



Business and Environmental Obligations: A Study of The Transitioning Regulatory Framework

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Abstract

The primary obligation to provide a safe, clean and healthy environment and by extension, a means to tackle climate change lies on the concerned State. The State has the authority to frame policies and legislation to guarantee the same. It has also been witnessed that States have started accepting this responsibility since the historic Stockholm Declaration of 1972. However, environmental degradation and the ill effects of climate change have taken a lethal form. This is primarily due to man-made or human-induced activities that climate change has accelerated. Burdening only the nation-states to take action on a global issue might not yield results. It is in this regard that, businesses or the private sector have been looped in through several regulatory mechanisms to take proper action and has mandated corporate social responsibility in 2013 and recently, the environmental, social and governance mechanisms as well. But when it comes down to witnessing changes in the fulfilling of environmental obligations, India is still facing problems. This paper aims to highlight the connection between business, human

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rights and the environment. This shall be done with a focus on the current regulatory framework for the same in India.

Keywords: Climate Change, Corporate Social Responsibility, Green washing, Human Rights, The Brundtland Report

1 Introduction

India has always been certain to balance environment and economic development.¹ In a multitude of cases ranging from *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh*² to the *Orissa Mining Corporation Limited v. Ministry of Environment & Forest & Others*³, the judiciary has highlighted it to the corporations/industries that while economic development is essential for a developing country like India, it shall happen with a precaution towards environmental degradation. The recent mandate regarding Corporate Social Responsibility (hereafter, CSR) and the Standards of Environmental, Social and Governance (hereafter, ESG) in India also signals the trend of making businesses responsible towards the society and environment.

A terrifying aspect of man-made environmental degradation is the issue of climate change. The interrelation among businesses, human rights and climate change is manifested through the negative impacts that climate change has on human rights. Climate change when read with the negative impacts on human rights inherently leads a layman to connect the businesses, the human rights of the people and the ever-evolving worldwide climate change. Now, when one dwells upon the correlation between the three concepts, a

¹ *Looking back at Stockholm 1972: What Indira Gandhi said half a century ago on man & environment*, Down to Earth, <https://www.downtoearth.org.in/news/environment/looking-back-at-stockholm-1972-what-indira-gandhi-said-half-a-century-ago-on-man-environment-83060> (last visited May 30, 2024).

² *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh* 1985 SCR (3) 169.

³ *Orissa Mining Corporation Limited v. Ministry of Environment & Forest & Others* [2013] 6 SCR 881.

parallel is drawn between the cause of climate change and the solutions to the same to be inherently tied to such non-state actors, namely, the businesses. While delving into the correlation of business showing responsibility towards the climate change aspect of human rights, it is important to dive deep into the fact that multinational businesses form the core trajectory to global emissions – both historical and current.⁴In such a scenario, it is imperative to ascertain and understand how the impact of climate change percolates from the head of the responsibility pyramid the States to its bottom the businesses.

The international scientific community agrees that anthropogenic climate emissions, particularly those resulting from economic vis-à-vis industrial activities such as land use changes, and the utilization of major plants and machinery for industrialization, are major contributors to the exceeding climate catastrophe.⁵ In lieu of this, the United Nations since the year 2007 began promoting the United Nations (hereafter, UN) Global Compact, Framework Convention on Climate Change as well as the UN Environment Programme created the Caring for Climate initiative specifically to bring together and organise corporate leaders to raise awareness about the need to take responsibility for climate action.⁶ The mobilization of like-minded business leaders who believe in deploying low-carbon technologies, increasing energy efficiency and undertaking other such measures that lead to making climate change is desirable. However, this initiative does not seem to consider the idea that as climate change may lead to a human rights dimension, businesses should also take on human rights responsibilities.

The International Bar Association launched, *Achieving Justice in an Era of Climate Disruption*, one of the first international efforts to involve business accountability in the protection of stakeholders'

⁴Zhang, Z., Guan, D., Wang, R. *et al.*, *Embodied carbon emissions in the supply chains of multinational enterprises*, NAT. CLIM. CHANG., <https://www.nature.com/articles/s41558-020-0895-9> (last visited Sep. 8, 2024).

⁵Special Report on Climate Change and Land, IPCC, <https://www.ipcc.ch/srccl/> (last visited Sep. 8, 2024).

⁶UNEP, 'Caring for Climate' (2007).

human rights, in the context of climate change in the year 2014.⁷ The study caused fundamental shifts in the mindsets of climate change academics, shifting the focus away from science and economics, towards equality and human rights.⁸ It has been suggested that states may need to develop regulations on standards to control the conduct of businesses and that the establishment of internal company policies to self-regulate the same as it might help to ameliorate the effects of the current situation. While the basic foundation for connecting businesses and human rights was already laid down, the interconnectedness is still not clear. Businesses are primarily private entities against whom the human right is not enforceable. International documents like the UN Guiding Principles on Business and Human Rights, or national documents like the Constitution of India, in no way reflect that enforcement of human rights against businesses is possible.

However, businesses must also acknowledge their role as part of the society and be responsible towards the environment and society at large. Keeping this in mind, India mandated Corporate Social Responsibility (CSR) for the corporations through the Companies Act, 2013. One of the permitted activities for CSR is ensuring environmental sustainability¹⁰. However, since there is an array of activities listed as CSR activities that can be undertaken by businesses, difficulties arise in properly implementing the same.

⁷ Achieving Justice and Human Rights in an Era of Climate Disruption (int) - La GBD, [https://www.lagbd.org/Achieving_Justice_and_Human_Rights_in_an_Era_of_Climate_Disruption_\(int\)](https://www.lagbd.org/Achieving_Justice_and_Human_Rights_in_an_Era_of_Climate_Disruption_(int)) (last visited Sep. 8, 2024).

⁸ Sara L. Seck, *Climate Change and the Human Rights Responsibilities of Business Enterprises*, Climate Change, Justice and Human Rights, Amnesty International, <https://www.amnesty.nl/media/strategic-studies-future-human-rights-policypractice/changing-perspectives-human-rights>.

⁹ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, OHCHR, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights> (last visited Sep. 8, 2024).

¹⁰ The Companies Act 2013, S. 135 read with Schedule VII, No.18, Acts of Parliament, 2013

Moreover, India while having a mandatory CSR policy does not explicitly mention action against climate change as a CSR activity. Amid this chaos, the UN has declared a connection between business and human rights.¹¹ Based on this development, several lawsuits started emerging against corporations for breach of human rights due to their non commitment towards climate goals. The landmark judgement in this regard is the *Milieudefensie et al v. Royal Dutch Shell*.¹² It highlighted that the human rights obligations as mentioned under international conventions are applicable against states only. However, the court held that Shell was violating human rights obligations by not fulfilling the climate goals. It read:

Due to the fundamental interest of human rights and the value for society as a whole, they embody, the human rights may play a role in the relationship between Milieudefensie and Shell. Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care.¹³

The goal of this paper is to determine what corporate businesses' independent duties are with regard to environmental degradation, in general, and climate change, in particular in light of the current regulatory framework. The paper will first introduce business and environmental obligations through a human rights perspective, the debate around which is gaining momentum globally. The second part will focus on the origins and the present-day status of corporate social responsibility in India. The paper will then try to bring forth the present-day implementation of environmental, social and governance concerns in India. Finally, the paper will shed light on emerging issues like greenwashing which has been growing as a concern during the implementation of corporate environmental

¹¹ *supra* note 9.

¹² *Milieudefensie et al v. Royal Dutch Shell PLC*, C/09/571932/HA ZA 19-379.

¹³ Otto Spijkers, *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell* (2021), 5 CHINESE J. ENVTL. L. (2021), <https://doi.org/10.1163/24686042-12340073>.

obligations and conclude by suggesting a modest mechanism as a way ahead.

2. Business, Human Rights and the Environment

While climate change induced by non-state businesses violates a great deal of human rights, there is no uniformity regarding the statement. Certainly, with the advancement of research, there has been a growing understanding of the causal relationship between fossil fuel emitters and the resulting environmental harm. Green bond issuance is being considered as part of a larger effort to raise funds for climate-resilient and low-emission development.¹⁴ However, is there an explicit relationship between businesses' obligations to respect human rights and climate action?

The International Bill of Human Rights that is, the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights¹⁵ and the Optional Protocols to ICCPR¹⁶ (OP-ICESCR¹⁷) nowhere mention climate change or reduced/no greenhouse gas emissions as a human right.¹⁸ The issue begins here. Even when businesses are deemed responsible to respect human rights, the lack of an express provision for tackling climate change provides the former with a strong defence for inaction. Further, even if mitigating climate change is incorporated as part and parcel of safeguarding human rights, the loophole of enforceability would remain, as International human rights are non-binding. However, climate change has become the core topic of discussion throughout

¹⁴ Climate Explainer: Green Bonds, <https://www.worldbank.org/en/news/feature/2021/12/08/what-you-need-to-know-about-ifc-s-green-bonds> (last visited Sep. 8, 2024).

¹⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁶ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948).

the globe and nations have even started referring to it while encapsulating the right to a satisfactory environment. Needless to say, the fundamental right to a wholesome environment has been read into the constitution of several nations apart from India.¹⁹ But holding businesses in one state responsible for a global issue like climate change is irrational.

Moreover, one should also look at the working mechanism of the issue at hand from a different lens to comprehend the larger picture. A State drafts and propagates such policies that enable the economic and industrial development of the State at large. In doing so, it may give a free pass to the industries to take such steps that may in the near future curtail certain human rights, as well as lead to irreversible damage to the climate. So, while such actions are broadly performed on State made policies, the liability of the State to protect and enforce the safeguarding of human rights increases vis-à-vis the liability of non-state actors like businesses and industries to preserve the climate. In simpler terms, our jurisprudence tends to point out the State to be the protector of human rights even in cases where the international conventions hold a persuasive value with the help of the formation of policies which make the various stakeholders (special reference to businesses) accountable for their actions. When such a mechanism is instilled, the businesses which undertake their activities for the growth and development of the State shall, in turn, find themselves in a scenario wherein they are held accountable for the climate change repercussions that are a result of some State provided incentives to take liability of the same. For that matter, it has been argued that even individual states do not want to take the responsibility of combatting climate change on their shoulders. It is against this backdrop that the regulatory framework regarding the inclusion of businesses to combat environmental degradation and climate change gains importance.

¹⁹ UNGA, Report of the “Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy And Sustainable Environment” (2018), UN Doc A/73/188.

3. Overview of CSR in India

Similar to businesses in other nations, Indian businesses have a long history of social responsibility that extends beyond the short-term financial objectives of the business. However, as governance challenges gained importance in the late nineties, corporate social responsibility initiatives started to catch the interest of stakeholders and policymakers.²⁰ With the publication of the CSR Voluntary Guidelines²¹ by the Ministry of Corporate Affairs (hereafter, MCA) in 2009, India began working on CSR at the policy level. This led to the sanction of Section 135 of the Companies Act 2013²² which made it mandatory for particular companies to implement CSR and its reporting. More significantly, as CSR issues gained popularity across the globe, India was the first to make it mandatory for large-scale companies to engage in CSR activities, which was later followed by nations like China, Indonesia, and South Africa.²³ The traditional way of CSR reporting is to make it voluntary, which is adopted by majority of nations.

Back then Section 135 of the Companies Act, 2013 had sparked the debate amongst various stakeholders, academicians and policymakers. On one side, it was argued that the government should take on a social responsibility role, which would be celebrated as a historic moment²⁴ in policy circles. It was argued that this would be a game changer²⁵ for India, if businesses collaborated with the government and civil societies to foster sustainable

²⁰ Kalpana Sharma, *Corporate Social Responsibility (CSR): An Overview of the Indian Perspective*, 3 INDIAN J.L. PUB. POL'Y 1 (2016).

²¹ Ministry of Corporate Affairs, *Corporate Social Responsibility Voluntary Guidelines*, 2009.

²² *supra note* 10, Section 135.

²³ Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences | Oxford Law Blogs, (2020), <https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/11/mandatory-corporate-social-responsibility-legislation-around-world> (last visited Sep. 8, 2024).

²⁴ Jayati Sarkar, *Corporate Social Responsibility in India - An Effort to Bridge the Welfare Gap*, H53 L21 (IGIDR).

²⁵ *Id.*

development. Another argument that CSR may be used by developing nations like India to create a middle ground between a liberal and a regulated state to balance growth and security, may seem a little out of the box argument.²⁶ On the other side, critics of mandatory CSR, who are mostly from businesses and commercial organizations, point out that these initiatives shift government obligations to the private sector to make up for their failures. Additionally, CSR should provide incentives for businesses to conceal their actions to comply with regulations and not discover ways to break the law, when these activities as described in Schedule VII of the Companies act are itself evasive. The theoretical similarity between Environment sustainability and corporate social responsibility has created the term Environment CSR which in layman's language can be comprehended as business going beyond the legal compliances, or following compliance and working towards protecting the environment or taking decision which are environment friendly.²⁷ The need for such actions have arisen due to the market demand and global competition as well, as such actions have been a green signal to fetch greater investment deals.²⁸ Therefore, CSR has been used as a tool for Environment sustainability, as it is part of CSR. Specifically in India, Schedule VII of the Companies Act, 2013²⁹ mentions about environment sustainability which can be referred to as an extension to protection from the negative impacts of environmental degradation and climate change.

²⁶ Shubhashis Gangopadhyay, *CSR, Out of the Box: Mandated Corporate Social Responsibility Hurts Shareholders, Not Firms*, BUS. STANDARD (Mar. 21, 2014), http://www.businessstandard.com/article/opinion/shubhashis-gangopadhyay-csr-out-of-the-box-114032101233_1.html (last visited May 5, 2023).

²⁷ Thomas P Lyon, *Corporate Social Responsibility and the Environment: A Theoretical Perspective*, REEP, Vol. 2 No. 2.

²⁸ K. De Roeck, Delobbe, N, *Do Environmental CSR Initiatives Serve Organizations' Legitimacy in the Oil Industry? Exploring Employees' Reactions Through Organizational Identification Theory*, JOURNAL BUSINESS ETHICS Vol. 10, (2012).

²⁹ *supra note 10*, Item (iv), Schedule VII

There is no denying the fact that some private businesses have made significant contributions to social welfare and sustainable development initiatives, such as expanding green cover, introducing more advanced technology to reduce greenhouse gas emissions, increasing contributions to health and education, and building rural infrastructure.³⁰ Specifically, corporation like Reliance Industries, Tata Motors, and Tata Steel have been appreciated for their CSR efforts. Similar to this, multinational corporation IBM has partnered with Gujarat government to promote development and sustainability in the area of Gir Forest.³¹ They are the prime examples in India, where the mandatory CSR contributed to the aspirational objectives of CSR and Environment sustainability. It has also helped the government to a large extent in meeting and controlling the challenges of Climate change with respect to business.

4. CSR transition in India

The Ministry of Corporate Affairs (hereinafter, MCA) tabled voluntary guidelines on CSR in 2009³² as the Indian government's initial effort to address the CSR problems. Prior to that, the significance of CSR in the context of corporate governance was highlighted in the Task Force on Excellence report from the Ministry of Corporate Affairs.³³ It was the 2009 guidelines, which defined the fundamental principles of corporate social responsibility, such as taking care of all stakeholders, ethical environment, respecting employee rights and health, respect for human rights, environment, and related activities. These guidelines were not mere recommendations but had some actionable points to promote and foster development with regards to corporate governance. The recommendations emphasize the voluntary character of CSR

³⁰ Mousami Prasad, *Corporate Social Responsibility and Environmental Sustainability: Evidence from India Using Energy Intensity as an Indicator of Environmental Sustainability*, 31 IIMB MGMT. REV. 374-384 (2019).

³¹ Pankaj Dodh & Ravita, *Corporate Social Responsibility and Sustainable Development in India*, 3 GLOB. J. MGMT. BUS. STUD. 681-68 (2013).

³² *supra* note 23.

³³ Ministry of Corporate Affairs, Report on Task Force on Corporate Excellence (2000).

activities above and beyond any statutory regulation and draw a clear difference between volunteering and CSR activities. The National Voluntary Guidelines for Corporate Social, Environmental, and Economic Responsibility, published by MCA in 2011³⁴ further provided an extension to the previous guidelines. However, the 2011 guidelines forced companies to accept all nine principles and announce them on a apply or explain basis. It's interesting to note that the 2011 guidelines did not have the recommendation to allocate a specific amount related to profits after tax, cost of planned CSR activities, or any other suitable parameter, which was one of the implementation options indicated in the 2009 guidelines.³⁵

When the Securities and Exchange Board of India (hereafter, SEBI) ordered the top 100 listed business entities to ultimately disclose CSR activities³⁶. There was a shift from voluntary reporting CSR to a mandatory one. According to SEBI, this disclosure method is more effective and constitutes an effort to combine corporate governance with responsibility. The most comprehensive effort to regulate businesses' CSR operations was made with the adoption of Section 135 of the Companies Act 2013. As discussed above, Section 135 is the first approach of Indian corporate jurisprudence that regulates CSR spending, reporting, and actions of Indian business entities.³⁷

Specifically, the provisions under Section 135 require

Companies with a net worth of rupees five hundred crores or more, or turnover of rupees one thousand crores or more or a net profit of rupees five crores or more

- (i) to appoint a CSR Committee of at least 3 directors (one independent director), and

³⁴ Ministry of Corporate Affairs, Report of The National Voluntary Guidelines on Socio Economic and Environmental Responsibilities of Business, (2011)

³⁵ *supra note 23.*

³⁶ SEBI, Business Responsibility Reports, CIR/CFD/DIL/8/2012.

³⁷ The Companies Act 2013, No.18, Acts of Parliament,2013.

- (ii) under the guidance of the CSR Committee, spend in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.'

The mandatory approach of CSR is a step which reflects how the state guides the CSR behaviour of the companies concerning two broader aspects that is, reporting and spending for CSR. One of the most debated matters in this regard is the question of whether companies should be forced by laws and regulations to publish their CSR efforts.

Section 135 of the law mandates the amount of CSR spending and reporting, but it also gives businesses considerable freedom in the CSR initiatives they choose to engage in. Although Schedule VII of the Companies Act, 2013 generally defines the responsibilities, that is, the list of activities that companies can conduct, and sets the choice of activities itself, it does not rigidly limit the bounds of the organization's obligation.³⁸ The aforementioned provision follows the 'apply or explain' principle, with no specific consequences for non-compliance. In 2014, MCA issued rules³⁹ for CSR activities. Listing the precise activities for which the corporation has contributed funds is also part of its CSR strategy. It also stated that money spent on the areas covering the employees' benefits and their families would not be a part of the CSR activity. However, businesses were allowed to help their employees to develop their CSR skills, through credible institutions, provided that the cost of doing so does not exceed 5% of the business's overall CSR spending for the fiscal year.

Section 135 of the Companies Act 2013 has made India the first nation to incorporate CSR in the Companies Act and thereby, set a precedent mandating firm to spend on CSR.⁴⁰ CSR is still a voluntary

³⁸ The Companies Act 2013, S. 135 read with Schedule VII, No.18, Acts of Parliament, 2013

³⁹ Ministry of Corporate Affairs, CSR Rules, 2014.

⁴⁰ Lok Sabha Standing Committee on Finance (2009-2010), The Companies Bill, 2009.

policy in other regions of the world, left to the corporation's choice. The necessity to record CSR efforts is one of most crucial issues across the globe. As a result, governments or stock market entities, or perhaps both, have made it mandatory to disclose their CSR operations through sustainability reports. This is applicable in Sweden, Norway, the Netherlands, Denmark, France, Australia, and China⁴¹. The significance of section 135 is that it goes beyond simply regulating the reporting of CSR activities by making such activities necessary in the first place.

5. Global debate between the Voluntary & Mandatory Approach of CSR

According to Sheehy⁴², 'The voluntary aspect of the definition was motivated in part by the argument that individual firms are better able to find ways to implement CSR and reduce their social costs more effectively, when tailored by management to the specific industry or firm in which it is being applied'. This is one reason for the voluntary nature being more comprehensive and pragmatic. As a result, the effect that voluntary CSR has on corporate expenses and societal benefits may be used to explain why it is so important. As discussed in Chapter 2 of this paper the discussion of the government's decline to control business activities to prevent adverse external consequences on people and the environment is another justification for voluntary CSR. Politicians who support CSR claim, for instance, that since the global economy has taken hold, business collaboration has surpassed territorial boundaries and expanded exponentially hence making self-organizing and voluntary process the perfect match for the declining control and

⁴¹ E. Hoffmann, C. Dietsche & C. Hobelsberger, *Between Mandatory and Voluntary: Non-Financial Reporting by German Companies*, 26 NACHHALTIGKEITSMANAGEMENTFORUM 47-63 (2018), <https://doi.org/10.1007/s00550-018-0479-6>. (last visited Sep 8, 2024).

⁴² B. Sheehy, *Defining CSR: Problems and Solutions*, 131 J. BUS. ETHICS 625-648 (2015), <https://doi.org/10.1007/s10551-014-2281-x>.

regulation of a government state model.⁴³ The voluntary approach is, however, also profoundly criticized in for encouraging free-riding behaviour⁴⁴, making it impossible to punish violators⁴⁵, and having issues with the level of transparency and credibility of voluntary CSR reports⁴⁶.

There are several advantages to the government's engagement in the CSR policymaking. For example, making CSR mandatory can increase awareness and make it a legitimate governmental goal⁴⁷. Furthermore, the transition from a voluntary to a mandatory system may make it easier to construct regulated (and comparable) CSR measures which in the end, would benefit the entire country.⁴⁸

Management Involvement in developing and implementing CSR programmes is reduced since businesses may only employ CSR as it is mandatory to do so. In fact, according to certain research, this type of CSR hinders rather than helps in developing a favourable implementing ground for CSR.⁴⁹ Some scholars claim that this

⁴³ G. A. Scherer, *Global Rules and Private Actors - Towards a New Role of the Transnational Corporation in Global Governance*, 16, no.4, BUSINESS ETHICS QUARTERLY, Pgno.505 (2006)

⁴⁴ B. O'Neill, *Solving the "Problem" of Free Riding*, MISES INST., <https://mises.org/library/solving-problem-free-riding>.

⁴⁵ M. Cominetti & P. Seele, *Hard Soft Law or Soft Hard Law? A Content Analysis of CSR Guidelines Typologized Along Hybrid Legal Status*, 24 UMWELTWIWI FORUM 127-140 (2016), <https://doi.org/10.1007/s00550-016-0425-4>.

⁴⁶ Irina Lock & Peter Seele, *The Credibility of CSR (Corporate Social Responsibility) Reports in Europe: Evidence from a Quantitative Content Analysis in 11 Countries*, 122 J. CLEANER PROD. 186-200 (2016), <https://doi.org/10.1016/j.jclepro.2016.02.060>.

⁴⁷ The Companies Act 2013, No.18, Acts of Parliament,2013

⁴⁸ Bryan T. Horrigan, *21st Century Corporate Social Responsibility Trends: An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability*, 4 MACQUARIE J. BUS. L. 85-122 (2007)

⁴⁹ Dirk Matten & Jeremy Moon, *'Implicit' and 'Explicit' CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social*

reduces corporations' creative and financial engagement in CSR and makes CSR programmes ineffective.⁵⁰ It is further contended that mandated methods might encourage the distribution of CSR funds to individual initiatives with little social benefit or worse still 'become a cover for graft and corruption by funding local political projects or organisations'⁵¹.

6. Reviewing the efficiency of Mandatory CSR

Initially, the idea of mandatory CSR was an unusual one as discussed before. It was the first time that any country had taken such a step towards social responsibility. Many scholars would term this idea to be socialism but then that can even be stated for the voluntary CSR approach.⁵² CSR is an aspirational practice and in the words of Immanuel Kant, 'aspirations are difficult to legislate'.⁵³ However, this suggestion of Kant that aspirations are inherently challenging to codify through legislation, as they are contingent upon societal norms and are subject to continuous evolution and change could be criticized for being narrow and not comprehensive. But companies have a duty to contribute back to the society, and perhaps corporations should have greater discretion over how they spend the funds.⁵⁴

However, it appears that these factors have influenced India's proposal from the beginning. On the one hand, the proposal acknowledges the reality of free trade globally and avoids having too many regulations, while on the other, it recognises the equally important need to support development and prevent the widening

Responsibility, 33 ACAD. MGMT. REV. 404-424 (2008),
<http://www.jstor.org/stable/20159405>

⁵⁰ Erin M. Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 STRATEGIC MGMT. J. 1157-1178 (2009)

⁵¹ Wang, H., Tong, L., *Corporate social responsibility: An overview and new research directions*, AMJ, 59(2), 534-544 (2016)

⁵² Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 33.

⁵³ Thomas Donaldson, *Corporations And Morality*, Vol. 42-54 (1982)

⁵⁴ Kent Greenfield, "The Failure Of Corporate Law", Vol. 29-40 (2006)

of the wealth gap.⁵⁵ Many scholars ⁵⁶contended that making CSR expenditure mandatory is going too far and that the measure would lead to market inefficiencies that might eventually hurt the economy. The possibility that spending would put India at a competitive disadvantage in the global economy and would potentially halt or even reverse the nation's nearly miraculous rise should be the strongest argument against it. Additionally, it is unclear how CSR has been implemented because the regulation does not outline its objectives and mechanism. Due to the law's ambiguity and lack of a structured review procedure, it may hardly strengthen the state's ability to regulate. In other words, 'mandatory' CSR could continue to be mostly voluntary in nature.⁵⁷ Some might argue that it could be preferable to levy a tax so that the government could genuinely get financing for its infrastructure transformation methodically and democratically.

7. Shift from CSR to ESG: Global Perspectives

CSR addresses significant issues such as the welfare of employees and the larger role of business towards society.⁵⁸ However, when the ownership structure severed the connection between ownership and management in the 1930s, the companies started to develop the goal of corporate management and give it greater thought.⁵⁹ As businesses came to be viewed as something beyond just profits and taking into account the effects of their decisions, more extensive conversations concerning the social duties of corporations began to emerge in the 1940s. However, CSR did not gain momentum until the 1950s. The economic, legal, ethical, and discretionary expectations that society currently has of organisations are all

⁵⁵ Caroline Van Zile, *"India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market"*, ASIAN-PACIFIC LAW & POLICY JOURNAL, (2012)

⁵⁶ *supra* note 51.

⁵⁷ *supra* note 34.

⁵⁸ Carroll, *"A History of Corporate Social Responsibility"*, Oxford University Press, p.21, (2008)

⁵⁹ *Id.*

included in the concept of business's social responsibility.⁶⁰ In this sense, economic value refers to what a company achieves via its operations in terms of both people and itself. Others see a more direct connection between CSR and ethics, claiming that CSR is typically concerned with arriving at conclusions on decisions that benefit the larger society while avoiding influencing them.⁶¹

Sustainable development and its connections to institutional and legal reforms started getting recognition in the 1980s. The Brundtland Report's release in 1987 marked a watershed moment because it established the foundational ideas for sustainable development as we know it today. The creation of the 'triple bottom line approach' as a sustainability paradigm that balances a company's environmental, social, and economic consequences may be directly attributed to it.⁶² This method, which directly connects the concepts of the United Nations Sustainable Development Goals⁶³ to the analysis of the actual economy, gained popularity in the 1990s as a sustainable strategy. Despite the inconsistencies mentioned above, the method is also raised in the CSR conversation, indicating that there is a chance to combine several concepts in practise.⁶⁴ Moving to the concept of ESG as is known today, it first became a notion for portfolio risk management that was connected to financial performance in the 1990s.⁶⁵ The foundation of ESG investing is the assumption that its components have a significant impact on the risk

⁶⁰ Carroll, *A three dimensional approach of CSR*, AMR, Vol. 4, p 500 (1979)

⁶¹ E. M. Epstein, *The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness*, 29 CAL. MGMT. REV. 99-114 (1987)

⁶² *Id.*

⁶³ Madelyn Antoncic, *Uncovering Hidden Signals for Sustainable Investing Using Big Data: Artificial Intelligence, Machine Learning, and Natural Language Processing*, J. RISK MGMT. FIN. INST. (2020).

⁶⁴ M.A. Latapí Agudelo, L. Jóhannsdóttir & B. Davídsdóttir, *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT'L J. CORP. SOC. RESPONSIBILITY 1 (2019)

⁶⁵ Boffo & Patalano, *ESG Investing: Practices, Progress and Challenges*, OECD Paris, pg 37-40 (2020)

and return profile of financial assets⁶⁶. ESG investing is closely related to so-called 'responsible investment' in the stock market, which can include the complete range of 'sustainable investment'.⁶⁷ The transition to ESG is a departure from earlier CSR approaches, which emphasised the concrete level and practical effects of business engagement. Stakeholder participation, voting, and corporate disclosure of ESG practises continue to draw attention. The practise of social cooperation, now referred to as contemporary social collaboration, has grown to incorporate ESG, corporate citizenship, and corporate responsibility around the turn of the century.⁶⁸

Globally, voluntary CSR programmes like the establishment of the United Nations Global Compact were prominent in the early 2000s.⁶⁹ In the 2005 Global Compact report entitled 'Who Cares Wins,' the phrase 'ESG' was used and considered often.⁷⁰ Companies will continue to report on CSR concerns, explain how they perform specific social obligations, and strike a balance between benefits and best outcomes since ESG does not replace CSR⁷¹. The business case and perspective of development as defined by Pollman⁷² for CSR is said to be what motivates the shift from CSR to ESG, which ultimately leads to sustainability. This demonstrates a

⁶⁶ Amel-Zadeh & Serafeim, *Why and How Investors use ESG information: Evidence from a global Survey*, FAJ, Vol. 74, Pg 87-103 (2017)

⁶⁷ *Id.*

⁶⁸ Deutsche Bank Group "Sustainable Investing Establishing Long-Term Value and Performance", p 24 (2012)

⁶⁹ *supra* note 61.

⁷⁰ *Who Cares Wins: Connecting Financial Markets to a Changing World*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins_wci_1319579355342.

⁷¹ Hazen, *Social Issues in the Spotlight: The increasing Need to Improve publicly held Companies CSR & ESG Disclosures*, U. Pa. J. Bus. L. 740, Vol. 23, p 5 (2020)

⁷² Pollman, Elizabeth, *Corporate Social Responsibility, ESG and Compliance*, *Cambridge Handbook of Compliance*, (D. Daniel Sokol & Benjamin van Rooij eds, 2019)

transition from social obligations (as social responsibility) in CSR to risk management (as risk management and litigation) in ESG.⁷³

The emphasis on financial management reform during the 2008 Global Financial Crisis gave sustainability as a target, and ESG as a channel even more momentum. The Climate-Related Financial Disclosures Task Force⁷⁴ study, published in 2016,⁷⁵ establishes a framework for efficient climate-related disclosures that can support informed credit, insurance, and investment decisions, resulting in improved participant knowledge, the quantity of carbon-related goods available on the financial market and how financial markets can be affected by risks from climate change.

8. Voluntary to mandatory ESG

In today's business and financial policies, sustainability is a vital Issue. There are various aspects to it, but one of the most vital ones is on how corporate governance and financial management may lessen externalities or assist in problem-solving. This discussion focuses on the more general issue of whether financial regulation and corporate governance are the best tools to address these issues. For the majority of the 20th century, corporate social responsibility (CSR) was the most significant development of corporate governance tools, but with the progress of time, this notion has changed.⁷⁶ Sustainability appears to be a major concern, and evidence⁷⁷ shows that investors should include ESG components in their construction portfolio to reduce risks related to governance, social, and environmental factors that might influence long-term investments. A current global trend that has consequences for ESG evaluations, ratings, recommendations, and legislation is the financial modelling of ESG investments. It gives less attention to the function of the board of directors and the fiduciary responsibilities

⁷³ *Id.*

⁷⁴ Recommendations Of the Task Force on Climate-Related Financial Disclosures (TCFD), 2017, <https://www.fsb-tcfd.org/>.

⁷⁵ *Id.*

⁷⁶ Iain MacNeil & Irene-Marié Esser, *From a Financial to an Entity Model of ESG*, 23 EUR. BUS. ORG. L. REV. 9, 10 (2022).

⁷⁷ *supra note 72.*

of directors and instead emphasizes on the role of capital and investors in bringing about change in sustainable development. Sustainable development, social responsibility, and ESG have recently been merged and are now widely embraced by professionals, academics, and other scholars.⁷⁸

9. Transition from voluntary to mandatory ESG in India

In order to encourage firms to practise corporate governance, MCA adopted the voluntary guidelines in December 2009⁷⁹. Its goal back then was to make the market and decision-making process more stable and sustainable. To hold business enterprises accountable for their efforts in community engagement, the Department of Public Enterprises created extensive guidelines in 2010⁸⁰. The National Voluntary Principles for Corporate Social, Environmental, and Economic Responsibility 2011⁸¹, which emphasise on the significance of environmental, social, and economic responsibility that needs to be incorporated into business and investment decisions, were subsequently released by MCA for the decision-making process. The main goal of these initiatives was to get corporations to focus on issues like treating all stakeholders fairly, acting ethically, respecting the rights and welfare of employees, human rights, and the environment, and engaging in social and inclusive development initiatives.

However, in 2012, the top 100 publicly traded companies by market capitalization were required to file a Business Responsibility Report, after a request from SEBI.⁸² ESG reporting was made necessary by SEBI as well which was later expanded to cover the top 500 publicly listed companies by market capitalization in

⁷⁸ Iain MacNeil & Irene-Marié Esser, *From a Financial to an Entity Model of ESG*, 23 EUR. BUS. ORG. L. REV. 9, 10 (2022).

⁷⁹ Ministry of Corporate Affairs, Corporate Social Responsibility Voluntary Guidelines, 2009.

⁸⁰ *Id.*

⁸¹ Ministry of Corporate Affairs, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011.

⁸² *supra note 72.*

2015.⁸³ Later in 2017, the top 500 listed businesses required to produce BRR were advised to implement ESG voluntarily starting with the 2017–18 financial year.⁸⁴ It was only in 2019, the National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business, 2011 have been updated, and the National Guidelines on Responsible Business Conduct have been developed. These requirements compel companies to adhere to the guidelines' aspirations in totality.

Finally, On May 10, 2021, SEBI published new ESG rules named Business Responsibility and Sustainable Reporting (hereafter, BRSR).⁸⁵ The BRSR mandates that listed firms (top 1000 companies) identify ESG risks and opportunities, as well as plans for reducing or eliminating these risks and the effects they have on the bottom line. The BRSR's objective is to give the top 1000 listed firms a platform to demonstrate to participants their commitment to sustainable development. The National Guidelines on Responsible Business Conduct has nine principles, and the BRSR mandates that listed firms declare their performance following each of those principles, broken down by important indicators. The mandated reporting of the key indicators contrasts with the voluntary reporting of the leadership indicators.

The BRSR aims to provide quantitative and standardised disclosures on ESG criteria to enable comparison across businesses, industries, and periods of time. Investors will benefit from these disclosures by making wiser investing choices. The BRSR will also help businesses interact more deeply with their stakeholders by enticing them to consider factors other than just profits, such as social and environmental implications.

⁸³ Circular no. CIR/CFD/CMD/10/2015, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Sebi.gov.in.

⁸⁴ Circular No. SEBI/HO/CFD/CMD/CIR/P/2017/10, SEBI, Integrated reporting by listed entities, 2017, Sebi.gov.in.

⁸⁵ Gaz. Not. No. SEBI/LAD-NRO/GN/2021/22, SEBI, Business Responsibility and Sustainability Report (BRSR), 2021, Sebi.gov.in.

10. Greenwashing

While on one hand, disclosures considering sustainable development and the environment have been implemented, on the other hand, issues related to businesses and the environment have been thriving. The term 'green washing' first arose in the 1960s which is essentially a strategy employed by⁸⁶ businesses to trick their customers into thinking that their goods and services are environment friendly, to capitalise on the rising consumer concern about protecting the environment. In India, awareness regarding ESG has grown lately. The SEBI (Issue and listing of Non-convertible Securities) Regulations 2021 (hereafter, ILNCS Regulations), which mandate the issuance of Green Debt Securities (hereafter, GDS)⁸⁷, have now been implemented by companies as part of their strategy for obtaining money for non-convertible securities investments. biofuel and solar energy. Such a regulation places industries as responsible and sustainable by making investments in public transit, energy-efficient structures, the preservation of biodiversity and sustainable waste management.

However, as ESG awareness increases in India, there is also a growing concern over greenwashing. One key reason for this concern is the absence of a strong regulatory framework in India. However, SEBI has been attempting to strengthen the disclosures to be made at the time of the issue of GDS to combat Greenwashing in India. For any GDS issuances on or after 02.02.2023, revised regulatory framework issued by SEBI is in effect. The proposed regulatory framework only applies to GDS issuance that will be traded on Indian stock markets. The general compliance with the contract regulation under the Companies Act, 2013 and the specific compliance with the legislation for which the registration of the

⁸⁶ *supra* note 66.

⁸⁷ Circular No. SEBI/LAD-NRO/GN/2021/39, The SEBI (Issue and listing of Non-convertible Securities) Regulations 2021 (hereafter, ILNCS Regulations), https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-issue-and-listing-of-non-convertible-securities-regulations-2021_51764.html.

contract is required, will apply when the GDS proposal is intended to be listed on the international market.

GDS are a specific kind of debt security that can only be used for projects that are specifically included in the definition under Regulation 2(1) of the ILNCS Regulations. No other project type comes under GDS unless it is included in the definition, which means that it is exhaustive.⁸⁸ But SEBI's guidelines have recently been modified to include more assets and activity that are covered by the GDS, including those related to climate change, pollution prevention and product quality. These new categories cover initiatives to increase buildings' resistance to climate change, as well as supporting materials, greenhouse gas emissions reduction, greenhouse gas control, waste reduction, and the development of recyclable and effective goods. The new category included in the GDS announcement is consistent with India's goal of attaining net zero carbon emission and the Green Bond Principles.

10.1 Guidelines against Greenwashing

Under prior legislation, businesses were required to publicly disclose the identity of their appointed external auditor(s) when issuing Global Depository Shares (GDS). Furthermore, businesses had to engage external auditors to verify the use of proceeds derived from GDS transactions. This verification shows whether the money was appropriately allocated to the project or item in question. Now, SEBI has made it mandatory for GDS issuers to employ external auditors or persons who can verify and reveal the time mentioned in the offer document.⁸⁹

The Operational Circular⁹⁰ does not specify any particular requirements that an independent third-party reviewer must satisfy to be selected; rather, a reviewer is regarded competent if they have the appropriate technical skills and experience to carry out the relevant responsibilities. The optional Guidelines for External

⁸⁸ *supra* note 85.

⁸⁹ Iain MacNeil & Irene-Marié Esser, *From a Financial to an Entity Model of ESG*, 23 EUR. BUS. ORG. L. REV. 9, 10 (2022)

⁹⁰ *supra* note 83.

Reviewers are listed on the ICMA website, although the organisation does not support any of the external reviewers on this list. A list of verification organisations has also been authorised by the Climate Bonds Standards Board and is available on their website. Also, due to the special features of GDS, the issuer must include extra disclosures in the offer document, than are generally needed for conventional debt instruments. Furthermore, the issuer has an ongoing duty to disclose the use of proceeds following the conditions of the offer instrument because public monies are involved.⁹¹ According to Chapter IX of the Operational Circular,⁹² the issuer's annual report and/or financial statements must incorporate certain continuous disclosures. As suggested in the Consultation Paper, the disclosure standards have been updated to comply with the Green Bond Principles.⁹³

Greenwashing might involve exaggerating a product or service's environmental advantages, providing only good information while omitting negative information, or using ambiguous or derogatory wording to draw attention away from environmental benefits.⁹⁴ Because it makes customers and investors believe they support environmental practises, when they in reality they do not, greenwashing may be dangerous. To mitigate the negative consequences of green cleaning, businesses should be honest and explicit about their environmental practises. In its Consultation Paper⁹⁵, SEBI has voiced concerns regarding issuers' exploitation of green bonds. Investors who are interested in socially conscious investments that concentrate on Environmental, Social, and Governance (ESG) practises may also face a major reputational risk

⁹¹ Arjun Goswami & Anmol Jain, *An Introduction of ESG Disclosures in Indian Regulatory Space – Part 2*, <https://amlegals.com/greenwashing-in-india-under-the-guise-of-green-debt-securities/>.

⁹² *supra* note 85.

⁹³ *supra* note 85.

⁹⁴ *supra* note 91.

⁹⁵ SEBI, Consultation Paper on ESG Disclosures, Ratings and Investing, 2021, https://www.sebi.gov.in/reports-and-statistics/reports/feb-2023/consultation-paper-on-esg-disclosures-ratings-and-investing_68193.html.

as a result of such practises. The SEBI has published dos and don'ts linked to GDS that must be followed by the firm at the time of issuing of GDS to stop the practise of 'greenwashing' in India.⁹⁶ The purpose of the aforementioned circular is to ensure that such actions are not taken.

11. Corporate Climate Litigation: International Perspective

Neither CSR nor ESG can be a one-step solution for making businesses responsible towards environmental or climate change issues. This is so because CSR is a wide concept with environmental sustainability being one of the many activities a business can undertake. Nevertheless, CSR is a means to incorporate sustainability in business operations. Thus, globally CSR is becoming a means to compel businesses to invest in climate change mitigation and adaptation policies. However, issues like greenwashing remain. Moreover, it has been noted that sometimes CSR is undertaken by businesses to gain profits and not to serve community interests.⁹⁷ Despite these difficulties, CSR along with other regulatory mechanisms like ESG, have been used to integrate responsibility towards environment and climate in the business culture. But the "E" pillar in ESG has to be delineated in a manner to make businesses legally responsible. This is because, as highlighted earlier, the primary responsibility to guarantee human rights and by extension, environmental rights lie with the concerned state. Businesses are private entities and not a defined subject under international law, which makes it difficult to hold them responsible for environmental or climate change obligations. The world collectively as a community has made progress towards its climate change objectives due to a number of events, including the present

⁹⁶ *Id.*

⁹⁷ Myria W. Allen & Christopher A. Craig, *Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communication Perspective*, 1 INT J CORPORATE SOC RESPONSIBILITY 1 (2016).

global climate change, the Paris Climate Agreement 2015, and adaptation, and rejuvenation as a national decision.

The several international environmental law doctrines/principles along with mandates like ESG framework, read with the duties of businesses as outlined in the domestic corporation/company law have assisted the courts in holding businesses responsible towards environment and climate change. Environmental law is seen by judges alike as a field that should be given at most importance and uniformity.⁹⁸ India has long been on the road of advocacy towards legal matters that the Legislature and Judiciary have disregarded and empathy towards the populace as a whole. A lengthy history of public interest litigation has taken place in the nation, including significant lawsuits on climate change.⁹⁹ The Judiciary is a dynamic pillar that can grant itself an ongoing mandate to supervise the execution of its judgements, and it has more lenient standing criteria, such as the public interest lawsuit.¹⁰⁰ Thus, Public Interest Litigation cleared the door for the Courts to address a wide range of social needs, which were frequently made worse by a lack of political will to address particular issues or a delay in the political economy. Through innovative declarations, like the Indian Judiciary has adopted a more aggressive stance towards resolving the matters brought before it.¹⁰¹ Global trends in climate change litigation: The Centre for Climate Change Policy and Policy in partnership with the 2022 London School of Economics, Institute for Business and Research, and the Grantham Institute, has compiled a report that demonstrates the importance of the events related to global climate

⁹⁸ Lennart Wegener, *Can the Paris Agreement Help Climate Change Litigation and Vice Versa*, TRANSNAT'L ENVTL. L. 17, Vol. 9 (2020)

⁹⁹ Ivano Alagano, *Climate Change Litigation: Comparative and International Perspectives*, (2020),
https://www.researchgate.net/publication/340455320_Climate_Change_Litigation_Comparative_and_International_Perspectives.

¹⁰⁰ Arpita Saha, *Judicial Activism in India: A Necessary Evil*, (2008)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979.

¹⁰¹ *Id.*

change.¹⁰² These include claims against governmental directives as well as claims against negligent businesses.¹⁰³

According to analysis, the types of defendants involved in business climate lawsuits are changing and are growing more diversified. Cases against corporate holders are also becoming much more diversified, since formerly, cases were typically filed against the Carbon Majors and other businesses engaged in the exploitation of fossil fuels or the provision of fossil energy.¹⁰⁴ The potential of liability for the board of directors is rising as the focus of climate litigation shifts to corporations. In comparison to 22 cases filed against private sector players globally in 2020, about 38 lawsuits were brought against them in 2021.¹⁰⁵ Only upward movement is anticipated for this trend.¹⁰⁶ Climate lawsuit is still a result of violations of care and due diligence. In reality, a substantial portion of the jurisprudence surrounding climate litigation has formed around basic care and due diligence concepts that have been proposed and supported in case laws unrelated to climate and the environment.

For instance, in the case of *Caremark Intern Inc Derivative Litigation*¹⁰⁷ the director's liability was in question with respect to the inaction in good faith or not. In this case, the prime issues were regarding breach of director's fiduciary duty of care, where the court went on to decide as to when can the fiduciary duty of a director be

¹⁰² *supra* note 98.

¹⁰³ Nachmany M, *Policy brief Global trends in climate change legislation and litigation: 2018 snapshot*, GRANTHAM RESEARCH INST, <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>.

¹⁰⁴ Eeshan Chaturvedi, *Climate Change Litigation: Indian Perspective*, GERMAN LAW JOURNAL, 22, pp. 1459–1470 (2021).

¹⁰⁵ *Id.*

¹⁰⁶ Subodh Mishra, *The Rise of Climate Litigation*, <https://corpgov.law.harvard.edu/2022/03/03/the-rise-of-climate-litigation/>.

¹⁰⁷ Re: *Caremark Intern Inc Derivative Litigation* 698 A.2d 959 (Del. Ch. 1996).

breached and held that, firstly, such liability can be enforced when there is a board meeting and such meeting's decisions were malafide and negligent. Secondly, when board the fail to act in situations where their action could have mitigated the loss. Court further stepped in and explained that 'good faith' is an important element to ascertain the existence of the director's liability. Lastly, they also laid down the principle that it is the duty of the director to maintain a robust reporting system and information management system. By this the Court meant that the internal information and/or reporting process should be such that the key managerial personnels have reliable and authentic information on time. Such a system would permit the management to reach sound and reasonable judgements concerning their business and compliances with regulations. If such a system is missing, it would render a director responsible for the breach of duty of care towards the shareholders.

The Caremark Judgement has since been defended in a variety of other cases, such as *Marchand v. Barnhill*¹⁰⁸, also known as the Blue Bell's case, where a board of directors of an ice cream manufacturing company was accused of failing to oversee food safety. Likewise, allegations were made in *Teamsters Local 443 Health Care and Insurance Plan v. John G. Chou*¹⁰⁹ that the pharmaceutical corporation behaved deliberately by peddling dangerous medications and that the directors disregarded their obligations to monitor the pharmacy's activities. The court rejected the director's claim because it concluded that the director disregarded warning signs and permitted improper publicity pertaining to commercial dealings. A similar observation was made in *Clovis Oncology Inc*¹¹⁰. In all of these cases, corporations and even its directors were held liable for breaching their duty of care.

The abovementioned cases bridge the gaps and principles for climate litigation as well, where these principles of due care and negligence have been upheld and corporations have been held

¹⁰⁸ *Marchand v. Barnhill* 212 A.3d 805 (2019).

¹⁰⁹ *Teamsters Local 443 Health Care and Insurance Plan v. John G. Chou* C.A. No. 2019-0816-SG (Del. Ch. Aug. 24, 2020).

¹¹⁰ *Clovis Oncology Inc* 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

responsible for the breach. This could be understood via *Milieudefensie et al. v. Royal Dutch Shell*¹¹¹ before the District Court of The Hague on the basis of 'duty of care.' The non-governmental organisations fighting for the reduction of greenhouse gas (GHG) emissions initiated their case against the Shell group of corporations, who were the main producers of fossil fuels. While holding a private entity guilty for a global concern, GHG emissions might seem like a far-fetched idea, it has been noted that more than 70 percent of such emissions is due to 100 fossil fuel companies.¹¹² The Court considered that on the international platform, all nations, developed or not, have pledged to work towards lowering emissions and saving the planet. Hence, it held that even if a corporation breaches their responsibility and tries to stall the global efforts towards climate change, it would be held liable. The Court held that it was a 'catastrophic event' since it may endanger the environment and undermine the Shell Group's agreement on business rights. It was believed, as mentioned earlier, that Companies have a duty to uphold human rights. Carbon dioxide emissions are caused more by the oil sector than by several states combined and the Court added that severe climate change and global warming, which might have major, long-lasting effects and jeopardise the human rights of all the claimants in the abovementioned case.

Similarly, in *Four Islanders of Pari v. Holcim*,¹¹³ four residents of the Indonesian island of Pari, sued Holcim, a major greenhouse gas emitter, claiming that the company's emissions had caused sea levels to rise resulting in floods, endangering their ability to support themselves through fishing and tourism on Pari. The court held them to be liable for the breach of duty of care towards the environment and citizens. Likewise, in the *Native Village of Kivalina*

¹¹¹ *supra* note 12.

¹¹² Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, THE GUARDIAN, Jul. 10, 2017, <https://www.https://theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> (last visited Sep. 9, 2024).

¹¹³ *Four Islander of Pari v. Holcim*, *Four Islanders of Pari v. Holcim* | InforMEA

v. *ExxonMobil Corp*¹¹⁴, the big oil firm was sued under federal law because of its greenhouse gas emissions, which threaten global warming and cause the melting of Arctic glaciers. Although the court of appeals rejected arguments that remedies available under U.S. environmental law have supplanted reparation claims under federal law, the Supreme Court however, acknowledged the objection and issued the *writ of certiorari* contesting the ruling of the court of appeals.

12. Corporate Climate Litigation: Indian Perspective

Climate lawsuit involving corporations has not yet occurred in India as lawsuits here focus mostly on environmental pollution, which may be related to climate change but is not appropriately situated. The examination of the short and long-term effects of business operations on climate change and the ensuing impact on the environment and people may serve as the foundation for the calculation of damages in climate-related litigation. To make up for the damage done, the polluter is subject to an absolute liability. In India, the 'Polluters Pay' philosophy has developed, which mandates that the companies responsible for pollution bear the financial burden of avoiding or repairing any damage that results from it. From the oleum gas leak¹¹⁵ to the recent Vishakhapatnam gas leakage¹¹⁶, judiciary has held hazardous industries 'absolutely liable' for any catastrophes inside and outside their premises. Apart from the said principle, the Indian judiciary has also incorporated 'precautionary principle' through the landmark case of *Vellore Citizens' Welfare Forum v. Union of India & Others*¹¹⁷, 'inter-generational equity' through the *State of Himachal Pradesh and Others*

¹¹⁴ *Native Village of Kivalina v. ExxonMobil Corp*, 696 F.3d 849 (9th Cir. 2012).

¹¹⁵ *M.C. Mehta v. Union of India*, [1987] 1 SCR 819.

¹¹⁶ *LG Polymers India Private Limited v. Andhra Pradesh Pollution Control Board and Ors.*, (2020) 6 SCC 619.

¹¹⁷ *Vellore Citizens' Welfare Forum v. Union of India & Others* [1996] Supp 5 SCR 241.

v. *Ganesh Wood Products and Others*¹¹⁸ to hold corporation liable or preventing them from adding to environmental degradation.

It is true that the cases in which the courts and tribunals have referred to climate change and India's objectives is primarily meant for the government or its instrumentalities to take appropriate action. For instance, in the case of *Gaurav Kumar Bansal v. Ministry of Environment, Forest and Climate Change*¹¹⁹, the National Green Tribunal asked the defaulter states to prepare a working plan to adopt and implement the National Action Plan on Climate Change. In the case of *Society for Protection of Environment & Biodiversity v. Union of India*¹²⁰, a draft notification was issued back in the year 2016 by the Ministry of Environment, Forest and Climate Change exempting construction activities from environmental clearances. The National Green Tribunal highlighted that how the aforementioned projects led to carbon emissions and reminded the Ministry of the importance of the environmental impact assessment as a means to implement the precautionary principle, and quashed the exemption. However, due to the growing awareness with respect to corporations' duties towards the environment, courts have also considered their duties in consonance with the regulations. For instance, in the case of *M.K. Ranjitsinh v. Union of India*¹²¹, the Apex court discussed the feasibility of Section 135 (CSR) and Section 166 (duties of directors) of the Companies Act, 2013¹²² towards environmental protection. The Court clarified that the latter not only talks about stakeholders' aspirations but also environmental protection. While this stance is certainly a step ahead, it is yet to be seen how corporations could be held liable for breach of climate change obligations.

¹¹⁸ *State of Himachal Pradesh and Others v. Ganesh Wood Products and Others* [1995] Supp 3 SCR 477.

¹¹⁹ *Gaurav Kumar Bansal v. Ministry of Environment, Forest and Climate Change*, Original Application No. 498/2014, Delhi.

¹²⁰ *Society for Protection of Environment & Biodiversity v. Union of India*, MANU/GT/0133/2017.

¹²¹ *M.K. Ranjitsinh v. Union of India* [2021] 4 SCR 81.

¹²² The Companies Act 2013, S. 135 & S.166, No.18, Acts of Parliament,2013

While there is yet to be a direct climate lawsuit against a corporation in India, the court now revised its order under the abovementioned case that is, *M.K. Ranjitsinh v. Union of India*¹²³ and held that the right to be protected from the negative impacts of climate change is a part of the fundamental rights guaranteed to every citizen under the Indian Constitution. The order highlights India's nationally determined contribution towards the Paris Agreement and other climate obligations. Based on the said goals, the Court declared that violations arising from climate change is required to be assessed as a different concern altogether and mitigation and adaptation processes should be planned accordingly.

13. Conclusion

Though economic development is essential, it should ensure avoiding environmental degradation. To maintain this balance between economic development and environmental protection, many measures have been employed in India, starting from voluntary to mandatory CSR and later on through the implementation of ESG concerns. In this regard, the impact of Section 135 of the Companies Act, 2013 has played an uncertain role in coupling CSR to legislation, which essentially creates the first example of the codification of aspirations linked to Environmental Sustainability. Later on, this landscape introduced the concept of ESG framework while making a shift from voluntary to mandatory CSR. While the efforts were commendable, there still remained several loopholes for the corporations to fall back on. This led to the emergence of issues like greenwashing as discussed above. Nevertheless, including environmental sustainability as one of the activities under CSR was a bold move. It has to be remembered that environmental degradation and climate change are the realities of today. Issues regarding climate change exist and are becoming terrible with each passing day and addressing each aspect of climate change is essential. However, being aware of climate change and its effects are two distinct matters. Climate change is adversely affecting almost every facet of human development and environment. But the boundaries of climate change are still unknown. Even when Right to

¹²³ *M.K. Ranjitsinh V. Union Of India*, MANU/SC/0274/2024.

Information forms an essential part of the Paris Agreement, absence of correct public information about adaptation, mitigation and so on are frequent. On the other hand, to proceed with policy making on an inadequately defined issue is the biggest hurdle. Michelle Bachelet highlighted that climate change can be mitigated only through effective cooperation between the government and the private sector.

In the end, the future lies in Corporate Climate Litigation, which in the Indian scenario is yet to occur but the required jurisprudence for such litigation can be found in different mechanisms - Public Interest litigation, being one. Undoubtedly, this is not a task that can be achieved in a day. But the authors would like to gather in some points for initial action:

1. There needs to be an urgency in the steps taken towards ensuring environmental protection. While this cannot be achieved by one single state or non-state actor, each state should stop merging human rights obligations and business responsibility. Human rights while inherent to every human being cannot coerce the businesses, a non-state actor to support in environmental or climate change action. Businesses can however be brought into the mainstream of safeguarding human rights if provided with incentives. Now, these incentives can be sector specific or industry specific. The government of a country needs to conduct groundwork to understand the requirements of the business sector to proceed further.
2. It has also to be understood that businesses worldwide are majorly private entities. Their primary purpose of establishment is to earn profits. The other activities that they undertake assume secondary importance. But these entities are highly resourceful, and the growth of the economy is invariably linked to their growth. Keeping this in mind, any policy that mandates them to undertake activities that are secondary to their objectives, like CSR, might not yield fruit. For instance, India mandated CSR back in the year 2013. However, the provision is loaded with loopholes, like applicability to only certain companies and a mechanism to do

away with the responsibility after a certain time period. The researchers believe that instead of focusing on mandatory policies, businesses should be made aware of how indulging in CSR or related activities adds to their growth and stability in the economy. This will allow them to appreciate the value of climate-friendly business policies and how they add up to the overall climate action of a country.

3. Moreover, the role of local communities should be made pivotal in all climate actions. The government needs to actively involve the local people before deciding upon a new project or proposal for climate change. The Paris Agreement has emphasised that climate action requires both mitigation and adaptation policies. Even when business and the government come up with a decent plan towards building a climate-resilient solution, it would be the local community who would have to adapt to these changes in their environment. In India, there have been instances wherein the local communities have lost their land and means of livelihood due to some or other climate-friendly developments in their area. The government should cater to their needs first, otherwise it would be deemed to be a blatant infringement of human rights.