CSR, Sustainability, Ethics & Governance
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Mia Mahmudur Rahim

# Legal Regulation of Corporate Social Responsibility

## A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy

Springer

# CSR, Sustainability, Ethics & Governance

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*This book is dedicated to my father, who passed away when I was a teenager but who first inspired my interest in the domain of knowledge.*

# Preface

Even though corporate social responsibility (CSR) has become a widely accepted concept promoted by different business stakeholders, business corporations' internal strategies, known as corporate self-regulation in most of the weak economies, respond poorly to this responsibility. It seems that most of the weak economies' laws relating to corporate regulation and responsibilities do not possess any recurrent bearing insisting on corporate self-regulation to create a socially responsible corporate culture. How the laws and legal regulations relating to CSR could contribute to the inclusion of CSR principles at the core of corporate self-regulation, without being intrusive in normal business practice, is the phenomenon investigated in this book.

This book proposes that a 'meta-regulation' approach to laws relating to corporate regulation and social responsibility would be an effective legal strategy to incorporate CSR principles into corporate self-regulation. It conceptualizes this legal strategy as a fusion of responsive and reflexive modes of regulation, particularly by converging the patterns of private ordering and state control in contemporary corporate law from the perspective of a weak economy. It describes different meta-regulation strategies for laws to link social values to economic incentives and disincentives and to indirectly influence companies to incorporate CSR principles at the core of their self-regulation strategies.

Most of the weak economies' laws relating to companies and their social responsibilities have the scope to contain a meta-regulation approach. This book assesses that scope taking Bangladesh as a case study. It concludes that inclusion of this regulatory approach in weak economies' laws would be suitable to alleviate regulators' limited access to information and expertise, enlist corporate commitment, and enhance the self-regulatory capacity of companies. This is also necessary to overcome the inherent limitations of prescriptive rules to raise CSR in weak economies.

# Acknowledgements

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I am deeply indebted to my wife Bipasha, who had to manage her own doctoral research needs to carefully proofread the draft chapters of this book. I am also indebted to my daughters, Raya and Rida, who have been deprived of time with dad, time they deserved. My mother, brother, sisters, and other members of our extended family were physically located continents apart but remained a constant source of inspiration. I thank all of them for giving my heart and mind a home, a secure foundation from which to think and write.

# Abbreviations

| | |
|---|---|
| BELA | Bangladesh Environmental Lawyers Association |
| BGMEA | Bangladesh Garments Manufacturer and Export Association |
| BILS | Bangladesh Institute of Labour Studies |
| BSCIC | Bangladesh Small and Cottage Industries Corporation |
| CG | Corporate Governance |
| CSR | Corporate Social Responsibility |
| EPB | Export Processing Bureau |
| EPZ | Export Production Zone |
| ESP | Enlightened Shareholder Primacy |
| EU | European Union |
| GDP | Gross Domestic Product |
| ILO | International Labor Organization |
| NG | New Governance |
| NGO | Non-Government Organisation |
| OECD | Organization for Economic Cooperation and Development |
| PAC | Political Action Committee |
| RMG | Ready-Made Garment |
| UNDP | United Nations Development Program |
| UNIDO | United Nations Industrial Development Organization |
| USA | United States of America |
| WBCSD | World Business Council for Sustainable Development |

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# Chapter 1
# Introducing the Book

## 1.1 Introduction

CSR generally refers to social, economic, environmental and stakeholder responsibilities that companies should undertake in their activities.[1] It is a strong component of new business and corporate governance (CG) models for long-term sustainability and for the development of socially responsible corporate culture.[2] It has converged with the new trend of CG and contributed to the shifting of the traditional notion of CG to a vehicle for pursuing corporate management to consider broader public policy goals.

The convergence of CSR and CG is an important issue in the landscape of corporate regulation. The issue has somewhat decreased in significance in the strong economies; however, in the weak economies, it has contributed to significant reform in the legal regulatory environments that guide corporate regulation.[3] This reform is meant to transform corporate self-regulation from stockholder-centred

[1] Peter Utting, 'CSR and Policy Incoherence' in Kate Macdonald and Shelley Marshall (eds) *Fair Trade, Corporate Accountability and Beyond: Experiments in Global Justice* (2010) 170.

[2] Gordon Renouf, 'Fair Consumption? Consumer Action and Labour Standards' in Kate Macdonald and Shelley Marshall (eds) *Fair Trade, Corporate Accountability and Beyond: Experiments in Global Justice* (2010) 191.

[3] In the South Asian Association for Regional Cooperation (SAARC) region, for instance, almost all economies have either newly revised corporate laws or measures to reform their corporate laws. Sri Lanka revised its company law in 2007, Nepal in 1991, Pakistan in 1984, the Maldives in 1996 and Bhutan in 2000. Bangladesh is about to reform the *Companies Act 1994* (Bangladesh) and currently the Indian Lok Sabha is considering the *Companies (Amendment) Bill 2009* (India). Some developing economies such as those of Thailand and Indonesia also have recently revised their company-related legislation. For details, see the *Companies Act 2007* (Sri Lanka), the *Nepal Companies Act 1991* (Nepal), the *Companies Ordinance 1984* (Pakistan), the *Companies Act of Republic of Maldives 1996* (Maldives), the *Thailand's Public Limited Companies Act of 1992* (Thailand), *Companies Act of the Kingdom of Bhutan 2000* (Bhutan), the *Companies Act 1994* (Bangladesh), the *Limited Liability Companies Act 2007* (Indonesia). For a detailed discussion on this point, see Chap. 3 of this book.

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governance to stakeholder-oriented governance, as seen in the strong economies.[4] This phenomenon has set the context of this book.

In the strong economies, institutional investors, regulators, non-government organisations (NGOs) and civil society groups have generally responded by collaborating with the private sector to make corporate self-regulation more enforceable and effective. In these economies, pension funds, consumer coalitions, non-profit organisations and other groups have developed monitoring schemes that incorporate aspects of CG into their CSR guidelines, ratings and best practices.[5] However, in most of the weak economies, the ethos of CSR has not been suitably incorporated into CG. Hence, in weak economies corporate self-regulation does not contribute greatly to social development. Generally, in labour-intensive weak economies where the presence of CSR-driven social coalition is sparse, NGOs and media do not reflect corporate conscience and regulatory strategies do not possess the required features to ensure corporate societies' long-term commitment to stakeholder accountability, corporate self-regulation does not seem to contain the core principles of CSR.

In these circumstances, some developing economies are attempting to incorporate CSR principles into the core of their corporate regulations and are adopting different regulatory strategies to this end. They are reforming their main corporate laws and regulations to assist corporate management to relate CSR principles to their self-regulation. For instance, economies like Indonesia and Ghana have reportedly incorporated CSR issues in their company and labour laws.[6] Vietnam has taken different regulatory initiatives to boost the social responsibility of its

[4] For instance, the *Occupational Pension Law 1999* (Belgium) requires pension fund managers to disclose the criteria on which they have based their CSR performance, the *Trustee Act 2000* (UK) c. 29 provides directions to the trustees to develop social performance, the *Environmental Management Act 1997* (Netherlands) requires environment reporting. For a thorough discussion on the legal regulation of CSR in strong economies, see Chap. 3 of this book.

[5] For example, the California Public Employees' Retirement System, one of the largest institutional investors in the United States, has used its proxy power to implement its Core Principles of Accountable Corporate Governance. It is the largest public pension fund in the USA with assets totalling more than US $250 billion. For details see the Global Principles of Accountable Corporate Governance, available at http://www.calpers-governance.org/docs-sof/principles/2010-5-2-global-principles-of-accountable-corp-gov.pdf at 14 November 2011.

[6] For instance, Article 74 of the *Limited Liabilities Companies Act 2007* (Indonesia) denotes how companies should incorporate CSR principles in their internal regulation. Likewise, the Bursa Malaysia Corporate Social Responsibility Framework provides a set of guidelines for companies to develop their social responsibility-oriented strategies. The *Extractive industries Transparency Initiative Act 2007* (Nigeria) is vital legislation in Nigeria; with this legislation, Nigeria attempts to ensure transparency by the extractive companies working in it. In Ghana, the *Ghana Extractive Industries Transparency Initiative* performs the same function. In 2006, this country launched the *Ghana Business Code* (Ghana), a joint effort of the association of Ghana industries, the Ghana Employers association and the Ghana National Chamber of Commerce and industry. The aim of this effort is to introduce and strengthen the practice of CSR in Ghanaian companies. For details, see Kwesi Amponsah-Tawiahb and Kwasi Dartey-Baah, 'Corporate Social Responsibility in Ghana' (2011) 2(17) *International Journal of Business and Social Science* 107.

companies,[7] while India is considering an amendment of its company, mines and mineral-related laws to include CSR notions.[8] Other developing economies are providing different incentives as well as making coercive measures to insist their companies be more inclined to participate in labour, environmental and community activities. They are providing the necessary directions through legal provisions and policies for developing multi-player activism in the corporate sector. As a result, economies like Singapore, Hong Kong, China and South Korea are becoming competitive with the strong economies in certain aspects of CSR.

While CSR has been included in the business strategies in many developing economies, the corporate laws and regulations of weak economies in general has remained unchanged in terms of incorporating CSR principles in the core of their corporate self-regulation. This book gets into this problem, taking Bangladesh as a case study. The major laws relating to corporate regulation in Bangladesh do not consider the needs and characteristics of CSR practices. In this country, corporate self-regulation is not sufficiently focused on the development of self-regulated social, environmental and ethical corporate responsibilities. CG does not nurture internal regulations based on any established concept. Due to the absence of a socially responsible corporate culture, companies often consider their social, environmental and ethical responsibilities as peripheral issues. Hence the role of corporate self-regulation in the development of a socially responsible corporate culture is minimally present in this country.

There is no systematic approach in corporate self-regulation to ensure the fulfillment of CSR. The companies who are suppliers in the global supply chain are, however, meeting some moderate social and environmental responsibilities (where compliance is required). Their expenses for maintaining compliance are high and are not sustainable since their governance and internal strategies are not focused enough to allow them to develop a self-regulated responsibility system that

[7] Incorporation of the idea of a one Stop Shop into the *Enterprise Law 2005* (Vietnam), CSR notions in the Public Administration Reform Master Plan 2001–2010 and in the *Law on Government Organization 2001* of this country are some instances of legal initiatives to develop CSR notions in corporate self-regulation. For more information, see http://www.google.com.au/url?sa=t&source=web&cd=10&ved at 14 November 2011; United Nations industrial Development organization (UNIDO), *Capacity-building for Business Information Networking: The UNIDO Support Program* https://www.unido.org/en/doc/18761 at 14 November 2011. Decree 88/2006/ND-CP of 29 August 2006, Decision No. 181/2003/Q?-TTg of 9 January 2003, Decision No. 136/2001/Q?-TTg of 17 September 2001, Decision No. 181/2003/Q?-TTg of 9 January 2003, inter-Ministerial Circular No. 02/2007/TTLT/BKH-BTC-BCA are some important instruments related to the development of one Stop Shops in Vietnam. For a detailed discussion of this type of move in different economies, see Chaps. 2 and 6 of this book.

[8] Two instances where India is actively considering the incorporation of CSR notions in corporate regulation through legislation are the *Companies (Amendment) Bill 2009* (India) and the *Mines and Minerals (Development and Regulation) Bill 2010* (India). For the *Companies (Amendment) Bill 2009*, visit http://www.prsIndia.org/uploads/media/Company/Companies%202009.pdf at 8 June 2011; India CSR, *New Mining Bill Proposes 26 Percent Profit to Share*, http://www.Indiacsr.in/article-1517-New-Mining-Bill-proposes-26-percent-Profit-to-share.html8June2011 at 8 June 2011.

would enable them to meet these practices more easily and in a cost-effective manner.[9] For an instance, Bangladeshi laws and legal regulation relating to corporate regulation are of a prescriptive nature and do not contribute to developing a culture sensitive to CSR. These laws happen to be less effective in developing social responsibility in corporate plans and do not provide the required scope for external stakeholders to assess the performance of corporate self-regulation, especially in the absence of effective monitoring agencies and organised civil society drivers that could be considered as complementary to formal legislation. In retrospect, the instances of unethical business operation, industrial pollution, labour agitation, and mistrust in the corporate strategies are on the increase in the country.[10]

Indeed, the very idea that the law might force companies to be socially responsible is problematic, especially between the proponents of a 'post-regulatory'[11] world and an increased demand for socially responsible corporate regulations.[12] Under these circumstances, scholarly evidence and regulatory best practice suggests that regulators should use a mix of regulatory styles and strategies to improve the implementation of CSR in companies, rather than relying on any single strategy.[13] This legal approach should attempt to link social values to economic

[9] Gary Hamel and C K Prahalad, 'The Core Competence of the Corporation' (1990) 68(3) *Harvard Business Review* 79, 91.

[10] For instance, in the recent labour agitation in the ready-made garments industry in Bangladesh, there were 72 incidents in the first 6 s of 2010, which caused the deaths of four workers, while 988 workers were injured and 45 arrested. Over the last 30 years, Bangladesh's ship-breaking industry has killed more than 7,000 workers and seriously injured 10,000 others. The untreated discharge of toxic effluent by the leather goods and processing industries of Bangladesh has already turned the Buriganga—a major river—into a toxic dump. There are many more instances like these. A detailed discussion and references are provided in the next chapter of this book.

[11] Simply put, a 'post-regulatory world' indicates the decrease of state-promulgated regulations and the rise of private ordering systems throughout the world. State authority is not at the centre of this regulatory system; rather, it is a joint effort in which private parties play an important part in the dominant mode of regulation in all aspects within a country, including its international affairs. In these circumstances, governments create less legislation and depend more on private parties. For details, see Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World' (2002) 54 *Current Legal Problems* 103; Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145.

[12] Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006) 32.

[13] Peter May, 'Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities' (2005) 27(2) *Law & Policy*; Soeren Winter and Peter J May, 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) *Journal of Policy Analysis and Management*; Bridget M Hutter, 'The Role of Non-State Actors in Regulation' (Centre for Analysis of Risk and Regulation, 2006) 14; Neil Gunningham, Peter Grabosky and Daren Sinclair, *Smart Regulation: Designing Environmental Policy* (1998); Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (2000); Vijaya Nagarajan, 'from "Command-and-Control" to "Open Method Coordination": Theorising the Practice of Regulatory Agencies'

incentives and disincentives, and indirectly influence CG to incorporate CSR principles through self-regulation. In strong economies, this self-regulated responsibility helps to create a more socially responsible corporate culture as CG is in a stronger position to persuade management to more fully embrace the principles of CSR as part of their core strategies. However, in weak economies, the degree to which the ethos of CSR has turned corporate governance towards their social responsibilities needs to be explicated. Indeed, very little is known of the convergence of CG and CSR in weak economies. Most of the scholars have highlighted this convergence from the perspective of strong economies, while the research of this convergence in weak economy context could also provide valuable insights.[14]

Given the lack of effective legal strategies and other non-legal drivers necessary for incorporating the ethos of CSR into companies, corporate self-regulation in weak economies are not contributing adequately to the development of a socially responsible corporate culture. The corporate attitude in these economies towards social responsibility seems to be that 'we are complying with all the rules and regulations but we do not need to disclose'.[15] Corporate directors and managers argue that they should be trusted, since they believe themselves to be the sole agents necessary to develop their social responsibilities. However, this corporate attitude does not reflect the management strategies of most of the companies in these economies. For instance a survey-based research conducted in Bangladesh has come to this conclusion, finding that even company owners and directors do not fully understand the notions of corporate self-regulation and CSR. Their social, environmental and ethical performance has become a concern for investors, buyers, consumers and other local stakeholders.[16]

At this critical juncture, weak economies need suitable legal strategies to gradually increase its companies' capacity to resonate with their social and environmental demands, as well as to improve their competence in fulfilling CSR-related compliance requirements. It needs a legal strategy that can assist companies to synthesis their CG approaches with the principles of CSR, to enable them to develop internal self-regulated responsibility systems by allowing external social actors access to corporate management and by unfolding corporate behaviour control.

In the weak economies in general, it is difficult, though not impossible, to determine which strategy the law should take for making companies accountable

(2008) 8 *Macquarie Law Journal* 6; for a big picture view of changing regulatory scholarship, see Carol Harlow, 'Law and Public Administration: Convergence and Symbiosis' (2005) 71(2) *International Review of Administrative Sciences* 279.

[14] Ataur Rahman Belal, 'A Study of Corporate Social Disclosures in Bangladesh' (2001) 15 (5) *Managerial Auditing Journal* 274–289.

[15] Ataur Rahman Belal, *Corporate Social Responsibility Reporting in Developing Countries: The Case of Bangladesh* (2008) 38.

[16] Ataur Rahman Belal, 'Stakeholders' Perceptions of CSR in Bangladesh' (CSR in Asia Conference, Kuala Lumpur, April 2006; Eight Interdisciplinary Perspectives on Accounting Conference, Cardiff, July 2006) 8.

for their actions, and to encourage companies to transcend basic legal requirements. This is difficult because these economies do not have the necessary non-legal drivers that the strong economies possess, and their legal regulations are not suitable to balance the need for CSR and the business cases of companies. Most of the relevant legislation in these economies does not address the argument that a prescriptive regulatory approach has been unsuccessful in facilitating, rewarding, or encouraging companies to go beyond their profit-centred behaviour. Simultaneously, the legal regulations[17] of these economies should recognise that relying solely on corporate self-regulation is not a viable approach to encourage the incorporation of social values in corporate behaviour in the absence of non-legal drivers. To address these discrepancies, the legal regulations of these economies could be based on the rule-making power of the government and the strength of the private ordering system for developing any strategy for raising CSR. Legal regulation with such a basis represents a fusion of responsive and reflexive legal approaches and could take into account both public policy goals and the scope of CG to persuade company management to fully embrace the objectives of these goals.

Despite of the lack of initiatives that have been undertaken to make a systematic analysis on the scope of legal strategies to incorporate CSR principles in corporate self-regulation in weak economies, this book merges the overlapping borders of companies' interests with those of CSR, while taking into account the evident gap in existing literature and practice.[18] This book is the first to addresses legal regulation strategies to raise the social responsibility performance of companies of weak economies in general. Through providing an effective legal strategy this book assists the regulatory scholarship of weak economies in general and Bangladesh in particular, to assist companies in achieving both their social and business goals. It endeavours to deal with the following issues:

1. Normative basis for legal regulation to raise CSR in weak economies
2. Meta-regulation approach of law and its suitability to incorporate CSR principles in corporate self-regulation in weak economies
3. Bangladeshi laws' scope to hold a meta-regulation approach to incorporate CSR principles in corporate self-regulation.

[17] Legal regulation, legislation and laws are used interchangeably in this book, without making any distinction between them. The definitions and scopes of regulation, legal regulation and law are provided in Chap. 5 of this book.

[18] For an idea of the extent of this knowledge gap, see Tom Dodd, *A European Public Policy Perspective, Small and Medium Sised Enterprises and Corporate Social Responsibility: Identifying the Knowledge Gaps* (2005) 2; Allan Larberg Jorgensen, 'Sustainability and Competitiveness in Global Value Chains: A Research Project into SMEs and CSR' in Tom Dodd (ed) *Small and Medium Sized Enterprises and Corporate Social Responsibility: Identifying the Knowledge Gaps* (2005); Laura Spence, 'Corporate Social Responsibility and Small Business in a European Policy Context: The Five "C" s of Corporate Social Responsibility and Small Business Research Agenda 2007' (2007) 112 (4) *Business and Society Review* 533, 535.

## 1.2 Scope of the Book

This book considers the term 'company' with its general meaning. It defines a company as an association of persons for the purpose of carrying out commercial activities that have an effect on society as a whole. Hence, this book includes the commercial activities and regulations of corporations; firms, such as the East India Company; manufacturing companies; and joint-stock companies. Accordingly, it takes CG and corporate self-regulation with their general meaning without dividing them into any particular notions. It is confined to the strategies of legal regulation and does not compare these strategies with any non-legal strategies to incorporate social responsibility issues in the core of corporate self-regulation.

Incorporation of CSR principles into corporate self-regulation in Bangladesh does not rely solely on laws and corporate societies. For this development to occur, there must be a strong political commitment, a dedicated bureaucracy, a conscious civil society and a dedicated business environment along with the enabling laws containing suitable strategies. However, this book concentrates on the strategies in the major Bangladeshi laws relating to the nexus of CG, CSR and corporate regulation. It situates its discussion and assessment in the context of Bangladesh in particular, and of the weak economies in general. In this book, strong, developing and weak economies resemble the equal meaning developed by the United Nations Organizations for developed, developing and least developed countries respectively.[19]

This book does not endeavour to present a comparative study between regulatory and other strategies to incorporate CSR principles into corporate self-regulation, as that is believed to be a separate book in itself. However, it uses the development of CSR implementation in other economies to inform and enrich the discussion. Due to time and space constraints, it focuses on the regulatory strategies suitable for the corporate laws and regulations of Bangladesh to allow the incorporation of CSR principles into self-regulated corporate responsibility.

[19] The Committee for Development Policy, a subsidiary body of the UN Economic and Social Council, prepares the list of least developed countries (LDCs) or weak economies for every 3 years. The identification of LDCs or weak economies is based on a 3 years monitoring of a country's or economy's per capita gross national income, human assets and economic vulnerability to external shocks. Currently, there are 48 LDCs or weak economies in the world, within which 33 in Africa, 14 in Asia and the Pacific and one in Latin America. Bangladesh, Nepal, Sudan, Bhutan etc. are some of the LDCs or weak economies in the world. For details, visit http://www.unohrlls.org/en/ldc/25/ 15 January 2012.

## 1.3 Methodology

This book uses a qualitative research method. It uses secondary materials, including books, journal articles, conference papers, policy research papers, working papers, and newspaper articles to articulate the research problem. It does not make any attempt to collect primary statistical data. Where statistical data are necessary, secondary materials are relied upon.

Critical analysis of the impact of CSR on corporate regulation and the role of law in incorporating social, environmental and ethical responsibilities into company policy form the bulk of this book. However, legal provisions alone cannot sufficiently capture the complex issues involving these crosscutting regulatory issues. Hence, to accomplish the objectives of this book, it pursues an interdisciplinary study in which legal materials are juxtaposed with the presentation and analysis of business data and a critique of regulatory setups for CSR. Since corporate regulations may also be influenced by the non-trade strategic objectives of governments, insights from the discipline of international trade relations are included where appropriate.

The research of this book based on scholarly articles and organisational reports to present the concepts of CSR and CG and their nexus, followed by a description of the convergence of these two concepts in corporate regulation in general, and in Bangladesh in particular. It also assesses different approaches to CSR to narrow down its core meaning, as developed in the secondary materials.

While considering the context of Bangladesh as an instance of weak economy, it became evident that Bangladeshi laws relating to corporate regulation do not have the required strategies to adequately incorporate the principles of CSR into corporate self-regulation. Clearly, this is the fundamental reason why CSR is not developing sustainably in these economies. To explain this problem, this book considers Bangladesh as a suitable case for the general context of weak economies and assesses three major Bangladeshi laws: the *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Law 2006* and the *Environmental Conservation Act 1995* (Bangladesh). These three laws were chosen due to their close relationship with company affairs and their importance in social responsibility regulation from the corporate perspective. The *Companies Act 1994* (Bangladesh) is the core legislation that deals with corporate issues.[20] Other than this, there is no legislation that describes the rights, liabilities and formation of corporate bodies in this country. With respect to the regulation of the environmental responsibilities of companies, the *Environmental Conservation Act 1995* (Bangladesh) is the primary legislation concerned, as there is no other legislation in this country that solely deals with the industrial use of natural resources, industrial pollution and the penalties for such

[20] The *Societies Registration Act 1860* (Bangladesh) and the *Partnership Act 1932* (Bangladesh) do not deal with the core issues of companies. These laws are for the registration and operation of businesses under the form of societies and partnership agreements. This book is limited to the social responsibilities of companies.

pollution.[21] This legislation is the main source of operations of the different public organisations responsible for environmental development. Before the enactment of the *Bangladesh Labour Law 2006* (Bangladesh)—commonly known as the Labour Code—there were at least 44 laws dealing with labour and labour regulation in companies. With the enactment of the Labour Code, all 44 laws have been repealed and the Code has consolidated the matters of the preceding laws. In a labour-abundant country, this Code is the main legislation that deals with labour rights and corporate responsibility for labour development.

CSR is an evolving concept, and until now no universal definition has been accepted. Its dimensions are vast and highly contextual. Moreover, 'voluntariness' is a dominant factor in any strategy for implementing its core principles in companies. In this situation, to create a suitable regulatory approach to incorporate core CSR principles into self-regulated corporate responsibility, this book embarks on a doctrinal analysis of the concepts relating to the 'voluntary' and 'compulsory' notions of implementing CSR principles in companies. This analysis includes different theoretical perspectives, but largely focuses on the precepts of legitimacy theory, stakeholder theory, CG and new governance, since they provide an interesting philosophical basis for why, and how far, CSR principles might be incorporated into self-regulated corporate responsibility by legal regulation.

Based on the findings of this analysis, this book conceptualises a 'meta-regulation' approach to incorporate CSR principles as a central component of corporate self-regulation in Bangladesh. For the conceptualisation of this legal approach, it analyses different concepts related to the role of law in rendering companies socially responsible, and in increasing corporate abilities to fulfil their social responsibilities in the context of a weak economy. Through this conceptualisation, this book concludes that meta-regulation is a fusion of responsive and reflexive regulatory modes and that it takes into account both the regulators and the regulatees and uses different strategies with sequential effects in business strategies.

[21] There are other laws dealing with environmental issues, but those are either dedicated to environmental issues or do not provide provisions for substantial environmental development. Though there are many drawbacks in this Act, it is comparatively broader in its scope for this development. While the *Penal Code 1860* (Bangladesh) provides some penalties relating to offences affecting public health, safety and convenience, as well as offences affecting the human body and life through environmental pollution, the main aim of this Code is to cover penal provisions for all types of offences. Likewise, the *Code of Criminal Procedure 1989* (Bangladesh) only describes a few procedures relating to the occurrence of public nuisance through environmental hazards. The *Smoke Nuisance Act 1905* (Bangladesh) is limited to the issue of abatement of nuisances arising from the smoke of furnaces or fireplaces in certain areas. The *Conservation of Playing Field, Open Space, Garden and Natural Water Body Act 2000* (Bangladesh) does not deal with the corporate and industrial nexus with the environment in Bangladesh. The *Bangladesh Environmental Conservation Act 1995* (Bangladesh) is the flagship legislation in the environment sector. It deals exhaustively with conservation of the environment, improvement of environmental standards and the control and mitigation of environmental pollution. It is the only legislation that provides the de facto definition of 'pollution' in this country. The *Environment Court Act 2000* (Bangladesh) and the *Environmental Conservation Rules 1997* (Bangladesh) were enacted to implement the substantive issues mentioned in the Act.

This book offers a number of meta-regulatory strategies that have the potential to indirectly relate social values to economic incentives or disincentives, and thereby influence CG to add CSR principles to their corporate self-regulatory mechanisms. To test the suitability of these strategies in achieving this aim, the scope for incorporating these strategies in the three major Bangladeshi laws mentioned above is assessed, along with other relevant laws and guidelines that regulate corporate activities and strategies in Bangladesh. This assessment extends to quasi-legal policies and guidelines, but this aspect is limited to the extent necessary to evaluate the suitability of a meta-regulation approach for creating a socially responsible corporate culture in weak economies in general and Bangladesh in particular.

## 1.4 Organisation

This book is organised into eight chapters. Following the introductory chapter, the remainder of the book proceeds as follows.

Chapter 2 discusses CSR: its principles, development and impact on corporate regulation. This chapter assesses the definition of CSR as used in this study and identifies the core principles of CSR. It then focuses on the synergies between CSR and CG, highlighting the impact of these synergies on CG in weak and strong economies in general. Finally, it discusses the current trend of CSR implementation in several strong and developing economies.

Chapters 3 and 4 present the conceptual framework for this book. Chapter 3 discusses the theoretical basis of implementing CSR principles in corporate self-regulation through legislation. It presents the principles of stakeholder theory and legitimacy theory as well as the concepts of new governance in so far as these relate to CSR implementation. Chapter 4 outlines the basis of the regulatory strategies for CSR implementation. It discusses the contradictory arguments of pro-regulation and pro-business advocates as they relate to this implementation. Next, it highlights the arguments of a 'third perspective' that synthesis the contradictory arguments of the pro-business and pro-regulation advocates. Finally, it summarises the major scholarly works on this issue.

Based on the conclusions of Chaps. 3 and 4, Chap. 5 conceptualises a meta-regulation approach—a comparatively new regulatory approach that channels different regulations so that they regulate one another. This approach allows laws to meet the objectives of regulators, without depending heavily on either the prescriptive or voluntary modes of regulation. Finally, this chapter discusses the strategies for incorporating this approach into legislation.

An assessment of the scope for incorporating a meta-regulation approach into the major laws related with companies in Bangladesh is in Chap. 6. It evaluates three major Bangladeshi laws, with the objective of explaining their roles in incorporating the principles of CSR in corporate self-regulation. First, it assesses the general characteristics of CG and corporate attitude in Bangladesh. Three case

studies are then presented, followed by an assessment the role of three major Bangladeshi laws in the development of CSR. Finally it describes the scope and strategies for incorporating meta-regulation strategies in the *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Laws 2006* (Bangladesh) and the *Environmental Conservation Act 1995* (Bangladesh). This chapter also discusses different options for this incorporation and focuses on future trends for such incorporation.

This book ends with the concluding remarks made in Chap. 7.

## 1.5 Conclusion

Weak economies must ensure their companies' growth as well as their responsibilities to society. They need their companies to sustainably incorporate CSR principles at the core of their self-regulatory mechanisms. Suitable strategies must be proposed to assist their companies in becoming competent at fulfilling their social responsibilities without incurring substantial costs and hampering their business practices. However, most of their corporate laws do not currently have the power to insist that companies consider CSR issues as central to their self-regulation, although they do allow scope for the incorporation of suitable strategies for the development of a socially responsible corporate culture.

In view of the current situation, this book explores the manner in which corporate laws could contribute to the incorporation of CSR principles into corporate self-regulation. It demonstrates that the legal regulatory strategies for this must bridge two contradictory disciplines; while retaining the voluntary nature of CSR, they must instill the principles of CSR into corporate self-regulatory mechanisms without using an authoritative legal mode. To meet these two contradictory requirements, this book conceptualises a 'meta-regulation' approach to legislation. This approach attempts to link social values to economic incentives and disincentives, and thereby indirectly influence CG to adopt CSR principles in managing their self-regulated responsibilities. This represents a novel regulatory approach through which different modes of regulation could co-regulate one another and create the scope for developing an internal corporate conscience moderated by external forces. This book shows that such an approach will allow the regulator to indirectly insist that CG maintains CSR ethos at the centre of their corporate strategies, while providing scope and flexibility necessary for corporate management to accommodate their business strategies according to their unique needs and circumstances.

This book assesses the possibility for incorporating a meta-regulation approach in the *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Law 2006* (Bangladesh) and the *Environmental Conservation Act 1995* (Bangladesh). It finds that these laws have the potential to operate within this approach, and that they are capable of allowing the development of the capacity for corporate self-regulation within a socially responsible corporate culture. Further, this framework will enable companies to acquire and promote social, environmental and ethical values without incurring substantial costs.

# Chapter 2
# Corporate Social Responsibility, Corporate Governance and Corporate Regulation

## 2.1 Introduction

CSR is increasingly an essential issue for companies.[1] It is a complex and multi-dimensional organisational phenomenon that is understood as the scope for which, and the ways in which, an organisation is consciously responsible for its actions and non-actions and their impact on its stakeholders. It represents not just a change to the commercial setting in which individual companies operates, but also a pragmatic response of a company to its consumers and society.[2] It is increasingly being understood as a means by which companies may endeavour to achieve a balance between their efforts to generate profits and the societies that they impact in these efforts.[3] This chapter discusses these issues. First, it describes CSR and its core principles. Second, it describes CG and narrates CG's convergence with CSR. Third, it highlights how different economies are incorporating CSR notions in their corporate regulation.

[1] Jeremy Moon and David Vogel, 'Corporate Social Responsibility, Government, and Civil Society' in Andrew Crane et al. (eds), *Oxford Handbook of Corporate Social Responsibility* (2008) 303; David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005); Nada K Kakabadse, Cecile Rozuel and Linda Lee-Davies, 'Corporate Social Responsibility and Stakeholder Approach: A Conceptual Review' (2005) 1(4) *International Journal of Business Governance and Ethics* 277, 279.

[2] Wilfred Luetkenhorst, 'Corporate Social Responsibility and the Development Agenda. The Case for Actively Involving Small and Medium Companys' (2004) *Intereconomics* 157, 166.

[3] John Clark, *Worlds Apart: Civil Society and the Battle for Ethical Globalisation* (2003) 2002–2003; Bridget M Hutter and Joan O'Mahony, 'The Role of Civil Society Organisations in Regulating Business' (Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, 2004) 3.

M.M. Rahim, *Legal Regulation of Corporate Social Responsibility*,
CSR, Sustainability, Ethics & Governance, DOI 10.1007/978-3-642-40400-9_2,

## 2.2 Corporate Social Responsibility (CSR)

The role of business in society is an ancient concern.[4] However, until now this concern has not been conclusively determined; business communities and international civil societies have not yet been able to reach to an overall agreement[5] when defining the responsibilities of companies to society.[6] Indeed, defining CSR is complex and contingent on situational factors. Moreover, there are an enormous number of varied definitions for CSR. One of the reasons behind the inconclusiveness of the definitions of CSR is rooted in its interchangeable and overlapping characteristics with other terminologies.[7] Another reason may also lie in the fact that the contemporary CSR agenda essentially involves the concept of stakeholders and development as an integral issue of business operations. Another reason is related to the ever-changing and dynamic character of CSR and its expansion of practices aligned with the increased demands from society and from development issues.[8] Despite the inconclusive definitions, different approaches and many dimensions of CSR, the principal notions of this paradigm are almost established. Although these notions are not conclusive, they are consistent and have converged on common characteristics and similar elements. These are related to the economic, social and environmental impacts of business operations and their responses to customers' expectations, employees, shareholders and stakeholders in the context of these impacts. CSR is no longer confined to corporate philanthropy; rather, it has been established that accepting social responsibilities has a positive effect on

[4] Richard C Warren, 'The Evolution of Business Legitimacy' (2003) 15(3) *European Business Review* 153, 154; Rob Gray, Dave Owen and Adams Carol, *Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (1996) 1–2.

[5] Michael Hopkins 'Corporate Social Responsibility: An Issue Paper' (Working Paper No. 27, Policy Integration Department, World Commission on Social Dimension of Globalisation, 2004). http://www.ilo.org/integration/resources/papers/lang–en/docName–WCMS_079130/index.htm at 23 July 2010. For details, see M Van Marrewijk, 'Concept and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003) 44(2–3) *Journal of Business Ethics* 95,105.

[6] Jamie Snider et al., in their article titled 'Corporate Social Responsibility in the 21st Century: A View from the World's Most Successful Firms' stated that an exact definition of CSR is elusive since beliefs and attitudes regarding the nature of CSR fluctuate with the relevant issue of the day. As such, viewpoints have varied over time and occasionally have even been opposing. See also T Pinkston and Archie B Carroll, 'A Retrospective Examination of CSR Orientations: Have They Changed?' (1996) 15(2) *Journal of Business Ethics* 199, 207.

[7] Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 4; for details, see Michale Blowfield and Jerdej George Frynas, 'Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81(3) *International Affairs* 499, 501; Dirk Matten and Jeremy Moon, '"Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 33(2) *Academy of Management Review* 404, 505.

[8] Jamie Snider et al., 'Corporate Social Responsibility in the 21st Century: A View from the World's Most Successful Firms' (2003) 48(2) *Journal of Business Ethics* 175; see also Pinkston and Carroll, above n 6, 207.

companies' financial performances. Thus, CSR has established the core principles for furthering appropriate strategies for incorporating its different notions into business practice.

This section will not provide a thorough discussion on the definition of CSR, as this is believed to be a study in itself, and in this book no distinction is made between the different meanings attached to this term. This book is not focused on the philosophies in CSR. Rather, it concentrates on identifying the core principles of CSR and suitable legal regulatory strategies to incorporate these principles into corporate self-regulation in weak economies.

CSR is a fluid concept.[9] Its interchangeable and overlapping character is dominant in its definition. To some scholars, this concept resembles the source of competitive advantage; to others, it is 'an important response to the increasing demands of key stakeholders such as employees, investors, consumers and environmentalists.'[10] Again, the precepts of CSR change with each generation, and its criteria may change according to the society in question.[11] For instance, its meaning in the Continental European welfare society is different to its meaning in the USA or in developing or transitional societies.[12] In the USA, companies consider philanthropy as a dominant factor of CSR; in the Northern economies companies bear their social responsibilities by paying taxes.[13] In these circumstances, a consistent terminology for this concept is yet to be developed. It is currently described using a number of terms: corporate citizenship, the ethical corporation, CG, corporate sustainability, socially responsible investment, corporate accountability and so on, and there is no overall agreement on its definition.[14] The concepts underlying these terms are internally consistent and converge on certain common qualities and similar elements. In a broader sense, CSR is about the impact of business on a society or, in other words, the role of companies in the development of the society. In a narrower sense, it is a complex and multi-dimensional organisational phenomenon that may be defined as the extent to which, and the way in which, an organisation is consciously responsible for its actions (and non-actions) and the impact of these on its stakeholders.

The concept of CSR can be defined in various ways and may have different meanings. Archie B Carroll gave a long account of the evolution of the definition of CSR beginning from the 1950s and continuing through to the 1990s with the

[9] Hopkins, above n 5, 1; Marrewijk, above n 5, 105.

[10] Aida Bagi, Marina Krabalo and Lana Narani, 'An Overview of Corporate Social Responsibility in Croatia' (2004) *Zagreb: AED*; Pinkston and Carroll, above n 6.

[11] Kakabadse, above n 1.

[12] Emma Daugherty, 'Public Relations and Social Responsibility' (2001) *Handbook of Public Relations* 389, in Kakabadse, above n 1, 280.

[13] Kakabadse, above n 1, 280.

[14] William Werther and David Chandler, *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (2010) 6; see also Michael Bowfield and Jerdej George Frynas, above n 7, 501; Matten and Moon, above n 7, 505; Australian Parliamentary Joint Committee and Financial Service, Corporate Responsibility: Managing Risks and Creating Value (Report 2006) 4.

specific features of each decade in terms of its development.[15] In the 1980s, as he mentioned, some alternative theoretical issues were added to the concept itself, including corporate social performance, stakeholder theory, and business ethics theory.[16] In the definitional development that occurred in the 1990s, these alternative themes took centre stage in the manifestation of CSR[17] and all subsequent definitions were dominated by the stakeholder and societal approach, with the recognition of social, economic, and environmental issues as the basic components of responsibility. The best illustration of this is available in the definitions and views developed in the late 1990s and subsequently by different intergovernmental, government and development organisations and some postmodern academics.[18]

The World Business Council for Sustainable Development defines CSR as '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.'[19] According to this definition, business societies have responsibilities to contribute to the development of their employees, their families, the local community and wider society to improve their quality of life and thus to try to ensure sustainable economic development.[20] The phrase 'continuing commitment' used in this definition indicates that CSR is not a temporary issue that a company considers only in certain situations. Rather, it is a permanent issue that should be placed strategically within the policies and programs of companies. Business for Social Responsibility defines CSR in a more holistic way. This organisation refers to CSR as a tool for 'achieving commercial success in ways that honour ethical values and respect people, communities, and the natural environment.'[21] Thus, Business for Social Responsibility relates CSR to the idea of recognising and responding to a broader spectrum of stakeholder interests. The International Business Leaders Forum extends this idea and accepts it as a responsible business practice that could benefit business and society by maximising the positive impact business has on society while minimising the negative impact. In a similar fashion, a Green Paper published by the European Commission in 2001 defines CSR as 'a concept whereby companies

[15] Archie Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38(3) *Business and Society* 268, 269.

[16] Ibid 280; Edward R Freeman and John McVea, 'A Stakeholder Approach to Strategic Management' (2001) *Blackwell Handbook of Strategic Management* 189.

[17] Archie Carroll, above n 15, 288; Rob Gray, Dave Owen and Adams Carol, *Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (1996).

[18] Alexander Dahlsrud, 'How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions' (2008) 15(1) *Corporate Social Responsibility and Environmental Management* 1.

[19] Phil Watts and Lord Holme, *Corporate Social Responsibility: Meeting Changing Expectations* (1999) 3.

[20] Ibid.

[21] Allen White, 'Business Brief: Intangibles and CSR' (2006) *Business for Social Responsibility* 6, available at http://www.bsr.org/reports/BSR_AW_intangibles-CSR.pdf at 30 July 2010.

integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.'[22] The World Economic Forum identifies the concerns for responsible business as follows:

> . . .To do business in a manner that obeys the law, produces safe and cost-effective products and services, creates jobs and wealth, supports training and technology cooperation and reflects international standards and values in areas such as the environment, ethics, labour and human rights. To make every effort to enhance the positive multipliers of our activities and to minimise any negative impacts on people and the environment, everywhere we invest and operate. A key element of this is recognising that the frameworks we adopt for being a responsible business must move beyond philanthropy and be integrated into core business strategy and practice.[23]

Given these definitions, CSR appears to be a managing element that starts at the company level by its performance in a socially responsible manner, where the trade-offs between the needs and requirements of different stakeholders are balanced and acceptable to all.[24] In a recent publication, rather than giving any conclusive definition of CSR, the Australian Parliamentary Joint Committee on Corporations and Financial Services examined the concept of CSR from the following standpoints: (a) considering, managing and balancing the economic, social, and environmental impacts of companies' activities; (b) assessing and managing risks, pursuing opportunities, and creating corporate value beyond the traditional core business; and (c) taking an 'enlightened self-interest' approach to consider the legitimate interests of the stakeholders in CG.[25]

Michael Hopkins relates CSR 'with treating the stakeholders of the firm ethically or in a socially responsible manner.'[26] Here, the words 'ethically' and 'responsible' emphasise the notion that the treatment of stakeholders should be deemed acceptable in civilised society. According to Hopkins, this treatment of the stakeholder is an economic responsibility of companies.[27] Marsden perceives CSR as a core behavioural issue for companies. He states 'CSR is not an optional add-on nor is it an act of philanthropy. A socially responsible corporation is one that runs a

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[22] European Commission, *Green Paper: Promoting a European Framework for Corporate Social Responsibility* (2001) www.europa.eu.int at 5 July 2007.

[23] World Economic Forum, 'Global Corporate Citizen: The Leadership Challenge for CEOs and Boards' (2002) http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf at 21 February 2009.

[24] Ibid; the definition of the Commission of the European Communities mentioned in the text were made in 2001. However, the later definition made in 2002 speaks broadly of CSR, stating: 'Corporate responsibility is about companies having responsibilities and taking actions beyond their legal obligations and economic/business aims. These wider responsibilities cover a range of areas but as frequently summed up as social and environmental—where social means society broadly defined, rather than simply social policy issues. This can be summed up as the triple bottom line approach, that is, economic, social and environmental.'

[25] Australian Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Corporate Responsibility and Triple-Bottom-Line reporting for incorporated entities in Australia (2005)*. http://www.philanthropy.org.au/pdfs/advocacy/pa_jpicr_0905.pdf at 31 October 2013.

[26] Hopkins, above n 5, 1.

[27] Ibid.

profitable business that takes account of all the positive and negative environmental, social and economic effects it has on society.'[28] Andersen defines CSR following a broader societal approach. He states that the broader meaning of CSR relates to the extension of 'the immediate interest from oneself to include one's fellow citizens and the society one is living in and is a part of today, acting with respect for the future generation and nature.'[29] While other scholars have studied CSR, to respect space constraints and retain the focus on the main theme of this study, only the works of these three recent and well-cited scholars are mentioned here.[30]

All of the definitions outlined above confirm that there is no conclusive definition of CSR and that it can have different meanings to different people and different organisations as an ever-growing, multifaceted concept. Nevertheless, it may be said that the concept of CSR is consistent and converges on certain common characteristics and elements. More precisely, if CSR as defined above is examined from a practical and operational point of view, it converges on two points. CSR requires companies (a) to consider the social, environmental, and economic impacts of their operations and (b) to be responsive to the needs and expectations of their stakeholders.[31] These two points are also embedded in the meaning of the three words (i.e., 'corporate', 'social', and 'responsibility') of the phrase 'corporate social responsibility'. The word 'corporate' generally denotes business operations, 'social' covers all the stakeholders of business operations, and the word 'responsibility' generally refers to the relationship between business corporations and the societies within which they act together. It also encompasses the innate responsibilities on both sides of this relationship. Accordingly, CSR is an integral element of business strategy: it is the way that a company should follow to deliver its products or services to the market; it is a way of maintaining the legitimacy of corporate actions in wider society by bringing stakeholder concerns to the foreground; and a way to emphasise business concern for social needs and actions that go beyond philanthropy. Next, the core principles of CSR are introduced.

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[28] Chris Marsden, *The Role of Public Authorities in Corporate Social Responsibility* (2001) in Dahlsrud, above n 18, 9.

[29] K I Andersen, *The Project* (2003) in Dahlsrud, above n 18, 11.

[30] Some other prominent works are: Archie Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organisational Stakeholders' (1991) 34(4) *Business Horizons* 39; Archie Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38(3) *Business & Society* 268; John Conley and Cynthia Williams, 'Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' (2005) 31 *Journal of Corporation Law* 1; Tom Fox, 'Corporate Social Responsibility and Development: In Quest of an Agenda' (2004) *Development* 29; Andy Lockett, Jeremy Moon and Wayne Visser, 'Corporate Social Responsibility in Management Research: Focus, Nature, Alience and Sources of Influence' (2006) 43(1) *Journal of Management Studies* 115; Moon and Vogel, above n 1; Karrin Buhmann, 'Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR' (2006) 6(2) *Corporate Governance* 188.

[31] Christopher Tung, *The Legal Implications of CSR: Changing Landscape of Liability* (2006) at www.csr-asia.com/CGconference2006/ChrisTung.pdf at 20 November 2010.

### 2.2.1 Core Principles of Corporate Social Responsibility

The 'triple bottom line' introduced by Elkington is one of the best-known models to discuss the core of CSR.[32] In this model, the concept of CSR emphasises three responsibilities of a company: social, economic and environmental. These responsibilities are necessary to ensure economic prosperity, environmental quality and social justice.[33] Carroll has identified four responsibilities which a company should accept to become socially responsible in a balanced way. According to him, a socially responsible company 'encompasses the economic, legal, ethical and discretionary expectations that society has of organisations at a given point of time.'[34] Another strong argument in the recent CSR practice literature relates to stakeholder engagement in CSR performance. Freeman argues that companies have a responsibility to add their stakeholders to corporate activities. To him, stakeholder engagement is a vital way for companies to deal with their external environment effectively.[35] Considering these major sources of CSR practices, they may be grouped into four major categories: the societal, environmental, economic and stakeholder approaches.

Each of these approaches has different perspective in terms of definitions and boundaries of responsibility.[36] However, each of these approaches has their individual underlying principles. Briefly, the principle of the societal approach to CSR is that companies should contribute to building better societies and therefore they should incorporate social concerns into their core strategies as well as consider the full scope of their impact on societies. More particularly, this principle requires companies to implement fair wage policies, uphold human rights, fair trade and ethical issues, produce safe products and cooperate in the network of companies and communities.[37] The economic principle emphasises company efficiency in

[32] John Elkington, 'Partnerships from Cannibals with Forks: The Triple Bottom Line of 21st Century Business' (1998) 8(1) *Environmental Quality Management* 37.

[33] Ibid; for a discussion on the implementation of these precepts in companies, see Grahame Thompson, 'Global Corporate Citizenship: What Does it Mean?' (2005) 9(2) *Competition and Change* 131, 133.

[34] Archie Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) *Academy of Management Review* 497, 499–500.

[35] Freeman and John McVea, above n 16 189, 24.

[36] Van Marrewijk, above n 5, 95.

[37] Astrid Konrad et al., 'Empirical Findings on Business–Society Relations in Europe' (2006) 63 (1) *Journal of Business Ethics* 89, 91; Archie Carroll, 'Corporate Social Responsibility' (1999) 38 (3) *Business & Society* 268; E Garriga and D Mele, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53(1) *Journal of Business Ethics* 51; Carmen Valor, 'Corporate Social Responsibility and Corporate Citizenship: towards Corporate Accountability' (2005) 110 (2) *Business and Society Review* 191; Van Marrewijk, above n 5, 95; Marjo Siltaoja, 'The Relationship Between Corporate Social Responsibility and Corporate Reputation from a Value-Laden Viewpoint: An Empirical Study in a Finnish Newspaper Context' (University of Jyvaskyla, 2006) 299.

producing goods without compromising social and environmental values.[38] This principle denotes that along with their responses to the financial expectations of their shareholders, companies should focus on the economic wellbeing of society as a whole.[39] The environmental principle, in short, states that the companies should not harm the environment in order to maximise their profits, and that companies should have a strong role in repairing environmental damage caused by their irresponsible use of natural resources.[40] Finally, the principle of the stakeholder approach to CSR practice holds companies responsible for considering the legitimate interest of their stakeholders.[41] These principles are the drivers of the sources of different CSR practices and hence important factors for initiating any strategies for developing CSR practices.[42] These principles are used broadly within different segments of government, business and the academic world. For this book, these principles are considered to be the cornerstone for the development of socially responsible corporate culture.

Defining a paradigm is problematic; defining CSR is complex and contingent on situational factors. In its second generation, although CSR should have a universal definition, this has not yet been satisfactorily achieved. Despite this, CSR has defined its principles, which are now acknowledged by standardisation regimes, global business societies, civil societies and nation states. The broad understanding of CSR is that companies should be committed to 'contribute to sustainable economic development—working with employees, their families, the local community and society at large to improve the quality of life, in way that [is] also good for business.'[43]

[38] Elkington, above n 32; Maureen Rogers and Roberta Ryan, 'The Triple Bottom Line for Sustainable Community Development' (2001) 6(3) *Local Environment* 279; Elisa Juholin, 'For Business or the Good of All? A Finnish Approach to Corporate Social Responsibility' (2004) 4 (3) *Corporate Governance* 20.

[39] A Konrad et al., above n 37, 89, 93.

[40] Rodney McAdam and Denis Leonard, 'Corporate Social Responsibility in a Total Quality Management Context: Opportunities for Sustainable Growth' (2003) 3(4) *Corporate Governance* 36; Drek Matten and Jeremy Moon, 'Pan-European Approach. A Conceptual Framework for Understanding CSR' (2007) *Corporate Ethics and Corporate Governance* 179.

[41] Edward Freeman and Ramakrisna Velamuri, 'A New Approach to CSR: Company Stakeholder Responsibility' Institute for Corporate Ethics Bridging Paper http://www.corporate-ethics.org/pdf/csr.pdf at 12 December 2011; Dima Jamali, 'A Stakeholder Approach to Corporate Social Responsibility: A Fresh Perspective into Theory and Practice' (2008) 82(1) *Journal of Business Ethics* 213.

[42] Duane Windsor, 'The Future of Corporate Social Responsibility' (2001) 9(3) *International Journal of Organizational Analysis* 225; Jamali, above 215.

[43] Halina Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (2004)3.

## 2.3 Convergence of CSR and Corporate Governance*

There is an evolving interplay between CG and CSR.[44] Both these mechanisms hold economic and legal features. These may be altered through socio-economic processes in which competition within the product market is the most powerful force.[45] CG and CSR are complementary and are closely linked with market forces. Their objectives are not concurrent; they may act as tools for attaining each other's goals, though their setups as corporate frameworks are different. CSR operates in a free-form manner, whereas CG issues operate within well-defined and accepted structures.[46]

CG is an umbrella term.[47] In its narrower sense, it describes the formal system of accountability of corporate directors to the owners of companies. In a broader sense, the concept includes the entire network of formal and informal relationships involving the corporate sector and the consequences of these relationships for society in general. These two senses are not concurrent; rather, they are complementary. CG has been described as the ways in which suppliers of finance to corporations assure themselves of obtaining a return on their investment.[48] However, it could also implicate 'the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated'.[49] Taking these senses together, CG is no longer merely about maximising stock value; rather, it concerns the 'relationships among the many players involved (the stakeholders) and the goals for which the corporation is governed.'[50]

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*The core of this section has been published as a chapter of a book on corporate social responsibility and corporate governance. For details, see Mia Mahmudur Rahim 'Corporate Governance as Social Responsibility: A Meta-regulation Approach to Incorporate CSR in Corporate Governance' in Sabri Boubaker and Duc Khuong Nguyen (eds), *Board of Directors and Corporate Social Responsibility*, Palgrave Macmillan (UK).

[44] Lawrence E Mitchell, 'The Board as a Path toward Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 279.

[45] Andrei Shleifer and Robert Vishny, 'A Survey of Corporate Governance' (1997) 52 (2) *Journal of Finance* 737, 3.

[46] Lawrence E Mitchell in McBarnet, Voiculescus and Campbell, above n 44, 279.

[47] For details of CG see Shleifer and Vishny, above n 45; Shann Turnbull, 'Corporate Governance: its Scope, Concerns and theories' (1997) 5(4) *Corporate Governance* 180; Oliver Hart, 'Corporate Governance: Some Theory and Implications' (1995) 105(430) *Economic Journal* 678; Marco Becht, Patrick Bolton and Alisa Roell, 'Corporate Governance and Control' (2003) 1 *Handbook of the Economics of Finance* 1; Catherine Daily, Dan Dalton and Albert Cannella Jr, 'Corporate Governance: Decades of Dialogue and Data' (2003) 28(3) *Academy of Management Review* 371; Lucian Bebchuk, Alma Cohen and A Ferrell, 'What Matters in Corporate Governance?' (2009) 22 (2) *Review of Financial Studies* 783.

[48] Shleifer and Vishny, above n 45, 737.

[49] Margaret Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (1995) 3.

[50] Corporate Governance, http://en.wikipedia.org/wiki/Corporate_governance at 3 February 2011.

In the usual CG framework, the roles, rights and responsibilities of corporate directors are vital. In particular, the board of directors is the most appropriate body to allow and design policies to enable corporate management to fulfil their responsibilities to society.[51] In most cases, this board is the sole body that communicates corporate performance to corporate owners. Moreover, with the beginning of the modern CSR era,[52] its role in CG has vastly extended; Eisenberg described this as the 'board as manager'.[53] Chapter 3 of this book discusses this in greater detail.

In the marketplace, CG is an old actor, whereas CSR is comparatively new. It is worth noting that the sophistication of consumers in the 1960s, the environmental movement of the 1970s and the increasing interest in the social impacts of business in the 1990s have all helped CSR reach the heart of CG.[54] The list of key issues associated with this timeline is by no means comprehensive. However, it is aimed at highlighting some key initiatives over the last few decades that have contributed to the movement of CSR from the margins to the mainstream of the policy agenda.[55] In almost every instance, these events did not specifically actuate CSR initiatives; rather, these instances set the global scene for the intersection between CSR and CG. Several of these events have been important drivers of this intersection: the global social urge to include the previously excluded social costs of production and the hidden costs incurred by the environment as a result of business activities with the corporate balance sheet; the lack of confidence in the institutions of the market economy[56]; and the demand for ensuring sustainable development. Kakabadse et al. identify 'consumerism' and 'corporate scandals' as the current most important drivers underpinning this development.[57] These two factors are, indeed, closely related to market competition, and hence, they act as strong drivers for CG and CSR to develop the required framework by which a company can demonstrate its responsibility to society through its performance.

To CG, this intersection largely contributes by reconciling the tension between CG's engagement with shareholder and stakeholder interest; it has become attuned to constituency concerns in CG. To CSR, this intersection establishes CSR as:

> [a] business strategy to make the ultimate goals of corporations more achievable as well as more transparent, demonstrate responsibility towards communities and the environment, and take the interests of groups such as employees and consumers into account when making long-term business decisions.[58]

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[51] Mitchell, above n 46, 280.

[52] For details of the corporate Board of Directors reform and the beginning of modern corporate social responsibility, see Mitchell, above n 46, 284–288.

[53] Melvin Eisenberg, 'The Modernisation of Corporate Law: An Essay for Bill Cary' (1982) 37 *University of Miami Law Review* 187, 209–10.

[54] Bagi, Krabalo and Narani, above n 10.

[55] Ibid.

[56] Ibid.

[57] Kakabadse, above n 1, 279; for a detailed study on this issue, see Maurice Thevenet, 'Viewpoint: Global Responsibility and Individual Exemplarity' (2003) 3(3) *Corporate Governance* 114.

[58] Amir Gill, 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26 *Berkeley Journal of International Law* 452,463; 'Just Good Business', *Economist* 17 January 2008.

This convergence has incited arguments between the pro-regulation and the pro-business schools regarding the way in which a corporation ought to act in a socially responsible fashion.[59] To the pro-regulation advocates, an option that is commonly advanced is that the regulation of corporate directors' duties ought to be modified to incorporate an obligation for directors to consider social responsibilities at the core of corporate strategies.[60] Pro-business advocates fervently disagree with this notion and argue that burdening corporate directors with this type of liability may significantly disrupt the administration of CG laws as well as damn the socio-political compact.[61] They suggest, however, that the elected legislature is responsible for ensuring that corporations act in a socially responsible manner and that directors are responsible for ensuring that companies operating for long-term profit maximisation comply with regulatory constraints.[62] To them, the consequence of this is that the legislature is responsible to the electorate, whilst directors respond purely to competitive pressures. A detailed discussion on this point can be found in Chap. 4 of this book.

The potential convergence of CSR and CG, however, fuses the arguments of these two schools. It paves the way for CG to be driven by ethical norms and the need for accountability, and it enables CSR to adapt prevailing business practices. 'Where there were once two separate sets of mechanisms, one dealing with 'hard core' corporate decision-making and the other with 'soft', people-friendly business strategies, scholars now point to a more hybridised, synbooked body of laws and norms regulating corporate practices.'[63] This has affected the modes of corporate regulation: 'Hierarchical command-and-control' regulation[64] is being replaced by a mixture of public and private, state and market, traditional and self-regulation institutions that are based on collaboration among the state, business corporations, and NGOs.'[65]

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[59] See also Leon Gettler, 'The Blurred Lines of Being Responsible', *The Age* 22 November 2006.

[60] Devid Levi-Faur and Hanna Comaneshter, 'The Risks of Regulation and the Regulation of Risks: The Governance of Nanotechnology' (2007) *New Global Frontiers in Regulation: The Age of Nanotechnology* 149.

[61] Michael Greve, 'Business, the States, and Federalism's Political Economy' (2001) 25 *Harvard Journal of Law and Public Policy* 895; John W Cioffi, 'The Corporation and Comparative Capitalisms: Corporate Governance Reform and the Regulatory Politics of Structural Change in the United States and Germany.'

[62] Corporations and Markets Advisory Committee, 'The Social Responsibility of Corporations' (Corporations and Market Advisory Committee, 2006) 111; Chris Durden and Richard Pech, 'The Increasing Cost of Corporate Governance: Decision Speed-Bumps for Managers' (2006) 6(1) *Corporate Governance* 84.

[63] Gill, above n 58, 463.

[64] Orly Lobel, 'Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety' (2005) 57 *Administrative Law Review* 1071.

[65] Gill, above n 58,464; for details on compliance management, financial regulation and administration at the corporate company level, see Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 263.

This convergence has gradually extended the narrower meaning of CG. It adds the agency focus to corporate ethics and accountability, and it relies on the 'business judgment' of CG to ensure this accountability.[66] Jamali et al. has nicely summarised this relationship in the chart mentioned below.

Links between CG and CSR (Modified version of the chart presented in Dima Jamali et al.,'Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship' (2008) 16(5) *Corporate Governance* 443, 446)

| CG | | CSR |
|---|---|---|
| Broader CG conception: Entails due regard to all stakeholders and ensuring that companies are answerable to all their key stakeholders | ⇨ | Stakeholder approach to CSR: Companies are the crux of a complex web of stakeholder relationships and have an obligation or responsibility to these different stakeholders |
| Narrow CG conception: Ensuring accountability, compliance, and transparency | ⇦ | Internal dimension of CSR: Companies should accord due diligence to their responsibility to internal stakeholders, addressing issues relating to skills and education, workplace safety, working conditions, human rights, equity/equal opportunity, and labor rights |

It finds 'corporate self-regulation' as its dominant expression in the field of corporate conduct. On the ground, by adding issues such as human rights, workers' rights and environmental protection to 'self-regulation', CG has gained the opportunity to develop stakeholder engagement programs that could increase their competitiveness and to launch a marketing campaign that could emphasise their humanistic, democratic values as 'corporate citizens'.

In strong economies, corporate self-regulation has gradually absorbed the ethos of this convergence. In these economies, for instance, many companies have appropriate measures to internalise the costs externalised to the environment due to their business operations.[67] These initiatives are not driven by laws; rather, they are driven by the corporate conscience to reduce costs as well as to contribute to environmental development. Wal-Mart has recently taken initiatives to 'green' its

[66] Lawrence Mitchell and Mitchell Diamond, *Corporations, a Contemporary Approach* (2004); Jamali et al. has examined the relationship between CG and CSR and find three basis for this relationship, namely: '(1) CG as a pillar for CSR; (2) CSR as an attribute of CG and (3) CG and CSR as coexisting components of the same continuum.' In this continuum, as Bhimani and Soonawalla described, the poor CG and misleading financial statements are one side of the corporate coin—the other side being poor CSR. For details see Dima Jamali, Asem M Safieddine and Myriam Rabbath, 'Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship' (2008) 16 (5) *Corporate Governance* 443, 447; Alnoor Bhimani and Kazbi Soonawalla, 'From Conformance to Performance: The Corporate Responsibilities Continuum' (2005) 24 *Journal of Accounting and Public Policy* 165–74.

[67] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005)14–46.

stores to reduce its energy and labour use.[68] Between 2003 and 2008, Gap Inc. cut its greenhouse gas emissions by 20 % and eliminated child labour from its suppliers.[69] 3M's 3P program—'Pollution Prevention Pay'—helped the company discover enormous savings that it had previously overlooked.[70] John Deere's recent foray into renewable energy is another prime example. Other than selling tractors, it provides financial support and consultation to help farmers harvest using wind energy.[71] This may seem an odd fit, but the venture has become a source of value innovation as well as a way to meet social responsibilities; it is helping farmers to survive and creating a new revenue stream for the company. A detailed discussion on how the governments of strong and developing economies are incorporating these principles into their companies is presented at the end of this chapter.

### 2.3.1 *Impact of Corporate Social Responsibility and Corporate Governance Convergence on Corporate Regulation*[*]

There are different regulatory systems in the corporate regulation landscape.[72] Amongst these systems, public regulation, self-regulation and co-regulation are

[68] Mary Pflum, 'Wal-Mart Commits to Going Green', *ABC News* 14 September 2007; Julie Schmit, 'Going Greener: Wal-Mart Plans New Solar Power initiative ', *USA today* 19 September 2010.

[69] Sean Gregory, 'Transparency: A Good Fit', *Time* 10 September 2009.

[70] CSRpedia, *3P Pollution Prevention Pays, a CSR Program by 3M Co* (19 May) http://www.csrpedia.com/programs/3p-pollution-prevention-pays-229 at 19 May 2011.

[71] Daniel C Esty and Andrew S Winston, 'Green-to-Gold-Plays' (2009) http://www.positivearticles.com/Article/Green-to-Gold–Plays/47943 at 19 May 2011.

[*] For a detailed discussion on the impact of this convergence on the scope of small- and medium-sized companies as they try to enter into the global market as first tier suppliers, see Mia Mahmudur Rahim 'Convergence of CSR and Corporate Governance and its Impact on SMEs' Access to Global Market as First-Tier Supplier: Evidence from Bangladesh' (2013) 14 (1) *Journal of Asia-Pacific Business* 58–83.

[72] Defining regulation is difficult as this term is employed for a myriad of discursive, theoretical, and analytical purposes. Moreover, it is highly contested. For this study, regulation is defined for any process or set of processes, as Colin Scott states, by which 'norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime'. This definition relates to the principles of 'new governance' and the 'new regulatory state' where one of the objectives of regulation is to capture the plurality of interests and sources of control around issues, problems and institutions. For details, see Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and institutional Design' (2001) 283; Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State, the Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004); Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World' (2002) 54 *Current Legal Problems* 103; Neil Gunningham, 'The New Collaborative

prominent. Public regulation denotes the traditional form of regulation where public authorities set the relevant legislation or other forms of binding actions for the purpose of achieving public policy aims. In this system, legislation is adopted to set the necessary rules, monitor compliance and impose sanctions to aid in enforcing these actions. This form of regulatory system also details the structures, tasks and means for the involvement of private citizens and organisations in the implementation of its rules. Nevertheless, the responsibility for implementing these rules remains with the state.[73]

Self-regulation is the opposite of public regulation. As Julia Black defines, self-regulation is 'the situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority'.[74] In this regulatory system, social groups such as producers, providers and so on create their own regulatory system in order to reach their objectives. In this system, private parties take the responsibility for monitoring compliance, and public authorities usually do not interfere in the regulatees' self-monitoring strategies. When considering the implementation phase, this regulatory system can be divided into two levels: self-regulation at the macro level and self-regulation at the micro level. At the macro level, self-regulation may have technical and qualitative standards related to codes of conduct that define good and bad practices in internal regulation.[75] These standards may be provided by a self-regulatory organisation created by the parties concerned.[76] At this level, the rule-making power (the regulator) is separated from the rule-applying power (the regulatee). At the micro level, the regulatee is solely responsible for both the rules and the implementation strategies. Here, the key feature of this mode of regulation is that the regulator and regulatee are identical, and therefore the regulatee enjoys the scope of framing their own internal strategies to reflect the public policy goal and the norms of the code of conduct in a given circumstance.

In its widest sense, the term co-regulation means 'cooperative forms of regulation that are designed to achieve public authority objectives—the cooperation being performed by public authority and civil society.'[77] In its narrowest sense, it means that the regulator and the regulatee are linked by a regulatory scheme designed to reach a public policy goal as well as to fulfil the interests of the regulatee. A co-regulatory scheme combines elements of self-regulation, self-monitoring and traditional public regulation strategies. Hence, in co-regulation, there can be many different forms of regulatory strategies depending on the combination of public

Environmental Governance: The Localisation of Regulation' (2009) 36(1) *Journal of Law and Society* 145; David Levi-Faur, 'Regulation and Regulatory Governance' (Hebrew University, 2010) 8–9.

[73] Carmen Palzer and Alexander Scheuer, 'Self-Regulation, Co-Regulation, Public Regulation' (2003) *Promote or Protect* 165.

[74] Julia Black, 'Constitutionalising Self Regulation' (1996) 59(1) *Modern Law Review* 24, 27.

[75] Carmen Palzer and Alexander Scheuer, above n 73.

[76] Ibid 166.

[77] Ibid 170.

authority and private sector elements. Nonetheless, in this regulatory system, generally the public authority lays down the legal basis so that the system can begin to function, and the private parties develop the rules that describe its functioning.

The impact of the convergence of CSR and CG has mostly been reflected by the development of self-regulatory (micro-level) regimes in the business environment. Corporate self-regulation is an increasingly important part of business regulation.[78] Advocates of this convergence believe that corporate self-regulation that contains the principles of CSR offers opportunities to companies for greater market access, cost savings, productivity and innovation, as well as broader social benefits such as education and community development.[79] At the level of the individual company, the notion of corporate self-regulation is usually enshrined either through its own code of conduct or through its incorporation of a multi-stake holder initiative or guidelines prepared by another social or commercial organisation.

### Corporate Self-Regulation

In the age of globalisation, the authority and power of the nation-state has faced a dramatic decline. Non-state actors and transnational bodies are increasingly becoming engaged in constructing regulatory schemes and devices for businesses.[80] Corporate self-regulation, as motivated by international agencies, social groups, and business-related entities, has gained considerable interest due to its emergence as a complement to (if not a substitute for) formal governmental regulation.[81]

There is no single conception of self-regulation. Self-regulation refers to any mechanism whereby a subject exercises control over itself to maintain the stability of its function. From the corporate regulation perspective, the broader meaning of this concept is that it is a 'part of the process of homeostasis by which a system regulates its internal environment to maintain a stable, constant condition by means of multiple equilibrium adjustment, by interrelated regulatory mechanisms.'[82] Its narrower meaning implies that self-regulation is the rules of business and the rights

[78] John Clark, *Worlds Apart: Civil Society and the Battle for Ethical Globalisation* (2003); Hutter and O'Mahony, above n 3, 3.

[79] Orlay Lobel, *Crowding Out or Ratcheting Up?: Fair Trade Systems, Regulation, and New Governance,* Fair Trade, Corporate Accountability and Beyond: Exprements in Globalising Justice (2010) 313.

[80] John W Cioffi, 'Governing Globalisation? The State, Law, and Structural Change in Corporate Governance' (2000) 27(4) *Journal of Law and Society* 572.

[81] Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (2002); Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19 (4) *Law and Policy* 363.

[82] See http://iit.ches.ua.edu/systems/homeostasis.html at 14 April 2007, mentioned in Elizabeth Spencer, 'Reconceiving the Regulation of the Franchise Sector' (2008) 8 *Macquarie Law Journal* 103, 106.

of practice set and enforced by a profession guild. This narrower meaning has been extended, and now this concept is no longer confined to professional organisations.[83] It is widely applied in financial regulation and in many other sectors. It is now the *plat du jour* in studies of regulation in many economies and an important element of the new learning.[84] Neil Gunningham and Peter Grabosky define this concept as: '[S]elf-regulation is not a precise concept but, for present purposes, it may be defined as a process whereby an organised group regulates the behaviour of its members.'[85] Julia Black relates this concept to the concept of 'decentered' regulation.[86] She identifies four basic forms of self-regulation: (1) mandated self-regulation; (2) sanctioned self-regulation; (3) coerced self-regulation and (4) voluntary self-regulation.[87] In broad terms, mandated self-regulation denotes the mandates provided by the state to a collective group to formulate and enforce norms within a framework defined by the government. In sanctioned self-regulation, a group formulates its own rules, which are then subjected to government approval. In coerced self-regulation, 'the industry itself formulates and imposes regulation, but in response to threats by the government that if it omits to do so the government will impose statutory regulation instead'.[88] In voluntary self-regulation, the state is not involved in the regulatory strategies of the regulatees; instead, the regulatees take the initiative in the formation and operation of their regulatory system.[89] All these modes of self-regulation serve different objectives in internal regulation and contribute to increased ownership and responsibility at the same time; they help to develop internal regulatory mechanisms capable of minimising the cost of compliance.

Within this panorama, a highly visible and frequently debated form of self-regulation is the corporate code of conduct. In contrast to private business codes that deal with transactional and contractual aspects of commerce, codes of conduct address corporate ethics, moral guidelines, and key CSR issues like human rights, labour, the environment, and sustainable development.[90] Throughout the 1990s,

[83] Anthony Ogus, *Regulation: Legal form and Economic Theory* (1994) 107.

[84] Iain Ramsay, 'Regulatory Capitalism and the "New Learning" in Regulation' (2006) 28 *Sydney Law Review* 9.

[85] Neil Gunningham, Peter Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy* (1998) 50.

[86] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" world' (2002) 54 *Current Legal Problems* 103, 118.

[87] Ibid.

[88] Marc Hertogh and Pauline Westerman, *Self-Regulation and the Future of the Regulatory State Manuscript: International and Interdisciplinary Perspectives* (2009) 19.

[89] Black, above n 74, 27; for details, see Marc Hertogh and Pauline Westerman, above.

[90] Eddy Wymeersch, 'Corporate Governance Codes and their Implementation' (Gent University, 2006).

these codes were adopted by large companies, particularly those with a strong presence in developing economies with weak state-based regulatory systems.[91]

These codes are the main self-regulatory instrument for companies; they address corporate conduct with respect to their external social, environmental, human rights and economic factors. Hence, these codes are largely focused on sectors where brand reputation and export orientation are vital. Codes relating to labour issues usually align with the footwear, garment, sporting goods, toy and retail sectors, while those related to environmental aspects are likely to be present in the oil, chemical, forestry and mining industries.[92] Sources suggest that the world's larger multinational companies and buyers have taken the lead in adopting such codes, which can perform as dependable sources[93] and alternative means of regulation.[94]

The principles (similar to a code of conduct) of Fish4Ever are worth mentioning at this point. Fish4Ever, a famous brand of seafood products with a target of fulfilling 90 % of its turnover with organic and/or sustainable products, has a clear policy that restricts it from selling any fish species declared as endangered by the International Union for the Conservation of Nature and other reputed NGOs.[95] According to these principles, it does not trade with any supplier that does not respect workers rights or does not ensure fair pay and treatment for their workers. For example, when sourcing skipjack tuna, they consciously look for suppliers who support sustainability and use ethical practices to ensure their product quality and processing efficiency.[96]

Adidas Group, the owner of the Adidas and Reebok brands, has more than 1,120 independent factories (on 31 December 2009) in 68 economies, and has responded to this convergence through its standards, guidelines and principles to deal with their social, ethical, and environmental issues.[97] For instance, the 'Workplace Standard' settled by Adidas mainly sets forth the group's position on a number of challenging labour issues faced by workers. These issues include working hours,

[91] Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation,* Labour Law in an Era of Globalisation: Transformative Practice and Possibilities (2005) 471.

[92] United Nations Research Institute for Social Development, Corporate Social Responsibility and Business Regulations: How should Transnational Corporations be Regulated to Minimise Malpractice and Improve their Social, Environmental and Human Rights Record in Developing Economies? (2004) www.unrisd.org at 29 June 2010.

[93] Hu Xiaoyong, *Corporate Codes of Conduct and Labour Related Corporate Social Responsibility: Analysing the Self Regulatory Mechanisms of Multinational Enterprises and their Impacts to Developing Countries* (2006) The Japan Institute for Labour Policy and Training http://www.jil.go.jp/profile/documents/Hu.pdf at23 July 2010.

[94] Levis Julian, 'Adoption of Corporate Social Responsibility Codes by Multinational Companies' (2006) 17(1) *Journals of Asian Economics* 50, 51.

[95] http://www.fish-4-ever.com/content/view/131/100/ at 24 July 2010.

[96] Ibid.

[97] Adidas Group, *Supply Chain* http://www.adidas-group.com/en/sustainability/suppliers_and_workers/default.aspx at 25 July 2010.

fair wages, freedom of association, child labour etc.[98] This group prepares guidelines and training programs for its suppliers to minimise their business operations' impact on the environment. These guidelines emphasise the suppliers' responsibility to adopt the group's mandatory environmental management systems. By imposing this system in their supplier's companies Adidas is attempting to tackle pollution and to ensure that its products are environmentally safe.

Gap Inc., one of the most popular brands as well as the largest retailer of garments in the world, has identified six factors in garment suppliers that influence their selection criteria for the suppliers they choose. These factors are: (a) efficient process and operation practices; (b) good supervisory and management skills; (c) a full assessment of capacity and capability; (d) adequate modern technology and equipment; (e) respect for workers rights; (f) an adequate understanding of labour laws and standards. This buyer is less interested in suppliers that do not comply with these requirements. This has been reflected in Gap Inc.'s statement that 'poor factory working conditions are simply unacceptable.'[99]

Two major critiques have risen in regard to codes of conduct. The first of these concerns the legal pluralism and free market ideology underlying self-regulation.[100] It has been argued that since codes of conduct are based on the principles of legal pluralism and free market ideology, economic players in the private sphere use this form of self-regulation to fulfil their own interests. This mode of regulation creates a tendency to view private ordering systems as pursuing their own policies rather than public policy goals.[101] The second critique contends that codes of conduct have almost always failed to improve corporate behaviour worldwide, and thus are hypocritical in their purpose.[102] Indeed, many agree that these codes, even when supported by a strong monitoring system, might not generate ground-level change, unless accompanied by fitting changes in business culture and decision-making.[103]

In response, advocates of codes of conduct propose arguments that the analysis of these codes' potential for engendering change requires more complex doctrinal and empirical understanding.[104] They argue that the new institutional economic approach has gradually supported the integration of CSR and business cases since CSR not only represents costs for the company but also results in various advantages. To reap the benefits of these advantages, companies depend upon

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[98] Ibid.

[99] http://www.gapinc.com/GapincSubSites/csr/Goals/SupplyChain/SC_Factory_Working_Conditions.shtml at 21 July 2010.

[100] Adelle Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct' (2000) 8 *Indiana Journal of Global Legal Studies* 401.

[101] Carmen Palzer and Alexander Scheuer, above n 73.

[102] Richard Locke and Monica Romis, 'Beyond Corporate Codes of Conduct: Work Organisation and Labour Standards in Two Mexican Garment Factories' (2006).

[103] *Progressive Corporate Law* (1995).

[104] Peer Zumbansen, 'The Parallel Worlds of Corporate Governance and Labour Law' (2006) 13 (1) *Indiana Journal of Global Legal Studies* 261.

their codes of conduct. They argue that corporate codes of conduct can positively affect sales, purchasing and recruitment of new staff.[105] Moreover, these codes of conduct can aid CG to secure their company's reputation, create innovation and increase motivation among their employees, leading to the increased sustainability of their company. Hence, CG creates a corporate code of conduct not just as a nominal part of their strategic communications.[106]

Another recent trend in self-regulation that has drawn attention is its feature of non-financial reporting. First published in the 1990s in response to a series of environmental disasters, non-financial corporate reports are now increasingly covering a much wider range of corporate policies.[107] This trend seeks to not only inform the public of existing CSR policies implemented by the reporting firm but also to provide incentives for companies to ensure transparency and create channels for dialogue with their stakeholders.[108] In other words, besides corporate disclosure, the advantage of non-financial reporting is that it encourages CG to consider and incorporate better mechanisms for long-term accountability to their constituencies.[109] Nevertheless, such reporting is still largely a voluntary concept, despite recent attempts to mandate it. Some companies have chosen to incorporate CG and CSR issues into their annual financial reporting, creating what has become known as 'integrated reports.'[110]

Both the codes of conduct and non-financial reporting trends exemplify how corporate self-regulation serves as a significant medium for connecting governance with responsibility. Through various strategies and instruments, self-regulation has subjected businesses to a mix of supervisory principles that reflects the convergence of CG and CSR. External stakeholders have an important role in the supervision of corporate self-regulation and corporate codes of conduct. This has helped the development of a 'standardisation regime'. Large companies depend on this regime to ensure that their suppliers are fulfilling, or are able to fulfil, CSR practices following a set of international standards commonly known as the multi-stake holder codes. These codes allow divergent CSR practices to be bundled into 'generic management systems standards' for business corporations.[111] The convergence of CSR and CG at the macro level plays an important role in this

[105] Stephen Tomsen, 'Encouraging Public Private Partnerships in the Utilities Sector' (NEPAD/OECD, 2005).

[106] Blowfield and Frynas, above n 7, 512; for the factors that relate corporate codes of conduct to the business case see Fox, above n 30, 31.

[107] Ans Kolk, 'Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices' (2008) 17(1) *Business Strategy and the Environment* 1.

[108] David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency' (2007) 17 *Business Ethics Quarterly* 455, 458.

[109] See, John Elkington, *The Triple Bottom Line for 21st-Century Business,* The Earthscan Reader in Business and Sustainable Development (2001).

[110] Kolk, above n 107.

[111] Antonia Gawel, *Corporate Social Responsibility: Standards and Objectives Driving Corporate Inititatives* (2006).

development; this convergence has driven companies to create commercial value for a standardisation regime.

### Development of a Standardisation of CSR Practices

Standardisation means the process of reaching a standard. A standard can be defined as a limited set of solutions to actual and potential matching problems; it is a means by which a party can balance its need to fulfil a given requirement. A standard may also be considered as solutions that intend or expect repeated or continuous use for a certain period. Standards Australia defines a standard as a 'published document which set out specifications and procedures designed to ensure that a material, product, method or service is fit for its purpose and consistently performs the way it was intended to.'[112] Therefore, in the narrow sense, a standard is a set of criteria that is meant to check the requirements and expectations of organisations. In a broader sense, particularly while dealing with CSR issues, standard refers to CSR norms, rules, agreement, guidelines and codes directed towards benefits for the party or parties involved.[113] The term 'regime' in the standardisation regime denotes an agreement that creates and facilitates cooperative behaviour within a particular issue area.[114] This term 'partly overlaps with the term governance structure, which refers to the way an actor network or organisation governs a particular field of interest.'[115] Combining the meanings of these terms, standardisation regime denotes an agreement based on the principles that guide the standards of activities.[116]

The impact of this regime no longer remains only within business management. Rather, it has extended to areas such as consumer safety, environmental degradation, ethical operations and a myriad of others, all of which serve to raise the quality of everyday life.[117] Against the background of the less proscriptive role of national governments, these institutions help companies to manage the pressures from

[112] Standards Office of Spatial Data Management, Australian Government http://www.osdm.gov.au/Metadata/Standards/default.aspx at 18 April 2011.

[113] M Mueller, V G dos Santos and S Seuring, 'The Contribution of Environmental and Social Standards towards Ensuring Legitimacy in Supply Chain Governance' (2009) 89(4) *Journal of Business Ethics* 509.

[114] Paul J DiMaggio and Walter W Powell, 'The New Institutionalism in Organisational Analysis' (1994) 6.

[115] Tineke M Egyedi, 'Judicio-Standardisation Regime: Exploring the Grounds for IPR Paralysis' (2000) (Version 1.0, Draft, 06/11/00) *Information and Communication Technology Section, Faculty of Technology, Policy and Management, Delft University of Technology* http://administration.ewi.tudelft.nl/live/binaries/0b330c26-def4-45e3-a367-43b61bf0ae45/doc/Egyedi_judiciostandards_ITS.pdf at 13 July 2011. For details see Schneider V and Werle Schneider, 'Co-Evolution and Development Constraints: The Development of Large Technical Systems in Evolutionary Perspective' (1995).

[116] Ibid.

[117] Lockett, Moon and Visser, above n 30.

society to account for the adverse consequences of their activities as profit-seeking corporations. Hence, these initiatives have become part of global economic, social and legal systems[118] as these can facilitate their coordination. Henk J Vries termed standardisation functions as a 'lubricant for modern industrial society' as these initiatives can facilitate contact, cooperation and trade throughout the world.[119]

Amongst the sources of CSR standardisation, multi-stake holder initiative or codes are prominent. These codes are the product of concerted initiatives among corporate stakeholders such as companies, trade unions and other worker's associations, government agencies, NGOs and academics.[120] These initiatives are not only standardising CSR but also developing their management, and thus CSR, though voluntary, has taken the form of a quasi-binding responsibility.[121] They have developed monitoring and verification mechanisms, and their institutional application in the global supply chains helps to promote ethical business in a broader context. These initiatives help to evaluate companies' CSR performances in other ways; they have gained the necessary acknowledgement from corporate and civil societies, and support from government and international organisations. The organisations that are creating and nourishing these initiatives have gradually created norms for standardising sets of CSR practices for companies. The increasing acceptance of multi-stakeholder codes by companies, and civil society organisations' affiliation with these codes have further developed a standardisation regime that can help companies to demonstrate their efforts towards fulfilling their social, economic, environmental and ethical responsibilities. The development of CSR standardisation has also allowed the establishment of many organisations specialising in diverse initiatives to facilitate entrepreneurs' ability to do business in a more socially acceptable way. These organisations have detailed different social, ethical and environmental standards to evaluate corporate performance in society, as well as to enumerate the social responsibilities of companies.[122]

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[118] Standards Australia, *Standards and Standardisation* (2002).

[119] Henk Vries, *Standards for the Nation. Analysis of National Standardisation Organisations* (1999); Nils Brunsson and Bengt Jacobsson, *A World of Standards* (2000).

[120] Ibid.

[121] Peter Utting, 'Rethinking Business Regulation: From Self-regulation to Social Control' (1020–8216, UN Research institute for Social Development, 2005).

[122] ISO Standard Series, SA8000, AA1000, ETI Base Code are some examples of prominent initiatives for standardising CSR practices. Like these initiatives, there are many other that have contributed to the development of a number of codes on particular CSR issues and monitoring and verification procedures. The Workplace Code of Conduct and Principles for Monitoring of the Fair Labour association has developed internal and independent monitoring procedures to promote labour standards in the workplace in the USA and worldwide apparel industries. Similarly, the Clean Clothes Campaign has adopted a code of conduct with a view to improve working environments in the global suppliers' factory premises, including garment and sportswear industries. The Global Reporting initiative has provided a framework for reporting on the basis of triple bottom lines, which refers to companies' social, economic and environmental impacts. In addition, under the auspices of the United Nations Global Compact, learning and networking

The convergence of CSR and CG has helped to develop the standardisation regime. Most global companies have acknowledged this development. They exclusively consider certain of these initiatives to measure their suppliers' performance. Some of them weed out suppliers from their chains on the results of performance tests based on these initiatives. Using these initiatives they select strategic suppliers to (a) reduce their transaction costs; (b) increase their profitability; (c) reduce costs as a result of a reduced need to switch suppliers; and (d) increase their competitiveness in the marketplace through improved relationships with consumers.[123]

## 2.4 Trends in the Implementation of CSR Principles in Different Economies

The core principles of CSR are being integrated into the core policy objectives of different economies and global companies and are also moving beyond their individual business initiatives. For the global companies of Europe, the EU Commission's Green Paper on Promoting a Framework for CSR[124] and the European Code of Conduct Regarding the Activities of Transnational Corporations Operating in Developing Economies are two instruments that guide them when integrating CSR principles in their core policies.

This integration can also be seen from individual states' perspectives; states are also accepting these issues in their socio-economic strategies and thus are establishing these issues within national economies. For instance, in the UK, for the last 10 years there has been a post of CSR Minister to encourage greater social responsibility in UK companies.[125] Belgium passed the *Occupational Pension Law*

processes have been developed for the promotion of CSR practices on the basis of ten principles declared by the Compact. For details, see Hu Xiaoyong, above n 93.

[123] Mark Goyder and Peter Desmond, *Is Ethical Sourcing Simply a Question of Good Supply Chain Management?* Visions of Ethical Sourcing (2000) 28; T Mason, 'Getting Your Suppliers on the Team' (1996) 4 *Logistics Focus* 10.

[124] The European Commission Green Paper: Promoting a European Framework for Corporate Social Responsibility (2001) www.europa.eu.int at 15 September 2008. For a detailed discussion on this Green Paper see Jonathon Lux, Sune Skadegard Thorsen and Annemarie Meisling, *The European Inititatives, Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2005) 283.

[125] Tony Blair's government created the post of CSR Minister in the UK for the first time to promote CSR and responsible business practices in the UK. Since then, there have been seven CSR Ministers, although the new coalition government in the UK has not yet appointed anyone to this post. For details, visit http://www.fabianpattberg.com/2010/06/csr-minister-post-disappears-devaluation-uk-leadership-responsible-business-practice/ at 22 March 2011. For a study on the UK's CSR initiatives in the oil and gas industry, see Cynthia A Williams, 'Civil Society Initiatives and Soft Law in the Oil and Gas Industry' (2004) 36 *New York Journal of International Law and Politics* 457.

*2003* (Belgium)[126] that requires pension fund managers to disclose the extent to which they consider ethical, social, and environmental criteria in their investment policies in their annual reports. In the same fashion, the *Occupational Pension Schemes (Investment) Regulation 1996* (UK) requires that the trustees of occupational pension funds disclose the social, environmental or ethical considerations they have made in the selection, retention and realisation of their investments.[127] This has been further amplified with the legislative directions to trustees according to the *Trustee Act 2000* (UK). This Act requires the trustees of investments to ensure that they have applied 'relevant ethical considerations as to the kinds of investments that are appropriate for the trust to make.'[128] The *Companies Act of 2006* (UK) has introduced specific reporting requirements on environmental and social issues.[129] It provides a comprehensive guideline with potential implications for a variety of CSR actors. It makes a crucial triumvirate of directors' duties, business risk management, and corporate reporting more explicitly long-term, relational, and stakeholder-sensitive in their structure, content, and implementation.[130] In Germany, since 2001, certified private and occupational pension schemes have been required to report whether they consider ethical, ecological, and social aspects in their investment policies.[131] Denmark is the first country in the

[126] For details on the use of CSR notions through this legislation, see Karin Buhmann, 'Corporate Social Responsibility: What Role for Law? Some aspects of Law and CSR' (2006) 6(2) *Corporate Governance* 180, 189; see also Lux, Thorsen and Meisling, above n 124, 294.

[127] Act No. 3172 of 1996. This legislation came into effect in July 2000. It requires that the annual statement of investment principles comments on the 'extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investment.' For more details, see Occupational Pension Schemes (Investment) Regulations 1996, available at http://www.legislation.gov.uk/uksi/1996/3127/contents/made at 9 August 2011. Perhaps as a result of this Act, as of 2001, 89 % of the top 100 companies in the UK included health, safety, environmental and social information in their financial reports and 49 % of them published a separate report with this information. For details, see KPMG International Survey of Corporate Sustainability Reporting 2002.

[128] For details, see the Trustee Act 2000, c. 29, section 4(3)(a).

[129] Alessia Di Pascale, 'The EU Voluntary Approach to Corporate Social Responsibility in Comparison with Regulatory Initiatives Across the World' (Fondazione Eni Enrico Mattei, 2007), available at http://core-conferences.net/attach/CSR2007-016.pdf 27 March 2011.

[130] Bryan Horrigan, '21st Century Corporate Social Responsibility Trends-An Emerging Comparative Body of Law and Regulation of Corporate Responsibility, Governance, and Sustainability' (2007) 4 *Macquarie University Journal of Business Law* 85, 104.

[131] With the reform of the state pension system in Germany and with some reforms in its legislation, this country has imposed new reporting duties for the companies and investments depending on pension funds. For instance, the Old-Age Provision Act (Germany) states that 'The provider must declare in writing, whether and how ecological, ethical and social needs have been considered in the investment of pension contributions'. The *Certification Act* (Germany) requires that companies using pension funds must maintain certification from the environmental authorities. According to Section 115(4) of the Supervision of insurance Undertakings *Insurance Supervision Act 1992* (Germany), the 'pension fund trustee must inform its beneficiaries in writing as to whether and how ecological, ethical and social needs have been considered in the investment of pension contributions'.

world to introduce a law on mandatory public environmental reporting. This country enacted legal provisions that made the announcement of environmental performance to the public and the maintenance of environmental accounts mandatory for companies.[132] In the Netherlands, under a statutory scheme formed by an extension of the *Environmental Management Act* in April 1997 and the *Environmental Reporting Decree* effective from 1999, certain categories of industries (currently approximately 250) are required to produce two environmental reports, one for the public and another for the authorities.[133] The *Accounting Act 1999* (Norway) requires all companies to include environmental information in their annual financial reports, and simultaneously, the Norwegian Environmental Department has developed its own standard for environmental reporting.[134] Likewise, according to Section 1013D (1)1 of the *Corporations Act 2001(Cth),* all financial products with an investment component, including pension funds and mutual funds, must include disclosure of 'the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.'[135]

The enactment of the *Social Label Law 2002* (Belgium) is a notable instance of incorporating CSR ethos in business regulations through law. For this legislation, companies and the subsidiaries of foreign corporations operating in Belgium have been under obligation to produce a report on their social performance over a 3-year period since 1996. However, this legislation does not require companies to comply with eight fundamental ILO conventions[136] to follow its requirements.

In 2001, France passed the *New Economic Regulations 2000* (France). It requires listed companies to disclose their impact on social and environmental issues in their annual reports and accounts.[137] Another piece of legislation, the *National Pension*

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[132] Tine Herreborg Jorgensen and Jette Egelund Holgaard, 'Environmental Reporting: Experiences from Denmark' (Department of Development and Planning, 2004) 6. Available at http://www.plan.aau.dk/digitalassets/5/5479_workingpaper62004.pdf at 27 March 2011.

[133] Eva Hoffmann, 'Environmental Reporting and Sustainability Reporting in Europe: An Overview of Mandatory Reporting Schemes in the Netherlands and France' (University of Maastricht, 2003). Available at http://enviroscope.iges.or.jp/ modules/envirolib/upload/118/attach/BE2_3025.pdf at 27 March 2011.

[134] Alessia Di Pascale, 'The EU Voluntary Approach to Corporate Social Responsibility in Comparison with Regulatory initiatives Across the World' in *The Potential of CSR to Support the Implementation of the EU Sustainability Strategy* (2007). Available at http://core-conferences.net/attach/CSR2007-016.pdf at 27 March 2011.

[135] Section 1013D (1) l of the *Financial Services Reform Act 2001*(Cth). Act No. 122 of 2001.

[136] The ILO eight fundamental conventions include the Freedom of association and Protection of the Right to organise Convention (87) 1948, the Right to Organise and Collective Bargaining Convention (98) 1949, the forced Labour Convention (29) 1929, the Abolition of Forced Labour Convention (105) 1957, the Equal Remuneration Convention (29) 1951, the Discrimination (Employment and Occupation) Convention (111) 1958, Minimum Age Convention (138) 1973, and the Worst form of Child Labour Convention (182) 1999.

[137] Francesco Perrini, Stefano Pogutz and Antonio Tencati, *Developing Corporate Social Responsibility: A European Perspective* (2006) 39.

*Reserve Fund Act 2001* (France), requires the disclosure of social, environmental, and ethical issues used for investment. The *Law on Social Modernisation 2002* (France) is designed to encourage employers to look beyond academic excellence and recognise the skills, knowledge, and experience people develop by working in different contexts, including voluntary social work.[138]

The 'Our Common Concern Campaign', initiated by the Danish Minister of Social Affairs[139]; the Swedish 'Partnership for Global Responsibility',[140] initiated by a group of Swedish ministers; the French government-supported organisation 'The French Study Centre for CSR' and the International Business Leaders Forum[141] of the UK are a few more quasi-legal initiatives for the promotion of CSR at the national level.

In this regard, the role of the European Parliament is prominent. In addition to a code of conduct based on the ethos of CSR, it has adopted a series of resolutions to facilitate the development of the incorporation of CSR principles in its member economies. In 2002, this parliament called for new legislation to require companies' triple-bottom-line reporting on their social and environmental performances and suggested steps for the effective implementation of CSR issues.[142] It took another resolution in 2007 in order to set up a European Alliance for Corporate Social Responsibility in partnership with several corporate

[138] Ariane Antal and andre Sobczak, 'Corporate Social Responsibility in France' (2007) 46 (1) *Business and Society* 9, 15.

[139] Lux, Thorsen and Meisling, above n 124, 279–292.

[140] Lux, Thorsen and Meisling, above n 124, 295.

[141] The international Business Leaders forum was formerly known as the Prince of Wales Business Leaders forum. It has programs in more than 30 economies with a view to promoting responsible business for the benefit of business and society. It helps companies to attain social, economic and environmentally sustainable strategies for their overall development. Like the international Business Leaders forum, Business in the Community-Business Impact and the Ethical Trading initiative are two active organisations devoted to developing CSR principles in companies. Business in the Community is a unique movement of over 800 of the UK's largest corporations that are committed to improving their positive impact on society. The Ethical Trading initiative's emphasis is more on the alliance of companies, trade unions and NGOs whose goal is to promote the use of widely-endorsed standards in relation to the working conditions in the global supply and production chains. For details on these organisations, visit http://www.iblf.org/, http://www.bitc.ie/ and http://www.ethicaltrade.org at 27 March 2011.

[142] European Parliament, *Resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility* (2002) www.europarl.europa.eu/ at 15 September 2008; the international Chamber of Commerce Business Charter for Sustainable Development has developed 16 principles that are also reconfirmed by the 'triple-bottom-line' reporting system. The major principles relate to establishing environmental management as one of the highest corporate priorities; integrating a management system; using environmentally sound products and operational designs; minimising waste and reducing the life cycle impacts of products. See the *International Chamber of Commerce Business Charter for Sustainable Development* (1991) at www.http://www.bsdglobal.com/tools/principles_icc.asp at 30 September 2008.

networks.[143] In addition to these resolutions, the council of the EU passed a resolution with a call to all member states to promote CSR at the national level.[144]

Since the focus for CSR incorporation in the USA is driven by a context in which minimal legislative control on business is preferable, this country emphasises developing specialised organisations to assist companies to incorporate CSR principles into their business strategies.[145] For instance, the Occupational Safety and Health Administration, Equal Employment Opportunity Commission, Consumer Product Safety Commission and the Environmental Protection Agency[146] are dedicated to maintaining standards for responsible corporate business practices that establish thresholds for CSR behaviour in daily business operations. The better known contributions of this process are the development of industry-specific and sector-wise regulation, such as in pollution control, working conditions, and consumer protection.[147] The US Model Business Principles is a voluntary guideline for companies, and the aim of this instrument is to provide a benchmark for developing self-regulated responsibility at the company level. It is based on the ILO Tripartite Declaration of Principles concerning multinational companies and social policy and the OECD Guidelines for Multinational Companies.[148] Corporate societies have begun incorporating these principles into their self-regulatory mechanisms. For instance, the USA automobile makers require their suppliers to adopt environmental management systems as a requirement for doing business.[149] Similarly, the

[143] European Parliament Resolution of 13 March 2007 *Corporate Social Responsibility: a New Partnership* (2006/2133(INI) www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=p6-TA-2007-0062&language=EN at 30 September 2008.

[144] Council of Bars and Law Societies of Europe, 'Corporate Social Responsibility and the Role of the Legal Profession: A Guide for European Lawyers advising on Corporate Social Responsibility issues' (Council of Bars and Law Societies of Europe, 2008) Available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_CSR_guidelinespd11221 057092.pdf at 27 March 2011.

[145] For a general idea on how the USA uses legislation compared to the EU, see Joan C Williams, *The interaction of Courts and Legislatures in Creating Family-Responsive Workplaces, Working Time for Working Families: Europe and the United States* (2005).

[146] Roberto Gutierrez and Audra Jones, 'Effects of Corporate Social Responsibility in Latin American Communities: a Comparison of Experiences' (2004) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018680 at 27 March 2011.

[147] For instance, some of these legislations are the *Community Reinvestment Act 1977* (USA), the *Federal Water Pollution Control Act 1948* (USA), the *Clean Air Act (Amendments) 1977* (USA), the *Occupational Safety and Health Act 1970* (USA), the *Equal Employment Opportunity Act 1972* (USA), the *Consumer Product Safety Act 1972* (USA), the *foreign Corrupt Practices Act 1977* (USA) and the *Public Company Accounting Reform and Investor Protection Act 200* (USA).

[148] See United States Department of Commerce, *US Model Business Principles* (1995) www.state.gov/www/global/human_rights/business_principles.html at 28 March 2011.

[149] Press Release, Ford Motor Company, 'Ford Becomes First U.S. Automaker to Require Suppliers to Achieve ISO 14001 Certification' (Sep. 21, 1999); Press Release, General Motors Corporations, 'General Motors Sets New Level of Environmental Performance for Suppliers' (Sep. 21, 1999).

American Forest and Paper Association requires its members to adopt a set of management practices directed toward sustainable forestry.[150] Other important organisations working for the development of the incorporation of CSR principles in the corporate self-regulated responsibility system are the Center for Corporate Ethics, a division of the Institute for Global Ethics, and the Fair Labor Association. Both organisations are active in implementing CSR in and around the USA. The Center for Corporate Ethics is focused on the ethical culture needs of businesses in and outside the USA. The Fair Labor Association addresses labour rights standards in USA and worldwide apparel industries.

Some notable federal activities indirectly insist that companies incorporate CSR principles into their self-regulatory mechanisms. For instance, through the Department of State's Award for Corporate Excellence, the government endorses CSR by providing awards to companies, and a Department of Commerce program facilitates CSR by providing training on corporate stewardship.[151] Some organs of the government provide partnership with corporations on specific projects related to their core mission.[152] These programs indirectly help endorse, facilitate, partner, or mandate the core principles of CSR in the USA business's global corporate responsibility efforts. Another important USA initiative to develop CSR implementation is the advancing notion of social responsibility in large investments. Indeed, the notion of socially responsible investments has evolved in this country and is widely acknowledged by its financial service industries. Socially responsible investment can be defined as the process of integrating personal values and social concerns into investment decision-making.[153] This is a very important tool for promoting CSR. This investing activity found its modern roots in the 1960s and has expanded dramatically up to the present day.[154]

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[150] Errol Meidinger, 'The New Environmental Law: forest Certification' (2003) 10 *Buffalo Environmental Law Journal* 211, 239; Jennifer Nash, *Industry Codes of Practice: Emergence and Evolution, New Tools for Environmental Protection: Education, Information and Voluntary Measures* (2002) 237.

[151] United States Government Accountability office (Report to Congressional requesters), *Numerous Federal Activities Complement U.S. Business's Global Corporate Social Responsibility Efforts* (2005) www.gao.gov/fraudnet/fraudnet.htm at 24 April 2008.

[152] For example, the US Agency for international Development provided a partnership with one USA Company working in post-war Angola to reconstruct the country's business sector and workforce. Other agencies, such as the Overseas Private investment Corporation, mandate CSR by requiring companies to fulfil CSR-related objectives to obtain their services.

[153] Steve Schueth, 'Socially Responsible Investing in the United States' (2003) 43(3) *Journal of Business Ethics* 189, 194.

[154] Ibid; the amount of investment increased greatly in the 1980s to African Black people as millions of people, churches, universities, cities and states used this investment strategy to press the White government of South Africa to abstain from the racist apartheid system. Socially responsible investment was involved in the wake of the Bhopal, Chernobyl and Exxon Valdez incidents, and is currently involved in efforts to combat global warming and ozone depletion. By and large, environmental issues have come to the forefront of companies' socially responsible investment agendas.

At the policy level, Japan follows a mixed-policy strategy to develop CSR practices. Its CSR initiatives encourage private companies to adopt CSR issues in their business policies, and at the same time, they emphasise enabling instruments to encourage private actors to continue to develop their CSR-oriented strategies. Japan introduced to CSR implementation during its post-war reconstruction period by the adoption of the resolution 'Awareness and Practice of the Social Responsibility of Business'.[155] This resolution states that businesses should not simply pursue corporate profit, but must seek harmony between the economy and society, combining factors of production and services, and that social responsibility is a better way to pursue this goal.[156] In this country, the impact of this resolution can be traced back to the adoption of the three corporate principles; namely, *Shoki Hoko* (corporate responsibility to society), *Shoji Komei* (integrity and fairness), and *Ritsugyo Boeki* (international understanding through trade).[157]

In parallel to the initiatives of the private sector, the Japanese government has undertaken efforts to achieve CSR under the auspices of different ministries, including the Cabinet Office, the Ministry of Agriculture, Forestry, and Fisheries; the Ministry of Health, Labour, and Welfare; and the Ministry of Environment. The Cabinet Office issued the 'Corporate Code of Conduct' in 2002 to build consumer confidence in businesses and set guidelines to promote the establishment and implementation of corporate codes of conduct.[158] In a sequel to this, the Ministry of Agriculture, Forestry, and Fisheries established a study group to promote transparency between consumers and producers in 2004. It proposed the promotion of corporate management with an emphasis on social responsibility related to food safety and security.[159] The Ministry of Health, Labour, and Welfare established the Research Council on CSR in Labour and suggested that consideration should be given to employees based on changes in their social conditions.[160] The Ministry of Environment in 2005 also established a Research Council on Social Responsibility and proposed an ideal model for a sustainable environment and economy.[161]

The Japanese public sector has also developed partnership activities for the advancement of CSR. In collaboration with the Japanese Standards Association, the Ministry of Economy, Trade, and Industry has launched a working group to develop CSR standards in Japan. This group is now working to present their views to international organisations such as the International Standards Organization. In

[155] Masahiko Kawamura, 'The Evolution of Corporate Social Responsibility in Japan (Part 1)—Parallels with the History of Corporate Reform' (NLI Research institute, 2004).

[156] Ibid.

[157] James Brumm, *The Japanese Perspective,* Corporate Social Responsibility: The Corporate Governance of the 21st Century (2005) 337, 341.

[158] Asian Productivity Organisation, Policies to Promote Corporate Social Responsibility (Report of the Asian Productivity Organisation top Management forum, 2006) www.apo-tokyo.org at 21 December 2008.

[159] Ibid.

[160] Ibid.

[161] Ibid.

Japan, the government, the Japanese Business Federation, and eight companies (including Sony, Ricoh, Fuji Xerox, Asahi Beer, IBM Japan, NEC, Mitsubishi, and Panasonic) are working hand-in-hand to promote CSR. Lastly, in 2004, they released a joint report on the CSR agenda in Japan.[162]

Beyond these institutional developments at both the government and corporate levels, as a developed Asian economy, Japan has been an active participant in different intergovernmental initiatives for the promotion of CSR. It has already endorsed the OECD Declaration and is one of its 30 member economies. Hence, a National Contact Point has been established in Japan within its Ministry of Foreign Affairs to monitor the implementation and efficacy of the guidelines and to promote awareness of them. In addition, in 1994, the Caux Principles for Business were issued and sponsored by the Caux Roundtable, comprised of senior business leaders from Europe, Japan, and North America.[163] These Caux Principles include a set of seven general principles available for business decision-making on CSR.[164]

With this mixed strategy, CSR integration in Japanese corporations has increased remarkably in recent years.[165] The practice of CSR principles, social and environmental reporting, and socially responsible investments illustrate its competitive status with other strong economies in the world. A survey conducted by the Japan Productivity Centre for Socio-Economic Development in 2005 revealed that almost 80 % of listed Japanese companies were already implementing CSR activities.[166] Regarding CSR reporting, in the fiscal year 2004, Japan had the highest number of companies (66) that published their reports based on the Global Reporting Initiative.[167] According to the KPMG International Survey Report of 2005, 80 % of Japanese national companies published their social responsibility

[162] Brumm, above n 157, 45.

[163] Djordjija Petkoski, *Corporate Social Responsibility Diamond—Main Elements of CSR* (2005) World Bank Institute http://www.worldbank.org/wbi/governance/corporatics.htm at 3 October 2007.

[164] The Caux Principles are the responsibility of business towards its stakeholders, the economic and social impact of business, business behaviour beyond the letter of the law, respect for rules, support for multilateral trade, respect for the environment; and avoidance of illicit operations; see the Caux Round Table: Principles for Business (1994) at http://www.cauxroundtable.org/index.cfm?menuid=8 at 27 March.

[165] This regulatory strategy can be termed co-regulation where the private and public sectors are involved in a joint initiative to reach a common goal. In co-regulation, the public sector assists the private sector to reach a public policy goal. For further details on this regulatory system, see *Law Concerning the Promotion of Business Activities with Environmental Consideration by Specified Corporations, etc., by Facilitating Access to Environmental Information and Other Measures* as an instance of co-regulation in Japan to facilitate acceptance of environmental responsibilities in companies, in Brumm, above n 157; Kawamura, above n 155.

[166] Asian Productivity Organisation, 'Management Forum: Corporate Social Responsibility' (Asian Productivity Organisation, 2006). Available at http://www.apo-tokyo.org/00e-books/IS-17_CorpSocialResp/IS-17_CorpSocialResp.pdf at 27 March 2011.

[167] Kanji Tanimoto and Kenji Suzuki, 'Corporate Social Responsibility in Japan: Analysing the Participating Companies in Global Reporting Initiative' (Working Paper 208, European Institute of Japanese Studies, March 2005) 4.

reports.[168] Likewise, 83 % of Japanese multinationals published their corporate responsibility reports.[169] Japanese national companies topped the list of strong economies. These companies all maintain a separate CSR department or taskforce, and have already developed a code of conduct in the light of internationally recognised CSR standards applicable both in and outside of Japan.[170]

Developing and less-strong economies are also incorporating the principles of CSR within their regulatory frameworks. For instance, in Thailand, alongside the legislative initiative for labour issues, the passage of the *Tambon Administration Organization (TAO) Act 1994* (Thailand), the New Thai Constitution of 1997, and the *National Decentralization Act 1999* (Thailand) are evidenced as landmark public sector efforts to enhance power sharing between the public, private, and civil society sectors and increase community–business partnership.[171] In Vietnam, the Vietnam Agenda 21 can be viewed as formulating a sustainability strategy in a broader way, although it still may be termed a crosscutting subject.[172] In Malaysia, the Bursa Malaysia CSR Framework provides a set of guidelines for Malaysian public listed companies to help them in the practice of CSR. This framework focuses on four areas within or CSR practice: the environment, the community, the workplace, and the marketplace. It has been accepted by the Government of Malaysia, as articulated in the Prime Minister's budget speeches in 2006 and 2007 and includes a directive for public-limited companies to disclose their CSR activities.[173] The King Report on Governance for South Africa 2009 suggested that the company related legislation should have some provisions to encourage the directors for constructive stakeholder management strategies in companies.[174] The new Companies Act 2008 of this country mandates that certain companies have to constitute 'social and ethics committees' so that they can manage their social responsibility and stakeholder issues in a better way.[175] Among other developing

[168] KPMG, International Survey of Corporate Responsibility Reporting (2005). Available at http://www.kpmg.com.au/Portals/0/KPMG%20Survery%202005_3.pdf at 27 March 2011.

[169] Ibid.

[170] Ibid.

[171] Wolfgang Frank, *Partnership for Successful CSR Activities in Thailand: The Nike Village Development Project* (2004) Population and Community Development association (PDA) http://www.pda.or.th/downloads/CSR-ThailandFinalRevision-WF0811.pdf at 28 March 2011.

[172] GTZ, *The CSR Navigator: Public Policies in Africa, the Americas, Asia and Europe* (2006) http://www.gtz.de/en/presse/21396.htm at 28 March 2011.

[173] See Stephen Frost, *Comparative Overview of CSR in Asia: Issues and Challenges* (2008) CSR Asia, Hong Kong http://www.adbi.org/files/session1_01_stephen_frost_pdf at 28 March 2011.

[174] "King III- Shareholder management and ADR" (2012) http://www.deloitte.com/view/en_ZA/za/services/audit/deloitteaudit/kingiii/0514e1a6b1c53210VgnVCM100000ba42f00aRCRD.htm

[175] For a study on the perspective of such an inclusion into the Companies Act 2008 of South Africa, see Flores-Araoz, "Corporate social Responsibility in South Africa: More than a Nice Intention" (2012) http://www.consultancyafrica.com/index.php?; Hamann and Acutt, "How Should Civil Society (and the Government) Respond to Corporate Social Responsibility? A Critique of Business Motivations and the Potential for Partnership" (2003) 20 (2) *Development Southern Africa* 255.

economies, Brazil, Argentina, Mexico, Poland, Slovenia, Hungary, South Africa, India, and China have advanced remarkably in their institutional frameworks and public framing for implementing the core principles of CSR.

With the *Extractive Industries Transparency Initiative (NEITI) Act 2007* (Nigeria), Nigeria became the first country that provides statutory backing to regulate transparency in extractive industries operating in a country.[176] In Ghana, the Ghana Extractive Industries Transparency Initiative has the same function. In 2006, Ghana launched the Ghana Business Code, a joint effort of the Association of Ghana Industries, Ghana Employers Association and the Ghana National Chamber of Commerce and Industry. The aim of this effort is to introduce and expand the practice of CSR in companies operating in this country.[177] Recently, the Socialist Republic of Vietnam passed the *Enterprise Law 2005* (Vietnam) with CSR at its core.[178] Article 74 of the *Limited Liabilities Companies Act 2007*(Indonesia) is another instance a developing country incorporating CSR tenets in corporate regulation.[179]

In his analytical study on the companies of four regions (i.e., Asia, Latin America, Africa, and Central and Eastern Europe), Jeremy Baskin concluded that on occasion, with respect to certain CSR issues, companies in the developing economies are more advanced than those in the developed economies.[180] This observation is supported by a web-based study conducted by Chaplet and Moon in 2005. They assessed the CSR practice status of seven Asian economies: India, South Korea, Thailand, Singapore, Malaysia, the Philippines, and Indonesia. In this study, variation in CSR trends were identified using quantitative and qualitative indicators of five aspects of regional CSR practices: the penetration of CSR among the companies in each country, the extent of CSR reporting within these companies, the waves of CSR reflected in national profiles, their underlying CSR issues, and the modes of CSR developed in these economies.[181] This study revealed that the companies of India and South Korea were well positioned in terms of CSR reporting.[182]

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[176] For details of this Act, visit http://eiti.org/Nigeria at 22 March 2011.

[177] For details, see Kwesi Amponsah-Tawiahb and Kwasi Dartey-Baah, 'Corporate Social Responsibility in Ghana' (2011) 2(17) *International Journal of Business and Social Science* 107.

[178] A translated copy of this law can be found at http://www.khucongnghiep.com.vn/vbpq/en/companylaw2005.pdf at 22 March 2011.

[179] This Article has four sub-sections. Sub-section 1 states '[c]ompanies doing business in the field of and/or in relation to natural resources must put into practice Environmental and Social Responsibility'. For this Act, visit http://www.scribd.com/doc/31592880/Indonesian-Company-Law-No-40-Year-2007 at 22 March 2011.

[180] Michael Hopkins, *Corporate Social Responsibility and International Development: Is Business the Solution?* (2007) 174.

[181] Ibid.

[182] Ibid. There are many reasons for the development of CSR reporting practices in South Korean and Indian companies. For South Korea, these include a national rise in sensitive consumerism and the need to raise the business impact of this country's companies on the world-wide market. For

The above discussion demonstrates that companies in the strong economies use a mix of different strategies to incorporate CSR principles in their self-regulatory mechanisms. Strategies based on legal regulation are not foremost in this mix; rather, in these economies regulation-based strategy is meant to assist the non-legal drivers of CSR. This mixture of strategies encourages various business stakeholders to reach an economically optimal level of investment in firm-specific human and physical capital. The use of these mixed strategies in weak economies may not be possible. One of the reasons for this is the lack of non-legal drivers in these economies. Moreover, due to insensitive consumers, a lack of organisation in civil groups, inadequate private institutions monitor corporate performances, and corrupt public organisations, companies do not incorporate the ethos of CSR in their policies. In this flux, it is difficult to determine the most appropriate policy to create a nexus between CSR and corporate self-regulation in the weak economies. The remainder of this book deals with this difficult task.

## 2.5 Conclusion

The basis of corporate responsibility has transitioned from why companies must be socially responsible to how they can become socially responsible. CSR is now a major component of new business and CG models for long-term sustainability. It has converged with the new trend of CG and contributed to the shifting of the traditional notion of CG to a vehicle for pushing corporate management to consider broader social issues. CSR defines corporate responsibilities to society as follows: firstly, that companies have a responsibility for their impact on society and the natural environment, which on occasion goes beyond legal compliance and the liability of individuals; secondly, that companies have a responsibility for the behaviour of others with whom they do business; and thirdly, that business needs to manage its relationship with wider society, whether for reasons of commercial viability or to add value to society.[183]

With the rise of sensitive consumerism, as well as increasing competition for market share, this convergence has made companies more attuned to public, environmental and social needs. Global companies have integrated the ethos of this convergence into their core policy objectives. They tend to ensure that CSR practices are implemented within their supply chains; a demonstrated commitment to CSR helps global companies to secure their long-term profits, brand images and managerial efficiencies.[184] They have developed self-regulation to reflect their

India, the pressures of multinational buyers on suppliers in the global supply chain, and civil society activism have been the major factors.

[183] Blowfield and Frynas, above n 7, 504.

[184] This concept may be described by a number of terms, such as ‘corporate citizenship’, ‘The Ethical Corporation’, ‘corporate governance’, ‘corporate sustainability’, ‘social responsible investment’, ‘corporate accountability’ etc. Regardless of the terminology, the core principles

corporate responsibilities to the society and environment and helped the development of standardisation regime. This standardisation regime creates different codes of conduct, networks and auditing strategies to measure corporate self-regulation performance on CSR issues.

At the national level, CSR has attracted considerable attention. Most of the strong economies have adopted CSR principles within their corporate regulatory mechanisms. They have used different strategies and employed different actors to encourage this incorporation of CSR principles in corporate regulation. Though their regulatory strategies are not identical, their goals for relating CSR to public policies amplify their political affiliation for CSR practices in companies; the role of government in these economies is to facilitate the private sector. In these economies, laws and regulations for incorporating the ethos of this convergence are not authoritative. Rather, they are advisory and focused on bringing a broader perspective to the necessity of environmental responsibility in corporate self-regulation. Broadly speaking, incorporation of CSR notions in corporate self-regulation in these economies appears to focus on 'process-oriented regulation' where system-based strategies, enforced self-regulation, management-based strategies, meta-regulation approaches, and principle-based strategies coexist to ensure greater flexibility for the regulators where an objective needs to be incorporated in the era of deregulation.[185]

From the perspective of the weak economies, as has been discussed in the case of Bangladesh, it is unclear how the ethos of CSR might be incorporated into the fabric of the socio-economic and environmental regulation of these economies. In these economies, public interest advocacy groups to oversee this convergence are absent, civil groups are not organised, the media does not have a specific focus on corporate issues, and the corruption rate in general is high. Hence, the incorporation of CSR principles in corporate regulation has not been noteworthy. However, certain weak economies have attempted to add CSR notions into their corporate regulation, although these attempts are too preliminary to show any trends, and as yet have not been followed by any substantive policy, suitable strategy or long-term goals. The impact of these drawbacks, particularly in Bangladesh, has been discussed in the previous chapter of this book. The remaining chapters will assess the theoretical

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are the same. In this article, the term 'CSR' is used not because it carries any special meaning, but simply to be consistent.

[185] Peter May, 'Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities' (2005) 27(2) *Law and Policy* 317; Soeren Winter and Peter J May, 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) *Journal of Policy Analysis and Management* 675; Bridget M Hutter, 'The Role of Non-State Actors in Regulation' (Centre for Analysis of Risk and Regulation, 2006)14; Neil Gunningham, Peter Grabosky and Daren Sinclair, *Smart Regulation: Designing Environmental Policy* (1998); Malcolm Sparrow, *the Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (2000); Vijaya Nagarajan, 'From "Command-and-Control" to "Open Method Coordination": Theorising the Practice of Regulatory Agencies' 8 *Macquarie Law Journal* 6; for a big-picture view of changing regulatory scholarship, see Carol Harlow, 'Law and Public Administration: Convergence and Symbiosis' (2005) 71(2) *International Review of Administrative Sciences* 279.

basis of CSR implementation in corporate self-regulation through law; discuss the normative basis of the regulatory strategy for this implementation; conceptualise a meta-regulation approach of law as a suitable regulatory strategy to instil CSR principles in corporate self-regulation through laws in weak economies in general and, finally, assess the scope of this regulatory strategy through three major Bangladeshi laws related to corporate regulation.

# Chapter 3
# The Theoretical Basis for the Implementation of CSR Principles Through Legal Regulation

There are many ways of examining CSR, although as yet there is no single generally accepted, fully specified concept encompassing its practices. Contemporary scholars of CSR have shown that the voluntary mode of practising CSR is predominant. However, there are opponents of this mode, especially in the weak economies in which the non-legal drivers in society are sparse. In these circumstances, establishing a theoretical basis for implementing CSR through legislation is difficult, but important. It is difficult, since legal regulation could be detrimental to business development if it narrows the scope of innovation in business and becomes a barrier to companies' usual business practices in the post-regulatory world. It is important, since the public interest groups—who are sceptical of the role of companies' voluntary responsibility for social development—need a theoretical basis to demonstrate instances of corporate irresponsibility to society in an articulate manner. This chapter presents a detailed discussion of several theories to establish that a normative basis exists for implementing CSR principles through legal regulation.

## 3.1 Introduction

There are many theoretical explanations for why business organisations engage (or not) in CSR practices, including political economy theory, legitimacy theory, the concept of sustainable development, the concept of new governance (NG), stakeholder theory, decision usefulness theory, positive accounting and agency theory. However, in this chapter, decision usefulness theory, positive accounting, and agency theory are not discussed. These three theories explain CSR motivation but do not adopt broader perspectives by considering the wider set of stakeholders. Rather, these functionalist economic theories mostly focus on the financial stakeholders and consider only the market outcomes that run counter to the

M.M. Rahim, *Legal Regulation of Corporate Social Responsibility*,
CSR, Sustainability, Ethics & Governance, DOI 10.1007/978-3-642-40400-9_3,

principal concerns of CSR practices.[1] This chapter contends that social and political theories such as legitimacy, NG, and stakeholder theory provide far more interesting and insightful theoretical perspectives on CSR practices. These theories are essential for the notion of CSR to respond to the expectations of society. The following discussion examines these theories with the aim of explaining the philosophical basis of why, and to what extent, CSR principles can be incorporated into corporate regulation.[2]

## 3.2 CSR Through Legal Regulation: 'Legitimacy' Arguments

The role of business in society is considered as an inherently normative issue that 'explains what companies should or should not do on behalf of the social good.'[3] It is related to the dimension of civil rights and the broader ethical context from a societal perspective.[4] In society, the norms for business are not fixed; they change

[1] Rob Gray, Reza Kouhy and Saimon Lavers, 'Corporate Social and Environmental Reporting: A Review of the Literature and A Longitudinal Study of UK Disclosure' (1995) 8(2) *Accounting, Auditing & Accountability Journal* 47 in Ataur Rahman Belal, *Corporate Social Responsibility Reporting in Developing Countries: The Case of Bangladesh* (2008) 11. For a detailed discussion on the theoretical consideration of corporate motivation for CSR, see Belal, above, 11–27.

[2] For details of these theories, see, for example David Campbell, 'Legitimacy Theory or Managerial Reality Construction? Corporate Social Disclosure in Marks and Spencer Plc Corporate Reports, 1969–1997' (2000) 24(1) *Accounting Forum* 80; Gray R, Owen D and Maunders K, *Corporate Social Reporting: Accounting and Accountability* (1987); James Guthrie and Lee D Parker, 'Corporate Social Reporting: A Rebuttal of Legitimacy Theory' (1989) 19(7) *Accounting* and *Business Research*; Markus Milne and Dennis Patten, 'Securing Organisational Legitimacy: An Experimental Decision Case Examining the Impact of Environmental Disclosures' (2002) 15 (3) *Accounting, Auditing and Accountability Journal*; Marc Newson and Craig Deegan, 'Global Expectations and their Association with Corporate Social Disclosure Practices in Australia, Singapore and South Korea' (2002) 37(2) *International Journal of Accounting* 183; Gray O'Donovan, 'Environmental Disclosures in the Annual Report: Extending the Applicability and Predictive Power of Legitimacy Theory' (2002) 15(3) *Accounting, Auditing and Accountability Journal* 344; Dennis Patten, 'Intra-industry Environmental Disclosures in Response to the Alaskan Oil Spill: A Note on Legitimacy Theory' (1992) 15(5) *Accounting, Organisations and Society* 471; Mitchell William, 'Voluntary Environmental and Social Accounting Disclosure Practices in the Asia-Pacific Region: An International Empirical Test of Political Economy Theory' (1999) 34 (2) *International Journal of Accounting* 209; Trevor Wilmshurst and Geoffry Frost, 'Corporate Environmental Reporting: A Test of Legitimacy Theory' (2000) 13(1) *Accounting, Auditing and Accountability Journal* 10.

[3] Diane Swanson, 'Toward an Integrative Theory of Business and Society: A Research Strategy for Corporate Social Performance' (1999) *Academy of Management Review* 506.

[4] Drik Matten and Andrew Crane, 'Corporate Citizenship: Toward an Extended Theoretical Conceptualisation' (2005) *Academy of Management Review* 166; Van Oosterhout, 'Corporate Citizenship: An Idea Whose Time Has Not Yet Come' (2005) 30(4) *Academy of Management Review* 677.

over time.[5] Entrenching this change as a central theme, arguments for 'legitimacy' maintain that business organisations need to be responsive to changing social expectations to be perceived as legitimate.[6] This is because business organisations can only continue operating as long as their value systems are considered congruent with their society's value system.[7] Society holds this power, as it is the source of the legal status of business organisations, and it provides authority and the rights to resources for business operations. Organisations cannot acquire these resources automatically; they must establish that benefits from their operations can be expected by society, and that these benefits exceed their cost.[8] Thus, the dynamics of acquiring legitimacy in society do not depend on technological and material imperatives, but rather stem from social customs, norms, beliefs and rituals.[9]

However, corporate society does not adequately reflect these arguments. With their apolitical role based on compliance with national laws, corporate organisations limit their social liabilities to the relatively homogeneous and stable societal expectations. They consider social legitimacy at the cognitive level; they deal with legitimacy issues pragmatically and do not consider these issues at their moral or ethical levels. Under these circumstances, it is difficult, though not impossible, to determine the normative basis of the role of corporate organisations in society; it is difficult to 'explain what companies should or should not do on behalf of the social good.'[10]

This section deals with the intricacies of corporate strategies to retain the legitimacy of their operations in society. It discusses this in relation to civil rights and the broader social responsibilities of business companies.[11] First, it highlights legitimacy and the precepts of legitimacy theory. Second, it discusses the interface between the classical view of business responsibilities and the need for corporate legitimacy in society, highlighting how corporate actions have been depoliticised and why they should be situated within the political framework from the perspective of their social responsibilities. Third, it focuses on the gradual development of the nexus between the demand for corporate legitimacy and corporate approaches to fulfilling this demand. Finally, it concludes that to retain their legitimacy in society, companies should accept the principles of CSR at their moral level, and their strategies for social responsibility should be situated within the framework of

[5] Belal, Above n 1, 14.

[6] Craig Deegan, Michaela Rankin and Voght P, 'Firms' Disclosure Reactions to Major Social Incidents: Australian Evidence' (2000) 24(1) *Accounting Forum* in Belal, above n 1, 14.

[7] Rob Gray, Dave Owen and Adams Carol, *Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (1996) 46.

[8] Mark Mathews, *Socially Responsible Accounting* (1993) 26.

[9] Mark Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *Academy of Management Review* 571.

[10] Swanson, above n 3.

[11] Matten, above n 4; J. Van Oosterhout, 'Corporate Citizenship: An Idea Whose Time Has Not Yet Come' (2005) 30(4) *Academy of Management Review* 677.

deliberative democracy in order for them to accept targeted public disclosures[12] or controlling by, or collaborating with, other parties who are considered legitimate.[13] This will be facilitated if they consider their social responsibility performance as central to their development policies.

### *3.2.1 Legitimacy and CSR to Society*

The discourse of CSR builds on the concept of organisational legitimacy.[14] The arguments based on legitimacy for the development of CSR can be traced back to the precepts of legitimacy theory. Although this theory is more usually associated with politics, it has an organisational context. According to this theory, organisations exist within society under an implied or expressed social agreement. Scholars such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau have related the intricacies of these agreements to the political theory 'insofar as it explained the supposed relationship between a government and its constituencies'.[15] Even in the changes of the medieval concept of the social contract, the notion of social agreement for organisational legitimacy remains virtually unchanged. In the modern era, the interpretation and development of arguments related to organisational legitimacy in society by scholars including John Rawls, Thomas Donaldson, John Dowling, Jeffrey Pfeffer, Mark Suchman and others are also based on the notion of this agreement.[16] The core of this agreement is that business organisations exist within a superordinate social system.[17] In this system, organisations enjoy legitimacy in so far as their activities are congruent with the broad objectives of this system.[18] From this perspective, J G Maurer describes corporate legitimacy in society in terms of the justification of

[12] It is also referred to as the process of communication.

[13] Craig Deegan, Michaela Rankin and John Tobin, 'An Examination of the Corporate Social and Environmental Disclosures of BHP from 1983 to 1997: A Test of Legitimacy Theory' (2002) 15 (3) *Accounting, Auditing and Accountability Journal* 312.

[14] Gray, Kough and Lavers, above n 1; Campbell, below n 15, 82.

[15] David J Campbell, 'Legitimacy Theory or Managerial Reality Construction? Corporate Social Disclosure in Marks and Spencer Plc Corporate Reports, 1969–1997' (2000) 24(1) *Accounting Forum* 80, 82.

[16] For the ideas of these scholars, see John Rawls, *A Theory of Justice* (Revised Edition Ed, 1999); John Dowling and Jeffrey Pfeffer, 'Organisational Legitimacy: Social Values and Organisational Behaviour' (1975) *Pacific Sociological Review* 122; Thomas Donaldson and Thomas Dunfee, *Ties That Bind: A Social Contracts Approach to Business Ethics* (1999); Amartya Sen, *The Idea of Justice* (2009); Suchman, above n 9.

[17] Dowling and Pfeffer, above n 16 in Campbell, above n 15, 83.

[18] Campbell, above n 15, 83.

certain corporate behaviours.[19] Suchman describes it from a different angle; he considers this legitimacy in terms of manipulation and engineering societal support.[20]

Cristi Lindblom defines the term 'legitimacy' as 'a condition or status which exists when an entity's value system is congruent with the value system of the larger social system of which the entity is a part.'[21] In legitimacy theory, the term 'legitimacy' also postulates that business organisations employ different strategies to ensure that their operations are considered legitimate by outside parties. It requires them to have adequate strategies in response to, for example, major environmental damage, major accidents leading to social crises or financial scandals created by their activities.[22] In other words, this theory assesses the kind of authority executives possess and the manner in which this authority is used.[23] This study considers the precepts of this theory relating to the legitimacy of business organisations within the boundaries and norms of society.

Corporate legitimacy deals with the appropriate role of companies in society.[24] It also emphasises the means by which society and companies might reach agreement on the issue of CSR. Suchman defines this nexus as a 'generalised perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'[25] Given this, he proposes three types of organisational legitimacy: pragmatic, cognitive and moral.

From the corporate perspective, pragmatic legitimacy is related to a company's strategies to ascribe their legitimacy to their stakeholders and the wider public.[26] Through this approach, companies are challenged to influence an individual's assessment of the usefulness of its operations, structure and leadership behaviour in society.[27] To gain legitimacy in a pragmatic way, companies create strategies to provide direct benefits, for instance, management roles for their constituents. In most cases, this approach allows companies to gain legitimacy by strategic manipulation of the perceptions of their stakeholders.[28] Cognitive legitimacy operates

[19] John G Maurer, *Readings in Organisation Theory: Open-System Approaches* (1971) in Campbell, above n 15, 83.

[20] Suchman, above n 9, in Campbell, above n 15, 83.

[21] Cristi Lindblom, 'The Implications of Organisational Legitimacy for Corporate Social Performance Disclosure' (1994) 2.

[22] Ibid. 14.

[23] Richard C Warren, 'The Evolution of Business Legitimacy' (2003) 15(3) *European Business Review* 153, 156; Craig Deegan and Jeffrey Unerman, *Financial Accounting Theory* (2006) 253.

[24] Guido Palazzo and Andreas Georgscherer, 'Corporate Legitimacy as Deliberation: A Communicative Framework' (2006) 66(1) *Journal of Business Ethics* 71, 77.

[25] Suchman, above n 9, 574 in Palazzo and Scherer, above n 24, 77.

[26] Suchman, above n 9.

[27] Ashforth, B.E. and Gibbs, B.W., 'The Double-edge of Organizational Legitimation' (1990) O*rganization Science* 177.

[28] Campbell, above n 15, 86.

mainly at the subconscious level within the company and its constituents in society. This form of legitimacy emerges at the company level when stakeholders consider that the company's output, procedures, structures and leadership behaviour are necessary and based on their assumptions. Therefore, it is difficult for companies to strategically manipulate the perception of legitimacy of their stakeholders.[29]

Moral legitimacy refers to the conscious moral judgment of society on corporate output, procedures and leadership behaviour.[30] This legitimacy approach provides companies with the scope to give reasons and justify their actions, practices and values. It requires that the company 'reflects a pro-social logic that differs fundamentally from narrow self-interest.'[31] This legitimacy approach is preferred by society, as it resists the self-interested manipulation of other legitimacy strategies and insists on purely pragmatic legitimacy strategies within companies. Companies achieve moral legitimacy through 'explicit public discussion', which can be achieved by vigorous participation in social dialogue. Therefore, as Suchman states, companies should be dedicated to convincing others by demonstrating their genuine commitment to social values and demands, and should not depend on strategies for manipulating and persuading social perception of corporate legitimacy. With this approach, an organisation is perceived as legitimate, if it pursues 'socially acceptable goals in a socially acceptable manner.'[32] The following discussion elaborates on these issues.

### *3.2.2 Corporate Legitimacy in Society: The Interface*

From a classical standpoint, the main objective of corporate strategies is to maximise the interest of their stockholders. This view contends that the 'invisible hand doctrine'[33] creates the greatest good for the greatest number and therefore government need not intervene in the market. However, in reality, there are problems

[29] Christine Oliver, 'Strategic Responses to Institutional Processes' (1991) *Academy of Management Review* 145; Suchman, above n 9; Oliver argues that this type of legitimacy could also be manipulated but a minor degree and through an indirect way. For details, see Christine Oliver, 'Strategic Responses to Institutional Processes' (1991) *Academy of Management Review* 145.

[30] Campbell, above n 15, 87.

[31] Suchman, above n 9 in Campbell, above n 15, 87.

[32] Ashforth and Gibbs, above n 27.

[33] The 'invisible hand' is the term economists use to describe the self-regulating nature of the marketplace. the theory of the invisible hand states that if each consumer is allowed free choice of what to buy and each producer is allowed free choice of what to sell and how to produce it, the market will settle on a product distribution and prices that are beneficial to all members of a community, and hence to the community as a whole. For details, see Ingrid Hahne Rima, *Development of Economic Analysis* (6th Ed, 2001).

within markets due to externalities,[34] monopolies,[35] and moral hazards.[36] Theoretically, these problems may not be present, though there are de facto constraints on the ability of the classical business company to act in the interests of the greater community. From a socio-political perspective, the apolitical role of companies, based on the rhetoric that all members of society benefit from capitalist production, increases confusion on the surge of corporate power and its impact on society.

The arguments for a reconceptualisation of corporate objectives centre round the following question: 'For whose benefit and whose expense should the firm be managed?'[37] This question, indeed, puts the ever-increasing interest of companies to maximise their returns without considering the future of their communities under scrutiny. It goes against the classical corporate objective, which is intrinsically related to the depoliticisation of corporate roles in the society.

### Depoliticisation of Corporate Roles in Society

Societal change is closely related to the precepts of organisational legitimacy. With this change, the liberal idea of maintaining legitimacy in political institutions and processes also change. This can be traced back to social-political developments in the medieval period. After the development of freedom in medieval Europe, the notion of civil liberty emerged. Subsequently, the concept of citizenship took a more formal form within which individualism and economic liberty became the two dominant themes.

In the notion of citizenship in modern civilised society, 'individualism' is an essential theme; it is determined by the free will of the people and the rule of law. States derive the legitimacy for their legal rules and public policies from the reason and the will of their citizens[38] and limit their individual decisions and actions by politically legitimate actions to ensure the interest of all citizens. However, unlike the individual citizen, actions for economic gain are kept beyond the reach of immediate legitimate demand. The activities of private actors and companies as the economic extension of the private self are not required to go beyond legal requirements and roles for common decency.[39] Thus, the economic actors in society

[34] Externalities means that the impact of one person's actions on the wellbeing of a bystander.

[35] Some markets have only one seller, and this seller sets the price. Such a seller is called a monopoly.

[36] The phrase moral hazard refers to the risk, or 'hazard', of inappropriate or otherwise 'immoral' behaviour by the agent who is imperfectly monitored.

[37] Edward Freeman, *Stakeholder Theory of the Modern Company: Kantian Capitalism* (1993) in Constantina Bichta, *Corporate Social Responsibility: A Role in Government Policy and Regulation?* (2003) 18; for details, see R Edward Freeman, *Strategic Management: A Stakeholder Approach* (1984).

[38] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1998).

[39] Milton Friedman, *Capitalism and Freedom* (1982).

have been depoliticised.[40] Economic theory on freedom of choice in the market sphere emphasises that 'legitimisation in the market sphere is 'automatic' and that markets thus avoid the typical legitimisation problem of the state.'[41] In the liberal concept of political theory, legitimacy demands that companies remain subjective, rather than objective. Companies do not have an obligation to relate their economic reasoning to social policies and values, and are focused on maximising their profit within the framework of the basic moral and legal rules of society.[42] Their roles for the development of the legitimacy of their actions within society remain primarily at the cognitive level.

This depoliticisation of companies with respect to legitimacy issues has become more salient with the dynamics of globalisation. 'Globalisation does not only macerate the cultural background of the nation state, it furthermore leads to a vivid debate on the interplay of state, economy and civil society which in turn results in reconceptualisations of legitimacy in political theory.'[43] The impact of globalisation has boosted the private sector and in turn, this sector has become tremendously powerful in all respects. Accordingly, this has also raised the general expectation of wider society towards corporate society; these days, society considers companies as 'quasi-public' actors. However, the response from corporate bodies to these expectations has not matched social expectations; companies are frequently blamed for the misuse of their ability to influence social development and for their self-centred strategies.[44] Moreover, although the side effects of

[40] Georg Scherer and Gudio Palazzo, 'Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective' (2007) 32(4) *Academy of Management Review*1096 in Palazzo and Scherer, above n 24, 13.

[41] Fabienne Peter, 'Choice, Consent, and the Legitimacy of Market Transactions' (2004) 20 (01) *Economics and Philosophy* 1.

[42] Theodore Levitt, 'The Dangers of Social Responsibility' (1958) 36(5) *Harvard Business Review* 41; Deepak Lal, 'Private Morality and Capitalism: Learning from the Past' in John Dunning (Ed), *Making Globalisation Good: The Moral Challenges of Global Capitalism* (2004) 41; 'The Good Company', *The Economist* 22 January 2005, 3–18; Robert Reich, 'The New Meaning of Corporate Social Responsibility' (1998) 40(2) *California Management Review* 8 in Palazzo and Scherer, above n 24, 86.

[43] Palazzo and Scherer, above n 24, 88. For details, see Ulrich Beck, *What is Globalisation?* (2000); Stephen J Kobrin, 'Sovereignty@ Bay: Globalisation, Multinational Company, and the international Political System' (2001) *Oxford Handbook of International Business* 181; Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39 (2) *Government and Opposition* 314.

[44] Currently, large companies are keen to enter national and global economic, fiscal, social, cultural, environmental and political systems, with the objective of creating a favourable climate for transnational investment and competition in the new global economy. This intervention creates confrontation on issues of employment policy, equality, job security and national security within developing states. There are many examples to illustrate this point. For example, it is argued that the concerns expressed by former Chilean president salvador allende to the un regarding the plans of the international telegraph and telephone company (ITT) and the kenneth copper corporation to overthrow his government was the main cause of his death in a military coup. For details, see Judith Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes and*

corporate operations have been raised and in many instances go beyond the sphere of state control, corporate society's contribution to the mitigation of these side effects is meagre.[45] At this juncture, corporate activities that were originally considered politically neutral are now loaded with more and more public demands; their interface with civil liberty and social legitimacy is more important than that with the state authorities.

### Politicisation of Corporate Roles in Society

The classical view of the corporate role in the social development is constantly being challenged. Recently, this challenge has gained momentum. With the rise of corporate influence in politics, corporate operations being increasingly viewed as responsible for social and environmental damage, hence the necessity of corporate expertise to further development. Neo-liberal economic reasoning is related to these circumstances: on one hand, it assists the increase of international trade, in which corporate organisations hold a major stake; while on the other, it helps the development of arguments against the depoliticised role of companies in society. With the increase in the volume of international trade, the number of corporate initiatives at a national level to deal with issues such as human rights, labour standards, corruption and environmental protection has also increased. Again, with neo-liberal discourse emphasising deregulation and corporate rights, the number of large companies and their influence has increased following the acceptance of the 'open door' economy. However, compared to the increase in corporate ability, their role in social development has not improved.[46] Moreover, the contribution of

*Citizen Action* (2001); for a synopsis of this issue, visit the Corner House, 'Codes in Context TNC Regulation in an Era of Dialogues and Partnerships' (2002) at http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/26codes.pdf at 7 November 2011. In 1954, the United Fruit Company was a key actor in overthrowing Jacobo Arbenz' government in Guatemala, resulting in decades of violence in this country. For details, see Gustavo Gonzalez, 'Code of Conduct for TNCs Reappears' (2001) http://www.twnside.org.sg/title/code-cn.htm at 7 November 2011. People rioted and one person was killed when bechtel, a US-based water consortium, took over the water system of cochabama in Bolivia and almost immediately raised water prices. Feelings ran so high that the corporation's managers left the country and the service was returned to public ownership; Bechtel filed a legal suit against the Bolivian government for US $25 million. For details, see Barry James, 'Challenges of Development for Corporate Responsibility', *International Herald Tribune* 19 August 2002, 5.

[45] The cost of damage to the environment by the business sector in 2008 estimated by London-based consultancy firm Trucost was worth US $2.2 trillion—a figure bigger than the national economies of all but seven economies in the world that year. For a sector wise graph of this cost, visit http://www.guardian.co.uk/environment/2010/feb/18/worlds-top-firms-environmental-damage at 7 November 2011.

[46] Three billion people do not have access to clean water and basic sanitation and these causes about 5,000 children to die from water borne diseases every day. For details, see WHO, *World Water Day Report* (2002), available at http://www.who.int/water_sanitation_health/takingcharge.html 7 November 2011. Greenhouse gas emissions are causing severe climate change and ecological imbalance; receding glaciers threaten low lying coastal cities with rising sea levels;

the larger companies to social development is meagre at best; they were originally designed to fulfil public purposes but have grown beyond their original mandate through the pursuit of economic growth and material progress.

'In contemporary societies, [corporate] economic power drives the circular loop of power/benefits.'[47] Large companies, with their economic power, can either contribute to or disrupt the circulation of this loop. In nations in which they contribute less to overall socio-economic life, the people of that nation benefit less from economic activities.[48] Hence, as mentioned above, 'an inward spiral of diminishing benefit could result in increased disillusionment and deterioration of legitimate support from society for the companies.'[49] Regarding this point, at the peak of the growth and influence of companies (and simultaneously during the failure of the paradigmatic dominance of instrumental rationality to check the continuing extension of socio-economic imbalances), the question of the rationality of the regulatory framework for companies comes to the forefront of the social agenda. Advocates for the legitimate role of companies in social development demand new regulations focusing on socio-environmental needs with extended corporate responsibilities.[50] They connect this question with the concept of the 'social contract', which holds that there is a 'social contract' between business companies and the society within which they operate.[51] This can explained as follows:

> The social contract would exist between companies (usually limited companies) and individual members of society. Society (as a collection of individuals) provides companies with their legal standing and attributes and the authority to own and use natural resources and to hire employees. Organisations draw on community resources and output both goods and services and waste products to the general environment. The organisation has no inherent rights to these benefits, and in order to allow their existence, society would expect the benefits to exceed the costs to society.[52]

for details, see J Floor Anthoni, 'Seafriends: Summary of Threats to the Environment' (2001) www.seafriends.org.nz/issues/threats.htm at 7 November 2011.

[47] Andrew Fergus and Julie Rowney, 'Sustainable Development: Lost Meaning and Opportunity?' (2005) 60(1) *Journal of Business Ethics* 24.

[48] Ibid. The recent 'occupy wall street' movement in the USA is an appropriate example that illustrates the lack of public trust in corporate power, strategies and responsibility to the society in which they operate. The core tenet of this movement is that corporate power and position in society and politics is creating serious class conflicts (mostly economic) in society, and corporate society is liable for the misery of individual economic life in the USA. For details, visit http://www.guardian.co.uk/world/occupy-wall-street at 10 October 2011.

[49] Ibid; for details of the political support of companies in the society and their impact on the social life of mass people, see Willis Harman, 'The Great Legitimacy Challenge' (1975) 42(5) *Vital Speeches of the Day* 147 in Fergus and Rowney, above n 47, 17, 24.

[50] Paul Hawken, 'A Declaration of Sustainability' (1993) 54(61) *Unte Reader*; Harman, above n 49.

[51] Belal, above n 1, 15.

[52] Mark R Mathews, *Socially Responsible Accounting* (1993) 26 in Deegan, Rankin and Tobin, above n 13, 315.

The term 'social contract' reflects the expectations of a society, both explicit and implicit, concerning the manner in which a company should conduct its operations in that society.[53] Different legal requirements of societies form the explicit terms of the social contract, while community expectations constitute the implicit terms.[54] The legitimacy of a company may be threatened by breaching social customs and rules (e.g., the terms of a social contract) and by failing to conform to social norms and expectations.[55] These issues are sensitive, and inappropriate responses to them would detrimentally affect the status of companies in society. In such situations, society may revoke the company's 'contract' to continue its operations.[56] The withdrawal of social support can have serious implications for companies, as explained by Deegan et al.:

> This might be evidenced through, for example, consumers reducing or eliminating the demand for the products of the business, factor suppliers eliminating the supply of labour and financial capital to the business, or constituents lobbying government for increased taxes, fines or laws to prohibit those actions which do not conform with the expectations of the community.[57]

International society has criticised the classical corporate objective and pressured corporate societies to guarantee more external control of corporate management in order to ensure corporate responsibility within the societies in which they operate. The most demanding voices joining this chorus against the corporate system have come from a perfectly respectable corner of global society: 'from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences and from politicians.'[58] With their criticism, certain rights over corporate management have been bestowed upon the groups with a stake in, or claim on, manufacturers.[59] This has been leveraged by some major shifts in the related doctrinal cohort. For example, the doctrine of 'privity of contract' as articulated in *Winterbottom v. Wright* (1842) 10 M&W 109 changed in the USA with the decision of *Greenman v. Yuba Power* (1963) 59 Cal.2d 57. Through the decision of the Greenman case, manufacturers bear strict liability for damage

[53] Richard C Warren, 'The Evolution of Business Legitimacy' (2003) 15(3) *European Business Review* 153, 156.

[54] Deegan argues that the terms of a social contract are difficult to determine and different organisations might have different perceptions of the terms. It is in relation to the implicit terms where managers' perceptions can vary to a great extent. For details, see Craig Deegan, Michaela Rankin and Peter Voght, 'Firms' Disclosure Reactions to Major Social Incidents: Australian Evidence' (2000) 24(1) *Accounting Forum* 101.

[55] Belal, above n 1, 15.

[56] Craig Deegan, 'The Legitimising Effect of Social and Environmental Disclosures–A Theoretical Foundation' (2002) 15(3) *Accounting, Auditing & Accountability Journal* 282, 292–293.

[57] Deegan, Rankin and Voght, above n 55.

[58] Comment of Lewis F. Powell, Jr is mentioned in http://www.answers.com/topic/lewis-franklin-powell-jr at 22 November 2010.

[59] For details on this point, see the discussion on the stakeholder approach to the corporate management at the later part of this chapter.

caused by their products, even though the seller has maintained all precautions and the buyer has no contractual agreement with the seller. Thus, the concept of *Caveat Emptor*[60] has been replaced with that of *Caveat Venditor*.[61] Institutionalised consumerism and regulations following this consumerism have also changed the classical mode of corporate management. International consensus and national frameworks for protecting labour and environmental rights have also emphasised this change. For instance, the recent legal regulations related to clean water and air have constrained companies from 'spoiling the commons'. In *Marsh v. Alabama* (1946) 326 US 501, the US Supreme Court negated the 'property rights' of the company to uphold the right of local citizens.[62]

In this context, the business system has focused more on united actions.[63] From 1971 to 1979, the number of companies represented by registered lobbyists grew from 175 to 650 in USA; the National Association of Manufacturers was moved to Washington in 1973; while the chief executive officers of Fortune 500 companies formed the Business Roundtable in 1972. Their joint efforts raised the membership of the Chamber of Commerce from 36,000 in 1967 to 80,000 in 1974.[64] With this new approach, corporate societies have directed their power to the cultural and political fronts. For instance, corporate grants to the Public Broadcasting System increased from US $3.3 million in 1973 to US $22 million in 1979, and between 1974 and 1978 at least 40 'free company' chairs were funded, primarily at liberal undergraduate colleges in the USA.[65] Gradually, these cultural initiatives became guided by political ends. As Gramsci, Lewis F Powel have noted:

> ...one should not postpone more direct political action, while awaiting the gradual change in public opinion to be effected through education and information. Business must learn the lesson, long ago learned by labour and other self-interested groups. This is the lesson that political power is necessary; that such power must be assiduously [sic] cultivated; and that

[60] This Latin term is for 'let the buyer beware'. It is a property law doctrine that controls the liabilities of the seller of a real property. According to this doctrine, the buyer could not recover from the seller for defects on the property that render the property unfit for general use. For detail, visit http://en.wikipedia.org/wiki/caveat_emptor at 1 August 2011.

[61] Caveat venditor is the opposite of caveat emptor. This Latin term translates as 'let the seller beware'. It suggests that sellers can also be deceived in a market transaction. This doctrine forces the seller to take responsibility for faulty products and discourages them from selling sub-standard products. For details, visit http://en.wikipedia.org/wiki/caveat_venditor#caveat_venditor at 1 August 2011.

[62] The facts of this case are as follows: a lady was distributing religious handbills standing beside the road in a town owned by a company. She was arrested on a charge of 'trespassing'. The United States Supreme Court decided that the right to freedom cannot be denied simply to uphold property rights. For details, visit http://en.wikipedia.org/wiki/marsh_v._alabama at 1 August 2011.

[63] Freeman, above n 37.

[64] Edsell Thomas Byrne, 'Business in American Politics: Its Growing Power, Its Shifting Strategies' (1990) Spring *Dissent* 248 in James K. Rowe, *Corporate Social Responsibility As Business Strategy* (2004) 131, available at http://escholarship.org/uc/item/5dq43315jsessionid=f6bafa0de62a77972be9ffebe8157cee at 3 December 2011.

[65] Ibid.

> when necessary, it must be used aggressively and with determination—without embarrassment and without the reluctance which has been so characteristic of American business.[66]

Corporate societies' strategies to tackle societal pressure on legitimacy issues gained momentum when businesses successfully organised the Political Action Committee (PAC) in the USA as the steering body for implementing their programs in society. In 1974, there were 89 corporate PACs. This increased to 784 by 1978, and by the end of 1982, there were 1,467.[67] In response to their organised political efforts, labour-related PACs grew only from 201 to 380 between 1972 and 1982.[68] As Edsell lucidly points out:

> The political wing of the nation's corporate sector staged one of the most remarkable campaigns in the pursuit of power in recent history. By the late 1970s and the early 1980s, business, and Washington's corporate lobbying community in particular, had gained a level of influence and leverage approaching that of the boom days of the 1920s.[69]

Corporate society began dealing with 'social legitimacy' issues pragmatically; from the cognitive level, companies gradually shifted legitimacy issues to the pragmatic level. Although the contradicting arguments and practices related to corporate roles and strategies for social responsibility have been prominent in the discussion of CSR, this momentum has made corporate society more relaxed and strategic in response to demands for social responsibility. They have stepped back from their economic value creation-centred arguments based on their depoliticised status and became defensive. With the changed social circumstances they have initiated a plan of action of 'counterbalancing the use of intergovernmental codes as political levers while also creating a better understanding of corporate operations that could preclude more restrictive actions in the future.'[70] Their plans of action are designed to make them a self-consciously political force. They have focused more on efforts to legitimise their activities and began engaging in CSR practices in order to obtain social approval in support of their continued existence and 'license to operate'. Previously, companies were accustomed to seeking this legitimacy through philanthropy. However, with the institutionalisation of CSR practices, corporate engagement in society is more attached to specific circumstances and needs when dealing with social legitimacy and responsibility issues.

The conception that '200 years worth of work in economics and finance indicate that social welfare is maximised when all firms in an economy maximise total firm value'[71] is not as prominent as it was in the 1970s and argument has created doubt

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[66] Lewis F. Powell Jr., 'Attack on the Free Company System' (2004), available at http://www.mediatransparency.org/stories/powellmanifesto.htm at February 2004 cited in Rowe, above n 65.

[67] Byrne, above n 65, 131.

[68] Edsell Thomas Byrne, *The New Politics of Inequality* (1984) 107.

[69] Ibid.

[70] John Kline, International Codes and Multinational Business: Setting Guidelines for International Business Operations, London: Quorum Books, 161 in Rowe, above n 65, 129.

[71] Michael Jensen, 'Value Maximisation, Stakeholder Theory and the Corporate Objective Function' (2002) *Business Ethics Quarterly* 235, 239.

that this capitalist rhetoric relates to the objectives of organisational legitimacy. The advocates for the extension of corporate roles in social development doubt the benefits of a pragmatic approach by companies to gain social legitimacy. As discussed earlier, this approach for creating legitimacy depends upon the strategic posture of individual companies; a company plans for this as long as it is required by the company. Therefore, in this approach, the objective of legitimacy strategies is limited to the narrow interests of the company and barely provides room for a genuine ethico-political interpretation of corporate behaviour. Moreover, with this approach, companies do not gain the insight needed to influence them to accept any additional social responsibility beyond that required by the law and their economic interests in order to claim legitimacy. As discussed earlier, civil groups, NGOs and the political system in general do not rely upon pragmatic legitimacy that 'refers either to a weak idea of a company's cognitive compliance or to the pragmatic legitimacy provided by capitalist rhetoric.'[72] Moreover, they have accused the corporate sector of not adequately contributing to the redressment of major socio-environmental problems. For instance, they claim that corporate society is directly or indirectly liable for the greenhouse gas emissions that are causing severe climate change and ecological imbalance; receding glaciers threaten low-lying coastal cities with rising sea levels.[73] The 2001 CSR monitor, based on 20,978 interviews with average citizens across the world found that more than 75 % of the participants felt that large companies should be 'completely responsible' for protecting the health and safety of workers and protecting the environment; that corporate beneficiaries owe an enormous ecological debt, particularly to the South, which must be redressed; and that governments should reassert their authority and responsibility over corporate powers.[74] This has helped civil groups put pressure on companies to shift the depoliticised status of companies towards their politicisation.

Political theory has identified companies as political since they provoke, and have the ability to provoke, 'public concern resulting from power.'[75] Their growing public influence on national sovereignty and democratic governance demands that scholars create suitable processes to provide rights and liabilities within the democratic order. The purpose of the politicisation of companies is to redefine their place

[72] Palazzo and Scherer, above n 24, 86.

[73] Corporate organisations, especially the transnational companies are capable of contributing to the redressment of social and environmental problems to the same extent as the nation states. Of the 15 companies and governments with the world's largest budgets, six are governments, nine are companies. Each of the 15 largest transnational companies now has a budget that exceeds the GDP of more than 120 nation states. Of the 100 largest economies, 51 are now transnational companies and 49 are nation states, with 90 % of these transnational companies being based in the 49 nation states. For details, visit http://www.wcc-coe.org/wcc/what/jpc/corp-account.pd at 10 October 2011.

[74] For details, visit http://www.globescan.com/news_archives/csr_exec_brief.pdf at 10 October 2011.

[75] Neil Mitchell, 'Corporate Power, Legitimacy, and Social Policy' (1986) *Western Political Quarterly* 197,208; Max Weber, 'Economy and Society' (1968) 213; Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9(2) *European Journal of International Relations* 249.

in the society and their role in democratic accountability.[76] 'The call for discourse and communicative ethics in the broad field of corporate responsibility studies denotes a politicisation of the company since it opens corporate decision-making to civil society discourses.'[77]

The core of this politicisation would be the development of moral legitimacy in companies. While their cognitive legitimacy is eroding and their pragmatic legitimacy provokes growing resistance, moral legitimacy could help companies to genuinely address their social responsibilities.[78] Moral legitimacy is the key source of social acceptance and provides less scope for companies to engineer and manipulate the strategies required for managing the legitimacy pressures acting on them.[79] Even Friedman concludes that companies should conform 'to the basic rules of the society, both that embodied in law and those embodied in ethical custom.'[80]

### 3.2.3 *Corporate Legitimacy in Society: The Nexus*

Jesper Grolin offers an interesting account of three challenging models of corporate legitimacy.[81] Friedman's approach to corporate legitimacy, which focuses on the economic functions of companies, could be taken as the classical model of corporate legitimacy.[82] The second model is the stakeholder approach to gaining corporate legitimacy in society. This model details companies' responsibilities to those

[76] James P Walsh, Klaus Weber and Joshua D Margolis, 'Social issues and Management: Our Lost Cause Found' (2003) 29(6) *Journal of Management* 859.

[77] Palazzo and Scherer, above n 24, 91; for details, see Suchman, above n 9; Andrew Wicks and Edward Freeman, 'Organisation Studies and the New Pragmatism: Positivism, Anti-Positivism, and the Search for Ethics' (1998) *Organization Science* 123; Daniel Swanson, 'Toward an Integrative Theory of Business and Society: A Research Strategy for Corporate Social Performance' (1999) 24(3) *Academy of Management Review* 506.

[78] Palan shows how these two types of approaches for corporate legitimacy in society have been eroded. The unethical accounting in big companies, inadequate investment at the company level to minimise carbon emissions amid other issues has made previously accepted business behaviour the subject of critical public debate. For details, see Ronen Palan, *The Offshore World: Sovereign Markets, Virtual Places, and Nomad Millionaires* (2006) in Palazzo and Scherer, above n 24, 91.

[79] Blake Ashforth and Barrie Gibbs, 'The Double-Edge of Organisational Legitimation' (1990) *Organization Science* 177, 181.

[80] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' (2007) *Corporate Ethics* and *Corporate Governance* 173,218; in the same fashion, Epstien and Votaw concludes that companies have to act according to the moral foundation of the society. For details, see Edwin Epstein and Dow Votaw, *Rationality, Legitimacy, Responsibility: Search for New Directions in Business and Society* (1978) 3.

[81] Grolin, below n 90; John Dryzek, 'Transnational Democracy' (1999) 7(1) *Journal of Political Philosophy* 30, 35.

[82] Friedman, above n 81; James Guthrie and Parker L D, 'Corporate Social Reporting: A Rebuttal of Legitimacy Theory' (1989) 19(7) *Accounting and Business Research*.

affected by business decisions and operations in a tangible way. The third model is the political company model. It reflects the ethos of the globalisation of the economy and a parallel weakening of national government authority. Its scope is greater than that of the other two models, and it touches the transnational context of this issue by advocating that:

> ...a company should adopt a clear set of moral and ethical values, which relate to the general public both globally and locally, and which can guide corporate actions irrespective of whether [the company] is explicitly required by law.[83]

Grolin's arguments on the political company model are closely related to the Brent Spar conflict.[84] On the knowledge gained from this conflict, Grolin argues that companies should reach out to the general public to acquire legitimacy for their operations. During this conflict, although Shell was experiencing a consumer boycott across the northern economies, it took time to dispose of its oil storage platform, as it was unable to solve certain engineering problems. The British government helped Shell to solve these problems, and hence Shell was dependent on the government and its allied political institutions. However, Shell had to face the conflict with the public, and as a result of public pressure, it had to step back. Thus, this conflict relates to the 'clash between the reductionist rationality of the scientific expert and the common-sense rationality of the lay public.'[85] It also marks a change 'in the location of the driving forces of politics from formal political institutions to groups and individuals of civil society.'[86] Based on the inability of political institutions to establish the legitimacy of organisational activity, in the future, companies are likely to be held accountable by the public for their legitimate activities.[87]

Following the concept of corporate legitimacy through CSR practices, international societies, consumers, and transnational companies develop different frameworks to ensure greater legitimacy in the companies within their societies. Most of the principles of these frameworks are meant to provide guidance (i.e., in the development of moral responsibility for ensuring good CG) and assist national governments to assess and develop CG. Moreover, scholars have become interested in applying moral responsibility to organisations as they do to individuals. Goodpaster and Matthews argue in this direction, asserting that companies should

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[83] Ibid.

[84] Brent Spar is an oil storage platform in the North-East Atlantic. Regarding its dumping, shell and greenpeace had conflicts started in 1995. Based on theories of corporate legitimacy and risk society, this conflict raised an argument that created a demand for a new balance between business, government and civil society as well as a radicalisation of the requirements for corporate legitimacy. For more details, see Jesper Grolin, *Corporate Legitimacy in Risk Society—the Case of Brent Spar,* Business Strategy and the Environment (1998), available at http://www3.interscience.wiley.com/journal/61003263/abstract?cretry=1&sretry=0 at 14 November 2011.

[85] Grolin, above, in Bichta, above n 37, 22.

[86] Ibid.

[87] Bichta, above n 37, 22.

base their corporate conscience on the morals individuals hold, and that business strategies should follow the efforts of individuals to hold moral attitudes.[88]

In order to establish moral responsibility in companies, Goodpaster and Mathews have analysed individual moral responsibility and relate this to organisational behaviour. According to them, individual decision-making (or moral responsibility) is based on rationality, and it extends its values to others' rationalities. They further argue that this responsibility involves 'careful mapping of alternatives, clarity about goals and purposes, attention to details of implementation. . .and concern for the effects of an individual's decisions and policies on others.'[89] Business society is gradually accepting this argument, and accordingly, shows almost the same kind of rationality and values that individuals hold while making decisions. Companies have developed 'features into their management incentive systems, board structures, internal control systems, and research agendas that in a person we would call self-control, integrity, and conscientiousness.'[90] They also consider the human impact of their operations and strategies; they usually do not make controversial policies.[91] For instance, companies tend to rely on management-based strategies rather than strategies based on the concept of the 'invisible hand' and government intervention to explain their moral behaviour.[92] This is because they aim to create an internal source for their behaviour rather than be guided by any external system. Like individuals, companies have their own sets of values. Thus, the ethos of individual behaviour and responsibility has scope to shape corporate conscience; the moral responsibility that exists among individuals could be the source of the socially responsible corporate behaviour that is a vital component of acquiring legitimacy of business operations in society.[93]

Companies incorporate CSR practices to gain social legitimacy. Their interest in CSR practices has increased, as evidenced by the increasing numbers of companies joining the existing cohort of CSR reporters.[94] The precepts of legitimacy theory help to secure their commercial interest through building a strong relationship with their customers.[95] By adopting and implementing CSR practices, they can improve customer satisfaction, which translates into better business, while increasing employee satisfaction results in the delivery of a better quality service and greater

[88] Kenneth E. Goodpaster and Jr. John B. Mathews, 'Can A Corporation Have A Conscience?' (1982) 60(1) *Harvard Business Review* 132 in Bichta, above n 37, 21.

[89] Ibid.

[90] Ibid.

[91] Ibid 132, 136.

[92] Ibid 132.

[93] Ibid.

[94] For example, 80 % of ftse-100 companies now provide information about their environmental performance and social impact. For details, see Deegan and Rankin, above n 87; for more information, visit http://www.article13.com/a13_contentlist.asp?straction=getpublication&pnid=569 at 15 April 2009.

[95] D. Neu, H. Warsame and K. Pedwell, 'Managing Public Impressions: Environmental Disclosures in Annual Reports' (1998) 23(3) *Accounting, organizations and Society* 265.

business success. With CSR practices, companies can gain social legitimacy and, at the same time, minimise the threat and cost for litigation and NGO action that could have a detrimental effect on their reputation and overall business performance. Moreover, they can use their legitimacy to create a competitive advantage by raising barriers to entry in the market. For example, Wal-Mart relies heavily on advertising the CSR activities that its stores carry out in the local communities where they operate. The Body Shop's reputation was built on the ethical sourcing of its products.

A shift towards improving corporate moral legitimacy would help companies implement CSR principles as an integral part of their business plans. This approach would allow companies to move from economic, utility-driven, and output-oriented strategies to political, input-oriented and communication-driven strategies for fulfilling their social responsibility. Appropriate political strategies would allow for the development of 'the link between corporate decision-making and process of will-formation in a company's stakeholder network.'[96] Strategies for a communicative approach could include the exchange of value-based information between a company and its social environment.[97] For the development of this approach, particularly in the weak economies, Guido Palazzo and Andreas Scherer propose embedded organisational legitimacy, with the central aim being to link the legitimacy and social responsibility issues of companies to a deliberative democracy framework through communication-based strategies.[98] This strategy acknowledges the role of public and private actors in addressing the consequences of problematic market behaviour. The communicative power of companies is used in this strategy 'in the manner of a siege...without intending to counter the system itself.' A company, therefore, must be open to critical deliberation in principle as well as to assume its actions for gaining social acceptance since 'issues of legitimacy does not arise unless an order is contested.'[99]

To summarise, 'legitimacy' is critical to companies seeking to secure a continued supply of key resources,[100] and they must retain their legitimacy to retain their license to operate within society. Moreover, in order to conform to the changing perceptions of society, they must adapt and change their strategies and,

[96] Palazzo and Scherer, above n 24, 93; for details, see Andrew Wicks and Edward Freeman, 'Organisation Studies and the New Pragmatism: Positivism, Anti-positivism, and the Search for Ethics' (1998) *Organization Science* 123; Iris Young, 'From Guilt to Solidarity' (2003) 50 (2) *Dissent* 39.

[97] Palazzo and Scherer, above n 24, 93; Carlton and Payne defines this strategy as 'an interactive field of discourse'. For details, see Jerry Calton and Steven Payne, 'Coping With Paradox' (2003) 42(1) *Business & Society* 7; Timothy Kuhn and Karen Lee Ashcraft, 'Corporate Scandal and the Theory of the Firm' (2003) 17(1) *Management Communication Quarterly* 20.

[98] Palazzo and Scherer, above n 24, 93.

[99] Bosire Maragia, 'Almost There: Another Way of Conceptualising and Explaining NGOs' Quest for Legitimacy in Global Politics' (2002) 2(3) *Non-State Actors and International Law* 301, 312.

[100] John Dowling and Jeffery Pfeffer, 'Organisation Legitimacy: Social Values and Organisational Behaviour' (1975) 18(1) *Pacific Sociological Review* 122.

more importantly, communicate these changes to their stakeholders. With the changes in the landscape of their social, corporate and political environments, the cognitive and pragmatic approaches that companies have previously employed to fulfil their social responsibilities are no longer sufficient for protecting the ethos of their contract with society. Increasingly, these changes in the socio-political framework are being accompanied by arguments calling for these approaches to be complemented with moral approaches for social legitimacy.[101]

## 3.3 CSR Through Legal Regulation: 'Stakeholder' Argument

The framework by which organisations are governed has changed.[102] This change comes through changes in industrial structures and shifts in economic relationships and the broader dimension in the business–society interface where the force of community compels political powers and business society to review the ways in which companies are governed. Stakeholder theory has gradually put this change at the centre of research into business and society relations. The works of Edward Freeman make this theory an internationally dominant paradigm. He set forth the reconceptualisation of the notion of corporate management in the form of this theory, which has spurred the theoretical as well as the strategic approaches of corporate management.[103]

The meanings of 'stake' and 'holder' are important within stakeholder theory. Simply stated, the word 'stake' means a right to do something in response to any act or attachment. Since 'rights' are generally associated with liabilities, this word also denotes the liabilities a person possesses for enjoying a particular right. Hence, a stake could be a legal share of something. It could be, for instance, a financial involvement with something. From the organisational stakeholder perspective, Carroll identifies three sources of stakes: ownership at one extreme, interest in between, and legal and moral rights at the other extreme.[104] The word 'holder' is comparatively easy to understand. It denotes a person or entity that faces certain consequences or a need to do something because of an act or to meet a certain need.

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[101] Georg Scherer and Gudio Palazzo, 'Toward A Political Conception of Corporate Responsibility: Business and Society Seen from A Habermasian Perspective' (2007) 32(4) *Academy of Management Review* 1096.

[102] For an earlier version of this section, see Mia Mahmudur Rahim, 'The Stakeholder Approach to Corporate Governance and Regulation: An Assessment' (2011) 8 *Macquarie Journal of Business Law* 304–325.

[103] Tom Cannon, *Corporate Responsibility- A Textbook on Business Ethics, Governance, Environment, Role and Responsibilities* (1994).

[104] Archie B Carroll and Ann K Buchholtz, *Business and Society: Ethics and Stakeholder Management* (2008) 58 in Eeva Siljala, *Development of Corporate Social Responsibility in Finnish Forest Industry* (Masters Book, Lappeenranta University of Technology, 2009) 23.

From the organisation and management perspective, Freeman defines stakeholder as 'any group or individual who can affect or is affected by the achievement of the firm's objectives.'[105] Archie Carroll defines a stakeholder from a broader perspective, as he determines stakeholders to be 'any individuals or groups who can affect or are affected by the actions, decisions, policies, practices or goals of an organisation.'[106] Thus, employees, customers, owners, competitors, government and civil organisations could be the stakeholders of a company. Gray and colleagues even extend this list to include future generations and non-human life.[107]

Within business and society relations, the core idea of stakeholder theory is that CG has the responsibility (i.e., the stakeholder has rights) to consider the views of their stakeholders in corporate self-regulation. Hence, this concept challenges the central position of managerial capitalism. Two arguments could have prompted this challenge. The first of these considers that today's companies are no longer fit for the old model of governance. It argues that the concept of ownership has shifted from its hard strand, and hence, companies can no longer accurately be viewed by their owners as private property.[108] The second argument develops around the power relationship between business and society. It claims that social power comes with social responsibility, and hence, failing to mitigate the costs that arise (i.e., out of industrial pollution, hazardous products, job dissatisfaction, etc.) inevitably raises questions about the exercise and limitation of corporate power.[109]

Taking these arguments as vital to this theory, it focuses on a particular question: 'For whose benefit, and at whose expense, should the firm be managed?'[110] In reply, the initiators of this theory define stakeholders as all the parties that have vested interests in, or are claimant on, the company, including proprietors, management, suppliers, customers, employees, and the local community.[111] They argue, in accordance with Kantian philosophy, that none of these stakeholders can be treated as a means to some end, and they have the obligatory right to participate in determining the future direction of the businesses in which they have a stake.[112] They challenge the opinion that business organisations have no absolute right to decide on how things should be settled for their constituents by

[105] Freeman, above n 37, 46.

[106] Carroll and Buchholtz, above n 105.

[107] Gray, Owen and Carol, above n 7, 45 in Siljala, above n 105, 24; for more details on the classification of stakeholders, see Archie B Carroll and Ann K Buchholtz, *Business and Society: Ethics and Stakeholder Management* (2008) 58; Ming-Dong Poul Lee, 'A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead' (2008) 10(1) *International Journal of Management Reviews* 53, 61.

[108] Michael Hoffman and Robert Frederick, *Business Ethics—Readings and Cases in Corporate Morality* (3rd Ed, 1995).

[109] Ibid.

[110] William Evan and Edward Freeman, *A stakeholder theory of the modern corporation: Kantian Capitalism* (1993).

[111] Ibid.

[112] Ibid 148.

positing that 'if the modern company requires treating others as means to an end, then these others must agree on, and hence participate (or chose not to participate) in, the decisions to be used as such.'[113] Reasonably, this theory has noted that the rights to property, though legitimate, are not absolute, specifically when it comes to conflict with the rights of others. It was further advocated that 'the property rights are not a license to ignore Kant's principle of respect for a person.'[114] Another dominant theme of this theory deals with the impact of managerial capitalism and the manner in which the precept of 'modern company' affects the welfare of others. In terms of corporate externalities and harmful actions, this theory extends the liabilities for these actions to the persons responsible for the corporate decisions and activities. Hence, any theory that seeks to justify the corporate form 'must be based at least partially on the idea that the company and its managers as moral agents can be the cause of and can be held accountable for their actions.'[115]

Indeed, the justification for the normative basis of this theory is based on the evolving arguments regarding the concepts of property rights,[116] though there is no single set of norms that describes the term 'property'. 'Property' and 'bundle of many rights' are defined synonymously. However, property resembles the right with recurrent features. Ronald Coase subscribed to the view that 'what a land-owner in fact possesses is the right to carry out a circumscribed list of actions. . .and his rights as a land-owner are not unlimited.'[117] Authors such as Honore and Pejovich have extended Coase's notion of property rights and underscored the link between property and human rights by noting that 'the right of ownership is not an unrestricted right.'[118] Another oft-quoted opinion relevant to the right of property is that it is a core human rights issue, emphasising its rational use. This opinion is also intrinsic to the concept of property rights and clearly signals the engagement of stockholders in the conception of the property rights of business organisations. Within the academic community, this opinion creates contention over the notion of property rights. On one hand, it is contended that simply bringing non-owner stakeholders into the conception of property rights does not provide justification for stakeholders' arguments assigning managerial responsibilities toward specific groups (i.e., employees, customers). On the other hand, the contemporary theoretical concept of property rights does not ascribe unlimited rights to owners or shareowners.

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[113] Ibid.

[114] Bichta, above n 37.

[115] Hoffman and Frederick, above n 109, 148.

[116] Thomas Donaldson and Preston L E, 'The Stakeholder Theory of the Company-Concepts, Evidence and Implications' (1995) 20 *Academy of Management Review* 65.

[117] Ronald Coase, 'The Problem of Social Cost' (1960) 3(October) *Journal of Law and Economics* 1.44.

[118] For more information on contemporary arguments of property rights look at Anthony M Honoré, *Ownership,* Oxford Essays in Jurisprudence (1961); Svetozar Pejovich, *The Economics of Property Rights—Towards A Theory of Comparative Systems* (1990).

Stakeholder theory has allowed the convergence of these contradictory arguments. To be attached to the right of property that is created and maintained by companies, this theory aligns two principles: the principle of corporate rights and the principle of corporate effects. According to the principle of corporate rights, corporate managers who are liable for framing core corporate decisions cannot violate the legitimate rights of a company's constituents for their personal benefit. The principle of corporate effects denotes that corporate managers and companies as separate entities are equally responsible for the effects of their actions on others. These two principles are the source of a further two principles for managing the stakeholders of business companies. The principle of 'corporate legitimacy' focuses on the rights and responsibilities of companies and their effects on others, while the 'stakeholder fiduciary principle' drives the managerial strategies for addressing the demands of shareholders. These principles, in fact, contribute to creating structural mechanisms to facilitate the application of the concept of stakeholder management. This management concept provides scope to revise and reform corporate law so that the companies can be managed for the benefit of their stakeholders, and allows stakeholders to participate in the company decision-making processes that affect their welfare.

### *3.3.1 A Stakeholder Approach for Regulation CSR in Companies*

To ensure the best possible fit with the various dimensions of corporate management, the pioneers of stakeholder theory have developed three main operational approaches: normative, instrumental and descriptive/empirical.[119] The normative approach defines the manner in which management deals with different stakeholders.[120] The instrumental approach describes the outcomes of managerial treatment of stakeholders. The descriptive approach is concerned with the stakeholder management activities of companies.[121] This approach is used to describe and explain specific corporate characteristics and behaviours. The instrumental approach to stakeholder theory is used to identify the connections between stakeholder management and the achievement of traditional corporate objectives such as profitability and growth. The normative approach to stakeholder theory is used to

[119] For details, see Donaldson and Preston, above n 117.

[120] For details, see Edward Freeman, Business Ethics—Readings and Cases in Corporate Morality in Michael Hoffman, Robert Frederick, Schwartz (2001 4th Ed); Jerry I Porras and Jim Collins, *Built to Last: Successful Habits of Visionary Companies* (1994); Lynn Sharp Paine, 'Managing for Organisational Integrity' (1994) 72 *Harvard Business Review* 106.

[121] Shawn Berman et al., 'Does Stakeholder Orientation Matter? The Relationship Between Stakeholder Management Models and Firm Financial Performance' (1999) 40(5) *Academy of Management Journal* 488,199; Belal, above n 1, 18.

interpret the function of the company. From these perspectives, the relevance of this theory to corporate management can be summarised as follows[122]:

1. Companies have relationships with many constituent groups (stakeholders) that affect and are affected by their decisions.
2. It is important for companies to be concerned with the nature of these relationships in terms of both processes and outcomes for themselves and their stakeholders.
3. The interests of all legitimate stakeholders have intrinsic value, and no set of interests can be assumed to dominate the others.
4. A focus on managerial decision-making is vital to the company-stakeholder relationship.

Based on research findings on the above-mentioned tenets, Berman and colleagues have suggested two distinct stakeholder approaches that amplify the causal relationship between groups of stakeholders and a company.[123] The first of these, the strategic stakeholder management approach, suggests that companies are interested in stakeholders because they are part of the corporate constituents and consumers and hence necessary for developing financial performance. The second approach, intrinsic stakeholder commitment, suggests that 'managerial relationships with stakeholders are based on normative, moral commitments rather than on a desire to use those stakeholders solely to maximise profits.'[124] Freeman's definition of stakeholders stated earlier also suggests a two-way relationship between companies and their stakeholders.[125] The first element, whereby stakeholders can affect companies, relates to the strategic stakeholder management approach suggested by Berman et al., and the second element, whereby stakeholders are affected by companies' activities, relates to intrinsic stakeholder commitment.[126]

Focusing more on the strategic relationship between stakeholders and companies when considering their social responsibilities, Arieh Ullmann suggested a three-dimensional conceptual approach of stakeholders towards business operations in

[122] Thomas Jones and Andrew Wicks, 'Convergent Stakeholder Theory' (1999) 24(2) *Academy of Management Review* 206,207; for a detailed discussion on this approach, see Belal, above n 1, 18.

[123] Berman et al., above n 122.

[124] Ibid 492; for a detailed discussion on this view of Freeman, see Ataur Rahman Belal, 'Stakeholder Accountability or Stakeholder Management: A Review of UK Firms' Social and Ethical Accounting, Auditing and Reporting (SEAAR) Practices' (2002) 9(1) *Corporate Social Responsibility and Environmental Management* 8.

[125] Edward Freeman, *Strategic Management: A Stakeholder Approach* (1988) in Belal, above n 1, 19.

[126] Berman et al., above n 122; Belal, above n 1, 19.

society.[127] The first approach, stakeholder power[128]; the second approach is the strategic posture (active vs. passive)[129] adopted by companies towards corporate social activities and the third approach is concerned with the economic performance of companies. Ullmann argues that the economic potency of companies affects corporate capacity to adopt CSR practices and disclosure, since economic strength affects the weight of social demands and the attention they receive from the top decision-makers in a company.[130] From this perspective, Deegan divides stakeholder approaches to corporate regulation into two groups: ethical and managerial.[131] The ethical approach emphasises the ongoing responsibility of companies to society and denotes directions in terms of how to deal with stakeholders, irrespective of their status. The managerial approach highlights managerial strategies to respond to stakeholder issues and denotes the details of the most appropriate strategies to deal with different types of stakeholders. In this approach, corporate responses to their stakeholders are determined by the extent to which the corporate managers consider the stakeholders as furthering the goals of the company.[132]

The power of stakeholder approaches and the strategic posture of companies are interrelated, depending on the economic impact of such a relationship.[133] The dimensions of the stakeholder approach described by Ullmann show that economically stronger companies are in a better position to maintain a higher level of CSR practices. Therefore, certain relative shortcomings in CSR practices may exist while they are being regulated at the corporate level. What is more interesting is that companies may have internal difficulties in regulating their CSR practices. However, these difficulties, as significant as they may be, do not render CSR practices unnecessary, since these practices are particularly implicated in the issues of labour accumulation and profit distribution. Robin Roberts argues that the unique features of the stakeholder approach highlight the possibility for companies to incorporate their stakeholders' strengths and therefore allow them to contribute within their context.[134] Companies could strengthen CSR practices if these

[127] Arieh A Ullmann, 'Data in Search of A Theory: A Critical Examination of the Relationships among Social Performance, Social Disclosure, and Economic Performance of US Firms' (1985) *Academy of Management Review* 540; Belal, above n 1, 19.

[128] Belal, above n 1, 19; D. Neu, H. Warsame and K. Pedwell, 'Managing Public Impressions: Environmental Disclosures in Annual Reports' (1998) 23(3) *Accounting, Organizations and Society* 265, 278–279.

[129] Belal, above n 1, 19.

[130] Ullman, above n 131,553; MD López-Gamero, E Claver-Cortés and JF Molina-Azorín, 'Complementary Resources and Capabilities for an Ethical and Environmental Management: A Qual/Quan Study' (2008) 82(3) *Journal of Business Ethics* 701, 708.

[131] Deegan, above n 57, 294.

[132] Gray, above n 7, 46.

[133] Craig Deegan and Jeffrey Unerman, *Financial Accounting Theory* (2006) 272.

[134] Robin Robert, 'Determinants of Corporate Social Responsibility Discloser: An Application of Stakeholder Theory' (1992). 17(6) *Accounting, Organization and Society;* for details, see Belal, above n 1, 19.

practices were gradually embedded into their day-to-day practice and included their surroundings.

To summarise, though it cannot be argued that the traditional framework of CG has totally failed in both legal and managerial terms, it can safely be stated that the conventional approach of corporate self-serving behaviour has been challenged by stakeholder theory.[135] The core themes and approaches of this theory entail comprehensive restrictions on such behaviour; its arguments prohibit any specific attention to the interests of a single constituent of any company. The arguments based on this theory attach a new meaning to CSR and corporate strategies.[136]

The aim of stakeholder theory is to redefine the purpose of business and its mode of response to its non-economic factors. It has challenged the traditional view that corporate activities should only be reflected by the signals from markets and the economic system. While CG is restricted to its shareowners and meant for profit maximisation, this theory 'offers an alternative to both business and government institutions as to what is the very purpose of a business.'[137] Its precepts denote that companies are also responsible to 'serve as a vehicle for coordinating stakeholder interests and to meet the claims of each of the group of stakeholders, who are affected by companies' actions.'[138]

## 3.4 CSR Through Legal Regulation: 'New Governance' Argument

The authoritative role of one sole actor or a group of actors no longer dominates the scholarship and practice of governance. For instance, over the last two decades, the authoritative mode of regulation has been under considerable scrutiny. Argument rages between scholars and practitioners as to what the best rules will be in business practice, as authoritative regulation and state agencies are incapable of predicting the trend. In addition, the mechanisms for monitoring and adjusting these rules in the light of experience are severely lacking, especially in today's uncertain world.[139] Michael Dorf puts it in this way: '[I]n the conditions of modern life, people increasingly find that their problem is not so much an inability to persuade those with different interests or viewpoints of what to do; their problem is that no

[135] Richard Warren, 'The Evolution of Business Legitimacy' (2003) 15(3) *European Business Review* 153, 154, 156. For details, see Deegan, above n 57, 292–293.

[136] The theory also explores the criteria on evaluating the legitimacy of CSR.

[137] Michael Hoffman and J.M. Moore, *Business Ethics: Readings* and *Cases in Corporate Morality* (1990) in Bichta, above n 37, 20.

[138] Ibid.

[139] Michael Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 (2) *Columbia Law Review* 267, 278–279.

one has a complete solution to what collectively ails them'.[140] Two other vital reasons for this devolution in governance are that it becomes difficult for private actors alone to raise the compliance level[141] and that the state alone does not possess adequate resources to sufficiently help private actors to comply, to enforce the law, or to monitor and update rules in light of experience.[142]

Against this background, the arrival of NG can be deemed a new form of governance that assists the change in CG. The basic concept of NG is that it proposes many types of stakeholders and strategies to reach an optimal welfare level from any given perspective. In other words, this concept argues for 'collaborative governance' in which agencies and industry representatives work together to define and revise standards.[143] It is a rapidly growing concept.[144] The kinds of regulations included in NG tend to be less prescriptive, less top-down, and more focused on learning through monitoring than compliance with fixed rules. NG also provides scope for using a provisional and quasi-legislative framework that helps to 'set the terms of diffuse groups of stakeholders to elaborate in particular applications, which will then be reviewed at the centre with an eye toward revision of the frameworks.'[145]

The NG approach has contributed to changes in CG frameworks. Accordingly, the meaning of CG is changing; in the public marketplace of ideas, the term 'corporate governance' is also described as 'the set of processes, customs, policies, laws and institutions affecting the way in which a company is directed, administered or controlled.'[146] From the perspective of NG, the main feature of this devolution is that along with a functional economic focus, a public policy approach that seeks to protect investors as well as non-shareholder stakeholders is also important in CG. This devolution has also contributed to changes in the socio-legal view of corporate regulation.[147] In this form of governance, the role of law is

[140] Micheal Dorf, 'After Bureaucracy' (2004) *University of Chicago Law Review* 1245, 1269.

[141] Jody Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA L. Rev*. 1, 3.

[142] Jason M Solomon, 'Law and Governance in the 21st Century Regulatory State' (2007) 86 *Texas Law Review* 819, 822.

[143] Adam Winkler, 'Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History' (2004) 67(4) *Law and Contemporary Problems* 109; Michael Bradley et al., 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at A Crossroads' (1999) 62 *Law* and *Contemporary Problems* 9.

[144] For details on this concept, see Charles F. Sabel and William H. Simon, *Epilogue: Accountability Without Sovereignty,* Law and New Governance in the EU and the US (2006) 395; David M Trubek and Louise Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' (2007) 13 *Columbia Journal of European Law* 639; Neil Walker and Grainne De Burca, 'Reconceiving Law and New Governance' (2006) 13 *Columbia Journal of European Law* 519.

[145] Sabel and Simon, above n 150, 399.

[146] Corporate Governance http://en.wikipedia.org/wiki/corporate_governance at 6 June 2011.

[147] Recent major corporate scandals have contributed to cg gaining attention as a public policy topic. These incidents have prompted legislators and businesses to allow greater scrutiny over

to catalyse a process of deliberation that ensures that different actors contribute to governance and learn from the results of one another's contributions, and that the regulator itself can learn from others.[148]

This section elaborates the intricacies of NG approaches to devolution into CG. Firstly, it discusses NG, CG and the nexus between them. Secondly, it discusses the impact of this nexus on the traditional pattern of CG and highlights the devolution into the dominant frameworks of CG and their shift towards the notions of NG. Finally, it concludes that NG has contributed to these shifts in the traditional format of CG.

### *3.4.1 New Governance to Corporate Governance*

#### New Governance

NG comes from a conceptual background explaining how hardcore corporate decision-making and people-friendly business strategies have begun to converge, relying on executive fiduciary duty, stakeholder engagement, and economic analysis of management incentives.[149] It also addresses how companies incorporate

accounting manoeuvres and more transparency in order to prevent managers from engaging in fraud. After the enron crisis, the US President announced his 'ten point plan to improve corporate responsibility and protect America's shareholders' focusing on cg reform in the USA. Subsequently, the sarbanes-oxley act was passed. This Act, which introduced comprehensive accounting reforms for public companies and severe penalties for failure to comply, divided pro-business and pro-regulation advocates over the value of these reformative approaches and their political effects. For details see the President's leadership in combating corporate fraud at http://georgewbush-whitehouse.archives.gov/infocus/corporateresponsibility/ at 6 June 2011; *Public Company Accounting Reform and investor Protection Act 2002* (USA) at http://www.j-bradford-delong.net/movable_type/refs/2002-07-25-sarbanes.html at 6 June 2011; Scott Harshbarger and Goutam Jois, 'Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance' (2007) 40(1) *Akron Law Review* 1.

[148] Michael Dorf and Charles Sabel's concept of 'democratic experimentalism' and 'directly deliberative polyarchy' are consistent of this view of law. For details, see Sabel and Simon, above n 150,284. For an example of how these approaches could be used in corporate regulation, see Archon Fung, Dara Rourke and Charles Sabel, 'Realising Labour Standards. Boston Review' (2007) 26 *Boston Review*, available at http://bostonreview.net/br26.1/fung.html 24 July 2011.

[149] Amir Gill, 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26 *Berkeley Journal of International Law* 452, 463; regarding fiduciary duty aspect in NG, see Lyman Johnson and David Millon, 'Recalling Why Corporate officers are Fiduciaries' (2004) 46 *William and Mary Law Review* 1597; Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Review* 247. For stakeholder aspect see, Mitchell, below n 168. For economic analysis, see Craig Mackenzie, 'Boards, Incentives and Corporate Social Responsibility: The Case for a Change of Emphasis' (2007) 15(5) *Corporate Governance: An International Review* 935; Jayson Scott Johnston, 'Signaling Social Responsibility: On the Law and Economics of Market incentives for Corporate Environmental Performance' (University of Pennsylvania, Institute for Law and Economic Research, 2005).

stakeholder-friendly business strategies,[150] examines the role of shareholder and board activism in pushing for social responsibility,[151] and provides quantitative assessments of reporting practices, indices and ratings that link governance with responsibility.[152] Finally, it suggests models for pursuing this emerging frontier through greater involvement on behalf of the board of directors and utilises a comparative approach to cross the border between CG and accountability.[153]

A visible change is marked in that the public policies that were traditionally imposed by formal regulatory bodies (e.g., workplace anti-discrimination and environmental-protection boards) are now being collaboratively addressed through participation, negotiation, and dialogue between the public and private sectors.[154] Accordingly, the regulatory tools themselves are shifting; they no longer consist exclusively of legislative or administrative acts but also contain market-oriented institutions that enforce business transparency, disclosure, reporting and monitoring practices as well as internal sanctions to tackle individual misconduct. The primary challenge for NG arrangements is how to create a suitable atmosphere and the appropriate conditions for these tools to work as effectively as possible.[155]

To function as a tool for regulation, NG highlights the need for public scrutiny and enforcement. It promotes new regulatory structures that require companies to track the growing public expectations for accountability. In fact, studies show that internal governance policies that emphasise social responsibility through transparency and coordination are more successful in bringing about ethical corporate conduct than traditional proscriptive regulation.[156] Moreover, contrary to the more traditional forms of regulation, proponents of NG believe that these structures

[150] Winkler, above n 145; Michael Bradley et al., 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62 *Law and Contemporary Problems* 9.

[151] Adam Sulkowski and Kent Greenfield, 'A Bridle, A Prod, and A Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behaviour' (2005) 79. *John Marshall Law Review* 929; Tomas W Joo, 'A Trip Through the Maze of Corporate Democracy: Shareholder Voice and Management Composition' (2003) 77. *John Marshall Law Review* 735.

[152] Ans Kolk, 'Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices' (2008) 17(1) *Business Strategy and the Environment* 1; Meir Statman, 'Socially Responsible Indexes: Composition and Performance' (Leavey School of Business, Santa Clara University, 2005); Deegan, above n 57.

[153] See Generally Yadong Luo, *Global Dimensions of Corporate Governance* (2007); Arthur R. Pinto, 'Globalisation and the Study of Comparative Corporate Governance' (2005) 23 *Wisconsin International Law Journal* 477.

[154] David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency' (2007) 17 *Business Ethics Quarterly* 455; see also Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342.

[155] John M. Conley and Cynthia A. Williams, 'Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' (2005) 31 *Journal of Corporation Law* 1.

[156] Phlip Selznick, *The Communitarian Persuasion* (2002) 101; see generally, John Braithwaite, *Crime, Shame, and Reintegration* (1999).

can and should be designed to rely less on state-dictated preferences and more on public–private collaboration, flexibility, and pragmatism.[157] Empirical evidence suggests that companies are more willing to consider effective ways of enforcing compliance standards and processes, as well as share more information, when they operate in a collaborative climate that allows them to perform their own monitoring.[158] Studies have shown that enforcing environmental protection through non-conventional regulatory tactics may also enhance corporate compliance with financial and workplace protection.[159]

The intricate combination of governance and responsibility characterising the post-Enron corporate transformation illustrates this decentralisation of regulatory power and the development of public–private monitoring agencies. The number of codes of conduct, best practices, and guidelines initiated by businesses, regulators, and administrative agencies serving as a primary source of business regulation is on the rise. NG finds its strongest expression in corporate conduct on this occasion. NG precepts have stimulated the development of new approaches, a 'new learning' about regulation. The theoretical approaches to regulation have evolved from interest-based to process-based approaches. In regulatory practices, disillusionment with the burden and inefficiencies of substantive regulation has further shifted the devolution from process-based regulation to system-based regulation. A systems approach to regulation has created scope for incorporating different modes in regulation; it denotes that regulation is a synbook of the principles of self-regulation, reflexivity, and responsiveness. Two important features of legal regulation within this synbooked mode of regulation are that legal regulation leads process where different actors can participate on a democratic basis, and that legal regulation aims to reach the full range of governance of a particular process.

### Corporate Governance

In the term CG, 'governance' comes from the Latin words *gubernare* and *gubernator,* which refer to steering a ship and the captain of a ship, respectively. This is the origin of the word governor. Another source of the word governance can be traced back to the old French word *gouvernance* meaning control and the state of being governed. Hence, the metaphoric meaning of this word is the idea of steering or captaining a ship, with the reference of control and good order.

[157] Bradley Karkkainen, 'New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004) 89 *Minnesota Law Review* 471.

[158] Cary Coglianese and David Lazer, 'Management Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) *Law & Society Review* 691.

[159] Christine Parker and Vibeke Nielsen, 'Do Corporate Compliance Programs influence Compliance?' (University of Melbourne, 2006).

CG is an umbrella term.[160] In its narrow sense, it describes the formal system of accountability of corporate directors to the owners of companies. In its broad sense, the concept includes the entire network of formal and informal relationships involving the corporate sector and the consequences of these relationships to society in general.[161] These two senses are not contradictory; but rather, complementary. CG has been described as the ways in which suppliers of finance to companies assure themselves of getting a return on their investment.[162] However, it may also allude to 'the whole set of legal, cultural, and institutional arrangements that determine what publicly traded companies can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated.'[163] Taking both of these senses together, CG is no longer merely about maximising stock value.[164]

Within the CG framework in general, the roles, rights, and responsibilities of corporate directors are crucial.[165] In particular, the board of directors is the most appropriate body to design policies and allow corporate management to fulfil its responsibilities to society.[166] In most cases, this board is the sole body that communicates corporate performance to corporate owners. Moreover, with the beginning of the modern CSR era,[167] its role in CG has extended enormously; Eisenberg describes this as the 'board as manager'.[168]

[160] For details of 'Corporate Governance' see Andre Shleifer and Robert Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737; Shann Turnbull, 'Corporate Governance: Its Scope, Concerns and Theories' (1997) 5(4) *Corporate Governance* 180; Oliver Hart, 'Corporate Governance: Some Theory and Implications' (1995) 105(430) *The Economic Journal* 678; Marco Becht, Patrick Bolton and Alisa Röell, 'Corporate Governance and Control' (2003) 1 *Handbook of the Economics of Finance* 1; Catherine Daily, Dan Dalton and Albert Cannella Jr, 'Corporate Governance: Decades of Dialogue and Data' (2003) 28(3) *Academy of Management Review* 371; Lucian Bebchuk, Alma Cohen and Allen Ferrell, 'What Matters in Corporate Governance?' (2009) 22(2) *Review of Financial Studies* 783.

[161] K. Keasey, S. Thompson and M. Wright, *Corporate Governance: Economic and Financial Issues* (1997) 2.

[162] Shleifer and Vishny, above n 162.

[163] Margaret Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (1995) 3.

[164] Corporate Governance, http://en.wikipedia.org/wiki/corporate_governance at 3 February 2011.

[165] John Farrar, *Corporate Governance: Theories, Principles and Practice* (2008) 69–146.

[166] Lawrence E Mitchell, 'The Board as A Path toward Corporate Social Responsibility' in Doreen Mcbarnet, Aurora Voiculescu and Tom Campbell (Eds), *New Corporate Accountability* (2007) 280.

[167] For details of the corporate board of directors reform and the beginning of modern CSR, see Mitchell, above n 155, 284–288.

[168] Aron Eisenberg, 'The Modernisation of Corporate Law: An Essay for Bill Cary' (1982) 37 *University of Miami Law Review* 187, 209–210.

### 3.4.2 *The Nexus of New Governance and Corporate Governance*

The potential convergence of CG and CSR is frequently understood against the backdrop of the NG theory that identifies increased participation of the private sectors in shaping public policy and regulation.[169] According to scholars, global economic transformations can potentially decentralise state regulatory power.[170] Therefore, this convergence has been manifested by the replacement of the traditional hierarchical 'command-and-control' mode of regulation with a mixture of public and private, state and market, traditional and self-regulation institutions based on collaboration between states, companies, and NGOs.[171] This nexus urges that social actors other than the state and the company should actively participate in regulation, from the creation phase through to the monitoring phase. Social groups concerned include employee and consumer coalitions, public interest groups and international NGOs, and courts and legislators. It focuses on making self-regulation of corporate conduct more effective, rather than on replacing it with prescriptive legal regulation. Since enforceable legal frameworks are rare in the context of voluntary stakeholders of CG, it suggests an indirect strategy to oblige CG consider CSR as central to their internal business strategies. To this end, it creates environments to promote ground-level activism, advocacy, and media campaigns to influence CG acceptance of its social responsibilities.[172]

Scholars have devoted substantial attention to investigating the efforts undertaken by these civil actors (e.g., NGOs and non-profit companies) and companies to mandate this synbook by legal regulation.[173] To date, these efforts have concentrated on strategies such as working with companies to build their CSR tools through consulting, training, and publishing stock market indices and ratings that measure CSR performance.[174] Along with the development of the precepts of NG, multi-party involvement in regulation and monitoring is also developing as a vehicle through which CG and social responsibility converge. The changing nature

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[169] Lester Salamon, 'The New Governance and the Tools of Public Action: An Introduction' (2000) 28 *Fordham Urban Law Journal* 1611.

[170] Orly Lobel and On Amir, 'Behavioural Versus Institutional Antecedents of Decentralised Enforcement in Organisations: An Experimental Approach' (2007) *Regulation*; see generally, Orly Lobel, 'Setting the Agenda for New Governance Research' (2004) 89 *Minnossota Law Review* 498.

[171] Orly Lobel, 'Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety' (2005) 57 *Administrative Law Review* 1071.

[172] Christine Parker, 'Meta-regulation: Legal Accountability for Corporate Social Responsibility?' in Doreen Mcbarnet, Aurora Voiculescu and Tom Campbell (Eds), *The New Corporate Accountability: Corporate Social Responsibility and The Law* (2007).

[173] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

[174] Kees Bastmeijer and Jonathan M. Verschuuren, *NGO-Business Collaborations and the Law: Sustainability, Limitations of the Law, and the Changing Relationship between Companies and NGOs,* Corporate Social Responsibility, Accountability and Governance. Global Perspectives (2005).

of corporate monitoring, the identity of the social regulators participating in the process, and the substantive mechanisms unfolding to control corporate behaviour indicates the important role of this convergence. Laws, rules, or policies hold the key dimension of this convergence and drive the process underlying this convergence within companies with the aim of reaching a particular goal. This regulatory approach drives CG to think reflexively about regulation so that CG can insist that management initiate the strategies required to contribute to fulfilling public policy goals. Chapter 6 of this book describes the concept of meta-regulation, a form of legal regulation in which different stakeholders can contribute to reach a given goal and discusses the suitability of this form of regulation to assist in the incorporation of CSR principles in corporate self-regulation.

Read against the background of the NG literature, the shift of regulatory focus from the regulators' interest and projected outcomes to a systematic process captures a central element in the complexity of corporate regulation. These regulatory patterns accompany socio-legal changes in market economies, highlighted by the decline in state authority and private ordering.[175] They assist CG to acknowledge and pursue the synbook between old and new legal institutions, orthodox and novel social concepts, and conservative and liberal political conceptions.[176]

In NG, corporate morals and ethical behaviour find their expression in accountability mechanisms, transparency, and disclosure.[177] This has led to a semi-public legal debate in which corporate managers use governance as a synonym to describe their duties of care, fairness, and fiduciary responsibility simultaneously.[178] The agency focus in CG associated with the 'pro-business school' has gradually, yet overwhelmingly, cleared the way for a 'third way perspective' focus on ethics and accountability. CG is no longer merely about maximising stock value but rather about 'the relationships among the many players involved (the stakeholders) and the goals for which the company is governed.'[179]

Contemporary legal regulation scholarship's recognition of NG mechanisms that rely on co-enforcement also contributes to more effective CG strategies. This has led to the development of different regulatory strategies for CG to target their resources in a more sophisticated manner and direct corporate management to hold public policy goals as central in corporate self-regulation.[180] This development in CG has begun the process of convergence in the tensions between CG's engagement with shareholder and stakeholder interests. It has united the ethos of the CSR

[175] Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 1071; Parker, above n 175.

[176] Peer Zumbansen, 'The Parallel Worlds of Corporate Governance and Labour Law' (2006) 13 (1) *Indiana Journal of Global Legal Studies* 261, 299–305.

[177] Brian A. Warwick, 'Reinventing the Wheel: Firestone and the Role of Ethics in the Corporation' (2002) 54 *Alabama Law Review* 1455.

[178] Guhan Subramanian, 'Board Silly', *New York Times* 14 February 2007.

[179] Wikipedia, 'Corporate Governance' (2011).

[180] Lobel and Amir, above n 172.

movement that has helped the new notion of CG to reconcile this tension and render CG more attuned to constituency concerns. Business society has gradually accepted this development in the CG framework. When *The Economist* recently asked over 1,000 executives 'how [their] organisation[s] define corporate responsibility', 31.4 % of the respondents answered 'maximising profits and serving the interests of shareholders.'[181] This was the second most common answer after 'taking proper account of the broader interests of society when making business decisions', which was chosen by 38.4 % of respondents.[182] This development has methodological implications for the conceptual applications of CG and social responsibility. The study of CG is gradually beginning to incorporate concepts such as non-financial accountability, ethical codes and standards of conduct, socially driven investment and fiduciary duties, board diversity, stakeholder engagement, sustainability reporting, and socially responsible corporate strategies.[183] The discussion below highlights this issue.

### *3.4.3 From the Nexus of New Governance and Corporate Governance to the Devolution into Corporate Governance Frameworks*

This section discusses how the nexus of NG and CG notions have impacted the devolution of the traditional CG framework into the dominant pattern of CG today. CG is instrumental in the attainment of fundamental social and economic goals. To reach these goals, numerous frameworks exist for CG, among which property justification for shareholder primacy is predominant, and challenges the inclusion of the core approach of NG in CG. The discussion below focuses on the devolution into this framework. To this end, first, it discusses shareholder primacy and the libertarian and economic justifications of shareholder primacy. Next, it presents the major arguments of team production and stakeholder pluralism, which maintain a NG approach and reject shareholder primacy in CG. Finally, it focuses on the development of enlightened shareholder primacy (ESP), which has acknowledged the NG approach in CG.

[181] Economist Intelligence Unit, *Global Business Barometer January 2008* (January 2008) The Economist http://www.economist.com/media/pdf/barometer2.pdf 13 June 2011.

[182] Ibid.

[183] Sandra Dawson, 'Balancing Self Interest and Altruism: Corporate Governance Alone is Not Enough' (2004) 12(2) *Corporate Governance: An International Review* 130.

### Shareholder Primacy

Shareholder primacy assumes that a corporate company should be run in such a way as to maximise the interests of the shareholders ahead of any other interested parties who might have claims against the company.[184] The principle of this concept is also known as 'shareholder value' or the 'shareholder wealth maximisation norm'.[185] Under this principle, the objective of a company is to maximise the market value of the company 'through allocative, productive, and dynamic efficiency.'[186] This concept argues that this corporate approach is the best way to secure overall prosperity and welfare in society.[187] Shareholder primacy is widely used in Anglo-Saxon jurisdictions such as the UK, Australia, Canada, and, most notably, the USA.

The basis of the concept of shareholder primacy is its argument that shareholders are the sole residual claimants of corporate property in the sense that they are entitled to whatever corporate assets are left once fixed claims have been met. According to traditional property justification, as shareholders own the property rights in a company, the company must be managed in their interest. This justification for property rights in companies affects the most of other provisions in CG. Based on this justification, this concept rests on the proposition that 'the more amorphous the managers' mandate is, the more difficult it is to determine whether the managers are faithfully and diligently accomplishing their mandate.'[188] The classic judicial affirmation of this is contained in the decision of *Dodge v. Ford Motor Co.*[189] in which the Michigan Supreme Court stated:

> A business company is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not intend to a change in the

[184] See generally Stephen M Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2002) 97 *Northwestern University Law Review* 547, 549, 552, 563; Stephen M Bainbridge, 'In Defense of the Shareholder Wealth Maximisation Norm: A Reply to Professor Green' (1993) 50 *Washington and Lee Law Review* 1423; Mark Roe, 'The Shareholder Wealth Maximisation Norm and Industrial Organisation' (2000) 149 *University of Pennsylvania Law Review* 2063.

[185] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 *Sydney Law Review* 577.

[186] Colin Mayer, 'Corporate Governance, Competition, and Performance' (1997) 24(1) *Journal of Law and Society* 152, 155.

[187] Keay, above n 191, 578.

[188] Ian B. Lee, 'Efficiency and Ethics in the Debate about Shareholder Primacy' (2006) 31 *Delware Journal of . Corporation Law* 533, 537.

[189] 170 N.W. 668, 684 (Mich. 1919); the core finding of the court is: 'a business company is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the non-distribution of profits among stockholders in order to devote them to other purposes.'

> end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.

This view is considered somewhat antiquated, as it assumes rather than justifies shareholder primacy.[190] It is not reflected in the state of the law, as shareholders do not have property rights in the company. The property rights held by shareholders are in its shares.[191] As it is a distinct legal entity, shareholders have no direct access to company assets. In this framework, other than the shareholders, several different parties have rights and claims in respect to the company, and there is no inherent reason to attribute priority to one type of claim.[192] (This point is elaborated upon in the discussion on the stakeholder pluralism critiques of shareholder primacy.)

Other arguments propound this concept. First, shareholders are in the best position to guide and discipline corporate directors, as corporate directors are the agents of the shareholders, according to agency theory.[193] It is argued that without this guidance, corporate directors would engage in opportunistic behaviour (known as 'shirking'). This behaviour would incur cost (commonly known as 'agency cost') on the company. Therefore, to reduce the incidents of shirking and to reduce agency costs, it is argued that shareholder value should be predominant in CG.

Second, shareholders have incentives to maximise profits, and therefore, they are more focused on economic efficiency than other parties in CG. Accordingly, shareholder primacy argues that CG should be solely focused to maximise shareholders' wealth, because 'the least cost is expended in having this as the object rather than something else'.[194] Parallel to this argument, this concept holds that corporate directors can work more efficiently if they are only focused on one objective.[195]

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[190] Ewald Engelen, 'Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology' (2001) 31(3) *Economy and Society* 391; T. Clarke, *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (2004) 309.

[191] Bryan Horrigan, *Comparative Corporate Governance Developments and Key Ongoing Challenges From Anglo-American Perspectives,* Research Handbook on Corporate Legal Responsibility (2005) 39.

[192] Margaret Blair and Lynn Stout, 'Directors Accountability and the Mediating Role of the Corporate Board' (2001) 403(79) *Washington University Law Quarterly* 411–414.

[193] This is based on a large number of work, amongst those the most influential are: Michael C Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305; Eugene Fama, 'Agency Problems and the theory of the Firm' (1980) 88(2) *Journal of Political Economy* 288; Eugene Fama and Michael Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301; Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (1996).

[194] Mark E Van Der Weide, 'Against Fiduciary Duties to Corporate Stakeholders' (1996) 21 *Delware Journal of Corporate Law* 27, 56–57.

[195] Keay, above n 191, 584.

Third, corporate directors should not be engaged in a range of duties, as it would be impossible for them to balance all of their divergent interests, and therefore, it might interfere in their decision-making for the company.[196]

Fourth, shareholders are not able to protect themselves as other constituents are, since their liabilities in companies are not protected by any terms of contract. Shareholders find themselves in a vulnerable position, as unlike creditors, they do not have scope to negotiate special terms by way of contract and hence rely on the performance of the directors.[197] If shareholders do not have control over the work of corporate directors, as this concept argues, they may not be able to overcome the vulnerable situation in which they find themselves.[198]

Finally, shareholders cannot exit a company without considerable sacrifice, as 'while they can sell their share to another, the price obtained will take into account any shareholder exploitation'.[199] Jill Fisch's observation is noteworthy in this regard; she states: '[The shareholders] will bear the costs of misdeeds or self-dealing by other stakeholders even if they exit.'[200]

In their paper 'The End of History for Corporate Law', Henry Hansmann and Reiner Kraakman contend that the dominance of shareholder primacy has increasingly led to a convergence that leaves 'no serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.'[201] They describe the elements of the shareholder primacy 'consensus' as follows:

1. Control over the company should be in the hands of the shareholders.
2. Managers must manage the company in the interests of the shareholders.
3. Other corporate constituencies have their interests protected by contractual and regulatory means.
4. Non-controlling shareholders receive strong protection from exploitation.
5. The principal measure of the publicly traded company's shareholders is the market value of their share in the firm.

This unanimity is represented through a 'widespread normative consensus that directors should act exclusively in the economic interest of shareholders, including non-controlling shareholders.'[202] This convergence has occurred owing to the success of companies in jurisdictions where shareholder primacy predominates,

[196] The Committee on Corporate Law, 'Other Constituencies Statutes: Potential for Confusion' (1990) 45 *Business Lawyer* 2253, 2269.

[197] Luigi Zingales, in *The New Palgrave Dictionary of Economics and the Law* (1998) 501.

[198] Jill Fisch, 'Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy' (2005) 31 *Journal of Corporate Law* 637.

[199] Keay, above n 191, 584.

[200] Fisch, above n 204, 662.

[201] Henry Hansmann and Reiner Kraakman, 'The End of History for Corporate Law' (2000) 89 *Georgetown Law Journal* 439.

[202] Ibid.

the increasing influence of the academic disciplines of economics and finance, as well as the spread of share ownership and the advent of effective shareholder representative interest groups.[203]

### Libertarian and Economic Justification for Shareholder Primary

The modern justification for shareholder primacy derives from both libertarian and economic considerations. As noted by Milton Friedman, there is tension between the need to organise production and distribution in modern society and the fundamental liberal concern of concentration of power.[204] This stand goes against the stakeholder pluralism model and places less emphasis on the arguments of team production theory; it broadens managerial discretion and ultimately undermines the strict accountability of directors to shareholders.

From a regulatory perspective, the implication of shareholder primacy is that corporate regulation should be essentially facilitative, and that regulatory intervention should be limited to encouraging competitive and informed markets. Within this framework, corporate directors are to maximise the future value of expected profits per share while complying with relevant public law requirements.[205] According to this concept, it is for the government and the courts to protect the interests of 'other corporate constituencies' by way of contract and regulation. This can be distilled even further by the argument raised by Butler. He proposes that 'companies should be as profitable as possible over the long term in the interests of their shareholders.'[206] Directors are therefore employed to ensure the maximum return for the risk ventured by shareholders.

### A Team Production Critique of Shareholder Primacy

The team production concept owes much to Armen Alchian and Harold Demsetz's characterisation of activity within corporate firms. They define corporate activities as a type of production that requires investment of resources by several contributors in circumstances in which the value created by them as a whole is observable.[207]

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[203] Ibid 4; see generally D. Gordon Smith, 'The Shareholder Primacy Norm' (1997) 23 *Journal of Corporation Law* 277.

[204] Milton Friedman, *Capitalism and Freedom* (1982) 39.

[205] Steven Wallman, 'Understanding the Purpose of A Corporation: An introduction' (1998) 24 *Journal of Corporation Law* 807; Michael C Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305.

[206] See generally, Henry Butler, 'The Contractual Theory of the Corporation' (1988) 11 *George Mason University Law Review* 99.

[207] Armen A Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organisation' (1972) 62(5) *American Economic Review* 777, 779.

Margaret Blair and Lynn Stout extended this concept and argued that CG should consider that the corporate directors are not simply the agents of the shareholders charged with the maximisation of profits. Rather, as they argue, corporate directors should act as a 'mediating hierarch' and should be responsible for allocating the surplus produced by the company to the various team members such as investors, managers, employees.[208] These proponents have further extended the source of managerial discretion to 'sacrifice profits in the public interest.'[209]

Team production theorists challenge the justification for the rights of shareholders on corporate properties as the sole 'residual claimants'. They contend that there is nothing unique about shareholders' equity investment. On the contrary, a variety of parties, such as creditors, employees, managers, and even governments, often make significant firm-specific investments.[210] Employees may develop company-specific skills, and governments may invest in infrastructure to support a major company. These theorists maintain that these investments are not compensated by 'complete' contracts. This is a result of the difficulty of drafting contracts that deal with every eventuality and the fact that many parties rely on expectations not subject to complete agreements.[211] These expectations are often long running in nature and subject to the vagaries of market fluctuation and other external factors. Stakeholders engaging in a contractual relationship often surrender a significant amount of mobility in their reliance on these expectations, and their risk is therefore heavily tied to the fortunes of the contracting company. This means that other stakeholders also share the residual risk of corporate failure with the shareholders. Indeed, shareholders are often in a better position to manage their risk, as they are able to diversify their investment portfolio, and their shares offer greater liquidity than other types of investments.

These arguments illustrate the dilemma for the shareholder primacy model, as they show that situations may arise in which directors may make shareholders better off by simply appropriating value from other stakeholders. This is done despite having a negative impact on the total value of firm-specific investments and by becoming sub-optimal from a broader efficiency perspective.[212] Hence, team production theorists argue that directors should not be focused only on maximising

[208] Margaret Blair and Lynn Stout, 'Director Accountability and the Mediating Role of the Corporate Board' (2001) 79 *Washington University Law Quarterly* 403, 404–405; Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) *Vandebuilt Law Review* 247, 250–251.

[209] Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 *New York University Law Review* 733, 739. Some other noteworthy contribution in developing this concept are Lawrence E Mitchell, *Corporate Irresponsibility: America's Newest Export* (2001); Ian B. Lee, 'Corporate Law, Profit Maximisation and the" Responsible Shareholder"' (2005) 10 (31) *Stanford Journal of Law, Business and Finance* 442.

[210] Blair and Stout, above n 210, 259.

[211] Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2001) 75 *S. California Law Review* 1189, 1196.

[212] Ibid 1997.

shareholder value but instead should try to 'maximise the sum of all the risk-adjusted returns enjoyed by all the groups that participate in firms.'[213]

CSR arguments parallel the arguments of these theorists. CSR offers theoretical insights as to why companies should not be treated solely as their shareholders' private property but rather as semi-public companies based on sophisticated transactions and relational contracts among investors, managers, and employees.[214] CSR scholars suggest that applying the contractarian approach to corporate law (which portrays the company as a voluntary 'nexus of contracts')[215] as well as the realistic approach (which paints the company as a separate legal personality akin to a human being)[216] should not result in giving superior property rights to shareholders over employees. Rather, they posit, workers who invest their labour as an input in the company should enjoy legal recognition of their residual interest in the company's assets.[217]

### A Stakeholder Pluralism Critique of Shareholder Primacy

In CG, stakeholder pluralism argues that the objective of the company is to benefit all those who have contributed to the development of business gains.[218] Corporate directors are responsible for managing the company not only to ensure profits for shareholders but also in the interests of a multitude of stakeholders who can affect or be affected by the actions of a company.[219] According to this concept, corporate directors are liable to balance the interests of various stakeholders, including shareholders, in deciding the appropriate course of action required for governing a company.[220] This approach is 'premised on the theory that groups in addition to shareholders have claims on a company's assets and earnings because those groups

[213] Ibid 1998.

[214] Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 (2) *Vanderbilt Law Review* 247.

[215] Michael Klausner, 'The Contractarian theory of Corporate Law: A Generation Later' (2005) 31 *Journal of Corporation Law* 779, 782–784; Melvin Eisenberg, 'The Conception that the Corporation is A Nexus of Contracts, and the Dual Nature of the Firm' (1998) 24 *Journal of Corporation Law* 819, 825–826.

[216] David S. Allen, 'The First Amendment and the Doctrine of Corporate Personhood' (2001) 2 (3) *Journalism* 255.

[217] Kent Greenfield, 'The Place of Workers in Corporate Law' (1997) 39 *Boston College Law Review* 283; William Allen, 'Our Schizophrenic Conception of the Business Corporation' (1992) 14 *Cardozo Law Review* 261.

[218] Keay, above n 191, 578.

[219] Freeman, above n 37 in Tom L Beauchamp, Norman E Bowie and D.G. Arnold, *Ethical Theory and Business* (2001) 69.

[220] Edward E Freeman, 'The Politics of Stakeholder theory: Some Future Directions' (1994) 4 (4) *Business Ethics Quarterly* 409.

contribute to a company's capital.'[221] This approach is used in many continental European jurisdictions' CG systems, most notably, in Germany.[222]

The source of these stakeholder pluralism arguments in the CG framework is the role of long-term thinking in investment policies and management decision-making. The core argument of this concept is that companies exist to serve a number of stakeholders rather than shareholders alone.[223] The notion that stakeholder pluralism critiques shareholder primacy was advanced in 1932 by Berle and Means, who documented the separation of ownership and control occurring in the majority of large public companies. They showed that due to the broad dispersal of share ownership, no individual could control or adequately monitor the company. They concluded that this justified a fundamental reconceptualisation of property, in which 'the passive property right of today must yield before the larger interest of society.'[224] In this system of CG, the role of the board would be to act as 'a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.'[225]

Other critiques of shareholder primacy in CG also propound this concept. First, this concept critiques the arguments in favour of 'shareholder value'. This concept considers that this value produces a short-term process. This focus overshadows all else and fails to maximise social wealth.[226] In this regard, Larry Mitchell has noted that CG in the USA is deleterious for various groups of stakeholders, as it is overly focused on turning over short-term profits in order to benefit shareholders.[227]

Second, 'the emphasis on the shareholders being residual risk-bearers is misplaced vis-à-vis other stakeholders.'[228] Other than the shareholders, as this is

[221] Roberta S Karmel, 'Implications of the Stakeholder Model' (1992) 61 *George Washington Law Review* 1156, 1171.

[222] Keay, above n 191, 578.

[223] Damien Grace and Stephen Cohen, *Business Ethics: Australian Problems and Cases* (1998) Chap. 3; Thomas Clarke and Stewart Clegg, *Changing Paradigms: The Transformation of Management Knowledge for the twenty-first century* (1998) Chap. 6.

[224] Adolf Berle and Gardiner C Means, *The Modern Corporation and Private Property* (1991) 80.

[225] Ibid.

[226] Steven Wallman, 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties' (1991) 21 *Stetson Law Review* 163, 176–177; see also Martin Lipton and Steven Rosenblum, 'A New System of Corporate Governance: The Quinquennial Election of Directors' (1991) *University of Chicago Law Review* 187, 203,205–215; Mark E Van Der Weide, 'Against Fiduciary Duties to Corporate Stakeholders' (1996) 21 *Delware Journal of Corporate Law* 27, 61.

[227] Larry Mitchell, *Corporate Irresponsibility: America's Newest Export* (2001); for a critic of the whole notion of shareholder maximisation in corporate law, see Lawrence Mitchell, 'Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes' (1991) 70 *Texas Law Review* 579.

[228] Keay, above n 191, 585.

argued, stakeholders are also put in a vulnerable position because of their firm-specific investment. For instance, employees who have invested their time and effort in acquiring a certain skill to meet a certain company requirement may have limited prospects in the job market, as they may be unable to move to a different employer and gain from the training undertaken. This situation could create scope for ransom from the perspective of a company. Rather, there are arguments that shareholders are in a more flexible position to diversify risk more easily than other stakeholders.[229]

Third, a vital drawback of the concept of shareholder primacy is that it has undermined the very idea that companies are separate and independent legal entities.[230] Shares are clearly shareholders' property, but the company is not. According to scholarship and practice related to the concept of 'company', shareholders do not have rights to point to any property held by the company and assert ownership rights over it. Hence, the control of the shareholders over the corporate boards does not match the concept of company.

Finally, companies should serve broader social purposes than simply generating profits for shareholders, since they are involved in, and dealing with, companies that include human beings. Hence, CG should not be depersonalised. Communitarian theorists identify social and political values in CG, since they argue that the assessment of whether the company is useful is measured by its performance in gaining a richer understanding of community and respect for human dignity and overall welfare.[231] They contend that people are part of a shared community who 'inherit the benefits, values and goals of the community; thus the cultural milieu in which people find themselves cannot be ignored.'[232] Hence, they regard the concept of company as 'a community of interdependence, mutual trust, and reciprocal benefits.'[233] Moreover, they consider that the effect of invoking the shareholder value approach in CG damages the chances of non-shareholder contribution to corporate development; this preference would subordinate the non-shareholder stakeholders' firm-specific investments at all times.[234] Lyman Johnson's commentary is prominent in this respect. He states that 'a radically pro-shareholder vision of corporate endeavour [is] substantially out of line with prevailing social norms',[235]

[229] Keay, above n 191, 586.

[230] Ibid 586.

[231] Daniel Sullivan and David Conlon, 'Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware' (1997) 31(4) *Law & Society Review* 713 in Janet Dine, *Company Law* (2001) 27–30.

[232] David Millon, 'New Directions in Corporate Law: Communitarians, Contractarians and the Crisis in Corporate Law' (1993) 50 *Washington and Lee Law Review* 1373, 1382.

[233] David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies,* Progressive Corporate Law: New Perspectives on Law, Culture and Society (1995) 10.

[234] Gavin Kelly and John Parkinson, *The Conceptual Foundations of the Company: A Pluralist Approach,* The Political Economy of the Company (1998) 131.

[235] Lyman Johnson, 'Delaware Judiciary and the Meaning of Corporate Life and Corporate Law' (1989) 68 *Texas Law Review* 865, 934.

and therefore, the meaning of corporate endeavour should embrace norms 'wider than the thin thread of shareholder primacy.'[236]

Stakeholder pluralism in CG suggests that the role of company directors would be to mediate the competing interests of various stakeholders.[237] This includes both contractual stakeholders (e.g., shareholders, employees, customers, distributors, suppliers, and lenders) and community stakeholders (e.g., customers, regulators, governments, pressure groups, the media, and local communities).[238] Each of these parties has different expectations of the company, and the company is accountable to each in different ways. For instance, shareholders expect dividends and share price appreciation, and the company is accountable by means of its annual reports and continuous disclosure obligations, while the general public expects safe corporate operations and corporate accountability. The leading advocate of this approach, Edward Freeman, and his co-author express the rationale of this approach in this way:

> Business is about putting together a deal so that suppliers, customers, employees, communities, managers and shareholders all win continuously over time. In short, at some level, stakeholder interests have to be joint—they must be travelling in the same direction—or else there will be exit, and a new collaboration formed.[239]

The stakeholder pluralism arguments in CG have shifted the rights of a person or a group from an acceptable proposition to the idea that this right is enforceable and CG is also subject to ideas on ethics, social justice, and moral sense.[240] Germany

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[236] Ibid 934.

[237] There are some models that describe the strategies for incorporating stakeholders in corporate regulation. Amongst these models, Clarkson's risk-based models, the normative stakeholder accountability model and the managerial stakeholder model are noteworthy. The underlying notion in Clarkson's risk-based model is that 'a stake represents some form of risk and that without risk there is no stake' and hence the rights of stakeholders in any strategy should be based on the stakeholder's liabilities. On the basis of this notion, this model divides stakeholders into two groups: voluntary stakeholders and involuntary stakeholders. For details see M.B.E. Clarkson, 'A Risk Based Model of Stakeholder theory' (1994) 1; Belal, above n 1, 21. The normative stakeholder accountability model argues that the corporate strategies related with stakeholders should not be based on the ability of the stakeholder; rather, it is the duty of the company to look after the interest of all stakeholders without dividing them according to their ability to further the economic objective of the company. For details, see Craig Deegan and Jeffrey Unerman, *Financial Accounting Theory* (2006); Belal, above n 1, 21. The managerial stakeholder model puts emphasis on the strategies to relate the voluntary stakeholders with corporate issues in accordance with their abilities to further corporate interests. For details, see generally Gray, above n 7.

[238] Ewald Engelen, *Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology,* Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance (2004) 309.

[239] Edward Freeman, Andrew Wicks and Bidhan Parmar, 'Stakeholder Theory and "the Corporate Objective Revisited"' (2004) 15 *Organization Science* 364, 365; see also Sankaran Venkataraman, *Stakeholder Value Equilibration and the Entrepreneurial Process,* Ethics and Entrepreneurship (2002) 45.

[240] John Plender, *A Stake in the Future: The Stakeholding Solution* (1997) in Janice Dean, *Directing Public Companies: Company Law and the Stakeholder Society* (2001) 117; see also Freeman, above n 227, 413.

and Japan are prominent for maintaining a scale of values based on different types of moral sense and ethics. In Germany, co-determination and worker representation on the supervisory boards of companies are common, while in the UK, CG allows corporate directors to consider employee issues that are beyond the contractual agreement. Recently, even a number of US states have created constituency statutes that allow consideration of a broad range of stakeholders.[241] This devolution in the scholarship of CG has paved the way for ESP, a considerably new concept in the CG framework.

### Enlightened Shareholder Primacy

The development of ESP dates back to the debate between Professor Adolf Berle and E Merrick Dodd concerning the objectives of a company. Berle argued that corporate directors should not, as managers of companies, have any responsibilities other than to shareholders and that their focus should be only upon making money.[242] On the other hand, Dodd argued that companies are economic institutions and that they should therefore have liabilities to contribute to social development along with the responsibility of generating profits for investments.[243] While the arguments of Berle have largely been adopted, especially in the USA, the arguments of Dodd have successfully paved the way for a college of scholarship on the societal approach in CG. This seminal debate, and the practices following the proponents of this debate, has gradually raised the argument for ESP that allows corporate directors to consider the interests of their constituencies, other than their shareholders, in the actions they take. This has also created the scope for directors to design their strategies for the long-term wellbeing of a company. In this regard, in many jurisdictions, courts have stated that CG can make commercial judgments based on the interest of non-shareholder interest in the management of the company.[244] Accordingly, this concept in shareholder primacy has moderated directors' obligations to manage the company to ensure only short-term benefits, such as maximising immediate profits.[245]

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[241] John Farrar, *Corporate Governance: Theories, Principles and Practice* (2008) 451.

[242] Adolf A Berle, 'Corporate Powers as Powers in Trust' (1930) 44 *Harvard Law Review* 1049. See also Adolf A Berle, 'For Whom Corporate Managers Are Trustees: A Note' (1931) 45 *Harvard Law Review* 1365; Adolf A Berle and Gardiner Means, *The Modern Corporation and Private Property* (1991).

[243] E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45(7) *Harvard Law Review* 1145, 1148; see also E Merrick Dodd, 'Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?' (1935) *University of Chicago Law Review* 194.

[244] For some instances of court decisions, see *Provident International Company V International Leasing Corp Ltd* [1969] 1 NSWR 424, 440; *Paramount Communications Inc V Time Inc* 571 A. 2d 1140 (Del, 1989).

[245] Corporations and Market Advisory Committee, 'Social Responsibility of Corporations' (CMAC, 2006) 84–89. Available at http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf at 8 June 2011.

The narrow approach of shareholder primacy in CG, a contemporary variation of shareholder primacy theory, is the main source of the development of ESP. Recent literature has utilised the term 'enlightened shareholder value' or 'enlightened self-interest' to indicate that although shareholder value is paramount, careful consideration of stakeholder interests is usually in the interest of the company.[246] This development in shareholder primacy accepts that good management should involve assessing the impact of a particular decision considering the likely consequences for corporate reputation. It has paved the way for corporate management to attract and retain employees and minimise transaction costs and risk by incorporating social policy goals at the centre of their strategies.[247]

ESP suggests that corporate directors ought to be empowered to consider the interests of stakeholders while maintaining shareholder primacy. This has given new insights into how companies are run and operated on a daily basis within the precepts of CG. It relates to the social welfare-driven approaches to CG and policy, and proposes that business efficiency should not only aim at higher stock prices but also at internalising environmental and social externalities and acknowledging the often unequal distributive consequences of creating corporate surpluses.[248] However, this concept does not undermine the interests of shareholders. Rather, it adds stakeholders' interests to the CG framework along with shareholders' interests. To avoid ambiguity, consider the following instance: where there are two routes a company can take, X and Y, where both benefit the company equally but where X may benefit one or more constituency interests and Y may not, then according to this concept, X should be adopted. Corporate management should not take a course of action that clearly provides benefits to a number of constituencies but does not provide any benefits to shareholders. Thus, this concept emphasises moral arguments associated with justice, fairness, and communitarianism[249] and endorses doctrinal approaches that reject the exclusivity of cost-benefit analysis and the exclusion of distributive aspects from efficiency models focused on maximising each transaction's dollar value.[250]

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[246] Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk* and *Creating Value* (2006) 46; see also UK Steering Group, *Modern Company Law for A Competitive Environment: The Strategic Framework* (1999) 5, 41.

[247] UK Steering Group, *Modern Company Law for A Competitive Environment: The Strategic Framework* (1999) 3.16–3.61.

[248] Kent Greenfield, 'New Principles for Corporate Law' (2005) 1 *Hastings Business Law Journal* 87; Lawrence Mitchell, 'Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes' (1991) 70 *Texas Law Review* 579.

[249] Kent Greenfield, 'Corporate Social Responsibility: There's A Forest in Those Trees: Teaching About Corporate Social Responsibility' (2000) 34 *Georgia Law Review*. 1011; Ronen Shamir, 'The Age of Responsibilisation: On Market-Embedded Morality' (2008) 37(1) *Economy and Society* 1.

[250] For a recent critique of the existing scholarship of corporate regulation thought, see generally Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (2006).

There are other arguments in support of ESP. First, this approach legitimises the far-sighted strategies in CG; it supports corporate directors' and senior managers' initiatives by considering the interests of non-shareholder stakeholders as long as these initiatives foster corporate profits. In its report 'Corporate Responsibility: Managing Risk and Creating Value', the Australian Parliamentary Joint Committee on Companies and Financial Services observed that the rate of social responsibility in business decision-making has increased in recent times. This report mentions that many directors of Australian companies make decisions founded on social responsibility as well as the interests of shareholders. The Committee mentions that '[p]rogressive, innovative directors, in seeking to add value for their shareholders, will engage with and take account of the interests of stakeholders other than shareholders.'[251] Fiona Buffini reported a comment from Ms Meredith Hellicar, the Chairwoman of the substantive James Hardie Group, who mentioned that corporate directors are aware of the threat from the shareholders and the possibility of being the object of legal suits, even though they are engaging more in CSR plans in the belief that their shareholders are enlightened and that the majority of them agree with the nexus of CSR and long-term profit.[252]

Second, ESP permits corporate directors to focus on long-term interests. It is accepted that most shareholders prefer to earn a stable rate of profit over the long term; not all shareholders want directors to focus on short-term benefits.[253] The Australian Parliamentary Joint Committee on Companies and Financial Services is of the view that most shareholders prefer to support corporate responsibility, as they believe that this will lead to long-term gain for shareholders.[254] At this point, Hansmann and Kraakman mention that there is 'no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.'[255]

Finally, ESP allows corporate directors to decide corporate issues based on their own conscience and economic justification; it does not require directors to balance the interests of a wide range of constituents. According to this approach, 'directors merely have to state that what they did was a result of balancing interests, and no

[251] Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 59.

[252] Fiona Buffini, 'Calls to Protect Corporate Conscience', *Australian Financial Review* (Sydney) 2005, 4; see also L.E. Preston and H.J. Sapienza, 'Stakeholder Management and Corporate Performance' (1990) 19(4) *Journal of Behavioral Economics* 361.

[253] International Accounting Standards Board, 'Discussion Paper on Preliminary Views on an Improved Conceptual Framework for Financial Reporting: The Objective of Financial Reporting and Qualitative Characteristics of Decision-Useful Financial Reporting Information' (2006) in Investment Management Association, 'IMA Response to Discussion Paper on An Improved Conceptual Framework for Financial Reporting' (2006) 4.

[254] Parliamentary Joint Committee on Corporations and Financial Services, above n 253, 50.

[255] Hansmann and Kraakman, above n 203; see also Michael Jensen, 'Value Maximisation, Stakeholder Theory and the Corporate Objective Function' (2001) 7(3) *European Financial Management* 297.

one could challenge the conclusion at which they arrived.'[256] The move towards this enlightened approach has contributed to the inclusion of NG notions in CG.[257] NG defines this transformation as a convergence of business self-interest and the interest of society to ensure that companies perform their social responsibilities.

To summarise, the dominant position of shareholder primacy has been minimised within the CG framework, where issues related to companies' public policy and social responsibility are now significant. Of late, ethical norms and the need for accountability have been two of the driving sources of CG, and with CSR being increasingly adopted in existing business practices, the potential convergence between CG and CSR comes to the foreground. Whereas previously there were two separate mechanisms of CG—one catering to 'hardcore' corporate decision-making and the other to 'soft' people-friendly business strategies—scholars are currently considering the more hybridised, synbooked body of laws and norms that regulate corporate practices. NG provides scope of such convergence in CG frameworks. The nexus between the NG and CG approaches in the face of regulatory, business, and social change has somewhat decreased the controversy over both the potential and the limitations of corporate accountability mechanisms. It enables scholars and practitioners in many fields to look beyond their traditional perspectives to explore ways in which synbooking governance and responsibility may change existing practices in business and social advocacy.

## 3.5 Conclusion

This discussion of legitimacy theory, stakeholder theory, and NG explains that the demand for incorporating CSR principles into corporate regulatory mechanisms is adequately supported by theory and is philosophically well grounded. These theories are based on moral arguments in favour of justice, fairness, and communitarianism. They are endorsed by doctrinal approaches that reject the exclusivity of cost-benefit analysis and include distributive aspects in efficiency models focused on maximising profits. From these theoretical bases, CSR is relevant to how

[256] Keay, above n 187, 602.

[257] Based on this approach, different economies are incorporating different strategies into their corporate regulation. For instance, the operational and financial review completed in the UK was built on the concept of 'enlightened shareholder value', that is, it was designed to provide shareholders with better information concerning company performance. The EU adopted this approach in its modernisation directive that requires a balanced review of a company's non-financial key performance indicators, including information relating to environmental and employee matters. The European Management Audit Scheme and the *Companies Act 2006* (UK) are other instances where considerable weight has been given to this approach. For details, see Filip Gregor, 'How Can Reporting Become A Relevant tool for Corporate Accountability at the European Level?' (2007) *Discussion Paper for European Coalition for Corporate Justice* http://ec.europa.eu/company/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/ files/position_papers/how_can_reporting_become_a_relevant_tool_en.pdf at 14 July 2011.

business considers the existing political and economic landscape and enables companies to adopt ethical guidelines, incorporate stakeholder concerns and to more efficiently internalise the costs previously externalised to the environment and society.[258] Shifts in the political economy are gradually promoting these fundamental changes in CG, largely by relying on the changing role of companies and their license to operate within society.

This has been reflected in studies of CG and CSR regulation in the strong economies. For instance, the OECD's recent publication of CG principles defines the basis of an effective CG framework: it 'should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.'[259] It considers that CG is instrumental in reaching fundamental social and economic goals, and emphasises that the CG framework should be developed with a view to its impact on overall economic performance, market integrity, and the incentives it creates for market participants and the promotion of transparent and efficient markets. Regarding the legal and regulatory requirements, as this organisation describes, CG should be 'consistent with the rule of law, transparent and enforceable.' It further mentions that the division of responsibilities in CG should be 'clearly articulated and ensure that the public interest is served.' However, such a framework is absent in the weak economies. The CG laws of these economies have not yet clearly taken CSR on board. The convergence of CG and CSR in the strong economies is of limited relevance to weak economies like that of Bangladesh.[260] At this juncture, the precepts of legitimacy theory, stakeholder theory and NG are becoming increasingly important for the regulation of CG and CSR in the weak economies; they have gradually reduced the profit-centric focus of their companies in general and made room for an alternative way of focusing on the pluralisation of actors, ethics, and accountability in corporate self-regulation.

[258] Gill, above n 151, 461; see generally, Doreen Mcbarnet, Aurora Voiculescu and Tom Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007); David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005).

[259] OECD, *OECD Principles of Corporate Governance* (2004) 17.

[260] The impact of such drawbacks in Bangladesh has been discussed in Chap. 6 of this book.

# Chapter 4
# Legal Strategies for Incorporating CSR Principles in Corporate Self-Regulation

Developing a normative strategy for incorporating CSR in corporate self-regulation through legal regulation is difficult but important. It is difficult, as legal regulation could be detrimental to business development if it narrows the scope of innovation in business and becomes a barrier to companies' usual business practices. It is important, as civil society, being sceptical of the role of companies' voluntary responsibility for social development, needs this normative basis to further the arguments for CSR in a well-articulated manner. The previous chapter has discussed the theoretical basis for incorporating CSR principles in corporate self-regulation. This chapter discusses the basis and type of regulatory strategies for this incorporation. It presents the 'third perspective' as the normative basis for implementing CSR principles in corporate self-regulation through legal regulation.

## 4.1 Introduction

CSR is a strong component of new business and CG models for long-term sustainability. This paradigm embraces four core CSR principles: the societal, economic, environmental and stakeholder precepts. The societal principle of CSR holds that companies should contribute to building better societies, and they should therefore integrate social concerns into their core strategies and consider the full extent of their impact on communities.[1] The economic principle emphasises the need for companies to be efficient in their production of goods or provision of

[1] Archie B Carroll, 'Corporate Social Responsibility' (1999) 38(3) *Business & Society* 268; Elisabet Garriga and Domenec Melé, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53(1) *Journal of Business Ethics* 51; Carmen Valor, 'Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability' (2005) 110(2) *Business and Society Review* 191; Van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003) 44(2) *Journal of Business Ethics* 95.

M.M. Rahim, *Legal Regulation of Corporate Social Responsibility*,
CSR, Sustainability, Ethics & Governance, DOI 10.1007/978-3-642-40400-9_4,

services without violating social and environmental values.[2] The environmental principle maintains that companies should not harm the environment to maximise profits and that they should repair any environmental damage caused by their irresponsible use of natural resources.[3] The stakeholder principle holds that companies should take the legitimate interests of their stakeholders into account.[4]

These principles are being integrated into the core policy objectives of global companys, which are moving beyond their individual business initiatives. Chapter 3 showed that the strong economies have started adopting CSR principles in their socio-economic strategies and incorporating these issues in their legal regulations.[5] Chapter 4 showed that there is a strong theoretical basis for incorporating CSR principles in corporate regulation. Both of these chapters have also shown that contemporary practices in CSR implementation cannot be described by a common strategy; these strategies are not built on any one single normative basis. Corporate regulators in weak economies are, however, attempting to develop different regulatory strategies to formalise CSR principles to increase the social responsibility of their companies, although these initiatives do not have any solid strategic basis. Moreover, in most cases, these initiatives do not adequately fuse the concurrent strategic options for this development.

The lack of any central basis for CSR implementation strategies can be traced back to the concurrent arguments for this implementation. Scholars are divided in terms of their thinking regarding the core issues of CSR implementation: while some scholars claim that 'CSR lacks a dominant paradigm',[6] others argue that the dominant approach of CSR is instrumental and focuses on the economic function of companies.[7] On the one hand, civil societies and NGO groups demand social

[2] John Elkington, 'Partnerships from Cannibals with Forks: The Triple Bottom Line of 21st Century Business' (1998) 8(1) *Environmental Quality Management* 37; Maureen Rogers and Roberta Ryan, 'The Triple Bottom Line for Sustainable Community Development' (2001) 6 (3) *Local Environment* 279; Elisa Juholin, 'For Business or the Good of All? A Finnish Approach to Corporate Social Responsibility' (2004) 4(3) *Corporate Governance* 20.

[3] Rodney Mcadam and Danis Leonard, 'Corporate Social Responsibility in A Total Quality Management Context: Opportunities for Sustainable Growth' (2003) 3(4) *Corporate Governance* 36; Drik Matten and Jeremy Moon, 'Pan-European Approach. A Conceptual Framework for Understanding CSR' (2007) *Corporate Ethics and Corporate Governance* 179.

[4] Edward RFreeman and Ramakrishna S Velamuri, 'A New Approach to CSR: Company Stakeholder Responsibility'; Dima Jamali, 'A Stakeholder Approach to Corporate Social Responsibility: A Fresh Perspective Into Theory and Practice' (2008) 82(1) *Journal of Business Ethics* 213.

[5] Simon Zadek, Third Generation Corporate Citizenship: Public Policy and Business in Society, London, Foreign Policy Centre in association with Accountability, London, 2001b.

[6] Andy Lockett, Jeremy Moon and Wayne Visser, 'Corporate Social Responsibility in the Management Literature: Focus, Nature, Salience and Sources of Influence' (2006) 43(1) *Journal of Management Studies* 115; A Mcwilliams, D Siegel and P M Wright, 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1.

[7] Subobarata Boby Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly* (2007); John Roberts, 'The Manufacture of Corporate Social Responsibility' (2003) 10 *Organization* 249.

responsibility from companies, while on the other, companies want to operate without interference. Tension has emerged between what has grown to be the two wings of CSR: the voluntary pro-business regulation wing and the mandatory pro-regulation wing. This makes it extremely difficult to characterise CSR implementation using a widely accepted normative basis.[8] This chapter discusses this phenomenon with the aim of suggesting a normative basis of CSR implementation that would allow corporate regulators to insist that companies include CSR principles as a central aspect of their self-regulatory mechanisms. It deals with the contradicting arguments for this implementation and emphasises the convergence of the pro-business and pro-regulation arguments related to this implementation.

This chapter first discusses the voluntary and mandatory modes of incorporating CSR in corporate self-regulation. Second, it describes the pro-business and pro-regulation arguments, as these two sets of arguments are the source of the voluntary and mandatory modes. Third, it describes the arguments of the 'third perspective' that provide the basis for the convergence of pro-regulation and pro-business arguments regarding CSR implementation. Fourth, it discusses academic work related to the normative basis for CSR implementation through legal regulation. Finally, it recommends the incorporation of CSR principles in corporate self-regulation through a fusion of these different modes of regulatory strategies. The hallmark of the laws and regulations included in this fusion is that they simultaneously integrate state sanctions, market incentives and private ordering and do not rely solely on the prescriptions of the law or corporate conscience.

## 4.2 Voluntary and Mandatory Modes in Corporate Social Responsibility Implementation

The voluntary mode for including CSR notions in corporate regulation refers to a CSR implementation process that is dependent on the will of a corporate entity. It denotes that corporate entities may, or may not, add CSR principles to their internal strategies, and that external force cannot oblige them to add these principles in a particular way. This mode is predominant in the CSR literature; it is typically used by companies in their CSR practices and has many advantages that can improve the outcomes of traditional policy dimensions.[9] Through this mode, corporate bodies

[8] Ronen Shamir, *Corporate Responsibility and the South African Drug Wars,* The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice (2005)38.

[9] Michael Peters and R. Kerry Turner, 'SME Environmental Attitudes and Participation in Local-Scale Voluntary Initiatives: Some Practical Applications' (2004) 47(3) *Journal of Environmental Planning and Management* 449, 7. For more discussion that finds promises in the voluntary mode of CSR practices, see Ans Kolk, R Van Tulder and C Welters, 'International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?' (1999) 8 *Avril* 143; Elliot J Schrage, 'Promoting International Worker Rights Through Private Voluntary

can achieve greater flexibility in terms of their ways and means of reaching targets; increase the scope of discussion amongst stakeholders; enhance their public image; promote innovation; reduce enforcement costs, and so on.[10] The most important benefit of this mode is its focus on cooperation and compromise rather than confrontation.[11] This mode helps to create consensus-building strategies and provides flexibility that enables participants to take action according to their needs and company type.[12] From an economic perspective, this mode can also benefit companies in terms of their own situations.[13] Barron contends that 'unpriced' economic return is obtainable from the voluntary mode of CSR in corporate management, which generates the same type of efficiency advantages as priced incentives (e.g., via emission taxes and permits).[14]

Nevertheless, the voluntary mode of CSR is not flawless.[15] Rather, the empirical literature continuously stresses that this mode alone is not a panacea for the nexus of CSR and corporate regulation; it has many intrinsic limitations likely to hinder its effectiveness.[16] The flux of this mode largely depends on potential participants who believe that there are sufficient benefits to these types of practices. Where there is no such business self-interest, this mode may not be effective, and this may be interpreted as a weakness of CSR.[17] At this point, to propose new corporate

Initiatives: Public Relations or Public Policy' (2004) *Report Presented to the US Department of State by the University of Iowa Centre for Human Rights* cited in James K Rowe, 'Corporate Social Responsibility as Business Strategy' (2005) 3.

[10] OECD, *Reforming Environmental Regulation in OECD Economies* (1997); Alberto Cavaliere, 'Over-Compliance and Voluntary Agreements: A Note about Environmental Reputation' (2000) 17 (2) *Environmental and Resource Economics* 195; Michael Peters and R Kerry Turner, above n 9, 8.

[11] Michael Peters and R. Kerry Turner, above n 9, 8.

[12] OECD, *Reforming Environmental Regulation in OECD Economies* (1997); Carlo Carraro and Domenico Siniscalco, 'Voluntary Agreements in Environmental Policy: A Theoretical Appraisal' in Anastasios Xepapadeas (Ed), *Economic Policy for the Environment and Natural Resources* (1996); Kilian Bizer and Ralf Julich, 'Voluntary Agreements-Trick or Treat?' (1999) 9(2) *European Environment* 59; Rinaldo Brau and Carlo Carraro, 'Voluntary Approaches, Market Structure and Competition' (CAVA, 1999).

[13] Seema Arora and Timothy N Cason, 'An Experiment in Voluntary Environmental Regulation: Participation in EPA's 33/50 Program' (1995) 28 *Journal of Economics and Management* 271.

[14] W F Barron, 'Unpriced Economic Incentives for Environmental Management' (Centre of Urban Planning & Environmental Management, the University of Hong Kong, 1998); Michael Peters and R. Kerry Turner, above n 9, 7.

[15] For a detailed discussion against the voluntary mode of CSR practices, see Christian Aid, 'Behind the Mask: The Real Face of Corporate Social Responsability' (Christian Aid, 2004); Lyuba Zarsky, 'Beyond Good Deeds: for Multinational Corporations to Adopt Socially Responsible Practices, Voluntary Measures are Not Enough' (Paper Presented At 2002); OECD, 'Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes' (2003) in James K Rowe, 'Corporate Social Responsibility as Business Strategy' (2005).

[16] UNEP, *Voluntary Initiatives, Industry and Environment* (1998); for a detailed discussion, see, Michael Peters and R. Kerry Turner, above n 9, 9.

[17] Michael Peters and R. Kerry Turner, above n 9, 9; Raino Sairinen and Outi Teittinen, 'Voluntary Agreements as An Environmental Policy Instrument in Finland' (1999) March-April *European Environment* 67.

regulations that go beyond CSR and touch on concrete and enforceable legal rules, several scholars have developed a body of thought frequently entitled 'Progressive Corporate Law'. They reject the voluntary nature of CSR, with its focus on self-regulatory ethics, and suggest far more comprehensive mandatory changes to the fundamental legal structure of corporations,[18] advocating the mandatory mode of implementing CSR principles in corporate regulation. This mode refers to the implementation of these principles in corporate entities through regulation. In other words, it is based on legal regulation that binds the regulatee to perform a certain act following a given prescription. Legal regulation is buttressed by the political will and the sovereign power of a state, and hence, the regulatee is bound to implement the prescription of the regulator.

The voluntary mode requires a minimum of existing trust and cooperation between government agencies and industry to foster public confidence.[19] Without a satisfactory level of trust, it is not likely that voluntary effort will form an effective partnership between corporate bodies and their stakeholders. The building of this trust is important, particularly for companies, because limited trust amongst stakeholders makes it difficult for them to offset the costs of monitoring and verification by the potential efficiency gained from their voluntary performance.[20] 'Unless the community can be convinced that offering regulatory relief to industry in exchange for voluntary action is a reasonable way ahead, it is likely that the companies will find it difficult to get political acceptance'[21] to implement their large-scale voluntary schemes successfully 'even where efficiency gains are felt to be certain.'[22]

Voluntarily performing corporate social responsibilities requires both resources and skills (e.g., organisational strength, expertise, and considerable investment)

[18] Kent Greenfield, 'Corporate Social Responsibility: There's a Forest in Those Trees: Teaching About Corporate Social Responsibility' (2000) 34 *Georgia Law Review* 1011; Kellye Y. Testy, 'Capitalism and Freedom: For Whom?: Feminist Legal Theory and Progressive Corporate Law' (2004) 67(4) *Law and Contemporary Problems* 87; Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (2001).

[19] Atle Midttun, 'Partnered Governance: Aligning Corporate Responsibility and Public Policy in the Global Economy' (2008) 8(4) *Corporate Governance* 406; Allen L White, 'Fade, Integrate or Transform? The Future of CSR' (2005) *Business for Social Responsibility, Issue Paper, www. bsr. org*; for a detailed discussion, see Bryan W Husted, 'Governance Choices for Corporate Social Responsibility: to Contribute, Collaborate or internalise?' (2003) 36(5) *Long Range Planning* 481.

[20] Alberto Cavaliere, *Voluntary Agreements, Over-compliance and Environmental Reputation* (1998).

[21] Michael Peters and R. Kerry Turner, above n 9, 10.

[22] Michael Peters and R. Kerry Turner, above n 9, 10; for more on this issue, Madhu Khanna and Lisa A Damon, *EPA's Voluntary 33/50 Program: Impact on Toxic Releases and Economic Performance of Firms* (University of Illinois, 1998); John J Quinn, 'Personal Ethics and Business Ethics: The Ethical Attitudes of Owner/Managers of Small Business' (1997) 16(2) *Journal of Business Ethics* 119.

without any definite gain in the short term.[23] It requires that companies incorporate CSR performance according to a detailed plan that can also add value to the organisations' economic performance. It is worth mentioning here that the requirement of incorporating CSR practices varies with company size. Whereas there may be incentives for large companies to embrace CSR, such as increased consumer loyalty, this may not be the case for smaller companies. In particular, from a financial and competitive risk standpoint, it is more difficult to justify small companies' CSR performance efforts than those of large companies. Hence, incorporating CSR practices on a voluntary basis may be inappropriate for small companies.[24]

The implementation of any holistic approach for incorporating CSR principles in corporate self-regulation through legal regulation may create an ideological imbalance in the CG paradigm. In the era of globalisation, in which deregulation is a key principle, corporate societies as a whole may not prefer state-promulgated laws. Companies perceive regulatory intervention in the market as against innovation and the free flow of market forces, and hence, moving from a voluntary mode of practice to a mode involving binding responsibility may not be welcomed. Currently, there are significant barriers to incorporating CSR principles in business regulations and imposing sanctions upon companies for social and environmental irresponsibility. The following section examines these contradictory modes of CSR implementation and discusses the arguments related to them.

## 4.3 Pro-business and Pro-regulation Arguments for CSR Implementation in Corporate Self-Regulation

The contesting position of the pro-business and pro-regulation arguments is the main source of the disagreement on the most appropriate mode of implementing CSR principles in corporate self-regulation. Again, the ideological contest between these two sets of arguments can be traced back to the broader debate on the issue of legislating versus not legislating. Philosophically, this debate is not new; it is the result of an old political debate between the advocates of the neo-liberal school and those of the state-led school.

[23] Raffaella Bianchi and Giuliano Noci, 'Greening' SMEs' Competitiveness' (1998) 11 *Small Business Economics* 269.

[24] Clifford S Russell and Philip T Powell, 'Practical Considerations and Comparison of Instruments of Environmental Policy' in J. van den Bergh (ed), *Handbook of Environmental and Resource Economics* (1999).

### 4.3.1 Pro-business Arguments

At the centre of the pro-business arguments regarding the objectives of corporate regulation is the belief that laws for regulating business activities should not interfere with internal business strategies, as this hampers innovation and obstructs businesses from reaching an optimal point in the competitive market. The conceptual basis of this argument is derived from the neo-liberal school of thought.

The core precepts of neo-liberalism are associated with the notions of individualism, market freedom, and deregulation. Taken together, these notions posit a minimalist, or non-interventionist, government. Individualism emphasises the importance of one's own freedom to choose strategies to fulfil one's self-interest. Within this school of thought, this notion is apparent in the doctrine of separate legal personality. A business entity is a separate artificial person, and hence, it has the right to take its own course without following any prescriptions imposed by the government.[25] The notion of market freedom in this school recommends reliance on market forces to allocate resources. According to this notion, an unregulated market is more efficient than a regulated one. It holds that if regulation is absent—although there may be tariffs and other artificial restrictions imposed upon businesses—there would still be scope for their own processes for reaching business judgments in terms of financial cost and benefit, and profit and loss. Deregulation is closely related to this notion; indeed, this notion maintains that business is more likely to be encouraged in society if the existing rules regulating businesses are progressively relaxed or abolished.

As a style of corporate regulation, neo-liberalism relies more upon ideological commitment by the subject than direct coercion by the state. It demands that the regulation and resources of a state should be focused on the collective interest of the ruled rather than the interest of the ruler. 'It demands the recognition of a new kind of political subjectivity: the juridical subject in the administrative state obeys a different logic to that of the economic subject within civil society.'[26]

Within the conceptual framework of this school, pro-business advocates argue that rather than regulations, market incentives drive CSR and business case relationships forward. According to this school, CSR is a tool used to gain advantage for businesses. The neo-liberal school discourages regulation, as this may simply lead to competitive disadvantages. This school argues that companies, whether they accept social responsibilities or not, depend upon the market advantages or disadvantages of these responsibilities. According to the followers of this school, leaving these practices to companies could help them to develop a more profitable situation that allows them to better accommodate their stakeholders

[25] Pamela Hanrahan, Ian Ramsay and Geofrey Stapledon, *Commercial Applications of Company Law* (2002).

[26] Nick James, 'Distracting the Message: Corporate Convictions and the Legitimation of Neo-liberalism' (2008) 8 *Macquarie Law Journal* 179,192.

and meet their demands through market incentives.[27] In a broader sense, these incentives are the outcome of the market rationalities that aim to maximise the market players' performance. The Coase theorem asserts that to achieve the social optimum, it is not necessary for government to set the standards of the market.[28] Moreover, Coase argues that private economic actors can resolve the problems associated with external factors between themselves when property rights over their assets are clearly defined and bargaining is allowed among the parties.[29]

Milton Friedman affirms this argument, and he rejects any strategies that bind companies to perform any responsibilities other than engaging themselves to generate more profits for their stockholders.[30] As he points out, in societies every group has a specific function, and the function of companies is to do business in order to generate returns for their investors. Adopting the agency theory framework, he emphasises the commercial activities of companies[31] and contends that performing social responsibilities ends in decreased profit margins for business. To him, 'the alleged social responsibilities of business people are nothing but agents acting inappropriately as "civil servants"[32] and hence business people eventually do more of a disservice than good to society.'[33] Those accepting this argument also claim that companies that incur costs from performing social responsibilities are put at an economic disadvantage compared to other less socially responsible companys, which in turn hampers the effectiveness of the market.[34]

[27] De la Cuesta González and C.V Martinez, 'Fostering Corporate Social Responsibility through Public Initiative: From the EU to the Spanish Case' (2004) 55 *Journal of Business Ethics* 277.

[28] Ronald Coase, 'The Problem of Social Cost' (1960) 3(October) *Journal of Law and Economics* 1-44 cited in Michael Peters and R.Kerry Turner, above n 9, 451.

[29] Gregory N Mankiw, *Principles of Economics* (2004) 201.

[30] Milton Friedman, 'A Friedman Doctrine: The Social Responsibility of Business is to Increase Its Profits' (1970) 13 *New York Times Magazine* 33 in Duane Windsor, 'Corporate Social Responsibility: Three Key Approaches' (2006) 43(1) *Journal of Management Studies* 93, 96.

[31] Ibid; for the classical piece of Friedman, see Milton Friedman, 'The Social Responsibility of Business is to Increase Its Profits' (2007) *Corporate Ethics and Corporate Governance* 173.

[32] Friedman, above in Nada K Kakabadse, Cecile Rozuel and Linda Lee-Davies, 'Corporate Social Responsibility and Stakeholder Approach: A Conceptual Review' (2005) 1(4) *International Journal of Business Governance and Ethics* 277, 278.

[33] Nada K Kakabadse, Cecile Rozuel and Linda Lee-Davies, above n 32, 279; for details on this issues, GP Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18 (7) *Journal of Consumer Marketing* 595; Lance Moir, 'What Do We Mean by Corporate Social Responsibility?' (2001) 1(2) *Corporate Governance* 16.

[34] David Henderson, Misguided Virtues: False Notions of Corporate Social Responsibility, Institute of Economic Affairs, London, 2002; J H Bradgon and J Marlin, 'Is Pollution Profitable?' (1972) 19(4) *Risk Management* 9; S Vance, 'Are Socially Responsible Firms Good Investment Risk?' (1975) 64 *Management Review* 18.

### 4.3.2 *Pro-regulation Arguments*

At the centre of the pro-regulation arguments is the notion that government holds the political mandate to ensure the welfare of all and the proper allocation of assets in society. Hence, it should possess the necessary regulations to ensure that the gains generated in the market, as a component of society, are distributed to maximise the public interest. The conceptual basis of this argument is the precept of 'realism', a broad concept with different meanings in different disciplines. This concept denotes the present need, statement, and intricacies of a subject in a given circumstance. It is a dominant school of thought concerned with fact or reality and against impractical and visionary theories. The concepts of realism that support the implementation of CSR principles in corporate self-regulation assume that reality is inherent in the here-and-now, unlike Platonism and philosophical realism or idealism.[35]

Proponents of this school contend that the 'states perform essential political, social and economic functions, and no other organisation rivals them in these respects.'[36] States are understood as rational actors that pursue their national interest.[37] Moreover, realists assume that states are functionally similar and unitary actors.[38] In other words, any differences of view among political leaders or domestic actors within the state are ultimately resolved so that the state speaks with one voice.[39] Accordingly, realists argue that the state should play a role in corporate regulation to respond to the public demand for correction of inefficient or inequitable market practices; ensure that there are mechanisms guaranteeing benefit to the society as a whole rather than allowing any vested interest; and to assure the society that resources are directed to productive use. The following set of circumstances could also be related to corporate performance and strengthen these arguments, as follows.

Firstly, the pursuit of profit alone is no longer the sole aim of CG, which is under growing pressure to consider the changes in the values and circumstances of the society in which they operate, even if it means giving up profit in the short run. As business activity is closely interrelated with social, environmental and political systems, these activities have a whole array of consequences—such as pollution or unemployment—on individuals, communities, nations, and the entire human

[35] For details on 'Realism', see Andrew R Sayer, *Realism and Social Science* (2000); Oliver E Williamson, 'Revisiting Legal Realism: The Law, Economics, and Organisation Perspective' (1996) 5 *Industrial and Corporate Change* 383;Bryant Garth and Joyce Sterling, 'From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State' (1998) *Law and Society Review* 409;Wikipedia, Realism http://en.wikipedia.org/wiki/realism at 14 August 2011.

[36] Scott Burchill, *Realism and Neo-Realism,* Theories of International Relations (2001)96.

[37] Ibid 93.

[38] John M Hobson, *The State and International Relations* (2000)20; Poul R Viotti and Mark V Kauppi, *International Relations Theory: Realism, Pluralism Globalism and Beyond* (1999)53–56.

[39] Viotti and Kauppi, above, 20.

race.[40] The notion of CSR conceptualises this development in CG and regulation, suggesting that companies are responsible for contributing to this development.

Secondly, these days corporate performance is judged by social policies rather than products and services,[41] since the impact of irresponsible business behaviour may result in social and environmental crises and cause suffering to shareholders, customers, and employees alike.

Thirdly, companies have become the major institutions of business in society, and they are vital to both economic and social development. They exercise more power than ever; for example, they are the most powerful and competent actors in society for assisting social and environmental programs.[42] The evolving power of the corporation is the main basis for the increasing public awareness of the potential harms arising from business.[43]

Against the arguments of the neo-liberal schools, pro-regulation advocates argue that the state needs to intervene in the market in order to advance CSR. To them, performance of these liabilities should not be totally vested in the will of companies, since market actors do not behave rationally all the time and economies are not always self-balancing, even in an active welfare state.[44] Despite the appealing logic of the Coase theorem, as Mankiw contends, private actors alone frequently fail to resolve problems created by externalities.[45] This theorem applies only when the interested parties have no difficulty in reaching and enforcing an agreement. However, it is not possible to confirm that bargaining will always work; even within the scope of a mutually beneficial agreement there may be inappropriate bargaining. According to this theorem, desirable outcomes are not achieved as a matter of routine, for example, in issues of environmental development, the majority of businesses in the real world do not seek to develop their environmental performance.[46]

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[40] Rob Gray, Dave Owen and Adams Carol, *Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (1996)1–2.

[41] Elisa Juholin, 'For Business or the Good of All? A Finnish Approach to Corporate Social Responsibility' (2004) 4(3) *Corporate Governance* 20, 21.

[42] Ibid.

[43] L. Rayman-Bacchus, 'Reflecting on Corporate Legitimacy' (2006) 17(2–3) *Critical Perspectives on Accounting* 323, 325.

[44] Joseph Stiglitz, *An Agenda for Development for the Twenty-First Century,* The Global Third Way Debate (2001)345; for details of this Nobel Laureate Economist's Arguments on this point, see Generally Joseph Stiglitz, 'The Economic Role of the State: Efficiency and Effectiveness in the Public Domain' (Institute of Public Administration, 1991); Joseph Stiglitz, 'Globalisation and the Economic Role of the State in the New Millennium' (2003) 12(1) *Industrial and Corporate Change* 3;World Bank, 'World Development Report 1997—The State in A Changing World' (World Bank, 1997).

[45] N. Gregory Mankiw, *Principles of Economics* (2004) 211; see generally Ha-Joon Chang, *Globalisation, Economic Development, and the Role of the State* (2003); Joseph Stiglitz, *Some Lessons from the East Asian Miracle,* World Bank Research Observer (1996).

[46] Michael Peters and R.Kerry Turner, above n 9, 451.

Companies usually tend to use an imbalanced, rather than a balanced, economy, as this type of economy helps them to concentrate more on their business outcomes.[47] In this economy, though there can be strong competition between companies to maximise their individual market share, the average return of business generally remains higher than that in a balanced economy. Moreover, in an unbalanced economy, companies have more scope to create monopolies that guarantee the highest return for a long period. In these circumstances, according to the pro-regulation advocates, governments need to intervene in the behaviour of companies to ensure equal opportunity for all and to restore the equal use of natural resources. Currently, in terms of the promotion of CSR practices, the role of government is to incorporate the principles of CSR through moderate regulation without placing companies at a disadvantage on the open market. It is important to note that government intervention in CSR issues does not mean tilting market rationality; rather, it means ensuring that companies perform the duties they are obliged to do in return for the benefits they derive from government policy, social protection, and a broader scope of business. The US Supreme Court ruled that companies are 'presumed to be incorporated for the benefit of the public',[48] and since they 'receive certain special privileges and franchises',[49] they are subject to 'proper government supervision.'[50] Regulation, therefore, may not necessarily be a disadvantage; it can create incentives by ensuring a level playing field, by creating obstacles to free-riders, and by ensuring the security of business transactions.[51]

The principles of the neo-liberal and state-led schools are not helpful in the search for the best manner in which CSR principles can be incorporated into the activities of companies. Whereas the neo-liberal school intends to ensure the maximum benefits from business through market rationalities, the state-led school aims to ensure the maximum good for all through necessary regulations. Nonetheless, these schools explain that the current framework of corporate regulation is not paralleled by any strategy that requires companies to incorporate social responsibility programs. They also explain that there is a growing demand for the voluntary mode of incorporating CSR principles in companies.

[47] Generally, a balanced economy denotes the financial conditions in an economy in which both its imports and exports are balanced. It also denotes that business activities in rural and urban areas are equivalent, equal gross ability of income and expenditure in all areas of the economy, and minimum differences in the health and education services in all sectors of an economy.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Michel E Porter and C Van Der Linde, 'Toward A New Conception of the Environment-Competitiveness Relationship' (1995) 9(4) *Journal of Economic Perspectives* 97, 3.

## 4.4 Convergence of Pro-business and Pro-regulation Arguments: The Rise of the 'Third Perspective'

Within the field of corporate regulation, numerous discourses interact and compete for dominance, with varying degrees of success. However, none of the concepts advanced in these discussions (e.g., consumerism, realism, neo-liberalism, environmentalism, or Marxism) dominates corporate regulation scholarship and practice. Though neo-liberalism is more widely practiced, it is always contested. Indeed, the debate surrounding corporate regulation does not consist of a simple competition between a dominant discourse—neo-liberalism—and a resistant discourse—anti-neo-liberalism. At this point, Foucault as insists, '[W]e must not imagine a world of discourse divided between the accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that may come into play in various strategies.'[52]

Scholars and practitioners are sceptical of the role of legal regulation as an abstract, monolithic, and apolitical system of regulation. In this situation, there is a perspective that considers the objectives and functions of regulation in a way that is not accommodated by any of the concepts mentioned above. This has been termed by the author 'the third perspective'.[53] Rather than an abstract system, this perspective considers legal regulation in terms of particular events and relationships within a particular social context. Rather than a monolithic system, it views legal regulation as pluralistic and fragmented. It views legal regulation 'not as a vertically autonomous source of authority which arbitrates down among human beings, but as a horizontal collage of disjointed agencies of regulation.'[54] The precepts of this

[52] Michel Foucault, *The Will To Knowledge* (1998)100. For Some Studies on Foucauldian theory to an analysis of law, see Hugh Baxter, 'Bringing Foucault into Law and Law into Foucault' (1996) *Stanford Law Review* 449; D. Litowitz, 'Foucault on Law: Modernity as Negative Utopia' (1995) 21 *Queen's Law Journal* 1; Gray Wickham and George Pavlich, *Rethinking Law, Society and Governance: Foucault's Bequest* (2001). A Comment of Joseph Stiglitz would be worth mention here; he mentions: 'there is a need to learn from theory and history, from best practices, and from what has worked. But care must be taken in extracting the appropriate lessons.' For details, see Joseph Stiglitz, above n 44,354.

[53] The concept of Joseph Stiglitz's 'the New Perspective' is closer to my concept of 'the third perspective'. The new perspective considers governments and markets as complementary rather than substitutes for each other. From this perspective, the role of government is to create the institutional infrastructure that the market requires; its role is to create laws to define property rights, enforce contracts, ensure effective competition and to minimise fraud. This perspective allows regulatory intervention in the market to implement these laws to monitor market failure. It is more related to economic issues and advocates cooperation between government and private ordering to develop markets. The third perspective is more related to regulatory strategies to help the convergence of public and private policy goals. For details of the 'new perspective', see Joseph Stiglitz, above n 44, 346.

[54] Anthony Carty and Jane Mair, 'Some Post-modern Perspectives on Law and Society' (1990) 17 (4) *Journal of Law and Society* 395 in Nick James, 'Distracting the Message: Corporate Convictions and the Legitimation of Neo-Liberalism' (2008) 8 *Macquarie Law Journal* 179, 185.

perspective are not based on apolitical thinking. They view law and regulation as an 'ideologically empty' mechanism in which numerous discourses compete to deploy a regulatory strategy that must be recognised and accepted as a framework for fulfilling a given objective.[55] From this perspective, it is pointless to attempt to prove a particular set of arguments as dominating regulation scholarship and practice. Hence, the objective of this perspective is to elaborate how the regulatory scheme might operate an ideologically biased mechanism to reach a particular goal.

The basis of this perspective can be traced back to the theoretical components of the Third Way. The Third Way is the term loosely used to describe the emergence of new social democracy throughout the world. Though it is easy to explain this term in this way, it is by no means a simple matter to analyse coherently. It is a socio-political concept largely conceptualised in Europe. The principal architect of this theory has been Anthony Giddens; his two recent seminal books, *The Third Way* and *The Third Way and its Critics,* best articulate this theory.[56] Though this term frequently refers to a way of social democratic variety between free market capitalism and centrally planned socialism, this study, however, considers it by focusing on its relationship with classical social democracy and neo-liberalism. Giddens narrates this notion as follows:

> Classical social democracy thought of wealth creation as almost incidental to its basic concerns with economic security and redistribution. The neoliberals placed competitiveness and the generating of wealth much more to the forefront. The Third Way also gives very strong emphasis to these qualities, which have an urgent importance given the nature of the global market place. They will not be developed, however, if individuals are abandoned to sink or swim in an economic whirlpool. Government has an essential role to play in investing in the human resources and infrastructure needed to develop an entrepreneurial culture.[57]

Bodo Hombach describes the Third Way more simplistically. To him, the Third Way is a policy that could steer 'a third course, a path between competing ideologies, a system that represents a realistic response to the changes that have taken place in the world.'[58] He argues that this perspective has superseded 'the extremes of free market economies on the one hand and centralised welfare state economies on the other.'[59] It interprets 'market failure' within neo-classical economics as a basis of regulatory intervention into the internal regulation of

[55] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994)57; Alan Hunt, 'Foucault's Expulsion of Law: Toward A Retrieval' (1992) 17(1) *Law & Social Inquiry* 1.

[56] Anthony Giddens is one of the leading social scientist in the world. His other seminal works include: Anthony Giddens, *A Contemporary Critique of Historical Materialism* (1981); Anthony Giddens, *The Constitution of Society: Outline of A Theory of Structuration* (1984); Anthony Giddens, *The Consequences of Modernity* (1990);Anthony Giddens, *Beyond the Left and Right* (1996).

[57] Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (1998)99.

[58] Bodo Hombach, *The Politics of the New Centre* (2000)1.

[59] Ibid.

corporations when the effect of such failure is widespread, although there are various instances of 'regulatory failure'.[60] Thus, the precepts of the Third Way can also be understood as an intervention in the new classical economics.[61] Giddens considers globalisation vital to his conceptualisation of the Third Way. For instance, he states that:

> Globalisation, in sum, is a complex range of processes, driven by a mixture of political and economic influences. It is changing everyday life, particularly in the developed economies, at the same time as it is creating new transnational systems and forces. It is more than just the backdrop to contemporary policies: taken as a whole, globalisation is transforming the institutions of the societies in which we live.[62]

As Giddens argues, in circumstances transformed due to the impact of globalisation, the roles of government and regulation have shifted towards creating a favourable environment for transnational investment. He relates the impact of these circumstances to state policy perspectives in terms of a shift from industrial policy and the globalisation demand measures favoured by the demands of social democracy, deregulation, and market liberalisation.[63] He mentions that the economic notion of the Third Way needs to 'concern itself with different priorities—with education, incentives, entrepreneurial cultural flexibility, devolution, and cultivation of social capital.'[64] At the same time, he emphasises economic development in society and argues that the policies for this development should not be based on 'old-style interventionism.'[65] Accordingly, Tony Blair and Schroder argue for the creation of conditions in which existing businesses can prosper and adapt and new businesses can be established and grow.[66] The Third Way encourages the corporate sector to collaborate at the local level to create wealth,

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[60] Philip Arestis and Malcolm Sawyer, *Economics of the 'Third Way' : Introduction,* The Economics of the Third Way: Experiences From Around the World (2001)2.

[61] Philip Arestis and Malcoln Sawyer postulate that the economic notion in Third Way should be based on seven principles. For details see Philip Arestis and Malcolm Sawyer, *Economics of the 'Third Way' : Introduction,* The Economics of the Third Way: Experiences from Around the World (2001)3–5.

[62] Anthony Giddens, above n 57, 33. Globalisation is an umbrella term; it confers different meanings to different subjects. In general, it refers to the increasing unification of the world's economic order through reduction of potential barriers to increasing material wealth, goods, and services. It describes the process by which regional economies, societies, and cultures could be integrated through communication, transportation, and trade. Hence, it could also be considered as a process driven by a combination of economic, technological, socio-cultural, political, and biological factors. Anthony Giddens does not define globalisation differently; he emphasises the effect of globalisation on a nation's socio-economic policy perspective. For details of globalisation visit Wikipedia, *Globalisation*, http://en.wikipedia.org/wiki/globalization at 14 August 2011; also see Jagadis Bhagwati, *in Defense of Globalisation* (2007); Sheila L Croucher, *Globalisation and Belonging: The Politics of Identity in A Changing World* (2004) 10.

[63] Anthony Giddens, *The Third Way and Its Critics* (2000)73.

[64] Ibid.

[65] Ibid.

[66] Tony Blair and Gerhard Schroder, *Europe: The Third Way/Die Neue Mitte* (1999)163.

job creation, and responsible risk-taking in the pursuit of entrepreneurial activity; it highlights the need for this collaboration between the public and private sectors to maximise shared benefits.[67] It is a socio-political argument to ensure 'productivity...profitability... [and] the bottom line.'[68] Bodo Hombach also promotes this policy approach. He asserts that this type of approach is necessary not only for the demand and forces of globalisation but also for changes in patterns of employment, values, and demographic and social structure.[69]

On the one hand, the precepts of the Third Way argue for a strong role for the state in corporate regulation, and on the other, they limit the role of the state in regulation. Giddens mentions that the goal of the regulatory politics of the Third Way is to develop a new mixed economy. He mentions that there are two different versions of a mixed economy: one aims to separate the roles of the state and the private sector, and the other is the social market. The objective of the Third Way is to develop regulatory policies that could facilitate the development of a mixed economy where there is a synergy between the public and private sectors, 'utilising the dynamism of markets but with the public interest in mind.'[70] This regulatory approach advocates a balance between regulation and deregulation to maintain a balance between the economic and non-economic life of a society.[71]

The Third Way is not solely concerned with the debate between the political positions of the right and the left. Rather, it is a new approach to map out the strategy necessary for a renewal of social democracy.[72] Concepts from the Third Way have contributed to the development of, according to the author, the third perspective. According to this perspective, the state has a role as well as limitations in corporate regulation, and the state should not 'row, but steer: not so much control, as challenge.' It also advocates that the solutions to problems must come from different efforts from different social actors.[73] Given this, the following section discusses how the contradictory arguments within CSR implementation scholarship have converged by following these precepts.

Pro-business arguments support voluntary modes of CSR, since this helps businesses develop their own ways of engaging in stakeholder programs that increase their competitiveness, as well as enable them to launch marketing campaigns that emphasise their humanistic, democratic values as 'corporate

[67] Sally Wheeler, *Corporations and the Third Way* (2002)27.

[68] Speech by Stephen Byers, Secretary of State for Trade and Industry at New Ways to Work Conference on 9 May 2000, mentioned in Sally Wheeler, *Corporations and the Third Way* (2002) 27.

[69] Bodo Hombach, above n 58, 31.

[70] Anthony Giddens, above n 57, 100.

[71] Ibid.

[72] Sally Wheeler, above n 67, 28; there are differences and similarities between the notions of the third way advanced by Giddens and Tony Blair. However, they are not identical. For details, see Stephen Driver and Luke Martell, 'Left, Right and the Third Way' (2000) 28(2) *Policy & Politics* 147, 156–7.

[73] Tony Blair and G Schroder, *Europe: The Third Way/Die Neue Mitte* (1999)164.

citizens'. They prefer to declare their social commitment using their own strategies, accompanied by their profit-maximisation goals.[74] CSR as a whole has not become a source for regulatory authorities' control over business financing, and at the same time, it is not yet a fully business-driven practice. Nonetheless, it has become a sensitive issue in business, with growing worldwide support.[75] This development in CSR regulation allows businesses to agree on the objective of CSR practices in their corporate plans. However, a strong criticism of the pro-business approach to CSR points out that the motive for social changes through CSR has been surrendered to the marketing interests of large companies.[76] Another criticism is that this development is supportive of the logic of private order.[77]

On the basis of pro-regulation arguments, a wave of public interest advocacy led by regulators and NGOs increasingly aims to create more enforceable tools to relate public policy goals to corporate accountability and social responsibility.[78] These tools include civil group campaigns, litigation that addresses human and workers' rights violations by companies, and, in rare instance 'soft' legislation.[79] These tools seek to improve corporate engagement in CSR by allowing public groups and coalitions to become participants in shaping this area.

The third perspective aims to merge the ethos of these contesting positions.[80] It contends that performing social responsibilities has positive consequences, and state intervention in market policies could create incentives for businesses to engage in CSR practices. It emphasises that corporate self-regulation related to

[74] For an idea on corporate strategies related with CSR, see the corporate citizenship websites of Gap http://www.gapinc.com/content/gapinc/html/csr/facts.html at13 June 2011, Nike http://www.nikebiz.com/responsibility/documents/nike_fy04_cr_report.pdf at 13 June 2011, Wal-Mart http://walmartstores.com/search/?q=citizenship&t=a&p=1&s=r&fd=a&fa=p at 13 June 2011.

[75] Ronen Shamir has termed this development as the 'Deradicalisation' of CSR. For details, see Ronen Shamir, 'The De-radicalisation of Corporate Social Responsibility' (2004) 30(3) *Critical Sociology* 669.

[76] Jedrzej George Frynas, 'The False Developmental Promise of Corporate Social Responsibility: Evidence From Multinational Oil Companies' (2005) 81(3) *International Affairs* 581; Sankar Sen and C B Bhattacharya, 'Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility' (2001) 38(2) *Journal of Marketing Research* 225; for a general discussion, see generally, David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005).

[77] For a detailed normative discussion, see generally David Harvey, *A Brief History of Neoliberalism* (2007); see also Robert Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (2008).

[78] Jonathan P Doh and Terrence R Guay, 'Corporate Social Responsibility, Public Policy, and NGO activism in Europe and the United States: An institutional Stakeholder Perspective' (2006) 43(1) *Journal of Management Studies* 47.

[79] For a detailed discussion on these tools, see Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in Doreen Mcbarnet, Aurora Voiculescu and Tom Campbell (Eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007).

[80] David Milman, *National Corporate Law in a Globalised Market: The UK Experience in Perspective* (2009) 146.

CSR should be actively scrutinised by the society in which the government has the responsibility of ensuring development. This is because relying only on the private sector for social development in weak economies may not meet public policy demands. At this point, a study conducted by the UN Secretary General's Special Representative in 2006 is worth mentioning. This study showed that companies are not always committed to social issues. It finds that only 25 % of the surveyed companys performed their community consultation process related to human rights to the standards set out in their CSR agendas.[81]

This perspective also asserts that businesses affect the manner in which values in society are created, and without businesses, innovation, better consumption, and redemption may be hampered. In other words, this perspective asserts that distortion in the usual ways of doing business could lead society towards a less productive, labour-consuming, and innovative way of transforming natural resources for human needs. Based on these precepts, it allows regulatory intervention in business as long as this intervention helps to create a better business case for companies in general. Hence, regulatory intervention in the market should try to relate to the stance from which the parties involved choose to respond, and the issues in developing regulations should contain the broader perspective of a specific point of time as well as the underlying objectives of a given subject. This has been shown in the EU strategies for regulating $CO_2$ emissions from cars. At first, the EU was reluctant to impose any regulations for controlling these emissions. During the initial stages of developing their $CO_2$ emission control policies, without imposing any regulatory directives, they determined that the automobile industries should take measures to keep $CO_2$ emissions below 130 g $CO_2$/km. After a few years, it was found that the emissions had not been lowered, and the EU was obliged to lower these emissions according to the Kyoto protocol. Ultimately, they will shift their stance to regulate the industries concerned to meet the Kyoto and sustainable development strategy goals they had planned to meet by 2012 and 2020, respectively.[82] The Commission is not yet in favour of formally incorporating CSR principles in business regulation; however, they are gradually indicating that they do not oppose this approach. They have mentioned that public authorities need to promote CSR practices, because these practices are useful instruments to promote community policies and are necessary 'to ensure a proper functioning of the internal market and the preservation of a level playing field.'[83] This has been done against the background of the recent proliferation of the standardisation regimes that source

[81] Stefano Pogutz, *Sustainable Development, Corporate Sustainability, and Corporate Social Responsibility: The Missing Link,* Corporate Accountability and Sustainable Development: Ecological Economics and Human Well-Being (2008)36.

[82] Mette Ballebye, *CSR As A Tool To Reduce CO2- Is Intervention Necessary?* (Masters Book, Aalborg University, 2008)1.

[83] European Commission, Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development (COM 2002) 347,10 in Thomas Conzelmann, 'A New Public-Private Divide? Co- and Self-regulation in the EU' (Mannheim Centre for European Social Research, 2008) 136.

different CSR instruments that can be confusing for businesses, stakeholders, and the public in general.[84]

In converging the contradicting arguments of the pro-business and pro-regulation advocates, this perspective sets out its objectives for this convergence in three core stands:

1. That corporate entities should portray themselves as good corporate citizens through self-regulation of their responsibility for greater legitimacy in society.[85]
2. That the devolution in the perception of CG has created scope for corporate management to add social policy goals at the core of corporate strategies.
3. That stakeholder engagement in corporate issues has gained a normative stance in institutional economics.

From the societal perspective, there is a need for companies to be socially responsible. Hence, the laws and regulations that require social actors to behave in an acceptable manner should also affect companies. Moreover, like all good citizens, companies should take responsibility for the externalities they create. CSR helps to minimise these externalities; it helps maintain a moral dimension in business strategies. Furthermore, where the market system is a sub-system within the social system, and where the idea of 'the good life' is the basis of economic growth, companys also have, in addition to their legal and economic responsibilities, a social responsibility to the state of development of the societies in which they operate.

Another strand of this perspective is that laws and public policies should not undermine the key role of CG (i.e., the delegated rights of corporate directors to gain the maximum return on the investments of the shareholders). It emphasises that CG must ensure transparency and accountability in corporate regulation. Hence, in general, if it becomes evident that corporate regulators are not accountable to their shareholders, there must be strategies available to redress this without hampering the right of companies to organise their own internal strategies.

This perspective is not a way of carving rights out of existing frameworks by undermining the property rights of others, but rather, a means of overcoming the problems caused by the issues of property rights of subjects that may create negative consequences for others who do not possess any rights over these subjects. It argues that stakeholder engagement in corporate responsibility issues could create additional 'opportunity' interests for companies.[86] Active stakeholders of

[84] A comprehensive discussion will be found in Papadakis K, Participatory Governance and Discourses of Socially Sustainable Development: Lessons from South Africa and European Union, *International Labour Studies* (September 2005)38.

[85] Orlay Lobel, *Crowding Out or Ratcheting Up?: Fair Trade Systems, Regulation, and New Governance,* Fair Trade, Corporate Accountability and Beyond: Exprements in Globalising Justice (2010)313.

[86] Sally Wheeler, above n 67, 31; Stakeholding in this perspective has an articulated voice depending upon the Kantian style imperatives such as 'No Stakeholder Should Be Used as A Means to An Ends.' For details, see Elaine Sternberg, *Stakeholder Theory: The Defective State It's*

companies drive CSR forward; stakeholders can influence policy formation without being attached to either government or business and can pressure companies to accept their social responsibilities. By including consumers and other constituencies of the business, stakeholder groups can even directly contribute to business development. Hence, this perspective argues that companies as well as corporate regulators should allow scope for systematic input in corporate self-regulation from their stakeholders.

This perspective has converged the arguments of the pro-business and pro-regulation advocates and has allowed scope for assisting any strategy to incorporate social responsibility principles in corporate regulation. This convergence does not focus on either deregulation or hard regulation but on regulatory redesign to provide scope to the private ordering systems to develop their own strategies to respond to public policy goals. In other words, it suggests a 'changing of the regulatory structure in ways that promote competition.'[87] For the development of a regulatory framework, this perspective emphasises the combination of all options available at the policy level of an economy. The most common instruments would be high public-private interaction, low public-private interaction, obligatory measures, voluntary measures in regulation, and so on. The contribution of each option used in the preparation of the regulatory framework would be unequal. From this perspective, businesses will be given adequate opportunities to produce their own plans to maximise their profits within the boundaries of the law and minimal ethical constraints, while simultaneously, mandatory regulation is used to ensure companies' liabilities to society. The strength of this perspective is its ability to provide scope to fix the proportions of different policy instruments. For instance, the proportion of command-and-control type regulation and regulation by consensus or negotiated rule-making would be less in strong economies than in weak economies, while the aim is to incorporate CSR principles in corporate self-regulation. Simultaneously, a proportion of self-regulation would be preferred in developed societies. Such variation may exist along with variations in types of companies and strengths of regulatory agencies.

At the heart of this perspective is the fusion of different strategies to suit the corporate culture of a given company within a certain context, as well as its acknowledgment of the main arguments of the pro-business and pro-regulation advocates in corporate regulation. Relating it to the implementation of the key principles of CSR, holistically, the strategic fusion envisioned by this perspective is a combination of the regulatory and voluntary modes of CSR to meet the social responsibilities of a business that 'encompasses the economic, legal, ethical, and discretionary expectations that society has of organisations at a given point of

*In,* Stakeholding and Its Critics (1997)70; for the discussion on Kant's expression of 'End-in-Itself', see generally Michael Slote, *From Morality To Virtue,* Vertue Ethics (1997)138–9.

[87] Joseph Stiglitz, above n 44, 347.

time.'[88] This perspective helps regulation scholarship move from its traditional framework to a framework gradually being understood as a policy option by which policy-makers could attempt to balance the drive of companies for profits and the needs of the society in which businesses make an impact. This has contributed to the development of the convergence of different strategies in designing 'modern laws'.

The 'renew deal scholars'[89] subscribe to the evolution of modern law through three legal paradigms: first, a system that merely facilitates private ordering; second, a regulatory model; and third, progression from the regulatory model towards the governance approach. In the first paradigm, though a set of formal laws is prominent, economic actors consider the rules a 'thin regulatory framework for freedom of contract and property security.'[90] At this stage, private parties are free to carry out their own transactions within a minimal set of rules. This paradigm has shifted towards the development of substantive laws within which the thick regulatory state was formed. Of particular importance to this paradigm is the perception of the centralised authority that social subsystems are incapable of self-adjustment; hence, it deems it logical to intervene in diverse areas through goal-oriented legal policies. However, this regulatory model often fails to improve compliance, because it is fated to be either under-effective or over-effective or distort other social values. Christine Parker notes that enforcement of these types of laws often fails to improve compliance, as they insufficiently deter.[91] Specifically, the laws that aim to deter business offences are limited in their effectiveness, because it is difficult to detect the type of offence committed by business actors, and therefore it is difficult to enforce punishment. These circumstances, if not addressed carefully, create a trap in which the penalties for non-compliance, as Parker describes, are either too weak or too strong. Due to this trap, the object of the

[88] Archie B Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) *Academy of Management Review* 497,500 in Mark S Schwartz and Archie B Carroll, 'Corporate Social Responsibility: A Three-Domain Approach' (2003) 13(4) *Business Ethics Quarterly* 503.

[89] Amongst the regulatory reformers, there is a growing trend of stepping outside of a litigation and rule enforcement regulatory focus to explore alternative conception of law and law-making scholarship. Orley Lobel has attempted to draw together such scholarship under an umbrella that she labeled the 'renew deal'. For details on 'Renew Deal' see Orley Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 262–390. Many scholars who are active in a wide variety of field are considered as renew deal scholars. For example, some of these scholars are Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia Law Review* 458; Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2); Bradley C Karkkainen, 'Adaptive Ecosystem Management and Regulatory Penalty Defaults: toward A Bounded Pragmatism' (2003) 87 *Minosota Law Review* 943; Jody Freeman, 'Collaborative Governance in the Adminstrative State' (1997) 45 *University of California, Los Angeles Law Review*.

[90] O Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 282.

[91] Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40(3) *Law & Society Review* 591.

laws usually becomes frustrated, as it fails to obtain the required reflection from the regulatee.[92]

The third transformation in the legal paradigm is based on reconstitutive legal strategies that aim to 'restructure subsystems rather than simply prescribe substantive orders.'[93] Laws and legal regulation at this stage are more related to market mechanisms, less related to discretionary provisions, more focused on the rationale for regulation, and more related to the development of institutions.[94] Janicke and Helmut found references to this line of regulatory transformation. They studied the evolution of environmental laws and regulations in 13 economies and found that most economies first used formal market-based laws; second, direct control through substantive laws; and third, approaches for the reflexive mode of laws that facilitate coordination with private actors.[95]

With this move in NG-type regulatory scholarship, Teubner emphasises breaking the taboo circulating within legal thinking and embracing the facts.[96] Different schools of thought within legal academia are breaking this taboo and moving away from the conventional models of regulation, administration, and adjudication.[97] '[P]ointing to the false dilemma between centralised regulation and deregulatory devolution', Orley Lobel argues that there is a growing consensus on the necessity for innovative approaches in law and law-making to incorporate social policy goals with self-regulated corporate responsibility.[98] Renew deal scholars argue for more governance approaches in legal regulation, as 'a myriad of policy initiatives in different fields are employing new regulatory approaches in legal practice that reflect this theoretical vision.'[99] The 'civil regulation' of corporate activities holds this notion.[100] The core of this regulation scholarship is that the public availability of reasonably complete, reliable information about companies' social

[92] John Braithwaite, *Restorative Justice and Responsive Regulation* (2002)108.

[93] Richard B Stewart, 'Reconstitutive Law' (1986) 46 *Maryland Law Review* 90; Gunterteubner, 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' (1986) 299 *Dilemmas of Law in the Welfare State*.

[94] Joseph Stiglitz, above n 44, 348.

[95] Martin Jänicke and Helmut Weidner, 'Summary: Global Environmental Policy Learning' (1997) *National Environmental Policies: A Comparative Study of Capacity-Building* 310–312.

[96] Gunter Teubner, 'Introduction to Autopoietic Law' (1988) *Autopoietic Law: A New Approach to Law and Society* 1–11.

[97] Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1996) 18(1) *Michigan Journal of International Law* 282–283.

[98] Lobel, above n 90, 343.

[99] Ibid.

[100] According to John Parkinson, Companies are increasingly subject to pressure from market and civil society actors with regard to their social and environmental performance. He referred this pressure to as being part of 'civil regulation' that offer some prospect of advancing the cause of corporate social responsibility, but without the need to rely on altruism on the one hand, or to have recourse to problematic governance reforms on the other. For details see, John Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in A Broader Social Frame' (2003) 3(1) *Journal of Corporate Law Studies* 3–40

and environmental impacts is able to compensate for some of the limitations of conventional regulation techniques. Susan Sturm has summarised the common elements of this type of regulatory governance. She states:

> [T]his approach places a focus on regulation through centrally coordinated local problem solving. Public agencies encourage local institutions to solve problems by examining their own practices in relation to common metrics and by comparing themselves to their most successful peers. Problem solving operates through direct involvement of affected and responsible individuals. Information about performance drives this process. Its production and disclosure enable problems to be identified, performance to be compared, pressure for change to mount, and the rules themselves to be revised. Public bodies coordinate, encourage, and hold accountable these participatory, data-driven problem solving processes.[101]

This mode of governance in modern law could be contentious due to the need to synergise two contradictory circumstances (in most instances) within the contemporary regulation landscape. On the one hand, this landscape needs to respond to increasing public demand and NGO advocacy for the inclusion of more enforceable tools to monitor corporate strategies to meet their environmental accountability and social responsibility objectives. On the other hand, it needs to ensure that public policies do not hinder the development of economic efficiency and maintain the principles of property rights. Within this flux, the third perspective opts for decentralisation of legal power, pluralisation of public actors, and economic incentives.

From this perspective, the role of the state in the trend of incorporating the key principles of CSR is juxtaposed with NG, where state-promulgated laws, civil regulation, and the market rationale coexist in various interdependent configurations.[102] This perspective allows regulatory intervention in business so long as this intervention helps to create a better business case for companies in general. From this perspective, regulatory intervention in the market generally tries to relate to the stance from which the parties involved choose to respond to a public policy goal. In the light of this growing consensus and with the aim of converging the concurrent arguments of the pro-business and pro-regulation advocates, it implies that regulatory mechanisms and legal strategies should rely on a mix of different styles to improve compliance rather than on any single strategy.[103]

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[101] Susan Sturm, 'The Architecture of Inclusion: Advancing Workplace Equity in Higher Education' (2006) 29 *Harvard Journal of Law and Gender* 247.

[*] For an earlier discussion of this author on this issue, see Mia Mahmudur Rahim, 'On the Perspective of the Implementation of 'Corporate Social Responsibility'' (2011) 3(3) *Transnational Corporation Review* 1–17.

[102] Clifford Shearing and Jennifer Wood, 'Nodal Governance, Democracy, and the 'New Denizens'' (2003) 30(3) *Journal of Law and Society* 405; David Levi-Faur, 'Regulatory Capitalism: The Dynamics of Change Beyond Telecoms and Electricity' (2006) 19(3) *Governance* 521.

[103] For a general discussion on meta-regulation, see Sharon Gilad, 'It Runs in the Family: Meta Regulation and Its Siblings' (2010) 4(4) *Regulation & Governance* 485; Mia Mahmudur Rahim, 'Meta-regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Self-regulation in Least Developed Common Law Countries' (2011) 42(2) *Common Law World Review* 174.

## 4.5 The Trend in Implementation of CSR Principles in Corporate Self-Regulation

The CSR literature and programs suggest different options for incorporating its principles in corporate self-regulation. Scholarly works on this incorporation are diverse, and cannot be grouped according to any prescribed criterion. The following discussion covers some randomly chosen major works with the aim of assessing the views of leading scholars from a broad range of perspectives for incorporating CSR principles in corporate regulation through law.

The World Business Council for Sustainable Development (WBCSD),[104] the Commission on the European Communities and the Australian Parliamentary Joint Committee on Corporations and Financial Services have indicated that CSR is not a temporary or momentary issue that a company should consider under certain situations; rather, it is a permanent issue that should be strategically included in policies and programs related to companies.[105] They have agreed that CSR has contributory aspects that can be considered as a broader policy agenda for business management systems. A recent publication from the Australian Parliamentary Joint Committee on Corporations and Financial Services pointed out three characteristics of CSR that echo the necessity of CSR as a broad-based policy option for the corporate management. This Committee points out that CSR is a complete process that should (a) consider, manage and balance the economic, social and environmental impacts of company activities; (b) assess and manage risks, pursue opportunities and create corporate value beyond the traditional core business of the companies; and (c) take an 'enlightened self-interest' approach to consider the legitimate interests of the stakeholders of all companies.[106]

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[104] World Business Council for Sustainable Development, *Dialogue in the Netherlands* (1998) info.worldbank.org/etools?zdocs/library125527csr-mainconcepts.pdf at 12 January 2009; Juno Consulting, *Making Sense of Corporate Social Responsibility* Part 1 (2001) www.junoconsulting.com.au at12 January 2009; Michale Blowfield and Jerdej George Frynas, 'Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81(3) *International Affairs* 499; for an interesting discussion in this issue, see-Dirk Matten and Jeremy Moon, '"Implicit" and" Explicit" CSR: A Conceptual Framework for A Comparative Understanding of Corporate Social Responsibility' (2008) 33(2) *Academy of Management Review* 404.

[105] European Commission, *Green Paper: Promoting An European Framework for Corporate Social Responsibility* (2001). For a detailed discussion, see- Alexander Dahlsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' (2008) 15(1) *Corporate Social Responsibility and Environmental Management* 1, available at www.interscience.wiley.com at 17 December 2008.

[106] Australian Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Responsibility: Managing Risks and Creating Value' (Australian Parliamentary Joint Committee on Corporations and Financial Services, 2006); Michael Hopkins, 'Corporate Social Responsibility: An Issues Paper' (Policy Integration Department, World Commission on Social Dimension of Globalization, 2004); Michale Blowfield and Jerdej George Frynas, 'Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81

This Committee, however, doubts the position of CSR as the central tenet of CG.[107] It has also expressed doubt as to whether CSR and CG as paradigms of corporate management patterns follow the path taken by company management or if they have diverged. There are conflicting views on this point; this Committee holds that the notion of CG is broader than the notion of CSR within company management practices. It considers CG as the main source of the interactions between a company's board of directors, management and shareholders,[108] whereas transparency in corporate decision-making and accountability to shareholders are the key points of CSR.[109] Agreeing with this view, Grant summarised the role of CG as '[c]orporate governance is a broad theory concerned with the alignment of management and shareholder interests.'[110] A framework for CG mentioned in the OECD Principles of Corporate Governance also revealed CSR as a part of CG.[111] Thus, academics and organisations have taken the stand that CSR is a segment of CG and thereby they place less emphasis on the incorporation of CSR into corporate self-regulation.

However, a large number of scholars have contested the above-mentioned relationship between CSR and CG. For instance, Mark Walsh and John Lowry view CG as an increasingly important aspect of CSR, with one of CG's roles being to provide more solid foundations on which broader CSR principles and business ethics can be further enhanced.[112] Thus they assessed the notion of 'CG' in its narrower sense to draw an important distinction from the notion of CSR. To them, CG is a mere administrative/procedural concern and is mostly related to shareholders' values and interests.[113] CG encourages management to develop the business in the best interest of the shareholders whereas, despite legal underpinnings, CSR is more connected with environmental, labour and consumer obligations than CG.[114] Chris Marsden supports the views of Walsh and Lowry and has noted that CSR is not an additional option for corporate regulation patterns;

(3) *International Affairs* 499, 501 and also see Jeremy Moon and David Vogel, 'Corporate Social Responsibility, Government, and Civil Society' in Andrew Crane et al., (Eds), *The Oxford Handbook of Corporate Social Responsibility* (2008) 303.

[107] Australian Parliamentary Joint Committee on Corporations and Financial Services, above n 74, 6.

[108] Ibid.

[109] Ibid.

[110] Gerry H Grant, 'The Evolution of Corporate Governance and Its Impact on Modern Corporate America' (2003) 41(9) *Management Decision* 923. For more support, see- Momtaz Uddin Ahmed and Mohammad Abu Eusuf, 'Corporate Governance: Bangladesh Perspective' (2005) 33(6) *Cost and Management* 16.

[111] The Organisation for Economic Cooperation and Development, 'Principles of Corporate Governance' (2004) www.oecd.org/dataoecd/32/18/31557724 at 15 January 2009.

[112] Mark Walsh and John Lowry, *CSR and Corporate Governance,* Corporate Social Responsibility: The Corporate Governance of 21st Century (2005)38.

[113] Ibid.

[114] Ibid.

rather, it deals with the core issues of any business entrepreneurship. In this regard he states:

> Corporate social responsibility is about the core behaviour of companies and the responsibility for their total impact on their societies in which they operate. CSR is not an optional add-on nor is it an act of philanthropy. A socially responsible corporation is one that runs a profitable business that takes account of all the positive and negative environmental, social and economic effect it has on society.[115]

Although there is no agreed definition of CSR at a global level, the concept of CSR has been settled within a broader perspective in corporate management and recognised as a long-term business strategy that balances corporate rights with obligations towards stakeholders. It has been repeatedly mentioned by scholars that this concept can add value to society and therefore should not be given less weight in the CG pattern. However, there are few studies that directly advocate the implementation of CSR in corporate regulation. For example, Caroll's definition of CSR includes four responsibilities of which 'legal' responsibility is marked as a future responsibility for companies.[116] Moreover, it has not been described how any such future legal responsibility could be discharged by companies.

The UNIDO, an active international organisation for the promotion of industrialisation in the world, holds the view that there could be logical enhancements of the CSR dimension while this practice is in its third generation. This organisation states that with the increasing concern regarding sustainable and ethical trade practices and the positive relationship between CSR and business cases, in the near future CSR could be considered as an obligation for commercial entities.

Wilfried Lutkenhorst has agreed with the views of the UNIDO and emphasises the necessity of public action for scaling up CSR initiatives, even at the level of individual companies. He notes that the economic dimension of CSR that has been least explored though this dimension is the way in which large buyers interact with their suppliers. He argues that companies of the developing economies that are involved with export-oriented manufacturing for global markets need to be

[115] Chris Marsden, CSR Europe at http://www.csreurope.org/aboutus/faq_page396.aspx#csr at 6 May 2005 in Andreas Richter, 'COM021 Current Trends in Public Relations theory and Practice' (2005) http://www.andreas-worldwide.com/study/current_trends.pdf at 7 August 2011; for a same view in different angle, see- Michael Hopkins, 'Corporate Social Responsibility: An Issues Paper' (Policy Integration Department, World Commission on Social Dimension of Globalization, 2004). This paper can accessed via www.ilo.org/public/english/bureu/integration/download/publicat/4_3_285_wcsdg-wp-27-27.pdf

[116] According to Caroll, CSR has four responsibilities mainly; those are- Economic (Must Do), Legal (Have to), Ethical (Should Do) and Discretionary (Might Do). For details, see Archie B Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organisational Stakeholders' (1991) 34(4) *Business Horizons* 39, 40, 41.

equipped with the tools and expertise to monitor and report on their own CSR performance and to continuously improve that performance.[117] Hence, he calls for more emphasis on:

> Deliberate public action seeking to reshape markets and strengthen drivers for the adoption of CSR practices. This will have to work on both the supply and the demand side: by providing financial incentives to companies that take the lead in moving CSR forward (e.g. rewarding the introduction of environmentally friendly processes and products) and by stimulating consumer preferences in support of 'responsible' products. Finally, good public sector governance itself is essential: It is primarily small and medium companys that can benefit from transparent rules and the absence of corruption.[118]

Acknowledging the debate on the future importance of CSR strategies, he has argued that CSR-oriented strategies are a source of competitive advantage and provide strengths to companies to face the challenge of rising production standards to the exporting companies of the weak economies. According to him, with more and more evidence that being a responsible producer has lasting economic benefits in many highly competitive markets, CSR practice has powerful incentives and may become increasingly rooted in corporate strategies.[119]

He admits the necessity of public policy for the development of CSR within the self-regulatory mechanisms of companies, especially those that are seeking access to international markets as suppliers to the global supply chains of large international buyers. Simultaneously, he believes that companies are less likely to become competitive within the global supply chain if CSR is a mere inclusion in their regulatory structures and does not add value to their business cases. Therefore, the policies he as suggested are primarily strategic in nature and focused on the development of CSR as business tools.

Ira Jackson and Jane Nelson have elaborated on the scope of CSR and referred to three ways in which companies can embed the broader vision of CSR into their core business strategies.[120] These business strategies and activities are centred on the development of companies' product quality and new value chain relationships aligned with social and environmental needs of corporate bodies. For example, they suggested eco-innovation and the development of environment friendly technologies that meet consumer needs with less of an environmental footprint.

Jane Nelson emphasised the necessity of a complete framework for the insertion of CSR into the development of corporate regulation initiatives and suggested new types of partnerships between large and small companies, and between the private sector, governments, NGOs, business associations and research institutions. Here, she does not mention the type of mechanism that could build these stakeholder

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[117] Wilfried Luetkenhorst, 'Corporate Social Responsibility and the Development Agenda: Should SMEs Care?' (Working Paper No 13, UNIDO, 2004) 18.

[118] Ibid.

[119] Ibid.

[120] Ira A Jackson and Jane Nelson, *Profits With Principles: Seven Strategies for Delivering Value With Values* (2004).

partnerships, although she does describe six issues that motivate companies to adopt CSR practices. In her summary of the strongest motivators for companies to engage in CSR issues, 'responding to market or regulatory requirements' is noted as one of the most important. According to her summary of the results of several surveys in Europe at the national and regional levels, as well as surveys by the UN Global Compact, other strong motivators for companies to adopt CSR practices can be summarised in the following table.[121]

| Motivators | Context |
|---|---|
| Personal values and ethics of firm leaders | Often owner-operators |
| Market or regulatory requirements | Global supply chain standards, especially in buyer-driven value chains and on workplace and environmental practices |
| | Government regulations, specially relating to environmental performance and safety |
| Improved stakeholder relations and reputation | Employees, leading to greater motivation and better morale |
| | Customers leading to increased sales, more stable relationships |
| | Regulators, linked to license to operate and less regulatory oversight |
| Cost savings | Eco-efficiency measures, especially energy and water savings and waste reduction |
| | Reduced employee turnover, downtime and absenteeism |
| Improving productivity | More motivated employees |
| | Links to quality initiatives |
| Innovation and learning | Opportunities to catalyse innovation and to increase or diversify organisational learning |

Considering these motivators and their effects on the overall context of companies, she ultimately showed the scope and impact of regulatory initiatives for adopting CSR into corporate regulation. She mentioned that the role of any government in supporting companies should be:

> . . .Ensuring that framework conditions, consultation structures and delivery mechanisms for finance and business development service enable rather than exclude small companys, helping informal companys move into the formal economy and high-potential entrepreneurs upgrade into broader value chains.[122]

In *Building Linkages for Competitive and Responsible Entrepreneurship*, she suggests government actions for creating an enabling environment for private sector development that diminishes the risk, lowers the costs and barriers and raises the rewards and opportunities for competitive and responsive private companys. In line with these views, the World Development Report 2005 mentioned:

[121] Jane Nelson, 'Building Linkages for Competitive and Responsible Entrepreneurship' (UNIDO, John F. Kennedy School of Government and Mossavar-Rahmani Center for Business Government, 2007) 99.

[122] Ibid 105.

> Government policies and behaviour play a key role in shaping the investment climate. While governments have limited influence on factors such as geography, they have more decisive influence on the security of property rights, approaches to regulations and taxation (both at and within the border), the provision of infrastructure, the functioning of finance and labour markets, and broader governance features such as corruption.[123]

This report warns about the contrast between formal regulations (or laws) and what actually happens in practice. It identifies several challenges that impede the implementation of ethical, social and environmental practices by companies in developing economies.[124] The first challenge is that companies and their stakeholders will have to increase their research, and collect credible data and information on their business cases. The second challenge is to increase the knowledge and good practice examples of how to most effectively and efficiently implement the ethical, social and environmental performance criteria and innovations in practice. The third challenge relates to companies' capacity to ensure adequate finance, skills and support services to move forward with integrating CSR practices into their operations. Finally, it mentions that the nexus between corporate self-regulation and CSR must be accompanied by market incentives and regulatory sanctions to tackle the problems that arise with the emergence of free-riders.

To meet these challenges, this report focuses on four areas where the government has a role to play. Among these areas, two are directly related to the broader aspects of policy framing, implementation and the building of policy credibility to give businesses confidence that these policy interventions have been crafted to fit local conditions and local administrative capacities.

Developing socially responsible corporate culture in corporate self-regulation is an area that requires special treatment, particularly in the labour-intensive weak economies.[125] Again, although macro-level policies are undeniably important, there is increasing consensus that the quality of business regulation and the institutions that enforce these regulations are a key determinant of the success of the incorporation of CSR principles in company regulations.[126]

To enable this development, government must play a role in the necessary macroeconomic reforms. According to *Doing Business in 2005*, reforms in business regulations can be highly beneficial to economic growth and poverty reduction while at the same time, cumbersome business regulations hurt the poor in

[123] World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (2004).

[124] Jane Nelson, 'Building Linkages for Competitive and Responsible Entrepreneurship' (UNIDO, John F. Kennedy School of Government and Mossavar-Rahmani Center for Business Government, 2007)95.

[125] UNIDO Industrial Report 2004 showed that after the macro-economic stability and infrastructure, supporting small and medium sized companies is the most priority area for improving the investment climate. For details, see International Monetary Fund, *World Economic Outlook, April 2003: Growth and Institutions,* World Economic and Financial Surveys (2003a).

[126] World Bank, *Doing Business in 2004: Understanding Regulation* (2004).

particular.[127] Halina Ward mentions four roles for the public sector.[128] One of these is 'mandating' laws and regulatory sanctions. The public sector can also mandate that companies associate with government organisations to control certain aspects of their investments and operations. 'Facilitating', 'partnering' and 'endorsing' are the other three roles through which the public sector could introduce and develop CSR-oriented corporate regulation.[129]

The framework proposed by Jane Nelson also mentions the role of government in creating an enabling environment for responsible business.[130] In this framework, she mentions three roles for the government in establishing the 'rules of the game'. One of these roles is 'command-and-control regulations', while the other two are creating government-driven market mechanisms and providing government support for voluntary approaches.[131] By 'command-and-control regulations' she means that the government can enforce responsible business practices through the creating of binding practices and regulatory frameworks.[132] Thus, she relates an active role for government in the integration of CSR into the business practices of companies, and describes quasi-regulatory measures as a potential means for government to achieve this. In this regard, in a 2004 study the World Bank notes:

> . . .Developing economy governments are likely to be successful in improving social and environmental standards if they develop coherent strategies that address all critical elements of the enabling framework: transparent and efficient legal and market-based drivers, robust capacities and useful tools and skills.[133]

Robert Reich has written more directly about the role of government and the scope of legal policy in implementing CSR principles. He argues that the government should act as an arbiter to facilitate business performance in fulfilling their responsibilities in society.[134] He marked this issue as an important question for a nation and demanded political decisions to answer this question, since CSR issues are also a part of public policy, which is primarily the government's task. This view is reinforced by a different argument that gives scope to government strategies to develop socially responsible corporate culture through regulation, incentive-based strategies and different legal sanctions. This has been seen in some Scandinavian

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[127] Ibid.

[128] Halina Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (2004); see also Tom Fox, Halina Ward and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (2002).

[129] Ibid.

[130] Nelson Jane, *Creating the Enabling Environment: Mechanism to Promote Global Corporate Citizenship* (2000).

[131] Ibid.

[132] Ibid.

[133] World Bank Group, *Public Sector Support for the Implementation of Corporate Social Responsibility (CSR) in Global Supply Chains: Conclusion form Practical Experience* (2004).

[134] Robert B Reich, 'The New Meaning of Corporate Social Responsibility' (1998) 40 (2) *California Management Review* 8.

economies where the control/enforcement model is used to 'eliminate' the problem of cost externalisation.[135] To avoid this cost externalisation, he identifies five models of which the 'regulation and control/enforcement model' is one.

Halina Ward also agrees with the role of policy initiatives for the development of CSR at the national level. She examined the relationship between CSR, law and policy and focused on an understanding of CSR as enabling sustainable development. She argues that the contemporary international context of CSR may require states to revisit basic frameworks for the pursuit of profit and economic growth, with a view to integrating lessons from the last decade of CSR.[136]

Allan Jergensen of the Copenhagen Centre adds a different dimension to the issue of incorporating CSR principles through law. He denies any conflict between the binding mode of CSR and the market voluntarism mode.[137] He argues that voluntary and market-based CSR are both perfectly compatible with regulation. With the argument that CSR does not need to be off-limits for regulation, he suggests that regulation must be in the form of incentives other than enforced as an obligation. In one of his articles, he states:

> Policy-makers readily—and rightly—punish the negative externalities of business. By the same reasoning they should also reward the positive ones- such as CSR. But in the debate on CSR policy we seem to have forgotten that regulation can just as well be about encouraging business behaviour that produces positive externalities for society.[138]

Regulatory intervention in corporate self-regulation also depends upon the economic rationales of the objective of such intervention. Hence, it is important to determine whether CSR can create economic incentives for companies. There are scholarly works that argue that CSR has economic rationales. For instance, Michael Porter relates economic justification to the institutional approach of CSR. He argues for integrating economic rationales with CSR strategies as this can achieve a competitive advantage for companies.[139] He further argues that CSR should not remain as a source of good public relations for companies; rather, it should be seen as a part of their long-term investment strategies and the effort to secure the companys' own sustainability. The 'bottom of the pyramid' approach suggests that corporate regulation from any perspective should relate societal issues to business operations as this can create an opportunity to reduce the tension between

[135] Morten P Broberg, 'Corporate Social Responsibility in the European Communities—The Scandinavian Viewpoint' (1996) 15(6) *Journal of Business Ethics* 615 in Constantina Bichta, *Corporate Social Responsibility: A Role in Government Policy and Regulation?* (2003)23.

[136] Halina Ward, *Corporate Social Responsibility in Law and Policy,* Perspectives on Corporate Social Responsibility (2008).

[137] http://www.copenhagencentre.org/csr-law.pdf at 2 February 2009.

[138] Ibid.

[139] Michel Porter, 'The Competitive Advantage of Corporate Philanthropy' (2002) *Harvard Business Review*.

free trade and global capitalism and environmental and social sustainability.[140] Ananya Reed and Darryl Reed suggest that CSR principles in business operations could act as a mediator between market failure, public administrative insufficiency and the aims of sustainable development. They argue that government should manage regulations to incorporate CSR in CG mechanisms, stating:

> [. . .] issues such as minimal environmental standards should only be conceived of as issues of CSR under the conditions of institutional failure. Under these conditions, corporations have a responsibility to establish rules, but only on a temporary basis until other more legitimate arrangements can be developed. The basic lessons here are that many issues of CSR should move beyond the realm of CSR by being incorporated into a legal framework and that corporations should support such moves to a CA agenda rather than oppose them.[141]

For companies to align their investment with public policy goals related to CSR issues, they need an enabling environment. In this regard, Thomsen proposes five mechanisms: (1) legislation, regulation and formal institutions; (2) culture, conventions and informal institutions; (3) market mechanisms; (4) stakeholder influences; and (5) reputation and public relations.[142] Governments can also play an important role in developing this environment. One of the tools that government could use for developing this environment could be legislation, as this may facilitate linking private and public efforts to strengthen this capacity. Tom Fox, Halina Ward and Bruce Howard have summarised this role as follows[143]:

| Mandating | 'Command-and-control' legislation | Regulators and inspectorates | Legal and fiscal penalties and rewards |
|---|---|---|---|
| Facilitating | Enabling legislation | Creating incentives | Capacity building |
| | Funding support | Raising awareness | Stimulating markets |
| Partnering | Combining resources | Stakeholder engagement | Dialogue |
| Endorsing | Political support | | Publicity and praise |

This discussion shows that both scholars and business practice have accepted CSR as an increasingly important element of corporate policies. CSR principles are increasingly understood as a policy option by which policy-makers could attempt to balance the profit drive of companies with the needs of the societies that they impact on their operations. This has contributed to the convergence of different strategies for designing law and legal policies. As the literature shows, the

[140] CK Prahalad and SL Hart, 'The Futune At the Bottom of the Pyramid' (2002) 26 *Strategy and Business issue*

[141] Ananya Mukherjee Reed and Darryl Reed, 'Corporate Social Responsibility and Human Development: towards A New Agenda and Beyond' (international Secretariat for Human Development, York University, 2004)6.

[142] Stephen Thomsen, 'Encouraging Public-Private Partnerships in the Utilities Sector: The Role of Development assistance' (NEPAD/OECD Investment Initiative, 2005).

[143] Tom Fox, Halina Ward and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (2002)4.

decentralisation of legal powers, pluralisation of public actors and the relationship between economic factors and regulation are prominent amongst these factors.

## 4.6 Conclusions

The debate between pro-business and pro-regulation advocates over the value of CSR practice and its political effects is no longer dominant in corporate regulation scholarship. Rather, in the face of changes in regulatory strategies, CG, and social policies, controversy over the potential for, and limitations of, corporate accountability mechanisms has been minimised. These changes have affected both academic study and real-world practices. Scholars and practitioners are now more engaged in looking beyond their traditional perceptions to explore how the law could synbooke its different strategies to develop a nexus between CSR and CG, as this will undoubtedly affect existing practices in business and social advocacy.

This notion has been echoed in the recent literature related to the central issues in incorporating CSR principles in corporate self-regulation. The role of the state in this trend of incorporating the core principles of CSR has been juxtaposed with NG, where state-promulgated laws, civil regulation, and the market rationale coexist in various interdependent configurations.[144] This allows regulatory intervention in business insofar as this intervention helps to create a better business case for companies in general. In this mode of governance, regulatory intervention in the marketplace relates to the responses of the parties concerned, in that prescriptive regulations maintain a broader perspective than that of a specific point in time and the underlying objectives of a given subject. In the light of this growing consensus, and with the convergence of the arguments of the pro-business and pro-regulation advocates, academic evidence and regulatory best practice imply that the regulatory mechanisms or corporate regulation strategies should contain a mix of different regulatory styles to improve compliance, rather than relying on any single strategy.[145]

The 'third perspective' provides the basis of strategies to merge the contradictory arguments in CSR implementation. It proposes that the regulatory strategy to implement CSR principles in corporate self-regulation should consider companies' needs for improved social responsibility performance as well as offer the scope to devise internal regulatory mechanisms according to companies' individual circumstances. It highlights that corporate regulation should not be solely dependent on CG and corporate laws. Rather, it could be based on the 'relationships

[144] Clifford Shearing and Jennifer Wood, 'Nodal Governance, Democracy, and the New 'Denizens'' (2003) 30(3) *Journal of Law and Society* 405; David Levi-Faur, 'Regulatory Capitalism: The Dynamics of Change Beyond Telecoms and Electricity' (2006) 19(3) *Governance* 521.

[145] For a general discussion on meta-regulation, see Sharon Gilad, 'It Runs in the Family: Meta Regulation and Its Siblings' (2010) 4(4) *Regulation & Governance* 485; Rahim, above n 102.

among the many players involved (the stakeholders) and the goals for which the company is regulated.'[146] Given that this concept is vital in the third perspective, the core characteristics of legal regulation strategies for adding the principles of CSR to corporate regulation are as follows: first, legal regulatory strategies for the implementation of CSR principles should not depend on any single mode; rather, they should be a fusion of regulatory modes that facilitate business case development as well as the rights of the stakeholders of corporate operations; and second, legal regulatory strategies for the implementation of CSR should avoid direct interference in the internal management of companies. Unlike the prescriptive mode of regulation, strategies for implementing CSR principles should ensure ample scope for companies to develop their own strategies in response to public policy goals.

The 'third perspective' is the normative basis of the above-mentioned legal regulatory strategies to be incorporated in state-promulgated laws, so that these laws can indirectly evaluate corporate self-regulation. This strategy aims to connect corporate self-regulation with the public justice debate and dialogue, and to subject the private justice of corporate internal management systems to the public justice of legal accountability. The strategies within this perspective are suitable to motivate and facilitate socially responsible reasoning within companies; they are also suitable to link the internal capacity of corporate self-regulation with an external commitment to self-regulate. This perspective could also form the basis of legal regulation and business policies to develop CSR. Based on this perspective, corporate laws and regulation would allow corporate self-regulation to catalyse each phase of the development of an internal compliance system within a company. The following chapter discusses the conceptualisation of this type of legal regulatory strategy and assesses its suitability to facilitate the incorporation of CSR principles in company self-regulation.

[146] Corporate Governance Systems and Processes: The Key for Uncompromising Growth and Development http://ivybook.typepad.com/term_paper_topcis/2009/07/corporate-governance-systems-and-processes.html at 22 November 2010.

# Chapter 5
# A Meta-regulation Approach to Laws to Incorporate CSR Principles in Corporate Self-Regulation

How, and to what extent, legal regulation matters in developing social responsibility in companies are long debated questions. In the corporate regulation landscape, while some legal regulation reformers have argued that the prescriptive mode of regulation has failed to facilitate, reward, or encourage companies to go beyond their profit-centred behaviour, others have argued that relying only on corporate self-regulation is not a viable approach to enable the incorporation of social values in corporate behaviour in the absence of non-legal social drivers. In the context of this dilemma, meta-regulation[1] is a comparatively new regulatory approach that encourages companies to transcend their social responsibilities. Its normative base is built on the arguments of the 'third perspective' discussed in the previous chapter of this book. The core of this regulatory approach is the fusion of the responsive and reflexive modes of regulation to merge the patterns of private ordering and state control in contemporary corporate regulation. This chapter describes this approach to assist legal regulation to ensure social values are accepted as a central corporate responsibility from the perspective of a weak economy.[2]

[1] For detailed discussion on meta-regulation, see Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability*: *Corporate Social Responsibility and the Law* (2007) 5; Neil Gunningham, Peter Grabosky and Daren Sinclair, *Smart Regulation*: *Designing Environmental Policy* (1998); Bronwen Morgan, 'The Economisation of Politics: Meta-regulation as a form of Non-judicial Legality' (2003) 12(4) *Social & legal Studies* 490; Christine Parker, *The Open Corporation*: *Effective Self-regulation and Democracy* (2002) 245–291.

[2] The core argument of this chapter has been published in a referred journal. For details, see Mia Mahmudur Rahim 'Meta-regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Self-regulation in Least Developed Common Law Countries' (2011) 40 (2) *Common Law World Review* 174–206.

M.M. Rahim, *Legal Regulation of Corporate Social Responsibility*,
CSR, Sustainability, Ethics & Governance, DOI 10.1007/978-3-642-40400-9_5,

## 5.1 Introduction

The idea that the law might force companies to be socially responsible is problematic. Between the proponents of a 'post-regulatory' world and the increased demand for socially responsible corporate regulations, it is difficult, though not impossible, to determine what role the law should play in making businesses accountable for their actions, and in encouraging businesses to transcend basic legal requirements. This chapter is concerned with addressing this challenge; it focuses on the way in which legal regulation can be applied to develop a socially responsible corporate culture. It emphasises the need for socially responsible corporate self-regulation, but not on the basis of the arguments for either market-based or voluntary regulation rather than government regulation as discussed in Chap. 5. It draws upon regulatory scholarship that rejects the dichotomisation of regulation and deregulation. Rather, it conceptualises a pragmatic view of the power that companies wield, the need for companies to internalise public policy goals and the limitations of traditional prescriptive regulation to achieve this internalisation and, in consequence, change corporate culture.

The objective of this conceptualisation is to assist corporate and social responsibility laws in incorporating CSR principles at the core of corporate self-regulation, from the perspective of the weak economies. In Chap. 2 of this book, the lack of the necessary drivers for this process in the weak economies was highlighted. Taking Bangladesh as an example, this chapter showed the impact of the lack of non-legal drivers and suitable legal strategies on CSR performance. In Bangladesh, CG does not consider social responsibility to be an important aspect of corporate self-regulation and its laws do not have the required bearing to ensure that CG insist on corporate self-regulation that improves CSR performance. The non-legal drivers in this country are either inadequate or do not deal with CSR issues as their prime concern. Assuming that these circumstances represent the general condition of CSR regulation in weak economies, the following discussion will develop the concept of meta-regulation, with the aim of combining legal and non-legal strategies to increase CSR. This discussion focuses on the concept of meta-regulation, addresses its core critics and formulates its applications to companies in weak economies. It also describes the strategies necessary for the application of this concept in corporate laws and business regulations.

## 5.2 A Meta-Regulation Approach to Law

### *5.2.1 Regulation*

The definition of regulation is unclear, as it covers very broad areas of state control over social and economic activities, including various forms of unintentional and

non-state actions.[3] Nonetheless, it is widely accepted that regulation refers to anything that controls or influences the activities in which society is an important aspect.[4] Such control or influence is purported to prevent undesirable behaviour, actions and activities, and to enable and encourage desirable ones.[5] To this end, regulations may include policies, norms, market principles, institutional/international principles, or covenants designed to affect social and economic behaviour and activities.[6] Accordingly, all law is regulatory in nature.[7]

The aim of regulation varies with the objectives of regulators in different contexts. One of the predominant aims of creating regulation is to render the behaviour of regulatees consistent with market principles and widely-valued social norms by emphasising greater efficiency and flexibility in internal management. Accordingly, in the regulatory landscape, the manner in which regulatory strategies could improve compliance at the generic level without being intrusive in usual business practice is an ever-growing issue.[8] Against this backdrop, regulatory strategies are increasingly used to improve compliance with environmental

[3] Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (1998) 4; for a detailed study on regulation, see generally Julia Black, 'Critical Reflections on Regulation' (2002) 27(1) *Australian Journal of Legal Philosophy*; Christine Parker, 'The Pluralisation of Regulation' (2008) 9 *Theoretical Inquiries in Law*.

[4] P Selznick, *Focusing Organisational Research on Regulation*, Regulatory Policy and the Social Sciences (1985); Keith Hawkins and Bridget Hutter divide the landscape of regulation into two major parts: The economic regulation and social regulation. They define economic regulation as regulation of financial markets, price and profits, and the social regulation as laws protecting the environment, consumer, social values, employees. For details, see Keith Hawkins and Bridget M Hutter, 'The Response of Business to Social Regulation in England and Wales: An Enforcement Perspective' (1993) 15(3) *Law & Policy* 199; Bridget M Hutter, *Compliance*: *Regulation and Environment* (1997) 7.

[5] Robert Baldwin and Martin Cave consider regulation as a tool of the government to intervene in the economy and in the rules of private ordering systems to influence the behaviour of business. For details, see Robert Baldwin and Martin Cave, *Understanding Regulation*: *Theory*, *Strategy and Practice* (1999) 2, 63; Economic and Social Commission for Asia and Pacific, 'The Economic Regulation of Transport Infrastructure Facilities and Services Principles and issues' (United Nations 2001) 1.

[6] Anthony I Ogus sees regulation as 'fundamentally a politico-economic concept and, as such, can best be understood by reference to different systems of economic organisation and the legal forms which maintain them.' for details, see Anthony I Ogus, *Regulation*: *Legal form and Economic Theory* (1994) 1; Peter C Yeager, *The Limits of Law*: *The Public Regulation of Private Pollution* (1993) 24.

[7] Archana Parashar, 'Re-conceptualising Regulation, Responsibility and Law' (2008) 8 *Macquarie Law Journal* 59.

[8] Baldwin and Cave, above n 4; Ian Ayres and John Braithwaite, *Responsive Regulation*: *Transcending the Deregulation Debate* (1995); A. Shleifer, 'Understanding Regulation' (2005) 11(4) *European Financial Management* 439.

standards,[9] the implementation of occupational health and safety guidelines,[10] the involvement of stakeholders/inclusion of equal opportunities,[11] ethical standards,[12] and the adherence to principles of fair competition in business and society.[13]

### 5.2.2 Meta-Regulation

In the regulation landscape, meta-regulation is a comparatively new approach in which different forms of regulations regulate one another. It is based on the precepts of NG that encourage different actors and factors to work together in regulatory strategies designed to reach a public policy goal.[14] This approach attempts to link social values to economic incentives and disincentives, and it indirectly influences companies to incorporate CSR principles through self-regulation. Taking these concepts as vital to this approach, it is argued that meta-regulation is a viable way to incorporate CSR principles into corporate self-regulation. It could help regulators create a more socially responsible corporate culture, as companies would then be in a stronger position to persuade management to embrace the ethos of this notion in their core strategies.

Peter Grabosky first proposed the notion of meta-regulation and the concept has gradually been expanded, most notably by Christine Parker and John Braithwaite.[15] They developed the meta-regulation approach as a more effective and responsive way to link sociological conditions to corporate regulations than

[9] Keith Hawkins, *Environment and Enforcement*: *Regulation and the Social Definition of Pollution* (1984); Gunningham, Grabosky and Sinclair, above n 1; Bridget M Hutter, *Compliance*: *Regulation and Environment* (1997).

[10] Andrew Hopkins, *Making Safety Work*: *Getting Management Commitment to Occupational Health and Safety* (1995); Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety*: *System and Sanctions* (1999); Sidney A Shapiro and Randy Rabinowitz, 'Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA' (2000) 52 *Administrative Law Review* 97.

[11] Phlip Nanton, 'Extending the Boundaries: Equal Opportunities as Social Regulation' (1995) 23 (3) *Policy and Politics* 203; S. McKay, 'Between Flexibility and Regulation: Rights, Equality and Protection at Work' (2001) 39(2) *British Journal of Industrial Relations* 285; Belinda Smith, above n 17.

[12] Andrew Crane and Drik Matten, *Business Ethics*: *Managing Corporate Citizenship and Sustainability in the Age of Globalisation* (2007).

[13] Christine Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26(2) *Journal of Law and Society* 215.

[14] For a detailed discussion on the percepts of NG and its impact on the devolution in corporate regulation, see Chap. 4 of this book.

[15] Peter N Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 527; Gunningham, Grabosky and Sinclair, above n 1; John Braithwaite, 'Meta-risk Management and Responsive Regulation for Tax System Integrity' (2003) 25(1) *Law & Policy* 1.

command-and-control regulations; they have located the development of meta-regulation at the intersection of state regulations and self-regulation. Bronwen Morgan puts this regulatory approach in a broader perspective, considering it as a regulatory policy that 'desire[s] to think reflexively about regulation, such that rather than regulating social and individual actions directly, the process of regulation itself becomes regulated.'[16]

Meta-regulation recognises that the 'motivation, standards and even monitoring and enforcement systems for responsibility come from places other than law' and it helps individual companies to design their own compliance management systems according to their specific circumstances.[17] Laws requiring businesses to report on their social and environmental impact and ethical performance, for instance, might be perceived as meta-regulatory. To fulfil such legal reporting requirements, corporate management might create regulations regarding the collection of information. Management may then use this information to adopt strategies for managing any risks identified during the information collection process. These reports would also enable business stakeholders to exert pressure on management to implement systems to manage risk, thereby helping to protect the company's reputation and enhance its performance.

Requiring reports on CSR is a comparatively new and popular meta-regulating strategy. Other common strategies include determining corporate liability and damages or penalties in civil or criminal law according to whether a business has implemented an appropriate compliance system.[18] The application of such strategies through laws could make state promulgated laws meta-regulating laws. For instance, a law that requires companies to add information on their energy consumption into their annual report could be called a meta-regulating law, since information regarding the energy consumption of each company would assist audit or tax authorities to calculate the rebate or fine for each company; the information could also be used by the media to canvas against inefficient companies, so that companies would be encouraged to be energy efficient. Thus, meta-regulating law could also operate to encourage businesses to ensure they have internal risk-management processes in place. Another example of the effect of such a meta-regulating strategy can be seen in the way businesses have responded to occupational health and safety laws in the past; in this example, tort laws effectively operate as meta-regulating laws.[19] Laws that take into account a business's compliance system

[16] Bronwen Morgan, 'The Economisation of Politics: Meta-regulation as a form of Non-judicial Legality' (2003) 12(4) *Social & legal studies* 490.

[17] Parker, above n 1, 5.

[18] For a comprehensive overview, see Kimberly D. Krawiec, 'Organisational Misconduct: Beyond the Principal-Agent Model' (2005) 32 *Florida State University Law Review* 14; Blenda Smith, 'Not the Baby and the Babywater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28 *Sydney Law Review* 689.

[19] Collin Scott, *Regulation in the Age of Governance*: *The Rise of the Post-regulatory State*, The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance (2004), 145; Parker, above n 1, 5, 218; for the recent development of this legal approach in the health

to determine its liabilities or penalties in relation to vicarious liability for sexual harassment and discrimination, or unequal employment opportunities for example, also have a meta-regulatory effect.[20]

Likewise, there could be non-legal strategies to create meta-regulatory effects in corporate regulation. Meta-regulating strategies could be embodied into corporate codes of conduct or in their best practice principles or business guidelines. These non-legal instruments could have provisions, for instance, for fast-tracking the granting of permissions, scheduling inspections less frequently, offering tax breaks or public recognition to reward businesses that demonstrate commitment to specific social values in their internal regulations. To take advantage of these incentives, businesses would then develop suitable internal systems to demonstrate their social commitment. The later sections of this chapter will detail some of these meta-regulatory strategies.

## Conceptualisation of a Meta-Regulation Approach of Law

Christine Parker is one of the pioneers of the development of the concept of meta-regulating law. She places the concept of meta-regulation 'into a broader literature in which governance is seen as increasingly about 'collaborations', 'partnerships', 'webs' or 'networks' in which the state, state-promulgated law, and especially hierarchical command-and-control regulation, is not necessarily the dominant, and certainly not the only important, mechanism of regulation.'[21] She emphasises the plurality of legal governance methods while conceptualising meta-regulating law and points out that the legal regulation of business is generally an ineffective way to hold corporations socially responsible for their actions. She makes a distinction between accountability and responsibility, arguing that legal regulation of businesses merely holds them accountable for conduct that fails to meet legal standards, as distinct from instilling them with a sense of social responsibility. To hold businesses socially responsible for their behaviour, Parker believes that a legal approach should go 'beyond accountability'[22] to ask whether, and how much, a corporate entity should care about its social responsibilities where 'responsibility internalises standards by building them into the self-conceptions, motivations, and habits of individuals and into the organisation's premises and routines'.[23]

In *The Open Corporation*, she draws together a wealth of empirical and theoretical regulatory scholarship to argue that other than relying only on laws and directions from the government, development of social responsibility in companies

sectors in UK and Canada, see Fiona McDonald, 'Patient Safety Law: Regulatory Change in Britain and Canada' (2010).

[20] Parker, above n 1, 249–251; for details, see Smith, above n 17.

[21] Parker, above n 1, 5, 210.

[22] Parker, above n 1, 210.

[23] Phlip Selznick, *The Communitarian Persuasion* (2002) 29, 102 in Parker, above n 1, 210.

should depend more on corporate self-regulation. She further argues that to this end, corporate self-regulation could be prompted, fostered and made accountable for the efficient and effective achievement of policy goals through a combination of law (formal government regulation or meta-regulation), internal corporate self-management and input from external stakeholders.[24] Within this framework, she has limited the role of regulation to ensure corporate openness or permeability to stakeholder views. Parker states:

> In the open corporation, management self-critically reflects on past and future actions in the light of legal responsibilities and impacts on stakeholders. They go on to institutionalise operating procedures, habits and cultures that constantly seek to do better at ensuring that the whole company complies with legal responsibilities, accomplishes the underlying goals and values of regulation, and does justice in its impacts on stakeholders (even where no law has yet defined what that involves). The open corporation. . .is internally responsible for its own actions through self-management, yet externally accountable through the requirements of disclosure, dialogue, exposure and enforcement.[25]

According to her model of meta-regulation, the establishment of permeable self-regulation can be depicted in three phases: the commitment to respond; the acquisition of specialised skills and knowledge; and the institutionalisation of purpose.[26] To develop social responsibility in corporate self-regulation, as she argues, a corporate company with a self-regulation system has to be positioned at one of these three phases, or regulation must have the capacity to move a company through these phases.

The aim of the first phase is to prompt management commitment to becoming accountable. At this stage, the law has a role since appropriate provisions in corporate law could set the normative goals for corporate self-regulation. However, Parker states that other than insisting that the regulatee hold a particular value to reach a policy goal, the law should not interfere with the internalisation of values in companies' compliance management systems. She contends that private ordering should bring the values required by law into effect.[27] In this setting, the prompting of the commitment to respond to legal requirement is initially due to the force of legal sanctions, although thereafter it is carried forward by the self-regulation system. Hence, her model of meta-regulation for developing accountability in corporate company starts by using a combination of regulatory approaches where the effects of these approaches are dependent upon each other. Here, private ordering or self-regulation is neither completely voluntary nor totally dependent on prescriptive laws, but rather a necessary part of the web of regulation with respect to the particular policy goal.

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[24] Parker, above n 1, 292.

[25] Ibid 292–293.

[26] Ibid 31.

[27] Jill Murray nicely summaries this view: 'Law does not work by automatic fiat, but requires some kind of internalisation to ensure its effectiveness', for details see Jill Murray, 'Corporate Social Responsibility: An Overview of Principles and Practices' (2004) 5.

The main aspect of the second phase is related to the ability of companies to raise their capacity to facilitate this internalisation process in their self-regulation systems. Here the role of legal regulation considerably less significant. At this stage, companies depend upon their leaders, strengths, innovation and on the scope of the generalisation of these innovations across the industry.

In the third phase, companies develop their own strengths and strategies to reach their goals. According to Parker, at this stage they could use 'double-loop learning', by evaluating their compliance management programs and learning from the results. At this stage the role of law is to promote the evaluation of performance against benchmarks and to insist that companies disclose their evaluations to stakeholders so that corporate constituents are in a better position to decide on a company's performance, and so that regulators can assess the regulatory impact of any changes in their regulatory strategies.

Together, these processes set up a 'triple loop' for corporate self-regulation, where regulators set the substantive goal of a process; corporate companies (as regulatees) undertake self-regulated programs according to their individual strengths, needs and market standards to reach the goal; and the performance of companies' self-regulation is evaluated by their stakeholders who have the ability to create an impact on an company's internal regulatory strategies.[28] In each of these processes, the role of laws and regulators is to facilitate companies' connection with their 'internal capacity for corporate self-regulation with internal commitment to self-regulate'[29] and 'the potential for other institutions of civil society to hold'[30] corporate self-regulation accountable.

Utilising Philip Selznick's conceptualisation of 'corporate conscience', Parker argues that for meta-regulation to be effective at holding businesses accountable for CSR, the following three things must be achieved:

1. Meta-regulation of CSR must be aimed at clear values or policy goals for which businesses can take responsibility, as distinct from allowing businesses merely to comply with output rules.
2. Meta-regulation of CSR must aim to ensure that these values are embedded into the practices and structures of businesses.
3. Meta-regulation of CSR must recognise that a business must still be able to pursue its main goals and it should be given space to determine itself how best to meet those goals within the responsibility framework.[31]

When these three factors are present, regulation can be seen as operating to make businesses socially responsible—that is, the regulatory approach is indirectly insisting that companies accept social responsibilities as central to their self-regulatory strategies.[32]

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[28] Parker, above n 1, 277.

[29] Ibid 246.

[30] Ibid.

[31] Parker, above n 1, 5, 215.

[32] Ibid 217.

Using a meta-regulation approach to attempt to develop a socially responsible corporate culture is a relatively new idea. Nonetheless, this legal approach is not confined solely to corporate regulations; Bronwen Morgan contends that a meta-regulatory approach has the ability to manage the tension between the 'social' and 'economic' goals of regulatory politics, for example.[33] According to Fiona Haines and David Gurney, a meta-regulatory approach is consistent with market principles as it emphasises greater efficiency and flexibility; they considered this approach as relatively unobtrusive in day-to-day business practice and they regard it as effective in terms of problem solving.[34]

Let me present a few more examples to clarify the characteristics of meta-regulating law. The Australian *Financial Services Reform Act 2001* (Cth) contains provisions on socially responsible investment that impose product disclosure obligations on financial planners and investment product providers.[35] Section 1020E of the *Corporations Act 2001* (Cth) empowers the Australian Securities and Investments Commission to issue a 'stop order' if a product disclosure statement is 'defective', though it does not detail the way a product disclosure statement should be prepared.[36] It delineates the criteria of a defective product disclosure statement but leaves its presentation to the product owners' discretion.

Here, the aim of the regulator is to ensure that consumers have sufficient information to help them make an informed decision when considering the acquisition of financial products.[37] The values behind this aim are vested in the belief that

[33] Morgan, above n 1; Jurgen Habermas, 'Technology and Science as Ideology' in S Seidman (ed), *Jürgen Habermas on Society and Politics*: *A Reader* (1989) cited in Fiona Haines and David Gurney, 'The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict' (2003) 25(4) *Law & Policy* 356.

[34] Haines and Gurney, above.

[35] A product disclosure statement is a document that explains the features of a financial product. It provides an explanation of the investment options available to potential investors. This explanation relates to the risks associated with investing in each option, the importance of getting advice and the past investment performance of each option. Product disclosure obligations mean that the seller of a product (the investment option) must disclose product-related information necessary for a consumer to decide on their purchase. Most of the laws related to the regulation of financial products have provisions to ensure that (1) a customer must receive a product disclosure statement describing the financial product before he or she purchases it; and (2) anyone can ask for the product disclosure statement of a product by contacting the advertiser of the product.

[36] According to Section 1012A 1012B, 1012C or 1012I to be given in accordance with Division 2 of Part 7.9 and 1012H of the *Corporations Act 2001* (*Cth*), an issuer of a financial product have to take reasonable steps to ensure that he/she has provided required information in Product Disclosure Statement. This Act can be found at http://www.comlaw.gov.au/details/C2005C00498 at 12 May 2011. For a discussion on this Act, see Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations law in Australia* (2002).

[37] For the detailed objective of this provision, visit the website of Australian Securities and Investment Commission at http://www.asic.gov.au/asic/asic.nsf/byheadline/IR+04-71+ASIC+issues+guidance+on+PDS+disclosure?openDocument 26August 2010; for a comprehensive discussion on this Act, see Matthew Haigh, 'Managed Investments, Managed Disclosures: Financial Services Reform in Practice' (2006) 19(2) *Accounting*, *Auditing & Accountability Journal* 186.

providers of financial products should not use incomplete, fake or misleading information about their product that could prevent consumers from making informed decisions on whether to acquire a financial product. The United States' *Sarbanes-Oxley Act 2002* requires certain corporate employees to report suspected corporate fraud to senior management and requires or encourages companies to adopt policies that protect whistleblowers.[38] Part 9.4AAA of the *Corporations Act 2001* (Cth) of Australia contains similar provisions on whistleblowers.[39] These laws, rather than mandating the implementation of policies, encourage businesses to establish processes that protect whistleblowers, whose behaviour could help ensure corporate responsibility by alerting the public not just to financial fraud but to any breach of legal or ethical obligations.[40] The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) is another example of legislation that holds a meta-regulatory approach. It provides that an organisation will be guilty of corporate manslaughter 'if the way in which any of the organisation's activities are managed or organised by its senior managers (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.[41] Given these provisions, it is logical that a business will be cautious regarding potentially dangerous activities and will frame effective strategies to avoid being found guilty of corporate manslaughter.

It is worth noting that management-based regulation and meta-regulation are different. The meta-regulatory approach to regulation is buttressed by the required political power and state sanctions, where the aim of the regulator is to indirectly require that the regulatee incorporate a particular practice in its internal management framework. Management-based regulation is more a process-oriented regulation where corporate management details processes to fulfil the objective dictated

[38] For details of US Sarbanes-Oxley reform, see Robert Eli Rosen, 'Resistances to Reforming Corporate Governance: The Diffusion of QLCCs' (2005) 74 *Fordham Law Review*. 1251; for the discussion on meta-regulatory effect of this Act, see Ruth V Aguilera, 'Corporate Governance and Director Accountability: An Institutional Comparative Perspective' (2005) 16 *British Journal of Management* 39; Dimitris Karagiannis, John Mylopoulos and Margit Schwab, 'Business Process-based Regulation Compliance: The Case of the Sarbanes-Oxley Act' (2007).

[39] The Act could be found in CCHC Law, *Australian Corporations & Securities Legislation 2009*: *Corporations Act 2001*, *ASIC Act 2001*, *Related Regulations* (2009); for a detailed discussion, see Paul Latimer, 'Whistleblowing in the Financial Services Sector' (2002) 21 *University of Tasmania Law Review* 39.

[40] Paul Latimer, 'Reporting Suspicions of Money Laundering and 'Whistleblowing': The Legal and other Implications for Intermediaries and Their Advisers' (2003) 10(1) *Journal of Financial Crime* 23; Stefanie A Lindquist, 'Developments in Federal Whistleblower Protection Laws' (2003) 23(1) *Review of Public Personnel Administration* 78.

[41] *Corporate Manslaughter and Corporate Homicide Act 2007* is available at www.justice.gov.uk/guidance/docs/guidetomanslaughterhomicide07.pdf; for details see, Centre for Corporate Accountability, *Response to the Government's Draft Bill on Corporate Manslaughter*, available at http://www.corporateaccountability.org/manslaughter/reformprops; see generally A. Hall, R. Johnstone and A. Ridgway, 'Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths' (2004) available at http://www.ohs.anu.edu.au/publications/pdf/WorkingPaper26pdf.pdf.

by a regulation or in order to reach a certain goal. Meta-regulation always holds that a particular objective is indirectly incorporated into the management approaches of the regulatee, whereas management-based regulation is focused only the achievement of a given objective. Cary Coglianese and David Lazer argue for 'management-based regulation' when regulation is needed to address some of the most intractable public policy issues related with corporate regulations.[42] According to them, this type of corporate regulatory approach requires companies to engage in their own planning and internal rule-making efforts that are supposed to aim toward the achievement of specific public goals. Under this strategy companies are expected to produce plans that comply with general criteria designed to promote the targeted social goal.[43] However, a set of prescribed management processes may not necessarily assure that companies will have adequate motivation to achieve a socially optimal result. If they are not motivated to reach the regulatory objective, they may not design their relevant managerial strategies in good faith. Hence, management-based regulation requires either economic[44] incentives or legal enforcement to ensure that the regulatee conducts the necessary planning and implements its plans as required. Hence, the perspective of management-based regulation is not as broad and comprehensive as that of meta-regulation. Simultaneously, management-based regulation is not law; it is a set of managerial strategies through which corporate management creates a regulatory synbook in order to meet the requirements or attain the objective of a regulation. Other than these differences, both these regulatory approaches provide the required scope to allow regulatees to design their own internal regulatory syntheses.

### Meta-Regulation: A Fusion of the Responsive and Reflexive Modes of Regulation

My conception of meta-regulation has much in common with the notions of the reflexive and responsive modes of regulation. While these regulatory modes are theoretically distinct, ideally they are interdependent.[45] I contend that meta-regulation represents a fusion of the ideas of both the responsive and reflexive modes of regulation: it is a pluralised form of regulation that embraces the normative criteria of responsive and reflexive law theories. In this concept the state sets the general goals and plays a role in facilitating and enforcing their achievements,

[42] Cary Coglianese and David Lazer, 'Management-based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) *Law & Society Review* 694.

[43] Eugene Bardach and Robert Kagan, *Going by the Book*: *The Problem of Regulatory Unreasonableness* (1982) 224 in Coglianese and Lazer, above n 41, 692.

[44] The term economic is being used here is in its narrow sense, not to refer to the market economy and its constitutive institution and actors.

[45] Christine Parker, 'The Pluralisation of Regulation' (2008) 9 *Theoretical Inquarie of Law* 356.

while simultaneously promoting and relying on the regulated actors to identify problems and develop solutions in conjunction with their stakeholders.[46]

In its normative sense, the concept of the reflexive mode of regulation is about the mechanisms through which a regulatory system could relate to other subsystems by promoting a multi-level approach to governance depending on decentralised forms of deliberation.[47] This mode allows regulatory interventions to underpin the autonomous processes of adjustment, representation and participation. It does not intervene by imposing particular distributive outcomes. It also has a positive or descriptive notion that seeks to devolve and confer rule-making powers to self-regulatory processes.[48]

Regulations operating in this mode may be termed reflexive regulation. Most of the EU directives, such as the EU Working Time Directive can be classed as this type of regulation. Likewise, laws and policies within this mode are commonly known as reflexive laws or policies. For instance, the laws that allow collective bargaining by trade unions to make qualified exceptions to limits on working time or similar standards in labour governance could be called reflexive labour laws.[49] In this mode laws 'tr[y] to "regulate" not only through "performance" but also through influencing centres of "reflexion" within other social subsystems.'[50] In his seminal article *Substantive and Reflexive Elements in Modern Law*, Gunther Teubner summarises the dimensions of reflexive mode in laws as follows:[51]

| | |
|---|---|
| Justification | Controlling self-regulation: the coordination of recursively determined forms of social cooperation |
| External function | Structuring and restructuring systems for internal discourse and external coordination |
| Internal structure | Procedure orientation: relationally-oriented institutional structures and decision processes |

[46] Smith, above n 17.

[47] Stijn Smismans, *Reflexive Law in Support of Directly Deliberative Polyarchy*: *Reflexive-Deliberative Polyarchy as a Normative Frame for the OMC*, Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe (2004).

[48] Catherine Barnard, S. Deakin and Richard Hobbs, 'Reflexive law, corporate social responsibility and the evolution of labour standards: The case of working time' (2005) *Social Rights and Market forces*: *is Open Coordination the Future for European Employment and Social Policy* 2, available at http://www.google.com.au/search?hl=&q=REFLEXIVE+LAW.

[49] C. Barnard, Simon Deakin and R. Hobbs, *The Use and Necessity of the Article 18(1)(b)i) of the Working Time Directive in the United Kingdom. Repo for the European Commission* (2003) 219–220; see also Simon Deakin, 'Two Types of Regulatory Competition: Competitive Federalism Versus Reflexive Harmonisation. A Law and Economics Perspective on Centros' (1999) 2 *Cambridge Yearbook of European Legal Studies* 231.

[50] Ralf Rogowski and Ton Wilthagen, *Reflexive labour law*: *an introduction*, Reflexive Labour Law (1994) 7.

[51] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1982) 17 *Law & Society Review*.

The reflexive mode in regulation depends on self-regulation of regulatees within the regulatory system.[52] It catalyses the process of social cooperation and emphasises that people should be given the scope to match specific values to specific problems.[53] An important feature of this type of regulatory mode is that 'it involves not simply an attempt to delegate rule-making authority to self-regulatory mechanisms…, but also [represents] an effort to use legal norms, procedures and sanctions to "frame" or "steer" the process of self-regulation.'[54] The main aim of this mode is not the establishment of specific rights and duties as is the case for general laws and regulations.[55] Laws and regulations with this mode do not define the substantive values and goals to be realised by the welfare state. Rather, they emphasise procedures; appropriate decisions are assumed to be made on the basis of procedures indicating who should take part in making a particular decision, resulting in decisions being made by the stakeholders whose interests will be directly affected.[56] In the reflexive regulatory mode, self-regulation may be combined with due consideration of the interests of the collective and decisions may be made solely on the basis of arguments and not upon economic or political power.[57]

Briefly, the reflexive mode of regulation has two core features: it catalyses the process of networking among stakeholders; and it allows stakeholders to choose which legal values apply to their problems.[58] Since the reflexive mode catalyses a process of self-regulation in which stakeholders are able to coordinate themselves,[59] it has 'special potential to provoke other subsystems to engage in

[52] Rogowski and Wilthagen, above n 49, 7.

[53] The Oxford English Dictionary online defines 'reflexive' as 'applied to that which turns back upon, or takes account of, itself or a person's self, esp. methods that take into consideration the effect of the personality or presence of the researcher on the investigation', Reflexive in www.oxfordreference.com; for a discussion on the philosophical basis of reflexive law, see GP Calliess, 'Lex Mercatoria: A Reflexive Law Guide to An Autonomous Legal System' (2001) 2 *German Law Journal* 17, available in http://www.germanlawjournal.com/article.php?id=109.

[54] Teubner, above n 50; Gunther Teubner and V Generalisations (eds), *Corporate Fiduciary Duties and their Beneficiaries*, Corporate Governance and Directors' Liabilities: Legal, Economic, and Sociological Analyses of Corporate Social Responsibility (1985); Oliver De Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination' (2004) *Social Rights and Market Forces*: *Is the Open Coordination of Employment and Social Policies the Future of Social Europe* 279.

[55] Sanford E Gaines, 'Reflexive Law as a Legal Paradigm for Sustainable Development' (2002) 10 *Buffellow Environmental Law Journal* 1.

[56] Daniel J Fiorino, 'Rethinking Environmental Regulation: Perspectives on Law and Governance' (1999) 23(2) *Harvard Environmental Law Review* 441; Ruth Barratt and Nada Korac-Kakabadse, 'Developing Reflexive Corporate Leadership: The Role of the Non-executive Director' (2002) 2 (3) *Corporate Governance* 32.

[57] Julia Black, 'Constitutionalising Self-regulation' (1996) 59(1) *Modern Law Review* 24.

[58] Parker, above n 44.

[59] Black, above n 56.

processes of networking with each other.'[60] However, the output of this networking can conceivably be problematic. Christine Parker doubts its potential success, as it is difficult to connect and coordinate many subsystems with many different processes.[61] Regulations with specific social values that are adopted by the state, however, may have a better chance of coordinating different subsystems within society in order to attain a common social goal.

The responsive mode of regulation embraces broad substantive values and focuses on ways to promote these values within the practices of a range of self-regulating or semi-autonomous groups.[62] Ian Ayres and John Braithwaite have made this regulatory mode well known. Building on the argument that '[g]ood policy analysis is not about choosing between the free market and government regulation [n]or is it simply deciding what law should proscribe',[63] they have pointed out this regulatory mode as suitable to 'promote private market governance through enlightened [but not absolute] delegations of regulatory functions.'[64] To them, the 'notion of responsiveness is the idea that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation.'[65] Based on this notion, they argue that any external intervention in self-regulation should depend on the extent to which the regulatee has already internalised the underlying values or aims of the law or regulation.[66]

One predominant assumption in this mode is that the most regulatees are rational and will therefore be influenced to do the right thing if they are assisted by education and incentives balanced by persuasive pressure and deterrence. It also recognises that regulatees are 'motivationally complex'; more particularly, it recognises that motivating the 'individual and corporate repute, dignity, self-image and the desire to be responsible citizens' is difficult as these are intrinsic to the core of one's perception. Pointing to this particular issue, the key enforcement mechanism of this regulatory approach is the presence of an enforcement agency with a 'big stick'.[67] Hence, in responsive regulation, there must be a regulatory agency that has the power oversee the enforcement of regulations by providing incentives as well as investigating and punishing non-compliance. This agency should also possess a range of sanctions so that the sanction could be varied

[60] Parker, above n 44, 357.

[61] Teubner, above n 50, 254; Parker, above n 44, 358.

[62] Philippe Nonet, Philip Selznick and Robert Kagan, *Law and Society in Transition*: *Toward Responsive Law* (2001).

[63] Ian Ayres and John Braithwaite, *Responsive Regulation*: *Transcending the Deregulation Debate* (1995) 3.

[64] Ibid.

[65] Ibid.

[66] Ayres and Braithwaite, above n 62, 231; Valerie Braithwaite, 'Responsive Regulation and Taxation: Introduction' (2007) 29(1) *Law & Policy* 3; Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29 (1) *Law and Policy* 137, 153.

[67] John Braithwaite, *To Punish or Persuade*: *Enforcement of Coal Mine Safety* (1985).

appropriately according to the degree of non-compliance. Accordingly, this regulatory mode is dependent on the political affiliations that help to preserve its integrity in a diverse society.

The laws and policies based on the responsive mode of regulation allow regulatees to plan their implementation strategies in a culturally appropriate manner. Likewise, in responsive regulatory modes, regulators are also granted scope to modify their goals and principles; plural actors and institutions are given the latitude to learn and correct themselves.[68] Ayres and Braithwaite state that regulators could intervene in such a regulatory framework if it is found that regulatees have failed to design effective self-regulation. Similarly, regulatees may avoid punitive regulation or harsh enforcement if they respond to the core aims of these laws in their self-regulatory mechanisms.[69] The responsive mode could thus be seen to facilitate the reflexive process by promoting the demonstration of particular values in the conduct of regulatees. Robert Baldwin and Julia Black discuss five ways for responsive modes in regulation to make a regulatee 'really responsive', other than focusing on the regulatee's compliance. They contend that responsive law should respond to:

1. The operational and cognitive framework of regulatees.
2. The broader context of the regulatory regime.
3. The different precepts of regulatory strategies.
4. The state's own performance.
5. Changes in each of these elements.[70]

Considering these elements, regulation based on the responsive mode embraces substantive public interest-oriented goals backed by widely accepted social values that are either related to the values of the regulatees or can be associated with their values. In this broader sense, responsive regulation also has two main objectives: promoting broad substantive values, and insisting on the incorporation of its values in the strategies of different actors.[71]

This type of regulatory mode is also flawed. In particular, its aim to place its values at the core of corporate implementation strategies may not be possible. This approach is extremely challenging for regulators; it is impossible to expect them to know all about their regulatees and their ever-changing attitudes.[72] This mode assumes that political deliberation is capable of channelling its values with integrity. However, politics alone may not be able to determine the core values of independent actors. Further, this mode of regulation may destroy an organisation's

[68] Parker, above n 44, 357.

[69] Ayres and Braithwaite, above n 62, 19–35 cited in Parker, above n 44, 357.

[70] Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59.

[71] Nonet, Selznick and Kagan, above n 61; Ayres and Braithwaite, above n 62.

[72] Vijaya Nagarajan, 'From 'Command-and-control' to 'Open Method Coordination': Theorising the Practice of Regulatory Agencies' 8 *Macquarie Law Journal* 11.

process for implementing its values without substituting it with an alternative process. Using political deliberation as an automatic driver to push different mechanisms to conceive substantive values as the basis of their strategies could also expose flaws in this theory of regulation.[73] Teubner accordingly argues that regulation should not focus on setting substantive duties.[74]

The basis of a meta-regulatory approach consists of the two normative features of reflexive and responsive regulatory modes. This type of regulation has two core features. The first is that it consists of substantive and procedural values derived from regulations originating within the state, and it indirectly insists that participants incorporate these values in their self-regulation approaches. This feature is consistent with definitions of the responsive mode of regulation or responsive law. Its second feature is that it involves a process through which its substantive values are applied to the behaviour of participants who agree on them, and that this process may be revised as the values are applied. This feature has a uniquely reflexive regulatory or legal quality.

Like the responsive mode of regulation, meta-regulation requires the regulatees (who have accepted the option to do perform an action) to align themselves with the core values of the regulation. Meta-regulating laws or strategies do not directly impose values on regulatees or force them to abandon their current values, nor do they emphasise the values of any particular law. This type of regulation informs companies of the rationales of society (or any sub-section of the society) or of the incentives or legal sanctions that might colour the development of their business strategies.[75] For instance, where meta-regulation is designed for corporate regulation, it would be appropriate to inform the regulatees of the market-based rationale. This indirect method could be implemented in different ways, such as requiring information, offering incentives or narrating situations that may incur disincentives. Here, the objective is to integrate the market rationale, incentives and disincentives with business strategies. For instance, requiring companies to disclose their CSR performance could create a situation that enables stakeholders to sanction the way companies act. If the information provided in a company's performance disclosure is judged to be favourable according to the standards that the particular stakeholder group expects business regulation to follow, the consequences may be positive. For example, public perception of the company's reputation may improve, investment in the business may increase, or it might gain a greater market share. Negative judgments, on the other hand, may lead to a damaged reputation, reduced

[73] For a study that raises questions about the applicability of the theory of responsive regulation, see Peter Mascini and Eelco Van Wijk, 'Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions Underlying the Theory' (2009) 3(1) *Regulation & Governance* 27–47. See also Fiona Haines, *Corporate Regulation: Beyond "Punish or Persuade"* (1997); Baldwin and Black, above n 69.

[74] Gunther Teubner and V Generalisations (eds), *Corporate Fiduciary Duties and Their Beneficiaries*, Corporate Governance and Directors' Liabilities: Legal, Economic, and Sociological Analyses of Corporate Social Responsibility (1985) 167.

[75] Richard C Ericson, Arron Doyle and Dean BarryEricson, *Insurance as Governance* (2003).

investment or a lesser market share. To modern companies, such losses may matter more than the imposition of a fine for breaching a formal law.[76]

Though meta-regulation is not as process-oriented as regulation based on the reflexive mode, it does indirectly bind regulatees to adopt certain processes in order to avail themselves of incentives or avoid sanctions. The reflexive mode, however, 'seeks to structure bargaining relations so as to equalise bargaining power, and it attempts to subject contracting parties to mechanisms of "public responsibility" that are designed to ensure that bargaining processes will take account of various externalities.'[77] Accordingly, meta-regulation allows regulatees to design their own internal strategies, which should take their stakeholders into account. In this approach, the responsive and reflexive modes remain as normative ordering and help legal regulation to bridge the 'frontier' between imperialism and being democratic.[78] To be more specific, the aim of the fusion of these modes is to provide regulatees with the power to adopt the most competitive business strategies, giving them the best chance to compete effectively.

For example, the US Federal Sentencing Guidelines insist that companies maintain an effective compliance system. According to these guidelines, companies that have effective compliance systems may be granted a reduced penalty for any breach of law.[79] The guidelines also state that the absence of a compliance system could lead to a company being placed on probation until it implements such a system. These meta-regulatory approaches have significant effects on how corporations assess acceptable practices. For instance, because several US agencies (such as the Department of Defense and the Department of Health and Human Services) consider the performance of compliance mechanisms when deciding whether to initiate civil or criminal proceedings, their regulated companies maintain effective compliance systems that follow the standards of compliance outlined in the Federal Sentencing Guidelines. Section 86C of the *Competition and Consumer Act 2010* (Cth) allows the courts to issue corporate probation orders in relation to competition and consumer protection offences.[80] As a result, companies

[76] Karrin Buhmann, 'Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR' (2006) 6(2) *Corporate Governance* 188, 196.

[77] Teubner, above n 50, 256.

[78] Boaventura de Sousa Santos, *Toward a New Common Sense*: *Law*, *Science and Politics in the Paradigmatic Transition* (1995); for more on the concept of dual and paradoxical role of law, see Jurgen Habermas, *Between Facts and Norms*: *Contributions to a Discourse Theory of Law and Democracy* (1998).

[79] See Diana E. Murphy, 'Federal Sentencing Guidelines for Organisations: A Decade of Promoting Compliance and Ethics, the' (2001) 87 *Iowa Law Review* 697. For details, see Centre for Corporate Accountability, *Response to the Government's Draft Bill on Corporate Manslaughter*, available at http://www.corporateaccountability.org/manslaughter/reformprops; see generally Andy Hall, Richard Johnstone and Alexa Ridgway, 'Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths' (2004), available at http://www.ohs.anu.edu.au/publications/pdf/WorkingPaper26pdf.pdf.

[80] Parker, above n 1,248; Christine Parker and Vibeke Nielson, 'Do Businesses Take Compliance Systems Seriously-An Empirical Study of the Implementation of Trade Practices Compliance

adopt various different strategies to avoid being charged with these offences, since punishment by corporate probation could be extremely damaging to them.[81] Here, the important point is the presence of the source of meta-regulatory effects in legislation. In the instances mentioned above, the importance given to the presence of a compliance program by the legislation is one of the sources of incorporating social responsibilities into self-regulated corporate responsibility.

## Reflection on the Critics of Meta-Regulation

The institutionalisation of meta-regulation is under profound criticism from various perspectives even though it is in its early stages of development and has not yet fully established its authority within the structure of economic law-making. Amongst the critiques of this mode of regulation, those of Bronwen Morgan, Kim Krawiec and Julia Black are vital. Other scholars have also criticised meta-regulation, but to respect space constraints and remain focused on the main theme of this study, only these three scholars are mentioned here.[82]

Although the obligatory, precise and 'arm's length' characteristics of the application of this mode of regulation go some way towards minimising any perception that raw power has determined the outcome of corporate regulations, as Bronwen Morgan argues, this may undermine the broad scope of its values, especially those pertinent to fundamental corporate rights. She argues that though these types of laws delegate an important portion of the interpretive power to 'arm's length' actors who will dispose of them with technical precision, this strategy could mute their discretionary and value-laden aspects.[83]

Kim Krawiec argues that this regulatory approach considers corporate compliance breaches too narrowly in internal compliance systems.[84] According to her,

Systems in Australia' (2006) 30(2) *Melbourne University Law Review* 441; for general discussion on this Act, see Robert Bryan Vermeesch et al., *Business law of Australia* (1998).

[81] For a detailed discussion, see JG Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) *Journal of Business Law*; Len Gainsford, 'The Australian Competition and Consumer Commission's Proposed industry Codes of Conduct-A Compliance Solution?' (2004) 3 *Journal of Law and Financial Management* 2.

[82] Some noteworthy critique would be Brian Tamanha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296; Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13(1) *Social & legal studies* 57; Stuart Henry, *Private Justice*: *Towards Integrated Theorising in the Sociology of Law* (1983); Ayelet Shachar, 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9 (2) *Theoretical Inquiries in Law* 11; Bronwen Morgan, *Social Citizenship in the Shadow of Competition* (2003).

[83] Bronwen Morgan, 'The Economisation of Politics: Meta-regulation as a form of Non-judicial Legality' (2003) 12(4) *Social & Legal Studies*; Bronwen Morgan, 'The Economisation of Politics: Meta-regulation as a form of Non-judicial Legality' (2003) 12(4) *Social & Legal Studies* 517.

[84] Kimberly D Krawiec, 'Organisational Misconduct: Beyond the Principal-Agent Model' (2004) 32 *Florida State University Law Review* 1, 28.

meta-regulation is therefore aimed narrowly at giving organisational principles incentives to more carefully police their agents, rather than substantively addressing the ways in which organisational management, systems and culture could be developed. She also argues that 'heightened organisational liability in exchange for a "safe harbour" in the form of mitigation based on internal compliance structures' is 'far less onerous' to business than actually 'altering current business practices or paying damages for agent misconduct.'[85]

Another principal criticism of meta-regulatory developments in the corporate regulation landscape is that this approach could allow companies to set only those processes that meet their own needs, thereby allowing them scope to avoid accountability.[86] Julia Black argues parallel to this, stating that the differences of objectives between the regulators and their regulatees could be vast and thus meta-regulation may not reach a sufficiently concrete point to allow the advancement of these reforms. Pointing to this, she further argues that regulators should 'fashion their own regulatory process' on the regulatees' (for instance, companies) system of internal control. She admits one of the strengths of a meta-regulatory approach is that it allows companies to cater for their own internal strategies. Nonetheless, she emphasises certain modifications to this regulatory approach, following the differences in regulatory objectives.[87] The basis of the differences in the objectives of different regulators lies with the potential conflict between incorporating social values in companies and the never-ending corporate aim of maximising profit. It is difficult for regulators and stakeholders to locate these differences and hold companies accountable for them. Critics of meta-regulation argue that it provides scope for companies to avoid conflicts over substantive change to their internal management, structure and practices by symbolic structures by making visible efforts to comply with law without making any actual substantive changes[88]; that it subsumes the requirements for sensitising the corporate conscience to social values in ways that could obscure the possibilities for corporate accountability[89]; and that it undermines internal management conflicts in determining whether

[85] Ibid.

[86] Karen Yeung, *Securing Compliance*: *A Principled Approach* (2004) 204–214.

[87] Julia Black, 'The Emergence of Risk-based Regulation and the New Public Risk Management in the United Kingdom' (2005) (3) *Public Law* 512 in Parker, above n 1, 224.

[88] Lauren B. Edelman et al., 'Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma' (1991) 13(1) *Law & Policy* 73, 75; S Beder and Beder, *Global Spin*: *The Corporate Assault on Environmentalism* (1997) 128–130; Lawrence A Cunningham, 'The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills' (2003) 29 *Journal of Corporation Law* 267; Kimberly D Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly* 487, 514, 542; Gray Weaver, Linda Trevino and PL Cochran, 'Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000' (1999) 18(3) *Journal of Business Ethics* 283.

[89] Robert Eli Rosen, 'Risk Management and Corporate Governance: The Case of Enron' (2002) 35 *Connecticut Law Review* 1157, 1180.

management has the ability to address appropriate values for developing a corporate conscience.[90]

These criticisms imply that the objectives of meta-regulation, such as developing a socially responsible corporate conscience without intervening in companies' internal management, are not being adequately considered in corporate strategies. Rather, companies are utilising the scope of this regulatory approach to shape social values to suit themselves.[91] Nevertheless, the main point of these criticisms is that 'there is nothing worthwhile to be enforced anyway'.[92] Their critiques are based on two principal grounds: that of effectiveness and that of value.

Parker responded to these criticisms by considering meta-regulation as an 'aspect of a broader shift in the way law regulates in the context of the NG'[93] which focuses on 'a logic of informal, negotiated process within socio-legal networks.'[94] She considers the 'process rationality' that usually 'shares neither the rule governed and proceduralist schemata of formal legal rationality nor the consensual goal directedness of substantive rationality'. However, the rationalities in this process depend upon the 'emergent deconstruction of procedural and substantive rights, the dissolution of the normative legality that is historically embedded in formal justice, and the deformation of constitutional protections and safeguards.'[95]

As mentioned earlier, meta-regulating strategies have substantive aims, such as social policy goal or responsibility values. To attain these aims, this type of regulatory strategy insists that corporate management initiate the necessary processes. Since it is a mode of regulation, not merely a process, it has political sanction and therefore can garner widespread legitimacy. However, its legitimacy does not rely solely on state sanctions or coercion. Rather, its strengths rely on the nexus of its values (which are backed by either political power or the economic rationale and can be related to the 'corporate conscience') and the scope of its incorporation to hold substance-oriented process in 'organisational culture.'[96] In his

[90] Christine Parker, 'The Open Corporation: Effective Self-regulation and Democracy' (2002) *Cambridge Books* 156-164; Robert Baldwin, 'The New Punitive Regulation' (2004) 67(3) *Modern Law Review* 351, 379.

[91] John Conley and Cynthia Williams, 'Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' (2005) 31 *Journal of Corporation Law* 1; Ronen Shamir, 'The Age of Responsibilisation: On Market-embedded Morality' (2008) 37(1) *Economy and Society* 1.

[92] Parker, above n 1, 229.

[93] Ibid 230.

[94] William E Scheuerman, 'Reflexive Law and the Challenges of Globalisation' (2001) 9(1) *Journal of Political Philosophy* 81; Wolf Heydebrand, 'Process Rationality as Legal Governance: A Comparative Perspective' (2003) 18(2) *International Sociology* 325, 326.

[95] Heydebrand, above, 334.

[96] According to Selznick, the simplest meaning of corporate conscience relates with the inner commitment of doing the right things. For details, see Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1994)345; Kenneth Goodpaster, 'The Concept of Corporate Responsibility' (1983) 2(1) *Journal of Business Ethics* 1.

description of the creation of corporate conscience, Selznick emphasises this nexus, which includes the realities of interdependence as well as maintaining self-interest in the organisational culture of companies.[97]

Whether meta-regulation is being pursued in accordance with certain values is therefore a vital issue to be determined to answer these criticisms. Societies want their values to be reflected in corporate behaviour and hence the laws that carry these values could act as medium for corporate bodies to gain legitimacy for their activities. They cannot avoid seeking this legitimacy, because their resource accumulation, manpower availability and product sales depend upon the quality of their 'licence to operate' in society; and this license is dependent upon the legitimacy of their operations in society. Laws could use provisions for licensing to create a meta-regulatory effect to allow regulators to reach an objective indirectly. As mentioned above, usually the provisions for obtaining or restoring a certain type of license are dependent on the nature of the activity and the results of this activity. Certain legal provisions could be added to the licensing provisions to demand that companies be more inclined to accept their social, environmental and ethical responsibilities. For example, Danish companies have to maintain a 'Green Account' to help evaluate their business operations' impact on the environment and their investment for developing the environment. The *Consolidated Environmental Protection Act 1998* (Denmark)[98] requires certain types of companies to maintain and publicise this account. The social values behind this requirement are related to the protection of the environment and companies show their efforts for fulfilling these requirements through their Green Account.[99] Companies that do not maintain this account may gradually lose their license to operate with respect to the legitimacy of their operations in societies. This Act, for instance, takes a meta-regulatory approach: it contains values; obliges companies to maintain appropriate internal strategies, and indirectly binds them to fulfilling its objectives.[100] This instance could be cited in reply to the criticisms of this law that suggest it is unable to achieve what it has set out to achieve. With respect to corporate law, the characteristics of meta-regulating strategies are interrelated and stimulating. As mentioned earlier, the objects or requirements of these strategies are related to social values that nurture the licence to operate in the society; incentives or disincentives within meta-regulating strategies may increase or decrease the

[97] Phlip Selznick, *The Communitarian Persuasion* (2002) 101.

[98] No. 698 of September 22, 1998, available at http://www.lexadin.nl/wlg/legis/nofr/eur/lxweden.htm#Environmental%20Law.

[99] Section 35a of the *Consolidated Environmental Protection Act 1998* (Denmark).

[100] See, Lara Hassel, Henrik Nilsson and Siv Nyquist, 'The Value Relevance of Environmental Performance' (2005) 14(1) *European Accounting Review* 41; D. Liefferink and Mikael Skou Andersen, 'Strategies of the 'Green' Member States in EU Environmental Policy-making' (2001) 5(2) *Journal of European Public Policy* 254; J.E. Holgaard and Herreborg Jørgensen, 'A Decade of Mandatory Environmental Reporting in Denmark' (2005) 15(6) *European Environment* 362.

competitive edge of economic actors, while their power of sanction could punish or reward.

The criticism regarding 'hollowing the state' is not a moot point in the context of meta-regulation. It is neither totally 'decentred' or 'centred', nor created only by the state or private parties.[101] It is based on the conceptual core of both decentred and centred understandings of law. While its values are settled by political powers, its implementation strategies are provided by private actors. This position allows this legal approach to tackle the problem of information asymmetry between regulators and regulatees. In the context of the pluralisation of actors exercising social power, where it is accepted that government does not exercise a monopoly on power and control, this approach to regulation is based on dispersing regulatory control between social actors in the broader sense of regulators and regulatees. Here, the rationale behind this dispersal of power is that the greater scope for exercising autonomy will facilitate the regulatees' ability to integrate social values within the basis of their governance. While regulation is moving towards the 'conduct of conduct'[102] or to 'act upon action',[103] this regulatory approach does not change its objectives, being modelling on the concurrent objectives of different corporate behaviours. States (or the regulators) set the values of this approach and hence it holds the political power to transcend social values with uniformity.

It may be trite to say that the construction of meta-regulation is complex. It aims to cover the results of various interacting factors, the nature and relevance of which changes over time. Since these interactions are complex and the actors involved are diverse in their goals, intentions, purposes, norms and abilities, meta-regulation might seem overly complex. Nonetheless, it possesses rationality and coherence in its structural formation. The basis of this form of regulation—the fusion of responsive and reflexive legal characteristics—has linked its values to its implementation process. It is an alternative regulatory approach for instilling social values in the operations of corporations. How this type of regulation can harness different social objectives and how the regulators can fulfil their social objectives through this regulatory approach needs to be investigated. The next section of this chapter delves into these issues.

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[101] Regarding the understanding of 'decentred' law, see Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 2–27; Adelle Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct' (2000) 8 *Indiana Journal of Global Legal Studies* 401; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-regulatory" World' (2002) 54 *Current Legal Problems* 103. For the understanding of 'centered' law, see Gunther Teubner, *Juridification of Social Spheres* (1987); Nikolas Rose and Peter Miller, 'Political Power Beyond the State: Problematics of Government' (2010) 61(s1) *British Journal of Sociology* 271; RJ Veld et al., *Autopoiesis and Configuration Theory*: *New Approaches to Societal Steering* (1991).

[102] Michel Foucault, 'Governmentality' (1991) in Graham Burchell, Colin Gordon and Peter MillerBurchell, 'The Foucault Effect: Studies in Governmentality' (1991).

[103] Nikolas Rose, *Powers of Freedom* (1999) 4.

## 5.3 A Meta-Regulatory Approach to Develop Social Responsibility in Corporate Self-Regulation in Weak Economies

I conceptualise meta-regulation on the basis of Parker's formulation in order to specifically address the unique issues of self-regulated corporate responsibility in weak economies. Although my conception of meta-regulation is based on Parker's formulation, my version of this regulatory approach differs from hers, primarily due to the fact that she has framed her regulatory approach with regard to companies in general and has not categorised them in any particular way, whereas my approach specifically relates to companies in weak economies. This focus on corporate regulation in the weak economies has led me to consider the formulation of regulations and their implementation differently. While Parker places less emphasis than I do on the role of the state as a regulator, and minimises the role of government as an external influence with regard to corporate self-regulation, the political power of the state and the role of government are vital components of my approach.[104]

According to Parker, meta-regulation helps the internal 'corporate conscience' to be externally regulated.[105] She argues that different social organisations and stakeholders, together with the government, should formulate regulations. Among these regulators, however, she puts minimal emphasis on the role of state in regulating corporate behaviour. She believes that law-makers and regulators may not be best placed to implement CSR values in corporate regulations[106]; she contends that the people who are directly involved in particular situations should play a meaningful role in the development of the regulations of those situations.[107]

I believe, however, the state has a vital role to play in corporate regulation in the weak economies: it should use its political power to establish the values that inform meta-regulation.[108] In the context of weak economies like that of Bangladesh,

[104] Anthony Heyesa and Neil Rickman, 'Regulatory Dealing-revisiting: The Harrington Paradox' (1999) 72(3) *Journal of Public Economics* 361; Peter N Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 542.

[105] Parker, above n 1, 5, 237.

[106] Ibid 217.

[107] Ibid.

[108] It would be worth mentioning the basis of state power while taking this role. Brierly defines state as an institution for securing certain objects, of which the most fundamental is a system of order within which all parties of a particular territory carry on their activities. Salmond observes a state with reference to its essential use of force for the maintenance of order and justice within a determined territory. The main source of this power is 'sovereignty' which is absolute and uncontrolled within its own sphere. The sovereign is supreme both externally and internally; there is no power above it. Nonetheless, there are non state powers which are more powerful than a state with sovereignty. For instance, some transnational companies hold far better economic and political power than a least developed state holds. These types of non state powers even can distort the government of a sovereign state. In recent days, the wave of globalization, moreover, has

without the backing of the state and without strong economic incentives or legal sanctions, small to medium companies may not be interested in incorporating the principles of CSR into their self-regulatory frameworks. In her approach to meta-regulation, Parker replaces the impact of political and governmental sanctions with the impact of multiple actors within CG and the enabling environment of the strong economies. In strong economies (and in some developing economies) consumer activism,[109] voluntary industry codes and the importance of reputation are all factors that motivate corporate behaviour.[110] As a result, state-promulgated laws and regulations do not need to play a significant role in shaping corporate behaviour in these economies.[111]

However, the state plays an essential role in formulating laws and regulations in most weak economies. Most of these economies do not have an environment that enables different actors to affect CG, and their corporate laws have not yet delineated stakeholders' rights, limits and abilities in regard to influencing CG.[112] The laws of Bangladesh, for instance, do not have any bearing on how companies should accommodate different stakeholders other than the government and

minimized the power of sovereign state in international order. However, one should not fall to the extreme and argue as globalizers that states' power is decreasing and might even become irrelevant. Indeed, the situation and power bargaining relationship amongst the state and non state actors is far more complex. In this context, the sovereign power still remains prominent, if not the prominent. Unlike what the globalizers predicted, states' relative size has increased in the last decade and the movement of non state actors has not been as easy as it was predicted. Backed by the sovereign power, a government of a state can make laws necessary for the maintenance of a system within it; it can bind all parties residing in its territory to follow the system it has created. For details, Vernon R. 'Big Business and National Governments: Reshaping the Compact in a Globalizing Economy' (2001) 32(3) *Journal of International Business Studies* 509,514; Held D, McGrew A, Goldblatt D, Perraton J 'Corporate Power and Global Production Networks' in Held, D. McGrew A., Goldblatt D and Perraton, J. Glob. (1999) *Transformations*: *Politics*, *Economics and Culture* 242–283; Marsh I. 'Multi-national Corporation Investment as an Object of State Economic Strategy' (2000) 35 *Australian Journal of Political Science* 63, 64; Mia Mahmudur Rahim, 'Who's Who: Transnational Corporations And Nation States Interface Over The Theoretical Shift Into Their Relationship' (2010) 4(6) *African Journal of Political Science and International Relations*195–200; Mia Mahmudur Rahim, 'TNCs and Countries Interface' (2009) 1 (3) *Transnational Corporations Review* 40–48; Murtha L. 'Country Capabilities and the Strategic State: How National Political Institutions Affect Multinational Corporations' Strategies' (1994) 15 *Strategic Management Journal* 116.

[109] Severyn T Bruyn, 'The Moral Economy' (1999) 57(1) *Review of Social Economy* 30.

[110] Bridget M Hutter, 'The Role of Non-state Actors in Regulation' (Centre for Analysis of Risk and Regulation, 2006) 8; Shery Cable and Michael Benson, 'Acting Locally: Environmental Injustice and the Emergence of Grass-roots Environmental Organisations' (1993) 40(4) *Social Problems*.

[111] Severyn T Bruyn, 'The Moral Economy' (1999) 57(1) *Review of Social Economy* 36.

[112] John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884, 886.

stockholders.[113] One of the reasons for this is that the groups[114] working on corporate regulation issues in weak economies lack knowledge, the ability to effectively disseminate information, and public credibility. Due to the high degrees of poverty, illiteracy and ignorance, non-state actors in the civil sphere of the weak economies lag behind in corporate issues. Therefore, while in the strong economies these types of actors are able to monitor the operation of businesses and are even able to impose sanctions against particular corporate behaviour,[115] equivalent actors in the weak economies are not in a position to garner public support for similar actions. For example, in Bangladesh, the number and influence of NGOs that engage with the corporate sector is low, despite the fact that this country is home to the largest NGO in the world and that one of its NGOs won the Nobel Prize for its immense impact on the socio-economic life of the people of Bangladesh.[116] Recently, when workers from the RMG industries demonstrated in Bangladesh's capital city for an increase to their minimum wage, very few NGOs were involved either for or against the cause. The impact of these NGOs on the RMG factory owners was negligible; their lack of public support, credibility and organisational skills meant that they were not able to bring the issue to the forefront of public attention. Ultimately, the government had to step in and the Minimum Wage Board (a statutory body) settled the issue, with the government facilitating the settlement.

It is worth repeating that where the companies of the strong and some developing economies are considering consumer demands and stakeholder requirements when developing their standards, companies in most of the weak economies are not sufficiently accountable to the societies in which they operate.[117] Though the

[113] Halina Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility*: *Taking Stock* (2004).

[114] Non-state actors can be divided into two major spheres: The economic sphere and the civil sphere. the economic sphere includes markets and a broad range of profit-motivated organisations and activities embracing finance, industry etc. the civil sphere includes NGOs, charities, trusts, foundations, advocacy groups, groups of professionals etc. in this study, non-state actors are generally taken to be non-state actors from within the civil sphere. For details of non-state actors, see Bridget M Hutter and Joan O'Mahony, 'The Role of Civil Society Organisations in Regulating Business' (Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, 2004) 2; Helmut K Anheier, *The Third Sector in Europe*: *Five Theses*, Strategy Mix for Non-Profit Organisations: Vehicles for Social and Labour Market Integration (2004).

[115] Bridget M Hutter, 'The Role of Non-state Actors in Regulation' (Centre for Analysis of Risk and Regulation, 2006) 13; Severyn T Bruyn, 'The Moral Economy' (1999) 57(1) *Review of Social Economy* 25, 30.

[116] Bangladesh Rural Advancement Committee (BRAC) is the largest NGO in the world with over seven million microfinance group members, 37,500 non-formal primary schools and more than 70,000 health volunteers. BRAC is the largest NGO by number of staff employing over 120,000 people and it reaches to over 110 million people in Asia and Africa. For details, visit http://en.wikipedia.org/wiki/BRAC_%28NGO%29; Grameen Bank was awarded the Nobel Peace Prize in 2006. For details, visit http://www.grameen-info.org/index.php?option=com_content&task=view&id=21&Itemid=139.

[117] Alyson Warhurst, 'Future Roles of Business in Society: The Expanding Boundaries of Corporate Responsibility and A Compelling Case for Partnership' (2005) 37(2–3) *Futures* 151; Daine L

companies that are suppliers to global buyers try to satisfy the buyers' conditions to which they have agreed, complying with these conditions alone does not effectively contribute to the development of a socially responsible corporate culture. Most of these suppliers have confined their efforts to adopting their buyers' denoted CSR-related practices simply to further their own self-interest; these principles and practices are rarely incorporated into wider corporate culture. Indeed, they usually comply with CSR standards only so long as they are under pressure from their buyers to do so.[118]

In these circumstances, social responsibility is not developing sustainably within corporate culture in the weak economies. For instance, an investigation revealed that most of the RMG factories near the capital city of Bangladesh are not using their effluent plants regularly; they have set up these plants since it is a requirement for obtaining orders from the renowned buyers/brands. They only use these plants when the buyers and governmental agencies are supposed to inspect them. This investigation into the environmental pollution caused by the export-oriented manufacturing companies covered a region containing three villages; Kumkumari, Khagan and Basaet, located beside the Turag river approximately 35 km away from Dhaka. These three villages alone have 30 export-oriented manufacturing factories of which almost all have effluent plants.[119] Sometimes these factories face inspection teams and pay fines for not using their effluent plants regularly. Despite this, pollution in these villages is mounting and thousands of tonnes of toxic liquid wash through the agricultural fields and enter the Turag every day, with the result that currently, the water in the Turag contains only 0.4–0.5 mg/l of oxygen and is losing its usual flow, and the villagers are being exposed to a risky environment.

From a weak economy's perspective, regulating these companies is difficult, particularly when the buyers' agencies are not vigilant regarding the pollution caused by their supplying manufacturers, government agencies are highly corrupt and do not have the necessary expertise to assess industrial pollution, and a large portion of the media is either owned or patronised by the owners of polluting industries. In this situation, corporate regulation needs a combination of various strategies: it should be able to channel external pressure, including pressure from local groups, on the companies concerned; it should provide scope to stakeholders to assess companies' CSR programs; it should be linked with incentive schemes for

Swanson, 'Toward An Integrative Theory of Business and Society: A Research Strategy for Corporate Social Performance' (1999) 24(3) *Academy of Management Review* 506; Jeremy Moon, Andrew Crane and Drik Matten, 'Can Corporations Be Citizens? Corporate Citizenship as A Metaphor for Business Participation in Society' (2005) 15(3) *Business Ethics Quarterly* 429.

[118] Dnise Baden, Ian Harwood and DG Woodward, 'The Effect of Buyer Pressure on Suppliers in SMEs to Demonstrate CSR Practices: An Added Incentive or Counter Productive?' (2009) 27 (6) *European Management Journal* 429; Suk-Jun Lim and Joe Phillips, 'Embedding CSR Values: The Global Footwear Industry's Evolving Governance Structure' (2008) 81(1) *Journal of Business Ethics* 143.

[119] Satadol Sarker, 'ETP Plants Are Inactive, Villages and Rivers are Facing Acute Industrial Pollution', *The Prothom Alo* (Dhaka), 20 April 2011.

the champion and legal sanctions for the laggard etc.[120] For developing this type of regulatory approach, political consensus and the involvement of the state are both necessary to determine the extent of corporate and stakeholders' rights and liabilities through laws and to set public policy goals for industry. Within this framework, in the weak economies the role of state is to set the policy goals of regulations for industry and to act as a facilitator in implementing these regulatory goals. In the context of the weak economies, with their low levels of civil society and media engagement in corporate regulation, together with the high prevalence of corruption, the need for a regulatory framework that depends on a combination of different forces rather than primarily relying on private ordering and market-based rationales becomes particularly apparent.

The high rate of corruption in corporate regulation in the weak economies is an important factor that needs to be addressed in any regulatory reform. As corruption is much less frequent in strong economies, which also have vigilant media, civil groups and sophisticated anti-corruption agencies, corporate regulation in these economies does not need to emphasise anti-corruption strategies in their internal regulations. As the roles of these actors are not adequate in most of the less developed economies, addressing corruption in corporate regulation is of the utmost importance. Hence, I emphasise the roles of the state, private sector and local civil society engagement in regulation: the state should provide sanctions against coercive measures as well as an effective court system; the private sector should develop innovative systems to create benchmarks for corporate society; and civil groups and the media should monitor and address the performance of both the public and the private sectors. Laws or legal policies could incorporate these strategies and could allow sanctions for breaches of these laws; together, these factors would then create a meta-regulatory effect in which the state's role would be to insist that private parties develop systems to avoid coercion, while the role of civil groups would be to put pressure on the state and private ordering systems for the development of regulatory strategies.

This scenario can be better illustrated by an instance taken from Bangladesh. Bangladesh is home to the largest ship-breaking industry in the world and its RMG industry is also one of the largest in the world. Hence, Bangladesh has a number of pieces of legislation related to corporate issues. However, the response of these industries to the corporate regulations of this country is not noteworthy There are many reasons for such poor responses. For instance, as discussed in Chap. 2, Bangladeshi companies consider laws and regulations to be against their profit-centric objectives. Hence, they prefer to take the chance that corrupt and ineffective regulatory agencies are not being pressured by social organisations and media groups to police corporate activities effectively. During the period between 2006

[120] Andrew King and Michael Lenox, 'Industry Self-regulation Without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43(4) *Academy of Management Journal* 698, 3; Neil Gunningham, 'Environment, Self-regulation, and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law & Policy* 57.

and 2008, Bangladesh was ranked as the most corrupt country in the world; over the last few years corruption has been reduced and Bangladesh was ranked the 12th most corrupt country world-wide in 2010. According to Transparency International, Bangladesh, corruption in this country is prevalent in both the public and private sectors. It is worth mentioning that the economies that have achieved less than 3 on the 0–10 scale of the Transparency International Index are mostly the weak economies such as the Philippines, Honduras, Nigeria, Ukraine, Iraq and Sudan. None of the strong economies scored less than 3 points on this scale.

Given these circumstances, regulatory reform for developing social responsibility in corporate self-regulation in weak economies demands different strategies than those used in the strong economies. Consequently, it would be short-sighted to rely on the initiative of companies to develop the normative basis for socially responsible corporate regulation while simultaneously relying only on corporate self-regulation and public agencies to develop a socially responsible corporate culture in the weak economies.[121] Companies operating in the weak economies will only incorporate CSR principles within their self-regulatory frameworks if they are adequately motivated, incentivised[122] and simultaneously put under legal obligation to do so.[123] Since companies in weak economies often do not have the required knowledge of CSR, or the information and expertise to systematically develop a socially responsible corporate culture, the governments of these economies need to create an environment that enables companies to take social, environmental and ethical responsibility issues as a central aspect of their self-regulation.[124] That is, unlike the strong economies, the weak economies need to use political power to facilitate a meta-regulatory approach in corporate regulation to allow them create this environment.[125]

Another reason for emphasising the role of government more than Parker does is the diverse nature of companies in different economies. While most transnational corporations and buyers are based in strong economies, the companies of the weak economies are typically small and medium-sized companies and they tend to act as suppliers to global buyers. Their business management strategies are, therefore, different to the strategies deployed by the businesses of strong economies. In particular, their corporate psychology, organisational patterns and motivational

[121] Halina Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility*: *Taking Stock* (2004); Claudio M Radaelli, 'Towards Better Research on Better Regulation' (2007).

[122] Gunseli Berik and Yana van der Meulen Rodgers, 'The Debate on Labour Standards and International Trade: Lessons from Cambodia and Bangladesh' (Department of Economics of the University of Utah, 2006) 26.

[123] Ibid 27.

[124] Bridget M Hutter, 'The Role of Non-state Actors in Regulation' (Centre for Analysis of Risk and Regulation, 2006) 13; Nils Brunsson and Bengt Jacobsson, *A World of Standards* (2000) 172.

[125] J Jordana and Devid Levi-Faur, 'The Politics of Regulation in the Age of Governance' (2004) *The Politics of Regulation*: *Institutions and Regulatory Reforms for the Age of Governance* 1.

factors differ from those of large companies.[126] The meta-regulatory approach to enable CSR principles to be incorporated into self-regulated corporate responsibility from the perspective of the weak economies is therefore different from that formulated by Parker to suit the businesses of the strong economies.

## 5.4 Meta-Regulating Strategies in Laws to Develop CSR

How best to create a meta-regulatory approach to corporate regulation in order to integrate social responsibility ethics within self-regulated corporate responsibility is a vital issue. To obtain the maximum benefits from a meta-regulatory approach to different regulatory initiatives designed to enable CSR implementation in companies, regulators and policy-makers have to select relevant incentives, disincentives, sanctions, coercion or other issues related to CSR principles. Incentives (the same incentive could be considered to be a disincentive depending on its acceptance or avoidance by the specific company), coercion and the giving of certain privileges are the strategy through which the concept of meta-regulation may be realised. For instance, developing an independent and efficient media that reflects the social, ethical, and environmental performance of companies would be considered one strategy for meta-regulation. Providing better education and raising awareness regarding consumer rights is another instance of such a strategy.

### *5.4.1 Legal Rights for Bounty Hunters*

In simple terms, bounty hunters are individuals or professional bodies who are expert in assessing secondary materials to expose the exact picture of any performance. In the corporate context, for instance, private auditors who are able to bring new tax shelters to light by assessing corporate tax profiles could be considered bounty hunters. The incentive for bounty hunters is that they obtain a share of the gains they identify as being owed to the authorities.[127] For instance, where the tax return data of the companies within a particular industry is available in a useful form, private auditors may assess those data to determine whether the tax authorities are entitled to a greater return from a particular company. In this

[126] Rodney McAdam and Renee Reid, 'SME and Large Organisation Perceptions of Knowledge Management: Comparisons and Contrasts' (2001) 5(3) *Journal of Knowledge Management* 231; for a detailed discussion, see Camille Carrier, 'Intrapreneurship in Large Firms and SMEs' (2002) 12(3) *Entrepreneurship*: *Critical Perspectives on Business and Management* 392.

[127] For details of this idea, see Sheryl Stratton, 'Closing the Credibility Gap by Disclosing Corporate Returns' (2002) 23 *The Insurance Tax Review* 220; TS Sims, 'Corporate Returns: Beyond Disclosure' (2002) 29 *Tax Notes* 735; Peter C Canellos and Edward Kleinbard, 'Disclosing Book-tax Differences' (2002) 96 *Tax Notes* 999, 1002.

situation, the tax authority usually provides a certain amount of the excess return to the auditor as an incentive for detecting more anomalies or faults in the financial performances of companies.

Facilitating the function of bounty hunters within the domain of regulation is an old idea[128] that can be traced back to the *qui tam* writs in the English state during the fourteenth and fifteenth centuries.[129] 'A writ of *qui tam* is a writ whereby a private individual who assists a prosecution can receive all or part of any penalty imposed.'[130] The objective of this idea is to increase vigilance in society so that law enforcement authorities will obtain more information. It is the ultimate way to create a more law-abiding corporate society. With these objectives, this meta-regulating strategy has been incorporated in many economies. For example, England and Wales incorporated this idea into the *Common Informers Act 1951* (UK), and in the USA its *Federal False Claims Act* 31 USC §§ 3729–3733 (2010) has given it a more principled footing.[131] These legislations have detailed the incentives to the informer for initiating judicial action against an offender as well as the penalties for abusing the right of private prosecution.[132] Bangladesh could create provisions related to the rights and liabilities of bounty hunters within the laws related to auditing and accounting.[133] Currently, the Institute of Chartered Accountants Bangladesh has 1,013 members and each of the Fellow Members and

[128] Thomas C Crumplar, 'Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement, An' (1975) 13 *Harvard Journal on Legislation* 76 in John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884, 894.

[129] Braithwaite, above, 884, 894.

[130] Qui tam is the abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "[he] who sues in this matter for the king as [well as] for himself." A more literal translation would be "who as much for our lord the king as for he himself in this action pursues" or "follows." for details, see Wikipedia at en.wikipedia.org/wiki/Qui_tam at 19 February *2011*.

[131] Braithwaite, above n 126, 884, 895; the *False Claims Act* is a very popular tool to recover the billions of dollars stolen through fraud in U.S. every year. According to this Act, those who knowingly submit, or cause another person or entity to submit false claims for payment of government funds are liable for three times the government's damages plus civil penalties of US $5,500 to US $11,000 per false claim. For details of it, visit http://www.taf.org/federalfca.htm at 26 July 2011.

[132] TS Sims, 'Corporate returns: Beyond disclosure' (2002) 29 *Tax Notes* 735, 736; on the effectiveness of private bounties for detecting corporate wrongdoing, see B. Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) 283.

[133] Some of the Bangladeshi laws and guidelines related with auditing are: *Bangladesh Chartered Accountants Order 1973* (Bangladesh);*CA Bye-Laws 2004* (Bangladesh); Council Directives/Decisions; Government Auditing Standard, Civil audit Manual, Audit Code, Code of Ethics for Auditors etc. these law/guidelines are available at http://www.cagbd.org/in.php?cp=methd, http://www.icab.org.bd/publication_list.php at 26 July 2011. Other than these laws and guidelines, there could be provisions related with the punishment/fines and other liabilities of the bounty hunters in the *Bangladesh Penal Code 1860* (Bangladesh), the *Code of Criminal Procedure 1898* (Bangladesh) etc.

Associate Members can train 30 or 22 students respectively in their accounting firms. The Office of the Comptroller and Auditor General of Bangladesh currently has 1,780 officers who are skilled in auditing. Apart from this, almost all public universities and some private universities of this country provide courses on accounting and auditing. Hence, it could be assumed that if legal sanctions were applied, including incentives to bounty hunters, a group of experts in auditing would be available within the private sphere. This could be an effective option to tackle the shortage of staff in the public auditing organisations and could also create scope to check the quality of the auditing practices at both the corporate and public auditors' levels.

### *5.4.2 Legal Protection for Whistleblowers*

The whistleblower is the latest version of the bounty hunter. Like the idea of a bounty hunter, the objective of the whistleblower is to maintain business activities in a vigilant environment as well as to facilitate the development of an ethical base for business policies. Anybody can be a whistleblower in an organisation. Senior managers in particular could be the most effective whistleblowers, as they know the pros and cons of their company's business strategies and transactions and are in a better position to expose any fraud or unethical transaction that transgresses the law and social values. An aggrieved member of an organisation also is another potential whistleblower, who could report his or her grievance related to fraud or dishonesty at the organisational level. Whistleblowers may raise the issue in question with a prescribed body within the organisation, or with other people within the organisation. They may also raise their allegations with regulators, law enforcement agencies, the media, or groups concerned with the issue at hand.[134]

Like bounty hunters, the role of whistleblowers needs to be secured by suitable legislation to include this role as one aspect of a meta-regulating strategy. Whistleblowers should have their position protected with their organisation in the weak economies; they should also be incentivised. In the USA, if a suit initiated in response to the information given by a whistleblower is successful, a whistleblower usually receives 15–25 % of any settlement or judgment attributed to fraud or unethical transactions or policies identified by the whistleblower.[135] Different economies have created various legislations incorporated this notion and have detailed the protection of whistleblowers, such as *Public Interest Disclosure Act 1998* (UK), *Sarbanes-Oxley Act 2002* (USA), and the *Federal False Claims Act*

[134] Paul Latimer, 'Reporting Suspicions of Money Laundering and 'Whistleblowing': The Legal and other Implications for intermediaries and their Advisers' (2003) 10(1) *Journal of Financial Crime* 23; Stefaine A Lindquist, 'Developments in Federal Whistleblower Protection Laws' (2003) 23(1) *Review of Public Personnel Administration* 78.

[135] Braithwaite, above n 126, 884, 895.

31 USC §§ 3729–3733 (2010). Australia has protected whistleblowers by incorporating suitable provisions into the *Australian Corporations Act 2001* (Cth) in 2004.[136]

The leniency provisions in legislation that empower the regulator to waive penalties for whistleblowers have been useful for different organisations to boost their policy implementation strategies. The Australian Competition and Consumer Commission's Immunity Policy for Cartel Conduct and Immunity Policy Interpretation Guidelines provide immunity from litigation and penalties for those who assist with cartel investigations.[137] However, the immunity under this policy and guidelines is strictly conditional and is subject to a number of conditions. The Competition Commission of India has waived the penalty of whistleblowers, even to the extent of 100 %.[138] Different organisations involved in corporate regulation in the weak economies could also use this meta-regulating strategy. The *Companies Act 1994* (Bangladesh) and the *Bangladesh Penal Code 1860* (Bangladesh), for instance, could have provisions ensuring immunity and protection to whistleblowers, which would encourage individuals and corporations to assist law enforcement agencies to obtain necessary information on corporate fraud, mistrust and non-compliance. Such legal provisions would ensure the protection of whistleblowers in weak economies like that of Bangladesh, since the success of this strategy largely depends upon the provision of effective protection and incentives to the whistleblower, irrespective of the differences in their circumstances.[139]

### 5.4.3 *Corporate Owners, Directors and Senior Manager's Legal Duties and Liabilities*

The determination of corporate directors' and senior managers' duties and liabilities under trade practice, environmental, occupational health and safety and

[136] Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) *Common Law World Review* 1.

[137] This policy and guideline are available at Australian Competition & Consumer Commission, *ACCC Immunity Policy for Cartel Conduct* Australian Competition & Consumer Commission http://www.accc.gov.au/content/index.phtml/itemId/708758 at 17 May 2011.

[138] For details visit http://www.cci.gov.in/ at 17 May 2011.

[139] It has been reported that the Standing Committee for Law and Justice Affairs of the Parliament of Bangladesh is considering draft legislation; namely, the *Public Interest Related Information Disclosure* (*Protection*) *Act* 2010 that contains whistleblower-related provisions. Bangladesh is party to the United Nations Convention Against Corruption 2007, and the rate of corruption in this country is one of the highest in the world. It is hoped this legislation (if it is passed) will be an important strategy in the fight against corruption. For details, see Staff Correspondent, 'Whistleblowers to be Protected: Bill Placed at Parliament', *The Daily Star* (Dhaka), 23 September 2010, available at http://www.thedailystar.net/newDesign/news-details.php?nid=155610 at 25 July 2011.

anti-discrimination legislation is a recurring feature used by CG for the development of socially responsible internal management systems. This legislative and regulatory development attempts to mandate or encourage CG to address the various social liabilities of companies.[140] Appropriate descriptions of directors' and senior managers' duties can hold the board of directors responsible for the active implementation of social responsibilities in internal management systems, including compliance systems.

In the broader sense, the duties and responsibilities of corporate directors to develop a socially responsible compliance management system in companies should include: (a) general duties, following business judgment rules and due diligence; (b) general liabilities for aiding and abetting any offences committed by the company; (c) personal liabilities for non-compliance within their company under the terms of specific legislation; and (c) concern for social responsibilities and potential liabilities, even if the company is vicariously liable for the non-compliance of its employees.

The narrower sense of these duties and liabilities includes: (a) the assurance that the compliance standards and management are reasonably capable to reduce the prospect of criminal conduct; (b) that specific high-level personnel are made responsible to oversee the performance of management for fulfilling their social responsibilities; (c) that due care is not delegated to individuals who are either incapable or have a propensity to engage in illegal activities; (d) plans for effective communication of corporate standards and procedures to fulfil their social responsibilities to all employees and stakeholders; (e) steps to detail the monitoring, auditing and reporting systems for management; (f) the enforcement of the disclosed standards through disciplinary mechanisms; (g) the incorporation of reforms, including modifications to compliance programs to prevent any non-compliance.

These two sets of duties and liabilities for corporate directors creates a set of standards that can facilitate the development of a corporate culture in which the corporate attitude, policies, rules, conduct and practice has the scope to be socially responsible. Clearly setting the directors' duties will help management identify what they need to know from CG about the company's compliance. Setting these duties and liabilities within the corporate laws and regulatory guidelines will oblige CG to consider what internal compliance monitoring systems are necessary to determine their companies' risks. CG will also wish to maintain a compliance system that assures that company directors are performing their duties appropriately, and that corporate management has strategies to implement directors' decisions according to the company's rules.

[140] Christine Parker and Olivia Conolly, 'Is There a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30(4) *Australian Business Law Review* 273, 275.

### 5.4.4 Legislating Suitable Tax Provisions

Governments usually respond to an externality that causes a market to reach an inefficient allocation of resources and to business behaviour that does not reflect the national policies in two ways: (a) through command-and-control type regulation and (b) through market-based policies. Amongst the market-based policies, tax provisions are one of the most common strategies to control corporate policies. Tax provisions can act as incentives (or disincentives) to private decision-makers to help government attain a certain objective.

Governments can distort corporate conduct by ruling that certain behaviours are either required or forbidden by their legislative powers. For instance, government can have a command-and-control policy that restricts dumping poisonous chemicals into the water supply and thus can prohibit this act altogether. However, in most cases, government cannot reach all its objectives through these types of authoritative policies; it must weigh the costs and benefits to society to regulate private behaviour in response to external factors. Rather than making authoritative regulations, government could use market-based policies to align private incentives with social efficiency. For instance, other than fixing the allowable limit of pollution by a factory, the government could levy a tax on the factory depending on the amount of pollution it emits. In this case, the regulatory approach dictates a level of pollution, whereas offering tax incentives provides factory owners with an economic incentive to reduce pollution. To avoid this tax, factory owners will incorporate more efficient ways to reduce their emission and maximise their profits. This method is an effective alternative approach to push factory owners to invest in efficient technologies as well as to develop their managerial strategies. However, if the tax is too high, there could be a negative impact on manufacturing industries and the factories would close down, reducing pollution to zero. Therefore, efficient use of tax provisions is an alternative way to encourage industries to establish better and more efficient ways of operating. A tax could be used as an incentive for companies to develop social responsibility policies; this could also be used to insist that CG institute suitable strategies for developing efficient compliance management systems within their industries.[141]

Like the strong economies, this strategy could be an appropriate fit for the weak economies. For instance, from the Bangladeshi perspective, this strategy could be used through tax provisions and tax administration. This country has an established tax administration, and has already begun to apply this strategy to raise its companies' contribution to social development. By the end of 2008, the government approved the proposal of the National Board of Revenue for tax exemption at a rate of 10 % on the proportion of the corporate income to be spent on complying

[141] Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29(1) *Law and Policy* 137, 153; Valerie Braithwaite, *Dancing With Tax Authorities*: *Motivational Postures and Non-compliant Actions*, Taxing Democracy: Understanding Tax Avoidance and Evasion (2003).

with CSR, whereas the corporate tax rate was 45 %.[142] During mid-2010, empowered by Section 44(4)(b) of the *Income Tax Ordinance 1984* (Bangladesh) the government passed a circular describing the sectors to which company donations should be made to allow them claim the 10 % tax rebate on their total income.[143] The national budget for the 2011–2012 financial year further reforms of this provision. It has mandated that a company could invest up to 20 % of its profit in CSR related issues.[144] Business society has a profound interest in these provisions and hence the government continues to work on them. This is a good start for a weak economy to establish this strategy. However, both the government and the corporate societies of Bangladesh should not consider CSR as a mode of philanthropy or as a way to bypass corporate tax to retain profits. Rather, this strategy should be used to develop a systematic approach at the corporate level to fulfil their social responsibilities. Another important issue is that both the government and industry should be vigilant against the scope this strategy might create for paving ways for corruption via the changes of tax provision and administration. Hence, some other strategies are required along with meta-regulation strategy.[145] For instance, alongside this strategy, weak economies could rely more on the legal provisions for facilitating country hunters, whistle blowers and independent media.

### *5.4.5 Licence and Registration Provisions*

By shaping the provisions for business licensing and registration, policy-makers can insist that companies incorporate a certain notion into their regulatory strategies. By such shaping, policy-makers could create either incentives or disincentives for companies which would lead to imbalances in market facilities. Where the aim of creating this sort of imbalances is to raise social responsibilities in corporate self-regulation, companies would then develop suitable social, ethical and environmental strategies to cope with these imbalances in the market. The crux of creating this sort of imbalance is that its cost should be less than the benefit it can create. In weak economies, these provisions could be enabled to prompt companies to develop environmentally responsible business strategies from their inception.

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[142] Star Business Report, '10pc Tax Waiver on CSR Spending', *The Daily Star* (Dhaka), 25 December 2008.

[143] S.R.O. 270-Law/income Tax/2010 of the internal asset Division of the Ministry of Finance, Bangladesh.

[144] Staff Reporter, 'Scope of CSR Has been Reformed', *The Prothom Alo* (Dhaka), 10 June 2011.

[145] The underlying object of this strategy is to indirectly insist companies to take the principles of CSR at the core of their corporate strategies. Regulation of market actors via tax provision is a traditional and well practiced strategy. Like all other meta-regulation strategies proposed in this book, this strategy has both drawbacks and benefits. Describing these drawbacks and benefits is not the purpose here. Pointing the meta-regulation quality in these strategies is the main goal in the discussion of these strategies.

In the general sense, the license or registration of any organisation is based upon its ability to fulfil a certain standard or set of conditions. Organisations obtain a license or registration in order to gain certain capabilities as well as protection from the government or other professional association that has the political power to create an impact in society. Against this backdrop, licensing and registration are processes that are considered as deals between the business owner and the state; indeed these processes bring the legal entity into existence. Hence, the incentives for obtaining a license and registration are immense for any company; they provide the ability to operate a lawful business, perpetual succession, and limited liability for shareholders.

Companies need this license and registration to conduct legitimate business, in most cases with the added benefits of separate corporate status, limited liability, and market benefits.[146] At this point, the policy-makers have considerable scope while detailing these provisions; there could be special arrangements for any particular group of companies, differences in charges for different categories of applicants, and special certification depending on the business's performance in fulfilling the terms of their license and registration.

Rick Sarre[147] and Mazerolle and Ransley[148] consider this meta-regulating strategy an optimal 'regulatory mix'. Taking the rationale of creating incentives and disincentives through license and registration provisions, Gunningham shows how the command-and-control mode in environmental regulation could be supplemented by regulatory flexibility to induce systematic approaches to environmental compliance that may transcend minimum requirements. To this end, he suggests adding options to the license and registration provisions, such as the fast-tracking of licenses or permits, reduced fees for registration, technical assistance to meet the requirements of tax and other authorities in one go, and so on.[149] *The Enterprise Law 2005*[150] and the Decrees on Business Registration[151] of Vietnam incorporated this notion to foster its business regulation as well as to curb corruption. With this notion, these regulatory initiatives have helped to develop the 'One-Stop-Shop'[152] which mitigates information asymmetry within the business

[146] David Walke, 'Business Registration in Vietnal: Burden or Opportunity' (2007) Spring (2) *Vietnam Economic Management Review* 3, 7.

[147] Rick Sarre, 'The Future of Policing in a Broader Regulatory Framework' (Australian Institute of Criminology, 2004).

[148] Lorraine Mazerolle and Janet Ransley, 'Third Party Policing: Prospects, Challenges and Implications for Regulators' (Australian Institute of Criminology, 2004).

[149] Neil Gunnigham, 'Beyond Compliance: Next Generation Environmental Regulation' (Australian Institute of Criminology, 2004).

[150] Article 13(1),7(1), 162(3)(b) of the Company Law 2005. This legislation is available at http://www.khucongnghiep.com.vn/vbpq/en/companylaw2005.pdf at 4 March 2011.

[151] Decree 88/2006/ND-CP of 29 August 2006. Decision No. 181/2003/Q?-TTg of 9 January 2003 is also an important source of the development of one-Stop-Shop in Vietnam.

[152] For details of one-Stop-Shop in Vietnam, see Dinh Van An, 'Building Institutions for a Market Economy with Socialist Orientation in Vietnam' (2006) Winter(1) *Vietnam Economic Management Review* 10; *Business Licensing*: *Current Status and Ways Forward* (2006).

regulatory agencies, minimises documentation hurdles, disseminates information to potential corporate constituencies, and minimises the scope for corruption in corporate regulation. This idea could be used to encourage businesses to accept their social responsibilities; the legislation that creates the means for this service could also add a provision that the party interested in obtaining 'One-Stop-Shop' facilities must have a convincing policy to incorporate an environmentally and socially responsible compliance management system within the company from its inception. Thus, legislation with a meta-regulatory approach can pass the responsibility of developing social responsibilities to another agency that is able to give direct benefits to companies.

Adding the requirement for socially responsible compliance management plans or a record of accomplishment of acceptable performance of environmental responsibilities in order to obtain corporate licenses/permits should not hinder the growth of businesses. There is evidence that shifting of the mode of registration from the traditional procedure towards simpler business start-up procedures has increased the number of registrations of new companies. For instance, after adding the requirement for an environmental performance record or agreement on certain provisions regarding energy consumption to certain corporate licenses in Pakistan, business registrations did not decrease; rather, they increased by 18.8 % from 1998 to 2004. After the reforms designed to facilitate business registration[153] in Vietnam (one component of which was a requirement for agreement on certain provisions related to the use of natural resources in order to obtain a business permit), the trend in business registration increased by 28 %.[154] Likewise, this strategy could be added to the existing provisions for corporate licencing and permits in Bangladesh. From the 1990s, this country has accepted the underlying objectives of CG and the need for licencing from the proper authorities to do business in a formal way. With the increase in competition for market share, the incentive package from the government becomes an important issue for companies suffering from unavoidable circumstances. To obtain such an incentive package and financial support, many companies would be ready to add social responsibilities as a contingency condition on their corporate licence.

### *5.4.6 From Legal Sanctions to Incentives*

Incentives for developing environmental responsibility in corporate self-regulation can be divided into two broad categories: economic incentives and direct

[153] Shamim Ahmad Khan, former Chairman, Securities and Exchange Commission of Pakistan: Business Registration Reforms in Pakistan, April 23, 2004 in Liliana de Sa, 'Business Registration Start-up: A Concept Note' (International Finance Corporation, 2005).

[154] Doing Business 2005 and 2006, World Bank and International Finance Corporation, http://rru.worldbank.org/DoingBusiness/ at 12 December 2011.

incentives. Tax provisions, levies imposed on a certain act in a certain market, and custom provisions relating to imports and exports are examples of incentives (note that these arrangements could also be disincentives to an individual or to certain groups of business firms) generated using an economic rationale.[155] The main attribute of this type of incentive is that it does not act as a direct incentive to a company. Rather, these incentives depend on the potential application of economic instruments. Incentives given to companies or particular groups of companies without any economic rationale are direct incentives. This type of incentive creates an economic impact on the market as soon as it is accepted. A declaration from the government to procure a certain product from a certain company could be considered a direct incentive.

Incentives based on economic instruments have the capacity to give companies much greater flexibility than command-and-control regulation in tailoring their responses to individual circumstances and achieving least-cost solutions. Economic instruments that create incentives are a particularly effective means of encouraging improvements in small businesses because 'these are the companies most likely to respond to the potential financial benefits inherent in many incentive options...smaller business appear to respond more to marginal changes.'[156] However, the aim of providing incentives to small companies should be to increase their adaptability. Hence, this meta-regulating strategy is highly contextual, since the notion of adaptability varies with according to needs and cultures.[157] For example, a reduction in tax for small companies who import environmentally friendly jet engines would be economically impractical, since no small companies in weak economies deal with billion-dollar exports. Economic incentives may not produce the expected result if they are inadequate, lack awareness, are difficult to use or are too complex for their beneficiaries.

In weak economies, the government could be the main provider of direct incentives to minimise the amount of industrial pollution and the misuse of natural resources by companies. This strategy could be put in place by reducing the cost of statutory provisions, generating customer demand using public awareness programs, reducing regulatory provisions, and so on. More direct incentives for developing environmental responsibility within companies' internal regulatory systems could be provided through mechanisms such as audits and technology assistance, development of internal management practices and government procurement policies.[158] Bangladesh has started to use this strategy, though not in a

[155] Robert A Kagan and John T Scholz, 'The Criminology of the Corporation and Regulatory Enforcement Strategies' (1984) *Enforcing Regulation* 67, 79; see also Toni Makkai and John Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31(4) *Journal of Research in Crime and Delinquency* 347, 366.

[156] Environmental Improvement through Business Incentives, Global Environmental Management Initiative (1999) 4, available at http://www.gemi.org/resources/IDE_004.pdf at 6 March 2011.

[157] Kagan and Scholz, above n 152, 86.

[158] Neil Gunningham, 'Regulating Small and Medium-sized Companys' (2002) 14(1) *Journal of Environmental Law* 3, 22.

structured way. Since most of its companies are small, in 2006, a Small and Medium Company Foundation was established with the aim of bringing 'the grassroots entrepreneurs into the main stream of economic development through employment generation, reduction of social discrimination and poverty alleviation'.[159] Amongst other regulatory initiatives, the direction from the Central Bank and the government of Bangladesh to provide easy and adequate financing to small companies is noteworthy. Bangladesh could use these initiatives to develop social and environmental responsibilities in companies; it could relate incentive initiatives to these responsibilities via corporate rules and regulations. Further discussion of the implementation of this strategy is presented in the next chapter.

### *5.4.7 Education and Training*

Building awareness of the misuse of natural resources and harmful acts to society, responsibilities to society and the necessity of integrity in business strategies will help companies realise the necessity of incorporating the ethos of CSR into their self-regulatory mechanisms. Education and training are important factors in building this awareness, as they help to minimise ignorance and incapability. These are two important ways of developing socially responsible internal business plans, as poor social and environmental performance are commonly explained the absence of such planning.

Due to the lack of proper education and the necessary training, companies, particularly the small and medium-sized manufacturing companies in the weak economies, cannot plan and generate the skills or solutions necessary to allow them to fully integrate the socio-economic and environmental perspective into their business practices.[160] Hence, proper education and adequate training could raise their understanding of their role in the society, increase their narrow view of the relationship between business performance and the environment, change their entrenched idea that acting on their socio-environmental responsibilities is associated with technical expertise, and minimise their high resistance to organisational change.[161] Regulatory policies could add either incentives or sanctions or create an economic rationale with these issues to motivate companies in weak economies to encourage education and training in environmental

[159] Small and Medium Company Foundation got registration from the Ministry of Commerce on 12-11-2006 and from the Registrar of Joint Stock Companies and Firms on 26-11-2006 under the *Companies Act 1994* (Bangladesh). A resolution (Gazette notification) was circulated on 30-05-2007 regarding the establishment of SME Foundation. It is an independent and unique non-profit organisation. For details visit http://www.smef.org.bd/ at 3 June 2011.

[160] Fiona Tilley, 'The Gap between the Environmental Attitudes and the Environmental Behaviour of Small Firms' (1999) 8(4) *Business Strategy and the Environment* 238, 241.

[161] Neil Gunningham and Darren Sinclair, 'Barriers and Motivators to the Adoptation of Cleaner Production Practices' (Environment Australia, 1997).

responsibility practices. Cary Coglianese and Jennifer Nash argue that rather than providing direct incentives to reach a given goal, governments should provide incentives for training and education focussed squarely on management; it should invest to develop corporate management skills so that improved management can lead to improved outcomes.[162] They mention in one of their studies that the legislature of Massachusetts have been successful in reducing toxic chemicals in their industries by requiring the managers of manufacturing companies to engage in management efforts to develop toxic use reduction plans.[163] However, the success of these arrangements depends largely on how education, awareness, and assistance are presented and packaged into a regulatory strategy, and upon who delivers them. With respect to this point, Neil Gunningham mentions six generic issues to add for successful policy framing to develop social responsibility in corporate culture. These are: capitalising on win-win solutions, developing industry-government partnerships, putting the right people in the right place, developing codes of practice, exploiting third-party leverage, and integrating with other strategies.[164] The weak economies could use this strategy; for instance, Bangladesh could use its corporate regulation and social responsibility-oriented organisations, such as the Bangladesh Standards and Testing Institution, the Bangladesh Small and Cottage Industry Corporation, the Bangladesh Industrial Technical Assistance Centre, the Bangladesh Accreditation Board, the Ministry of Industries, the Federation of Bangladesh Chambers of Commerce and Industry and the Small and Medium Company Foundation, among others. These organisations could incorporate these issues into their training and assistance programs. Other than these public organisations, Bangladesh could develop the scope of CSR education and awareness by providing incentives, supports and recognition to the NGOs. This country has many NGOs engaged in education and social awareness programs and they could use their existing strength to disseminate basic education on the social responsibilities of business and raise awareness in the general population regarding the rights and liabilities of consumers.[165]

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[162] Cary Coglianese and Jennifer Nash, 'Leveraging the Private Sector: Management-based Strategies for Improving Environmental Performance' (RPP-06-2004, Center for Business and Government, John F Kennedy School of Government, Harvard University, 2006) 2.

[163] Coglianese and Nash, above, 2.

[164] Gunningham and Sinclair, above n 158, 6–7.

[165] Till the end of July 2011, this country has 2061 NGOs enlisted in the NGO Affairs Bureau. These NGOs has performed 1,120 programs worth US$ 5,080,424,321 foreign donation between June 2010 and June 2011. All these NGOs are regulated under the *Foreign Donations* (*Voluntary Activities*) *Regulation Ordinance 1978* (Bangladesh). Amongst these NGOs, Bangladesh Rural Advancement Committee (BRAC), ASA, PROSHIKA are prominent. BRAC is the largest NGO in the world with over seven million microfinance group members, 37,500 non-formal primary schools and more than 70,000 health volunteers. BRAC is the largest NGO by number of staff employing over 120,000 people and it reaches to over 110 million people in Asia and Africa. For details, visit http://en.wikipedia.org/wiki/BRAC_%28NGO%29; PROSHIKA has provided human resource and practical skill development training to 21.40 million people; it has 53616 adult literacy centers in this country. For details, visit http://www.proshika.org/at_glance.htm at

### 5.4.8 Self-Inspection and Self-Audit

Given the limited resources of most weak economies and the limited reach of many conventional regulatory strategies, there is a need to create a variety of alternative strategies involving voluntary compliance, self-assessment and the use of third parties as surrogate regulators. These issues could be detailed in regulations so that they could be practiced in a wider context. Self-inspection and self-auditing are two potentially relevant issues here; these are less comprehensive and ambitious.

Government agencies could detail the necessary provisions enabling companies to self-audit and illustrating how social responsibility issues can be identified and controlled. In this way companies could be encouraged to take greater internal responsibility for risk management. 'By publicising in advance key audit criteria, which the inspectorate also uses in random audits, workplace compliance may be facilitated even without inspections.'[166] Minnesota has embodied this provision within their legislation. The *Environmental Improvement Act 1995* of Minnesota encourages companies to self-inspect and to report the results to the relevant government agencies. For the printing industries of Minnesota, where most companies are relatively small, a separate corporation, the Printing Industry of Minnesota Environmental Service Corporation, has been created to provide auditing services to this industry. The government agency provides the format of their probable audit to the company auditor, and the firm auditor then provides a complete evaluation of the company's environmental, safety and health systems and passes this report to the Printing Industry of Minnesota Environmental Service Corporation which oversees the correction of any compliance problems. Sector-specific companies such as the RMG sector in Bangladesh could develop this type of arrangement, and the legislation related to the auditing provisions of this country could supervise the standard of this self-arranged auditing service. There could be an agreement between the coalition of self-audited companies and the auditing authority of the government whereby a company which audits and corrects itself promptly will 'have this fact taken into account when regulators decide whether to initiate any enforcement action, whether an enforcement action should be civil or criminal in nature, and what penalties to impose.'[167] To make this arrangement attractive, there could also be provision for a potent 'enforcement stick' for non-participants. However, this provision should depend upon the extent and strength of the companies involved, in other words, this provision should not be imposed on all companies; rather, it should be optional but linked to direct

26 July 2011. Other than general NGOs, Bangladesh Company institute, Bangladesh Development Studies, Center for Policy Dialogue, Bangladesh institute of Labour Studies, Consumer association of Bangladesh are some specialised private organisations that could assist the public policy goals in corporate sector.

[166] Occupational health and safety, Queensland Department of Employment, Vocational Education, Training and industrial Relations Submission No. 79 to the industry Commission, 30 September 1994 in Gunningham and Sinclair, above n 158, 8.

[167] Ibid 9.

incentives. Different trade associations and associations of companies of the same nature could provide assistance to the companies in weak economies in their self-inspection and auditing processes. The Bangladesh Garments Exporters and Manufacturers Association, Bangladesh Textile Mills Association, the Leather Goods and Footwear Manufacturers and Exporters Association of Bangladesh are examples of associations that could provide such assistance to their member companies.

The choice for self-auditing and inspection should not be 'between compliance and non-compliance but between low-cost, low-stress, collaborative route to compliance on the one hand and fines, liability, and public notoriety on the other'[168] This arrangement is a pertinent example of the importance of establishing the correct balance between enforcement and assistance in corporate meta-regulation as the National Academy of Public Administration mentions:

> Without maintaining a credible threat of enforcement [the regulators] lacks the leverage to get small business to invest in self-monitoring, let alone compliance. Without establishing an attitude of assistance and forgiveness [the regulator] will be unable to win the trust of small business owners, and those owners will be unwilling to accept the technical assistance they need to identify and correct their problems. A strong education and outreach program has successfully linked those livers...to make the system even more credible, [the regulator] must begin considering spot checks of firms submitting audit and self-inspection reports to determine if companies are doing a sufficiently good job on their self-inspection and corrective action and to demonstrate the risk of false reporting. Of course, the agency also needs to make regular inspections of facilities that have not participated in the self-inspection program and to ensure that its entire regulatory program is credible.[169]

### *5.4.9 From Legal Sanction to Coercion*

Unlike the strategies used in the developed economies, the weak economies can rely on the legal provision of coercion to insist that businesses implement environment-friendly strategies and technologies. However, the impact of penalties and punitive measures on companies could vary according to the differences in size, sophistication, visibility, and the recent business profile of companies. For instance, penalties have more impact on the behaviour of small companies than the informal pressures seen in developed economies. Large companies consider social pressure more seriously than they do any regulatory actions taken against them. They consider formal regulation primarily due to the stigma associated with being sanctioned, while they accept social pressure since they believe that transgressing social expectations can create bad publicity and damage their reputation. On the contrary, the spectre of legal sanctions for non-compliance is always in the minds of

[168] National Academy of Public Administration, *Resolving the Paradox of Environmental Protection*: *An Agenda for Congress*, *EPA & the States*: *A Report for Congress* (1997) 134.
[169] Ibid.

small to medium-sized company owners and directors. To them, the threats of fines or prison sentences are powerful motivators to perform their environmental responsibilities.[170]

Penalties, punishments and sanctions have an obvious and powerful impact on the behaviour of most business owners and directors. Hence, creating fear of these actions is an important method of bringing about internal changes within companies. However, when using these methods to indirectly incorporate social responsibilities in small companies, determining the limits of these regulations and the manner in which they are to be used is vital. This is because small companies view legal compliance in a different way: in most cases, they consider compliance as a reactive process carried out at a particular point in time.[171] They consider performing their legal obligations only when they feel that they are going to face inspection by law-enforcement agencies. Moreover, they honour their legal liabilities to evade penalties or punitive measures following the instruction of law-enforcing agencies. Hence, immediately after passing an inspection, they tend to believe that they are compliant until the next inspection. However, regulators view compliance as a proactive, on-going process of evaluation and monitoring; they tend to view compliance as an integral part of the day-to-day running of business activities. Therefore, a gap between the views of compliance of business owners or directors and regulators persists. 'Regulators emphasise compliance to be a proactive, continual process while small and medium companies view it as a reactive outcome of negotiation during the regulatory encounter'.[172] This gap needs to be addressed when using coercion as a strategy to force the companies of the weak economies to develop self-regulated responsibility. For effective implementation of coercive measures, it is important that the society as a whole is aware of the negative effects of the act for which the offender is liable to face imprisonment, fines or cancellation of their licence. At present, this awareness is not adequately present in Bangladesh. Nonetheless, the demand for punitive actions against companies that damage the environment is increasing; the different civil society organisations, the media and the NGOs are becoming more active in this issue. This development could be a suitable base for implementing appropriate coercive measures against corporate management if companies are proved to be guilty of damaging the environment and transgressing the social values of this country.

[170] Neil Gunningham, Dorothy Thornton and Robert A Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27(2) *Law & Policy* 289, 299.

[171] Chrlotte Yapp and Robyn Fairman, 'Assessing Compliance with Food Safety Legislation in Small Businesses' (2005) 107(3) *British Food Journal* 150, 155.

[172] Ibid 159.

### 5.4.10 Mitigation of Penalties

Legal provisions to facilitate the justice delivery system to take genuine responsibility as a source of mitigation of penalties for companies that have been sanctioned is another meta-regulating strategy to incorporate social values in corporate self-regulation. From an enforcement point of view, companies are particularly interested in remedies and defences. They can use their 'responsibility system' to serve a 'preventive function in relation to strict liability offences and inferential function in relation to other types of conduct in that the existence or lack thereof may assist a court to assess the purpose'[173] behind their conduct. Accordingly, there could be legal provisions in the major corporate legislations of the weak economies to facilitate the courts to take the existence of 'genuine' responsibility as a source of mitigation of penalties.

The determination of the criteria of CSR is an important issue in the implementation of this meta-regulatory approach in weak economies. Though the determination of 'genuine responsibility' is contextual and largely depends upon a court that knows the circumstances well, there could be some assertion in this regard. For instance, genuine corporate responsibility should be based on an effective ethics policy, an aspirational operating strategy, and a good record of accomplishment. In the *ACCC v Australian Safeway Stores Pty Ltd.* (1996) 153 ALR 393 case the court indicated that the compliance program for which there could be a mitigation of penalties should be (a) substantial and actively implemented and (b) with a successful record of accomplishment.[174] The Australian Standard on Compliance Programs[175] has fixed some salient features of a genuine compliance program in companies. Among these, a 'top-driven' approach and the appointment of senior managerial staff are important. In the *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 case, Justice French detailed the criteria to mitigate corporate penalties upon the plea of maintaining a genuine responsibility system for a considerable time with good record. The criteria he mentioned are as follows:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power that it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.

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[173] The Australian Trade Practice Reporter (CCH 2001) in Ronald Francis and Anona Armstrong, 'Ethics as a Risk Management Strategy: The Australian Experience' (2003) 45(4) *Journal of Business Ethics* 375, 386.

[174] W. Dee, 'The Goldberg Test for Compliance: Opening the Key Performance indicators Debate' (1999) *Compliance Solutions*, *Melbourne*.

[175] AS 3606 of 1998.

7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidence by educational program and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the act in relation to the contravention.

The mitigation of penalties is gradually being used in different sectors as a strategy to push companies to develop their own internal responsibility systems. Some institutions are using this strategy to decide their organisational actions against their members.[176] The insertion of this strategy into corporate regulation would force companies to continuously develop their standards of self-regulation. The incentives for this strategy in weak economies would be high: it could help businesses save money, time, and reputation; minimise the risk of suffering severe punitive actions from the authorities; and help regulators force companies to have socially and environmentally responsible programs without detailing any direct legislation. The incentives of using this strategy would also be high for government agencies: by using this strategy, governments could save money and power to police and audit companies more frequently. For this meta-regulating strategy to function well in a weak economy, corporate law must acknowledge this strategy and preserve the right of the court to use a company's good record in a compliance program as one of the determining factors of punishment grading.

### *5.4.11 From Legal Provision to Stakeholder Engagement*

Provisions and initiatives that could relate stakeholders to corporate strategies are considered one of the best strategies to ensure that companies have the required systems to fulfil their social responsibilities.[177] Effective stakeholder engagement

[176] S.C. Jones, 'Creativity Helps Companies Cut Penalties' (1992) 14(50) *National Law Journal* 18, 21 in Ronald Francis and Anona Armstrong, 'Ethics as a Risk Management Strategy: The Australian Experience' (2003) 45(4) *Journal of Business Ethics* 375, 376.

[177] There are many definitions of stakeholders. According to Freeman, a stakeholder is a group or individual that can affect or be affected by the implementation of an organisation's objectives. Mitchell et al. include only those who are prominent and legitimate as stakeholders. Clarkson classifies stakeholders into two groups: primary stakeholders are those who are more related to the organisation, while the secondary group of stakeholders are those who are not directly related to a particular organisation but are indirectly related to company performance. For details, see Edward Freeman, *Strategic Management*: *A Stakeholder Approach* (1984); Ronald Mitchell, Brad Agle and Dona Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22(4) *Academy of Management Review* 853; Max B E Clarkson, 'A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20(1) *Academy of Management Review* 92.

in CG can minimise the role of policing by governmental agencies and the use of coercive modes in corporate regulation.

The Proper Prokasih Program of Indonesia exemplifies this notion. Under this program, regulators rank the performance of individual company using surveys, a pollution database of team reports, and independent audits. They also make their findings (based on a colour-coded system of business activities that have environmental impact) available to the public. The instruments of this program also allow stakeholders to question the companies whose performance is not satisfactory according to the standards of a particular community. Therefore, if a company is marked as black, blue, or red, that company usually needs to negotiate its pollution-control strategies with teams comprised of public agencies, environmental groups, and community representatives.

The basis of the stakeholder-based meta-regulating strategy is a combination of several socio-economic concepts: business operations need to be legitimate to ensure their free flow, while stakeholders are the most suitable source of gaining legitimacy for business operations in the society. Moreover, since the stakeholders are also the consumers, their collective initiatives have the ability to affect the business performance of an company. This notion is important to corporate regulation in the market-based economic framework. Neil Gunningham mentions in a recent study that examined community engagement in corporate regulation that stakeholder engagement, negative media attention, and increased likelihood of obtaining certificates from standardisation authorities are the major stimuli for the improved environmental performance of companies.[178] Vietnam has incorporated this approach by creating the Vietnam Business Council, a consultative and deliberative forum comprised of representatives from business, government, and civil society to coordinate community–corporate collaboration for social development.[179] It is committed to addressing issues related to the development of economic and social business policies or laws. It seeks corporation and community collaboration for social development, which is a means of widening the application of CSR for the community at large.[180] It also seeks to improve the process for obtaining input from both government and business in the reform process. This council was created under the leadership of four key organisations: the Vietnam Chamber of Commerce and Industries,[181] the Prime Minister's Research

[178] Neil Gunningham, *Beyond Compliance*: *Next Generation Environmental Regulation*, Regulation: Enforcement and Compliance (2002)50, 58.

[179] Roberto Gutiérrez and Audra Jones, 'Effects of Corporate Social Responsibility in Latin American Communities: A Comparison of Experiences' (2004), available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018680 at 27 March 2011; http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2220311 at 29 March 2011.

[180] Joaquin L Gonzalez, *Corporation-Community Collaboration for Social Development*: *An Overview of Trends*, *Challenges*, *and Lessons from Asia*, Corporate Social Responsibility in the Promotion of Social Development: Experiences from Asia and Latin America (2004).

[181] The Vietnam Chamber of Commerce and industry is a national organisation that assembles and represents companies and associations from all economic sectors across Vietnam. The Prime

Commission, the Central Institute of Economic Management, and the Association of Small Companies in Hanoi. The King Report on Governance for South Africa 2009 suggested that the company related legislation should have some provisions to encourage the directors for constructive stakeholder management strategies in companies.[182] The new Companies Act 2008 of this country mandates that certain companies have to constitute 'social and ethics committees' so that they can manage their social responsibility and stakeholder issues in a better way.[183]

Stakeholder pressure is more effective for insisting on socially responsible behaviour from medium-sized companies to small companies, since in most instances small companies perceive themselves as being 'beneath the radar' of community or environmental activists, and they usually face less significant threats from stakeholder groups. On the contrary, medium to large companies consider their social relationships seriously as they believe that the violation of their 'social license' could result in serious economic damage. For instance, without maintaining a reasonable relationship with the local stakeholders and society, they may be unable to obtain the necessary approvals for expansion of their plants or technological change. This relationship also matters to them as it is also the source of better relationships with their business constituencies.

Based on the strength of the stakeholders' role in society, the weak economies could use stakeholders to police and shape business activities, in addition to the traditional modes of regulation. Their laws and regulations could pave the way for a tacit bargain between stakeholders and business society; that is, if companies commit to reaching the expected performance target through their own plans, stakeholders will not interfere in corporate plans. Here, the role of the meta-regulating strategy in law is to provide legal sanctions for stakeholder interference in corporate strategies that touch the lives of stakeholders. With this legal footing, stakeholder involvement typically enables companies develop the most viable strategy for all concerned.

To sum up, there are various strategies suitable to create a meta-regulatory approach to corporate regulation. Among these, some are suitable for corporate regulation in general, some are suitable for large companies, while others are particularly suited to small and medium-sized companies. The strategies described above were chosen as appropriate to the companies operating in weak economies.

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Minister's Research Commission is the Prime Minister's think-tank on economic, social and administrative reforms, providing advice and proposals to the Prime Minister and leaders of the Vietnamese Government. The Central Institute of Economic Management is the research institute which helps the Vietnamese government devise its economic laws and policies.

[182] "King III- Shareholder management and ADR" (2012) http://www.deloitte.com/view/en_ZA/za/services/audit/deloitteaudit/kingiii/0514e1a6b1c53210VgnVCM100000ba42f00aRCRD.htm

[183] For a study on the perspective of such an inclusion into the Companies Act 2008 of South Africa, see Flores-Araoz, "Corporate social Responsibility in South Africa: More than a Nice Intention" (2012) http://www.consultancyafrica.com/index.php?; Hamann and Acutt, "How Should Civil Society (and the Government) Respond to Corporate Social Responsibility? A Critique of Business Motivations and the Potential for Partnership" (2003) 20 (2) *Development Southern Africa* 255.

The key advantage of these strategies is that they are able to generate a considerable gain or loss to business. Provisions that ensure the fast-tracking of licenses or permits, reduced fees, technical assistance, public recognition, penalty discounts under certain conditions, reduced burden from routine inspections and greater flexibility in self-regulation are not solely based on coercion and legal prescription. Rather, these strategies are based on economic rationales that are able to insist that companies go beyond compliance; these strategies are designed in such a way that they are economically able to offset the cost of going beyond compliance.[184]

A meta-regulating strategy is most effective when it is used in combination with other strategies, rather than a stand-alone approach. Therefore, the best outcome of using these strategies could be dependent on the affordability of different actors and the level of agreement of the different types of regulations, regulators and regulatees. Parker has identified four key components necessary for a successful implementation of meta-regulating strategies:

1. The companies engaging in meta-regulating strategies should adopt practices and processes that lead to the pursuit of 'beyond compliance' goals and include outcome-based requirements.
2. There should be independent verification of the functioning of a corporate management system by a third party and the result, or a summary of the results, should be available to other stakeholders.
3. On the part of the company, there should be an ongoing dialogue regarding the outcome of any meta-regulating strategy to ensure the credibility and legitimacy of the corporate process and to enable third party input and oversight.
4. Meta-regulating strategies should be tied with the possibility of regulatory intervention as a safety net that operates only when triggered by the failure of less intrusive processes on the part of corporate management.

The element of 'informational regulation' could be an effective meta-regulating strategy. It 'provides to affected stakeholders information on the operations of regulated entities, usually with the exception that such stakeholders will then exert pressure on those entities to comply with regulations in a manner which serves the interests of stakeholders.'[185] However, this strategy has not been described in this chapter as it does not seem suitable as a meta-regulating strategy for the weak economies like that of Bangladesh. The reason is simple: most of the companies in weak economies do not have expertise to generate quantitative reports and simultaneously, most of the corporate stakeholders in these economies do not have the ability to assess either quantitative reports or the qualitative, but hazy, information included in corporate reports.[186] Indeed, the types and level of efficiency of the strategies that generates meta-regulation vary with variation in

[184] Neil Gunningham, *Beyond Compliance*: *Next Generation Environmental Regulation*, Regulation: Enforcement and Compliance (2002) 50, 53.
[185] Ibid 55.
[186] Ibid 57.

circumstances and objectives. For instance, in a less developed country where the civil groups are less organised and the media has limited power, legal sanction or coercion or actions against corruption could be a necessary meta-regulating strategy.[187] On the other hand, for the development of meta-regulation in the strong economies, giving incentives to media groups would be a more suitable strategy than coercion or sanctions.

## 5.5 Conclusion

Meta-regulation is the fusion of different modes of regulation. It has significant implications for our understanding of regulation, requiring us to squarely face the analyses of the patterns of private ordering and state control in contemporary corporate regulation. This analysis shows that a state-centred conception of regulation is not sufficient in a pluralistic society and the decentred understanding of regulation that simply has an add-on to allow for corporate self-regulation is not capable of integrating social responsibility within corporate culture. At this gap, laws and policies with a meta-regulatory approach can indirectly relate social values to economic incentives or disincentives and influence CG to consider social responsibility issues as central to their self-regulation. The main characteristics of the legal provisions holding a meta-regulation approach for the development of CSR are that they insist that corporate management has appropriate internal policies based on the core principles of CSR; and that they do not directly compel companies to follow any specific plans. Rather, they allow corporate management to develop their own strategies according to their needs and strengths.

Incorporating a meta-regulation approach in law is a potential legal regulatory strategy that could be successfully deployed to develop a socially responsible corporate culture in companies in weak economies, so that companies are able to sustainably acquire social, environmental and ethical values in their self-regulatory mechanisms. The next chapter assesses the scope of incorporating a meta-regulation approach into three Bangladeshi laws relating to corporate regulation to enable the incorporation of the core principles of CSR into self-regulated corporate responsibility.

[187] For details, see Mia Mahmudur Rahim, 'Meta-regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Self-regulation in Least Developed Common Law Countries' (2011) 40(2) *Common Law World Review* 174.

# Chapter 6
# Legal Regulation of CSR in Weak Economies: The Case of Bangladesh

The aim of this chapter is to assess the extent to which laws relating to CSR in Bangladesh might contribute to including CSR as a central theme in self-regulated corporate responsibility. It explains why the major Bangladeshi laws relating to corporate regulation and responsibility do not possess the required features necessary to compel corporate self-regulators to contribute to developing a socially responsible corporate culture in this country. It argues that development of a socially responsible corporate culture in Bangladesh should not rely on either corporate self-regulation or authoritative modes of regulation. Rather, this should be based on a combination of *force majeure* and economic incentive-based legal strategies, as long as civil society, the media, NGOs, and the consumers of Bangladesh are able to systematically monitor corporate self-regulation.

This chapter is divided into three parts. The first describes the general characteristics of corporate attitudes in Bangladesh. To explain these attitudes, it provides three case studies related to three of the major industries of this country: the ready-made garment (RMG) industry, the ship-breaking industry and the leather goods and processing industry.[1] The second part assesses three laws related to

An initial version of this chapter was published. For details, see Mia Mahmudur Rahim, 'Legal Regulation of Corporate Social Responsibility: Evidence from Bangladesh' (2012) 41(2) *Common Law World Review* 97–133

[1] These industries are prominent for their impact, attitude and business strategies. Bangladesh's RMG industry is one of the largest exporters of garments in the world. It is the largest foreign currency earning industry in this country and engages a large proportion of the labour force of this country. Currently there are 4,673 registered companies/companys in this industry. Other than the registered companies, there are thousands of unregistered companies working as sub-contractors, and together, these registered and unregistered companies contribute the most companies/companys to all the industries in Bangladesh. The Bangladeshi ship-breaking industry is the largest of its kind in the world. Recently, its workplace environment, business strategies and pollution management have become important issues in the industrial policy and corporate regulation debates. The leather goods and processing industry is also prominent for its poor environmental management strategies and corporate attitudes. Together, approximately 150 companies from this industry are the largest water polluter in Bangladesh.

M.M. Rahim, *Legal Regulation of Corporate Social Responsibility*,
CSR, Sustainability, Ethics & Governance, DOI 10.1007/978-3-642-40400-9_6,

corporate regulation and responsibility, with the aim of clarifying their roles in the development of CSR.[2] First, it assesses the *Companies Act 1994* (Bangladesh); second, the *Bangladesh Labour Law 2006* (Bangladesh) and finally the *Environmental Conservation Act 1995* (Bangladesh).

The last part assesses the scope of incorporating a meta-regulating approach in the major corporate laws and regulations that relate to the development of CSR in Bangladesh. It is divided into four sections. In the first section, it provides a brief synopsis on the precepts of the meta-regulation approach developed in the previous chapter. Second, it assesses the scope for incorporating this approach into three Bangladeshi laws that relate to the development of the nexus between CSR principles and corporate regulation. Third, it assesses the scope for incorporating a meta-regulatory approach within the factors that impinge on CSR and corporate regulation. At this stage, it also assesses some other pieces of legislations and socio-legal policies associated with these three laws.

This chapter concludes that as a weak economy, the existing regulation strategies in Bangladesh is not suitable to raise social responsibility of companies and the incorporation of objects of meta-regulation into the major laws of Bangladesh would make it possible to insist that companies incorporate the core principles of CSR within their self-regulated responsibilities. It highlights the options for this incorporation into the driving factors associated with these laws, and concludes by presenting criteria to test the effectiveness of the incorporation of CSR principles in company regulatory strategies.

## 6.1 Corporate Attitudes to CSR in Bangladesh

The aim of this section is to provide background information on the general characteristics of corporate attitudes in Bangladesh and their impact on the development of companies' social responsibilities. Three case studies illustrating the corporate response to public policies will then be presented to further clarify this attitude. The first case relates to the recent turmoil in the RMG industry, the second relates to labour management in the ship-breaking industry, and the third case relates to the responsibilities of the leather goods and processing industry in the current regulatory deadlock in attempts to shift them to an industrial zone in order to save the environment.

[2] The rationale for the choice of these three laws is provided in the Methodology section of Chap. 1 of this book.

### 6.1.1 Bangladesh

With an area of 147,570 km$^2$, Bangladesh is a developing country in South Asia, surrounded by India, Myanmar, and the Bay of Bengal.[3] Bangladesh has a population of approximately 160 million people, and 75 % live in rural areas.[4] Urbanisation has, however, been rapid in the past few decades. In 2010, Bangladesh's gross domestic product (GDP) was 5.8 %, slightly higher than that of the previous year.[5] In 2008, 52.5 % of its GDP came from the service sector, as compared to 28.5 % from industry and 19.0 % from agriculture (World Bank 2009). According to an estimation by the Asian Development Bank, Bangladesh needs to increase its current investments to at least 30 % of GDP to attain the significantly higher economic growth needed to reduce its massive levels of poverty.

The country's corporate sector is developing. In 2006, it contained 1,327 registered companies, of which 327 were listed on its two stock markets.[6] The number of listed companies has since increased: there are 494 companies listed by the Dhaka Stock Exchange at 23 September 2011.[7] The general corporate environment of this country is characterised by a concentrated ownership structure, a poor regulatory framework, dependence on bank financing, and a lack of effective monitoring. Bangladesh has an abundant labour force, and Bangladeshi people working abroad are the main source of its foreign currency earnings.[8] Its RMG and ship-breaking industries are also internationally prominent; in April 2011, RMG sector exports totalled US $14,170 million,[9] while Bangladesh's ship-breaking industry is the largest in the world. The availability of cheap labour has been largely responsible for the success of these two industries.

[3] Central intelligence Agency, *the World Fact Book* (2009) Central intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/index.html at 1 April 2011.

[4] Bangladesh Bureau of Statistics, *Statistical Pocketbook of Bangladesh*, 2008, Dhaka.

[5] Asian Development Bank, 'Bangladesh Quarterly Economic Update' (Asian Development Bank, 2010) 8, http://www.adb.org/Documents/Economic_Updates/BAN/2010/QEU-Sep-2010.pdf at 6 February 2011; in four of the last 6 years Bangladesh's economy has grown at around 6 %. For details, see GDP, Savings and investment, Ministry of Finance at http://www.mof.gov.bd/en/budget/er/2009/c2.pdf at 12 February 2011.

[6] Javed Siddiqui, 'Development of Corporate Governance Regulations: The Case of an Emerging Economy' (2010) 91(2) *Journal of Business Ethics* 253, 257.

[7] Details are available at http://dsebd.org/latest_share_price_scroll1.php at 23 September 2011.

[8] In June 2011, this sector earned $1,000 million. For details, visit Bangladesh Bank, Economic Data at http://www.bangladesh-bank.org/econdata/openpdf.php?i=6 at 2 July 2011.

[9] Bangladesh Bank, Monthly Balance of Payments http://www.bangladesh-bank.org/econdata/bop?txtPeriod=1 at 2 July 2011.

### 6.1.2 Corporate Attitudes in Bangladesh

CG in this country has been under reform since the first stock market debacle in 1996. The World Bank has led this reformation, since it considers corporate regulation a development goal.[10] Along with other international financial agencies, the World Bank encouraged Bangladesh to adopt internationally accepted accounting and CG practices as a 'powerful tool to battle against poverty'. These tools have been created and tested in developed economies, and hence, as Shahzad Uddin and Jamal Choudhury reported, they have ignored the socio-economic conditions of weak economies such as that of Bangladesh.[11]

Nonetheless, for various reasons, the corporate sector and the regulatory agencies of Bangladesh do not object to integrating CSR into corporate regulations. Indeed, they have little reason to deny this inclusion in their governance, as they need to develop business relations with global buyers, retailers and brands to hold their position as a supplier in the global market. Moreover, Bangladesh's heavy dependence on external funds has left the government no option but to open up its traditional format of corporate regulation. For these reasons, this reform does not face strong opposition. However, its outputs have raised a vital question in the corporate regulation framework: in a weak economy, is corporate regulation capable of upholding the merits of CSR in the absence of its associated non-legal drivers?[12]

### 6.1.3 Social Responsibility in Corporate Attitudes

In Bangladesh, the usual corporate attitude toward social responsibility is as follows: '[W]e are complying with all the rules and regulations, but we do not need to disclose.'[13] The corporate dictum conveys the message of 'Trust us, and

[10] World Bank, 'The Future of Research on Corporate Governance in Developing and Emerging Markets' (World Bank, 2002) in Shahzad Uddin and Jamal Choudhury, 'Rationality, Traditionalism and the State of Corporate Governance Mechanisms: Illustrations from a Less-Developed Country' (2008) 21(7) *Accounting, Auditing & Accountability Journal* 1026. For details on this reform from a developing country's perspective, see Randhal Morck, Daniel Wolfenzon and Bernard Yeung, 'Corporate Governance, Economic Entrenchment, and Growth' (2005) 43 (3) *Journal of Economic Literature* 655; Ajit Singh and Ann Zammit, 'Corporate Governance, Crony Capitalism and Economic Crises: Should the US Business Model Replace the Asian Way of "Doing Business"?' (2006) 14(4) *Corporate Governance: An International Review* 220.

[11] Uddin and Choudhury, above.

[12] Non-legal drivers are those actors and factors that can create an impact on the internal regulation of the regulatees. The type and availability of such drivers varies with the societies and regulates concerned. Some general non-legal drivers are the media, civil groups, NGOs, coalitions of corporations, quality of education, consumerism etc.

[13] Ataur Rahman Belal, *Corporate Social Responsibility Reporting in Developing Countries: The Case of Bangladesh* (2008) 38.

everything will be alright.' However, this corporate outlook has not been reflected in corporate management strategies. A survey-based study conducted by the Centre for Policy Dialogue has revealed the gap between corporate promises and reality. This study found that companies do not even fully understand the idea of CG.[14] This survey was conducted in 2003, and among the respondents, 50 were company executives, 70 were employees of different companies, and 32 were members of the general public. Two other studies on this topic have been conducted more recently; however, the 2003 study is the most authentic, as the other two studies were conducted by groups with vested interests. Of these two studies, one was conducted in 2006 by the Bangladesh Institute of Labour Studies (BILS), a known advocate for the labourers/industrial workers in this country. The other was conducted in 2007 by the Bangladesh Garments Manufacturer and Export Association (BGMEA), the official forum for the owners of RMG-producing companies in Bangladesh. In terms of employment issues (i.e., working terms and conditions), the information gathered by the BILS (based on a survey of workers and trade union leaders) varies a great deal from that gathered by the BGMEA. The BGMEA report shows a satisfactory level of performance in certain areas of employment.[15] On the other hand, the BILS survey findings show an unsatisfactory level of performance.[16] Given the information available in these survey reports, it is difficult to assess the reality of the situation.

Nonetheless, the survey conducted by the Centre for Policy Dialogue in 2003 found that while more than 60 % of the respondent companies did not have well-articulated policies to deal with workers' rights-related issues, none of the responding companies had a director assigned to address this issue.[17] On the issues of sustainable development and human rights, only 11.1 % and 4.4 % of companies,

[14] M J H Jabed and Kazi Mahmudur Rahman, 'Corporate Responsibility in Bangladesh: Where Do We Stand' (The Centre for Policy Dialogue, 2003) 3.

[15] BGMEA, *Summary Report on Compliance* (2008). The BGMEA's report is based on its Compliance Monitoring Cell's quarterly investigation into compliance situations. The BGMEA's quarterly survey covers employment conditions such as minimum wages, issue of identity cards and appointment letters, provisions of leave including weekly, casual, sickness and maternity, festivity leave and benefits for maternity leave, overtime payments, fire safety arrangements, and formation of participatory committees. For a scholarly contribution that supports this, see Jabbar Jenefar, *Ready Made Garment Sector in Bangladesh*: *A Study from the Employers' Perspective*, RMG industry, Post MFA regime and Decent Work: The Bangladesh Perspective (2005) 55, 63.

[16] In this regard, an international Labor organziation (ILO) study found that though a worker cannot work for more than 8 h per day, 50 % of Bangladeshi workers work for at least 12 h per day, and 40 % of workers work 12–15 h per day. For details, see ILO, *Social Compliance and Decent Work*: *Bangladesh Perspective* (2007) 16. Another study by the Nari Unnayan Kendar supports the findings of the BILS survey. According to the NUK survey, 90 % of the export production zone (EPZ) factories and 30 % of factories with a contract with their buyers maintain the working hours required by the law. Factories working with buyers' agents and subcontracting factories do not maintain legal working hours. Masuda Khatun Shefali (Executive Director, Nari Unnayan Kendar), 'Social Compliance in Textile and Garment Sector in Bangladesh' (speech delivered at the Ministry of Commerce Textile Cell, Dhaka, 25 July 2005).

[17] Jabed and Rahman, above n 14, 5.

respectively, had dedicated people available at the management level.[18] By reviewing the existing corporate policies and strategies related to employees, this study showed that these policies were not available for part-time or casual workers.[19] To investigate this issue in detail, the researchers asked corporate managers whether they audited the implementation of their labour policies; however, all managers refrained from making any detailed comments on this matter. It was found that 67 % of the respondent companies had formal polices to ensure clean, healthy, and safe working environments, but 26 % of them did not have procedures involving senior management in the implementation of this policy.[20]

A notable point in this finding is that the responses of the three groups were concurrent. While 62.2 % of corporate respondents claimed that they had policies to uphold the principles of human rights, only 16.7 % of respondents from the general public agreed that CG had policies to uphold their workers' fundamental rights. On the other hand, while 71.1 % of corporate managers claimed that they paid employees for their extra work hours, more than 90 % of the workers and members of the general public complained that corporate managers underpaid them in these circumstances.[21] This situation has not greatly improved. A recent study showed that only 12.5 % and 24 % of the manufacturing companies studied had made written commitments to human rights and environmental protection, respectively.[22] Regarding their ethical obligations, only 16.1 % of these companies had written anti-corruption policies.[23]

Corporate liability in the recent turmoil in the RMG industry suggests that the governance of this industry does not consider their workers' livelihoods as their social responsibility.[24] Rather, they consider workers as assets and hence their

[18] Ibid.

[19] Ibid 4.

[20] Ibid.

[21] Ibid 5.

[22] Malik Asghar Naeem and Richard Welford, 'A Comparative Study of Corporate Social Responsibility in Bangladesh and Pakistan' (2009) 16(2) *Corporate Social Responsibility and Environmental Management* 108, 113, 115.

[23] Ibid 119.

[24] The RMG industry is the only multi-billion-dollar manufacturing and export industry in Bangladesh, and is one of the chief RMG exporters worldwide. In April 2011, this industry exported US $14.17 billion worth of garments. This industry is the most flourishing trade in this country: from 0.001 % of the country's total export earnings in 1976, it has increased its share to approximately 79 %. Over the last two decades it has grown by approximately 20 % per annum on average. For details, see Bangladesh Bank, Monthly Balance of Payments at http://www.bangladesh-bank.org/econdata/bop.php?txtPeriod=1 2 July 2011; 'Comparative Statement on Exports of RMG and Total Exports of Bangladesh, Bangladesh Garments Manufacturing and Exporters Association', http://www.bgmea.com.bd/home/pages/Tradeinformation at 11 February 2011; 'BGMEA At a Glance', http://www.bgmea.com.bd/home/pages/aboutus at 11 February 2011; 'Facts and Figures of Knitwear Sector', Bangladesh Knitwear Manufacturers and Exporters Association, http://www.bkmea.com/facts_figures.php at 11 February 2011; Mohammed Ziaul

strategies related to their workers are solely based on cost-benefit analysis designed to generate quick returns.[25] Along with the extremely low wages, the dire working conditions have caused the recent unrest in this industry: according to the Alternative Movement for Resource and Freedom Society, 72 incidents of this unrest took place in the first 6 months of 2010, and resulted in injuries to at least 988 workers as well as the arrest of 45 RMG workers.[26] This unrest has increased since it was found that one-fourth of RMG factories are not complying with mandatory wage standards.[27] It is worth mentioning that there were very few NGOs and civil groups interested in this unrest. For instance, the Bangladesh Rural Advancement Committee, one of the world's largest NGOs and the Grameen Bank, a Nobel laureate, did not raise their voices on these issues.

Indeed, industrial employers in Bangladesh tend to treat labour as a fixed cost and do not want to index wages to productivity.[28] This trend gives instant gains, but over the long term may lead to frequent labour agitation, as has occurred in many state-owned companies.[29] Though it is perhaps premature to draw conclusions regarding this situation, one could make the observation that this disaster may

Haider, 'Competitiveness of the Bangladesh Ready-Made Garment industry in Major International Markets' (2007) 3(1) *Asia-Pacific Trade and Investment Review* 3, 6.

[25] Mohammed Ghulam Hussain, 'Compliance in RMG Industry of Bangladesh' in *Social Compliance and Decent Work: The Bangladesh Perspective: Papers and Proceedings of the National Tripartite Meeting on Social Compliance in the RMG Sector* (2007) 1, 33; Pratima Paul Majumder and Anwara Begum, 'The Gender Impact of Growth of Export Oriented Manufacturing in Bangladesh: Case Study: Ready-Made Garment Industry Bangladesh' (Bangladesh Institute of Development Studies, 2000) 37; in 1994, a Bangladeshi worker was paid only US $0.11 for each shirt made, Indian and Pakistani workers were paid US $0.26 and US $0.43 respectively. For details, see Salma Chaudhuri Zohir, *Intra-Household Relations and Social Dynamics among Garment Workers in Dhaka City* (2000).

[26] Clean Clothes Campaign, *Bangladesh: Factory Workers are Entitled to Realistic Living Wage* (29 July 2010) http://www.fibre2fashion.com/news/apparel-garment-association-news/newsdetails.aspx?news_id=89200 at 28 December 201; Matiur Rahman, 'Grievance Against the Wage Role, Agitation in Chittagong: Three Killed', *The Prothom Alo* (Dhaka), 13 December 2010; M. Hossain, 'RMG Workers' Minimum Wage Fixation: BGMEA Wants a Balance Between Need, Affordability', *The Financial Express* (Dhaka), 15 July 2010.

[27] Clean Clothes Campaign, *Bangladesh: Factory Workers are Entitled to Realistic Living Wage* (29 July 2010) at 11 January 2011.

[28] Fahmida Khatun et al., *Gender and Trade Liberalisation in Bangladesh: The Case of the Ready-made Garments* (2007) 39.

[29] A study revealed that for the same investment and the same time period, a compliant RMG company generates more turnover than a non-compliant company. For details, see Lal Mohan Baral, 'Comparative Study of Compliant and Non-Compliant RMG Factories in Bangladesh' 10 (2) *International Journal of Engineering and Technology* 129, http://www.ijens.org/108602-7272%20IJET-IJENS.pdf at 4 January 2011; Monjur Ahmed, 'Message to Walmart: Low Wages Hampers the Credibility of the top RMG Exporting Country', *The Prothom Alo* (Dhaka), 21 July 2010; Shahiduzzaman Khan, 'Trade Unionism and Minimum Wages issue in Apparel Industry', *The Financial Express* (Dhaka), 4 July 2010.

have been avoided if the ethos of CSR in CG was genuinely present.[30] Bangladesh's company owners and directors primarily consider their immediate profits and do not consider moral or ethical issues to be an important aspect in corporate management. Islam and Deegan have illustrated this attitude, describing a notice[31] circulated to the members of BGMEA stating that they should not use child labour in their factories due to the 'potentially negative economic effects of being identified as using child labour, and the impact this had on the survival of the industry.'[32] They could also have highlighted the fact that children are not meant to work for pay, but they did not think about the issue from this perspective.

Another glaring example of this attitude among Bangladesh's business owners is the poor environmental and labour management strategies in the ship-breaking yards.[33] Ship-breaking is the process of dismantling an obsolete vessel for scrapping or disposal. This activity has not yet been officially declared as an industry in Bangladesh, even though this country is one of the biggest ship-breakers in the world. Since 1974, this country has had approximately 50 ship-breaking yards that have dismantled about 52 % of the end-of-life vessels above 200 dead weight tonnage in the world.[34]

Ship-breaking activities in these yards present both opportunities and challenges; they provide Bangladesh's main source of iron, but are also a source of environmental pollution in the coastal zone and an example of severe labour exploitation. These yards supply 25-30 % of this country's total yearly demand for steel.[35] Between June 2007 and June 2008, these yards demolished one million tons of steel; Bangladesh currently does not have the ability to buy this much steel on the international market.[36] Simultaneously, the ship-breaking yards discharged thousands of tons of toxic substances such as asbestos, lead, waste oil, polychlorinated biphenyls and so on into the beach soil and the seawater, which in turn has seriously damaged the coastal environment and its biodiversity.[37]

[30] Muhammad Azizul Islam and Craig Deegan, 'Motivations for an Organisation Within a Developing Country to Report Social Responsibility Information: Evidence from Bangladesh' (2008) 21(6) *Accounting, Auditing and Accountability Journal* 850, 854.

[31] Circular No. BGA/ssd/2005/128, Dec. 10, 2005.

[32] Islam and Deegan, above n 30, 854.

[33] Mohammad M Maruf Hossain and Mohammad Mahmudul Islam, 'Ship-Breaking Activities and its Impact on the Coastal Zone of Chittagong, Bangladesh: towards Sustainable Management' (Young Power in Social Action, 2006) 5; M Shadad Hossain et al., 'Occupational Health Hazards of Ship Scrapping Workers at Chittagong Coastal Zone, Bangladesh' (2008) 35(2) *Chiang Mai Journal of Science* 370, 371.

[34] In this country, Chittagong Steel House first scrapped a Greek ship, the 'M D Alpine' in 1964. The introduction of commercial ship-breaking in this country began in 1974 when Karnafully Metal Works Ltd. bought a damaged Pakistani ship, the 'Al Abbas'. See, Hossain and Islam, above 5; M Shahad Hossain et al., above.

[35] Sitakundu AFP, 'Scrap Ships Could Shore up Demand for Cheap Steel', *The Daily Star* (Dhaka), 19 August 2008.

[36] Ibid.

[37] For details, see Hossain and Islam, above n 33.

Ship-breaking activities are labour intensive. Bangladesh's ship-breaking yards provide at least 30,000 jobs directly.[38] The booming activity in the port cities of this country is mainly due to the laissez-faire climate of this long and flat intertidal coastal zone, the abundant supply of cheap labour and the lax environmental regulations. Based on these factors, this industry has dramatically expanded in Bangladesh, at the cost of environmental degradation and severe labour exploitation.

Over the last 30 years, numerous workers have died or been disabled in these yards; it has been estimated that approximately 7,000 workers have died and a total of 10,000 have been injured to date.[39] This situation is not improving. Rather, the number of fatal accidents and injuries continues to increase unabated to this day; in only 8 months of 2008, ten workers were killed in Bangladeshi ship-breaking yards.[40] Considering this scenario, Saiful Karim has termed these yards 'graveyards' for workers.[41] Recently, the failure of these yards' managers to ensure a safe working environment has sparked serious questions regarding the industry's overall governance. Bangladeshi society and media groups have frequently termed this attitude 'profit mongering' and 'irresponsible' governance, and have brought the issue before the highest court of the country. The High Court Division of the Supreme Court of Bangladesh has given detailed directions to the regulatory authority to ensure environmental conservation in this coastal zone and labour rights in the yards.[42] The Court has also halted any further operations in these

[38] Ruben Dao, 'Childbreaking Yards: Child Labour in the Ship Recycling Industry in Bangladesh' (2008), http://www.fidh.org/IMG/pdf/bgukreport.pdf at 6 January 2011.

[39] Md. Saiful Karim, 'Violation of Labour Rights in the Ship-Breaking Yards of Bangladesh: Legal Norms and Reality' (2009) 25(4) *International Journal of Comparative Labour Law and Industrial Relations* 379, 380.

[40] Dao, above n 38, 5. There are no official statistics regarding human casualties in these yards. The figures relating to these casualties are dependent on regular local media releases complied by local NGOs. According to these sources, 500 people died over the last 15 years, with 200 deaths occurring in the last 5 years. In both cases, these deaths amount to between 1,000–1,200 over the last three decades, assuming that the annual loss of life of ship-breaking workers is more or less the same each year. However, these figures do not cover the deaths of workers who die as a result of chronic diseases due to exposure to toxic substances. For details, Erdem Vardar et al., 'End of Life Ships: The Human Cost of Breaking Ships' (December 2005). This report can be found at http://www/fidh.org/IMG/pdf/shipbreaking2005a.pdf at 14 November 2011.

[41] Karim, above n 39, 380.

[42] The apex court of this country has given these directions while deciding some writ petitions related with the conservation of costal environment and labour rights in ship braking yards. For instance, in writ petition Writ Petition No. 2911 of 2003 (Bangladesh Environmental Lawyers Association—BELA v. Bangladesh). In its petition Bangladesh Environmental Lawyers Association named as respondents the Ministry of Shipping, the Ministry of Industries and Commerce, the Ministry of Labour and Employment, the Ministry of Environment and Forest, the Department of Environment, the Department of Fire Service and Civil Defence, the Chief Inspector of Factories and Establishments, the Department of Explosives, the Collector of Customs, the Mercantile Marine Department, and the Bangladesh Ship Breakers Association. The BELA sought to compel the respondents to "(i) ensure that ship breaking operation by the owners of ship breaking yards are

yards several times[43]; consequently, the re-rolling mills and the workers depending upon these yards are at a crossroads. The Bangladeshi government is attempting to develop a policy with suitable strategies to regulate this industry.[44]

The lack of corporate conscience with respect to CSR and the need for suitable strategies in laws related to corporate regulation have been amplified with the

undertaken only after obtaining certificate of environmental clearance as required under section 12 of the *Environment Conservation Act 1995* and the *Environment Conservation Rule 1997* and in strict compliance thereof to check pollution of coastal/marine ecosystem caused by the disposal of hazardous ship wastes; (ii) ensure that ship breaking operation by the owners of ship breaking yards are undertaken only after obtaining gas free certificate . . .; (iii) ensure that import of ship for breaking purposes is regulated in line with the requirements of the Basel Convention, 1989; [and] (iv) adopt detailed and appropriate safety and labour welfare measures." The petitioner also sought an order requiring the government authorities "to submit periodic reports of compliance stating the progress achieved in implementing the time-bound directions of [the] Court and/or require any other person, body or authority to monitor such progress and report." Upon hearing the petition, the High Court Division of the Bangladesh Supreme Court "issued a Rule Nisi calling upon the respondents to show cause why they should not be directed to ensure that ship breaking operation is undertaken only after obtaining certificate of environmental clearance as required under section 12 of the *Environment Conservation Act 1995* and on adopting detailed and appropriate safety and labour welfare measures as required under the *Factories Act 1965*. The Court has also asked the respondents to show cause as to why ship breaking shall not be undertaken only after obtaining gas free certificate from the custom Department to prevent dangerous explosion and protect the workers/labourers from the risk of death, grievous heart [sic] and injuries. In this regard the respondents would also show cause why import of ship for breaking purposes shall not be regulated in line with the requirements of the Basel Convention, 1989." Amongst the other writ petitions where the court has provided direction, Writ Petition No. 3916 of 2006 (Bangladesh Environmental Lawyers Association v. Bangladesh), Writ Petition No. 3916 of 2006 (*Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others,* judgment delivered on 6 Jul. 2006, unreported), Bangladesh Environmental Lawyers Association v. Ministry of Shipping (*MT Enterprise* Case, order dated Mar. 17, 2009), Writ Petition No. 2048 of 1997 (*Bangladesh Ship Breakers Association and Another v. The Commissioner of Customs and other*, order dated 10 Apr. 1997, unreported) are prominent. For some references of some other writ petitions related with these issues, visit Bangladesh Environmental Lawyers Association, *List of Selected Public Interest Litigation* at http://www.belabangla.org/html/pil.htm 29 January 2010.

[43] In Bangladesh, like "other common law countries with written constitution[s], neither the [c]onstitution nor the judiciary is supreme, and the Supreme Court is the final interpreter of law. The function of the judiciary includes the enhancement of rule of law, to promote the fundamental rights, and to administer the law impartially between citizen and state and between citizen and citizen. The judiciary can mould principles of law and give them a sense of coherence and direction." Jona Razzaque, '*Access to Environmental Justice: Role of the Judiciary in* Bangladesh' (2000) 4 *Bangladesh Journal of Law* 1, 1.

[44] It would be worth mentioning the suggestion of Sawyer. He writes: 'These developing nations [India, Bangladesh, and Pakistan] must improve conditions themselves because the shipbreakers are in their jurisdictions. If the shipbreakers do not improve their standards, developed nations will increase their own shipbreaking industries and nations with minimally higher standards, like China, will steal away market share. In order to sustain their shipbreaking industry, these three developing nations must do together what they have been unwilling or unable to do alone, achieve the goal of environmentally sound management of the shipbreaking industry'. For details, see John F. Sawyer, *Shipbreaking and the North-South Debate*: *Economic Development or Environmental and Labor Catastrophe*? (2002) 20 Pennsylvania State International Law Review, 535, 562.

recent deadlock in the relocation of the leather goods and processing industry in an effort to stop massive environmental pollution. The leather-processing industry is one of the oldest industries in Bangladesh. It is mainly located on the bank of Buriganga, one of the main rivers at the heart of the capital city of this country. Bangladesh has more than 200 leather goods and processing companies, and at least 178 of these are located in 50 acres of land on the bank of the Buriganga.[45] They process hides into finished leather using acids and chromium and produce roughly 20 million square metres of leather and leather goods each year. They account for an average of 1.5 % of the total exports of this country over the last 3 years.[46]

The most important feature of this industry is the fact that it is the main water polluter in this country. None of the companies within this industry has an effluent plant and most of their 30,000 workers work in chemical-filled environments without the required protective equipment. It is notoriously the most significant water polluter in Bangladesh: the leather industry alone pollutes 26 % of the total river water of Bangladesh.[47] People living near these tanneries are 'exposed to higher morbidity and mortality compared to people living 2–3 km away.'[48] A recent report shows that the leather goods and processing plants of different companies (particularly on the bank of the Buriganga) have dumped approximately 3,000 t of liquid waste in the Buriganga. In effect, they have turned this river into a toxic dump by indiscriminately discharging their waste into it.[49]

Given these circumstances, the government has decided to shift these manufacturing units to a 200-acre industrial zone near the capital city. Bangladesh Small and Cottage Industries Corporation (BSCIC) has developed this zone for these units at a cost of US $66.42 million, and has almost finalised the process for establishing a central effluent plant in this zone, at a cost of US $61.42 million. Nonetheless, this relocation is at a crossroads. In 2003, the High Court Division finally provided a guideline, which is mandatory for all residents of this country according to the constitution of Bangladesh, to facilitate the relocation. However,

[45] Satadal Sarkar, 'When Will the Waste Flow in the Buriganga Stop?', *the Prothom Alo* (Dhaka), 10 November 2010.

[46] Product-Wise and Region-Wise exports, the Ministry of Commerce of the Government of Bangladesh, http://www.epb.gov.bd/?NoParameter&theme=default&Script=exporttrend#Region at 14 February 2011.

[47] Mohammad Golam Rasul, Faisal Islam and Mohammad Masud Kamal Khan, 'Environmental Pollution, Generated from Process industries in Bangladesh' (2006) 28(1) *International Journal of Environment and Pollution* 144.

[48] A K Enamul Haque, *Human Health and Human Welfare Costs of Environmental Pollution from the Tanning Industry in Dhaka—An Environmental Impact Study* (North South University, 1997) in Moinul Islam Sharif and Khandaker Mainuddin, 'Country Case Study on Environmental Requirements for Leather and Footwear Export from Bangladesh' (Bangladesh Centre for Advanced Studies, 2003) 10.

[49] Sharif and Mainuddin, above 9; for details and the source of this information, see Sarkar, above n 42.

the industry owners and government authorities have failed to begin the shift.[50] The Court has repeatedly provided more time, but the relocation has not advanced.[51] This regulatory deadlock syndrome can be traced back to the notification of August 7 1986, when the Ministry of Local Government, Rural Development and Cooperatives identified 903 industrial units of 14 sectors as polluters and directed the Department of Environment, the Ministry of Environment and Forests and the Ministry of Industries to ensure appropriate pollution control measures were undertaken by these industries within 3 years. The notification also obliged these authorities to ensure that no new industry could be established without pollution-fighting devices. Paradoxically, between 1986 and 1994, they failed to ensure that these industries undertook any suitable pollution control measures.

In 1994, the Bangladesh Environmental Lawyers Association (BELA) filed a writ petition before the High Court Division of the Supreme Court of Bangladesh seeking relief against the indiscriminate pollution of air, water, soil and the environment by 903 industrial units. These units included tanneries; paper, pulp and sugar mills; distilleries; as well as the iron and steel, fertilizer, insecticide and pesticide, chemical, cement, pharmaceutical, textile, rubber and plastic, tyre and tube and jute industries (*Dr. Mohiuddin Farooque v. Bangladesh & Others*, 1994).[52] It was pled that though the air and water of the major rivers of this country were being severely affected by these 903 units, the government organisations responsible had failed to tackle this damage to the ecological system. The petitioner, moreover, informed the Court that the number of polluting units had risen to 1,176 according to the list prepared by the Department of Environment.

In the first instance, the court issued a Rule Nisi to the respondents, including the Ministry of Local Government, Rural Development and Cooperatives, Ministry of Environment and Forest, Ministry of Industries and Department of Environment to show cause as to why they should not be directed to implement the decisions of the Government. After hearing all the parties, the Rule was made absolute. On July 15 2001, the court directed the Director General of the Department of Environment to implement the decision to mitigate the pollution by the original 903 units within 6 months from the date of the judgment. The court directed to 'report to this Court after 6 months by furnishing concerned affidavit showing that compliance of this Order of this Court.'[53] To ensure the implementation of the Court's directions, it was further held that 'it will be imperative on the part of the Director General to

[50] Anisur Rahman Khan, 'Tanneries Relocation Move Hits Roadblock', *The Independent* (Dhaka), 21 July 2010.

[51] Ibid; Sarkar, above n 42.

[52] *Dr. Mohiuddin Farooque v. Bangladesh & Others*, Writ Petition No. 891/1994 (Industrial Pollution Case).

[53] Ibid. A synopsis of this case is available at Bangladesh Environmental Lawyers association, 'List of Selected Public interest Litigation (PIL) of BELA', http://www.belabangla.org/pdf/pil.pdf at 22 October 2011.

take penal action against such department for persons who are responsible for not implementing the letter of the Environment Conservation Act, 1995.'[54]

This petition is still pending before the court. According to Article 112 of the constitution of Bangladesh, all executive and judicial agencies are obliged to carry out the directions of the High Court Division of the Supreme Court of Bangladesh. Unfortunately, these respondents have not been able to carry out the court's directions; they have sought more time from the court, and the court has allowed them time for the ends of justice.

Of these 903 industrial units, most are leather goods and processing companies. Of the 178 tanneries situated on the bank of Buriganga, 158 have been red-listed by the Department of Environment.[55] None of these companies has any kind of effluent plant, which has virtually transformed the Buriganga River into a pool of septic water.[56] According to the environmental laws of this country, this situation is intolerable. BELA brought this issue before the High Court Division of the Supreme Court of Bangladesh and claimed directions for relocating these units from the bank of the Buriganga (*BELA v. Bangladesh and Others*, 2003).[57] The Court issued a Rule Nisi on March 3, 2003, and called upon the seven government agencies and two tannery associations as respondents. Namely, the court summoned the Secretaries of the Ministries of Industries and Commerce and Environment and Forest; the Director General and the Director of the Department of Environment; a member of the Planning Commission; and the chairmen of RAJUK (the capital city development authority), BSCIC and Tanners Association. They were asked to show cause as to why they should not be directed to relocate the tanneries from the city to a suitable location as contemplated in the Master Plan prepared under the *Town Improvement Act 1953* (Bangladesh) within 18 months from the date of judgment. The Court directed them to ensure that adequate pollution-fighting devices were developed in the new location or site as required under the *Environment Conservation Act 1995* (Bangladesh) and the *Factories Act 1965* (Bangladesh). They were also directed to notify the Court regarding the process of the relocation of the tanneries and submit a report in this regard to the Court within 6 months. This petition is still pending before the court.

While failing to treat these tanneries according to the provisions mentioned in the Act and other related laws, the government is trying to relocate them to a well-planned leather industry zone near the city; an industrial zone has been developed with adequate industrial plots for them. Many of them have obtained their plots in the new industrial zone where the construction of an effluent plant is underway. Nonetheless, the tanneries are not interested in moving from the bank of Buriganga. They maintain that they will not consider relocating until the government (a) pays

[54] Ibid.

[55] Sharif and Mainuddin, above n 45, 9.

[56] Khan, above n 47.

[57] *Bangladesh Environmental Lawyers Association* (*BELA*) *v. Bangladesh and Others*, Writ Petition No. 1430 of 2003.

them US $155.57 million as compensation, (b) discharges them from the debt they owe to the commercial banks, (c) provides them loans at a low interest rate and (d) ensures that the government will bear the cost of maintaining the effluent plant. In 2006, a committee, formed by the secretaries of the government ministries concerned, suggested the government pay US $33.60 million to the tanneries as compensation.[58] Both parties are standing their ground with respect to their remaining demands. Meanwhile, the Buriganga has been, and still is, becoming more and more toxic, and the government is losing its investment in preparing a modern leather industrial zone. At this time, the respondents have extended their time to carry out the Court's directions, and nobody knows when they will reach a concrete solution.

In summary, there is a lack of interest in fulfilling corporate social responsibilities and creating suitable regulatory strategies to compel companies to respond to public policy goals. The situations described above in three of Bangladesh's industries would be less exasperating if corporate society did not use the vulnerability of a highly labour-intensive and poor country as their source of profit. Apart from these vulnerabilities, the lack of adequate personal obligation on the part of the business owners and managers, as well as the lack of suitable strategies to provide responsible roles for all stakeholders to implement the law are important causes of the current situation. This exploitation of the current situation demonstrates that relying solely on corporate societies to incorporate CSR principles in their self-regulatory mechanisms is not a meaningful way to develop a socially responsible corporate culture in this country. This situation could be somewhat improved if the laws relating to corporate regulation could have recurring features that obligated CG to endorse CSR principles in their business management system. The next section of this chapter assesses three major Bangladeshi laws relating to corporate regulation with the aim of examining their suitability as a means to oblige companies to accept their social responsibilities.

## 6.2 Legal Regulation of Self-Regulated CSR in Bangladesh

There is no specific legislation in this country to assist the regulation of CSR, and this issue has been drawn to the attention of Bangladesh's policy-makers only recently. General regulatory strategies and policies related to corporate regulation deal with CSR in corporate regulation in this country. Given this fact, this section assesses three Bangladeshi laws—the *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Law 2006* (Bangladesh), and the *Environmental Conservation Act 1995* (Bangladesh), closely related to corporate self-regulation and CSR issues, and their roles in developing social responsibility in corporate self-regulation.

[58] Abul Hasnat and Suvongkor Kormokar, 'Leather Industry Passing a Critical Situation', *The Prothom Alo* 5 November 2011.

Moreover, it assesses the provisions and enforcement mechanisms mentioned in these laws, with the aim of explaining the features and strategies of these laws required to facilitate the development of a social responsibility culture in companies.

### *6.2.1 The Companies Act 1994 (Bangladesh)*

The *Companies Act 1994* (Bangladesh) (hereinafter referred to as the Act) defines the rights and liabilities of business owners or boards of corporate directors. It also defines a company's CG attributes, ownership structure, and characteristics.[59] In addition, it describes the provisions required to establish a company as well as the rights and liabilities of company, its shareholders, its directors, and managers. However, it does not contain any provisions regarding the social responsibilities of directors or their management strategies. According to this Act, company directors are liable for most of the company's financial operations, although they are rarely personally liable for any damages to the stakeholders (other than the stockholders) due to their irresponsible business strategies.[60] This Act does not provide any specific duty to corporate management for fulfilling social responsibility. Moreover, though this Act contains some bearings that could help develop this responsibility, these are either incomplete or ambiguous. For instance, on the one hand, it imposes certain liabilities on corporate directors for supplying incorrect, insufficient, or misleading information in the company prospectus.[61] On the other hand, the statutory defence provided by this Act has weakened these liabilities to compensate the investors (potential stockholders who are also stakeholders in a company).[62] Furthermore, it does not provide adequate judicial observation related to its provisions to promote the social responsibility of directors.

There are two important ways of measuring the performance of social responsibility of companies. The first of these is through the evaluation of the reports published by companies on their social performance and the quality of information

[59] Section 104 of Schedule 1 of the *Companies Act 1994* (Bangladesh).

[60] In this Act, most of the rights and liabilities of corporate directors are mentioned in Sections 90–115. In certain other sections of this Act, there are more rights and liabilities of directors. However, none of these sections has specifically dealt with the liabilities of corporate directors for the social responsibilities of companies.

[61] Section 139 of the *Companies Act 1994* (Bangladesh) is related to this issue. It states: '(1) If any prospectus is issued in contravention of [S]ections 136 or 137, the company and every person, who is knowingly a party to the issues thereof, shall be punishable with fine which may extend to 5,000 taka.'

[62] Section 146 of the *Companies Act 1994* (Bangladesh) denotes that directors stating false information in their company's prospectus will not be liable if they can prove that the 'statement was immaterial or that he had reasonable ground to believe, and did, up to the time of the issue of the prospectus, believe the statement was true.' Moreover, the due diligence provision of this Act is not clearly defined. These issues will be explained in the next section of this chapter.

in these reports.[63] The second way is through the evaluation of the internal mechanisms of companies to respond to the needs of society, the environment, and social values.[64] There are some other ways for this measurement. For instance, 'external social audit' promoted by Charles Medawar in 1980 in the UK.[65] This way helps powerful organizations to prepare an independent social account with a view to enhance corporate transperance and accountability. Nevertheless, the provisions of the Act related to these issues and the suitability of these provisions to attain the objectives of the regulator are worthy of discussion, as this will help to evaluate the strength of a legislation to make companies socially responsible. The discussion below highlights the notion of 'corporate disclosure' and the provisions related to it in this Act, then the notion of 'due diligence' as well as the provisions related to it in this Act.

### Company Reports on Social Performance

Typically, company reports on social and environmental issues are compilations of information relating to a company's activities, aspirations, and public image with regard to environmental, community, employee, and consumer issues. These reports may contain other, more detailed matters such as energy usage, equal opportunities, fair trade, CG, and the like.[66] The medium of these corporate reports varies (e.g., through data contained within the company's annual report or through advertising, focus groups, employee councils, booklets, school classes, etc.).[67]

Although the Act requires companies to publish annual reports as an indirect initiative to present corporate strategies to the corporate constituencies, it does not

[63] Heledd Jenkins and Natalia Yakovleva, 'Corporate Social Responsibility in the Mining industry: Exploring Trends in Social and Environmental Disclosure' (2006) 14(3–4) *Journal of Cleaner Production* 271; Francesco Perrini, 'Building a European Portrait of Corporate Social Responsibility Reporting' (2005) 23(6) *European Management Journal* 611; MaryAnn Reynolds and Kristi Yuthas, 'Moral Discourse and Corporate Social Responsibility Reporting' (2008) 78(1) *Journal of Business Ethics* 47.

[64] Andrew Griffin, *New Strategies for Reputation Management*: *Gaining Control of Issues*, *Crises and Corporate Social Responsibility* (2008); Mette Morsing and Majken Schultz, 'Corporate Social Responsibility Communication: Stakeholder Information, Response and Involvement Strategies' (2006) 15(4) *Business Ethics*: *a European Review* 323; William S Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43(3) *Journal of Business Ethics* 253; M L Barnett, 'Stakeholder influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility' (2007) 32(3) *Academy of Management Review Archive* 794.

[65] Charles Medawar, 'Corporate Social Audit' (1976) 1(4) *Accounting*, *Organizations and Society* 389–394.

[66] Rob Gray et al., 'Social and Environmental Disclosure and Corporate Characteristics: A Research Note and Extension' (2001) 28(3–4) *Journal of Business Finance and Accounting* 327, 329.

[67] For details see D Zeghal and S A Ahmed, 'Comparison of Social Responsibility information Disclosure Media Used by Canadian Firms' (1990) 3(1) *Accounting*, *Auditing and Accountability Journal* 38.

suggest CG direct corporate management to include their non-financial performance in these reports. To date, and only recently, one requirement concerning environmental disclosure on the expenditure on energy has been made mandatory for corporate bodies.[68] Nonetheless, laws and regulatory bodies hold this 'discloser philosophy following the path of developed markets without any commensurate amendments to the laws pertinent to the prospectus.'[69] Hence, though this Act, the *Securities and Exchange Ordinance 1969* (Bangladesh) and the tort laws of this country have some provisions to deal with the consequences of disclosing 'untrue statements',[70] most of them are flawed in multiple ways and do not provide the necessary aid to develop a 'liability regime' for corporate mistrust.

For instance, Section 145 of the Act imposes liabilities on directors for disclosing untrue statements, but it does not mention the liabilities of other people such as lawyers, auditors, issue managers, underwriters and so on who are also involved with the preparation of the prospectus. These professional groups are considered to be self-regulated, sources of normative pressure on CG, and regulators. However, despite having such powers, these groups are not truly institutionalised and are rarely disciplined in this country. For instance, cases of members of the Institute for Chartered Accountants of Bangladesh being punished for violating its bylaws are rare. In the 38 years since its inception, the Institute for Chartered Accountants of Bangladesh has suspended only one audit firm, for 3 years in 2002.[71] Failure to penalise all people involved in disclosing untrue statements implies that not all those who commit offences may be subjected to legal imperatives. This may preclude investors from seeking remedies under this Act.

The defence embedded in Section 145(2) favours the corporate directors and officials who exploit the ignorance and innocence of investors.[72] According to

[68] Under Schedule X1, and Part II of the *Companies Act 1994* and under Schedule, Part II of the *Securities and Exchange Rules 1987*, the total amount spent on the use of energy is to be shown in notes in the financial statements under a separate heading of expenditure. For details, see Probal Dutta and Sudipta Bose, 'Web-Based Corporate Reporting in Bangladesh: an Exploratory Study' (2007) 35(6) *Cost and Management* 29, 37.

[69] Sheikh Solaiman, 'Investor Protection and Civil Liabilities for Defective Prospectuses: Bangladeshi Laws Compared with their Equivalents in India and Malaysia' (2005) 25 *Journal of Law and Commerce* 509, 538; Belal, above n 13, 36; Moazzem Hossain, 'Some CA Firms Fail to Perform Duties in Capital Market', *The Financial Express* (Dhaka), 22 March 2011.

[70] According to Section 143(1) of the *Companies Act 1994* (Bangladesh), 'untrue statement' includes statements that are misleading in the form and context in which they are included, and any omission from a prospectus which is calculated to mislead.

[71] Siddiqui, above n 6, 271. For a comprehensive report on the institute of Chartered Accountants of Bangladesh's role in regulating the accounting auditing profession, see Bangladesh Company institute, 'A Comparative Analysis of Corporate Governance in South Asia: Charting a Roadmap for Bangladesh' (Bangladesh Company institute, 2003) 24, 27.

[72] AIMS, 'AIMS Ditches Modern Food', *Weekly Market Review* (Dhaka), 10 July 2000, 2. Details available at http://www.aims-bangladesh.com/2000/75WeeklyJuly-10-2000.pdfcan; M S Rahman, 'AIMS Backs Down on Pledge to Underwrite Modern Food: Audited Accounts Differ from Prospectus Statement', *The Daily Star* (Dhaka) 3 July 2000, in Solaiman, above n 65, 24.

Section 145(2)(a), a prospective director can withdraw his or her consent given in the prospectus before its issue and can plead his or her defence on this withdrawal in any legal suit. However, this withdrawal does not need to be declared in any public notice, at least according to this Act. AIMS of Bangladesh Limited withdrew its commitment to underwrite the floatation of Modern Food Products Limited after the publication of their prospectus. This had a serious impact on prospective investors, as many of them had been prepared to invest in Modern Food Products Limited due to the commitment of AIMS Bangladesh Limited. AIMS withdrew its commitment after determining that Modern Food Products had concealed the true financial status of its issuers: while the bad loans liability and litigation against the issuers of Modern Food Products was US $0.20 million, only US $0.07 million had been declared in the prospectus.[73] Currently, this Act can define the extent of disclosing information for developing corporate disclosure practice and can report the influence of CG attributes, ownership structure and company characteristics on the disclosure decision. In this respect, in 2005, the Centre for Corporate Governance of Kenya issued a draft Corporate Governance Guidelines on Reporting and Disclosures to improve the quality of reporting and governance of companies. These guidelines emphasised non-financial disclosures such as CSR performance.[74]

Section 102 of this Act bars a company from indemnifying its director or officer or agent against any liability which, by virtue of any rule of law, would otherwise attach to him/her in respect to any negligence, default, breach of duty or breach of trust of which s/he may be guilty. This Act, however, does not provide a clear-cut list of these negligences or breaches of trust. It describes some duties—closely related to CSR—of company directors and officers, but these are mostly related to the day-to-day financial management of the company, and failure to fulfil these duties does not render them liable for damage due to 'mistrust'.

### The Due Diligence Defence of Corporate Managers

In its broad sense, due diligence refers to the level of judgment, care, prudence, determination, and activity that a person would reasonably be expected to exert under a given circumstance. In corporate law, it denotes that corporate directors must act in good faith, in the best interest of the company, and with appropriate diligence and care.[75] In the internal regulation of a company, the operational stage refers to a process of acquiring objective and reliable information prior to a specific event or decision at the corporate director and senior management levels. Hence, it

[73] Rahman, above.

[74] Dulacha G Barako, Phil Hancock and H Y Izan, 'Factors Influencing Voluntary Corporate Disclosure by Kenyan Companies' (2006) 14(2) *Corporate Governance: An International Review* 107, 109.

[75] Harvey Pitt, 'The Changing Standards by Which Directors Will Be Judged' (2005) 79(1) *St. John's Law Review* 1, 2.

is a systematic research effort used to gather the critical facts and descriptive information most relevant to making an informed decision on a matter of importance.[76]

Due diligence is important in circumstances in which social responsibility performance by companies is poor but the social and environmental damage caused by companies is high. In these circumstances, while companies can be taken through the judicial process for alleged actions that have harmed society or the environment, companies or their directors usually raise the plea of due diligence to defend themselves against such allegations. Therefore, if the provisions relating to due diligence are not clear and well-defined in legislation, this allows corporate directors to depend on due diligence to escape their liabilities for the damage occurring due to their faulty decisions and irresponsible actions. The following discussion focuses on the provisions of the Act.

In most cases, the provisions in this Act are either flexible or incomplete in the issues of due diligence and expert defence of the directors in any legal suit. For instance, in a legal suit over false or inadequate information in a prospectus, a director or official (the defendant) does not need to prove his or her enquiries into the authenticity of the information s/he disclosed publicly. Since a defendants' due diligence plea does not need to be coupled with a certain degree of competence, the defendant is in a suitable position to make a due diligence plea in order to escape their legal liabilities.[77] Hence, the legal provisions that suggest they focus on their responsibilities become less effective, as they also enjoy opportunities to avoid these legal directives by using the ambiguities and incoherence within the existing legal arrangements. Just like these flaws, it does not emphasise the defendants' (the corporate directors' or managers') reasonable enquiries regarding the competence of the experts, while the defendant argues for his or her innocence on the point that he or she has presented the exact statement provided by the competent expert. This type of legal emphasis is absent, for instance, in India and Malaysia, but they have established the judicial view that relying on the due diligence defence is dependent upon the degree of reasonable investigation carried out by the defendant.[78] In Bangladesh, no case law is available regarding this ambiguity.

Indeed, the *Companies Act 1994* (Bangladesh) resembles the ineffective market-based CG system in Bangladesh. Although broadly categorised as a common-law

[76] For more discussion of this term, see Richard R Cipra, 'There is No Substitute for Due Diligence' (2004) 8 *Los Angeles Business Journal*; Eric Hallinan, 'Due Diligence' (2004) *Reeves Journal*; Reference for Business, 'Due Diligence', http://www.referencesforbusiness.com/management/De-Ele/Due-Diligence.html at 23 July 2011.

[77] Solaiman, above n 65, 525.

[78] For judicial observations on due diligence in Malaysia, see *Globallink Container Line v. Bhumiputra Commerce Bank* (Suit No. S7-22-1502-2003, Civil Division of the High Court of Malaya at Kuala Lumpur); for judicial observations on due diligence of corporate directors in India, see Soma Dhawal, 'Directors Liability' (2011), http://www.legalservicesIndia.com/articles/dl.htm at 22 October 2011; V Karthyaeni, 'Directors' Care and Duty in Case of Breach' (2011), http://www.goforthelaw.com/articles/fromlawstu/article49.htm.

country, economic negligence during the colonial rule of more than two centuries has significantly deterred the development of an institutional corporate regulatory system in this country.[79] Moreover, for the last 50 years, it has experienced different CG models with the changes in political models during this time. Currently, the CG of this country is a hybrid of the outsider-dominated market-based system (as in the USA and UK) and the insider-dominated bank-based system (as in the control and relationship model mostly practised in Germany and Japan).[80] Of these two systems, the CG of this country is dominated by direct control measures. Furthermore, in the absence of a developed capital market,[81] an efficient stock market[82] and a strong legal framework, corporate ownership in Bangladesh is generally concentrated.[83] For instance, this Act allows sponsor directors to retain a maximum of 50 % of total issued capital. Farooque et al. mention that on average, five shareholders hold more than 50 % of ordinary shares of a business firm in this country, and in most cases, these five major shareholders are family members; families have extensive influence in the corporate decision-making process.[84]

[79] Shahzad Uddin and Trevor Hopper, 'A Bangladesh Soap Opera: Privatisation, Accounting, and Regimes of Control in a Less Developed Country' (2001) 26(7–8) *Accounting, Organisations and Society* 643; Comparative Analysis of Management Accounting Practices in Sri Lanka, Bangladesh and Ghana (2004), Paper presented at the Asia and Pacific Interdisciplinary Research in Accounting Conference, Singapore in Uddin and Choudhury, above n 37, 30.

[80] Omar Al Farooque et al., 'Corporate Governance in Bangladesh: Link Between Ownership and Financial Performance' (2007) 15(6) *Corporate Governance: An International Review* 1453, 1455; Rwegasira provided a detailed account of this hybrid CG, see K Rwegasira, 'Corporate Governance in Emerging Capital Markets: Whither Africa?' (2000) 8(3) *Corporate Governance: An International Review of Financial Studies* 258; for a discussion on the suitability of US-styled stockholder model in weak economies, see Troy Paredes, 'Corporate Governance and Economic Development' (2005) Spring *Regulation* 34; Regarding CG in South Africa, see Andrew West, 'Theorising Corporate Governance in South Africa' (2006) 68 *Journal of Business Ethics* 233, for India, see A M Mukherjee-Reed, 'Corporate Governance Reforms in India' (2002) 37 *Journal of Business Ethics* 249.

[81] The capital market of this country is still in a primitive stage; in 2006, this market accumulated only 7.5 % of this country's GDP. Hence, the banking sector supplies most business capital; excessive liquidity and competition drive this sector to pass credit leniently. For details, see the Bangladesh Bank at http://www.bangladesh-bank.org/ and the Securities and Exchange Commission of Bangladesh at http://www.secbd.org/ at 5 February 2011.

[82] Bangladesh has two stock exchanges, the Dhaka Stock Exchange and the Chittagong Stock Exchange. These Stock Exchanges, though established in 1954 and 1995, have not flourished in comparison with neighbouring exchanges. In 2006, the average number of listed companies for the four Indian stock exchanges was 1,175 and 237 in Sri Lanka, the average for the Bangladeshi exchanges is 347, as of 5 February 2011. Amongst the 500 listed securities on the Dhaka Stock Exchange (until 16 November 2011), only 271 are tradable. For details, see http://www.secbd.org/ and http://www.secbd.org/ at 5 February 2011.

[83] Siddiqui, above n 6, 256; Asian Development Bank, 'Bangladesh Quarterly Economic Update' (Asian Development Bank, 2010), http://www.adb.org/documents/economicupdates/ban/default.asp at 5 February 2011.

[84] O Imam and M Malik, 'Firm Performance and Corporate Governance Through Ownership Structure: Evidence from Bangladesh Stock Market' (2007) 3(4) *International Review of Business*

After analysing 219 companies from 12 different industries listed on the Dhaka Stock Exchange, Imam and Malik found that the top three shareholders of these companies held an average of 32.33 % of shares of their companies.[85]

This Act is designed to act alongside other market drivers, such as strong capital markets, the stock exchange, regulatory agencies, organised civil groups, efficient NGOs and the media. However, in the absence of these enabling market drivers for corporate regulation, CG in this country typically suits the needs of the company owners. Due to the lack of features of this Act for enabling direct interference in the social liability issues of corporate directors, its provisions (which could encourage management to incorporate the ethos of CSR into their core policies) remain ineffective. This Act, for instance, requires that listed companies hold regular annual general meetings, but most of them do not fulfil this statutory requirement.[86] The annual general meetings are 'characterised by domination by small groups of people, poor attendance and discussion of trivial matters.'[87] The core of the governance mechanisms in this country relies on ownership-based monitoring and control, particularly in the absence of market-based monitoring and control measures.[88] The Bangladesh Enterprise Institute developed the Code of Corporate Governance for Bangladesh to fill the above-mentioned drawbacks of this Act, but neither of Bangladesh's two stock exchanges have yet adopted this code for their listed companies.[89]

*Research Papers* 88, 92; this scenario is prevalent in Asian CG structure. For instance, 68, 72, 67, 62, 56, and 48 % of listed companies in Hong Kong, Indonesia, Malaysia, Thailand, Singapore and South Korea respectively are controlled by family. For details, Richard Welford, 'Corporate Governance and Corporate Social Responsibility: Issues for Asia' (2007) 14(1) *Corporate Social Responsibility and Environmental Management* 42, 43, 48; Farooque et al., above n 76, 1455.

[85] Ibid.

[86] Section 86 of the *Companies Act 1994* (Bangladesh). Uddin and Choudhury, above n 10, 1037; Bangladesh Company Institute, 'A Comparative Analysis of Corporate Governance in South Asia: Charting a Roadmap for Bangladesh' (Bangladesh Company Institute, 2003) 33; M Reaz and T Arun, 'Corporate Governance in Developing Economies: Perspective from the Banking Sector in Bangladesh' (2006) 7(1) *Journal of Banking Regulation* 94, 101.

[87] Siddiqui, above n 6, 257; Uddin and Choudhury, above n 10, 1034.

[88] Farooque et al., above n 76, 1455; for details of the influence of ownership structure on corporate disclosure practices, see Gerald Chau and Sidney Gray, 'Ownership Structure and Corporate Voluntary Disclosure in Hong Kong and Singapore' (2002) 37(2) *International Journal of Accounting* 247; Simon Ho and Shun Wong, 'A Study of the Relationship Between Corporate Governance Structures and the Extent of Voluntary Disclosure' (2001) 10(2) *Journal of International Accounting, Auditing and Taxation* 139.

[89] This code is the sole comprehensive set of guidelines for CG and resembles the Cadbury Code or the Combined Code in the UK. The Cadbury Code has been adopted by the London Exchange Commission.

### 6.2.2 *The Bangladesh Labour Law 2006 (Bangladesh)*

Bangladesh has an abundant labour force, and Bangladeshi workers employed abroad are the main source of its foreign currency earnings.[90] The history of labour regulations in Bangladesh reveals poor adherence to labour standards in industrial production. Although this country has a comprehensive set of labour regulations that reflects its ratification of all the core labour standards of the International Labor Organization (ILO),[91] labourers in its manufacturing industries experience numerous violations of workers' rights, supposedly guaranteed in the *Bangladesh Labour Law 2006* (Bangladesh) (hereinafter referred to as the Code). This Code is the major legislation for labour regulation of this country. Before its enactment in 2006, there were 44 labour-related laws covering four broad categories of labour issues: (a) wages and employment, (b) trade union and industrial disputes, (c) the work environment and occupational health, and (d) labour administration and industrial relations. This law has repealed almost all of these laws and consolidated the matters of all these issues within its ambit.[92]

This Code has been acknowledged by its stakeholders for widely covering labour-related issues. It has been praised for its approach toward the latest developments in labour-related international practices. The Bangladesh-German Development Cooperation conducted a comparative analysis of this law along with seven internationally recognised general codes of conduct related to labour issues in business industries. These were the SA8000 of Social Accountability International, Base Code of the Ethical Trading Initiative, Fair Labour Association, Fair Wear Foundation, Business Social Compliance Initiative, Worldwide Responsible Apparel Production, and Joint Initiative on Corporate Accountability and Workers' Rights. In this analysis, they found that if the manufacturing units of a company of this country were 100 % compliant with this law, this would address 85 % of the requirements of the general codes of conduct mentioned earlier.[93] Their study concludes that this Code, along with other supporting legislation, provides a comprehensive guideline for companies (e.g., for the RMG manufacturing units of a company) to meet the compliance demands of the brands and retailers that they supply.

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[90] In April 2010, this sector earned US $922.16 million. For details, visit Bangladesh Bank, Economic Data at http://www.bangladesh-bank.org/econdata/openpdf.php?i=6 at 2 July 2011.

[91] Some ILO Conventions that Bangladesh has ratified are: Convention No. 29 on no forced labour, No. 87 on the freedom of association, No. 98 on the right to organise; No. 100 on equal remuneration, No. 105 on the abolition of forced labour, No. 111 on no discrimination in employment and occupation; No. 182 on the abolition of the worst forms of child labour. This country has not ratified Convention 138 on respect for the legal minimum age.

[92] Islam, above n 40, 385.

[93] Ammena Chowdhury and Hanna Denecke, 'A Comparative Analysis Between the Bangladesh Labour Law 2006 and 7 General Codes of Conduct' (German Technical Cooperation 2007).

The Code has covered some drawbacks of the earlier labour laws relating to this industry.[94] For instance, in the *Factory Act 1961* (Bangladesh), there was no clear mention of appointment letters or identification cards for workers. Before this Code, only the *Newspaper Employees* (*Conditions of Services*) *Act 1974* (Bangladesh) and the *Road Transport Workers Ordinance 1983* (Bangladesh) had this provision. This Code requires that employers provide this letter and card to all their workers. Earlier, maternity leave only lasted 12 weeks; now, it has been increased to 16 weeks. Since 2006, every female worker has been entitled to claim this leave if she has been working for the factory for more than 1 month, whereas it was 6 months according to the earlier law. Under the previous labour laws, there was no benefit for sudden death, but this Code requires owners to pay an amount equivalent to 30 days' wages or gratuity, whichever is higher, to the nominee of the deceased or his or her dependents. This benefit is in addition to the benefits the worker would have received as retirement benefits. It has also made provisions for the termination of a contract by either of the parties. Now, an employer has to provide at least 120 days notice or payment of wages for 120 days.[95] In both cases, the employer has to pay compensation equivalent to 30 days wages for each year a permanent worker has been working for him or her.[96] This Code requires that all monthly payments be paid within 7 days of the last date of the wage period, irrespective of the number of workers in a factory.[97] Workers are now entitled to 10 days casual and 14 days sick leave in a year with full benefits.[98] Under earlier laws, sick leave was allowed; however, workers only received half their average wages. While the previous law was unclear regarding the calculation of overtime, this Code clearly states that overtime is to be calculated based on basic salary plus the dearness allowance, if any.[99]

Section 195 of this Code has included four unfair labour practices on the part of the employer in addition to those mentioned in the earlier law. The enactment of this Code entitled every industrial worker to 1 day of leave for every 18 days of work, whereas it was 1 day for every 22 working days under the earlier law.[100] Regarding the formation of an association, this Code has added supplementary provisions. Now, one cannot become a member of a company trade union without being employed by that particular company. Trade unions can be formed by the

[94] Before the enactment of this Code in 2006, there were about 44 labour laws, dealing with four broad categories of labour issues: (a) wages and employment; (b) trade union and industrial disputes; (c) working environment and occupational health and (d) labour administration and industrial relations. This law has repealed almost all of these laws and consolidated the matters of all these four groups of issues within its ambit.

[95] Section 26 of the *Bangladesh Labour Law 2006* (Bangladesh).

[96] Ibid.

[97] Section 123 of the *Bangladesh Labour Law 2006* (Bangladesh). According to Section 122, a fixed period for regular pay cannot be more than 30 days.

[98] Section 115, 116 of the *Bangladesh Labour Law 2006* (Bangladesh).

[99] Section 108 of the *Bangladesh Labour Law 2006* (Bangladesh).

[100] Section 117 of the *Bangladesh Labour Law 2006* (Bangladesh).

workers of a cluster of units even if the number of workers in a similar company is less than 20.[101]

Nevertheless, the Code has many drawbacks that hinder its prospects of becoming a major source for developing a systematic and accountable labour administration through corporate self-regulation. It is proscriptive in nature, and it does not seem to focus on the development of a socially responsible working environment. Moreover, due to the lack of suitable strategies provided in it, government agencies and employer groups do not appear to prioritise enforcing most of its provisions. Hence, violations of workers' rights (e.g., long working hours, forced overtime, underpayment, discrimination, etc.) are common in Bangladesh's manufacturing industries.[102]

There are several possible reasons for this, the most important of which are the failure of the Code to administer important labour regulation issues, the weakness of its enforcement agencies, and the lack of suitable strategies to encourage business owners and factory management to comply with its provisions. Moreover, the labour standards and occupational health hazards in the ship-breaking yards, the disputes between the RMG factory owners and workers, and the anti-unionism mindset of the owners and employers suggests that having good legislation may be insufficient to establish a solid platform for systematic labour administration. A set of clear and timely provisions in law is required to oblige both the factory owners and their labourers to develop a socially responsible corporate culture. The following section assesses this Code in the context of the four social principles developed by the ILO for ensuring 'decent work'.

### 'Decent Work' and Its Principles

The ILO defines decent work as 'the aspirations of people in their working lives.'[103] According to this concept, labourers' working lives should meet certain standards and be free of discrimination.[104] It provides the general standard of 'work': work

[101] Section 183(2) of the *Bangladesh Labour Law 2006* (Bangladesh).

[102] Hamida Hossain, Roushan Jahan and Salma Sobhan, 'Industrialisation and Women Workers in Bangladesh: From Home-based Work to the Factories' (1988); *Daughters in Industry*, *Kuala Lumpur*: *Asian and Pacific Development Center* 107 in Noeleen Heyzer, *Daughters in Industry*: *Work*, *Skills*, *and Consciousness of Women Workers in Asia* (1988); Repon Chawdhury and Sayeed Ahmed, *Social and Economic Costs of Post-MFA Phase Out*: *Workers*' *Perspective*, in RMG Industry, Post MFA Regime and Decent Work: The Bangladesh Perspective (2005); Kevin Kolben, 'Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights and Development Law Journal* 79; Salma Chudhury Zohir, 'Emerging Issues in the RMG Sector of Bangladesh: Insights from an Company Survey' (Bangladesh institute of Development Studies and OXFAM, 2003).

[103] The ILO, Decent Work, http://www.ilo.org/global/topics/decent-work/lang–en/index.htm at 23 June 2011.

[104] Dharam Ghai, 'Decent Work: Concept and Indicators' (2003) 142(2) *International Labour Review* 113.

should be productive and deliver a fair income, security in the workplace, and social protection for families; it should provide prospects for personal development and social integration; it should allow people the freedom to express their concerns, to organise and to participate in the decisions that affect their lives.[105] This notion implies that a movement toward decent work requires an integrated approach to labour regulation: Labour policy instruments need to be socially responsible and consistent with macroeconomic measures and the investment climate.[106]

This study, however, focuses on the socio-legal notion of decent work. This notion can be considered as consisting of four basic themes: access to employment, promotion of rights at work, social protection, and social dialogue.[107] In this concept, employment is considered not only as the means of sustaining life and meeting basic human needs, but also an activity that affirms individual identity and personal satisfaction.[108] It is the way in which individuals strive to develop their potential and use their skills to contribute to the common wellbeing. This concept considers rights in the workplace to be a basic need for the development of a sustainable work environment.[109] It requires that every worker enjoys certain rights irrespective of the type of their employment (i.e., whether in organised labour, in the formal/informal economy, or at home, in the community or in the voluntary sector). It refers to social protection as a means to protect labourers in general from vulnerabilities and contingencies that compel them to leave their work.[110] It considers social dialogue an important process required for the development of a sustainable and labour-friendly environment at the industry level. This process helps employers and employees to minimise their differences, defend their rights, and ensure social equity in this environment.

Based on these basic themes, the notion of decent work has four interrelated principles that serve as strategic objectives to develop decent work in corporate self-regulation. These are as follows:

[105] The ILO considers 'decent work' as an agenda for development. The incorporation of this concept in labour regulation was tested between 2002 and 2005 under the Decent Work Pilot Program in eight economies, including Bangladesh. For details of the ILO's views on this agenda, see http://www.ilo.org/global/topics/decent-work/lang-en/index.htm at 23 June 2011.

[106] For a detailed study on how the role of state in corporate regulation might explore the connection between development within companies and the labour market, see Christopher Arup, *innovation*, *Policy*, *and Law*: *Australia and the International High Technology Economy* (1993); Christopher Arup, 'Labour Law as Regulation: Promises and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229, 243.

[107] ILO, 'Decent Work, Report of the Director General' (International Labour Organization, 1999)2.

[108] Gray S Fields, 'Decent Work and Development Policies' (2003) 142(2) *International Labour Review* 239, 240.

[109] Ibid.

[110] Ibid.

1. Employment is not simply a way to access any job, but rather a way to access a full-time job that is acceptable, productive, and freely chosen. Hence, promotion of employment should be one of the central objectives of economic and social policy-making.
2. Fundamental rights at work must be safeguarded.
3. The need to recognise that the rights of workers rights must be emphasised in industrial policy-making.
4. Social dialogue to forge fair compromises and consensuses (on otherwise conflicting issues of distribution and working conditions) must be promoted.[111]

Recently, this notion has been considered as a strategy for sustainable development and poverty reduction goals in different economies. The Millennium Declaration calls for global cooperation on strategies for decent and productive work.[112] The Non-Aligned Movement echoed this need and affirmed that '[a] decent standard of living, adequate nutrition, health care, education, and decent work for all are common goals for both the South and the North.'[113] This concept upholds non-discrimination and individual dignity and social equity in the workplace, which are, as the United Nations Development Program (UNDP) Human Development Report of 2000 identified, necessary to ensure freedom.[114] The UNDP has included decent work in the new human development dashboard; now, it is a vital component to measure this development.[115] Pope John Paul II supported a call for a global coalition for decent work.[116]

The social notion of decent work relates to CSR from two perspectives. The broader perspective is related to the labour welfare of developing economies in general, while the narrower perspective is related to the possible strategy for incorporating the underlying principles of decent work into the main source of labour regulation in these economies. The following section assesses the Code to explain the degree to which it is based on the narrower perspective of this notion.

[111] Muhammed Muqtada, 'Promotion of Employment and Decent Work in Bangladesh: Macroeconomic and Labour Policy Considerations' (Employment Strategy Department, ILO, 2003)2.

[112] Article 20 of the United Nations Millennium Declaration http://www.un.org/millennium/declaration/ares 552e.htm at 1 July 2011.

[113] ILO, *Reducing the Decent Work Deficit*: *A Global Challenge* (2001)12.

[114] UNDP, 'Human Development Report 2000' (UNDP, 2000)1 http://hdr.undp.org/en/media/HDR_2000_EN.pdf at 1 July 2011.

[115] Ibid.

[116] Tasneem Siddiqui, 'International Labour Migration from Bangladesh: A Decent Work Perspective' (Policy Integration Department, National Policy Group, ILO, 2005)2.

### The Notion of Employment

While the objective of employment refers to a commitment to achieve 'full, productive, and freely chosen employment',[117] this Code is a subset of corporate law in which employees are considered as assets or appendages of the corporation. The core theme on which it is constructed does not consider that a person's employment is about livelihood, identity, and citizenship, and that it is not akin to the holding of shares or the patronage of a client.[118] It does not clearly convey to employers that labour is not a commodity. Simultaneously, it implies that all wages and hiring or firing should be strictly institutionally mandated, without any relationship to productivity.[119]

In addition, it treats labourers as indistinguishable from other stakeholders (e.g., shareholders and customers). Moreover, its strategies do not acknowledge that the corporations are regulatory actors in the setting of terms and conditions of employment and workplace cultures. Hence, its provisions are mostly prescriptive and merely address the roles and interests of the labourers at the central position in the regulatory scheme. A survey conducted by the Fair Labour Association in 2005 found that the malpractices in the clothing factories' labour administration resembled bonded labour. It showed that in this industry, rates of forced labour, harassment and abuse, child labour, and unawareness of codes of conduct were the highest in the world.[120] Another study showed that close to three-quarters of the employed workforce—whether in agriculture, industry, or services—worked for more than the standard 40 h per week in 1999–2000.[121] After the enactment of the Code, this situation has not changed; a recent survey-based study found that it is common for workers in the RMG sector to work 72 h per week with only 2 days off per month, which is considerably worse than in China and other regions.[122] These findings imply that underpaid labourers remain the 'working poor' in this country.

Without the recurrent features in the Code to change the notion of corporate strategies and the traditional mindsets of corporate owners and managers, it continues to face challenges in its implementation phase. For instance, it is worth mentioning the hearing on the labour rights status in this country's garments and frozen food industries held on October 4 2007 by the United States Trade Representative on a petition lodged by the American Federation of Labor and Congress of

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[117] Employment Policy Convention 1964 (ILO Convention No. 122).

[118] Jill Murray, 'Corporate Social Responsibility: An Overview of Principles and Practices' (2004) 123.

[119] Muqtada, above n 107, 31.

[120] Fair Labour association (FLA), *2006 Annual Public Report*, http://www.fairlabor.org/2007report/ in Gunseli Berik and Yana van der Meulen Rodgers, 'The Debate on Labour Standards and International Trade: Lessons from Cambodia and Bangladesh' (Department of Economics of the University of Utah, 2006)39.

[121] Labour Force Survey 200, in Muqtada, above n 107, 24.

[122] Berik and Rodgers, above n 116, 22.

Industrial Organization.[123] This organization included four allegations in the petition: the violation of domestic and internationally recognised workers' rights in Export Processing Zones (EPZs) in Bangladesh; the violation of domestic labour laws and internationally recognised labour standards in the RMG industries; similar violations in shrimp and fish processing industries; and repressive and violent actions taken by government security forces against trade unionists, workers, and labour rights groups.[124]

This Code should revisit its provisions that impose undue restrictions on the right to strike; allow government authorities to appeal against court verdicts in labour-related cases; empower employers to terminate employees without cause; prevent labourers from engaging in trade union activities in the establishment; and prohibit having trade union offices and industrial actions within 200 m of the relevant establishment's premises.[125] The provisions that undermine unionism in EPZs should also be revisited to uphold the freedom of association and the right to bargain collectively for labour welfare in industries. To this end, the *EPZ Workers' Associations and Industrial Relations Act* (Bangladesh) was passed in 2004, but it has been seriously criticised for its various provisions that severely restrict the right of EPZ workers to organise themselves.[126] For instance, Section 18(2) of this Act

[123] See 'Ministry of Fisheries and Live Stock of Government of the Peoples' Republic of Bangladesh', a handout answering allegations in the petition (manually collected).

[124] See, US Department of State, *United States Trade Representative Considers Withdrawing Bangladesh's Trade Preference* (13 April 2004, updated 30 July 2008) http://www.america.gov/st/washfile-english/2004/April/20040413173337ndyblehs0.3866541.html at 29 March 2011; in the last two decades, at least 13 major incidents occurred in garment factories, which claimed the lives of more than 1,300 workers. Among them, two recent major incidents, the fire in the KTS garment factory in Chittagong and the collapse of the nine-storey Spectrum Garment Building, have caused widespread shock and showed the state of vulnerable situations in the workplace. See New Steps, *Workers' Rights and Working Conditions in the Export-oriented Garment Sector in Bangladesh*: *A Review* (2006) http://www.newsteps.info/workers_rights.php at 26 March 2011. For a detailed picture of labour casualties due to the lack of proper implementation of this Code, see Part III of Chapter II of this study.

[125] Sections 20, 180 and 221 of the *Bangladesh Labour Law 2006* (Bangladesh).

[126] There are six EPZs in Bangladesh. They are governed by the *Bangladesh Export Processing Zones Authority Act*, *1980* (Bangladesh). Section 11A of this Act empowers the government to exempt EPZs by notification in the *official Gazette* from the operation of all or any of the following enactments: The *Boilers Act 1923* (Bangladesh), the *Employment of Labour Act 1965* (Bangladesh), the *Factories Act 1965* (Bangladesh) and the *Industrial Relations ordinance 1969* (Bangladesh). on 6 March 1986, the Government of Bangladesh issued a notification under Section 11A of the *Bangladesh Export Processing Zones Authority Act* exempting the EPZs created under the Act from the application of the *Industrial Relations Ordinance*, *1969* (Bangladesh), and the *Employment of Labour* (*Standing orders*) *Act 1965* (Bangladesh). On 9 January 1989, the Government issued another notification exempting the EPZs from the application of the *Factories Act 1965* (Bangladesh). As a consequence, EPZ workers in Bangladesh had been deprived of the rights mentioned in the *Bangladesh Labour Law 2006* (Bangladesh) to form and join trade unions and to bargain collectively with their employers. For details see Ramapriya Gopalakrishnan, *Freedom of Association and Collective Bargaining in Export Processing Zones*: *Role of the ILO Supervisory Mechanisms* (2007)15.

undermines and interferes with the right of workers' organisations to organise their administration and activities without interference from public authorities, as it requires workers' associations to obtain permission from the executive chairman of the Bangladesh Export Processing Zones Authority to receive any funds from outside sources. It is also a procedural Act, which only cursorily describes the substantive goals and liabilities of employers regarding labour unionism in industries.

### Fundamental Rights in the Workplace

Social issues related to the determination of the standards of decent work can be contextual and change with changing industry/employee circumstances.[127] Thus, the ILO has established only very basic characteristics of decent work. It declares that to ensure decent work, every workplace regulation must promote and safeguard labourers' freedom of association and eliminate child labour, forced labour, and discrimination at work.[128]

The role of this Code in the development of freedom of association for collective bargaining is still in its infancy considering the number of manufacturing companies in Bangladesh. It has provided a guideline for the formation of participatory committees in industries as an alternative to unionism. Employers have accepted this arrangement; however, in most cases, workers do not consider this arrangement a viable alternative to labour unions in factories, as the provisions for this committee do not ensure their true representation.[129] Given the lack of a clear set of provisions regarding unionism and workers' welfare committees, the development of labour welfare oriented arrangements is slow in the industries in this country.[130] This Code has failed to develop a positive perception of the role trade unions play in industrial development and to reduce employers' passive attitudes toward unionism. The trade union movement is perceived to be weak and getting weaker. It is confined mainly to state-owned companies, with very little presence in the private sector. As a result, the number of labour-related organisations in Bangladesh has not increased concomitantly with the increasing number of

[127] Gray S Fields, 'Decent Work and Development Policies' (2003) 142(2) *International Labour Review* 239, 240.

[128] These rights are mentioned into the ILO Declaration on Fundamental Principles and Rights at Work adopted **by the international Labor Conference at its 86th session, Geneva, 18 June 1998. This Declaration is available at http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang–en/index.htm at 5 July 2010.**

[129] Berik and Rodgers, above n 116, 23.

[130] Bangladesh has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) on 22 June 1972. For the list of the ILO conventions that are ratified by this country, visit http://webfusion.ilo.org/public/applis/appl-byCtry.cfm?lang=EN&CTYCHOICE=3090&hdroff=1 at 2 July 2011.

industrial units. According to the Ministry of Labour and Employment data, trade unions had only 2.2 million workers in June of 2009. This equates to roughly 4 % of the country's labour force.[131] Over the past 5 years, the number of registered trade union members increased by only 1.8 %, far less than the increase in the size of the labour force.[132] One study shows that the number of registered trade unions in the RMG industry increased from 112 in 2000 to 123 in 2004 and that the number of federations increased from 8 to 10. Against 4,355 registered RMG factories in 2006,[133] this sector had only 54 registered workers' associations. By this year, 285 workers' welfare committees had signed out, though only 87 had been successful.[134]

Regarding workplace discrimination, this Code does not provide any specific provisions.[135] It does not apply the principle of equal wages for male and female workers for work of equal nature or value to the non-wage aspects of remuneration, and it does not prohibit discrimination in workplaces. In Section 148, it mentions that the employer is bound to provide the minimum wage to the labourer. In Sections 149 and 289, it mentions that payment of wages less than the minimum level set by the government is an offence punishable by imprisonment (of 1 year), a fine (of US $66.35), or both. These sections aim to encourage employers to maintain standard wages. However, this is not enough to manage gender discrimination in the workplace in a country in which gender discrimination is prevalent in every industry. An occupational wage survey of non-agriculture workers in 2007 found that women earned an average of 21 % less per hour than their male counterparts.[136] According to a World Bank report, women in rural and urban areas earned 60 % and 56 % of men's wages, respectively.[137] Apart from these

[131] Ministry of Labour and Employment of Bangladesh in Karen Dunn and Abdul Hye Mondal, 'Report on the Review of the Decent Work Country Program: Bangladesh 2006–2009' (ILO Regional office for Asia and the Pacific, 2010) 12.

[132] An interesting point in the trend of unionisation in this country is that the rate of increasing of the registered labour unions is higher than the rate of registered members in the unions. The number of registered trade unions increased by 5.3 % and the registered members of this unions increased by 1.8 % in 2009. This indicates that there is increasing fragmentation in the trade union movement in this country. For details, see Dunn and Mondal, above, 12.

[133] BGMEA, *BGMEA at a Glance* (2009) Bangladesh Garment Manufacturers Association http://www.bgmea.com.bd/home/pages/aboutus at 24 May 2011.

[134] Jenefar Jabbar, *Ready Made Garment Sector in Bangladesh*: *A Study from the Employers' Perspective*, RMG Industry, Post MFA Regime and Decent Work: The Bangladesh Perspective (2005)55, 63.

[135] Section 345 is the only section in this Code that deals with discrimination in workplaces. It mentions that the employer must ensure equal wages for equal work. For details, see Naila Kabeer and Simeen Mahmud, 'Globalisation, Gender and Poverty: Bangladeshi Women Workers in Export and Local Markets' (2004) 16(1) *Journal of International Development* 93.

[136] Steven Capsas, 'The Gender Wage Gap in Bangladesh' (ILO, 2008).

[137] This report is based on the Labour Force Survey of 2002–2003 for this data. For this survey, visit http://www.bbs.gov.bd/WebTestApplication/userfiles/Image/Wing/labour_indus.pdf at 28 November 2011.

situations, a traditional culture of job segregation is prevalent in this country. This is evident from the frequent complaints that female workers are underpaid in the RMG industry.[138] There are also many complaints from workers regarding discrimination in the assignment of job responsibilities, inasmuch as men are preferred in higher-skilled and higher-paid jobs.[139] According to a survey conducted by Nari Unnayn Kendra, the discrimination rate in RMG factories located in EPZs is 20 %, whereas in factories working with buyers, it is 50 %, in factories working with buyers' agents, it is 70 %, and in sub-contracting factories, it is 70 %.[140]

The Code's role in ensuring corporate management responsibility to reduce workplace health and safety risks is not satisfactory. It provides some provisions in this regard, but these are ineffective. The prescriptive modes of these provisions require corporate management to limit their efforts in this regard; corporate management in Bangladesh barely meets the requirements of the provisions of this Code. In their 2008 study, Berik and Rodgers found, for instance, that inadequate fire safety equipment and training, inadequate first aid kits and procedures, inadequate toilet facilities, and lack of or non-use of protective equipment are all reasonably common in non-EPZ factories.[141]

This code has mainly relied on coercive measures to deal with violations of its provisions and restore workers' rights in the workplace. These measures include insubstantial fines and imprisonment terms, which have proven ineffective. For instance, the maximum fine for breaching the Code provision that causes death is only US $1,378.64, and the maximum imprisonment is 4 years.[142] Moreover, according to Section 302 of this Code, the maximum fine for using a false certificate of fitness at a factory premises is only US $13.79.

### Social Security Provisions

Bangladesh does not have a regulatory framework that could provide social protection to all labourers in all sectors. [143] In this country, protected labourers in the civil service, public companies, and autonomous agencies enjoy pension schemes, provident funds, and health and group life insurance. However, labourers in private

[138] Berik and Rodgers, above n 116, 23.

[139] Chawdhury and Ahmed, above n 98, 100, 108.

[140] Masuda Khatun Shefali, 'Social Compliance in Textile and Garment Sector in Bangladesh' (Textile Cell, Ministry of Commerce, 2005).

[141] Berik and Rodgers, above n 116, 22.

[142] Section 309(1) of *the Bangladesh Labour Law 2006* (Bangladesh). For a comprehensive a list of different offences and criminal punishment for the offences under this Code, visit http://www.corporateaccountability.org/dl/international/bang/briefing/enforcementfeb08.doc at 6 January 2011.

[143] A 2009 ILO-supported study by the Centre for Policy Dialogue (2009).

manufacturing companies are left vulnerable with respect to social security.[144] Due to the lack of suitable strategies mentioned in this Code and in the regulatory framework, women labourers rarely receive paid maternity leave. This Code does not have any provision that requires employers to hold the position of a pregnant labourer while she is on maternity leave. Pregnant labourers generally have to leave their jobs to have their baby and later seek a new job.[145] This Code defines minimum labourer ages for light, regular, and hazardous work (12, 14, and 18, respectively), but it does not clearly define these types of work. Whereas the vast majority of child labour occurs within the informal economy, the provisions related to child labour in the Code only address the formal sectors.[146] It does not provide any legal status or recognition to domestic labourers, and it does not call for a priori design of a social safety net. It could have provisions for unemployment insurance, retraining and redeployment mechanisms, and so on.

The lack of social security provisions in the Code has immense impact on labourers' livelihoods. Khatun et al. mention Saraswati, a 35 year old married woman with two children, who works in the sewing section in a woven garments factory in Dhaka. She has a primary education and her husband is also a garment worker in the city. One of her daughters goes to school and her mother-in-law takes care of her children. She works 11 h a day including 3 h of overtime. She earns US $19.28 per month, which she does not consider enough to provide a decent living for her family. She thinks that her salary should be more than US $26.59 per month. Her productivity rate is 300 pieces per day. She reported that there is no workers' welfare committee in her factory and they are not allowed to be involved in any type of trade union activity. She thinks that all the workers in her section work at their maximum productivity level and hence they should be given better treatment from the management.[147]

They also mention Rabeya Khanam in their report. Khanam joined an RMG manufacturing company at 14. She had neither education nor work experience when she started working. Her salary was US $14.62 per month and she and three other members of her family had to survive on this salary. She is unmarried and lives in a one-room tin-roofed house with her family. She barely survives on this

[144] Employees in the public sector constitute only 4 % of the total labour force of this country where employees in the formal private sector constitute 17 %, and workers in the informal economy the remainder. For details, see Dunn and Mondal, above n 127, 8.

[145] Berik and Rodgers, above n 116, 24.

[146] According to the Second National Child Labour Survey conducted by the Bangladesh Bureau of Statistics in 2002–2003, there were 4.9 million working children, or 14.2 % of the total 35.06 million children in the 5–14 years age group. The total population of working children aged between 5 and 17 years is estimated at 7.9 million. Another survey in 2006 revealed that among these child labourers, the agriculture sector accounts for 62 %, while the service and industrial sectors account for 23 % and 15 % respectively. For details see the Multiple indicators Cluster Survey 2006 and the National Child Labour Survey 2002–2003; for a general view on this issue, visit ILO, Sub-regional Information System on Child Labour http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/responses/Bangladesh/index.htm at 1 July 2011.

[147] Khatun et al., above n 28, 50.

salary and has no savings. When asked what measures could improve her livelihood and that of other workers, she mentioned medical allowances, food rationing, vulnerable group feeding and development cards and an increase in wages from factory owners.[148]

### Strategies for Stakeholder Engagement and Social Dialogue

Within the concept of decent work, stakeholder engagement and social dialogue related to labour regulation includes all types of negotiation, consultation, and exchange of information among representatives of governments, civil groups, employers, and workers on issues of common interest. Though the effectiveness of these strategies varies with variations in local contexts and circumstances, there are some common requirements for their success[149]:

1. Respect for the fundamental rights of freedom of association and collective bargaining.
2. Strong, independent workers' and employers' organisations with the technical capacity and knowledge required to allow their participation in social dialogue.
3. Political will and commitment to engage in social dialogue on the part of all parties.
4. Appropriate institutional support.

These requirements are not clearly defined in this Code. It is prescriptive due to its narrow focus on stakeholder engagement in labour-related issues and the absence of provisions required to facilitate civil society engagement in its framework. While it provides some opportunities to labourers to use unions as their voice in consultations and bargaining, its lack of a substantive approach to unionisation and the restriction on civil groups' engagement in workplace management undermine its role in the labour-related regulatory scheme.[150] It needs to include enabling mechanisms to facilitate the participation of workers and other stakeholders, both in defining the problems and in designing the response to them. If it is to rely upon such participation, it should have additional and alternative mechanisms for enabling labourers and other stakeholders to participate in consultations and lobbying.[151]

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[148] Ibid 27.

[149] Dunn and Mondal, above n 127, 12.

[150] Bangladesh has ratified the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). This country has a Tripartite Consultative Council as its highest tripartite body. However, the Bangladeshi government rarely follows the provisions of this convention and the recommendations of this committee. As mentioned earlier, the Code was passed without full consultation between the tripartite partners. For details, see Dunn and Mondal, above n 127, 12.

[151] Belinda Smith, above Chapter I n 16.

### 6.2.3 *The Environmental Conservation Act 1995 (Bangladesh)*

In this country,[152] there are roughly 200 laws directly related to the environment.[153] These laws describe different rights and liabilities relating to the environment, provide measures for environmental conservation, and offer protection against different environmental offences by prescribing or prohibiting certain activities. Among these laws, the *Bangladesh Environmental Conservation Act 1995* (Bangladesh), the *Environment Conservation Rules 1997* (Bangladesh) and the *Environment Court Act 2000* (Bangladesh) relate to industries, industrial pollution, and the management of environmental pollution by companies. Of these three Acts, the *Environmental Conservation Act 1995* (Bangladesh) is most related to the substantive issues of environmental rights, liabilities, and their implementation at the company level.

Following the Environmental Policy of 1992, the *Environmental Conservation Act 1995* (Bangladesh) was adopted to conserve and improve environmental standards and control pollution. This Act was passed by Parliament in February 1995, and it came into force in June 1995, repealing the *Environmental Pollution Ordinance 1977* (Bangladesh). Other than relating the penalties for the offences mentioned in it to the personal liabilities of business owners, directors, and officials, this Act provides CG and management with very few substantial obligations.

It is a proscriptive legislation that depends heavily upon public institutions and government employees. For example, according to this Act, permission for establishing new businesses depends solely on government agencies. Section 12 imposes restrictions upon the establishment of business units and projects that may be related to environmental issues. Section 7 provides a detailed account of the procedure for applying for and granting environmental clearance. Only Section 7 of this law relates non-governmental agencies to this clearance process, requiring that applications for environmental clearance be accompanied by a certificate declaring that the local government authorities do not object to the project. However, it does not elaborate on the procedure required for the local authority to grant such a certificate. In a country where the literacy rate is low, the level of environmental awareness is very poor, and the level of corruption is high, it would be appropriate to require a thorough procedure in this regard.[154] For example, guidelines could be given for forming a stakeholder committee to facilitate the certification. In India and certain other economies, there are provisions for a public hearing to reach a

[152] Act No. 1 of 1995.

[153] Salahuddin M Aminuzzaman, 'Environment Policy of Bangladesh: A Case Study of an Ambitious Policy With an Implementation Snag' (2010) www.monash.edu.au/research/. . ./asia. . ./paper_salahuddin_aminuzzaman.pdf at 14 December 2010, 12.

[154] For details, see Asian Development Bank, 'Country Environmental Analysis Bangladesh' (Asian Development Bank, 2004), www.adb.org/Documents/CEas/BAN/BAN-CEA-Jul2004.pdf *at 14 December 2010*.

decision in these situations.[155] The local government could arrange such a hearing to determine the risks, benefits, and the conditions to be imposed on the business establishment requesting certification.

This Act does not include substantial descriptions of many of relevant issues. Rather, in most instances, it prescribes what an act can or cannot do. For example, though it has described the standards, parameters of emission measurement, and management elements upon which an application for environmental clearance should be assessed, these descriptions are not substantive. Though the *Environmental Conservation Rules 1997* (Bangladesh) have broadly defined guidelines for the disposal of waste from different categories of industries, they have not specified the permissible extent of emissions or the obligations for corrective actions.[156] In this respect, they do not have the required features to be the source of information and measures for addressing the shortcomings of other laws regarding environmental issues. For instance, it could define the factors that are connected with ecology and environment. Article 6 of the *Bangladesh Petroleum Act 1975* (Bangladesh) provides that any person engaged in petroleum operations must ensure that their operation is carried out in accordance with good oilfield practices. They must also ensure that it does not interfere with navigation, fishing, or conservation of the resources of the sea and seabed and that it considers factors related to ecology and environment. Neither of these Acts have described the factors that could harm the ecology.

The prescriptive mode of this Act prevents it from becoming an umbrella legislation for environmental regulation. Weakness in implementing its provisions is another important hurdle this Act must overcome to become an effective legal measure to develop an environmentally responsible corporate culture in this country. Legal strategies for developing an environmentally responsible corporate culture need to contain some broader objectives to be fulfilled at the corporate level. Considering the type, size, and circumstances, environmental laws and regulatory policies therefore need to have adequate provision for the following:

1. Promoting commitment to the environment.
2. Developing environmental strategies.
3. Ensuring stakeholder involvement.
4. Insisting on ethical procurement.
5. Encouraging environment-friendly products.

The discussion below examines whether this Act has sufficient provisions and strategies to meet these objectives.

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[155] *The Environmental Impact Assessment of Development Projects Notification* 1994 (as amended in 1997) under the *Environment* (*Protection*) *Act 1986* (Bangladesh). For details, visit http://envfor.nic.in/divisions/ic/wssd/doc2/ch2.html at 13 January 2011.

[156] The *Environmental Protection Rules 1986* (India) have detailed these issues. see http://India.gov.in/allimpfrms/allrules/264.pdf at 19 August 2011. For a comparative study, see IUCN-Bangladesh (2000), *Review of the Laws and Policies Concerning Natural Resources Management in Bangladesh*; Aminuzzaman, above n 149.

### Promotion of Corporate Commitment to the Environment

Laws and legal policies to reduce the environmental impact of corporate operations should have provisions to develop corporate commitment to the environment; they should require CG to consider the environmental effects of their projects in all their policies. Laws and policies could require companies to reflect on their environmental commitment in their strategies, their use of technologies for production, and their designs for product distribution. This Act lacks these features, and it does not encourage companies to go beyond environmental compliance and establish an open-book policy whereby employees, community members, and others can be informed of any potential adverse effect the company may have on the environment.

### Development of Environmental Strategies

Companies should be committed to the environment and attempt to reduce their impact on the environment. It is essential that they first gain a full understanding of the adverse effects of business operations that are not designed within an environment-friendly compliance system.[157] Laws and legal policies, therefore, need provisions and substantive notions to encourage companies to consider environmental issues at the core of their corporate strategies. Laws and legal policies should hold CG responsible for directing corporate management to create strategies to deal with environmental issues such as energy consumption, effluent treatment, environmental audits, and so on. This Act, however, requires businesses to submit descriptions in process flow diagrams, layout plans showing effluent treatment plants, and waste discharge arrangements; it does not require that companies possess effective environmental audit systems. These systems are necessary to evaluate the effectiveness of other environmental strategies, and without any auditing strategy, there is the possibility of ineffective environmental commitment at the corporate level. The goal of such auditing strategies is to elucidate the type and amount of resources actually used by a company, production line, or facility.

Like this auditing strategy, environmental impact assessment is another strategy that helps to clarify the actual quantity and type of waste and emissions a production process may generate.[158] This strategy has not been made mandatory. The

[157] The comment of Niaz A Khan and Ataur Rahman Belal would be worth mentioning here. To them, the 'rhetoric purposes only for the central politicians and bureaucratic leadership.' For details, see Niaz A Khan and Ataur Rahman Belal, 'The Politics of the *Bangladesh Environmental Protection Act*' (1999) 8(1) *Environmental Politics* 311, 316; Aminuzzaman, above n 149.

[158] Bangladesh first prepared a *Guideline for Environmental Impact Assessment* (*EIA*) *in 1992 under the Flood Action Plan*. Afterwards, a Manual for Environmental Impact Assessment was prepared in 1995 to clarify the technical aspects of EIA. There is another instrument, namely the Guidelines on Environmental issues Related to Physical Planning, developed by the Local Government Engineering Department in 1994. The *Environmental Conservation Rules 1997*

common trend among regulatees is to provide only subjective judgments in response to the probable environmental impact of a project. In most cases, these impacts are enumerated in physical terms without assessing monetary values.[159] This Act could impose these regulatory strategies on business projects. A mandatory provision of this Act could require companies to develop their expertise in accurately quantifying this data in monetary terms, to better understand the bottom-line impact of their business operations on the environment. This provision could help companies set their priorities to obtain the greatest returns on their investments, and simultaneously, regulatory authorities could develop appropriate measures against environmental damage caused by companies. This Act could have provisions relating to the promotion of dialogue among stakeholders, the creation of partnerships necessary for creating voluntary initiatives, and agreement on a systematic and monitorable program for establishing and financing voluntary initiatives.

**Assurance of Stakeholder Involvement**

For the development of effective environmental responsibility systems in companies, an environmental law or legal policy needs to have adequate provisions to require that stakeholders in corporate policies fulfil their commitment to the environment. The law should ensure that companies committed to environmental development have provided scope for their various stakeholders to contribute to their environmental strategies, including those stakeholders whose work is not related to the environment. This Act provides no direction to corporate management to ensure this provision. It could have provisions to hold corporate self-regulators responsible for engaging in, for instance, educating stakeholders about business operations and their environmental impact, helping employees to understand the environmental impact of their jobs, and supporting their efforts to bring positive changes. While this Act could provide a guideline for deciding on incentives, rewards, and recognition programs for companies that have demonstrated environmental commitment, it remains prescriptive on these issues.

(Bangladesh) requires all that projects have their environmental impact assessment made following these guidelines and manuals. For details, see Khorshed Alam, *The Environment and Policy-Making in Bangladesh* (2007) 255.

[159] This makes the task difficult for the environmental policy-makers. It becomes hard for them to decide whether the welfare gains of a project will outweigh the ensuing loss (i.e., cost). If the projection of this impact were to be valued in monetary terms, it would be easier for them to project this impact more clearly. For details, see Alam, above 255.

### Insisting on Ethical Procurement

The degree to which a company is committed to the environment can be understood by examining its procurement policies. A company can be deemed truly responsible to the environment if it is procuring environmentally friendly materials from ethical sources. This Act does not have many provisions in this area; for example to insist that companies buy 'greener' products and materials from their suppliers. It could provide guidelines compelling companies to develop buyers' groups through which they could leverage their collective buying power to encourage suppliers to consider alternative products or processes.

### Encouraging Environmentally Friendly Products

Ensuring that the products produced by business operations are environmentally friendly is an important strategy to develop the environmental commitment of companies. Encouraging companies to consider this issue could have a constructive effect on the production process and corporate management, by making them more attuned to environmentally friendly technologies. The existing Act does not seem to have the necessary features regarding this issue. It could urge companies to invest in eco-friendly products so that business operations would minimise emissions, noise, energy consumption, and health and safety risks.

This Act is the main legislation dealing with the nexus of environment and industrial issues in Bangladesh. This Act was enacted to provide for conservation and improvement of environmental standards and to control and mitigate pollution of the environment. However, it has not been able to create a solid framework for environmental regulation in this country.[160] It provides some procedures and coercive measures for corporate environmental performance, but these are not substantial and are less focused on developing corporate responsibility for the environment. The Act does not have the necessary measures to effectively implement provisions for ensuring sustainable corporate environmental performance. For instance, Section 12 of this Act requires manufacturing companies or projects to obtain an 'Environmental Clearance Certificate' from the Director General of the Department of Environment,[161] but this remains simply a part of the necessary paperwork.[162] This Act also imposes an obligation for companies to report the

[160] Peigi Wilson et al., 'Emerging Trends in National Environmental Legislation in Developing Economies' (1996) *UNEP's New Way forward*: *Environmental Law and Sustainable Development* 185, 186.

[161] Section 12 of the *Bangladesh Environmental Conservation Act 1995*: 'Environmental Clearance Certificate. No industrial unit or project shall be established or undertaken without obtaining, in the manner prescribed by rules, an Environmental Clearance Certificate from the Director General'.

[162] Wolfgang Wiegel, 'Compliance with Environmental Regulations in the Textile Industry (2008).

discharge of any pollutant, or if such a discharge is likely to occur in excess of the prescribed limit,[163] but there is very little evidence of any such reporting to the Director General of the Department of Environment; further, there is no evidence to show that the Director General has taken any action in response to any such report. Though this Act suggests the establishment of manufacturing industries in non-residential areas away from densely populated areas, this remains ineffective in terms of any having impact on the establishment of manufacturing units in densely populated, residential and 'ecologically critical areas'. It is estimated that there are at least 7,000 manufacturing units in the metropolitan area of Dhaka, the most densely populated city in the world.[164] In 2006–07, this country had 4,490 RMG factories[165] and out of these, 3,000 were in Dhaka and its three adjacent areas.[166]

The symmetry between the enactment of this law and its implementation has not progressed.[167] There are various reasons for the disappointing outcome of this legislation.[168] Of particular importance is the lack of professional and scientific knowledge, information dissemination and infrastructure for environmental regulation. These deficiencies have increased further because of this Act's dependence on a poorly trained bureaucracy rooted in a culture of corruption and inefficiency.[169] These shortcomings have made the provisions for environmental impact assessment in Bangladesh less effective: setting environmental quality standards for industrial emissions and effluent do not make the required difference since the country does not have adequate environmental protection agencies, equipment, laboratories and technical administrators to police these standards. Another vital drawback of this legislation is its narrow focus on stakeholder engagement in its framework.

Other than this Act and Rules, other environment and industry-related laws of this country are inadequate, ineffective, or outdated. For instance, the *Agricultural and Sanitary Improvement Act 1920* (Bangladesh), the *Water Hyacinth Act 1936* (Bangladesh), the *Embankment and Drainage Act 1952* (Bangladesh), the *Town Improvement Act 1953* (Bangladesh), the *Shops and Establishments Act 1965* (Bangladesh) and so on are outdated. Some laws are not adequately buttressed by suitable punitive actions, considering the damages and the fines or punishments for violating them. For instance, the *Penal Code 1860* (Bangladesh), the *Tea Plantation Ordinance 1962* (Bangladesh) and the *Wildlife (Preservation) Act 1974*

[163] According to Schedules 2–11 of the *Environmental Conservation Rule 1997* (Bangladesh).

[164] Pinaki Roy, 'All Dhaka Rivers Left "Dead": Industrial Pollution Goes Unabated on Docile Action', *The Daily Star* (Dhaka), 27 April 2009.

[165] BGMEA, above n 129.

[166] Shakhawat Hossain, 'Most RMG Factories Not Fully Compliant, Survey Finds', *The New Age* 18 April 2009.

[167] Parvez Hassan and Azim Azfar, 'Securing Environmental Rights Through Public Interest Litigation in South Asia' (2003) 22 *Vargina Environmental Law Journal* 215, 221.

[168] Jona Razzaque, 'Human Rights and Environment: National Experience' (2002) 32(2) *Environmental Policy and Law* 100, 103.

[169] Hassan and Azfar, above n 163, 222.

(Bangladesh) among others need to be reassessed to determine appropriate punitive approaches. According to the Penal Code, the maximum punishment for fouling water is only 3 months imprisonment, and the fine for creating a noxious atmosphere is only US $7. Under the *Agricultural Pest Ordinance 1962* (Bangladesh), punishment for transport or sale of infested crops is a maximum fine of US $7, and under the *Agriculture Pesticides Ordinance 1971* (Bangladesh), it is a maximum fine of US $14.[170]

Other statutory provisions in other legislation also deal with environmental issues in Bangladesh. For instance, environmental wrongs may be redressed by invoking Section 91 of the *Code of Civil Procedure 1908* (Bangladesh). This provides that a suit for declaration, injunction, or other appropriate relief may be instituted by the Attorney General, or with his consent, by two or more persons for resolving a public nuisance or any other wrongful act affecting or likely to affect the public. This section encourages community participation and is very simple to invoke. However, it is also of less use in Bangladesh as far as environmental protection is concerned. However, it is also possible to obtain relief against environmental wrongs under Sections 133 and 144 of the *Code of Criminal Procedure 1898* (Bangladesh). Section 133 of this code empowers an executive magistrate to issue a conditional order for removal of a nuisance. India has successfully made use of this Section for the protection of the environment. In a case brought under this Section of the *Code of the Criminal Procedure 1973* (India), the Supreme Court of India affirmed that citizens have the right to have a public nuisance removed by the public authorities. They can seek direction from the courts so that the municipality (wrongdoer) is then bound to take the necessary steps to stop effluent from flowing into nearby streets from business plants. However, the justice delivery system and government administration does not use this provision to rapidly redress the situation for sufferers of industrial pollution in the cities.

Bangladeshi courts could use their powers given by Section 144 of this Code to issue absolute orders in urgent cases of environmental nuisance or apprehended danger to natural resources. Furthermore, under Sections 52–55 of the *Specific Relief Act 1877* (Bangladesh) together with Order 39 Rules 1 and 2 of the Code of Civil Procedure 1980, steps can be taken to obtain temporary injunctions in order to prevent environmental pollution (already committed or to be committed in the future). The *Penal Code 1860* (which has been amended from time to time) is not an environmental legislation, but it has been providing punishments for environmental crimes for nearly one and a half centuries. Other than these legal provisions and the provisions in the *Environmental Conservation Act 1995* (Bangladesh), there is no major legal arrangement in this country to deal with corporate responsibility to the environment. Apart from the court system, some environmental agencies

[170] For details, see Asian Development Bank, 'Country Environmental Analysis Bangladesh' (Asian Development Bank, 2004) 42–43, www/adb/org/Document/CEas/BAN/BAN-CEA-Jul2004.pdf at 14 December 2010.

implement environmental rights, however, the aggrieved person's role is negligible in these agencies' operations and strategies.

Other than the rights, liabilities, and implementation of the environmental strategies mentioned in these laws, most environmental wrongs fall under the purview of tort laws. Manufactured environmental hazards are the result of negligence or trespass or are based on the doctrine of nuisance. Thus, a suit for compensation may be brought for environmental wrongs by invoking the common law principles of negligence, nuisance, strict liability, vicarious liability, and trespass. However, regrettably, in Bangladesh's legal system, hope for remedy under tort laws often proves frustrating.

To summarise this part, corporate self-regulation in Bangladesh is not under any pressure to have adequate strategies to fulfil social responsibilities. This country does not have the required non-legal drivers that could hold corporate self-regulation responsible for promoting public policy goals for CSR development. The literacy rate in this country is very low and awareness programs for consumers are negligible. The NGOs operating in Bangladesh are mostly concerned with poverty eradication or womens' rights and health issues; there are very few NGOs concerned with corporate issues. The Consumer Association of Bangladesh is a new organisation, and a newly enacted law for protecting consumers' rights has not been implemented. Furthermore, this country does not have dedicated law enforcing agencies, effective strategies, adequate equipment and trained administrators to deal with corporate social responsibility issues. For an instance, the Chief Inspector of Factories and Establishments of the Ministry of Labour and Employment has only 86 inspectors, who between them are liable to execute the legal provisions in 40,000 factories, 3,000,000 shops, 170 tea gardens, 90 ship-breaking yards, 2 dockyards and 150,000 transport organisations. Up until 2008, there were only 20 inspectors in four divisions for inspecting the hygiene and occupational health conditions in 24,229 registered factories.[171] The Institute of Chartered Accountants Bangladesh has only 315 active members.[172] The certification of the Bangladesh Standardisation and Testing Institute is not internationally accredited.[173] Each of the 78 judges in the High Court Division of the Supreme

[171] There are contradictory views regarding the number of factory inspectors. For instance, where a study conducted by PROGRESS (a joint program of the Ministry of Commerce of Bangladesh and the Federal Ministry of Economic Cooperation and Development of Germany) mentions that this country had only 53 factory inspectors for all sectors in 2007, A K M Nasim states that until mid-2005, Bangladesh had only 86 inspectors under the Chief Inspectors of Factories and Establishments. For details of these studies, see Chowdhury and Denecke, above n 89; A K M Nasim, 'Occupational Safety of Formal and Non-formal Workers: Factory Act and the Roles, Advantages and Limitations of Labour Administration' (2008) (2nd) *Labour* 5.

[172] For details, visit ICAB http://www.icab.org.bd/member_stat/member_stat.pdf at 22 October 2011.

[173] For details, see Shafiq Rahman, 'Sub-Standard Standards of BSTI: Caught in the Net of Corruption and Failure, the Bangladesh Standards and Testing Institution Fails to Protect Consumers from Sub-Standard Products' (2011) 10(16) *PROBE News Magazine* http://www.probenewsmagazine.com/index.php?index=2&contentId=2989 at 22 October; Recently, this

Court of Bangladesh tried 275 (on average) cases in 2009, against the filing of more than 50,000 cases in the same year.[174] One of the consequences of this situation is that the public organisations relevant to increasing CSR in this country are often corrupt. Between 2006 and 2008, Bangladesh was considered the most corrupt country in the world; more recently, corruption has been reduced and Bangladesh has now become the world's 12th and 13th most corrupt country in 2010 and 2011, respectively.[175] According to Transparency International Bangladesh, corruption in this country is prevalent in both the public and private sectors.[176]

Under these circumstances, the legal system of this country could play an important role, but it seems that this country's laws relevant to business and CSR do not have an adequate focus or appropriate strategies to insist that corporate self-regulators fulfil their social responsibilities. The *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Law 2006* (Bangladesh), and the *Environmental Conservation Act 1995* (Bangladesh) are proscriptive, and they do not have substantive provisions to enable the development of corporate self-regulated responsibility systems. The *Companies Act 1994* (Bangladesh) does not provide the required focus on CSR or the liabilities of CG for developing social responsibility. This Act does not have the necessary strategies to insist that CG direct corporate management to place CSR issues at the centre of their internal strategies. Though the *Bangladesh Labour Law 2006* (Bangladesh) provides a long list of labour rights, the implementation strategies mentioned in it are not sufficient to develop a welfare-oriented workplace management system. Its provisions are descriptive, and the punishment measures detailed in it do not seem worthwhile. The *Environmental Conservation Act 1995* (Bangladesh) asserts some modern ideas to curb industrial pollution, though it does not possess the required strategies to implement these ideas. It prescribes penalties for breaches of its provisions, but it does not provide adequate directions to effectively impose these penalties. Its sole dependence on government agencies for its administration is another drawback that

body has won accreditation from the Indian National Accreditation Board for Calibration and Testing Laboratories (NABL). For recent developments, see Monira Minni, 'BSTI Gets NABL Accreditation', *The Financial Express* (Dhaka), 25 March 2011.

[174] Currently the total number of Judges in this apex Court is 98. For details, Mizanur Rahman Khan, 'Question Raised in Judges Appointment' *The Prothom Alo* (Dhaka), 21 October 2011; Bangladesh Supreme Court http://www.supremecourt.gov.bd/scweb/contents/Judiciary_2010.pdf at 22 October 2011.

[175] Other economies at the 13th position are Ecuador, Ethiopia, Guatemala, Iran, Kazakhstan, Mongolia, Mozambique and the Solomon islands. Of 183 economies, Bangladesh ranks 120th on Transparency international's Corruption Perception index 2011. For details, see Transparency International, 'Corruption Perception index' http://cpi.transparency.org/cpi2011/ at 2 December 2011.

[176] For details, see Transparency International Bangladesh http://www.ti-bangladesh.org/research/TIB%20%Annual%20Report%202010.pdf at 22 October 2011; Iftekharuzzaman, 'Corruption Perceptions Index 2010: Why Have We Failed to Improve?', *The Daily Star* (Dhaka), 27 October 2010.

makes it a less effective legislation, particularly for developing an environmentally responsible system of corporate self-regulation.

The following section of this part discuss how these laws could be made more effective in incorporating CSR principles into corporate self-regulation, without being intrusive in normal business practice.

## 6.3 Instilling CSR Principles in Corporate Self-Regulation Through Meta-Regulating Laws

The blurred picture of the state-promulgated command-and-control type of laws in pluralised societies and their strong scepticism of corporate self-regulation performance has resulted in the development of a meta-regulating approach in law as an alternative legal strategy to enable the incorporation of the central principles of CSR in companies. This approach renders companies responsive to social values and provides them autonomy in designing their own reflexive strategies.[177]

There is no clear definition of meta-regulating law. Generally, laws that possess meta-regulating strategies could be termed meta-regulating laws. As described in the previous chapter, meta-regulating strategy denotes a strategy that could initiate a series of activities on the parts of both the regulatees and regulators, so that they reach a given objective.[178] Meta-regulating law to develop self-regulated corporate responsibility determines regulatory strategies in three ways: firstly, it provides scope to offer incentives that encourage corporate management to adopt internal regulations and systematic compliance processes that address social, environmental and ethical responsibilities. Secondly, it ensures that sanctions embedded in laws for facilitating the incorporation of CSR principles have been adequately included in the compliance systems of companies in a manner that befits the companys in question. Thirdly, it provides scope to different stakeholders to contribute to corporate self-regulation. With the provisions for pluralisation of power in corporate regulations, meta-regulation creates the possibility of meta-evaluation of corporate self-regulation in the development of a socially responsible corporate culture.

Given these strategies, regulators must select the incentives, disincentives or sanctions (in this book, the issues that are able to create these incentives,

[177] Darren Sinclair, 'Self-Regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19(4) *Law & Policy* 537.

[178] See generally, Collin Scott, *Regulation in the Age of Governance*: *The Rise of the Post-Regulatory State*, the Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance (2004), 145; Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in Doreen McBarnet, Aurora Voiculescu and tom Campbell (eds), *The New Corporate Accountability*: *Corporate Social Responsibility and the Law* (2007) 5, 218; for recent developments in this legal approach within the health sectors in the UK and Canada, see F McDonald, 'Patient Safety Law: Regulatory Change in Britain and Canada' (2010).

disincentives, coercion, privilege etc. are termed the 'strategies' or 'tools' for meta-regulating law) that are strongly linked to CSR principles to affect corporate regulations via a meta-regulatory approach through laws. Hence, a meta-regulation approach to instil the principles of CSR in corporate self-regulation establishes regulatory objectives that are strongly related to these principles. The meta-regulating 'tools' or 'strategies' to reach the regulatory objectives could be many, and would vary according to the variation in context and circumstances. Nonetheless, some potential meta-regulating tools for incorporating the central CSR principles in Bangladeshi company management structures are: legislating suitable tax provisions, granting legal rights for bounty hunters, providing legal protection to whistleblowers, clearly delineating corporate directors and senior managers' legal duties and liabilities, establishing license and registration provisions, granting legal sanction to the provision of incentives, education and training, instituting self-inspection and self-audit, providing legal sanctions against coercion (imprisonment, penalties, confiscation, etc.), offering mitigation of penalties and legal provisions to encourage stakeholder engagement.

The discussion in the following sections relates to the use of these tools. These sections assess the scope within the major laws and regulations related to corporate regulation to incorporate meta-regulating approaches so they can use meta-regulating tools to incorporate the core principles of CSR into corporate self-regulation. The first section assesses this scope in the *Companies Act 1994* (Bangladesh); the second section assesses the *Bangladesh Labour Laws 2006* (Bangladesh) and the third section assesses the *Environmental Conservation Act 1995* (Bangladesh). In all these sections, the scope of incorporating these strategies in some other legislations and socio-legal polices associated with these three laws are also assessed from a broader perspective of CSR development through legal regulation. This might seem a broad assessment but it is important to provide a substantive assessment of the scope of incorporating meta-regulation approach in the above mentioned three laws.

### *6.3.1 Incorporating a Meta-Regulating Approach into the Companies Act 1994 (Bangladesh)*

In the landscape of the internal regulation of Bangladeshi companies, ownership and governance are almost synonymous; control and ownership usually coincide in these companies and this causes a concentration of functions and responsibilities.[179] Managements in these companies are often oriented towards short-term survival, rather than within a framework of strategic planning. Many of them consider their

[179] M Lahdesmaki, 'When Ethics Matters–interpreting the Ethical Discourse of Small Nature-Based Entrepreneurs' (2005) 61(1) *Journal of Business Ethics* 55; L J Spence, 'Does Size Matter? The State of the Art in Small Business Ethics' (1999) 8(3) *Business Ethics*: *a European Review* 163.

social and environmental responsibilities as peripheral issues.[180] They usually do not want to, or are unable to, function according to the theoretical constructs of CSR and hence do not considering adopting these strategies.

Against this backdrop, ownership is the core component in the development of companies' self-regulated responsibility. In these companies, moreover, the ownership structure is highly concentrated in the absence of a well-developed capital market, established professional bodies and democratic institutions. The owners or the board of directors (which is usually formed by the owners) are responsible for leading the company, for effective decision-making and also for proper monitoring. In Bangladesh, the major legislation relating to the rights, liabilities and performance procedures for these owners/directors is the *Companies Act 1994* (Bangladesh). The discussion of this section is centred on these rights, liabilities and the procedures for delivering their duties as mentioned in this Act, and on the scope of relating meta-regulating tools to them.

This section firstly assesses this Act to explain its contribution to the development of socially responsible internal CG and management in companies, emphasising the provisions of the Act with respect to the role of corporate directors and managers in developing socially responsible business strategies. Lastly, it assesses the scope of this Act to incorporate a meta-regulating approach to facilitate the incorporation of CSR principles in companies' governance in general.

Companies would effectively consider the development of social, environmental and ethical issues as within the scope of their self-regulated responsibilities should their owners, directors or managers be put at risk of being held liable for any act that goes against the welfare of society, the environment or the ethical norms in their societies. This may not be possible if CG does not uphold the responsibilities of the directors in this regard. The *Companies Act 1994* (Bangladesh) could have provisions that would empower corporate directors to utilise CSR-related strategies. As has been discussed in Chap. 3 of this book, CG scholarship in the UK has embraced the notion of enlightened shareholder values[181] within their main corporate legislation. It is now enshrined in section 172(1) of the *Companies Act 2006* (UK) that:

> A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

[180] Michael Peters and Kerry Turner, 'Small and Medium Company Environmental Attitude and Participation in Local-Scale Voluntary Initiatives: Some Practical Applications' (2004) 47(3) *Journal of Environmental Planning and Management* 449.

[181] Michael Jensen advocates for Enlightened Shareholder Value as follows: 'it is obvious that we cannot maximise the long-term market value of an organisation if we ignore or mistreat any important constituency. We cannot create value without good relations with customers, employees, financial backers, suppliers, regulators, communities, and so on.' Michael Jensen, 'Value Maximisation, Stakeholder theory and the Corporate Objective Function' (2001) 7(3) *European Financial Management* 297, 309.

a. The likely consequences of any decision in the long term.
b. The interests of the company's employees.
c. The need to foster the company's business relationship with suppliers, customers and others.
d. The impact of the company's operations on the community and the environment.
e. The desirability of the company maintaining a reputation for high standards of business conduct.
f. The need to act fairly between members of a company.

In its recent move towards incorporating CSR notions in CG, the Indian Lokshobha (the Upper Chamber of the Indian Parliament) is considering some amendments in its company law to include CSR notions in CG. This country is considering direct and legal provisions in this regard. The *Companies* (*Amendment*) *Bill 2009* proposes that each company having a net worth of US $112.28 million or more, or a turnover of US $224.56 million or more, or a net profit of US $1.12 million per year will be obliged to have a CSR policy. It proposes that companies meeting these criteria must spend at least 2 % of their yearly profits from the three previous financial years on CSR initiatives. Furthermore, it suggests a legal requirement for all companies to publish CSR issues separately in their annual reports.[182] Another important initiative in this country to increase CG's ability to include CSR is the proposed bill for incorporating provisions to assist the CG of mining companies to share profits with the local stakeholders. In the *Mines and Minerals* (*Development and Regulation*) *Bill 2010* (India), it has been proposed that 3 % of the profits of mining and minerals companies should be spent on social responsibility issues around the mining area. This amendment bill also proposes that every year these types of companies should have schemes for this type of profit-sharing. This proposed amendment will also require that all mining leaseholders, including the public sector, undertake to share 26 % of their after-tax profits with local stakeholders.[183] Such provisions and amendments will eventually create a substantive basis for CG to focus more on CSR issues. These legal provisions will assist CG to create suitable strategies to relate corporate issues to social welfare and public policy goals.

Clear and appropriate penal provisions against negligence on the part of corporate directors and senior managers who do not develop the required corporate CSR initiatives is an important strategy to encourage the development of self-regulated responsibility in companies. If the terms of Bangladesh's penal laws were clear about the personal liabilities of managers and directors in response to any type of non-compliance within the company, they would be more interested in maintaining an effective self-regulatory system. Considering the high concentration of ownership of businesses, the justice delivery system and the socio-economic texture in Bangladesh, corporate owners/directors should be made personally liable for any

[182] For the *Companies* (*Amendment*) *Bill 2009*, visit http://www.prsIndia.org/uploads/media/Company/Companies%20Bill%202009.pdf at 8 June 2011.

[183] India CSR, New Mining Bill Proposes 26 % Profit to Share, http://www.Indiacsr.in/article-1517-New-Mining-Bill-proposes-26-percent-Profit-to-share.htmlat 8 June 2011.

harm caused by the company, other than those covered by the specific civil penal provisions against companys liable for aiding and abetting any offence, and for the mismanagement of specific responsibilities.

To this end, there needs be a clear definition of corporate fault and the criteria for deciding what constitutes corporate fault. These could be placed in the *Companies Act 1994* (Bangladesh) as well as in other legislations related to CG. For instance, the *Bangladesh Penal Code 1860* (Bangladesh) and the *Code of Criminal Procedure 1898* (Bangladesh) could have definitions in this regard. Whatever the wording of this definition, it should have provisions related to any tool of meta-regulating law to ensure that corporate self-regulation acknowledges and upholds it. The definitional construct could include a requirement for the presence of effective compliance programs in corporate self-regulation to decide the penalties for this fault; the notion of 'due diligence' in relation to compliance would make this definition a complete one. Hence, the notion of due diligence requires review. Currently, in Bangladesh 'due diligence' is used as a plea for defence; a 'due diligence' defence occurs where the directors/senior managers of companies are made personally liable for a regulatory offence committed by an agent or employee, but can escape liability if they can show they had an effective internal control or compliance system to prevent the breach occurring.'[184] The discharge of a due diligence plea could depend upon the maintenance of an internal compliance system. For this there could be a clear indication in the laws that the due diligence defence is dependent upon the maintenance of an effective compliance system within a company. However, selecting the type of internal compliance system necessary to discharge the owners/directors due diligence obligations is difficult. For a guideline for selecting its type, scholars and practitioners often cite the decision of the English House of Lords in *Tesco* vs. *Nattrass* (1972) AC 156.[185]

This case was about a charge made against Tesco, a British supermarket chain, under the *Trade Descriptions Act 1968* (UK).[186] Tesco had advertised a special deal in which washing powder was being sold at a discounted price, as long as discounted stock was available. When the discounted stock ran out at one store, a shop assistant re-stocked the display with normally-priced stock but did not inform the store manager as she should have done. If the manager had known, he would have either removed the signs advertising the special or instructed that the stock be sold at the special price. As it happened, customers who had thought they were buying goods for a discount were told at the checkout that they had to pay full price. Tesco raised the statutory defence to liability that the offence was the fault of

[184] Christine Parker and Olivia Conolly, 'Is there a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30(4) *Australian Business Law Review* 273,288.

[185] The decision of the House of Lords in this appeal can be found at http://statutelaw.blogspot.com/2011/04/tesco-supermarkets-limited-vnattrass.html at 27 July 2011.

[186] The *Trade Descriptions Act 1968* (UK) can be found at http://www.legislation.gov.uk/ukpga/1968/29 at 27 July 2011.

'another person'—the manager—and that Tesco had taken 'all reasonable precautions and exercised all due diligence to avoid commission of the offence.'

The court asked whether Tesco had set up an efficient system for the avoidance of offences and whether it had properly operated that system. The court found that the system was adequate to avoid the commission of offences: the operating procedure was issued by the Board, and placed each store under the control of a manager who received instructions from the company regarding the running of the store. In this case, the system for selecting managers was careful and reasonable; for instance, the particular manager at this store had considerable experience and a good performance record. The company also provided adequate staff and equipment for him to run the store properly. The House of Lords held that this was appropriate, and Tesco was not held liable.

The 'due diligence' issue was not the main point in this case.[187] However, it indicates that a company must have design and operational procedures that are adequate, including effective managers, adequate back-up and resources and adequate instructions issued from the company directors, among other factors, to claim the due diligence defence.[188] Gray summarises this notion in due diligence as:

> The real 'de facto' ability of a company to evade or break external legal controls resides as often as not at the interface between the company and the public (in the case of consumer protection legislation), or the environment (in the case of environmental protection legislation), or the factory floor (in the case of health and safety legislation). These places are exactly where the law is designed to protect and regulate the company's business and are often a very long way, in terms of the corporate culture and power structure, from the head office, where supposedly preventative compliance systems are promulgated.[189]

Clarification of the criteria for deciding due diligence may seem an odd fit here, however, it is necessary to put this in legal language with a different notion. It is one of the most important pleas made as a defence against any personal charge. The legal provisions that provide the scope for the use of the due diligence defence by corporate owners and directors could also ensure that this defence depends upon the maintenance of an effective compliance management program within companys. Thus, when the question of due diligence becomes the deciding factor in corporate fault, the owner/director of a company either have the benefit of maintaining an

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[187] For a detailed discussion on this case see Celia Wells, 'Corporate Liability and Consumer Protection: Tesco v Nattrass Revisited' (1994) 57(5) *the Modern Law Review* 817; for other cases on corporate liability and consumer protection see *Warwickshire County Council v Johnson* [1993] I All ER 299. the Divisional Court decision was noted in 56 MLR 227, *Tesco Stores Ltd v Brent London Borough Council* [1993] 2 All ER 718 (QBD, DC), *Seaboard offshore Ltd v Secretary of State* [1994] 2 All ER 99 (HL).

[188] See Colin Scott, 'Criminalising the Trader to Protect the Consumer: The Fragmentation and Consolidation of Trading Standards Regulation' in Loveland (ed), *Frontiers of Criminality* (1995) 165 on recent British legislation.

[189] Joanna Gray, 'How Regulation Finds its Way through the Corporate Veil' (1997) 4 *European Financial Services Law* 254, in B Rider (ed), *the Corporate Dimension* (1998) 266. Gray cites the following cases: *Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

effective compliance management system or run the risk of personal punishment for not maintaining such as system.

These issues in corporate fault, namely, due diligence on the part of corporate owners or directors and their track record of maintaining a compliance management program could be bundled together under the notion of a socially responsible culture of compliance. The definition of this culture of compliance could also include the notion of 'due diligence' and 'effective compliance program'. Therefore, corporate owners or directors would maintain a system that promotes compliance with the ethos of CSR in order to avoid personal liability. A provision narrating the necessity of a corporate culture that directs, encourages, tolerates or leads to compliance with the relevant social, environmental and ethical responsibilities could further insist on CG for a socially responsible self-regulation and could close this loop by applying a duty that forbids corporate systems and practices that tolerate, encourage or cause non-compliance.

The *Companies Act 1994* (Bangladesh) could be amended to define this culture as 'an attitude, policy, rule, and course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.'[190] This definition should be framed in a way that it holds the diligence of owners/directors, the nature of fault and the trait of a compliance management program. The vital point to be considered in detailing this definition is that the provisions that relate to a corporate culture of compliance and due diligence to ensure socially responsible compliance program in companies cannot be ambiguous; rather, the provisions in this regard must provide adequate guidance to CG and their consultants regarding their intentions. This Act could endorse the general principles of CG of companies as have been endorsed by the New Zealand Securities Commission and the Australian Stock Exchange Corporate Governance Council. These principles could imply that corporate directors should observe and foster high ethical standards. For example, according to the New Zealand Securities Commission, '[t]he board should regularly verify that the entity has appropriate processes that identify and manage potential and relevant risk' and 'respect the interest of stakeholders within the context of the entity's ownership type and its fundamental purpose.'[191] The 10 original principles of good CG formulated by the Australian Stock Exchange Corporate Governance Council particularly emphasise responsible and ethical decision-making by directors and hold that directors should recognise the legitimate interests of stakeholders.[192] These principles help CG to efficiently and systematically manage compliance and the effects of

[190] Division 12.3(6).

[191] New Zealand Securities Commission, *Corporate Governance in New Zealand*: *Principles and Guidelines–a Handbook for Directors*, *Executives and Advisors* (2004), 2. Available at www.ecgi.org/codes/documents/cg_handbook2004.pdf *at 14 December 2010*.

[192] Australian Stock Exchange Corporate Governance Council and Australian Stock Exchange, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003). Available at http://www.csaust.com/AM/Template.cfm?Section=ASX_Corporate_Governance_Council_guidelines&Template=/CM/ContentDisplay.cfm&ContentID=7504 at 14 December 2010.

non-compliance. Furthermore, they help to develop a responsible corporate culture within which socially and environmentally friendly business strategies are encouraged. To reap the benefit of the convergence of CSR and CG, these principles could be explicitly incorporated into the corporate laws and guidelines. Corporate laws can also include the Guiding Principles on Business and Human, so that the companies can maintain a standard relating to human rights. These principles state that 'the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate'. These principles emphasise on companies avoiding any act detriment to human rights and seeking necessary steps to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. Corporate laws can describe these principles as obligations for corporate directors and senior officers, so that a company would be interested to a statement of policy in which they commit to meeting their responsibility to respect human rights and have due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. While the creation of such process within a company should depend upon the directors, it could be assumed that the directors would be catious for the development of such process as there are chances of legal sanction against them if it is found that they did not create a process with appropriate actions.[193] Some internationally renowned companies have already created this process where corporate directors are directed to consider human right issues as part of their 'due deligence'.[194]

An indirect way to encourage CG to maintain a socially responsible compliance program within its internal regulation would be the use of evidence of this program in relation to the mitigation of criminal and civil penalties in the case of offences against the owners/directors. There could be provisions in the related legislation to consider this evidence in order to mitigate a penalty where a defendant claims a culture of compliance, but only if the defendant provides specific evidence of a program aimed at the effective disbursement of their social, environmental and ethical liabilities as well as preventing breaches. Legal provisions to this end could include the criteria of a self-regulated compliance system so that the court and the government agencies are able to assess whether the CG is genuinely maintaining a corporate culture conducive to compliance with the principles of CSR. Maintaining an educational scheme, disciplinary or other corrective measures in response to an acknowledged contravention could be the components of such criteria. There could also be legal provisions that allow the consideration of the implementation of a compliance program even after discovery of the breach, or a compliance system

[193] For the text and its application, visit http://www.business-humanrights.org/Home 17 June 2012.

[194] Some of these companies are Cisco Systems, Barclays, Credit Suisse, Asia Pulp & Paper, adidas Group ets. For details, visit http://business-humanrights.org/Links/Repository/1009990 17 June 2012.

that has failed to manage a corporate fault as a mitigating factor, although there should not be a gap in the legal provisions in this regard that would allow a mere policy statement or the intention to adopt such program to be acknowledged as a sufficient plea for the mitigation of penalties.

Legal provisions for securing consumer rights through stakeholder engagement in business affairs and the dissemination of information and assistance would be other meta-regulation strategies to raise the ethical standards of CG and internal regulation. The following sections discuss these meta-regulation strategies in law.

### Securing Consumer Rights Through Stakeholder Engagement in Business Affairs

In a weak economy where consumers are illiterate and NGOs are either formed by businessmen or are patronised by corporate societies, the most plausible way to uphold these rights is to include them in legislation with effective implementation strategies. Recently, Bangladesh has passed the *Consumer Rights Protection Act 2009* (Bangladesh). Other than this Act, there are certain legal provisions that contain consumer rights issues such as the *Control of Essential Commodities Act 1956* (Bangladesh), the *Pure Food Ordinance 1959* (Bangladesh), the *Tobacco Goods Marketing* (*Control*) *Act 1988* (Bangladesh), the *Breast-Milk Substitute* (*Regulation of Marketing*) *Ordinance 1984* (Bangladesh) etc. These legislations are related to business activities and hence there are possibilities to add meta-regulating strategies into them to motivate companies to adopt CSR principles.

The *Control of Essential Commodities Act 1956* (Bangladesh) is more of an administrative tool for public agencies than for substantiating the rights and obligations of the regulatees.[195] It empowers the government to control the stock and marketing of certain specific commodities by declaring them as essential, hence it enables the government to control their production, distribution, preservation, use and trade. To facilitate these activities, this Act empowers government agencies to arrange special provisions for obtaining licenses and permits for certain goods in order to maintain their prices at a fixed level, keep proper accounts of the sale of essential commodities, and prevent the hoarding of these commodities. During the implementation phase, this Act uses penal provisions: any breach of the Act may entail 3 years' imprisonment or fines, or both. With these provisions, this legislation could allow some scope to incorporate appropriate CSR principles. This Act could craft the scope for allowing local stakeholders of the companies that operate under this Act into their business operations under the licence provided according to this Act. Thus, the local stakeholders will have the opportunity to examine the strategies by which the company maintains the obligation it has accepted with its licence to operate. Nonetheless, this Act should also include provisions on the formation of stakeholder groups, their rights and liabilities and the limits of their ability to

[195] It was passed by the East Pakistan Provincial assembly on September 19, 1956.

interfere in the businesses' internal regulations. The goal of creating this scope for stakeholders' groups is to develop a corporate culture where business management works with external actors towards maintaining their legal rights, liabilities and specific duties.[196] Development of this type of corporate culture could insist that the companies within this culture develop their internal strategies to maintain these core values. For details on the characteristics of such meta-regulating laws, see the discussion in Chap. 5.

Stakeholder engagement would be a worthy meta-regulating tool for the *Price and Distribution of Essential Commodities Ordinance 1970* (Bangladesh). The objective of this Ordinance is to ensure the correct pricing and equal distribution of the country's essential commodities so that importers, producers, and businessmen may not make unjustified profits. This Ordinance requires the companies to affix the prices of commodities and to hang the list of prices where it can be seen clearly. Furthermore, it requires them to provide a receipt for the sale of goods to the purchaser. However, due to the lack of effective monitoring agencies, these provisions have not been effectively implemented.

The general tendency amongst manufacturing companys is that either the producers, the buyers or the government are capable of fixing the price of a product. In the weak economies, where market rationale is weak in the presence of a strong oligopoly, government agencies are either incompetent or corrupt and political power is biased due to many factors, it is the producers who enjoy absolute authority over fixing the prices of their products in order to maximise their returns. In this situation they usually do not consider ethical values in business, but take advantage of the vulnerability of consumers. Under these circumstances, the role of stakeholders in the internal strategies of companies would be to help them to consider ethical issues in their business operations. When stakeholders have specific rights backed by specific legal provisions to assist the producer, the producer encounters an opponent who questions their unethical price fixing strategies. Facing this contest with their stakeholders, companies will gradually nurture more socially just corporate ethics within their management.

An important issue to mention here is that the usual method of fixing the price of a product should be guided by the economic rationale, which must be considered in every situation. Nonetheless, misuse of the scope for using the economic rationale should not remain uncontested. In strong economies, the development of competition law and its implementation agencies are active means of policing these issues.

[196] Most of the developed and developing economies have legal frameworks to encourage grassroots participation in corporate regulation. The Environmental Defenders' office in Australia supports different stakeholders with the aim of associating community and environmental groups with development projects, resource exploitation activities and corporate and governmental strategies. For details, visit http://www.edo.org.au/ at 21 November 2011; The *Resource Management Act 1991* (New Zealand) provides opportunities to community stakeholders and interest groups to interfere in business and governmental organisations' strategies related to social and environmental issues. For details, see Philip John Gendall, Jessie E Hosie and D F Russell, *The Environment*: *International Social Survey Program*, International Social Survey Program (1994).

In the weak economies where competition law and policy issues are not developed, providing the legal footing to stakeholders to enter internal business strategies would be an alternative way to monitor the ethical standards in business strategies.

The *Pure Food Ordinance 1959* (Bangladesh) was passed on October 14 1959 and later amended in 1966. The Ordinance was initiated to ascertain the production, supply, and distribution of pure foodstuffs. It regulates the production and distribution of certain essential foods for daily use such as flour, oil, clarified butter etc. It also prohibits persons having infectious diseases such as tuberculosis and leprosy, or other notifiable diseases, from taking part in the preparation, sale, or distribution of foodstuffs.

The Directorate of Public Health has been entrusted with the duty of inspecting and the quality of foodstuffs prepared for sale on the open market and to pursue any breach of the provisions of the Ordinance. To tackle breaches of its provisions, it mainly relies on a mix of pecuniary and physical punishments. However, the limits of the penalties and imprisonments described in this ordinance are inadequate. For instance, the first breach is punishable by a fine of up to US $13.14 or by imprisonment for 6 weeks to 1 year. Any subsequent breach is punishable with a fine of US $13.14-US $52.56 and imprisonment for 3 months to 1 year. Moreover, the lack of manpower and financial constraints has drastically curtailed the effectiveness and implementation of this otherwise useful ordinance.[197] Inadequate awareness of this legislation is another drawback that hinders its effectiveness. One study showed that only 1.5 % of the population is aware of the Ordinance.[198]

An appropriate meta-regulating strategy within this Ordinance could promote its effectiveness and develop social responsibility and corporate ethics in companys whose operations are related to the provisions of this Ordinance. As suggested for the *Control of Essential Commodities Act 1956* (Bangladesh), this Ordinance could also provide scope for stakeholder groups to monitor the internal processes of companys that produce food products. There could be provisions in this Ordinance to allow stakeholder groups to inspect the production, preservation and quality control strategies of these companys; to make this stakeholder engagement worthwhile, the reports of such inspections could be used when determining the continuation of the licences of these companys and in the determination of punitive measures for breaches of the Ordinance.

The *Bangladesh Drugs Control Ordinance 1982* (Bangladesh) is the first legislative initiative that directly relates rights and contains suitable strategies to ensure these rights. This Ordinance was passed in 1982 and was widely acclaimed, both within and outside Bangladesh, as a 'historic step' towards the protection of

[197] A Farouk, *Commodity Distribution System in Bangladesh* (1983) 189 in Mizanur Rahman, 'Consumer Protection in Bangladesh: Law and Practice' (1994) 17(3) *Journal of Consumer Policy* 349, 352.

[198] M Ali Quazi, 'Consumer Protection: An Evaluation', *The Daily Khabor* (Dhaka), 15 March 1986, in Rahman, above 352.

consumer rights and interests.[199] This Ordinance has used few meta-regulating strategies to reach its objectives.

This Ordinance empowers the government to exercise control over the manufacture, import, distribution, and sale of drugs. Under its provisions, the government cancelled the registration or licenses of 1,707 drugs, and their manufacture, import, and distribution were prohibited. This Ordinance describes the constitution of a Drug Control Committee to oversee the overall administration of drug production, import, export and the quality and prices of these products on the domestic market. This committee is known as the Drug Administration. This Ordinance also provides scope of incorporating members of the general public as an important stakeholder of drug administration. The impacts of imposing this type of administrative control over the drug manufacturing companys are many. Since registration from the Drug Administration is mandatory, companys that are producing, importing, exporting or marketing drugs are under its supervision. Since the guidelines used by this Administration follow the recommendations of the World Health Organization, all participants of in the drug industry must comply with these world-class recommendations. This Ordinance also uses coercion; breach of this Ordinance may entail punishment in the form of fines (up to US $2,627.88), or imprisonment (up to 10 years), or both. For implementing its provisions and to mediate disputes without incurring unnecessary delays it also has provisions for a Drug Court. However, the government has not yet asked the Drug Court to use these provisions.[200]

A legislation that has employed meta-regulating strategies rather than prescriptive measures to ensure consumer rights is the *Breast-Milk Substitute* (*Regulation of Marketing*) *Ordinance 1984* (Bangladesh). This Ordinance was passed on May 24 1984 to promote breastfeeding by regulating the marketing of breast-milk substitutes. It was drafted as a direct response to the International Code of Marketing of Breast-Milk Substitutes adopted in 1981 by the World Health Organization at its 36th annual session.[201] The underlying objective of complying with an established international standard is to demonstrate to the manufacturers of breast-milk substitutes that there are ethical, environmental and social issues related to their business operations and hence their strategies should be aligned with these issues.

This Ordinance could be cited as an example of how the use of the media and information dissemination creates an impact on business regulation by increasing consumers' knowledge. This Ordinance declares that 'no person shall make, exhibit, distribute, circulate, display, or publish any advertisement that promotes the use of any breast-milk substitute or implies or is designed to create the belief or impression that breast-milk substitutes are either equivalent or superior to

[199] Quazi, above 15.

[200] Mizanur Rahman, 'Consumer Protection in Bangladesh: Law and Practice' (1994) 17(3) *Journal of Consumer Policy* 349, 351.

[201] Quazi, above n 21, 12.

breastfeeding.'[202] It is now considered to be a breach of law if any person promotes or induces others to buy a breast-milk substitute either by advertising, offering any gift, prize, discount coupon, or other free items or by any other means. The Ordinance explicitly prohibits that packages of the breast-milk substitutes or any other printed material inside these packages carries a picture of an infant or any other picture or appeal that could induce a purchase of the substitute. The Ordinance now makes it obligatory that the package of the substitute carry the words 'there is no substitute for breastfeeding.' It provides the possibility of coercion as it declares that the violators of this provision may be subjected to imprisonment for 2 years, or a fine of US $65.70 or both. To add stakeholders' participation to reach its objectives, this Ordinance makes provision for the government to appoint an Advisory Committee, the function of which is to advise the government on the proper observation of the International Code of Marketing of Breast-Milk Substitutes.[203]

Joining the international anti-smoking campaign has prompted Bangladesh to enact the *Tobacco Goods Marketing* (*Control*) *Act 1988* (Bangladesh), with the objective of controlling and discouraging the use of tobacco goods under threat of penalty. In 2005, this Act has been repelled by the *Tobacco Control and Usages Act 2005* (Bangladesh). This is an updated version of the earlier Act and it is an instance that expresses society's interest in a certain kind of business product. It passes the message to the business community that the entrepreneurial goal should not only be to earn the highest return from their investment but also to consider the choice of the wider community to run a sustainable business with pride. This Act is also an example of a disincentive that the law can indirectly use to influence business activities. This Act directs the manufacturers and sellers of tobacco goods to put the warning note 'smoking is injurious to your health,' either on the packet or on the container, in the first language spoken in the country. This direction has had a negative impact on the advertisement of tobacco products and therefore could ultimately make the tobacco business a losing concern. It is of interest to note that this business is still profitable in many jurisdictions since it is based on a common but unhealthy human desire. However, due to the world-wide legal pressures on this business to raise the awareness of the general population regarding the harmful effect of smoking, the accumulated profits of this business are decreasing.

In tune with international practice, this Act makes it a punishable offence to display or advertise any tobacco goods if they are not accompanied by the warning note 'smoking is injurious to your health.'[204] This strategy has successfully

[202] Rahman, above n 20, 353–354.

[203] Rahman, above n 20, 354.

[204] Imposing high taxes on tobacco products is a commonly used indirect way to curb tobacco consumption. Apart from this, another effective indirect means of curbing this consumption is the banning of tobacco-related advertisement. Developing economies like China, India and South Africa have legal provision as stringent as the legal provisions for the banning of this type of advertisement in the strong economies.

minimised the tobacco manufacturers' initiatives to promote their products; these companys have acquired strategies to fulfil their legal liabilities, and these strategies are slowly minimising entrepreneurial zeal for a business that society does not appreciate.[205]

The *Consumer Rights Protection Act 2009* (Bangladesh) is an important legislation through which consumers and regulatory agencies could make an impact on corporate self-regulation strategies and encourage them to adopt CSR principles. Strategies could be incorporated in this legislation that could encourage corporate self-regulation to adopt a particular strategy, without which consumers could sanction socially irresponsible companys via this Act. For instance, this Act could propose the formation of a 'consumer right monitoring committee' in society.[206] It could require that the committee include different types of stakeholders so that the committee was fully representative of the business in every respect.[207]

This Act could also generate avenues for media groups to raise the general public's awareness of their rights as consumers, to campaign against companies that are detrimental to social, environmental and ethical values and to promote the positive effects of a particular entrepreneurial endeavour. This Act could allow the consumer society to get information related with manufacturing companies' energy and natural resource consumption. In these days, these types of companies are required to report their energy and resource consumption to the Department of Environment. This Act could allow this department to make these reports public, so that the consumers can assess the performance of the product manufacturer more efficiently while they will be using their purchasing power. This Act could also link

[205] An effective strategy to this end would be the development of civil society and NGOs actions against this business. With the support of legislative provisions, these non-legal drivers could play an active role against the promotion of this business. For instance, the Action on Smoking and Health in Thailand has successfully spread the drawbacks of this business amongst potential entrepreneurs considering this business. This NGO played an active role in the development and implementation of Thailand's tobacco control policy. Its action serves as a model for others. For details, visit http://www.enotes.com/public-health-encyclopedia/tobacco-control-advocacy-policies-developing at 16 November 2011.

[206] India has created some indirect but substantive programs to enforce the provisions of the *Consumer Protection Act 1986* (India). Under the Department of Consumer Affairs, this country has created a national committee with sufficient regional committees to monitor these programs. These programs include: increasing consumer awareness, strengthening the consumer grievance redressal machinery, developing standards laboratories for weights and measures, strengthening consumer forums, developing the infrastructure of the national commission etc. For details, visit http://fcamin.nic.in/Events/Eventdetails.asp?EventId=1471&Section+Consumer%20welfare%20Fund& ParentID=0&Parent=1&check=0# at 15 November 2011.

[207] United Nations Economic and Social Commission for Asia and Pacific, 'Regional Action Program for Environmentally Sound and Sustainable Development, 2001–2005' (2006) available at http://www.unescap.org/mced2000/rap2001-2005.pdf at 22 November 2011; Koh Kheng-Lian and Nicholas A Robinson, 'Strengthening Sustainable Development in Regional inter-Governmental Governance: Lessons from the 'ASEAN Way' (2002) 6 *Singapore Journal of International and Comparative Law* 640.

media groups with the economic incentives incorporated in a different regulatory arrangement.

The Act is meant to determine the right of consumers, to raise general public awareness of their rights and its effective implementation. These are the drivers that could impact corporate strategies by affecting the balance sheets of companies. Thus, the Act carries meta-regulating strategies to regulate corporate business strategies. However, the success of the meta-regulating strategies enshrined in this Act largely depends on their implementation. Government agencies, consumers and business society are all necessary to facilitate its implementation and allow it create a degree of responsibility in terms of maintaining product quality, deciding on product prices and overseeing the production process.

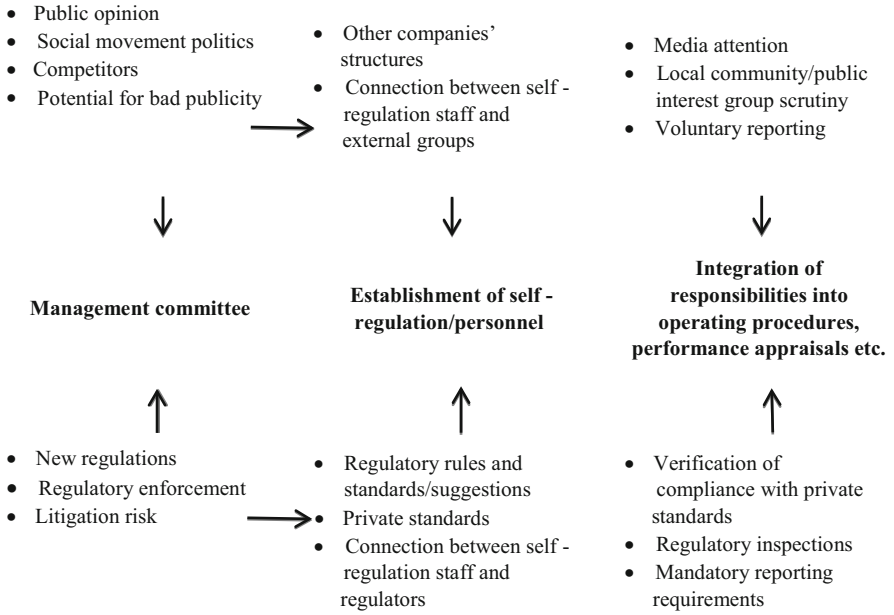
This Act could relate other regulatory provisions for the implementation of consumer rights and for the punishment of violations of these rights. There is a tendency in recent legislative frameworks to create unified and issue-specific legislation. This trend is not in keeping with the meta-regulating approach, which helps to regulate by regulating through other regulations. It helps to create an impact beyond the immediate context so that the objectives of using this approach may be fulfilled by different actors and factors. By taking the precepts of a meta-regulating approach, this Act could be related to other provisions described prior to its enactment in the context of different legislations. However, in this case, harmonisation in the delimiting of fines, civil liabilities and physical punishments would be necessary. This Act could provide insight for its coordination with the main legislations related to the protection of consumer rights in this country. For example, this Act could relate the provisions provided in the *Bangladesh Penal Code 1860* (Bangladesh), which contains rules that have a direct bearing on consumer protection. To minimise the overlapping factors among these legal provisions, related legislations could be amended as required. The point raised here is that stakeholders should have access to suitable forums to raise their grievances and obtain remedies according to their needs. The number of forums available for this implementation is likely to be directly related to their effectiveness; the more forums that are available, the more likely they are to be effective. Therefore, a meta-regulatory strategy in this Act would be one that provides consumers with the liberty to seek redress under the particular law they deem to be suitable.[208]

Parker has explained this sort of meta-regulation and termed this as a model for corporate social responsiveness. Based on the work of Chaganti and Phatak,[209]

[208] The *Special Powers Act 1974* (Bangladesh), *the Trade Mark Act 1940* (Bangladesh), *the Dangerous Drug Act 1930* (Bangladesh), *the Standards of Weights and Measures ordinance 1982* (Bangladesh) are other legislations that have provisions related to consumer interests. These laws are based on pecuniary and physical punishments. The coercion detailed in the consumers' interest related provisions in these laws could be used as meta-regulating objects in the *Consumer Protection Act 2009* (Bangladesh) if these provisions are acknowledged in this Act.

[209] R Chaganti and A Phatak, 'Evaluation and Role of the Corporate Environmental Affairs Function' (1983) 5 *Research in Corporate Social Performance and Policy* 183,187.

she has suggested that companies travel through three phases in order to manage their internal responsibility systems effectively: first, management has to have the commitment to respond to their social responsibility via self regulation; second, management must acquire the special knowledge and skills to implement social responsibility and third, governance and management must to develop a socially responsible culture within the company.[210] In this model, 'the beginning of each phase represents a strategic decision point at which the opportunity for social responsibility issues to couple with organisational process occurs.'[211] These deciding points depend upon external pressure. To face these external pressures or obligations, CG takes decisions that interact within these phases and facilitates management commitment to boost the effectiveness of their self-regulatory strategies. During this phase, the principles of CSR must be set at the core of every corporate strategy. Regulators and stakeholders can assess companies' positions within these phases through signs in their corporate moves and can create pressure by including economic incentives or coercive measures to insist that CG enforce suitable strategies in relation to their social, environmental and ethical responsibilities.




Phases in the development of a self-regulated corporate responsibility system (Adapted from Christine Parker, Is there a reliable way to evaluate organisational compliance programs? *Regulation*: *Enforcement and Compliance* (2002) 108)

[210] Parker, above n 3, 57.

[211] Ibid.

However, if it is found that management has not channelled their desires by adopting a systematic process, it could be deemed that the first phase has not been completed. In the second phase, if it is found that the system has not been adequately implemented within the context of the company in question, then it could be assumed that the regulatory system existed only as a policy. During the third phase, the system should achieve a continuous capacity to self-regulate social compliance. At this stage, the system should have the commitment to undertake 'holistic evaluation of the company's compliance performance outcomes that relates compliance outcomes back to the design and implementation of the compliance management system.'[212] The meta-regulation approach of the *Companies Act 1994* (Bangladesh) must tap in to all three of these phases; meta-regulation strategies in this Act must assist these three phases to provide a valid and equitable understanding of the quality of the corporate self-regulation system. This Act with meta-regulatory approach should not, as Parker has mentioned, focus on any one phase of this system. However, there can be imbalances in the performance of management in these phases due to differences between companies. While some companys need to focus on one particular phase more than the others, when preparing meta-regulatory approaches in law regulators must bear in mind the speciality of the company and their stage of development while assessing the progress of such as system in a company.

### Dissemination of Information and Assistance for Incorporating CSR Principles in Corporate Self-Regulation

Michael Hopkins identifies two main reasons for the slower uptake of CSR in the weak economies. Firstly, CSR is yet to be recognised as a development agenda in these economies, since in his opinion, development refers to 'increased economic growth, more direct foreign investment, less debt, more employment, increased levels of basic needs, improved environment, less poverty and more recently, better governance, transparency and reduced terrorism.'[213] Secondly, the companies of these economies are still more focused on philanthropy.[214] These reasons are prevalent in the corporate attitudes of Bangladesh. To gradually distance CG from this attitude, one vital meta-regulation approach of laws would be the incorporation of provisions for facilitating the dissemination of CSR-related information and assistance.[215] The following evaluation is on the scope of incorporating such provisions in certain corporate laws and administrative guidelines that are

[212] Christine Parker, *Is There A Reliable Way to Evaluate Organisational Compliance Programs*? Regulation: Enforcement and Compliance (2002) 107, 108.

[213] Michael Hopkins, *Corporate Social Responsibility and International Development*: *Is Business the Solution*? (2007) 174.

[214] Ibid.

[215] Ibid.

directly or indirectly related to the broader perspective of the *Companies Act 1994* (Bangladesh). This evaluation, however, is limited to the regulations that are related to the dissemination of the information and assistance necessary for framing of internal corporate strategies.

Pointing to the drawbacks mentioned by Hopkins, provisions for the development of the flow of adequate information related to CSR, CSR principles and assistance for their implementation would be a viable indirect way to raise the social responsibility performance of companies.[216] Such a legal strategy could assist corporate regulations to indirectly relate economic incentives and disincentives to the corporate interest in incorporating CSR principles into their internal strategies. In other words, with this type of strategy, corporate regulation could make distinctions between the competitiveness of companies in the marketplace. For instance, with respect to the availability of necessary information, if one company ignores such information or fail to use this information to increase its efficiency, that company would become a victim of self-made information asymmetry.[217] Hence, sources of information and assistance that could be sources of economic incentive could be used as meta-regulating objects to affect the strategic choices of companies. A detailed discussion on this point was presented in Chap. 6 of this book. The following section assesses the scope of incorporating these strategies in certain other legislation.

The *Bangladesh Small and Cottage Industries Corporation Act 1957* (Bangladesh) could contain provisions to bind the Bangladesh Industrial Technical Assistance Centre, the Bangladesh Council for Scientific and Industrial Research

[216] See Neil A F Popovic, 'The Right To Participate in Decisions That Affect the Environment' (1992) 10 *Pace Environmental Law Review* 683, 684–85. The recently introduced the *Right to Information Act 2009* (Bangladesh) is a strong step towards ensuring the right obtain information from public organisations in this country. However, this legislation does not have adequate provisions to facilitate public participation in public and private programs; it has simply provided scope for the public to apply for access to certain types of information, and the whole regulation is under the bureaucratic control. For a synopsis of this Act, visit http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/Bangladesh/Bangladesh_rti_act_2009_summary.pdf at 2 November 2011. This is also the case for the *Enactment and Conservation of National Environmental Quality Act 1992* (Thailand). For details on the bureaucratic culture that hampers the free flow of information in the Asia-Pacific region, see Elena Petkova, *Closing the Gap*: *information*, *Participation*, *and Justice in Decision-Making for the Environment* (2002). The *Environmental Protection Regulation 1997* (Nepal) provides the right to relate both public and private projects that concern their interests. The objective of this legislation is to ensure that 'anybody and everybody concerned about a proposed project shall be given an opportunity to voice their concerns.' Surya P Subedi, 'Environmental Inputs Into the Planning Process and Access to Justice' (1998) 28 *Environmental Policy and Law* 96, 99; the recent step taken by China for releasing weekly reports of the air quality of major cities is worth mentioning here. The Air Pollution index of Hong Kong and Monthly Environmental Information Bulletin of South Korea are two more instances that show the use of information for developing stakeholders' ability to impact on polluters. For more information, visit http://epd.gov.hk/epd/eindex.html at 22 November 2011; http://eng.me.go.kr/main.do at 22 November 2011.

[217] For details on asymmetric information see N Gregory Mankiw, *Principles of Economics* (2005) 479.

and the Bangladesh Small and Cottage Industries Corporation (BSCIC)[218] to expand the merits and techniques of responsible business among their companies. BSCIC is responsible for (1) the allotment of developed industrial estates (2) credit arrangement and end-use supervision (3) the design, development, and distribution of prototypes through its design centre (4) research and development activities (5) management and skills development; and (6) market study and marketing assistance (e.g., trade fairs). The Act could make this corporation responsible for delivering CSR knowledge and strategies for acquiring standardised CSR practices to companies.[219] In this regard, seven Indian states and five Indian national institutions have incorporated the 'cluster' approach of the UNIDO into national policies as a way to support their small companys. For example, the Government of Kerala has adopted an incentive policy for consortia called 'Common Corporate Entities' under its cluster development approach.[220]

Bangladesh's *Cooperative Societies Act 2001* (Bangladesh), which provides detailed guidelines and procedures for establishing cooperative business structures,

[218] This corporation, along with the entrepreneurship development training activities, is responsible for (i) allotment of developed industrial estates (ii) credit arrangement and end use supervision (iii) design, development, and distribution of prototypes through its design centre (iv) research and development activities (v) management and skills development; and (vi) market study and marketing assistance (e.g., trade fairs). With these core objectives, CSR practices as a tool for extending the business case for small and medium companies could be incorporated as another objective of this corporation. It is worth noting that this corporation has immense impact on the development of small and medium companies.

[219] In 2008–09, BSCIC established 6,020 and 4,691 small companies and the total investment in these units is Tk. 2,445.99 crores. In this financial year, 9,168 industrial units in its 74 industrial estates have produced products worth Tk. 24,683.67 crores of which products worth Tk.13,325.80 crores have been exported. It is establishing a new tannery industrial estate and has taken an initiative to establish a pharmaceutical industrial park in Bangladesh. For details, see the Ministry of Finance of the Government of Bangladesh, *Bangladesh Economic Review* (2009) Finance Division, Ministry of Finance http://www.mof.gov.bd/en/budget/er/2009/c8.pdf at 25 November 2010.

[220] Wilfred Luetkenhorst, 'Private Sector Development: The Support Programs of the Small and Medium Companys Branch' (Working Paper No 15, UNIDO, 2005)18, 21. For more information, see, http://www.unido.org/cluster 18 November 2011. In corporate regulation, the use of 'clustering' approach could be a vital meta-regulating strategy to raise CSR. The crux of this strategy is that the incorporation of CSR principles into companies would be easier if these are related to other facilitative services to businesses. The clustering approach is meant to minimise unnecessary delay, cost and ambiguity and hence, the incorporation of CSR issues in business would not be considered as a burden if these could be included in this approach. Another dimension related to this strategy, especially in weak economies, is that this approach helps to minimise the number of procedures involved in starting a business, to minimise the correlation between high levels of regulation and perceived corruption. To illustrate the nexus of this approach and strategy, the case of adding CSR issues with corporate license and registration, taxation and custom regulations of few East African economies is an important mention here. For details, see the Ministry of Planning and National Development, *Improving the Legal and Regulatory Environment Through Trade Licensing Reform* (1997) in Fiona Macculloch, 'Government Administrative Burdens on Small and Medium Companys in East Africa: Reviewing Issues and Actions' (2001) 21(2) *Economic Affairs* 10,11; World Bank, *Doing Business in 2007*: *How to Reform* (2006) 12.

also provides guidelines for implementing CSR principles in small industries. If these principles were categorically defined in this Act, the Small and Cottage Industries Training Institute's training manual could provide relevant materials to potential industry stakeholders. These legal strategies would enable this organisation to take programs to develop awareness of CSR principles within the internal regulations of companies from their inception. This would also provide practical and affordable training methods and tools that are specifically developed to integrate environmental and social standards into the business plans of companies. Showcasing the practicability and benefits of implementing the principles of CSR in business plans would be another meta-regulating strategy in this regard.

The laws and legal regulation of this country could formally include the international norms necessary to develop a socially responsible corporate culture. There is evidence of this incorporation in developed economies' legislation. For instance, the *Resource Management Act 1991* (New Zealand)[221] and the *Basic Environment Law 1993* (Japan)[222] has incorporated the international norms for sustainable development. Article 5(1) of the *Resource Management Act 1991* (New Zealand) sets out that the purpose of this Act is to ensure 'sustainable management of natural and physical resources.' It defines sustainable management as 'sustaining the potential of physical resources. . .to meet the reasonably foreseeable needs of future generations.'[223] Accordingly, the aim of the *Basic Environmental Law 1993* (Japan) is to promote 'a comprehensive environmental policy, with the goal of preserving the natural environment for the enjoinment of present and future generations.'[224] The *Environmental Conservation Act 1995* (Bangladesh) and the National Conservation Strategy of this country could have these notions. This legislation could also hold the provisions to facilitate the 'environmental impact assessment' at the large company level.[225]

Bangladesh is a signatory to many international treaties and covenants and thereby is obliged to implement most of the provisions of those instruments. Most of these instruments are related to CSR issues and therefore, taking considering these treaty obligations at the macro level would build an environment where companies would be at the focus of negative media coverage, punitive actions and losing their reputations. The CSR-oriented provisions of the UN Declaration of Human Rights, International Labor Organization conventions and other UN

[221] This legislation is available at http://www.legislation.govt.nz/act/public/1991/0069/66.0/DLM230265.html at 21 November 2011.

[222] For this legislation, visit http://www.env.go.jp/en/laws/policy/basic/index.html at 21 November 2011.

[223] Shiro Kawashima, 'A Survey of Environmental Law and Policy in Japan' (1994) 20 *North Carolina Journal of International Law and Commercial Regulation* 231, 252.

[224] Ibid 248.

[225] Economic and Social Commission for Asia and the Pacific, *State of the Environment 1995* (1995) 473 in Roda Mushkat, *International Environmental Law and Asian Values*: *Legal Norms and Cultural Influences* (2005) 41.

conventions could be perceived as the benchmarks for framing national corporate regulations to help develop initiatives that would operate to create a more socially responsible corporate culture.[226] Vietnam has incorporated this approach by creating the Vietnam Business Council, a consultative and deliberative forum that comprises representatives from business, government and civil society to coordinate community–corporate collaboration for social development.[227] It is committed to addressing issues related to the development of economic and social business policies or laws. It seeks corporation and community collaboration for social development, which is a means of widening the application of CSR to the community at large.[228] It also seeks to improve the processes for obtaining input from both government and business in this reform process. This Council was created under the leadership of four key organisations: the Vietnam Chamber of Commerce and Industries,[229] the Prime Minister's Research Commission, the Central Institute of Economic Management, and the Association of Small Companys in Hanoi.

An International Treaty/Convention Obligation Monitoring Authority could be constituted to help follow up the implementation of international treaty obligations.[230] This authority could be empowered to assist businesses, as well as put them on probation where they are the source of a violation of any obligation. This authority could even bring the sense of being liable to implement international treaty provisions in a broader perspective. For this, this authority could pass directives to companies regarding their obligations as outlined in international

[226] P Brew and F House, 'The Business of Company: Meeting the Challenge of Economic Development Through Business and Community Partnerships' (Paper presented at 2002) 26.

[227] Joaquin L Gonzalez, *Corporation–Community Collaboration for Social Development*: *An Overview of Trends*, *Challenges*, *and Lessons from Asia*, Corporate Social Responsibility In the Promotion of Social Development: Experiences from Asia and Latin America (2004), available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2220311 at 29 March 2011.

[228] Ibid.

[229] The Vietnam Chamber of Commerce and industries is a national organisation that assembles and represents companies and associations from all economic sectors across Vietnam. The Prime Minister's Research Commission is a think-tank that provides advice and proposals to the Prime Minister and leaders of the Vietnamese Government on economic, social and administrative reforms. The Central institute of Economic Management is a research institute that advises the Vietnamese government on economic laws and policies.

[230] Under the *Environmental Protection Agency Act 1994* (Ghana) has established the Environmental Protection Agency, a body corporate endowed with the power to prescribe and enforce environment standard. A major task of this agency is to incorporate some of the norms that were crystallised at the 1992 Rio de Janeiro Earth Summit. Among the norms this agency is trying to incorporate is the environmental impact assessment. The powers of enforcement of environmental impact assessments and that of the Environmental Protection Agency have been enhanced by the enactment of the *Environmental Assessment Regulation 1999* (Ghana). This regulation is a 'comprehensive peace of legislation that deals with procedures and other matters appertaining to environmental impact assessments, environmental audits and management plans; such as public hearings, complaints and penalties.' G A Sarpong, 'Environmental Law and the Ghanaian Court' in Michael R anderson and Paolo Galizzi (eds), *International Environmental Law in National Courts* (2002) 113.

treaties/conventions. As these international conventions and treaties are related to basic human, environmental and political rights issues, these are important for the establishment of a common standard for socially responsible behaviour in companies. If such an authority could be developed with private and public participation it would facilitate the creation of an environment where companies' efforts to fulfil their international treaty obligations would be constantly monitored. To reduce the costs and time losses involved with facing frequent inspections, companies will naturally devise their own strategies to maintain these standards effectively. To facilitate this approach, legislative reform in Vietnam is noteworthy. This country has recently enacted two separate laws in this regard: the *Unified Enterprise Law 2006* (Vietnam) and the *Common Investment Law 2006* (Vietnam). The *Unified Enterprise Law 2006* (Vietnam) merges the *Enterprise Law 1999* (Vietnam), the *State-Owned Enterprise Law 2003* (Vietnam) and the *Law on Cooperatives 1996* (Vietnam), providing a mechanism to protect the rights of citizens to establish and operate private businesses. The *Common Investment Law 2006* (Vietnam) aims to level the playing field between foreign and domestic companies, and private and state-owned companys. With this unification, it has protected the right of investors from undue interference by governmental agencies and officials, as long as businesses operate legally.[231]

Laws related to trade facilitation could provide directives to trade facilitation organisations to frame any necessary provisions to disseminate information[232] related to CSR principles and business cases. These laws could empower the relevant organisations to assist companys and monitor their initiatives to incorporate CSR principles into their internal regulations. To clarify this concept, let me illustrate it with an example. The *Bangladesh Bank Order 1972* (Bangladesh)[233] is a circular issued by the central bank of Bangladesh announcing that all banks operating in Bangladesh could add a chapter to their reports regarding their CSR performance.[234] This was optional, but banking corporations competed among themselves to implement CSR operations. To put the effect of this circular simply, if one bank were to report on its CSR performance to the central bank and the central bank were to reveal this information to the general public; banks that failed to report on their CSR performance would run the risk of losing their market share

[231] For details, see Tamara Bekefi, 'Vietnam: Lessons in Building Linkages for Competitive and Responsible Entrepreneurship' UNIDO and the Kennedy School of Government, Harvard University, 2006.

[232] Access to required information helps to overcome the information failures that are particularly common in LDCs. Without an adequately enabling environment, it is difficult for any type of support program to have much impact. For details see Luetkenhorst, above n 42, 15.

[233] For details of this law, visit http://www.bangladeshbank.org.bd/aboutus/bankregulations/bbankorder.pdf at 4 September 2010.

[234] Department of Off-site Supervision (Bangladesh Bank) Circular No. 1 of 1 June 2008. this circular can be found in Appendix 1 in S K Sur Chowdhury, Saiful Islam and Qazi Mutmainna Tahmida, *Review of Corporate Social Responsibility (CSR) Initiatives in Banks (2008 & 2009)* (2010), available at http://www.bangladesh-bank.org/pub/annual/csr/csr0809.pdf at 20 May 2011.

to the bank that reported their CSR performance data. Recent research indicates that companys' reports are studied not just by financial stakeholders but also by customers.[235] Hence, banks have become motivated to incorporate the principles of CSR; they tend to have improved strategies and budgets for CSR operations in order to maintain a good CSR record to present to their existing and potential customers. This strategy has considerably enhanced the CSR performance of Bangladesh's banks; their direct expenditure has been deepened and broadened substantially. In 2010, almost all the banks (46 of the 49 banks) of this country have reported their CSR initiatives as supplements to their usual annual financial reports in accordance with the directive of the Bangladesh Bank compared to only 24 in 2009.[236] Bangladesh Bank has extended this strategy by publishing the *Review of CSR Initiatives in Banks* (*2008 & 2009*) in 2010. This report appraises recent CSR-related activities of different banks and conveys the updated guideline that they first issued in June 2008. In its Review of CSR Initiatives in Banks (2010), Bangladesh Bank has revealed the direct expenditure of the banks on CSR initiatives has dramatically increased from US $7.58 million in 2009 to US $31.91 million in 2010.[237]

This is an instance of creating a meta-regulating effect in corporate self-regulation by adding CSR with an economic rationale. This strategy both insists and helps 49 banks of this country to perform their social responsibilities in each of their 3,640 branches; it pushes the banking society to create better strategies to contribute to the livelihoods of the 120,000 direct employees of this sector.[238] A report from Bangladesh Bank revealed that during 2007 this sector spent US $3,013,500, in 2008 this amount was US $5,464,610 and in 2009 this amount increased to US $7,368,400.[239] Within the banks, CSR performance is an incentive for management as the managers can use these performances as an indicator their efficiency. They can include this information in their reports on the financial performance to their shareholders.[240]

Some economies have included this model in their corporate regulations. For instance, to facilitate these strategies, the *Banking Laws 2001* (Turkey)[241] of

[235] Globalscan, *Press Release*, GlobeScan 22 April. 2004 in Karin Buhmann, 'Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR' (2006) 6(2) *Corporate Governance* 196; Ataur Rahman Belal and David L Owen, 'The Views of Corporate Managers on the Current State of, and Future Prospects for, Social Reporting in Bangladesh: An Engagement-Based Study' (2007) 20(3) *Accounting, Auditing & Accountability Journal* 472; M H Khan, 'The Effect of Corporate Governance Elements on Corporate Social Responsibility (CSR) Reporting' (2010) 52(2) *International Journal of Law and Management* 82.

[236] Chowdhury, above n 57, 10.

[237] S K Sur Chowdhury et al., *Review of CSR Initiatives in Banks* 2010 (2011) 1.

[238] Bangladesh Bank, www.bangladesh-bank.org at 10 December 2010.

[239] Chowdhury, above n 57, 23–24.

[240] According to the *Banking Companies Act 1991* (Bangladesh), all banks are liable to report their financial performance to their shareholders.

[241] No. 5411.

Turkey have detailed the principles for banking corporations.[242] This legislation has referred the power to ensure that banking corporations adopt principles of responsible management to the Board of Capital Markets so that bank customers are informed of the ethics involved in every investment. These principles also require that corporate bodies that rely on banking corporations for financial support have detailed strategies for disbursing their social commitments included in their business plans.

The legal provision related to public procurement could be an important source of creating meta-regulating effects in companies. These provisions could clearly state that companies with proven tax and social premium debts cannot participate in any public procurement tenders. Moreover, this provision could also refer to the tax provisions that provide tax incentives to companies who have donated a considerable sum to support public programs for social development. This provision would help in two ways: it would help to limit negative corporate effects and would insist that companys become involved in social development programs. According to Article 89 of the *Income Tax Law 2006* (Turkey),[243] companies can benefit from tax incentives for charitable contributions and donations to education programs, which in fact has triggered the support of business society for special campaigns such as 'Girls Let's go to School'. Likewise, this type of strategy could help ongoing social programs such as 'Education for All' or 'Small Family, Happy Family' in Bangladesh, and simultaneously insist that companies must make substantial contributions to obtain benefits and goodwill by supporting these public social programs. Moreover, the procurement provision could also state that it is the responsibility of companies to take every precaution to guarantee the safety of third parties during the supply of the commodity to the relevant public facility. These provisions would help to ensure that potential companies are not simply evading their tax liabilities and maintain clear guidelines within corporate management regarding these tax incentives. Moreover, the laws related to these functions could also require a declaration of the wealth of the interested parties to the contractor. This declaration would be helpful for the other public agencies combatting bribery and corruption. The objective of this requirement would be to create a database for the public agencies and, if necessary, for the media. This would provide an opportunity for the public agencies and the media to act as watchdogs against corporate fraud and corruption; creating the scope for such monitoring would ultimately render potential contractors, suppliers and companies more vigilant against corporate fraud and misappropriation. This strategy has been incorporated into the *Declaration of Wealth*, *Combating against Bribery and Corruption Law 1990* (Turkey).[244] This legislation aims to provide supportive tools to combat bribery and corruption by forcing individual corporations and

[242] Ceyhun Gocenoglu and Isil Onan, 'Turkey Corporate Social Responsibility: Baseline Report' (European Commission and UNDP, 2008) 49.

[243] No. 193.

[244] No. 3628; Gocenoglu and onan, above n 65, 49.

individuals, including the owners of media, leaders of business organisations etc. whose activities are considered to be benefiting the public to declare their personal financial status.

Meta-regulation strategies would be more effective if the notion of 'social compliance' could be broadened and better understood by the stakeholders. Social compliance should not be limited to the observation of certain recognised social standards incorporated into bilateral agreements. Rather, it should extend to automatic compliance with the generally accepted social norms. In this context, the view of Reed Consulting,[245] an agency working to promote CSR in Bangladesh, is noteworthy. It holds that although CSR as a holistic approach goes beyond social compliance, social compliance is a mainstream component for the incorporation of the core principles of CSR. This is because the broader sense of 'social compliance' includes each of the issues and principles of CSR, including prohibiting child labour, health and safety in workplace, working hours, discrimination, disciplinary practices, remuneration, freedom of association, the right of collective bargaining, security of employment and also environmental management.[246] It also includes human resources and product quality, education and healthcare, and overall good management of a company.[247] Given this, the incorporation of the core principles of CSR into the self-regulated responsibilities of Bangladeshi companies would be greatly benefited if this Act could develop strategies to promote the broader meaning of the 'social compliance' within the corporate culture.

### *6.3.2 Incorporating a Meta-Regulating Approach in the Bangladesh Labour Law 2006 (Bangladesh)*

One of the objectives of the *Bangladesh Labour Law 2006* (Bangladesh) is to protect labour rights in industry. To fulfil this objective, this law has 354 sections that are either proscriptive or prescriptive. As discussed in Chap. 2, the mode of this law is authoritative and its implementation relies on government agencies. However, other than its present framework, it has scope to incorporate different strategies to improve its performance in fulfilling its aims. It could emphasise (a) prompting of corporate commitment; (b) enabling stakeholders; and (c) developing strategies for effective evaluation of corporate accountability.

[245] A UK-based consulting company working in Bangladesh for research on CSR.

[246] See Reed Consulting (Bangladesh) Ltd., Corporate Social Responsibility: An Awareness Guide for Companies Operating in Bangladesh (2008).

[247] Ibid.

**Prompting Corporate Commitment**

This law describes the rights of labourers in the workplace and the liability of employers for any infringement of these rights. Due to its prescriptive nature, employers limit their responsibility for their workers to those prescribed by this law. Hence, it has narrowed the scope for building a culture of corporate responsibility from the employer's perspective. This law could develop this commitment in two ways: by imposing duties and by including persuasive provisions.[248] For instance, this law could have a provision detailing a negative duty (i.e., not to discriminate on the ground of sex) and a process duty (i.e., to identify and remove barriers to women's advancement). The important point in providing this type of provision is that it is not based on the prescriptive mode of legal regulation. Rather, its aim is to create a substantive effect to prompt corporate commitment. Such a provision in this law could promote corporate commitment by using a combination of arguments concerning the business case, the moral case and the litigation risk associated with inadequate efforts for labour welfare.

This law could provide sanction to a public inquiry committee to monitor corporate performance. A multi-stakeholder committee with legal sanction could affect the internal management strategies of companys, as its monitoring and actions against any infringement of workers rights would warn, challenge, and assist strategic development. This committee could be formed by the members of different stakeholder groups to run a regular enquiry program and to minimise the load and corruption in the existing government agencies' inspection programs. Moreover, it could provide disclosure and publicity for exemplary efforts. In Australia, Sara Charlesworth has found evidence that this strategy can indirectly prompt corporate responsibility.[249] She argues that this strategy has helped to raise corporate awareness of discrimination against pregnant workers and for paid

[248] The commonly used legal strategy for increasing such commitment is the sanction of strict punishment measures. The *Public Health Liability Act 1991* (India) holds company boards and managers personally liable for death, injury or any damages to property arising from any act or plan of the company. In *M. C. Mehta v Union of India*, the Supreme Court of India describes the scope of company acts for which the board of directors and managers of a company may be punished under this Act. The Court held that 'an company, engaged in a hazardous or inherently dangerous industry and posing a potential threat to the health and safety of workers and persons residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken.' for details, see AIR (SC) (1987)1086, 1087. Hong Kong also follows this strategy. The *Water Pollution Control Ordinance 1980* (Hong Kong) holds company directors, managers, partners and secretaries liable in so far as the offence is related to their consent and negligence. The *Water Pollution Control Act 1991* (Taiwan), the *Environmental Protection Act 1997* (Pakistan), the *Labour Protection Act 1998* (Thailand), the *Employment of Children Act 1991* (Pakistan) are other pieces of legislation that are largely based on the deterrent factor of punishment provisions.

[249] Sara Charlesworth and Belinda Probert, 'Why Some Organisations Take on Family-Friendly Policies: The Case of Paid Maternity Leave' (2005) http://airaanz.econ.usyd.edu.au/papers/Charlesworth_Probert.pdf at 23 May 2011.

maternity leave, for instance.[250] Charlesworth notes that incorporation of this strategy in law can indirectly drive corporate action for developing a systematic response to the rights of labourers.[251] Incorporating the provisions of this type of enquiry committee might compel companies to adopt the system, because the risk of not adopting the system is not amenable to the particular regulatory pressure exerted. However, mandates run alternative risks of non-compliance due to of resistance.[252]

This law could relate social responsibility commitment to attractive incentive packages that would stimulate corporate interest in accepting their social responsibilities. For instance, Section 348 of this law stipulates that the government should facilitate training on labour rights for labour union leaders and employers with the assistance of the companys at which the trainees work. It is further stipulated that workers should be deemed to be working while they are being trained. The objective of this provision is to make employees aware of their rights and duties. Employers may not consider this responsibility a worthy one, as it will not generate any instant profit but may also incur extra costs. However, companys might be more interested in providing such training if the provisions for training are able to provide them with an instant incentive or risk management benefit. This could relate, for example, to sentencing guidelines for the labour courts or arbitrators. Thus, this section might read as follows:

> [T]he company will train its labour union and general managerial employees on their labour rights and on the provisions of this law. The performance of this responsibility will be considered by courts, arbitrators, and tribunals when determining punishment for violating any provisions of this law.[253]

### Enabling Stakeholders

Legal regulations that relate stakeholders to corporate strategies are considered one of the best approaches to ensure that companies have the required systems to fulfil their social responsibilities.[254] Effective stakeholder engagement in corporate self-regulation could minimise the role of policing by governmental agencies and the use of coercive modes in corporate regulation.

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[250] Ibid.

[251] Ibid.

[252] Belinda Smith, Chapter 1 n 16.

[253] There could be provisions related to the performance of companies in Sections 215, 216, 221 of the *Bangladesh Labour Laws 2006* (Bangladesh). These sections mention the power of the court, arbitrator and tribunal in deciding their decisions.

[254] Ronald K Mitchell, B R Agle and Dona J Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22(4) *Academy of Management Review* 853; M B E Clarkson, 'A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20(1) *Academy of Management Review* 92.

Within business and society relations, the core idea of stakeholder thinking is that CG is responsible for considering the views of their stakeholders in corporate self-regulation (i.e., the stakeholders have rights). Hence, this concept challenges the central position of managerial capitalism. Two arguments might have prompted this challenge. The first considers that today's companies are no longer fit for the old model of governance. It argues that the concept of ownership has shifted from its 'hard' strand, and hence companies can no longer accurately be viewed by their owners as private property.[255] The second argument considers the power relationship between business and society. It claims that social power comes with social responsibility, and hence, failing to mitigate the costs that arise (i.e., out of industrial pollution, hazardous products, job dissatisfaction, etc.) inevitably raises questions about the exercise and limitation of corporate power.[256]

Based on this stakeholder thinking, it is clear that there could be regulatory strategies to use stakeholder engagement to develop companies' social responsibility.[257]

This Code could be the source of developing and distributing knowledge of labour-related compliance requirements and responsibility practices that could facilitate self-regulation. It is unlikely that the strategies in this law could do much to prompt innovation and instant benefits; however, they could disseminate innovative initiatives at the management level. Moreover, they could involve stakeholders in developing innovation and the knowledge sharing between business and society at large. They could also have provisions to incorporate the principle of the stakeholder approach of CSR in corporate self-regulation.

The stakeholder principle of CSR embodies the ethos of the meta-regulation approach, and, therefore, incorporating it into corporate laws could facilitate meta-regulation in CG. Corporate- and labour-related laws could be the source of the incorporation of this principle in the companies of this country. This principle entails the notion that a person who affects, or is affected by, an company's operations has a stake in that company's operations.[258] It reflects the idea that the conduct of companys can affect more than just shareholders. All the people in these groups are 'vital to the success and survival of a corporation.'[259] Generally, these people can be divided into three types of stakeholders: organisational, economic, and societal. Together, these three types of stakeholders form a set in which the employees of the company are the foremost organisational stakeholders; the customers, creditors, distributors, suppliers, and shareholders are the economic

[255] Michael W Hoffman and Robert E Frederick, *Business Ethic–Readings and Cases in Corporate Morality* (3rd ed, 1995).

[256] Ibid.

[257] Neil Gunningham, *Beyond Compliance*: *Next Generation Environmental Regulation*, Regulation: Enforcement and Compliance (2002) 50, 58.

[258] Edward Freeman, *Strategic Management*: *A Stakeholder Approach* (2010); see also UN Norms on the Responsibilities of Transnational Corporations and other Companies with Regard to Human Rights 2003 at paragraph 22.

[259] Ibid 31.

stakeholders; while communities, government, civil and environmental groups, and so on are the societal stakeholders.[260]

This principle could be placed at the core of corporate management with appropriate regulatory incentives and sanctions. For instance, under Section 323 of the Code, the scope and objectives of the National Council for Industrial Health and Safety could be implemented in companies, applying the stakeholder principle of CSR. This council monitors the occupational health and safety issues of industrial workers in Bangladesh and develops relevant standards. Under the National Council, regional councils and units could be established nation-wide. The units under the regional councils could form and monitor local multi-stakeholder committees for companies. With the direction and standards set by the National Council, regional councils could provide support and administrative help to units that oversee the health and safety concerns of factory workers. These units could create an environment that supports the development of CSR practices in companies.[261] They could be involved with the registration of businesses and the direct monitoring activities of government organisations. Environmental clearance certification[262] could be delivered by these units to curb corruption and compensate for the lack of expertise, management planning, and precise knowledge on how to incorporate CSR practices into companies. Currently, Bangladesh has only 46 inspectors under the Chief Inspectors of Factories, which are under the administrative control of the Ministry of Labour and Employment. These inspectors represent the sole government body that implements occupational health and safety provisions, and they are responsible only to their higher authorities in the same ministry. Moreover, considering the total number of factories in Bangladesh, the number of inspectors is very low, especially given that the factory inspectorate is not assisted by lawyers. Here, there are ample chances for a factory inspector to be corrupted. In these circumstances, multi-stakeholder committees—composed of the representatives of different stakeholder groups and focused upon a specific goal—could be a viable way to reduce corruption in the business environment.

At this point, it is relevant to mention the tensions among factory owners in the metropolitan area of Dhaka, the capital of Bangladesh. During the 1980s, many garment factories were built in Dhaka without any regard for the future or their potential competitiveness. At that time, some large factories were built that were structurally very poor. These inadequate structures were one of the main reasons behind the massive fire in some of these factories on April 11, 2005. Along with the irreparable loss of life and property, this incident also hampered the prospects of

[260] WBCSD, *Corporate Social Responsibility*: *The WBCSD's Journey* (2002) 2.

[261] Without an adequately enabling environment, it is difficult for any type of support program to have much effect. For details, see Luetkenhorst, above n 43, 15.

[262] In Bangladesh, according to the *Environment Conservation Rules 1997*, all companies have to obtain an Environmental Clearance Certificate but this certificate is usually issued without adequate verification and no effective inspection is made regularly. For specific evidence, see Wolfgang Wiegel et al., Compliance with Environmental Regulations in the Textile Industry www.ecorys.com at 11 January 2009.

Bangladeshi RMG-related companys acting as suppliers in the global supply chains.[263] Even now, the owners of the businesses in these factory buildings are under continual pressure from the government, labour unions, and international buyers to enact the required safety measures and sanitation arrangements. Currently, the conditions of most of the garment factory buildings in the city are in clear contravention of the newly enacted Code and the *Bangladesh National Building Code 1993* (Bangladesh) provisions. Its recently repealed the *Factories Act 1961* (Bangladesh) also prohibited the establishment of these factories in such substandard buildings, but corruption and nepotism ensured that the provisions of this Act were never fully implemented. If this industry were to be guided by a long-sighted national policy and multi-stakeholder-oriented meta-regulation strategies, then these businesses would not have to deal with these issues.

In this respect, the notion of the Vietnam Business Links Initiative program initiated by the Company Act of this country is an appropriate example. It is a multi-sector initiative through which corporate management is engaged for developing companys, building local communities, and supporting marginalised groups. This program was developed through a consultation process with the footwear industry, worker representatives, government departments, research bodies, multilateral agencies, and health and safety organisations.[264] The program is a success story in terms of promotional activities for occupational health and safety issues in the footwear industries in Vietnam. This is an instance of the development of the social responsibility performance of companies, as it has successfully convinced the maximum number of companies, managers, and beneficiaries to respond in terms of their CSR performances.[265] Similarly, it has helped raise awareness among industry leaders of occupational health and safety issues, and at the same time, its programs have positively influenced occupational health and safety management.[266]

The Code could have provisions to facilitate programs such as the Vietnam Business Link Initiative. There could be guidelines regarding publishing information in this law. It could insist that corporations and government agencies publish labour-related complaints, the process and outcome of labour-related public inquiries, litigation reports, and conciliation of disputes. The goal of such information dissemination is to help employers to understand what the legal rule of non-discrimination proscribes and what they can do to avoid legal liability and go beyond risk management. It should push not only remediation but also systemic reforms, such as the implementation or improvement of a compliance program.[267]

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[263] S Frost, 'Garment Factory Collapses in Bangladesh' (2005) 1(16) *CSR Asia Weekly* 12–13.

[264] P Brew and F House, 'The Business of Company: Meeting the Challenge of Economic Development Through Business and Community Partnerships' (Paper presented in 2002). For related issues, see the United Nations Conference on Trade and Development, above n 35, 29.

[265] Bekefi, above n 54.

[266] Ibid.

[267] For an in-depth study on this issue, see Annemarie Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280.

In this regard, the initiative of the Human Rights and Equal Opportunity Commission of Australia is an appropriate example. This organisation helps corporate actors to identify equality problems and develop self-regulatory responses.[268] With respect to sexual harassment and pregnancy discrimination, for instance, it produced *Sexual Harassment*: *A Code of Practice*, an associated guideline based on corporate best practice and, in an inchoate way, representing a benchmark for compliance. It also publicises case summaries, recent seminar findings, and other initiatives that reflect any jurisprudence in workplace discrimination and equality issues.

Adding a meta-regulating approach to the *Bangladesh Labour Welfare Foundation Act 2006* (Bangladesh) could make it an enabling Act for companies' engagement in CSR activities. Its scope could also be extended to foster public-private partnership to incorporate the notion of decent work in industries. Under this Act, a 12-member board of directors, with the Ministry of Labour and Employment, runs the foundation with an objective to improve the social and economic life standards of the workers.[269] The main source of funding is the garment industry owners and government grants. However, this foundation is only meant for garment workers. It could extend its provisions for developing labour rights in general and add clear provisions to create a strong position for non-governmental and non-industry stakeholders. The source of funding and the steering body for allocating the funds should be different. As long as the government is depending upon a particular industry to fund this foundation, it will be difficult to take the appropriate action for developing labour rights practices in that particular industry.

Upgrading the performance of the Social Compliance Forum would positively affect labour conditions in the manufacturing companys in this country. Formed in 2005, this forum is a coordinating authority at the policy level on compliance-related issues, mostly on those areas prominently focused on by its international counterparts (i.e., working conditions and occupational safety, security, and labour standards). The unique feature of the Social Compliance Forum is its multi-stakeholder representation that creates an intra-organisational partnership. It is comprised of the Commerce Minister (as chairman) and the State Minister for Labour and Employment (as co-chairman), other members from concerned ministries and departments (e.g., representatives from the Ministries of Works and Labour, Home, Industry, Environment, Foreign Affairs, and the Export Promotion Bureau), business associations (BGMEA and BKMEA), NGOs, labour leaders, international organisations and development partners (e.g., International Labour

[268] For details on the Human Rights and Equal Opportunity Commission, visit http://www.hreoc.gov.au/ at 27 July 2011.

[269] The objectives of the said Act include (a) ensuring the welfare of workers and their families; (b) implementation of different welfare projects for the benefit of workers and their families; (c) providing financial assistance to workers who are physically handicapped; (d) assistance to workers for treatment; (e) assistance to the families of any deceased worker; and (f) paying stipends to the children of workers and insurance premiums from the fund.

Organization, United Nations Development Program, German Technical Cooperation), as well as international buyers' representatives.

The Taskforce on Labour Welfare, the Taskforce on Occupational Safety, and the Compliance Monitoring Cell are vital parts of this forum, and the performance of this forum mostly depends upon the performance of these three parts. Hence, the development of competence in fulfilling labour-related compliance also depends upon effective coordination between the labour regulations and administrations. The Taskforce on Labour Welfare was formed with the Joint Secretary of the Ministry of Labour and Employment as Chair, and it includes representation from other ministries, governmental departments, and business and workers' associations.[270] Along with the focus on the substantive issues in labour rights and liabilities, the Taskforce on Labour Welfare should focus more on the elimination of all sorts of discrimination. It should also focus on the abolition of forced labour, the removal of all sorts of harassment and abuses, and the abolition of child labour. Finally, it should aim to provide workers with appointment letters, reasonable working hours, a workplace which is healthy and hygienic, and the rights of freedom of association and collective bargaining at the factory level. To this end, it could increase its surprise visits to the factories to identify non-compliant factories with the goal of gradually persuading them to become compliant. This could have provisions related to these initiatives so that these initiatives could have a legal basis. This is important for the development of stakeholder coordination in industries.

Likewise, the Compliance Monitoring Cell needs to be sanctioned by the Code to deal with labour issues from an economic and multinational angle. The Compliance Monitoring Cell was formed by the Director General of the EPB of Bangladesh. Its main objectives are to coordinate compliance-related activities at the implementation level through compiling the reports of the taskforces, creating a database on the progress made in the industry, and suggesting to the forum means of creating a positive image of industry in Bangladesh and abroad. This cell is mainly involved in compliance monitoring and auditing. The establishment of the cell by the Government of Bangladesh is evidence of its recognition of the need to standardise compliance requirements and audit practices. The activities of the forum and the taskforces are supposed to revolve around the Compliance Monitoring Cell. In order for this to be accomplished, it has to increase its functional efficacy[271]; it should be widely structured and equipped with the necessary staff. This forum is one of the few promising initiatives that could sustainably raise the efficiency of addressing compliance issues in potential companies. However, its

[270] The other members are the Deputy Secretary of the Ministry of Womens' and Children's Affairs, the Director, Textile (EPB), A representative from the Ministry of Environment and Forest, the Chief Inspector, Factories and Establishment, The Directors of BGMEA and BKMEA; The President of Bangladesh Independent Garment Workers Union Federation (BIGUF); Representatives of Workers Unions, Director Operations, Fire Service and Civil Defence.

[271] ILO, Social Compliance and Decent Work: Bangladesh Perspective (Papers and Proceedings of the National Tripartite Meeting, 2007)16.

overall efficiency is decreasing, mainly due to a shortage of funds. The UNDP provided initial support for a year, and after that, the consultant had to leave, as financial support for their continuance was not available from either donors or the Government of Bangladesh, rendering the Compliance Monitoring Cell almost non-functional. Furthermore, the EPB has no budgetary allocation to maintain a cell with the required number of staff and logistic support. It does not have adequate staff to monitor, for instance, the roughly 4,500 RMG factories in this country.

The Code could focus more on the conflict of interest involved in running an effective labour organisation in general. This Act could be an umbrella legislation to create a wholehearted effort towards improving the labour rights and workplace environments in this country, with the objective of accumulating all sources and drivers of labour rights development to create a force against the force that runs against workers' rights and welfare. This accumulated force is necessary to send the message that the violation of workers' rights will not go unnoticed.

### Developing Effective Evaluation of Corporate Self-Regulation for Labour Welfare

This Code provides no requirements for self-evaluation, disclosure, or any other mechanisms allowing companies to evaluate their own performance in a systematic way. It provides no judicial evaluation of internal policies and procedures designed to prevent the infringement of labour rights and develop a socially responsible culture in labour management, as the focus of adjudication detailed in this Code is on determining liability and harm rather than on establishing blameworthiness or genuine due diligence in seeking to prevent harm.[272] The absence of provisions to encourage and support the evaluation of internal programs and disclosure of assessments would certainly reinforce a corporate approach to social responsibility that focuses on accountability development.[273]

There could be some clear guidelines in the Code to help corporate management to assess their performance following a common standard. For instance, it could have a wage-setting guideline to review each company's wage structure for their workers. This guideline could mention to all companys that, for instance, wages correspond with productivity gains and thereby allow greater labour mobility and employment generation. The existing labour regulations of this country provide a minimum wage as a social protection and poverty-reduction measure. Therefore, this guideline could emphasise the regular application of this provision, especially for unskilled labourers who need it most. Apart from this setting, there could be detailed guidelines in labour-related laws for institutions to deliver information to their stakeholders to devise better implementation and compliance strategies with wider coverage.

[272] Smith, above n 39, 721.

[273] Ibid.

Nevertheless, the effectiveness of labour regulations from the companies' self-regulation perspective will be judged on the extent of their implementation as well as on the extent of consensus achieved through social dialogue. To this end, the regulatory strategies must have provisions related to those for the development and strengthening of labour-related institutions. The type of strategies could vary, as there could be variations in the notion of implementation of law in different legal systems. Nonetheless, there could be a basic notion of such a strategy in laws to guide the agencies responsible for developing companies' effective, self-regulated, and socially responsible systems.

The Code is the main legislation on labour regulation of this country. Before this law was passed, Bangladesh had almost 700 sections related to labour issues in more than two dozen legislations. It has consolidated those provisions into 21 chapters and 353 sections in this Code. It has attempted to address the inadequacies and inconsistencies of previous laws to meet the changing circumstances that have come with 'globalisation'. It has been drafted over roughly 12 years and under three governments. At its inception, it was observed that the effective implementation of its provisions could help industry to meet most of the requirements of the international compliance practices in labour-related issues. However, the rise of labour exploitation in some industries, chronic labour agitation, increasing number of workplace fatalities, and the slow improvement of the living standards of the labourers of this country in general show that this Code is limited in its ability to provide a sustainable labour-friendly corporate culture in industries.[274]

The Code was passed without full consultation of the tripartite partners, and in many ways, it does not seem to uphold the core notions of decent work. It does not apply to many categories of workers (e.g., domestic workers, managerial and administrative employees, agricultural establishments with less than ten workers, and businesses without hired labour). In its 2009 report, the Committee of Experts on the Application of Conventions and Recommendations noted, '[T]he new Act does not contain any improvements in relation to the previous legislation and in certain regards contains further restrictions that run against the notion of decent work. The Code seemed a promising one at its inception: it received positive appraisal. However, it now requires substantive revisions.'

The regulatory mechanisms developed within it are not sufficiently sophisticated and responsive to the task of securing behavioural and cultural change in corporate self-regulation. Its regulatory mechanisms are tailored to resolving complaints as individual disputes, which may be useful in reducing blatant and intentional infringement of an individual worker's rights but does little to reveal or address the more structural forms of infringement that characterise today's workplaces.

[274] Committee of Experts on the Application of Conventions and Recommendations (CEACR), 2008/79th Session. Observations on the application of ILO convention 100 (Equal Remuneration Convention) and on the application of ILO Convention 111 (Discrimination—Employment and Occupation).

A tripartite seminar organised in 2009 resulted in a consensus that the Code should be revised in line with the principles of decent work.

This Code could have suitable provisions for the promotion of corporate commitment to labour welfare, stakeholder engagement in labour regulation, and the monitoring of corporate self-regulation for labour welfare at the industry level. These strategies in this Code could create a meta-regulation effect in labour regulation that would cause non-legal drivers in labour regulation to encourage the corporate mindset to become more worker-friendly. With the provisions for pluralisation of power in corporate regulations, these labour law strategies could lead to the meta-evaluation of the self-regulated corporate responsibility of companies to their labourers.[275] Legal sanctions of these strategies could help companies to incorporate the notion of decent work into their compliance process that addresses their social, environmental, and ethical responsibilities.

### 6.3.3 *Incorporating a Meta-Regulating Approach in the Environmental Conservation Act 1995 (Bangladesh)*

As mentioned earlier, the regulatory arrangements provided by the *Environmental Conservation Act 1995* (Bangladesh) are focused on the general issues of environmental development and most of them do not specifically deal with the corporate liabilities for the effects of their inappropriate business operations in the environment.[276] Of course, corporate misuse of environmental resources is not beyond the purview of this Act but the provisions mentioned in it do not contribute to

[275] Smith, above n 39, 722.

[276] One of the most notable steps within the reformation of the environmental regulation framework of developing economies is to frame a substantive environmental legal regulation framework. However, many of them have not been able to reach this elusive goal. The Philippines though has an arguably progressive environmental law, its environmental legal regulation heavily depends upon several other Acts and Presidential decrees. The core environmental legislation of Singapore is dependent upon more than 12 other legislations. the *Enhancement and Conservation of the National Environmental Quality Act 1992* (Thailand) was created as an integrated pollution and natural resource management law, however it primarily deals with the pollution control issues. This scenario is prevalent in the case of weak economies. For instance, the *Law on Environmental Protection and Natural Resource Management 1996* (Cambodia) is 'extremely broad and diffuse in its language, and does not prescribe adequate guidance in many instances.' the *1998 Framework Environmental Protection Law* (Laos) is an exceedingly general document that does not have specific provisions to manage sectors such as water quality, air quality, waste management and natural resource exploitation. Similar frameworks in Indonesia and Vietnam are thought to be progressive but their implementation strategies are based on ad hoc and intermittent strategies. On the contrary, the *New Zealand Resource Management Act 1991* and the *Basic Environment Law 1993* of Japan set out comprehensive environmental management frameworks. For a detailed discussion, see Roda Mushkat, above n 48. The discussion on the scope of incorporating meta-regulation strategies in this section focuses on the development of the Code to assist the promotion of sustainable management of natural and physical resources at the manufacturing company level.

developing a systematic response from the corporate sector to environmental development. In this Act, there are some specific initiatives for conserving natural resources at the general level, but those are less suitable to develop a sustainable system in business management so that businesses would automatically control their environmentally harmful operations.

A solid and substantive base for the environmental justice system can promote the application of environmental principles and rights in several ways.[277] This Act could have provisions to promote such development: it could assist the judiciary assume an independent, progressive role with regard to environmental protection; it could also empower the justice delivery system to implement the broader meaning of a sustainable environment in internal regulation of companies 'with a view to giving these a sense of coherence and direction.'[278] If this Act could hold provisions related to a broader perspective for developing a sustainable environment, the national courts, environmental administration and industry would be placed in harmony for developing such a system. Such a system could increase environmental responsibility at the corporate level as it could create the impact necessary for shaping companies long-term conduct.[279] The Indian environmental justice delivery system has considered some commonly recognised principles as customary law whereas their status in international law is uncertain and, thereby, made the precautionary principle of 'polluter pays' directly applicable to sustainable

[277] It is generally agreed that 'national court decisions can promote the implementation of international environmental law in several ways. First, by applying an international environmental norm, national courts implement the norm in the individual case. Second, if courts implement international norms with sufficient regularity, national court decisions could have a deterrent effect; they could help shape future conduct. Finally, through their decisions, national courts can help incorporate international norms into national law, thereby supplementing (or even correcting) the work of legislatures' in D Bodansky and J Brunnee, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7(1) *Review of European Community & International Environmental Law* 11,13; for a general discussion on the role of the justice delivery system on environmental regulation, see Judith Schiffer and Marion Dowling, 'Reflections on the Role of the Courts in Environmental Law' (1997) 27(2) *Environmental Law*.

[278] Lal Kurukulasuria, 'Role of Judiciary in Promoting Sustainable Development' (1998) 28 *Environmental Law and Policy Journal* 27, 28.

[279] International business and social organisations suggest business organisations 'support a precautionary approach to environmental challenges', 'undertake initiatives to promote greater environmental responsibility' and 'encourage the development and diffusion of environment-friendly technology'. Accordingly, for example, the international Chamber of Commerce Business Charter for Sustainable Development introduced 16 principles for environmental management covering, inter alia, the establishment of environmental management on the basis of priority, integration of management systems, efficient use of energy and materials, sustainable use of renewable resources, minimisation of adverse environmental impact and waste generation, and safe and responsible disposal of residual waste. For details, see Principles 7, 8 and 9 of the United Nations Global Compact. Available at http://www.unglobalcompact.org/AbouttheGC/theTenPrinciples/index.html at 18 June 2011; ICC, *Business Charter for Sustainable Development* (1991) ICC http://www.bsdglobal.com/tools/principles_icc.asp at 20 June 2010.

development.[280] The environmental justice delivery system of Bangladesh does not directly use these internationally developed principles in environmental management; this system could use these principles to determine environmental norms. It could help the administration by its directions to insist that corporate society develops its environmental management programs according to international standards as much as possible.[281]

The development of an effective environmental justice delivery system would be an effective approach of this Act to raise corporate environmental responsibility. Three meta-regulating strategies of this Act for the development of this system could be: (1) adequate provisions to empower the judicial administration related to environmental issues; (2) the incorporation of suitable provisions within this Act to ensure environmental justice; and (3) suitable provisions for raising the capacity of plaintiffs in environmental litigations.

The effect of the legal provisions related to these strategies would create an impact on corporate management that would require them consider environmental issues as being central aspects of their internal regulation. For instance, the development of an environmental justice delivery system will (a) insist the victim applies to the court system for redress and will (b) increase the rate of litigation against companies that cause environmental damage. From the company perspective such litigations are costly, time consuming and detrimental to their reputations. The

[280] Indian judiciary played the most important role in this development. The landmark case of *Rural Litigation and Entitlement Kendra v Uttar Pradesh* (AIR SC 359 (1985)) laid the basis for the subsequent recognition of a constitutional right to environmental protection by judicial activism. This case has clearly established the link between the international environmental instruments and environmental protection mechanisms at the national level. in *Vellore Citizens' Welfare Forum v Union of India* (AIR SC 2715 (1996)), the court declares that 'The rule[s] of Customary international Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the court.' this case has established that, for instance, the precautionary principle and the polluter pays principle are 'accepted as part of the land.' Afterwards this position was affirmed in five subsequent cases: *M. C. Mehta v Union of India* (Badkhal and Surajkund Lakes Case, 3 SCC 715 (1997)), *S. Jagannath v Union of India* (2 SCC 87 (1997)), *M.C. Mehta v Union of India* (Calcutta Tanneries Case, 2 SCC 87 (1997)), *M. C. Mehta v Union of India* (Taj Trapezium Case, 2 SCC 353 (1997)) and *M.C. Mehta v Kamal Nath* (1 SCC 388 (1997)). Thus, the justice delivery system has been involved in incorporating the substantive notion of sustainable development of the environment in India. For a detailed discussion on this development, see Michael R anderson, 'International Environmental Law in Indian Courts' in Michael R anderson and Paolo Galizzi (eds), *International Environmental Law in National Courts* (2002) 145–165.

[281] This has been emphasised in the Johannesburg Principles on the Role of Law and Sustainable Development. these principles set the role of the justice delivery system in weak economies as follows: '[T]he fragile state of global environment requires the Judiciary, as the guardian of the rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilisation, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.' for these principles, visit http://www.unep.org/dpdl/symposium/Principles.htm.

outcome of such litigation may even result in the cancellation of their license and registration. Hence, the development of this system will insist that companies develop internal strategies to ensure environmentally friendly production and management strategies. The following section discusses the application of these meta-regulation approaches through this Act to raise environmental responsibility of companies.

### Developing Environmental Judicial Administration

An effective judicial administration is complimentary to a solid notion of environmental justice in a country. This Act could have some regulatory strategies to enhance the ability of this country's judicial administration and standards in order to increase stakeholders' confidence so that potential litigants would be more motivated to raise their cases before the court system, industry would be better motivated to monitor environmental issues. To be precise, this Act could embrace the ethos of 'sustainable development.'[282]

The ethos of sustainable development reflects the principle of sustainable and equitable use of natural resources and its integration in the domestic legal system. As an umbrella concept,[283] it tends to reconcile the conflicting goals of economic development and environmental protection.[284] Though the national environmental policy and legislation of Bangladesh do reflect a concern for a balance between trade, development and the environment, no case directly mentions this concept. In India, however, the court has adopted a balancing approach to deal with pollution from leather industries or tanneries, to prevent encroachment into wetlands or to preserve forests and vegetation.[285] In most cases, the Indian judiciary gave priority

[282] The Brundtland Report defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. For this report, visit http://www.un-documents.net/wced-ocf.htm at 29 March 2011. According to G Handl, the essence of this concept is living off nature's 'income' rather than squandering its 'capital'. G Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 24.

[283] The concept of sustainable development is linked to other principles such as intergenerational and intragenerational equity, the principle of integration, sustainable use of natural resources and biological diversity.

[284] The 1972 Stockholm Conference acknowledges the need to provide assistance to developing economies to enable them to meet their obligations towards the environment and, on the other hand, to secure their right to development. Principle 4 of the Rio Declaration 1992 states that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' At the same time, it talks about the 'right to development' which has recently been recognised by the General assembly. For G A Resolution, see Environmental Policy and Law (28)1, 1998 at 51.

[285] AIR 1988 All 121. See P Leelakrishnan, 'Law and Sustainable Development in India' (1991) 9 *Journal of Energy and Natural Resources Law* 193, 195. 1 SCR 637 (1987) on the restriction on mining operation causing ecological hazard: (1987); AIR 1988 HP 4. KLT 580 (1990) 583 on the

to sustainable use of the natural resources, preservation of biological diversity and the right to healthy environment for the present, and to certain extent, the future generations. The justice delivery system of Bangladesh could give priority to the fundamental right to healthy environment[286]; it could maintain a balance between the needs of business activities and the proper use of natural resources. A sustainable balance between these two issues would then help to develop long-term approaches in business operations. In cases dealing with preserved forests, for instance, an Indian court based its decision on the nexus of the need of the present generation and rational use of natural resources. Indian courts, moreover, tend to connect the notion of equity with the concept of public trust. In this regard, the recent observation of the Supreme Court of India in its *suo moto* proceeding in the Delhi Transport Department Case,[287] is that the precautionary principle, a part of the concept of 'sustainable development' has to be followed by state governments in controlling pollution. According to the Supreme Court, the state government is under constitutional obligation to control pollution and, if necessary, by anticipating the causes of pollution and curbing them. The Supreme Court reaffirmed the customary status of the precautionary principle in another recent case.[288] In *Vellore Citizen Welfare Form v. Union of India*,[289] this court laid down three ingredients of the precautionary principles in the context of municipal law environmental measures; the state government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation. These principles have been reiterated in a number of environmental cases that have come before the courts, namely, the Shrimp Culture case,[290] the Calcutta Tanneries Case[291] and the Taj Mahal Case.[292]

The precautionary principle provides guidance in the development and application of international environmental law where there could be scientific uncertainty; it emphasises that the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[293] The purpose of incorporating this principle would be to indirectly require internal corporate decision-making to consider the harmful effects of their activities on

sustainable use of natural resources. AIR 1996 SC 2715 and (1996) 5 SCC 647 regarding leather industries that were closed in favour of environment.

[286] For an optimistic view in this regard, see A T M Afzal, 'Country Representation-Bangladesh' in the *Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development* (Colombo, SACEP/UNEP/NORAD,1997) 61–72.

[287] 9 SCC (1998) 250.

[288] *A P Pollution Control Board v. Professor M V Nayudu* (1999) SOL Case No. 53; AIR 1997 SC 221.

[289] Writ Petition No. 914 of 1991. This petition was decided on 28 August 1996 by the Supreme Court of India; AIR 1996 SC 2715.

[290] 1997 SC 160.

[291] 1997 SC 221.

[292] 1997 SC 734.

[293] Principle 15, the 1992 Rio Declaration. Available at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en at 29 March 2011.

the environment before they pursue those activities. Moreover, this might provoke a fundamental change in the shifting of the burden of proof. It means that the polluter, or the polluting company, must have suitable strategies to determine whether their activities and the discharge of certain substances would not adversely or significantly affect the environment before they commence the proposed activity or release the potentially polluting substances.[294]

In Bangladesh, the court does not apply this principle on the ground that neither the Constitution nor the national legislation of Bangladesh explicitly mentions this principle.[295] Having said that, this Act could hold the precautionary approach for environmental protection; this could create the scope for the justice delivery system of this country to give priority to the fundamental right to healthy environment.[296] This approach would be a better fit for the development of sustainable environmental responsibilities in companies.[297]

The 'polluter pays' principle is another important principle through which laws could develop environmental liabilities as a priority concern in corporate strategies. The use of this principle through this Act could be an indirect way to prevent, control and reduce environmental harm. This principle expects polluters to bear the costs of measures carried out by the public authorities with respect to potential and actual environmental damage.[298] Though there is no uniform way to determine the ratio between the 'pollution' and 'payment', it is obvious that the laws using this

[294] Generally, the onus of proof lies with the person opposing an activity to prove that it does or is likely to cause environmental damage. When the precautionary approach is applied, this would shift the burden of proof and require the person who wishes to carry out an activity to prove that it will not cause harm to the environment.

[295] Bangladesh Environmental Lawyers association, the petitioner of *M. Farooque V. Bangladesh and Others* (1997) 49 DLR (AD) case submitted that they represented not only the present generation but the generation yet unborn. The petitioner mentioned *Minors Oposa Case* in which the twin concepts of 'intergenerational responsibility' and 'intergenerational justice' were presented by the plaintiffs to prevent the misappropriation or impairment of the Philippine rainforest. According to the Bangladeshi court, standing in the *Oposa Case* was allowed because 'The right to a balanced and healthful ecology' was a fundamental right in the Constitution of the Philippines. Several laws in the Philippines also apply this principle. The Constitution of Bangladesh, expressly does not provide any such right. See especially Mustafa Kamal J in pg.16, para. 53. For the judgement of *Minors Oposa Case*, see 33 ILM 173 (1994).

[296] Azfal n 109, 61–72.

[297] Some Bangladeshi legislation that could hold this approach would be the *Bangladesh Wild Life* (*Preservation*) *Order 1973* (Bangladesh), the *Marine Fisheries Ordinance 1983* (Bangladesh), the *Brick Burning* (*Control*) *Act 1989* (Bangladesh), the *Public Parks Act 1904* (Bangladesh), the *Agricultural and Sanitary Improvement Act 1920* (Bangladesh), the *Protection and Conservation of Fish Act 1950* (Bangladesh). Some major policies are the National Environment Management Action Plan 1992, the Forest Policy 1994 and the Forestry Master Plan 1993.

[298] H Smets, *The Polluter Pays Principle in the Early 1990s*, The Environment after Rio: International Law and Economics (1994) 136–137; S E Gaines, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' (1991) 26 *Texas International Law Journal* 463, 465–467; J R Nash, 'Too Much Market: Conflict Between Tradable Pollution Allowances and the Polluter Pays Principle' (2000) 24 *Harvard Environmental Law Review* 465.

principle must have detailed a standard in this regard. It is only after these standards are set by the public authorities that polluters will take steps to comply with them. It should also be noted that any standard in this regard should also determine the limit of 'minimum pollution' for which companies are not liable. In this regard, the Indian court applied absolute liability for the polluters to pay the costs of pollution remediation and adopted the 'clean up or close down' formula, with the aim of rendering companies liable to pay the social costs of carrying out inherently dangerous activities.[299]

Developing the goodwill of the judicial administration could be another way to impact on corporate strategies that not in the public interest. In the landscape of well-defined environmental rights and liabilities, and with the trend of choosing apex courts to direct governmental agencies and polluters to suitably redress the victims, the goodwill of the general judicial administration is vital for spreading these benefits to a greater extent. For the development of this goodwill in Bangladesh, the quality and quantity of judges, and the general judicial administration must be developed. Simultaneously, the implementation agencies should be better equipped and impartial while executing court decisions.

### Establishing the Core of Environmental Justice

Settling the principles of substantive issues in environmental rights and liabilities is important to allow the environmental justice delivery system to insist that polluters to consider the precautionary and polluter pays principles in their internal strategies. This settlement is yet to be completed in Bangladesh. Hence, the settling of these substantive issues will have a substantial on the shaping of the strategies of potential polluters. In almost all cases, companies pollute the environment. At this point the rationale behind the pollution and the outcome of the pollution is more important than the rationale for ensuring zero pollution (even a cart drawn by a horse pollutes the environment but this pollution is acceptable since otherwise minimum movement cannot be ensured, and movement is an obvious element for development). These issues need to be settled and the settlement needs to be implemented.

In Bangladesh these substantive issues should be determined by the apex court since the administration has not yet been able to develop an adequate framework to deal these issues. While the environmental legislation of this country defines certain rights, liabilities and procedures, it remains ineffective in requiring corporate self-regulation to include sustainable environmental strategies. Developing public interest litigation for environmental issues could be an indirect but effective way to attune corporate self-regulation to the internal strategies necessary for raising their

[299] AIR SC 965 (1987); 3 SCC 212(1996); AIR SC 2715 (1996); 2 SCC 411(1997). All these Indian cases dealt with the application of the pollutoer pays principle, payment of the clean-up cost and absolute liability of the polluters.

environmental rights and liabilities systematically. The rationale behind this strategy is the backward social education of this country, 'the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the generic inefficiency and corruption at various level.'[300] This Act could have adequate notions to assist such judicial activism.

Public interest litigation denotes litigations initiated for the protection of public interest. In this type of litigation, the aggrieved party need not be the party in the court of law; this type of litigations could be introduced by the court itself or by any member of the public.[301] It is an example of judicial activism by which society can claim redress from an act that is not safeguarded by the constitution where the state has failed to redress it.[302] In *A. B. S. K. Songh* (*Railway*) *v. Union of India*,[303] the Supreme Court of India provides the cultural orientation of public interest litigation in this region. In this case the court clearly mentions that the current jurisprudence of this region (the Indo-Pak Sub Continent) is not an individualistic Anglo-Indian mould; it is broad-based and people-oriented. It has toned down the confusion regarding the *lucas standai* as it mentions that 'the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent. . .' Public interest litigation took its form after the seminal judgment of the Supreme Court of India in *S. P. Gupta v. Union of India*. In this case the court provides the framework of this litigation:

> [W]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without any authority of law. . ... and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court of relief, any member of the public can maintain an application for an appropriate direction, order or writ. . .[304]

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[300] *State v M.D. WASA*, CLC (Lahore) 471, 475.

[301] Wikipedia, 'Public Interest Litigation' http://en.wikipedia.org/wiki/Public_interest_Litigation at 20 May 2011.

[302] In this litigation, the claimant needs to show that there are aggrieved persons who were directly and obviously injured or would be injured by an official act; in this litigation, it is important to prove that the aggrieved person's right recognised by statute has been infringed, and a causal relationship between the contested act and the alleged adverse effect on the aggrieved person's legal interest. This is a strict interpretation of the requirements for public interest litigation. Some developing economies such as those of Malaysia and Thailand follow this interpretation while India and Pakistan follow a flexible interpretation. see Tsun Hang Tey, 'Public interest Litigation in Malaysia: Executive Control and Careful Negotiation of the Frontiers of Judicial Review' in Po Jen Yap and Holning Lau (eds), *Public Interest Litigation in Asia* (2011); Vipon Kititasnasorchai and Panat Tasneeyanond, 'Thai Environmental Law' (2000) 4 *Singapore Journal of International & Comparative Law* 1; Surya Deva, 'Public Interest Litigation in India: a Quest to Achieve the Impossible?' in Po Jen Yap and Holning Lau (eds), *Public Interest Litigation in Asia* (2011).

[303] A.I.R. SC. 298,317 (1981).

[304] AIR S.C. 149, 188 (1982).

Until 1994, Bangladesh had no reported cases on environmental law decided by the Supreme Court. The Bangladesh Environmental Lawyers Association[305] brought this issue before this court for the first time in this country. This NGO is prominent for its involvement with public interest litigation. Since 1994, BELA has undertaken a large number of cases that have contributed to the development of public interest litigation in this country. *Dr. Mohiuddin Farooque* vs. *Bangladesh & Others*[306] was the first case of this nature in this country. In this case, the determination of *lucas standai* of the petitioner was the vital substantive issue to be settled.[307] In this case, the legality of an experimental structural project of the huge Flood Action Plan of Bangladesh was challenged. The High Court Division of the Supreme Court of Bangladesh[308] initially rejected the petition of this case on the ground that the petitioner had no standing. The petitioner had preferred an appeal to the Appellate Division of the Supreme Court of Bangladesh. This Division had decided the issues in *locus standi* in public interest litigation. In July 1996 the Appellate Division gave its decision in which Mustafa Kamal, J. observed:

> In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.

To date, public interest litigations in this country have been due to various environmental problems; amongst these, the relief sought against pollution caused by companies is prominent. This is mainly due to the fact that the environmental regulation framework and this country's governmental agencies are either inefficient, biased or do not have adequate strategies to tackle environmental degradation by business operations. It would be worth mentioning the drawbacks of judicial activism for protecting environmental right. Rosenberg puts a strong doubt in this

[305] Established in 1992, BELA is the best known Bangladeshi NGO working with the broad objective of promoting environmental justice and contributing to the development of sound environmental jurisprudence. BELA is a member of IUCN–the World Conservation Union, Environmental Law Alliance Worldwide and the South Asian Watch on Trade, Economics and Environment. In 2003 it received the Global 500 Role of Honors of the United Nations. For details, visit http://www.belabangla.org/bela/index.php?option=com_content&view=article&id=48:introducing-bela&catid=40:belabangla at17 November 2011.

[306] Writ Petition No. 891 of 1994. Dr. Mohiuddin Farooque was the founder of BELA.

[307] Writ Petition No. 998 of 1994.

[308] The Supreme Court of Bangladesh is the highest court of this country. This court is divided into two Divisions: The Appellate Division and the High Court Division. Both these divisions sit in Dhaka. The High Court Division has some original jurisdiction and it is the appellate authority of the subordinate courts. It decides all writ petitions. Against the decision of this Division, an aggrieved person can go to the Appellate Division. The decision of this Division is final. These Divisions are safeguarded by the Constitution and they provide clarification of any issues related to the constitutional provisions. For details, see Articles 94–113 of the Constitution of the Peoples' Republic of Bangladesh.

role. He has developed two types of courts, a dynamic court model and a constrained court model and tests the impact of these courts by examining social policies and practices before and after a number of apex courts' decisions often regarded as important sources of social change. He finds that the courts decisions have had no or virtually no significant independent direct or indirect effect on social change. He argued that special change depends on other factors like political efforts wholly separate from court system.[309] Rajamani also assed the impact of the leading PIL on the social changes in India. He finds that the legal activism has been able to provide some 'chemotherapy for the carcinogenic body politic'[310] and exemplary work. However, he raises concern in the exercise of public interest environmental jurisdiction with respect to access, participation, effectiveness and sustainability.[311]

Moreover, in some cases, this activism in Bangladesh often developed a 'policy evolution fora' for a particular national issue and gets into the executive governance with judicial governance in sectors highlighted by a group of public interest litigants.[312] Along with an insufficient impact on a substantive change into the social movement, this type of overlapping in the major organs of the state reveal some dissatisfaction with judicial process. The social change motion set by the judicial activism in this country, in most cases, is less than participatory, which therefore arguably led to unrealistic solutions. Some stakeholders have already raised their voice against this activism claiming that the solutions provided from the court system are, in most cases, ineffective and unsustainable.[313]

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[309] G. Rosenberg, *The Hollow Hope*: *Can Courts Bring About Social Change*? Chicago: University of Chicago Press, 1991, pp xii+425; G. Rosenberg, 'Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann', (1993) 17 *Law & Social Inquiry* 761–778; for a critique of Rosenberg's arguments, see M. Feeley, 'Hollow Hopes, Flypaper, and Metaphors', 17 *Law & Social Inquiry* 745–760.

[310] U Baxi, 'Preface' in SP Sathe (ed.), *Judicial Activism in India*, New Delhi: Oxford University Press.

[311] L Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability', (2007) 19(3) *Journal of Environmental Law* 293, 296.

[312] It would be worth mentioning the latest reported PIL at this point. In a leave to appeal against High Court Division order in Writ Petition No. 3503 on 2009, the Appellate Division of the Supreme Court of Bangladesh has put the maxim '*Salus Papuli Suprema lex*' in the imperative, that is, '*Salus Papuli Suprema Lex Esto*'—let the safety of the people be the supreme law. The impact of this notion taken by the apex court would be many. One of those effects would be the use of PIL as a means of getting personal redress. For details, see 62 DLR(AD) 2010, 428–435.

[313] To illustrate this, a latest High Court Division order in a PIL would be a worth mention here. Police was investigating the death of a journalist couple in Dhaka and was taking time for the sake of proper investigation. Meanwhile, Human Rights and Peace for Bangladesh (HRPB) filed a PIL asking for judicial direction for a speedy investigation of this death. On February 28, the court asked the government to explain within 2 weeks why it should not be directed to find out the motive for the murder of journalist couple and to bring the killers to justice. The court also directed the authorities concerned not to make any statement to the media without any specific

Nonetheless, judicial activism through PIL helps to redress for any activities detrimental to public welfare. It is a means by which the apex court can deal public rights and liabilities within the constitutional framework and can direct the government agencies to address any issue ruled to be against the public interest. In a society where poverty and corruption is prevalent and corporate society has a strong influence on political society, public interest litigation could be an effective way through which the judicial activism can insist public and private organizations to be more accountable, especially against the backdrop of the legislatures' apathy and the lack of political will in the executive branches.[314]

As mentioned earlier, public interest litigation could be used as a part of a strategy to promote changes in corporate behaviour.[315] It could be an attempt to resolve the intra- and inter-sectoral conflicts of law on mandatory delimitation.[316] Through public interest litigation, the environmental justice delivery system would have scope to prove itself as an effective process to establish certain values. This process could have the scope to promote the inclusion of environmental rights and liabilities in the 'corporate conscience'. It has been successfully used in many other economies.[317] In most public interest litigations related to environmental issues, the justice delivery system may not respond the way an activists would like (due to its own limitations) but this nonetheless creates awareness that marks the making or remoulding of values in the society.

The impact of public interest environmental litigation may not always be visible but may also initiate a process which in the long term would provide tangible dividends. This has been better explained in recent public interest litigation in *BELA* vs. *the Election Commissioners and Others*.[318] This case raised the failure of the Election Commission and other law enforcement agencies to prevent candidates from violating laws in the name of the election campaign for the post of Mayor and Commissioners of the Dhaka[319] City Corporation in January 1994. The campaigners for the candidates defaced peoples' property, encroached on

development in the ongoing investigation into the double murder. For details, visit http://www.thedailystar.net/newDesign/news-details.php?nid=224312.

[314] Parvez Hassan and Azim Azfar, 'Securing Environmental Rights Through Public Interest Litigation in South Asia' (2003) 22 *Virginia Environmental Law Journal* 215, 246.

[315] H Ward, 'Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options' (2000) 24 *Hastings International & Company Law Review* 451.

[316] A Sahay, 'Environmental Policy and Corporate Environmental Behaviour in India: Social, Economic and Legal Aspects' (2006) 3(6) *Progress in Industrial Ecology*, *an International Journal* 559; J Nolan and LTaylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' (2009) 87 *Journal of Business Ethics* 433.

[317] P S Sangal, *Law As a Tool for Environmental Conservation and Management in India*, Environmental Law in India: issues and Responses (1996); C M Abraham, *Environmental Jurisprudence in India* (1999); for details, see L Rajamani, 'Public interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) *Journal of Environmental Law* 293.

[318] Writ Petition No. 186 of 1994.

[319] The capital city of Bangladesh.

public streets and pavements and used many loudspeakers, disturbing the peace and creating pollution. The High Court Division directed the respondents to show cause as to why the election should not be postponed since it was not being conducted in accordance with the law. All respondents appeared and the major political parties joined as respondents to make a commitment that all illegal acts would be stopped and removed. The Attorney General ensured that funds would be set aside to repaint peoples' properties. The impact of this case becomes multidimensional: the law enforcement agencies assessed their extent of statutory sanction; the political parties of this nation came to understand that what they had been doing and witnessing for more than half a century as 'election culture' was not lawful and that the people could challenge their acts and failures. During the 1996 parliamentary election there was hardly any graffiti or electioneering boxes on public properties and little rampant use of loudspeakers. The credit for this situation, inter alia, should also go to BELA; this NGO successfully raised these issues in public interest litigation form and thereby publicised them.

The aim of public interest litigation is to provide the opportunity for any member of the society to use judicial activism to obtain redress for any activities detrimental to public welfare. It is a means by which the apex court can deal public rights and liabilities within the constitutional framework and can direct the government agencies to address any issue ruled to be against the public interest. It could be a source of creating a meta-regulating approach in corporate regulation. Since it has the potential to allow a strong peoples' movement to reach their goal using judicial activism, any member of the society can use public interest litigation to place the corporate society at fault before civil society, media and judicial activism. Using public interest litigation as a forum, society in general and informed groups in particular could create a much more constructive role to allow them to pressure corporate society to carefully consider their strategies that affect society at large. Simultaneously, in a society where poverty and corruption is prevalent and corporate society has a strong influence on political society, public interest litigation could be an effective way through which the apex judicial administration could require companies to be more socially responsible, especially against the backdrop of the legislatures' apathy and the lack of political will in the executive branches.[320]

For the development of social responsibilities in corporate self-regulation, public interest litigation in this country should be encouraged; it should be developed as an institution and therefore should not be only used by one or two NGOs. There are many incentives for these strategies. This type of litigation usually relates the substantive issues of an incident, helps to build public opinion, obtains wide media coverage to inform the general public of the malicious act and results in financial penalties to companies that have been alleged to damage society. Hence, companies will not wish to face such litigation and accordingly will prefer to have

[320] Parvez Hassan and Azim Azfar, 'Securing Environmental Rights Through Public Interest Litigation in South Asia' (2003) 22 *Virginia Environmental Law Journal* 215, 246.

adequate policies to tackle any risk of detrimental effects to society that could lead to the filing of public interest litigation.

### Raising the Capacity of Environmental Litigants

Raising the capacity of the victim to reach the environmental justice delivery system and administration could be another meta-regulation strategy to increase the environmental responsibility within corporate self-regulatory mechanisms. This is important for the environmental regulation of a country. Environmental justice, its delivery system and goodwill will be of little use if the public does not have access to funding to move their petitions. Raising this capacity would include the provisions to minimise the initial expenses of the applicant, the overall cost of the case, the availability of legal aid and the cost order of the court. This Act could have provisions related to these capacity development measures.

Currently, funding to access to the apex courts with public interest litigation is mostly dependent on private foundations and foreign assistance.[321] These sources are unreliable and not suitable for developing public interest litigation. At the grass roots level, victims do not have any external funding, which means that it is difficult for a litigant to run a legal suit against a corporate body. Hence, the development of a reliable source of funding to assist environmental litigation against corporate bodies would enable the environmental justice delivery system to have a much greater impact on corporate strategies for their own environmental management.

In this country, the *Legal Aid Act 2000* (Bangladesh),[322] dealing with legal aid, contains nothing specific for the protection of environmental and public interest litigation. At the district level, where the general courts sit in this country, there is a Legal Aid Committee. This committee is composed of different stakeholders and

[321] BELA and Bangladesh Legal Aid and Services Trust (BLAST) are prominent amongst the NGOs working to expand public interest litigation in Bangladesh. Both these NGOs are dependent on the donations of foreign development agencies and international NGOs. For instance, the cost to Bangladesh Legal Aid and Services Trust for public interest litigation is covered by the donation this NGO gets from OXFAM-NOVIB, DANIDA and DIAKONIA. For details, visit http://www.blast.org.bd/who/donors at 18 November 2011; in this regard, the observation of Professor Rehman Sobhan of the Centre for Policy Dialogue is worth mentioning. He states: 'The reality of the matter is that NGOs cannot substitute the Government any more than the private sector can...so whilst this may not have been the intention of the donor community, the objective results have been not just a downsising, but also a devaluation of the State and an increasing reliance, at least in the social sector, on NGOs which has become a counterproductive exercise.' For details, see Richard Phinney, 'A Model NGO ?', Radio Netherlands, 5 December 2002, available at http://www.globalpolicy.org/component/content/article/176/31470.html at 18 November 2011.

[322] On 21 November 2011, the National Parliament of Bangladesh passed an amended version of this Act. Four Sections of the previous version of this Act have been amended as not vital. For instance, according to the amendment in Section 6, the national committee for the administration of the fund created under this Act will be presided over by the Minister for the Ministry of Law, Justice and Parliamentary Affairs. Earlier, the head of this committee was selected from the bureaucrats of this ministry by the Minister.

presided over by the head of justice delivery system at the district level. Generally, this committee favours the civil, criminal and family matters related litigants who are facing economic and social constraints. This aid is not available to assist litigants in environmental cases, even though the poor and vulnerable people in Bangladeshi society are highly victimised in any environmental disorder. There could be a separate public fund for assisting environmental litigation against corporate bodies. Simultaneously, the government of Bangladesh could increase the budget for aid under the *Legal Aid Act 2000* (Bangladesh) and could add provisions in this Act to emphasise the need for funding to litigants in environmental issues and public interest litigation. If such provision could be arranged in this Act, the general public will be better able to use the judicial system for preventing industrial pollution and harmful corporate activities. Increased funding and privileges for obtaining this funding would help environmental litigations to attract better legal counsel, more media attention and would help to ensure an equal footing against the wealthy environment polluter.

Moreover, the *Environmental Conservation Act 1995* (Bangladesh) could have clear provisions for 'pay orders' against losers of environmental cases in order to raise legal aid for litigants. This would have twofold impact on environmental litigation management; first, the victim of environmental pollution would have the ability to obtain redress, and second, there would be fewer test cases. Both of these impacts are necessary for this administration. Since companies are the usual defendants in environmental litigation, the 'pay order' would have a far greater impact on them.[323]

Furthermore, extending the 'No-win, No-fee' policy to related legislation would be another meta-regulating strategy. This would allow lawyers to take on cases without charging their clients. In a successful case, the other party is usually ordered to pay the greater part of the lawyer's nominal fees. By inserting the rights and liabilities of the party who wishes to take advantage of this policy, a more vigilant context against environmental pollution by companies would be created. Like the 'bounty hunters',[324] energetic legal counsel will be able to give their best efforts especially in cases against companies as it is be likely that the pollution and 'pay orders' would be more substantial in cases against manufacturing companys than in the case of an individual polluter. They would be more interested in these cases as they would also prevail on insurance to cover the risk of losing or having to pay their adversary's costs. In this way, if the applicant loses the case, insurance would cover the cost of the case.[325]

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[323] In an adversarial system, the court's orders for costs largely depend upon the discretion of the court. In most of the environmental cases in India, the cost was decided on a case-by case-basis. For instances of some of these cases, see S Ahuja and S Muralidhar, *People*, *Law*, *and Justice*: *A Casebook of Public-interest Litigation* (1997).

[324] The idea of the bounty hunter was presented in Chap. 5 of this book.

[325] There could be some drawbacks to this strategy. For instance, in the UK, this system is being used in personal injury cases where the injury arises from exposure to toxins, pollution or injuries resulting from an accident. Critics say that this system will destroy the chances of environmental

The enactment of the *Environment Court Act 2000* (Bangladesh) is a recent development in environmental pollution control measures. If these courts are fully functional, with expert judges, substantive legislations, genuine litigants and interested counsel, pressure would be greatly increase on the manufacturing companies to put in place precautionary measures and suitable strategies to prevent environmental damage rather than face a heavy pecuniary loss.

Even though an environmental court is likely to solve environmental disputes, this would be based on criminal liability and there would be an added question of cost and funding. At this point, alternative dispute settlement mechanisms[326] could be a viable meta-regulatory option to initiate better protection of the environment. This Act could link alternative dispute resolution in environmental issues with the Gram Adalat (Village Court) created by the *Gram Adalat Act 1998* (Bangladesh). The Gram Adalat could have the jurisdiction to try environmental disputes with small and local environmental impact. This pro-people legal mechanism would be less adversarial and would help to provide better access to justice with reduced cost, informal procedures and with tight time-frames. Alternative dispute resolution, such as mediation, could provide a solution if the dispute is between local groups and medium-sized manufacturing companys. In this type of quasi-judicial process for dispute settlement, the mediator assists the parties in a problem solving process or can offer an opinion on the merits of the case. The parties then use the opinion to decide whether they want to compromise their position. Using this option, if it is embedded in the Act, parties could resolve disputes more rapidly, efficiently and more privately than by judicial processes. It is noteworthy that participation in mediation does not waive the right to use more formal means of dispute resolution.

test cases as most lawyers would not take such a risk under the conditional fees system. Moreover, the insurance companies may not be willing to provide commercial cover with reasonable premiums. Most of environmental lawyers may be unwilling to take such cases due to the high investigative costs, time taken and overall risk in terms of success.

[326] The general public prefers to resolve their problems and disputes at the community or local level in an informal way. In legal circles this way is popularly known as 'alternative dispute resolution' or simply ADR. The forms of these alternative methods may vary depending on the culture, practice and traditions of people in their particular contexts. While in some societies the practice has become redundant, alternative dispute resolution could provide the people of Bangladesh with a viable alternative to the formal legal system. For this, ADR needs to be institutionalised in this country. Recently, the long-practiced ADR mechanism of this country has undergone some changes and experiments and results in different outcomes. While the purpose of these experiments is for clarification of the justice delivery system, creation of more options for addressing disputes and making the formal justice delivery system cost effective; the outcomes do not always reach their targets. Rather, the experiments are facing many obstacles with different issues. There are several areas where there are no obstacles, since all parties prefer an easy and speedy trial with a non-bias verdict. Along with the positive notions in the outcomes of the experiments for institutionalising ADR in Bangladesh, there are still some factors that hinder its institution. For details, Stephen Golub, *Non-State Justice Systems in Bangladesh and the Philippines* (2003); Sarder Asaduzzaman, *Rethinking Community-Based Justice Mechanisms: An Action Research Reflection From Bangladesh*, Applied Conflict Transformation Studies (2009); Zahidul Islam Biswas, 'The Village Court: A Neglected but Potential Rural Justice Forum', *The Daily Star* 1 August 2008.

Rather, it provides an option to settle environmental problems before going to the formal litigation process which is complex, time consuming and costly.[327]

The strength of an environmental justice delivery system is very much dependent on a strong and comprehensive regulatory framework where NGOs should take a greater role in policy-making and alert politicians to loopholes in environmental regulations. A central complaints body would be an appropriate solution to integrate the conservation laws. This would be facilitated by the creation of an environmental law reform body able to assist with the formulation of comprehensive legislation and thus provide incentives for the complaints body to operate efficiently. In South Asia, incentive-based mechanisms are applied only in India to encourage the implementation of environmental regulations. For instance, the Trade in Environmental Services Technologies (TEST) program was created to improve environmental protection and productivity in Indian industries. This is an assistance program between the USA and India that provides loans, conditional grants and technical assistance to industry. In this country another successful alternative strategy in the form of assistance was the offer of a number of financial incentives to different stakeholders.[328] For instance, financial incentives were given for converting four-stroke petrol and diesel-powered cars to compressed natural gas to reduce urban air pollution. The registration and renewal fees for compressed natural gas powered vehicles were reduced as part of these incentives, which was also aimed at increasing the use of natural gas. This approach has also been incorporated into certain legislation. Under Section 28 of the *Forest Act 1927* (India), the government may assign any village community the right of government over any land that has been constituted as reserved forest. The community in charge of that forest is then responsible for its protection and conservation. Likewise, the *Environmental Protection Act 1997* (Nepal) 'makes provision for rebates and

[327] The *Pollution Dispute Settlement Act 1970* of Japan has provided legal expression of this practice. Vietnam offers the services of government-appointed mediators to litigants who prefer to resolve disputes through private negotiation. The *Public Nuisance Disputes Mediation Act 1992* of Taiwan is another instance of legal sanction to dispute mediation and arbitration at the local level. For details, see toan, 'Vietnam' in Terri Mottershead (ed), *Environmental Law and Enforcement in the Asia-Pacific Rim* (2002)5 77; Tang, 'Taiwan' in Terri Mottershead (ed), *Environmental Law and Enforcement in the Asia-Pacific Rim* (2002) 469–71.

[328] Most of the developing economies are following this meta-regulating strategy. The South Korean government, for instance, operates an environmental improvement charge system and a deposit refund system that encourages companies to reduce their discharge of pollutants. The Malaysian government has reduced import duty, sales tax and excise duty to assist companies to purchase efficient technologies for manufacturing waste management and air pollution control facilities. In the Philippines and Thailand, companies are offered tax incentives to import industrial waste management systems and to adopt sustainable consumption and production practices. For a detailed study, see Roda Mushkat, above n 48, 47; for the latest approaches of some economies, visit http://www.un.org/esa/dsd/dsd_aofw_ni/ni_index.shtml?utm_source=OldRedirect&utm_medium=redirect&utm_content=dsd&utm_campaign=OldRedirect at 20 November 2011.

facilities to any industry, commercial activity and technological innovation resulting in a positive impact on the environment.'[329]

There could be many more meta-regulating strategies to incorporate CSR principles within the core of corporate self-regulation. The major Bangladeshi laws relating to the development of the social responsibilities of companies do not widely sanction these types of strategies. However, these legislations have the scope to support these strategies, and they do not have any strong objectives that could prevent the incorporation of these strategies. The discussion above has described how some of these types of strategies could be incorporated into these laws and the probable effects of this incorporation. Apart from this, the success of this incorporation depends upon cooperation between the stakeholders in CSR: the different regulatory bodies, non-legal drivers and corporate societies must cooperate with each other to fulfil the objective of incorporating meta-regulating strategies in legal regulation. They must improve their understanding, so that none of these stakeholders are disadvantaged due to their lack of understanding and communication.[330] The policies and guidelines for the development of business and CSR must be responsible for uniting fragmented authorities as well as the promulgation of the necessary directions to stakeholders in laws with a meta-regulatory approach. Accordingly, the current lack of personnel, budgetary resources and motivation to enforce the existing legislation must be reduced.

[329] Lal Kurukulasuriya, 'Strengthening Compliance and Enforcement of Environmental Regulations in the Asia Pacific: The Role of Capacity Building and Networking' (2000) 5 (1) *Asia Pacific Journal of Environmental Law* 1, 3.

[330] First and foremost, this must be achieved in government agencies and policies. With the current lack of suitable policy and coordination, these agencies frequently overlap which results in the misuse of public resources. For instance, policies and programs related to land and water are run by ten ministries, seven directorates/departments and 19 statutory bodies. Environmental management programs are run by more than 16 ministries, 13 departments and 13 other subordinate organisations. In another example, in Cambodia, this lack of coordination was exacerbated by the power sharing arrangements in government, as the key personnel of the ministries are usually from various political parties and groups, some of whom are antagonistic. In Myanmar, there are significant problems in coordination among the agencies responsible for environmental development. To develop effective coordination, this country has created a National Commission for Environmental Affairs and various divisional and state authorities, but due to the lack of a guiding policy and private sector involvement with these authorities, its output remains negligible. the one-stop agency for environmental services in the Philippines, are considered as well-meaning but its outcome been less than satisfactory due to the 'resistance of vested interests, corruption, the overriding needs of the development and the lack of financial and technical resources.' Alan Khee-Jin Tan, 'Recent Institutional Developments on the Environment in South East Asia-A Report Card on the Region' (2002) 6 *Singapore Journal of International & Comparative Law* 891, 906. For details, see Roda Mushkat, above n 48, 43; Mohammad Alauddin and Clement Allan Tisdell, *The Environment and Economic Envelopment in South Asia: An Overview Concentrating on Bangladesh* (1998)108–9; APCEL Reports: Cambodia, available at http://law.nus.edu.sg/apcel/publications.html at 19 November 2011.

## 6.4 Conclusion

The discussion in this chapter has explained the scope of meta-regulation approaches in laws to influence corporate self-regulation to develop internal responsibility systems. It showed that the *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Law 2006* (Bangladesh) and the *Environment Conservation Act 1995* (Bangladesh) have the potential to require companies to specify this system by implementing CSR principles within their self-regulatory frameworks. The notion that the application of a meta-regulatory approach through law to increase social responsibility standards in companies should not hurt their usual business case is of particular relevance here.[331] It is important to focus on the strategy that a meta-regulating law should contain to ensure an effective self-regulated corporate responsibility system. These types of strategies will vary, as there will be variations in the notion of implementation of law in different legal systems. Nonetheless, there could be a basic notion of such strategy in laws to guide the agencies responsible for developing an effective self-regulated and socially responsible system in companies.

The most vital aspect of creating an effective, self-regulated and socially responsible corporate management system is the system's ability to move 'forward to the next phase'.[332] In other words, the efficiency of a self-regulated responsibility system depends upon how the company learns and evaluates its self-regulated responsibility for its development. Parker suggests a triple-loop system[333] in which the first two loops ensure effective learning and the third loop ensures effective evaluation of this learning process. In the first loop, companies adopt strategies according to their needs and strengths to reach a social policy goal, and in the second loop, they improve their own strategies depending on their successes and failures. In the third loop, they learn from the results of their performance: They disclose their internal strategies and the results of their performance to the stakeholders and regulators in order to receive external feedback to develop company performance. The presence of a triple-loop system in a company ensures that the company is in a suitable position to maintain the core principles of CSR. Meta-regulating laws related to the development of company social responsibility should

[331] Wilfred Luetkenhorst, 'Corporate Social Responsibility and the Development Agenda: Should Small and Medium Companys Care?' (Working Paper No13, UNIDO, 2004) 7.

[332] Parker, above n 35, 107, 108.

[333] Parker, above n 4, 278.

have provisions for the issues necessary for the development of such a system. These provisions holding meta-regulation strategies should aim to ensure that:

1. Corporate management and employees regularly and rapidly respond to the company's compliance system, which respects the employee's integrity, connects with their values and allows the company as a whole to learn from individual mistakes and misbehavior to prevent their recurrence.[334]
2. CG pushes the management to maintain appropriate plans to engage with social responsibility issues.
3. Corporate management determines social responsibility issues, monitors compliance, accepts complaints from internal and external stakeholders as well as responsibility for coordinating the publication of company performance to stakeholders.
4. Corporate management creates scope for external experts to evaluate their responsibility system in order to evaluate its capacity to respond to changing circumstances and the need for maximising the return from this investment.

The meta-regulating strategies suggested in this chapter are proposed in order to render corporate legal regulation more effective in incorporating CSR principles as a part of self-regulated corporate responsibility. More precisely, these strategies are proposed for the *Companies Act 1994* (Bangladesh), the *Bangladesh Labour Law 2006* (Bangladesh), the *Environmental Conservation Act 1995* (Bangladesh) and for the legislations and socio-legal policies associated with these three laws, so that these legislations could insist that companies incorporate CSR principles within their self-regulatory frameworks. This chapter explains that there is scope in each of these three Bangladeshi laws for them to contain suitable provisions to create a meta-regulatory approach to corporate regulation for the development of CSR in this country.

[334] Ibid 109.

# Chapter 7
# Concluding This Book

The basis of corporate responsibility has reached a new level with the transition from the question of why corporations must be socially responsible to that of how they can become socially responsible. At this level, issues of CSR are being integrated into the core policy objectives of global companies which are also moving beyond their individual business initiatives. Strong and developing economies have begun incorporating CSR principles within their socio-economic strategies and are also integrating these principles into the very fabric of their national economies.[1]

Unlike the strong and developing economies, this reform has not been reflected in corporate regulation in Bangladesh, where civil society groups are unorganised, regulatory agencies are either ineffective or corrupt, consumers are not adequately informed regarding their rights and abilities and the media and NGOs do not mirror the corporate conscience. CG in this country, therefore, does not consider social responsibility issues as important in corporate self-regulation; they respond very poorly to their social responsibilities. In this situation, the laws and legal regulations related to corporate responsibilities are generally prescriptive and do not include the required strategies to compel CG to embrace CSR notions within their core strategies. Moreover, the major laws of this country do not possess suitable features to consider stakeholders, other than government agencies and stockholders, within corporate self-regulation so that they could contribute to and monitor corporate compliance and performance.

This book is about how the laws and legal regulation of this country could contribute to incorporating the core principles of CSR in corporate self-regulation. It assesses the major laws of Bangladesh associated with CG and environmental and social responsibility. It finds that these laws are prescriptive in nature and hinder corporate scope to devise and adopt appropriate strategies for CSR. These laws are

[1] Saimon Zadek, *Third Generation Corporate Citizenship*: *Public Policy and Business in Society* (2001b ed, 2001).

M.M. Rahim, *Legal Regulation of Corporate Social Responsibility*,
CSR, Sustainability, Ethics & Governance, DOI 10.1007/978-3-642-40400-9_7,

also proscriptive, limiting the capacity of legislation to support suitable strategies to contribute to the development of self-regulated corporate responsibility.

In this context, this book conceptualises 'meta-regulation, a fusion of the reflexive and responsive modes in regulation and argues that meta-regulation could merge the patterns of private ordering and state control in contemporary corporate regulation from the perspective of a weak economy. It shows that laws with this regulatory approach could overcome the inherent limitations of prescriptive rules. Taking three Bangladeshi laws as a case study, this book has assessed the scope of incorporating a meta-regulatory approach into legal regulation. It shows that this could greatly improve the monitoring capacity of the regulatory agencies, increase corporate commitment and enhance the capacity of corporate self-regulation for developing a socially responsible corporate culture in Bangladesh.

## 7.1 CSR and Its Core Principles

CSR is a strong component of new business and CG models for long-term sustainability. CSR embraces four core principles: societal, environmental, economic and stakeholder. The societal principle holds that companies should contribute to building better societies, and they should therefore integrate social concerns into their core strategies and consider the full extent of their impact on communities. More particularly, this principle requires companies to uphold labour and human rights, and to engage with other relevant ethical issues.[2] The economic principle emphasises company efficiency in producing goods or providing services without violating social and environmental values. The environmental principle states that companies should not harm the environment in order to maximise their profits and they must take a strong role in repairing any environmental damage caused by their irresponsible use of natural resources. Finally, the stakeholder principle of CSR holds that companies should be responsible for considering the legitimate interests of their stakeholders. Strong economies have begun adopting CSR issues into their socio-economic strategies and are merging these issues into their legal regulations.[3]

[2] Archie B Carroll, 'Corporate Social Responsibility' (1999) 38(3) *Business & Society* 268; E Garriga and D Mele, 'Corporate Social Responsibility theories: Mapping the Territory' (2004) 53 (1) *Journal of Business Ethics* 51;C Valor, 'Corporate Social Responsibility and Corporate Citizenship: towards Corporate Accountability' (2005) 110(2) *Business and Society Review* 191; M Van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003) 44(2) *Journal of Business Ethics* 95.

[3] Simon Zadek, *Corporate Responsibility and the Competitive Advantage of Nations* (2002).

## 7.2 Incorporation of CSR Principles in Corporate Self-Regulation Through Law

In today's post-regulatory world, it is difficult to determine the role of law in implementing social responsibilities in corporate self-regulation. Nonetheless, this book provides a detailed theoretical discussion on the implementation of CSR principles in corporate regulation through laws and contends that there is an adequate theoretical basis for such implementation.

The discussion in Chap. 3 centred on legitimacy theory, stakeholder theory and NG. It concluded that the demand for incorporating CSR principles in corporate regulation is supported by adequate normative arguments associated with justice, fairness and communitarianism. These are endorsed by the doctrinal approaches that reject the exclusivity of cost-benefit analysis and include distributive aspects in the efficiency models focused on maximising profits. Standing on these philosophical arguments, this book considers that state-promulgated laws have the scope to assist corporate regulation to adopt ethical guidelines, to incorporate stakeholder concerns and to develop internal strategies within companies to internalise the costs that currently externalised to the environment and society more efficiently.[4] On the same basis, it asserts that the shift in the larger political economy is moving towards fundamental changes in CG by relying on the changing role of companies and their license to operate in societies. The profit-centred focus of CG has gradually been reduced and has allowed the development for an alternative way that focuses on the pluralisation of actors, ethics and accountability in CG and regulation.

Chapter 4 of this book discussed the legal strategies required to incorporate CSR principles within corporate self-regulation. It explained that the strategies for incorporating CSR principles into corporate self-regulation generally depend on the efficacy of the nexus between CSR practices and corporate approaches when considering the social, environmental and ethical demands on companies. The implementation of CSR principles in corporate self-regulation creates two interrelated approaches; the holistic approach 'makes sense only within the context of more substantive discussions of regulatory and social policy that tells us for what corporations must take as responsibility.'[5] The materialistic approach seeks various mechanisms to absorb these principles effectively within the internal governance structures and management practices of companies. Companies tend to follow this materialistic approach rather than the holistic approach of CSR.

In this situation, how the principles of CSR could be incorporated at the core of corporate self-regulation through laws is a crucial question that sparks many ideas

[4] Amir Gill, 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26 *Berkeley Journal of International Law* 452, 461; see Doreen McBarnet, Aurora Voiculescu and tom Campbell, *The New Corporate Accountability*: *Corporate Social Responsibility and the Law* (2007); David Vogel, *The Market for Virtue*: *The Potential and Limits of Corporate Social Responsibility* (2005).

[5] Ibid 48.

as well as many controversies. Scholars are divided over the core issues of such incorporation; while some claim that 'CSR lacks a dominant paradigm'[6] others argue that the dominant approach of CSR is instrumental and focuses on the economic function of companies.[7] Again, on the one hand, civil societies and NGOs demand greater social responsibility on the part of companies, while on the other corporate societies want to conduct their operations without interference. These contradictory arguments and demands are the source of the ongoing debate between pro-regulation and pro-business advocates. These groups are supported by arguments taken from the realism and neo-liberal schools of thought.

This book has discussed these normative arguments and showed that the nexus between corporate regulation and CSR principles are no longer confined within the debate between pro-business and pro-regulation advocates over the value of CSR practice and their political effects. Rather, their nexus in the face of changes in regulatory strategies, CG, and social policies have minimised this controversy over both the potentials and limitations of corporate accountability mechanisms. These changes also make impacts on the scholarly works and real world practices. Scholars and practitioners are more engaged in looking beyond their traditional perceptions to explore how laws could synbooke their different strategies to develop this nexus and could affect existing practices in corporate regulation and social advocacy.

As discussed in Chap. 4, this book sees a place for the concept of the 'third perspective'—a normative basis for regulatory strategies for incorporating CSR principles in corporate self-regulation. This perspective focuses on the pluralisation of actors, ethics and accountability in corporate regulations and implies that CG is no longer solely dependent on shareholders, rather, on the 'relationships among the many players involved (the stakeholders) and the goals for which the corporation is governed.'[8] On this theoretical basis, the third perspective merges the arguments of the pro-regulation and pro-business advocates for assisting strategies to incorporate CSR principles in companies. It proposes consensus in creating regulation, joint efforts in policy-making, an authoritative mode in regulation and scope for self-regulation while forming any regulation.

This book contends that this perspective is a suitable fit for developing regulatory strategies to incorporate CSR principles into corporate self-regulation. This perspective is a combination of all the options for developing a regulatory

[6] Andy Lockett, Jeremy Moon and Wayne Visser, 'Corporate Social Responsibility in Management Research: Focus, Nature, Alience and Sources of influence' (2006) 43(1) *Journal of Management Studies* 115; Abigail McWilliams, Donald S Siegel and Patrick M Wright, 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1.

[7] Subhabarata Boby Banerjee, *Corporate Social Responsibility*: *The Good*, *the Bad and the Ugly* (2007); John Roberts, 'The Manufacture of Corporate Social Responsibility: Constructing Corporate Sensibility' (2003) 10 *Organization* 249.

[8] Corporate Governance Systems and Processes: The Key for Uncompromising Growth and Development http://ivybook.typepad.com/term_paper_topics/2009/07/corporate-governance-systems-and-processes.html at 22 November 2010.

framework, though the proportion of each of these options in such a framework might vary. It allows adequate scope to companies to cater for their own plans to maximise their profits within the boundaries of the law and minimal ethical constraints, while simultaneously using obligatory regulation to ensure companies' liability to society. The main characteristic of this perspective is its flexibility to fix the proportion of the different policy instruments to suit the corporate culture of a company in any individual context. It lays the basis of a strategic fusion of different modes and actors of regulation in laws; laws with this fusion could ensure that corporate self-regulation responds to public policy goals and could also provide scope to companies to design their own strategies for balancing their interests and the aim of such laws. Taking this characteristic as vital in laws for implementing CSR principles in corporate self-regulation, this book conceptualises 'meta-regulation' to assist laws related to the development of corporate social responsibilities.

## 7.3 A Meta-Regulation Approach of Law to Instil CSR Principles in Corporate Self-Regulation

A meta-regulation approach is one where different forms of regulations regulate one another. This regulatory approach, when incorporated into laws, attempts to link social values to economic incentives and disincentives, and it indirectly influences CG to incorporate CSR principles through self-regulation. With these characteristics, as was discussed in Chap. 5, this approach to develop self-regulated responsibility in companies determines regulatory strategies in laws in three ways:

1. A meta-regulation approach provides scope to devise incentives that encourage corporate management to adopt internal regulations and systematic compliance processes that address social, environmental and ethical responsibilities.
2. The sanctions embedded in laws with a meta-regulation approach ensure that CSR principles have been included in the compliance systems of companies in a manner that befits the company in question.
3. A meta-regulation approach allows laws to provide scope to different stakeholders to contribute to corporate self-regulation. With provisions for the pluralisation of power in corporate regulations, a meta-regulatory approach creates the possibility of meta-evaluation of corporate self-regulation in the development of a socially responsible corporate culture.

To obtain the maximum benefit from the meta-regulatory approach to enable CSR implementation in companies, regulators and policy framers must select relevant incentives, disincentives, sanctions, coercions or other issues that are related to CSR principles. Incentives (the same incentive could be treated as a disincentive depending on its acceptance or avoidance by the specific company), coercion, or certain privileges are the tools through which the concept of meta-regulation is realised in companies. For instance, developing an independent and

efficient media that reflects the social, ethical, and environmental performance of companies would be considered as a tool for meta-regulation. Arrangement for better education and raising awareness of consumer rights would be another instance of such tools (the last section of Chap. 5 described other tools for meta-regulation). It is worth mentioning that companies have diverse motivations and it cannot be assumed that deterrence is the main source available to regulators and policy-makers. The effects of negative publicity, informal sanctions and shaming, incentives provided by various third parties, the significance to private companies of maintaining legitimacy and the necessity to maintain cooperation and trust are also capable of influencing corporate self-regulation. Nonetheless, the types and efficiencies of the tools that generate meta-regulation are contentious; they vary with differences in circumstances and objectives. For instance, in a weak economy where civil groups are less organised and the media is weak, legal sanctions, coercion or actions against corruptions could be suitable tools for meta-regulation. For the development of meta-regulation in strong economies, providing incentives to media groups would be a more efficient tool than coercion or sanctions.

The meta-regulation approach of law described in this book provides insights concerning how to best to approach the task of incorporating the principles of CSR in the companies of Bangladesh. This book contends that returning to the policies of the past may not be the best option for regulatory reconfiguration. Although there is a role for the traditional mode of regulation in corporate regulation, this alone does not meet many contemporary policy needs. The increased dynamism, diversity, and interdependence of contemporary society has made the older policy strategies and patterns of governance less effective. This calls for a convergence of other strategies for corporate regulation. However, these regulatory strategies are contextual; they make different contributions depending on the nature and context of the corporate policy issue to be addressed. At this point, the best way would be to accomplish a substantive compliance with regulatory goals by any viable means, using the combination of relevant regulatory, economic and quasi-regulatory tools. This book has assessed the scope of incorporating this approach in three major laws of Bangladesh.

## 7.4 A Meta-Regulation Approach in the Major Laws of Bangladesh

Assessing the scope for incorporating the meta-regulation approach in the major corporate laws and regulations related to the development of self-regulated CSR in Bangladesh has been another major task of this book. This assessment, presented in Chap. 6 of this book, finds that the incorporation of a meta-regulatory approach in the major laws of this country is possible.

This book suggests that the principles of CSR need to be considered as central in all laws related to corporate self-regulation. This would enhance the scope for

regulators and stakeholders to assess the presence CSR principles within CG frameworks. From a broader perspective, laws and legal regulations need to have suitable strategies to ensure that business strategies provide clear signs of a move towards the acceptance of their social responsibilities are some other meta-regulating tools that do not base on the coercive mode of regulation. To this end, the laws with a meta-regulatory approach should have three ingredients:

1. A substantive notion of CSR so that they could insist that CG maintains a strong commitment to CSR.
2. Meta-regulating tools that could indirectly require CG to direct management to consider the principles of CSR as central to corporate self-regulation.
3. Provisions creating scope for stakeholders to be systematically involved in corporate self-regulation where this relates to CSR.

In particular, this book suggests that the *Companies Act 1994* (Bangladesh) could incorporate the meta-regulation approach to raise CSR; it could have provisions relating the obligations of corporate directors to accept CSR principles at the policy level. There are many indirect ways to increase corporate directors and senior managers' liabilities for this obligation. Amongst these, redefining the 'due diligence' clause, providing clear responsibilities and liabilities for providing consumer education and raising awareness as well as including coercion and economic incentive-based measures in different laws related to manufacturing and marketing are noteworthy. Another meta-regulating tool for this Act would be the incorporation of a provision relating to the rights and liabilities of bounty hunters as discussed in Chap. 5 of this book. This would insist that corporate management ensures the ethical standards of all their internal strategies. Moreover, this would also allow the public organisations to better accommodate their lack of expertise in dealing with corporate performance and responsibility, as well as contribute to a reduction in the rate of corruption in public officials in general.

Extending the substantive notion of 'decent work' in labour and industrial laws is an important option to develop corporate responsibilities in labour-related issues. The *Bangladesh Labour Law 2006* (Bangladesh) could incorporate this notion. It could sanction the provisions for stakeholder involvement in the internal strategies of companies so that these reflect their needs and circumstances. This law could redefine its provisions about labour unionism, workplace discrimination, the monitoring of corporate performance and the coercive measures described in it. It could have provisions that could relate the internal regulations of companies for labour welfare and safety with the provisions for the mitigation of penalties for companies. This would enable judges and administrators to consider the corporate performance track record as a criterion when determining the limits of a punishment. This would encourage companies to maintain effective internal strategies and systematic management for the welfare of their workers. Chapter 7 of this book has discussed this meta-regulation approach in detail.

The implementation strategies mentioned in the *Environmental Conservation Act 1995* (Bangladesh) could be based on a system combining public agencies, business societies and civil groups at the macro level. At the micro level,

implementation strategies could provide incentives to stakeholders and media groups to monitor corporate performance in environmental issues. Incentives for the development of public interest litigation, increasing legal aid to the victims of industrial pollution and so forth are other important issues needing to be incorporated in any environmental conservation regulatory framework. Provisions on the protection of whistleblowers could be another important meta-regulating tool of this Act. Such protection would encourage CG to insist corporate management remains vigilant in their self-regulatory strategies for waste, effluent and environmental management. Given the current shortage of efficient manpower, information sources and technologies in the public agencies established to protect the environment from industrial pollution, this provision would be an effective source of information from a wide range of corporate constituents and public organisations. This has been achieved in the related laws of many other strong and developing economies. Chapter 6 has assessed this Act and finds scope for incorporating these types of meta-regulating tools within it.

This book is the first study of its nature to explore how corporate laws and legal strategies could contribute to developing corporate social responsibility without interfering directly in companies' internal regulation. It shows that the legal strategies for this development must connect two contradictory disciplines: while retaining the voluntary nature of CSR, they must instil CSR principles in corporate self-regulation by means other than the command-and-control modes. In line with these two contradictory points, this book has conceptualised a meta-regulation approach of law that can channel one regulation so that it is regulated by another to reach the desired objective. Taking three Bangladesh laws as a case study, this book has assessed the scope of incorporating this approach in laws related to CSR; it has explained that a meta-regulatory approach within these laws could contribute significantly to the incorporation of the core principles of CSR in corporate self-regulation in weak economies that lack strong non-legal drivers to require companies to become more committed to the society in which they operate.

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