Redefining Corporate Purpose: An International Perspective

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INTRODUCTION

Over the past decade, corporate law in India has undergone significant reforms with implications for not only corporate governance but also for questions about the purpose of the corporation and beneficiaries of the corporate form. Following years of debate and attempts at reforms that began in the late 1990s, India's reform efforts culminated in the 2013 Companies Act (hereinafter the "Act" or the "Companies Act").[1] The Act has been described as "the single most important development in India's history of corporate legislation" and a "watershed" event for corporate law reforms in the country.[2] Much attention has been placed on specific aspects of the new Companies Act, such as the requirements that firms provide specific corporate social responsibility (CSR) disclosures or appoint independent directors.[3]

In designing India's new corporate law, policymakers grappled with the subject of corporate purpose and with determining which institutional structure could best further the purpose of the corporation. When viewed holistically, the Companies Act is a radical experiment with corporate purpose. The Companies Act does not specifically define corporate purpose, other than stating that a company may be formed for any "lawful

1. *See* The Companies Act, No. 18 of 2013, INDIA CODE (2013) (India) [hereinafter Companies Act, 2013].

2. Bala N. Balasubramanian, *Strengthening Corporate Governance in India: A Review of Legislative and Regulatory Initiatives in 2013-2014*, 2 (IIM Bangalore Research Paper No. 447, Jan. 2014).

3. *See generally* Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 175 (2014) (discussing CSR requirements); Vikramaditya S. Khanna & Umakanth Varottil, *Board Independence in India: From Form to Function?*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Harald Baum et al. eds., 2016) (discussing independent director requirements under the Companies Act).

purpose."[4] Nevertheless, the Act's various provisions regarding a board's fiduciary duties and responsibilities make clear that shareholder wealth maximization should no longer be the primary lens for decision-making by Indian boards. One of the most essential provisions of the Act declares that corporate directors "shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."[5] Moreover, the Act's code for independent directors requires them to "safeguard the interests of all stakeholders" and to "balance the conflicting interest of the stakeholders."[6] These duty-focused provisions are bolstered by several other important provisions relating to CSR spending and disclosure and, in some cases, stakeholder access to board members.[7] The substantive reforms of the Companies Act are then overlaid with an extensive disclosure regime that envisions a vast increase in corporate transparency.

The Indian experiment with corporate purpose is worthy of analysis for several reasons. First, as the world's largest democracy, legislative changes in India could have a significant impact on the lives of more than 1.2 billion people living in the country.[8] Second, as Indian companies become even larger global players, the corporate governance of Indian firms will have wide implications for many people outside of India. Third, India is an attractive country for global investors,[9] and if the Indian experiment with more socially responsible firms succeeds, investors could be persuaded to push for similar reforms around the world. Fourth, the Indian experiment has been noticed and debated by stakeholders and commentators globally who hope to emulate India's move toward corporations with legally mandated responsibilities to stakeholders beyond shareholders.[10]

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4. Companies Act, 2013, *supra* note 1, § 3.

5. Companies Act, 2013, *supra* note 1, § 166.

6. Companies Act, 2013, *supra* note 1, sch. IV, paras. II (5), (6).

7. *See infra* notes 97–125 and accompanying text.

8. *See* INDIA GLOBAL COMPETITIVENESS INDEX: 2016-2017 EDITION, WORLD ECONOMIC FORUM, http://reports.weforum.org/global-competitiveness-index/country-profiles/#economy=IND [https://perma.cc/7DRK-6NF9].

9. *See* Sneha Shah & Baiju Kalesh, *India is Among the Most Attractive Investment Destinations: Sri Rajan, Bain India*, ECON. TIMES (July 20, 2015, 5:37 PM), http://economictimes.indiatimes.com/opinion/interviews/india-is-among-the-most-attractive-investment-destinations-sri-rajan-bain-india/articleshow/48146026.cms [https://perma.cc/HV2W-QH62].

10. *See, e.g.*, Sandeep Gopalan & Akshaya Kamalnath, *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials*, 10 NW. J.L. & SOC. POL'Y. 34 (2015) (advocating for a model similar to India's to be adopted in the U.S.); Jingchen Zhao, *Promoting a More Efficient Corporate Governance Model in Emerging Markets Through Corporate Law*, 15 WASH. U. GLOB. STUD. L. REV. 447 (2016) (discussing India's CSR model as a potential example for other emerging economies).

India's new corporate law, in many ways, engages with debates in other parts of the world to redefine the purpose of the corporation. Given the large extent to which corporate law in India looks at comparative examples from other common law jurisdictions, this Article primarily focuses on comparative developments in the U.K. and U.S.[11] In the U.K., for example, the concept of "enlightened shareholder value" was introduced through the passage of the U.K. Companies Act 2006.[12] Similarly, the U.S. has also been debating the purpose of the corporation and experimenting with different forms of business entities aimed at moving away from the claim that the law requires shareholder wealth maximization as the primary purpose of the corporation.[13] In the U.S., the emergence of new types of business entities, such as the benefit corporation, clearly challenges long-held views that the purpose of the corporation is to maximize shareholder wealth.[14]

There are many similarities between India's 2013 Companies Act, the U.K.'s codification of directors' duties, and the re-examination of corporate purpose within the movement toward benefit corporations in the U.S. Similar to the U.K. approach, India has codified directors' duties in the 2013 Companies Act. Like the U.S. benefit corporations approach, India's legislative changes extend beyond codification of directors' duties.

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11. For a discussion of U.S. and U.K. influences on Indian corporate law, see generally Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NW. J. INT'L L. & BUS. 335 (2009) [hereinafter Afsharipour, *Corporate Governance Convergence*]; Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L. L. REV. 253 (2016) [hereinafter Varottil, *Evolution of Corporate Law*].

12. For a detailed comparison of the U.K.'s ESV framework and Section 166(2) of the India's Companies Act, 2013, see Mihir Naniwadekar & Umakanth Varottil, *The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis*, (NUS - Centre for Law & Business, Working Paper No. 16/03, Aug. 11, 2016).

13. *See generally* J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 3–4 (2011). For an overview of the many different types of new business entities that have arisen since the mid-2000s, see J. Haskell Murray, *State Laboratories and Social Enterprise Law*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLC AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS (Robert W. Hillman & Mark J. Loewenstein eds., 2015). For debates about this claim, compare Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015), *and* J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAW. 33 (2014), *with* LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012), and Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012).

14. *See* Lyman Johnson, *Law and the History of Corporate Responsibilities: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 990 (2013) [hereinafter Johnson, *Law and the History of Corporate Responsibilities*] (describing benefit corporations as an "avowed rejection of a strict and exclusive focus on investor welfare [that] expressly permit corporate directors to craft corporate strategy in a way that both benefits investors and advances a larger general or specific social and environmental purpose").

India's move toward a broader purpose for the corporation, much like the move toward benefit corporations in the U.S., flies in the face of long-standing beliefs that corporations "are incapable of having social or moral obligations."[15] Like the benefit corporation model in the U.S., profit maximization is no longer clearly the primary lens in decision-making by Indian boards. Instead, Indian boards must now consider a variety of interests in running the company. The legislative changes enhancing the responsibilities of directors to all stakeholders are bolstered by specific disclosure requirements and a "soft mandate" for CSR spending by the board.[16] Both the U.K. and U.S. comparisons are useful in that many of the questions over the value of the enlightened shareholder value (ESV) model and benefit corporations, and whether each will achieve the goals of protecting stakeholder interests, are similar to questions that can be raised with respect to India's corporate law reforms.

There are also important differences between the reforms undertaken in India and those undertaken in the U.S. and U.K. Under the U.K.'s ESV model, shareholder interests arguably remain the top priority of boards. India, however, has recognized both shareholder and stakeholder interests "without necessarily indicating a preference to either."[17] India's approach also differs from recent movements in the U.S. Much of the changes toward more socially responsible corporations in the U.S. have arisen from changes in business norms and practices rather than through legislative changes.[18] This is in stark contrast to India's recent corporate law reforms, which clearly mandate, both through company law legislation and through securities regulation, stakeholder rights, social responsibility, and board diversity, among other matters. Unlike the benefit corporation model in the U.S. that mandates broader board responsibilities for a select class of companies that have opted into the benefit corporation status, the move toward social responsibility and stakeholder duties in India applies to all publicly traded corporations and even to some large unlisted companies.

While the Indian experiment has been hailed, like the benefit corporation experiment and ESV model, it is not clear that the lofty goals of the Companies Act will truly come to fruition. Certainly, there is a need for additional time to assess the Indian model's aim and effectiveness. The Companies Act in India arguably does not push forward a new corporate purpose as far as it could. For example, the CSR provisions of the Act seem to equate CSR with corporate philanthropy rather than promote

15. Daniel R. Fishel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982).

16. *See* Afsharipour & Rana, *supra* note 3, at 218.

17. Varottil, *Evolution of Corporate Law*, *supra* note 11, at 315.

18. *See* Johnson, *Law and the History of Corporate Responsibilities*, *supra* note 14, at 975.

strategic CSR with a holistic view of the impacts businesses have on society and the environment. Moreover, while directors must consider the interests of all stakeholders, many of the remedies provided under the Companies Act are given only to shareholders and not to all stakeholders.

This comparative analysis of India's move toward redefining corporate purpose proceeds as follows. Part I presents an overview of global debates over corporate purpose, drawing principally from the move toward the ESV model in the U.K. and benefit corporations in the U.S. This section briefly recounts the debates in both jurisdictions about whether the changes they have experienced will engender more socially responsible corporations. Part II then provides a condensed history of corporate law reforms in India and an overview of the legislative changes undertaken in the past decade. In Part II, this Article takes a broad approach toward analyzing the Act and argues that the various provisions of the Act demonstrate a move toward broader corporate purpose. In Part III, this Article argues that despite the goals of Indian law makers in passing the Companies Act, there are serious shortcomings in the law as it pushes toward a pluralistic stakeholder oriented purpose. Part III identifies several structural challenges that stand in the way of a move toward companies that truly are responsible to a wide variety of constituencies, including vagueness in the legislation, promoter-dominated ownership structures, ineffective institutional framework to support enforcement efforts by stakeholders generally, and weaknesses in the judiciary. These challenges suggest that India's experiment with corporate purpose is one that is uncertain to succeed.

I. GLOBAL DEBATES AND EXPERIMENTS WITH CORPORATE FORM AND PURPOSE

A. The Shareholder–Stakeholder Debate

The corporate purpose debate is a long-standing and fundamental question for corporate law around the world. The concept of corporate purpose is centrally tied to the function and duties of the corporate board. Whose interests must the board consider when making decisions? What does it mean to say that corporate directors owe a fiduciary duty to the corporation? Does the board's fiduciary duty to the corporation mean that directors must focus on maximizing the wealth of shareholders even at the expense of other nonshareholder constituencies? To what extent can directors consider the interests of a broader group of stakeholders than just shareholders?

Questions about corporate purpose and the role and responsibilities of directors in advancing the purpose of the corporation have arisen in many different contexts and jurisdictions. In the U.S., for example, vigorous debates as to whether the board of directors should have duties only to shareholders or whether their duties should extend to stakeholders beyond shareholders go back to the early 1930s.[19] Many noted scholars have argued that "shareholder value is the proper object of corporate law" because "focusing principally on the maximization of shareholder returns is, in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare."[20] Other scholars argue that, in managing the company, the board must consider the interests of all stakeholders, such as employees, consumers, and the general public and must make decisions for the benefit of all stakeholders.[21] Under the stakeholder view "the corporation has both public and private roles."[22]

Debates over the stakeholder versus shareholder-oriented models have occurred in other parts of the globe as well, with countries settling on different approaches. Many countries have more readily recognized the stakeholder approach than the shareholder oriented approach adopted in U.S. corporate law, particularly Delaware law.[23] Moreover, international organizations have articulated the stakeholder approach in their various principles.[24] The Organization for Economic Co-operation and Development (OECD) principles of corporate governance, for example, state that boards should "take into account the interests of stakeholders" and should "take due regard of, and deal fairly with, other stakeholder

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19. *See* Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 435–37 (2013) [hereinafter Johnson, *Unsettledness*]. The famous debate was between Adolf Berle and Merrick Dodd who struggled with questions over the nature and purpose of the corporation. *See* A.A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1060–69 (1931); E. Merrick Dodd Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–57 (1932). Berle emphasized the fiduciary duties of managers toward shareholder-beneficiaries, while Dodd argued for broader obligations to a wider set of constituencies, including employees, consumers, and the public at large. In the 1970s, Milton Friedman argued for a strong shareholder wealth maximization goal. *See* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32.

20. REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 28–29 (2d ed. 2009); *see also* Henry Hansmaan & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (arguing that the best way to achieve aggregate social welfare is by focusing on shareholder wealth maximization).

21. *See* Johnson, *Unsettledness*, *supra* note 19, at 435–36.

22. Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder–Stakeholder Divide*, 36 J. CORP. L. 59, 71 (2010).

23. *See id.* at 72; Sanford M. Jacoby, *Corporate Governance in Comparative Perspective: Prospects for Convergence*, 22 COMP. LAB. L. & POL'Y J. 5, 6 (2000); JAYATI SARKAR & SUBRATA SARKAR, CORPORATE GOVERNANCE IN INDIA 17–18 (2012). Outside of Delaware, many states have adopted constituency statutes that permit directors to consider the interests of a broad range of stakeholders when making decisions. *See generally* Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227 (2004).

24. *See* SARKAR & SARKAR, *supra* note 23, at 17.

interests including those of employees, creditors, customers, suppliers and local communities."[25]

Even with respect to Delaware law, there are strong opinions supporting one position or the other, with fundamental ramifications for the purpose of the corporation.[26] As Professor Lyman Johnson has noted, not only have scholars and jurists debated "what the purposes of the corporation should be," but there is a fundamental dispute among these experts as to what "the law really is" on corporate purpose—in other words, "whether the law requires the maximization of shareholder wealth as the sole or predominant corporate purpose."[27] Recently, Chief Justice Strine of the Delaware Supreme Court proclaimed that "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[28] On the other hand, other experts argue that shareholder wealth maximization is neither a legal requirement, even in Delaware, nor a desirable approach to corporate purpose.[29]

B. Moving Away from Shareholder Wealth Maximization: U.K. and U.S. Examples

In several countries, questions about corporate purpose have resulted in actual legislative changes. For the purposes of this Article, two of the most prominent changes are those undertaken in the U.K. and the U.S., the two jurisdictions that Indian corporate law often looks to for inspiration.

In the U.K., legislators settled on the ESV model as adopted in Section 172 of the U.K. Companies Act.[30] Section 172 defines the duties of directors as follows:

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25. ORG. FOR ECON. CO-OPERATION & DEV., PRINCIPLES OF CORPORATE GOVERNANCE 51, 53 (2015), http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf [https://perma.cc/TT79-B98M].

26. *Compare* Strine, *supra* note 13, at 763–68, *with* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 30–31 (2012).

27. Lyman Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 11 (D. Gordon Smith & Andrew Gold eds., forthcoming 2016); *see also* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013).

28. Strine, *supra* note 13, at 768.

29. *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736 (2005).

30. For a brief history of the purpose of Section 172, see Andrew R. Keay & Hao Zhang, *An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law*, 8 EUR. CO. & FIN. L. REV. 1, 6–9 (2011).

> [A] director . . . must act . . . in good faith . . . to promote the success of the company for the benefit of its members as a whole, and in doing so *have regard to* . . . the likely consequences of any decision in the long term[;] the interest of the company's employees[;] the need to foster the company's business relationships with suppliers, customers and others[;] the impact of the company's operations on the community and the environment[;] the desirability of the company maintaining a reputation for high standards of business conduct[;] and the need to act fairly as between members of the company.[31]

Some scholars have argued that Section 172 makes clear that directors must, as a fundamental matter, advance and "prioritize" the interests of shareholders above all else.[32] Thus, while corporate directors must "have regard" for the interests of nonshareholder constituencies, these interests "are relevant only insofar as they relate to the paramount goal of advancing the shareholders' interests."[33]

Other commentators have argued that the ESV model "transcends the shareholder–stakeholder divide."[34] These scholars argue that under the ESV framework:

> [A]ttention to traditional "stakeholder" interests such as the effect of corporate operations on the environment, employees, or local communities, is seen as *a means of* generating long-term shareholder wealth and improving portfolio- and firm-level risk assessment. Enlightened shareholder value thus emphasizes the benefits to *shareholders* that can result from focusing corporate management on areas of shared shareholder and stakeholder concern while recognizing the very real challenges posed by the diversity of shareholder and stakeholder interests. At the same time, by asserting that shareholders should not achieve wealth through disregard for the impact of corporate decision-making on stakeholders, enlightened shareholder value also parts course to some degree from the standard shareholder wealth maximization conception of the corporate purpose.[35]

Thus, the ESV framework goes beyond paying just lip service to stakeholder interests. Directors must, in good faith, consider the interests of stakeholders even if shareholder interests trump stakeholder interests. Accordingly, if the board makes decisions that seek to opportunistically benefit shareholders at the expense of other stakeholders, "then they might

31. Companies Act, 2006, c. 46 § 172 (Eng.) (emphasis added).

32. *See* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 34 (2013).

33. *Id.* at 44.

34. Harper Ho, *supra* note 22, at 62.

35. *Id.*

well be in breach because such action is not likely to benefit the company in the long term or accord with either ideas of the directors engaging in responsible behavior, as envisaged by the . . . principles underpinning the concept of ESV."[36]

In the U.S., the corporate purpose debate has undergone an important shift with the emergence of benefit corporations and other hybrid business entities.[37] Of the various models that have proliferated, such as benefit corporations, low-profit limited liability companies (L3C), benefit LLCs, and social purpose corporations, the benefit corporation has gained the most steam across the U.S.[38] To date, benefit corporation statutes have been adopted in more than thirty states, with proposed legislation being debated in a number of other states.[39]

Benefit corporations have three fundamental characteristics addressing corporate purpose, board accountability, and reporting. More specifically, benefit corporations feature (1) a requirement that they must have a corporate purpose to create a material positive impact on society and the environment; (2) an expansion of the duties of directors to require consideration of nonfinancial stakeholders as well as the financial interests of shareholders; and (3) an obligation to report on their overall social and environmental performance using a comprehensive, credible, independent, and transparent third-party standard.[40]

With respect to corporate purpose, benefit corporations allow the board "to advance both investor and noninvestor interests, in aid of pursuing a larger public benefit."[41] A "general public benefit" is defined in the Model Benefit Corporation Legislation as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit

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36. Keay & Zhang, *supra* note 30, at 10.

37. For a comprehensive overview of the many different types of hybrid entities formed since the mid-2000s, see generally J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 588 (2016) [hereinafter Murray, *The Social Enterprise Law Market*].

38. The rapid expansion of the number of states with benefit corporation statutes is in large part due to the advocacy of B Lab and other proponents of the benefit corporation. *See id.* at 547.

39. *About B Lab*, BCORPORATION, https://www.bcorporation.net/what-are-b-corps/about-b-lab [https://perma.cc/U68G-79YL]; *State by State Status of Legislation*, BENEFITCORP., http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/GVX7-FHBF]. Delaware passed a benefit corporation statute that became effective on August 1, 2013. DEL. CODE ANN. tit. 8, §§ 361–68 (2013).

40. WILLIAM H. CLARK JR. ET AL., BENEFIT CORP, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 1 (Jan. 18, 2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/33N5-PFEF] [hereinafter CLARK ET AL., WHITE PAPER].

41. Lyman Johnson, *Law and the History of Corporate Responsibilities: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 975 (2013).

corporation."[42] Thus, benefit corporations are designed to have "a corporate purpose broader than maximizing shareholder value" and to be responsible for maximizing "the benefits of [their] operations for all stakeholders, not just shareholders."[43]

There are several important legal distinctions that make the benefit corporation form attractive to both investors and directors who seek to achieve a corporate purpose that goes beyond shareholder wealth maximization. Benefit corporation directors owe a fiduciary duty and are *legally obligated* to make decisions that generate both a profit and a positive social or environmental impact.[44] Accordingly, a business that is formed as a benefit corporation may be particularly attractive to certain investors and consumers. There is also an argument that directors of benefit corporations face a reduced risk of liability in the event of shareholder suits alleging that the company's management is prioritizing other considerations over profits. Most benefit corporation statutes provide that "the consideration of all stakeholders shall not constitute a violation of the general standards for directors, which requires good faith, the care of an ordinarily prudent person, and the consideration of the best interests of the corporation."[45]

Proponents of benefit corporations also argue that the model provides greater transparency of the board's decision-making process because the company must issue an annual benefit report that is available to the public and measures the public benefit against a third party standard that is "comprehensive, credible, independent and transparent."[46] This third party standard requirement has been described as an "essential" feature of the benefit corporation.[47] Some scholars have lauded the potential of the benefit reporting requirement for developing and maintaining good corporate governance practices.[48]

While there is much to be lauded in the benefit corporation movement, scholars have launched several criticisms against the benefit corporation. For example, several papers have argued that the accountability and transparency measures provide little comfort that

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42. MODEL BENEFIT CORP. LEGIS., § 102 (2016). Scholars have noted that the wording in section 102 of the legislation may invite much need clarification from the judiciary. *See* Murray, *The Social Enterprise Law Market*, *supra* note 37, at 567.

43. *See* MODEL BENEFIT CORP. LEGIS., § 101 cmt. (2016).

44. *See* CLARK ET AL., WHITE PAPER, *supra* note 40, at 16–17.

45. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 848 (2012).

46. *Id.* at 846.

47. *Id.* at 845.

48. *See* Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 961, 970 (2016).

benefit corporations will in fact achieve their lofty goals.[49] Others have argued that there may be potential unintended dangers with these new business entities. Scholars have noted that a potential drawback of the move toward benefit corporations is "the 'ghettoization' of corporate responsibility within benefit corporations" and other hybrid entities.[50] These scholars argue that there is a risk of "even less attention to such concerns in the traditional business corporation."[51] "The argument is that, by resting on the false premise that managers of traditional corporations must prioritize profits above all else, the benefit corporation form undermines efforts to convince *all* corporate managers that CSR-driven activities are consistent with their fiduciary duties."[52]

Overall, the U.K. move toward the ESV model and the U.S. move toward hybrid entities have generated both hopes about their success in transforming the goals of corporate entities and skepticism about whether the lofty goals surrounding these changes will be fulfilled. Many of the debates with respect to both the ESV model in the U.K. and the move toward hybrid entities in the U.S. echo the debates that have arisen with respect to India's experiment with corporate purpose.

II. TOWARD A NEW CORPORATE PURPOSE IN INDIA'S CORPORATE LAWS

Over the past decade, company and securities laws in India have undergone a major transformation. Starting with industry efforts in the late 1990s, there has been a vigorous focus on reforming corporate governance practices in India.[53] After the introduction of voluntary governance standards proposed by leading industry groups, both the Securities Exchange Board of India (SEBI)—the country's primary capital markets regulatory authority—and the Ministry of Corporate Affairs (MCA) sprang into action to undertake more mandatory reforms. These efforts culminated in comprehensive revision of India's primary corporate law—the Companies Act, 2013—as well as reform of the listing standards, which were later adopted as the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.[54]

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49. For an overview of the criticisms lodged against benefit corporations, see generally Murray, *The Social Enterprise Law Market*, *supra* note 37, at 548–51.

50. Johnson, *supra* note 41, at 975.

51. *Id.*

52. Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 800 (2015).

53. For an overview of India's corporate governance reform efforts, see AFRA AFSHARIPOUR, HANDBOOK ON CORPORATE GOVERNANCE IN INDIA: LEGAL STANDARDS AND BOARD PRACTICES 7–28 (2016) [hereinafter AFSHARIPOUR, HANDBOOK].

54. *See* Bala N. Balasubramanian, *Strengthening Corporate Governance in India: A Review of Legislative and Regulatory Initiatives in 2013* 2 (Indian Inst. Of Mgmt Bangalore Research Paper No. 447, 2014) (passage of the Companies Act, 2013 "is probably the single most important development

A. History: Ambiguity Between Shareholder and Stakeholder View Points

The history of India's approach to the corporate purpose debate has been described as "ambiguous at best."[55] This ambiguity is due in part to India's post-independence political engagement with socialism juxtaposed against the reality of corporate ownership of Indian firms.[56] As in many other countries, controlling shareholders dominate corporate India.[57] The Indian corporate landscape is characterized by groups of companies that are owned either by business families (i.e., the controlling shareholders or promoters)[58] or by the state.[59] This concentrated ownership structure has not changed despite years of significant economic and legal changes affecting businesses in India. For example, a recent study of ownership patterns for fifty large Indian firms found that ownership patterns "continue to be skewed toward controlling inside shareholders—a legacy of family-owned business ventures and state nationalization" and that "the trend seems to be moving *away* from outside share ownership."[60]

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in India's history of corporate legislation, next only to the monumental Companies Act 1956 which it replaces"); AFSHARIPOUR, HANDBOOK, *supra* note 53, at 22–28.

55. SARKAR & SARKAR, *supra* note 23, at 18. In earlier periods, such as the colonial period, Indian corporate law "was unequivocal in its zeal to protect shareholders so as to enable companies to attract capital." Varottil, *Evolution of Corporate Law*, *supra* note 11, at 312.

56. *See* Naniwadekar & Varottil, *supra* note 12, at 4; Varottil, *Evolution of Corporate Law*, *supra* note 11, at 312.

57. *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 563 (2016); N. Balasubramanian & R.V. Anand, *Ownership Trends in Corporate India 2001–2011: Evidence and Implications* (Indian Inst. of Mgmt, Bangalore, Working Paper No. 419, 2013).

58. The concept of "promoter" has specific legal significance in the Indian context. Promoters in India are typically controlling shareholders but can also be those instrumental in a public offering or those named in the prospectus as promoters. Section 2(69) of the Companies Act, 2013 defines a "promoter" as "a person who (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act." Section 2(27) of the Companies Act, 2013 defines control as "the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner."

59. For a listing of various studies regarding promoter shareholding in Indian companies, see Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NAT'L L. SCH. INDIA REV. 1, 18–20 [hereinafter Varottil, *A Cautionary Tale*]. Apart from absolute shareholding in Indian public companies, the control of promoters is emboldened through other mechanisms such as crossholding, pyramiding, and tunneling. *See* M. Bertrand, P. Mehta & S. Mullainathan, *Ferreting Out Tunneling: An Application to Indian Business Groups*, 117 Q.J. ECON. 126 (2002).

60. George S. Geis, *Shareholder Power in India*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, 592–610 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

Scholars have noted that "colonial law in India was unequivocal in its zeal to protect shareholders so as to enable companies to attract capital" and corporate law under the colonial period did not recognize nonshareholder interests.[61] Nevertheless, with India's post-independence move toward socialist policies, Indian corporate law began to recognize the interests of nonshareholder stakeholders, including employees and creditors.[62]

Corporate purpose in India moved toward a more shareholder-oriented approach in the first decade after economic liberalization. A somewhat ambiguous shareholder-oriented corporate purpose is reflected in the first significant corporate governance initiatives undertaken in India. For example, in 1998 the Confederation of Indian Industry (CII)—one of India's largest industry and business associations[63]—released its Voluntary Code of Corporate Governance (Desirable Corporate Governance: A Code) for listed companies. The CII Code states that the objective of good corporate governance is to maximize long-term shareholder value and to "limit the claimants to shareholders and various types of creditors."[64] Nevertheless, the CII Code does not fully ignore stakeholders and declares that "this objective follows from a premise that, in well performing capital and financial markets, whatever maximises shareholder value must necessarily maximise corporate prosperity, and best satisfy the claims of creditors, employees, shareholders, and the State."[65]

The focus on shareholders, with only a nod to stakeholders, continued in the early government-commissioned reports on corporate governance. Formed by SEBI in 1999 to help develop corporate governance standards for publicly listed companies, the Committee on Corporate Governance (the Birla Committee) issued a report that decidedly saw shareholder interests as the focus of corporate purpose.[66] According to the Birla Committee, shareholders "are the raison de etre for

61. Varottil, *Evolution of Corporate Law*, *supra* note 11, at 312.

62. *See id.* at 313–14.

63. CII, a non-government, not-for-profit, industry-led and industry-managed organization dominated by large public firms, has played an active role in the development of India's corporate governance norms. *See About Us*, CONFEDERATION OF INDIAN INDUSTRY, http://www.cii.in/About_Us.aspx?enc=ns9fJzmNKJnsoQCyKqUmaQ== [https://perma.cc/8Q7L-7QMY].

64. CONFEDERATION OF INDIAN INDUSTRY, DESIRABLE CORPORATE GOVERNANCE: A CODE (1998), http://www.nfcgindia.org/desirable_corporate_governance_cii.pdf [https://perma.cc/7WTA-WV5Z].

65. *Id.* at 1.

66. SHRI KUMAR MANGALAM BIRLA ET AL., THE SEC. & EXCH. BD. OF INDIA, REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE § 2.5 (1999), http://www.sebi.gov.in/commreport/corpgov.html [https://perma.cc/7WWL-5LVC] [hereinafter BIRLA REPORT].

corporate governance."[67] The committee did, however, exclaim that, while it viewed the goal of corporate governance to be the "enhancement of shareholder value," the company must "strike a balance at all times between the need to enhance shareholders' wealth whilst not in any way being detrimental to the interests of the other stakeholders in the company."[68]

Other reports in the 2000s similarly presented somewhat conflicting pronouncements regarding corporate purpose. With respect to the government-commissioned reports, scholars have criticized the lack of any significant effort to determine "who should qualify as a legitimate stakeholder" or to discuss "the relative weights to be assigned to the different stakeholders, or to specify, in the recommendations, mechanisms for 'equitable distribution' among the variety of stakeholders."[69] For example, SEBI's 2003 Murthy Committee focused on shareholders as the "true owners" of the corporation and stated that good corporate governance regimes display "a high degree of priority placed on the interests of shareholders."[70] Much like the Birla Committee, the Murthy Committee briefly touched upon the interests of stakeholders by stating that a corporation must be "fair and transparent to its stakeholders" and that, in being accountable to shareholders, boards must operate the company "for the benefit of society as a whole."[71] Neither the Birla nor the Murthy Committees clearly defined who encompassed stakeholders.

Despite some recognition of stakeholder interests from SEBI Committees, India's initial corporate governance reforms, enacted via Clause 49 of the Listing Agreement, were shareholder focused.[72] The focus on shareholders was not surprising given the vast shortcomings in

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67. BIRLA REPORT, *supra* note 66, at § 1.5.

68. *Id.* § 4.2; *see also id.* § 13.1 ("In the view of the Committee, the over-riding aim of management is to maximize shareholder value without being detrimental to the interests of other stakeholders.").

69. SARKAR & SARKAR, *supra* note 23, at 20.

70. N. R NARAYANA MURTHY ET AL., THE SEC. & EXCH. BD. OF INDIA, REPORT OF THE SEBI COMMITTEE ON CORPORATE GOVERNANCE §1.1.14 (2003), http://www.sebi.gov.in/commreport/corpgov.pdf [https://perma.cc/7QR9-7SPW] [hereinafter MURTHY REPORT].

71. *Id.* at § 1.1.

72. In 2000, SEBI introduced unprecedented corporate governance reforms via Clause 49 of the Listing Agreement of Stock Exchanges. The Listing Agreement with stock exchanges defines the rules and processes that companies must follow in order to remain listed companies on an Indian stock exchange. THE SEC. & EXCH. BD. OF INDIA, AMENDMENTS TO CLAUSE 49 OF THE LISTING AGREEMENT (Sept. 12, 2000) (reporting changes in response to Birla Report); THE SEC. & EXCH. BD. OF INDIA, CORPORATE GOVERNANCE IN LISTED COMPANIES: CLAUSE 49 OF THE LISTING AGREEMENT (Aug. 26, 2003). For an overview of Clause 49's initial reforms, see generally Afsharipour, *Corporate Governance Convergence*, *supra* note 11, at 378–84.

investor rights and disclosure in Indian corporate law prior to enactment of Clause 49.[73]

In addition to committees formed by SEBI, the MCA also formed several committees to address potential amendments of the Companies Act. Most significantly, in December 2004 the MCA convened the Irani Committee to evaluate the Companies Act with a focus on combining internationally accepted best practices in corporate governance with the particular needs of the growing Indian economy.[74] The Irani Committee expressed that the best approach to corporate governance in India would be to construct a single framework of governance provisions for all companies, requiring them to comply with a uniform set of rules.[75] The report of the Irani Committee made a few passing references to the interests of other stakeholders, but its focus was clearly on shareholders, with an emphasis on proposals to augment shareholder rights, especially the rights of minority shareholders.[76] The Irani report has been described as "business friendly" and is aimed at "attracting greater investment" into Indian firms.[77]

India began to more clearly move toward a stakeholder-oriented approach with debates over various versions of the Companies Bill that arose after the Satyam corporate scandal came to light in 2009.[78] A massive accounting fraud totaling more than $1 billion that involved one of India's then-leading technology companies as well as the Indian affiliate of leading accounting firm PricewaterhouseCoopers; the Satyam scandal has been billed as India's Enron.[79] The Satyam scandal served as a catalyst for the Indian government to rethink the corporate governance, disclosure, accountability, and enforcement mechanisms in place.[80] In a detailed account of corporate law in post-colonial India, Professor Umakanth Varottil notes that The Companies Bill, 2009 (2009 bill) was "shareholder-oriented, in that directors owed duties to carry on the

73. *See* Varottil, *A Cautionary Tale*, *supra* note 59, at 8–9.

74. JAMSHED J. IRANI ET AL., EXPERT COMM. ON CO. LAW, REPORT OF THE EXPERT COMMITTEE TO ADVISE THE GOVERNMENT ON THE NEW COMPANY LAW 3 (2005), http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf [https://perma.cc/L2UF-Y5QQ] [hereinafter IRANI REPORT].

75. *Id.* at 8–9.

76. *See id.* at 3, 23, 41–44.

77. Varottil, *Evolution of Corporate Law*, *supra* note 11, at 290.

78. For further details of the Satyam scandal, see AFSHARIPOUR, HANDBOOK, *supra* note 53, at 18–19.

79. *See* Vikramaditya Khanna, *Corporate Governance in India: Past, Present and Future?*, 1 JINDAL GLOB. L.R. 171, 188–89 (2009) (comparing Satyam with the U.S. Enron scandal).

80. *See* Omkar Goswami, *Aftermath Of Satyam*, BUSINESSWORLD (INDIA), Jan. 23, 2009; Prashant K. Sahu, Sapna Dogra & Aditi Phadnis, *Satyam Scam Prompts Clause 49 Review*, BUS. STANDARD, January 14, 2009; AFSHARIPOUR, HANDBOOK, *supra* note 53, at 20.

business of the company for the benefit of its members as a whole."[81] The 2009 bill made little reference to stakeholders other than a requirement for certain companies to have a Stakeholder Relationship Committee to "resolve the grievances of stakeholders" without defining who would qualify as a stakeholder.[82] The Parliamentary Standing Committee on Finance, which reviewed the 2009 bill in a detailed report, abandoned this shareholder-oriented approach.[83] The Standing Committee instead "insisted on a broader stakeholder approach to corporate law," perhaps to address political pressures and criticism of the corporate sector that had arisen after the Satyam scandal.[84] The Standing Committee's review also included a discussion of the extent of CSR being undertaken by Indian firms and the need for a comprehensive CSR policy.[85]

In addition to the viewpoints of the Standing Committee regarding CSR, the Indian government made other efforts to strengthen and encourage CSR activities by Indian businesses. For example, in late 2009, the MCA proposed the Corporate Social Responsibility Voluntary Guidelines, which promoted the stakeholder-oriented triple bottom line approach articulated in international CSR standards.[86] Moreover, in 2011, the MCA issued the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (ESG Guidelines) to establish concrete measures to be voluntarily adopted by companies to address interests of various stakeholders such as employees, customers, and the environment.[87]

Following the initial report of the Standing Committee, the resulting Companies Bill (2011) included substantial changes related to corporate governance matters, including a greater emphasis on stakeholders, as well as on CSR. Over the next several years, the MCA fluctuated between imposing mandatory CSR requirements into the Companies Bill and adopting CSR recommendations with a "comply-or-explain" approach,

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81. Varottil, *Evolution of Corporate Law*, *supra* note 11, at 289; *see also* Companies Bill, 2009, No. 59 § 147(2), INDIA CODE 2009 (India).

82. Companies Bill, 2009, No. 59 § 58(13), INDIA CODE 2009 (India).

83. *See* Standing Comm. on Fin., 15th Lok Sabha, The Companies Bill, 2009, 21st Report (Aug. 2010) [hereinafter Standing Comm. on Fin., 21st Report].

84. Varottil, *Evolution of Corporate Law*, *supra* note 11, at 289–91.

85. Standing Comm. on Fin., 21st Report, *supra* note 83, at 33, para. 49.

86. *See* Afsharipour & Rana, *supra* note 3, at 211. For further exploration of the triple bottom line concept, see generally JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1998); ANDREW W. SAVITZ & KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS-AND HOW YOU CAN TOO (2006).

87. GOV'T OF INDIA, MINISTRY OF CORP. AFFAIRS, NATIONAL VOLUNTARY GUIDELINES ON SOCIAL, ENVIRONMENTAL & ECONOMIC RESPONSIBILITIES OF BUSINESS, http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf [https://perma.cc/2CNG-Q5Q9] [hereinafter ESG GUIDELINES].

eventually settling on a compromise approach.[88] In part to address some of the concerns raised regarding the Companies Bill (2011) and the debates, which ensued following the Satyam scandal, in 2012 the MCA created the Godrej Committee to formulate a comprehensive policy framework with practical suggestions to guide corporate governance in India.[89]

The move toward a redefined corporate purpose was further strengthened by the pronouncement of the 2013 Godrej Committee.[90] The Godrej Report enumerated a set of recommendations and general principles that aimed to strengthen Indian corporate governance by having these recommendations eventually adopted into law.[91] The Godrej Report explicitly recognized that corporate purpose is not about shareholder wealth maximization, at least in the short term, stating the following:

> [I]t is now more explicitly accepted that the shareholders have responsibilities towards other stakeholders, and in particular the host communities within which the company operates. Failure to respect these obligations is likely to provoke negative interventions from government or negative market reactions in the long term. If the interests of all the relevant stakeholders are balanced, good corporate governance should maximize the shareholders' wealth and maintain the company's surrounding relationships. Therefore managers need to satisfy and balance the interests of a wider set of stakeholders, not simply the shareholders. Fair and balanced stakeholders' perspective results in long-term shareholder maximization value. Good corporate governance is the reconciliation of otherwise (possibly) diverging interests.[92]

Unlike prior government reports, the Godrej Report was more specific with respect to potential stakeholders, identifying "creditors, employees, and business partners, such as suppliers and the local

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88. *See* Standing Comm. on Fin., 15th Lok Sabha, The Companies Bill, 2011, 57th Report, at 14–15 (June 2012).

89. AFSHARIPOUR, HANDBOOK, *supra* note 53, at 21.

90. NAT'L FOUND. FOR CORP. GOVERNANCE, GODREJ COMMITTEE, REPORT OF THE COMMITTEE CONSTITUTED BY MCA TO FORMULATE A POLICY DOCUMENT ON CORPORATE GOVERNANCE, 1 (2012) http://www.nfcgindia.org/pdf/Guiding-Principles-of-CG.pdf [https://perma.cc/F7UX-ZG46] [hereinafter GODREJ REPORT].

91. *See* PTI, *Govt. Considering Godrej Panel Suggestions on Corporate Governance*, ECON. TIMES (Mar. 14, 2013, 6:40 PM), http://economictimes.indiatimes.com/news/economy/policy/govt-considering-godrej-panel-suggestions-on-corporate-governance/articleshow/18972047.cms [https://perma.cc/MR87-4PEX]; Press Release, Securities and Exchange Board of India, Consultative Paper on Review of Corporate Governance Norms in India (PR No. 4/13) (Jan. 4, 2013), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1357290354602.pdf [https://perma.cc/WSD5-LMCQ].

92. GODREJ REPORT, *supra* note 90, at 5.

community" as stakeholders.[93] The Godrej Report also argued for greater diversity in board composition to have a board that better addresses the perspective of a variety of stakeholders.[94]

B. Reexamining Corporate Purpose? The Companies Act, 2013 and SEBI's Listing Regulations

The process of reforming India's corporate and securities laws, particularly after the Satyam fiasco, involved significant debate about corporate power and the role of the corporation in Indian society. Moreover, there was a vigorous debate about the need for an explicit public/private partnership in pushing India toward greater economic development and equality.

After years of committee reports and discarded bills, the Companies Act, 2013 was finally passed in August 2013.[95] In line with the progression of earlier debates and reports—in particular reviews by the Standing Committee and the 2013 Godrej Report—the Companies Act no longer articulates shareholder wealth maximization principles. Instead, the Act envisions a significant cultural change for Indian firms, with a purpose that goes beyond shareholder wealth maximization. Arguably, firms in India are now a kind of "hybrid entity" that must be run for the benefit of shareholders while at the same time considering the best interests of the company's "employees, the shareholders, the community, and . . . the protection of [the] environment."[96]

Several provisions of the Act, when viewed together, eschew shareholder wealth maximization in favor of a balance between the interests of stakeholders and shareholders. These provisions include specific statutory articulation of the board's fiduciary duties, board responsibilities for CSR, enhanced disclosure and reporting requirements that extend beyond matters relevant to shareholder wealth, and, in some cases, board engagement with stakeholders beyond shareholders.

After passage of the 2013 Act, in 2015 SEBI amended its Listing Regulations.[97] The SEBI Listing Regulations reinforce the stakeholder viewpoint encompassed in the Act, particularly with respect to large companies.

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93. *Id.*

94. *Id.*

95. See AFSHARIPOUR, HANDBOOK, *supra* note 53, at 22, for details about passage of the Act.

96. *See* Companies Act, 2013, *supra* note 1, § 166.

97. SEC. & EXCH. BD. OF INDIA, SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015 (Sept. 2, 2015), http://www.sebi.gov.in/cms/sebi_data/pdffiles/32763_t.pdf [https://perma.cc/4FVP-3VUF] [hereinafter SEBI LISTING REGULATIONS].

1. Board Fiduciary Duties and Independent Director Responsibilities

Unlike the 1956 Companies Act, the 2013 Act articulates broader board responsibilities, including a sweeping provision codifying the duties of directors as well as a specific code of conduct for independent directors, which supplements the provisions on director duties and responsibilities.

Section 166 of the Companies Act, 2013 provides that directors must "act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."[98] In reviewing the legislative history of Section 166, scholars have argued that the language of the section was intentionally drafted "to cast a positive duty on directors, and was not merely an enabling provision."[99] Section 166 appears to imply that the company has a wide array of stakeholders, including employees, shareholders, the community, and the environment.

Section 166's broad vision of directors' duties to stakeholders is reinforced in the Act's Code for Independent Directors. The Code provides that independent directors must "safeguard the interests of all stakeholders, . . . [and] balance the conflicting interest of the stakeholders."[100] Independent directors are charged with assisting in "protecting the legitimate interests of the company, its shareholders and its employees."[101] One of the challenges with both provisions is that there remains vagueness as to the definition of stakeholders. Moreover, there has been little guidance on how directors should go about balancing the conflicting interests of stakeholders and how such balancing must work when there are conflicts between shareholder and other stakeholder interests.[102]

2. The Companies Act's CSR Provisions

One of the most significant provisions of the Companies Act, 2013 is Section 135, which imposes a requirement for companies to have a CSR committee and adopt a "comply-or-explain" approach toward mandatory CSR spending along with mandatory CSR reporting.[103] The reach of the CSR clause is expected to be vast, with some experts estimating that at

98. *See* Companies Act, 2013, *supra* note 1, § 166. There is still debate as to whether Section 166 clearly imposes two duties of good faith, one to act in good faith to promote the objects of the company for the benefit of its members and a separate duty on directors to act in good faith in the best interests of stakeholders. *See* Naniwadekar & Varottil, *supra* note 12, at 10.

99. *See* Naniwadekar & Varottil, *supra* note 12, at 9.

100. *See* Companies Act, *supra* note 1, sch. IV, II(5)–II(6).

101. *See* Companies Act, *supra* note 1, sch. IV, III(12).

102. *See* Khanna & Varottil, *supra* note 3, at 26–27.

103. *See* Afsharipour & Rana, *supra* note 3, at 218–22.

least 6,000 Indian companies will be required to comply with the CSR provisions of the Companies Act.[104]

More specifically, Section 135 of the Act establishes that companies with (1) a net worth of Rupees 500 crore or more (approx. $81 million), (2) turnover of Rupees 1,000 crore or more (approx. $162 million), or (3) net profit of Rupees 5 crore or more (approx. $811,400) during any financial year must have a board-level CSR committee, with three or more directors (one of them an independent director), to create and implement a CSR policy.[105] Such companies must spend 2% of their average profit in the previous three years on CSR activities or explain their failure to do so.[106] If a company does not have adequate profit or is not in a position to spend the prescribed amount on CSR, the regulation requires the directors to provide a disclosure and give suitable reasons in their annual report.[107] The Companies Act also includes a detailed schedule of CSR activities that companies "may" undertake.[108] In addition, the final rules adopted by the MCA to implement Section 135 of the Act both define the term "CSR" and expand the scope of permissible CSR activities.[109] The final rules provide significant limitations regarding what counts as CSR, excluding the following from CSR activities and expenditures: (1) expenditures incurred in undertaking normal course of business; (2) CSR activities undertaken outside of India; (3) projects, programs, or activities meant exclusively for employees and their families; and (4) direct or indirect contributions to any political party.[110]

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104. *See* CONFEDERATION OF INDIAN INDUS., HANDBOOK ON CORPORATE SOCIAL RESPONSIBILITY IN INDIA 5 (2013), http://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf [https://perma.cc/M39E-364J]; *see also* ERNST & YOUNG, CORPORATE SOCIAL RESPONSIBILITY ADVISORY 2 (Jan 8, 2013), http://www.ey.com/Publication/vwLUAssets/EY-Corporate-social-responsibility-advisory/$FILE/EY-Corporate-social-responsibility-advisory.pdf [https://perma.cc/6LR8-MJXF] (estimating that the law would cover over 2,500 companies in India, including the top 100 companies across sectors). Other reports indicate that given the low profitability threshold in the Act, the CSR requirements may apply to about 8,000 companies in India. INSTITUTIONAL INV'R ADVISORY SERVS., CORPORATE SOCIAL RESPONSIBILITY: REVIEW OF CURRENT POLICIES, PRACTICES AND DISCLOSURES 13 (Mar. 2014), http://iias.in/downloads/IiAS_CSR_Report.pdf [https://perma.cc/38NZ-P9W6] [hereinafter CORPORATE SOCIAL RESPONSIBILITY: REVIEW].

105. Companies Act, 2013, *supra* note 1, § 135. Section 135 was operationalized through the Corporate Social Responsibility (CSR) Policy Rules, which were introduced at the Companies Act through an amendment dated February 27th, 2014. Notification G.S.R. 129(E), GOV'T OF INDIA, MINISTRY OF CORP. AFFAIRS, Feb. 27, 2014.

106. Companies Act, 2013, *supra* note 1, § 135.

107. *Id.*

108. Companies Act, 2013, *supra* note 1, § 135, sch. VII.

109. *See* GOV'T OF INDIA, MINISTRY OF CORP. AFFAIRS, THE COMPANIES (CORPORATE SOCIAL RESPONSIBILITY POLICY) RULES, 2014, r. 5(1) (Feb. 27, 2014).

110. *See id.* at r. 4.

3. Board's Stakeholder Relationship Committee

Under both the Companies Act and the SEBI Listing Regulations, certain Indian firms must have a stakeholder relationship committee. Under Section 178(5) of the Companies Act, a company that has more than one thousand shareholders, bond-holders, deposit-holders, and other security holders must have a stakeholder relationship committee as part of the board.[111] Under the Act, the stakeholder relationship committee is charged with considering and resolving grievances from financial stakeholders only; no mention is made of other stakeholders.[112] Similarly, SEBI also requires listed entities to have a stakeholder relationship committee to "consider and resolve the grievances of the security holders of the listed entity including complaints related to transfer of shares, non-receipt of annual report and non-receipt of declared dividends."[113]

With respect to both the Companies Act and the SEBI Listing Regulations, the constituency of stakeholders identified in the legislation causes some ambiguity as to who the stakeholders are. Despite the use of the term "stakeholders," the definition of stakeholders with respect to this committee is quite limited and only includes financial stakeholders.[114] Other sections of the Act and the SEBI Listing Regulations, however, imply a very broad set of stakeholders.[115] Large companies in India have seized upon the narrow definition of stakeholders in the Act and have charged their stakeholder relationship committees with only reviewing and redressing shareholder and investor grievances.[116]

4. SEBI Listing Regulations: Reinforcing a Broader Corporate Purpose

In November 2014, SEBI announced that it intended to convert the Listing Agreement into the SEBI (Listing Obligations and Disclosure Requirements) Regulations to provide a comprehensive framework

111. Companies Act, 2013, *supra* note 1, § 178(5).

112. *See* Companies Act, 2013, *supra* note 1, § 178(6) (providing that the stakeholder relationship committee is charged with considering and resolving the grievances of security holders of the company).

113. SEBI LISTING REGULATIONS, *supra* note 97, sch. II, part D(B).

114. *See* Companies Act, 2013, *supra* note 1, § 178(6).

115. *See, e.g.*, Companies Act, 2013, *supra* note 1, § 166.

116. *See, e.g.*, INFOSYS LTD., CORPORATE GOVERNANCE REPORT 2015–2016, https://www.infosys.com/investors/reports-filings/annual-report/annual/Documents/AR-2016/corporate-governance-report.html [https://perma.cc/U492-S5EH] ("We have a Board-level stakeholders relationship committee to examine and redress complaints by shareholders and investors."); THE TATA POWER CO. LTD., REPORT ON CORPORATE GOVERNANCE 2015–2016, https://www.tatapower.com/aboutus/corporate-governance.aspx [https://perma.cc/4L8T-F79T]("The responsibilities of the SRC *inter alia* include: Review of statutory compliance relating to all security holders; Resolving the grievances of all security holders of the Company; Overseeing and reviewing of all matters related to the transfer of securities and movement in shareholding and ownership of the Company.").

governing listed securities with the intent "to consolidate and streamline the provisions of existing Listing Agreements, thereby ensuring better enforceability."[117]

In addition to shareholder rights, the SEBI Listing Regulations recognize a role for stakeholders in corporate governance, stating that:

> (i) The listed entity shall respect the rights of stakeholders that are established by law or through mutual agreements.
>
> (ii) Stakeholders shall have the opportunity to obtain effective redress for violation of their rights.
>
> (iii) Stakeholders shall have access to relevant, sufficient and reliable information on a timely and regular basis to enable them to participate in corporate governance process.
>
> (iv) The listed entity shall devise an effective whistle blower mechanism enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.[118]

The SEBI Listing Regulations also address stakeholder concerns by detailing the accountability of the board of directors and the company's disclosure obligations. The regulations provide that

> [t]he board of directors and senior management shall conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture of good decision-making. . . . [and,] [t]he board of directors shall maintain high ethical standards and shall take into account the interests of stakeholders.[119]

The SEBI Listing Regulations also include significant additional reporting obligations for large entities. The top 100 listed entities must file a business responsibility report describing the initiatives taken by them from an environmental, social, and governance perspective.[120]

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117. Press Release, Securities and Exchange Board of India, SEBI Board Meeting (PR No. 130/2014) (Nov. 19, 2014), http://www.sebi.gov.in/sebiweb/home/detail/29593/yes/PR-SEBI-Board-Meeting [https://perma.cc/6Y9C-NMPG]; *see also* Press Release, Securities and Exchange Board of India, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (PR No. 226/2015) (Sept. 3, 2015), http://www.sebi.gov.in/sebiweb/home/detail/31894/yes/PRSEBI-ListingObligations-and-Disclosure-Requirements-Regulations-2015-Listing-Regulations [https://perma.cc/EW4L-M745].

118. SEBI LISTING REGULATIONS, *supra* note 97, at Reg. 4.2(d).

119. *Id.* at Reg. 4.2(f).

120. *Id.* at Reg. 34.2.

5. Changes in Disclosure Policy and Practices

An important element of the Companies Act and the SEBI Listing Regulations is the move toward significant additional disclosures to be provided by the company and the board. Experts have stated that "transparency with self-reporting and disclosure is the foundation of [the] new Companies Act, 2013."[121] Section 134 of the Companies Act outlines a long list of details that must be included in annual reports by the board of directors.[122] For example, Section 134(6)(o) requires that board reports include "the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year."[123] With respect to CSR, the Companies Act requires that the board of the company must, after taking into account the recommendations made by the CSR committee, approve the CSR policy for the company, disclose its contents in the board report, and publish the details on the company's official website.[124] In addition, directors must issue a responsibility statement with significant information on internal and financial controls, including whether they "had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively."[125]

Presently, it is not clear whether the extensive disclosure requirements of the Act and the SEBI Listing Regulations will achieve their stated goal. Per a 2016 study by Deloitte, many companies have failed to include some of the disclosures required by the Act.[126] It is also still too soon to determine whether stakeholders will use the disclosures given by companies to pressure for greater accountability in corporate practices.

Nevertheless, disclosure can be a useful tool for non-government organizations, employees, and other stakeholder groups, who hope to hold the firm responsible to stakeholders beyond shareholders. Disclosure can also be used by institutional players, such as proxy advisory firms, which

121. ERNST & YOUNG, INDIA INC. COMPANIES ACT, 2013 (Sept. 2, 2013), http://www.ey.com/Publication/vwLUAssets/India_Inc_Companies_Act_2013/$File/India_Inc_Companies_Act_2013.pdf [https://perma.cc/U275-VN4Z].

122. Companies Act, 2013, *supra* note 1, § 134(3).

123. Companies Act, 2013, *supra* note 1, § 134(3)(o).

124. Companies Act, 2013, *supra* note 1, § 135(5)(f).

125. Companies Act, 2013, *supra* note 1, § 134(5).

126. *See* DELOITTE, INSIGHTS INTO ANNUAL REPORTS FY2015 (March 2016), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/in-risk-insights-into-annual-reports-noexp%20FY2015.pdf [https://perma.cc/6853-XMEA]; *see also Indian Firms' Disclosure in Annual Reports Just a Tick in the Box: Deloitte*, HINDU (May 24, 2016), http://www.thehindu.com/news/cities/mumbai/business/indian-firms-disclosure-in-annual-reports-just-a-tick-in-the-box-deloitte/article8639123.ece [https://perma.cc/XC3U-9ZLK].

have recently gained some prominence in India.[127] There are several very active proxy advisory firms in India, which not only analyze corporate proposals and provide voting recommendations but also focus on corporate governance trends in general, including matters related to CSR.[128] Other analysts can also use the more robust disclosure regime to ensure greater accountability for corporate boards.[129] One potentially useful institution that can be a powerful agent for furthering the legislative moves in India would be an independent and unbiased third party entity, such as B Lab, to create assessment and analytical tools to help boards better assess their company's impact on various stakeholders.[130]

III. EVALUATING INDIA'S NEW CORPORATE PURPOSE FRAMEWORK

While India has moved toward redefining corporate purpose with a stakeholder approach, whether this move will be effectively implemented is subject to many questions. This section addresses some of the questions that arise with respect to India's legislative reforms, including definitional problems with the law itself, issues with potential enforcement, and challenges related to the closed ownership structure of Indian firms. Despite these challenges, there is hope that stakeholders can utilize the tools offered by the new legislation to nudge Indian boards toward a stakeholder approach.

A. Who are the Stakeholders and What Should Directors Do to Balance the Interests of Various Stakeholders?

Several challenges with India's new approach to corporate purpose begin with the law itself. One of the concerns with the legislative changes is that there remains much confusion in both the Companies Act and the SEBI Listing Regulations with respect to the language and mandates placed in legislation. A second concern with the legislation is a more fundamental concern that a more diffuse duty as espoused in the Act may make directors' fiduciary duty of little value.

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127. *See* Umakanth Varottil, *The Advent of Shareholder Activism in India*, 1 J. ON GOVERNANCE 582, 602–03 (2012).

128. *See, e.g.*, CORPORATE SOCIAL RESPONSIBILITY: REVIEW, *supra* note 104.

129. Lijee Philip & Kausik Datta, *Analysts Go Beyond Numbers to Take on Promoters: Will Corporates Learn to Live with Criticism?*, ECON. TIMES (Aug. 21, 2012, 6:00 AM), http://economictimes.indiatimes.com/news/company/corporate-trends/analysts-go-beyond-numbers-to-take-on-promoters-will-corporates-learn-to-live-with-criticism/articleshow/15578933.cms [https://perma.cc/2PKU-KZ43].

130. *About B Lab*, *supra* note 39; *State by State Status of Legislation*, *supra* note 39; Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 30, 2014), http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefitcorporation/#88b39b36ea31.

The language of stakeholder duties in the Act and the SEBI Listing Regulations fails to make clear the universe of potential stakeholders. While Section 166 appears to indicate a broad universe of stakeholders, one could read the provisions of the Code for Independent Directors as envisioning a narrower group of stakeholders limited to employees and minority shareholders.[131] But, Section 166 envisions the community and the environment as stakeholders, so are future generations affected by corporate activity stakeholders?

There is also a significant lack of clarity and specific standards for directors charged with balancing the conflicting "interests" of stakeholders.[132] Board members may rightly ask if "interests" are broader than "rights" and if so, how does a board go about identifying "interests" of stakeholders? Both the Act and the SEBI Listing Regulations are also vague as to how directors should weigh the interests of varying groups of stakeholders. In terms of "balancing" these competing interests, how does a board develop a consistent method to measure and balance these interests? In measuring stakeholder interests, how does a board measure the value of other forms of life that are present in the environment and affected by the activities of a firm? How does the board balance its responsibilities when there are conflicts between the interests of different stakeholders? The lack of guidance regarding how directors should go about considering the interests of stakeholders is in contrast with the clearer ESV approach in the U.K. where directors must "prioritize" the interests of shareholders above other stakeholders.[133]

A more fundamental concern with the stakeholder-oriented model espoused in the Act and SEBI Listing Regulations is the overly permissive or deferential nature of this model. If the board is accountable to everyone, could it then not be accountable to anyone? Scholars have raised the concern that the broad wording of Section 166 of the Act provides "directors with substantial (and somewhat untrammeled) discretion" that would allow them "to foster their own self-interest, and leave them with little accountability to anyone."[134]

The criticisms about the universe of stakeholders and the lack of guidance the law provides to directors in making corporate decisions or to courts evaluating board actions mirrors criticisms levied against the benefit corporation model in the U.S. Corporate law experts in the U.S.

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131. *Compare* Companies Act, 2013, *supra* note 1, § 166, *with* Companies Act, 2013, *supra* schs. IV, III(12).

132. My gratitude to Mr. Nawshir Mirza for thoughtful discussions regarding these points.

133. *See* BRUNER, *supra* note 32, at 34.

134. Naniwadekar & Varottil, *supra* note 12, at 19–20.

have criticized various aspects of the benefit corporation form.[135] Criticism of the benefit corporation form includes concerns that "the 'general public benefit' concept is too vague, provides insufficient guidance to directors when they face zero-sum games, and should be supplemented to require the prioritization of the interests, or at least the identification of the benefit corporation's primary interest."[136] Others have expressed concern that the broad discretion afforded to directors by benefit corporation statutes may allow directors to favor their own interests.[137]

Given the relative youth of the benefit corporation model and India's recent move toward a stakeholder-oriented purpose, debates about these models and whether they will be successful will undoubtedly continue.

B. Enforcement Challenges

With respect to many legal reforms, particularly in the realm of corporate law, India has faced significant problems with enforcement and implementation. For example, in enforcing the vast corporate governance reforms contemplated by Clause 49, SEBI fell short, and compliance inadequacies were rampant, particularly for companies where the government was the controlling shareholder.[138] Further, courts in India have not played a significant role in the enforcement of modern corporate law.[139] Remedies for shareholders, such as derivative actions, have not played any real role in enforcing directors' fiduciary duties.[140] Moreover, litigation in India is notoriously delayed; it takes a significant amount of time, approximately fifteen years, for final resolution of a case.[141] According to some reports at the end of 2013, more than 31 million cases were pending in various courts, all the way up to the Supreme Court.[142] By some calculations, "[i]f the nation's judges attacked their backlog

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135. *See generally* Michael B. Dorff, *Why Public Benefit Corporations?* 42 DEL. J. CORP. L. (forthcoming 2017) (chronicling the various critiques against the benefit corporation form).

136. Murray, *The Social Enterprise Law Market*, *supra* note 37, at 549.

137. *See* Dana Brakman Reiser, *Benefit Corporations: A Sustainable Form of Organization?*, 26 WAKE FOREST L. REV. 591, 598–600 (2011).

138. *See* Afsharipour, *Corporate Governance Convergence*, *supra* note 11, at 388–90.

139. *See* Varottil, *Evolution of Corporate Law*, *supra* note 11, at 318–19.

140. *See* Vikramaditya Khanna & Umakanth Varottil, *The Rarity of Derivative Actions in India: Reasons and Consequences*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 380 (Dan W. Puchniak et al. eds., 2012) (finding that "over the last sixty years only about ten derivative actions have reached the high courts or the Supreme Court. Of these, only three were allowed to be pursued by shareholders, and others were dismissed on various grounds").

141. *See id.*

142. *See id.* at 319.

nonstop—with no breaks for eating or sleeping—and closed 100 cases every hour, it would take more than 35 years to catch up."[143]

In addition to weaknesses in regulatory and judicial enforcement, the Companies Act as it stands provides little opportunity for nonshareholder stakeholders to bring an enforcement action to protect their interests. For example, there appears to be little opportunity for stakeholders to find a remedy in the courts for director violations of the board's duty to consider the interests of stakeholders under Section 166 of the Companies Act.[144] While the Companies Act contemplated the establishment of a National Company Law Tribunal to address corporate law disputes, including a newly introduced class action remedy, a close reading of the statute suggests that "the class action remedy is unavailable to stakeholders in ensuring the enforcement of directors' duties of which they are the ultimate beneficiaries."[145]

The lack of enforcement remedies for stakeholders under the Companies Act mirrors the lack of specific remedies for nonshareholders in both the U.K. and the U.S. models. In the U.K., even under the ESV model, directors' duties are owed only to the company, and stakeholders cannot seek remedies against directors.[146] In the U.S. benefit corporation form, only shareholders, and not the other stakeholders, may bring a benefit enforcement proceeding.[147]

Other sections of the Companies Act relating to stakeholder interests, such as the CSR provision, similarly suffer from enforcement weaknesses. Under the law, the penalties for companies that fail to report and spend adequately on CSR activities are rather minimal. For companies that fail to spend 2% of their profits on CSR activities, Section 135 of the Act does not contemplate any enforcement.[148] There is potential enforcement of the failure to adequately report on CSR activities under Section 134(8) of the Act.[149] However, the enforcement process is only in the early stages because the CSR requirement only came into effect for financial year

143. Tom Lasseter, *India's Stagnant Courts Resist Reform*, BLOOMBERG BUS.WEEK (Jan. 8, 2015), http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases [https://perma.cc/XQK9-BW9N].

144. *See* Naniwadekar & Varottil, *supra* note 12, at 15.

145. *See id.* at 16.

146. *See id.* at 15.

147. *See* Murray, *The Social Enterprise Law Market*, *supra* note 37, at 550.

148. *See* Afsharipour & Rana, *supra* note 3, at 226.

149. Companies Act, 2013, *supra* note 1, § 134(8), suggests that a company which neither invests in CSR Activities nor provides the required disclosure will be subject to a fine of not less than Rs. 50,000 but which may extend to Rs. 25,00,000, and every officer of the company who is in default may be punishable with imprisonment for a term which may extend to three years or with fine which may not be less than Rs. 50,000 but which may extend to Rs. 5,00,000 or with both.

2014–2015.[150] In addition, a 2015 report of a committee formed by the MCA suggested that "leniency may be shown against the companies for non-compliance in [the] initial two/three years to enable them to graduate to a culture of compliance. This is being recommended because [the] initial three years will be a period of learning for all the stakeholders."[151] Moreover, the MCA has publicly stated that "the main thrust and spirit of the law is not to monitor but generate a conductive environment for enabling the corporates to conduct themselves in a socially responsible manner."[152]

Whether the MCA's vision for creating an atmosphere of greater social responsibility will come to fruition will depend in part on the quality of the CSR reporting done by companies. Proponents of the CSR provisions of the Companies Act argue that this type of CSR disclosure can "enable dissemination of information to society about the value generated by the company's activities and will facilitate monitoring."[153] With respect to benefit corporations in the U.S., proponents similarly argue that the requirements of the benefit corporation form increase transparency through the requirement of annual benefit reports.[154] Moreover, some scholars have argued that annual benefit reporting serves a potentially powerful function that would allow for boards and the entity to reflect upon the purpose of the company and the decision-making processes undertaken.[155] With respect to CSR reporting by Indian firms, it may be still too early to have a definitive view as to the value of these reports, although a recent study has found that early reports do not provide much specific information to stakeholders.[156]

Despite the lack of effective enforcement or legal remedies for stakeholders, there is also a possibility that the amended duties and

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150. *See* Rajat Arora & Deepshikha Sikarwar, *100 Companies Get Government Notice to CSR Spend*, ECON. TIMES (July 16, 2016, 3:41 AM), http://economictimes.indiatimes.com/news/company/corporate-trends/100-companies-get-government-notice-on-csr-spend/articleshow/53234608.cms [https://perma.cc/U32C-K6G9].

151. GOV'T OF INDIA, MINISTRY OF CORP. AFFAIRS, REPORT OF HIGH LEVEL COMMITTEE 28 (Sept. 2015), http://mca.gov.in/Ministry/pdf/HLC_report_05102015.pdf [https://perma.cc/UMR8-MF27].

152. GOV'T OF INDIA, MINISTRY OF CORP. AFFAIRS, GENERAL CIRCULAR NO. 01/2016: FREQUENTLY ASKED QUESTIONS WITH REGARD TO CORPORATE SOCIAL RESPONSIBILITY UNDER SECTION 135 OF THE COMPANIES ACT, 2013 (2016), http://www.mca.gov.in/Ministry/pdf/FAQ_CSR.pdf [https://perma.cc/FQ96-7XXL].

153. Gopalan & Kamalnath, *supra* note 10, at 103. Other authors have argued that the current "statutory requirements involving benefit reports are extremely vague, susceptible to white- and green-washing, and generally lack an express enforcement mechanism for punishing benefit corporations that do not provide the reports." Murray, *The Social Enterprise Law Market*, *supra* note 37, at 551.

154. *See* Murray, *The Social Enterprise Law Market*, *supra* note 37, at 550.

155. *See* Ball, *supra* note 48, at 966–67.

156. *See* Gopalan & Kamalnath, *supra* note 10, at 95.

responsibilities espoused in the Companies Act will affect board function and decision-making. Many boards consider reputational and relationship issues significant even without the threat of a lawsuit. Formal judicial enforcement is not the sole method that can be used by various stakeholders. Around the world companies have developed deep relationships with various stakeholders and have engaged significantly with the interests of their stakeholders.[157] It may be that the broadened fiduciary duties of directors under the Companies Act may propel Indian boards and stakeholders to approach each other in new and innovative ways.

C. The Continuing Dominance of Promoters and Its Implications for Corporate Purpose

An important question about the efficacy of India's redefined corporate purpose is whether a broad mandate to consider and balance the interests of all stakeholders is possible in a system where firms are primarily dominated by controlling shareholders of business families or the state. Given the broadly worded provisions of the Act, which give much discretion to the board, this concern is particularly acute because even independent directors in India often view their position with an allegiance to the controlling shareholder.[158] Thus, directors could, within their discretion, place a priority on the interests of promoters over other shareholders or stakeholders.

Even if directors want to take into consideration the interests of nonshareholders, the entire system of director nomination and election in India is subject to the voting power of controlling shareholders. Under the Act, as well as under the SEBI Listing Regulations, publicly listed companies must have a nomination and remuneration committee (the NRC), which is to consist of three or more non-executive directors out of which not less than one half must be independent directors.[159] The chairperson of the company, whether an executive or non-executive director, may be appointed as a member of the NRC but is not permitted

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157. *See* GLOB. CORP. GOVERNANCE FORUM & INT'L FIN. CORP., STAKEHOLDER ENGAGEMENT AND THE BOARD: INTEGRATING BEST GOVERNANCE PRACTICES 1–2 (2009), http://documents.worldbank.org/curated/pt/791711468330347261/pdf/629800WP0Stake00 Box0361496B0PUBLIC0.pdf [https://perma.cc/6LKL-PP8J].

158. *See* Vikramaditya Khanna & Shaun J. Mathew, *The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence*, 22 NAT'L L. SCH. OF INDIA REV. 35, 37–38 (2010).

159. Companies Act, 2013, *supra* note 1, § 178; SEBI LISTING REGULATIONS, *supra* note 97, at Reg. 19.

to chair the committee.[160] While the NRC must be composed of a majority independent directors, experts have argued that the committee might be compelled to function in the shadow of an ultimate shareholder decision (with controlling shareholder influence).[161] The regulatory framework in India does not prohibit controlling shareholders from being on the NRC. While such shareholder presence on the NRC could potentially provide an opportunity for controlling shareholders to ensure that the NRC adheres to best practices, it may also mean that directors will feel an allegiance to the controlling shareholder and may be reluctant to oppose any corporate actions proposed by such shareholder. Moreover, controlling shareholders may also deliberately work to pack the board with people whose skill sets do not match the company requirements so that they are not able to question the management in an effective manner.

Despite concerns with the controlling shareholder model, there are arguments that a broader corporate purpose and controlling shareholder dominance may not be at odds. Scholars have argued that companies with controlling shareholders may be better at protecting the interests of stakeholders as they are motivated by the long-term interests of the company more so than widely held firms with short-term shareholders.[162] Examples abound of very successful controlled firms with broad stakeholder engagement; most famously, the Tata Group in India which is world renowned for its commitment to the community and other stakeholders.[163] Further, some scholars have argued that it is possible that the incentives of controlling shareholders are better tied with the interests of the company.[164]

CONCLUSION

India has undertaken a vast experiment with corporate purpose, one whose outcome is, at best, unclear. Overall, the reforms under the

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160. Companies Act, 2013, *supra* note 1, § 178(1); SEBI LISTING REGULATIONS, *supra* note 97, at Regs. 19(1), (2).

161. The Companies Act requires companies to have a nomination committee composed of a majority of independent directors. Companies Act, 2013, *supra* note 1, § 178; *see also* Khanna & Mathew, *supra* note 158, at 64 (stating that the effectiveness of nominating committees "received mixed reactions" with some directors articulating the continuing influence of promoters in the selection process).

162. *See* Albert H. Choi, *Costs and Benefits of Concentrated Ownership and Control* (Va. L. & Econ. Research Paper No. 19, 2016); *see also* COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT 208–12 (2013) (advocating for greater shareholder voting rights for long-term shareholders). *But see* Jessie Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554, 1560 (2015).

163. *See* MAYER, *supra* note 162, at 195–97.

164. *See, e.g.*, Ronald Gilson and Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119 (2015).

Companies Act and the SEBI Listing Regulations suggest (although they do not guarantee) that India intends to transform corporate purpose beyond the ESV model adopted in the U.K. Moreover, unlike the U.S. move to allow for benefit corporations, India's transformation of corporate purpose does not apply to a mere subset of entities, but instead contemplates an overhaul of corporate vision in Indian firms. Nevertheless, there is reason to doubt that the specific legal provisions provided by the Companies Act and the SEBI Listing Regulations will in fact lead to substantive "structural change" given the various forces and institutions that may stand in the way of redefining the purpose of the Indian firm.[165]

There is much potential in India's model toward redefining the purpose of the corporation beyond shareholder wealth maximization. India's move toward a pluralistic model that recognizes stakeholder interests is a powerful vision that has the potential to significantly transform corporate and board practices in India and beyond. Whether this transformation will take place depends on the will of the various stakeholders involved, including boards, shareholders, employees, and civil society organizations, as well as on institutional players such as proxy advisory firms and independent and unbiased third parties that can help facilitate and support the board in achieving the broader purpose envisioned by India's reforms.

165. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 275 (1994) (stating that "[l]egal change alone might not lead to structural change" in long-standing ownership and governance structures given economic, political, and institutional forces that favor the status quo).