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From Corporate Responsibility to Corporate Accountability

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I. INTRODUCTION

The concept of corporate responsibility or corporate social responsibility ("CSR") keeps evolving since it appeared. The emphasis was first placed on business people's social conscience rather than on the company itself, which was well reflected by Howard Bowen's landmark book, *Social Responsibilities of the Businessman*.[1] Then CSR was defined as responsibilities to society, which extends beyond economic and legal obligations by corporations.[2] Since then, corporate responsibility is thought to begin where the law ends.[3] In other words, the concept of social responsibility largely excludes legal obedience from the concept of social responsibility. An analysis of 37 of the most used definitions of CSR also shows "voluntary" as one of the most common dimensions.[4] Put differently, corporate responsibility reflects the belief that corporations have duties beyond generating profits for their shareholders. Such responsibilities include: the negative duty to refrain from causing harm to the environment, individuals and communities; as well as positive duties to actively engage in activities to improve society and environment, for example, protecting human rights of workers and communities affected by business activities.

Although corporate accountability is sometimes used interchangeably with corporate responsibility, the concept of corporate accountability is not synonymous with corporate responsibility. Corporate responsibility is

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1. HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 7 (1953).

2. *See, e.g.,* JOSEPH W. MCGUIRE, BUSINESS AND SOCIETY 144 (1963).

3. Keith Davis, *The Case For and Against Business Assumption of Social Responsibilities*, 16 ACAD. MGMT. J. 312, 313 (1973); Marcel V. Marrewijk & Marco Werre, *Multiple Levels of Corporate Sustainability: Between Agency and Communication*, 44 J. BUS. ETHICS 107, 107-119 (2003).

4. Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESPONSIB. ENVIRON. MGMT. 1-13 (2008).

focusing on voluntary approaches to engage with social/environmental issues,[5] while corporate accountability is more about the confrontational or enforceable framework of influencing corporate behaviour.[6] Corporate accountability focuses more on establishing institutional mechanisms that hold companies accountable rather than merely urging companies to act toward a socially desirable end voluntarily.[7] In this regard, corporate accountability could be understood as corporate control—the ability of those affected by a corporation to control the corporate behaviour. Despite the controversial argument which claims that companies should be controlled by society, today's public companies, especially those large ones with enormous social impact, can hardly be seen as entirely private concerns.[8] In effect, shareholders have lost much of its *de jure* or *de facto* control in many jurisdictions due to the development of modern corporate law as well as the separation between ownership and control.[9]

On the ground that voluntary CSR is inadequate to deliver the necessary change and to secure more socially responsible activities, corporate accountability will continue to grow. Accordingly, pressure exerted by social and governmental actors beyond the company itself will influence corporate behaviour. Such actors can adopt a wide range of strategies, including, but not limited to, the mobilisation of legal mechanisms through reward and punishment to enforce social standards.

This paper will, therefore, propose a framework for corporate accountability that focuses on implementing, rather than introducing, rights and duties for companies. Accountability could be referred to as "the perception of defending or justifying one's conduct to an audience that has reward or sanction authority, and where rewards or sanctions are perceived to be contingent upon audience evaluation of such conduct."[10] In order to build an enforceable framework for corporate accountability against a wider society, it is essential to establish more precise means for sanctioning failure amounts to the fundamental element of corporate control. Unlike the neoclassical version of corporate accountability (i.e., companies should be

5. Davis, *supra* note 3, at 107.

6. For example, in international relations and public administration literatures, accountability is about questioning, directing, sanctioning, or constraining others' actions. *See* Kate Macdonald, *The Meaning and Purposes of Transnational Accountability*, 73 AUSTL. J. PUB. ADMIN. 426, 428 (2014).

7. *See* Carmen Valor, *Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability*, 110 BUS. & SOC. REV. 191, 196 (2005).

8. *See*, *e.g.*, JOHN PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 22 (1993) (noting that it is well argued that these large companies are no longer private organisations because they have the ability to exercise social decision-making power).

9. *See*, *e.g.*, MIN YAN, BEYOND SHAREHOLDER WEALTH MAXIMISATION 10 (2018).

10. Danielle Beu & M. Ronald Buckley, *The Hypothesized Relationship between Accountability and Ethical Behaviour*, 34 J. BUS. ETHICS 57, 61 (2001).

accountable only to shareholders),[11] actors other than shareholders can sanction corporate results based on the existing institutional framework if the concept of corporate accountability can be adopted. One typical example is where market participants are able to sanction or constrain corporate behaviour through market mechanisms. However, due to the inadequacy of market forces, or failure of the market, as will be discussed in the next section, multilayers of disciplines are required for a workable corporate accountability framework. In particular, the law's ability to frame such an accountability framework becomes extremely important.

Studies have already provided abundant empirical evidence on the significant role of different stakeholders on CSR-related activities.[12] This paper will, as a result, focus on how the primary stakeholder groups, whose continuing participation is essential to the survival of the company as a going concern,[13] can enforce and ensure corporate accountability through the law under the existing institutional framework. It is important to note that this paper mainly focuses on irresponsible corporate behaviour that does not necessarily breach the mandatory law.

The remainder of the paper is organised as follows. Section II critically discusses how market discipline ensures corporate accountability. Section III examines how the primary stakeholder groups, including shareholders, employees, customers, suppliers, community, and creditors, can potentially employ the existing legal mechanisms[14] to ensure corporate accountability even when a company's conduct remains in compliance with the law. Section IV then discusses regulations in general, serving as side constraint, and improving the bottom line for corporate behaviour. Section V provides some concluding remarks at the end.

II. MARKET MECHANISM

The contemporary CSR with an essentially voluntary nature has intellectual roots in neoliberal economics. Neoliberalism as a new economic orthodoxy advocates: "new forms of political-economic governance

11. Shareholders are neither the sole residual claimant nor the sole residual risk taker. *See*, *e.g.*, Min Yan, *Agency Theory Re-examined: An Agency Relationship and Residual Claimant Perspective*, 26 INT'L COMPANY AND COMMERCIAL L. REV. 139, 140 (2015).

12. *See*, *e.g.*, Jedrzej George Frynas & Camila Yamahaki, *Corporate Social Responsibility: Review and Roadmap of Theoretical Perspectives*, 25 BUS. ETHICS: A EUROPEAN REV. 258, 266 (2016).

13. Max B.E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92, 106 (1995) (noting that although there are different categories of primary stakeholder groups, it generally includes shareholders, employees, customers, suppliers, the community, the government, and the environment).

14. For example, using competition law, corporate law, insolence law, contract law, and tort law as a binding force to hold companies accountable.

premised on the extension of market relationships[.]"[15] Free markets are consequently treated as the best way to ensure the most efficient allocation of resources, hence the maximization of wealth and welfare. [16] Unsurprisingly, corporate control by a society under neoliberalism can only occur through the market; namely, only the market can sanction non-compliance or failures.

Market forces include product market discipline, capital market discipline, and labour market discipline, which are also used under the conventional corporate responsibility framework to justify or incentivise companies to behave responsibly. The assumption is that the product, capital, and labour markets will influence corporate behaviour by penalizing poor performers (i.e., social irresponsibility) and rewarding good ones (i.e., social responsibility).

First, in the product market, or say consumer market, consumer boycotts are the most visible and acute means of product market response.[17] A more generalized form of product market response is ethical purchase behaviour, namely, to purchase products according to the manufacturer's reputation for socially responsible conduct. A positive reputation may encourage consumers to decide to purchase, while a negative reputation would likely make consumers avoid the product. Empirical studies show that increasing numbers of consumers are prepared to spend more on ethical goods.[18] Second, investors in the capital market could also *prima facie* affect corporate behaviour via investment policy.[19] The rapid growth of socially responsible investment ("SRI") funds are a good example that reflects how the capital market could ensure accountability. For instance, by the end of 2017, the market size of SRI in the U.S. was over $12.0 trillion, a quarter of all investments under professional management in the U.S.[20] Investors take

15. Wendy Larner, *Neo-liberalism, Policy, Ideology, Governmentality*, 63 STUDIES IN POLITICAL ECONOMY 5, 5 (2000).

16. *See* PADDY IRELAND & RENGINEE G. PILLAY, CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE 85 (Peter Utting et al. eds., 2010).

17. See N. Craig Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability*, 10 J. BUS. ETHICS 881 (1991).

18. *See, e.g.*, ANDREW CRANE & DIRK MATTEN, BUSINESS ETHICS: A EUROPEAN PERSPECTIVE: MANAGING CORPORATE CITIZENSHIP AND SUSTAINABILITY IN THE AGE OF GLOBALIZATION (3d ed. 2003); *see also* Marylyn Carrigan, Isabelle Szmigin & Joanne Wright, *Shopping for a Better World? An Interpretive Study of the Potential for Ethical Consumption within the Older Market*, 21 JOURNAL OF CONSUMER MARKETING 401, 401-17 (2004).

19. *See* Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value*, 44 JOURNAL OF CORPORATION LAW 205 (2019).

20. *See Report on US Sustainable, Responsible and Impact Investing Trends*, The Forum for Sustainable and Responsible Investment, 2018, https://www.ussif.org/trends; *see also* Adam Connaker & Saadia Madsbjerg, *The State of Socially Responsible Investing*, HARV. BUS. REV., Jan. 17, 2019, https://hbr.org/2019/01/the-state-of-socially-responsible-investing.

social (and environmental) performance into consideration and divest in socially irresponsible companies, which in turn creates adverse effects on the share price. Third, companies in the labour market with poor reputations will find it more difficult or costly to recruit and retain employees, while images of responsible companies will have a positive impact on employees' morale and productivity.

A company is, to a large extent, an economic entity. This determines it has to survive in the market first of all. Different markets could accordingly affect and discipline corporate behaviour. However, one should not overlook the weakness of market discipline. For the product market, ethical considerations may easily be outweighed by conventional product attributes, such as quality, value for money, and service.[21] Meanwhile, the scope of issues attracting high levels of consumer interest is limited.[22] Empirical evidence further suggests that consumers are selectively ethical.[23] Sometimes there could be a boycott against products made by irresponsible firms, but such momentum is normally difficult to sustain. For those non-consumer-oriented companies (i.e., not selling directly into consumer markets and hence, not brand sensitive) or those with monopolistic powers, the disciplinary pressure from the product market is also understandably inadequate.

In the capital market, ethical investment and SRI funds remain small compared to the size of the entire equity market. More importantly, there will always be socially-neutral buyers for shares in companies that ethical funds reject, which implies that their share price and cost of capital will be unaffected by the irresponsibility.[24] The crucial question is whether institutional investors would be ready to permit or encourage their investee companies to work on their social performance if it were to the companies'

21. *See* Roger Cowe & Simon William, *Who are the Ethical Consumers?*, THE CO-OPERATIVE BANK, 2000, at 2.

22. For example, child labour, sweatshops, genetically modified organism and environmental issues are more likely to attract consumers' attention, but consumers may be insensitive to some wider employment issues, such as gender equality, due to their very nature. In other words, some ethical concerns are to a lesser degree expressed in consumers' buying behaviour. Moreover, although there was a high awareness of high-profile companies' socially irresponsible behaviours, awareness was generally low in relation to ethical behaviours. *See, e.g.*, *id*. at 11-12.

23. Marylyn Carrigan and Ahmad Attalla, *The Myth of the Ethical Consumer: Do Ethics Matter in Purchase Behaviour*? 18 JOURNAL OF CONSUMER MARKETING 560-577 (2001) (arguing that consumers' purchase behaviour is not always influenced by their social criteria). There is also empirical evidence showing that social responsibility was not an important consideration in consumers' purchasing behaviours. *See id.* at 565.

24. *See* EDWARD S. HERMAN, CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY 269 (1981); Brest, Gilson & Wolfson, *supra* note 19, at 14 ("[A]ny premium in the valuation of shares that results from socially-motivated investors clamoring to own them presents an opportunity for socially-neutral bargain-hunters to profit from selling shares that overprices.").

financial detriment. The collective action problem and conflicts of interest would inevitably lead to a general reluctance of institutional investors to intervene in their investee companies' internal affairs, though they are encouraged to be more actively involved.

It is argued that "[leaving] corporate control in the hands of the market is a political decision that could be reversed, and should be reversed when evidence shows that markets are not successfully changing corporate practices."[25] In short, markets can discipline corporate behaviour to some degree but not always sufficiently,[26] hence, other disciplinary mechanisms are urgently needed to ensure corporate accountability.

III. LEGAL MECHANISM

Law has an important role to play in restraining corporate behaviour through its reward and sanction system. In fact, many CSR-related issues concerning the environment, health, and safety, are already regulated by the law.[27] The challenge here is how to use legal mechanisms to make companies accountable even when they do not violate the existing law and how primary stakeholder groups could enforce accountability.

The first part of this section discusses tort law, which bears a close connection to corporate responsibility and explores the possibility for victims of irresponsible corporate behaviour to use tort law as a weapon against the wrongdoer. The second part discusses the potential of competition law to be used by customers and other market participants, such as competitors holding companies accountable for their behaviour. The third part examines the role of contract law in ensuring accountability by transforming voluntary commitments into enforceable obligations, such as in a supply chain. This part also explores whether employees and other relevant third parties could use contract law to enforce a company's voluntary CSR commitments. The fourth part discusses how companies can provide both shareholders and non-shareholding stakeholders opportunities to affect corporate accountability. Last but not least, the fifth part focuses on both voluntary and involuntary creditors, including tort victims using insolvency law to hold companies accountable for their behaviour.

25. Carmen Valor, *Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability*, 110 BUS. & SOC. REV. 191, 201 (2005).

26. Companies are, as a result, "likely to fulfill their responsibility in a minimalist and fragmented fashion." Peter Utting et al. eds., *Visible Hands: Taking Responsibility for Social Development,* UNRISD Report for Geneva 90 (2000). Moreover, empirical evidence also shows "good" companies do not necessarily prosper and "bad" companies do not necessarily lose out. *See id*. at 70.

27. JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY LIMITATIONS AND OPPORTUNITY IN INTERNATIONAL LAW 34 (James Crawford et al. eds., 2006).

A. TORT LAW

CSR-related issues, such as safety and health protection for workers and environmental protection, bear a close connection to tort law.[28] When Eilbert and Parket attempted to define CSR, they argued the best way to understand social responsibility is to think of it as "good neighbourliness."[29] This concept involves two phases. First, it means not doing things that spoil the neighbourhood. Second, it can be expressed as the voluntary assumption of the obligation to help solve neighbourhood problems.[30] In this regard, the neighbour principle in tort law is helpful in ensuring corporate accountability across the industry.

Lord Atkin famously said in *Donoghue v. Stevenson* that "the rule that you are to love your neighbour becomes in law . . . You must take reasonable care to avoid acts or omissions *which you can reasonably foresee would be likely to injure your neighbour* . . ."[31] Regarding corporate behaviour, it could undoubtedly affect our society in many different ways, so a company should take reasonable care to avoid acts or omissions which it can reasonably foresee would be likely to injure any part of the society. This is not inconsistent with Waddock's view, which is that "companies need to assume responsibility for the impacts of their practices and processes and the decision that stands behind those practices[.]"[32]

It would be easier to hold companies accountable for their behaviour by adopting the tools of tort law. A company will have a duty to change its behaviour or adopt preventative measures if a reasonable person would have foreseen acts that would affect other parties (i.e., the likelihood of injury). If the company fails to do so, which in turn causes any harm to other members of the society, then the victims or their representatives would be allowed to sue the company for damages.

Tort law can be relied upon to provide extra help to victims even though there is no physical or legal proximity between the alleged companies and the victims. Especially in the context of group companies, a parent company can be held liable for harm caused to the employees of its subsidiaries, despite the principle of corporate separate personality. In other words, a subsidiary company's employee who is a tort victim, can possibly claim that the parent company owes a duty of care to her and thereby seek recourse

28. *See* ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY Chains 164 (Janet Dine et al. eds., 2015).

29. Henry Eilbert & I. Robert Parket, *The Current Status of Corporate Social Responsibility*, 16 BUS. HORIZONS 4, 7 (1973).

30. *See id*. at 7.

31. Donoghue v. Stevenson [1932] A.C. 562, 580 (U.K.) (emphasis added).

32. SANDRA WADDOCK, LEADING CORPORATE CITIZENS 219 (1st ed. 2002).

through tort law remedies.[33] For multinational companies, it becomes possible for local victims of unsound safety and health policies, environmental pollution, and human right infringement, to consider litigation abroad in the state of the parent companies.[34]

One good example is the innovative use of the U.S. Alien Tort Statute ("ATS").[35] This statute is used to hold companies accountable for their breaches of duties of human rights protection, environmental protection, or employees' welfare. It allows a non-U.S. citizen to sue a company, which commits a wrong to the person based on treaties under international law or norms under international customary law.[36] Since domestic law may include treaties and norms under international customary law, the U.S. gains jurisdiction to hear a wide range of tort law cases.[37] As a result, multinational companies may have direct liability to certain victims under ATS. However, after a recent case, *Kiobel v. Royal Dutch Petroleum Co*,[38] the U.S. Supreme Court curbs the universal jurisdiction by requiring tort claims to touch and concern U.S. territory. When these claims do not, the ATS remains a viable alternative to redress for tort victims.

Tort law in other jurisdictions can also potentially work as a weapon for victims of human rights infringement or environmental pollution. Besides general tort law doctrines, such as negligence, special forms of tort regulation may help reduce the evidential burden for victims. Take product liability, a unique form of tort, for example. Under Part I of the U.K. Consumer Protection Act of 1987, traders may be subject to strict liability whereby aggrieved consumers can sue traders producing faulty products without needing to prove manufacturer negligence.

In short, due to the duty of care companies owe to the general public to avoid causing them harm, victims of irresponsible corporate behaviour could choose to turn to tort law to hold such companies accountable.

33. *See, e.g.*, Chandler v. Cape plc, [2012] E.W.C.A. Civ 525 (explaining that a party company may owe a duty of care to its employees and its subsidiaries, despite subsidiaries being separate legal persons, where it failed to provide a secure work environment to employees exposed to asbestos).

34. *See* LIESBETH ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND: EXPLORING THE ROLE OF TORT LAW IN PROMOTING INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY AND ACCOUNTABILITY 44 (A.G. Castermans et al., eds., 2012).

35. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

36. Liesbeth Enneking, *The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case,* 10 UTRECHT L. REV. 44 (2014).

37. *See* Erenest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after Kiobel,* 64 DUKE L.J. 1023, 1049 (2015).

38. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

B. COMPETITION AND UNFAIR COMMERCIAL PRACTICES

The main objective of competition law at a macro-level is to protect the freedom of consumers to make informed choices and maintain free-market competition. In addition to antitrust rules, there are also rules governing unfair commercial practices to protect customers from detrimental effects, such as unfair competition at a micro-level.[39]

The U.S. case *Kasky v. Nike*[40] discussed below is an excellent example of how competition law can be used to hold companies that conduct unfair commercial practices accountable. Nike had been actively writing press releases, sending letters to newspapers, athletic directors, and university administrations, since the early 1990s, claiming that workers in Nike factories were well treated. In 1997, an employee of Nike leaked a confidential audit prepared by Ernest and Young about Nike's sweatshop and labour practices in Southeast Asia.[41] The leaked audit showed that Nike's statements in these press releases and letters were either false or misleading. In 1998, Marc Kasky, an activist in California, brought a lawsuit against Nike for unfair and deceptive practices (i.e., issuing false or misleading statements to the people of California); specifically, the lawsuit alleged Nike violated labour practices under California's Unfair Competition Law and False Advertising Law.[42] The case was finally settled out of court, with Nike paying $1.5 million to the Fair Labor Association.[43]

It is clear from *Nike* that voluntary CSR reports and codes of conduct may have legal repercussions. Put it differently, companies can continue to

39. On the macro-level, the competition law strives to maintain fair competition among competitors so that efficient firms are chosen by the customers and, at the same time, the social welfare that arises from the competition, is maximised. On the micro-level, it aims to guarantee that customers can obtain a fair share of such maximisation of overall social welfare; a dominant seller in the market may, therefore, have a special responsibility to not abuse its position at the expense of customers' welfare. *See* BERT KEIRSBILCK, THE NEW EUROPEAN LAW OF UNFAIR COMMERCIAL PRACTICES AND COMPETITION LAW 540 (2011). The latter part of the law bears close connection to intellectual property ("IP") law. As in many cases, unfair commercial practices may involve infringement of IP rights. *See also* DAMIEN GERADIN, ANNE LAYNE-FARRAR & NICOLAS PETIT, EU COMPETITION LAW AND ECONOMICS 20-22 (1st ed. 2012).

40. Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002) [hereinafter *Nike*].

41. The audit stated that workers in the Nike factory were exposed to toxic chemicals without protection, subjected to physical, verbal and sexual abuse, forced to work illegal excess overtime without proper pay, and suffered from poor ventilation and lack of drinking water. Most people in the factories were women under the age of 24. *See id.* at 947.

42. California consumer-protection law that allows one person to sue a company on behalf of all the people of California for consumer-protection violations. CAL. BUS. & PROF. CODE § 17535 (2019). *Id.* at 962.

43. The settlement also involved investments by Nike to strengthen workplace monitoring and factory worker programmes. *See* Lisa Girion, *Nike Settles Lawsuit Over Labor Claims,* L.A. TIMES (Sept. 13, 2003), https://www.latimes.com/archives/la-xpm-2003-sep-13-fi-nike13-story.html.

tell their stories, but they need to be more careful that what they say is accurate. Businesses will find that they may also be held legally liable for their voluntary disclosure (among other voluntary initiatives). Any voluntary declarations or disclosures may turn out to have legal implications.[44]

Apart from public enforcement,[45] private parties can lodge complaints as an indirect means to initiate an investigation of anti-competitive activities, unfair commercial practices, or initiate litigation to claim a breach of contract in terms of an infringement of competition law.[46] For example, a market participant can claim compensation by initiating a petition under articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") against companies who abuse their market position in a national court.[47] Consumers and competitors can also choose to complain to relevant national competition authorities or the European Commission to seek remedies under the E.U. antitrust law, for example.

In the U.K., the introduction of the Consumer Protection from Unfair Trading Regulations ("CPUT") [48] was a response to the E.U. Unfair Commercial Practices Directive ("UCPD")[49]. When customers believe that they are the victims of unfair commercial practices conducted by traders, they can sue the traders based on a new amendment of CPUT; i.e., § 1(3) of the Consumer Protection (Amendment) Regulations of 2014.[50] For example, when a company fails to keep its word that it promised in its code of conduct, its behaviour may amount to a misleading action under regulation 5(3)(b) of CPUT.

Accordingly, consumers, who have contracts with traders, are able to sue traders and require a full or partial repayment of the price of goods and/or services; provided that traders are or ought to have been aware of their misleading behaviours, that are likely to change the average consumers decisions regarding whether to buy products from the traders.[51] Unless

44. Anna Beckers, *Legalization Under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes*, 24, IND. J. GLOBAL LEGAL STUD., 15, 23 (2017) (providing a related example here: the E.U. Consumer Sales Directive Article 2(d) imposes a duty on sellers of goods whereby they need to comply with public statements with regard to the characteristics of their goods).

45. Given the nature of the anti-competitive practices, public enforcement by public authorities are frequently the main solution to deal with competition law cases. DAMIEN GERADIN, ANNE LAYNE-FARRAR & NICOLAS PETIT, EU COMPETITION LAW AND ECONOMICS 322, 324-27 (1st ed. 2012).

46. *See* JOHN FAIRHURST, LAW OF THE EUROPEAN UNION 754 (10th ed. 2014).

47. MICHAEL.J. FRESE, SANCTIONS IN EU COMPETITION LAW: PRINCIPLES AND PRACTICE 4 (2012). The author points out that public bodies may also commence public enforcement through a European competition network within the E.U. *Id.* at 15. Similarly, article 11 of the E.U. Directive on Unfair Commercial Practices opens the door for both administrative enforcement and private law solutions. *Id*.

48. Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 (U.K.).

49. Unfair Commercial Practices Directive 2005, SI 2005/29/EC.

50. The Consumer Protection (Amendment) Regulations 2014, SI 2014/870 (U.K.).

51. *Id*. at Part 4A.

consumers would like to claim damages arising from inconvenience or certain financial expenses at more than the value of the products, consumers have nearly no burden to prove trader faults, such as dishonesty, negligence, or their losses.[52] The strict liabilities imposed on the traders would have a far-reaching impact regarding their promises to the public.[53] Therefore, regulations such as CPUT can offer consumers an edge that is not otherwise available under traditional common law.

The UCPD regulates communication between companies and customers.[54] It is worth noting that communication-related responsibilities may also be a part of CSRs, as companies frequently prescribe beyond-law responsibilities like human rights, environment, and consumer protection in their codes of conduct. Apart from the reputation damage caused by breaching of these promises, in some cases, companies are also legally liable to customers for misleading communication. Therefore, for those traditionally voluntary duties provided by companies' codes of conduct, which are implemented and made available to the public, consumers can potentially sue companies for their breach if the codes materially influence the consumers' transactional behaviours. In other words, failure to keep these promises in certain situations may amount to misleading communication.

C. CONTRACT LAW

Following the idea behind the foregoing competition law control, another viable mechanism to ensure accountability is to transform voluntary commitments into legally enforceable obligation. For example, a company could increasingly include CSR commitments into the terms and conditions in contracts with their suppliers to formalize CSR commitments as legal obligations.[55] It is also possible to require external suppliers to adopt CSR codes of conduct via legal mechanisms, such as procurement contracts, to ensure accountability.

Of course, other contractual techniques could also be used to make CSR enforceable, such as perpetual clauses. Through a perpetual clause, one party

52. *Id*. at Part 4A(27J).

53. *See Misleading and Aggressive Commercial Practices: New Private Rights For Consumers*, Department for Business, Energy & Industrial Strategy, 10 (2018).

54. Anna Beckers, *The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms,* 54 COMMON MARKET L. REV. 475, 481-83 (2017).

55. *See* DOREEN MCBARNET, AURORA VOICULESCU & TOM CAMPBELL, THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (2007); *see also* ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW 48 (Hugh Collins et al., eds. 2015).

may require another to impose duties on the latter's suppliers to meet the same standards or terms so that the same clause will bind all upstream or downstream parties.[56] However, the success of this mechanism depends on the bargaining power.

Promises made by companies in codes of conduct may add economic value to each company through fostering mutual trust and long-term relationships, which is a reasonable justification for companies to keep their own words. Failure to comply may not only result in unfair commercial practices, as explained earlier but misrepresentation, as well.[57] Also, equitable doctrines, such as promissory estoppel, could further stop companies from reneging on their promises. For instance, suppliers and employees may be committed to deliver high-quality goods or services to companies and make firm-specific investments based on companies' CSR commitments. Stakeholders who detrimentally rely upon a company's words deserve more protection and may have a claim against the company.[58]

It is also worth noting that many jurisdictions allow third parties to enforce contract terms even if they are not a party.[59] Contract law could potentially give contracting parties at both the domestic and international level the power to provide third parties enforceable rights.[60] This power overrides the limitation brought by the privity of contract and potentially enables third parties to monitor the implementation of CSR-related promises made by companies.

A good attempt is in *Doe v. Wal-Mart Stores, Inc.*, where the defendant Wal-Mart wrote a code of conduct into its contract with suppliers that required suppliers to comply with all relevant employee protection standards and improve their work environment.[61] Later, it turned out that Wal-Mart disregarded its promises and continued to purchase goods from suppliers who did not meet these standards.[62] The question was whether overseas workers, who claimed themselves to be third-party beneficiaries, were entitled to sue Wal-Mart with recourse through contract law.[63] Under the U.S. Restatement (Second) of Contracts, the promise should flow from promisor

56. *See*, *e.g.*, Paul Verbruggen, *Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts*, 35 RECHT DER WERKELIJKHEID 79, 89 (2014).

57. *See* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake*, 52 U. CHI. L. REV. 903, 925, 928 (1985).

58. *See* Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 78 (1996).

59. *See* Contracts (Rights of Third Parties) Act 1999 (c. 31).

60. *See* Paul Verbruggen, *Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts*, 35 RECHT DER WERKELIJKHEID 79, 90 (2014).

61. Jane Doe I v. Wal-Mart Stores, Inc., 2007 WL 5975664 (C.D. Cal. Mar. 30, 2007) (unreported).

62. *See id*. at 1-2.

63. *See id*. at 3.

A to the third-party beneficiary rather than from promisee B to the third-party.[64] In this case, without sufficient evidence to show Wal-Mart made a contractually-binding promise to workers, the lawyers of overseas workers argued that it was the intent of promisee, i.e., suppliers, to protect overseas workers' interest.[65] Although the court did not support this argument,[66] its potential cannot be dismissed.

D. CORPORATE LAW

Directors' duty may be required by corporate law to not only focus on shareholder interests but also broader social and environmental issues when making corporate decisions.[67] If directors' fiduciary duties to a company could be redefined in a way to cover the interests of various stakeholders, then a more accountable decision-making process can be expected. For example, the U.K. Companies Act of 2006 mandates directors to regard stakeholders' interests, including employees, communities, and others, when promoting the long-term interests of the company. Currently, stakeholders other than shareholders do not have a say in internal corporate governance systems[68] or external litigation processes (e.g., directive actions). Setting out a list of specific factors requiring consideration can at least "expand the grounds for judicial review of directors' decision-making[.]"[69]

Shareholders could, of course, engage through proposals and their voting power. They could file CSR-related shareholder proposals at annual general meetings, which would constitute a formal and visible signal of shareholders' discontent about a specific social or environmental issue.[70] Such visible signals may be consistent with the logic behind SRI funds, which is driven by financial concerns—associated with traditional shareholders' interests—or by investors' social and environmental moral

64. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

65. Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (2009).

66. *Id*.

67. The distinction between the shareholder interests and wider society's interests is important as conflicts are sometimes inevitable. *See*, *e.g.*, Min Yan, *The Corporate Objective Revisited: Part II*, 38 BUS. L. REV. 55, 60 (2017).

68. For example, a possible solution to further increase corporate accountability to society is to allow representatives of main stakeholder groups to sit in the board meetings.

69. GEOFFREY MORSE, PALMER'S COMPANY LAW ¶ 8.2613 (2019); *see also* Jingchen Zhao, *Promoting More Socially Responsible Corporations Through a Corporate Law Regulatory Framework*, 37 LEGAL STUDIES 103 (2017).

70. *See* Parthiban David, M. Bloom & Amy J. Hillman, Investor Activism, *Managerial Responsiveness, and Corporate Social Performance*, 28 STRATEGIC MGMT. JOURNAL 91 (2007); Erin M. Reid, and Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 STRATEGIC MGMT. JOURNAL 1157 (2009).

principles.[71] However, shareholder activism could be both positive and negative. It is not uncommon for activist shareholders to use the same strategies to press directors to push share prices, even at the expense of other corporate constituents.

In addition to the role played by directors and shareholders, sufficient, reliable, and timely information disclosure can also be employed under the company law to ensure accountability.[72] Information disclosure can be utilised as a part of company law mechanism to all relevant stakeholder groups as to how the company has performed. Take the revised U.K. Companies Act of 2006, for example. The new Chapter 4A of Part 12, in replacing § 417 "Directors' Report," requires directors of a company to prepare a "Strategic Report," including information relating to environmental matters and employee matters.[73] Further details about societal, community, and human rights issues, as well as the effectiveness of any company policies concerning those matters, is required to be disclosed in cases of listed companies.[74]

Although reporting itself does not prescribe a change in the underlying corporate behaviour and force corporations to be more accountable, it can strengthen the market forces. As Schwartz and Carroll pointed out, "[for] there to be real accountability, [a] business must engage in a process of providing sufficient, accurate, timely, and verifiable disclosure of all of its activities (e.g., through auditing and reporting) when such activities might affect others."[75] Apart from stimulating and strengthening public pressure on corporations to improve their social and environmental performance, the so-called "greenwashing" or "window-dressing risk" can also be mitigated by increased transparency and comprehensive information because customers and other members of the society could more easily assess and compare corporate social performance.[76] A clearly defined mandatory CSR reporting framework would at least prevent corporations from providing selective information or solely concentrating on positive aspects.[77] Such a framework

71. *See* Maria L. Goranova and Lori V. Ryan, *Shareholder Activism: A Multidisciplinary Review*, 40 JOURNAL OF MANAGEMENT 1230-1268 (2014); Yan, *supra* note 9, at 98-109.

72. *See*, *e.g.*, Min Yan, *Corporate Social Responsibility vs. Shareholder Value Maximization: Through the Lens of Hard and Soft Law*, 40 NW. J. INT'L L. & BUS (2019). Sufficient, reliable, and timely information disclosure may be regulated by securities law in some countries.

73. U.K. Companies Act 2006 §§ 414A, 414C.

74. *Id*. at § 414C.

75. Mark S. Schwartz & Archie B. Carroll, *Integrating and Unifying Competing and Complementary Frameworks: The Search for a Common Core in the Business and Society Field*, 47 BUS. & SOC'Y 148, 171 (2008).

76. *See* Yan, *supra* note 72.

77. Apparently, mandatorily required reporting may be more effective in ensuring the corporate accountability, but it should be equally borne in mind that disclosure cannot guarantee the success of non-

could also help to establish an atmosphere for businesses to pay more attention to their impact on the environment, society, and other issues. After establishing such a reporting framework, directors and managers with better information about the effects of their corporate activities might then voluntarily adopt higher standards.[78]

E. INSOLVENCY LAW

Multiple values and public policies need to be weighed upon for a meta-law, such as insolvency law. A company's responsibility to society also plays an important role in the insolvency law context.[79] Non-shareholding stakeholders can use insolvency law to protect their interests and hold companies accountable for their behaviour. It is the main objective for insolvency laws to pursue various values, including preserving jobs, protecting stakeholders other than creditors, and protecting local community interests.[80]

To begin, creditors can protect themselves by initiating a creditors' voluntary winding-up procedure or applying to courts to initiate a compulsory winding-up procedure. A positive account of insolvency law provides that it distributes losses incurred from debtors' default by considering creditors' respective abilities to bear losses and risks.[81] The

mandatory initiatives.

78. John Parkinson, *Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame*, 3 J. CORP. L. STUD. 3, 32 (2003).

79. For example, certain banks are said to be too big to fail as their failure may give rise to systemic risks to the whole state or beyond. *See* Kinga Bauer & Joanna Krasodomska, *Social Responsibility of Organizations: Directions of Changes*, 387 PUBL'G HOUSE OF WROCŁAW U. OF ECON. 11, 26 (2015).

80. *See* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 153, 577 (1998) (noting that some insolvency law scholars, who are called "traditionalists," believe that economic value is not the only value that insolvency law should pursue; they believe other stakeholders' interests should also be respected); *see also* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 764 (1991).

81. For example, certain employees, besides managers, do not have access to financial information of the company so they have difficulties in predicting the risks of the company where they are working. The employees also suffer severe hardship when they lose their jobs and, as a result, their incomes. Furthermore, employees are not experts in shielding their risks, and rarely do they have more than one job to spread out the risk of a layoff. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777, 790 (1987). Further, Korobkin argued that the reason why companies internalize employees is to reduce the cost, as employees may accept a remuneration lower than market value. They may expect other informal benefits from the company, such as a promotion. When a company is wound up, the direct effect to the employees, among other things, is their reliance on savings and that it is difficult for them to immediately find another job. Bankruptcy law was described as "dirty complex elastic and interconnected policies." Donald R. Korobkin, *Employee Interests in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 5, 12 (1996); *see also* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 766 (1991).

availability of the right to make a petition to liquidate a company gives creditors, and other possible parties, leverage to protect themselves.

Tort victims and employees, among other voluntary and non-voluntary creditors, will equally participate in the framework of negotiating whether certain protective mechanisms—not limited to absolute priority, cross-class cram-down mechanism, and fair and equitable doctrine—are ignored or misused by liquidators and administrators.[82] In other words, when mulling over a reorganisation plan, creditors can protect their rights by fastening the consciences of administrators and liquidators, who, in turn, investigate the business conduct of the insolvent companies. Furthermore, insolvency law makes companies accountable to tort creditors, who are either employees or victims of faulty products or pollution. Though those contingent creditors' debts will mature and due in the future, their debts are still recognised by insolvency proceedings.[83] For instance, in a famous mass tort case, the Johns-Manville Corporation had to file a U.S. bankruptcy proceeding due to its significant tort liabilities arising from exposing its employees to asbestos.[84] The court appointed a legal representative for victims who had yet to be identified and asked the company to set up a trust fund to settle future potential claims.[85]

Stakeholders are also passively protected by miscellaneous tools under insolvency law. In the U.K., for example, corporate reorganization proceedings require administrators, who are the officers of courts, to rescue a company to protect a broad range of stakeholders.[86] It is clear that the priority of administration is to rescue the insolvent companies themselves, as opposed to the interests of some secured creditors; only when this goal cannot be achieved, administrators may consider other objectives, such as achieving a better result than winding-up for all creditors.[87] Another important aspect of the reform of insolvency law was that insolvency law ring-fenced a prescribed portion of assets of a debtor on behalf of unsecured creditors. As a result, assets subject to floating charges are available to unsecured creditors to the extent arranged by this "prescribed part requirement." This means that secured floating charge holders have to give up a percentage of debtor companies' assets for the sake of a wide range of unsecured creditors. Insolvency law also provides certain weak categories of

82. *See* Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L.J. 229 (1990).

83. *See* Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1443 (2004).

84. In re Johns-Manville Corp., 68 B.R. 618, 634 (Bankr. S.D.N.Y 1986).

85. *See* Listokin and Ayotte, *supra* note 83, at 1443.

86. *See* Insolvency Act 1986 (c. 45), Schedule B1 § 3 (U.K.).

87. *See id*. at § 3(1)(a).

creditors with preferential creditor status,[88] including employees' wages.[89] The law makes clear that the liquidator, administrator, or receiver "shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts."[90]

Under certain circumstances, courts would allow stakeholders to sue debtors to seek relief.[91] Secured creditors who are unable to be fully protected by insolvency proceedings can seek a lift of stay and take further actions, as long as the purpose of administration will not be frustrated.[92] Such design shows that it remains possible for private enforcement to be conducted within insolvency proceedings so that creditors can protect themselves and make the debtor companies accountable for their conduct.

Public authorities other than courts may also play a role under insolvency law, generally based on public interest protection.[93] These authorities can punish companies that conduct illegal businesses, such as Ponzi schemes, illegal lotteries, or insurance contracts.[94]

In short, insolvency laws of many countries require companies to consider stakeholders' interests.[95] Breach of these obligations can lead to remedies clearly prescribed by insolvency law.

IV. MULTILAYERS OF ENFORCEMENT

A traditional way to ensure accountability is to use mandatory laws to control companies' negative externalities by elevating the social and environmental bottom lines.[96] For example, the regulatory regimes for consumer protection laws, employment laws, anti-discrimination laws,

88. Preferential debts include contributions to occupational pension schemes, remuneration of employees, levies on coal and steel production, and so on. *See* Insolvency Act 1986 § 386 (U.K.).

89. *See id*.

90. *See id*. at § 176.

91. In Re Atlantic Computer Systems plc, [1990] B.C.C. 859, (866) (appeal taken from Ch. Court) (U.K.). Although the general rule is that litigations against insolvent companies are normally not allowed in administration and liquidation proceedings, creditors may, subject to the discretion of the court, require the court to life the moratorium and seek individual remedies. *See, e.g.*, Insolvency Act 1986, sch. B1, § 43(7) (U.K.).

92. In Re Atlantic Computer Systems plc, [1990] B.C.C. 859, 879 (appeal taken from Ch. Court) (U.K.).

93. *See, e.g.*, Insolvency Act 1986, § 124 (U.K.).

94. *See* DERECK FRENCH, MAYSON, FRENCH & RYAN ON COMPANY LAW 597 (2018).

95. Take the 1986 U.K. Insolvency Act, for example. Under the Sch B1 § 3, the purpose of administration proceedings is to rescue the whole insolvent company on behalf of all stakeholders.

96. There is an emerging body of literature on regulating CSR. *See, e.g.*, Adedayo L. Abah, *Legal Regulation of CSR: The Case of Social Media and Gender-Based Harassment,* 5 U. BALT. J. MEDIA L. & ETHICS 38 (2016); Onyeka Osuji, *Fluidity of Regulation-CSR Nexus: The Multinational Corporate Corruption Example*, 103 J. BUS. ETHICS 31 (2011).

environmental protection laws, and so on, are about requiring corporations not to harm the society through banning certain behaviour. It can either involve public enforcement, where regulations confer investigative power to authorities and allow them to punish certain business activities; or offer new remedies to private parties and enable them to seek remedies by suing companies under certain circumstances.[97]

Elevating the minimum voluntary obligations of corporations to the level of obligatory duties by providing incentives/disincentives through the threat of liability can fill the governance void. Although mandatory minimum standards may account for only a small portion of the entire set of mechanisms meant to hold companies accountable, they are undoubtedly at the core of the overall framework of control. As a result, companies will either proactively or passively change their original business conduct to comply with the mandatory requirements. When some parts of originally voluntary CSRs become legally enforceable under the accountability regimes, the states are then able to learn from the processes of implementation and the results achieved.[98] As a result, the states' ability to regulate social, environmental, and economic affairs can also be improved, which would further encourage them to advance development more justly.[99]

Nevertheless, the regulatory gap has some limitations. First, the hysteresis nature of the laws and legislative processes are self-evident. It takes time for legislators and policymakers to react to new sources of harm. Secondly, according to Armour and Gordon, the "regulatory slack,"[100] such as under-specification of regulatory terms and under-enforcement of regulations, would be exploited by companies to lower costs. Indeed, it may be more reasonable from an economic standpoint to exploit the slack, or even seek to lobby the regulator, rather than to amend the original behaviour for reducing regulatory costs.[101] In contrast to the under-specification, there would also be a problem of over-specification (i.e., over-inclusiveness).[102] Rather than failing to catch all forms of harmful conduct, over-inclusive

97. These private enforcement tools based on private litigations, or public enforcement tools based on regulatory sanctions, will also largely deter companies' irresponsible behaviour and thereby increase the corporate accountability.

98. *See* Thomas McInerney, *Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 190 (2007).

99. *See id.* at 194.

100. John Armour & Jeffrey Gordon, *Systematic Harms and Shareholder Value*, 6 JOURNAL OF LEGAL ANALYSIS 35, 48 (2014).

101. For example, "exercise[ing] political influence to achieve a lower rate of regulatory tax" rather than seeking "innovation that reduces the social costs of one's activities in accordance with regulatory strictures." *Id.* at 38.

102. *See* ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE 103-06 (1999).

regulation may interfere with legitimate activities. Moreover, as summarized by Parkinson, apart from the technical limitation, there are jurisdictional and politico-economic limitations on conventional regulation.[103] For example, regulatory standards on the same activity can vary among different countries, especially between developed and developing countries.[104] It may be difficult for developing countries to raise their standards to match those in the developed countries, due to a concern that more stringent regulations will make them less attractive for inward investment. Another point worth mentioning is that nongovernmental organizations ("NGOs") and other parties who advocate for CSR may themselves be interested groups seeking rents through lobbying within the current legal, institutional framework with the aim of obtaining what may not be easily or cheaply able to obtain in the market.[105] The new regulations, in the form of new CSR statutes, may be the products of their influence.[106] Therefore, whether the so-called CSR regulatory initiatives are genuinely in the interests of wider society may be taken with a pinch of salt, at least in some cases.

The foregoing discussions in Section III demonstrate that in addition to the market forces, legal forces can also be used to tackle corporate irresponsibility. Affected parties may use innovative manners to hold companies accountable.[107] However, it is not the purpose of this paper to encourage mandating CSR-related requirements or incorporating all of them into the mandatory legal system under the current neoliberal context where the emphasis is on deregulation.[108] Rather, the discussion above shows the potential of traditional corporate responsibility, which was previously regarded as intrinsically voluntary, to be enforceable. As an already well-

103. *See* John Parkinson, *Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame*, 3 J. OF CORP. L. STUDIES 3, 29-31 (2003).

104. Karin Buhmann, *Corporate Social Responsibility in China: Current Issues and Their Relevance for Implementation of Law*, 22 THE COPENHAGEN JOURNAL OF ASIAN STUDIES 77 (2005). (arguing that developing countries such as China may adopt a relatively low standard regulation for environmental and labour protection while some buyer companies may, due to ethical and moral reasons, choose to purchase products or services from the Chinese suppliers which comply with a higher standard according to international law or other applicable law).

105. *See* Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 441 (2014).

106. *See id.* at 436.

107. Particularly for small and medium-sized companies who may not have a strong incentive to comply with voluntary CSR responsibilities—due to the limited reputational and financial gains from compliance, as suggested by Doreen McBarnet—legal mechanisms would become the only route for aggrieved parties to seek remedies against companies.

108. G. John Ikenberry, *Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order*, 7 PERSPECTIVES ON POLITICS 71, 71 (2009); *see also* Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 390 (2005); Mark T. Kawakami, *Pitfalls of Over-Legalization: When the Law Crowds Out and Spills Over*, 24 IND. J. GLOBAL LEGAL STUD. 147, 155 (2017).

established system, the law[109] could facilitate the development of corporate responsibility as well as corporate accountability.

Admittedly, it would be difficult to hold companies accountable beyond the law. Apart from the moral restraint and market forces, an innovative application of existing legal mechanisms, as explored above, proffers a potential solution. For example, companies' CSR commitments can not only be viewed as a type of self-constraint from a social-legal perspective to reduce the externalities,[110] but also as potentially controlled by competition law or contract law with a legal impact.

It has been identified that enforcement based on private law has a structural role to play in the system of public regulation in that private litigations may fill some gaps left by the public enforcement regimes.[111] The effectiveness of public or private enforcement may depend on their respective informational advantages in a particular setting. In some cases, employees and suppliers may have first-hand information due to their direct losses or harms caused by corporate irresponsibility. Therefore, private litigations brought by those parties may facilitate regulators to supervise certain activities of companies. Private enforcement mechanisms of CSR do not necessarily mean replacing voluntary mechanisms or public enforcement regimes; rather, the relationship between private enforcement mechanisms and public ones can be complementary.

Corporate accountability could exist at the international level, however, as it is still under-developed, and there is no effective international enforcement court or mechanisms yet available.[112] As a result, enforcement mechanisms, based on national law, seem to be attractive options at the time being.[113] One may point out that private law, including contract law and tort law, are malleable materials, which can be used to adapt to new changes in social and economic contexts. If legislators believe that there is a strong social need to regulate CSR-related issues, formal regulation may be enacted and implemented either by public authorities or private parties.

In practice, it may be difficult to draw a clear line between voluntary CSR enforcement, private enforcement, and public enforcement, as they may be intertwined. Depending on the degree of involvement of private parties

109. *See*, *e.g.*, Jan M. Smits, *Enforcing Corporate Social Responsibility Codes Under Private Law: On the Disciplining Power of Legal Doctrine*, 24 IND. J. GLOBAL LEGAL STUD. 99,106 (2017).

110. *See* Anna Beckers, *Legalization Under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes*, 24 IND. J. GLOBAL LEGAL STUD. 15, 26 (2017).

111. J. Maria Glover, *The Structural Role of Private Enforcement Mechanism in Public Law*, 53 WM. & MARY L. REV. 1137, 1176 (2012).

112. *See* Anna Beckers & Mark T. Kawakami, *Why Domestic Enforcement of Private Regulation is (Not) the Answer: Making and Questioning the Case of Corporate Social Responsibility*, 24 IND. J. GLOBAL LEGAL STUD. 1, 4 (2017).

113. *See id.* at 6.

and the harshness of the regulation, the regulation can be categorised into self-regulation by private parties, hard law regulation by states, nonbinding soft law regulation (aiming to persuade corporates to do something), civil regulation where NGOs play an important role, and co-regulation where public and private work together to regulate a certain area or industry.[114]

Many NGOs, administrative agencies, and private parties have already started to creatively enforce the voluntary CSR responsibilities basis on private law, including contract and tort law.[115] After becoming shareholders, NGOs can influence companies' internal governance through shareholder meetings and resolutions.[116] In certain industries, self-regulation and public regulation are not easily separated as they may have a relationship of mutual influence or collaborative rulemaking.[117] For example, public regulations may be made by public organisations while private agencies implement the supervision. Also, it is equally possible to have a process where both public and private parties are involved in regulation-making meetings.[118]

Both the process and outcome of transposing corporate responsibility, which is intrinsically voluntary, to corporate accountability, which can be seen as legally implementable, is worth our attention. Some have argued that implementable substantive values and mechanisms should be the basis of the accountability regimes of corporate responsibility, while the process should be able to subject internal corporate governance to external stakeholders and their influences.[119] Meanwhile, there is a need to maintain a balance between the accountability of companies and the efficiency of managers' decision-making.[120] It is true that to assert that a high level of corporate accountability, especially in a case where directors need to consider a variety of stakeholders' interests, may slow down the efficiency of decision-making and blur the focus of the management team. However, without implementable external monitoring from affected stakeholders, companies may not be responsible for their externalities.

114. *See*, *e.g.*, Richard Steurer, *The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe*, 43 POL'Y SCI. 49-72 (2010).

115. *See* Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law* 31 (Univ. of Edinburgh School of Law, Working Paper No. 2009/03, 2009).

116. *See id.* at 38.

117. *See* Martin W. Scheltema, *Assessing Effectiveness of International Private Regulations in the CSR Arena*, 13 RICH. J. GLOBAL L. & BUS. 263, 271-272 (2014).

118. *See id.*

119. *See*, *e.g.*, CHRISTINE PARKER, THE NEW CORPORATE ACTIVITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (2007).

120. *See* ANDREW KEAY, BOARD ACCOUNTABILITY IN CORPORATE GOVERNANCE 32 (1st ed. 2015).

V. CONCLUSION

Compared with corporate responsibility, which focuses on the introduction of rights and duties, corporate accountability focuses more on its implementation. The legal mechanisms discussed in this paper demonstrate the possibility of having a more enforceable framework to ensure corporate accountability and implement the corresponding rights and duties without any material changes to the current legal environment. Primary stakeholder groups, who are most likely to affect, or be affected by, corporate behaviour, can seek recourse through existing laws by innovatively seeking remedies in addition to traditional forms, such as boycotts or strikes.

It is, however, important to bear in mind that no single mechanism is sufficient to tackle all accountability concerns alone, due to each having their own weakness and limitation. Holding companies accountable must include multiple layers of legal tools. At the same time, legal intervention does not necessarily make market forces redundant. For example, some legal mechanisms such as disclosure requirements under corporate law may in turn strengthen the market force in disciplining corporate behaviour by increasing transparency.

From lawyers' eyes, enforceability is itself an important topic. Responsibility as a duty to perform or refrain from performing would be inefficiently affected if it did not come with accountability for the failure of compliance. Discussing corporate social responsibility without an enforceable framework is less convincing, especially when the voluntary adoption or engagement of truly responsible behaviour is currently problematic. By shifting the focus from seeking the introduction of rights and duties to their effective implementation, this paper wishes to serve as a starting point of corporate accountability debate for future scholars interested in CSR topics.