MANDATORY CORPORATE SOCIAL RESPONSIBILITY LEGISLATION AROUND THE WORLD: EMERGENT VARIETIES AND NATIONAL EXPERIENCES

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ABSTRACT

Corporate social responsibility (CSR) is typically assumed as a voluntary initiative rather than a legal mandate. Yet, in recent years, a growing number of countries have adopted laws that explicitly require corporations to undertake CSR. When it comes to CSR legislation, most scholars focus on mandatory disclosure. This article presents emergent varieties of CSR legislation other than mandatory disclosure and investigates the experiences of representative adopting countries. It compares and evaluates the motivation, nature, implementation, function and potential diffusion patterns of the emerging types of CSR legislation. This article shows that while the new legislative methods appear progressive, politics and the open-ended notion of CSR significantly weaken the compulsory nature of the laws. The major function of the CSR laws as they currently stand appears mostly expressive. At best, the explicit recognition of CSR in the laws may send signals about appropriate corporate behavior and reconstruct business norms that exclusively focus on profits. At worst, the laws may be political greenwashing through which politicians give symbolic importance to CSR. This article offers policy lessons and possible directions for future reform.

INTRODUCTION

Corporate social responsibility (CSR) is typically assumed as a voluntary initiative rather than a legal mandate.[1] However, the trend of legalizing CSR has given rise to the oxymoron of mandatory CSR. Despite its increasing usage,[2] the notion of mandatory CSR remains vague. Different users attach the label to somewhat different things. With the growing interest in legal policies for CSR, there is an urgent need to analyze what is meant by making CSR mandatory. Without clarification, the debate on whether or not CSR should be made mandatory makes no real headway.

In a very simple sense, mandatory CSR means that the law imposes an obligation on corporations to undertake CSR. Thus, the meaning of mandatory CSR significantly hinges on what is meant by law and what is meant by CSR. As to the scope of law, this article focuses on national law

1. *See generally* Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESP. & ENVT'L. MGMT. 1 (2008) (finding that 21 of the 37 CSR definitions explicitly refer to voluntariness).

2. Typing the keyword, "mandatory corporate social responsibility" with quotation marks, Google Search returned more than 15,000 results, and Google Scholar returned 832 results, as of November 2, 2020.

rather than international law.[3] Different national systems (e.g., common law and civil law systems) have different sources of law.[4] It is fair to say that legislation (including statutes and regulations) is the most common primary source of law for most jurisdictions around the world. Hence, this article focuses on mandatory CSR in the form of legislation.

Nowadays, the notion of CSR usually covers a broad spectrum of issues in relation to business operations. For instance, the European Commission defines CSR as "the responsibility of enterprises for their impact on society . . . . To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy . . . ."[5] Accordingly, CSR legislation may take place in the form of labor law, environmental law, consumer protection law, human rights law, etc. Often, the subjects of labor law, environmental law and the like comprise a wide range of actors, including individuals, business organizations, non-governmental organizations, governments, international organizations, etc. Such laws are not intended to target corporations specifically and often do not make any explicit reference to CSR. For instance, the minimum wage law applies to all employment relationships, whether or not the employer is a corporation. Most of the laws may be regarded as *implicit* CSR legislation as the laws define proper legal roles and responsibilities for social actors including corporations.

Implicit CSR legislation can be found in virtually every jurisdiction around the world. In comparative perspective, some countries have more and tougher implicit CSR legislation than others. For instance, regulations on maternal and parental benefits for employees vary wildly from country to country.[6] Within a country, implicit CSR lawmaking emerges whenever the government raises social, labor, environmental, or human rights standards.

3. Mandatory CSR law is a more complicated issue under international law because the subjectivity of corporate entities remains controversial in international law – a topic beyond the scope of this article. *See generally* José E. Alvarez, *Are Corporations "Subjects" of International Law?,* 9 SANTA CLARA J. INT'L L. 1 (2011).

4. *See generally* Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMPAR. L. 419 (1966) (comparing civil and common law as legal systems).

5. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, at 6. COM (2011) 681 final (Oct. 25, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681 [https://perma.cc/JU3E-GK9N].

6. *See* OECD, *Key Characteristics of Parental Leave Systems*, at 2–11, https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf [https://perma.cc/NL8D-85M2] (providing an overview of parental leave systems across OECD and EU countries).

Mandating CSR through implicit CSR legislation is nothing new. The development of labor law, for example, began with the industrial revolution in the eighteenth century.[7] Mandating CSR by way of tightening labor or environmental regulations is perhaps the least controversial way, as even CSR critics acknowledge that the corporation shall maximize profits within the confines of laws including labor law, environmental law, etc.[8]

Compared to implicit CSR legislation, *explicit* CSR legislation is a relatively recent development. Over the past few decades, the world has witnessed an emerging body of laws that specifically target corporations and explicitly incorporate CSR or its synonyms such as "business ethics," "corporate citizenship," "sustainability," "ESG" (environmental, social, governance), "the triple bottom line" (i.e., social, environmental and financial performance), "business and human rights," "responsible business conduct," etc.[9] Explicit CSR legislation is the focus of this article.

The most common type of explicit CSR legislation is mandatory reporting, in which companies are required to disclose extensive information about their social and environmental plans, actions or performance. Such disclosure is often referred to as "CSR reporting," "sustainability reporting," "non-financial reporting," "triple bottom line reporting" or "ESG disclosure."[10] The law requires disclosure but not substantive social or environmental performance. Nevertheless, nowadays, sustainability

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7. *See generally* Joanna Innes, *Origins of the Factory Acts: The Health and Morals of Apprentices Act, 1802 in* LAW, CRIME AND ENGLISH SOCIETY 1660–1830 (Norma Landau ed., 2009) (discussing how the Health and Morals Apprentices Act of 1802 served as a model for labor regulations around the world).

8. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG (Sept. 13, 1970) https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/MG32-A6K2].

9. *See, e.g.*, Andrew Crane and Sarah Glozer, *Researching Corporate Social Responsibility Communication: Themes, Opportunities and Challenges* 53 J. MGMT. STUD. 1223, 1223–25 (2016) (discussing CSR synonyms including "corporate sustainability," "corporate responsibility," "stakeholder management" and "corporate citizenship"); Marcel van Marrewijk, *Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion,* 44 J. BUS. ETHICS 95, 95–96 (2003) (noting various CSR concepts such as "sustainability development," "corporate citizenship," "triple bottom line" and "business ethics"); European Union, Executive Summary of EU Multi Stakeholder Forum on Corporate Social Responsibility (February 3-4, 2015), https://ec.europa.eu/docsroom/documents/8774/attachments/1/translations/en/renditions/native [https://perma.cc/26ZA-JQ65] (noting CSR synonyms such as "sustainability," "responsible business conduct" and "business and human rights").

10. *See* Global Reporting Initiative, About Sustainability Reporting https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx [https://perma.cc/TNV4-RFE3] ("Sustainability reporting can be considered synonymous with other terms for non-financial reporting; triple bottom line reporting, corporate social responsibility (CSR) reporting, and more.").

reporting *itself* has become part of CSR *per se*. CSR performance indexes usually give an unfavorable rating to companies not engaging in sustainability reporting.[11]

According to a recent report by KPMG International, Global Reporting Initiative (GRI), United Nations Environmental Programme (UNEP), and the Centre for Corporate Governance in Africa, at least sixty-four countries in the world have introduced almost 400 sustainability reporting instruments and more than two thirds of the instruments are mandatory regulations.[12] Despite the worldwide adoption of mandatory CSR disclosure, rich empirical evidence shows that mandatory disclosure regimes rarely achieve their stated objectives.[13] Existing empirical evidence suggests that CSR disclosure legislation often increases information quantity but without much improvement in quality.[14]

To date, most scholarly and policy attention on explicit CSR legislation is focused on mandatory CSR disclosure.[15] Yet, it is important to expand the focus beyond disclosure and explore other possibilities, especially given the limitations of the mandatory disclosure approach. In recent years, several countries have been enthusiastically pushing the frontiers of CSR legislation beyond mandatory disclosure. This article presents a variety of recent innovations in making CSR mandatory through legislation, including the due diligence approach in France, the philanthropy approach in Mauritius and India, the governance structure approach in South Africa, and the general duty approach under corporate law in China and Indonesia.

Mandating CSR through legislation raises a raft of important questions beyond the theoretical inquiry about whether mandatory CSR is desirable. As a matter of legal reality, how can mandatory CSR legislation be possible? Given that CSR is conventionally understood as voluntarism, what is the

11. Donna Wood, *Measuring Corporate Social Performance: A Review,* 12 INT'L J. MGMT. REV. 50, 60–65 (2010).

12. Global Reporting Initiative, *Carrots and Sticks: Global Trends in Sustainability Reporting Regulation and Policy*, at 10, 12 (2016), https://www.globalreporting.org/resourcelibrary/Carrots%20and%20Sticks-2016.pdf [https://perma.cc/JMA5-MKJP].

13. *See generally* Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure,* 159 U. PA. L. REV. 647 (2011) (noting that a series of required conditions for mandated disclosures to succeed are rarely met, leading to dubious indirect benefits and various costs).

14. For a review of empirical evidence, see David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 33–40 (2019).

15. The body of mandatory CSR disclosure literature is large. With combined keywords of "mandatory disclosure," "corporate social responsibility" and "transparency," LexisNexis returned 293 U.S. law review articles, and Google Scholar returned 3,260 articles, as of June 26, 2019.

impetus to break the convention and make CSR mandatory? What is the relationship between the CSR mandate and its pre-existing corporate law? What is the meaning and scope of CSR defined in the law? How has the law been implemented? What is the function of the law? Has the law made companies more socially responsible? This article investigates the institutional backgrounds of representative adopting countries in an attempt to shed light on the motivation, definition, implementation, function and possible diffusion of the recent emergent forms of mandatory CSR legislation.

The comparison of the national experiences reveals some important similarities and differences. Among various findings, this article shows that the governments are often motivated to pursue their own interests unrelated to labor, environmental or human rights protection. The non-CSR related motivations, such as appeasing political allies, shaming political enemies, and unloading welfare burdens to corporations, play a critical role in enacting the laws. The political interests of the governments carry far more weight than the nature of the pre-existing corporate law (whether shareholder-oriented or stakeholder-oriented) in explaining the adoption of the mandatory CSR laws. Although the CSR laws appear mandatory, politics and the open-ended notion of CSR significantly weaken the compulsory nature of the laws. At least for now, the major function of the mandatory CSR laws appears largely expressive rather than regulatory or adjudicative. At best, the laws may send signals about appropriate corporate behavior and potentially lead to reconstruction of business norms that prioritize economic interests over social and environmental concerns. At worst, the mandatory CSR laws, as they currently stand, may be exploited as a political signaling device through which politicians send a symbolic message to their constituents that they care about society and nature. In other words, it could be nothing more than political greenwashing.

This article proceeds as follows. Sections I-IV present emerging types of explicit CSR legislation and take an institutional perspective to discuss the experiences of the representative adopters under each type. Given the national experiences, Section V provides an assessment of the impetus, coverage, definition, implementation, function, potential diffusion and reform direction of the emerging CSR laws.

I. MANDATORY CSR DUE DILIGENCE

CSR is increasingly understood as a management process. For example, the United Nations Industrial Development Organization (UNIDO) defines CSR as "a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders."[16] This kind of CSR definition inspires process-oriented CSR laws. The essence of mandatory CSR due diligence is to require companies to identify social and environmental risks associated with its business operation and establish and execute reasonable plans to prevent harms resulting from the identified risks. France's duty of vigilance law, adopted in 2017, is a pioneer of this approach. This type of law is gaining traction in Europe.[17]

A. National Experience: France

The French duty of vigilance law emerged in a wave of responsible supply chain initiatives. Unlike California 2012 Transparency in Supply Chains Act and UK 2015 Modern Slavery Act, which merely mandate disclosure of voluntary due diligence efforts in global supply chains (or the absence thereof),[18] the French duty of vigilance law takes a step further, requiring due diligence and imposing legal liability in case of ineffective implementation resulting in damages.

The French duty of vigilance law is the result of a lengthy and persistent campaign by NGOs, trade unions, and left-wing parliament members. For years, many French NGOs and trade unions had called for the government to act over corporate irresponsibility related to globalization. During the 2012 presidential campaign, François Hollande of the Socialist Party, in response to an electoral appeal made by NGOs, pledged to "establish a law

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16. UNIDO, *What is CSR?,* https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr [https://perma.cc/J3KJ-5NUK].

17. *See* Saskia Wilks, *High Hopes for Mandatory Human Rights Due Diligence in 2020,* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Dec. 17, 2019), https://www.business-humanrights.org/en/high-hopes-for-mandatory-human-rights-due-diligence-in-2020# [https://perma.cc/8LYK-TQDS] (reviewing the development of mandatory due diligence law in Europe); *see also* European Coalition for Corporate Justice, *Comparative Table – mHRDD with Corporate Liability Laws in Europe,* https://www.business-humanrights.org/sites/default/files/documents/eccj_hrdd_pcl-comparative-table-2019-final.pdf [https://perma.cc/FH6H-JGJ8] (comparing France's duty of vigilance law, Swiss proposals, Germany's draft law for Human Rights and Environmental Due Diligence Act, and Dutch Child Labor Due Diligence Law).

18. *See generally* Adam S. Chilton and Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1 (2017) (providing an in-depth analysis of the California Transparency Supply Chain Act and its possible effects); PwC, *Responsible Business: What Are Companies Doing To Respond To The Modern Slavery Act?,* https://www.pwc.co.uk/sustainability-climate-change/assets/pwc-modern-slavery-act-business-insights.pdf [https://perma.cc/2Z6L-GHQV] (providing an introduction to reporting under the Modern Slavery Act).

that would give effect to the responsibility of parent companies for the actions of their subsidiaries abroad when the latter has a detrimental impact on the environment and human health."[19] Encouraged by this commitment, a coalition of NGOs and trade unions worked closely with a few socialist parliament members to bring the bill onto the legislative agenda.[20] The collapse of the Rana Plaza textile factory in Bangladesh in April 2013, which killed over a thousand workers who were hired by sub-contractors of several global companies including French ones, gave an important impetus to turn the political promise into a legislative bill.[21] In November 2013, six months after the disaster, the first version of the bill was put forward.

The initial bill proposed two legal innovations. First, the bill introduced a general duty for corporations to prevent any negative impact on human rights, health and safety, and the environment caused by their operations. Second, the bill introduced a new liability regime where corporations would be presumed liable unless they could prove that they had taken necessary steps to prevent the harm. The initial bill faced tremendous opposition from the business sector and even the Ministry for the Economy and Finance. As a result, a second version of the bill was proposed.[22]

The second version significantly reduced the legal obligations for corporations. It removed the general CSR duty and replaced it with an obligation to produce a vigilance plan to identify risks and prevent harms to human rights, health and safety, and the environment. While the second version provided that companies would be liable for any harm resulting from failure to implement the vigilance plan, the burden of proof was on claimants rather than corporations. Moreover, it significantly narrowed the scope of companies subject to the bill, i.e., only applicable to large corporations. The National Assembly (the lower chamber of the parliament) adopted the second version, but the Senate (the higher chamber) with a right-wing majority adopted a significantly modified version referred to as the third version.[23] The third version was simply a mandatory disclosure law without

19. Friends of the Earth France and ActionAid France-Peuples Solidaires, *End of the Road for Transnational Corporations*?, 6–7 (2017), https://www.amisdelaterre.org/IMG/pdf/end_of_the_road_for_tncs_foef-aaf-oct17.pdf [https://perma.cc/LXZ5-CP56].

20. *See* Alice Evans, *Overcoming the Global Despondency Trap: Strengthening Corporate Accountability in Supply Chains,* 27 REV. INT'L POL. ECON. 658, 671–76 (2019) (explaining why the law emerged in France but not in other European countries).

21. *Id.* at 667–69.

22. For a detailed account of the legislative history, see Nadia Bernaz, *Unpacking the French Bill on Corporate Due Diligence: A Presentation at the International Business and Human Rights Conference in Sevilla*, RIGHTS AS USUAL (Oct. 21, 2016), http://rightsasusual.com/?p=1087 [https://perma.cc/QXB9-BLD7].

23. *Id.*

any liability for human rights or environmental violations.

Meanwhile, the Cabinet initially was uninterested in pursuing the bill. Nevertheless, the Cabinet became supportive at the later stage in an attempt to pacify the left-wing parliament members who felt aggrieved by the pro-business labor code amendment in August 2016.[24] The National Assembly and the Senate then found a compromise and adopted the final version in February 2017.[25] However, the legal battle did not end there. More than 120 right-wing members from both chambers of the parliament appealed to the French Constitutional Council (the highest court) to challenge the constitutionality of the law.[26] In March 2017, the court upheld most parts of the law.[27]

The law, as it stands now, requires French companies that have more than 5,000 employees in France, or more than 10,000 employees worldwide, to develop, disclose and implement a vigilance plan in order to identify risks and prevent severe human rights violations and environmental damage resulting directly or indirectly from the operations of the company, its subsidiaries or its subcontractors with whom it has an established relationship.[28] The plan should include a mapping of risks, regular assessment procedures, actions to mitigate risks or prevent serious breaches, and warning and reporting mechanisms.[29] In case of non-compliance with the disclosure obligation, any interested party may give notice to the parent company or seek injunctive relief by the court. More importantly, those harmed by the company's failure to establish or implement a plan may launch a civil action and seek damages for corporate negligence.[30]

In 2018, large French companies were obliged to establish, publish and implement their first vigilance plan. The government does not publish a list of companies subject to the law. It is estimated by NGOs that there are around 300 companies subject to the requirement.[31] Available empirical

24. Evans, *supra* note 20, at 675.

25. Bernaz, *supra* note 22.

26. Evans, *supra* note 20, at 675.

27. The French Constitutional Council upheld the majority of the legislation but struck down the proposed civil penalties for companies that fail to develop a diligence plan. For the analysis of the constitutional decision, see Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM RTS. J. 317, 321–23 (2017).

28. For more details about the law, see *id.*

29. *Id.* at 320.

30. *Id.* at 321.

31. Friends of the Earth et al., *Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1 : les entreprises doivent mieux faire* [*Law on the Duty of Care of Parent Compagnies and Contractors - Year 1: Businesses Must Do Better*] 7 (2019).

reports consistently show that most of the vigilance plans published by companies only meet the minimal requirements of the law and lack informative details and substantive performance.[32] As noted, France's duty of vigilance law provides little regulatory monitoring but relies on private actions for enforcement. The first legal action under the law emerged very recently. In June 2019, a group of six environmental NGOs (two based in France and four in Uganda) formally requested the French energy giant Total to revise its vigilance plan and implementation for an oil project in Uganda.[33] Total refused to change after the three-month legal deadline. Total reasoned that the French duty of vigilance law only requires general rather than specific risk assessment, thus claiming that it already conducted detailed environmental and social impact assessments for the oil project under other laws.[34] The NGOs took Total to court, seeking a court order to force Total to revise its vigilance plan and/or take any urgent measures.[35] In January 2020, the court (Tribunal de Grande Instance) dismissed the application, finding that the vigilance plan would fall in the category of disputes among commercial companies and, as such, the appropriate venue was a commercial court.[36] The NGOs appealed to the Versailles Court of Appeals. The higher court confirmed the view in favor of corporations that the vigilance plan was a business management issue rather than a matter of human rights or environmental protection.[37]

Under the law, those harmed by the company's failure to establish or

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32. *See* Juan Ignacio Ibañez et al., *Devoir de Vigilance: Reforming Corporate Risk Engagement*, DEVELOPMENT INTERNATIONAL, at 121–23 (2020) (reviewing ten empirical studies on the implementation of the duty of diligence and conducting a new empirical study).

33. Friends of the Earth, *Oil Company Total Faces Historic Legal Action in France for Human Rights and Environmental Violations in Uganda* (Oct. 23, 2019), https://www.foei.org/news/total-legal-action-france-human-rights-environment-uganda [https://perma.cc/F52C-KUMJ].

34. *Id.*

35. AFP, *NGOs File Suit Against Total Over Uganda Oil Project*, THE EAST AFRICAN (Oct. 24, 2019), https://www.theeastafrican.co.ke/business/NGOs-sue-Total-over-Uganda-oil-project/2560-5323092-r3aeku/index.html [https://perma.cc/9K9Z-KBQC]; *Total Sued Under France's New Duty of Vigilance Law*, INTERNATIONAL DAILY NEWSWIRE (Oct. 23, 2019), https://ens-newswire.com/2019/10/23/total-sued-under-frances-new-duty-of-vigilance-law/ [https://perma.cc/PMK5-VSDK].

36. Ed Reed, *Win for Total in French Case over Duty of Vigilance*, ENERGY VOICE (Jan. 30, 2020), https://www.energyvoice.com/oilandgas/africa/221363/win-for-total-in-french-case-over-duty-of-vigilance/ [https://perma.cc/UTQ5-B4CF].

37. Business and Human Rights Resource Centre, *French Court of Appeal Remands Case Against Total Over Alleged Failure to Respect Duty Of Vigilance Law In Uganda To Commercial Court* (Dec. 10, 2020), https://www.business-humanrights.org/en/latest-news/french-court-of-appeal-remands-case-against-total-over-alleged-failure-to-respect-duty-of-vigilance-law-in-uganda-to-commercial-court/ [https://perma.cc/SH5B-3V7T].

implement the plan may pursue a negligence claim against the company.[38] To date, no such cases have been reported. Legal commentators appear to share the view that civil actions are an unlikely remedy for victims.[39] As the French Constitutional Court explained, civil liability is based on the ordinary law of tort.[40] In France, there are three elements necessary to establishing tort liability: damage, a breach of duty, and causation. There is great uncertainty with regard to the breach element. The obligation under the duty of vigilance law is to establish and implement a vigilance plan rather than to guarantee any actual preventive results of the plan.[41] Thus, any occurrence of harm does not imply a breach of duty. It is uncertain how to assess whether a company has fulfilled the obligation of effective implementation of the plan. Moreover, proving causation is a daunting task for victims.[42] Lastly, while the law gives foreign victims a legal right to seek remedy from the parent company based in France, it remains very difficult for foreigners to access French courts given French procedural laws.[43]

II. MANDATORY CORPORATE PHILANTHROPY

CSR used to be seen as synonymous with corporate charity. Accordingly, mandatory CSR could mean mandatory corporate philanthropy. Mandatory corporate philanthropy is very controversial even among CSR advocates. If CSR is voluntary by nature, corporate charity is likely the very inner core of a firm's voluntarism. Corporate donations raise the specter of window dressing merely to improve corporate image.[44] In this regard, mandatory corporate philanthropy may be viewed as a type of mandated public relations management. As modern CSR has expanded far beyond corporate charity and focuses on accountable management of any negative externalities resulting from daily business operations, corporate philanthropy is a narrow or even outdated aspect of CSR. Nevertheless, corporate philanthropy remains a popular (mis)understanding of CSR. There

38. Cossart et al., *supra* note 27, at 321.

39. *See* Stephane Brabant & Elsa Savourey, *French Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies*, 50 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES [INT'L REV. COMPLIANCE & BUS. ETHICS] 1, 3–11 (2017).

40. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-750DC, Mar. 23, 2017, para 27.

41. Brabant & Savourey, *supra* note 39.

42. Brabant & Savourey, *supra* note 39.

43. Brabant & Savourey, *supra* note 39.

44. Inger L. Stole, *Philanthropy as Public Relations: A Critical Perspective on Cause Marketing*, 2 INT'L J. COMMC'N. 20, 20 (2008).

seems to be a growing interest in this legislative mode. Mauritius is the first country that adopted mandatory corporate philanthropy. India and Nepal followed suit and Nigeria is currently deliberating over such legislation.[45] While mandatory philanthropy statutes vary across the countries, the gist of this legislative mode is to require companies to commit a certain percentage of their profits to designated CSR programs, such as programs to build schools and to provide shelters for the poor.

A. National Experience (1): Mauritius

Mauritius is an island nation in the Indian Ocean that sequentially experienced Dutch, French and British colonialism over the past centuries. The country gained independence in 1968. In the decades following its independence, Mauritius liberalized its economy and gained great economic development. However, as the economic growth started to stall in the 1990s, the government undertook further liberal reforms at the turn of the century.[46]

Meanwhile, as Mauritius remained plagued with poverty and inequality, the government was mindful of potential negative consequences and critiques of liberalism. To support and legitimize its liberal approach to development, the government appealed to CSR in several policy instruments. For instance, part of the reform was the adoption of the national code of corporate governance in 2003, declaring the pursuit of long-term shareholder value as the ultimate goal of the corporation.[47] Notably, in the 2007 budget speech, the Minister of Finance called for companies to contribute at least one percent of their profits to CSR activities.[48] This initial voluntary call did not receive much response from the private sector.[49] In 2009, the

45. For India, see Section II.B. In Nepal, the 2016 Industrial Enterprise Act provides that companies with an annual revenue of more than NRs 150 million must contribute at least one per cent of their annual profit to CSR. Moreover, Circular issued by Nepal Rastra Bank (NRB) requires bank and financial institutions to allocate at least one per cent of net profit to the following categories: social projects, direct grant expenses, sustainable development goals and/or setting up a child daycare centre for employees. For more details, see Drishti Maharjan, *Corporate Social Responsibility (CSR): Scenario & Implications in Nepal*, BIRUWA ADVISORS (July 9, 2018), http://biruwa.net/2018/07/corporate-social-responsibility-csr-scenario-implications-nepal/ [https://perma.cc/RYH2-TTN2]. For Nigeria, see Jacob Segun Olatunji, *Reps Pass Bill for Companies to Adopt Corporate Social Responsibility*, NIGERIA TRIB (July 5, 2018), https://www.tribuneonlineng.com/153855/ [https://perma.cc/NM72-6FDR].

46. See generally Renginee Pillay, THE CHANGING NATURE OF CORPORATE SOCIAL RESPONSIBILITY: CSR AND DEVELOPMENT – THE CASE OF MAURITIUS 202–03 (2015).

47. Code of Corporate Governance for Mauritius § 2.3.2(g).

48. Pillay, *supra* note 46, at 223.

49. Pillay, *supra* note 46, at 226.

government escalated its efforts to turn voluntary CSR into a legal mandate by amending the Income Tax Act of 1995. The amendment requires all profitable companies to contribute two percent of their preceding year's profits towards CSR activities.[50] This mandatory CSR legislation was spearheaded by the Minister of Finance, who was tasked with reducing the government's expenditures on social services while significantly lowering tax rates for corporations.[51] The government viewed national development as a joint responsibility of the government and the private sector.[52]

To implement the CSR mandate, the government created the National CSR Committee to oversee the implementation. The committee was composed of representatives of the government, the corporate sector, and the NGO sector. The committee issued guidelines on how companies should use their CSR funds. Initially, the CSR guidelines provided detailed categories of qualified and non-qualified programs and a list of approved NGOs eligible to receive corporate donations. In July 2015, all the CSR guidelines were abandoned, and companies were allowed to use their CSR funds according to their own CSR agendas. As a result, many companies set up their own NGOs and hired employees through their NGOs, strategically claiming compliance with the CSR expenditure requirements.[53] The government viewed this practice deceitful, replaced it with a new CSR framework in 2016, and has made some further adjustments since then.[54]

Under the current CSR scheme (effective October 2019), every profitable company in a year is required to set up a CSR fund equivalent to two percent of its chargeable income of the preceding year, and at least seventy-five percent of its CSR fund shall be remitted to the Ministry of Finance.[55] The remitted CSR money is received and managed by the National Social Inclusion Foundation (NSIF), whose council consists of representatives from the government, the private sector, the NGO sector, and academia.[56] The NSIF channels the CSR funding to programs in priority

50. Pillay, *supra* note 46, at 226.

51. Ram Seegobin, *The Source and Growth of the NGO Phenomenon in Mauritius*, LALIT MAURITIUS (June 8, 2016), https://www.lalitmauritius.org/en/newsarticle/1869/the-source-and-growth-of-the-ngo-phenomenon-in-mauritius-by-ram-seegobin/ [https://perma.cc/2BU6-4CJR]; Pillay, *supra* note 46, at 226.

52. *Id.*

53. *Id.*

54. Ministry of Social Integration and Economic Empowerment of Mauritius, The New Corporate Social Responsibility (CSR) Framework (2016).

55. Mauritius Revenue Authority, Guide on Corporate Social Responsibility (CSR) (August 2019).

56. National Social Inclusion Foundation, *Charter of National Social Inclusion Foundation*, at 4–10, https://www.nsif.mu/wp-content/uploads/2019/08/Charter-of-the-National-Social-Inclusion-Foundation-.pdf [https://perma.cc/XJ4Z-F4QU].

areas such as poverty alleviation, educational support, social housing, assistance to persons with disabilities, environmental protection, etc.[57]

After contributing the requisite amount to the NSIF, companies are allowed to manage the remaining CSR money according to their own CSR policies. In practice, large companies usually create their own CSR programs or work with NGOs to spend the remaining CSR funds, while small and medium-sized companies have limited resources and usually prefer to remit all their CSR money to the NSIF.[58] The NSIF acts as the central body to receive and allocate public funds to NGOs. The foundation maintains a list of NGOs for the fund allocation purpose. As of June 2018, there were 370 NGOs registered with the foundation. In the fiscal year of 2017-2018, the foundation approved and allocated a total of Rs 201.8 million (USD 5.81 million) to 230 projects proposed by 172 organizations.[59] A significant share of the approved programs (forty-four percent) were in the priority area of educational support.[60] According to the foundation, it has consistently monitored all the funded projects and provided necessary training to NGOs.[61]

The CSR scheme has aroused controversy in Mauritius. The mandatory contribution of two percent of profits to CSR activities has been viewed as a levy. Those who oppose the CSR levy argue that it may hurt the country's ability to attract foreign investment and disadvantage Mauritian companies in international competition.[62] Moreover, without reliable monitoring and credible assessment, there are concerns about the extent to which the CSR programs, whether carried out by the NISF or companies themselves, have fulfilled the purposes stated in the law.[63]

B. National Experience (2): India

India's CSR law is closely related to its corporate law development. India's corporate law in the colonial period was unequivocally shareholder focused. The 1956 Companies Act, the first corporate statute adopted after India's independence, also centered on shareholder interests. The corporate

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57. Mauritius Revenue Authority, *supra* note 55; National Social Inclusion Foundation, *supra* note 56.

58. Pillay, *supra* note 56, at 254.

59. National CSR Foundation, Annual Report 2017-2018, 16.

60. *Id.*

61. *Id.* According to the National CSR Foundation, during the period ending as of June 2018, the foundation monitored 82 percent of the 230 CSR programs, spent 600 hours on field visits to the funded organizations and provided mentoring supports to 71 organizations.

62. Seegobin, *supra* note 51, at 438.

63. Pillay, *supra* note 46, at 258.

law reform during the economic liberalization in the 1990s continued this focus on shareholder interests until the Satyam scandal (commonly known as India's Enron scandal) in 2009, which prompted the Indian government to revisit its regulatory regime for corporate governance.[64] When reviewing the Companies Bill in 2009, the Parliamentary Standing Committee on Finance moved toward a stakeholder-oriented approach. The Committee examined the extent of CSR being undertaken by Indian companies and proposed the need for a comprehensive CSR policy.[65]

In addition to the pro-CSR position taken by the Parliamentary Standing Committee, the Indian government undertook other CSR initiatives. For instance, in late 2009, the Ministry of Corporate Affairs (MCA) released the Corporate Social Responsibility Guidelines that exhorted companies to share the burden of the government through CSR. As the then-Minster of MCA (Salman Khurshid) explained, "At a time when the Government is engaged with delivery of a gigantic national development initiative and is taking a leadership position on various global issues, I am sure that India Inc. will be ready to walk step in step *with the Government to discharge their responsibilities towards national development*."[66] However, the voluntary guidelines appeared to have little effect — CSR activities remained uncommon among Indian companies after the guidelines were released.[67]

In 2010, the government was deliberating on a new law requiring companies to contribute at least two percent of their annual net profits to CSR. The Indian business sector clearly opposed this proposal. Indian business leaders were concerned not only about the appropriateness of turning CSR into mandatory obligations but also the weakening of the commitment to economic liberalization.[68] Ultimately, the government adopted a compromised approach (i.e., comply or explain) in the Companies Act, passed in August 2013.

The 2013 Companies Act shifts away from shareholder primacy and requires directors to consider the interests of a wide range of stakeholders,

64. For the legislative history of the mandatory CSR law in India, see Afra Afsharipour, Redefining Corporate Purpose: An International Perspective, 40 SEATTLE U. L. REV. 465, 476–88 (2017).

65. *Id.*

66. Ministry of Corporate Affairs Government of India, Corporate Social Responsibility Voluntary Guidelines 2009, at 6 (emphasis added), http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf [https://perma.cc/PPX7-SL3L]

67. Dhammika Dharmapala & Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013,* 56 INT'L REV. L. & ECON. 92, 94–95 (2018).

68. *Id.* at 95.

including employees, shareholders, communities, and the environment.[69] The most striking CSR provision is Section 135. It requires large companies (defined by net worth, turnover, or net profit) to spend in every financial year at least two percent of their average net profits made in the preceding three years on qualified CSR programs. Each company subject to Section 135 shall establish a CSR board committee composed of three or more directors, and at least one of the committee members must be an independent director. The committee shall advise the board on how to spend the CSR fund and monitor the implementation. If the company fails to spend the requisite amount, the board shall explain the reasons for the non-compliance in the annual report.[70]

The CSR expenditure law has attracted great criticism in India. Those from the political right view the mandatory CSR expenditure as a tax against economic liberalization, while those from the left claim the comply-or-explain approach does not go far enough to solve inequality problems in India.[71] Moreover, as a matter of practice, the law raises questions about its enforceability given that there is great uncertainty about the meaning of CSR.[72] While the corporate statute mentions CSR multiple times, it does not define it. In an attempt to solve the implementation problem, the government issued a schedule that specifies qualified CSR activities, including programs to eradicate hunger and poverty, to promote education and gender equality, to assist rural development projects, etc.[73]

According to the MCA, during the 2015-2016 financial year (the most recent available data year as of the time of writing), 5,097 companies subject to the CSR mandate contributed a total of 9,822 rupees crore (about $1.48 billion USD) to qualified CSR activities.[74] Yet, a significant portion of the

69. The Companies Act, 2013, §166; *see generally* Afsharipour, *supra* note 64 (detailing the reformation of India's corporate governance within the past decade).

70. The Companies Act, 2013, §135 (5).

71. *See* Aneel Karnani, *Mandatory CSR in India: A Bad Proposal*, STAN. SOC. INNOVATION REV. (May 20, 2013), https://ssir.org/articles/entry/mandatory_csr_in_india_a_bad_proposal [https://perma.cc/DBY5-2J4Q] (analyzing how the concept of CSR is controversial to both sides of the political spectrum).

72. *See Corporate Social Responsibility in India: No Clear Definition, but Plenty of Debate*, KNOWLEDGE@WHARTON (August 2, 2011), http://knowledge.wharton.upenn.edu/article/corporate-social-responsibility-in-india-no-clear-definition-but-plenty-of-debate/ [https://perma.cc/X2SW-3FPL] (explaining that the rules of CSR are so vague that reporting will be vague and unsuccessful as well); *see also* Karnani, *supra* note 71 (arguing that the CSR law is ineffective since it does not include an enforcement mechanism, penalties for non-compliance, or an adequate legal definition).

73. Companies (Corporate Social Responsibility Policy) Rules §4 (2014).

74. Ministry of Corporate Affairs of India, CSR Expenditure of 5097 Companies for the F.Y 2015-16*,* http://www.mca.gov.in/MinistryV2/csrdatasummary.html [https://perma.cc/SK

large firms subject to the CSR mandate failed to contribute the requisite amount.[75] In July 2019, India amended the law, requiring companies to transfer any unspent amount for ongoing CSR projects to a special account and spend the amount within three years after transfer. Any unspent amount not committed to any ongoing CSR project shall be transferred to Prime Minister's National Relief Fund or any other fund set up by the central government for socio-economic development and welfare of minorities and other disadvantaged groups.[76]

III. MANDATORY CSR GOVERNANCE STRUCTURE

CSR is a concept often juxtaposed to shareholder wealth maximization. CSR expects corporations to consider and balance the interests of various stakeholders in the course of doing business. A progressive way of implementing such stakeholder-concerned CSR through the law is to require the corporation's central decision-making institution (i.e., the board of directors) to be composed of representatives of various stakeholders. In other words, shareholders as well as other stakeholders have institutionalized powers in the corporate governance structure. It is a structural way of implementing mandatory CSR — addressing CSR concerns through legal requirements in a corporate governance structure.

An embodiment of this structural approach of mandatory CSR is the so-called co-determination in which employees have representation at the board level. For instance, Germany's Codetermination Act requires companies with more than 2,000 employees to have half the supervisory board of directors as representatives of workers.[77] The inclusion of employee-representatives on the board helps the protection of workers' rights, which is an important part of CSR. This co-determination legislation has existed since World War II, mainly in European countries.

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75. *See* Dharmapala & Khanna, *supra* note 67, at 103 (finding that firms that had spent more than two percent of their net profits on CSR prior to Section 135 actually decreased their CSR spending after its enactment); *see also* G.K. Kappor & Sanjay Dhamija, *Mandatory CSR Spending – Indian Experience,* 3 EMERGING ECON. STUD. 98, 102–03 (2017) (stating that from 2014-2015 56% of companies did not spend the required amount); *see also* CRISL FOUNDATION, ALTRUISM RISING: THE CRISIL CSR YEARBOOK 6 (2017), https://www.crisil.com/content/dam/crisil/crisil-foundation/generic-pdf/CRISIL%20CSR%20year%20Book_Altruism%20rising_30Jan2017.pdf [https://perma.cc/C3B7-24VS] (finding that in 2016, 133 companies did not spend any money on CSR).

76. The Companies (Amendment) Act, 2019, §135, https://www.mca.gov.in/Ministry/pdf/AMENDMENTACT_01082019.pdf [https://perma.cc/2X5Z-HUV6].

77. The main source of the co-determination law is Mitbestimmungsgesetz of 1976.

A new structural approach, albeit less structurally dramatic, is to require the establishment of a CSR committee within the corporate governance structure. The CSR committee is responsible for enacting and supervising the company's CSR policies and implementation. South Africa is the forerunner of this approach.

A. National Experience: South Africa

The development of CSR in South Africa is inextricably linked to the country's apartheid history. The institutionalized racial segregation since 1948 gave the white-minority political and economic privileges and deprived the black majority of fair opportunities. Although apartheid was abolished more than three decades ago, the country's large business organizations remain under the control of the white minority. According to the World Bank, South Africa is one of the most unequal countries in the world, and its inequality is the persistent legacy of apartheid.[78]

Since the abolishment of apartheid in 1994, the government has adopted a series of affirmative action laws to assist the historically disadvantaged racial group. The most notable example is the Broad-Based Black Economic Empowerment (BBBEE) Act of 2003, the purposes of which are to encourage black ownership of business entities and to empower black employees through human resources and skills development.[79] Under the BBBEE Act, the government encourages companies to be socially responsible by giving licensing and procurement preferences to BBBEE-compliant companies.

The abolishment of apartheid introduced not only political and social liberalization but also economic transformation. With the end of the international anti-apartheid economic sanctions, South Africa sought to reintegrate with the global economy through economic reforms. The improvement of corporate governance was an important part of the reform scheme. The 1994 King Report on Corporate Governance, which was created to set good corporate governance standards in South Africa, took a fresh view that directors should have a responsibility to society rather than to shareholders only.[80] In 2004, the government published a policy paper

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78. World Bank, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities*, at 43 (2018), http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf [https://perma.cc/Z6HS-EREG].

79. BBBEE Act § 2 (published on Jan. 9, 2004), https://www.gov.za/sites/default/files/gcis_document/201409/a53-030.pdf [https://perma.cc/2JCU-9VWL].

80. *See* Philp Armstrong, *The King Report on Corporate Governance,* 3 JUTA'S Bus.

that kicked off an extensive overhaul of South African corporate law. The document emphasized the alignment between corporate purposes and societal objectives.[81]

Against this legal background, South Africa adopted a new company law in 2008. South Africa's 2008 Companies Act provides that its legislative purpose is to "promote compliance with the Bill of Rights as provided for in the Constitution" as well as to "reaffirm the concept of the company as a means of achieving economic and social benefits."[82] Consistent with the legislative purpose, the new company law introduces an innovation: "The Minister, [of Department of Trade and Industry] may by regulation, may prescribe (a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to (i) annual turnover; (ii) workforce size; or (iii) the nature and extent of the activities of such company."[83] The Companies Amendment Act (2011) and the Companies Regulations (2011) further elaborate on the composition, mandate and powers of the social and ethics committee.

According to the regulations, state-owned companies, listed public companies, and companies that meet the public interest standard are required to set up a social and ethics committee.[84] The committee must consist of three directors or prescribed officers.[85] The committee must monitor the company's performance in five areas: social and economic development; good corporate citizenship; the environment, health and public safety; consumer relationships; labor and employment. When the committee monitors each of these five areas, it has to consider relevant legal rules and prevailing codes of best practice. The regulations provide example standards for each of the five areas.[86] When considering "social and economic development" issues, for instance, the regulations refer to the United Nations Global Compact Principles, the Employment Equity Act, the BBBEE Act, etc. In addition to monitoring, the committee has to report to shareholders at the company's annual general meeting on matters within its mandate. In order to fulfil its mandate, the committee is vested with the powers to require any director or prescribed officer to furnish any information or explanation

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65, 68 (1995) (providing a review and the historical background).

81. The title of the policy paper is South African Company Law for the 21st Century—Guidelines for Corporate Law Reform. For a discussion of the document, *see* Sulette Lombard & Tronel Joubert, *The Legislative Response to the Shareholders V Stakeholders Debate: A Comparative Overview*, 14 J. CORP. L. STUD. 211, 219–20 (2014).

82. Companies Act 71 of 2008 §7(a), §7(d) (S. Afr.).

83. *Id.* at §72(4).

84. Companies Regulations, GN R.351 of GG 34239 (26 Apr. 2011).

85. *Id.*

86. *Id.*

necessary for the performance of the committee's function and to attend any annual shareholder meeting to address any issues related to its function.[87] The Companies and Intellectual Property Commission can issue an order to a non-compliant company to form a social and ethics committee.[88] To strengthen the legal status of the social and ethics committee, the South African government is now considering explicit incorporation of many of the detailed regulatory rules into its corporate statute.[89]

Until now, much of the debate about the social and ethics committee seems to focus on the status of the committee and its relationship with the board of directors. Scholars are debating whether the social and ethics committee is a board committee, or a corporate organ separate from the board.[90] In practice, it seems that corporations usually treat it as a board committee composed of a mix of executive and non-executive directors. Some companies may include non-directors on the board, such as human resources executives.[91]

The initial reaction of the business sector in South Africa was cautious, and businesses implemented the committee requirement reluctantly. A survey conducted one year after the law came into effect found that 50% of the companies subject to the law had not yet established a social and ethics committee, and only 11% of the companies indicated a strong awareness of the role and functions of the committee.[92] Despite the slow adoption at the initial stage, almost all the state-owned enterprises and listed and public interest companies in South Africa now have a social and ethics committee

87. Companies Act 71 of 2008 §72(8) (S. Afr.).

88. *Id.* at §84(6)-84(7).

89. Companies Amendment Bill 2018, GN 969 of GG 41913 (Sept. 21, 2018), http://www.cipc.co.za/files/7715/4149/0472/Companies_Amendment_Bill_2018.pdf [https://perma.cc/9AGE-NVU6].

90. For a summary of the debate, *see* Irene-Marié Esser & Piet Delport, *The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 2*, 50 DE JURE 221, 223–24 (2017). The view that the social and ethics committee is a board committee is based on the heading of Section 72 and the overall context of Section 72 of the Companies Act, while the view that the committee is a separate corporate organ is based on the fact that the committee members are appointed by shareholders, may be composed of non-directors, and directly report to shareholders.

91. *Social and Ethics Committee Report*, ILLOVO (May 23, 2014), http://annualreport.illovo.co.za/Archive/2014/sustainability/social-and-ethics.asp [https://perma.cc/K35T-WCKP]; *Social and Ethics Committee Report*, SPAR (Nov. 14, 2017), https://investor-relations.spar.co.za/ir2017/governance-approach/social-and-ethics-committee-report/ [https://perma.cc/ZVS4-WDWZ].

92. DEON ROSSOUW, ETHICS INSTITUTE OF SOUTH AFRICA, THE SOCIAL AND ETHICS COMMITTEE HANDBOOK, 2 (2012), https://www.tei.org.za/phocadownloadpap/Handbook_toolkits/SEC%20Handbook%20WEB.pdf [https://perma.cc/HZB7-Z3E5].

in place.[93] Although there is no problem with establishing a social and ethics committee, whether and how the existence of the committee helps CSR performance remains unclear.[94]

IV. MANDATORY GENERAL CSR DUTY (UNDER CORPORATE LAW)

Over the past decades, CSR has evolved into a comprehensive system of daily business management.[95] As a result, mandatory CSR may refer to a general legal duty to act in a socially responsible way. Available legal experiences suggest that such a duty is often established under corporate law. Exiting corporate law literature tends to equate the CSR duty with part of directors' fiduciary duty. This tendency is attributable to the influence of common law jurisdictions.[96] For instance, the UK 2006 Companies Act requires directors to consider the interests of employees, consumers, suppliers, the environment, and the community when pursuing the interests of shareholders.[97] However, less noted is that the CSR duty can be a corporate obligation rather than merely part of directors' fiduciary duty. The corporate statutes of China and Indonesia illustrate this legislative mode, where the law imposes an apparently broad legal obligation on *corporations* to undertake CSR.

A. National Experience (1): China

The key feature of the CSR development in China is state centricity—

93. DEON ROSSOUW, ETHICS INSTITUTE OF SOUTH AFRICA, THE SOCIAL AND ETHICS COMMITTEE HANDBOOK, SECOND EDITION, 5 (2018), https://www.tei.org.za/phocadownload/Handbooks_Toolkits/SEC%20Handbook_2nd_Final%20for%20upload_March%202018.pdf [https://perma.cc/ZVJ2-R5KX].

94. *See* Esser & Delport, *supra* note 90, at 232 (reporting no empirical evidence available regarding the effectiveness of the social and ethics committee).

95. Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19, 20 (Andrew Crane ed., 2008).

96. *See* Benedict Sheehy & Donald Feaver, *Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted or Prescribed?*, 37 DALHOUSIE L. J. 345, 386–92 (2012) (comparing whether directors have a CSR duty in Australia, Canada, the U.K. and the U.S.).

97. Companies Act 2006 § 172, c.46 (Eng.); *see also* Virginia E. Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide,* 36 J. CORP. L. 59, 78–79, 92 (2010) (explaining how Section 172 mandates greater corporate social responsibility); *see also* Andrew R. Keay & Hao Zhang, *An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law*, 8 EUROPEAN COMPANY & FIN. L. REV. 445, 446–48 (2011) (evaluating whether Section 172 is too vague a requirement to effectively ensure that directors consider the interests of all stakeholders).

the state, rather than civil society, playing a central role in advancing CSR.[98] This state-centric approach to CSR is the outgrowth of the state's dominance in China's politics, economy and society. China's economic system is often characterized as "authoritarian capitalism" or "state capitalism."[99] Political liberation remains minimal, which suppresses civil society that is supposed to be a major force pushing for CSR. The state-owned sector remains a dominant economic power.[100] The state (and ultimately the Chinese Communist Party) has used its position as a regulator and a controlling shareholder of state-owned enterprises to promote CSR. The motivation of the party-state is not simply economic, but more importantly, political. The party-state views CSR helpful to "social harmony" and ultimately, its ruling stability.[101]

The Chinese government has taken numerous measures to promote CSR. Most of these state-led CSR initiatives are quite recent, dating back to 2006.[102] The most salient and representative is probably the CSR provision in China's 2006 Company Law. China's corporate law since its first adoption in 1993 has been a stakeholder-oriented model in which employees have representation on the supervisory board.[103] The 2006 Company Law reinforces employee participation in corporate governance by requiring that at least a third of the supervisory board members be employee representatives.[104] In this regard, China has already had a structural type of

98. *See* Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 VAND. J. TRANSNAT'L. L. 375, 378–79 (2013) (comparing the state-centric model of Corporate Social Responsibility found in China to the market and relationship driven model found in other parts of the world).

99. Barry Naughton and Kellee S. Tsai eds., STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE 1–24 (2015); Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 697 (2013); James McGregor, NO ANCIENT WISDOM, NO FOLLOWERS: THE CHALLENGES OF CHINESE AUTHORITARIAN CAPITALISM 13–15 (2012).

100. *See* University of Alberta China Institute, *State-Owned Enterprises in the Chinese Economy Today: Role, Reform and Evolution* (2018), https://cloudfront.ualberta.ca/-/media/china/media-gallery/research/policy-papers/soepaper1-2018.pdf [https://perma.cc/2QSX-WJ8H] (noting how State-Owned Enterprises in China continue to have an important, yet declining, role in China's economy).

101. The idea of "harmonious society" was formally adopted in the Fourth Meeting of the 16th Central Committee of the Communist Party of China (October 11, 2006). *See also* Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?,* 28 BERKELEY J. INT'L L. 64, 88 (2010) (discussing the relationship between CSR and the government's social harmony policy in China).

102. Ho, *supra* note 98, at 397.

103. Company Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 298, 1993, effective July. 1, 1994), arts. 55, 121, Westlaw China.

104. Company Law of the People's Republic of China (promulgated by Standing Comm.

mandatory CSR for decades. However, empirical evidence often suggests that employee participation through the supervisory board is merely superficial.[105]

More importantly, the 2006 Company Law explicitly requires corporations to undertake CSR. Article 5 provides that "[i]n the course of doing business, a company shall comply with laws and administrative regulations, conform to social morality and business ethics, act in good faith, subject itself to the government and the public supervision, and undertake social responsibility."[106] The official legislative documents reveal little to the public about the motivation of Chinese legislators who decided to adopt the CSR provision. Nevertheless, some government officials and legal scholars who were involved in the legislation compiled and published the opinions considered in the law-making process, which may shed light on the legislative motivation.[107] According to the sources, legislators from different provinces seemed enthusiastic about incorporating CSR into corporate law.[108] For instance, Shanghai delegates at the National People's Congress proposed that the company law should make it clear that "companies shall protect and improve the interests of other stakeholders in addition to shareholders."[109] They also proposed that CSR might be included as one of the legislative purposes of company law.

While there seemed to be little debate about CSR in the legislative process, controversies arose in the legal community after the enactment of the CSR provision (i.e., Article 5). The statutory language of Article 5 appears mandatory, yet Chinese law scholars have different interpretations about the nature of the CSR provision. Some scholars take the CSR provision as a purely ethical obligation without legal enforceability, because the corporate statute does not provide any definition for CSR or any remedies

Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art.52, Westlaw China.

105. *See e.g.*, Weian Li and Chen Hao, *An Empirical Research of Supervisory Board Governance in China's Listed Companies*, 2006 J. SHANGHAI U. FIN. & ECON. 78 (2006) (in Chinese); Limin Wang and Shiquan Wang, *An Empirical Analysis of Supervisory Board Governance of China's Private Listed Companies*, 11 INQUIRY INTO ECON. ISSUES 120 (2007) (in Chinese).

106. Company Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art.5, Westlaw China.

107. Kongtai Cao et al., A RESEARCH REPORT ON THE AMENDMENTS TO COMPANY LAW (2005) (in Chinese). The Chinese government did not disclose official documents concerning the legislative history. The editors of this report compiled the opinions considered in the legislative process. The leading editor was the head of the State Council's Legislative Affairs Office, responsible for drafting laws and regulations. Other editors were also affiliated with the Office; and some are prominent law professors in China.

108. *Id.*, at 21, 141.

109. *Id.*

in case of non-compliance.[110] In contrast, some scholars see Article 5 as mandatory in nature.[111] They argue that the CSR provision is a fundamental principle of corporate law; as a fundamental principle, it shall be mandatory in nature and be applied to interpretations of all provisions throughout the statute.[112] Moreover, they maintain that the corporate statute includes some specific obligations consistent with the broad CSR principle, such as employee participation in corporate governance. Other scholars argue that the CSR provision is both a moral obligation and a legal obligation.[113]

While the Chinese legal community holds divergent views on the nature of the CSR provision, it agrees that the CSR law likely has little value in legal practice. Indeed, Chinese courts rarely apply the law in a legally consequential way. Nevertheless, it is not useless in judicial decisions. As I have shown elsewhere, in some cases, Chinese courts used the CSR provision as an additional legal basis to require companies to comply with laws; in some cases, the courts used the CSR provision to exhort companies to go beyond legal compliance, and more importantly, in a few cases, the courts applied the CSR provision to determine the outcome of judicial dissolution.[114] The courts viewed maintaining "social stability" as part of CSR and thus denied granting judicial dissolutions that would potentially cause riots by a large number of employees or customers.[115] China's political institutions play an important role in this "social stability" interpretation of CSR. The Chinese government (ultimately the Chinese Communist Party) suppresses any social unrest that would possibly threaten its ruling stability. The Chinese courts subject to the Party's control advance the Party's political interests in the name of CSR.[116]

While judicial application of the CSR provision is generally limited, there are many specific regulatory measures with a view to implement the CSR provision in the corporate statute.[117] Mandatory sustainability reporting

110. *See e.g.*, Xiaoxing Chen, *Rational Consideration on the Legal Rule of Corporate Social Responsibility: A Comment on Article 5 of Chinese Company Law*, in *China Commercial Law Annual* 2009, 50–53 (Baoshu Wang eds., 2009) (in Chinese).

111. Junhai Liu, INSTITUTIONAL INNOVATION OF NEW COMPANY LAW: LEGISLATIVE AND JUDICIAL CONTROVERSIES, 555 (2006) (in Chinese).

112. *Id.*

113. *See e.g.*, Jianbo Lou, *The Literal Interpretation and Implementation Path of Article Five Paragraph One of Chinese Company Law,* 20 PEKING U. L. J. 36, 36–37 (2008) (in Chinese).

114. Li-Wen Lin, *Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*, AM. J. COMP. L. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361448 [https://perma.cc/ZD9P-YE2Y].

115. *Id.* at 35–38.

116. *Id.* at 44.

117. *Id.* at 45; Ho, *supra* note 98, at 382–96.

is a good example. For instance, in an explicit attempt to further the CSR provision in company law, the Shanghai Stock Exchange requires certain types of listed companies to issue annual CSR reports.[118] Moreover, many of the regulatory measures target state-owned enterprises (SOEs). For instance, the State-Owned Assets Supervision and Administration Commission (SASAC), the government's ownership agency, issues the CSR guidelines for SOEs and requires SOEs to publish annual CSR reports.[119]

Overall, except for a few judicial cases and specific CSR-related regulations, the CSR law (i.e., Article 5) as a corporate behavioral standard, is largely *de facto* voluntary, despite the mandatory tone of the statute.

B. National Experience (2): Indonesia

Indonesia's early initiative of mandatory CSR began with the regulations on state-owned enterprises (SOEs). After independence from Dutch colonial control in 1945, the Indonesian government sought to gain economic sovereignty by nationalizing Dutch businesses.[120] Since then, SOEs have played an important role for economic development purposes. Starting from 1999, every Indonesian SOE is required by law to allocate four percent of their profit to partnerships with small and medium enterprises and environmental management programs.[121]

Unlike the state-owned sector where CSR is driven by the government, the private sector's CSR movement is mainly driven from outside Indonesia. The global anti-sweatshop movement in the 1990s questioned the labor conditions of multinational companies and their suppliers in Indonesia. As a result, it raised local awareness of CSR and led to the emergence of CSR-

118. For detailed discussion about the Chinese stock exchanges' CSR disclosure rules and implementation effects, see Li-Wen Lin, *Corporate Social and Environmental Disclosure in Emerging Securities Markets*, 35 N.C.J. INT'L L. & COM. REG. 1, 18–22 (2009).

119. In 2008, SASAC released the Guiding Opinions on Central Enterprises' Implementation of Social Responsibility, which required the state-owned enterprises (SOEs) under the central government's control to publish CSR reports by 2018. In 2012, SASAC released an informal notice requiring the central SOEs to begin publishing CSR reports in 2012. All the central SOEs have published annual CSR reports since then.

120. Sinaga, *infra* note 121.

121. The Ministry of SOEs of Indonesia issued a Minister Decree No. Kep-216/M-PBUMN/1999, the Law No. 19 of Year 2003 concerning SOEs, and the SOE Ministry Regulation No. Per-05/MBU/2007 concerning SOE's partnership with small enterprises and environmental management programme. *See* Rifeald Romauli Sinaga, *The Indonesian Government's Role in the Development of Corporate Social Responsibility in Indonesia*, 103 (November 2017) (Ph.D. Thesis, Griffith University) (discussing the Decree and rules adopted), https://research-repository.griffith.edu.au/handle/10072/370832 [https://perma.cc/B5H2-6KJR].

focused NGOs in Indonesia.[122]

In 2005, the government began a comprehensive revision to its 1995 corporate statute (i.e., Limited Liability Company Act). The 1995 company law was clearly shareholder-focused, where the legislators adopted shareholder wealth maximization as the purpose of the corporation and abandoned any consideration of wider social purposes suggested in the earlier drafts.[123] With shareholder primacy as the accepted principle, the intended purpose of the 2005 revision was to promote trade, investment and economic growth. Unsurprisingly, the original draft submitted to the parliament did not refer to CSR at all. The parliamentary committee responsible for preparing the final draft held a series of public hearings with key stakeholders. Representatives of Business Watch Indonesia (BWI), a prominent CSR-focused NGO in Indonesia, attended one of the hearings and argued for the inclusion of CSR in the statute.[124] After this hearing, BWI funded a trip to the Netherlands for three parliamentary members to investigate CSR issues.[125] A subsequent parliamentary committee meeting was held in June 2006, which occurred two weeks after the massive mud flow pollution caused by a mining corporation owned by Aburizal Bakrie (then Coordinating Minister for People's Welfare and a key leader of the Golkar Party, a conservative party).[126] In the meeting, various political factions, including the Golkar's opponents, supported mandatory CSR in the law, partly intending to embarrass Bakrie and his party and partly intending to direct CSR money to the indigenous Indonesian businesses in their own electoral districts.[127]

With the agreement on the inclusion of mandatory CSR into the new corporate law, the parliamentary committee's deliberation focused on how much companies should spend on CSR activities. The proposed amount ranged between three to five percent of a company's net profit. Several

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122. *See* Melody Kemp, *Corporate Social Responsibility in Indonesia, Quixotic Dream or Confident Expectation*, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, TECHNOLOGY, BUSINESS AND SOCIETY PROGRAMME, Paper Number 6, 11–13, (Dec. 2001), http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=EF8F86E50D18E6D480256B61005AE53A&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/EF8F86E50D18E6D480256B61005AE53A/$file/kemp.pdf [https://perma.cc/FUG3-XKSF] (discussing how the anti-sweatshop movement originating outside Indonesia impacted CSR in Indonesia).

123. Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 412 (2013).

124. Andrew Rosser & Donnie Edwin, *The Politics of Corporate Social Responsibility in Indonesia*, 23 PAC. REV. 1, 11–12 (2010).

125. *Id.*

126. *Id.* at 12.

127. *Id.* at 12–13.

business associations were strongly opposed to mandatory CSR. They demanded that the parliament abandon the mandatory approach and opt for a voluntary approach. Consistent with the business sector's wishes, the Golkar representatives on the parliamentary committee submitted a proposal to replace mandatory CSR with a voluntary CSR statement in the law. However, the committee rejected this proposal. The Golkar representatives then proposed that mandatory CSR should be limited to natural resources companies. The committee partially accepted the proposal; it agreed that the law would be applied to natural resources companies and companies that have activities connected with natural resources.[128]

As a result, Article 74 of Limited Liability Company Act, passed in July 2007, provides that: (1) A limited liability company that carries out business activities in natural resources sectors or in connection with natural resources is obliged to implement corporate social and environmental responsibility; (2) The social and environmental responsibility undertaken by the corporation shall be budgeted and calculated as expenses of the company and its implementation must be undertaken by considering appropriateness and reasonableness; (3) Failure to implement the CSR obligation will incur sanctions in accordance with further regulations.[129]

Although the business sector failed to stop the law at the legislative branch, it continued its battle against the mandatory CSR law by resorting to the constitutional court. Indonesia's Chamber of Commerce and Industry, along with certain other associations and companies, jointly filed a judicial review of Article 74 with the constitutional court. They argued that the law violated the principle of legal certainty because the CSR mandate would contradict the voluntary nature of CSR and essentially amount to double taxation. The court reasoned that the meaning of CSR must be in line with the culture of each country and therefore that the voluntary nature of CSR is not universally true.[130] Moreover, the court took the position that CSR as a legal obligation, as opposed to a voluntary initiative, provides more legal certainty, not less.[131] The court also distinguished between taxation and CSR spending. According to the court, tax levies are used for national development, while CSR funds are used for communities and the restoration of the environment where the company is located. The court also explained

128. *See Id.* (detailing the legislative history leading up to the law).

129. For an English-translated version of the Law of the Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Company, see http://dlplawoffices.com/pdf/limitedliabilitycompanies.pdf [https://perma.cc/9NGP-YBCL].

130. Indonesian Constitutional Court Decision No. 53/PUU-VI/2008, available at http://hukum.unsrat.ac.id/mk/mk_53_2008.pdf [https://perma.cc/BSD2-ZAFJ].

131. *Id.*

that there is no double taxation because the costs incurred for CSR are calculated as the company's costs and its implementation ability.[132] As a result, the court upheld the CSR law.

Although the business sector was unsuccessful in defeating the CSR law at the legislative and judicial review stages, it effectively delayed and weakened the law at the regulatory implementation stage.[133] The implementation regulation was belatedly released in 2012, five years after the CSR legislation.[134] The regulation holds the board of directors responsible for the practical details of CSR implementation, including the preparation of annual CSR operations plans and budget plans. However, the regulation adds little substance to implementation.

The regulation vaguely explains the meaning of "appropriateness and reasonableness" as being "the financial capacity of the company having regard to the risks that give rise to the social and environmental responsibilities that must be borne by the company, subject to the obligations of the company as set out in the legislation governing the company's business operations."[135] Article 7 of the regulation provides that if a company fails to fulfil its CSR obligations, it will be sanctioned as prescribed by laws and regulations in effect. However, the regulation itself imposes no sanctions. In fact, Article 3 of the regulation provides that "CSR shall be mandatory for companies that carry on business in the natural resources sector or related fields, where such CSR obligations are imposed by a specific sectoral statute." The regulation echoes the constitutional court's view that "CSR has been implicitly regulated by other laws and regulations such as Forestry Law, Environmental Law, Water Resources Law and the Law on Gas and Oil," and administrative sanctions imposed under such laws serve as an important way to punish companies failing to perform the CSR obligation under the corporate statute.[136] As a result, the CSR obligation under Article 74 of the Limited Liability Company Act turns out to be no more than a legal obligation to comply with existing laws and regulations.

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132. *Id.*

133. *See* Rosser and Edwin, *supra* note 124, at 8–11, 16–17 (describing the political dynamics that shaped the introduction of mandatory legal requirements for corporate social responsibility in Indonesia).

134. Government Regulation, 2012 (Regulation No. 47/2012) (Indon.).

135. *Id.*

136. Indonesian Constitutional Court, Decision No. 53/PUU-VI/2008 (Indon.). *See also* Laurensia Andrini, *Mandatory Corporate Social Responsibility in Indonesia,* 28 MIMBAR HUKUM 512, 519 (2016) (discussing the various forms of sanctions for when companies fail to meet their CSR obligations).

V. EVALUATION

At first glance, the CSR laws appear to be very different from each other. They emerged in countries with different political, economic and legal institutions. The laws, even for those similar in type, differ in content in one way or another. Nevertheless, a deeper analysis reveals some important commonalities of the apparently different CSR laws.

A. The Impetus of the Law

A comparison of national experiences suggests that governments on the left wing of the political spectrum play a central role in bringing explicit, mandatory CSR laws into fruition. China is ruled by a communist party. The French law was passed under the socialist government. Mauritius, India, and South Africa also passed their CSR laws under left-leaning governments.[137] Left-wing politics generally supports egalitarianism and public control of major political and economic institutions.[138] This political ideology echoes many CSR issues (e.g., worker welfare and wealth distribution) and endorses more government intervention in business activities. A left-leaning political climate makes mandatory CSR laws more possible.

Although left-wing politics helps, the governments' immediate instrumental needs likely play a more important role in mandatory CSR legislation. The governments when pursuing the laws often had their own instrumental interests unrelated to the protection of labor, human rights or the environment. In France, the Cabinet supported the CSR bill mainly to placate disgruntled fellow party members after the passage of a pro-business labor law. In Mauritius and India, the governments use the mandatory philanthropy law to ease their financial burdens for social welfare programs, while seeking economic liberalization. The Chinese government pursues social harmony in the name of CSR to maintain its ruling stability. The Indonesian experience shows that politicians have predatory interests in redistributing wealth from large foreign and Sino-domestic companies to indigenous Indonesian businesses in their political network. The national

137. The Alliance Sociale led by the Labor Party won the 2005 general election in Mauritius. The African National Congress, which is a center-left party, won the 2004 general election in South Africa. The United Progressive Alliance (UPA) led by the Indian National Congress, generally considered to be on the center-left of Indian politics, formed the government after obtaining the majority in the 2009 general election.

138. *See* CHRISTOPHER COCHRANE, LEFT AND RIGHT: THE SMALL WORLD OF POLITICAL IDEAS 10–33 (2015) (discussing the meaning of left and right).

experiences reveal a dark side to the governments' motivation. CSR literature often portrays the bright side of why governments pursue CSR policies. For instance, a well-cited World Bank report presents that governments are driven by the desire to access international markets, attract foreign investment, improve social and environmental standards, etc.[139] While the positive drivers may play a facilitating role in the policy background, the national experiences suggest that it is often the dark motives that give a powerful push in enacting the CSR laws.

The national experiences suggest a North-South divide in the impetus of such CSR legislation. The French duty of vigilance law reflects a Western focus on human rights violations and resonates with the United Nation's call for business responsibility and human rights.[140] In contrast, the CSR laws in the developing countries including China, Mauritius, India and South Africa focus on national development rather than human rights concerns in globalization. By mandating CSR, the developing-country governments seek resources from corporations to alleviate the development burden.

In addition to the political interests of governments, the advocacy of NGOs plays an important role in some of the countries. In France, a coalition of NGOs initiated the bill and sustained it throughout the legislative process, which was critical to its passage in the face of strong lobbying power of large corporations. In Indonesia, an NGO triggered the idea of writing CSR into the corporate law bill in a public hearing, and the NGO also funded a number of parliamentary members to become familiarized with CSR issues. Moreover, the occurrence of corporate disasters as a result of irresponsible conduct created a timely and favorable policy climate that accelerated the lawmaking progress in both of these countries. As NGOs usually have limited resources relative to big corporations, the external events gave the civil sector more legitimacy currency to buy support from politicians.

Compared to the political interests of the governments, the type of the pre-existing corporate law has limited explanatory power for the rise of the progressive CSR laws. Intuitively, mandatory CSR legislation appears more compatible with a stakeholder-oriented corporate law. France and China give support to this proposition. They have had institutionalized employee participation at the board level long before their recent CSR laws. Mauritius and South Africa had a shareholder-centered corporate statute, though they adopted a stakeholder-oriented code of corporate governance years prior to

139. TOM FOX ET AL., PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: A BASELINE STUDY (World Bank Group, 2002), http://documents.worldbank.org/curated/en/284431468340215496/Public-sector-roles-in-strengthening-corporate-social-responsibility-a-baseline-study [https://perma.cc/69YV-N6R4].

140. RBC Group, *infra* note 163.

the mandatory CSR law. India's mandatory CSR provision in the corporate statute was adopted contemporaneously with other amended provisions that expressly recognize various stakeholders. Indonesia's corporate law prior to the mandatory CSR provision focused on shareholders only, with the adoption of a stakeholder-oriented corporate governance code just a few months before the enactment of the mandatory CSR law.[141] The national experiences indicate that a stakeholder-oriented corporate law is not a precondition for the rise of progressive CSR law, and neither is a pre-existing shareholder-focused corporate law a hurdle to the emergence of progressive CSR law.

B. The Scope of Corporations Subject to the Law

The scope of corporations under the recent explicit CSR laws varies across countries. The legislative histories in the examined countries indicate that there was little discussion about the scope of corporations subject to the law. It is unclear how the legislators determined which companies should assume the legal obligation of CSR. Often, the laws target large companies. The focus on large corporations has some merits. As large corporations have greater impact on society, there may be a greater need to regulate large corporations. In addition, large corporations, compared to small ones, have more resources to engage in CSR. However, the determination of the size threshold appears arbitrary rather than based on any rational analysis. For instance, it is unclear why the French vigilance duty uses the number of employees rather than revenues or other indicators as the threshold to trigger the obligation of human rights and environmental protection.[142] As illustrated, the Indonesian experience provides a vivid example that the scope of corporations covered by the law is determined by politics rather than any rationality.[143]

Besides large corporations, state-owned enterprises (SOEs) are another

141. The corporate governance code was adopted in October 2006; the corporate statute was adopted in August 2007.

142. The French duty of vigilance uses the number of employees as the threshold, while the UK Modern Slavery Act applies a turnover threshold. France's legislation to implement the EU directive on the disclosure of non-financial information including the transposing order of 19 July 2017 and Law n° 2016-1691 of 9 December 2016 on transparency, anti-corruption and the modernization of economic life use the threshold of both the turnover and the number of employees. *See* Stéphane Brabant & Elsa Savourey, *Scope of the Law on the Corporate Duty of Vigilance*, 50 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES [INT'L REV. COMPLIANCE & BUS. ETHICS] 1, 2 (2017) (discussing the use of number of employees as a criterion for triggering CSR obligations).

143. For the relevant discussion, see Section IV.B.

target group. The CSR laws in China, South Africa, and Indonesia specifically refer to SOEs. The linkage between SOEs and CSR is unsurprising. SOEs have been known for pursing non-economic goals in addition to (or sometimes other than) profits. Governments often use SOEs to achieve objectives such as providing public goods, improving labor relations, encouraging national economic development and industrialization, etc. The inclusion of SOEs in the CSR laws reflects this governmental orientation. In addition, the CSR laws may provide SOEs (ultimately the government) with a legitimate excuse for their financial performance that is often inferior to their counterparts in the private sector.[144]

C. The Definition of CSR

A common theme of the explicit CSR laws is that CSR (or its synonyms) is often undefined or unclear in the statutes. The laws in China and Indonesia simply require companies to undertake "CSR" without giving any definition of CSR. The courts in China and Indonesia suggest a context-dependent approach to CSR, where the meaning of CSR depends on the organizational, cultural, and national contexts. On the one hand, a context-dependent approach makes sense from a business management perspective because it considers the different needs of business organizations. On the other hand, it may be open to abuse by the government, especially when the rule of law is not well established to keep the government's power in check. The government may easily justify its intervention in business management for the sake of CSR. For instance, as noted, Chinese courts in the name of CSR refused to grant judicial dissolutions for fear of mass protests. A context-dependent approach to CSR provides business flexibility, but at the same time, it may add legal and political unpredictability.

Given that scholars and international organizations such as the United Nations and the European Union have provided many CSR definitions ready to use, why did the legislators prefer to leave it blank? On the one hand, the lack of definition may be a result of the lack of genuine intention to implement the law. On the other hand, great vagueness seems inevitable despite efforts to define CSR. Mauritius and India provide a list of CSR activities. Yet the named activities such as "poverty alleviation" programs

144. *See e.g.*, SEA-JIN CHANG & SANDY YUAN JIN, THE PERFORMANCE OF STATE OWNED ENTERPRISES IN CHINA: AN EMPIRICAL ANALYSIS OF OWNERSHIP CONTROL THROUGH SASACS 22–25 (2016) (researching the historical performance of SOEs in China in reference to various reforms); Emita W. Astami et al., *The Effect of Privatization on Performance of State-Owned-Enterprises in Indonesia*, 18 ASIAN REV. ACCT. 5, 6–19 (2010) (discussing how Indonesian SOEs have been effected by CSR legislation).

remain vague. The lack of definition is a common critique of the explicit CSR laws.[145] As explained below, it does pose great challenges to the implementation and the function of these laws.

D. The Implementation of the Law

A review of the national experiences shows that effective implementation of the CSR laws is a very challenging task. To be sure, it may be too early to judge given that many of the CSR laws have only recently come into existence. Nevertheless, there are serious concerns about future implementation.

As illustrated, the mandatory CSR laws often experienced a difficult legislative journey. The laws faced strong opposition from the business sector, which is unsurprising, as the laws explicitly target corporations, especially large corporations with lobbying prowess. Mandatory CSR obligations were significantly watered downed after the legal battles. In France, the general CSR duty and the reversal of burden of proof proposed in the original bill were completely gone and replaced by a vigilance plan. The final law provides no regulatory monitoring over whether the company adequately implements the legal requirements. In India, the compulsory nature of CSR spending is compromised by the comply-or-explain approach. In Indonesia, the implementation regulations were long delayed and, when finally promulgated, too vague to provide any meaningful guidance for implementation. All the CSR laws provide little or no government monitoring over implementation. Consequentially, the mandatory CSR laws permit superficial implementation.

Moreover, as noted, when pursuing the CSR laws, the governments are often motivated more by political self-interests than by the pursuit of social/environmental justice. When the motivation is to shame political opponents or to appease fellow party members, the implementation of the CSR laws depends on the vagaries of politics. Politicians may tend to exploit the immediate political value of CSR without giving serious thought to its long-term enforcement.

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145. *See e.g.*, Patricia Rinwigati Wassgstein, *The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications*, 98 J. BUS. ETHICS 455, 461 (2011) ("Without the clear clarification that such a regulation would provide, Article 74 is more inspirational in character than it is any kind of operational regulation"); KNOWLEDGE@WHARTON, *supra* note 72; Peixin Luo, *Woguo Gongsi Shehui Zeren De Sifa Caipan Kunjing Ji Ruogan Jiejue Silu* [*The Judicial Adjudication Dilemma and Several Solutions for Corporate Social Responsibility in China*], 12 LEGAL SCI. 66 (2007) (China) (arguing that Chinese courts are unlikely to apply the CSR law given its vagueness).

Explicit CSR legislation is a politically attractive tool for politicians to promote their self-interests. The explicit reference to CSR or its synonyms makes politicians feel that they are making a "good" law. Moreover, explicit mandatory CSR legislation generates favorable political publicity and easily impresses the public. Politicians may use it as an expedient way to signal their commitments to social and environmental issues. They may be more concerned with political signaling than actual implementation of the law, especially when lack of legal enforcement is a taken-for-granted systematic problem, often in developing countries. It poses little to no extra harm to politicians' credibility when the vast body of law is already infamous for lack of enforcement.

Besides politics, the inherently open-ended nature of CSR leaves great room for manipulation. As illustrated, the laws often deal with broad and diverse legal issues (e.g., social, environmental, human rights issues). The goal appears ambitious – wishing to hold corporations responsible for a wide spectrum of their behavior through one statutory instrument. This ambition comes at a price: vague statutory language. Meanwhile, the business reality that there is no one-size-fits-all CSR strategy requires some vagueness to accommodate diverse needs of corporations. This suggests a great limitation on the residual lawmaking and enforcement functions undertaken by regulators and courts.[146] It would be unlikely for regulators to proactively stipulate CSR standards suitable for each company, and it would be often inappropriate for judges to substitute their own opinions for CSR policies made by corporate managers. Even if possible, the interpretation and specification of a highly vague CSR law would place high demands on legal infrastructure, which is particularly challenging for developing countries. As a result, in practice, corporations would have great discretion in interpreting and implementing the law.

In China and Indonesia, companies are required by law to undertake a broad CSR duty, while CSR is completely undefined in the statute. In France, the duty of vigilance law requires companies to have a plan to identify and prevent "violations of human rights and fundamental freedoms," "serious harm to health and safety," and "environmental damage." The law leaves wide discretion to corporations to determine what these terms mean when constructing the vigilance plan. In Mauritius and India, while the regulators provide categories of permitted CSR programs, such categories

146. *See generally* Katherina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL'Y 931 (2003) (discussing law being inherently incomplete). According to the incomplete law theory of Professors Pistor and Xu, when law is highly incomplete, the optimal allocation of the residual lawmaking and enforcement powers depends on the extent of expected harm and the costs of standardizing actions that might cause harm. *Id.* at 951–54.

are broadly stated, such as programs for "eradicating hunger and poverty" or "educational support." In practice, companies have great freedom to characterize their CSR activities as one of these categories. In South Africa, each company's CSR committee enjoys liberty to decide the concrete meaning and relevant measures of "labor and employment" and "the environment, health and public safety," etc. In short, while the CSR laws impose a legal duty to undertake CSR, they often leave companies to decide what CSR means at the implementation stage. Consequentially, the compulsory nature of such CSR laws would be significantly diluted.

E. The Function of the Law

The purpose of the CSR laws is presumably to make corporations more socially responsible. Yet, it remains unclear whether the recent progressive forms of CSR legislation have made corporations any more responsible toward society or the environment. Part of the reason is that it is very difficult to measure social and environmental outcomes.[147] Moreover, there is little evidence that the laws have effectively performed any regulatory or adjudicative function to force corporations to change behavior. Regulatory enforcement remains sparse or even lacking entirely. Judicial cases are very rare. When courts do apply the CSR laws, as demonstrated in China and Indonesia, they hesitate to impose any additional legal burden on corporations beyond compliance with existing laws and regulations. As noted, the French court interpreted the duty of vigilance as a commercial matter, indicating judicial deference to corporate management.

Up to now, the function of the CSR laws seems largely expressive. The expressive function operates in two ways. In one way, as noted, the laws serve political signaling purposes. The laws with explicit reference to CSR or its synonyms provide politicians an expedient and high-profiled way to demonstrate to the public (or their constituents) that they are doing something good to society and nature. The laws are intended to deliver political symbolic value. In another way, which is good, the legal signaling may potentially reconstruct existing business norms and change the social meaning of appropriate corporate behavior.[148] The effectiveness of the norm-changing function through a legal expression significantly depends on the legitimacy of the state and the consistency of messages sent by the

147. *See* Galit A. Sarfaty, *Regulating through Numbers: A Case Study of Corporate Sustainability Reporting,* 53 VA. J. INT'L L. 575, 621 (2013) (showing the problems and challenges of constructing quantitative CSR indicators).

148. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996).

government.[149] In this regard, the national experiences unfortunately suggest that the norm-changing function may be quite limited. The adopters tend to be developing countries, and their governments do not have a reputation of effective enforcement of their pre-existing labor, environmental, and human rights laws. Although France is not afflicted by the systematic enforcement problem, its government passed the duty of vigilance law in the midst of labor law reforms that were viewed by many to favor business at the expense of labor.[150] As a result, the governments' signaling of CSR commitment is at best ambiguous or at worst deceitful.

In addition, the expressive function of the CSR laws does not necessarily work in a way that increases CSR activities at the firm level. Part of the expressive function of the law is that the law provides a focal point around which firms structure their behavior.[151] As the Indian experience shows, while companies that initially spent less than two per cent of their net profit increased their CSR spending after the law was passed, companies that originally contributed more than the two per cent threshold reduced their CSR expenditures after the law was passed.[152] Firms converge on the minimum legal standard, and the two per cent threshold becomes an anchor, putting a floor and a ceiling on CSR activities.[153] Law is helpful to set minimum standards to provide behavioral guidance. Yet, in some cases, law may not be useful to prescribe best practices because it incurs the risk of crowding out intrinsic motivations for continuous improvement[154] and/or raises the problem of using aspirational language that is difficult for courts or regulators to enforce.

F. The Relationship Between the Laws and Beyond

Scholars often use soft/hard law categories to characterize the nature of CSR initiatives.[155] In this regard, the recent CSR laws fall into the category

149. Ho, *supra* note 98, at 434.

150. The labor law reform caused mass protests of students, workers and unions in France. Lucien Libert and Morade Azzouz, *Hundreds of Thousands Protest at French Labor Reforms*, REUTERS (March 31, 2016).

151. Richard H. McAdams, *Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1654–71 (2000).

152. Dharmapala and Khanna, *supra* note 67.

153. Dharmapala and Khanna, *supra* note 67.

154. For the literature on extrinsic incentives crowding out intrinsic motivations, see e.g., Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 15–16 (2000) (discussing how fines may not yield the intended results depending on social circumstances and incentives).

155. For the distinction between hard law and soft law, *see* Kenneth W. Abbott and Duncan Snidal, *Hard and Soft Law in International Governance,* 54 INT'L ORG. 421, 421–23

of "soft hard law,"[156] in that they appear to be hard law that imposes legal obligations on corporations but turn out to be soft in nature because of vague behavioral requirements and weak compliance mechanisms. Governments may use multiple "soft hard laws" to promote CSR. The different types of explicit CSR legislation are not mutually exclusive; in fact, they often co-exist with each other. As illustrated, France has mandatory CSR disclosure and mandatory CSR due diligence;[157] Indonesia adopts mandatory philanthropy for SOEs and imposes a general CSR duty on companies related to the natural resources sector; China requires corporations to engage in CSR reporting and undertake a general CSR obligation. Having multiple "soft hard laws" might increase the chances of norm change. Nevertheless, it is doubtful that multiple "soft hard laws" have comparable effects to a "hard hard law" that has precise behavior requirements and rigorous enforcement. It cautions against using the recent CSR laws as substitutes for regulatory modes that require specific and substantive performance, though the CSR laws may have a complementary role to play through promoting CSR norms.

The Total case in France, discussed previously, is illuminating for the relationship between the broad CSR law and other specific laws. Total's statement highlighted the general nature of the French duty of vigilance law, distinct from the specific duty to conduct environmental impact assessments for individual projects arising from other areas of law such as environmental regulations.[158] As explained, the CSR laws tend to be broad and ambitious, seeking to regulate social, labor, environmental, human rights and many other issues through one legal instrument. This broad approach may be useful for raising general awareness, but it runs the risks of symbolic

(2000).

156. Marcel Brus, *Soft Law in Public International Law: A Pragmatic or a Principled Choice? Comparing the Sustainable Development Goals and the Paris Agreement*, in LEGAL VALIDITY AND SOFT LAW 243, 263 (Pauline Westerman eds., 2018).

157. As early as 1977, France was the pioneer of mandatory corporate social reporting that required large companies to disclose detailed information on employment, salaries, training, hygiene, job security, industrial relationships and other working conditions. In 2001, France was the first country in the world that required listed companies to disclose wide-ranging social and environmental information about their activities. In 2012, France made the disclosure obligations more comprehensive, requiring listed and unlisted companies with a physical presence in France to disclose information under 32 social, environmental, and governance indicators. Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Regulations Economiques,* 21 ARIZ. J. INT'L & COMP. L. 441, 443–45 (2004); Jonathan Morris, The Five W's of France's CSR Reporting Law, BSR (July 2012), https://www.bsr.org/reports/The_5_Ws_of_Frances_CSR_Reporting_Law_FINAL.pdf [https://perma.cc/8KRG-TGS2].

158. Friends of the Earth*, supra* note 33.

implementation and lax enforcement on the ground. It is questionable that any one single government bureau would have requisite expertise and resources to assess and monitor such a wide range of corporate behavior. To the extent that specific corporate performance is required, it probably entails specific legal requirements under specialized laws, such as topic-focused, industry-specific, geography-targeted and behavior-specified regulations.

G. The Reform of the Law

The CSR laws, as they currently stand, have great limitations in forcing responsible corporate behavior. Nevertheless, considering that many laws began with tentative designs and compromises with politics but gradually improved over time, the recent CSR laws might be viewed optimistically as an experimental step toward development of better CSR legislation in the future. With this positive view, how could the laws be improved? As examined, the CSR laws generally lack government monitoring, legal punishment for non-compliance, and/or any remedial mechanisms for stakeholders. Accordingly, the laws may be strengthened along with these issues. Beyond the general directions, different regulatory modes have different specific issues to be addressed.

Mandatory CSR due diligence focuses on the importance of risk identification and prevention plans. The corporation's statements on risk mapping and prevention policies, like other corporate reports such as financial/CSR annual reports, should be verified by an independent third party. However, the current mode of mandatory CSR due diligence as adopted in France does not require any independent auditing but merely relies on *ex post* litigation by victims to enforce the law. Given that the main purpose of due diligence is to prevent harm, independent verification is an important *ex ante* safeguard.

The legislative purpose of mandatory philanthropy is mainly concerned with helping socio-economic disadvantaged groups in the local community. It is important to ensure that corporations spend funding on such purposes and not hide regular business expenses (e.g., employee compensation) under the category of CSR. Transparency is an important monitoring device. However, the mandatory philanthropy legislation as adopted in India and Mauritius has few disclosure requirements. The law should require corporations to provide a detailed annual report of the requisite philanthropy spending subject to third party auditing.

Both the mandatory CSR committee legislation as adopted in South Africa and the mandatory CSR duty as adopted in China and Indonesia embed the CSR obligation in corporate law. Although the CSR legislation is presumably to protect non-shareholders such as employees, consumers, communities, etc., none of the corporate statutes in these adopting countries provide stakeholders with legal rights to challenge the board of directors or the corporation in case of any breaches of the CSR obligation. The law can be strengthened through empowering non-shareholders affected by corporate actions to bring lawsuits against the board or the corporation for breaches of their CSR duty. More importantly, similar to the fiduciary duty in corporate law, CSR is "a residual concept that can include factual situations that no one has foreseen and categorized."[159] The judicial determination of whether the corporation/the board meets the general CSR obligation under corporate law requires many institutional supports including, but not limited to, incentives for plaintiffs and attorneys to bring lawsuits; judges and attorneys conversant with how to apply broadly stated principles; courts capable of fashioning remedies without clear judicial guidance.[160] Given that CSR is inherently a context-specific concept, policymakers when adopting such legislation should not be preoccupied with drafting a perfect definition of CSR. They should focus on institutional capacity building to deliver the concrete meaning sensitive to the context of each case.[161]

H. The Diffusion of the Law

There seems to be some regional diffusion of the aforementioned CSR laws. After France, some European countries such as Switzerland and the Netherlands are now considering a version of mandatory CSR due diligence. Mandatory philanthropy was first adopted in Mauritius and then in India and Nepal. Geographical proximity appears to play a role in the diffusion of the CSR laws. As noted, mandatory CSR disclosure is now adopted globally. Do any of the new types of CSR legislation potentially have similar popularity? While politicians around the world may find the various forms of explicit CSR legislation attractive for some reason (good or bad), institutional factors suggest that the CSR laws may have divergent diffusion patterns.

The institutional theory in sociology suggests that there may be normative, coercive and mimetic forces that potentially lead to a wide adoption of mandatory CSR due diligence.[162] The United Nations as an

159. ROBERT CHARLES CLARK, CORPORATE LAW, 141 (1986).
160. Lin, *supra* note 114.
161. Lin, *supra* note 114.
162. For the three diffusion mechanisms, *see* Paul J. DiMaggio and Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields,* 48 AM. SOC. REV. 147, 150–54 (1983).

international norm setter recommends CSR due diligence as part of the best practices on human rights protection in the United Nations Guiding Principles on Business and Human Rights. To implement the UN's principles, in March 2019, the European Parliament's Responsible Business Conduct Working Group launched a plan for an EU law requiring companies to carry out human rights due diligence regarding their operations, investments, business relationships and supply chains.[163] Moreover, policymakers in the face of increased political and economic uncertainty tend to emulate measures taken by leading countries. Accordingly, policymakers who are uncertain about CSR policies may copy laws from countries that are perceived as CSR leaders, often developed countries such as France and other European countries.

In comparison, the diffusion of mandatory philanthropy legislation, if it occurs at all, is likely among developing countries only. Mandatory philanthropy is particularly attractive to developing countries whose governments have difficulties in meeting basic community needs. Developed countries usually do not have such problems, and they often have a sophisticated NGO sector to help. Moreover, as modern CSR now focuses on comprehensive risk management and downplays or even discredits corporate charity, mandatory philanthropy is unlikely to pass muster in developed countries that have more advanced understanding of CSR.

Unlike mandatory philanthropy, mandatory general CSR duty and mandatory CSR board committees have a better chance to travel across the institutional contexts of developed and developing countries. As noted, various forms of mandatory general CSR duty under corporate law have emerged in both developing (obviously China and Indonesia) and developed countries. The initial goal of France's duty of vigilance law was to impose a general CSR duty on corporations. Moreover, some developed countries such as the U.K. have already had a version of mandatory CSR duty by incorporating CSR concerns into directors' fiduciary duty. Likewise, although until now the mandatory requirement of CSR board committees exists only in South Africa, the international community is quite familiar with this regulatory mode in corporate governance. Mandatory CSR board committees can be viewed as part of the international trend of using mandatory special board committees (such as audit committee, compensation committee, nomination committee, etc.) to solve particular

163. The Responsible Business Conduct Working Group (RBC Group) of the European Parliament, *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU* (March 19, 2019), https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf [https://perma.cc/Q9UL-NLE7].

corporate governance concerns.[164] This institutional familiarity may increase the likelihood of widespread acceptance.

CONCLUSION

Clearly, CSR is not merely a business word but a legal term. The legal importance of CSR will likely continue to rise with the increasing threats of climate change and social inequality around the world. The enthusiasm for explicit CSR legislation seems real and growing. Explicit CSR legislation looks appealing, politically and morally. However, it is challenging to make it legally effective. It is fraught with conceptual contradictions and vagueness, subject to political confrontation, and requires deep commitment. Mandatory CSR disclosure is widely recognized as a weak form of regulation, as it does not mandate any substantive social or environmental performance. At first glance, the recent emergent forms of explicit CSR legislation seem more progressive than mandatory CSR disclosure. However, a close look at the national experiences shows that the laws are not as "hard" as they appear. Optimistically, the recent legal innovations of CSR may strengthen CSR awareness and reshape business norms. Pessimistically, they may be merely window dressing legislation.

164. Jason Royce Fichtner, *The Recent International Growth of Mandatory Audit Committee Requirements*, 7 INT'L J. DISCLOSURE & GOV. 227, 227–29 (2010).