the UK and Indian jurisdictions, the UK has been found to follow an outsider model of corporate governance where companies are in total control of their shareholders.[1118] India, on the other hand, follows an insider model where companies are controlled by either the state or family businesses.[1119] It has been established in chapter 5 (see section 5.5.3) that there are many family run, but government controlled companies in Kuwait. This indicated that Kuwait follow a state-owned system, whereas India has family businesses controlling companies and the UK follows a shareholder corporate model. Through the lens of Indian and UK laws, the stakeholder approach is different in Kuwait since stakeholder support is important due to their strong social considerations when it comes to culture and socioeconomics, and they are free to invest in family businesses.[1120] This demonstrates socially responsible attitudes of shareholders through facilitating the diversification of the Kuwaiti economy.[1121] Therefore, the idea of the family business in Kuwait as a sustainable economic resource should be promoted as a CSR provision in future amendments because it promotes economic sustainability, which is one form of CSR.

[1118] McCahery and others (n 631), 696.
[1119] Mathew (n 632), 800.
[1120] KPMG, *GCC Family Business Survey 2017* (2017), 18.
[1121] Ibid, 18.

It was also established in chapter 5 that Kuwaiti citizens are concerned about the quality of education[1122] and healthcare systems,[1123] the development of young people[1124] and the rising unemployment rate among Kuwaitis.[1125] Companies are therefore expected to take action in these areas and contribute to a long-term solution to the problems faced by Kuwaiti citizens. In this way, the public will feel that companies are interested in the problems of society and are addressing them or contributing to the development of possible solutions. Future amendments to the law that include CSR provisions could act as possible solutions to economic, social and environmental issues (e.g. increase social wealth, invest in greener technologies and improve social well-being) as they would promote good governance within companies, which in turn will discourage them from engaging in social irresponsibility or bad governance. This demonstrates a clear link between the socio-economic issues of Kuwait and companies' corporate objectives to resolve these problems through social development, and this is evident in existing provisions in the UK, Indian and Kuwaiti company laws.

Section 414c(7) of the UK Companies Act 2006 states that companies are expected to report on any information regarding social development that will improve the performance of the company, though are not required to report on any financial contributions that would result in such developments.[1126] Although the UK companies are not expected to

[1122] World Bank. (2015). Data on health expenditure, public (% of GDP). Available: http://data.worldbank.org/indicator/SH.XPD.PUBL/countries/1W-KW-OM- SA?display=graph. Accessed Nov 19th 2018.
[1123] UN Women, 'Kuwaiti companies get ready to empower women' (2018) Available: http://arabstates.unwomen.org/en/news/stories/2018/10/kuwaiti-companies-get-ready-to-empower-women: Accessed 1st April 2019.
[1124] Oxford Business Group. (2010). The Report: Kuwait 2010. Available: http://www.oxfordbusinessgroup.com/news/kuwait-year-review-2010. Accessed: Accessed 1st April 2019.
[1125] International Labour Organization (ILO). (2013). The Kuwaiti labour market and foreign workers: understanding the past and present to provide a way forward. Available: http://www.ilo.org/wcmsp5/groups/public/@arabstates/@ro-beirut/documents/meetingdocument/wcms_330314.pdf. Accessed: 1st April 2019.
[1126] UK Companies Act 2006 S.414c(7).

disclose any financial information about their business performance resulting from social developments, Indian and Kuwaiti companies are obliged to disclose such information. Section 135(1) of the Indian Companies Act 2013 states Indian companies are expected to give 2% of its profits to charity as this enables the law to disclose and release important funds that would contribute to societal development.[1127] Kuwait is similar through companies having to pay a 1% Zakat tax for social development according to Article 1 of Law Number 46 of the Zakat Tax Law 2006.[1128] These laws demonstrate that religion plays, or may not play, a role in influencing societal development. However, amendments to the Kuwaiti company law should embrace the spiritual or religious issues as they are a part of Kuwaiti society and influence CSR in a way that reflects social well-being and equality or fairness. Therefore, Sharia and CSR provisions have a mutual interest to promote social responsibility in Kuwaiti companies and thus religion plays a vital role in the success of CSR in Kuwait.

Sticking to the theme of religion, both UK and Indian provisions are not entirely influenced by religion, but in Kuwait, religion plays a key role in the law. This is down to the prominent issue of "giving" in Islamic societies, which are influenced by religious values. In terms of CSR, the principle of giving can be observed through the religious concept of Zakat, meaning that Muslims are obliged to give a certain percentage of their wealth to charity, which gave inspiration to the Zakat tax law. However, no such religious influence exists in UK and Indian company laws. Therefore, it can be established that religion and corporate philanthropy can be defined as

[1127] Indian Companies Act 2013 S.135(1).
[1128] Zakat Tax Law No. 46, 2006 A.1.

a CSR activity in Kuwaiti company law, which can state that such activity can contribute to the wider society.

The middle ground here is to take the corporate philanthropy of Indian company law and align it with the philanthropic influences stated in the Islamic context of Kuwaiti company law to promote societal development. A CSR provision could consider the funding of charitable interventions through the Zakat tax in order to promote societal development, including:

- Provision of scholarships to reputable schools;
- Funding public schools that are under-resourced;
- Renovating hospitals, raising awareness of some of the country's common diseases;
- Supporting youth initiatives; and
- Provision of summer training for young people in companies, Kuwaiti youth with employment opportunities in companies and training and developing young people.

The above interventions are important because they not only promote social well-being but also benefit Kuwait because investing in infrastructure ensures that the community has the facilities needed to drive economic development and prosperity, investing in education supports the future talent pool in Kuwait, which could improve future employability for Kuwaiti nationals and ultimately boost the economy, enabling them to reinvest the above interventions. This cycle of sustainability therefore satisfies and reinforces the four types of CSR through social well-being, which reflects ethical CSR, environmental sustainability through investing in initiatives that promote greener energy and minimise pollution, corporate philanthropy through companies investing in charitable or social initiatives designed to improve the quality of life for the disadvantaged of society

and economic sustainability through investing in education, future talent and businesses that help to create wealth for the country.

However, companies should not only adhere to CSR principles, but also approach and be closer to stakeholders and listen to their views in order to understand their main concerns. Therefore, future amendments of the Kuwaiti company law could advocate for the equal rights of stakeholders through passing a CSR provision stating that any concerns put forth by stakeholders should be heard, but could be challenged if they are unreasonable or are against the company's CSR agenda. In this way, companies will demonstrate their commitment towards aligning their strategy with the needs of the community and then report such strategies to the community.

6.5.4 Developing CSR Reporting in Kuwait

It is important for corporations to participate in improving the level of knowledge about CSR. This can be achieved through information workshops to educate the public about CSR, as well as through partnerships with schools to conduct educational programmes that inform stakeholders about the benefits of social responsibility at an early stage. This ensures that stakeholders are well informed about the company's CSR activities. With regard to CSR reporting, accompanying parties should be aware that they would be able to interact with stakeholders and maintain a constructive dialogue on business direction when reporting on their environmental, economic and social activities. In addition, companies need to understand the disclosure of information about their social activities. Therefore, companies also need to establish relevant, clear, monitored and verifiable key performance indicators, which will be reflected in their annual CSR reports. This will undoubtedly enhance the understanding of social

requirements and management issues, as well as contribute to the continuous improvement of CSR plans. In addition, companies should ensure that this body or department has access to the board of directors to ensure that the company's strategy addresses long-term issues that will ensure sustainable development. Therefore, the new Kuwaiti company law could include a CSR provision which ensures that the directors are obligated to commit to and prioritise CSR initiatives that aim to promote sustainable development on an environmental, social and economic level, in the interests of not only companies, but also the country and its citizens.

In terms of environmental, social and economic activities, Kuwaiti corporations are looking to report on possible solutions, such as powering Kuwait into the 21st Century. For example, Kuwait is looking to adopt sustainable energy strategies, namely providing alternatives for power generation.[1129] On an environmental level, Kuwait is committed to minimising greenhouse gas emissions from oil based commodities by 2030 through introducing policies that promote the use of renewable energy sources.[1130] On an economic level, this includes reformation of oil prices, electricity and water costs and investments in environmentally cleaner transport systems that are less fuel intensive.[1131] On a social level, a reduction in greenhouse gases and the provision of cheaper energy sources will support the wider society through reducing side effects from pollution and giving them better access to affordable energy alternatives.[1132] This is backed by an Environment Protection Law No.99 2015 (amended from No.42 2014) that aims to protect and sustain individual health, manage pollution, improve and increase the use of

[1129] IRENA (n 1005), 48.
[1130] Ibid.
[1131] Ibid.
[1132] Ibid.

natural resources and promote clean energy, as well as energy efficiency and sustainability.[1133] This shows the committed efforts from the Kuwaiti government to provide sustainability to the country which has yet to be passed as a CSR provision in Kuwaiti company law. Although socio-economic and environmental issues are stated in both UK[1134] and Indian[1135] company law, reporting on these issues are voluntary, and thus CSR reporting is scarce in this area.

The middle ground here is that Kuwait may need to turn to its own interventions like their newly proposed 2035 strategic plan[1136] for developing their own sustainability vision, similar to what Saudi Arabia is doing with its Vision 2030 project. This is because the vision aims to develop areas such as healthcare, the environment, infrastructure, economy, public administration, global position and human capital by 2035.[1137] This will demonstrate that Kuwait is committed to CSR in the future on a socio-economic and environmental level.[1138] The new Kuwaiti law could ensure the participation of companies in the country's sustainability initiative by enforcing a provision that requires companies to contribute to CSR practice to some extent, whether it be through charity or a means to support the environment. Therefore, unlike India and the UK where CSR reporting in areas such as socio-economics and the environment are voluntary, new Kuwaiti company law should make CSR reporting mandatory as this would show that Kuwaiti companies are committed to CSR and making the corporate environment more socially

[1133] Ibid.
[1134] Williamson and Lynch-Wood (n 742),131-132.
[1135] A. Sahay. "Environmental reporting by Indian corporations." Corporate Social Responsibility and Environmental Management 11.1 (2004), 12-22.
[1136] The Economist, 'Government releases New Kuwait 2035 strategic plan' (2017): Available: http://country.eiu.com/article.aspx?articleid=1675084151: Accessed 18th June 2019.
[1137] New Kuwait Summit 2019. The Kuwait National Development Plan. (2019). Available: http://newkuwaitsummit.com/new-kuwait. Accessed: 30th August 2019.
[1138] World Trade Organisation, *Trade Policy Review Report by the State of Kuwait* (2012): Available: https://www.wto.org/english/tratop_e/tpr_e/tp358_e.htm: Accessed: 18th June 2019.

responsible. Therefore, the new law can state that CSR reporting is required to promote social responsibility, social cohesion, economic stability, a safer environment and better infrastructure.

Although India[1139] and the UK[1140] provide for CSR reporting under law, since Kuwait has no such provisions for reporting, companies in the country are largely free to report on anything they desire. Therefore, there is a need for CSR provisions to be explicitly stated in the Kuwaiti Companies Law 2016 with respect to reporting. It has been established that CSR related issues have been stated in existing Kuwaiti companies law but have not been so categorised. For example, Article 224 of the Kuwaiti Companies Law 2016 states that a company is obliged to give a share of their profits towards meeting the company's obligations under the labour and social security laws.[1141] This could be down to the fact that CSR is a new paradigm in Kuwait. Although Article 224 mentions a socially responsible deed of a company, it is not categorised as a CSR provision, and thus future amendments of the law should explicitly state this. Here, social reporting in UK, Indian and Kuwaiti companies is promoting socially responsible acts, but through different methods. On the one hand, India and the UK through the literal lens of CSR (e.g., sections 132[1142] and 135[1143] of the Indian Companies Act 2013 and section 407[1144] of the UK Companies Act 2006) since these provisions are recognised and categorised as CSR related issues. On the other hand, Kuwait operates through the metaphorical lens of CSR (e.g., section 224),[1145] since the provisions are associated with CSR related issues but are not recognised and categorised as such. Therefore,

[1139] Gouda, Khan, and Hiremath (n 613): 141-161.
[1140] Williamson and Lynch-Wood. (n 742), 128.
[1141] Kuwaiti Companies Law 2016, A.224.
[1142] Indian Companies Act 2013, S.132.
[1143] Indian Companies Act 2013, S.135.
[1144] UK Companies Act 2006, S.407.
[1145] Kuwaiti Companies Law 2016, A.224.

despite India and the UK clearly stipulating CSR reporting under their respective company laws, CSR reporting under Kuwaiti company law is provided, but is not treated as CSR related issues owing to the recent emergence of this paradigm in the country.

A middle ground here could be that Kuwait adopts the literal lens of CSR reporting as found under both self-regulatory and prescriptive provisions of the UK and India respectively, to ensure that Kuwaiti companies are committed to the CSR effort. Future amendments of the law could explicitly state that reporting on the financial, social, economic and environmental issues associated with the company is obligatory for the sake of promoting CSR and socially responsible behaviour. Such amendments could therefore increase companies' adherence to the cultural and social norms of the country as reflected in the institutional theory and constructivism.[1146] It is recommended that the legal vision of CSR in Kuwaiti company law should align with the company's vision and values, as well as be embedded in the organisational culture, core activities and the corporate style. This is because new company law should seek the best way to develop CSR programmes that reflect business values while addressing social, humanitarian and environmental issues. In addition, there should be a separate body or department responsible for the development and implementation of a CSR strategy for reporting on environmental, social and economic issues. Special attention should therefore be paid to environmental, social and economic issues by the law through installing a committee that ensures environmental, social and economic protection for the country. Now that a middle ground has been

[1146] MacCormick and Weinberger (n 825), 207-208.

established, it is important to establish a legal vision for Kuwait, which is discussed in chapter 7 (see section 7.3).

6.6 Conclusion

This chapter aimed to define and apply a middle ground for Kuwaiti company law to incorporate CSR provisions based on discussing the legal and organisational contexts of Kuwait, the UK and India. The middle ground in this chapter was defined as a process that brings together and compares both legal and organisational contexts of the UK and India through a CSR lens to define new legal provisions for CSR in Kuwait. A middle ground for CSR in Kuwait has been applied to areas such as socio-economic considerations, corporate structures, directors' duties and corporate constituencies and reporting with support from contextualism, legal transplant and institutional theories. The middle ground for each area is summarised below.

In terms of CSR provisions for socioeconomic considerations, it was established that Kuwait should lean more towards the Indian view of CSR since Indian companies follow a philanthropic model of mandatorily donating a certain percentage of profit to charity, therefore satisfying both the wider community and the economy through financial contributions to improve peoples' quality of life. The new legal vision for Kuwait aims to encourage companies to give to charity, but they have the freedom to choose where their contributions will go. Although it would be mandatory for Kuwaiti companies to donate some of their profits to charity, they would be given the freedom to choose how much they are willing to give and where it will be distributed. This was inspired by the highly charitable nature of Kuwaiti companies owing to cultural and religious influences, and the idea of giving to the needy is reflected in the Surah al baqarah

(2:215).[1147] Therefore, this provision will maintain cultural and religious influences of charity, whilst giving companies the freedom of how and where their contributions will be distributed.

In terms of corporate structures, the middle ground is to ensure that information disclosure is mandatory at each corporate level, whether that be directors or managers among others. This will enable Kuwaiti companies to disclose potential information regarding their CSR activities, namely their socio-economic contributions to maintain their reputation and remain competitive by attracting new customers. This idea is inspired by CSR being an innovative initiative where Kuwaiti companies are starting to be recognised as a socially responsible entity. Therefore, the new law could incorporate a clause, which states that information disclosure on CSR related issues should be obligatory in order to promote CSR in Kuwaiti companies on the world stage.

In terms of directors' duties, it was established that Kuwait has no such law that expects directors to commit to CSR. The Indian model has been proposed as a middle ground owing to its law being highly influenced by CSR (e.g., philanthropy). This is unlike the UK, where CSR exists, but it is not taken too seriously owing to the country's voluntary stance on social responsibility. Therefore, the middle ground is to adopt both the UK and Indian approach to shareholder protection. The amended law could incorporate provisions for the protection of shareholders' rights in which directors have the final say on CSR issues, unless they are deemed unfit to make any such decisions.

Finally, in terms of CSR reporting, a middle ground is for Kuwait to adopt both self-regulatory and prescriptive provisions of the UK and India

[1147] Qur'an: Surah al baqarah (2:215).

respectively so they are committed to the CSR effort. Reporting on the financial, social, economic and environmental issues of Kuwaiti companies under the newly proposed law could be made obligatory to encourage CSR and socially responsible behaviour and increase companies' adherence to the country's cultural and social norms.

Even though a middle ground has been established in this chapter, there are some limitations. For example, Kuwait is a strict country when it comes to culture and religion, which influences some of the country's laws e.g., Sharia. This strict nature may impede some of the proposed provisions in this chapter. For instance, CSR provisions that aim to improve the state of segregation and gender divide in the workplace could be thwarted by the strictness of the Islamic religion, which upholds the idea of gender segregation. Therefore, unless the country changes its stance on the gender divide, the proposed CSR provisions that relate to the religious and cultural norms in Kuwait may not make it into a future law.

Kuwait could adopt the models applied to both the UK and India but could geared more towards the Indian model given that the Indian model might inspire Kuwaiti corporate law and share similar principles as outlined in this chapter. The middle ground here is more for Kuwait to adopt the Indian model as it appears to be more robust and flexible compared to the UK model and the Indian and Kuwait models share similar views on philanthropy, which is the idea of giving, that is in this context, donations towards the development of companies and industry. Therefore, the final chapter will reflect on the entire research process, as well as provide more details about the middle ground to be adopted for Kuwait, and proposing the legal vision for CSR for future Kuwaiti company law.

Chapter Seven: Conclusion

7.1 Reflection

This thesis has argued in favour of a middle ground for the Kuwait Companies Law 2016 to incorporate appropriate CSR provisions that have been identified following an analysis of the legal and organisational contexts of Kuwait, the UK and India. The middle ground has been defined in Chapter 6 (see section 6.3) above as a process that brings together and compares both legal and organisational contexts of the UK and India through a CSR lens to provide new legal provisions for CSR in Kuwait.

The development of the legal vision for Kuwait is inspired by the chosen CSR definition for this thesis by Aguinis: "context-specific organisational actions and policies that take into account stakeholders' expectations and the triple bottom line of economic, social, and environmental performance."[1148] This definition is chosen owing to several reasons. The definition is explicit as it specifically considers the actions and policies pertaining to CSR and additionally considers not only social issues, but also economic and environmental issues as well. Other definitions were rejected owing to the lack depth and contextualism.

Narrating that CSR is a contextual approach clarifies a number of issues. For instance, that CSR may vary from case to case. For example, in one case, opening a school may be considered a socially responsible deed, but in another context, opening a school could serve a means to merely generate profit. Despite this, there is a need establish a definition of CSR. Therefore, Aguinis' definition ought to serve as a guideline which specifies

[1148] Aguinis (n 192), 855.

what CSR can or cannot be. Without a definition, it would be difficult for organisations to run clear CSR campaigns and be even more difficult for society to appreciate an organisation's efforts, such as investing in charities, as well as investing in infrastructure improvements of roads, schools and smoke-free environments etc.

As well as defining and theorising CSR, this thesis also offers some valuable insights into comparative corporate law and post-colonial legal systems in order to understand the origins of CSR. Some of the key messages emanating from the analysis are summarised as follows. While "common law" systems tend to rely on judge-made law in the development of their jurisprudence, in the corporate sphere India has largely relied on a codification process rather than through judge-made law (which is almost non-existent in this subject area). Consequently, greater reliance is placed on public enforcement of corporate law rather than private enforcement. As a result, India begins to resemble the typical civil law jurisdiction through the hybrid legal framework the country adopts.[1149] For example, nothing explains why India has not gone as far as civil law jurisdictions in insisting on codetermination whereby workers obtain a seat on the board of directors and hence participation in the management of the company. India's position as a member of the "common law" family is different from others, particularly the UK and Kuwait. This is because of historical, economic and political reasons that have determined its destiny in a manner that is different from that of its coloniser, e.g., employment, population, economic status and education that shape the law systems of the UK, India and Kuwait. Therefore, the differing historical, economic and

[1149] A Bhan and M Rohatgi, 'Legal systems in India: overview' (2018): Available: https://uk.practicallaw.thomsonreuters.com/w-017-5278?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1: Accessed: 6th April 2019.

political backgrounds of Kuwait, the UK and India shape the way they perform CSR or their socially responsible activities.

India's initial corporate law during the colonial period was a direct transplantation of English law on an ongoing basis and the UK model inspires part of Kuwaiti law. Such a legal transplant did not take into account local conditions. For instance, the corporate law was focused on enabling British businesses to trade with India, and failed to heed to the indigenous business.[1150] More importantly, the transplanted Indian legislation was incapable of addressing local issues in the post-colonial era due to which ongoing reliance on English law for legislative reform in India ended. All future corporate law reform processes looked inward for solutions to problems and did not look at all to the origin country for guidance. This suggests that transplants that do not take cognisance of local circumstances may be present formally but may not possess much functional effect.

Furthermore, a comparison of the historical colonial experience in the functioning of the transplanted legal system and the more contemporary experience in the post-colonial period suggests fragility in the transplanted law in India. It is also an indication that formal transplants may be inevitable during the colonial era, but following decolonisation, such transplants could be called into question since India was now free to make their independent decisions and pass their own company laws, which prompted the enactment of the Indian Companies Act.[1151] India's post-colonial economic history also appears to have a significant role to play in the evolution of corporate law. A laissez faire policy that aimed to benefit British businesses operating in India at independence gave way to socialist

[1150] Harris (n 502), 1602-2002.
[1151] Wells (n 503), 395.

propensities for nearly three decades followed by a process of gradual liberalisation of the economy.[1152] In terms of CSR, India's decolonisation from the UK enabled them to pursue their own socially responsible activities, since prior to decolonisation, India was required to abide by UK company law. This can be evidenced through the later enactment of India's Companies Act during the late 1940s and throughout the 1950s.[1153]Therefore, decolonisation seems to play a major role in shaping India's modern company law and their CSR provisions.

The above discussions helped to envision the proposed middle ground approach for CSR in Kuwait in areas such as socio-economics issue, corporate structures, directors' duties and corporate constituencies and reporting. As a result, this helped to form the legal vision for Kuwait, which is presented in section 7.3. Moreover, the thesis has been able to achieve several objectives that have been formulated in order to address the research problem as shown in the next section, which provides a summary of the objectives and the chapters of the thesis.

7.2 Research Objectives and Chapter Summary

In terms of the research questions, there were two central research questions, which reflect the regulatory approach to be applied to Kuwait and whether such regulations consider the best interests of stakeholders.

The first research question, "is either mandatory compliance or voluntary ''comply or explain'' enforcement a more effective regulatory approach to CSR?" is investigated through these objectives: (i) "To critically evaluate the nature, scope and impact of CSR principles in the UK, Indian and Kuwaiti company law" and (ii) "To assess the regulatory model that best

[1152] Ibid.
[1153] Ibid.

aligns with CSR principles by comparing different regulation theories." This is because the thesis has first explored CSR and regulation theories in order to understand which regulatory approach applies to UK, Indian and Kuwaiti company laws. This has helped to develop an evaluation of the Kuwait Companies Law 2016 and comparative analysis of the company laws of India and the UK to determine the direction that Kuwait should take. It has been established that Kuwait could adopt both UK and Indian models (mandatory and voluntary, respectively), but would largely favour the Indian model since it might inspire Kuwaiti corporate law and both share similar principles such as corporate philanthropy, and thus leans more towards mandatory compliance enforcement.

As for the second research question, "can regulation create a hierarchy to enable prioritisation of stakeholder interests?" this is investigated with three objectives in mind, including the third and fourth objectives, which is to "To establish a suitable middle ground to address the regulatory deficiencies of CSR in the Kuwait Companies Law 2016" and "To propose a legal vision for mandatory CSR compliance in the Kuwait Companies Law 2016." This is because stakeholders are the backbone of companies and whatever regulations or policies are enforced upon an organisation will have a direct impact on their role and affiliation with that organisation.

The first objective is to "To critically evaluate the nature, scope and impact of CSR principles in the UK, Indian and Kuwait company law." This objective sets out to determine how far CSR principles affect companies. This is achieved by investigating CSR principles and concepts and regulatory theories (chapters 2 and 3). This involved discussions of companies as a business form, company interests and stakeholder models, meaning of CSR and CSR theories and stakeholder theory among others, as well as regulatory theories, such as nudge theory, reflexive law,

responsive regulation, better regulation approach and the comply or explain approach, in addition to using theoretical frameworks for analysis such as the institutional theory and constructivism. Therefore, chapters 2 and 3 helped to set the theoretical foundation of CSR through a legal lens, which has been used for analysis in the later chapters, such as chapters 4 and 5, regarding CSR provisions in the UK, Indian and Kuwaiti company laws.

Although chapter 2 discovered a plethora of general literature on company and regulatory theories through a CSR lens, studies that compared the legal systems of two contrasting cases (UK and India) were scarce. This sparked a need to debate the regulation of CSR, namely the application of company and regulatory theories in CSR, thus calling for a robust approach for enforcing corporate obligations. In addition, chapter three found that the main regulatory theories that built the foundation for analysis of how CSR objectives may be effectively achieved suggest the need for voluntary rather than mandatory compliance for corporate obligations and responsibilities that require the development of a legislative framework. It is demonstrated that "one standard code of conduct" approach to CSR regulation is unsatisfactory, and thus this justifies the need to look at both Indian and UK legal contexts that would help to determine CSR-related legislative provisions that are missing in Kuwaiti company law.

Chapters 4 and 5 have helped to address the second objective, which is to "To assess the regulatory model that best aligns with CSR principles by comparing different regulation theories." This objective is addressed by reflecting on the regulatory theories defined in chapter three, as well as assessing the Indian, UK and Kuwaiti company laws in chapters 4 and 5. It is established that the UK follows more of a self-regulatory model, whereas India follows more of a prescriptive regulatory model (comply or explain).

In order to establish the regulatory model for Kuwait, a middle-ground approach between the UK and Indian regulatory models of CSR has to be defined.

Chapter 4 found that the Indian Companies Act had eventually moved away from its colonial origins and contemporary English law. However, English law has strong ties with shareholder value, while India moved away from this model to consider the larger interests of all stakeholders. India also appears to provide the more socially responsible company law of the two countries, since the Indian Companies Act 2013 obliges companies to dedicate 2% of their annual earnings towards socially responsible efforts,[1154] whilst the UK Companies Act 2006 contains no such obligation and is voluntary as opposed to mandatory. UK companies have been found to be less participative and have a greater freedom to engage in CSR activities, whereas this is a strict obligation for Indian companies. Chapter 4 therefore demonstrated that companies' CSR efforts gear more towards donating profits for charitable causes, particularly as evidenced in Section 135(1) of the India Companies Act 2013.

Chapter 5 presented a comparative analysis of corporate law in Kuwait to India and the UK across two planes. It compared the law as it evolved, as well as comparing the evolution of corporate law in Kuwait in relation to India and the UK to determine the direction that Kuwait should take. Finally, it placed company law in the context of historical, social, environmental, economic and political factors that were at play in determining the legal regime of Kuwait. Despite the leniency of Kuwaiti legal requirements of CSR information compared to the UK and Indian legislation, Kuwaiti companies could develop and implement a voluntary

[1154] India Companies Act 2013 S.135.

information disclosure provision, similar to the UK and India. Therefore, both the UK and Indian models could potentially be applied to Kuwait, though the Indian model would be more suited given that the model shares similar principles and motivations such as corporate philanthropy.

The middle ground approach is established in chapter 6 (see sections 6.3, 6.4 and 6.5), where it was discovered that Kuwait leans more towards a prescriptive model, owing to the philanthropic nature of both Kuwaiti and Indian legal systems. This helped to address objectives three and four, which aims to "establish a suitable middle ground to address the regulatory deficiencies of CSR in the Kuwait Companies Law 2016" and "propose a legal vision for mandatory CSR compliance in the Kuwait Companies Law 2016." This has helped to recommend how reforms to include CSR principles could be incorporated in future amendments to the Kuwait Companies Law. Therefore, the next section demonstrates a legal vision for CSR in Kuwait in order to determine stakeholder importance and recommend provisions that can be incorporated in future amendments of the Kuwaiti Companies Law 2016.

7.3 Providing a CSR Legal Vision for Kuwait

The legal vision for Kuwait is realised through three main areas of importance: emphasising need for a legal vision for CSR in the context of Kuwaiti company law, defining the actual legal vision for CSR in Kuwaiti company law and the CSR vision in theory and practice. The purpose of this section is to justify a need for a legal vision for Kuwaiti company law and to then emphasise what the actual proposed legal vision will be.

7.3.1 Need for a Legal Vision for CSR in Kuwait

The aim of this thesis is to determine whether legislation mandating CSR principles compliance is likely to be more effective than regulatory

encouragement and voluntary company compliance, as captured by the phrase ''comply or explain." This is due to the difficulty of the problem surrounding a middle ground between voluntary and mandatory compliance in company law. Therefore, the scope of this thesis is to compare both voluntary and mandatory regulatory models in company laws and their respective CSR provisions. This is achieved through identifying and comparing the UK and Indian company laws through a CSR lens. This would help to determine the current laws that are likely to promote CSR principles in a context that lack such provisions in their company law e.g. Kuwait. Therefore, the scope of the study directly relates to regulatory theories and the way they can overcome the barriers and ease the conflict between profit and the fulfilment of CSR obligations.

Kuwait has been used as a study to identify an effective regulatory model for the country based on the CSR provisions analysed in both the UK and India, owing to the lack of CSR provisions in the legal framework of Kuwait. Ultimately, this helped to provide a middle ground as to which CSR regulatory model should be adopted for the Kuwait Companies Law 2016. Reforms to the Kuwait Companies Law 2016 could be treated in a similar manner as the Indian company law reform in 2013, where the amended law incorporated CSR as a means to ensure that companies address stakeholder interests and financially contribute to the well-being of society through charitable donations.[1155] This is based on the lack of evidence to suggest that CSR was even discussed during the 2016 reforms of the Kuwaiti company law. It is therefore important to determine how far the

[1155] U. Varottil, 'Initial Experience in Implementing CSR Law in India' (2018): Available: https://www.law.ox.ac.uk/business-law-blog/blog/2018/07/initial-experience-implementing-csr-law-india: Accessed 24th July 2019.

thesis has addressed the current problem and achieved the research objectives to ultimately answer the research questions.

CSR has been found to be a relatively new concept and conceptually immature, particularly through a legal lens. The existing literature shows a potential conflict between profit and CSR, as confirmed by Osuji,[1156] de Graaf and Mehrtens[1157] and Matten and Moon[1158] who mention a lack of definitions of CSR, thus resulting in the inadequate regulation of CSR owing to the difficulty of assessing whether companies are fulfilling their CSR roles. Despite the lack of consensus on whether CSR obligations should be applied to company law, Gunness[1159] argued that even if such a consensus exists, it would not be possible to impose CSR upon companies as an obligation to address social issues unilaterally. Gunness concluded that companies should not be held accountable for social issues because this enforces unrealistic and unfair obligations upon the corporate structure, which is not designed to address such concepts. For the above reasons, this called for the need to explore CSR concepts that encourage the identification of specific core CSR categories such as ethical, legal, economic and environmental responsibilities and obligations that measure how well companies are doing under different legal conditions and contexts to actually fulfil their CSR obligations. This inspired the realisation of the need to explore and compare the UK and Indian company laws that already contain CSR provisions, in order to recommend CSR provisions for Kuwaiti company law, which lacks such provisions.

In order to address the research problem, the current study used Kuwait as a case study to determine the ideal regulatory model for the country,

[1156] Osuji (n 5), 4-5.
[1157] De Graaf & Mehrtens (n 27), 1.
[1158] Matten & J Moon (n 37), 409.
[1159] Gunness (n 38), 12.

whether CSR adherence is more likely to be voluntary (self-regulation) as demonstrated in the UK Companies Act 2006, or mandatory (prescriptive) as demonstrated in the India Companies Act 2013. This is based on the idea that Kuwait has no CSR related provisions in its existing regulatory model. Although no CSR provisions exist in Kuwaiti company law, the country had shown some promise to implement CSR in its company law by having applied a combination of self-regulatory and prescriptive regulatory approaches that are similar to the respective provisions of the UK and Indian company laws. This includes the social, economic and environmental issues they raise, e.g., giving money to charity and supporting the development of family businesses. This stipulation in company law, particularly in India, has ultimately helped to determine a middle ground to be adopted for CSR in Kuwait.

7.3.2 Legal Vision for CSR in Kuwait

A lesson from section 7.2 of this thesis is that an effective CSR practice ensures long-term investments by each company, proper protection of shareholders, and defines the duties and responsibilities of the board of directors, as well as ensuring that companies effectively report on maintaining socio-economic prosperity. Thus, the establishment of an effective CSR system in any country should be based on at least some aspects of company law, such as social, legal, financial, political and cultural aspects. In other words, although the convergence of CSR systems is not applicable to all countries, the establishment of a CSR system should be consistent with the country's business, legal and political culture. CSR in Kuwait, as indicated in this thesis, is loosely linked to the laws, provisions or regulations that should protect stakeholders' rights, as well as promote socially responsible practices.

Kuwait is yet to adopt a CSR code in its company law. However, the Kuwaiti parliament is making some efforts to incorporate CSR with the introduction of the 2035 Strategic Plan.[1160] This strategic plan involves the Kuwaiti government investing billions of dollars on projects that aim to achieve a "New Kuwait". It is a seven-pillar programme that sets out to secure the country's future through economic sustainability.[1161] In this regard, Kuwait should adopt a CSR code to take into account changes in the regulatory framework implemented by neighbouring states. Kuwait should finalise the legal and financial regulations following the adoption of the capital market law and establish its own integrated CSR code to ensure company management discipline and adequate shareholder protection in the country. Accordingly, this thesis recommends elements that, in general, should contribute to the proper application of CSR in Kuwaiti company law and, in particular, highlights the provisions that should be included in the CSR code. In addition, recommendations are made to amend certain provisions of the Companies Law 2016 or to include them in a new law, as the existing law of 2016 lacks CSR provisions.

As shown in this thesis, there are several proposals for the application of CSR principles that could contribute to a legal framework for Kuwaiti companies and prevent political interference in the affairs of companies. The rationale for this is the lack of a legal framework for CSR activities of Kuwaiti companies, which has led to confusion. For instance, directors' duties are not clearly defined in Kuwaiti company law, since there is no provision that expects directors to commit to CSR. Directors' or managers' duties are unclear, since they are governed by Article 44 of the Kuwaiti Companies Law 2016, which states that a company can be managed by a

[1160] The Economist, 'Government releases New Kuwait 2035 strategic plan' (2017): Available: http://country.eiu.com/article.aspx?articleid=1675084151: Accessed 18th June 2019.
[1161] Ibid.

single partner or multiple partners, as well as determine how managers are appointed and dismissed.[1162] As a result, directors in Kuwait are potentially unaware of the specific rules that apply to them, as well as the overlapping rules in the Kuwaiti Companies Law 2016 (e.g. Article 21[1163]) which could hold directors accountable for malpractice. This could further lead to the appointment of managers, whose decisions are not based on the best interests of the company, thereby leading to a lack of socially responsible practices.

Accordingly, it is recommended that the Kuwaiti legislature introduce a special law for Kuwaiti companies that, among other issues, will offer clear definitions of directors' duties and responsibilities. This special law should incorporate provisions that prohibit political interference, as this could reduce political bias in the appointment of directors, which in turn will minimise any socially irresponsible activities that they may engage in. The appointment of the company management should be carried out via a special committee that has clear requirements for qualifications. Consequently, any new law that would reshape the corporate structure must not rule out the parliamentary supervision of companies, and thus the special law for Kuwaiti companies should incorporate provisions that ensure appropriate parliamentary supervision via a special committee, e.g., approving a company's annual budgets and examining any potential fraudulent acts which may occur within the company. This provides a good opportunity to integrate CSR into Kuwaiti company law as it would help to uncover any persons who are committing malpractice and hold them to account as well as preventing future offences.

[1162] Kuwaiti Companies Law 2016 A.44.
[1163] Kuwait Companies Law 2016 A.21.

In chapters 5 and 6, it is found that Kuwaiti companies follow a mandatory approach to CSR, similar to India's company law, through corporate philanthropy, in which companies, through the kind gesture of giving, provide financial support to charities for the sake of social well-being. However, it is further discovered that there are no CSR provisions in Kuwaiti company law that promote corporate philanthropy. Simultaneously, CSR issues are included but not in a way that support the efficient application of CSR, while enhancing shareholder protection. Consequently, a recommendation concerning Kuwaiti company law could include the amendment and incorporation of aspects that promote the application of CSR activity in Kuwait. In other words, the recommendations could include solutions or newly proposed CSR provisions that the legislature could use to reform existing company law in Kuwait or enact a new law to achieve stakeholder protection when investing in Kuwaiti companies.

As part of the law reform, Kuwait should follow the UK approach to directors' duty of care because section 174 of the UK Companies Act 2006 states that only directors with the knowledge and experience should exercise reasonable care, skill and diligence.[1164] Therefore, it is recommended that Kuwaiti companies should incorporate provisions that aim to define directors' duties, similar to the provisions in the UK Companies Act. However, this solution is not without ambiguity, since without a clear definition of directors' duties, Kuwaiti company directors will still be immune from liability for engaging in neglectful and socially irresponsible actions that impede shareholder rights. Although shareholders have some freedom to invest in businesses as argued in chapters 5 and 6, directors' malpractice can still impede these freedoms, e.g. preventing shareholders investing in companies. In addition, there are

[1164] UK Companies Act 2006, S.174.

no CSR provisions for the directors' duty of loyalty in Kuwaiti company law to prevent directors from causing harm to companies, disclosing company secrets and exploiting sectors, such as commerce, education and financial services, among others, for their own personal gain. The directors' duty of loyalty will therefore remove any conflict of interest with the company which they direct. As a result, the clear definition given in section 174 of the UK Companies Act 2006[1165] could be used to inspire Kuwaiti company law to offer directors and shareholders a solid legal basis on deciding whether a director has breached their duty of care and duty of loyalty to their company and shareholders. At the same time, a clear definition would encourage directors to properly manage their company and ensure they are held responsible for violations on their behalf. Through a CSR lens, such a definition could help to minimise the malpractices of directors, such as gross negligence towards shareholders.

A number of important recommendations have been made above that should enhance shareholder rights. Such shareholder rights are particularly important in Kuwait, where the company's ownership is concentrated and the majority shareholder is the manager of most Kuwaiti companies. To some extent, such recommendations can be effective, but in order for them to be of significant benefit, shareholders themselves must actively exercise their rights in a face-to-face interaction (e.g. a general meeting) with the principal shareholder, who is usually the company's manager. Shareholders can exercise their right to actively participate, especially in general meetings of companies. For example, Article 177[1166] and Article 178(2)[1167] of the Kuwaiti Companies Law 2016 states that shareholders have the right to attend general meetings as members of the board of directors

[1165] UK Companies Act 2006, S.174.
[1166] Kuwaiti Companies Law 2016 A.177.
[1167] Kuwaiti Companies Law 2016 A.178(2).

to engage in company discussions. In terms of CSR, this reflects shareholder ethics and social well-being as the company is being courteous towards the rights of shareholders and enabling them to have their voice heard within the company. These rights also go beyond the right to be heard within the company to include shareholder protection.

Another important proposal is the creation of a shareholders' association to ensure the protection of shareholders and the proper exercise of their rights. Such an association would also help to raise awareness among shareholders of both their rights and the appropriate ways to exercise them. From a CSR point of view, a shareholders' association could potentially raise shareholders' awareness of CSR, especially in Kuwait, where shareholders continue to exercise their rights and participate in the annual general meetings. Accordingly, the establishment of a shareholders' association can result in increased awareness of CSR among shareholders, which in turn will contribute to the achievement of the goals of adequate protection of shareholders and the sustainable development of businesses. The establishment of a shareholders' association could contribute to the rational application of CSR principles in Kuwait. The concept of a shareholders' association is available in some countries around the world. For example, in the UK. Integrating the vision of the UK shareholders´ association, which is to support shareholder investments and improve the fair treatment of private investors[1168] would protect shareholders from other constituents, such as managers and directors. In terms of promoting CSR, a shareholders´ association is recommended for Kuwait to raise shareholders' awareness of the benefits of CSR in order to protect their rights from abuse by the company's management and to

[1168] UKSA, 'UK Shareholders' Association' (2019): Available: https://www.uksa.org.uk/: Accessed 25th July 2019.

increase the activity of shareholders at general meetings of shareholders. Therefore, new Kuwaiti company laws could amend the existing memorandum of association when setting up a company to include a mandatory stipulation that the owners are obligated to encourage the formation of a shareholder association by giving them more power to have their interests and concerns of the company equally heard during the general meetings.

To ensure the success of CSR in Kuwait, it is recommended that market participants, i.e., the company's board of directors, company shareholders and stakeholders, primarily understand the importance of best international CSR practices. This can be achieved by integrating new provisions in Kuwaiti company law which are inspired by existing CSR provisions in other company laws from other countries, e.g. UK and India, which promote social, economic and environmental prosperity (e.g., encouraging corporate philanthropy as stated in section 135 of the Indian Companies Act 2013[1169] and promoting business ethics through exercising company constituents' rights as stated in section 145 of the UK Companies Act 2006[1170]). This ensures stakeholders' participation in CSR activity and ultimately informs them about the significance of CSR. In addition, the CSR code should contain relevant rules and not borrow them from other Kuwaiti laws and regulations. Thus, the CSR code would facilitate the fulfilment of the mission among the participants of the meeting in accordance with the best CSR practices. The law will encourage the above CSR issues by clearly stating it is the moral obligation to promote viable societal values and that organisational actors must adhere to these social values in order to promote socially responsible behaviour throughout the company.

[1169] Indian Companies Act 2013, S.135.
[1170] UK Companies Act 2006, S.145.

It is recommended that Kuwait can apply lessons from the experience of other countries, such as the UK and India, namely the experience of codifying CSR rules in their company laws, as the codes contain rules that improve the discipline of company management and thus protect shareholders.[1171] The lesson learned from these experiences is to take the most successful aspects of CSR that require companies to be morally obligated to promote viable societal values, e.g., corporate philanthropy as demonstrated in section 135 of the Indian Companies Act 2013.

The legal vision for Kuwait in this thesis includes suggestions that some aspects of the law be amended or, if they do not exist, incorporated into the legal infrastructure for CSR in Kuwaiti company law. While it acknowledges the current level of CSR provisions in the company law of Kuwait, this thesis has shown that CSR practice in Kuwait is minimal on some issues and absent on others. Thus, one of the purposes of the thesis is to recommend whether or not to amend or establish new legislation or regulations that should promote the rational application of CSR in companies. It is recommended that the Kuwaiti legislature introduce a special law for companies instead of the current situation in Kuwait where there are no CSR provisions that grant protection to corporate constituents, as well as hold companies responsible for malpractice or require them to engage in more socially responsibility activities. A provision that could be transplanted to the new Kuwaiti company law as a means to protect stakeholders and hold any constituents liable for malpractice, is section 149(12) of the Indian Companies Act 2013. The provision states that any constituent can be held accountable for acting in their own interests before consulting other company constituents.[1172] So

[1172] Indian Companies Act 2013, S149(12).

the establishment of a special law for companies will ensure good governance, as the duties of directors will be clear and political interference in the activities of such enterprises will be significantly reduced. Reduced political interference in the activities of companies will contribute to the effective application of CSR principles in the enterprises.

The company law of Kuwait does not provide for several issues that should be related to the application of an effective CSR approach. In turn, this failure undermines the rights of shareholders. However, shareholders can promote CSR through relations with other organisational actors, e.g., directors or shareholders who are committed to social responsibility within their respected companies.[1173] For example, it is recommended that the company law should include a clear definition of the duties and responsibilities of directors of companies to determine when violations occur and to facilitate control and balance by their shareholders. In addition, disclosure of directors' remuneration and related-party transactions was a major impediment to the application of CSR principles. In addition, it is recommended that the Kuwait company law require the establishment of committees of the board of directors, such as a remuneration committee, an audit committee and a nomination committee, in addition to appointing directors to the board of directors. Establishing committees will help to promote CSR by ensuring that qualified individuals who believe in social responsibility are appointed, thus increasing the likelihood of companies engaging in socially responsible activities. In addition, it is also recommended that the criteria for the appointment of directors be based on specific qualifications. In this regard, a proposal was made by directors to establish an Institute of

[1173] Emma Sjöström, *Shareholder influence on corporate social responsibility* (Economic Research Institute, Stockholm School of Economics (EFI) 2009), 26-27.

Directors, through which directors could develop their skills by participating in seminars or conferences organised by the Institute.[1174] In terms of CSR, these conferences and seminars could act as a way of educating directors about the dangers and consequences of committing malpractice and moving to engaging in socially responsible activity that could contribute towards company development and improving relationships with stakeholders. The new Kuwaiti company law could achieve this by including a provision that obligates directors to undergo mandatory training that teaches them the principles of CSR and good governance in relation to their role in the company.

Accordingly, the recommendations mentioned in this thesis will contribute to the application of CSR principles in Kuwait to protect the rights of stakeholders and their interests, as well as ensuring the sustainable development of each company's business in Kuwait. Referring back to objective (iii), which is to establish a suitable middle-ground to address regulatory deficiencies of CSR in the Kuwait Companies Law 2016, and research question (ii), which is: can regulation create a hierarchy to enable prioritisation of stakeholder interests? it could be reiterated that these two milestones could only achieved by establishing a legal vision for CSR in Kuwait. A legal vision can indeed create a hierarchy to enable prioritisation of stakeholder interests, as well provide solutions to address regulatory deficiencies of CSR in the Kuwait Companies Law 2016. The legal vision will demonstrate the importance of stakeholder interests through recommending a mixture of voluntary and mandatory provisions that not only promote the social well-being of companies, but also considers the protection of shareholders, which is an important stakeholder interest

[1174] Institute of Directors (IoD). About. (2019) Available: https://www.iod.com/about. Accessed: 31st August 2019.

group. Shareholders may wish to have some degree of protection from socially unacceptable activities from the board of directors, such as preventing shareholders from making investments and creating bias towards certain groups of shareholders, which can limit their participation and contributions in the company.

In terms of CSR, integration of CSR in Kuwaiti company law will give shareholders a better opportunity to pursue their interests in a company through investment without interference from other organisational actors such as managers and directors. On that basis, the newly defined regulatory model for Kuwait could indeed create a hierarchy to enable prioritisation of stakeholder interests by integrating the proposed legal vision that promotes the protection of shareholder rights and holds any constituencies, such as board of directors accountable for committing to socially irresponsible activities among other significant policies. Since the legal vision of Kuwait is one of the main contributions of this thesis, the next section summarises its contributions to theory and practice.

7.3.3 CSR Vision in Theory and Practice

This thesis is the first study to consider potential CSR provisions in Kuwait from a legal perspective. The thesis has explored the legal infrastructure in Kuwait and its legal systems for companies to examine the efficiency of the current laws and regulations that should relate to the application of CSR. While Kuwait has not yet adopted a CSR code in its company law, despite existing provisions that hint at the idea of potential CSR provisions, this thesis contributes in bringing the attention of the policymakers in Kuwait to the importance of adopting CSR provisions in the company law to provide proper protection for stakeholders and promote CSR related matters. The thesis also identifies some important steps that should be

taken to facilitate the application of provisions for a sound CSR system in Kuwaiti company law. This would ultimately help to overcome potential loopholes that give unlimited power to directors and managers and restrict stakeholder interests, as well as promote a more socially responsible company environment.

This study has also addressed the importance of CSR in a Middle Eastern context, adopting existing CSR provisions from the company laws of the two contrasting legal systems of the UK and India. Although a middle-ground approach has been proposed for how to implement potential CSR provisions in existing Kuwaiti company law, the thesis is limited to one Middle Eastern context. Various countries in the Gulf area of the Middle East hold different cultural and social values. Therefore, the CSR provisions recommended for Kuwaiti company law might not necessarily work for the Saudi company law, for example, owing to their differing cultural and social values despite the geographical proximity of the countries. This has been demonstrated by the institutional theory.

Therefore, limiting the thesis to a single Middle Eastern context may have been justifiable to the extent of rationalising the lack of CSR provisions in Kuwaiti company law. However, the same goes for other Middle Eastern jurisdictions such as Saudi Arabia that, despite committing to some CSR activities, most notably through its Vision 2030 project, do not have provisions in their company law just like Kuwait. An example is Article 75 of the Saudi Companies Law 2016, which states that a company's board of directors are held accountable for any damages arising from unlawful acts committed by their managers.[1175] In terms of CSR, holding directors accountable for their malpractice gives shareholders more opportunity to

[1175] Saudi Companies Law (2016), A.75.

exercise their interests, e.g., investing in more socially responsible companies that are free from director or managerial biases.

Nonetheless, future studies could take the findings of this thesis and apply them to different Middle Eastern contexts. As previously mentioned, Saudi Arabia is in a similar position to Kuwait in the sense that its company law hints at the possibility of CSR provisions, but these are not clearly defined as such. However, both counties hold different social and cultural values. Therefore, it would be interesting to study the current state of Saudi company law through a CSR lens. Comparing the provisions of both Kuwaiti and Saudi company laws could help to shed some light on the similarities and differences between both legal systems and to determine whether the CSR provisions recommended to both countries could work harmoniously or be in conflict, thus opening to the need for redefining CSR provisions for Saudi company law. Future studies could also compare Kuwaiti company law to other legal systems in western societies, such as Australia or perhaps other Asian countries, such as Malaysia, in order to provide a different nuanced approach to the application of CSR provisions in company law. Now that the legal vision for Kuwait has been established, the final section discusses the final thoughts regarding the vision.

7.4 Final Thoughts

Overall, the thesis has provided a novel perspective of how CSR provisions can be incorporated into a company law that has no such provisions. This thesis has not only proposed a legal vision for Kuwaiti company law but has also provided a comparative analytical account of the CSR regulatory models applied in the UK and Indian company laws. This has inspired the proposal and development of an original legal vision for CSR in Kuwaiti company law. The legal vision proposed in this thesis could significantly

help companies in Kuwait to commit to socially responsible activities as the country already has the capability and potential to commit to this effort, although it needs an appropriate legal framework for CSR. The reasons are threefold.

The first is that Kuwait believes in the concept of philanthropy, which is a socially responsible act of giving money to a charitable cause. The second is the strict culture and religious values Kuwait holds and which can be linked to CSR through the Zakat tax. Zakat tax is a form of philanthropic act by Kuwaiti companies investing in public services for the sake of improving the entire country's infrastructure. The third reason is the idea that CSR can protect stakeholder interests, such as their rights to invest and having the right to participate in company meetings. These reasons suggest a middle ground approach for CSR provisions in Kuwaiti company law through a hybrid regulatory model of both mandatory and voluntary compliance. The middle ground approach is mandatory in the sense that CSR provisions may compel companies to commit to socially responsible activities and voluntarily in the sense that companies have the freedom to determine how they will commit to social goals and undertake socially responsible activities. For example, companies may be obligated to donate some of their profits to a good cause, but where and when this is distributed could be completely within discretion of the company. Therefore, such provisions provide the best of both worlds because while committing to social goals and undertaking socially responsible activities, companies will still have the freedom to plan and manage how these goals and activities will be delivered.

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Appendices

Appendix 1: Kuwaiti Laws & Provisions

Kuwait Constitution:

Article 1 [Sovereignty, Territorial Integrity]

Kuwait is an Arab State, independent and fully sovereign. Neither its sovereignty nor any part of its territory may be relinquished. The people of Kuwait are a part of the Arab Nation.

Article 2 [State Religion]

The religion of the State is Islam, and the Islamic Shari'a shall be a main source of legislation.

Article 8 [Guardian State]

The State safeguards the pillars of Society and ensures security, tranquility, and equal opportunities for citizens.

Article 174 [Amendments of the Constitution]

1. The Amir or one-third of the members of the National Assembly have the right.
2. To propose a revision of the Constitution by amending or deleting one or more of its provisions or by adding new provisions.
3. If the Amir and the majority of the members constituting the National Assembly approve the principle of revision and its subject matter, the Assembly debates the bill article by article. Approval by a two-thirds majority vote of the members constituting the Assembly is required for the bill to be passed. The revision comes into force only after being sanctioned and promulgated by the Amir regardless of the provisions of Articles 65 and 66.
4. If the principle of revision or its subject matter is rejected, it may not be presented again before the lapse of one year from the rejection.
5. No amendment to this Constitution may be proposed before the lapse of five years from its coming into force.

The Civil Code of Kuwait: Decree No. 76/1980

Article 1

1. The legislative texts apply to the issues addressed by these texts in their word or in their sense.
2. If there is no legislative provision, the judge has ruled in accordance with the provisions of Islamic jurisprudence that are more in accordance with the reality and interests of the country, if there is no provision by custom.

Zakat Tax Law No. (46) 2006

Article 1

The Kuwaiti shareholding companies (closed) have to pay 1 % from their annual net profits, this Law allows these companies, when submitting the declarations of the due amount accompanied with their financial statements, to specify the percentage of zakat from the paid sum. Moreover, the company has the right to request the dedication of sum or all the amount of money to be paid to one of the public services.

Each person submits false data or ceases to submit it with the aim of evading the settlement of the percentage stated in the first paragraph of this Article will be punished by imprisonment for not more than 3 years and a fine not exceeding KD 5,000 (Kuwaiti Dinar Five Thousands Only) or either penalty with the judgment of settling the required amount.

Article 2

The Ministry of Finance shall collect the percentage stipulated in the first Article in favour of the public treasury via the way decided under this Law and its executive regulation.

Article 3

The Minister of Finance shall issue the executive regulation of this Law to set out rules and procedures of collection and disbursement of the funds collected within one year as of the issuance date of this Law including the authorized channels of Zakat after getting the approval of Fatwa Supervisory

Board at the Ministry of Awqaf & Islamic Affairs subject to provisions of the first Article herein.

Kuwaiti Companies Law 2016

Article 21

Liability of the Company for the Acts of the Managing Director or Board of Directors

The company shall be liable for acts or the conduct of its managing director or board of directors performed in its name or on its behalf, if such acts or conduct remain within the company's objectives, even if such acts or conduct extend beyond the restricted scope of the managing director or the board of directors' authority determined in the Company Contract and unless the company proves that he who was subjected to such acts or conduct was aware or had the means to become aware of such restrictions at the time of the occurrence of the act or conduct.

The company may not repudiate its responsibility towards a *bona fide* third party for acts or conducts as described in the previous paragraph by claiming that the managing director or the board of directors have been appointed in contravention of the provisions of the law or the Company Contract unless the company proves that he who was subjected to such acts or conduct was aware or was able to be aware of such defect at the time of the occurrence of the act or conduct.

The company's managing director or the board of directors shall apply the care of a prudent person in exercising their powers and competencies.

Article 32

Right of Inspection at the Ministry

Any party with an interest shall have the right to inspect the Company Contract, minutes of the Company's general meetings and other relevant information and documents relating to the company and held at the Ministry. Such parties may obtain original copies in return for fees to be determined by the Ministry.

Article 44

Management of the General Partnership Company

The company shall be managed by one partner or more. The Company Contract shall determine the manner of the manager's appointment, dismissal and the limits of his management authority.

If the company has more than one manager and the Company Contract does not contain any specific provisions, decisions of the management shall be passed by a majority of the managers. In the case of a tie vote, the managers shall refer the matter to the partners for decision. Any approval shall be passed by decision of the majority of the partners.

Article 152

Payment of the Value of Shares

The value of the share shall be paid in full or in instalments. The instalment payable at subscription may not be less than twenty-five per cent of the nominal value of the share.

The remaining amount of the value of the share shall be paid within a maximum period of five years from the date of Registration of the company in the commercial register, and at the dates set by the board of directors.

Article 177

Members of the Shareholding Company

The Incorporators and shareholders shall be considered members in the company and all enjoy equal rights and are subject to the same obligations, subject to the provisions of law.

Article 178

Rights of the Members in the Shareholding Company

A member in the company shall particularly enjoy the following rights:

1. Receiving profits and bonus shares[147] that are resolved to be distributed.

2. Participating in the management of the company through membership in the board of directors and attending the general meetings and taking part in

its discussions, in accordance with the provisions of the law and the Company Contract. Any provision in the Company Contract to the contrary shall be null and void.

3. Receiving, at least seven days prior to the ordinary shareholders' meeting, the company's financial statements of the last accounting period as well as the board of directors report and the auditor's report.

4. Disposing of the shares owned by him and the pre-emption right to subscribe for new shares and bonds or *Sukuk* in accordance with the provisions of this law and the Company Contract.

5. Receiving a share of the company's assets on liquidation following repayment of its debts.

Article 179

Obligations of the Members in the Shareholding Company

A member in the company shall be subject to the following obligations:

1. Payment of the instalments on the shares he holds on the due date and payment of any delay penalties.

2. Payment of the expenses incurred by the company in order to collect any instalments remaining unpaid on the value of the shares. The company may satisfy its claim out of the shares.

3. Enforcing the resolutions made by the general meeting of the company.

4. Refrain from committing any acts that are detrimental to the company's financial or moral interests and compensating any damages resulting from such acts.

5. Following the rules and procedures established in respect of the trading in shares.

Article 180

Resolutions Prohibited to be Issued by the General Meeting

The general meeting of the shareholders may not:

1. Increase the financial burdens of shareholders or increase the nominal value of the shares.
2. Reduce the percentage of net profits to be distributed to shareholders as specified in the Company Contract.
3. Imposing new conditions other than those stated in the Company Contract relating to a shareholder's entitlement to attend and vote in the general meeting.

Resolutions to the contrary may be passed if accepted by all shareholders in writing or by a unanimous vote in which all shareholders take part and following approval of the Authority and satisfaction of the measures required for amendment of the Company Contract.

Article 181

Formation of the Board of Directors and Term of Membership

A board of directors shall manage the company, the formation of which and the number of its members shall be set out in the Company Contract. The members of the board of directors may not be less than five. A term of board membership shall be three years, subject to renewal.

If a new board of directors is not elected at the specified time, the existing board of directors shall continue to manage the operations of the company until the grounds therefore are eliminated and a new board of directors is elected.

Article 186

Corporate Governance Principals

The concerned Supervisory Authorities shall set the principles of corporate governance of the companies that are subject to their respective supervision, in a manner that ensures the best protection and balance between the interests of the management of the company and its shareholders, as well as, other interested parties in relation to it. In addition, the principles shall set out the requirements to be satisfied by the independent members of the board of directors.

Article 187

Independent Members

The Supervisory Authorities may require that companies subject to their supervision shall include in the boards of directors one or more qualified and experienced independent members, to be elected by the ordinary general meeting. Their remuneration shall be determined on the basis of the principals of corporate governance. The number of independent members shall not exceed half the number of members of the board of directors. Independent members of the board of directors are not required to be shareholders in the company.

Article 193

Requirements for Membership in the Board of Directors

Any person nominated for membership in the board of directors shall meet the following requirements:

1. He shall have the legal capacity to act.
2. He shall not be convicted of a criminal offence with the punishment of incarceration, the crime of negligent bankruptcy or fraud, crime against honour or honesty or any crime in violation of the provisions of this law, unless he has been rehabilitated.
3. With the exception of independent members, he shall personally hold or be the representative of someone who holds a number of shares in the company.

If a member of the board of directors fails to satisfy any of the above requirements or any other requirements as may be stipulated in this law or any other laws, he shall lose the capacity to be a member as of the date such requirement falls away.

Article 208

Right to Attend the General Meeting

Each shareholder, regardless of the number of the shares he owns, shall have the right to attend the general meeting, and shall have a number of votes equal to the number of the votes established for that class of shares held in the company. A shareholder shall not vote for himself or for whomever he represents in matters in which he has a personal interest or on a dispute between him and the company. Any provision or resolution to the contrary

shall be null and void. Any shareholder may appoint another person to attend the general meeting on his behalf under a specific power of attorney or delegation to be prepared by the company for this purpose.

Any person who claims a right to shares that is in contradiction to what is set out in the company's shareholders register may apply to the Judge of Urgent Matters to issue an order to deny the disputed shares from voting for a period to be specified by the judge or pending the resolution on the dispute by the competent court in accordance with the procedures prescribed in the Civil and Commercial Procedure Law.

Article 212

Removal of Members and Dissolution of the Board of Directors

The ordinary general meeting of the company may by resolution remove the chairman or any one or more members of the board of directors or dissolve of the board of directors and elect a new board of directors on the basis of a proposal made by shareholders owning at least one quarter of the company's issued share capital.

If a resolution is issued to dissolve the board of directors, and the election of a new board of director fails at the same meeting, the general meeting may choose to either order the current board of directors to continue to manage the company's affairs until the election of the new board or appoint a temporary administrative committee, whose main objective is to invite the general meeting to elect the new board, within one month of its appointment.

Article 220

Claim of Invalidity and Challenge of Resolutions of the Extraordinary General Meeting

Each shareholder may file a claim on the invalidity of any resolution of the board of directors, ordinary general meeting or extraordinary general meeting that is in violation of the law or the Company Contract or if its aimed at harming the interests of the company. In addition, compensation can be requested when filing such claim. The invalidity claim shall be time-barred two months from the date of the resolution of the general meeting or the date on which the shareholder gained knowledge of the resolution of the board of directors.

Resolutions of the ordinary general meeting and extraordinary general meeting that prejudice the rights of minority shareholders, may be challenged before the court. The challenge can be made by shareholders holding at least fifteen per cent of the issued capital of the company and who have not agreed to such resolution. The lawsuit challenging such resolutions shall be time-barred two months from the date of the resolution of the general assembly. The court may uphold, modify or repeal the resolution or postpone the execution of the resolution until an appropriate settlement for the purchase of the shares of the dissenting parties is reached, provided that such shares shall not be purchased from the company's capital.

Article 224

Deductions for Obligations under Labour and Social Security Laws

The ordinary general meeting shall resolve to deduct a percentage of the profits to meet the company's obligations under the labour and social security laws.

The Company Contract may provide for the establishment of a special fund to subsidise the company's workers and employees.

Article 246

Activities of the Holding Company

Subject to the provisions of the preceding article, the Holding Company may carry out all or some of the following activities:

1. Management of its subsidiary companies or participation in the management of other companies in which the Holding Company is a stakeholder and providing the necessary support to these companies.
2. Investing its assets in the trading of shares, bonds and other securities.
3. Owning real estate and movable property necessary to carry out its operations within the limits permitted under the law.
4. Financing or lending to companies in which the Holding Company holds shares or membership interests and guaranteeing their obligations towards third parties. In such case, the share of the Holding Company in the capital of the borrowing company shall be no less than twenty per cent.
5. Owning intellectual property rights, including patents, trademarks, industrial designs, concession rights and other such intangible rights

and exploiting them and licensing them to its subsidiaries or third parties, whether inside or outside Kuwait.

Article 304

Penalty for Breach of Management Obligations

Without prejudice to a more severe penalty provided for in any other law, any of the following shall be punished with imprisonment for a term not exceeding one year and a fine of not less than five thousand Dinars and not exceeding ten thousand Dinars or either of these two penalties:

1. Any member of the board of directors or manager who deliberately or fraudulently commits acts that would prevent one of the partners or shareholders from participation in the general meeting or the partners' meeting.
2. Any member of the board of directors or manager who deliberately and without reasonable excuse, after one month from being officially warned, refrains from holding a general meeting or partners' meeting that is required by law.
3. Anyone who prevents the auditor, a member of the supervisory board, judicial receiver, liquidator or any person entrusted with the task of inspecting the company, from accessing the company's books and documents, and anyone who refrains from providing information, documents and clarifications requested by them.
4. Any member of the board of directors, manager or liquidator who in such capacity exploited with *mala fide* intent the company's assets or shares to gain directly or indirectly a personal benefit for himself or for a third party.

The court in the crimes stipulated in this Article and the preceding article may dismiss the board member or the manager of the company.