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All contributors to *Amicus Curiae* are reminded that submission of final copy of their manuscript must follow the journal style precisely.

Amicus Curiae
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Editor's Introduction

Pablo Cortés

Professor of Civil Justice, University of Leicester

It is a pleasure to introduce my first issue as Co-Editor of A*micus Curiae*. I would like to begin by expressing my sincere thanks to my fellow Co-Editors, Maria Moscati and Amy Kellam, and in particular to our Consultant Editor, Michael Palmer, for their invaluable advice and support in preparing volume six, issue three. This issue offers a rich and wide-ranging collection of articles and reviews that together reaffirm the journal's core commitment to critical inquiry, interdisciplinarity, and the dissemination of scholarship that bridges theory and practice. The issue spans diverse subject areas—compliance and corruption, artificial intelligence (AI) regulation, consumer redress, leasehold management, tax transparency, climate change litigation, visual jurisprudence, and book reviews that cast light on key contemporary legal texts. The breadth of these subject matters is complemented by a special section, prepared by Navajyoti Samanta, acting as the Guest Editor, which presents a valuable collection of papers on the topic of environmental, social, and governance (ESG) from an impressive geographical scope, with contributions engaging with legal developments in China, India, Ghana, Japan, Nigeria, South Africa, and the United Kingdom.

The practice section opens with three thematically and geographically distinct contributions, each engaging with pressing issues in contemporary law and governance.

Chris Thorpe's contribution on bare trusts provides a compelling doctrinal exploration of an area often overlooked in mainstream legal discourse. While bare trusts are typically treated as tax-transparent and straightforward, Thorpe reveals the underlying complexities that distinguish them from other express trusts, particularly in their treatment under anti-money laundering regulations and in their functional resemblance to custodial structures. His article challenges conventional assumptions about the simplicity and marginality of bare trusts and suggests that their

evolving legal character may serve as a useful point of departure for reforming the balance between transparency and opacity in trust law.

In an article on the McKinsey Africa Scandal, Annerize Shaw (Kolbé) presents a sobering case study of corporate complicity in state corruption and the failure of internal compliance mechanisms. Her article provides a detailed account of McKinsey's engagements with Eskom and Transnet in South Africa and the resulting lapses in oversight, diligence, and ethical governance. Importantly, Shaw's analysis transcends the particularities of the scandal and offers broader insights into systemic compliance failures in global professional service firms, highlighting the dangers of institutional complacency and the limitations of self-regulatory frameworks.

In a similar vein, Sonu Choudhary and Christi Anna George's examination of India's strategic non-regulation of AI offers a critical discussion of regulatory restraint as a deliberate policy choice rather than a legislative lacuna. The article interrogates India's framing of AI as a "kinetic enabler", positing that the decision not to rush into binding regulatory frameworks reflects a form of developmental pragmatism that can discriminate and undermine the fundamental rights of individuals. Their comparative analysis—with reference to the European Union's AI Act and the United States' executive order on AI—underscores the complex interplay between technological innovation, human rights, and regulation. India's position, as the authors note, is not one of neglect but of calibrated experimentation in a global landscape increasingly defined by algorithmic governance.

The main body of the issue includes four research articles that engage with normative, empirical, and comparative approaches to current legal debates. In the context of regulatory justice and consumer protection, the article by Chudi Ojukwu provides a welcome socio-legal analysis of consumer redress mechanisms in Nigeria's electricity market. By framing their discussion within the context of process pluralism, Ojukwu charts a path from sector-specific informal dispute resolution mechanisms (ie the company's internal complaint handling systems and the alternative dispute resolution (ADR) scheme) to the formal legal adjudication and enforcement mechanisms (ie ADR appeals and public enforcement by the regulator and the courts). The article critiques the disjuncture between legal framework and implementation, and argues in favour of a holistic approach that values the strengths of industry-specific and judicial remedies. This is an important contribution to the literature on

access to justice in privatized and monopolistic sectors.

Haward Soper's article on service charge budgets addresses the underexamined question of consultation rights in long leasehold arrangements. Drawing upon a unique empirical dataset as well as doctrinal and theoretical analysis, Soper argues persuasively for the recognition of an implied contractual duty to consult leaseholders. The article is as much a contribution to housing and property law as it is to broader debates on participatory governance and legal culture. His call for a cultural shift towards meaningful consultation resonates with contemporary demands for transparency, accountability, and fairness in landlord–tenant relations.

Chidebe Matthew Nwankwo and Akachi Nwogu-Ikojo's contribution turns to the role of courts in developing normative standards in international climate change litigation. By examining recent decisions by regional courts in Latin America, Europe, and Africa, the article explores the emergence of a transnational judicial community committed to articulating and enforcing environmental rights. Their analysis of *La Oroya v Peru*, *Verein Klimaseniorinnen Schweiz v Switzerland*, and other landmark cases suggests a move towards judicial "globalisation" in the climate domain, where courts are not only interpreters of law but active participants in shaping its direction. The article is both timely and ambitious, offering a thoughtful account of how horizontal accountability and judicial creativity are transforming environmental jurisprudence.

Arianna Careddu and Paolo Vargiu take the discussion in a different direction with their article on "visual justice". This innovative contribution interrogates how courtroom dramas, legal films, and mediated representations of trials shape public understanding of the legal process. Drawing on media studies, aesthetics, and legal theory, the authors argue that as, these visual tropes migrate into journalistic and political discourse, they risk distorting expectations of legal procedure and outcomes. Their engagement with the phenomenon of "trial by media" is especially pertinent in an age of virality and social media saturation, where the aesthetic script of justice often supersedes its procedural integrity. The article adds a cultural and epistemological dimension to our understanding of legal consciousness and is likely to provoke further scholarly debate.

The issue concludes with three discerning book reviews. Ewa Karolina Garbarz provides a critical evaluation of Galetta and Ziller's *EU Administrative Law*, a volume that promises to become essential reading in the field. Paolo Vargiu reflects on Russell Sandberg's

Rethinking Law and Religion, highlighting the text's contribution to legal academia and in particular to the socio-legal study of belief systems. Finally, Olalekan Bello's review of Azubuike's *Risk Allocation and Distributive Justice in the Energy Industry* underscores the normative dilemmas posed by energy transitions and the role of law in mediating competing claims of justice and efficiency.

Following this general issue, the second half of the volume comprises a special section on ESG regulation, guest-edited by Navajyoti Samanta. His editorial note introduces an array of jurisdictionally grounded analyses that reflect the complex character of ESG as a regulatory, ethical, and legal phenomenon. This collection—which includes the United Kingdom, Germany, Japan, India, China, Nigeria and Ghana—reveals both convergence and divergence in ESG adoption and implementation. It situates ESG not merely as a compliance requirement, but as a contested and evolving field of legal and corporate responsibility.

As always, the Editor expresses his sincere thanks to all contributors, reviewers, and editorial colleagues, and specially to Marie Selwood, who make this publication possible. We hope that the diverse and thought-provoking contributions in this issue stimulate further reflection and engagement from our readership, both within academia and beyond.

Bare Trusts—Outside the Tax Door?

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Abstract

For tax purposes, bare trusts are effectively ignored—they are transparent, the beneficiary is treated as the real owner of the trust asset with any income arising therefrom taxed upon them. However, it is still a trust; whilst discretionary and interest in possession trusts (which I shall call "ordinary express trusts") are subject to special rules with trustees subject to tax, these rules do not apply to bare trusts when, in many cases, the trustees may have similar custodial duties. Also, bare trusts are subject to anti-money laundering regulations and, for tax purposes, adopt other guises such as partnerships and implied trusts. There is thus some disparity between bare trusts and ordinary express trusts, but this disparity may be what makes the bare trust unique. An option to break the transparency and offer settlors a halfway house between transparent tax treatment and greater opaqueness of ordinary express trusts might be a useful feature.

Keywords: bare trust; beneficial ownership; transparent; sham; opaque; express trust; vulnerable persons.

[A] INTRODUCTION

Bare trusts, often referred to as "nominee", "simple" or "naked" trusts—unlike ordinary express trusts—are still trusts but are transparent for income tax, capital gains tax (CGT) and inheritance tax (IHT) purposes—in other words they don't exist as far as HM Revenue and Customs (HMRC) is concerned as the beneficiary is deemed to own the trust asset personally. The bare trustees have no obligation other than to hold the asset for the beneficiary and pass the legal title of the asset to the beneficiary upon demand. They are not treated the same as ordinary express trusts which have their own trust returns for trusts and

tax credits for income distributions to beneficiaries. Bare trusts are not a new creation[1] and their trustees have the same legal obligations and responsibilities under trust law as with any other trust but are on the outside of trust tax law. Should they not be brought into the fold and treated as "settlements" for tax purposes?

Kenney and O'Brien (2007) give an interesting analysis of bare trusts and go so far as to state that bare trusts are not actually trusts at all. Nitikman discusses the approach to the Canadian authorities' treatment of bare trusts, whereby the Revenue Authority has recognized that bare trustees can be equated with agents; however, as he also points out:

> it appears to view a bare trust as being automatically an agent for the beneficiaries. That is not correct. The fundamental principle of agency is that the principal can direct the activities of the agent due to a contract between them. A trust is not a contract, so a bare trust cannot per se be an agency (2024: 445).

What are bare trusts?

For UK income tax purposes, bare trusts are defined within section 466 Income Tax Act 2007 as:

> (2) "Settled property" means any property held in trust other than property excluded by subsection (3).
>
> (3) Property is excluded for the purposes of subsection (2) if:
>
> (a) it is held by a person as nominee for another person,
>
> (b) it is held by a person as trustee for another person who is absolutely entitled to the property as against the trustee, or
>
> (c) it is held by a person as trustee for another person who would be absolutely entitled to the property as against the trustee if that other person were not an infant or otherwise lacking legal capacity.

"[A]bsolutely entitled to property as against a trustee" is defined in section 466(5) as:

> A person is absolutely entitled to property as against a trustee if the person has the exclusive right to direct how the property is to be dealt with (subject to the trustees' right to use the property for the payment of duty, taxes, costs or other outgoings)

For CGT purposes, a similar transparency provision exists within section 60(1) Taxation of Chargeable Gains Act 1992:

[1] Their being mentioned in the case of *William Aikman v John Aikman of Cairnie* (1677), as referenced by Nitikman (2024: 439).

> In relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee, or for any person who would be so entitled but for being an infant or other person under disability (or for 2 or more persons who are or would be jointly so entitled), this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).

For IHT purposes, the definition of a "settlement" is contained within section 43 Inheritance Act 1984:

> "Settlement" means any disposition or dispositions of property, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is for the time being—
>
> (a) held in trust for persons in succession or for any person subject to a contingency, or
>
> (b) held by trustees on trust to accumulate the whole or part of any income of the property or with power to make payments out of that income at the discretion of the trustees or some other person, with or without power to accumulate surplus income, or
>
> (c) charged or burdened (otherwise than for full consideration in money or money's worth paid for his own use or benefit to the person making the disposition) with the payment of any annuity or other periodical payment payable for a life or any other limited or terminable period.

Bare trusts are therefore outside the definition of a "settlement" under the tax rules and treated the same as a transfer to an individual directly, namely a potential exempt transfer rather than a chargeable lifetime transfer (which is a transfer into a relevant property, ie a separate and ordinary express trust).

Kessler (2012-2013: 68) gives a detailed outline of a bare trust (which he also calls a "nomineeship") and distinguishes them from (what he calls) "substantive" trusts:

> In classifying an entity as a bare or a substantive trust, three rules of trust law (or succession law) are particularly relevant:
>
> (1) A substantive trust must confer rights on more than one person [but not a minor, per section 466 Income Tax Act 2007]. If a trust has only one beneficiary, it can only be a bare trust.

> (2) A testamentary disposition has no effect during the life of the testator/settlor, so if a disposition is classified as testamentary, it can only be a bare trust during the lifetime of the testator/settlor.
>
> (3) A trust which is a sham is generally a bare trust.

[B] SHOULD BARE TRUSTS BE TREATED AS ORDINARY TRUSTS FOR TAX PURPOSES?

Sham

Kessler's third point is possibly the first reason why bare trusts should have their transparent tax status removed; the suggestion is that a bare trust simply is not a trust but rather a mechanism pretending to be one when actually the trustees have no power whatsoever and are merely nominees of the settlor. This proposal is supported by Kenney and O'Brien (2007) and Adams (2022) who point out bare trusts' employment as a means for settlors to escape their creditors. However, the type of arrangements often utilizing bare trusts are regarded as shams only because the settlor retains complete control over the asset and over the trustee (who is merely a nominee[2])—they have not really given up the asset, yet strictly (and legally) they have done so through a bare trust. Were a bare trust to exist, the settlor would either be required to dispose of the asset to another individual or place it into an ordinary express trust (if not another entity like a company), in which case the trustees' first duty would be toward the beneficiary. Kenney and O'Brien's view is that a settlor-interested trust, by definition, is a bare trust and therefore a sham:

> The simple rule remains that the trust is but a sham, or an "illusion", if the whole of the equitable ownership of the trust property remains in the settlor.
>
> There is not a true trust (as opposed to a bare trust) if the equitable ownership remains wholly in the settlor, whether as a matter of form or as a matter of substance (where the form is a sham), so that the settlor can freely dispose of the capital and income by directing the trustees to act as his nominee (2007: 61).[3]

However, an ordinary express trust can also be settlor-interested, so for tax purposes the asset would be regarded as belonging to the settlor; it does not automatically follow that bare trusts and settlor-interested trusts are one and the same, nor that a settlor-interested trust is automatically

[2] HMRC refers to bare trustees as "dummies" and "names" in Manual TSEM6360.

[3] Citing an abstract from Hayton (1992: 3).

a sham. Conaglen (2008: 177) reminds us that a sham trust does depend on there being an intention to disguise the true ownership of the assets and to mislead with dishonesty. The "canonical"[4] case of *Snook v London and West Riding Investments Ltd* (1967: 802) defines the doctrine of the sham trust:

> it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

So, a bare trust need not be the tool of any malicious intent to disguise the settlor's identity and ownership of an asset. As I will consider below, implied trusts are bare trusts for tax, a means of bringing parties' intentions to fruition and of restitution. Nominee arrangements are also often used for commercial reasons and executors act as bare trustees for certain legatees of a deceased's estate. Whilst bare trusts undoubtably can be used by individuals to hide their true ownership over assets, they are just as susceptible as limited companies to hide the true owner; ordinary express trusts were also sometimes used to hide the true beneficiary as secret or semi-secret trusts. What is significant is that HMRC's Trust Registration Service (TRS), which helps enforce the anti-money laundering (AML) Directives, ensures that bare trust settlors and beneficiaries are properly identified alongside all other trusts—there is now a more level playing field.

The Trust Registration Service

The creation of HMRC's TRS stems from the requirement under the Fourth (and now Fifth)[5] AML Directive that the details of all express trusts' constituent parties, irrespective of any tax liability, be disclosed—including those of bare trusts. Whilst bare trusts do not exist as separate trusts for HMRC, they are subject to the same AML Directive as ordinary express trusts. The logic behind the TRS is to combat the very thing that bare trusts can facilitate—fraud. The application of the TRS to bare trusts has therefore effectively negated the arguments that a bare trust is a sham—the parties' details are reported and the existence of the trust is made available to HMRC, thus (ideally) nullifying their effectiveness as malicious vehicles.

[4] This description was given to Snook (1967) in the case of *A v A* (2007: 32).

[5] Which took effect on 10 January 2020 as Directive (EU) 2015/849.

Saunders v Vautier (1841)

Under this rule, beneficiaries of majority age may require trustees to transfer the legal title of the trust assets to them absolutely and thus terminate the trust—this rule applies to any ordinary express trust and was extended to discretionary trusts per *Stephenson v Barclays Bank* (1975). Bare trustee beneficiaries can insist that the legal title of the trust asset reverts to them absolutely; so beneficiaries, collectively, have the same potential powers over the trustees whether it is a bare trust or not.

Lessons from Canada

On 29 October 2024 the Canadian Revenue Authority (CRA) announced that, for the years 2023, 2024 and 2025, bare trustees need not file an income tax return (Form T3) unless specifically requested to do so. A similar announcement[6] on 28 March 2024 had exempted bare trusts from filing T3s for 2023 on the grounds that it would have an "unintended impact on Canadians" and would "ensure the effectiveness and integrity of Canada's tax system". However, this exemption would only appear to target inter-spousal trusts; those with minor beneficiaries are still required to submit T3s.

The CRA's general requirement that *all* trusts file T3s would appear to mirror the UK's TRS desire to equate bare trusts with ordinary express trusts; however, the recent announcement concerning exemptions also acknowledges that they are clearly not the same if doing so would undermine the effectiveness and integrity of the tax system as a whole.

Vulnerable Persons' Trusts

Vulnerable Persons' Trusts (VPTs) are ordinary express trusts, made effective and brought to HMRC's attention by an election,[7] whose constitution is focused on the needs of individuals who are not capable of looking after themselves through mental disorder as defined by the Mental Health Act 1983, or are in receipt of state benefits due to a physical disability. The trustees are required to account for the tax (at rates which reflect the beneficiary's marginal tax position) but they are still ordinary express trusts whereby the income is calculated in accordance with the beneficiary's own tax position, whilst the tax is the responsibility of the trustees.

6 Government of Canada, "New – Bare Trusts Are Exempt from Trust Reporting Requirements for 2023" (28 March 2024).

7 Via Form VPE1.

The existence of the VPT might be an argument for saying that ordinary express trusts and bare trusts could be treated the same for tax purposes—the trustees would have the same duties with respect to tax and being a custodian, the beneficiaries have (to some degree) the same rights collectively, and for AML purposes they are treated as separate entities. By treating bare trusts as ordinary express trusts for tax purposes, nothing is changing in those regards, but it would help address the accusation that bare trusts are vehicles of scams. A bare trust can still place minimal obligations on the trustees (essentially keeping them as nominees—or with "passive" duties as Nitikman refers to them (2024: 443)) and near absolute rights to the beneficiary as an adult—so could bare trustees not be subject to tax in the same way as trustees of VPTs are?

[C] DON'T BARE TRUSTS HAVE A SPECIAL ROLE? SHOULDN'T THEY BE KEPT DISTINCT FROM ORDINARY EXPRESS TRUSTS?

Bare trusts are very fluid; they are not only standalone forms of trust, but can take the guise of other entities as set out below.

Partnerships

An ordinary partnership, limited liability partnership (LLP) or limited partnership (LP) are all essentially bare trusts for UK tax purposes with the legal owners holding the assets for the partners: that is, the beneficiaries. Partnerships are transparent for tax purposes, so their income profits/loss and capital gains/losses are taxable on the partners as beneficial owners rather than on the partnership itself. Whilst the legal owners of the partnership assets may also be the beneficial owners, English land can only have four legal owners, whereas a partnership may have more than four beneficial owners/partners—these scenarios may well require registration under the TRS where the legal owners are holding the assets as express trustees for the partners. Partnership law is very distinct from trust law and there cannot really be any confusion between the two, as is possible with trust and agency law. The treatment of partnerships is per the tax legislation and Statement of Practice;[8] they are not bare trusts in any other respect—indeed LLPs are separate corporate entities. LLPs, LPs and ordinary partnerships are separate entities with respect to value-added tax, and Scottish partnerships are distinct entities in Scottish law; yet for UK tax purposes, whatever their standalone status in law, they

[8] SP D12, January 1975.

are all bare trusts at their core. Even in the United States, limited liability companies (LLCs) and limited liability partnerships are transparent for tax purposes; however, the partners of an LLC can elect for their partnership to be opaque (ie not transparent, rather a separate taxable entity) for tax purposes thus being treated more like a limited company.

Implied trusts

Resulting trusts are generally either fail-safe mechanisms for failed gifts/express trusts placing beneficial ownership back onto the donor/settlor or are "common intention" trusts whereby the beneficial ownership is assigned according to the parties' intentions rather than strict recognition of legal ownership. Another type of implied trust is the constructive trust—effectively a form of restitution which imposes trusteeship upon individuals who have unjustly enriched themselves with the possession of property through dishonesty.

Implied trusts are the opposite of express trusts as the intended position, rights and responsibilities of the parties are not expressly laid out—instead they are imposed by the courts (acting as enforcers of the laws of equity). As with the bare trust, it is the beneficiary who is the taxable person, although often that person will not immediately realize they are the taxable person. As these trusts are the product of the courts which impose beneficial ownership and trusteeship, it will often not be until a dispute arises and the court has passed judgment that this will be apparent.

So, what would happen if bare trusts were equated with ordinary express trusts as far as tax is concerned? Partnerships and implied trusts need not change their rules—they are still distinct (transparent) entities, but they would simply not be equated to bare trusts anymore.

[D] WHY SHOULD BARE TRUSTS BE RETAINED AS TRANSPARENT ENTITIES FOR TAX?

The argument in favour of retaining the bare trust's transparency for tax purposes is largely bolstered by two factors: first, the TRS, which has addressed the "bare trust=sham" assertion and made it redundant; second, it is simply not right or just to impose an opaque settlement when one individual intends to make an absolute gift to another. A parent may want their children to have an asset, or cash in a bank account which they can utilize when they are older; children (under 18s in England and

Wales, under 16s in Scotland) cannot own property in their own name; the only way they could do so without any restrictions as to income and/or access to capital is through a bare trust, so this is one of the obvious advantages of retaining its transparent nature. To quote the Government's own guidance:

> Bare trusts are often used to pass assets to young people – the trustees look after them until the beneficiary is old enough.[9]

Likewise, when a life tenant of a trust dies, the trustees hold the assets on bare trust for the remaindermen until the legal title passes over—that was the settlor's intention and there should be no reason why the property should essentially remain settled property. Until the legal title of a deceased's asset is assented to a beneficiary, an executor will hold that asset on bare trust—the beneficiary will be deemed to have owned the asset from death, in accordance with the deceased's wishes.

Bare trusts are therefore more of a mechanism to facilitate absolute and direct ownership—not just a means to defrauding the authorities and concealing the real owner's identity. Sometimes the intended recipient simply cannot have the legal ownership due to age or probate; the possibility that some malevolent individual might use a nominee arrangement to disguise their ownership is no reason to think all bare trusts are shams.

LLPs are bare trusts for tax purposes, as alluded to above, but they are analogous to each other insofar as they are one thing legally and another thing for tax purposes. In a previous article (Thorpe 2024), I suggested that any members of an LLP might want the option to treat their partnership as an opaque entity if they so choose, like partners of LLCs are able to. But what if bare trustees could do the same? What if the trustees could elect to treat the trust as opaque for tax purposes? This would not mean that partnerships or even implied trusts would suddenly be treated as ordinary express trusts, but bare trusts could be so treated to a greater extent.

[E] AN OPAQUE BARE TRUST?

Why would bare trustees want to do this? Prior to the application of the TRS, a government might have wanted opaque bare trusts to clamp down on any fraudulent activity, but this would now seem unnecessary. There may be income tax reasons for taxing the trustees rather than the beneficiary, but that depends largely upon the beneficiary's marginal tax

[9] Gov.uk, "Trust and Taxes".

position—very often children, who receive no other taxable income, are beneficiaries of these trusts and so have a personal allowance and basic rate tax band available. This then begs the question: at what rate would trustees pay tax—the basic rate of an interest in possession trust or the additional rates of a discretionary trust with beneficiaries being able to claim a tax credit?

A better option, if the trustees and/or beneficiaries so choose, might be equating bare trusts to VPTs as ordinary express trusts, whereby the trustees account for the income tax but according to the beneficiary's own marginal tax rate. This would combine the benefits of taxing a bare trust's beneficiary with all the integrity of a "substantive" trust comprising of trustees with duties beyond the mere passive. Partnerships and implied trusts would retain their own identities through their respective legal and equitable regimes.

[F] CONCLUSION

The bare trust is not an ordinary express trust, nor can it be equated as such—it is a form of nomineeship or mechanism for holding onto an asset for those who cannot do so themselves. The criticism over bare trusts as shams and vehicles for fraud are largely redundant by the onset of AML regulations treating bare trusts like any other trust, but the possibility still exists; the issue about the tax anomaly is worth addressing.

As with the LLP, we have an entity which is one thing in law and another for tax. However, that is not necessarily a bad thing as it offers great flexibility which allows individuals to be treated as owners of assets for tax without being so in law. Not all nominee arrangements are malicious. However, if it did not suit the parties to the trust or there remained any doubt about the integrity of bare trusts, the option could be available to give tax responsibilities to trustees, akin to those of VPTs who act as custodians for those same individuals who might be beneficiaries of a bare trust. An opaque trust, with the same income tax status as VPTs might be seen as a "bare trust plus", with the trustees having more than nominee or "passive" duties, potentially giving more substance to the "simple" trust. At the same time an election for such treatment should ensure that the chosen beneficiary still has full benefit of the assets – akin to absolute ownership. The beneficiaries of a VPT are in no better position to manage their own affairs in fact as a child is in law; the option to turn a simple nominee arrangement into an ordinary express trust, but one which simultaneously gives the "real" owner of the asset all the benefits of absolute ownership, might be an attractive possibility.

About the author

Chris Thorpe *is a Fellow of the Chartered Institute of Taxation (CIOT), a member of the Association of Tax Technicians and full member of the Society of Trust and Estate Practitioners. He is a full-time technical officer at the CIOT but also works as a freelance lecturer and tax consultant and contributes to the trade press (*TaxInsider, Croner-I *and* Farm Tax Brief*). He has published one book,* Implied Trusts and Beneficial Ownership in Modern UK Tax Law *(Spiramus Press, 2021). He originally qualified as a barrister, though never practised, and has worked as a tax adviser in several accountancy firms.*

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Compliance in Question: The McKinsey Africa Scandal

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One would think that compliance agencies are crafters of compliance and not silent ringleaders of ethical pitfalls. South Africa's compliance landscape is distinctive. It created a unique opportunity for South Africa to be a leader in addressing historical socio-economic disparities, yet it seems that a colonial mentality keeps seeping through. Lip service is prevalent across the board, disguised in company culture and often only exposed when the so-called corporate line has been crossed.

The McKinsey Africa Scandal is a series of controversies involving the global consulting firm McKinsey & Company in its work with state-owned enterprises in South Africa (Eskom and Transnet) (US Department of Justice 2024). Between 2012 and 2016, McKinsey partnered with local companies, including the controversial Gupta-linked Trillian Capital, to secure lucrative contracts worth billions of rands. Allegations arose that McKinsey benefited from irregular procurement practices, failed to conduct adequate due diligence on its partners, and allowed itself to be implicated in state capture—a widespread corruption scheme that misappropriated public funds (Zondo Commission 2022). In response to public and regulatory pressure, McKinsey acknowledged lapses in governance. In 2018, the firm returned approximately ZAR1 billion to Eskom (the McKinsey-Eskom repayment). More recently, in December 2024, McKinsey agreed to pay over USD122 million to resolve a United States (US) investigation into a bribery scheme involving payments (bribes) to officials at Eskom and Transnet. The scandal highlighted critical compliance failures, such as inadequate risk assessments, insufficient oversight of local partnerships, and a lack of internal controls to prevent unethical practices, despite the partial existence of valid compliance programmes within these companies.

Existing legal frameworks in South Africa, regulating anti-corruption and compliance establish a robust structure for corporate governance, such as the Prevention and Combating of Corrupt Activities Act 12 of 2004. However, the recent McKinsey Africa Scandal exemplifies how enforcement gaps, rather than legislative deficiencies, enable corporate misconduct (especially in middle-income economies, such as South Africa). A lack of resources and political independence renders enforcement inconsistent. Unlike the US Department of Justice or the United Kingdom (UK) Serious Fraud Office, South Africa's National Prosecuting Authority and Financial Intelligence Centre often lack the autonomy and funding to prosecute corporate misconduct effectively. Despite existing legal provisions, systemic issues within regulatory bodies, such as delays in case handling and a lack of specialized forensic expertise further weaken enforcement efforts. South Africa's weak enforcement capacity is reflected in its ranking on the Transparency International Corruption Perceptions Index (CPI), which consistently places the country among those struggling with systemic corruption. In 2023, South Africa scored 42/100, indicating significant governance and enforcement failures (Transparency International 2023).

Bad compliance culture is often at the heart of corporate misconduct (Miller 2017). Compliance driven solely by a desire to avoid penalties and fines reduces ethical oversight to a mere tick-box exercise. Penalties and fines are absorbed as business costs and therefore do not serve as deterrents. This superficial approach fails to create an environment where integrity thrives and, instead, leaves room for unethical behaviour to proliferate. This approach often depends solely on a code of conduct and other watered-down human resources policies, uses case-by-case decision-making, and places excessive reliance on external advisors. A compliant company culture must start at the top, but changes should be implemented throughout the organization. While South Africa's anti-corruption laws align with international best practices, its enforcement failures place it significantly behind global leaders in governance and compliance. According to the Transparency International CPI, South Africa's score lags behind peer middle-income economies like Botswana and Mauritius, both of which benefit from stronger regulatory independence and enforcement mechanisms. This further underscores the need for South Africa not only to adopt stringent regulations but also to ensure their consistent enforcement.

Assigning senior staff to compliance functions does not mitigate risk; it may instead increase the likelihood of bypassing compliance structures, as illustrated in the McKinsey Africa Scandal (by Eskom and Transnet).

One change companies should adopt is implementing a structured compliance programme and creating a separate department staffed with compliance professionals whose goal is to prioritize genuine ethical integrity over profits or influence. Ultimately, compliance is only as strong as the people who work within an organization.

The McKinsey Africa scandal should serve as both a warning to international companies exploiting South Africa's unique historical circumstances and a wake-up call to its leaders who leverage these circumstances for personal and/or corporate gain. Many companies foster a culture of cosmetic compliance, driven by a self-serving mindset reminiscent of past generations' exploitative attitudes. Company culture remains driven by legal avoidance, rather than ethical responsibility. Worse still, some South African companies outsource compliance to agencies that act as silent enablers of unethical practices, disguising this under the pretence of adherence to regulations. This is especially true in regulated sectors that must meet industry-specific requirements, such as those stipulated in the Codes of Good Practice on Broad-Based Black Economic Empowerment, issued under the Broad-Based Black Economic Empowerment Act 53 of 2003. Prioritizing profits and influence over genuine ethical integrity continues to normalize corporate environments that allow dishonest and unethical behaviour to flourish. More often than not corruption is embedded in bureaucratic structures, making prosecution difficult.

Regulatory effectiveness is not solely reliant on enforcement agencies but also on market-driven compliance mechanisms. Institutional investors, such as pension funds and multinational shareholders, play an increasing role in demanding corporate transparency. For instance, global investment firms like BlackRock, which also operates in South Africa, have historically divested from companies with weak governance, forcing companies to strengthen ethical oversight to maintain investor confidence. Additionally, emerging regulatory frameworks, such as the European Union Directive on Corporate Sustainability Due Diligence 2024, will likely exert indirect pressure on South African companies to meet global compliance standards. These developments indicate that enforcement gaps may be partially addressed by financial market scrutiny and reputational risks, as investors and international regulatory expectations increasingly shape corporate behaviour.

Companies operate through individuals: this makes the investigation of individual conduct the most efficient and effective way to uncover the facts and scope of corporate misconduct. Delays in convictions (justice) and

perceived leniency undermine the incentive for companies to strengthen anti-corruption measures. To rebuild trust, the judicial system must expedite corruption cases and impose meaningful penalties. Efficiency in the judicial process is essential to restore public confidence and deter future misconduct.

South Africa can certainly draw on global examples and technological enhancements to strengthen its compliance framework. Countries with a compliant company culture often integrate ethics into every aspect of business operations. In the US, the Foreign Corrupt Practices Act 1977 (FCPA) is a benchmark for anti-bribery enforcement. To enhance its existing legislation, South Africa could implement similarly stringent measures, ensuring accountability for all entities and actively pursuing violations. This could include strengthening prosecutorial independence by insulating regulatory agencies from political influence, similar to the US Securities and Exchange Commission, and, additionally, increasing funding and resources for forensic investigations—mirroring the FCPA's dedicated compliance enforcement teams. South Africa could also introduce a consolidated public enforcement database to disclose corporate penalties, enhancing transparency and deterrence.

However, the recent slowdown in FCPA enforcement in the US, driven by policy priorities and resource constraints, illustrates that the legal framework is only as effective as its enforcement mechanism (Baker McKenzie 2025). The White House justified its temporary pause on FCPA enforcement by arguing that aggressive anti-bribery measures could harm the US economic competitiveness and national security. This shift underscores how political influence and resource allocation can significantly impact compliance efforts, even in jurisdictions with well-established regulatory frameworks. This confirms that there is indeed a global pattern of selective enforcement, driven by political and economic priorities rather than legal principles. For South Africa, this serves as a cautionary example. While adopting stringent anti-corruption laws and enhancing prosecutorial independence are critical, these measures must be reinforced with unwavering political will and adequate resources. Without consistent enforcement, even the strongest laws risk becoming ineffective, or worse, being dismantled entirely.

Unlike the US and UK, South Africa currently lacks a legislative framework for deferred prosecution agreements (DPAs) and, as such, corporate misconduct is not meaningfully penalized (Eskom and Transnet). This absence means there is no formal mechanism or legislation enabling the use of DPAs to resolve corporate criminal matters

and supports the need for independent anti-corruption commissions and stronger whistleblower protections. Stronger laws and financial rewards can encourage insiders to report misconduct (in line with the US Dodd–Frank Wall Street Reform and Consumer Protection Act 2010). Penalties and fines alone are insufficient as corporations treat them as operational costs. Implementing corporate bans for repeat offenders and holding executives personally accountable through criminal liability and disqualification could create stronger deterrence.

While the McKinsey-Eskom repayment functioned as a negotiated settlement, it was not classified as a DPA, although it bore similarities in intent. Implementing a formal DPA framework could significantly benefit the South African legal system by streamlining the resolution of corporate corruption cases. It would encourage greater co-operation from companies in investigating and addressing systemic corruption while expediting restitution and fostering compliance reforms. While DPAs are more commonly employed with companies than individuals, they are not unprecedented in other jurisdictions. In high-profile corruption cases where an individual's actions are central to broader investigations, a DPA might be a viable option, particularly when prosecution under existing laws appears less feasible. South Africa's equivalent of DPAs, plea and sentence agreements (Criminal Procedure Act 51 of 1977, section 105A) does not allow deferring prosecution in exchange for compliance with specified conditions, neither does it require corporate offenders to pay fines or implement compliance measures (immunity from prosecution under the National Prosecuting Authority). Witness co-operation agreements (Criminal Procedure Act 51 of 1977, section 204) also do not impose financial or compliance-related obligations. DPAs offer a pragmatic approach to balancing justice and practical considerations, especially in complex corruption cases where traditional prosecution is challenging. Adapting the framework to include individuals could help address high-profile cases where an individual's actions are central. It could encourage whistleblowing, transparency, and accountability while maintaining political and public trust.

Implementing DPAs in South Africa would likely face public scrutiny and concern, given the country's unique socio-political landscape and demand for accountability. Critics may fear that DPAs could enable corporate impunity. To address these concerns, any proposed framework must: (i) clearly prioritize justice and accountability; (ii) include strict oversight and transparent processes; and (iii) ensure that negotiated resolutions impose meaningful penalties and compliance obligations. The balance lies in addressing public demand for accountability while

recognizing the practical need for effective resolutions. Justice delayed is justice denied.

Artificial intelligence (AI) can enhance compliance and should be leveraged for compliance monitoring. However, regulatory decisions require human judgement. AI can detect procurement irregularities, such as bid-rigging and over-invoicing, and identify conflicts of interest by analysing employee and supplier data. Whilst AI flags high-risk transactions or business practices in real time, enforcement agencies and compliance professionals must interpret the data and take action. AI's effectiveness in compliance depends on integration with human oversight. Furthermore, AI is not infallible, it relies on historical data that contains inherent biases and produces false positives, leading to unnecessary, costly investigations. High-risk industries (mining, energy, construction and procurement), public tenders and state-owned enterprises (Eskom and Transnet) should be legally mandated to adopt AI-driven tools to detect and mitigate internal corruption risks. These sectors are particularly vulnerable to financial misconduct, bribery and regulatory loopholes. Without human review, AI-biased compliance systems risk flagging irrelevant transactions while missing more sophisticated schemes. AI should be viewed as an investigative aid, not a standalone solution, as human intervention remains crucial in contextualizing flagged risks and making informed enforcement decisions.

Despite AI's potential, companies can manipulate compliance systems by exploiting AI's automation speed, outpacing human regulators. One method is data-laundering, where companies alter financial structures to mislead AI risk assessments, making illicit transactions appear routine. AI's self-learning nature also presents a learning loop vulnerability, as corporations can flood systems with legitimate transactions to train AI into misclassifying certain patterns as low-risk. Additionally, regulatory arbitrage allows companies to shift compliance-sensitive activities to jurisdictions with weaker AI enforcement, capitalizing on gaps between global regulatory frameworks. Some companies may even exploit false positives, generating excessive minor infractions to overload enforcement agencies, diverting attention from deeper misconduct. To prevent AI-driven compliance manipulation, regulators must implement real-time AI audits, mandate hybrid AI–human forensic reviews, and deploy government-run AI "shadow systems" to cross-check corporate compliance claims. Without these safeguards, AI risks being repurposed as a tool for sophisticated regulatory evasion rather than genuine enforcement (Azzutti & Ors 2021).

South Africa has recently taken steps to strengthen its regulatory framework, notably with the introduction of a beneficial ownership register in April 2023, however, its restricted access, limited to law enforcement and "competent authorities", raises significant concerns (Cliff Dekker Hofmeyr 2023). Corruption is often embedded within these very structures, allowing bad actors to control and limit access to crucial ownership information. In contrast, countries like the UK provide public access to such registers, ensuring greater transparency and accountability.

While South Africans can request shareholder information under the Companies Act 71 of 2008 (section 26), this process is neither transparent nor accessible. The courts have clarified that the right of access to company information exists independently of privacy laws (*Nova Property Group Holdings v Cobbett* 2014). However, in practice, companies exploit legal loopholes, delay responses, or impose unnecessary documentation requirements, effectively stalling access. Most requesters face lengthy, costly litigation to enforce their rights—an impractical solution for the average South African citizen, who is often unaware of these legal protections.

To align with international best practices, South Africa must make the Beneficial Ownership Register publicly accessible. Transparency is one of the most effective tools in combating corporate corruption. Additionally, companies that fail to self-report should face stricter penalties beyond mere administrative fines, which are easily absorbed as operational costs. More severe consequences, such as freezing assets, would serve as a meaningful deterrent and reinforce corporate accountability.

The lessons from the McKinsey Africa Scandal illustrate that South Africa does not necessarily need new laws but effective enforcement of existing ones. Strengthening enforcement requires political will, adequate funding for regulatory bodies, and market-driven compliance measures that hold corporations accountable. Moreover, while AI presents new opportunities for compliance monitoring, its effectiveness is contingent on human oversight and enforcement mechanisms that act on flagged risks.

The McKinsey Africa Scandal underscores a stark reality: compliance is only as strong as its enforcement. While South Africa has a robust legal framework, systemic enforcement failures, driven by political interference, resource constraints, and bureaucratic inefficiencies, allow corporate misconduct to persist. The reliance on cosmetic compliance and legal loopholes highlights the urgent need for a shift from mere regulatory adherence to a culture of ethical accountability.

Addressing these challenges requires a multifaceted approach. Strengthening prosecutorial independence, increasing funding for forensic investigations, and implementing DPAs could enhance corporate accountability. Additionally, market-driven compliance mechanisms, such as investor pressure and reputational risks, may supplement regulatory gaps. Transparency measures, including public access to beneficial ownership registers and stricter penalties for non-disclosure, would further deter misconduct.

Technological advancements, particularly AI-driven compliance tools, present opportunities to enhance oversight, but they are no substitute for human judgement and institutional integrity. Without consistent enforcement and meaningful consequences, even the most comprehensive legal frameworks risk becoming empty gestures. The lesson from the McKinsey Africa Scandal is clear: South Africa does not need more laws, it needs the political will and institutional capacity to enforce the ones it already has. The Transparency International CPI serves as a stark reminder that South Africa's compliance failures stem not from legislative shortcomings, but from an inability to effectively enforce anti-corruption measures. Without addressing this enforcement gap, South Africa will continue to rank among countries where corruption is not just tolerated but embedded within the regulatory system.

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Legislation, Regulations and Rules

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Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US)

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India's Dormant Attitude towards AI Regulations: A Developmental Approach

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Abstract

Artificial Intelligence (AI), as the fifth generation of computing, has caught the attention of regulators worldwide, prompting the creation of new and diverse legislation to either regulate AI or adapt to this new era of machines. Recently, the European Union marked history by implementing the Artificial Intelligence Act 2024. The United States (US) also stood in line in 2025 by implementing the US Executive Order titled Removing Barriers to American Leadership in Artificial Intelligence. This insight has been recognized, as every other country at the domestic and global levels comes up with regulations for the ethical use of AI tools. However, India stunned the world by not considering regulating AI. India, being a global leader, considers AI as a "kinetic enabler" and does not want to harness its potential by hastily implementing any rules and regulations. This paper examines India's contentious position on AI, delving into the complexities and subtleties of the concept and its influences in other sectors such as healthcare, agriculture, education, and markets. This paper discusses the international perspective on regulating AI and India's stand in providing platforms for this new era of innovation without any leash while preserving human rights. The development approach of the Indian Government and its role as a member of countries involved in launching the Global Partnership on Artificial Intelligence will be critically analysed. Last but not least the paper discuss various projects implemented by the Indian Government along with the issuance of guidance and rules for maintaining the objective of "peace in development approach".

Keywords: artificial intelligence (AI); legislation; development; human rights; India; innovation; kinetic enabler.

[A] INTRODUCTION

> "Terminators into reality: rumpus around the world" (Choudhary 2024).

Technology advancement is classified into various generations. The first generation focuses on electronic tubes, the second generation is equipped with unit transistors, the third generation uses the first integrated circuit and then came the era of the fourth generation, the era which brought microprocessors, cheaper and more efficient compared to other generations. The present fifth generation of computing, considered the most advanced (Andreea 2015), is an era of artificial intelligence (AI) and has stimulated fervent interest across the globe in every domain. AI is presumed a replica of human intelligence resultant of which there is mass production of machinery-based consumer products. This is not limited to a particular industry as AI can take many forms. Therefore, there is no single exact definition or component of AI. As Tobin says: " In broad terms, it can be regarded as the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages" (Tobin 2023).

And as noted in the World Economic Forum: "People keep saying AI is coming but it is already here" (Shukla 2023). This is very much reflected in day-to-day tasks, as seen in the matter of ChatGPT (developed by OpenAI) as this application is used by billions of users for tasks like coding, grammar-checking, writing and even for palm-reading. One study noted the rapid rise in popularity of ChatGPT, which reached 100 million users in just 60 days, compared to Instagram's two years to achieve the same milestone (Ilzetzki & Jain 2023). AI-based technologies are capable of performing various tasks, including coordinating logistics, translating complex documents, retrieving information, writing business reports, providing financial services, diagnosing diseases and even preparing legal briefs (Sahbaz 2019). Moreover, the advanced features of these applications have the potential to enhance the efficiency and accuracy of tasks by leveraging machine learning, which enables them to learn, predict, and continuously improve. The results of this have been seen in a recent report from Stanford University indicating that the number of AI patents surged 30-fold between 2015 and 2021, underscoring the swift advancements in the field of AI development (Clark & Perrault 2023).

The tremendous growth of AI creates debatable issues around the globe for bringing in legislation to regulate AI. The European Union (EU) recently implemented the Artificial Intelligence Act 2024 to regularize AI-

based systems, and the United States (US) (White & Case 2015) and the UK (Brione & Gajjar 2024) are also working on legislation to deal with the tidal wave of AI applications, whereas the Indian Government is currently not contemplating any laws or regulations to manage the growth of AI in the country (Government of India 2023). This paper explores the issues relating to AI applications by examining the EU and US AI regulations and also highlights India's stance of not regulating AI, although it has enacted, or is about to enact, various legislations on a sector basis for the better growth of the country.

Definition usage of AI

The term AI was first introduced in approximately 1955. Many scholars have tried to give various explanations regarding the term. Marvin Minsky attempted to define AI as the "science of creating machines that perform tasks requiring human-like intelligence" (quoted in Bolter 1984: 1) whereas Nils J Nilsson describes it as "the endeavour of making machines intelligent whereas Intelligence is defined as the ability of an entity to function effectively and with foresight in its environment" (Nilsson 2010: 13). John McCarthy, considered the father of AI, coined the term along with his fellow researchers by observing that: "AI is characterized as the process of making a machine act in ways that would be considered intelligent if a human were performing those actions" (Cordeschi 2007: 260). However, Luciano Floridi and Josh Cowls conceptualize the term AI in its broader sense by reflecting on its characteristic features as AI can be described as a developing resource of interactive, autonomous, and often self-learning systems that handle tasks typically requiring human intelligence and intervention. In short, "AI can be seen as a reservoir of smart agency on demand" (Floridi & Cowls 2019: 4). In the 1950s the mathematician Alan Turing gave us the "Turing Test" which has become prominent in AI research. The Turing Test is a method of evaluating whether a machine can exhibit behaviour indistinguishable from a human (Uniyal 2024).

AI can excel in every field and provide huge development and growth and is not limited to a particular aspect of life. Below are some notable examples of the usage of AI in various domains.

1 AI has become the heart of enterprise growth rather than being limited to just one aspect as major private sector players such as Apple, IBM, Amazon, Google, Baidu, Facebook, and Microsoft use AI business models which indulge in non-oriental business practices, for example providing a physical store experience by installing a

"try me" feature where customers can see products on themselves through online mode, thus expanding the market by creating a whole world of digital shopping.

2 Offering AI natural language processing applications where big tech companies launch voice-responsive virtual personal assistants such as Apple's Siri, Amazon's Alexa or Microsoft's Cortana, and these have become everyday parts of people's lives for their entertainment and daily routine work reminders (Stanford University 2015: 15).

3 If looking into other innovations, AI solved the "captcha" test and acquired a 90% success rate (Metz 2013) and, even back in 2014, a chatbot named "Eugene Goostman" was developed which created confusion for the Royal Society judges as they believed it to be a 13-year-old boy (Press Association 2014).

4 AI may predict bank frauds by observing unusual card activities and large deposits in accounts which makes it easier to detect suspicious activities (Sabareesh & Ors 2024).

5 It is also observed how AI is effectively used in the healthcare sector and, as per an NHS England report, AI scrutinizes X-rays and helps radiologists assess the brain virtually without the physical presence of the patients by image analysis, detecting abnormalities and generating automatic reports. So through these technologies, patients recover at their home or in their comfort zone without being admitted to hospital (NHS England 2023).

The above examples reflect how AI has become a part of general public life in that, from digital marketing to detecting fraud and assisting doctors in examining the patient's profile, AI is everywhere.

[B] AI REGULATIONS: INTERNATIONAL INSTRUMENTS

The impact of AI is extremely large, which can create chaos as there is a high probability of biased algorithms in, for example, the healthcare sector, online advertising, and image generation which could impact the population and security of many countries. So governments around the globe are coming up with legislation to regulate AI. The objective behind regulating AI as per the government agencies is to ensure fairness under which governments will observe how AI impacts people's lives and how judiciously it operates in markets. Along with fairness, transparency is also one of the most important issues in observing how these applications come to their decisions. These issues cannot be overlooked otherwise there would be a bombardment of claims regarding discrimination and

other related liabilities noted in various government reports (Rodrigues 2020). Thus, major powers of the world are coming up with legislation to regulate AI (Candelon & Ors 2021).

The Artificial Intelligence Act: European Union

The EU Artificial Intelligence Act 2024 made history by being the first-ever regulation enacted for AI. The legislation's objective is to strengthen the rules around data quality, focus on specific utilization of AI systems and their associated or connected risks, and provide human oversight, accountability and, last but not least, transparency (World Economic Forum 2023).

Adopting a single definition of AI is not possible due to technical and scientific issues, thus the European Commission referred to the Organization for Economic Co-operation and Development (OECD) clause on AI which lays down the definition of "artificial intelligence system" under Article 3(1) as:

> software that is developed with [specific] techniques and approaches [listed in Annex 1] and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with (OECD 2019).

Annex 1, as referenced in the definition, outlines various techniques and approaches used to develop AI. The concept of an "AI system" encompasses a broad range of software-based technologies, including "logic and knowledge-based systems", "machine learning" and "statistical" methods.

The purpose of the legislation is to establish in EU law a definition of AI systems that should be technology-neutral and, thus, lay down a "risk-based approach" classification for AI systems. Under this classification, AI systems proposing "low or minimal risk" (Articles 51-56) have no such legal obligation. However, in the category of "limited risk" (Article 50) elements such as chatbots, deepfakes used to manipulate images, audio or video content are subject to light transparency obligation. If the AI system poses a "high risk" (Articles 46-49), it creates an impact on people's fundamental rights including biometric identification, law enforcement, and educational and vocational training. These high risks are divided into two categories and rules are applicable accordingly so that it would have to follow strict rules of requirements and obligation for authorized access to EU markets. The last classification categorization is "unacceptable risks" (Article 5) such as a threat to people's safety and livelihood, employing harmful manipulative practices or exploitation.

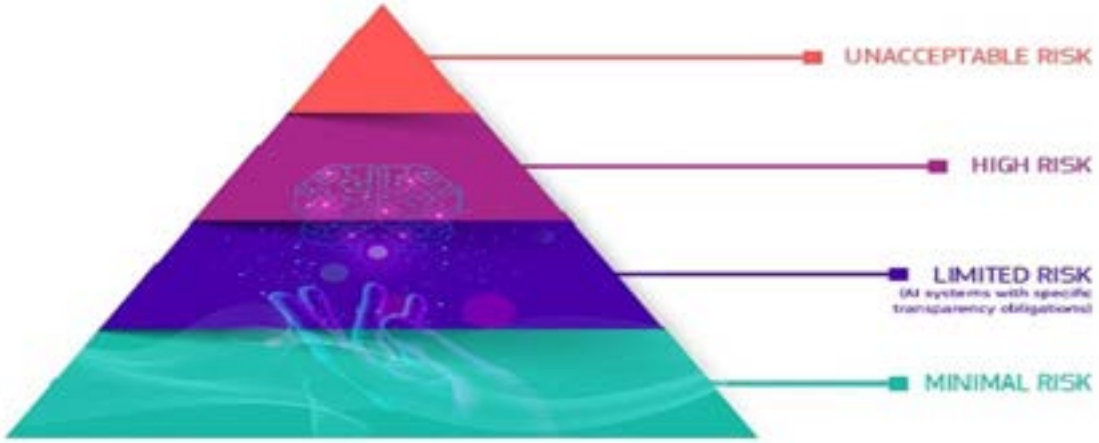

Figure 1: European Commission AI risk-based approach (European Commission 2025)

These AI systems are completely prohibited (Madiega 2024). Figure 1 represents the EU system of applicable AI categories.

To implement these rules and regulations, each member state designates one or two competent authorities that would supervise the implementation of the regulation and take corrective measures in matters of violation of AI regulations. A sufficient penalty would also be imposed in case of deviation from rules and regulations under two heads, namely matters related to Article 5 and matters other than Article 5 (Article 99).

AI legislation: the US approach

The US Government has introduced AI Bills, Acts and various guiding principles at both the state and federal levels. Under the first Trump administration, the National Artificial Intelligence Initiative Act of 2020 was introduced. It was one of the first major US Government efforts focusing on AI. However, the main objective behind this document is to foster research and development in the field concerned. The purpose of this Act is to develop trustworthy AI systems, prepare the workforce in the AI field in each sector and coordinate research and development among civilian agencies and departments (section 5101).

The US also faces challenges due to the transfer of power as, under the Biden administration, various executive orders (EOs) and the AI Bill of Rights were introduced but some were revoked once President Trump took office for the second time. However, not all orders were revoked as EO 14141 (the Biden 2025 AI Infrastructure EO) and EO 14144 (the Biden 2025 Cybersecurity EO) still exist. Under the first order, the US aimed to develop AI infrastructure for national security, without being

dependent on other countries' infrastructure, gaining advanced economic competitiveness by harnessing the benefits of AI for Americans and operating AI data centres (EO 14141). EO 14144 aims to promote security with and in AI. AI can transform cyber defence by identifying threats.

On 23 January 2025, President Trump signed a new EO (Removing Barriers to American Leadership in Artificial Intelligence). The purpose behind this order is to retain the global leadership of the US in AI and revoke all those directives aimed at restricting AI innovation. The objective is to sustain and enhance the global AI dominance of the US to promote economic efficiency, human flourishing and national security (EO 14179). This EO also instructs different agencies to set action plans for developing AI.

In addition, various states are framing legislation for AI compliance, such as the Colorado Artificial Intelligence Act 2024, the California Artificial Intelligence Transparency Act 2024 and the Utah Artificial Intelligence Policy Act 2024.

[C] INDIA'S APPROACH TO AI REGULATION

AI increasingly shapes sectors like fashion, medicine, and entertainment. Indian consumers actively engage with AI platforms from Amazon to Netflix. However, the extensive collection and storage of their data by these applications creates significant data privacy vulnerabilities. This raises critical legal concerns regarding potential breaches, cyber-attacks, unauthorized access, and data leaks, demanding careful legal and regulatory consideration to protect Indian consumer data in the evolving AI ecosystem. As per the Internet and Mobile Association of India (IAMAI) report, India's internet users' growth will surpass 900 million in 2025 (IAMAI 2025) and 67.9% internet penetration rate of the total population (Kemp 2025). Most of the credit goes to the Digital India initiative which is viewed as the modernizing triad to expand nationwide digital access. Analysing the trends and data, it is evident that AI will soon directly impact these initiatives. This makes it increasingly urgent for policymakers in India to seriously consider AI's potential (Vempati 2016). Countries around the globe are coming up with various pieces of legislation for regulating AI but, at the same time, the Indian Government has adopted a unique approach where there would be no legislation for regulating AI as the Government view is that it would restrict the development goals of AI culture in India. However, to protect the interests of the general public and to maintain law and order, the Indian Government has enacted

various specific items of legislation paving the way for the growth and development of AI in India.

1 India has enacted the Digital Personal Data Protection Act 2023 (DPDPB 2023). Under this enactment data that has been collected online, or even in offline mode which is digitized, would be protected. This Act focuses on digital personal data while following the guidelines of the case *Justice KS Puttaswamy and Another v Union of India (UOI) and Others* (2019) where the Supreme Court recognized privacy as the fundamental right under Article 21 of the Indian Constitution. This Act will apply to AI developers who facilitate AI technologies as these developers collect and store huge amounts of data to train their AI applications using algorithms to enhance the problem-solving of the applications concerned and these AI-based applications come under the category of data fiduciaries (section 2). The data fiduciary as per the Act ensures the accuracy of the data by adopting reasonable steps along with providing reasonable security safeguards to protect data which has been stored after obtaining the consent from the consumer (section 8(5)). In the event of a breach of security, it is their responsibility to inform the Data Protection Board of India and the affected persons concerned about the breach, and, once the purpose has been met, these AI applications must cease to retain personal data and therefore delete the data from the database (section 8(7)).

2 The Digital India Bill 2022 is yet to be implemented. Under this enactment, the Government aims to define and regulate high-risk AI systems. The main objective behind this Bill is to address the issues of digital India such as the open internet, online safety and trust, accountability and quality of service, adjudicatory mechanisms and new technologies. This Bill will also replace the 25-year-old Information Technology Act 2000. The most pressing issue is that this Bill will work in collaboration with other legislation and policies relating to the digital domain such as the Digital Personal Data Protection Act 2022 as discussed above, the National Data Governance Policy, various amendments for cybercrime, etc. All these laws and policies together establish a comprehensive framework governing different facets of the digital sphere under Indian jurisdiction (Anand 2023). This Bill categorizes the intermediaries into various sub-categories as per the size and risk involved, such as AI platforms, social media, fact-checking and, last but not least, e-commerce platforms. The objective behind implementing this categorization is to ensure the application of

rules and regulations as per the influence of specific intermediaries on a particular platform.

3 The Digital Competition Bill 2023 is meant to govern the digital market as the traditional market and e-commerce cannot be considered on the same footing. So how does one particular statute, namely the Indian Competition Act 2002, govern both these markets? To remove this inequality and protect the sanctity of market competition, the Government constituted the Standing Committee on Finance for the implementation of the above-mentioned Bill as it is high time to consider *ex ante* regulation rather than waiting for *ex post* law. Accordingly, the Committee recommended the following takes for the digital competition Bill. These are:

(i) Firstly, the Committee recommended initially identifying a small group of key players negatively influencing the market in this competitive digital landscape, referred to as "systemically important digital intermediaries" (Ministry of Corporate Affairs: 29).

(ii) Secondly, the Committee tagged 10 anti-competitive practices (ibid: 4). To ensure efficiency and transparency in the competitive market these practices are anti-steering provisions, platform neutrality and self-preferencing, bundling and tying, data usage, merger and acquisition, deep discounting and dynamic pricing, exclusive tie-ups and parity clauses, search and ranking preferencing, third-party applications and, last but not the least, advertising policies.

(iii) Thirdly, in introduced the establishment of digital market units within the ambit of the Competition Commission of India and proposed the Digital Competition Act to ensure fairness, transparency and equal opportunity for newcomers or start-ups in the digital market (ibid: 39).

[D] CRITICAL ANALYSIS

This fifth generation of computing, the era of AI or the era of predictive software, has caused a hue and cry around the world. Polities like the US and the EU involved in the development of AI are using different approaches. AI has created a disconcerting situation for lawmakers and governments around the need to regulate this algorithm-based technology which can mimic human intelligence. The influence or supremacy of AI is not limited to any particular area as it is impacting every field including the health sector, education sector, economic sector and so on. The regulation of AI and its related software is needed to protect the interests of people

as there have already been a tremendous number of worrying incidents including a violation of human rights in 2016 when the Microsoft Twitter chatbot handle "Tay" started showing racist content within a few hours of its launch as the main objective of this handle was to learn to engage with people through casual and playful conversation (Angulo 2018). The same is observed in another area as online giant platforms abuse their dominant position (Venkatesh & Ors 2025) as they are holding huge quantities of data, and even individual privacy was compromised after the invention of the concept of big data or machine learning. Destructive aspects of AI cannot be overlooked on the pretext of its advanced technology or generative AI. For instance, ChatGPT is making life so much easier as it is writing projects, decorating homes, doing research and even writing exams. But at what cost? These applications create biases, promote plagiarism, obstruct critical thinking, and even promote misinformation. So there is a need to protect vulnerable users; not to mislead users; to ensure users are aware of the risks; and to inform them when decisions are automated by AI. Countries around the world are coming up with legislations or policies to regulate AI, and, while Italy temporary banned ChatGPT (Pollicino & De Gregorio 2023), Germany implemented the 10th amendment to regulate the digital market, and the EU and the US have also brought in various legislations.

In this carnival of regulating AI, India took a back step by not implementing any legislation for AI, introducing Bills and regulations which are still not enforced as the Digital India Bill is still at its nascent stage, the DPDPB Act draft rules were released for public consultation on 3 January 2025 and the Digital Competition Bill is still at discussion stage. This laid-back attitude is explained by stating that the Indian Government is planning to provide space for technology to grow as it considers that this era of technology would lag behind if regulated or if the Government were to put restrictions on this flourishing technology, and the Government therefore considers it to be a kinetic enabler. This motto of the Indian Government was criticized around the world as scholars or experts viewed that:

> AI technology has enormous potential to shape India's economic and national security future; in the absence of a specific policy regime, however, India will find it difficult to realize the full power of AI while potentially falling prey to the detrimental effects of AI proliferation (Vempati 2016).

European countries criticize this approach of no regulation for AI in India and state that: "On artificial intelligence, trust is a must, not a nice to have" (Vestager 2021).

Even after the criticisms around the world, the Indian Government said no to AI legislation by reflecting the ideology that AI has so much potential to reform the various sectors. India argued that, being the hub of IT industries, the technology should be explored limitlessly and if put under restriction it would impact the growth of technology and the country negatively (Singh 2024). The Indian Government also agrees that one cannot ignore the destructive aspect of AI and, therefore, it is implementing various items of sectoral legislation to prevent harm to the general public and also maintain the sanctity of law and privacy of the individual, however, no such sectoral legislation has been passed and enforced to date.

As mentioned earlier, India can transform or modify various sectors using algorithm-based technology as the country has emerged as one of the largest markets for AI. At the same time, one cannot overlook the situation of India being a densely populated country, and it is an indispensable fact that there is a need to regulate this technology. One cannot turn a blind eye to issues of transparency or accountability while the creation or application of the same as a violation of multiple issues have been seen in the case of ChatGPT, such as misinformation, ethical concerns, safety matters and biased answers. Indeed, India needs legislation or policy for regulation and for that purpose is taking various initiatives to increase research in the area of AI. It also needs to promote rolling out guidance documents while keeping the objectives intact. The NITI Aayog, the government think-tank for public policy purposes, has released two AI strategy documents for India and these documents are "Responsible AI" and "Operationalizing Principles for Responsible AI" (NITI Aayog 2021a; 2021b). The Government has also focused on the expansion of the National Strategy for Artificial Intelligence and became the founding member of the Global Partnership on Artificial Intelligence (GPAI)[1] which, since 2024, has been chaired by India.

The Indian Government has adopted a distinctive, sector-specific tack to the governance of AI, prioritizing the avoidance of overarching regulations that could potentially stifle its nascent development. This contrasts with the legislative and executive actions undertaken in more developed jurisdictions such as the US and Europe, where dedicated legislation or EOs addressing AI regulation or research

[1] GPAI is a global, multi-stakeholder initiative designed to promote the responsible development and use of AI, with a focus on human rights, inclusion, diversity, innovation, and economic growth. It represents the first effort of its kind to enhance understanding of AI's challenges and opportunities through the experience and diversity of participating countries. To achieve this, GPAI aims to bridge the gap between theoretical knowledge and practical application by supporting advanced research and activities on AI-related priorities. See Press Release for details.

and development have been introduced. India, despite its developing nation status, is positioned as a significant destination for overseas investment. Consequently, the Government appears hesitant to impede AI's initial growth phase through broad regulatory constraints. This strategic approach aims to foster comprehensive national development by carefully calibrating technological expansion with the preservation of data protection principles, evidenced by the ongoing implementation of various sectoral legislation and pending Bills designed to achieve this delicate equilibrium.

[E] CONCLUSION AND SUGGESTIONS

To achieve the paramount benefit of this AI revolution, India adopted a "Responsible AI" policy as discussed above to attract AI adaptation, proliferation or innovation in every sector. India claims that it has adopted various policies or guidelines for this rapid AI diffusion in the market but none of the sectoral policies or Bills have yet been implemented. It creates challenges for the market to grow as AI-driven technology leads in every other field. However, the Indian Government claims that incorporating various sectoral policies or legislation emphasizes AI growth in India as well as maintaining the policy of protection of basic rights.

This approach posits that AI technology can grow to its fullest potential in the Indian market, as various other countries impose barriers, bans, or stringent regulations on the application of AI, thereby creating additional burdens for businesses seeking to invest in those jurisdictions. While India has undoubtedly been a benefactor of AI's rapid ascent, AI has yet to achieve its full potential. Therefore, the dormant attitude of India towards AI regulations is not to be considered as a developmental approach rather than a regression approach. The business community does not appreciate the EU's stringent approach towards AI as it has implemented the EU Artificial Intelligence Act 2024 and EU Digital Services Act 2022 which create a burden for them to invest in EU countries as certain restrictions are put on gatekeepers, developers and producers. As a consequence, India, being at the stage of development and one of the growing superpowers, has claimed that it cannot afford to put restrictions or hurdles in this advanced market even though basic human rights may be comprised in an unregulated state.

The Indian Government's sector-specific approach to AI governance, while potentially fostering innovation, requires urgent attention to the persistent threat of its risks. To achieve holistic growth, the authors advocate for the swift implementation of long-discussed sectoral policies

and Bills. A phased approach is recommended, involving public trials followed by formal enactment with legislative revisions, ensuring a balance between promoting AI development and establishing robust cybersecurity and data protection frameworks crucial for mitigating increasing online threats within specific sectors.

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Consumer Redress Options and Dispute Resolution in the Nigerian Electricity Market: A Socio-legal Analysis

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Abstract

The Nigerian electricity industry is undergoing reforms aimed at entrenching private-sector participation and competition. This article examines the efficacy of tier-structured consumer redress mechanisms within Nigeria's electricity market. Employing a socio-legal approach, the article explores the practical application of process pluralism, analysing the consumer redress pathways of Consumer Complaints Units, Customer Forums, Nigerian Electricity Regulation Commission, courts, and public enforcement. The analysis highlights the gap between legal frameworks and practical implementation, but it argues that sector-specific consumer redress framework is the correct approach to provide greater access to justice in a monopolistic market. The article advocates a conjunctive approach rather than "alternative" approach between the industry redress mechanisms and the court.

Keywords: consumer redress; dispute resolution; process pluralism; consumer ADR; electricity distribution; access to justice.

[A] BACKGROUND

The Nigerian electricity market is an emerging and critical sector of the Nigerian economy, which has been undergoing reforms in recent years (Federal Government of Nigeria Power, Sector Recovery Programme 2017–2021). Consumer awareness and expectations have also grown as the electric power sector reforms have taken root with increased private-sector participation. Expanding networks and service improvements have meant more customers are connected to electricity and, consequently, there has been an increase in consumer disputes (Musa 2023). The Nigerian electricity market is currently monopolistic, and a consumer rights regime

that includes an effective redress framework is even more critical in such circumstances. Consumer redress is multidisciplinary and influenced by economics, sociology, law, and political science (Cortés 2018: 11). The Nigerian Electricity Regulation Commission (NERC) *Handbook on Dispute Resolution* (2006) requires that dispute resolution mechanisms of the electricity sector should meet the goals of being accessible, cost-effective, timely and easy to use. This article is an offshoot of a PhD thesis on the socio-legal analysis of redress options for consumers in the Nigerian electricity market and how fit it is for purpose (Ojukwu 2024—hereinafter, the study). The doctrinal and socio-legal approach is used in this article to review existing legislation, consumer rights, redress regulations, and data on redress in the electricity sector in Nigeria. The approach included analysing practical workings of consumer redress in the electricity market by examining industry data and reports provided by the electricity distribution companies (DisCos) and the NERC *Quarterly Reports* (2017-2022). In addition, the study included semi-structured interviews with 26 industry stakeholders, conducted from March 2021 to June 2022. These included six NERC staff, five DisCo Customer Complaints Units (CCU), three industry experts, two independent lawyers, two judges, lawyers of legal departments of two DisCos, one director of a DisCo, one member of staff of the Federal Competition and Consumer Protection Commission (FC&CPC), and five Customer Forum secretaries. The findings in the study are influenced by the perspective provided by these key stakeholders' interviews. Thus, the analysis of consumer redress is not only about the laws and rules but also about the process, persons, and the context in which they are applied.

The article discusses the findings of the study and the extent to which the consumer redress processes in Nigeria's electricity market are fit for purpose. The underlying issue examined and addressed is how the electricity sector's consumer redress framework, comprised of Consumer Complaints Units (CCU) (the internal complaint process of DisCos), the Customer Forum (industry alternative dispute resolution (ADR)), the NERC (the regulatory commission), the courts and public enforcement, provide consumers with access to justice.

[B] INTRODUCTION

Cortés has defined consumer redress as: "The existing formal and informal processes (and their regulations) that consumers use to achieve compensation and justice" (Cortés 2018: 2). This article focuses on the existing processes provided to electricity consumers in Nigeria for redress. The redress pathways in the electricity market present a practical

demonstration of how the theory of process pluralism of Menkel-Meadow applies in dispute resolution and can help evolve dispute resolution design and mechanisms (Menkel-Meadow 2004). Process pluralism provides an effective lens for analysing electricity consumer redress in Nigeria as it allows for determining which process is most fit to provide consumer access to justice. Rabinovich-Eniy's description of process pluralism as serving "both as a descriptive lens in observing the dispute resolution landscape and as a normative prism through which various procedural schemes can be evaluated, and procedural reform can be devised" is very apt (Rabinovich-Einy 2022: 55). The study proceeds with the premise that procedural justice for electricity consumers is enhanced by applying the doctrine of process pluralism. The driving view behind process pluralism is that the justice system benefits when multiple processes can be tailored to meet dispute goals of differing situations and claims. The Nigerian electricity market represents a case study of how process pluralism can drive consumer redress outside the traditional dispute resolution routes, such as courts and ADR.

Process pluralism has mostly been discussed in the context of ADR. However, a better emphasis is on using it as a tool where the "alternative" is replaced by "appropriate" dispute resolution. This study recognizes that process pluralism may entail the availability of multiple avenues and is not necessarily an opportunity for disputants to choose freely their preferred processes. Pluralism can extend the consumer redress framework in the electricity market so that disputes are channelled to the most appropriate pathway that provides access to justice. This article summarizes and presents some findings from the study, analysing the consumer redress options in the Nigerian electricity market.

[C] GENERAL FRAMEWORK FOR CONSUMER PROTECTION AND REDRESS IN THE ELECTRICITY MARKET IN NIGERIA

The Nigerian electricity market has progressed from a public utility to a privatized market designed to be competitive in the long term. The DisCos are operating as monopolies, and the market is underperforming in many respects. The lack of competition in the electricity market means that market-driven consumer protection based on consumers' ability to change suppliers has no place. The legal framework for the electricity market in Nigeria creates a tiered, structured redress system based on process pluralism and hybridization. The first level is the CCU, the internal complaints handling system. The second level is the Customer

Forum, the electricity market's consumer ADR process. The third level is the NERC, which functions as the appellate body for the Customer Forum decisions and the public enforcement agency for consumer redress. The fourth level is the traditional judicial process, which is the default mechanism, though there are circumstances where it may be the first and only option. The final tier is public enforcement of consumer rights through the NERC.

Also, several economic and socio-political factors in Nigeria directly impact consumer redress. These include low literacy levels, an inadequate justice system, cultural diversity, and the dispersed nature of the electricity franchises. One of the first things established by the study is the existence of a legal and regulatory regime for consumer protection and redress in the electricity market in Nigeria. Electricity regulation has also recently seen a movement from national to subnational regulations, but federal regulations on consumer redress will remain dominant for some time. The Electricity Act 2023 (Nigeria), section 33, and Federal Competition and Consumer Protection Commission Act 2018 (Nigeria), section 3, created the NERC and the FC&CPC, two key regulatory agencies responsible for consumer protection and redress for electricity consumers.

Consumer protection and redress in the electricity market are based on regulations and the licensing regime of the NERC rather than the general law of contracts and torts (Electricity Act 2023, section 3). This statutory consumer protection regime removes consumers from the vagaries of general consumer law, which has been found inadequate in protecting consumers (Kanyip 2014). The Nigerian Electricity Act 2023, section 232, definition of consumer is much broader than what is obtainable in jurisdictions, such as the United Kingdom (UK), as it defines consumers in an inclusive manner, thereby enhancing access to justice for individual and small businesses acting as consumers (Fair Trading Act 1973, section 137(2); Enyia & Abang 2018: 66733). The definition of a consumer in the Nigerian electricity market thus includes businesses and even persons yet to be connected to the electricity network.

[D] OBJECTIVES OF THE CONSUMER REDRESS FRAMEWORK

The study identified key objectives of the consumer redress framework as enhancing access to justice by providing fair, efficient, expeditious ADR processes; building investor confidence in the dispute regime of the NERC; reducing the cost of resolving disputes; avoiding protracted and unnecessary litigation; building better relationships between

stakeholders; and providing a system that allows discretion, flexibility and delivers justice without being too formalistic (*Handbook on Dispute Resolution*, NERC 2011). This is in line with the common goals of dispute system designs (DSD) suggested by Gills and colleagues (Gills & Ors 2012: 438). Despite a consumer protection and redress regime in the electricity market with these laudable objectives, factors such as lack of information and education and poor awareness hamper its effectiveness (Usman & Ors 2015: 240). A key goal of the DSD for the electricity market in Nigeria is to have an effective ADR process for consumer disputes. This is based on a belief that ADR will better serve the industry than the traditional dispute resolution offered through the courts (Board & Finkle 1994: 308). The Nigerian electricity market DSD preference for ADR is also embedded in the licence conditions of the DisCos. *The Handbook on Dispute Resolution* provides:

> It is a licence condition that alternative dispute resolution is an obligatory mode of resolving disputes in the electricity sector. Licensees are obliged to attempt to resolve disputes through direct negotiations failing which the dispute may be resolved through other alternative dispute resolution procedures or arbitration as may be applicable in the relevant Commission's rules and regulations (NERC 2011: part 3, section 4.1).

This preference aligns with contemporary approaches to consumer dispute resolution.

[E] INTERNAL COMPLAINTS HANDLING IN THE ELECTRICITY MARKET (REDRESS LEVEL 1)

The NERC Customer Protection Regulation (NERC CPR) 2023, section 43(1) established the CCUs of the DisCos as the internal complaints handling mechanism of the electricity market. Internal complaints handling through CCUs, though compulsory for the DisCos and optional for the consumer, is usually the first industry-prescribed step in the complaints journey of a consumer. The CCU occupies a unique position because it is not a creation of the DisCos but rather a creation of law. Though the CCU is neither a third-party ADR body nor a tribunal, the fact that it is a creation of law firmly inserts it into the formal consumer justice process. It also affirms its role as a key factor in access to justice for electricity consumers. Although industry processes are technically optional for consumers, some courts recognize the CCU as a necessary first step even when the consumer decides to use the courts for redress (*Yusuf Ahmed v AEDC* 2018). This is the right approach, as consumer redress should

have a collaborative and integrated approach in order to effectively deliver justice.

Despite their relative newness to the consumer redress system, the CCUs continue to receive and process more consumer complaints than any other pathway in the electricity market (*Annual Report*, NERC 2020). The CCUs handle over 800,000 complaints annually, which is much greater than the about 40 cases per DisCo that the formal court process handles (Interviewee (22) and Interviewee (23)). A DisCo processing many complaints through its internal complaint mechanism may imply several positive and negative things. It may signify the commitment of the DisCos towards solving problems in service delivery or a high degree of faith by consumers that they have a better chance of getting justice through the CCUs.

Complaint numbers have generally been on the increase from year to year. For instance, for Ikeja Electric, 152,817 complaints were lodged with the DisCo in 2020 with a 91.16% resolution rate, contrasted with a total of 91,253 complaints in 2018 and a resolution rate of 87.67% (*Annual Report*, NERC 2020: 112). For the Enugu DisCo, 222,652 complaints were lodged with the DisCo in 2020 with a 97.55% resolution rate, contrasted with 70,957 complaints in 2018 and a resolution rate of 63.90%. The DisCos showed increases in the number of complaints and resolution rates in 2020 (*Annual Report*, NERC 2020). Available data also shows that most complaints were about billing, metering and disconnections. The data trend reveals that billing and metering complaints were 59% in 2017 (*Annual Report*, NERC 2017), 57% in 2018, 53% in 2019 (*Annual Report*, NERC 2018), 48% in 2020 (*Annual Report*, NERC 2020) and 70% in 2022 (*Annual Report*, NERC 2022a). This pattern is linked to the poor state of Nigeria's electricity infrastructure. The combination of weak infrastructure and historically poorly managed utilities has fertilized the environment for deplorable customer service up to date. However, it must be noted that even in developed electricity markets, such as the UK, billing, price and metering are the major sources of complaints because they are at the core of electricity services (Ofgem 2014: 16).

The causes and origin of complaints may provide a vital link to the appropriate mechanism or framework for handling, managing, and resolving certain complaints or disputes (Board & Finkle 1994: 308). Consumer complaints sometimes centre on how DisCo staff treat the consumers when offering service or receiving complaints. The perception that consumers feel they are not being heard, reported by Interviewee (13), an industry electricity distribution expert, points to a deficiency of

approach by some CCUs. Consumer unhappiness in these circumstances is based on perceived interactive injustice (Goodwin & Ross 1989: 89; Homburg & Ors 2009: 265). Interviewee (13) stated that some DisCos create discontent and unhappiness in how their CCUs interact with consumers, often giving the impression that complaints are not being taken seriously. Positive outcomes sometimes mean that consumers do not consider these individual strands of justice because procedural justice often merges with substantive justice. However, it would not be out of place if adverse outcomes were to trigger a deeper evaluation of each separate strand of justice by the consumer (Creutzfeldt & Bradford 2016: 985; Tyler & Huo 2002). However, it is also important to point out that many complaints in the electricity market are often transactional and, therefore, not impacted by value-oriented theories of justice. Interviewee (22) suggested that consumers in the electricity market are often concerned more about either compensation or restoration of supply (*Annual Report*, NERC 2020: 112). In these circumstances, outcomes from the CCUs may be more paramount to consumers than fairness perception (Creutzfeldt & Bradford 2016: 985). Put differently, the CCUs work when they meet consumers' expectations regarding outcomes. The CCUs are, therefore, very important for handling many types of purely transactional cases that are better resolved with minimum fuss and delay. Efficient consumer redress mechanisms must be based on some pluralism to properly tackle the different types of complaints arising in these circumstances.

The CCUs are required to resolve complaints within 15 working days except for complaints relating to meter and reconciliation of bills, which are to be resolved within a billing cycle of one month. On the face of it, there is no direct sanction on a DisCo for failure to resolve the complaints within this time limit. In the UK, the timeline for the internal complaint mechanism of the energy utilities to resolve a complaint is eight weeks (Ofgem 2021). The Nigerian regulations would appear more time-friendly for consumers than the UK ones. While the conditions of the UK and Nigeria's electricity markets are significantly different, it is unclear in both situations what drives the set timelines. The timelines could be a function of reasonableness or merely windows created to limit utilities' liability for failure to address complaints. Some interviewees alluded that complaints sometimes take too long to resolve and that there is limited and unsatisfactory feedback to the consumer (Interviewee (13) and Interviewee (17)). One example was a billing and metering complaint that took over a year to resolve. The NERC CPR 2023, section 43(9), provides that consumers have a right to escalate their complaints to the Customer Forum if they are unsatisfied with the resolution or if the CCU

fails to resolve them within the prescribed time. Where a DisCo cannot resolve a complaint within the 15 working days prescribed, a DisCo is required to write to the customer and explain why. NERC CPR 2023, section 43(8), allows the DisCos to request additional time of not more than 15 working days. Unlike the UK, where the rules require a utility to issue a deadlock letter, the NERC CPR 2023, section 43(9), gives the consumer an automatic option of escalating a matter to the Customer Forum if they are dissatisfied with the resolution at the end of 30 working days. Also, according to NERC CPR 2023, section 43(9), the consumer or the DisCo can escalate to the Forum if they cannot agree on a resolution within 30 days. The short timelines for the resolution of disputes are a major advantage of the CCUs. When they work, they are obviously more flexible and able to deliver resolution faster than any other redress pathway, thereby enhancing consumers' access to justice.

A key point to note is that both the consumer and the DisCo in Nigeria have a right to escalate a complaint to the Forum. The right given to the DisCo to escalate to the Forum is unique but in line with the objectives of the industry DSD. However, to encourage dispute resolution at the CCUs and dispute avoidance, such escalation by the DisCos should be discouraged. One measure to address this is for the NERC to introduce an incentive and penalty regime on the DisCos similar to the one employed by the UK Financial Ombudsman model. This model charges banks for any escalated complaint, and this is based on "the polluter pays" principle (Financial Ombudsman Service nd). If the Nigerian electricity market were to adopt this, it would encourage early settlement by the DisCos and discourage dogmatic responses to complaints. Many more disputes would be resolved at the CCUs by the DisCos, and fewer disputes would escalate to the Forum. This could be structured such that the financial burden of DisCos increases as they generate more complaints that escalate to the Forum. Adopting this will help improve the funding of the Forums. It will also help ensure that only serious issues that are difficult to handle get to the Forum. This will also be in line with the subsidiarity principle suggesting that consumer complaints be mandatorily and preferably resolved at the CCUs, and, unless this fails, other pathways ought not be used.

In the UK, for instance, the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 highlight a different and more comprehensive approach in prescribing regulations for internal complaints handling by electricity companies. The UK regulations are prescriptive and provide important guidelines on issues such as recording complaints, allocations, and maintaining adequate resources for handling complaints.

They also cover other issues such as signposting consumers to the redress scheme (Gas and Electricity Regulated Providers (Redress Scheme) 2008), recording steps taken during the handling of the complaint, the definition of resolution, the remedies that the companies should offer, the records to be kept by the companies, the information to be provided to consumers and many other issues (sections 6, 5, 8, 3(3)(h), 4(1 & 2) and 10 of the regulations). The Nigerian regulations leave most of the issues to be covered by internal complaints-handling regulations for the different companies to develop and implement. This was a major criticism of the old regulation (NERC Customer Complaint Handling Standards and Procedure 2006). There is also no guidance in the Electricity Act 2023 or the NERC regulations on the type of remedies to be provided to consumers whose complaints are upheld by the CCUs. To prevent uncertainty, it is suggested that the regulations follow the UK model and specify the type of remedies utilities may offer consumers.

This hands-off approach by the NERC in not providing a prescriptive guidance document may be counterintuitive to developing a process that leads to satisfactory resolution of complaints. Therefore, there should be a statutory role for a consumer body to assist consumers who wish to complain. In the face of an asymmetrical relationship in the electricity market, the absence of such support to consumers limits the CCUs "fitness for purpose". While it may be in the interests of the DisCos to develop an effective procedure that provides redress and avoids disputes, it may not be safe to trust them to do so, given the monopoly status of the industry.

[F] LIMITATIONS WITH THE CCU AS A REDRESS MECHANISM

For an internal complaint-handling system to work well, the company must, from the onset, clearly articulate the objectives it intends to achieve. It is not always clear from the DisCos whether they consider the CCUs and consumer redress a cost centre or a valued-added service that improves their business. The study also found some other limitations with internal complaints handling by the CCUs. The CCUs are not adequately publicized or brought to the attention of consumers. Despite the availability of online channels, access to the CCUs remains a challenge for rural dwellers due to poor feedback for complaints made through some of these online channels. Reoccurring complaint patterns identified in the study show the ineffectiveness of the CCUs in providing dispute avoidance. From the available industry data, metering, billing, and disconnection have

represented a huge portion of consumer complaints and disputes over the years. Though the NERC reports identify these categories as areas of concern to consumers, there appears to be no definitive action on them as systemic problems requiring a better response from the internal complaints system. The CCUs should be the first to flag a recurring complaint pattern, and, where they fail to do so, the NERC, through its quarterly reports, should expressly flag such issues and draw the DisCos' attention to it. For a more effective redress, there should be a framework requiring the DisCos to provide the regulator with a remedial plan once a pattern of reoccurring complaints is observed within their franchise area.

Some stakeholders interviewed suggest that information imbalance is one of the reasons for the persistent complaints around billing and metering. Poor information availability is not limited to billing and metering but also extends to consumer rights and redress options. The paternalistic approach of the electricity market to consumer rights would only be effective if matched by sustained education and sensitization of the consumers. The low level of consumer knowledge and willingness to enforce the rights directly impacts the accessibility of the redress framework to electricity consumers in Nigeria. The DisCos do not view providing information on the CCUs as particularly important but rather expect dissatisfied consumers to discover avenues of redress by themselves. The visibility of information to consumers on the CCUs is extremely low, with limited information being provided through social media and other online channels. The new regulation requires the DisCos to provide information on redress, but the problem would lie in the effective implementation by the DisCos (NERC CPR 2023, section 43(5)). Information on most of the DisCos' websites is quite opaque on how to complain, whom to complain to, and the process of complaining.

Nigerian consumers are likelier to have mobile and smartphones; thus, phones and social media applications are more likely to have a greater impact when integrated and used for redress. The NERC CPR 2023, section 43(5), now requires that CCUs receive complaints through phone calls, SMS, email, and other social media platforms. The challenge remains in how effectively the DisCos use these channels. Thus, a migration to a more robust online complaint-handling and redress process that is easily accessible through smartphones alongside the manual complaints handling by the DisCos will increase consumer access to redress.

Interviewee (24) suggests a lack of adequate communication from DisCos to consumers on the complaints and their outcome. DisCo employees sometimes appear uncooperative and project an attitude that is not

problem-solving. DisCos should be able to explain to complainants how and why they are making a decision regarding their complaint. Without proper explanations, consumers' perception of an internal complaints mechanism may be that it does not deliver justice (inclusive of retributive, procedural, and interactive), the fallout of which could be a boycott of the system, lack of complaining, and resort to other measures by consumers (Homburg & Ors 2009: 265). The new Customer Protection Regulation attempts to improve the perception of retributive justice offered by the CCUs by introducing additional remedies. This includes the DisCo having to pay a consumer who has been wrongfully disconnected the cost of their average daily consumption (NERC CPR 2023, section 26(2)). Also, the most common remedy of giving a consumer energy credit, as provided in the Regulation, rewards rather than punishes the DisCo. A more fitting remedy would be for the DisCos to make cash payments to consumers when found liable.

As pointed out above, when the CCU fails or is unable to resolve a dispute, then the next tier of consumer redress, the Customer Forum, is an option for the consumer or the DisCos.

[G] CONSUMER FORUM (REDRESS LEVEL 2)

Consumer ADR worldwide developed to aid the formal justice system, which had often struggled to provide redress to consumers due to their lack of legal capabilities and the low value of their disputes. ADR means alternatives to litigating a dispute (Office of Fair-Trading Report 2010; Gill & Ors 2017). Often, consumer cases arise from persons who cannot afford legal representation, and the courts are too slow and formalistic to provide any meaningful redress in the circumstance. The Nigerian situation is not dissimilar as Nigeria's justice delivery lags generally, and even more in consumer disputes. The Customer Forum is the only sector-specific consumer ADR process in Nigeria. It is the second-level redress process following the failure of the CCU to resolve a complaint. The NERC CPR 2023, section 2(16), defines the Customer Forum as the dispute resolution panel established to resolve disputes between DisCos and consumers amicably. The Customer Forum is created and managed by the NERC even though the actual members of the Forum are independent. The Forum can be compared to a consumer Ombudsman, but it is quite a different model of redress mechanism. One cannot, however, with certainty clearly classify the Customer Forum as a quasi-administrative tribunal or simply an ADR body. A review of the Forum's features would suggest it is not a tribunal, especially as the Forum does not have the power to compel parties to appear before it like a court or tribunal.

Another interesting point is whether sector ADR bodies such as the Customer Forum are subject to judicial review. The law on judicial review of consumer ADR bodies is not quite settled. In the UK, the Energy Ombudsman is subject to judicial review even though some other private Ombuds in the UK are not. Creutzfeldt and colleagues argue that the Energy Ombudsman is subject to judicial review because Ofgem's authority to approve the scheme is delegated to it by the relevant government minister (Creutzfeldt & Ors 2012: 308). In a similar vein, in Nigeria it could also be argued that because NERC, which created the Forum, is subject to judicial review, the Forum should also be subject to judicial review. There is, however, nothing in Nigerian law or practice so far to support such a position.

The Forum process has many positives as a consumer ADR scheme. It adopts a hybrid model of mediatory/conciliatory and adjudicatory methods in resolving disputes. There are, however, some identifiable gaps and challenges in performing the function of an alternative complaint and dispute resolution system for electricity consumers. One of the first noticeable challenges the Forum presents is the fact that there are few Forum offices across the DisCo networks (*Annual Report*, NERC 2022a). This raises a critical issue of the Forums' accessibility. Access is a key feature of procedural justice. If consumers cannot access an ADR process, it may lose legitimacy and be deemed unfit for purpose. Even with the growing importance of online dispute resolution (ODR) in the sphere of consumer redress globally (Katsh & Rifkin 2001; Lodder & Zelenikow 2010; Cortés 2018), submission of disputes to the Forum is largely offline, and the Forum does not have websites or use social media channels.

Furthermore, the Forum does not use document-only processes; rather, its cases require a full physical hearing. Virtual hearings have recently been introduced, but low internet penetration may limit their usefulness. With over 227 million phone subscribers, only about 10% use smartphones or even have access to the internet (Nigerian Communication Commission 2012-2023). Despite some scepticism about the effectiveness of an ODR framework in Nigeria's electricity market, it can be suggested that a hybrid Forum that uses both ODR and physical hearings will ultimately benefit consumers and increase access to justice (Cortés 2018; Genn 2010: 192). The scepticism could be linked to the lack of infrastructure and the literacy levels in Nigeria (Adedigba 2017; Monye 2018: 373). The courts' use of online hearings following the Covid pandemic gives some hope that the Forum's introduction of virtual hearings should work, and it could further aid access to justice for consumers (National Judicial

Council 2020; Orji 2020) despite previous failures of use of technology by the judiciary (Ojo 2020).

Another visible challenge with the Forum is the current staffing arrangement. The Forum has only one permanent staff member who oversees the secretariat and supports the Forum members. Interviewee (1) rightly points out that without automation, the workload of the Forum would be too much for a one-person secretariat to manage. For instance, the Ikeja Forum handled over 1571 cases in one year, which is about 131 complaints a month on average (*Annual Report*, NERC 2020). Another noticeable challenge observed with the Forum relates to the enforcement of its decisions. The Forum has no enforcement or monitoring powers or capacity for enforcing its decisions.

[H] GOING BEYOND DISPUTE RESOLUTION

In analysing the Customer Forum, the study evaluated it in comparison to the Ombudsman model of consumer ADR. One of the advantages of the Ombuds model is that it goes beyond dispute resolution to provide other add-on advantages, one of which is signalling the industry about systemic consumer issues. Though the Customer Forum provides regular reports to the NERC, signalling the industry is not a specifically assigned role. Also, the interviews of stakeholders and analysis of the NERC quarterly and annual reports show that this role is not currently being played by any entities connected with consumer redress (NERC 2017–2022). An effective consumer ADR process should go beyond simply reporting data and include analysing and making suggestions on dispute prevention to the NERC and the DisCos based on the data. To effectively do this, the Customer Forum would need to change from a structure comprising independent Customer Forums to a more unitary system. Data aggregation from the Forum is currently done by the NERC rather than the Forums. The Forums are better positioned to perform this role and can provide an independent view to the NERC for its regulatory actions. The Customer Forum can adopt the same process the Energy Ombudsman in the UK uses to fulfil this role (Lucerna Partners 2015).

Another gap that emerged from the research is that the Forum has no structure to provide consumer advisory support. This missing link in the consumer redress process in Nigeria leaves consumers who are disadvantaged by education and social status ill-equipped to engage in formal redress processes. In this respect, there are lessons for the Forum to learn from the UK on how the Energy Ombudsman has evolved. The Energy Ombudsman, in addition to dispute resolution, also provides

advisory support to consumers on the redress process, dealing with many more queries than complaints (Lucerna Partners 2015). The Customer Forums should be empowered to play the dual role of advising consumers in appropriate cases and adjudicating and resolving disputes.

[I] CONSUMER APPEALS TO THE NERC (REDRESS LEVEL 3)

Some ADR escalation mechanisms may be framed as an internal appeal process or an appeal to an external body. Consumer ADR systems tend to be single-tiered, with their decisions being final. This is understandable for several reasons. First, most consumer claims are low value, which means that additional costs associated with appealing may be disproportionate. Also, consumer ADR schemes mostly bind the business and not the consumer. For example, the Energy Ombudsman's decisions in the UK bind only the energy companies but not the consumers. The UK consumers' right to choose whether to be bound by the decisions in this circumstance makes an appellate process unnecessary. The Nigerian electricity consumer redress framework is different in this regard. The decisions of the Forum are binding on both the DisCos and consumers. This, on the face of it, explains why the Forum process requires an escalation or appeal mechanism. Also, appeals have other advantages besides reviewing the lower tribunal's or ADR body's decision, such as setting a precedent for future decisions of the first instance ADR and providing general legal guidance. It is possible to view appeals as unnecessarily complicating a cost-efficient and informal consumer redress process. The appeal to the NERC provides another layer of consumer redress to ensure an effective complaint resolution in the electricity market through the appellate body's corrective power. The Nigerian framework gives both the consumer and DisCo a right of appeal from a Customer Forum. The concept of appeal from a consumer ADR by both the consumer and the business is uncommon and unique to a few consumer ADRs (Hodges 2014: 601). This right of appeal by the DisCo may be considered a flaw in the Nigerian framework. A similar criticism exists about the Irish Financial Ombudsman being a consumer ADR with an appeal process (ibid).

Available information on appeals can be gleaned from the NERC *Annual Reports*, *Quarterly Reports*, and unpublished appeals data from the NERC (available only up to 2021). The aggregated data on appeals from 2019 to 2021 shows an average of 45 appeals per year. The level of usage of the appeal process weighed against the other tiers in the redress process

		2017	2018	2019–2021
1	**No of appeals/consumer cases**	7	12	134
2	**No of cases at the Forum**	3742	9137	27,524
4	**Top four DisCos with cases on appeal**	-	-	Abuja Disco: 32 Benin Disco: 26 Ikeja DisCo: 21 Ibadan DisCo:20

Table 1: Sample data on dispute resolution/appeals to the Commission (data from NERC 2017: 58; 2018: 61; 2020; 2022b).

could raise doubts about its usefulness. For instance, only about 0.53% of complaints at the Forum were appealed in 2020 (*Annual Report*, NERC 2020).

Most of the appeals across the DisCos franchise areas were brought by consumers (Interviewee (16)). In a particular franchise area, however, at least over 50% of the appeals were filed by the DisCo. The right of appeal granted to DisCos is an extension of the right DisCos have to file complaints at the Forum. Generally, consumer redress mechanisms are focused solely on giving the consumer justice. However, the Nigerian consumer redress model is reciprocal and seeks justice for consumers and DisCos.

The Nigerian model recognizes that, given the challenges of the electricity market, DisCos require some protection to encourage investments (Jeremiah 2022). Indeed, Nigeria's consumer DSD objectives include building investor confidence and creating better relationships between DisCos and consumers (NERC 2011, part 1, section 2). There is, however, some reservation about affording businesses the same protection as consumers, given that there is already a power imbalance (Kanyip 2017). The experience where over 50% of appeals in a particular franchise were filed by a DisCo demonstrates pitfalls. The DisCo did this to frustrate compliance and avoid enforcement penalties because appeals by a DisCo put the timeline for compliance by a DisCo in abeyance and shield it from penalties (NERC CPR 2023, section 51(5) and (6)). It can be suggested that this abuse was possible because DisCos are not made to pay filing fees and be liable for costs if the consumer wins the appeal. Fee-paying and cost-bearing by the DisCos would not only improve the funding of the industry redress system but also increase dispute avoidance and resolution at the earliest possible stage by the DisCos, thereby improving access to justice for consumers.

In cases where a monetary award has been made against a consumer at the Forum, a pre-condition must be met before an appeal can be filed. The complainant consumer must first pay the amount before the NERC can have jurisdiction to determine the appeal (NERC CPR 2023, section 52(3)). This condition is not applicable where the failure is on the part of the DisCo. Several rationales have been suggested for this rule. One rationale is that this provision prevents consumers from using the appeal process to deprive the market of revenues. This reasoning is doubtful as it appears not to consider that the DisCos will always be financially stronger than the individual consumer. Also, Interviewee (16) suggested that because consumers are mobile and the DisCo constant, the balance of convenience favours the DisCo retaining a disputed amount pending the outcome of an appeal. A further reason for this rule is that any wrongful payment can always be recovered or considered a prepayment for services from a DisCo.

On the face of it, none of the adduced reasons appears sufficiently convincing to justify putting the weaker party out of pocket. When a consumer eventually succeeds, the money they were forced to pay is not refunded, and they can only receive credit tokens. It is argued that this amounts to the DisCo being granted an unearned credit facility for complaints for which it should be penalized. The requirement to pay before filing an appeal imposes an unnecessary burden on consumers, especially as the condition is not reciprocal. The requirement that the consumer pays cash in advance and the company issues credit tokens in return shows an imbalance of the parties' obligations. It may well be inferred that this will discourage appeals and foist on consumers an acceptance of decisions they would otherwise wish to contest. It may rightly be one of the reasons that less than 1% of Forum users currently use the appeal process.

[J] PRIVATE ENFORCEMENT THROUGH THE COURTS AND PUBLIC (REGULATORY) ENFORCEMENT (REDRESS LEVELS 4 AND 5)

In Nigeria, there are significant obstacles to access to justice through the courts for individual and collective actions, with long delays that have cases lasting an average of three years before judgment being one of them. Also, the court's application of the law in cases that have sought relief under contract or tort over the years has left much to be desired. Kanyip (2014) points to cases such as *Kingsley Emenike Osuji v Nigeria Bottling Company plc* (2012) and *Etukudo Ekefere Nsima v*

Nigerian Bottling Company (2014), which show consumers' difficulties in obtaining redress through the courts. The standard of proof and nature of the contractual rights under Nigerian law is such that it was almost impossible for consumers to succeed in court (*Nigeria Bottling Company plc v Demola Olanrewaju* 2007; *Nigerian Bottling Company plc v Edward Okwejiminor* 2008). Much has been written about these limitations of litigation as a consumer redress tool. Though courts may not be suited for individual low-value claims, the courts remain a significant avenue for effective consumer redress in certain circumstances, such as those requiring interpretation of law or award of general damages. Effective consumer redress in the electricity market requires a holistic and pluralistic approach that includes all options. There must be clear points of intersection and interaction between the various redress pathways and tools. The Nigerian courts have, in some cases, such as *Yusuf v AEDC* (2018), insisted that electricity consumers must first exhaust the internal complaints mechanism and sector ADR process before they can access the courts. This is in line with the principles established in *Ojora v Ajip (Nig) plc* (2014: 216) and *Owoseni v Faloye* (2005: 234). This approach accords with reason and judicial precedent. The courts reasoned that these out-of-court processes are established because the law recognizes that specialized or administrative forums are better suited for resolving such disputes. Despite the increased advocacy for using ADR for consumer redress and the shortcomings of litigation, the courts' importance remains an avenue of last resort.

Regulatory enforcement is also becoming a stronger tool for individual and collective consumer redress. When provided effectively, regulatory redress tends to reduce resort to private enforcement through the courts, whether individual or collective actions. The limitations of the current framework lie primarily in how efficiently the NERC commences enforcement action following the failure of the DisCo to comply with a Forum decision. Effective regulatory redress processes tend to reinforce private enforcement and, in many cases, reduce the need for expensive individual or collective court actions. The NERC has, through some of its enforcement actions, demonstrated that regulatory enforcement can be used to deliver individual redress (NERC 2015). Regulatory enforcement proves a more effective mechanism, especially where many consumers suffer similar harm. The NERC has also used it to enforce Customer Forum orders that DisCos had failed to obey (NERC 2016). Regulatory enforcement can deliver individual and collective redress more efficiently and effectively when combined with the other existing redress pathways.

Despite the overall effectiveness of regulatory enforcement, some challenges exist with the current framework in Nigeria. Under the current legal regime, fines and penalties collected by the NERC must be paid to the rural electrification fund (Electricity Act 2023, section 142 (b)). This does not directly benefit the consumers' franchise area or the consumer itself. This seems unfair and can be said to deliver no distributive justice to the consumer. While NERC can order specific redress to affected consumers as an outcome of regulatory enforcement, the NERC should also have the discretion to redirect fines and penalties to benefit affected consumers or their franchise area as it is in the UK model (Gas Act 1986, section 30G, and Electricity Act 1989, section 27G, as inserted by the Energy Act 2013, section 144 and schedule 14; Canto-Lopez 2016: 66). Such a policy would be more in tune with consumer expectations of the outcome of a redress process.

[K] A CONJUNCTIVE RATHER THAN A COMPETITIVE APPROACH BETWEEN THE CUSTOMER FORUM AND THE COURTS

If access to justice is to improve for electricity consumers, then redress pathways must be seen from a pluralistic perspective that does not make them mutually exclusive but complementary. Interviewee (22) suggests that many consumer claims that end up in court do so because of a lack of knowledge of the existence of the Customer Forum. Also, the data from the sampled DisCos suggests a low success rate for the individual electricity consumer cases that reach the courts (DisCos' litigation data from 2019–2021: 2022). Thus, even though the courts must remain a viable choice for consumers seeking redress, greater emphasis must be put on promoting other, more viable options. The absence of small claims or special courts dealing with consumer cases has not helped courts as a redress option. In appropriate cases, even where a consumer has spurned the electricity industry ADR and chosen the courts, court-annexed ADR should remain an option. Referrals are increasingly seen as a more effective tool for advancing court-annexed ADR rather than a sanction-based regime of costs (Cortés 2023). The Nigerian courts' approach should be to safeguard the consumer by redirecting them to the appropriate redress process when they have made a wrong choice. The court's current practice appears to be to strike out the case and then ask litigants to use the industry ADR (*Yusuf Ahmed v AEDC* 2018). There could also be two approaches when the courts in Nigeria are confronted with whether to insist on compulsory use of the electricity industry consumer ADR process or resort to the courts. On the one hand, the court should

strike out suits that have not first attempted using the industry ADR, especially for smaller monetary claims, and follow similar English law principles on compulsory telephone mediation for small claims (Ministry of Justice & Ors 2023). On the other hand, the courts could adopt the process pluralism principle, decide the most appropriate redress pathway for the claim, and refer the consumer to it. Such referral will be justified given that the industry ADR will frequently conclude earlier than the average three years that litigation will take. It should be a two-way flow, which means the industry ADR should be able to refer consumers in appropriate cases to court, and the court should be able to do the same. Also, a decision of the Forum should act as a bar to further proceedings in court, except if it is by way of judicial review. Similarly, the Forum should redirect consumers to court when the issues in contention border statutory interpretation or declaration of rights, in which case the courts are a better fit for this purpose.

[L] RECOMMENDATIONS AND FINAL THOUGHTS

Consumer complaints and disputes are not monolithic and often have different causes, typologies, and remedial differences. The sector-based approach to complaints and dispute resolution in Nigeria's electricity market is unique. In an electricity market where switching is not an option, internal complaints handling cannot be left as an internal performance metric. Strong regulatory oversight is needed to make it a true path to access to justice. It is important to see each component process not as a standalone but as an integrated and linked framework. The electricity market presents a platform to see how effective pluralism in dispute resolution can be, especially in contributing to increased access to procedural justice. This means there is no alternative between ADR, courts, and public enforcement, but rather a plural dispute resolution system that caters for different types of disputes. This article firmly suggests that pluralism and hybridization would ultimately benefit access to justice. The hybridization suggested in this article advocates for a dispute resolution system design approach that better interconnects the pathways of sectoral ADR, courts and public enforcement with the overriding aim of improving access to justice for consumers participating in a monopolistic private market. Accordingly, it would be justifiable to assign each claim to the appropriate pathway rather than making consumers choose between competing options. The CCUs are at the lowest level in the justice chain in the electricity market and are closest to the consumer. Following the subsidiarity rule, resolving disputes at the lowest level is quicker and

cheaper, and this ultimately meets the objectives of access to justice and effective redress for consumers (Portuese 2011: 231). CCUs not only have the capacity to resolve disputes in a manner beneficial to the business of the DisCo, but they can also provide real-time opportunities for the DisCo to learn from recurring problems and avoid disputes. However, this may be undermined by the lack of a competitive market, so added regulatory vigilance by the NERC is required. The fact that sectoral consumer ADR, such as the Customer Forum, has specialization and focus is a major advantage for advancing consumer access to justice. Such a model, if operated as a hybrid of ODR and traditional systems, will create an even more efficient and effective process that delivers justice.

Several of the findings from the study point to a functional consumer redress framework that can be improved upon based on the theory of change that dispute resolution systems can always be better (Lande 2020: 121). Some of the identified general lapses in the consumer redress framework in the electricity market in Nigeria should be addressed by the NERC developing more comprehensive guidelines for CCUs similar to those in the UK electricity market (Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008, sections 3–10). The suggested guidelines should address issues like recording complaints, allocating and maintaining adequate resources for complaint handling, proper signposting and effective use of online resources for complaint resolution. Under the current arrangement, there appear to be no regulatory incentives for DisCos to improve the CCUs. The proposed guidelines must, therefore, include penalties and incentive regimes like a polluter-pays principle if disputes are referred from the CCUs to the Forum. Also, the NERC should give the Customer Forum the additional role of providing advisory support to consumers, similar to what the Energy Ombudsman does in the UK. A more balanced consumer appeal process that eliminates the requirement that consumers first pay any sum adjudged to be paid by the Forum before they can appeal is necessary to increase consumer access. The article further recommends a greater role for online tools and a hybridized process allowing physical, document-based, and online hearings at the Forum. The above, together with the simplification of the Forum processes to eliminate the current significant use of lawyers by disputants, will improve the overall performance of the industry redress mechanisms and increase access to justice for consumers.

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Service Charge Budget: To Consult or Not to Consult?

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Abstract

This article examines whether freeholders should be legally required to consult long-leaseholders on service charge budgets before imposing and collecting charges. Using empirical survey data—both qualitative and quantitative—alongside doctrinal analysis and theoretical insights from management studies, I argue in favour of such a requirement. Additionally, I draw upon my experience of over 30 years as both a leaseholder and a freeholder managing the block of flats in which I reside.

The discussion is structured around three key arguments. First, I propose that long leasehold contracts include an implied term necessitating consultation on service charge budgets. While legally complex and contentious, this argument establishes the foundation for the broader discussion. Second, I demonstrate that consultation constitutes good practice, as evidenced by professional guidance from management bodies—guidance that is not always adhered to in practice. Third, I advocate for a cultural shift towards greater consultation, arguing that fostering a consultative approach leads to improved outcomes for all parties involved.

Empirical data further supports this argument, revealing a clear correlation between the degree of control exercised by leaseholders and the extent of consultation, which in turn enhances their overall experience. The stratified nature of this dataset provides a unique contribution to the debate.

Keywords: contract law; contract management; implied terms; relational contract; domestic leasehold contracts/long leases; socio-legal empirical research.

* I thank my colleague and friend Professor Pablo Cortés for his robust suggestions on my first draft and his continuing support. I also thank the 655 leaseholders who provided a mountain of data which I am still mining.

[A] INTRODUCTION

In a long lease relationship in England and Wales, in which the freeholder owns the land and the "bricks and mortar" and the leaseholder has the right to live in demarcated (demised) areas of the freeholder's property and use other areas (usually described as common parts), the landlord or a service company takes on the task of repairing and maintaining the non-demised bricks and mortar and common areas, and that work is for the benefit of both leaseholders and freeholders. It maintains the value of the estate to the freeholder, and it keeps bricks and mortar and common areas in a fit and safe condition (usually along the lines of in "good repair and condition") for the benefit of residents. Long leases, which are conceptually complex, were described by Lord Browne-Wilkinson, in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994),as "a hybrid, part contract part property" (at 16) in a passage pointing out that when courts review contract provisions which purport to limit property transfer rights courts have usually "looked askance at any attempt to render [property] inalienable" (also at 16).

It is also worth remembering that leases are contracts as Aldridge notes:

> Construing a lease is the same process as interpreting any contract (nd: 2-064).

Service charge, which must be kept ring-fenced and in trust (expressly under the lease I hold), is usually collected under lease provisions, by the freeholder or an agent, and is subject to multiple statutory controls. For example, germane to this article, section 42 of the Landlord and Tenant Act 1995 provides that:

> – the payee holds the money
>
> (a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable, and
>
> (b) subject to that, on trust for the persons [or person] who are the contributing tenants for the time being

Sir Kim Lewison describes this as meaning that moneys belong "to the tenant beneficially" (Lewison 2015: 7.197).

The implicit contextual background to these contracts includes, using Leggatt J's description in *Yam Seng (Yam Seng Pte Ltd v International Trade Corporation Ltd* 2013: paragraph 134), amongst "shared values and norms" the expectation (the reasonable or commercial expectation) that parties will treat each other with dignity, respecting each other's

status and rights, use each other's assets (including service charge monies) as if they were their own, engage constructively, act reasonably, play fair, communicate, solve problems, and, critically, allow for peaceful enjoyment of the property, all vertical and horizontal and all directed to making the deal work. That particular argument infers that a long lease is a "relational contract".[1]

In advance of a service charge demand it is obvious that someone must develop a budget from which prospective service charges can be calculated. In our block we break the budget down as set out in Table 1.

Budget proposal 2X/2Z			
Line item	**This year**	**Next year**	**Comment (illustrative)**
General management			No increase
Management - accounting			
Management - secretarial			
Fire safety			FRA last year caused a major rise
Other safety			
Cleaning			
Gardening			
Insurance			
Major Projects			Discussed at April meeting
Ad hoc maintenance			
Electricity			
Bank charges			

Table 1: Model budget proposal.

There may be more line items in more complex buildings, such as lifts and building safety cases. But it really is not a complex undertaking.

This article examines the underlying lived reality of the budget process through which long-leaseholders become liable for service charges. It is informed by a qualitative and quantitative survey I carried out in 2024 asking respondents for details of their experience in long leasehold to which I received 655 responses.

I argue for a thorough and professional consultation process for this budget on three bases:

[1] This idea will not be fully developed in this article but is being developed in another, rather longer article.

- It is a contractual requirement.
- It is a management imperative. It is proper and professional to engage those on whose behalf one is spending money, especially when that money is not yours.
- It should lead to better decision-making.

[B] STATUTORY REQUIREMENTS FOR CONSULTATION IN LONG LEASEHOLD—THE DOG THAT CAN'T BARK

There are two statutory freeholder/tenant consultation schemes. One, contained in the Landlord and Tenant Act 1985 and the Commonhold and Leasehold Reform Act 2002, requires, in simple terms, that those who pay service charges are consulted in respect of works which are likely to cost more than £250 per any single flat. The "centrally relevant" requirements of the 1985 Act (sections 20(1) and 20ZA(1)) were described by Lord Neuberger in the *Daejan* case (*Daejan Investments Ltd v Benson & Ors* 2013: paragraph 7):

> 8. Section 20(1) states that:
>
> > "… [T]he relevant contributions of the tenants are limited in accordance with subsection (6) … unless the consultation requirements have been either –
> >
> > a) complied with in relation to the works …, or
> >
> > b) dispensed with in relation to the works"

The result of *Daejan*, is, in short, that a failure to consult only results in a remedy where a tenant is prejudiced by the failure, the onus being on the tenant to show prejudice. Professor Bright (2024: 2) has written that "the dial has shifted too far in favour of landlords", and I have argued that the consultation requirement provision is essentially neutered (Soper 2024).

Based on my three decades of experience as a leaseholder and freeholder, I proposed a legislative change designed to overcome *Daejan*. The amendment was based on a text I provided in "Lord Wilson was Right etc" (Soper 2024) and was drafted taking into account his powerful dissent in *Daejan* (paragraph 77): "Lord Neuberger's conclusion … seems to me to subvert Parliament's intention-… [and] … seems to me to depart from the width of the criterion ('reasonable') which Parliament has specified":

> 20ZA(1) Reasonable for the purpose of this provision is a matter of fact for the Tribunal which:

i. May or may not consider the matter of relevant prejudice to the tenant. If prejudice is to be considered the burden is on the landlord to demonstrate a lack of prejudice or to prove the degree of prejudice.

ii. Shall include consideration of the purpose of this Act which is to increase transparency and accountability, and promote professional estate management as well as to ensure that leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

iii. Shall consider the dignity and investment of the tenant, who should be treated as a core participant in the process of service charge decisions.

iv. Shall have regard to the tenant's legitimate interest in a meaningful consultation process, bearing in mind that minor or technical breaches may not impinge on the tenant's interest, nor prejudice the tenant.

v. At its discretion may or may not consider a reconstruction of the "what if" situation, analysing what would have happened had the consultation been followed properly. All costs of such a reconstruction shall be for the landlord.

The amendment was put forward by the Labour Party's Barry Gardiner. The then Government refused to accept any opposition amendments to its Leasehold and Freehold Reform Bill. However, Mr Gardiner was kind enough to acknowledge my work during the Third Reading:

> I also thank Dr Howard Soper, another academic who helped draft the amendment, who was appalled by the number of successful dispensations won by freeholders that he found in his study of first-tier tribunal decisions (HC Deb 28 February 2024, vol 746, no 55 at 53).

Under the Building Safety Act 2022 C30 (section 91), residents must be consulted on a residents' engagement strategy but this applies only to "an occupied higher-risk building", meaning, essentially, under section 31 of the Act:

(a) is at least 18 metres in height or has at least 7 storeys, and

(b) is of a description specified in regulations made by the Secretary of State.

This process does not apply to the block I help to manage but the resident directors on the board have formalized the engagement process, following this legislation with much wider consultation requirements in our recently distributed Residents Engagement Strategy:

> This strategy promotes and formalises the engagement strategy which ensures that flat-owners and residents may participate in the

> making of decisions which affect them directly or indirectly at XXXX including decisions relating to: -
>
> • Building Safety
>
> • Building Management
>
> • Service Charge Levels
>
> • Major works
>
> • Administration Charges
>
> The purpose of the strategy is to formalise consultation and communication arrangements at XXXX. We intend to ensure that all affected by safety or financial or other issues are provided with the opportunity to comment on all decisions relating to such issues and to be provided with appropriate documentation and advice in relation thereto. They will all be offered the opportunity to raise concerns face to face with management. Comment will be minuted by the Board and monitored to determine the effectiveness of the process.

It should be possible for Parliament to develop legislation or impose an implied term meeting these parameters. It should also be possible for a court to construe a lease accordingly but, given *Daejan*, this is unlikely. The latest legislation, in the form of the Leasehold and Freehold Reform Act 2024, does not add any new consultation requirements. In summary there is no statutory requirement for a landlord to consult those who must pay service charges in advance concerning the calculations and/or quotations underpinning a prospective service charge.

[C] AN EXPLANATION—WHAT IS "CONSULTATION"?

Dame Judith Hackitt, in her post-Grenfell report, found that "residents did not have a strong enough voice in the safe management of their homes and specifically that they often did not have the chance to offer views and participate in the decision-making process" -

> 4.3 The interim report identified the need to rebuild public trust by creating a system where residents feel informed and included in discussions on safety, rather than a system where they are "done to" by others.
>
> 4.4 No landlord or building manager should be able to treat the views and concerns of residents with indifference. The system should ensure that the needs of all residents, including those who are vulnerable, are taken into account,
>
> 4.6 The review has received evidence of excellent practice of consultation and resident involvement in decision-making by some

> organisations. Landlords and building managers have described the business benefits they gain from these collaborative relationships (Hackitt 2018: 64).

Fink and Kessler (2010) describe the power of collaboration in clear terms:

> By establishing a cooperation relationship, the partners can bundle (parts of) their resources and may thereby create a new and unique set of resources which can hardly be imitated. This is especially the case when the partners succeed in identifying and capitalizing on the synergetic potential of the cooperation arrangement. Under these circumstances, such an arrangement has the power to enhance the performance of both partners.

In public law settings, in England and Wales, a body which is required to consult over policy proposals is subject to what have become known as the "Gunning" or "Sedley/Gunning" principles, which were proposed to the High Court by Stephen Sedley QC in the *Gunning* case (*R v Brent London Borough Council ex p Gunning* 1985) in 1985. In *Gunning* the principles were approved by Hodgson J (at 189) saying that:

> Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content.
>
> - First, that consultation must be at a time when proposals are still at a formative stage.
> - Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
> - Third … that adequate time must be given for consideration and response and, …
> - Finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'

The Supreme Court approved them in 2014 in *Moseley* (*R (Moseley) v Haringey London Borough Council* 2014). In this case Lord Wilson observed that it would be hard to improve upon the principles, Lord Wilson also having observed, in *Daejan*, that the same Supreme Court had subverted the will of Parliament by undermining statutory consultation requirements in long-leasehold law (see Bright 2024; Soper 2024). In a concise description of *Gunning*, Geoff Wild (2024) concludes that: "The underlying principle of fairness should be at the forefront of the process."

The budget process where I live and manage is fairly straightforward. The Supreme Court in *Moseley* (paragraph 29) agreed with the proposition that "consulting about a proposal does inevitably involve inviting and considering views about possible alternatives". Each October a draft budget is issued by email or hard copy inviting comment (see Table 1

above). A face-to-face meeting with leaseholders is held, the budget reissued, if appropriate, and followed up with a final meeting in March setting the charges which become due in June. In those years we have experienced no service charge litigation and everyone has paid their service charge in full.

From the survey, however, we see comment about the difficulty of meeting management and below one sees comment about the budget arriving at the same time as the demand, terms such as "*fait accompli*" and more being used. I will argue that the results of the survey and theoretical/experimental works show that leases work better with good consultation and communication and that an obligation to consult is an implied term in any long leasehold, also using policy statements from industry professionals to support this. Our lease provides that the upfront, in-advance ("Interim") service charge demand is as: "the Management Company or their Managing Agent shall specify at their discretion to be a fair and reasonable interim payment".

The *Service Charge Residential Management Code* of the Royal Institution of Chartered Surveyors (RICS) (2016: sections 4.11 and 9.9) advises that:

> It is better to keep in touch with leaseholders than to remain silent and the legislative requirements to consult where qualifying works and long-term agreements are concerned … should be regarded as the minimum standard required, not the optimum. …
>
> In addition to any statutory consultation requirements you should consult with leaseholders on management matters that are likely to have a significant effect on the level, quality or cost of services provided.

The RICS Code is not universally admired, the prominent and influential Leasehold Knowledge Partnership (the Leaseholders Charity 2021) describing it, somewhat harshly, as "feeble", "tokenistic and cynical" and saying that it was "cooked up by the same duds who preside over the current state of leasehold" (O'Kelly 2012).

Another report, led by Gemma Burgess at the Cambridge Centre for Housing and Planning Research (Burgess 2020: 19, app D) concluded that: "Leaseholders would like to see more transparency in the accounts, improved verbal and written communications about their service charges and more involvement in decisions about the services they received and how the service charge was spent."

[D] SURVEY METHODOLOGY AND HEADLINE RESULTS

The survey was created as an online survey using the standard university tool. Survey design, which required both qualitative and quantitative data, was informed by my own experience and knowledge of leasehold. It was reviewed in advance by leasehold campaigners including Harry Scoffin and Cath Williams, both of whom provided material assistance in finding respondents.

As between qualitative and quantitative methods, says Martin Davies (2007), the "ethos of a particular course" may be the deciding factor, qualitative (non-numeric) methods being arguably "more human" and quantitative (numeric/statistical), more geared toward contemporary "scientific principles and techniques". I am not a "quantophreniac" (the term coined by Pitrim Sorokin for the "cult founded on the belief that quantification is the most, or indeed the only, valid form of knowledge": Dingwall 2014), nor am I a softy or a ninny, as per Sylvia & Turner (1987) who parody criticism of qualitative work saying that critics assert that "soft data are weak unstable impressible squashy and sensual … softies and ninnies who carry it out have too much of a soft spot for counter-argument".

As Carter and Little advise, one must use appropriate techniques to unearth social phenomena and I decided upon a combination of qualitative and quantitative methods (Carter & Little 2007). My epistemological approach is that the knowledge embedded in the lived experience of participants is a vital component of research in socio-legal studies such as this one. Miles and Huberman advise that qualitative researchers should be familiar with the setting, utilize a multidisciplinary approach, be able to draw people out and possess good investigative skills (1994: 38). Numbers are not mere numbers, not vacuum packed—they exist in a context. Empirical researchers must avoid crude equation of correlation with causation (Joly 2017: a read of Vigen 2015 is worthwhile in this context). Qualitative data, comment, can and should be used to support or critique qualitative results. The vox pop element of the survey, illuminating long-leaseholders' lived experience is, in my opinion, an essential part of this socio-legal work. Much of the story emerges through contextual analysis rather than number crunching. Triangulation is always good practice, and in this case it seemed to me to be essential to ensure that my respondents were not simply the disillusioned. In order to obviate this possibility, I also obtained data from estates which are owned or managed by their residents (either as the freeholder or under the statutory

so-called Right to Manage (RTM) scheme), because I wondered whether the data would show better (or different) experience in those cohorts (it did). Non-random samples are typical in such studies, as Landers and Behrend (2015) say in their abstract, "virtually all samples used in I-O psychology are convenience" and Bryman (2012: 191) comments that they "may be typical in management and business studies". A random sample, using a defined population, as Bryman notes (at 166-170) selecting a representative sample, is not practically possible for leaseholders. Commercial enterprises are generally unable or unwilling to provide population data to researchers (true in the case of this survey). And, as Robson notes (2011: 276): "The exigencies of carrying out real world studies can mean that the requirements for representative sampling are very difficult, if not impossible, to fulfil."

Alvesson and Deetz make similar comments (2000: 192). Evocatively, Miles and Huberman observe that (1994: 27): "social processes have a logic and a coherence that random sampling can reduce to uninterpretable sawdust!"

I am confident that the survey covered the right questions, although, in retrospect, some of the questions were difficult for people to answer because they required serious detail of management costs or insurance costs per flat.

I found responses in multiple ways.

- I posted the survey on many Facebook sites: some campaigning sites, others simply discussion sites, some devoted to individual developments, two devoted to resident/tenant managers or directors.
- I posted it on Twitter/X asking contacts to pass it on or re-X it. I did the same on LinkedIn.
- I wrote to the management of various blocks in my locality and several agreed to assist.
- I posted it on the university chatboard.
- I wrote to leaseholders in my own block and to friends and former colleagues directly asking them to assist or pass the survey on (so-called snowball surveying).

I received 655 responses, amongst which were 16,000 words on service charge issues alone. The results take up 227 pages of data and text and provide information in a number of areas, but what is unique is my ability to stratify the data by reference to management type. The survey suggests deep levels of general unhappiness with long-leasehold; as I set out below.

I asked whether respondents received a budget showing how service charge is calculated:

- Yes—a detailed useful breakdown 24.8%, 35 bare "yes"
- Yes—breakdown is not very clear 44.7%
- No—23.6%, 73 bare "no"
- Other—6.8%

I also asked whether they were offered face-to-face meetings to discuss the budget:

- Yes—32.7% (210)
- No—57.5% (369)
- Other—9.8% (63)

Respondents who answered "Other" recorded in face-to-face meetings:

- He's said I can come up to Birmingham to meet him. I'm based in London
- based hundreds of miles away and respond to messages infrequently
- In theory, yes. In reality, we request meetings with managing agent and get ignored [numerous similar comments]
- I can visit the MA office where a revolving cycle of young people is available but even then nothing gets achieved

The frustration is evident as is the feeling that some managers place obstacles in the way of leaseholders. I asked whether they were able to ask questions or make comment: 53.8% said yes and 46.2% said no.

My last question on this was an open question, intentionally designed to allow us to hear the voice of the leaseholder and ponder their lived experience: if you make comments or ask queries do you receive prompt sensible responses?

In order to determine how experience was rated, I had to code each response thus:

- very poor
- poor
- variable
- good
- very good

There is necessarily some judgement in play. I have not previously seen detailed data on long leasehold stratified by management structure or centre of power, except that a Competition and Markets Authority report

in 2014 recorded that: "Results were notably different for properties where there was either an RTMCo or an RMC; overall satisfaction was high with [83%] rating services as good, compared with 58% for non-RTM/RMC leaseholders."

Despite that, in line with the Government's then *laissez-faire*, deregulationary policy, it recommended more "self-regulation". The management category cohorts by percentage in my survey are comparable to those from Gemma Burgess' 2020 survey (20.A, app C). A government survey from 2022 reported that "Only 8% of leaseholders requested the right to manage their building/house" (UK Government 2022).

The Government describes RTM, the statutory basis for which is found in the Commonhold and Leasehold Reform Act 2002, as allowing "some leasehold property owners [to] take over management of the building - even without the agreement of the landlord".[2]

Cohort	Burgess Survey	Very Poor	Poor	Variable	Good	Very Good
Overall - 442		60%	7%	6%	6%	20%
Freeholder Manages: 54 (12%)	16%	65%	9%	11%	2%	13%
Freeholder Appointed Managing Agent: 229 (52%)	61%	76%	6%	5%	4%	9%
RTM Appointed Managing Agent: 68 (15%)	16%	35%	8%	10%	12%	35%
RTM: 23 (5%)		17%	9%	17%	13%	44%
Tenants who own the freehold: 21 (5%)		5%	5%		9%	81%
Other: 47 (11%)	2%	53%	6%	11%	9%	23%

Table 2: Budget process experience of long-leaseholders by management structure.

Freeholder manages

In the survey, 67% of 54 respondents asserted a poor or very poor experience in obtaining answers to questions from freeholder managers, with only 26% reporting the experience good or very good. I asked people to provide me with their opinions and I find this vox pop exercise valuable in setting out how people chronicle their own experience. Their time is worth rewarding by publishing a selection in full. In creating themes, a normal coding technique, I found that 8 people or 15% expressly described

[2] Government Guidance on how this works can be found at "Right to Manage statutory guidance: part 1".

the freeholder as obstructive, evasive or dismissive—although a few said, for example, "the freehold responds reasonably promptly".

- No, the housing association is evasive both by email and in person.
- No, they just drag it out hoping we will stop asking.
- Sometimes but I feel we are given minimal answers as an attempt to fob leaseholders off.
- Freeholder seems deliberately evasive.
- Amateurish gaslighting [a term used by another respondent] and patronising towards residents' complaints and concerns.
- You can email a generic email address where questions are lost in a black hole.

Eleven or 20% found answers slow, incomprehensible or vague:

- we end up talking to a brick wall (a certain member in the service charge team) who just copy and paste answers that don't make sense.
- No. Generic and repetitive.
- They do not encourage comments and queries and there is insufficient time to make changes before new charges start.

One said the freeholder threatened them with a late payment fee in lieu of a serious response.

Managing agent appointed by freeholder manages

I should record here that I wrote to over 20 managing agents asking for assistance with the survey. Not one dignified my request with a reply. In itself that seems to support my respondents' views of agents: 82% of 229 respondents asserted a poor or very poor experience in obtaining answers to questions from freeholder managers, with only 11% reporting the experience good or very good. Using the themes above, I found that 33 or 14% found the freeholder's agent obstructive, evasive or dismissive, saying, for example:

- No its like talking to a politician you never get a straight answer!
- It is apparent that the Managing Agent does not welcome questions and is rarely "honest, open and transparent" in their responses.
- The managing agent generally ghosts leaseholders on this issue [another used the term "gaslighting"].
- Receive a timely response but usually a no alternative response.

- I was told and now I quote: "you are not my client, freeholder is" [another said the same].
- No—largely ignored/fobbed off [the term 'fobbed off' also used by four others].
- not really—purpose appears to be to bat us away rather than understand or improve.

Thirty-one or 13% found answers slow or incomprehensible, saying, for example:

- Response takes weeks Rude and condescending replies.
- Not prompt but we do get responses.
- No not really, we have to chase approximately 3-4 times.
- We receive prompt responses, but it is very much a fait accompli by this point.

Twenty-eight or 30% found answers slow and/or vague, saying:

- Queries and comments are met with a generic, automated "we aim to respond to queries within 48 hours" email response [the term "generic" also used by 3 others].
- The answers are repetitive and copy paste to other leaseholders [two others made a similar comment].

Ten or 4% said that the agent threatened them, forfeiture meaning that the freeholder terminates the lease, you lose your property and any equity in it:

- When I asked for it, I was immediately told that I need to pay it or they will take forfeiture proceedings.
- Any question is answered with a threatening email saying you pay or else …
- If we question we get pushed back, ignored, spoken to aggressively and threatened so have now just given up questioning for my own mental health.

Managing agent appointed by RTM company manages

An RTM company is one in which the tenants have used the provisions of the Commonhold and Leasehold Reform Act 2002 to take control of the physical and economic management of their building. This transfers the rights to take decisions about service charge and maintenance works from the freeholder to tenants. The right has been made easier to obtain under the Leasehold and Freehold Reform Act 2024, with changes that became effective on 3 March 2025 (Goh 2025). Forty-three per cent of

68 respondents asserted a poor or very poor experience in obtaining answers to questions from managing agents appointed by an RTM, with 47% reporting the experience good or very good, one observing:

- The Directors of our right to manage company are currently very helpful but this has not always been the case.

Using the themes above, I found that three respondents or 4% found the freeholder's agent obstructive, evasive or dismissive, leaseholders saying:

- We are labelled troublemakers and get dismissed.
- No. The managing agent only answers questions she likes. If it's difficult, she ignores us.
- written answers are quite generic and do not really answer the queries.

Ten or 15% found answers slow or incomprehensible, although one noted that: "The company directors who set the budget with the managing agent provide immediate and detailed information":

- yes we receive sensible responses but not always prompt!

Two or 3% said answers were vague, for example, commenting:

- No. No transparency on any charges, plans, repairs, or anything.

Zero respondents said that the agent threatened them.

RTM company manages

Twenty-six per cent of 23 respondents asserted a poor or very poor experience in obtaining answers to questions from their RTM, with 57% reporting the experience good or very good, making such comment as "Yes as we have carried out a RTM and everyone is a member", with several simply answering "yes". Using the themes above, I found that three or 13% found the RTM obstructive, evasive or dismissive:

- No, responses are obstructive and obscure, sometime truly Trumpian.
- Lack lustre they do not like being asked questions.
- Pros I have always found them easy to get in touch with. Cons they treat and speak to us on the whole disrespectfully and aggressively. Like we are children and threaten us if we are slow at paying the service charge …

One or 4% found answers slow or incomprehensible, three or 13% found them vague, and one or 4% said that the RTM threatened them (albeit this was for late payment of service charge).

Tenant freeholder and manager

Ten per cent of 21 respondents asserted a poor or very poor experience in obtaining answers to questions when their property is tenant owned and managed, with 90% reporting the experience good or very good, saying for example:

- Yes—once the Budget is drawn up by the Board (all leaseholders) it is sent to leaseholders for consultation.
- We are the directors of the management company—we often find that other freeholders, particularly those who rent out their flats are disinterested.
- I am a director of the freehold company in which all tenants are shareholders. There are eight including me, two of whom would say they are not satisfied, whatever responses they are given.

Using the themes above I found that zero found management obstructive, evasive or dismissive, one found answers slow or incomprehensible, zero vague, zero reported threats.

[E] OVERALL EXPERIENCE OF LONG LEASEHOLD

As we saw in Table 1 above, I asked respondents to tell me how they felt about their experience of the long leasehold budget process and I cross-analysed their responses along the centre of power lines above. I also asked the same question about their general experience: in general how would you rate your experience of owning a leasehold, other than your experience of service charges or ground rent?

My survey paints a bleak picture with 70% of my 655 respondents giving a negative rating of their experience: see Figure 1.

Rate your long-leasehold experience

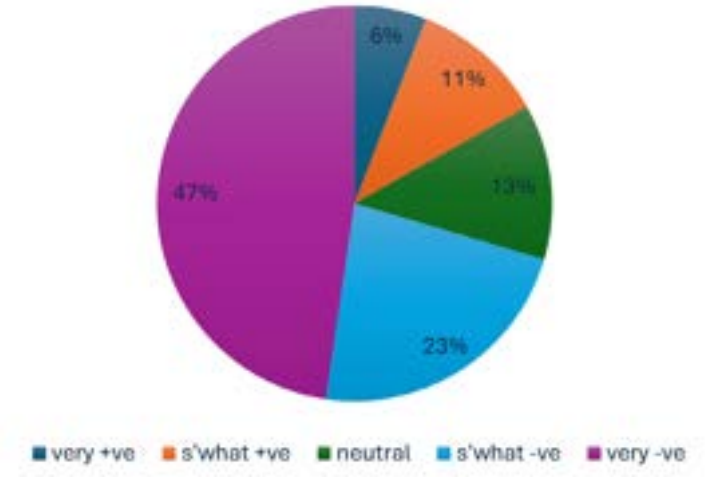

Figure 1: General leasehold experience rating.

When I asked them to think about their ground rent and service charge experience the negative numbers rose to 83%: see Figure 2.

Rate your experience including service charge and ground rent

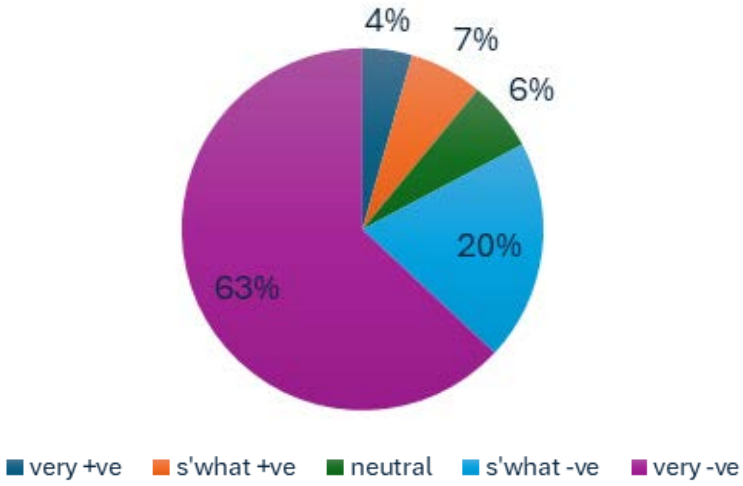

Figure 2: Experience of service charge and ground rent.

These results are very different from those obtained by Burgess (2020) although the question is slightly different: "Over half of surveyed leaseholders say that they are satisfied with their landlord/freeholder, management company or Right to Manage company (58%) or managing agent (52%)."

Wendy Wilson (2023) recorded that: "Fifty-seven per cent of those that responded to the 2016 National Leasehold Survey said that they regretted buying a leasehold property."

You will remember that I asked whether people were able to make comment on the budget: 53.8% said yes and 46.2% said no. I then analysed these two groups determining their overall experience levels: 63% of this group report an overall negative experience (see Figure 3).

May ask budget questions versus overall experience

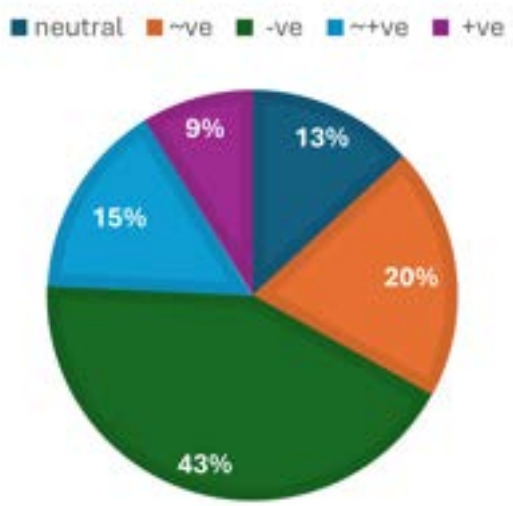

Figure 4: Satisfaction Levels—long-leaseholders who can ask budget questions.

Eighty-two per cent of this group report a negative experience (Figure 4).

Can't ask budget questions versus overall experience

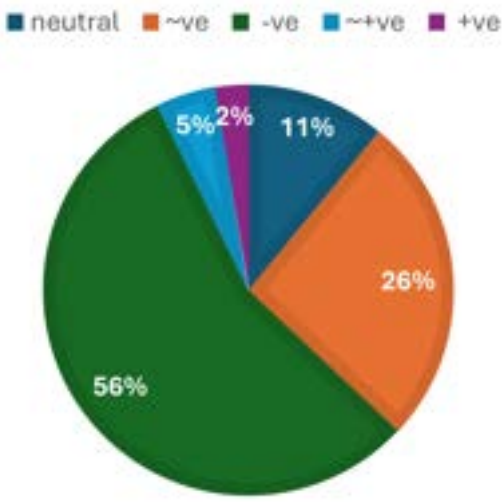

Figure 3: Satisfaction levels when long-leaseholders cannot ask budget questions.

Is there an implied term of a duty to consult?

An implied term is one which the court imposes in a contract where the matter is not covered by an express (or written) term. As mentioned above the obligations of freeholders and tenants are set out in the lease and in a vast array of legislation, which may include consumer protection legislation (Bright 2025). That legislative carapace does not mean that the lease has become unimportant, and, for example, one of the key protections for all parties remains the "ancient" implied term (implied-at-law) of peaceful enjoyment (Wilkinson 1990).

Woodfall records that:

> unless there is an express covenant, an obligation for quiet enjoyment [my emphasis] will be implied, whether the tenancy is by deed, under hand or oral …
>
> The basis of it is that the landlord, by letting the premises confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right to possession during the term (Lewison 2015: paragraph 11.267).

Where, therefore, there is a "gap" in the lease or in the statutory framework one possible remedy is to imply a term into the lease. In a recent case, *Barton v Morris*, Leggatt SCJ in the Supreme Court made the practical issue very clear, expanding, perhaps, on his comment above in *Yam Seng*:

> The essential reason why [implied terms] are necessary is, to put the point colloquially, that life is too short to negotiate contract terms designed to cover every contingency that may occur (2023: paragraph 127).

The best overall (and concise) account of the court's role in such interpolation was that of Lord Hughes in *Ali v Petroleum Company of Trinidad and Tobago*:

> the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement … negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy (2017: paragraph 7).

Lord Hughes cites *Marks and Spencer v BNP Paribas* (2015) but does not credit McKinnon J for the 1926 colourful and self-explanatory "oh; of course" phrase (*Shirlaw v Southern Foundries (1926) Ltd* 1939):

> that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!"

As Lord Kerr advised in *Ali* (paragraphs 30-31), one should "reformulate" the obviousness question to elucidate the answer. Paraphrasing him for the purposes of this argument:

> The question to be put by the supposed officious bystander must be reformulated to become.
>
> > what if, whilst the first purchaser of the flat was discussing matters with the estate agent, she asked about Service Charge works and whether she would be able to discuss the budget for future service charge or would be given credible advance detail of why it was being demanded and how it would be spent.

Framed in that way, it seems to me that the response of the estate agent—indeed the only reasonable response—would be along these lines:

> of course they will tell you how much it is and what it is for and I am sure there will be proper discussion and you will be involved; it is your home; after all, and they are professional managers …

Another question to be asked, when consideration is given to implying a term, relates to the state of knowledge of the parties. In *Luxor (Eastbourne) Ltd v Cooper* (1941) Lord Wright explained (at 137, my italics) that:

> what it is sought to imply is based on an intention *imputed* to the parties *from their actual circumstances.*

In *Barton v Morris* (paragraph 14), for example, the courts reviewed extensively the actual negotiations between the parties to determine whether there was anything in there to support or otherwise the claimed implied term, investigating the "actual circumstances". The Supreme Court found against an implied term on a majority decision, the Court of Appeal having found for it unanimously and the High Court having found against it, meaning that five judges out of nine found for an implied term. *Barton v Morris* involved an oral contract meaning that a review of the negotiations was required. Normally, courts will decline to construe contracts by interrogation of negotiations, even where such interrogation might make the intention of the parties "crystal clear"—Lady Hale's phrase in (*Chartbrook Ltd v Persimmon Homes Ltd* 2009: paragraph 99). This raises an interesting conundrum. If we envisage the estate agent providing a different answer to the one above, say that the freeholder will decline to consult or provide credible explanation for the sums being requested, would that be reviewed as part of the matrix seeking

to understand the parties "actual circumstances" or state of knowledge? If not, that appears to create potential unfairness to the freeholder. In *M&S v Paribas* (paragraph 38), Lord Neuberger at the Supreme Court took account of the fact that the lease had been "negotiated and drafted by expert solicitors" but it appears that it was the fact of negotiations and the participants rather than their content that was persuasive. At paragraph 21, Lord Neuberger approved Lord Steyn's analysis in *Equitable Life Assurance Society v Hyman* (2000: 459):

> [he] rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties

Lord Wright in *Luxor* (page 137) reiterated the principle that a second test for implication-in-fact "is that it should be 'necessary to give the transaction such business efficacy as the parties must have intended'". The principle dates back to 1889, from the well-known case of *The Moorcock* (1889) in which Bowen J, referring to an implied warranty as a "covenant in law", ruled:

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen (at 68).

He clarified the point at pages 68 and 70 in saying that the result derives from "inferences such as are reasonable from the very nature of the transaction". *Treitel* (Peel 2020) cites Lord Hoffmann in *A-G of Belize v Belize Telecom Ltd* (2009), explaining the danger in detaching the phrase "necessary to give business efficacy" from the "process of construction of the instrument": the contract "may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean" (paragraph 23). Other explanations of "necessity" cited by Treitel are:

> to give effect to the reasonable expectations of the parties—Lord Steyn in (*Equitable Life Assurance Society v Hyman* 2000: 459).

> make the contract "work in the way the parties would reasonably have expected it to work" (*Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* 2019: paragraph 152).

Although in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* (paragraph 152) Males LJ discusses how the parties might have reacted

had they foreseen the circumstances in question, stressing that these were unforeseeable, his general principle that "The Court's task is nevertheless to consider how reasonable parties should be taken to have intended the contract to work in the circumstances which have in fact arisen" holds good even in circumstances where parties have foreseen the circumstances but have not addressed them expressly. Unhelpfully perhaps, Lord Neuberger suggested in *M & S v Paribas* (paragraph 21) that "necessity for business efficacy involves a value judgment … the test is not one of absolute necessity". He went on to observe (also at paragraph 21) that perhaps a better test is whether, without the term, the contract lacks practical or commercial coherence.

It seems to me that, whether one uses the test of obviousness, necessity (near absolute or otherwise), or of practical coherence, or party expectation (reasonable expectation), the result is the same; a term requiring the freeholder to take serious steps to consult long-leaseholders on service charge budgets is a core requirement for a long leasehold. To make the contract work, to give it business efficacy, or make it coherent it is clear (obvious) that the freeholder must supply a reasonable amount of information and analysis to the tenant. It cannot be the intention of the parties that the machinery can have grit placed in its oil, or spanners in its works as Sir Robert Goff (1984), as he then was, described matters by the unreasonable or recalcitrant conduct or lack of conduct, lack of candour or exploitative behaviour of the freeholder.

Another issue as to whether the term is "necessary", whether the contract works without it, whether it has "practical coherence" as Lord Neuberger described this test in *M& S v Paribas* (paragraph 21), is worth exploring. Now, it is certain that service charge can be collected without adequate consultation. We have seen the threats that may be issued, and it is trite that leaseholders recognize that their building needs to be maintained. But, as we have also seen, inadequate consultation is correlated with negative experience in long leasehold and, given that these are homes for many, it is hard to conclude that success in collecting service charge is evidence of the contract working. Practical coherence, in my opinion, means that adequate, professional consultation, timeous and real, is essential to making these contracts work.

Another reason for early, clear consultation is that this provides a leaseholder with the ability to consider their legal options. The Leasehold Knowledge Partnership always advises leaseholders to pay first and fight later:

> If you are in dispute with your freeholder over service charges … pay the sum and fight the action retrospectively. Make sure that you are the applicant of the action, rather than the respondent (O'Kelly 2021).

If there is no consultation about the budget or limited consultation, leaseholders are left with a *fait accompli* and with professional advice that means they need to first pay the service charge and then the legal cost of challenging it. With consultation there is at least the possibility of early challenge.

There are, of course, two routes to implying a term. One is the common law; through a judgment. The other is statutory, as with terms implied in sale of goods or goods and services. The problem with the latter is that it does not appear to be on the legislative agenda. The problem with the former is that it is not clear what damage would be experienced by a non-consulted long-leaseholder; the *Daejan* prejudice issue is a good analogy. Pre *Daejan* the statutory remedy was to disallow service charge collection in excess of the threshold amount of £250 per property where the process had not been properly carried out or dispensation granted. Post *Daejan*, dispensation is a formality (Soper 2024), the burden on the leaseholder to show prejudice being generally impossible to overcome and my previous research showing dispensation granted in every case I reviewed. Any statutory implied term would have to provide a statutory remedy, which should be analogous to the section 20 remedy of limiting service charge liability but allowing some discretion to the First Tier Tribunal judge; who tends to be an industry professional. This might take the form of limiting management charges, or of insisting on proper consultation for larger items in advance of money being spent (whether covered by section 20 or not).

In 2024 I reviewed 110 dispensation cases in the First Tier Tribunal. The findings for that were reported in (Soper 2024) but for this article I think that the timelines are interesting.

Remedies alone are insufficient, and Professor Dixon (2020) is completely right to say that:

> one can reform the legal structures around the leasehold estate as much as one likes, but until there are effective, cheap remedies for long and short term residential tenants, millions of homeowners will still suffer

Figure 5 shows that around 50% of the cases are dealt with in the timeframes of construction adjudication. Although most are undefended and a formality, this shows that speedy resolution is possible and in cases such as failure to consult it is arguable that speed is of the essence in order to allow unwinding of decisions or control of service charge collection before irrevocable actions are undertaken. That might be taken care of by a new practice direction requiring speedy disposition of non-consultation cases.

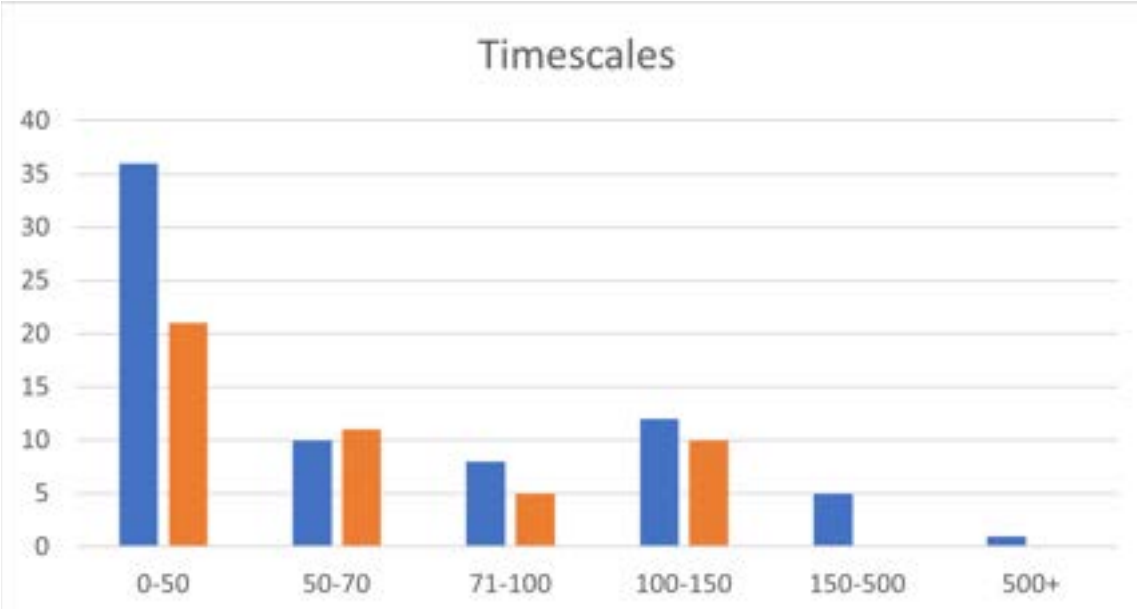

Figure 5: First Tier Tribunal: Decision timelines in consultation cases.

Is it a management imperative?

In the recently published report on the Grenfell disaster, the inquiry panel, led by Sir Martin Moore-Bick, concluded that the local authority "lost sight of the fact that the residents were people who depended on it for a safe and decent home and the privacy and dignity that a home should provide" (Moore-Bick 2024: section 2.56).

Dame Judith Hackitt prefaced her major report ("A Personal View") with a comment that:

> The relationship between landlords and tenants, in whatever ownership model exists in a given building, needs to be one of partnership and collaboration to maintain the integrity of the system and keep people safe (Hackitt 2018: 8)

The contempt and discrimination with which people subject to the vicissitudes of those running large systems or companies remotely was

exposed in the Post Office scandal, in which the inquiry heard from one help-desk trainee:

> Many of these people we were supporting were Asian subpostmasters. Sometimes they would ring up and say they have a £2,000 or £5,000 discrepancy, or even a wild figure like £100,000, and people in the team would say, "I've got another Patel" (Amandeep Singh Statement No WITNO6660100) (Wallis 2023).

Nick Wallis's work on the scandal documents this area in detail.

Michelle Lewis of the giant Managing Agents, Firstport in an article entitled "Building Trust in Property Management" explains that:

> It is our responsibility to ensure they [long-leaseholders] fully understand their rights and responsibilities under the lease, and to provide complete transparency. This involves explaining everything in simple terms, leaving no room for misinterpretation.
>
> An informed customer is an empowered customer, and working with empowered customers benefits all aspects of communal living, ensuring we can work in partnership with customers based on shared goals and understanding.
>
> Homeowners need to know exactly what they are paying for and why'(Lewis 2024).

Outcomes which do not take into account the needs and opinions of those most closely affected cannot seriously to be argued to reflect good professional management, especially when a home is the subject of the decision-making process.

Zygmunt Bauman argued that the technical-administrative success of the Holocaust was due in part to the skilful utilization of "moral sleeping pills" made available by modern bureaucracy and modern technology (Bauman 1991: 43). See also Villegas-Galaviz and Martin (2023: 1699):

> Individuals tend to hand over their responsibility for their actions to those who have ordered them to carry them out and limit themselves to doing their chores in the way that they have been instructed.

From the data above we can see that the closer management is to long-leaseholders, the more positive their experience. The more they are treated as responsible people by being consulted, the more positive their experience. There are occasional examples of cruelty, such as when a threat is made to take someone's home away (which is the effect of forfeiture), but in the main the complaints are of being dismissed or ignored; in other words a failure to respect the home owner. The Leasehold Advisory Service notes that: "Dissatisfaction with the present managing agent may result

more from the leaseholders' feelings of impotence in the decision-making process than from any real shortcomings in the manager's abilities."[3]

We can see both senior figures in Firstport and the RICS itself accepting the need for serious consultation. That reinforces the argument that this is a feature of good management. It would be worth further work to explore whether there is a difference in the experience of long-leaseholders depending on whether their managing agent is a local or a national company.

Does serious consultation lead to better decisions?

Elinor Ostrom won the Nobel Prize in economics for work, including *Governing the Commons: The Evolution of Institutions for Collective Action*, which suggested that groups of people can manage common resources successfully if certain core design principles are present (Ostrom 1990). Principle 3 is:

> *Collective-choice arrangements.* Group members must be able to create at least some of their own rules and make their own decisions by consensus. People hate being told what to do but will work hard for group goals that they have agreed upon (Wilson & Ors 2013)

Later work appears to have validated Ostrom's eight core design principles (Wilson 2015: 12 and generally). Wilson and colleagues (2013) explain Principle 3 in more detail at sections 3 and 4.2 (with an urban example):

> (3) Consensus decision-making provides a safeguard against decisions imposed by some members of the group at the expense of others, since group members will not agree to arrangements that place them at a disadvantage. In addition, when group-level decision-making is structured the right way, it can lead to better outcomes than individual-level decision-making. Group-level decision-making is itself a group-level adaptation.

In contract the decision-maker does, I think, deal with a resource, the contract, which can, particularly in long leasehold, be regarded as common, especially in the sense that service charges are collected and spent for the benefit of both parties (or, more accurately, all parties) and are held in trust by one. If that is the case, then it is arguable that good management requires that resources are dedicated to ensuring that decision-making processes are fair; and this, in turn, connotes the inclusion of key stakeholders in the process.

[3] Leasehold Advisory Service, "Right to Manage".

Theories of collective mind, neatly encapsulated in the equation [we ≠ you + I], ascribe "a unified mental state to a group of agents with convergent experiences" (Shteynberg & Ors 2023), which conveys well the *ad idem* idea of contract. Intuitively, one would say that consulting those affected by your decisions should lead to better decisions, and this is supported by extensive literature, much of which is cited by Alessia Isopi and colleagues in an experiment "where demonstrability of correct solutions is low" (Isopi & Ors 2014). They say in the "Introduction" that:

> There is now considerable evidence that groups can often "outperform" individuals. The bulk of it comes from experiments in social psychology examining behavior in decision problems that have correct solutions and thus have a meaningful criterion for assessing decision accuracy.

One important piece of field research revealed "Rational [as opposed to intuitive] decision-making was associated with good performance" when participants had looked "extensively" for information (Kaufman & Ors 2017) and it is possible that this finding can be read across to consultation in long leasehold. It is also possible, as Weber and Lindeman find (in Betsch & Ors 2008: 205-206) that personality and cultural differences will affect decision-making, and that "standardizing" processes or insisting on bias-reducing mechanisms will strengthen decision-making.

[F] CONCLUSION

The general thrust of this article is that there are significant advantages to consultation in general where people's material interests are concerned. This article has tried to convey from multiple viewpoints, managerial, legal and psychological, using empirical evidence and theoretical work alongside doctrinal legal positions that such consultation is obligatory, advisable and good professional practice.

About the author

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Courts and Horizontal Accountability in Climate Change Litigation

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Abstract

In *La Oroya v Peru*, the Inter-American Court of Human Rights, in its quest to protect the "interest of future and present generations" based on the facts before it, suggested that the right to a healthy environment should have the status of a peremptory norm of general international law. The European Court of Human Rights has been at the centre of debates over its judgments, such as *Verein Klimaseniorinnen Schweiz v Switzerland*, where it established positive obligations with regards to climate change under Article 8 of the European Convention on Human Rights. Under the African human rights system, regional courts have long sought to hold states to account for activities of state and multinational corporations that infringe on the right to a healthy environment. These developments reveal an emergent cadre of judges that are alive to the need to develop concrete normative standards on climate change litigation. To the untrained eye, these recent decisions suggest an erasure of the Global North–South divide that has stymied climate change negotiations. Consequently, this article examines the critical role of judge-made law in the potential cross-fertilization or "judicial globalization" of a normative body of climate change jurisprudence. It adopts a comparative approach by analysing recent jurisprudence emerging from regional courts in Africa and juxtaposing them with emerging trends in other international courts.

Keywords: climate change litigation; judge-made law; horizontal accountability; peremptory norm; *jus cogens*; African, European and Inter-American human rights system.

[A] INTRODUCTION

Courts remain critical to the generation of norms for the ordering of society. At the national level, courts by virtue of their function of interpretation and application of established constitutional provisions play a central role in establishing accountability in the process of governance. They are especially critical to the stabilization of democratic regimes by contributing to the rule of law and creating an environment conducive to economic growth. National courts act as centrepiece institutions that make power-holders accountable to the laws of the constitution and ensuring the protection of human rights (Gloppen & Ors 2004: 1). In a well-functioning democratic system, the expectation is that the courts are independent. This entails that the courts shall ensure *transparency*; obliging public officials to justify that their exercise of power is in accordance with their mandate and relevant rules (*answerability*); and imposing checks if government officials overstep the boundaries of their power as defined in the constitution, violate basic rights or compromise the democratic process (*controllability*) (Donnell 2022: 29-51). The accountability function of power is a well-contested concept of a modern democratic system at the intersection of law and political theory.

Under international law, states have long been considered the primary objects of the international law system. However, international courts at various levels have encountered contrasting fortunes. The role of courts in environmental law serves a cautionary note on their relationship with states. In the area of climate change, courts have increasingly been utilized at municipal and international level by litigants seeking to hold states and corporations to account. Climate change litigation is a budding practice that demands astute judges that are abreast with the intricacies of climate change and the varying interests of litigants. It is therefore inevitable that courts will be perceived as veritable tools in identifying climate change norms emanating from actions brought before them. However, international courts are limited procedurally and otherwise. Governments may consider the courts as encroaching too much on the role of the legislature and executive. Corporations may consider the courts are increasing the costs and risks of business unnecessarily. Based on the premise above, this article analyses the role of judges in climate litigation, particularly as it pertains to norm generation and their duty as instruments of accountability within the municipal law and international law. After this introduction, the second part of the article underlines the theoretical framework of accountability which is considered hotly debated across disciplinary boundaries. The third part examines the centrality of the modern judge in developing climate change norms and standards.

The fourth part briefly tracks the ascertainable patterns in climate change litigation in national courts. The fifth part analyses key emerging trends from international courts, chiefly the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) where recent jurisprudence helps paint a picture on approaches that are open to judges based on questions presented by climate litigants, and how they may apply legal norms towards entrenching legal accountability over states. The sixth part examines the current perspective from the African human rights system, while the final part concludes.

Theoretical framework

The concept of accountability has been interpreted in a myriad of ways by scholars across disciplines. The increase in the attention given to the concept of accountability in public debate has been attributed to the increasing complexity of policymaking, the impact of the transnational level of norms produced far beyond the control of democratic assemblies, and the mainstream of the new public management diffused among domestic policymakers and international experts (Caddy & Ors 2007; Piana 2010). From a purely legal perspective, the concept of accountability is also applicable in different ways. The concept is often related to the process of democratic governance within a constitutional democracy, and more specifically applied as a framework for ensuring that the independence of the judiciary does not mutate into a net negative due to lack of scrutiny in the procedural, substantive and institutional aspects of judicial lawmaking.

The notion of accountability inherently embodies the character of control. For instance, at national level, the process of selection to fill critical institutions in a modern state and a means of interaction between the government and the governed is fraught with a fundamental problem of power. Earlier classical theorists appreciated that power exists side-by-side with the need to control it, as expressed by James Madison who argues that "in framing a government … the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself" (The Federalist Papers, No 51: cited in Schedler 2022: 13). From the time of the early philosophers, political thinkers have worried about how to keep power under control, how to domesticate it, how to prevent its abuse, and how to subject it to certain procedures and rules of conduct (ibid). Ultimately, the term accountability encapsulates the existential concern for checks and oversight, for surveillance and institutional constraints on the exercise of power. The term has become widely applicable, utilized by international financial institutions, party

leaders, grassroots activists, journalists, political scientists, and legal theorists all of whom make reference to accountability in their respective disciplines.

Schedler alludes to the likeness of accountability to answerability as related characteristics of properly placed power in society. On one side, exercising accountability demands inherent mechanisms for monitoring and oversight. These include fact-finding and generating evidence. As a normative quality, accountability subjects power not only to the rule of law but also to the rule of reason. Power should be:

> bound by legal constraints but also by the logic of public reasoning. Accountability is antithetical to monologic power. It establishes a dialogic relationship between accountable and accounting actors. It makes both parties speak and engages them both in public debate (Schedler 2022: 15).

Conversely, accountability implies the matter of controllability and its product of enforcement. Hence, in addition to its informational dimension (asking what has been done or will be done) and its explanatory aspects (giving reasons and forming judgments), it also contains elements of enforcement (rewarding good and punishing bad behaviour). It implies the idea that accounting actors punish contravening behaviour and, accordingly, that accountable persons not only tell what they have done and why, but bear the consequences for it, including eventual negative sanctions.

To the purely legal mind, accountability is a constitutional principle. This is so when it is considered that there is an intrinsic failure embedded in any human action. Thus, the idea of accountability is co-terminus with constitutionalism and the rule of law. This is why judges are critical actors as interpreters of the law vis-à-vis holding other actors within the state to account. From a historical point of view, the emergence of the era of judicial activism and the judicialization of politics (Malleson 1999), where judges and judiciaries have expanded their judicial review into areas hitherto considered the reserve of politics, and where political life itself has become more judicialized, underscore the centrality of accountability as a judicial tool to gauge the transparency, answerability, and controllability functions of other arms of government under a constitutional democracy. The new judiciary is considered activist and bearing new responsibilities in the field of lawmaking and even policymaking (Voermans 2007). There is no gainsaying that the courts and justice system are the constitutional embodiment of the law enforcement machinery of the state that guarantee constitutional accountability.

The accountability function of the modern judge vis-à-vis states is more apparent under international law, particularly in the area of climate change where a combination of the sovereign nature of states, the transnational and fluid personality of corporations, and the lack of consensus on the normative make-up of climate change as a transboundary phenomenon make holding these actors to account an existential problem that needs urgent answers. Courts are therefore important actors in the quest to develop norms and standards that may be widely accepted by climate litigants (Nwankwo & Mukoro 2025). Factors such as the growth of international (human rights) law, the need to empower the judiciary vis-à-vis other arms of government, and the legislative attitude to rely more and more on the judiciary to decide on controversial issues in order to develop a balanced case law has entrenched the globalization of judicialization (Piana 2010). This judicialization underscores the much needed normative intervention of international courts in the area of climate change as litigants increasingly engage the courts for interpretation.

Bovens (2006) suggests five types of accountability, namely: 1) legal accountability; 2) managerial accountability; 3) institutional accountability; 4) societal accountability; 5) professional accountability. Legal accountability is related to the mechanism of legal control. It is guaranteed by judicial review of statutory law, by the mechanism to the higher courts, by the procedural guarantees of due process, and by the formal relationships that exist among the norms embedded in a legal system. At international level, for this legal accountability to become more widely ascertainable particularly in the area of climate change litigation, international courts are an indispensable variable in norm-generation. Therefore, within the context of this article, horizontal accountability refers to the capacity of international courts to hold states to account. States are the contracting parties to the instruments establishing these international courts.

[B] CLIMATE CHANGE LITIGATION AND JUDGE-MADE LAW: WHY IS THE MODERN JUDGE CRITICAL TO DETERMINING CLIMATE CHANGE STANDARDS?

Over the past few years, climate change and the threat it poses to our common existence have gained increased attention in national and international legislative assemblies, courts, the mass media, and public discourse. Intergovernmental institutions such as the Intergovernmental Panel on Climate Change (IPCC) and the Conference of the Parties (COP)

have been established to midwife the process of developing rules and standards on climate change. The functions of these intergovernmental organizations include scientific research, international political negotiations, and development of law and policy to restrict and guide the international community on activities that negatively impact the climate (Colby & Ors 2020). The IPCC has suggested that a failure to restrict temperature increase to 2° Celsius above pre-industrial levels will lead to irrevocable and serious harm to the planet. Consequently, political campaigns and governance debates globally are increasingly being shaped by climate change, but many insist that national policies by themselves have been insufficient in tackling the problem to any degree of impact (Dryzek & Ors 2011).

However, courts may play a critical role in establishing agreed normative standards for climate change policy and governance. As a natural consequence of the existential nature of the phenomenon, the issue of climate change has moved from being a subject exclusive to political battlefields and policy think-tanks to judicial institutions. This is due to the increasing number of litigants searching for avenues to hold corporations and governments accountable. In *Stichting Urgenda v Netherlanden* (2015: paragraphs 3.1 and 5.1) a district court in the Netherlands found that the Dutch Government had violated a duty of care towards the people and ordered more ambitious emission reduction targets. Since that judgment in 2015, climate change public interest litigation has emerged as an alternative method to push for climate policy goals and encourage social change (Colby & Ors 2020).

At the time of writing this paper, the Grantham Research Institute on Climate Change and the Environment places the number of global climate litigation cases at 2666 (Setzer & Higham 2024).[1] These actions are being filed mostly to establish responsibility to mitigate and respond to the dangers of climate change, indicating an increasing appreciation by litigants on the need for a fundamental right to a healthy environment (Burgers 2020). As these cases continue to increase, what is clear is the multidimensional ways through which an action by an individual, group, or civil society is presented as a climate change action. These suits permeate virtually every area of a court's work. They traverse issues of legislation, direct claims for damages for climate-related harms, suits pertaining to climate change as financial risk, cases brought by activists, human rights actions, youth claims, environmental law and

[1] 87% of these cases were brought in national courts in the Global North, 8% of them were brought in national courts in the Global South, while 5% were brought before international and regional courts.

treaty obligations of states, and cases seeking to protect indigenous people's rights (Glazebrook 2020). This underscores the increasing need for judges to acquaint themselves with the scientific (*Thomson v Minister for Climate Change Issues* 2017; Peel & Osofsky 2017),[2] technical, and policy labyrinth that climate change actions present.[3]

The law may provide a bridge between the uncertain position in which communities and societies currently find themselves in the face of manifest climate change impacts, and the sense of direction that will be required in the near future. The expectation is that judges can offer some of the building-block principles for the law's response to climate change. With regards to how judges view the challenge before national courts across jurisdictions, three significant areas of overlap exist. To start with, international norms such as the 2015 Paris Agreement (the Agreement) play a significant role in the adjudication of complex climate litigation. The Agreement projects global objectives regarding the maximum acceptable temperature rise and the necessity for the international community to reach net zero greenhouse gas (GHG) emissions during the second half of the century. Though not directly enforceable in national courts, and with the international level having rather weak compliance and dispute settlement provisions, the treaty makes it possible for litigants to place the actions of their governments or private entities into an international climate change policy context. This makes it easier, in turn, to characterize those actions as for or against both environmental needs and stated political commitments (Peel & Osofsky 2017).

Consequently, judges are likely to find themselves presented with cases that argue for an alignment between international and domestic objectives. In addition, judges acknowledge that, because climate change is a complex and global phenomenon, it does not respect existing legal boundaries. Lastly, there is an appreciation of climate consciousness, or an awareness of the climate crisis and its potential to inform a court's choices in finding, interpreting, and applying the law. Along this vein, there is a strong possibility of decisions from national courts to influence courts in other parts of the world (Carnwath 2022).

[2] The *Thomson* decision of New Zealand's High Court (finding that the country's domestic climate legislation required the Government to review its 2050 emissions reduction target in light of the latest scientific findings of the Intergovernmental Panel on Climate Change). The court found that the results of New Zealand's election, installing a Labour Coalition Government, rendered the decision moot as the new Government has pledged to review and reduce the country's 2050 target.

[3] As Justice Noer notes: "Courts must be aware of the long-term consequences of our rulings." Judges must "strike the right balance and appeal to the trust that is needed in societies", ensuring "the protection of nature and future generations" and working towards "a sustainable future". To achieve this balance, it is imperative that judges are "climate literate": that is, that they are as well informed on all issues surrounding climate change as possible Carnwath 2022).

[C] ASCERTAINABLE PATTERNS FROM CLIMATE LITIGATION IN NATIONAL COURTS

As already noted, climate change actions give courts the opportunity to influence discourse on climate change. In the Global North, climate change issues are aired in public due to the fundamental principle in constitutional democracies of open justice and the requirement that courts provide reasoned judgments on cases before them. This power of discourse which could be developed through climate change action procedure has been judicially acknowledged in national courts, even in cases where claimants are unsuccessful. Take for instance the statement of the United States court in *Juliana v United States* (2020) where the dissenting judge Staton underlined the considerable rhetorical force of court orders thus:

> The majority portrays any relief we can offer as just a drop in the bucket. In a previous generation, perhaps that characterization would carry the day, and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot* [original emphasis]. Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm (paragraphs 45-46).

This American ideation of discourse which represents the constant exchange between the judiciary and the legislature as reflected in *Juliana* parallels the Commonwealth Model of Rights Protections (Gardbaum 2012). It can be argued as being particularly valuable in Westminster systems where courts lack the power of judicial review to overturn legislation. That notwithstanding, the kernel of the value of dialogue lies mainly in its quality as a catalyst for legislative response to stands taken by courts. This is bound to be a useful tool in constitutional democracies where there is a need to consolidate international obligations of states through legislation. This is even more needful in Global South countries where the rule of law is tenuous, and the legislature and judiciary are often operating under the hegemony of the executive arm of government (Akinkugbe 2025: 381).

Along this line of discourse, the doctrine of separation of powers, with its divisions of the three branches of government (legislative, executive, and judicial) as a vital ingredient of the democratic ordering of states has called the justiciability of climate change matters into question. To this end, a bifurcation has occurred in analysis on the application of separation of powers to solving the climate crisis. On one end stand

advocates who argue for a judicial role in climate crisis. On the other end are scholars that favour legislative policy discretion. Proactive climate change litigation, which focuses on engendering policy change, especially raises the question as to what extent the judiciary can oblige the other branches of government to take urgent preventative action and to implement or adjust climate policies. As the doctrine of the separation of powers can be, and has proven to be, an impediment to judicial engagement, climate change litigation faces a dilemma between urgently needed measures against the serious threats of climate change on the one hand and compliance with the doctrine of the separation of powers on the other (Alogna & Ors 2024: 272).

The bifurcation above remains so due to the limitations of courts in climate governance. While it is true that courts fulfil a vital climate change governance role by ensuring that laws are observed, and that redress is granted where governments and private parties act outside the law, the role of courts are limited in a *stricto senso* governance sense. For instance, as Judge Glazebrook notes, courts are by their nature reactive rather than proactive (Glazebrook 2020). In addition, courts are limited in the sense that they mostly adjudicate on past events and, except for specialist environment courts, are not usually involved in assessing the future impact of current actions or in assessing scientific evidence in this regard. Furthermore, courts mostly rely on material, evidence and arguments presented before them by litigants which makes them institutionally unsuited to general policy design. The judicial process is by its very nature adversarial and does not allow for the views of all affected stakeholders to be presented.

One critical feature in the approach of national courts is the limitation to cases within their own borders. However, climate change has a transnational or transboundary effect and what is ideally required is global rather than purely national solutions. In this wise, some national courts have adopted a global approach towards climate action cases before them. In *Neubauer v Germany* (2021) the German Government pledged to swiftly adjust its climate change laws in response to the court's ruling. The court on its part agreed that, while Germany's 2% share of worldwide CO_2 emissions is only a small factor, it also stated that "if Germany's climate action measures are embedded within global efforts, they are capable of playing a part in the overall drive to bring climate change to a halt" (paragraph 2020).

While some have questioned the efficacy of climate change litigation as an effective tool in influencing policy outcomes and changing societal

behaviour (corporate, government, or otherwise), there have been notable instances of climate litigation moving the needle in governance (Glazebrook 2020; Bouwer & Setzer 2021). For instance, in *EarthLife Africa Johannesburg v Minister of Environmental Affairs* (2017), which was South Africa's first climate change-related judicial decision, the court considered the quality and form of climate change impact assessment required when a competent authority assesses an application for environmental authorization in South Africa. Notwithstanding the lack of an express legal obligation to conduct a focused climate change impact assessment, the court ruled that climate change is a relevant consideration when granting an environmental authorization, and a formal expert report on climate change impacts is the best evidentiary means to consider climate change impacts in their multifaceted dimensions. The court has so far made a meaningful contribution to climate change litigation, and also influenced governance in South Africa (Humby 2018; Chamberlain & Fourie 2024).

This case is one of the examples that showcases the potentials of climate litigation to affect the outcome and ambition of climate governance (Shukla & Ors 2022). It challenges states' responses and enforcement of climate commitments (Setzer & Higham 2022: 3). While climate litigation is not a silver bullet, it is a veritable tool, as its increasing use demonstrates, to peel back the uncharted terrain of creating universally agreed norms that will form the crucibles of accountability. Central to horizontal accountability at a government-to-government level are vibrant national courts that lean on each other's know-how. Judges in national courts may cross-fertilize ideas with each other. In this wise, Slaughter identifies an emerging cadre of global judges that realize the importance of cross-fertilization to address common problems plaguing a globalized world (Slaughter 2005: 66). Describing the phenomenon of "global judicialization" it is argued thus:

> One result of this judicial globalization is an increasingly global constitutional jurisprudence, in which courts are referring to each other's decisions on issues ranging from free speech to privacy rights to the death penalty. To cite a recent example from our own Supreme Court, Justice Stephen Breyer recently cited cases from Zimbabwe, India, South Africa, and Canada, most of which in turn cite one another. A Canadian constitutional court justice, noting this phenomenon, observes that unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue. … Chief Justice William Rehnquist now urges all US judges to participate in international judicial exchanges, on the ground that it is "important for judges and legal communities of different nations to exchange views, share information and learn to better understand one another and our legal systems".

As judges continue to interact and cross-fertilize to generate norms for their climate change action, at national and international level, it is expected that they acquire a practical understanding with which to determine existential problems particularly in the area of environmental governance and climate change. The environment and the complexity of its ramifications to the livelihood of the human being and the economic interests of governments and corporations continues to present unimaginable difficulties that are challenged in courts (Nwankwo & Mukoro 2025).

[D] EMERGING TRENDS FROM INTERNATIONAL COURTS: THE IACtHR AND THE ECtHR

Regional courts around the world are increasingly being viewed as platforms where climate litigants can seek remedy. In the past, these courts were approached by litigants from a purely human rights perspective. However, litigants have come to understand the power of a human rights framework as a tool to ensure the adherence of states to questions over the right to a healthy environment and most recently the quest for intergenerational equity to save the planet for future generations. In *La Oroya v Peru* (2023), the city of La Roya, which is populated by some 30,000, filed a suit challenging the activities of the metallurgical complex Complejo Metalúrgico de La Oroya (CMLO) which has been operating in this city. The applicants claimed that since 1922 its metallurgical activities have affected 30,200 hectares of vegetation, as well as the air, soil and water in La Oroya, causing it to be one of the 10 most contaminated cities in the word (paragraphs 76-84).[4] Out of the 80 alleged victims that filed the complaint case two of them lost their lives as a consequence of these health complications. Due to these claims established before the court, the State of Peru was found responsible for the violation of the rights to a healthy environment (RHE), health, personal integrity, life, access to information, political participation, children's rights, and the obligation of progressive development of Article 26.

In its landmark decision, the IACtHR applied an ecocentric approach by reinforcing the right to water free from pollution and the right to breathe clean air as substantive rights to a healthy environment. Furthermore, the court stated that the RHE should have the status of a

[4] Since at least the 1970s, several reports have warned about the dangers and risks that the activities of the CMLO meant for the health of La Oroya's population and environment, including the prevalence of respiratory diseases.

peremptory norm (Article 53 Vienna Convention on the Law of Treaties) of general international law (*La Oroya*: paragraph 129). According to the court, several states have recognized the right to a healthy environment on several occasions, which entails an obligation of protection for the international community as a whole. Flowing from the reasoning of the court, the international protection of the environment requires the progressive recognition of the prohibition of conducts that negatively affect the environment as a peremptory norm of general international law—a *jus cogens* norm.

Also noteworthy is the reference of the court on the importance of the legal expressions of the international community, whose superior universal value is indispensable to guarantee essential or fundamental values. Since the protection of "the interests of future and present generations", as well as the conservation of the environment against its degradation, are fundamental for the survival of humanity, the court suggests that the RHE should be considered as a *jus cogens* norm (Vera 2024).

Most recently, in 2024 the ECtHR had its hand forced by litigants seeking a clear and decisive statement on the impact of climate change, not just on current generations, but future ones too. In *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (2024), the ECtHR justified granting legal standing to the applicant non-profit association partially on the basis of the necessity to guarantee that future generations do not suffer from an absence of timely reaction today. The ECtHR emphasized that "members of society who stand to be most affected by the impact of climate change" are "at a distinct representational disadvantage" (paragraph 484). Consequently, collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes. Also, the detailed and interventionist European Convention on Human Rights Article 8-related positive obligations imposed on Switzerland in *KlimaSeniorinnen* were designed with an eye to avoiding a disproportionate burden on future generations. For that very reason, the ECtHR declared that "immediate action" ought to be taken and adequate intermediate reduction goals ought to be set for the period leading to neutrality (paragraph 549).

The submissions of the ECtHR in its judgment above has two implications. First, by attempting to clarify the importance of protecting future generations, the ruling of the court had two major implications: 1) the legal standing of non-profit associations, and 2) the positive

obligations under Article 8. Second, despite being a welcome development in climate change case law in the European region, the judgment by no means constitutes a ground-breaking change in future generations' legal situation (Brucher & De Spiegeleir 2024).

In *Duarte Agostinho and Others v Portugal and 32 Other States* (2024), six Portuguese youth filed a complaint with the ECtHR against 33 countries. The complaint alleges that the respondents have violated human rights by failing to take sufficient action on climate change and seeks an order requiring them to take more ambitious action. On 9 April 2024, the European Court declared the application inadmissible. With respect to extraterritorial jurisdiction, the court found no grounds to expand the judicial application as requested by the applicants. Territorial jurisdiction was therefore only established in respect of Portugal, and the complaint was declared inadmissible against other respondent states. Nonetheless, because the applicants had failed to exhaust domestic remedies in Portugal, the complaint against Portugal was also deemed inadmissible.

Perhaps, this is the most obvious proof of the ECtHR's attempt at self-preservation in the three 9 April rulings. The ECtHR decided simply not to address the individual applicants' victim status, as it was a complicated matter and that the ECtHR did not need to look at it. It has been argued that the reason why future generations received only slender room in the 9 April decisions was that these cases were never intended to be the panacea for all current and future generations' fate in the face of climate change. The court skilfully avoided the temptation to be viewed as a heroic figure of a saviour-like global climate change court (Brucher & De Spiegeleir 2024: 4). In reality, the ECtHR remains only one among many actors with a potential role to play in addressing climate change. Furthermore, while it is hard to disagree with the argument that future generations deserve equitable treatment, the first priority is to start to fine tune the practical implementations of this broad argument in the here and now.

[E] AFRICAN HUMAN RIGHTS SYSTEM AND AFRICAN STATES

Despite the emerging trends in other international courts, there is a paucity of jurisprudence from African regional courts. Spurred by international instruments, climate litigation continues to evolve in other jurisdictions. This is possible because judicial and quasi-judicial bodies at national, regional and United Nations (UN) levels are increasingly approached to

rule on various issues, including the relationship between climate change and the human rights of vulnerable populations and the adequacy or otherwise of states' efforts to adopt or implement domestic climate laws (Setzer & Benjamin 2019).

Under the African Human Rights system (AHRS), Article 60 of the African Charter on Human and Peoples' Rights (African Charter) lists the sources of African human rights law by providing that the African Commission on Human and Peoples' Rights (ACHPR) shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the UN, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the UN of which the parties to the African Charter are members. This serves as a statutory guide for courts and quasi-judicial treaty-monitoring bodies.

In addition to the African Charter, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention 2009), the African Charter on the Rights and Welfare of the Child (ACRWC 1990), and Maputo Protocol (2003) are significant. The treaty-monitoring bodies of the AHRS are the ACHPR, the African Court on Human and Peoples' Rights (African Court), and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Under this system, individual and interstate communications are possible before the Commission by applicants, including communities vulnerable to climate change under Article 56 of the African Charter; before the African Court under Article 6 of the African Court Protocol (1998), and before the ACERWC under Article 44 of the ACRWC.

Despite these robust treaties, African regional climate litigation focusing on human rights has been slow to emerge. There is no pioneering case on climate change at that level of accountability from the lenses of human rights. The future of this possibility is uncertain largely due to the history of clawback clauses and the disposition of African states to enforcement of the decisions of these judicial and quasi-judicial bodies (Mapuva 2016: 1-16; Jegede 2024: 57). Some of the critical provisions of instruments, such as Articles 6 (liberty and security of the person and freedom from arbitrary arrest), 8 (freedom of conscience), 9 (freedom of expression), 10 (freedom of association), 11 (freedom of assembly), 12 (exit and return to own country), 14 (right to property) and 24 (right

to satisfactory environments) of the African Charter all affect the right of African people to enjoy a healthy environment and the obligation on the part of states to respect, protect, promote and fulfil these rights. Other rights under the AHRS include Articles 7 (freedom of expression), 8 (freedom of association and peaceful assembly), 9 (freedom of conscience), 11 (education) and 13 (socio-economic rights of disabled children) of the ACRWC. These provisions, that may be relevant in climate litigation, are limited by clawback clauses which subject human rights provisions to the limitations of national laws and goals. This could serve as a stumbling block for potential climate change litigants (Jegede 2024).

As Jegede argues, human rights provisions under the AHRS accommodate clawbacks which may shape the application of litigants' climate claims, depending on the approach of the complaint mechanisms (Jegede 2024: 109). The purport of clawback clauses is to subject regional human rights provisions to the laws enacted by the parliament of a state party (Killander 2010: 388-413; Chirwa 2011). Furthermore, these clauses entail restrictions built into human rights provisions, most notably the African Charter. Thus they have the effect of permitting a state party to limit the relevant human rights provided for in a regional instrument to the extent permitted by a state party's domestic law (Singh 2010).[5]

The *acquis* of the AHRS contain several clawback clauses significant to climate change. For example, Article 6 of the African Charter on the right to liberty and security of the person and freedom from arbitrary arrest is to be enjoyed "except for reasons and conditions previously laid down by [national] law" of a state. Article 9(2) on the freedom of expression and the right to disseminate one's opinion is to be enjoyed "within the law" of a party. Freedom of association under Article 10(1) and the right to leave any country and to return to one's own country in Article 12(2) are guaranteed with a provision that one "abides by the law" of the relevant state party. Article 11 on the freedom of assembly is "subject only to necessary restrictions provided for by law, in particular, those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others".

In the same vein, the right to property under Article 14 of the African Charter is enjoyable only "in accordance with the provisions of appropriate laws". Regarding the ACRWC, Article 7 provides that the right of a child to freedom of expression is "subject to such restrictions as are prescribed

[5] Examples of these clawback clauses in other human rights regimes include clawback provisions found in Article 29(2) of the Universal Declaration of Human Rights on general limitations of rights, imposed by law; Article 19(3) of the International Covenant on Civil and Political Rights on the right to freedom of expression; and Article 10(2) of the ECHR on the right to freedom of expression.

by law". The right of the child to freedom of association and peaceful assembly under Article 8 is subject to "conformity with the law", and Article 9 on freedom of thought, conscience and religion is subject to "national laws and policies". Social economic rights of disabled children under Article 13 of the ACRWC are subject to available resources of state parties. The right of children to education under Article 11 is subject to minimum standards laid down by the states. The above provisions are likely to find application in climate litigation at the IACtHR. For instance, the right to liberty and security of the person and freedom from arbitrary arrest, the right to freedom of conscience, the right to freedom of expression, the right to disseminate one's opinion, and the right to freedom of association are useful for protests relating to climate change action or inaction of states in Africa (Jegede & Stoffel 2022; Jegede 2024).

It should be noted that some national courts have emerged to fill the gap of the regional system on climate change litigation. The database of the Sabin Center for Climate Change Law shows that African states have a minute number of climate change litigation cases. The database lists just 18 cases, with most from South Africa (10 cases), Nigeria three, Kenya two, Uganda two and Namibia just one case (Sabin Center 2025). With Africa as one of the most vulnerable regions in the world to climate change, it is expected that climate litigation would have proliferated considerably there, but this is not the case as African climate change litigants face various obstacles. These obstacles include, but are not limited to, weak legislative frameworks, procedural issues such as *locus standi*, slow judicial processes, and limited financial resources that stifle access to justice for climate litigants (Nwankwo 2019; Ekhator & Okumagba 2023)

Such situations typically impede prospective litigants from exhausting domestic remedies, not to mention the AHRS. Also, climate change in the African context has most probably been a secondary consideration compared to broader and more commonplace environmental disputes placing more emphasis on natural resources, land or property rights (Suedi & Fall 2024: 146-159), conservation and environmental protection in general. A recent example is the Ogiek case before the African Court (*African Commission on Human and Peoples' Rights v Republic of Kenya* 2017). On 26 May 2017, the court issued the historic judgment that the Kenyan government (the state) had violated seven articles of the African Charter by evicting the indigenous Ogiek people from their ancestral land in the Mau Forest. That decision ordered the Government to take all appropriate measures to remedy the violations and stipulated that the issue of reparations would be decided separately. After multiple delays

owing to the Covid-19 pandemic, on 23 June 2022, the court issued a final decision on reparations.

Promisingly, the global climate litigation movement before regional and international courts and tribunals is likely to arrive on Africa's doorstep in the near future. In December 2024, about 100 countries and 12 international organizations presented oral arguments before the International Court of Justice (ICJ) at The Hague on the question of the legal responsibility of states in matters of climate change. The ICJ is being asked to issue an opinion on what the legal obligations are of states to safeguard the climate system from GHG emissions, and the legal consequences when these emissions cause significant harm. Each country, regional group and organization that made written submissions was invited to make a 30-minute statement, with hearings spanning 2–13 December 2024. The African Union (AU) made a regional submission, with individual state submissions submitted by the Democratic Republic of Congo, Tonga, Sierra Leone, Namibia, Madagascar, Cameroon, Ghana, South Africa, Mauritius, Egypt, Kenya, Seychelles, The Gambia, and Burkina Faso (Rumble 2024).

The case was led by the Pacific island nation of Vanuatu, who were able to persuade members of the UN General Assembly to pass a resolution calling for an advisory opinion from the ICJ in 2023 (Setzer & Higham 2024).[6] The request for an opinion asks the court to consider the full suite of international law, including both treaty law like the Paris Agreement and UN Framework Convention on Climate Change, as well as "customary international law" and how it applies to all states across the world in a myriad of different contexts. The AU asked the court to recognize that states have preventative duties under customary international law not to harm the climate system. The AU also argued that states have a customary international law "due diligence" duty to urgently phase out fossil fuels and ensure a just transition. There is also a duty to allocate the burden of emissions reductions asymmetrically and fairly between them. The court is due to make a ruling during the course of 2025. Although not itself legally binding under international law, the advisory opinion will likely be cited in climate lawsuits around the world, including in regional and

[6] The ICJ, the world's highest court, was asked to consider the question of climate change. The request for an advisory opinion was made by a group of 18 states led by the small island nation of Vanuatu. It took above three years to be tabled, in part because standing rules mean that requests for such opinions can only be brought by public international bodies, and therefore require a broad base of support among member states. On 29 March 2023, the UN General Assembly unanimously adopted a resolution to ask the ICJ for an advisory opinion on climate change. The resolution asks the ICJ to clarify the duties of states to protect the climate system and the rights of present and future generations from climate-induced harms, as well as the legal consequences for states that have caused significant climate harm to the planet and its most vulnerable communities.

national courts, and would carry strong precedential weight before any judge. The above reflects a new dawn for the regional climate change litigation system and even at national level.

[F] FUTURE OUTLOOK AND CONCLUSION

Courts and judges serve an important purpose as a "rhetorical" force for climate change litigants. Crucial cases at the international, regional and national levels have brought important developments in climate change mitigation and adaption. A lot of these cases can be classified as being "strategic", meaning that they are filed with the aim of influencing the broader debate around decision-making with climate change relevance. The climate litigation trend positions judges and courts as governance actors in a just transition. It has sparked a flurry of analytical and archiving activity, including legislation and case law databases offering a novel approach to change and impact the dynamics in the battle against climate change. The rapidly developing theory and practice of climate litigation holds out that courts and other quasi-judicial forums provide an independent, non-political public forum to ventilate concerns and allow for claims to be heard and determined. Proponents of the climate litigation trends hold out that legal advocacy can provide a mechanism for dialogue and awareness, draw attention to regulatory options and debates, and push policymakers and regulators to fill gaps in climate change policies, laws and actions.

The climate litigation trend opens up a new legal terrain, encouraging courts to hold their governments and corporate actors to account to ensure that climate change commitments are given practical and enforceable effect. Key actors (the executive branch of the state and, to some degree, multinational corporations) are now held accountable for climate mitigation or adaptation failures. Courts are increasingly being approached by climate litigants and that may augur well for defining standards and norm generation. As such, judges may be required to draw on a wide collection of legal principles to adjudicate climate litigation, taking inspiration from other areas of law and applying old law in new ways. International courts in Europe and North America have the highest potential. Regional courts under the AHRS may be hamstrung by clawback clauses, nonetheless national courts can fill the gap by being braver. It should, however, be noted that courts can be limited too, so judges have an important role in leveraging activism as Africa is a promising regional venue for climate change-related complaints—not least because it is distinctively vulnerable to climate harms.

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Visual Justice and the Aesthetic Construction of the Trial

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Abstract

This article explores the concept of visual justice—the aesthetic and symbolic construction of justice in courtroom films and television—and its impact on public legal consciousness when its tropes and dynamics are used in journalistic discourse. While legal dramas do not claim to represent judicial reality, they shape cultural expectations through narrative coherence, emotional legibility, and moral clarity. As these visual tropes migrate from fiction into journalism, particularly in the phenomenon of "trial by media", they risk distorting public understanding of how justice operates in practice. We argue that when real trials fail to align with the aesthetic script popularized by cinematic representation and inappropriately adopted in the practice of reportage, public trust in the judiciary may erode. This article bridges legal theory, media studies, and aesthetics to interrogate the ethical and epistemic consequences of representing law as image.

Keywords: visual justice; legal aesthetics; trial by media; judicial representation; public perception of law.

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[A] INTRODUCTION

Courtrooms are often imagined as spaces of solemnity and restraint, rooms arranged for procedure, governed by silence, decorated with robes, rituals, and the persistent architecture of formality. However, when transposed onto the screen, these spaces are transformed: the courtroom becomes theatre, the trial becomes plot, the judge becomes arbiter of meaning as well as law, the lawyers become performers; and the language of the law, once dense with jurisprudence, becomes dialogue crafted for effect. Law, in this mediated form, sheds its precision to embrace its dramatics and its sensationalism. The courtroom drama is a mythology, not merely a genre: it is not aimed at portraying how the law operates, but rather to distil its drama, its ethical stakes and its human tension. In this process, justice is aestheticized and made visible through narrative coherence and visual clarity rather than conformity to the judicial reality. The procedural—and often mundane—aspects of litigation are stripped away, leaving behind a purified image of justice that is swift, moral, and emotionally legible.

We call this process visual justice: the visual and symbolic construction of justice within mediated forms, particularly cinema and television. Unlike procedural justice, which rests on fairness and impartiality in court proceedings, or distributive justice, which concerns outcomes, visual justice concerns the representation of justice and its aesthetic logic. It is justice as it appears—not to the judge or to the jurist, but to the public gaze. In this paradigm, the law turns from a system of norms into a performance.

"Trial by media", on the other hand, is one of the symptoms of a culture increasingly saturated by image and information. In such a culture, public legal consciousness is shaped neither by legislation nor by lived experience, but by mediation. For many, especially those who have never seen the inside of a courtroom, the law is only encountered as representation—in cinematic works of fiction as well as in the journalistic account. Courtroom dramas, used as models in reportage, end up teaching an imperfect model of what justice looks like, how it sounds, and how it should feel. Over time, this aesthetic miseducation forms expectations; and when real-world trials fail to meet those expectations the public can feel betrayed. This betrayal, in turn, becomes political: trust in the judiciary and in the legal system is fragile, as it is mostly built on perceived fairness, transparency, and intelligibility. When visual justice consistently renders law as moral clarity, swift verdicts, and righteous advocacy, and the tropes of visual

justice are then borrowed in the journalistic discourse, real law may begin to appear inadequate by comparison. A justice that does not look like justice becomes suspect.

Here, then, lies a critical question: what are the epistemic and ethical consequences of representing law as image? What does it mean to believe not in what justice is, but in what justice looks like? In this article we examine the aesthetic and rhetorical elements that dominate representations of trials in film and television, and question whether these visual narratives should shape the public's understanding of the law. To explore this, we must move between disciplines. Law alone is ill-equipped to read images: it can interpret texts, weigh facts, balance interests, but it hesitates before the visual. Aesthetics, on the other hand, understands the grammar of images, the codes of framing, lighting, pacing, gesture, and asks not only what is represented, but how and why. To understand visual justice, one must read courtroom drama as legal texts, and legal texts as aesthetic objects. This interdisciplinary approach is essential: meaning is always mediated (Barthes 1968), and the image is always a sign. A trial on screen can be a performance of legality, a ritual of legitimacy, even a narrative of guilt and redemption. To treat such images as mere entertainment is to ignore their power; to treat them as documentary truth, on the other hand, is to reduce the spectacle to an impoverished referent, stripping it of its theatrical seduction and narrative wonder, only to be left with a flawed imitation of reality—one that, precisely because it pretends to truth, fails to satisfy either as law or as drama.

In the pages that follow, we will discuss how trials are represented in popular media, with particular attention to the tropes and stylistic conventions that define courtroom narratives. We shall also address how the use of these tropes in the practice of reportage and in those parallel proceedings known as "trial by media" shape public expectations and influence trust in the judiciary and the legal system. Our aim is not to denounce fiction, nor to moralize about popular culture, but to reflect on how justice is seen on screen, and what is at stake when that seeing is inadvertently transposed onto reality. Ultimately, this is an article about perception: how justice is perceived, how that perception is shaped, and how it in turn shapes the law itself. As the border between fact and fiction grows ever more porous, should the courtroom reckon not only with truth, but also with its image?

[B] FRAMING THE PROBLEM: THE TRIAL AS A SHOW

Prior to the screen, there was the stage: long before cameras rendered justice in close-up, courtrooms were already structured, choreographed and performed scenes. Trials were a ritual of exposure, where private wrongs became public reckonings. The architecture of the courtroom, the sequence of speech, the solemnity of dress, these elements are as symbolic as they are functional (Dahlberg 2009): they mark the trial not just as proceedings, but also as a performance of legitimacy. Indeed, from its earliest incarnations, the trial was designed for public consumption. In ancient Athens, juries were vast, almost theatrical in size, sometimes numbering in the hundreds, ensuring that the trial was not merely heard but also witnessed (Bauman 1990). The Roman forum, too, was a literal space of gathering, where justice and performance were indistinguishable (Bauman 1996). Even medieval tribunals, often cloaked in secrecy, unfolded within highly ritualized processes that invoked divine judgment and feudal hierarchy (Langbein 1973; Taylor 2013). The courtroom has always been an architecture of visibility that signifies authority. This performative logic persists today, and language itself becomes ritualized, with terms and expressions like “Your Honour”, “may it please the court”, “objection” that are devoid of spontaneity but heavy with juridical weight. These are not mere formalities: the law, in the setting of the courtroom, is as much enacted as it is spoken (Wagner & Cheng 2011).

Indeed, the trial operates not unlike a classical drama: there is a prologue in the opening statements, there is a conflict (the dispute itself), there is a chorus—the jury or the public, when not both—and a denouement in the verdict. Each actor assumes a role that has usually been rehearsed prior to the hearing to achieve maximum persuasive effect and to minimize the risk of being taken unaware by the opposing side. The rules of evidence function as a kind of dramaturgy, determining what may and may not be said, thus shaping the narrative arc. The presiding judge, ostensibly neutral, becomes both director and adjudicator. The entire proceeding is less a free dialogue than a scripted improvisation, bound by rules and infused with persuasion, timing, and affect. Scholars have long gestured toward this theatricality (White 1973; Cover 1983-1984; Douzinas & Warrington 1996; Silbey 2017; Stone Peters 2022). It is particularly underscored in the scholarship that the trial is a site where state power is both asserted and aestheticized. Power cannot simply be just, but it must also *appear* to be just, hence

the elaborate symbolism: the blindfolded Lady Justice, the scales, the gavel. These are not tools of law, but images of law—icons that render abstract values visible. In this sense, the trial is inseparable from its aesthetic dimension.

These elements are not without their fascination for the public, and together they lend themselves readily to the dramatization of the trial, which has long served as fertile ground for works of fiction in both literature and film. Such dramatization, however, can both reinforce and undermine legitimacy. The trial, once transposed to the screen, ceases to be a juridical event and becomes a narrative myth—legible, affective, and coded. What is on screen is not the law in its procedural opacity, but its legibility as drama, governed not by due process but by intelligibility, rhythm, and desire. The omissions, the simplifications, the embellishments are not flaws but conditions of the form: they render the legal process coherent not in truth—which, as stated beforehand, would be pointless—but in meaning. When the trial fails to persuade aesthetically, it risks undoing the very myth it seeks to uphold: the law, stripped of its narrative force, appears arbitrary and faltering, and in such moments the public's belief is not lost in the letter of the law, but in its image; and with that image, trust begins to erode—for it is not justice alone that must be done, but justice that must be seen, and recognized as meaningful. The performative dimension of justice is constitutive of its reception: and, as with theatre, the audience must believe. This belief is not naïve, but is cultivated through repetition and symbol. Every trial, even the most mundane, re-enacts the myth of justice: that disputes can be resolved through procedure, that truth emerges from adversarial exchange, that order can be restored. These are not empirical certainties but necessary cultural fictions that the trial sustains.

In the pre-modern world, the spectacular function of the trial was overt. Public executions, confessions, and inquisitions made justice a theatre of power. In modern liberal democracies, the spectacle is subtler, displaced into legal formality and media coverage, but it has not disappeared: it has migrated from the scaffold to the screen, from the town square to the courtroom drama; and with it, the question remains: when justice is performed, what is being affirmed—the rule of law, or its image?

To understand the trial as drama is to read it through a matrix of performance, power, and representation. Goffman argued that social life is structured like a theatrical performance. Institutions, thus, do not simply function, but they rather perform, and individuals occupy pre-

established roles, managing impressions, concealing dissonance, and projecting coherence (Goffman 1956). The courtroom is a quintessential Goffmanian stage: front regions constructed to signal authority and truth, while backstage negotiations (such as plea deals, procedural delays, evidentiary compromises) remain hidden from the public gaze. In the trial, each actor—judge, lawyer, witness, the parties—performs a role calibrated to institutional expectations. The language is codified, gestures are rehearsed, disruptions are sanctioned, and the audience—be it the jury, the gallery, or the media and its public—is not passive but necessary, because it legitimizes the performance. Justice is as much delivered as it is staged, and its authority, to a certain extent, depends on the persuasive performance of legality.

Speaking of performance, however, requires addressing power. Foucault traces the evolution of punishment from the public display of sovereign power to the invisible machinery of disciplinary control. Visibility, however, is never innocent: it is a function of surveillance and control (Foucault 1975). The courtroom, therefore, is not merely a space of symbolic exchange, but rather a theatre of control, where the gaze (of the judge, the jury, or the media) governs not only the parties to the dispute but the public understanding of justice itself.

Trials, when filmed or televised, become part of what Foucault would call the "spectacular punishment" that persists beneath liberal veneers (Foucault 1975). Even when trials are not explicitly punitive, their exposure, especially in high-profile or media-saturated cases, reinforces a normative order. A defendant is made legible, the law is re-inscribed as guardian of morality, and the public is reassured that justice is watchful. Consider the courtroom as a field, as theorized by Bourdieu—a structured social space in which actors struggle over forms of capital, especially symbolic capital: the law therefore is a form of institutionalized symbolic power, as it names, classifies, and legitimizes. Symbolic power, however, operates best when it is misrecognized as natural or neutral (Bourdieu 1987; 1991). The trial, if viewed through this lens, is not just a forum for legal decision-making, but also a site where distinctions are asserted, hierarchies reinforced, and legitimacy claimed. The rituals and decorum of court are expressions of institutional dominance; and when these forms are reimagined on screen, the symbolic weight of law is amplified, condensed and made emotionally resonant.

This, however, applies to the reporting of trials; to journalism, in other words, not to fiction. What, then, is at stake in the act of fictional representation? It becomes necessary to consider media not

as passive reflections of ideology but as sites where meaning is actively generated, a perspective that emerges through Hall's theorization of the encoding/decoding process, which we adopt here to approach the trial as a mediated construct rather than a mimetic replay (Hall 1980). Representation, far from being neutral, is charged with the intentions of the producer and always susceptible to negotiation or resistance by the viewer. The courtroom drama, accordingly, must be read not as a transparent window onto juridical reality, but as a text shaped by genre conventions, institutional ideologies, and the anticipatory horizon of the audience. In the televisual or cinematic trial, the defendant is not simply an individual or entity subject to legal adjudication: they are constructed as a semiotic vessel, overdetermined by narrative need, embodying either excess or lack in ways that absorb, displace, or intensify the emotional response of the audience. Guilt and innocence, therefore, are not reducible to legal determinations but emerge as effects of narrative resolution—namely, of what must be true in order for the story to conclude.

The representation of proceedings is shaped by the divergence between juridical accuracy and the structuring imperatives of narrative coherence. Fiction, by its nature, seeks coherence, closure, catharsis. Trials, in reality, are slow, procedural, and the hearings are more often than not inconclusive. The rules of evidence do not make for gripping dialogue, the reasoning of lawyers is often opaque even to the initiated. To make trials cinematic, screenwriters have to streamline, heighten, and resolve otherwise problematic issues. Screenwriters must prioritize affect over accuracy and character arcs over the subtlety of the law (Corcos 2003). These are often chastised by lawyers as errors, but they are not: as stated beforehand, they are conditions of the medium. Can it be argued, however, that they create distortions? Could there be a danger that the public, increasingly initiated into the rituals of justice not by statute but by screen, comes to internalize a form of law that is moralistic rather than procedural, affectively transparent rather than obscure, narratively whole rather than juridically fragmented—a justice, in short, more legible as myth than as institution? Courtrooms become crucibles of truth, where good advocates win and justice prevails; and when real trials deviate from this script, as they invariably do, disillusionment can follow. Visual justice is thus caught in a paradox: on one hand it seeks to render justice visible, while on the other, in doing so, it could actually transform it. The result, therefore, may not just be a new aesthetic of law, but a new set of expectations that the actual legal system is not equipped to meet.

[C] THE CINEMATIC TRIAL: RHETORIC OVER LAW

The cinematic trial is not a replica of real ones: it is a condensation, a distillation, a potent image of what justice *ought* to feel like. Trials on screen are not designed to instruct, but to move. In its frame, the law is rendered not as a system of norms and procedures, but as an arena of passion, principle, and persuasion. The courtroom, once a space of technicality and delay, becomes instead a crucible of moral truth, pressed into the rhythms of narrative time. Consider the iconic moment from *A Few Good Men* (1992). Colonel Jessup, needled into confession by Lieutenant Kaffee, shouts the line "You can't handle the truth!" that is now embedded in cultural memory. That line is pure theatre: the legal issue in dispute (whether or not two marines acted under orders in the death of a fellow soldier) is overshadowed by the emotional choreography of the scene, aimed more at exposing the power dynamics within the military than at discovering the factual truth—a truth that eventually emerges not through slow procedural unfolding, but through pressure, confrontation, climax. This is not how trials unfold in the juridical reality, but it is how they must be written in the language of cinema: condensed, symbolized, purified of procedural excess. In this movie, the trial loses none of its power: it merely changes register from institution to story, from function to form. Here, the lawyer is no longer the mere interpreter of statute or precedent, but a figure of mythic resonance, regardless of whether they are cast as hero or villain: they persuade through courage, charisma, and a moral clarity that the adversary (whether defendant or witness) conspicuously lacks. The courtroom, from a space of law, becomes a battlefield of characters. The judge usually fades into the background, the jury is almost irrelevant; what matters is the performance, thus the monologues, the cross-examination, the final plea.

In *The Trial of the Chicago 7* (2020) the dynamic is even more explicit. Aaron Sorkin, writer and director, stages the real-life trial of anti-war protesters as a political theatre of resistance and absurdity. Questions of law that would be only interesting to the initiated are transfigured into scenes of confrontation, and the law, no longer confined to the technical, enters the domain of myth, becoming legible to all not as rule, but as story. Judge Hoffman becomes a caricature of authoritarianism, while Tom Hayden and Abbie Hoffman deliver competing visions of dissent, ideology, and revolutionary posture. The trial becomes a parable of injustice, structured not by procedure, but by the narrative

demands of heroism and villainy. Even in ostensibly realist films such as *Philadelphia* (1993), the courtroom is mostly shaped by affect. Andrew Beckett, dismissed from his law firm for having AIDS, brings a case for discrimination—a gesture that is at once legal and symbolic. The trial, though structured around questions of law (some still unsettled, touching on employment rights, burden of proof, and medical privacy) does not ask to be read as a legal discourse: these juridical elements remain present, but they recede graciously beneath the emotional architecture of the narrative. The focus is on expressions, silences, glances—the micro-rhetoric of humanity. The courtroom ceases to function as a space for legal calculation and becomes instead a theatre of social reckoning, where justice is not measured by its consistency with the law, but by its resonance with feeling. The judgment convinces not because it is demonstrably correct in law, but because it feels just; because, as myth, it restores order to a moral universe momentarily unbalanced. It must be acknowledged that, save for members of the legal profession and a handful of the legally curious, the public at large is seldom preoccupied with the legal correctness of courtroom decisions portrayed on screen. In the present case, the film offers only fragmentary glimpses of the proceedings—sufficient to suggest the basic aspects of a contested legal issue without turning a work of fiction into a specialist documentary.

Television, meanwhile, has taken this aesthetic even further. In series like *The Good Wife* or *Suits*, the law becomes fast-paced, glossy, and hyperarticulate. Cases are tried and decided within an hour-long episode that simulates a week at best—sometimes less. Motions are filed and ruled upon in a single conversation, the characters speak in perfectly timed exchanges, laced with wit and tension, and legal research—when present or even relevant—is reduced to a plot device. Courtrooms are pristine, modern, and improbably quiet or fittingly empty. The messiness of real trials, their ambiguity, their bureaucracy, and especially their institutional inertia is erased, and all that remains is the illusion of mastery. *The Good Wife*, in particular, plays with the theatricality of law. Alicia Florrick moves between courtroom and boardroom, with her voice calibrated to mood and decorum and her arguments always a semi-perfect blend of strategy and intuition. The cases mirror current events but are never bogged down by normative subtlety: they function mainly as moral puzzles, resolved not through jurisprudence but through insight; the viewer is invited to admire not the law, but the lawyer.

In *Suits*, this artifice is even more pronounced. The firm appears to be composed exclusively of individuals of quite arresting appearance,

with the exception of the devious Louis Litt, whose looks clash with those of every other partner, associate and administrative staff as to underscore his role as the villain. The cases are, in truth, relatively elementary, but they are staged as occasions for brilliance. Mike Ross, the impostor with a photographic memory, is less a character than a mythic signifier: he embodies the fantasy of perfect recall, the archive incarnate. In eclipsing the trained lawyers, he elevates memory above method, citation above structure, instinct above discipline. His absence of procedural formation is not a flaw but a narrative device: he represents law unmoored from institution, distilled into pure genius. In *Suits*, however, the dramatization does not succeed precisely because it refuses to remain within bounds: it stretches the conventions of the legal drama beyond their symbolic elasticity, venturing into the territory of fantasy without acknowledging the shift in register. The drama continues to wear the costume of legal realism even as it discards its internal logic. What is lost is not plausibility *per se*, but the tacit contract with the viewer: that this is still, however heightened, a world governed by legal forms. When style becomes excess and narrative abandons coherence, the myth collapses not into critique, but into confusion. In general, what works like *Suits* and *The Good Wife* share is an abandonment of the complexity, the sophistication and the wonder of the law in favour of its drama only. Procedure is not just compressed but often invented, rules are elided, judgments come swiftly, and time itself is manipulated, giving the impression that a case is resolved in a handful of hearings over the course of a few weeks (an impression not wholly inaccurate, except that those weeks are, in practice, dispersed across several years, as evidenced in the literature) (Spurr 1997; Grajzl & Zajc 2016; Örkényi 2021).

However, the law in practice resists such clarity: it is slow, often ambiguous, full of procedural wrangling, strategic ambiguity, and interpretive uncertainty. The cinematic trial, by contrast, demands resolution, and cannot abide open-endedness: it needs the last word, the echo of the gavel, the satisfied handshake between lawyer and client. The cinematic trial substitutes affect for evidence, pacing for realism, and presents the triumph of rhetoric over law, which is deeply seductive: indeed, the cinematic trial uses familiar, comforting, and stylized tropes that are the very grammar of visual justice, the signs through which the audience comes to recognize the action of the law.

Let us consider first the figure of the so-called rogue lawyer—an internal dissenter, committed not to subversion but to the higher ideals of justice. This is the lawyer who may strain procedural orthodoxy,

but does so in fidelity to principle rather than personal gain; one who harbours scepticism towards the institution, yet remains animated by a belief in its moral potential. Whether in the form of Alicia Florrick in *The Good Wife*, Jake Brigance in *A Time to Kill*, or the spectacular Jimmy McGill/Saul Goodman in *Better Call Saul*, such characters serve to reconcile disillusionment with the enduring possibility of integrity. In this narrative mode, the trial is cast less as a forum of neutral adjudication and more as a site of principled resistance. Closely aligned is the figure of the so-called genius lawyer—one who perceives what others overlook, who detects meaning in hesitation, tone, or typographical slip. Such lawyers do not so much apply the law as transcend it; their success lies less in doctrinal argument than in personal charisma, instinctive acuity, and rhetorical command. From Harvey Specter in *Suits* to Will Gardner in *The Good Wife* and Daniel Kaffee in *A Few Good Men*, these characters operate in a courtroom governed more by intuition than by citation. In such representations, the law is no longer the central instrument of persuasion, but rather a pliable backdrop against which individual brilliance is allowed to perform. These lawyers do not win through patient exposition or the accumulation of detail: they win through "the twist"—that is, a sudden reversal, the revelatory piece of evidence, the unexpected confession that reshapes the entire narrative. The twist is the cinematic substitute for complexity: it renders moot the ambiguity, the conflicting testimonies, the long shadow of doubt, and provides instead a key, and with it, a conclusion. The viewer is spared uncertainty as the law snaps into focus. Sometimes, the twist comes as a confession, a trope so entrenched it borders on ritual: the villain who breaks under pressure, the witness who admits the truth, the defendant who reveals their guilt, often in a moment of emotion. These confessions do not arise from forensic pressure or meticulous argumentation: they are the final flourish and the moral punctuation of the narrative.

All of these tropes find their resolution in what may be termed the "clean verdict": the jury returns, silence descends, the foreperson rises and pronounces the outcome—guilt or innocence—with a pause calibrated for dramatic effect. Rarely does a fictional trial conclude in ambiguity. The inconclusive decision, the mistrial, the hung jury, though not uncommon in reality, are generally eschewed on screen, lacking the narrative closure the audience has been conditioned to expect. Resolution is demanded not merely as a matter of plot, but as a ritual affirmation that justice has been seen to be done—definitive, public, and unambiguous. In practice, though, justice seldom presents itself in such a tidy form. Judgments

do not arrive to order; trials are frequently episodic, procedural, and, at times, uneventful. Weeks may pass without witness testimony, and the substance of legal argument is more often found in written submissions than in oral exchanges. Verdicts are delivered without ceremony, absent of drama. The law advances in what might be called slow time—bureaucratic, conditional, and frequently anticlimactic. A judgment does not so much resolve as it concludes, and even that conclusion is rarely final: subject as it is to appeal, further application, and the exercise of judicial discretion.

Cinematic time obviously bears little resemblance to the temporalities of actual proceedings. What in reality unfolds over months, even years, is compressed on screen into a matter of minutes. Proceedings that would, in practice, encompass depositions, motions *in limine*, jury selection, discovery disputes, and post-trial motions are distilled into a handful of scenes and a closing address. In such compression, it is often the complexity of the legal questions that is first to be lost. A lawyer might argue, however, that this distortion is not without consequence: fictional trials can nonetheless shape public understanding of how justice operates, creating expectations of speed, clarity, and finality that the law, by its very nature, is rarely able to fulfil. Where real proceedings are protracted, where delay is inevitable, and uncertainty persists, the system is perceived not as cautious but as defective. Procedure itself becomes suspect, and the deliberate pace of the rule of law is seen as incompatible with the immediacy demanded by public opinion. It is due pointing out, though, that what cinematic trials offer is not justice in its legal sense, but justice reimagined as sentiment, defined by tempo, structure, and emotional release. The medium does not seek to instruct the public that justice must be swift, visible, or emotionally charged: it seeks only to narrate. Law is a backdrop, not a lesson; it is a stage for fate, rhetoric, and spectacle. Real proceedings normally fail to conform to the cinematic script, as inevitably they must, and they can appear unfamiliar but also unjust. The cinematic tropes endure because they are consoling: they provide reassurance that truth can be discovered, spoken, and seen; that justice can be not only done, but performed. Is it up to cinematic trials to educate the audience as to how justice actually works?

[D] TRIAL BY MEDIA AND THE EPISTEMIC CONSEQUENCES

The expression "trial by media" is frequently employed as a warning, typically in circumstances where press coverage is thought to imperil the impartiality of legal proceedings. To the legal profession, it commonly signifies a form of contamination—of the jury, of due process, and of the law itself (Vargiu 2025). Its imagined opposite would be the courtroom conceived as a sanctified forum, shielded from the clamour of public opinion. However, such a conception is, on close inspection, a fiction. Courtrooms are not hermetically sealed, and the law does not operate in isolation from the society it serves. The media, moreover, do not merely intrude: they inform, interpret, and in no small measure shape the public's understanding of legal institutions.

To think of trial by media as merely a parallel adjudication, an extra-legal show that runs alongside the formal proceedings, is to understate its epistemic force. The media do not only speak about justice, but they also produce the terms in which justice is thought. They establish, through repetition and style, what a trial is expected to look like, how truth should reveal itself, how guilt should feel. In this sense, the media are not just commentators: they are also authors of legal consciousness.

Trial by media and the cinematic trial are not the same mythology. The former belongs to journalism, to reportage, exposure, the real made sensational; the latter belongs to fiction, to narrative, character, and the seduction of form. One claims truth; the other seeks meaning. Fictional trials, in particular, move quickly, offer emotionally satisfying judgments, and pretend that the law is clear, moral, and dramatic, that lawyers must dazzle, that judges must command, that the accused must be either monster or victim. These are aesthetic standards, not legal ones; they are not meant to shape public judgement or to be presented as authority. Media coverage, on the other hand, has a moral obligation not only to stick to the truth, but to narrate it with fidelity—as it might otherwise prejudice a court or a jury. Indeed reporting, over time, constitutes a parallel curriculum—that is, an informal education in justice that runs deeper than statute. Trial by media, however, often borrows the tropes of cinematic trials (the drama, the moral clarity, the swift verdict) without possessing the licence of fiction. Film and television make an implicit pact with the viewer: what you see is not the real, but its stylized echo. Journalism, by contrast, speaks in the name of truth. When it adopts the codes of fiction without declaring them, it fabricates not just a story, but a false justice that does not exist, but is nonetheless consumed as

real. This is the epistemic shift from law understood as a process of deliberation to law conceived as a form of performance; from adjudication rooted in reason to one shaped by affect. The consequence is not merely a misrepresentation of justice, but the creation of expectations that the legal system, operating under its own constraints and disciplines, is neither designed nor able to satisfy. Trial by media, in other words, often adopts an aesthetic of justice that, like all aesthetics, is normative: but it is not the aesthetic that it is supposed to adopt. This is the deeper mechanism of trial by media: not simply that the media pronounce guilt or innocence, but that they furnish the conditions under which guilt and innocence are expected to appear (Gies 2007).

The audience, primed by the tropes of fictional trials, brings to the real courtroom a subconscious script, in which there must be a turning point, the truth must come to light, the lawyer must be eloquent, and in which the system, though challenged, must prevail. When real trials fail to satisfy this aesthetic script, the public response is not confusion, but disappointment. The law, when observed in practice, may appear inert, procedural, methodical, at times uneventful. Justice, in its ordinary performance, proceeds at a pace unsuited to spectacle. It neither dazzles nor offers immediate resolution. Its rituals, though constitutionally significant, may seem undramatic to the untrained eye. To an audience to which trials are presented in the same form as the cinematic ones, this dissonance gives rise to disappointment; and such disappointment gives rise to a growing scepticism, born of the perception that the law no longer resembles justice. The legitimacy of the legal system becomes increasingly contingent upon its ability to meet performative expectations: the courtroom must not only function properly, but appear to do so in a manner that accords with popular imagination. In this respect, the cinematic template ceases to be merely illustrative to acquire a prescriptive force: it no longer offers one way in which justice might be conceived, but dictates the very terms by which it is to be recognized. Therefore, trial by media does not end at the courthouse door, but enters with the viewer, sits with the jury, hovers at the bench, and most importantly carries a script; and when the real trial fails to follow it, the audience leaves not only unconvinced, but also unfaithful.

The proliferation of legal imagery borrowed from cinematic trials has altered not only the public's aesthetic expectations of justice, but its very relationship with truth. What we confront is not merely a crisis of information, but a crisis of form. As McLuhan (1964) observed, "the medium is the message": proceedings—when refracted through the

conventions of film and television—are no longer apprehended primarily as an institutional procedure, but reconstituted as a genre. Their legal character yields to its narrative construction, and their authority, as stated beforehand is grounded less in law than in form. As with all genres, this one is governed by its own internal logic of narrative pacing, emotional cadence, and stylistic cohesion. Legal truth, however, is not guaranteed by adherence to form. The law resists neat construction and unfolds irregularly, contradicts itself, and requires time rather than immediacy. Cinema and TV rightly privilege sensation over thought (Postman 1985; Robson 2007; Robson & Schultz 2016); but within a screen-based culture, proceedings must now contend with the demands of entertainment, and are often compelled to account for their own slowness, their technical detail, and their silences. Where they fail to do so, they do not forfeit legal validity, but they risk forfeiting their authority in the public imagination.

Trust, like belief, is not purely rational, but also aesthetic: it relies upon signs and the outward performance of authority. When parallel trials are conducted in the media not according to the canons of the law, but to the tropes of cinema, proceedings do not conform to the anticipated script, placing trust under strain; it does not collapse all at once, but it quietly recedes. In the context of jury trials, this is particularly acute. Jurors, far from entering the courtroom as blank slates, carry with them an internalized cinematic template. They assess not only evidence, but performance: the poise of the defendant, the rhythm of the cross-examination, the narrative coherence of closing arguments. Their role, once juridical, becomes interpretative, half-legal and half-literary. Justice then becomes a question of plausibility, tone, even style. And in political discourse, where legal institutions are routinely invoked and contested, this aestheticized understanding of justice becomes weaponized: trials are no longer procedural mechanisms, but also (and perhaps foremost) media events, battlegrounds of perception. Trust is now performed more than it is built, and what is judged is the show more than the law.

[E] ETHICAL AND AESTHETIC IMPLICATIONS

The cinematic trial seduces because it is composed, structured, lit, framed, and offers clarity where the world offers confusion—as well as order where the actual law offers ambiguity. By its nature, the cinematic trial is indeed compelling. This very compulsion, however, raises an ethical question: should a representation of justice be both compelling and responsible? Should it satisfy the narrative desire for resolution without distorting the fragile architecture of truth?

We argue that the answer to both question is negative. The visual medium inevitably shapes that which it seeks to depict. The camera does not operate in a vacuum: it selects, excludes, and frames. Once placed within the lens, the courtroom ceases to be a neutral space of adjudication and becomes a stage upon which meaning is performed. Representation, in this context, is always interpretative, and never passive; and every act of interpretation carries with it an element of power. The power at play, however, is not to educate, but to offer the public a story, shaped in degrees of realism according to the codes of its genre. To represent a trial on screen, therefore, is not to proclaim a particular vision of justice, while relegating others to absence or silence. Filmmakers, screenwriters, showrunners do not assume an implicitly legislative function: they determine which voices are heard, which narratives prevail, and which visual symbols are granted authority. This is an aesthetic task, not an ethical one; ethics belong to journalism, where the claim to truth binds the form. Art must enjoy the freedom to imagine, to challenge, to provoke. Justice is not a fiction: it is a structure with tangible effects and binding authority. Misrepresentation in fiction film is declared by the cinematic medium itself. Trial by media, on the other hand, can calcify into mythology; myth, once internalized, gives rise to expectation; and expectation, when unmet, breeds distrust. The aesthetic, in trial by media, does not remain confined to the screen, but migrates into public consciousness, where it shapes perception and informs judgement. In this migration, the image ceases to be neutral or merely narrative to assume a moral charge, and with it, a measure of responsibility.

We argue that fiction film should not be constrained by didacticism. To produce works that are merely accurate or strictly procedural is to risk a different distortion: the effacement of human experience, the reduction of justice to forms, filings, and statutory text. The cinematic trial must not necessarily serve as documentation, but primarily as representation and, at times, interpretation: its objective is to engage, challenge, and move its audience—not necessarily to educate it. This does not mean that the divide between cinematic trials and trial by media is one between aesthetics and ethics, though. To represent justice ethically is not to deprive it of drama, but to remain faithful to its inherent complexity, resisting the impulse towards resolution, and avoiding the lure of narrative neatness or moral certitude delivered in the closing scene.

There are, in fact, even cinematic works of fiction that attempt this. These are films, such as Thomas Vinterberg's *The Hunt* (2012) or Orson Welles' *The Trial* (1962) that leave the ending unresolved, or that divert attention from the outcome altogether, turning instead to the human

cost of the proceedings—such as the fragmentation of communities, or the enduring weight of accusation. Such works embrace ambiguity as a necessary burden, recognizing that the trial is not solely a mechanism of resolution, but often a site of rupture. They accord due weight to silence as well as to speech, to uncertainty no less than to judgment, and in doing so, they offer a more faithful, if more demanding, vision of justice. Filmmakers remain not bound to the letter of the law, but can decide to assume an equally serious obligation: a respect for the gravity of that which is being portrayed, to represent justice in ways that wield a cultural authority that rivals that of law itself. It is, however, a conscious choice to act as architects of public perception—but there is no obligation to do so.

Moreover, representation can be both compelling and grounded in the codes of the real. Legal aesthetics as a field of study underscores that the law is not, and has never been, a matter of pure reason alone, but also a question of form, presence, and perception. The law communicates through words as well as through its appearance, its ceremonies, its setting, its manner of address. The question is not whether the law should be seen, but rather how it is seen, and what that act of seeing brings about in the public mind. In the ethics of representation, particularly in visual media, this problem becomes acute. Scholars such as Butler (1990), Rancière (2007) and Comolli (1980; 2004) have explored how language can affirm or disrupt dominant narratives, underscoring the lack of neutrality of representation, which either reproduces the visible order or unsettles it. The courtroom, in this sense, is an ideal site for visual ethics: it is a structure of visibility, but also a site of exclusion. Who is seen? Who is heard? Who narrates justice, and from where? There are indeed works of fiction that neither abandon the courtroom as dramatic setting nor submit entirely to cliché. Sidney Lumet's *12 Angry Men* (1957) is one such instance. The film resists the grandeur of the trial scene entirely, as the courtroom itself is off-screen. The drama unfolds instead in a cramped deliberation room, reliant only on dialogue, gesture, and the slow erosion of certainty. The jurors, each an avatar of prejudice, fatigue, or conviction, must confront their own assumptions rather than the theatrics of a lawyer. The result is no less compelling than a cross-examination, but it compels through doubt instead of disclosure; and the moral resolution emerges not from a twist, but from patient, discursive attention to the ordinary. In this, it approaches what one might call an "ethics of slowness"—that is, a cinematic rendering of procedural time that refuses easy catharsis. Stranger still, and more instructive, is Jonathan Lynn's *My Cousin Vinny* (1992), a courtroom comedy that satirizes the very tropes it inhabits. Vinny Gambini is an outsider lawyer with no

trial experience who stumbles through protocol, misreads decorum, and dresses inappropriately, and one may easily mistake this film for a surrealist parody of courtroom dramas. However, beneath its comedic register, the film discloses an unusually careful regard for the epistemic foundations of legal reasoning. Vinny's final victory is not the product of charisma or confession, but of a close reading of the evidence—the forensic observation of tyre marks, grits, and photographic details. The law here is not performed for an audience, but reasoned out through argument, repetition, doubt. The judge remains sceptical, the jury uncertain, the pace irregular, and still, the justice that emerges is both satisfying and plausible. The film does not strip away affect, but it anchors it in method. These examples resist the tyranny of aesthetic resolution, showing that legal storytelling does not need to abandon complexity to be compelling. What they offer, instead, is a different kind of narrative pleasure: one rooted not in finality, but in recognition of ambiguity, labour, and the uneasy proximity between truth and belief. If fiction can achieve this balance, there is no reason why trial by media should not do the same: rather than sacrificing accuracy to the spectacle, it might learn to signify with both clarity and care.

Visual epistemology underscores that seeing is never a passive act: it is a process of interpretation, and interpretation is always shaped by its context. An ethical approach to the reporting of trials must account for this embeddedness and must resist the seduction of the definitive image, the flawless utterance, the neatly rendered judgment. What is required, instead, is a more tentative gaze that refrains from premature resolution, and remains alert to the procedural ambiguity and human complexity at the heart of legal proceedings. In this, reporting need not neglect aesthetic form, but must exercise it with discernment and care.

[F] CONCLUDING REMARKS

To see justice is not necessarily to understand it. This is the paradox with which any serious inquiry must end, and, in a sense, begin anew. In a spectacle-saturated culture (Debord 1967), where representation often precedes experience, justice is increasingly perceived not through civil or criminal procedure, but rather through its appearances: it is received as show, shaped as narrative, and concluded with dramatic rhythm. The courtroom is transfigured into a screen, and the trial into a scene. The form remains familiar, but its substance risks being lost. What, then, is at stake when justice is seen rather than understood? The answer is not merely legal, but also symbolic. When justice is visualized it acquires legibility, but this legibility is always selective. The trial, rendered for the

eye, becomes a moral tableau in which find room heroes and villains, revelation and closure, guilt and redemption. The law itself, however, is lost in translation. To understand justice is to tolerate its slowness, its incompleteness, its refusal of narrative clarity, to sit with precedent, process, and ambiguity. Understanding requires deferring, listening, and often waiting. To see, by contrast, is to grasp immediately, to judge by appearance, to seek coherence. In this shift from understanding to seeing, the law becomes a surface, the depth of which is mostly flattened. Its authority becomes fragile because it is no longer epistemic to become aesthetic. And aesthetics, while powerful, is fickle. The cinematic trial offers pleasure, even catharsis, but it does so by openly mythologizing justice, turning it into a form it cannot reliably sustain. When journalism adopts the same codes, it presents real trials against an aesthetic script they cannot fulfil. Justice, no longer a process, becomes a performance, and when the feeling is absent the public reads it as failure.

This form of betrayal gives rise to mistrust—not always explicit, but gradual, cumulative, and cultural in nature. An institution that no longer appears just is soon presumed to be in error. At this point, trial by media ceases to function as a parallel discourse and becomes the prevailing mode of understanding. The courtroom is placed under public scrutiny by an audience trained not in law, but in its mediated image. To call for ethical reporting of justice is not to insist upon conformity in costume or citation: it is to inquire whether the image can bear the weight of uncertainty, of time, of silence, of doubt; whether it can remain open rather than resolved; whether it can depict not only the outcome of justice, but the conditions under which it is pursued, its delays, its dissonances, and its intrinsic fragility. The visual needs not to be abandoned, but must be treated with greater seriousness. Justice ought to be seen neither as spectacle, nor as myth, but with critical distance, with suspicion, with patience, and with informed understanding. Journalism must challenge the law and its understanding, without fear of its more complicated aspects; and in doing so, it may better reflect the deliberative character of the law itself—for justice, in the end, is not what is performed: it is what persists after the performance. Justice is what remains in the silence.

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EU Administrative Law by Diana-Urania Galetta and Jacques Ziller

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Diana-Urania Galetta and Jacques Ziller (2024) *EU Administrative Law*, published by Edward Elgar, Cheltenham ISBN 981800375741

Knowledge and understanding of European Union (EU) administrative law is a must for academics and practitioners, not least since the Big Bang Enlargement in 2004 when the EU integration took on a new dimension. The complexity, influence and importance of the EU's actions have been growing in parallel with its new calibre. With further enlargements on the horizon, the competence and impact of the EU are of ever more crucial status today. But what is EU administrative law? With all its significance and gravity, as the authors of this book acknowledge outright, one universal definition of EU administrative law does not exist. Some academic commentators focus on the policy administration or judicial review (Craig 2018), its relationship and consequences to the EU member states, such as implementation of EU law in national legal systems (Peers & Barnard 2023: chapter 8), while some approach the subject by employing other lenses such as political or administrative science (Hofman & Ors 2011). Whereas all are fascinating, one can be under an impression that the scholarship is rather disjointed. However, this is not an obstacle for the authors of this book. Diana-Urania Galetta and Jacques Ziller are acutely aware of these different models and

provide their readers with a diligent justification and methodology taken to establish their own approach and definition of EU administrative law. Via analysis of existing scholarship and drawing from their own rich experiences of studying and teaching EU law, the authors take a functional approach to this handbook, which results in a comprehensive compendium of knowledge with clear practical ramifications. Galetta and Ziller's experience is vast, and it has clearly influenced the way in which they conduct and frame their research. Both authors have been educated in multiple EU member states studying their national legal systems in the original languages. They have also both studied European and international law from some key figures of European integration, and, of course, they have experienced the formative years of the EU (page 8). Their research is steeped in these rich experiences, as evidenced by the way they approach this topic and ask their questions. It is clear that the European integration is at the heart of their scholarship, which gives a unique context to their review of EU administrative law.

Using the functional approach to EU administrative law is a valuable development in this field, rethinking and pushing the scholarship forward. The analysis, however, is solidly anchored in a typical legal methodology based on treaties, statutes as well as soft law tools (page 9). There is also something to be said about the variety, abundance and accuracy of the bibliography. The more complex analysis is supported by the most up-to-date Court of Justice of the European Union (CJEU) jurisprudence accompanied by legislation, which will make this a perfect title for early career researchers and experts alike. However, before delving deep into analysis, the book treats the readers to a thorough revision of the administrative division of the EU institutional structure as well as of the principles by which it is governed—something even the most experienced researchers can use every so often, and something students will no doubt appreciate.

The book is divided into well-organized sections which makes it easy to find relevant information. In a logical order, it starts with conceptualizing EU administrative law, its purpose, its coexistence with the national law of member states and principles through chapter 1, entitled "EU Administrative Law as a Subject Area". It then moves on to the more concrete functionalities, institutions and procedures of EU administrative law which are indispensable to its proper operation; chapter 2 discusses the executive function of the EU; chapter 3 explains the unique and sometimes hard to grasp nature of EU law as distinct from international law, underlining the central role of the CJEU and its jurisprudence; chapters 4 and 5 examine the EU's executive function from the perspective of the

EU, and that of the member states; chapter 6 talks about the principles of EU administrative law; chapters 7 and 8 focus on the administrative organization and procedure; and, lastly, chapters 9 and 10 spotlight the principles of transparency and judicial review respectively.

Extra attention should be paid to chapter 3, entitled "The Relationship between EU and Member States' Law". It emphasizes the important impact that general principles of EU law have on administrative law of the member states and skilfully discusses how the principles of conferral, subsidiarity and proportionality coexist to effectively regulate the competences of the member states as well as the EU. Additionally, it comprises a section on "Multilingualism and variable geometry" which should be praised for its unique take on the nature of EU (administrative) law and its consequences. Multilingualism, as the authors remark, is a feature of the EU guaranteed by the treaties, and it is key in characterizing the relationship between the EU and the member states; ensuring equal access to the EU across its members. This means that the EU has 24 official languages. Apart from promising the obvious equality and guarding against discrimination, the authors argue that lack of this feature would mean impotence for the single market. This is not to say that multilingualism on its own guarantees absolute equality. Actually, multilingualism, as the book mentions, might lead to differences in interpretation of the EU principles or legal texts. Perhaps a discussion of the role of the CJEU in these conflicts, and what it means with regards to the equivalence of concepts and principles across the EU, would be of some value to this section. The authors engage in a short discussion of the matter and reach the inescapable conclusion that between the member states' languages there are obvious favourites, and that fluency or native knowledge of English gives individuals considerable advantage, as for example the first drafts of EU legal Acts tend to be drafted in English and the translations follow. The issue of potential imbalance is also mentioned in the ever-growing context and presence of artificial intelligence (AI), and especially the role that AI tools play in translation processes, meaning that only experts in English language might be required. That said, the EU's multilingualism must not be disregarded or ignored by the scholarship. As the authors remark, in its efforts to provide all individuals and legal entities with equal access to the law, the EU outperforms the United Nations which has only six official languages (page 85).

The second interesting attribute of EU law impacting on administrative law identified by the authors is variable geometry (page 88). The term aptly encapsulates its meaning—different levels of integration across different member states, which seems simple enough in theory but is

rather complex in practice. Variable geometry of the EU also goes by "two-speed Europe" or, more accurately (taking into account all the recent and anticipated changes to the European integration) a "multi-speed Europe". This is an increasingly recognized trait of EU law which undoubtedly influenced the administrative law of the EU as well as of the member states. This is a crucial piece of the EU administrative law puzzle, as the already "multi-speed" Europe might be gaining a couple of new gears with the Balkan enlargement lurking on the horizon. Even though, as the authors note, the first even large-scale differentiation in integration occurred in 1985, it is indisputable that with passing time and the growing size of the EU, the variable geometry has gained importance and relevance in proportion to the state of its complexity. In this regard, as much as one might not want to, one must talk about Brexit as it has introduced yet further levels to differentiation of the integration. The same must be said about the Russian aggression towards Ukraine—its relevance to the EU itself as well as its impact on EU administrative law is undeniable. Political events, tensions and conflicts can and will influence EU law; in this case they might open new prospects of European integration. The authors do not shy away from these topics, even though they remain cautious in their analysis without indulging in predicting the political future of the EU—exactly the balanced discussion one expects from experienced and serious authors like Galetta and Ziller. Even though the authors draw from their comparative law expertise and background, this book does not offer a comparative lens to its analysis, nor does it make bold predictions about the future directions that EU administrative law will take. If one is looking for far-fetched legal or political prognosis, one will be disappointed. Instead, this book accepts change as a natural and integral part of the EU administrative landscape and lays it out in its current state to the reader. It is a welcome breath of fresh air in the form of certainty during uncertain times.

In conclusion, this book stands out as a resource offering a complete picture of EU administrative law. The unique but thoughtful approach and methodology foster a deeper understanding of the subject matter, especially the exploration of multilingualism as well as the concept of variable geometry. This comprehensible and accessible handbook will make a perfect and valuable library addition for academics, practitioners and students alike.

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Rethinking Law and Religion by Russell Sandberg

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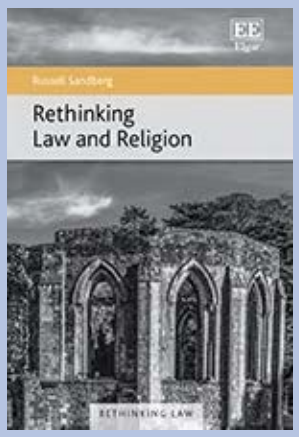

Russell Sandberg (2024) *Rethinking Law and Religion*, published by Edward Elgar, Cheltenham ISBN 9781800886186

There is a melancholy in beginnings, especially those which promised more than they delivered. The field of law and religion in the United Kingdom (UK), born (or rather reborn) at the turn of the millennium, was a hopeful response to the legislative incantation of the Human Rights Act 1998 and to the institutional gesture of specialized LLB and LLM courses. These were important and long-awaited signs, for those who cared to see them: the emergence of a legal consciousness that would finally take religion seriously, not as a footnote to constitutional history or a quaint residue of ecclesiastical law, but as a living and volatile form of social meaning. A field was to be established, mapped, legitimized. However, more than two decades on, the promised flourishing has not materialized. There are scholars, there is scholarship, but the discipline itself remains fugitive, its borders uncertain, its relevance too often questioned even by its own practitioners. It is this dissonance between the imagined potential and the muted reality that Russell Sandberg sets out to interrogate.

Much more than a spectator to this history, Sandberg is one of its authors. His *Law and Religion*, published in 2011, was—and remains—one of the few coherent pedagogical attempts to frame the subject for

a new generation of students. His recent *Rethinking Law and Religion*, however, is something altogether different: not a manual, not a primer, but an autopsy (or biopsy) performed with care, affection, and at times the sadness of one who believed. Why did the field not flourish? The question is not rhetorical, and Sandberg does not answer it with blame but with reflection; he enters the archive of his own career, and of the development of the discipline, to ask what went wrong, or rather what else happened: what subterranean forces, what institutional silences, what disciplinary habits conspired to hold the field in place or push it to the periphery? His book is not a critique in the sense of destruction, but in the older sense of unveiling—the attempt to say what has been left unsaid. It is a book that speaks from within the field's own failure to become what it might have been, and in doing so, it reopens the possibility that it still might.

Rethinking Law and Religion is a confession, an exegesis, and a manifesto, all staged within the theatre of a field that Sandberg both reveres and dissects with the forensic intimacy of one who has loved too much. Sandberg's book undoes its subject even as it reconstructs it, not in the sense of destruction, as stated beforehand, but in the sense of an archaeology that must begin with demolition.

The first act, "Repentance", is not simply a gesture of remorse, but a hermeneutic untangling of origins: a return to the field's mythologies, one might argue, and a disquieting recognition that these myths, once stabilizing, have become paralysing. The autobiographical tone is methodological, not incidental: Sandberg's revelation that he once believed in the liberatory potential of distinguishing "religion law" from "religious law" is a wound in the text that punctures scholarly detachment and replaces it with ethical reckoning. Through his reading of the foundational case law of the field, Sandberg reveals a law that speaks in tongues and the grammar of which fails the faithful. Article 9 of the European Convention on Human Rights is exposed not as guarantor but as mirage, promising freedom while binding it in the doctrine of margin of appreciation. This, however, is not a nihilistic deconstruction. Sandberg turns his gaze outward, finding in the American interdisciplinarity a model of hybridity: a field that refuses to stabilize the meanings of "law" and "religion", choosing instead to let them contaminate each other productively. Sandberg confesses, and the confession is performative: admitting his complicity in narrowing the field, he opens the possibility of expansion, a kind of scholarly rebirth through vulnerability.

In "Reappraisal", the second movement, Sandberg indeed stages a comparative dramaturgy, inviting the reader to imagine what law and

religion could have become if it had followed the narrative trajectories of law and gender, or law and race, or even law and geography—a field that, like religion, resists fixity. Here, the text becomes kaleidoscopic, fragmentary, bringing somehow pleasure through disorientation. There is no centre here—only centrifugal motion, as Sandberg allows these analogies to unsettle and reconfigure the field he critiques. The speculative becomes the methodological, and the subjunctive mood becomes his voice.

The third and final act, "Regeneration", is at once the most abstract and the most revolutionary. Luhmann's systems theory is introduced as the lens though which law and religion can be observed not as bounded disciplines but as communicative systems, endlessly recursive and paradoxical by nature. It is evident that Sandberg does not fear paradox: he courts it, proposing not its resolution but its redescription. Religious law, often marginalized (when not bluntly neglected) in mainstream legal scholarship, is reimagined as a social system—or, more precisely, a generator of norms and narratives that demand legal recognition not through assimilation but through conceptual hospitality. The crescendo that leads to the end of the book is audacious: a call to rewrite the history of the field and to abandon the conventional narratives that have led to its stagnation. This is not simply a critique: *Rethinking Law and Religion* is mythopoesis, a re-founding of the field through an act of narrative sabotage.

To call *Rethinking Law and Religion* an academic monograph would be both true and insufficient, for what Sandberg offers is not only a piece of scholarly labour, but also a textual mirror, at once archive and interior monologue. The book is both *texte lisible* and *texte scriptible*, a site of knowledge transmission and a document of authorial inquietude. The scholarship is impeccable, abundant, and precise: one senses in every line the weight of more than a decade of work, with citation as invocation and case law as liturgy; however, beneath this learned surface pulses the flicker of a personal narrative. Sandberg does not pretend to be absent from the stage: on the contrary, he inscribes himself within the very history he narrates. What results is not *memoir* in the confessional sense, but a kind of academic autobiography, wherein the evolution of a scholar becomes indistinguishable from the evolution of a discipline. The "I" that occasionally surfaces is structural rather than just ornamental. Sandberg has been one of the most prolific and visible figures in the field of law and religion in the UK for the past decade: he is not writing *about* the field so much as from *within* it, and it is precisely this position and this entanglement that make the book so resonant. *Rethinking Law and*

Religion becomes, in effect, a snapshot of the field as seen through the eyes of one of its principal architects: a photograph in motion, blurred at the edges, but unmistakably real. This dual movement between the autobiographical and the institutional is where the book's richness lies: it refuses to stabilize into a single genre, instead shifting restlessly between modes, between memory and critique, or between presence and structure. What makes the book especially compelling are its refusal of hagiography and its radical honesty.

Sandberg is not interested in preserving the field's dignity through euphemism, and he asks difficult, even wounding questions: who, in the end, is actually interested in law and religion? Why do so few legal scholars engage with it? Why has it remained marginal, orphaned, quietly tolerated in legal academia but rarely loved? These questions are not rhetorical, and open spaces where the reader must supply their own discomfort. Sandberg, however, does not merely catalogue the field's deficiencies, but also exposes their origins, and in doing so, makes their transcendence possible. There is a peculiar generosity in his criticism: it is written from within, as stated beforehand, like a believer would question the limits of the faith that has shaped them. This is where the book exceeds the boundaries of its form to become a philosophy of the field, a sociology of its exclusions, and an anthropology of its indifference. It also becomes a politics, however, because Sandberg resists the fatalism of nicheness to insist, with quiet determination, that law and religion should not be confined to the margins of legal scholarship. And here the text becomes almost prophetic, showing that what begins in academia does not remain there: ideas migrate, discourses mutate into policy, theologies become legal instruments. In this context, the marginality of law and religion is as unfortunate as it is dangerous: such marginality leaves a vacuum in public discourse where precision should be. Sandberg's analysis demonstrates that the apparent irrelevance of this field is a structural illusion: religion continues to shape law, politics, identity, space, and yet legal scholars often lack the tools to think it rigorously. The argument of *Rethinking Law and Religion*, however, is not for a defence of law and religion as it has been, but for its radical expansion, its opening to new methodologies, new interlocutors, and new imaginaries. The book thus performs a double movement, both mourning and imagining: it is a thanatology of the old field and a midwifery of the new. And in this, Sandberg offers a subtle but powerful theory of scholarly responsibility, as he suggests that the scholar is not merely a commentator but also a constructor of possibility. To rethink a field, therefore, cannot be limited to observe its decline, but

rather to prepare the conditions of its rebirth. And *Rethinking Law and Religion* is a rare text in that it does not hide the labour of thinking: it shows its scaffolding, its hesitations, the past errors of the field, and through this openness creates a space for collective reimagining.

The pages in *Rethinking Law and Religion* show the unfolding of a mind that refuses reduction. Sandberg does not write like a scholar limited to the precincts of his specialism—in fact, he writes like a jurist of the total text, capable of reading laws as well as the sedimented structures of meaning in which they are entrenched, crossing disciplinary borders with the same agility with which he deconstructs the borders of his own intellectual formation. More than just a system of rules, the law here is a way of listening, a form of attention—and Sandberg alertly listens to the shifting murmurs of religious life, to the anxieties of social identity, to the echoes of cases that appear settled but still reverberate with unspoken questions.

The method in *Rethinking Law and Religion* is constructive as much as comparative, not content with just placing fields side by side but compelled to imagining their recombinant potential. Sandberg's invocations of law and gender, law and race, law and geography are strategic disruptions for revealing how law and religion might have been otherwise, and how they still might be. What emerges is a portrait of a lawyer who is also a cultural reader, a semiotician in a jurist's clothes, capable of seeing not only what law says but what it cannot say, what it represses, what it mythologizes. However, there is a friction—perhaps even a productive irony—at the heart of the book: even though Sandberg's stated aim is to unshackle law and religion from its niche, to prise it open and demonstrate its relevance beyond the familiar circles, the book remains, in tone and focus, deeply implanted within those very circles. For most of its length, *Rethinking Law and Religion* looks written for the insiders who have followed the debates, attended the conferences, taken notes on the same texts. If this is a fault, however, I would argue that it is a luminous one: there is nothing wrong in speaking to one's own tradition—indeed, the scholar must first know where they stand before they can move. Nevertheless, the paradox is striking. The book's rhetorical gesture is outward, but its actual reach is inward. It is, without doubt, a mandatory reading for any scholar or activist in the field, not only because it offers a genealogy of the discipline, but because it contains the imprint of Sandberg's own intellectual life, and thus preserves something that will be cited, revisited, argued with, and perhaps rewritten.

As a document of the state of the discipline, it is unmatched; but for those standing outside the temple, perhaps glancing in with curiosity but not yet invested, the invitation may not be fully extended. The density of internal references and the assumption of a shared vocabulary may render it inaccessible to the very readers Sandberg wishes to address. Indeed, Sandberg himself points out at page 6 that "[t]his is a book about the study of law and religion": could this be a symptom of the very condition he diagnoses, namely law and religion as a field talking to itself? That Sandberg does so with lucidity, precision, and deep humanity does not eliminate the risk of echo. Perhaps, however, the book's greatness lies in this contradiction of being both manifesto and mirror, both opening and enclosure. One reads it with admiration not only for its argument but for its tone, its courage, its intellectual generosity. It is one of the best readings of 2024—unquestionably—but its very qualities put it at risk of remaining, despite its ambitions, within the small circle of those who already know how much this book matters.

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Legislation, Regulations and Rules

Human Rights Act 1998

European Convention on Human Rights 1950

Risk Allocation and Distributive Justice in the Energy Industry by Smith I Azubuike

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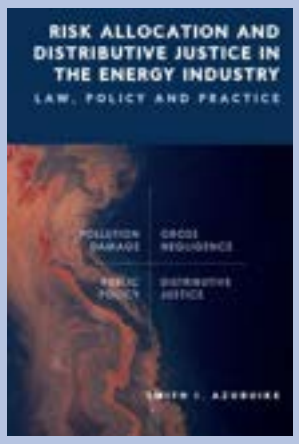

Smith I Azubuike (2024) *Risk Allocation and Distributive Justice in the Energy Industry*, published by Edinburgh University Press ISBN 9781399517706

[A] INTRODUCTION

It is incontrovertible that the energy industry is inherently risky, with volatile markets, and has been at the centre of global economic, environmental, and social challenges occasioned by climate change and energy transition. This is a pivotal period when the shift to sustainable energy sources has increased focus on sustainable development and energy justice. For many developing and fossil fuel-rich, yet dependent countries, particularly those in the Global South, weak regulations continue to ensure multinational corporations' exploitation of these dynamics, culminating in significant cases of environmental damage. Yet, the current international investment law paradigm offers limited pathways for holding them accountable. Thus, as countries continue to grapple with and adapt to the realities of the anthropogenic effects of fossil fuels extraction, several questions about the continued utility of fossil fuels remain unanswered.

Building on Rawls' theory of justice (1971; 1990) and Sen's *Development as Freedom* (1999) paradigm, Smith Azubuike's *Risk Allocation and*

Distributive Justice in the Energy Industry situates risk allocation in the energy industry within a framework that emphasizes equity, efficiency, and fairness. Reading and gleaning from his seminal theory–praxis centred treatise, three questions stand out. First, how does the existing risk allocation framework in oil and gas contracts function and what levels of responsibility should multinational energy companies have for damage to the environment and climate-related losses? Second, which risk allocation methods are most suitable to divide the transitional burdens among states, businesses, and impacted communities in a fair manner, and what are the limitations of mutual indemnity agreements? Third, how can frameworks for public policy be created to guarantee distributive justice, and how effectively can they be integrated into contractual risk frameworks to address environmental degradation, particularly communities most impacted by energy development?

The answers to these questions, and many more, enjoy Azubuike's focus in his seminal work, *Risk Allocation and Distributive Justice in the Energy Industry*. Let me therefore review what I believe are the *book's* most important contributions to the international energy law discourse.

[B] OVERVIEW OF THE BOOK'S LARGER CONTRIBUTION TO INTERNATIONAL ENERGY LAW

In response to the questions above, as an innovative approach to international energy investment law discourse, Azubuike's theory–praxis-centred *Risk Allocation and Distributive Justice in the Energy Industry* is a timely book. It offers a combination of theoretical and methodological tools to engage with the discourse of risk allocation, tortious liability, and public policy from the lens of allocation of costs and risks of energy extraction and development to ensure energy justice for host communities. Azubuike's innovative book has thus emerged with a multidisciplinary analytical framework that integrates legal analysis, economic reasoning, and philosophical perspectives on justice. He offers a thorough examination of risk allocation frameworks within the oil and gas industry, critically examining the issues of fairness, public policy, and contractual justice. Thus, this book is an original intervention which engages important topics related to justice and risk management in the global energy sector, which is undergoing rapid transformation due to climate imperatives and technological innovation.

As with other scholars in this area of study, Azubuike underscores petroleum and fossil fuels' importance and contribution to global energy

security and the global energy mix (page xiii), and the invaluable impact on resource-rich countries' economic and infrastructural growth. Yet, the resources' contribution to environmental pollution and global warming has shown to be profound, and, so, overcoming these challenges requires a "repurposing of the contractual risk allocation practice of the oil industry, especially in gross negligence cases" (page xiv). Azubuike's central thesis, therefore, is that risk distribution ought to be fair and effective, adhering to distributive justice concepts. This would necessarily require "understanding, defining and mainstreaming a standard of proof for gross negligence to allow its broad application as a term of art in the oil industry" (ibid).

To achieve his objective of remapping the parameters of risk allocation, tortious liability, and public policy in the energy industry, Azubuike adopts a comparative legal approach to examine how risk allocation operates in four countries: Indonesia, Nigeria, the United States (US), and the United Kingdom (UK). Centred on doctrinal analysis, the book assesses the legal principles underlying risk allocation by examining contractual terms, regulatory initiatives, and case law precedents.[1] Theoretically, Azubuike employs Rawlsian distributive justice and other economic and philosophical conceptions of justice as the lens through which to see the phenomena. Presented in seven chapters, my view is that Azubuike has, through theory and comparative case and country analysis, reappraised the entire strata of international energy law's discourse, providing radical and objective platforms to engage energy law scholarship. The book's chapters refuse to prioritize the traditional principles of energy law. Rather, what Azubuike presents us with is a compelling theoretical and methodological approach to tackle the thorny questions surrounding risk allocation, tortious liability, and public policy in the industry.

[C] SUBSTANTIVE ANALYSIS OF THE THEMES OF THE BOOK'S CHAPTERS

In the book's first chapter, Azubuike outlines his theoretical (Beck, Rawlsian, utilitarian, and capability approaches), core legal and economic concepts, and the nature of systemic risks, and their relevance to energy production and consumption. He enunciates his methodological and analytical frameworks for integrating distributive justice and risk theory in the energy sector through a summary of the intricacies that control risk in the offshore energy industry. Considering the importance

[1] For instance, he uses *Caledonian North Sea Ltd v London Bridge Engineering Ltd* (2002) to exemplify how the House of Lords describes the energy industry's risk allocation practice as market practice.

of risk allocation in reducing financial and environmental risks, this chapter prepares the reader for the book's more extensive examination of distributive justice. Azubuike expertly outlines the basic ideas of risk allocation, making a distinction between important terms like probability, risk, and uncertainty (page 5). His categorization of risks—operational, environmental, financial—provides a structured approach to understanding liability in offshore operations (pages 5-7). Yet, particularly illuminating is the examination of the legal and economic perspectives on risk (pages 12-13), which shows a sophisticated comprehension of the allocation of risk in contractual frameworks.

The chapter's comprehensive approach and analytical depth is, however, tempered by its cursory engagement with emerging paradigms in environmental justice and regulatory oversight. There is no doubting Azubuike's sophisticated examination of the need for environmental sustainability in offshore activities, yet it would have been interesting to see a discussion of its link to environmental justice. The chapter focuses on conventional models of risk allocation, placing an emphasis on contractual certainty and economic efficiency. He then goes on to argue that new licences "will increase the likelihood of offshore pollution accidents, which can impact environmental sustainability" (page 1), yet the discussion of how risk allocation relates to more general environmental governance concepts yearns for attention. It would have also been interesting to see how a connection of modern trends, including the growing importance of environmental and social governance (ESG) factors into contract structuring and risk allocation, thereby making the discussion more forward-looking in approach. This is because the oil and gas sector is undergoing a paradigm change towards sustainable contracting.

There is also potential for greater critical reflection on contractual practices; while Azubuike effectively outlines the rationale behind mutual indemnity agreements, his analysis could benefit from a more critical perspective on their drawbacks. His argument that these agreements provide "a basis for a party to accept the economic consequence of another party's fault pursuant to a mutual indemnity agreement" (page 16) is logical, yet there is need to include arguments against their potential to obfuscate accountability in circumstances of egregious carelessness. The discussion would have been more balanced if a comparative analysis with other industries that have moved towards more stringent fault-based liability frameworks is engaged.

In chapter 2, Azubuike's focus is on a thorough examination of offshore petroleum drilling operations and the allocation of associated risks with a meticulous outline of the historical and contemporary context of offshore petroleum exploration and the typology of drilling contracts. He also highlights the evolving legal and industry-specific frameworks governing risk distribution. This allows for a holistic comparative analysis of risk allocation through the jurisdictional approaches to regulatory oversights and their implications for contractual risk distribution. While the US uses a model contract framework (page 46), Nigeria operates the standard form contracts (page 53), and the UK adopts the mutual indemnification practice (page 44). However, Indonesia places regulatory constraints on indemnity clauses (page 59).

The chapter also rigorously engages with the classification of drilling contracts used to undertake the production-sharing contracts, joint-operating agreements, and concessions underpinning multinational corporations' operations (see, for example, Smith & Ors 2010; Martin 2004). Azubuike classifies these drilling contracts into three categories: turnkey, footage, and daywork/day rate contracts (pages 35-36). He meticulously defines each contract type with clear explanations of risk allocation between the operator and the contractor. In accordance with industry best practices, the turnkey contract, for instance, transfers all financial risks to the contractor until the well is completed (page 36).

These dynamics underline Azubuike's systematic scrutiny of the justifications for risk allocation, including the accountability doctrine, the doctrine of tradition, and the industry practice justification (page 72). He thus makes a compelling argument that these justifications are frequently influenced by industry standards rather than explicit legal requirements, which in turn, raises concerns about fairness and regulatory oversight. Alongside this, instructively, Azubuike undertakes a thorough analysis of regulatory interventions pertaining to anti-indemnity legislation and its implications for risk allocation (page 78). With the exemplification of the effects of Texas Express Negligence Rule and Louisiana's Oilfield Anti-Indemnity Act, Azubuike successfully underscores how regulatory interventions can limit the enforceability of risk allocation clauses, thereby ensuring greater accountability within the industry.

Therefore, Azubuike succeeds in bringing to scholars and researchers in internal energy law a rich historical account of offshore petroleum exploration, following its development from the 1930s to contemporary deepwater operations (page 31). This strengthens the case for Azubuike's thematic preoccupation—a more standardized strategy for offshore risk

distribution. Thus, for readers who wish to comprehend how technological advancements have influenced risk allocation practice, this historical background becomes invaluable.

Despite the sophistication and comprehensiveness of Azubuike's approach in this chapter, there appears to be an overarching focus on legal analysis and theoretical discussion. One wonders how the use of empirical case studies demonstrating how risk allocation has played out in real-world offshore drilling disputes would have benefited the analysis further. For instance, incorporating data on litigation trends or regulatory enforcement actions in the different jurisdictions could also have provided a more grounded analysis. In addition, a discussion of emergent technologies, such as blockchain, which are increasingly relevant to risk-sharing (see, for example, Aslam & Ors 2022) would have been welcome.

Chapter 3 is a sophisticated and intellectually stimulating contribution to the study of risk allocation in the offshore energy sector. Weaving together the concepts of distributive justice, sustainability, public policy, and contract law, Azubuike offers a comprehensive framework for comprehending risk allocation that goes beyond conventional economic justifications. His focus here is on the fundamental concepts shaping the offshore energy industry's contractual risk allocation mechanisms, via the roles of freedom of contract, public policy, sustainability, and distributive justice in the process based on Rawls, Nozick, and Keating's theories. Azubuike, therefore, does here a meticulous analytical framework that assesses the limitations of traditional risk allocation mechanisms and critiques profit-maximization paradigms that externalize environmental and social risks, and their broader implications for businesses.

One of Chapter 3's key strengths is the purposeful examination of freedom of contract in risk allocation, the author arguing that contractual autonomy is a pillar of private law, allowing parties to allocate risks as they see fit (page 87). He, however, recognizes this principle's inherent limits, especially when economic inequities result in contractual imbalances. The examination of externalities and commodification (pages 89-91) is particularly instructive here since it shows how risk distribution can occasionally place an unfair burden on weaker parties, such as small operations and subcontractors. Also, the author successfully situates risk allocation in the larger framework of public policy, with Lord Denning's well-known description of public policy as an "unruly horse" (page 95) eloquently cited to highlight the difficulty in establishing its boundaries. The discussion on public policy and the veil of ignorance (pages 101-103) is intellectually rigorous, with the author brilliantly deploying John Rawls'

theory to risk allocation in the energy industry. This provides a fresh perspective by arguing that fair risk distribution should be determined without prior knowledge of the benefits or drawbacks of a contract. The chapter also aptly captures the essence of sustainability for risk allocation, the author making a compelling case that risk allocation systems should prioritize sustainability rather than treating it as an afterthought (page 105). In the same vein, the chapter's applicability to contemporary discourse of corporate governance discussions shows in its categorizing of sustainability into environmental, social, and economic components (pages 107-109), which is consistent with current ESG frameworks.

While Azubuike provides an erudite discussion of the theoretical underpinnings (pages 127-141), what remains to be examined in detail is the operationalization of distributive justice within the industry. For instance, the author's argument that a redistributive burden to a party in a contract may be arbitrary when the core injustice is systemic (pages 122-124) is persuasive; yet providing a framework for redressing systemic inequalities in contractual negotiations could make it more compelling. Azubuike's crucial point is that sustainability in risk allocation should serve as a strategy to maximize environmental and social performance (page 144). However, integrating how businesses incorporate sustainability into risk management models like cost–benefit analysis or probabilistic risk assessment can be veritable. Again, a comparative examination of contractual arrangements in other jurisdictions would have enhanced the debate, given Azubuike's instructive discussion of the Deepwater Horizon tragedy (page 99) offers a relevant illustration of moral hazard in risk allocation. To illustrate how public policy affects contractual risk distribution, the chapter could have examined national regulatory responses, such as the US Oil Pollution Act 1990 or the UK's Offshore Safety Directive 2015.

In chapter 4, the confluence of causality, responsibility, and gross negligence—particularly in offshore drilling operations—is rigorously and contextually examined by the author, who excels in setting out its doctrinal clarity, comparative legal insights, and distributive justice analysis. There is a robust theoretical foundation for the concept of causation by distinguishing between factual causation—direct causal link between an act and harm—and legal causation—responsibility under regulatory or contractual provisions (page 149), drawing on seminal works of scholars such as Honoré (1985) (page 150) and Wright (1985) (*NESS Test*) (page 150). This analytical depth enables the chapter to move beyond conventional tort law perspectives and examine causation's role in contractual risk allocation.

The chapter effectively contextualizes *gross negligence* in the context of energy and oil and gas contracts as a separate legal category, with Azubuike contending that gross negligence in offshore operations serves as a deterrent, ensuring compliance with best industry practices (page 151). This perspective is supported by case law analysis, including the *Macondo* and *Montara* oil spills, where operator negligence played a pivotal role in environmental damage (page 153). Through a comparative approach to examine how gross negligence is treated in the UK and US legal systems, Azubuike notes that, in the UK, courts traditionally view negligence and gross negligence as conceptually similar, though contractual interpretations can create distinctions (page 159).[2] Conversely, in the US, gross negligence is often construed as *reckless indifference* to others' rights (page 171).[3] This comparative dimension enhances the chapter's analytical sophistication.

In line with Tamara Lev's justification of strict liability in offshore petroleum operations (2016), Azubuike argues that public policy restricts the contractual authority to avoid culpability for gross negligence (page 150). This position emphasizes how crucial it is to strike a balance between corporate freedom and societal and environmental responsibilities, and with the policy ramifications for distributive justice in risk allocation. Azubuike thus makes the case for considering ethical issues when drafting contractual indemnity clauses to prevent powerful corporations from externalizing risks onto weaker parties (page 174). This argument aligns with Keating's proposition that fair risk allocation requires a balance between liberty and security (2000). Overall, from a justice-oriented perspective, the chapter makes a compelling case for greater regulatory oversight in offshore energy contracts.

Despite the fragmented nature of conceptualizing gross negligence, Azubuike mainly approaches it from the judicial interpretation perspective in this chapter (page 162). But one wonders whether its conceptualization, grounded in regulatory frameworks, referencing the UK's Corporate Manslaughter and Corporate Homicide Act 2007 would have enhanced its strength.

In chapter 5 of this important text, the author undertook a well-structured and theoretically grounded analysis of risk allocation in gross negligence cases. Its strengths lie in its normative approach, particularly its emphasis on distributive justice, sustainability, and public policy as guiding principles. The chapter is particularly relevant given the

[2] Citing *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* (2011).

[3] Citing *Wedel v Klein* (1938).

increasing complexity of offshore petroleum operations and the ethical, legal, and economic implications of risk allocation mechanisms. It builds on preceding discussions by establishing normative frameworks that prioritize sustainability, public policy, human rights, and distributive justice as fundamental to allocating liability in gross negligence cases. The chapter's clear articulation of guiding principles—public policy, human rights, sustainability, and distributive justice—that should underpin effective risk allocation is its major strength. As Azubuike argues persuasively, risk allocation "should not be undertaken in isolation; instead, it should be guided by established principles that support human existence and environmental protection" (page 176). This bold attempt by the author to embed these principles into risk allocation frameworks allows him to advance a normative approach that seeks to balance corporate interests with social responsibility.

The discussion of distributive justice is particularly compelling because the author contends that liability in gross negligence cases should be "subject to the proportion of benefit derived from the harmful activity" (page 182), thereby ensuring fairness in the apportionment of responsibility. This strategy is in line with Keating's proportionality principle, which holds that parties bear burdens commensurate with their benefits. The emphasis on this principle reflects a broader commitment to equity in environmental risk management, reinforcing the notion that those who profit from high-risk activities must also bear the costs when things go wrong. Also, the practical approach to contractual strategies allows Azubuike to question the prevailing industry practice of shielding parties through mutual indemnity clauses and argues that liability carve-outs should be designed to prevent moral hazard (page 187). Based on this, the chapter advocates for a liability framework that compels parties to take precautionary measures, fostering an industry culture where safety and risk mitigation are paramount. This is a crucial intervention in contemporary debates on corporate accountability in the energy sector.

Although Azubuike makes a strong case for regulatory interventions, it would have been more interesting to see how the political and economic barriers that may hinder the adoption of stringent liability provisions could be overcome. This is because, historically, the oil and gas industry has resisted regulatory oversight, often leveraging economic arguments to dilute policy proposals. Thus, a more thorough discussion of how these industries influence legislative processes and contractual negotiations would have added depth to the analysis.

In chapter 6, the interplay between institutional frameworks, financial assurance mechanisms, and insurance schemes in managing gross negligence risks within the oil and gas industry is examined. It builds on previous discussions in the book regarding distributive justice and public policy by balancing legal, regulatory, and economic perspectives, whilst setting the stage for a more structured approach to risk mitigation. The incisive articulation of the institutional framework required to enforce risk allocation techniques is one of the chapter's core strengths, with the author making a strong case for a holistic approach to regulatory enforcement by emphasizing collaboration, capacity training, and institutional interoperability (pages 194-195). This rests on the dynamic function of regulatory agencies in mainstreaming energy transition and environmental compliance, as exemplified by using the North Sea Transition Authority (NSTA) (page 195).

The chapter also excels in its analysis of insurance coverage as a mechanism for distributing financial liability by meticulously outlining the range of offshore insurance schemes, including Oil Insurance Limited, Oil Casualty Insurance Limited, and the Offshore Pollution Liability Association Limited Scheme (pages 198-201). References to actual events, such as the Deepwater Horizon accident, which caused offshore insurance rates to rise by 25–30%, support this (page 207), an empirical approach which enhances the chapter's credibility and practical applicability. However, how the enforceability challenges of institutional mechanisms in jurisdictions such as Nigeria, where regulatory capture, corruption, and inadequate legal infrastructure's complexities are present and how they can implement similar frameworks as NSTA would suffice. Also, it would have been interesting to see how reinsurance markets and financial hedging instruments play a crucial role in stabilizing liability and mitigating risks in hazardous industries as posited by Skogh (1991). This would have heightened the author's coverage of insurance exclusions in gross negligence cases (page 212).

The discussion in chapter 7 serves as a culminating dissertation that synthesizes the book's primary arguments and findings. It provides an analytical examination of the implications of mutual indemnity clauses in offshore petroleum contracts and proposes policy, regulatory, and contractual pathways for a more equitable risk allocation framework. The author skilfully consolidates the previous chapters' discussions, underscoring both the strengths and weaknesses of prevailing risk allocation practices while advancing distributive justice as a guiding principle. The author's articulate and dynamic approach to risk allocation in the oil and gas industry helps to highlight inconsistencies in the application of

mutual indemnity clauses by closely analysing how they operate in various jurisdictions. For instance, he points out that "in the deep waters of Brazil, liability is based on fault", while "in the US and other notable jurisdictions, anti-indemnity statutes and public policy considerations still hinder the use of indemnity clauses" (page 222). This comparative analysis underscores the challenges of developing a universal standard for risk allocation, given the divergence in legal and policy frameworks.

The chapter also makes a strong case against the conventional industrial practice of employing mutual indemnity as a defence against responsibility for egregious negligence. This approach is criticized by Azubuike, who argues that it "negates the 'polluter pays' principle and does not seem to support environmental sustainability" (page 222). His engagement with extant literature on pollution liability, particularly the works of Cameron (2012) and Smith and colleagues (2010) situates his arguments within broader scholarly and legal discussions, strengthening the chapter's analytical depth. The chapter also introduces the concept of *a distributive outcome*, advocating for capped liability in gross negligence cases as a mechanism to strike a balance between industry interests with environmental and public welfare concerns. This perspective is reinforced by Keating's theory that those who reap benefits should also bear corresponding burdens (Keating 2000). Azubuike echoes this principle, asserting that "a well-structured contractual agreement, which includes an allocation of risk that aligns the burden with the benefits derived from petroleum activities in gross negligence situations, satisfies Keating's distributive justice" (page 224).

To overcome the shortcomings of the current risk allocation mechanisms, the author effectively integrates policy recommendations, proposing a three-pronged strategy. The first, is legal reforms to redefine the role of mutual indemnity clauses, the second, judicial clarification of gross negligence standards and, the third, regulatory frameworks that guarantee a more equitable distribution of liabilities among stakeholders. These recommendations are pragmatic and align with broader trends in environmental and corporate law, reinforcing the book's relevance to both legal practitioners and policymakers.

[D] CONCLUSIONS

It is unarguable that Azubuike's *Risk Allocation and Distributive Justice in the Energy Industry* is a timely one, in that it brings an innovative, free-thinking, and radical approach to risk allocation in the energy industry within a framework that emphasizes equity, efficiency, and fairness.

By exploring the contours of such concepts as risk allocation, gross negligence, mutual indemnity clauses, sustainability, and distributive justice, we have been gifted an enduring academic classic. Indeed, it is going to be relevant for years to come as we rethink the dynamics of international energy law through a fusion of theories and methodologies in risk allocation in the energy industry. To reiterate an earlier made point, Azubuike's thematic preoccupation—a more standardized strategy for offshore risk distribution presents a roadmap to readers and scholars who wish to comprehend how technological advancements have influenced risk allocation practices. This invaluable contribution also goes for technological advancements that have affected risk allocation practice.

About the author

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Legislation, Regulations and Rules

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Louisiana Oilfield Anti-Indemnity Act 1981 (US)

Offshore Safety Directive 2015 (UK)

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Cases

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Special Section:
Environmental, Social and Governance, edited by
Navajyoti Samanta, pages 664-855

Editorial: Environmental, Social and Governance

Navajyoti Samanta
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Environmental, social and governance (ESG) has lost a bit of its shine in recent months, as "viewpoint diversity" seems to have made managers and investors wary of it, particularly in the United States (US). However, the foundation of ESG remains firm. This is because it draws upon the notion that businesses have some intrinsic social purposes/responsibilities apart from making profits for the providers of their financial capital. The primary reason for the durability of this idea can be attributed to the neuroanatomy of human beings who in general have a brain networked for moral behaviour. This of course can be shaped, sharpened or dampened by social and environmental factors, which also explains our differing preferences and pathways for reaching a conclusion favouring an ethical outcome. A utilitarian may explain ESG in terms of rational, outcome-focused thinking about the future and intergenerational equity, a deontologist would project a societal level manifestation of universal moral considerations and empathy onto ESG rules, while contractarianists may seek solace in concession theory in using ESG to hold businesses accountable beyond just paying their fair share of tax and abiding by established laws.

Given the physiological roots of business ethics and responsibility, the resilience of the idea that a business needs to be a net social good is expected to outlast the current turmoil precipitated by the orange hand in the market. Eberstadt traces the idea of responsible business to Classical Greece; *Artha-shastra* provides a primary source for business conscience in first-century CE India; divine command provides the normative backing in the medieval era, while the European mercantile period makes a social contract with either God or society or both; moving through the industrial revolution, Carroll finds rich pickings in philanthropy; coming to the early twentieth century most readers would be aware of the Berle–

Dodd debates; some of us have now simply repackaged this fundamental idea and call it ESG.

However, the expression and implementation of ESG, by whatever name called, varies by jurisdiction. You can pick the reason as per your leaning—Savigny (*Volkgeist*), LLSV (legal origin), Posner (economic), Griffiths (pluralism) etc. The scholarly literature in corporate law generally tends to follow the Global North, however, that overlooks the huge variety of heterodox ESG in the Global South, diverging in both form and enforcement. This special section focuses on the ESG practices in seven primary jurisdictions—the United Kingdom (UK), Germany, Japan, India, China, Nigeria and Ghana. It balances between the "flagbearers" of ESG in the high-income countries and contrasts them with the "emerging" ESG innovations in the middle and low-income countries.

The first article in the special section is written by Horace Yeung and Omar Tahir and focuses on the UK's approach to ESG practices. It traces the evolution of the enlightened shareholder value model while raising the query of whether companies genuinely embrace more socially and environmentally responsible business practices. It conducts case studies on ESG scores and suggests that quantitative metrics should be used with caution to avoid spurious comparisons. It finds that the flexibility of a "comply or explain" approach has resulted in inconsistent compliance among companies. This may in the future reduce the stature of the UK as a "global standard setter".

The second article is written by Alina Ganser and Andreas Rühmkorf and focuses on ESG/sustainability practices in Germany in the context of EU harmonization. It looks at the political economy of the ESG rules and traces its evolution from the European Green Deal to the Supply Chain Due Diligence Act. The case studies show that ESG rules in Germany have become more legalistic and have increased the need for mechanical compliance. The authors conclude that the Supply Chain Due Diligence Act falls short of its potential, as demonstrated by its failure to mandate stakeholder engagement.

Next the special section moves to Japan, with Kohei Miyamoto and Mikiko Takara focusing on how ESG is reshaping the managerial decision-making there. The article starts by showing how the United Nations-led Principles for Responsible Investment influenced the modern ESG regulations in Japan which is primarily governed by the Corporate Governance Code. It then critically analyses the disclosure route taken by the regulators. It zooms onto ESG failures at Kobayashi Pharmaceutical as a case study to illustrate the limitations. The authors conclude that

Japanese managers increasingly focus on ESG rules primarily as a vehicle to contribute to company's profitability.

The fourth article, written by Dakshina Chandra and Navajyoti Samanta, focuses on the ESG innovations in India. It starts with a politico-economic analysis of state-led development and planning and the slow liberalization of the wider economy. It weaves in the development of stakeholderism, ESG and corporate law alongside innovations like mandatory corporate social responsibility (CSR) and the like. It provides a snapshot of four state-operated enterprises implementing the disclosure requirements and finds that the ESG framework in India suffers from limited accountability, greenwashing, and bureaucratic box-ticking. It concludes by highlighting the lack of any real corporate cultural shift in regards to sustainability and proposes stronger internal audits, clearer metrics, and meaningful stakeholder engagement for the future.

The fifth article, written by Xue Pang, Ning Liu and Carlos Wing-Hung Lo, focuses on the challenges of navigating the ESG rules across the dual jurisdictions of mainland China and Hong Kong. As dual-listed Chinese companies expand outwards this creates a tension between the top-down approach of the mainland and the market-led comply-or-explain approach of Hong Kong. They use the case study of an automobile company to effectively highlight this. They also use the Hong Kong Business Sustainability Index to compare the implementation and performance of the companies across the two markets. They show that a unique hybridization has developed out of harmonization pressures. Please note that the article was drafted before the 2025 tariff turmoil.

The penultimate article in this section is written by Adaeze Okoye, Adeolu Idowu, Temitayo Ogundare, Oluwatamilore Sowunmi, Chiamaka Ezenwa and Gideon Edem. It focuses on the multilayered multistakeholder-focused ESG regulations in Nigeria. It starts by tracing out the development of ESG-related rules across different regulations in Nigeria focusing on issues relating to environmental protection, social obligations and corporate governance. It uses multiple case studies illustrating sustainability reporting, financing, governance and implementation of environmental measures, dividing them up into successes and failures. They provide ample evidence of achieving excellent ESG practices, however, the main challenge is to replicate the success and minimize the failures. Although, several of the ESG regulations are inspired by international standards, Nigeria has ably adapted them to work within the local milieu which can act as global model for *sui generis* ESG-driven transformation.

The final article in the special section focuses on Ghana and is by Priscilla Akua Vitoh and Jude Serbeh-Boateng. The article focuses on the question as to what extent Ghana has successfully integrated ESG principles into its national governance and development frameworks, utilizing its banking sector as a case study. The article starts by focusing on Ghana's ESG reporting framework, regulatory structure and disclosure requirements. The article then showcases the promotion of gender equality through sustainable banking principles, highlighting "concerns about their genuine integration of ESG principles into sustainable development frameworks". This provides an excellent example of how ESG is treated more like an appendage to commercial activities rather than as a core principle.

If we are to find a few commonalities in the articles in this special section, we can observe the following:

a) All jurisdictions have taken steps for formalizing the role of ESG, focusing mainly on disclosures which have become a form-filling exercise.
b) Barring a few mandatory regulations like compulsory CSR spending, gender diversity in boards and so on, most directives are unclear as to the target and ambiguous as to the steps to achieve them.
c) Corporates often use ESG as a brand exercise either to greenwash credentials or to rebadge philanthropy. There is little recognition of ESG within the culture of the organizations.
d) The problems of implementing ESG are not a compliance issue but rather a gap in the norm. ESG is seen by the managers as a distraction. Until this is changed, ESG shall remain a box-ticking exercise.

Market at a Critical Juncture: Evaluating ESG Practices and Challenges in the UK

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Abstract

This article evaluates the approach of the United Kingdom (UK) to environmental, social, and governance (ESG) practices within the broader context of Anglo-American capitalism, emphasizing the "comply-or-explain" governance model. While the UK has pioneered corporate governance reforms, inconsistencies in compliance and underwhelming ESG performance have raised concerns. Comparing the UK's ESG scores and regulatory frameworks with other global players highlights both strengths and shortcomings. Emerging trends, such as litigation by non-government organizations and new disclosure frameworks, suggest a shift towards stricter accountability. This article considers how such measures can address challenges and enhance sustainability. The UK is at a critical juncture—striving to maintain its influence in global finance while facing a decline in its competitive edge and global standing.

Keywords: environmental, social, and governance (ESG); corporate governance; United Kingdom (UK); ESG score; comparative.

[A] INTRODUCTION

The concept of environmental, social, and governance (ESG) began emerging in the early 2000s. It gained prominence in 2004 when the United Nations (UN) Global Compact, in collaboration with the International Finance Corporation, released the report "Who Cares Wins: Connecting Financial Markets to a Changing World" (UN Global Impact 2004). This report formally introduced ESG as a framework for

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integrating sustainability considerations into financial markets and corporate governance. The idea was to encourage investors to incorporate ESG factors into their decision-making processes to drive sustainable business practices. Arguably, it was not the first time that the need arose for companies to conduct their business in a more socially responsible manner. For example, the corporate social responsibility (CSR) pyramid, developed by Professor Archie Carroll (1991), outlines four levels of CSR. At the base is economic responsibility, where companies must be profitable. Above that is legal responsibility, requiring companies to comply with laws. The third level is ethical responsibility, which involves going beyond legal requirements to act fairly. At the top is philanthropic responsibility, where companies voluntarily contribute to societal good through activities like charitable donations and community involvement. This hierarchy reflects a progression from basic obligations to voluntary societal contributions.

The worldwide approaches to ESG (and CSR) regulation vary significantly, reflecting different regional priorities and regulatory environments. As opposed to a more comprehensive and standardized approach in the European Union (EU) as exemplified by its Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards, elsewhere in the world, it looks much more fragmented. This article delves into the UK's ESG landscape, analysing its regulatory foundation, the performance of its companies as reflected in ESG scores and the comparative standing of its market within a global context. By examining key initiatives such as section 172 of the Companies Act (CA) 2006 and newer frameworks like Sustainability Disclosure Requirements (SDR), this article highlights the strengths and limitations of the UK's approach. Moreover, it explores systemic challenges, including inconsistent compliance, limited enforcement mechanisms, and the declining global relevance of the London Stock Exchange. Against this backdrop, this article considers emerging trends, such as non-governmental organization (NGO)-led litigation and enhanced regulatory measures, as potential pathways for improvement. The analysis underscores the urgent need for a pragmatic strategy to integrate ESG principles into the core of the UK's corporate governance, ensuring its competitiveness in an evolving global economy.

[B] THE ANGLO-AMERICAN MARKET-BASED SYSTEMS AND THEIR TRADITIONAL SHAREHOLDER VALUE APPROACH

The financial systems around the world can be broadly categorized into two types (Allen & Gale 2000). In market-based systems, exemplified by countries like the United States (US) and the UK, participants rely on financial markets, such as stock and bond markets, to dominate capital allocation. In contrast, in bank-based systems, such as those in Germany and Japan, banks play a central role in providing financing and allocating capital. It is believed that market-based systems promote innovation, transparency, and efficiency in resource allocation due to greater competition and market discipline, whereas bank-based systems provide stable, long-term financing and facilitate better monitoring of companies, which is particularly advantageous in economies with less-developed markets. In these two different systems, the focus of the corporate governance is different. As put by Black (2001: 784), within a strong market:

> Strong investor protection produces high prices, which encourage honest companies to issue shares. This increases share prices and encourages more honest issuers to issue shares. Outside investors then generate political support for strong investor protection.

In contrast, with a weak market:

> Most honest companies do not issue shares to the public because weak investor protection prevents them from realizing a fair price for their shares. This decreases the average quality of the shares that are issued, which further depresses prices and discourages honest issuers from issuing shares. Political demand for stronger investor protection is muted by the relative scarcity of outside investors (Black 2001: 784).

It is evident that the path of development varies across countries. The depth of capital markets across countries is not the same. A range of factors may be relevant to capital market development. Prominent economists have produced provocative empirical research which links economic structures to the quality of investor protections provided by national legal systems (eg La Porta & Ors 1998). With respect to the success of Anglo-American capitalism, common law, reflecting a tradition of constraint against governmental authority, may be better suited to a market economy than civil law (La Porta & Ors 1998). Higher quality protections are associated with more dispersed share ownership and larger stock markets. Two explanations with opposite causality may arise accordingly. The “law matters” thesis indicates that a good legal

environment protects potential financiers against expropriation by entrepreneurs (eg Milhaupt & Pistor 2008). Investors are willing to surrender funds in exchange for securities and therefore expand the scope of capital markets. Another explanation is that strong laws are a response to the presence of an influential constituency of retail investors, demanding robust jurisdictional oversight (Coffee 1999; Cheffins 2003).

There has been a common assumption in discussions of financial systems that financial markets are the new cutting-edge of financial technology and that countries that lack a highly developed system of financial markets are somehow backward or underdeveloped (Allen & Gale 2000: 127). From the story of Japan and Germany, the two core features of Anglo-American capitalism—namely dispersed ownership and large stock markets—are not necessarily the prerequisites of prosperity (Levine 2002). In fact, advocates of the bank-centred system claim that this structure fosters long-term planning, while a market-based system is said to encourage short-term expectations by investors and responsive short-term strategies by managers (Black & Gilson 1997). Roe (2003) argues that continental social democracies did not provide institutions that securities markets need, such that the markets in continental Europe have flourished to a lesser degree than their Anglo-American counterparts. In social democracies, employees are protected from actions that a company would often take to maximize the shareholder's value.

Adam Smith (1776), widely regarded as the father of modern economics, defined capitalism as an economic system driven by self-interest and competition within a framework of private property and free markets. In his seminal work, *The Wealth of Nations*, Smith (1776) introduced the concept of the "invisible hand", arguing that individuals, by pursuing their own economic interests, inadvertently contribute to the overall good of society. Traditionally, economists like Smith (1776) and Milton Friedman (1970) emphasized profit maximization as the primary objective of a company. John Maynard Keynes (1926), another of the most influential economists of modern times, accepted capitalism as the dominant economic system, but he also criticized *laissez-faire* capitalism for its inability to address social welfare and its propensity to concentrate wealth, thus exacerbating inequality, and therefore advocated for reforms to make it more humane and equitable. The Dodd–Berle debate, in the early 1930s, underlined the potentially diverse purpose and accountability of corporations. Adolf Berle (1931) and Merrick Dodd (1932), both prominent legal scholars, presented opposing views on whether corporations exist solely to maximize shareholder wealth or if they have broader responsibilities.

Berle (1931) argued for shareholder primacy, stating that corporate managers should prioritize maximizing returns for shareholders. He viewed shareholders as the primary beneficiaries of a corporation's activities, asserting that all corporate powers should be used to serve their financial interests. Dodd (1932) opposed this view, advocating a stakeholder perspective. He contended that corporations are more than profit-generating entities; they are social institutions responsible for serving employees, customers, and the broader community. Dodd emphasized that corporations should balance profitability with social contributions, such as job security and community welfare.

This debate remains relevant today. According to a group of leading corporate law scholars, the law also has the function of controlling the conflicts of interests between various constituencies of a company (Armour & Ors 2017). There are three generic agency problems that can arise in companies (Armour & Ors 2017: 29-30). The first type involves the classic agency problem identified by Adam Smith. The problem lies in assuring that the managers are responsive to the shareholders' interests rather than pursuing their own personal interests. The second agency problem involves the conflict between majority and minority shareholders. The former generally have a tendency to expropriate the latter. The third problem lies in assuring that corporate insiders do not behave opportunistically toward outsiders such as creditors, workers and consumers.

The interplay between financial systems, corporate governance, and legal frameworks underscores the complexity of economic development across nations. The ongoing evolution of capitalism, as seen in the integration of stakeholder considerations and debates like Dodd–Berle, highlights the necessity of balancing profit with broader societal responsibilities. This balance is increasingly reflected in the growing focus on ESG principles, demonstrating how financial systems and corporate governance can adapt to address modern challenges while fostering sustainable and inclusive economic prosperity.

[C] THE UK'S ESG REGULATION

The Company Law Review Steering Group (CLRSG) in its 2001 report advocated for a balanced approach to corporate governance, which is reflected in the enlightened shareholder value (ESV) model. The ESV framework aimed to ensure that, while the primary responsibility of company directors was to maximize shareholder value, they should also consider the interests of other stakeholders, including employees,

customers, suppliers, and the broader community. This approach was seen as a way to align corporate actions with long-term sustainability, not just short-term profit maximization.

The CLRSG (2001) rejected a more radical pluralist approach, which would have required directors to treat stakeholders' interests as co-equal with those of shareholders. They believed that such an approach would undermine the clarity of directors' duties and lead to excessive litigation. Instead, the ESV model emphasized shareholder primacy while recognizing that long-term shareholder value could be enhanced by considering wider societal impacts. This idea was later codified in section 172 of the CA 2006, though some critics argue that it does not fully capture the spirit of ESV, as the directors' discretion still largely centres on shareholder interests (Keay 2007; Harper Ho 2010; Bebchuk & Ors 2022).

Section 172 is one of the seven general duties of directors in the UK. It requires directors to act in a way that promotes the success of the company for the benefit of its members (shareholders), but they must also consider other factors such as the long-term consequences of their decisions, the interests of employees, the need to foster business relationships, the impact on the environment, and the company's reputation for high standards of business conduct. The provision is designed to balance shareholder interests with broader stakeholder considerations, promoting responsible and sustainable corporate governance. Keay (2013) argues that the implementation of the ESV approach by section 172 lacks clarity and may be difficult to apply in practice. For example, English law is yet to provide definitive guidelines as to when a director's disregard for ESG factors may constitute a violation of section 172. This is despite a raft of case law following the CA 2006 since its enactment.

Therefore, the enforcement of section 172 is largely through a disclosure-based approach. As noted by the CLRSG, "under the [ESV approach], the onus for ensuring good corporate governance amongst the most significant companies inevitably lies with the institutional investors" (UK Government 2003: 36). Under section 414CZA, a section 172 statement is a requirement for companies (except those qualifying for the small and medium-sized companies' regime) to include in their strategic report. This statement explains how the directors have complied with their duty to promote the success of the company for the benefit of its members as a whole, while having regard to various factors as stipulated in the section. According to the Institute of Chartered Accountants in England and Wales (2024), the statement should be authentic, specific,

and balanced, explaining both positive and negative matters faced by the company during the year. It should cover stakeholder engagement, the impact of decisions on stakeholders, and the long-term consequences of those decisions.

Apart from mandatory disclosures under the CA 2006, companies may be subject to other different reporting requirements. Streamlined Energy and Carbon Reporting (SECR) is a UK government policy designed to enhance transparency and accountability in energy use and carbon emissions among businesses (UK Government 2019). The primary goal of SECR is to encourage companies to implement energy efficiency measures, which can lead to both economic and environmental benefits. By requiring companies to disclose their energy use and carbon emissions, SECR helps investors and other stakeholders make informed decisions.

SECR applies to listed companies, large unquoted companies, and large limited liability partnerships (LLPs) incorporated in the UK. These entities must include specific information in their annual directors' report, such as UK energy use (including electricity, gas, and transport), associated greenhouse gas emissions (Scope 1[1] and Scope 2[2]), energy efficiency actions taken during the financial year, and an intensity metric that expresses the company's annual emissions in relation to a quantifiable factor like turnover or number of employees. The SECR seeks to identify areas for energy efficiency, reduce carbon emissions to contribute to environmental sustainability, and enhance a company's reputation among customers, investors, and other stakeholders. To comply with SECR, companies must ensure accurate data collection and reporting processes. Non-compliance can result in penalties and damage to the company's reputation.

Other than SECR, the Task Force on Climate-related Financial Disclosures (TCFD) was established by the Financial Stability Board in 2015 to develop recommendations for more effective climate-related disclosures (UK Government 2024a). The TCFD's recommendations focus on four key areas: governance (disclosing governance around climate-related risks and opportunities), strategy (disclosing the impacts of climate-related risks and opportunities on business and strategy),

[1] Scope 1 emissions are direct greenhouse gas emissions from sources that are owned or controlled by a company. These include emissions from the combustion of fuels in company-owned vehicles, boilers, and furnaces, as well as process emissions from industrial activities and fugitive emissions from equipment leaks.

[2] Scope 2 emissions are indirect greenhouse gas emissions resulting from the consumption of purchased electricity, steam, heat, or cooling. These emissions occur at the facility where the energy is generated but are attributed to the company that uses the energy.

risk management (disclosing how climate-related risks are identified, assessed, and managed), and metrics and targets (disclosing the metrics and targets used to manage climate-related risks and opportunities). The Financial Conduct Authority (FCA) Listing Rule 2024 requires all "equity shares (commercial companies)" (previously divided into premium listed and standard listed companies) to make disclosures under the TCFD framework on a comply-or-explain basis.[3] Since 2022, the types of business entities covered by the recommendations issued by the TCFD has been further extended by the Climate-related Financial Disclosure Regulations 2022. The 2022 Regulations require, in addition to publicly quoted companies, large private companies, banks, insurance companies, and large LLPs in the UK to disclose climate-related financial information in their strategic reports (broadly in line with the TCFD framework).

Apart from environment-related disclosures, companies are required as a legal obligation to make other types of disclosures. A modern slavery statement is a public document that certain organizations are required to publish annually under the Modern Slavery Act 2015 (UK Government 2024b).[4] This statement outlines the steps the organization[5] has taken to prevent modern slavery and human trafficking in their business operations and supply chains. It aims to increase transparency and accountability, ensuring that companies are actively working to combat these issues. The statement typically includes information on the organization's policies, due diligence processes, risk assessments, and training related to modern slavery. Furthermore, under the Equality Act 2010, gender pay gap reporting is a requirement for employers with 250 or more employees (UK Government 2024c). These employers must publish annual data on the pay differences between male and female employees. However, despite the statutory basis of these obligations, it is believed that currently there are no criminal and civil consequences at all for failure to comply with these obligations (Clifford Chance 2016; Shoosmiths LLP 2023). The enforcement powers, for example, by the Equality and Human Rights Commission (2024) are "corrective" in nature.

Meanwhile, voluntary ESG disclosures, while not mandatory, help businesses build trust, demonstrate sustainability efforts, and improve transparency. These disclosures can take various forms, including

[3] Governed by Listing Rule (LR) 9.8.6R(8) since 2021 until 28 July 2024; under LR 6.6.6R(8) in the new Listing Rules.

[4] See also section 54 of the Act.

[5] A commercial organization is required to publish an annual statement if it: (1) is a "body corporate" or a partnership, wherever incorporated or formed; (2) carries on a business, or part of a business, in the UK; (3) supplies goods or services; and (4) has an annual turnover of GBP36 million.

financial reports, sustainability reports, or website content, and can be enhanced by third-party assurance. Standards like the International Sustainability Standards Board, Global Reporting Initiative (GRI), and Task Force on Nature-related Financial Disclosures provide frameworks for businesses to assess and report ESG impacts, with the potential for future mandatory reporting. Adopting these standards now can improve resilience, decision-making, and appeal to investors.

Johnston (2024) argues that the UK corporate governance model has traditionally focused on shareholder value, but there is now a broader recognition of the need for companies to consider their environmental and social impacts. In the process, businesses are facing pressure to adopt sustainable practices due to growing societal expectations and governmental regulations. The UK experience has demonstrated both opportunities and challenges in aligning its corporate sector with global sustainability goals—namely how to best achieve corporate sustainability and how to measure it. Mayer (2024) shares Johnston's view that the law plays a critical role in shaping corporate behaviour and guiding businesses toward long-term sustainable value creation, rather than short-term profits. He emphasizes that businesses should not view ESG as a separate or external concept but integrate it into their core operations and legal strategies. By aligning corporate goals with societal and environmental needs, Mayer suggests that companies can achieve better, more resilient outcomes that benefit all stakeholders, including shareholders, employees, and communities. His analysis stresses that the law must evolve to support this integration, encouraging companies to prioritize responsible practices while maintaining profitability. This shift, he posits, is essential for tackling global challenges and fostering a more sustainable and equitable economy.

MacNeil (2024) highlights the legal uncertainty created by the evolving nature of ESG reporting. This uncertainty arises because the broad, often vague, legal frameworks for fiduciary duty make it difficult to align with the specific demands of ESG, thus complicating businesses' efforts to incorporate ESG principles into their operations. He suggests that clearer regulations may be necessary to ensure businesses are better equipped to navigate the legal landscape. Similarly, Turner (2020) contends that current corporate structures, which emphasize directors' fiduciary duties to maximize shareholder value, can sometimes hinder effective ESG interventions. A solution is to go further than corporate law and governance and rely on the role of international organizations and various legal interventions in shaping corporate behaviour.

Other than a far-from-optimal framework, there are concerns about the law in action. Johnston and Samanta (2024) explore how the UK's Corporate Governance Code 2018 has encouraged companies to engage more with their workforce in alignment with ESG goals. Despite institutional investors' increasing focus on ESG, the authors find limited evidence that these investors push for deeper workforce engagement. They conclude that relying on institutional investors alone may not be sufficient to significantly improve workforce participation in ESG-related decisions. Attenborough (2022) investigates how UK fossil fuel producers report on climate-related risks and their compliance with regulations like the TCFD. The findings highlight the gap between regulatory expectations and actual reporting, with many companies offering limited or vague disclosures. Despite this, Moussa and Elmarzouky (2024) examine the impact of ESG disclosures on the cost of capital for UK non-financial firms from 2014 to 2018. They find that ESG reporting is positively linked to the cost of capital. The research suggests that factors such as firm size and liquidity increase the cost of capital, while governance elements like non-executive directors on audit committees lower it. However, MacNeil and Esser (2022) critique an over-emphasis on the financial model of ESG that prioritizes short-term investor returns, and advocate instead for a holistic entity model that integrates sustainability into corporate governance, operations, and long-term strategy. This shift entails a more comprehensive approach to ESG, considering both financial performance and broader social and environmental responsibilities.

In a nutshell, the UK's corporate governance model, while rooted in shareholder primacy, is gradually evolving to incorporate broader ESG considerations. The legal framework, including the ESV approach and reporting regulations like SECR and TCFD, pushes companies to consider stakeholders and long-term sustainability. However, there are still concerns as to whether companies genuinely embrace more socially and environmentally responsible business practices.

[D] CASE STUDIES

Having talked about the legal framework, this section will turn to how the companies actually applied the law in practice. One way to do so is via an examination of ESG scores. In essence, ESG scores measure a company's performance and risk management practices in three key areas, namely environmental, social, and governance. There is not just a single provider of these scores. Different providers assign ESG scores to companies using their own methodologies. Major providers include MSCI, Sustainalytics (Morningstar), S&P Global, Moody's ESG Solutions,

Refinitiv (London Stock Exchange Group), and Bloomberg. In this part, owing to the availability of resources (some of the above require a paid subscription) and the limited space in this article, we will employ the ESG scores provided by Refinitiv (London Stock Exchange Group).

Refinitiv (2022), part of the London Stock Exchange Group, has developed its own methodology for calculating ESG scores. It claims to cover over 85% of the global market capitalisation, across more than 630 different ESG metrics. It collects data from publicly available sources, including company reports, regulatory filings, and news sources. This data is then audited and standardized by its specialists to ensure accuracy and comparability.

The scoring process involves several steps. First, the data is grouped into over 600 measures, categorized into 10 main themes such as emissions, environmental product innovation, human rights, and shareholders. Each measure is presented as a number or a Yes/No response. The importance of each category is weighted according to the company's industry group, using a materiality matrix. For example, the resource use category is more relevant for metals and mining companies than for banking services. Next, the category scores are grouped into three pillar scores—environmental, social, and governance. These pillar scores are also weighted according to the company's industry group. The weighted pillar scores are then combined to form the overall ESG score, representing the company's relative ESG performance. Additionally, Refinitiv calculates a controversies score based on negative media stories and controversies involving the company. This score is used to adjust the overall ESG score, resulting in the ESG combined (ESGC) score.

As of 12 December 2024, out of the 1476 companies listed and headquartered in the UK, Refinitiv recorded the ESG scores of 608 of these companies. Out of the top 10 performing companies, AstraZeneca leads with a score of 94.27, followed by Shell at 91.35 and Standard Chartered at 90.94. Unilever and GSK also have high scores of 89.82 and 89.33, respectively. Linde, British American Tobacco, and Mondi have scores ranging from 88.81 to 87.72. Pearson and BP round out the list with scores of 87.24 and 86.44, respectively. See Table 1 for these data. The companies listed are prominent players in various industries. AstraZeneca and GSK are leading pharmaceutical companies known for their innovative medicines and vaccines. Shell and BP are major players in the oil and gas industry, focusing on energy production and distribution. Standard Chartered operates in the financial services sector, providing banking and investment services. Unilever is a multinational consumer

Company Name	ESG Score	Company Name	ESG Score
AstraZeneca plc	94.27	Enwell Energy plc	7.67
Shell plc	91.35	Colefax Group plc	8.33
Standard Chartered plc	90.94	EKF Diagnostics Holdings plc	8.42
Unilever plc	89.82	Daniel Thwaites plc	9.20
GSK plc	89.33	Netcall plc	9.33
Linde plc	88.81	Dewhurst Group plc	9.55
British American Tobacco plc	88.72	Heathrow Finance plc	10.18
Mondi plc	87.72	London Security plc	10.90
Pearson plc	87.24	SOUND ENERGY PLC	11.03
BP plc	86.44	KORE POTASH PLC	11.17

Source: Refinitiv.

Table 1: The winners and losers of ESG (according to Refinitiv).

goods company, producing a wide range of products from food to personal care. Linde is a global leader in industrial gases and engineering. British American Tobacco is a major tobacco company, producing cigarettes and alternative nicotine products. Mondi specializes in sustainable packaging and paper solutions. Pearson is an education-focused company, that provides educational materials and services.

By contrast, at the bottom of the table, the 10 worst performers just managed to get a mean score of 9.58 (compared to the top 10's 89.46). Enwell Energy scored the lowest at 7.67. Colefax Group and EKF Diagnostics Holdings follow with scores of 8.33 and 8.42, respectively. Daniel Thwaites and Netcall have scores of 9.20 and 9.33. Dewhurst Group and Heathrow Finance scored 9.55 and 10.18. London Security and Sound Energy have scores of 10.90 and 11.03. Kore Potash rounds out the list with the highest score of 11.17. Again see Table 1 for these data. Amongst these companies, they operate in various sectors. Enwell Energy focuses on gas and condensate field development in Ukraine. Colefax Group designs and distributes luxury furnishing fabrics and wallpapers. EKF Diagnostics Holdings is a diagnostics company engaged in point-of-care testing and enzyme manufacturing. Daniel Thwaites is a family brewer with a presence in Northern England, also managing properties and pubs. Netcall specializes in communications and business process management software. Dewhurst Group develops electrical components, especially for the lift market. Heathrow Finance is part of Heathrow Airport Holdings, managing the financial operations of Heathrow Airport. London Security provides fire protection services across Europe. Sound Energy is involved in the exploration and production of natural gas in Morocco. Kore Potash focuses on potash production, primarily in the Republic of the Congo.

AstraZeneca (2025a) is considered a champion of ESG due to its sustainability initiatives. The company has made significant strides in reducing its environmental footprint, achieving a 67.6% reduction in Scope 1 and 2 greenhouse gas emissions since 2015. AstraZeneca (2025a) is also committed to increasing access to healthcare, having reached 66.4 million people through its healthcare programmes. Additionally, the company promotes ethical practices and transparency across its value chain, ensuring that its operations are inclusive and diverse (AstraZeneca 2025a). These efforts are detailed in its annual sustainability reports, which highlight its progress and commitments. Despite these achievements, the company has not been immune to ESG-related scandals over the years. For instance, the company was involved in the Thalidomide tragedy in the 1960s, where a drug it manufactured caused severe disabilities and deaths among infants (Corporate Watch 2021). The company has also faced allegations of bribery and unethical marketing practices (Corporate Watch 2021). More recently, the scandal of AstraZeneca related to Covid-19 vaccines (Dyer 2023). AstraZeneca faced significant controversy regarding its vaccine, Vaxzevria. The primary issue was the rare but serious side effect of vaccine-induced thrombotic thrombocytopenia, a condition involving blood clots and low platelet levels. This led to legal actions from patients and families who suffered severe injuries or lost loved ones due to the vaccine (Dyer 2023).

Meanwhile, at the other end of the scale, Enwell Energy, an oil and gas company operating in Ukraine, has faced significant ESG-related challenges, primarily due to regulatory and ownership issues. In December 2022, Enwell Energy's major shareholder, Vadym Novynskyi, was sanctioned by the Ukrainian Government. These sanctions led to regulatory scrutiny under Ukraine's natural resource laws, including the suspension of key licences such as the VAS and SC fields in 2023 (NASDAQ 2024). Furthermore, Ukraine introduced new legislation in 2023 (Law No 2805-IX), requiring transparency regarding the ultimate beneficial ownership of companies operating in the natural resource sector. Enwell Energy (2024a) faced compliance challenges, including the suspension of licences and the risk of further actions due to incomplete ownership disclosures.

In terms of corporate governance (one of the three main pillars of ESG), apart from disclosure and transparency,[6] other key issues of concern include the responsibilities of the board[7] and the gatekeeper role played

6 G20/OECD Principles of Corporate Governance 2023, IV.

7 Ibid, chapter V; UK Corporate Governance Code 2024, sections 1 and 2.

by the institutional shareholders.[8] On the former, as put by Principle A of the UK Corporate Governance Code, "a successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society". Under Principle L of the Code, an annual evaluation of the board should be undertaken to consider its performance, composition, diversity and how effectively members work together to achieve objectives. For AstraZeneca, an independent evaluation of the board and its committees' performance was carried out in 2024 by Christopher Saul Associates, an independent, external corporate governance advisory firm. According to this independent evaluation, AstraZeneca's (2025b: 99) board remains effective, demonstrating strong leadership, a collaborative approach, and high professional standards, supported by quality resources; and its committees are diligent, efficient, and closely aligned with the board's overall operations. Meanwhile, in the case of Enwell Energy (2024b: 43), the company has stated that, "[its] Board has not considered it necessary to undertake an external assessment of the Board performance and effectiveness". Indeed, on a more careful inspection of the company's most recent annual report, it can be seen that the attendance record revealed a mixed level of engagement among board members. Several members demonstrated full commitment by attending all 20 meetings in 2023. However, its two non-executive directors, Alexey Pertin and Yuliia Kirianova, attended only one and 10 meetings respectively, which inevitably raises concerns about their level of commitment (Enwell Energy 2024b: 42). As noted by the Financial Reporting Council (2024a: 29), "over-boarding"[9] can be a concern for non-executive directors.

As regards the gatekeeping role of institutional investors, AstraZeneca's ownership is pretty diverse with 53.22% of the company's shares held by 928 institutions.[10] Comparatively, Enwell Energy's ownership is concentrated in the hands of insiders (82.71%), with only one institutional shareholder holding 6.95% of shares.[11] As per Principle 1 of the UK Stewardship Code 2020, the institutional investors have a stewardship function to "create long-term value for clients and beneficiaries leading to

[8] G20/OECD Principles of Corporate Governance 2023, chapter III; UK Stewardship Code 2020; Myners 2001.

[9] Over-boarding refers to a director who is perceived to be sitting on an excessive number of boards which can result in an under-commitment of time and attention.

[10] Data from Yahoo! Finance.

[11] Ibid. Pelidona Services Ltd is the majority shareholder and is a limited company registered in Cyprus. According to a 2019 disclosure, Pelidona was 100% owned by Lovitia Investments Ltd, which was 100% owned by Vadym Novynskyi, a Ukrainian businessman. See Enwell Energy (2019).

sustainable benefits for the economy, the environment and society". In the case of AstraZeneca, institutional investors have certainly played a role in the company's corporate governance by influencing key decisions through their voting power and engagement with the company's board. A notable instance occurred when AstraZeneca proposed an increase in CEO Sir Pascal Soriot's remuneration to £18.5 million (Hill 2024). This proposal faced opposition from proxy advisory firms like Institutional Shareholder Services and Glass Lewis, who recommended that shareholders vote against it, citing concerns over the scale of the bonuses, which could exceed 1000% of his base pay.

Going back to the top 10, some of them have been subject to major environmental setbacks. The Deepwater Horizon oil spill, also known as the BP oil spill, was a catastrophic environmental disaster that began on 20 April 2010 (US Environmental Protection Agency 2024). It occurred in the Gulf of Mexico, approximately 41 miles off the coast of Louisiana, when an explosion on the Deepwater Horizon oil rig caused a massive blowout. The rig, owned by Transocean and leased by BP, sank two days later, leading to the largest marine oil spill in the history of the petroleum industry. Over the course of 87 days, an estimated 4.9 million barrels (210 million gallons) of oil were discharged into the Gulf of Mexico (US Environmental Protection Agency 2024). The spill had devastating effects on marine and coastal ecosystems, killing thousands of marine animals, including birds, fish, and sea turtles. The oil also contaminated vast areas of the Gulf, affecting the livelihoods of local communities dependent on fishing and tourism. Efforts to contain and clean up the spill involved multiple strategies, including the use of dispersants, skimming, and controlled burns. Despite these efforts, the environmental and economic impacts of the spill were profound and long-lasting. BP faced significant legal and financial repercussions, including a record-setting USD5.5 billion Clean Water Act penalty and up to USD8.8 billion in natural resource damages (US Environmental Protection Agency 2024).

Another top 10 performer, Shell, was the subject of a recent UK Supreme Court case.[12] The case involves claims brought by approximately 40,000 Nigerian citizens from the Niger Delta against Royal Dutch Shell and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC). The claimants allege that oil spills from SPDC's pipelines caused significant environmental damage, contaminating water sources and affecting their health and livelihoods. The central issue in the case is whether the UK-domiciled parent company, Royal Dutch Shell, owes

[12] *Okpabi and Ors (Appellants) v Royal Dutch Shell plc and Another (Respondents)* (2021).

a duty of care to the individuals affected by the actions of its Nigerian subsidiary. The claimants argue that Royal Dutch Shell exercised significant control over SPDC's operations and assumed responsibility for them, thus making Royal Dutch Shell liable for the environmental damage caused. In February 2021, the UK Supreme Court ruled that it was at least arguable that Royal Dutch Shell owed a duty of care to the claimants, allowing the case to proceed in the English courts. This decision marked a significant development in parent company liability, emphasizing that companies cannot rely solely on the separate legal personality of corporations to limit their responsibilities for the actions of their subsidiaries.

Whilst the case of Enwell Energy demonstrated the governance risk, and those of BP and Shell demonstrated the environmental risks, the Post Office IT scandal demonstrated the social risk for companies. The Post Office, which is a state-owned retail post office company in the UK and operates as a private limited company, provides a wide range of postal and non-postal related products and services. Perhaps due to the fact that it is a private limited company, Refinitiv has not traced the ESG performance of the Post Office. In recent years, the Post Office has been involved in the Horizon IT scandal, where faulty accounting software led to the wrongful prosecution of over 900 sub-postmasters for financial crimes. This has been described as the biggest single series of wrongful convictions in British legal history, leading to a public inquiry and ongoing efforts to provide compensation and support to the victims (Payne 2024).

In conclusion, while ESG scores are often touted as a comprehensive measure of corporate sustainability and ethics, they are far from perfect. The variability in methodologies among providers, such as Refinitiv, raises questions about the consistency and reliability of these scores (eg Kotsantonis & Serafeim 2019). High-performing companies like AstraZeneca and Shell, despite their ESG accolades, still face serious controversies, ranging from environmental disasters to legal challenges. ESG scores may offer a useful starting point for evaluating corporate behaviour, but their reliance on self-reported data and the absence of a standardized framework often obscure deeper systemic issues. These limitations suggest that ESG metrics should be used with caution, complemented by critical analysis to avoid superficial assessments of corporate responsibility.

[E] THE IMPLICATIONS OF THE UK EXPERIENCE TO THE WORLD

The previous part has given a glimpse of the company-level performance of ESG in the UK. This part will seek to give an evaluation of it as a jurisdiction/country, see how it fares against fellow competing countries, and eventually reflect on its strengths and shortcomings. Again using the ESG scores from Refinitiv, this part will start by making a comparison between the UK and five other selected countries (the US, France, Germany, Singapore and Hong Kong).

According to Refinitiv's database, as of 12 December 2024, according to their country of domicile, the UK has 608 listed companies with recorded ESG scores, averaging 48.24. In Europe, France reports 188 scores with an average of 59.41, while Germany has 276 scores averaging 51.95. In Asia, Hong Kong lists 171 scores with an average of 55.17, and Singapore records 106 scores with an average of 50.53. In the US, due to the large number of companies, scores are split by stock exchange. Companies listed on the New York Stock Exchange (1381) have an average ESG score of 49.53, while those on NASDAQ (1711) average a lower score of 35.93. See Table 2 for a summary.

Country	Companies (Number)	Mean ESG Score
UK	608	48.24
France	188	59.41
Germany	276	51.95
Hong Kong	171	55.17
Singapore	106	50.53
US (NYSE)	1381	49.53
US (NASDAQ)	1711	35.93

Source: Refinitiv.

Table 2: Mean ESG scores of companies (according to country of domicile) as of 12 December 2024.

It can be seen from Table 2 that UK companies as a whole are not performing as well as their foreign counterparts. But it is worth highlighting that US-headquartered companies listed on NASDAQ returned particularly low ESG scores compared to other companies. To account for the difference, it may be useful to compare their ESG frameworks. The Sustainable Stock Exchanges Initiative (2024a) maintains a database of key stock exchanges regarding whether their guidance documents refer to any of the six main reporting instruments, namely the GRI, Sustainability

Accounting Standards Board, International Integrated Reporting Council, Carbon Disclosure Project, TCFD, and Climate Disclosure Standards Board (CDSB). These are among the most widely used and recognized frameworks for sustainability reporting and climate-related disclosures.

The London Stock Exchange, Euronext Paris, and NASDAQ in their ESG guidance documents to their listed companies made references to all six of the instruments. Meanwhile, the German Deutsche Börse made references to four only (omitting TCFD and CDSB). New York Stock Exchange, Hong Kong and Singapore referred to just three. A more relevant indicator perhaps will be whether ESG reporting is required as a listing rule. For Euronext Paris, Hong Kong and Singapore, they are reported as "yes" by the Sustainable Stock Exchanges Initiative (2024b), whilst the other three as "no". Seemingly this indicator may better account for the performance of the countries in Table 2.

It can be seen that the UK (and the US) experience in ESG regulation is not actually that impressive compared to its peers. It takes us back to the discussion earlier that Anglo-American capitalism has been closely tied with its shareholder value approach. The UK has been widely regarded as a pioneer in corporate governance by first putting forward a comply-or-explain approach.[13] According to the Organisation for Economic Co-operation and Development (OECD) (2023: 40), a majority of the corporate governance systems of major economies around the world follow this ground-breaking, non-binding, soft law, comply-or-explain approach. As recognized by the Financial Reporting Council (2024b), this approach "offers flexibility, and it encourages companies to choose bespoke governance arrangements most suitable to their particular circumstances in both the short and long term". However, the downside of it is compliance. In reviewing the annual reports of 130 companies, the Financial Reporting Council (2024a) discovered that between the period of 2021 and 2024, only a minority of companies would fully comply with the UK Corporate Governance Code. That means a majority of them would disclose a departure from at least one code provision. This is not a concern for the Financial Reporting Council (2024a) as it expects that "instead of demanding strict adherence … it is vital that, shareholders, service providers and other stakeholders support the flexibility of the provisions and do not anticipate complete compliance". Whilst the Financial Reporting Council (2024a) generally acknowledges that "reporting on engagement [with stakeholders] is generally high quality", Grant Thornton (2024) has

[13] See the Cadbury Report (Cadbury 1992).

painted a more worrying picture that 15% of the 252 companies surveyed by it did not comply or explain in 2023.

Under the comply-or-explain regime, enforcement by the Code is down to the market, specifically the institutional investors. Armour (2010) highlighted three key features about the UK corporate governance enforcement model: the rarity of shareholder lawsuits, indicating minimal formal private enforcement; the predominance of public enforcement, with agencies like the Takeover Panel and the Financial Conduct Authority using suasion rather than sanctions; and the significant role of institutional investors in informal private enforcement, compensating for the weak formal private enforcement. Myners (2001) even went further by recognizing the highly developed equity culture and the professionalization of investment in the UK as "key national assets". The strength of the institutional investors in the UK has been largely connected to London's reputation as one of the most elite international financial centres.[14] However, there are signs that London's eminence is in danger of slowly sliding into irrelevance. One is its size. The London Stock Exchange is now just the ninth largest stock exchange in the world, sandwiched between newcomers like the National Stock Exchange of India (at eighth) and the Saudi Exchange (at 10th).[15] In a ranking for fundraising from initial public offerings, London even slipped to 20th place behind countries like Oman, Turkey, Malaysia and Poland (Bow & Price 2024). All these can have detrimental effects on London's market. Fewer listings and declining investor interest have led to lower liquidity in the London market. A less liquid market becomes less appealing, further compounding the problem. Fund managers are increasingly directing investments to the US, where markets are seen as more dynamic and profitable (Bow & Price 2024). The underperformance of the UK market drives investors away, which in turn leads to further underperformance. This "doom loop" creates a dangerous spiral that undermines London's role as a global financial hub.

In the absence of the "market" or strong institutional investor body to police the companies, there may be other ways to preserve the integrity of the ESG regulatory system in the UK. The case of *ClientEarth v Shell* (2023) may represent a new way of enforcement (Iglesias-Rodríguez 2023). ClientEarth, an environmental law charity, brought a derivative action against Shell's board of directors in the High Court of England and Wales. The claim alleged that the directors had breached their legal duties by failing to adequately address climate risks in their sustainability

[14] See eg the Global Financial Centres Index compiled by Z/Yen Partners.

[15] Data from the World Federation of Exchanges.

strategy. The case was notable because it was one of the first instances where a shareholder used a derivative action to hold corporate directors accountable for their handling of climate change risks. The High Court rejected ClientEarth's application for permission to bring the derivative claim at the end. Despite the dismissal of the claim, the case highlights the growing trend of litigation brought by NGOs and activist investors to challenge companies' responses to climate-related risks.

Another positive development is the UK's continuing efforts to step up its ESG regulatory efforts. One example is the planned SDR framework, which aims to enhance transparency and accountability in corporate sustainability practices (UK Government 2024d). It includes corporate, financial product, and taxonomy disclosures, supporting the UK's goal to become a Net Zero Aligned Financial Centre. The framework builds on global standards, with the UK Sustainability Reporting Standards expected in 2025. The FCA will require UK-listed companies to disclose against these standards, with potential obligations for non-listed companies from 2026. The SDR framework is designed to facilitate the flow of robust, decision-useful information between corporates, consumers, investors, and capital markets. The framework is built on the progress made on existing sustainability standards, including the launch of the International Financial Reporting Standards Foundation's International Sustainability Standards Board baseline standards.

In summary, the UK faces significant challenges in its ESG performance at both the corporate and country levels. Despite being widely recognized as a pioneer in corporate governance, the flexibility of this approach has resulted in inconsistent compliance among companies. Coupled with the declining stature of London as a premier global financial hub, the UK risks losing its competitive edge as a "global standard setter".

[F] CONCLUSION

The UK's ESG framework clearly stands at a critical juncture, reflecting both the legacy of its shareholder-driven governance model and the increasing demands for sustainability and corporate accountability. To remain competitive, it must release the stalemate between its historic comply-or-explain approach and the dynamic developments of modern economy, shifting towards a more rigorous and enforceable ESG regime. Two key takeaways must be understood to enable future improvement.

First, the current approach risks inconsistent application and weak enforcement. Comparative analyses with countries such as the US and

France highlight the UK's struggle in aligning its ESG performance with global best practices, whilst at the same time seeking to defend its position as a global financial hub. Emerging developments, such as the planned SDR framework together with high-profile litigation like *ClientEarth v Shell*, signal a gradual shift towards stricter ESG accountability. These efforts indicate a growing recognition of the need for robust measures that go beyond non-binding soft law disclosures. However, addressing systemic issues, such as the erosion of the London Stock Exchange's global standing, declining investor confidence, and underwhelming corporate ESG scores, requires a more transformative approach. Consequently, the UK's ESG infrastructure must be supported by stronger legal obligations, clear reporting standards and consistent regulatory oversight.

Second, and crucially, the UK must strike a pragmatic balance—enabling innovation and growth while at the same time embedding more robust ESG enforcement measures in its overall framework—the two are not, and nor should they be, mutually exclusive. Here, aligning corporate practices with global ESG standards ensures parity in a global market and allows the UK to have the best of both worlds—safeguarding its reputation as a leading financial centre while contributing to a more sustainable and inclusive global economy.

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Stewardship Code 2020 (UK)

Streamlined Energy and Carbon Reporting (UK)

Sustainability Disclosure Requirements (UK)

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ESG in Germany: From the European Green Deal to the Supply Chain Due Diligence Act

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Abstract

This article discusses the trend towards environmental, social and governance (ESG)-related laws in Germany in the context of Germany's membership of the European Union (EU). As an EU member state, Germany is subject to a wave of recent directives and regulations that the EU passed as part of its so-called "European Green Deal". However, Germany also has its own tradition of promoting the goal of sustainability in the law, including company law. The article first distinguishes relevant terminology as some regulations refer to ESG, whereas others to "sustainability". It then traces the historic development of such laws in German law, including the traditional debate about the interest of the company in German law. This discussion is followed by a case study that critically examines the German Supply Chain Due Diligence Act of 2021 that continues to be subject to heated political discussions. The article demonstrates how ESG has, in recent years, become a compliance issue in Germany that is now a matter of consideration for boards.

Keywords: sustainability; supply chain; LkSG; company law; implementation; Germany; corporate governance; compliance; human rights; ESG.

[A] INTRODUCTION

In Germany, discussions about ESG in the legal field tend to be framed through the concept of "sustainability". However, there is an increasing reference to ESG not only in practice, but also in the legal literature. Whilst the terms are not identical, they are often used interchangeably in discussions. At European level, ESG tends to be linked particularly to the concept of "sustainable finance". In accordance with the theme of this

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special section, this article will use a broader understanding of "ESG" unless a regulation or the legal text expressly refers to sustainability. This is particularly true for the recent wave of European directives and regulations related to promoting sustainability.

The article will introduce the political and legal discussions surrounding the increasing regulation of ESG. In terms of relevant regulations, the article will follow a dual approach. First, it will provide an overview of the flurry of recent European regulations which were passed as part of the so-called "European Green Deal" during the previous term of the European Commission and Parliament (2019–2024). Whilst these directives and regulations are not national German inventions, they form the core of what is the developing field of "ESG law" in Germany due to Germany's role as an EU member state. Second, the article will address the German Supply Chain Due Diligence Act (LkSG) of 2021 which introduced mandatory human rights and environment-related due diligence obligations on companies. This Act is a significant step forward for the promotion of greater corporate responsibility in Germany, but it is (still) also subject to intense political discussions. It will soon be superseded by the European Corporate Sustainability Due Diligence Directive (CSDDD), but it is still a national law and a core part of the developing legal framework in the area of business and human rights. The LkSG will then also be the focus of a case study in this article as the Act has both strengths and some potential practical challenges for businesses. The LkSG also provides a useful learning experience for other jurisdictions as it gives first-hand insights into the operation of human rights due diligence laws in business practice.

[B] THE POLITICAL ECONOMY AND HISTORY BEHIND THE EVOLUTION OF ESG RULES IN GERMANY

Germany adopted its first sustainable development strategy in 2002 which established quantifiable goals for 21 topics (von Hauff & Ors 2018). Linked to these goals are indicators that can reliably be measured and for which concrete years for the achievement of the objectives could be allocated (Bundesregierung 2022: 4). An example of these is the goal that the market share of renewable energies as part of the final consumption of energy should be increased to 18% by 2020 and to 60% by 2050 (Bundesregierung 2022: 97). The German sustainable development strategy has been regularly updated since (Bundesregierung 2023). The Government regularly reports about the progress with the implementation

of the national sustainability strategy through a progress report that is published every four years (Bornemann: 2014). Moreover, every two years the Federal Statistical Office reports indicators about the 21 quantifiable goals (see Statistisches Bundesamt 2021). Moreover, since 2009, all ministries assess the consequences of every piece of legislation and statutory instrument for sustainability (BMUV 2024). The results of this assessment are then reviewed by the Parliamentary Advisory Council on Sustainable Development (Hausding 2022).

As noted above, references to sustainability are more frequent than references to ESG in legal discussions in Germany. In practice, the term ESG tends to be more widely used by consultancy firms and by enterprises themselves and, indeed, in relation to sustainable finance. The reason why it is particularly linked to finance is due to the inclusion of "governance" and the use of criteria and ratings.

Whilst there is no legal definition of what "sustainable development" means in German law (Schomerus 2014: 290), there are references to it in the letter of the law. A general outline of the concept can be found in the German Spatial Planning Act 2008 (*Raumordnungsgesetz*). It notes in section 1(2) that the aim of "sustainable spatial development" would be to reconcile the social and economic demands on land with its ecological functions. Whereas this statutory provision refers to all three dimensions of sustainable development (ie economic, social and environmental aspects), it might nevertheless slightly prioritize the environmental (ecological) pillar as it defines sustainable development as the reconciling of social and economic issues with ecological matters (Schomerus 2014: 290; Hofmanm 2019: §1, rn 28).

Schomerus notes that there is not yet a clearly distinguishable field of the law for "the law on sustainable development" like environmental law or commercial law (Schomerus 2014: 290). Rather, the law on sustainable development concerns all areas of the law. Also, sustainability is generally considered to be a legal principle (Rehbinder 2002: 657). Principles have to be distinguished from rules. Rules are legal norms that consist of conditions and legal consequences and which are applicable to the particular case (Schomerus 2014: 294). Principles, on the other hand, are not based on conditions, but are of general applicability. They need to be concretized by rules in order to be applicable to individual cases.

However, whilst there is no established "law of sustainability" or "ESG law" like contract law, criminal law or company law, there is still scope to argue that this is an emerging field of law. One of the authors of this article has argued elsewhere that sustainability law (or termed ESG

law in line with the theme of this article) is an emerging field of law (Rühmkorf 2025: 379). This view is based, *inter alia*, on the number of recent laws such as the (LkSG) or, indeed, the European regulations that were passed as part of the EU's Green Deal. These different pieces of regulation overlap with the different pillars of ESG such as the social dimension (eg human rights) or the environmental side (eg net zero). Some of them contain the word sustainability expressly in their title such as the Corporate Sustainability Reporting Directive 2022 (CSRD) or the Ecodesign Regulation 2024. Moreover, these regulatory developments are also mirrored in the academic scholarship. For example, there are recent textbooks in this area in Germany (see, eg, Podszun & Rohner 2024).

If one applies criteria from academic literature from the common law world about the question of whether or not a new field of law has been developed, then one finds further support for the argument that there is, indeed, an emerging field of law called ESG law or sustainability law. For example, Hamilton applies two necessary criteria for determining whether a scholarly field exists: (i) academic scholarship and (ii) law school courses (Hamilton 1990). If one applies these two criteria to sustainability in Germany, then one finds an increasing number of hits in legal databases. For example, in online searches conducted on 4 December 2024, the main German legal database Beck-Online comes up with more than 1000 hits for the German term *Nachhaltigkeitsrecht* (in English, sustainability law). Similarly, the search term ESG *Recht* (in English, ESG law) produces more than 4000 hits. If one applies the second criterion—law school courses—then there is also a very recent trend towards creating modules on sustainability law in the law curriculum such as, for example, the module "*Nachhaltigkeitsrecht: Wirtschaft, Klima und Governance"* at Ostfalia Hochschule für angewandte Wissenschaften and the "*Master Nachhaltigkeitsrecht"* at Hochschule Hof.

Building on Hamilton, Linnekin and Broad Leib have developed a total of 10 criteria for this question (Linnekin & Broad Leib 2014). It would go beyond the scope of this article to fully engage with these. One of them is "academic centres". And, indeed, one can find academic centres in this area in Germany, for example, the Research Centre for the Law of Sustainable Development at the Martin-Luther Universität Halle-Wittenberg (which was founded in 2024), or subject-specific legal journals. Related to this, there is even a newly founded legal journal with ESG in its title: *ESG • Zeitschrift für nachhaltige Unternehmensführung* (*ESG—Journal for Sustainable Corporate Governance*). New journals in related areas such as climate change (*KlimaR—Klima und Recht*) add to

the observation that, indeed, this is an evolving field of law, no matter whether one refers to it as ESG law or sustainability law.

[C] THE REGULATIONS ON ESG IN GERMANY: A BRIEF OVERVIEW

Whilst the term ESG does not feature in the letter of the law, constituent elements of this concept do, in particular sustainability. The following analysis will therefore trace the use of the terms sustainability and sustainable development in German law as proxies for ESG-related laws in Germany.

First, in addition to the recent trend towards using sustainability in the law, one can already trace older references from a few decades ago such as in the Federal Forest Act (*Bundeswaldgesetz*) of 1975. This reference stipulates that it is the objective of forestry policy in Germany to protect the diverse functions of the forest and its proper management in a sustainable manner (section 1 of the Act). Another long-standing use of the term in the letter of the law can be found in the Federal Act for the Protection of Nature (*Bundesnaturschutzgesetz*) 2010. Section 1(1) of this Act refers to "sustainable usability" of natural resources.

For a complete historic depiction of the significance of ESG matters in German law one needs to look at German company law and corporate governance. For a long time now, German company law has been considered to be a "pluralist" or "stakeholder-oriented" model (see, for example, Wen 2011: 326). The German model has thus been put in opposition to the Anglo-American model of "shareholder value". It would go beyond the scope of this article to fully engage with that debate (see instead Rühmkorf 2020). Rather, some key aspects will be mentioned here to contextualize the analysis in this article. This will also provide a suitable framing of and background to the subsequent analysis of the more recent wave of German laws that are intended to promote sustainability.

The pluralist nature of German company law is not found in the wording of directors' duties. Here, section 76(1) of the German Joint Stock Corporations Act (*Aktiengesetz*) 1965 contains a rather neutral wording and it reads as follows: "The management board is to manage the affairs of the company on its own responsibility." It is generally assumed that the board's discretion in managing the affairs of the company is directed towards the interest of the company (*Unternehmensinteresse*). There is, in fact, a longstanding academic debate as to how this interest of the company is to be understood (see Spindler 2007). In essence, the

dominant academic view is that there is no preference to any stakeholder group, neither shareholders nor employees, but that directors must decide, on a case-by-case basis, what is best for the company as a whole (Mertens & Cahn 2010: § 76, paragraph 15; Koch 2016: § 76, paragraph 28). This equal standing of the different stakeholder groups does, at least, one thing: it is clear that shareholders are not given priority. Although not a law, the German Corporate Governance Code 2022 has an important role in the practice of German listed companies through its "comply or explain" approach and through the recommendations it makes. In its "Foreword", the Code states:

> The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour (the "reputable businessperson" concept, *Leitbild des Ehrbaren Kaufmanns*).

This statement is significant insofar as it highlights the equal standing of the different stakeholder groups in the decision-making process of German listed companies. It also emphasizes the aim of sustainable value creation which is an important point at times when short-termism is often seen as one of the flaws of corporate governance. And, indeed, ESG aims to promote companies taking a more long-term approach to doing business.

Rather than the wording of directors' duties, the stakeholder orientation of German company law and corporate governance can be seen through an institutional perspective. The most widely known distinguishing feature of German company law is the two-tier board structure of German joint stock corporations. Depending on the number of employees, the supervisory board has mandatory employee representation of up to 50% of the board in the largest German companies. This compulsory boardroom representation of employees is known as co-determination (du Plessis & Sandrock 2005: 67; Roth 2010: 53). Equal boardroom participation of employees in the supervisory board was first introduced in 1952 for the industry areas of mining and steel. This was then followed by a compulsory 33% representation of employees in companies with more than 500 employees through the One Third Participation Act (*Drittbeteiligungsgesetz*) of 1957. Finally, the Co-determination Act (*Mitbestimmungsgesetz*) of 1976 introduced the equal representation of employees in supervisory boards of large corporations. The supervisory

board is not only responsible for monitoring the running of the business by the executive directors, but it is also responsible for appointing and removing executive directors.

Through this important stake in the running of large, listed German corporations employees have gained a significant say and role. This situation provides the context for a generally more consensual approach between employers and employees and also a comparatively smaller role for shareholders in German company law. The increasing number of institutional investors (particularly foreign institutional investors) tries to enhance their role. Yet, from a legal point of view, it is the supervisory board (with the mandatory employee representation) that is central to German company law and corporate governance as it appoints and removes directors. Employees therefore play an important role in deciding who is in charge of their business (Rühmkorf 2020).

In addition to these important features of German company law and corporate governance, there are further regulations on ESG that are relevant here.

First, more recently, following the 2008 global financial crisis, Germany highlighted the importance of long-term approaches in the remuneration of corporate executives. Section 87 of the German Joint Stock Corporations Act now reads: "The remuneration structure of joint stock corporations is directed towards the sustainable and long-term development of the enterprise." Initially, the wording referred to "sustainable" only, but, following some confusion as to whether sustainable was only understood in this section as meaning "long term" (potentially with no regard to the environmental and social pillar of sustainability), a clarification was added and the amended version of this section now refers to "sustainable and long-term development" (see for an analysis of the original version: Röttgen & Kluge 2013: 900). This emphasizes that all three dimensions of sustainability play an important role in the remuneration structure.

As mentioned above, the German Corporate Governance Code plays an important role in practice although it is not a law. The current version of 2022 includes the term sustainability seven times. First, the already mentioned "Foreword", refers to sustainable value creation as an obligation of the board. Second, Recommendation A1 of the Code notes that "corporate planning shall include corresponding financial and sustainability-related objectives". Moreover, Recommendation A3 of the Code states that "the internal control system and the risk management system shall also cover sustainability-related objectives, unless required by law anyway".

These examples from both the German Joint Stock Corporations Act and the German Corporate Governance Code do not only demonstrate the increasing use of and reference to the term sustainability in the context of company law and corporate governance, but they also mean that this principle increasingly permeates the thinking about the purpose of corporations.

As mentioned above, there has been a recent trend towards regulating issues of sustainability in the European Union (EU) and, consequently, in Germany as an EU member state. The recent wave of EU directives and regulations that are intended to promote ESG matters have all been passed under the umbrella of the so-called European Green Deal (Pieper 2022). As mentioned above, in 2020, the European Commission adopted the Green Deal which pursues the EU's aim to become climate neutral in 2050. The political backdrop to the Green Deal was the EU's commitment towards achieving net zero by 2050. The focus of most of these regulations is therefore on reducing emissions and thus aimed at tackling climate change (Pieper 2022). Part of this plan is the review of existing laws in terms of their climate impact as well as the introduction of new laws that help achieve the aim of net zero (Burgi 2021: 1401; Pieper 2022). It could therefore be argued that the environmental pillar of ESG is currently dominant in the European approach towards ESG. However, there are also recent regulations related to the social side and the governance aspect, thus leading to a more holistic approach.

This section will now briefly outline the EU's recent regulatory framework for ESG as part of its Green Deal—ranging from regulations that cover the circular economy to biodiversity and also to human rights in global supply chains. Examples of the different directives and regulations include: the CSRD which, in turn, introduced the European Sustainability Reporting Standards (ESRS) as the new reporting framework, the Ecodesign Regulation 2024, the CSDDD, the Taxonomy Regulation 2020, the Deforestation Directive 2023, the 2024 Directive on the so-called "right to repair" and the proposed Green Claims Directive that is currently part of the legislative process.

The first regulation of this enumeration, the CSRD, is intended to reform and improve the area of non-financial information disclosure by companies (see CSRD, recital 1). Prior to the Green Deal, the rules on reporting of sustainability issues stem from the Non-Financial Reporting Directive of 2014. This Directive focused on the reporting of large, listed, public-interest entities and was criticized for being too restricted in its personal scope (by covering too few companies) as well as for not requiring

reporting that is comparable and detailed. Against this background, the new CSRD was developed with the aim of significantly improving both the quality and quantity of reporting (CSRD, recital 20). It entered into force on 5 January 2023. It significantly expands the number of companies that have to report, including small and medium-sized enterprises. Companies subject to the CSRD will have to report according to ESRS. A key aspect of the new reporting is the so-called "double materiality" (Rogg & Rothenburg 2024: 1439). This concept consists of both impact materiality and financial materiality and constitutes an important step of the mandatory sustainability reporting of companies (Rogg & Rothenburg 2024: 1439). Put simply, it means that companies must not only consider how their own business activities impact on sustainability (eg the environment), but also how sustainability issues can affect the company financially (Rogg & Rothenburg 2024: 1439). Assessing double materiality is thus a critical aspect of the non-financial reporting under the CSRD.

Another recent regulation in the list above is the European Ecodesign Regulation of 2024. It establishes a framework for ecodesign requirements for sustainable products and it repeals the European Ecodesign Directive 2009. As a regulation, the requirements automatically apply to the member states. The Ecodesign Regulation 2024 creates a framework of ecodesign requirements for sustainable products with the goal of expanding their lifecycle (Article 1). The regulation, *inter alia*, introduces a digital product passport and otherwise creates rules on the durability, reusability, upgradability and repairability of products.

The EU also adopted a directive on the so-called "right to repair" in 2024. The aim of this directive is to clarify the obligations for manufacturers to repair goods and also to encourage consumers to expand the lifecycle of a product through repair (Gramlich 2024: 209; Seitz 2024: 194). Manufacturers are under an obligation to inform consumers about their right to repair and they have to provide timely and cost-effective repair services (Augenhofer & Küter 2023: 243).

Another significant part of the EU framework are the different regulations and directives that are part of the EU's Sustainable Finance Strategy and which, as mentioned above, are particularly used in the context of referring to "ESG". The Sustainable Finance Strategy consists of the CSRD, the Taxonomy Regulation and the Sustainable Finance Disclosure Regulation (SFDR) 2019 (European Commission 2023). The aim of these three pillars of the strategy is to move capital flow towards sustainable investment with green business activities (European Commission 2023).

They all share the ambition of the EU to achieve net zero by 2050. The European Green Finance programme started in earnest only in 2018 with the EU Action Plan on financing sustainable growth. The SFDR came into force in 2021. It requires financial market participants to disclose sustainability information so that investors are able to assess how sustainability risks are integrated in the investment decision (Article 1 SFDR). The Taxonomy Regulation came into force in 2022. It creates a European-wide system of classifying business activities. It is intended to provide investors with information so that they can make decisions to invest in sustainable products (see recital 16 of the Taxonomy Regulation). Under the Taxonomy Regulation, businesses must show how sustainable their business and their investments are by conforming to the taxonomy criteria (Article 1 Taxonomy Regulation). The CSRD came into force in 2023 and it significantly increases both the number of enterprises that have to issue non-financial reports and the quality of those reports (Rogg & Rothenburg 2024: 1439). These three pieces of regulation are therefore central to the concept of ESG law.

At the domestic German level, the LkSG of 2021 is a recent law in Germany that was and still is widely discussed not just in academic circles, but also among politicians, non-government organizations and business (DIHK 2023). The Act imposes mandatory human rights and environment-related due diligence obligations on companies. It will form the case study below so will not be analysed here. It is, however, important to note that the European CSDDD which was passed in 2024 (again, after a long lobbying process) differs in some respects from the LkSG and will thus require some amendments to the German law such as the introduction of civil liability.

And, to complement the overview, the German Government that took office in 2021 (the so-called "traffic light coalition" consisting of the Social Democrats, the Green Party and the Liberal Party) has introduced several laws aimed at significantly cutting the use of energy, for example by introducing new rules on the energy efficiency of buildings in the Building Energy Act 2020 (*Gebäudeenergiegesetz*). However, the coalition broke up in November 2024 and, at the time of writing, the indications are that the new coalition consisting of Christian Democrats and Social Democrats is going to significantly review the Act (FAZ 2025).

At the time of writing, the current economic and geopolitical challenges also impact on the EU's approach towards its Green Deal. Whilst the directives and regulations introduced in this overview have all been passed, there are attempts to scale back some of them (European Commission

2025). In February 2025, the European Commission published the so-called "Omnibus Package" which is intended to particularly affect the reporting duties and the human rights due diligence obligations under both the CSRD and CSDDD. The aim of the proposals is, in the words of the Commission, "to simplify" which, in practice, means to reduce the obligations that companies have under the CSRD and CSDDD as passed.

[D] IMPLEMENTATION OF ESG IN GERMANY: THE SUPPLY CHAIN DUE DILIGENCE ACT

Given that it is the most widely discussed ESG-related piece of law in Germany, the LkSG will be discussed in this section as a case study. It serves as an example of a law that can be considered to be a success, but one that also has limitations.

As indicated above, the Act was passed in June 2021 after years of intensive political discussions about whether or not Germany should pass a law that imposes binding obligations on companies for their supply chains. One example for a similar law in Europe that, like the LkSG, imposes mandatory human rights due diligence obligations on companies is the French *Loi de Vigilance* (Vigilance Law) of 2017. The German LkSG has been in force since 1 January 2023. Due to space constraints, only its key characteristic features will be addressed here.

Since 2024 the LkSG has applied to all enterprises in Germany with over 1000 employees (from 2023, it initially applied to enterprises with over 3000 employees), see section 1. As the Act uses the term "enterprise" rather than company, this term will be used where references are made to the LkSG in this article. The Act imposes nine due diligence obligations whose aim is to prevent or to minimize any risks to the interests protected by the Act or to cease the violation of human rights-related or environment-related obligations (section 3). The legal positions that are protected by the LkSG are human rights and environmental issues that arise from the conventions on the protection of human rights listed in numbers 1 to 11 of the annex such as International Labour Organization Core Conventions (section 2; Weigel 2024: §2, paragraph 3).

The due diligence obligations imposed by the Act are:

1 establishing a risk management system;
2 designating a responsible person or responsible persons within the enterprise;
3 performing regular risk analyses;

4 issuing a policy statement;
5 laying down preventive measures in the business's own area of business and vis-à-vis direct suppliers:
6 taking remedial action;
7 establishing a complaints procedure;
8 implementing due diligence obligations with regard to risks at indirect suppliers;
9 documenting and reporting (for the list, see section 3(1)).

All these obligations are subject to a continuous process (BT-Drucksache 19/28649, 2021: 23).

When undertaking these due diligence obligations the enterprises have to meet the standard of "appropriateness" (section 3(2)); Voland & Lohn 2024: §3). This standard is, *inter alia*, determined by the following criteria: the nature and extent of the enterprise's business activities; its ability to influence the party directly responsible for a risk to human rights or environment-related risk or the violation; and the severity of the violation and its reversibility (see Voland & Lohn 2024: §3). An important point to note is that the obligations are obligations of means and not obligations of result.

As the title of the Act suggests, these obligations span over the supply chain of enterprises. However, the LkSG differentiates between three constituent parts of a supply chain: the actions of an enterprise in its own business area; the actions of direct suppliers and the actions of indirect suppliers (section 2(5)). The obligations relate, first and foremost, to the first two levels of the supply chain: the enterprise's own business area (that is, every activity of the enterprise to achieve the business objective which is every activity for the creation and exploitation of products and services, regardless of whether this is carried out in Germany or abroad) (section 2(6)) and to their direct suppliers (these are, within the meaning of the Act, partners to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service) (see section 2(7)).

As noted, the situation is different for indirect suppliers. The Act defines indirect suppliers as enterprises that are not direct suppliers and whose supplies are necessary for the production of the enterprise's product or the provision of the service (see section 2(8)). Under the LkSG, due diligence obligations in regard to indirect suppliers only arise where an enterprise has "substantiated knowledge" (section 9(3)). This term is

defined in the LkSG as having "actual indications that suggest that a violation of a human rights-related or an environment-related obligation at indirect suppliers is possible" (section 9(3)). Substantiated knowledge can, for example, be gained through employees of the enterprise who notice such a violation during a visit to an indirect supplier (see, for more examples, Depping 2022: §9, paragraph 11; Voland & Lohn 2024: §9, paragraph 11).

The Act is subject to a public enforcement approach that relies on monitoring and enforcement through a public authority, the Federal Office for Economic Affairs and Export Control (BAFA) (see section 19(1)). Enterprises that fall under the scope of the Act must submit an annual report to BAFA (section 12) which then assesses whether the contents meet the minimum requirements of the Act and, in case they do not, BAFA can then demand that the enterprise amends the report within a reasonable timeframe (section 13(2)). Moreover, BAFA has the power to take action to monitor compliance with the due diligence obligations (section 14). This includes the power to make the appropriate and necessary orders and measures to detect, end and prevent violations of the due diligence obligations under the Act (section 15). Accordingly, BAFA can summon people, order the enterprise to submit a corrective action plan within three months and require the enterprise to take specific action to fulfil its obligations (section 15), and it can also enter and inspect the enterprise's premises, offices and commercial buildings insofar as this is necessary for the performance of its duties (section 16). It is important to note that these powers are discretionary, that is, BAFA can decide whether or not to use any of these powers and, if it does so, it has to comply with the principle of proportionality (Depping 2022: §15, paragraphs 9-13).

The consequence of the public enforcement approach is that BAFA has the power to impose fines on enterprises that do not comply with their due diligence obligations (section 24 (1)). The fines can be up to EUR800,000 (section 24(2)) and, in the case of an enterprise with an annual turnover of more than EUR400 million, be up to 2% of the average annual turnover (section 24(3)). Another possible consequence of non-compliance is that enterprises can be excluded from the award of public contracts for up to three years (section 22).

It is rather unusual for an Act on ESG issues to regularly make it into the news. The German LkSG, however, has managed to continue to be mentioned by politicians and businesses and be discussed publicly since it was passed. The reason is that it is an ambitious law that imposes new obligations on companies not only for their domestic supply chains, but

also for their international supply chains. The core aim of the Act should not be controversial: the protection of human rights in the supply chain of companies that are based in Germany (BT-Drucksache 19/28649, 2021: 2). However, the way to achieve this aim is disputed due to the impact it has on business practice. The LkSG can therefore be used here both as an example of a successful implementation and as an example of an implementation that is challenging.

First, in terms of success, a direct impact of the Act is that it has managed to bring human rights in global supply chains to the attention of boards of directors. Boards are now taking notice. Before the introduction of this Act, reports about severe human rights violations in supply chains seemed to repeat themselves with little action by business. Companies pursued voluntary initiatives which did little to change the root causes of the human rights violations and which appeared to hardly have an impact on the activities of German businesses in their purchase practices. With the LkSG, the voluntary nature of ESG practices regarding human rights in global supply chains by companies has now come to an end (Ehmann & Berg 2021: 293). Rather than being a choice, human rights due diligence is now a legal obligation (Gehling & Ors 2021: 231). The effect of this situation is that the law has created a level playing field between enterprises as they can no longer choose to opt in or out of addressing human rights in their supply chains.

Also, in the dualistic (two-tier) board structure of German public limited companies, it is the role of the supervisory board to supervise the management board (section 111 of the Joint Stock Corporations Act, *Aktiengesetz*). Depending on the number of employees of the company, up to 50% of the members of the supervisory board are representatives of the employees. As part of their general supervisory role, they also supervise the compliance of the board with the LkSG, including the risk management in accordance with this Act. The Act expressly stipulates that the result of the risk analysis must be communicated internally to the relevant decision-makers such as the board of directors (see section 5(3)). The supervisory board is also a “relevant decision-maker”.

Moreover, the strength of the Act is that it is backed up by a rather stringent public enforcement approach with the BAFA as a public authority in charge of monitoring and enforcement (Ehmann 2021: 141). The Act includes some powerful tools such as BAFA’s right to enter business premises and to obtain documents. Also, the LkSG provides non-governmental organizations and trade unions with special capacity to sue, meaning that they can bring claims on behalf of victims of human

rights violations (section 11). Whilst the absence of civil liability in the Act means that this power is somewhat limited in practice, it nevertheless provides a possibly strong enforcement tool.

Third, the threat of sanctions by the public authority means that human rights in global supply chains are now a compliance issue. The topic has therefore been elevated in the hierarchy of businesses. The legalization of ESG issues as a whole has led to the integration of sustainability departments and compliance departments. Consequently, businesses are taking ESG matters much more seriously than they did before.

On the other hand, the LkSG is also an example of the challenges that a law in this area faces. It was a political compromise, as was the European CSDDD. As such, some features have been criticized by businesses and civil society, yet for different reasons (Thalhammer 2021: 832). First, the absence of civil liability means that victims of human rights abuses at the bottom of global supply chains did not gain a remedy against German enterprises. However, this situation will change with the implementation of the CSDDD as the CSDDD does contain such a liability provision. Second, the focus of the due diligence obligations in the LkSG on the enterprise's own area of business and its direct suppliers means that the automatic reach of the obligations is limited. This stands in contrast to the often long and complex structure of global supply chains in practice (Krajewski & Ors 2021: 556). It remains to be seen to what extent enterprises will have to extend their due diligence obligations to indirect suppliers. Therefore, the danger is that the due diligence obligations might not reach those parts of the chains where human rights violations occur, which is usually at sub-supplier factories in developing countries at the bottom of global supply chains (Initiative Lieferkettengesetz 2021). The key question for the practical impact of the Act is therefore whether or not enterprises will be able to effectively hide away between the different layers of their supply chain or whether they will quickly be assumed to have gained substantiated knowledge about the risk of a violation of due diligence obligations.

Another weakness of the LkSG from an ESG perspective is that the Act primarily focuses on human rights obligations, but includes only some environment-related obligations. These play a minor role compared to human rights, however. A noticeable absence in the LkSG is the lack of an obligation related to climate change. This comes as a surprise in light of the general drive towards net zero. Finally, the role of stakeholders is somewhat limited in the LkSG. There is no requirement for a formal stakeholder engagement process (Stöbener de Mora & Noll

2024: 1396). The CSDDD takes a broader view by including multiple stakeholder initiatives into the due diligence obligations (Hagel & Wiedmann 2024: 190).

Overall, one of the main dangers of the LkSG is that businesses might try to comply with the legal obligations by taking a box-ticking approach. This means that businesses might try to simply comply with the letter of the law, but not with the spirit of the law. Such an approach would mean that businesses run the required processes, but do not fully implement the underlying ideas into their business activities. Enterprises taking such an approach might submit a rather generic report that does not contain specific information about the way they have approached their due diligence obligations. Another example of a box-ticking approach would be enterprises that amend their supplier code of conduct and other policies and offer training for their direct suppliers, but that do not work with their suppliers to change the root causes of human rights violations.

[E] RELEVANCE OF ESG IN GERMANY: PROBLEMS AND SOLUTIONS AS WELL AS GLOBAL LEARNINGS

The analysis and the case study have highlighted the trend towards legally regulating ESG matters in Germany and, indeed, at EU level. Whilst the German LkSG is a particularly well known and contentious piece of law, ESG-related laws are a much broader and bigger phenomenon. These ESG laws do not only address particular issues such as preventing human rights violations in global supply chains, but, on the whole, they try to move the business model of the German economy towards pursuing net zero. Through pursuing a more sustainable long-term approach businesses should take a far-reaching view that integrates environmental, social and governance issues.

The analysis in the preceding parts has shown that the move towards ESG in legal regulation marks a significant shift. About a decade ago, not many expected to see the recent wave of regulations. They are all important contributions towards achieving a more sustainable business model. They are not the solutions on their own, but individually and collectively they are part of the puzzle as to how to integrate ESG aspects in the running of business. The case study of the LkSG provides important insights into both problems and solutions of the existing legal framework for ESG.

In terms of solutions, the German experience offers three main findings: first of all, ESG aspects are no longer voluntary issues that some companies adopt on reputational grounds. Through these laws and regulations, it is no longer optional for companies to reduce their impact on the environment and on human rights. The legal framework creates a set of minimum requirements that all companies covered by the respective laws have to comply with. The laws are creating a level playing field which means that it is now a legal obligation for enterprises to pursue ESG goals. It would go too far to consider those laws the solution, but, at least, they will help to shift businesses towards ESG with the obligations that they impose.

Second, and closely related to the first point, the consequence of this development is that ESG has become a compliance issue. Companies have to fulfil legal obligations such as those required by reporting laws or by the German LkSG and face sanctions if they do not. Consequently, ESG aspects are now matters of concern for boards of directors. Companies not only include them in their compliance work, but also employ new staff with legal backgrounds to implement these laws into the operation of the companies. The reporting requirements of the CSRD and the Taxonomy Regulation as well as the supply chain obligations all require enterprises to have staff that deal with this implementation. Surveys have shown that businesses need at least one full-time member of staff for the German LkSG, often three and in some cases even seven members of staff. In short, this means that the move to ESG also means that enterprises need more staff in legal compliance. This is also a challenge, however, as addressed below.

Thirdly, in the past, ESG issues tended to be a niche field in legal studies due to the lack of binding laws. With the flurry of new regulations this picture has changed. In fact, ESG is now becoming a new and growing field of law in Germany. However, the overview of regulations above has shown how broad the concept of ESG is. This means that the actual focus of ESG has to be understood in the context of the regulation in question.

Nevertheless, such a shift also leads to problems. Whilst civil society applauds that legal regulation on ESG matters is finally coming into force and that it is also designed more stringently than ESG-related laws in the past (ie with clear obligations backed up by sanctions for non-compliance), businesses take a different view. They often complain that these new laws increase their regulatory burden and thus increase the cost of production. This argument is particularly used in these times of political and economic uncertainties. Irrespective of one's view on this

debate, it is clear that a range of new laws does lead to an increased need for compliance. The process of the implementation of rules into the operation of a business is a challenge. Here, one needs to distinguish between large, listed enterprises and medium-sized enterprises that have a smaller structure. In Germany, the latter group are often family-owned enterprises. They are the ones that find the new regulatory framework harder to implement because they have a smaller staff base and may lack financial means to build up new teams for dealing with new regulatory requirements.

The recent European Green Deal will provide important global learnings. First, it will lead to a harmonized and comparable standard of ESG-related regulations across EU member states, and those, including Germany, can provide useful learnings globally. Second, as legal requirements are being implemented into the operation of enterprises, the feedback from businesses will show which parts of those regulations work and which are difficult to achieve in practice. Other jurisdictions will be able to monitor those developments, and they can then learn lessons from the European experience and design laws accordingly. Third, probably even more important than feedback from business about the operational side of ESG regulations are the learnings about the impact of those regulations. Do they achieve change in business practice? Are they moving enterprises towards a more sustainable business model? Those insights will only slowly emerge over the course of the coming years as more and more EU directives and regulations are coming into force and being implemented into national laws.

[F] CONCLUSION

The article has shown that ESG has become a significant part of legal regulation in Germany in recent years. This is particularly due to a recent wave of directives and regulations from the EU as part of its Green Deal.

The legal framework for ESG has created a level playing field, namely that all enterprises that are within the scope of a law have to comply with it. The impact of this change remains to be seen and only the future will tell to what extent the different pieces of regulation have moved enterprises towards a more sustainable business model.

Some smaller and small-medium sized enterprises find integrating some of the new regulations harder than do large, listed companies. This is particularly due to their comparatively smaller staff base. After all,

new regulatory requirements also require employees to deal with their compliance.

The case study has shown that the LkSG has had a significant impact for ESG in legal and business practice. However, the Act does not reach its full potential—evidenced, for example, by the absence of a mandatory stakeholder engagement process. The CSDDD will require amendments to the LkSG. However, at the time of writing, the political climate both in Germany and the EU is becoming increasingly sceptical of the due diligence obligations and the scale of the obligations could be reduced again. That would send mixed messages to businesses, as the existing rules provide a strong basis to improve the human rights record of enterprises and to create more sustainable and more resilient global supply chains. That, in turn, would be a business advantage of enterprises. What is important for the next stage of the ESG regulations that have either recently become law or are about to be implemented into German law soon is to accompany these with sufficient guidance for enterprises. BAFA has produced several guidance notes for the LkSG and these are quite helpful. In other ESG-related laws, a similar approach would help ensure a smooth practical implementation of the new rules into business practice.

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The Limitations and Possibilities of ESG as the Multifaceted Phenomenon: A Study of Japan

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Abstract

Environmental, social, and governance (ESG) considerations have become a key aspect of global investment and corporate governance. A substantial amount of capital is allocated worldwide with ESG considerations in mind. While the rules for ESG continue to evolve, their precise legal and governance implications remain ambiguous. Scholars debate whether ESG can prompt a shift in the corporate focus from shareholder wealth to broader stakeholder interests. Drawing on Japan's experience, this study posits that ESG, when combined with specific legal frameworks such as environmental and labour laws, can influence the way companies are managed by influencing the perception of executives of ESG-related risks. The findings contribute to the ongoing discourse on ESG's role in corporate governance and its potential to reshape managerial decision-making.

Keywords: ESG; company law; corporate governance; investor engagement; sustainability disclosure; shareholder value.

[A] INTRODUCTION

Taking environmental, social and governance (ESG) matters into consideration in investment and business has become a global phenomenon. ESG gained prominence when institutional investors worldwide signed the UN-led Principles for Responsible Investment (PRI), which envisaged that the investors "will incorporate ESG issues into investment analysis and decision-making processes" (Principles for Responsible Investment nd). More than USD30 trillion are invested with ESG considerations in mind worldwide (Global Sustainable Investment Alliance 2023: 10). Japan is no exception. Although it took

a decade for Japan to make serious efforts to catch up with European forerunners, ESG is spreading. As of 2022, USD4 trillion are invested with ESG considerations in mind in Japan (ibid: 10). ESG rules have evolved as both the Stewardship Code and the Corporate Governance Code require investors and companies to take ESG matters into consideration.

However, it remains to be seen what changes ESG will bring to the law and corporate governance in each jurisdiction. Henderson (2020: 141) expects ESG to be a game changer, potentially encouraging investors to focus more on environmental and social factors to improve the performance of their portfolios, thereby promoting a long-term view of companies away from the shareholder wealth maximization norm. Câmara (2022: 21) argues that ESG potentially redefines the duty of the boards so that they understand the impact of their decisions on stakeholders. On the other hand, Bebchuk & Tallarita (2020: 176) argue that encouraging company executives to focus more on the stakeholder interest is an inadequate and substantially counter-productive approach to addressing stakeholder concerns.

In this study, we argue that ESG could potentially change the way companies are managed by working with laws in specific areas such as environmental law or labour law through investor engagement that influences the perceptions of executives on risks the company faces in the long term. In addition to ESG for investors, researchers and practitioners are also highlighting, as a part of ESG, laws in individual areas that serve the interest of a wider range of stakeholders regardless of their impact on shareholder value. These two areas interact with each other, potentially affecting how companies are managed.

This article is organized as follows. Section B explains the background of ESG rules in Japan. Section C analyses the ESG rules, showing that ESG for investors and ESG for stakeholders interact with each other. Section D examines how ESG is implemented in Japan, with a case study showing how a failure in ESG can materialize various risks. Section E explores the limitations and possibilities of ESG. A short conclusion follows.

[B] ESG FOR INVESTORS, ESG FOR STAKEHOLDERS AND THEIR BACKGROUND

ESG is widely recognized as a multifaceted phenomenon. Its origins can be traced back to the incorporation of ESG considerations into the investment decisions by institutional investors. To support these investment decisions, investee companies are required to disclose ESG-related information. Moreover, investee companies are expected to integrate ESG factors into their business strategies. These three areas—investment, disclosure, and management—interact with another dimension of ESG: ESG rules in specific areas designed to serve a wider range of stakeholders.

The background of ESG investment

For a decade after the PRI, ESG investment among Japanese institutional investors remained relatively small, but it has since expanded (Global Sustainable Investment Alliance 2023: 10). A major shift began in September 2015, when the Government Pension Investment Fund (GPIF), Japan's largest institutional investor, became a PRI signatory (Government Pension Investment Fund 2015).

This shift is often attributed to the growing influence of universal owners (Noda 2019: 376). These investors hold large, diversified portfolios spanning multiple industries, effectively making them owners of the entire economy. Their primary concern is the long-term sustainability of society and thus the environmental and societal risks, rather than the profitability of individual investee companies.

This shift was also partly driven by government and ruling party policy aimed at revitalizing Japan's economy after a 20-year recession by improving company profitability. In 2015, a study group in the ruling Liberal Democratic Party revealed its intention to request the GPIF to sign the PRI. The study group envisaged that ESG investment would enhance investment performance and support the Japan Revitalization Strategy (ESG Toshi Kokurenn Toshi Gensoku Benkyokai 2015). First introduced in 2013 by the Government, the Japan Revitalization Strategy aimed at "[u]nleashing the power of the private sector to the fullest extent" (Cabinet Office 2014: 14). In response, the Financial Services Agency prepared the Stewardship Code in 2014, requiring investors to consider companies' risk management on social and environmental risks (Stewardship Code 2014: 3-3). As Tamaruya and Yukioka explain (2024: 451), the Code was

intended to increase the value of Japanese companies. The GPIF and other investors' commitment to ESG investment was, in part, a product of this policy-driven agenda to boost the profitability of companies.

The background of ESG disclosure

The profit- and risk-centred nature of ESG is also evident in ESG disclosure practices. As ESG investment expanded, companies were required to disclose ESG-related information to aid investors' decision-making. A key example is the 2022 Amendment to the Cabinet Office Ordinance on the Disclosure of Corporate Affairs, etc, which mandated listed companies to disclose their "sustainability-related views and initiatives" in annual securities reports (form no 3, part 1, section 2). This legislation evolved from voluntary disclosure in integrated reports, where companies had been voluntarily disclosing ESG information to better communicate with institutional investors (*Nihon Keizai Shimbun* 2015). Whether statutory or voluntary, these disclosures primarily serve investors by providing information regarding company profitability and risks. This investor-centric approach is evident in government guidelines to define materiality in disclosure based on its impact on company value and performance (Financial Services Agency 2019: paragraph 2-2, 3).

Beyond disclosures for investors, companies also publish sustainability reports, corporate social responsibility (CSR) reports, and environmental reports for a broader range of stakeholders. Environmental reporting dates back to voluntary environmental reporting in the late 1990s (Kozuka 2019: 451). Today, large companies are legally required to make efforts to publish environmental reports under Article 11 of the Act on the Promotion of Business Activities with Environmental Consideration by Specified Corporations, etc, by Facilitating Access to Environmental Information, and Other Measures (Act No 77 of 2004). Over time, environmental reports evolved into CSR reports and then into sustainability reports, which cover social matters.

Disclosure requirements aimed at a wider range of stakeholders often seek to promote socially beneficial management activities. A notable example is the Health, Labour and Welfare Ordinance (No 104 of 2022). Implementing the Act on the Promotion of Women's Active Engagement in Professional Life, which aims to promote women's activities in their professional lives, the Ordinance requires large companies to disclose gender diversity-related information. It is hoped that the disclosure will encourage companies to take steps to promote women's professional activities, thereby narrowing Japan's wide gender gap.

The background of ESG management

As ESG investment and disclosure regulations expanded, taking ESG matters into consideration has become a practical norm at the investee company level (Osugi 2019: 160). The primary source of ESG management rules is the Corporate Governance Code 2021, the background of which is the intention to enhance shareholder wealth (Kozuka 2019: 454). Kozuka highlights a paradox in its approach: while the Corporate Governance Code aims to maximize shareholder value, it requires companies to take ESG matters into consideration for the interest of a wider range of stakeholders. This contradiction can be explained by the business case scenario—the idea that responsible company actions ultimately benefit long-term shareholder value. The Corporate Governance Code explicitly acknowledges this, stating that "appropriate actions of companies based on the recognition of their stakeholder responsibilities will benefit the entire economy and society, which will in turn contribute to producing further benefits to companies" (Notes on General Principle 2). However, the central focus of ESG management remains shareholder wealth.

ESG management at the investee company level is also required by sector-specific regulations, which, unlike the Corporate Governance Code, require companies to comply regardless of their impact on profitability. These regulations cover areas such as environmental protection, climate change mitigation, labour rights, and consumer protection. One widely discussed topic is "business and human rights" (Hashimoto 2024: 84). In 2022, the Government promulgated the "Guidelines on Respecting Human Rights in Responsible Supply Chains" (Inter-Ministerial Committee 2022), requiring businesses to "strive in efforts to respect human rights in their business enterprise, group companies, and suppliers". These guidelines are applicable regardless of their impacts on profitability as the objective of the guidelines is not to mitigate management risks but to mitigate adverse impacts on human rights (Matsui 2023: 15). Similar principles apply to sector-specific rules in other ESG areas.

[C] THE EVOLVING RULES OF ESG IN JAPAN AND HOW THEY CHANGE THE WAY COMPANIES ARE MANAGED

Rules for ESG investment: a narrow-minded concept

For ESG investment, the Stewardship Code serves as the primary regulatory framework. First introduced in 2014, the Stewardship Code required institutional investors to "fulfil their stewardship responsibilities with an orientation towards the sustainable growth of the companies", taking into account various factors, including "governance … and risk management (including … risks arising from social and environmental matters) of the investee companies". The Stewardship Code, revised in 2017, further emphasized ESG consideration by requiring institutional investors to consider not only risks but also business opportunities arising from social and environmental matters (principle 3-3). The 2020 revision further evolved the ESG rules, revising the definition of the stewardship responsibility so that it explicitly requires that ESG factors be taken into consideration.

However, the ESG considerations required by the Stewardship Code remain narrow in scope. The code focuses only on the sustainability of individual investee companies, rather than broader societal sustainability. This contrasts with the United Kingdom (UK) Stewardship Code, which emphasizes the sustainability of society, stating that "Signatories' purpose, investment beliefs, strategy, and culture enable stewardship that creates long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society." The Japanese Stewardship Code's cautious approach is reflected in its requirement that ESG considerations must be "consistent with their investment management strategies". Tamaruya and Yukioka (2024: 453) suggest that this provision was likely to avoid any implication that the ESG considerations could take precedence over investment returns.

Rules for ESG management: robust shareholder wealth

At the investee company level, ESG management is primarily governed by the Corporate Governance Code, which listed companies are required to either comply with or explain deviations from. General principle 2 requires, on a comply-or-explain basis, listed companies to consider the interests of a wider range of stakeholders, including employees,

customers, business partners, creditors, and local communities. With its 2021 revision, the Corporate Governance Code explicitly incorporated ESG considerations by requiring listed companies to take appropriate measures regarding sustainability issues (principle 2.3) and defining sustainability as "mid-to long-term sustainability including ESG factors". Such issues, according to supplementary principle 2.3.1, include climate change, human rights, workers' health and working conditions, and fair transactions with suppliers and customers.

Despite the explicit references to ESG, the mainstream academic consensus maintains that ESG considerations do not override the shareholder wealth maximization norm in company law. Although Japan's Companies Act 2005 does not explicitly mandate shareholder value maximization, scholars argue that directors are implicitly obliged to maximize shareholder value, even if they may also consider stakeholder interests within their business judgement discretion (Kozuka 2019: 449). Kubota (2021: 38) argues that this position is similar to the enlightened shareholder value principle in the UK Companies Act 2006. Even as ESG gains prominence, Japanese scholars still continue to uphold the shareholder wealth maximization norm (ibid: 39). As a result, ESG management can only be justified through a business case scenario—that is, it must ultimately contribute to company profitability.

One illustrative case is gender diversity. The Corporate Governance Code justifies ESG-driven gender diversity initiatives based on their potential to enhance profitability. Principle 2.4 of the Code requires companies to promote gender diversity, stating that diverse perspectives and values support corporate sustainable growth. Building on this principle, Matsunaka (2021: 32) argues that the Code's promotion of gender diversity serves primarily to enhance corporate profitability. Researchers have extensively analysed the relationship between board diversity and firm performance, reinforcing the prevailing shareholder wealth maximization perspective. Despite early attempts to justify gender diversity regardless of its impact on profitability (Takahashi 2022: 77), progress in academic discourse regarding ESG's role in promoting societal sustainability remains slow.

Rules for ESG disclosure: possible interaction

ESG disclosure is the most advanced area in the ESG rules in Japan. Listed companies are legally obliged to disclose their "sustainability-related views and initiatives" in their annual securities reports under the Cabinet Office Ordinance. This statutory requirement was preceded by

the Corporate Governance Code. The Corporate Governance Code 2015 required, on a comply-or-explain basis, listed companies to disclose non-financial information (general principle 3). The 2018 revision clarified that non-financial information includes ESG matters (Note to general principle 3). The 2021 revision went further, requiring listed companies to disclose their own sustainability efforts (supplementary principle 3-1(3)). These matters are disclosed in corporate governance reports in accordance with the listing rules of the Tokyo Stock Exchange.

The evolving rules on ESG disclosure aim to address a key issue: the lack of reliability and consistency in non-financial reporting (Tamaruya & Yukioka 2024: 455). To enhance reliability and consistency, companies and investors have increasingly relied on international disclosure initiatives, such as the Task Force on Climate-related Financial Disclosures (TCFD). This reliance on global standards has shaped Japan's ESG disclosure framework. The Corporate Governance Code 2021 requires, on a comply-or-explain basis, companies listed on the Prime Market to "enhance the quality and quantity of disclosure based on the TCFD recommendations … or an equivalent framework". The four-element structure of the TCFD recommendations—"governance", "strategy", "risk management" and "metrics and targets"—has been incorporated into the statutory disclosure in annual securities reports (form 2, note 30-2 of the Cabinet Office Ordinance on the Disclosure of Corporate Affairs, etc). Moreover, in 2024, the Sustainability Standards Board of Japan (SSBJ) released a draft standard, which is expected to become a legal standard for non-financial disclosure in Japan (Financial Services Agency 2022). These initiatives are intended to respond to the demand of investors for comparable and consistent disclosure.

Although ESG disclosure for investors and ESG disclosure for broader stakeholders have different objectives, they increasingly influence each other. Investor-focused ESG disclosure primarily aims to improve investment decision-making by providing insights into corporate profitability and risk. In contrast, stakeholder-focused ESG disclosure is designed to serve the interests of a wider audience, irrespective of profitability considerations. Despite these differences, disclosure rules benefiting broader stakeholders have begun influencing investor-oriented disclosure requirements. For instance, under the Ministry of Health, Labour and Welfare Ordinance (No 104 of 2022) companies with 301 or more employees must publicly disclose the wage gap between men and women, one item from eight items under "Providing opportunities related to professional life for female employees" and one item from seven items under "Balancing work and family life" (Article 19). The former includes

"the percentage of women in managerial positions" and the latter includes "the rate of taking childcare leave by gender" among others. These requirements are taken into the disclosure requirements for investors. The securities regulations require companies disclosing the wage gap, "the percentage of women in managerial positions", or "the rate of taking childcare leave by gender" to include such information into their annual securities report (form 2, note 29 (d-f) of the Cabinet Office Ordinance on the Disclosure of Corporate Affairs, etc).

This interaction between investor- and stakeholder-oriented disclosure rules potentially encourages greater ESG consideration among both investors and companies, as institutional investors rely on this information when they engage with investee companies. The report of Cabinet Office Gender Equality Bureau (2023: 9), which surveyed institutional investors that were signatories of the Stewardship Code, found that about 65% of institutional investors use information on women's active engagement in their investment decisions. This suggests that investor-focused ESG frameworks can indirectly reinforce stakeholder-driven ESG objectives, effectively supplementing government efforts to advance gender equality.

[D] IMPLEMENTATION OF ESG IN JAPAN AND HOW FAILURE CAN MATERIALIZE RISKS

The endeavour to foster aspirational disclosure

Due to the multifaceted nature of ESG, the quality of ESG disclosure is critical. ESG disclosure bridges investment and management, providing investors with information and encouraging investee companies to take ESG issues into account. However, companies are afforded considerable discretion in the disclosure of non-financial information. If companies opt for boilerplate disclosure, it neither facilitates informed investment decisions nor enhances ESG management. Action is therefore needed to improve the quality of ESG disclosure.

Currently, discussions are underway regarding the introduction of mandatory ESG disclosure in line with detailed standards. This framework will require companies listed on the Prime Market to disclose sustainability-related matters in accordance with the standards issued by the SSBJ (SSBJ Standards), which have been developed in alignment with the International Financial Reporting Standards (IFRS) Sustainability Disclosure Standards (ISSB Standards). In addition, the mandatory disclosure will entail assurance requirements. This system is expected to be implemented in phases, and, once introduced, it will resemble the

European Corporate Sustainability Reporting Directive of 2022. However, such mandatory regulation has yet to be implemented, and efforts to enhance the quality of ESG disclosure have remained limited to improving the quality of voluntary disclosures.

The Government, stock exchanges and institutional investors have all sought to support the efforts of companies that wish to voluntarily make aspirational disclosures. In 2018, the Ministry of Economy, Trade and Industry prepared the guidance for the TCFD recommendations. The purpose of this guidance is to provide commentary and references for companies disclosing in accordance with the TCFD recommendations (Ministry of Economy, Trade and Industry 2018: 3).

Japan Exchange Group, the parent company of the Tokyo Stock Exchange, published *The Practical Handbook on ESG Disclosure* in 2020. To encourage aspirational disclosure by companies, the *Handbook* provides a detailed description of the methodology for identifying materiality. It provides examples of companies that, as a first step, have listed a wide range of ESG issues, drawing on international disclosure frameworks, and then identified materiality by assessing the significance of the listed issues, thereby avoiding omissions. For identifying materiality, the *Handbook* presents a methodology for assessing the link between each issue and the value of each company, including considering the company's purpose, conducting interviews with key stakeholders and being aware of the time horizon.

The Financial Services Agency has published the *Collections of Good Practice in the Disclosure of Non-financial Information* since 2018 (Financial Services Agency 2024). This publication highlights good examples from annual securities reports filed in the previous year. Since 2021, these collections have included best practices in ESG and sustainability disclosure to help spread good practices in ESG disclosure to other companies.

The GPIF has also presented best practices in integrated reports since 2018 (Government Pension Investment Fund 2018). This publication presents integrated reports submitted in the previous year that were highly rated by asset managers. It includes comments from the asset managers on integrated reports selected as best practices, so that companies can understand what the asset managers value highly.

The above measures to encourage aspirational disclosure appear to have improved the quality of ESG disclosure and enhanced investor engagement. Furthermore, voluntary ESG disclosure in securities

reports in accordance with the SSBJ Standards is expected to become more prevalent, both among companies outside the scope of mandatory requirements and those awaiting future mandatory implementation. However, there is ongoing debate about whether such enhanced disclosure will achieve its intended effect. Noda (2023: 12) argues that disclosure tailored to an image that conforms to investor expectations could potentially lead companies to avoid addressing more difficult but important issues. Therefore, the efficacy of ESG disclosure in providing information to investors, enhancing investor engagement and facilitating ESG management must be continuously evaluated.

The failure of a pharmaceutical company and the materialized risks

One example of an unsuccessful outcome can be observed in the case of Kobayashi Pharmaceutical. Kobayashi Pharmaceutical is a manufacturer of various health care goods and food products, listed on the Tokyo Stock Exchange. In 2024, the company announced that multiple customer deaths had been reported in connection with health problems related to its dietary supplement products. This scandal led to the resignation of both the Chair and the President (da Silva 2024; Kajimoto 2024). The following account is based on the report of the company's Fact-Finding Committee (2024) and other media sources.

This case highlights a failure of ESG implementation despite the company's apparently robust ESG framework. Kobayashi Pharmaceutical had comprehensive ESG disclosure initiatives, including integrated reports, corporate governance reports, and CSR reports. Its CSR Report (2022b: 78) states that the company's initiative in social matters includes product safety, with a dedicated Reliability Assurance Division overseeing quality audits across product development and manufacturing.

From a governance perspective, the company appeared to follow best practices. Until 2021, the board consisted of seven directors, including three independent directors. From 2022 onwards, independent directors formed the majority (four out of seven). Furthermore, three of the four independent directors were identified as having skills in "ESG and sustainability" and "legal and risk management" in the skills matrix disclosed in accordance with the Corporate Governance Code supplementary principle 4-11-1 (Kobayashi Pharmaceutical 2022: 131). All independent directors have attended all board meetings from 2021 onward, according to the Corporate Governance Reports (2022a: 11; 2023: 11; 2024b: 12). The CSR Report (2022b: 136) states that in times

of crisis, a Crisis Management Headquarters would be set up to manage risks. Despite these measures, none of these mechanisms prevented the crisis.

The crisis became public in March 2024 when Kobayashi Pharmaceutical announced that health problems had been reported by doctors in connection with its dietary supplement products, which were advertised as having health benefits by lowering LDL cholesterol and blood pressure (Otake 24 March 2024). According to the initial announcement, the company received reports of kidney problems from 13 people (Otake 24 March 2024). The problems were reportedly caused by Beni-Koji fermented rice contained in the product. In response, the company voluntarily recalled the products and notified government authorities. Later that month, it was announced that deaths possibly related to the products were reported (Benoza 2024). It was later revealed that the kidney problems were caused by a component of blue mould that occurred during the manufacturing process and entered the product (Otake 18 September 2024). By November 2024, the company reported that 125 people had died, while 540 had been hospitalized due to suspected links to the product (Kobayashi Pharmaceutical 2024a).

The Fact-Finding Committee highlighted the potential cause of the incident, citing the following testimony obtained during the interview (2024: para 4.2.4.3). In the drying process, a malfunctioning dryer left the Beni-Koji from the affected batch undried for an extended period. Blue mould was discovered inside a fermentation tank lid, but quality control dismissed concerns. Additionally, a clogged exhaust duct may have led to poor ventilation in the production facility. Moreover, the quality control was almost entirely left to the on-site personnel, and a shortage of personnel was a common situation.

Kobayashi Pharmaceutical was widely criticized for its delayed disclosure (Inoue 29 March 2024). The company received six reports of serious health cases between January and February 2024 and had been advised by doctors to warn users of potential health risks. However, the company failed to issue an alert or report the matter to government authorities until more than a month later. Further criticism emerged in June 2024, when government authorities disclosed that 79 additional deaths had been reported as potentially linked to the product, marking a sharp increase from the previously acknowledged five fatalities (Inoue & Tang 2024).

The company was also criticized for its “dysfunctional” governance despite its idealistic appearance (*Mainichi* 2024). Questions have been

raised about the effectiveness of the board of directors. The health problems were officially disclosed to the independent directors only one day before the announcement in March. The governance problems were also highlighted in the board's post-crisis response. Despite the resignation of both the Chair and the President, the board decided that the Chair would remain as *Tokubetsu-Komon* (special advisor) (ibid). The company was criticized for appointing the advisor and paying JPY2 million in monthly remuneration (*Nihon Keizai Shimbun* 2024). This criticism is in line with the recent criticism over the practice of appointing advisors due to their undue influence over the company without authority and responsibility (Johnston & Miyamoto 2023: 287).

The ESG failures at Kobayashi Pharmaceutical have materialized various risks. The first is liability risk, according to the categorization in Sjåfjell (2020: 11). One of the users who allegedly suffered kidney problems sued the company for damages (Otake 18 September 2024). In Taiwan, where local manufacturers used Beni-Koji supplied by Kobayashi Pharmaceutical, a consumer advocacy group brought a class action, seeking damages of TWD170 million (*Japan Times* 28 September 2024). The company decided to compensate its users for damages related to the products (Inoue 8 August 2024). The second is the reputational risk (Sjåfjell 2020: 12). This is evidenced by the suspension of recruitment activities for students graduating the following year (*Japan Times* 3 April 2024). The last is policy risk. In the aftermath of the incident, the Government tightened regulations on the health food labels that the product carried. The regulations include reporting health problems and implementing higher quality management standards (*Japan Times* 31 May 2024). This policy risk materialized not only for the company, but for all companies involved in health foods with such labels as predicted by Sjåfjell (2022: 70). As a result, the profitability of Kobayashi Pharmaceutical's food business was affected. For the six months following the announcement, the company's net profit plunged by 81.7% from the same period a year earlier (Inoue 8 August 2024).

[E] WORKFORCE ENGAGEMENT IN JAPAN AND THE LIMITATIONS AND POSSIBILITIES OF ESG

Given the need for global harmonization to address ESG-related challenges (Reiser 2019: 131; Câmara 2022: 29), Japan is expected to adopt an approach to ESG rules and practices similar to that of other countries. Governments, the private sector, and scholars have collaborated to

align ESG frameworks internationally. Despite some differences in implementation, Japan shares several key ESG characteristics with other regions.

First, risk management is fundamental to the concept of ESG. This is in accordance with the observation made by Pollman (2024: 425) that ESG has evolved from an investment analysis tool for investors to a risk management strategy for investee companies. The case study above illustrates the potential consequences of inadequate risk management. Second, the justification for ESG is based on the expectation that taking ESG matters into consideration will improve performance at both the investor and investee company levels. It is anticipated that ESG will influence the decision-making processes at various levels, originating from investors, extending to investee companies, and even affecting businesses in supply chains. This aligns with the concept of the "cascade effect" of ESG, as postulated by Câmara (2022: 21). Third, Japan and other regions also share the same problems. One of the significant challenges in implementing ESG is ensuring the reliability and consistency of ESG disclosure (Pollman 2021: 662; Câmara 2022: 29).

Notwithstanding the apparent similarity, there are notable differences in the background of ESG. While ESG in the global context emerged as a voluntary initiative driven by institutional investors (Câmara 2022: 7), Japan's approach has been shaped to some extent by government policy. This has resulted in a reluctant stance in the Stewardship Code, which does not seek to advocate the sustainability of society but rather focuses on the sustainability of individual investee companies. This makes it challenging to pursue the sustainability of society regardless of the profitability of individual companies, which serves as evidence of the robust shareholder wealth maximization norm.

The robustness of shareholder wealth can also be observed in the detail of issues that ESG addresses. For example, workforce participation has been a major topic in ESG discussions in the UK (Johnston & Samanta 2024: 158). A key policy issue in UK corporate governance reform is how to amplify the voice of the workforce, including the potential appointment of non-executive directors from among employees. In contrast, in the United States, workforce engagement is treated as a human resource management issue overseen by the board (ibid: 176). Japan's situation is more nuanced.

In Japan, the issue of workforce participation is less frequently discussed, arguably because it is assumed that the voice of the workforce is adequately heard. This assumption is rooted in Japan's employment

and managerial market practices, where employees typically remain with the same company for an extended period. This lifetime employment practice serves to emphasize the notion of a company as a community of employees (Shishido 2000: 202). Japanese executives are often promoted internally, meaning the majority of corporate leaders have an employee background (Araki 2005: 27). These connections and shared interests between management and employees contribute to the perception that the voice of the workforce is heard (Sarra & Nakahigashi 2002: 339). Hideki Kanda (1992: 23) argues that Japan did not adopt the German co-determination system because the workforce were already the owners of the company. Kozuka (2021: 34) asserts that, in the context of the recession that began in the 1990s, prioritizing workforce interests has been viewed as a challenge to corporate profitability rather than a solution.

However, the assumption that workforce voices are adequately heard is flawed. Even before the economic downturn of the 1990s, employee representation primarily reflected the interests of male workers. Japan's remarkable pre-1990s productivity and stable employment conditions in large corporations were sustained at the expense of subcontractors, who in turn relied on low-paid female workers who would otherwise have been engaged in unpaid family work (Osawa 2020: 96). These female workers were systematically excluded from lifetime employment (Sarra & Nakahigashi 2002: 340; Gordon 2017: 15; Heinrich & Imai 2021: 83), and, as a result, their voices were not heard.

Furthermore, since the 1990s, the limitation of heard voices has broadened, reflecting the growth of non-regular workers. This category of workers includes part-time workers, hourly workers, fixed-term contract workers and dispatched workers (Gordon 2017: 9; Osawa & Kingston 2022: 129). Following the economic downturn in the early 1990s, large companies were compelled to downsize their redundant workforces. In response, many companies reduced the recruitment of new graduates, rather than dismissing existing workers, in order to maintain the practice of lifetime employment. Consequently, the scale of lifetime employees within companies diminished, forming a "small core" that remained to provide the internal managerial market (Ono 2010: 23). Since then, the labour shortage has been met on a large scale by non-regular workers, who serve as shock absorbers for economic fluctuations. As of 2023, non-regular workers account for 37% of all workers (Statistics Bureau of Japan 2024), leaving a significant portion of the workforce without a voice in corporate governance.

Researchers have identified a variety of social risks associated with the expansion of non-regular workers. These workers not only receive lower wages but also have limited access to social security and benefits (Fu 2021: 269; Heinrich & Imai 2021: 88; Osawa & Kingston 2022: 128). They are also excluded from the opportunities to develop their professional skills, which can result in a lack of skilled workers in the future as Matsui (2019: 45) indicated in the context of independent service providers. Some researchers even correlate the growth of non-regular workers with Japan's declining marriage and fertility rates (Osawa & Kingston 2022: 133; Gordon 2017: 10). All of these factors arguably contribute to depressing consumption and productivity, thereby undermining the sustainability of pension and health care insurance systems (Gordon 2017: 10; Osawa & Kingston 2022: 137). Ultimately, deteriorating labour conditions may give rise to the risk of societal breakdown (Sjåfjell 2020: 2).

While companies may partially bear such societal risks due to their potential negative impact on business performance, it is challenging to rely on the companies' voluntary commitment to tackle these issues. First, the voices of regular workers are already reflected, leaving non-regular workers in a vulnerable position, thereby rendering it particularly difficult for their voices to be heard. This difficulty is exacerbated by the exclusion of non-regular workers from trade unions, which are often organized within an individual company. Second, addressing the non-regular worker issue presents a free-rider problem. Improving working conditions could reduce short-term profitability, making companies hesitant to act. Additionally, executives who have spent their careers in the lifetime employment system may fail to recognize the long-term risks potentially caused by socially unfavourable, non-regular labour practices (Matsui 2019: 49). The question is what can ESG do to address such problems?

The Corporate Governance Code exerts a considerable normative influence, as many companies opt for compliance over explanation as Johnston and Samanta (2024: 175) asserted in the UK. Nevertheless, its perspective is somewhat limited in that the implementation of ESG is justified only when it contributes to profitability while laws in specific areas intended for the interest of a wider range of stakeholders often fail to facilitate companies' responsibility to internalize the cost of unfavourable management activities due to the political power of business. In contrast, the Stewardship Code can have a wider potential scope, particularly for universal owners interested in the sustainability of society. However, its normative force remains weak, and it offers limited guidance on concrete actions. This gap can be potentially addressed by laws in specific areas,

even without strong enforcement. Laws such as disclosure rules and obligations to make best efforts can express clear values, providing institutional investors with a framework for action and encouraging investor engagement, as shown in Section C. This engagement, in turn, has potential to shift executive perceptions of ESG-related risks, which may offer a way out of the impasse. A clearer articulation of societal sustainability within the Stewardship Code, rather than a narrow focus on the sustainability of individual companies, should serve to accelerate progress in this domain.

[F] CONCLUSION

A decade after the inclusion of ESG principles in the PRI, Japan has initiated actions in this area. The incorporation of ESG at both the investor and the investee company levels through the Stewardship Code and the Corporate Governance Code represents a significant step forward. Additionally, ESG-related rules are evolving in specific areas, including environmental, labour, and human rights law.

Despite this progress, the pace of evolution remains slow. The Stewardship Code places an emphasis on the sustainability of individual companies rather than that of society. ESG management is primarily required when it contributes to company profitability. The rules pertaining to specific areas are largely limited to non-binding guidelines or disclosure requirements (Kozuka 2019: 446). From an academic perspective, scholars are closely examining the evidence pertaining to the efficacy of ESG, with a particular focus on foreign developments (Matsunaka 2021; Kubota 2022; Okuno 2023). Japan is still awaiting a societal transformation where meeting ESG requirements results in profitability (Matsui 2019: 49). This represents the robustness of shareholder value norm.

Despite the robust shareholder value norm, ESG has the potential to offer a path out of the current impasse. Even without strong enforcement, rules in specific areas provide guidelines for investors and encourage investor engagement. This engagement potentially influences the perceptions of executives on ESG-related risks. However, it remains to be seen which types of laws are likely to be incorporated into investor engagement, and how this engagement will influence executives' risk perception.

Japan is gradually developing ESG rules and practices, but the path out of the impasse remains narrow. If the world must change together as Câmara and Morais (2022: ix) suggest, it is essential for every jurisdiction to attempt to change and share its experience. Such an approach will

facilitate a deeper understanding of the unique circumstances shaping ESG implementation in different jurisdictions.

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Ministry of Health, Labour and Welfare (MHLW) Ordinance on General Employer Action Plans based on the Act on the Promotion of Women's Active Engagement in Professional Life (MHLW Ordinance No 104 of 2022)

Principles for Responsible Investment (nd) "What Are the Principles for Responsible Investment?"

SSBJ Standards

Between Compliance and Commitment: Evaluating India's ESG Regulatory Framework

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Abstract

India presents a distinctive model in environmental, social, and governance (ESG) policymaking, characterized by a blend of mandatory corporate social responsibility (CSR) spending and structured ESG reporting obligations. Rooted in a history of state-led economic planning and stakeholder-oriented governance, India's ESG framework reflects a complex evolution from voluntary guidelines to enforceable mandates. Through mechanisms such as the Companies Act 2013 and the Securities and Exchange Board of India Business Responsibility and Sustainability Reporting (BRSR) framework, India aims to institutionalize sustainability and corporate accountability. However, this article argues that despite progressive regulatory intent, practical implementation falls short due to vague qualitative disclosures, greenwashing, insufficient enforcement, and a compliance-driven mindset.

Using case studies of four public sector undertakings—COAL India Limited, NTPC Limited, the Oil and Natural Gas Corporation Limited, and the Steel Authority of India Limited—the article conducts a textual analysis of BRSR environmental disclosures. Findings reveal that, while some companies demonstrate robust identification of environmental risks and mitigation strategies, others rely on rhetoric, omit critical risks such as carbon emissions, and lack measurable ESG goals or timelines. Director statements across companies are promotional rather than reflective, failing to acknowledge environmental challenges. Additionally, sustainable sourcing practices are weak, with little data on supplier assessments or integration of ESG criteria in procurement.

The article contends that India's ESG framework, while promising, suffers from limited accountability, greenwashing, and bureaucratic box-ticking. It calls for a cultural shift in corporate governance where ESG is central to business vision

and strategy, supported by stronger internal audits, clearer metrics, and meaningful stakeholder engagement. Lessons from India highlight the need for regulatory balance alongside genuine corporate responsibility.

Keywords: PSU ESG case studies; BRSR; mandatory CSR; India.

[A] INTRODUCTION

India has been at the forefront of innovative environmental, social, and governance (ESG) related policy-making. The unique feature of India's ESG regulatory structure is the focus on mandatory reporting frameworks as well as the compulsory corporate social responsibility (CSR) spending requirements. India has always recognized corporate accountability beyond shareholder interests, owing to its mixed model economy, strong urge to decolonize mercantilism, encouragement of market domination by its various state-owned enterprises (SOEs) until the 1990s and a strong leaning towards a planned economic model until the 2000s. Although rapid market liberalization happened between 1992 and 1999, India had laid a strong political-economy foundation of companies as being stakeholder-oriented although in practice it often devolved to crony capitalism.

India's ESG regulations also reflect this tension and transition between the urge of the policymakers to "control" the companies for equitable development and the liberal market forces which champion shareholder primacy. Like most jurisdictions, India started off with a voluntary ESG model through its "Corporate Social Responsibility Voluntary Guidelines" (hereinafter referred to as the "Guidelines of 2009"). By 2011, "National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business" (hereinafter referred to as the "Guidelines of 2011") introduced a structured approach for companies to adopt responsible practices. This was further reinforced by the Securities and Exchange Board of India (SEBI), the market regulator, which mandated the top listed companies to disclose ESG factors in their annual reports, progressing towards a comprehensive regulatory framework that emphasizes accountability to stakeholders and societal welfare. Moreover, the Companies Act of 2013 specified duties for directors and mandated CSR spending for larger companies, establishing a legal obligation rather than a voluntary one. The BRSR framework was also introduced, which incorporates both qualitative and quantitative disclosures, aimed at standardizing reporting practices. Yet the effectiveness of such measures is often hindered by vague reporting, lack of actionable commitments,

and inadequate oversight. Despite this structured approach, challenges remain in enforcement and accountability, management of SOE (also sometimes referred to as public sector units or PSUs), weak market governance and endemic corruption. There is a lack of a clear strategy and a unified vision of economic growth.

This article aims to find out how India's mandatory model of CSR spending and reporting fits with the voluntary nature of overall ESG regulations, it uses case studies to highlight how this has not worked as hoped and suggests clear recommendations for improvements. This article starts by tracing the evolution of ESG regulations in India, then focuses on the regulatory framework on ESG in India where it first looks at the corporate governance framework to check how it enforces ESG considerations through directors' duties and mandatory CSR obligations, and what are the implications for stakeholder accountability. The article then focuses on the securities law framework analysing how the regulations require companies to report on general company details, ESG risks, governance structures, and performance across nine responsible business principles, using both quantitative and qualitative data, while allowing cross-referencing with international frameworks and following a "comply-or-explain" approach. The article then briefly analyses the regulations around the Stewardship Codes and moves to the case studies. The research carries out a textual analysis of qualitative environmental disclosures in the BRSR sections of four Indian PSU annual reports, focusing on risk identification, ESG commitments and performance and qualitative disclosures.

[B] HISTORY OF ESG IN INDIA

As per scholars, Indian corporate law has always focused on holding companies accountable to constituencies other than the shareholder interest. However, explicit recognition of CSR happened in India in the Guidelines of 2009 by the Ministry of Corporate Affairs (2009). These guidelines encouraged Indian companies on a voluntary basis to undertake CSR activities that emphasized core elements of the policy such as care for all stakeholders affected by companies, ethical functioning, respect for workers' rights and their welfare, human rights, the environment, and social inclusion (2009: 11-12). Subsequently, in 2011, the Ministry of Corporate Affairs released the Guidelines of 2011 (2011). The Guidelines of 2011 revised the Guidelines of 2009. The new framework, applicable to all organizations irrespective of their size, sector, or location, adopted an "apply-or-explain" approach requiring companies to adopt nine principles of responsible functioning in their business activities such

as ethical, transparent and accountable functioning; sustainability; employee wellbeing; respect for all stakeholders including marginalized and vulnerable groups; respect for human rights; and protection and restoration of the environment (2011: 7-26). The Guidelines of 2011 introduced a structured business responsibility reporting (BRR) format requiring companies to make specified disclosures demonstrating adoption of the nine principles (SEBI 2012).

Beyond the framework envisaged under the Companies Act (that applies to all Indian companies), the SEBI in 2011 issued the BRR framework that made it mandatory for the top 100 listed organizations (by market capitalization) to prepare and include sustainability disclosures in their annual reports based on principles of transparency and accountability and encouraged organizations to adopt sustainable business practices (SEBI 2012). This framework, applicable to listed companies only, recognized their special status and obligation not just to their shareholders from a "revenue and profitability perspective" but also their accountability to the "larger society which is also its stakeholder" (SEBI 2012). The BRR disclosure requirement was eventually extended to the top 500 and top 1000 listed organizations (by market capitalization) in the financial years 2015–2016 and 2019–2020, respectively (SEBI 2019a). The BRR framework was subsequently subsumed under regulation 34(2)(f) of the SEBI Listing Obligations and Disclosure Requirements Regulations of 2015 (LODR Regulations) (SEBI 2019b).

In March 2019, the Guidelines of 2011 were revised and released as the "National Guidelines for Responsible Business Conduct" (hereinafter referred to as "NGRBC Guidelines of 2019") in light of international developments such as the United Nations (UN) Sustainable Development Goals (SDGs), the Paris Agreement on Climate Change 2015, and the UN Guiding Principles on Business and Human Rights (SEBI 2021a). In 2020, the Ministry of Corporate Affairs recommended the BRSR framework of reporting for listed and unlisted companies (2020). This framework, a revision of the earlier NGBRC framework, divided the reporting criterion into essential and leadership indicators.

In 2021, SEBI extended the BRSR framework to the top 1000 listed companies (by market capitalization) mandating such reporting from financial year 2022–2023 in the form and manner as specified under the SEBI LODR Regulations (SEBI 2021b). While the essential indicators are required to be mandatorily reported by all companies, the leadership indicators are reported on a voluntary basis (though listed entities must attempt to report them). The purpose of the revised framework was to enable

"quantitative and standardized disclosures" for ease of comparison across companies, sectors, and time (SEBI 2021a). The BRSR framework is also expected in the future to apply to non-listed companies, although they may make such disclosures under the current framework on a voluntary basis. India has thus come a long way from voluntary implementation of CSR guidelines to now mandatory reporting of ESG factors. See Figure 1 for a brief timeline of ESG regulations in India.

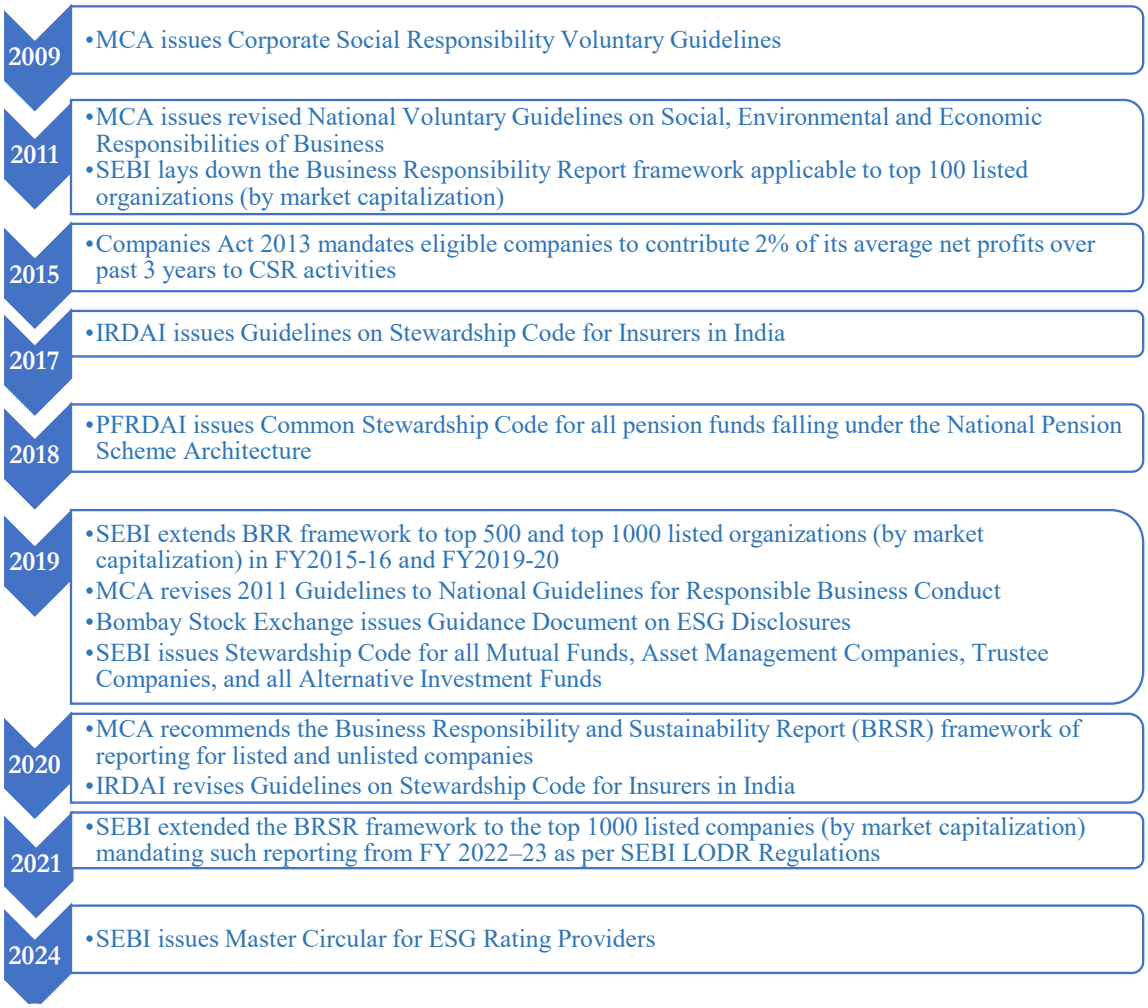

Figure 1: Timeline of the ESG regulatory framework in India.

[C] REGULATORY FRAMEWORK ON ESG IN INDIA

India does not have a single, national, codified law governing ESG. Broadly, it has opted for the path of regulation of ESG through several national legislations and policies such as the Environment Protection Act of 1986, the Factories Act of 1948, the Prevention of Money Laundering Act of 2002, the Companies Act of 2013 and the SEBI LODR framework. These enactments have together incorporated obligations for companies that together address matters of health and safety of workers, corporate governance, and environmental protection. Specifically, India has adopted a comprehensive approach to ESG with provisions under the Companies Act 2013, SEBI LODR regulations, and Stewardship Codes of regulatory agencies all addressing these factors. These laws require Indian company directors to adopt a "pluralist approach" and treat the interests of all stakeholders including shareholders at par with each other, without any hierarchy vis-à-vis the "enlightened shareholder value" approach followed in the United Kingdom (UK) that requires directors to consider non-shareholder interests for increasing shareholder value in the long run (Naniwadekar & Varottil 2017). The Indian laws cumulatively incorporate both the entity and financial models of ESG discussed below.

ESG reporting in India is done primarily under the financial regulation framework administered by the SEBI. However, the corporate governance legislative framework envisaged under the Indian Companies Act 2013 also addresses ESG factors and requires some reporting as part of this framework. While the latter framework applies to all Indian companies, irrespective of size, location, and sector, the former applies only to the top listed companies on Indian stock exchanges. Below, we investigate how the Indian corporate governance regulatory framework, the financial regulation framework, and the policies of sectoral regulators address ESG risks and concerns.

ESG and the corporate governance framework

ESG risks and concerns under the corporate governance framework are addressed through two key components: firstly, duties of directors of Indian companies; and secondly, the CSR framework that requires companies to undertake activities addressing ESG factors and to report regarding the undertaken activities.

ESG and CSR are believed to be sub-sets under the broader concept of sustainability that has focused on addressing externalities caused by

corporate activities vis-à-vis regulation or taxes. They are premised on the belief that financial regulation and corporate governance respectively can address externalities and create sustainable economic models, especially when global agreements on taxes and further regulation of corporations appears distant. While CSR activities and reporting focus on addressing externalities through board decision-making and director's duties (the "entity" model of ESG), ESG norms, on the other hand, emphasize the role of investors in creating sustainable entities (the "financial" model of ESG) by integrating ESG factors into portfolio construction and the investment process (MacNeil & Esser 2022). This process ensures that investors who are focused on financial risk and return can improve their investment returns in the long run by addressing the ESG risks of the firm. Thus, while the former framework relies on the leadership and decision-making of corporate boards for framing CSR policies and its implementation, the latter believes in the soft power of investors and capital to bring about behavioural change. Moreover, while the former framework employs non-financial reporting, the latter is supposed to be more geared towards metrics, benchmarks, and indices (MacNeil & Esser 2022).

The entity model of ESG lays emphasis on board decision-making and the impact of corporate activities on attaining sustainability for all stakeholders irrespective of the financial implications on the shareholders and investors. Umakanth Varottil demonstrates how post-decolonization, Indian corporate law transitioned from an early replication of English law (based on the nexus of contracts theory) that focused on the goal of shareholder maximization towards a framework of stakeholder theory (Varottil 2018). He argued that a shift towards the latter approach witnessed increasing questioning of the corporate purpose, the public nature of the firm, and the societal implications of a firm's actions. In fact, the Companies Act of 2013 explicitly cemented this theory by: a) incorporating this idea into directors' duties; and b) mandating provisions on CSR (Varottil 2018). Section 166 of the Companies Act 2013 lays down director duties. Specifically, section 166(2) requires directors of Indian companies to:

> 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, community and for the protection of environment.

The section does not emphasize any hierarchy of duties but only mandates the directors to consider all stakeholder interests while promoting the objects of the company. Varottil has later argued that section 166(2):

> resonates with the financial model of shareholder-driven ESG in that it requires directors to consider the long-term interests of the company rather than the short-term interests; and (ii) the provision also requires directors to specifically account for the interests of non-shareholder constituencies, which comports with the entity model of ESG (Varottil 2024).

Other than refining directors' duties, the Indian Companies Act 2013 also mandated CSR activities by Indian companies through the introduction of section 135 and the Companies (CSR Policy) Rules 2014. While in many jurisdictions, CSR works on principles of philanthropy and voluntarism, in India, this is a legal obligation. In fact, the CSR legal obligation as per practitioners resembles an "additional tax liability" on companies (Vasani & Kannan 12 May 2021). The Indian CSR regime vis-à-vis other jurisdictions has also been found to be rather "prescriptive" (Vasani & Kannan 16 February 2021) in nature with many detailed rules on what the scheme encapsulates, monitoring and compliance, and penalties for non-compliance (Varottil 2024).

Section 135 Indian Companies Act 2013, requires companies having net worth of INR 500 crore and above, or turnover of over INR 1000 crore, or a net profit of over INR 5 crore to constitute a CSR Committee. This committee is in turn required to formulate a CSR policy for the company and ensure the completion of activities under the policy. Schedule VII of the Companies Act 2013 provides a list of activities that may be undertaken by companies in fulfilment of their CSR obligations. The list of activities, though understood to be not comprehensive, addresses ESG factors including environmental sustainability; projects for employment-enhancing vocational skills; social business projects; and contribution to the Prime Minister's National Relief Fund or any other governmental fund for socio-economic development. All Indian companies are required to annually spend at least 2% of their average net profits made during the three immediately preceding financial years on such activities, failing which, they must contribute the amount to the Prime Minister's National Relief Fund or any other governmental fund mentioned under schedule VII. Additionally, defaulting companies and their liable officers can be subject to a maximum fine of INR 1 crore and INR 2 lakhs respectively.

The Indian CSR regime, originally a comply-or-explain one that required companies to undertake CSR activities or provide reasons for failing to do so (Vasani & Ors 2023), is now considered a "comply-or-pay" regime (Sharma & Kapoor 2022). It requires the board of directors of a company to provide reasons in its financial statements for not complying with the mandated spending. Inability to comply with the

mandatory rules not only attracts penalties for the corporates but also for the responsible individuals. The unspent money, irrespective of reasons for non-compliance, must be contributed to one of the funds listed in schedule VII of the Companies Act 2013. Transparency on undertaken activities and the monitoring of the law is ensured through the filing of CSR activity details annually in the MCA21 registry supplied by the Ministry of Corporate Affairs; and disclosures in the financial statements including non-compliance. Accountability of the CSR Committee and the board of directors, and provisions for audit of accounts of the company, supplement the mechanisms for monitoring of the law (Ministry of Corporate Affairs 2021).

While legislative provisions under the Companies Act mandate the consideration of ESG factors in corporate activities through director duties and CSR spending, the enforcement of these provisions by non-shareholder parties remains a dream. As argued by Varottil (2018), director duties (even though they require consideration of stakeholder interests) are a fiduciary duty that under common law is only owed to the company. Consequently, an action for breach of a fiduciary duty can only be initiated by the company. Moreover, while the option to initiate derivative action by non-shareholders is murky under Indian law (Pattanaik 2016),[1] the remedy of class action law suits available under section 245 of the Companies Act 2013[2] can also only be initiated by shareholders (Varottil 2018).

Thus, while the Indian corporate governance framework requires consideration of ESG factors in board decision-making, the enforcement remedies are only available to shareholders. Section 166(2) casts a duty on directors to consider the long-term interests and financial risks of the company along with the additional element of considering the interests of other stakeholders irrespective of financial implications. How the duties owed to different classes of stakeholders in cases of conflict *inter se* will be resolved remains to be seen. Moreover, as the CSR regime in India takes the form of an imposition of a 2% tax on corporates, its efficacy in creating a real behavioural shift of making businesses accountable for non-shareholder interests is mooted.

[1] Under Indian law, no statutory option is available to initiate derivative actions. Therefore, parties must rely on the broader common law remedy. Moreover, Indian law provides for institution of derivative actions by shareholders. No case has been brought before courts where institution of such an action by non-shareholders has taken place.

[2] The option to initiate a class action law suit is available under section 245 of the Companies Act 2013 to shareholders if the conduct of the affairs of the company in their opinion is being conducted in a manner prejudicial to the interests of the company or its members or depositors.

ESG and securities law framework

SEBI is the primary securities market regulator in India. It is also tasked with regulating market participants such as stock exchanges, brokers, mutual funds, and intermediaries. As per its mandate, in 2012, SEBI required the top 100 listed companies by market capitalization to include BRR as part of their annual reports. The BRR framework was broadly based on the nine principles set out in the Guidelines of 2011. In 2015, SEBI issued the LODR Regulations. The LODR Regulations extended the BRR framework to the top 500 listed companies by market capitalization. Later, SEBI amended the LODR Regulations including regulation 34(2)(f) to update the applicable framework from BRR to the BRSR which was in turn based on the NGRBC Guidelines of 2019 (SEBI 2021a). The revised framework became applicable from the financial year 2022–2023.

Regulation 34 of the SEBI LODR Regulations requires listed companies on Indian stock exchanges to send SEBI a copy of their annual reports which, amongst other things, must include the BRSR describing the initiatives taken by the listed entity from an ESG perspective as per the specified format. This requirement is applicable only to the top 1000 listed companies by market capitalization and from the financial year 2022–2023. Pursuant to the amendment in the SEBI LODR Regulations, SEBI has issued the BRSR format and a guidance note for clarity on reporting (SEBI 2021b). The BRSR Format encapsulates three key essential reporting criteria: general disclosures; management and process; and principal wise performance.

The general disclosures require essential information regarding the company including details of its business activities, geographical locations of its operations, details of employees, directors and key management personnel including number of males, females, other gender, and differently abled persons representation in these positions (SEBI 2021b). The general disclosures also require the companies to disclose some CSR information, complaints received from shareholders and other stakeholders such as communities, employees, investors, customers, and value chain partners (SEBI 2021b). This information must also include the number of complaints filed, complaints pending resolution from the previous year, its grievance redressal policy, and an explanation (where necessary) on reasons for pending complaints or information on the nature of the complaints (SEBI 2021b). Most importantly, companies must disclose "material responsible business conduct and sustainability issues pertaining to environmental and social matters that present a risk or an opportunity" to the company, the rationale used for identification of

the risk, mitigation measures adopted, and financial implications of the risk/opportunity (SEBI 2021b).

The section on management and process disclosures requires businesses to demonstrate the structures, policies and processes put in place towards adopting each of the nine NGRBC principles. Governance and leadership roles for implementation and oversight of the principles, performance of the company against each of the principles, and compliance with statutory requirements relevant to each of the nine principles must also be disclosed (SEBI 2021b). If any of the principles do not apply to the business of the company, they may also offer an explanation in the report.

The final section on principle-wise performance disclosure requires companies to reveal their performance on integrating of each of the nine principles and core elements in its key processes and decisions. This category requires mandatory disclosure of information sought in the "essential" criterion and voluntary disclosure of information sought in the "leadership" criterion for each of the nine principles (SEBI 2021b). The disclosure of information in the latter category, though only voluntary, can be a motivating factor for companies aspiring to score better than others in ESG rankings and improve their overall performance and appearance to stakeholders in their goal to be more responsible.

Importantly, the essential part of this section requires complete details of fines, awards and penalties paid by the company, its directors, and key management personnel to regulators, law enforcement authorities or judicial institutions including details of any anti-bribery/corruption actions, and cases involving conflict of interest. The provision on disclosure of penalties only requires details of those that are material. Materiality of information is assessed as per regulation 30 of the SEBI LODR Regulations. While what is "material" depends on the facts and circumstances, the regulations state that one of three factors can be used to assess materiality: a) if non-disclosure of information would result in discontinuity or alteration of publicly available information; b) if the omission would create significant market reaction; and c) if the information is material in the opinion of the board of directors.

Other than reporting of complaints received related to penalties, awards, and anti-corruption actions, companies are also required to disclose complaints related to human rights violations, employee/worker health and safety, sexual harassment, discrimination, payment of minimum wages, child labour, consumer complaints relating to data privacy, advertising, restrictive trade practices, energy and water consumption,

air and water emissions, waste management, and disability policy. Some of the disclosures require companies to also assess their value chain partners and provide relevant information regarding their compliance with the principles. For instance, a leadership criterion requires companies to disclose the percentage of their value chain partners that were assessed for environmental impacts.

Key features of the BRSR framework are that, firstly, the disclosures are a mix of not only quantitative but also qualitative inputs in the form of explanations, remarks, and summaries of corrective actions. Such inputs can promote complete transparency and a comprehensive understanding of the company's operations regarding the assessed criteria. Secondly, Indian law provides for interoperability, that is, if companies are making similar disclosures under other international ESG frameworks such as the Global Reporting Initiative, Sustainability Accounting Standards Board, Integrated Reporting, or the Task Force on Climate-related Financial Disclosures, then instead of making the same disclosure twice in the annual report, corporates may cross-refer to the relevant provision in the annual report. Thirdly, the framework adopts a comply-or-explain approach, that is, in case of inapplicability of certain provisions, companies must provide reasons to explain non-compliance.

Stewardship Codes

Stewardship Codes were introduced first in the UK in 2010 as regulatory instruments laying down a principles-based framework that is meant to aid institutional investors in fulfilling their responsibilities of protecting and enhancing their clients and beneficiaries thereby acting as "stewards" in enhancing corporate governance of investee companies (Jubb & Mohanty 2017). Such codes have now found their place in Indian regulatory frameworks. The Insurance Regulatory and Development Authority of India (IRDAI) introduced its Stewardship Code in 2017 which was subsequently revised in 2020. Soon after, the Pension Fund Regulatory and Development Authority (PFRDA) introduced a code in 2018. Later, SEBI introduced a Stewardship Code in 2019 for all mutual funds, asset management companies, trustee companies, and alternative investment funds, which was revised in 2021, and also mandated mutual funds to vote on all resolutions from 2022.

Each of the Stewardship Codes lays down seven principles that institutional investment firms must consider for bringing about overall improvement in corporate governance of the investee firms, especially through their voting decisions. A key component of the principle is regular

monitoring of the investee companies for factors such as the quality of company management, corporate governance matters, and risks including ESG risks to the company. Moreover, the codes require investors to lay down clear policies on intervention in the investee company and collaboration with other institutional investors for ultimate protection of investors on a range of matters including corporate governance, ESG risks, litigations and so on. The codes encourage institutional investors to take voting decisions only after independent and comprehensive analysis of company activities vis-à-vis mindless obedience to management decisions.

While Stewardship Codes have been introduced by various Indian regulators mandating consideration of ESG risks by institutional investors, questions regarding their efficacy remain. Mandal (2022) argues that Stewardship Codes in India have an "otiose existence". Absence of an enforcement mechanism makes them a soft-touch, market-invoking regulatory tool that can only lead to a tokenistic approach to compliance (Mandal 2022). Jubb and Mohanty (2017) argue that Indian regulators must adopt strong encouragement and exhortatory measures—naming and shaming institutional investors for their failure to provide adequate transparency in their stewardship measures—for ensuring compliance with the Code. Thus, it remains to be seen if the Indian Stewardship Codes will succeed in influencing investor decisions and subsequently improve corporate governance or continue to have tokenistic existence in the Indian regulatory framework.

[D] CASE STUDIES ON ESG REPORTING BY PUBLIC SECTOR UNDERTAKINGS ON ENVIRONMENTAL MATTERS

For years, the shareholder primacy theory was the dominant philosophy in the Anglo-American model of company law (Easterbrook & Fischel 1989; Gelter 2009; Keay 2010). Hansmann and Kraakman (2001) have demonstrated that the shareholder-oriented model of a company that incorporates all features of legal personality, limited liability for owners, shared ownership by investors, delegated management, and transferability of shares came to be the dominant model adopted by developing economies partially because of the failure of alternative models of the corporation such as the manager-oriented model, the labour-oriented model, and the state-oriented model. Company law thus became to be perceived as a tool enabling businesses to further the private interests of their shareholders with profit maximization as the goal. The stakeholder theory, in contrast, requires companies to consider the interests of all stakeholders beyond

shareholders in its decision-making (Dodd 1932; Keay 2007). This theory requires the consideration of non-financial performance and non-shareholder interests such as those of employees, workers, and the environment to be important in the functioning of the company.

The quest to make corporations change focus from the single approach of profit maximization to the triple focus of "people, planet and profits" (that is corporations must aid societies to achieve the three inter-linked goals of economic prosperity, environmental protection, and social equity) has focused on multiple methods of achieving this (Elkington 1998). Chiefly, reorientation of directors' duties from shareholder value maximization to stakeholder interest, mandating CSR activities, ESG reporting, and Stewardship Codes of regulators are ways of shifting the orientation of firms to stakeholders. The Indian law on companies has also, through the recent codification of directors' duties, mandatory spending on CSR activities, enactment of ESG reporting for listed companies and Stewardship Codes, focused on holding companies more accountable to people and the planet. Despite the noble objectives, each of these methods have been criticized by scholars for their effectiveness, emphasizing their obvious shortcomings such as lack of enforcement options by persons other than the shareholders. The ESG reporting framework in India is considered one of the methods of exerting pressure on corporations by institutional investors, especially foreign ones, and makes them more accountable to non-shareholder constituencies. The Indian framework is recent and perhaps far from perfect. In this section, the authors undertake content analysis of BRSR reports of four PSUs as case studies to highlight the limitations and shortcomings of the ESG reporting legislative framework in India. Importantly, this analysis is being conducted with regard to reporting on environmental matters only in the BRSR reports.

Introduced under the leadership of India's first Prime Minister, Mr Jawaharlal Nehru, PSUs or governmental companies are government-owned companies where at least 51% of the paid-up share capital is owned by state or national or state and national governments together. Post-independence, they were conceptualized under India's second five-year plan and the Industrial Policy Resolution of 1956 to further India's industrialization agenda and fuel economic growth. They perform commercial functions, keeping in view public welfare. It is often said that PSUs in India concentrate less on the idea of profit-making and more on their social obligations (Kumari 2019). Kansal and colleagues (2018) state that PSUs in India "develop public infrastructure, create employment and offer essential services to the society even if they are unprofitable for

the organisations". They make significant contributions to the social and economic environment of the country through employment generation and hiring—especially from disadvantaged sections of the society—inclusive growth, development of townships and civic amenities for employees—especially when industries are located in remote geographical locations—and thereby address inequities (Kansal & Ors 2018). In fact, the Planning Commission of India in 1951 in its first five-year plan deliberating on public-sector enterprises emphasized:

> The raison d'etre of a planned economy is the fullest mobilisation of available resources and their allocation so as to secure optimum results. The problem of how this has to be brought about when the economy functions partly through private enterprise motivated by profit expectations and partly through Government ownership and direction deserves careful consideration. For the private sector, the prevailing price relationships are the prime factor in determining resource allocations. In the public sector, the direction of investment need not always and necessarily be guided by the profit-and-loss calculus (1951: chapter 2).

Since public interest and welfare has always remained a key goal of PSUs vis-à-vis private companies, the study of BRSR reporting in the context of PSUs becomes an interesting question. Given their public nature and enhanced transparency and accountability duties to the public, their BRSR reporting assumes further importance. Quality reporting by PSUs legitimizes their existence to the public and other stakeholder groups. The assumption behind inclusion of this choice is that such companies' historical and continued focus on public welfare would make them more cognizant of ESG concerns and risks and consequently better at reporting. In fact, prior research demonstrates that companies in the public sector disclose more information than companies in the private sector (Mahadevappa & Ors 2012). The authors analysed the BRSR reports contained in the annual reports (2023–2024) of four PSUs namely, COAL India Limited (CIL), the Oil and Natural Gas Corporation Limited (ONGC) Limited, SAIL, and NTPC Limited (formerly known as National Thermal Power Corporation) which are all listed on Indian Stock exchanges and in the top 1000 market capitalization category.

Another reason for the choice of the PSUs is their impact on the environment. As of 2020, India ranked third (behind China and the United States (US)) in the list of highest greenhouse gas (GHG)-emitting countries (US Energy Protection Agency 2023a; 2023b). India's GHG emissions increased from 3242.05 $MtCO_2e$ in 2017 to 3419.89 $MtCO_2e$ in 2021 (ClimateWatch 2021). These GHG emissions have also been responsible for driving climate change with 60% of GHG emissions being

emitted by 10 countries including India (ClimateWatch 2021). As per reports, the stark rise in carbon dioxide (CO_2) emissions in India was due to growth in coal use for electricity generation and partly because of decline of renewables (IEA 2021).

In 2017, a Thomson Reuters report titled "Global 250 Greenhouse Gas Emitters" found that a small group of companies across the world was responsible for one-third of global annual emissions (DTE 2017). The report was released prior to the UN Climate Change Conference (COP23) at Bonn, and it revealed the names of four Indian companies namely CIL, NTPC, ONGC and Reliance Industries that comprised the top 250 list (DTE 2017). In fact, CIL alone was responsible for emitting approximately 86% of the country's total CO_2 emissions in 2016 (2014 $MtCO_2e$) (DTE 2017). The Thomson Reuters report also argued that without emission reductions from the group of highlighted companies, fighting climate change risks would not be feasible. The four PSUs selected for the study thus makes them ideal for this exercise. Incidentally, all four are Maharatna Companies—a title given to PSUs considered jewels for their pivotal role in the country's economic growth and global competitiveness. The insights from the paradigmatic case studies on environmental reporting will be ultimately helpful in improving the ESG regulatory framework in India specially in the context of PSUs.

Case study 1: COAL India Limited

CIL was established in 1975. It is a state-owned coal-mining company engaged in the production of coal and coal products. With pan-India operations, it provides coal to state, central government-owned power-producing companies and private power companies. Additionally, it supplies coal, used as raw material and fuel to industries such as cement, steel, aluminium, and others (CIL 2024). The administrative control of CIL rests with the Ministry of Coal. See Table 1 for the shareholding pattern of CIL.

As per the US Environmental Protection Agency (2023b), India is the world's second largest producer of coal and ranks third in global emissions from coal-mining. Emissions were estimated to be 22 $MtCO_2e$ in 2020 and are expected to reach 45 $MtCO_2e$ in 2050. As per reports, 56.3% of India's total primary energy consumption comes from coal, and coal production in the country increased by 44.1% between 2009 (497.64 million metric tons) and 2017 (717.18 million metric tonnes), and coal consumption increased by 76.7% over the same period (Global Methane Initiative 2020). This was coupled with natural gas production decrease

by 33% during the same period. As per Global Methane Initiative reports (ibid), the Government of India completely controls production of coal in India with 84% of all coal produced by CIL.

Other than carbon dioxide, India is also the largest emitter of sulphur dioxide (SO_2) in the world. It emitted approximately 11.2 million metric tons of the gas in 2022, accounting for almost 16% of global SO_2 emissions (Tiseo 2022). As per analysis done by Center for Research on Energy and Clean Air (Manojkumar 2024), the rising air pollution in North India in November 2024 was more due to thermal power plants in the region that released heavy amounts of SO_2 rather than stubble-burning by farmers. Despite rising SO_2, installation of flue gas desulfurization systems, which filter SO_2, has not been done by the Government of India in these power plants. The Union Power Ministry over the years has sought multiple requests from the Environment Ministry to extend the deadline for compliance for SO_2 emissions by thermal power plants (Verma 2024).

Case study 2: NTPC Limited

NTPC was established in India in 1975 and is engaged in the generation and distribution of electricity to state-owned electricity distribution companies, and power departments in India, Bangladesh and Sri Lanka. As per its 2023–2024 *Annual Report* (2024), it is the largest power company in India with almost 83% of power generated from coal whereas gas, hydro, solar and wind contribute to 6.47%, 2.76%, 1.22% and 0.08% respectively of the total power generated by the company. Its administrative control vests with the Ministry of Power. NTPC also appeared in the list of top 100 most polluting companies emitting 185.6 $MtCO_2e$ in 2016 (DTE 2017). Environmentalists have accused the Government of far less stringent regulatory enforcement of thermal power companies like NTPC despite the significant health and environmental impact caused by them (Manojkumar 2024). Others have also accused NTPC and CIL of "lobbying government to weaken pollution regulations" specially that curb ash fly (a by-product from coal-fired power plants) that can be reduced by a process known as utilization wherein the product can be recycled into products like bricks, cement sheets, panels and other construction materials (Deshmane 2024). They also argue that instead of installation of utilization processes, companies are instead lobbying for lax regulations to avoid penalties by pollution control boards. See Table 1 for its shareholding pattern.

Case study 3: Oil and Natural Gas Corporation

ONGC was founded in 1956 and is engaged in the production of crude oil, natural gas, and liquid petroleum gas. It supplies crude oil to refineries engaged in refining of crude oil and marketing of petroleum products in India such as the Indian Oil Corporation Limited, Bharat Petroleum Corporation Limited, and Gas Authority of India Limited. ONGC is the largest government-owned oil and gas explorer and producer in India. Like CIL and NTPC, ONGC also appears in the list of top 100 most polluting companies that emitted 149.8 $MtCO_2e$ in 2016 (DTE 2017). Administrative control over ONGC lies with the Ministry of Petroleum and Natural Gas. See Table 1 for its shareholding pattern.

Case study 4: Steel Authority of India Limited

SAIL was founded in 1973 and is the largest steel-producing company of India. As per its 2023–2024 *Annual Report* it supplies steel to government organizations, PSUs, private companies, distributors, and resellers in India and overseas. It has joint ventures with NTPC and a subsidiary power supply company in Bokaro for meeting the energy needs of its steel plants throughout India. Its administrative control vests with the Ministry of Steel. See Table 1 for its shareholding pattern.

PSU	Foreign institutional investors	Domestic institutional investors	Promoters	Public	Others
CIL	9.16%	22.57%	63.13%	5.13%	0
ONGC	8.12%	29.3%	58.9%	3.7%	0
SAIL	2.8%	16%	65%	16.2%	0
NTPC	18.6%	26.6%	51.1%	3.7%	0

Table 1: Shareholding pattern of selected PSUs as of September 2024.

[E] ANALYSIS AND RECOMMENDATIONS

The researchers conducted a textual analysis of qualitative environmental information provided in the BRSR sections of the annual reports of the four companies. Under section A of the reporting framework, the researchers analysed criterion 24 which requires companies to identify risks and opportunities to the business, the rationale for the identification, its approach to adapt or mitigate the risk along with its financial implications. Thereafter, we analysed the reporting criteria 5, 6 and 7 under section B that requires companies to list their specific ESG commitments, goals and targets with defined timelines, and performance

against these timelines. Further, we analysed the statements issued by the company director, responsible for BRSR reporting. The analysis was conducted to investigate if companies were highlighting ESG-related challenges, targets, and achievements and to what extent. Finally, the researchers analysed qualitative information contained in principles 2 and 6 of the reporting framework. The following are our findings.

i) Identification of ESG risks or opportunities

The researchers found that while ONGC conducted a comprehensive analysis of its operations and identified several environmental risks to its business, others adopted a random approach to risk identification. For example, NTPC did not identify risks/opportunities under each of the three categories and instead listed two risks and two opportunities overall. Moreover, when it comes to identification of risks to business, many companies seemed to not address the question of rising carbon emissions and instead focused on air emissions and climate change. CIL, for example, recognizes air emissions as a risk category, however, when it comes to providing a rationale for its identification, the focus is on other gases such as nitrous oxide and SO_2 with no mention of the company's carbon footprint. Given that CIL alone was responsible for emitting approximately 86% of the country's total CO_2 emissions in 2016 and even later, there is no identification of this factor as a risk. Similarly, NTPC identifies climate change and water security as environmental risk concerns but there is no mention of carbon emissions and air quality problems as risks emanating from massive power generation through coal-based thermal power stations. The BRSR framework gives companies the flexibility to identify risks relevant to their businesses. However, this flexibility can be exploited for overlooking important risks for which the companies may have no answer. A consequence of non-identification of important risks is that companies also chose to not focus on adaption/management techniques.

ii) Rationale for identification of risks/opportunities

The rationale offered for identification of the risk is sometimes short, vague, and brusque. For instance, CIL identifies "GHG Emissions/Climate Change" as a risk. Instead of providing a description on the impact of GHG emissions and climate change on the company's operations, it states: "Impact of climate change has increased in frequency and severity over the years and has become an emerging global risk" (CIL 2024: 5). CIL reporting is silent about how this risk affects the company or *vice versa*. In contrast, ONGC not only successfully identifies various classes

of environmental risks and opportunities such as climate change and energy transition, energy emission, low carbon and sustainable products, air quality, water management, waste management and so, but it also provides a rationale that describes its importance for the oil and gas industry, pressure from governments and investors for reductions of GHGs, how the risk could significantly affect its "assets, disrupt supply chains, impair economic performance, and influence consumer demand". On energy emissions as a risk, it highlights strategic challenges, such as "increasing pressure to decarbonize its value chain to retain its social license to operate". NTPC has also identified regulatory risk in the form of an anticipated carbon tax/cess due to rising climate change concerns (ONGC 2023-2024: 102).

iii) Mitigation or adaption approaches to identified risks/opportunities

While all companies only offered explanations when the impact of the risk was negative to the company's operations, ONGC not only clearly spelt out approaches for mitigation and adaption of risks but also goals for adapting in cases where opportunities with positive impact on the company's work could be identified. Moreover, while most companies sometimes state the rhetoric to avoid actual discussion on work done for mitigating the risk, others such as ONGC highlight specific steps. For example, in case of risk from GHG emissions and climate change, CIL's mitigation approach is largely rhetorical with no specifics or details on types of technologies and where they have been employed, considering their pan-India operations. It states (CIL 2024: 5): "The Company focuses on the importance of GHG reduction and effective utilization of energy by selecting appropriate environmentally friendly technologies." Such statements attempt to greenwash investors by presenting an environmentally responsible public image of the company when the emission disclosures in the same report point to increasing GHG emissions every year and reveal a different story. Moreover, the disclosures do not tell investors anything about the types of technologies used and in which plants/operations. In comparison, on air quality risk, ONGC lists four ways it is mitigating the problem, which are "by monitoring air quality around operational sites, monitoring fugitive emissions and VOC emissions, reducing flaring through technology like flare gas recovery units, and using cleaner fuel for power requirements". The latter description gives readers clearer understanding into ONGC's strategy, goals, and process for overcoming the risk (ONGC 2023-2024: 113).

Another problem in reporting that the researchers discovered is that companies may choose silence when the emerging threat is a grave one. For example, CIL clearly identifies risk to its business emanating from its dependence on coal for energy and less on renewable and clean energy. Given India's commitment to achieving net zero emissions promised under the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (at COP27), CIL faces pressure to transition to more sustainable alternatives and address environmental concerns. However, it provides no mitigation strategies for addressing this major business risk. The silence may hint at grave problems within the company and the Ministry of Coal with whom its administrative control lies. Given the company's public nature and Maharatna status, the silence could signal many things including inability to manage the company, its unsustainable future, and disinterest by the Government in pursuing climate change at ground level versus on paper. However, the silence also raises a pertinent question regarding the reporting framework—can the BRSR reporting framework be effective in addressing ESG concerns if companies choose not to provide qualitative inputs on approaches to mitigate risk or at best greenwash using rhetoric language?

iv) ESG-related specific commitments, goals and targets of companies with defined timelines and performance

The researchers found that reporting on commitments, goals and targets of companies was done in a random fashion. While NTPC has aligned its goals to the NGRBC principles, it has not identified goals under all the nine principles. Moreover, one goal is repetitive, appearing under two different principles. For example, its commitment to reduce fatality to zero appears as a goal under principles 2 (provision of goods and services in a safe and sustainable manner) and 3 (promotion of wellbeing of employees and those in the value chain). While such tactics exhibit a lackadaisical approach to reporting, they also point to lack of specific commitments, goals and targets undertaken by the company.

Of the companies studied, mostly no timelines with yearly targets were created for achievement of the goals. Many targets and goals appear to be mandatory commitments identified under statutory or international law. For example, ONGC has identified its commitment to provisions in the Companies Act 2013 and the SEBI LODR Regulations, achieving a net zero target by 2038 in alignment with the Paris Agreement's goal of reducing global warming by 1.5°C, UN SDGs, commitment to the

Zero Routine Flaring initiative of the World Bank, and the Oil and Gas Decarbonization Charter 2023 at COP 28 with no clear yearly targets. Consequently, the section on performance against the identified goals and targets refers readers to other sections of the report with no clear picture on the questions asked (ONGC 2023-2024: 116-117). The BRSR framework allows companies to refer to other sections of the report where the information may be repetitive. However, this flexibility in reporting can be misused for evading clarity on yearly performance of the company against the stated statutory and international law commitments as finding information (against the relevant commitment) becomes almost impossible.

Apart from the problem of identification of fewer goals and jumbled goals, researchers also noticed that sometimes progress on all target/ commitments is not provided. Moreover, none of the companies provided any information on goals not met or reasons for delays in achievement. CIL, for example, reported progress only on five items against eight goals identified. Information on past progress was also not provided to help compare annual progress. Moreover, the company provided no reasons for goals not met or delays against the stated commitments (CIL 2024).

v) Directors' statements on ESG-related challenges, targets and achievements

A common trend in all directors' statements is that companies can decide what to report and what is reported is mostly self-serving. None of the statements identified any challenges and focused on achievements only. For example, CIL director statements emphasized the company's commitment to India's Intended Nationally Determined Contributions under the Paris Agreement but showed no path for achieving it or integrating this in its long-term and short-term goals and strategies. The comment only identifies key work done on environmental matters, such as installation of solar projects, environment-friendly transportation, tree plantation, and future efforts to develop additional eco-parks, tourism sites, and eco-restoration areas by 2029 (CIL 2024). Similarly, NTPC director's letter to shareholders highlighted achievements and installations only (NTPC 2023–2024). Much of the language is meant to instil consumer confidence and is promotional. None of the four company's director statements addressed the short-term, medium-term, and long-term strategy on managing the significant environmental and social impacts that the organization causes, contributes to, or that are directly linked to its activities, products, or services. While three of the four companies investigated were top 250 global emitters, the problem of air emission or

efforts to mitigate air emissions were not addressed in any of the director statements. The directors instead diverted attention on green initiatives such as tree plantations, development of eco-parks, and solar power and LED light installations signalling a "licence to pollute" approach. The researchers also found use of platitudes in director statements. For example, CIL's director statement stated the company's vision of "the development of local regions, promoting community growth, prioritizing employee wellness, endorsing quality education, ensuring accessible healthcare, and safeguarding biodiversity" (CIL 2024: 10). The report, however, did not discuss any initiatives in many of the above-mentioned areas or provide references to demonstrate the work done.

vi) Sustainable sourcing

Principle 2 (businesses should provide goods and services in a manner that is sustainable and safe) of the BRSR framework requires companies to identify if they have procedures for sustainable sourcing and the percentage of inputs that were sourced sustainably by the company during the financial year. Sustainable sourcing means the integration of social, ethical and environmental performance factors into the process of selecting suppliers (SEBI 2021b). The SEBI Guidance Note for BRSR format indicates that companies must indicate what proportion of their inputs (by quantity or value) are sourced from suppliers who are either covered by the company's sustainable sourcing programmes and/or are certified with social and environmental standards such as SA 8000, ISO 14001, OHSAS 18001 or others. Sustainable sourcing was a problematic area for all four PSUs. While CIL identified a set of board-approved environment and sustainability policies that are applicable throughout its value chain, it did not provide information on percentage of inputs that were sourced sustainably. Moreover, on the question of disclosure of percentage of value chain partners that were assessed for environmental impacts, the company did not reveal any data but only stated: "The company takes all the necessary steps to Evaluate its value chain partners" (CIL 2024: 10). It appears that CIL assumes that creation of policies would automatically make all inputs sustainably sourced. Moreover, instead of providing quantitative data on percentage of suppliers, it preferred to instead provide self-serving, confidence-inducing statements.

Further, the authors note that neither NTPC nor ONGC had any criterion for sustainable sourcing. NTPC justified its stance on the ground that its procurement anyway comes from "big PSUs/MNCs who are ESG compliant and disclose their sustainability performances in public domain" (NTPC 2023–2024: 268).

While SAIL practised sustainable sourcing through implementation of environment management systems and provided certifications for its plants and major mines/units, on the issue of procurement of coal it stated that such procurement was done from "international markets of the advanced economies which are compliant with the global sustainable standards. Other inputs like iron ore, Limestone etc. are all sourced from organizations having robust ESG practices." Its response to the question to disclose any significant adverse impact to the environment arising from the value chain of the entity was that: "We have not identified any significant impact arising to the environment, arising from the value chain of SAIL." Further, its response to the question to disclose the percentage of value chain partners that were assessed for environmental impacts, the company revealed that it had not conducted assessments of its value chain partners for their environmental impact. Similarly, ONGC and NTPC also revealed that they had not conducted any environmental assessment of their value chain suppliers. The authors therefore note that all four PSUs views on sustainable sourcing are that it is a mere checklist. A comprehensive view of sustainable sourcing would require companies to put in place measures for selecting suppliers with good ESG scores, however, the companies instead pass the buck onto others. This is done through explanations such as the suppliers (whether domestic or international) themselves make ESG disclosures, and therefore the products and services are *ipso facto* sustainably sourced. Perhaps the framework requires an amendment casting a duty on companies to not only disclose their selection criteria but also consider ESG scores while choosing suppliers. Without such a duty, the companies' outlook towards sustainable sourcing will be a mere checklist wherein it champions green causes on paper but makes practical choices based on convenience and economics over sustainability.

vii) Quantitative vis-à-vis qualitative reporting

The authors note that overall quality of reporting where quantitative data was required to be disclosed was better than where qualitative data was required. For example, where disclosures were required on energy consumption (from renewable and non-renewable sources), water discharge (with or without treatment), details of air emissions and GHG emissions, waste management, and so on, all companies provided the requisite data. This data was also simpler to understand since it was required to be reported as per the format supplied by SEBI with specific sub-criteria on reporting clearly laid out. In comparison, qualitative data suffered many times from self-serving, promotional, vague language, and greenwashing attempts.

[F] CONCLUSION

While India's ESG framework represents a progressive step towards integrating sustainability into corporate governance and investment decisions, its practical execution reveals significant shortcomings. PSUs, despite their public welfare mandate, often fall short in addressing key environmental risks and providing transparent reporting. The emphasis on compliance over genuine stakeholder engagement and the lack of enforcement mechanisms for non-compliance raise questions about the efficacy of the current model. While companies like ONGC provided detailed insights on environmental risks, rationale, and mitigation strategies, others like, CIL and NTPC, offered vague, rhetorical, or incomplete information, often omitting major concerns such as carbon emissions despite their relevance. ESG goals were reported inconsistently, with few clear timelines or performance tracking. Director statements tended to highlight achievements while omitting key challenges, often using promotional language rather than addressing strategic environmental issues. Sustainable sourcing practices were also poorly reported, with companies failing to provide quantitative data or conduct environmental assessments of their value chain partners, often justifying compliance based on the ESG credentials of suppliers rather than internal screening. Overall, while companies adhered better to quantitative reporting due to prescribed formats, qualitative disclosures frequently suffered from vagueness, lack of transparency, and attempts at greenwashing. The flexibility of the BRSR framework, especially for qualitative disclosures, allows companies to avoid addressing significant ESG issues, thereby undermining the framework's potential effectiveness.

Learning from India's approach, other countries can consider the balance between regulatory frameworks and corporate accountability while ensuring that ESG reporting translates into meaningful action and stakeholder benefits rather than mere compliance. Internal audits should be strengthened to flag issues relating to greenwashing and box-ticking approaches. Outsourcing ESG is not the solution, a cultural shift of intrinsically tying ESG issues to companies' vision and strategy along with allocation of appropriate resource is required.

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Sustainability in Tandem: Navigating the Dual Jurisdictions of ESG Across Mainland China and Hong Kong amid Outbound Expansion

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Abstract

This study explores the evolution of the environmental, social, and governance (ESG) regulatory frameworks of Mainland China and Hong Kong with a focus on their implications for Chinese companies' outbound expansion. While Mainland China's ESG development is driven by government policies and top-down mandates, Hong Kong adopted a market-oriented model that aligns closely with global standards. Through a comparative review of ESG regulations and qualitative case studies, most notably Geely Automobile Holdings Limited, this study demonstrates how companies strategically navigate the tension between domestic compliance and international ESG requirements. The findings highlight the critical role of dual adaptation, wherein firms comply with both Mainland China's policy mandates and global market-driven ESG norms, fostering resource consolidation. By examining the regulatory differences between Mainland China and Hong Kong, this study also provides key public policy implications for improving cross-border ESG coordination. The results highlight that regulatory harmonization and effective stakeholder engagement mechanisms between the two jurisdictions play a crucial role in fostering sustainable business practices, enhancing the global competitiveness of Chinese firms, and strengthening policy consistency.

Keywords: ESG regulations; Mainland China; Hong Kong; outbound expansion; sustainability.

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[A] INTRODUCTION

Environmental, social, and governance (ESG) principles have become a cornerstone of responsible businesses as a tangible manifestation of globalization's core values (Maniruzzaman 2004; Shen & Ors 2023). As Chinese economist Wu Xiaobo (2024) aptly observed: "Globalization is fundamentally a value system, not merely an expansion of business operations. It embodies universal principles of the free flow of talent and capital, which are defining the features of modern civilization." ESG frameworks have emerged as critical enablers for businesses to align with these values, guiding companies to transcend borders and resonating as a common language with a wide array of global stakeholders (X Wang & Ors 2024). For businesses seeking to expand outside their home markets, adopting robust ESG practices is both a regulatory requirement and a strategic imperative to ensure long-term success in an increasingly scrutinized global landscape.

The economic downturn put pressure on Chinese firms to extend their footprint beyond the domestic market (Y Wang & Ors 2020). Leading technology firms Huawei and Tencent have expanded their global presence by investing in foreign markets and research and development centres overseas. High-tech manufacturing companies represented by BYD have established manufacturing plants in Thailand and Brazil to capitalize on the growing demand for electric vehicles. Finally, the national Belt and Road Initiative (BRI) strategy has enabled more outbound activities of Chinese companies. For example, state-owned enterprises in the energy and infrastructure sectors (eg China National Offshore Oil Corporation and China Communications Construction Company) have extended international projects as government agencies.

In this collective internationalization effort, incentivized by both business logic and policy mandates, Chinese companies increasingly target Hong Kong as an international station with unparalleled advantages channelled by the "one-country, two-systems" structure (Holliday & Wong 2003). As an international financial hub, Hong Kong has a robust legal framework and deep integration with global markets. Hong Kong's alignment with international regulatory standards and practices positions it as a gateway that links Mainland Chinese firms to global stakeholders, particularly investors.

Unlike the earlier phases of globalization in the 1990s and 2000s, which focused primarily on cost efficiency and production scalability, the current wave of internationalization presents unprecedented challenges driven by the consolidated core value of globalization (Yin & Jamali 2016).

Stakeholders now prioritize diverse pressing social and environmental issues, such as ecological sustainability, labour rights protection, and community engagement (Gunningham & Ors 2004). For Chinese companies expanding overseas through Hong Kong's strategic gateway, developing robust ESG strategies that reflect these values is essential to gain legitimacy and recognition on a global stage and facilitate successful internationalization.

Thus, by implementing ESG practices, companies inherently align with such global standards (Murè & Ors 2020), reduce their reputational risk (Sullivan 2016), and enhance their attractiveness for international audiences, including investors (Amel-Zadeh & Serafeim 2018), financial institutions (Chatterjee & Lefcovitch 2009), governments (Baratta & Ors 2023), and local communities (N Wang & Ors 2024). Therefore, it is crucial for Chinese companies to leverage Hong Kong's unique position to detect the shift in the institutional logic of ESG regulatory frameworks from Mainland China to Hong Kong.

This research presents a systematic review of the ESG regulatory environments in Mainland China and Hong Kong, with an emphasis on jurisdictional frameworks, reporting standards, and stakeholder management mechanisms. This review highlights the synergies and divergences between the two systems, providing insights into how each jurisdiction shapes corporate ESG adoption and facilitates outward expansion. Additionally, this study presents a trend analysis of ESG performance among Mainland Chinese and Hong Kong companies listed on the Hong Kong Exchange from 2017 to 2022. This analysis is complemented by an in-depth case study of Geely Automobile that explores the practical transition of ESG principles and practices operating within these two regulatory contexts. By examining these cases, this study identifies variations in ESG strategies and practices under dual regulatory frameworks, and uncovers the market expectations that drive these differences.

Finally, the results offer policy implications for regulators to guide firms in balancing domestic and global sustainability standards, while navigating jurisdictional complexities. The following section presents a comparative analysis of the ESG development trajectories in Mainland China and Hong Kong.

[B] ESG REGULATIONS: AN INSTITUTIONAL PERSPECTIVE

Mainland China and Hong Kong offer unique cases of regulatory divergence rooted in the same political basis (J Wang 2009). The institutional perspective and logic have been widely used to explain the differences between the ESG paths in Mainland China and Hong Kong (eg Zheng & Ors 2015). According to the institutional theory (DiMaggio & Powell 1983), ESG adoption in Mainland China is government-led through policies such as the ESG disclosure requirement and dual carbon goals.

Under the central mandate, there were significant variations in compliance. State-owned enterprises (SOEs) embark on ESG activities primarily because they are consistent with national and industrial policies; private companies lag in compliance because of weak monitoring mechanisms (Yan & Ors 2022). The China Securities Regulatory Commission regulates ESG practices; however, firms usually engage in selective compliance to achieve legal requirements without substantially embracing sustainability (Marquis & Qian 2014; Hyatt & Berente 2017). Moreover, ESG standards in China are industry-specific and therefore differ, with energy and manufacturing industries having the most constraints (Nie & Ors 2023). Furthermore, owing to fragmented ESG ratings, investors are unable to compare firms' ESG performance (Pang & Ors 2024). Overall, ESG in China is considered a legal requirement and a legitimacy-seeking tactic, rather than a corporate strategy (Zhao 2022). Consequently, corporate culture is inclined toward economic growth at the expense of sustainability, which may lead to decoupling (Lyon & Montgomery 2013; Marquis & Qian 2014; Chung & Ors 2024).

Conversely, the ESG framework in Hong Kong is investor-driven and consistent with international standards (eg Task Force on Climate-Related Financial Disclosures (TCFD)). The Hong Kong Exchange (HKEX) does not divide companies into categories but requires all listed firms to disclose ESG information. The Securities and Futures Commission of Hong Kong has gone further to regulate ESG-labelled funds to provide investors with clear information about sustainable finance. Hong Kong has encouraged a business culture in which ESG compliance is related to financial performance and risk management and is not simply a result of government intervention and policy mandates (Ng & Leung 2020).

This following section compares the ESG regulatory landscapes in Mainland China and Hong Kong, including a description of the evolution and unique features of the respective jurisdictions' ESG regulations.

Policy-driven ESG Development in Mainland China

National policy on sustainable development

ESG adoption in Mainland China has largely been a top-down policy-oriented mechanism. The main driver of this trajectory is the Government's shift of the national economy structure from the "growth at all costs" model to the "sustainable development" model. This change began with the 11th Five-Year Plan of the country in 2006–2010 that advocated a "Scientific Outlook on Development". Building on this foundation, ESG has become a national priority with a focus on achieving the "dual carbon goals" of peak carbon emissions by 2030 and carbon neutrality by 2060.

In line with national strategies, regulatory authorities and local governments have implemented several measures to ensure that ESG practices are systematically incorporated into business activities (Yan & Ors 2022). This regulatory expansion was first on SOEs and then on a broader set of listed companies, indicating a gradual increase in the stringency and sophistication of ESG-related standards. At the beginning of the 11th Five-Year Plan (2006–2010), the Company Law (2006) of the People's Republic of China (PRC) was revised to require companies to disclose information on corporate social responsibility (CSR) for the first time. The Guideline to State-Owned Enterprises Directly Under the Central Government on Fulfilling Social Responsibilities, issued in 2008, also emphasized ESG practices and called for SOEs to lead the way in achieving the nation's sustainability objectives. At the end of the decade, companies from a broad range of industries took stricter regulatory measures in line with the Guidelines for the Standardized Operation of Listed Companies issued by the Shenzhen Stock Exchange in 2009 and 2010.

The progression of ESG-related policies across the 12th, 13th, and 14th Five-Year Plans can be seen as the progressive development of a maturing regulatory framework for the institutionalization of sustainability and corporate governance across industries. The foundation for integrating ESG principles into corporate operations was established at the beginning of the 12th Five-Year Plan, from 2011 to 2015. A key initiative was Guiding Opinions on Strengthening the Corporate Environmental Credit System (2015), which introduced a credit-based system to monitor and assess corporate environmental performance. This system incentivizes firms to comply with environmental regulations by linking their credit scores to the level of supervision they require from regulators. By integrating credit mechanisms into environmental governance, policymakers translate compliance into measurable financial outcomes and encourage firms to internalize regulatory expectations.

The institutional framework was further enhanced during the 13th Five-Year Plan (2016–2020)[1] with a focus on ESG reporting guidelines. The Guidelines for Environmental, Social, and Governance (ESG) Reporting (Revised Edition 2019) require scheduled and detailed ESG disclosures from listed firms. The guidelines established standards to improve transparency and accountability, such as investor and corporate governance, environmental practices, employee care, and community engagement. From 2008 to 2020, the regulatory requirements concerning the Guideline expanded beyond SOEs to a wider spectrum of publicly listed firms. Over time, to facilitate the adoption of international best practices, several domestic guidelines were developed in alignment with established global frameworks, such as the Global Reporting Initiative (GRI) and the TCFD. This enabled Chinese enterprises to better integrate into the global ESG reporting landscape. However, the adoption rate remained low because of persistent challenges in aligning with international ESG norms. Internally, firms face inertia when transforming their governance models to integrate sustainability at the strategic level (Friede 2019; Huang 2021; Kouam 2024). Externally, inconsistent local regulations and the proliferation of emerging third-party rating systems send mixed signals, making it difficult for companies to maintain consistent and meaningful efforts (Pang & Ors 2024; He & Ors 2025).

The 14th Five-Year Plan (2021–2025)[2] was a significant step toward the institutionalization of concrete ESG compliance and reporting standards across industries with a specific focus on the financial sector. The 14th Five-Year Development Plan for Financial Standardization (People's Bank of China & Ors 2022) discusses the importance of green finance in realizing China's sustainability strategy. This created the foundation for a unified regulatory framework to steer ESG-related financial services and products. A significant achievement during this period was the publication of China's Green Bond Principles (China Green Bond Standard Committee 2022) to standardize the practices of green financial instruments. This framework covers a wide range of financial products such as green loans for specific uses, including carbon emissions reduction and clean coal use; green bonds, including ordinary green bonds, carbon revenue green bonds, green project revenue bonds, and green asset-backed securities; and ESG funds to attract responsible investors and align investments with sustainability goals.

1 The 13th Five-Year Plan (2016-2020).

2 The 14th Five-Year Plan (2021–2025).

During this period, the implementation of regional ESG policies enriched the ESG landscape by considering the contextual concerns and issues. For instance, the Code for the Construction and Management of "Carbon Neutral" Banking Institutions was issued by the Chaozhou Government in 2022 to provide guidance for local financial institutions on how to align their operations with carbon neutrality objectives. Likewise, in 2024, Fujian and Jilin provinces established their own ESG standards to prioritize sustainability issues tailored to their regions, including renewable energy development, ecological conservation, and regional carbon reduction targets. These local actions were in sync with national policy. Together, they form a flexible regulatory ecosystem that integrates ESG at multiple levels.

Also during this period, China attempted to form partnerships with international bodies to ensure that its ESG reporting accords with international standards. Knowing the necessity of cooperation to solve global sustainability issues, China has participated in international forums to strengthen its ESG framework and, thus, its position on the international stage. Engagement in the G20 Working Group on Sustainable Finance[3] and the Green Finance Network[4] demonstrates a significant role in promoting sustainable investment and financing through dialogue with member states. The Green Investment Principles for the BRI is a global initiative aimed at promoting sustainable and environmentally friendly investments across countries involved in the BRI. It involves organizations such as the Principles for Responsible Investment, another notable example which encourages BRI participants to incorporate ESG factors into their infrastructure and investment projects.

National Belt and Road Initiative strategy

The Chinese Government led the BRI, which drives companies to extend their businesses beyond their home country. Under the BRI framework, outbound companies are not only market actors but also agents of national strategy. When engaging with host-country governments, ESG strategies often extend beyond regulatory compliance and stakeholder expectations.

With the implementation of national projects, outbound companies often face scrutiny from global ESG stakeholders, particularly in host countries with stringent environmental and governance standards. Companies often face the dilemma of whether to relax ESG standards

[3] G20 Working Group on Sustainable Finance.

[4] The Green Finance Network (NGFS).

to ensure the timely and profitable execution of BRI projects or to fully comply with international ESG prescriptions, which may raise costs and delay implementation, thereby reducing competitiveness in the global market.

This dilemma highlights a deeper institutional tension between the developmental state logic underlying China's political agenda, particularly as articulated through the BRI, and the expectations of the global market, which increasingly prioritizes transparency and sustainability in line with international standards. This state-business embeddedness adds political complexity to ESG practices. Companies must align their actions with geopolitical considerations and diplomatic relations to extend beyond the scope of economic efficiency or regulatory compliance. Companies operating under both types of logic must constantly negotiate between state-led imperatives and market-driven legitimacy. In this light, how companies balance and practice ESG goals will project China's international positioning in highly contested fields, such as infrastructure building, labour rights protection, and environmental commitment.

In conclusion, over the past two decades, China has progressively transitioned toward sustainable development by leveraging ESG as a strategic enabler (Table 1). The central government has adopted top-down ESG strategies and policies at the national level, gradually strengthening standards and extending them to public companies across industries and regions. In addition, national strategies, such as the BRI, have shaped Chinese companies' outbound expansion by embedding the dual expectation to act as agents of national interests and conform to globally recognized ESG standards. During the evolution process, the Government continued to seek convergence between domestic and international rules. However, there are certain challenges, such as the lack of consistent application of ESG regulations and norms across industries and low levels of ESG disclosure (Pillay 2014; Wu & Ors 2024).

Market-driven ESG development in Hong Kong

Hong Kong, as a global financial centre, has been more aligned with international practices in ESG development. As early as the 2000s, Hong Kong began exploring the integration of ESG into its financial regulatory framework (Chung 2022). In contrast to Mainland China's policy-driven approach to ESG adoption, Hong Kong operates on a market-driven model guided by investor demand and financial market standards. Hong Kong, as a major global financial centre, has developed a regulatory framework to match international investors' expectations and maintain the credibility of its business infrastructure.

Table 1: The development of Mainland China ESG regulations.

National Strategy Plan	Related Business Policy (selected)
11th 5-year plan (2006-2010)	• The revised PRC company law requires disclosure regarding social responsibility (2006). • Guideline to State-owned Enterprises that are directly under central government on fulfilling responsibilities (2008). • Guidelines for Standardized Operation of Listed Companies in Shenzhen Stock Exchange for Growth Enterprise Market (2009) • Guidelines for Standardized Operation of Listed Companies on the Shenzhen Stock Exchange Main Market and SME Market (2010)
12th 5-year plan (2011-2015)	• Implementation handbook for the Guidelines of Corporate Social Responsibility for Chinese Industrial Enterprises (2012) • Guiding Opinions on Strengthening the Construction of Corporate Environmental Credit System (2015)
13th 5-year plan (2016-2020)	• Agreement on Jointly Carrying Out Environmental Information Disclosure for Listed Companies (2017) • Revised edition of the Guidelines for Corporate Governance of Listed Companies (2018) • Guidelines for Environmental, Social, and Governance (ESG) Reporting (Revised Edition 2019) • Assessment Measures for Information Disclosure of Listed Companies on the Shenzhen Stock Exchange (Revised in 2020)
14th 5-year plan (2021-2025)	• Measures for Supervision and Administration of Energy Conservation and Ecological Environmental Protection in Central Enterprises (2022) • Guidelines for Green Finance in the Banking and Insurance Industries (2022)

In 2013, the HKEX issued its first ESG Reporting Guide (Lu 2016). This guide is a significant step toward formalizing ESG, particularly ESG information disclosure, and encourages listed companies to voluntarily disclose their ESG practices. This represents an early acknowledgment that ESG is important for corporate sustainability.

A mandatory requirement for ESG information disclosure was introduced in 2016, which was a crucial step in encouraging global investors to invest in sustainability. As the demand for ESG transparency from global investors increases rapidly, the HKEX revised the ESG Reporting Guide to introduce a "comply or explain" disclosure framework[5] that requires companies to disclose ESG-related information or explain why they have not. This requirement was further enhanced in 2020 when the HKEX stressed the role of corporate boards in ESG strategy and oversight. It mandated that companies report on their board's participation in ESG matters, such as strategy-making and risk management processes. In addition, the HKEX encouraged alignment with the TCFD, which highlights the need to disclose climate-related financial risks and opportunities with greater substantiveness and connection to accounting metrics.

In 2023, the HKEX suggested further alignment of its ESG disclosure requirements with the climate standards of the International Sustainability Standards Board. The Hong Kong Government revealed its "Hong Kong Climate Action Plan 2050"[6] to achieve carbon neutrality by 2050. This progressive plan encompasses strategies to accelerate corporate adoption of net-zero-emission practices alongside initiatives such as the Green and Sustainable Finance Grant Scheme to support green financial development. This series of regulations demonstrates that Hong Kong is on the frontier of implementing global best practices.

The development of ESG policies and regulations in Hong Kong is closely related to the global business environment. The Hong Kong Government launched a series of policy initiatives aimed at strengthening its business environment to retain its position as a leading global financial centre, particularly amid rising competition from Singapore. These include enhancing transparency and accountability, fostering a vibrant technological ecosystem, bridging traditional finance with decentralized financial innovations, and implementing targeted policies to attract global talent. Collectively, these measures have helped Hong Kong sustain its

5 HKEX ESG Reporting Guide.

6 Government of the Hong Kong Special Administrative Region, "Government announces Hong Kong's Climate Action Plan 2050".

Table 2: The development of Hong Kong ESG regulations.

Year/Period Key Developments	Description
2000s - Early Exploration of ESG Regulations	Hong Kong began exploring the integration of ESG into its financial system, signaling early recognition of ESG's importance.
2013 - Introduction of HKEX ESG Reporting Guide	HKEX introduced its first ESG Reporting Guide, encouraging listed firms to voluntarily disclose ESG-related information (Lu, 2016).
2016 - "Comply or Explain" Framework	Revised ESG Reporting Guide introduced a mandatory "comply or explain" framework, requiring firms to disclose ESG information or provide reasons for non-disclosure.
2020 - Enhanced Board Accountability and TCFD Alignment	HKEX mandated corporate boards to take responsibility for ESG oversight, strategy, and risk management. Firms were encouraged to align with the TCFD recommendations, emphasizing the financial quantification of climate risks.
2023 - Proposed Alignment with ISSB Climate Standards	HKEX proposed aligning its ESG disclosure requirements with the ISSB climate standards to improve comparability in reporting.
2023 - Hong Kong Climate Action Plan 2050	The Hong Kong government committed to achieving carbon neutrality by 2050, introducing initiatives like the Green and Sustainable Finance Grant Scheme.
Ongoing Market-Driven ESG Integration	Hong Kong's ESG regulatory framework reflects its inter-connectedness with the global business environment and alignment with investor expectations.

international competitiveness through proactive policy innovations. A summary of Hong Kong's ESG policies is provided in Table 2.

[C] A STRATEGIC PILLAR FOR OUTBOUND EXPANSION

Empirical studies have shown that foreign capital is a force driving increased ESG adoption among Chinese companies with international presence. These companies must meet investors' expectations of transparency with effective governance, risk management, and sustainable business practices (Qing & Ors 2024).

For the outbound expansion of Mainland Chinese companies, listings in Hong Kong were a milestone. Hong Kong is an entrance to global capital markets through which mainland firms can diversify their financing channels, attract foreign institutional investors, and gain heightened market visibility (Arner 2016; Arner & Barberis 2022).

For foreign investors, sustainability disclosures are critical in capital allocation decisions, making Hong Kong listings a driver for Chinese firms to enhance their ESG practices (Ng & Ors 2023). Listing in Hong Kong allows companies to tap into a mature financial ecosystem and gain recognition as credible participants in global ESG standards. This heightened regulatory scrutiny boosts corporate legitimacy and investor confidence, thereby strengthening firms' abilities to access international capital flows while maintaining close ties with the domestic market.

[D] CASE STUDIES

Based on the discussed variations in divergent ESG regulatory paths, we compare the ESG activities of companies from Mainland China and Hong Kong. The following analysis reveals the disparities in ESG participation and explores how such participation changes over time. We employ a recognized business sustainability index developed by the Center for Business Sustainability at The Chinese University of Hong Kong (CUHK), which encompasses all significant companies listed on the HKEX, including both Hong Kong and Mainland Chinese firms.

The Hong Kong Business Sustainability Index

The Hong Kong Business Sustainability Index (HKBSI) was launched in 2015 as a CSR benchmark to encourage listed companies to embrace CSR and ESG as a forward-looking approach to managing sustainable

businesses. The index was created and operated by a research team in the Centre for Business Sustainability at the CUHK. The index is an annual assessment tool to conduct corporate sustainability performance reviews of constituent companies in the Hang Seng Index (HSI). By providing timely corporate sustainability performance assessment reports, the HKBSI not only enhances accountability, but also motivates participating companies to embrace business sustainability strategies as the core of their long-term positioning. The assessment was based on firms' sustainability data to perform a holistic assessment of corporate sustainability practices and their impacts.

To enhance its credibility and transparency, the HKBSI is certified by SGS Hong Kong Limited in each round of assessment, a Swiss-based international accreditation organization. This ensures that the index compilation process and results meet high technical and ethical standards.

The HKBSI adopts a VPI model (value-process-impact) to assess companies' ESG commitment, governance structure, sustainability practices, and outcomes. The index is built by asking each constituent company to complete an annual business sustainability questionnaire via an online Business Sustainability Reporting Platform using publicly available corporate disclosures. When companies do not participate directly, the research team records their performance based on their published CSR, sustainability, ESG reports, and annual reports. All completed assessments are sent to individual companies for accuracy and reliability checks before the scores and rankings are finalized.

Our observations are based on HKBSI data from 2017 to 2022 (reflecting firms' ESG performance between 2016 and 2021). We chose 2016 as the reference year because 2016 was a turning point. In this year, the HKEX adopted the "comply or explain" requirement for ESG reporting, and the Mainland Chinese Government issued detailed guidelines on environmental disclosure, corporate governance and ESG since 2016.

Overall ESG performance during reporting years 2017–2022

Market-driven growth versus policy-driven catch-up

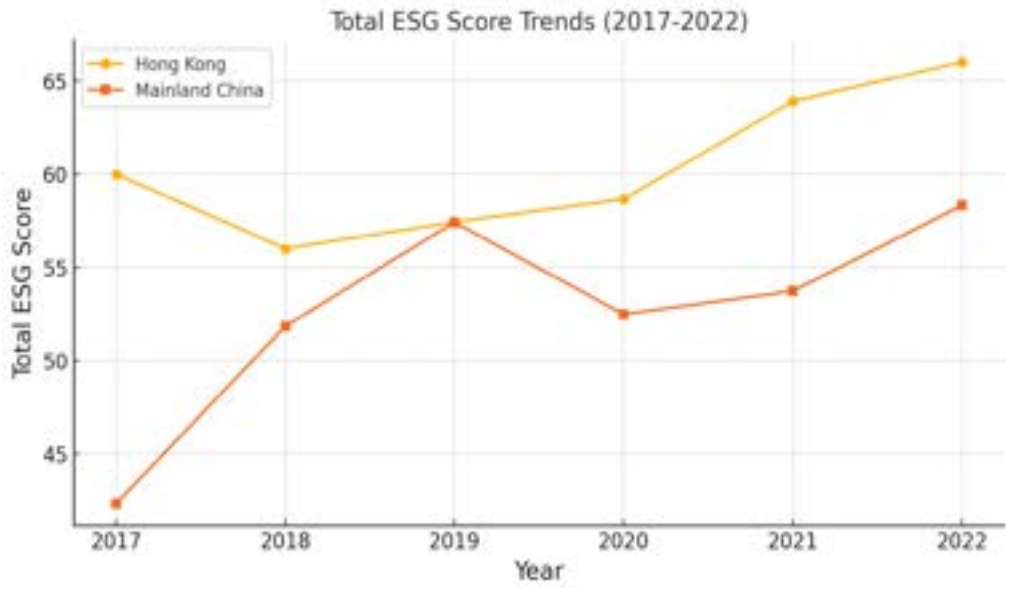
An annual comparison of HKBSI data shows that, in general, ESG performance is on an ascending trajectory (see Figure 1). Over the period 2017–2022, firms from Hong Kong and Mainland China showed significant improvement. The average ESG performance of Hong Kong

companies is 60.01 in 2017 and 66.02 by 2022, and with annual increase rates were between 3% and 5%. This increasing trend can be attributed to the mandatory ESG disclosure requirements introduced by the HKEX in 2016, which provided a mandatory mechanism for firms to include sustainability in their long-term business plans.

Companies from Mainland China manifested a faster increase in ESG scores, jumping from 42.33 in 2017 to 58.33 in 2022. The first boost between 2018 and 2020 was in line with several regulatory changes such as the tightening of environmental disclosure standards and changes in corporate governance. However, this improvement halted in 2020, which was attributed to the impact of Covid-19. The pandemic caused supply chain disruptions, reduced community engagement activities, and delayed environmental projects, all of which resulted in a decline in performance that year.

As of 2022, the ESG performance disparity between Hong Kong and Mainland China is steadily diminishing. Companies in Mainland China have significantly enhanced their governance, supplier engagement, and environmental disclosures. The regulatory advancements phased out by the Chinese Government have been effective in the observed corporate ESG behaviour. Hong Kong companies simultaneously maintained their positions as leaders, especially in the areas of corporate governance and customer engagement.

Figure 1: The HKBSI ESG score trends from 2017 to 2022.



Stakeholder engagement and outbound activities

Stakeholder engagement metrics show how Hong Kong's market-driven ESG environment is gradually influencing Mainland Chinese firms. As Chinese firms began engaging with international markets and investors in Hong Kong, their stakeholder strategies shifted from simply meeting domestic regulatory requirements to embracing market-driven approaches.

Customer engagement

In the year-to-year analysis, Hong Kong companies consistently led on customer engagement, demonstrating a mature approach to product responsibility and customer satisfaction strategies. This, coupled with their longstanding focus on ensuring ethical products and transparency, enabled Hong Kong companies to maintain high scores throughout the analysis period.

While companies in Mainland China started late, they showed significant improvement after 2020. This change became particularly apparent after 2020, when the outbound activities of Chinese companies increased.

Supplier engagement

Additionally, companies from Mainland China increased their supplier engagement to the highest level by 2020. This increase can be attributed to efforts to incorporate supply chain sustainability into the global value chain during outbound operations. With the growing corporate commitment to environmentally responsible sourcing and labour rights, supplier engagement has emerged as a critical area for ESG implementation and oversight. By 2022, Mainland Chinese firms had almost caught up with Hong Kong firms, while Hong Kong firms had an edge.

Community engagement

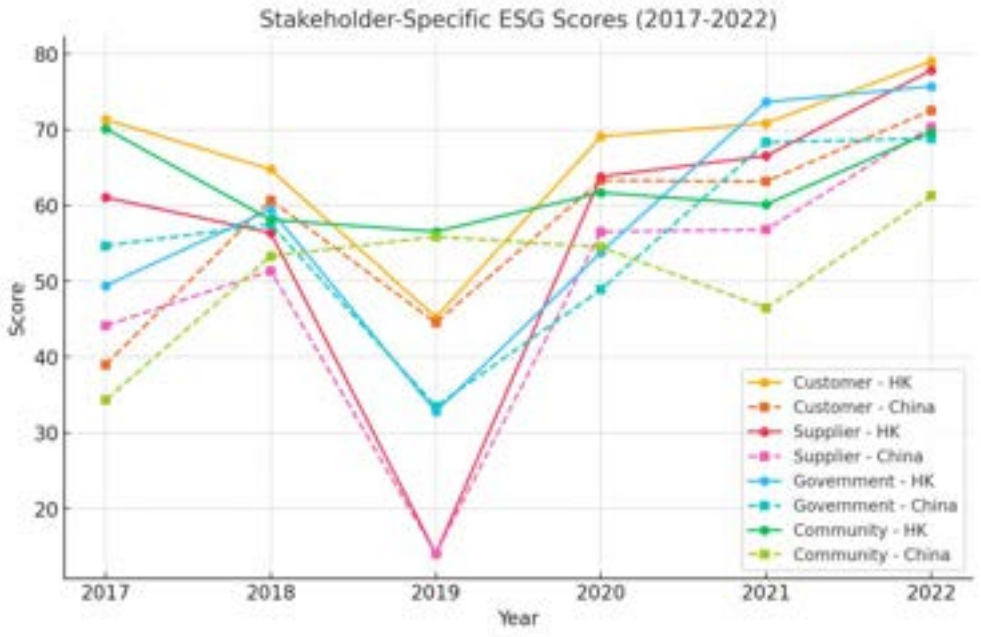
Strengthening community engagement is crucial to reducing local resistance while fostering a sense of ownership, access to local resources, and increased visibility during the international expansion of companies. From 2017 to 2022, Hong Kong companies had consistent and steady engagement with local communities under their well-established long-term community programmes and partnerships. In comparison, community engagement among Mainland Chinese companies has been rather erratic, especially before 2020. Notably, after 2020, Chinese companies' community initiatives decreased.

Government engagement

While companies from Mainland China generally scored lower than their Hong Kong counterparts in stakeholder engagement, they outperformed them in government engagement in 2017 and 2019, reflecting their strong participation in government-led ESG programmes and initiatives. The comparison is significant, as it shows that government action is a key driver of ESG performance in Mainland China, while Hong Kong companies, although consistent, do not rely heavily on government-led programmes.

Two key observations can be made based on the stakeholder engagement breakdown (see Figure 2). First, ESG development in Mainland China is more policy-driven, while Hong Kong companies are more market-driven. This is evident from the fact that Hong Kong companies show the highest levels of stakeholder engagement in value chain-related areas, particularly with customers, suppliers, and local communities. Companies in Mainland China responded prominently to government regulations and initiatives, with the Government being their primary stakeholder. Second, Mainland Chinese companies have been rapidly closing the gap with respect to customer, supplier, and community engagement, particularly since 2020, when they began to actively explore overseas opportunities.

Figure 2: ESG scores for customer, supplier, government, and community across 2017 to 2022.



Case illustration

We use Geely Automobile Holdings Limited,[7] a major Chinese automobile manufacturer (hereafter referred to as Geely), as a typical case study to demonstrate how listing on the HKEX has helped a company evolve its ESG strategy, reporting, and global operations and commitments. Geely was listed on the HKEX on 24 May 2005 (stock code 00175 HK). Geely's listing was an important factor in increasing the company's access to international capital markets and its exposure to global standards, including ESG practices. An evaluation of the company's 2016 and 2022 ESG Reports, which captured the company's ESG performance in 2016 and 2022, respectively, shows a clear transition from short-term, locally focused objectives to a global, strategically aligned sustainability framework, representative of Chinese companies that seek international expansion by ESG integration. Geely was ranked 10th in the HKBSI in 2022 and was the top company among Mainland Chinese companies listed on the HKEX, which indicates that the company is a leader in sustainability performance in terms of ESG strategies, governance, and reporting standards.

Geely ESG principles in business expansion

Initially recognized as a domestic Chinese automobile manufacturer catering to the middle-to low-end market, Geely undertook several ambitious global strategic acquisitions to enhance its global competitiveness and redefine its brand image. These acquisitions positioned the company as a significant player in the global automotive industry. In the last 20 years, Geely has made a series of successful international acquisitions, including Volvo Cars in 2010, Lotus Cars and Terrafugia in 2017, and a 34% stake in Renault Korea Motors in 2022 to strengthen its presence in South Korea, as well as the establishment of a joint venture between Geely and Volvo to launch Lynk & Co in 2016. In addition, Geely has established its global production sites and research and development (R&D) facilities, including R&D centres in Hangzhou, Shanghai, Gothenburg (Sweden), Coventry (UK), Barcelona (Spain), and California (USA). Geely's strategic intent is to transition to zero-emission vehicles, circular production, and the development of smart mobility ecosystems. With its 2045 carbon neutrality goal, Geely has incorporated renewable energy and recycling into its global operations.

Geely's market expansion during 2016–2017 into regions such as Europe, Southeast Asia, and North America was driven by

[7] Geely Automobile Holdings Limited.

strategic partnerships with companies such as Volvo and Proton. Through these collaborations, Geely was able to leverage its global networks to enhance its competitiveness in international markets (Geely ESG Report 2017: 79-80).

As reported in 2022, Geely took a proactive investment initiative and issued a sustainable loan of USD400 million under its Sustainable Finance Framework to support the global development of electric vehicles (EVs) and green technologies. This loan funded R&D and battery procurement for EVs, assisting global carbon reduction goals worldwide (Geely ESG Report 2022: 12 and 17).

In addition, Geely continued to engage in global initiatives, such as the United Nations Global Compact, and endorsed the 10 principles of human rights, labour, environment, and corruption. This commitment shows that Geely is ready to go an extra mile in synchronizing its global business with international ethical standards (Geely ESG Report 2022: 10).

From an operational perspective, Geely links sustainable development goals to its vision, mission, and strategy so its core business plans are in sync with global sustainability goals. The company's strategy entails creating value for stakeholders and contributing globally to the long-term development of the world (Geely ESG Report 2022: 4 and 10). ESG is embedded into Geely's daily operations using the Plan-Do-Check-Act model to ensure that the ESG aspects are addressed at all levels of the decision-making and business execution process (Geely ESG Report 2022: 16).

Geely ESG strategies

Geely actively aligns its ESG strategies a with Chinese government policies. As noted in its ESG Reports 2016 (at 7) and 2017 (at 8), Geely actively participated in the BRI industrialization initiatives. For instance, the establishment of automotive assembly plants in Belarus, initially launched in 2013 and further expanded in 2017 with the opening of the BelGee plant, demonstrated a strategic alignment with China's state-led developmental agenda. The BelGee facility, with a total investment of approximately USD329 million and an annual production capacity of 60,000 vehicles in its initial phase, not only supports the host country's industrial ambitions, but also leverages local manufacturing advantages to access the Eurasian Economic Union markets. This example underscores the dual-adaptation strategy, balancing compliance with China's geopolitical objectives and market-driven ESG considerations such as local economic development, employment creation, and technology transfer.

Geely also proactively responded to the Chinese Government's poverty alleviation policy. Geely explicitly responded to the directives set forth by the 19th Communist Party of China National Congress, embedding national policy goals directly into its corporate strategy, as encapsulated by Chairman Li Shufu's guiding principle: "Wherever Geely builds its production bases, targeted poverty alleviation follows" (Geely ESG Report 2017: 15). Geely designed a systematic structure to follow the policy spirit by engaging in industry development, employment boosting, education, and agriculture support.

Geely engages various stakeholders through strategic alignment with its core businesses. Geely employs multilevel stakeholder engagement strategies involving thorough consultations with local governments and educational authorities to ensure that poverty alleviation measures effectively address actual community needs. Such proactive engagement has earned widespread recognition and support from government bodies, media organizations, and the public, reinforcing the effectiveness and legitimacy of ESG initiatives. ESG initiatives were consistently presented and developed, as reported in the 2022 report (Geely ESG Report 2022: 114-120).

Geely's ESG strategy underwent a major transformation during the observation period between 2016 and 2022, shifting from localized and domestic objectives to a comprehensive, long-term approach addressing global sustainability challenges. In 2016, Geely's ESG strategy was more domestic and operational in nature, and the company's community initiatives were modest and easier to achieve than their current initiatives (Geely ESG Report 2016: 57-64; 2017: 12-16). From the environmental standpoint, Geely focused on the company's green production processes, new energy vehicles, and strict quality control to ensure sustainable manufacturing practices (Geely ESG Report 2016: 51-56; 2017: 58).

By 2022, Geely adopted a holistic and forward-looking ESG strategy that extends to global sustainability issues. The company unveiled six core ESG strategies: climate neutrality, nature positive, co-prosperity (including employees, supply chain, and dealers), all-around safety, digital transformation, and governance and ethics (Geely ESG Report 2022: 6-8). This strategy established specific goals to enable the company's long-term sustainability initiatives, including carbon neutrality by 2045 and a 25% reduction in vehicle lifecycle emissions by 2025 (ibid: 7).

Reporting standards

Geely's ESG reporting gradually evolved into global integration. Initially, Geely's reporting practices largely aligned with Chinese national standards, such as GB/T 36000-2015 and ISO 26000, except for the GRI G4 (Geely ESG Report 2016: 1-2). These standards determine the manner in which Geely managed environment, society, and governance in a regional context, with less regard to global issues. In its 2017 ESG Report, Geely reported compliance with the Hong Kong Stock Exchange's ESG Guide (appendix 27), a mandatory guideline for HKEX-listed firms.

By 2022, Geely increased its reporting scope and adopted frameworks and metrics. Alongside fulfilling the HKEX 2022 ESG Guide, the company embraced new frameworks, such as the updated GRI Standards, TCFD, and Sustainability Accounting Standards Board (SASB) frameworks (Geely ESG Report 2022: 129). These standards are aligned with more materialized climate-related financial risks, industry-specific relevance, and globally recognized stakeholder issues. The implementation of TCFD shows that Geely was ready to provide climate-related financial disclosures, whereas the SASB covered ESG performance in the automotive sector. In the 2022 report, Geely disclosed that the company protected employees' personal data with the highest confidentiality in accordance with the Hong Kong Personal Data (Privacy) Ordinance, where applicable (Geely ESG Report 2022: 59). This shift underscores a strategic pivot toward alignment with global capital market expectations, emphasizing climate-related financial disclosures, labour protections, and industry-specific reporting rigour.

Governance and transparency

From the observation period of 2016 to 2022, we found a substantial transformation of Geely's board structure, shifting from a Mainland China-based corporate structure toward a model compliant with HKEX regulations. In Geely's 2016 ESG Report (at 19-21), we found that Geely's governance emphasized administrative oversight and domestic compliance mechanisms typical of mainland enterprises, such as integrating party-related offices and internal control departments into corporate governance. By 2022, however, Geely had substantially enhanced the independence and transparency of its board governance, explicitly distinguishing between executive management and supervisory roles, increasing the proportion of independent non-executive directors, and implementing a comprehensive board diversity policy (Geely ESG Report 2022: 52-53). Geely increased its board diversity, with 27% of its board

of directors being female, thus embodying its principle of inclusiveness in the leadership structure (Geely ESG Report 2022: 6).

We also checked Geely's 2016 and 2022 annual reports to determine changes in the board structure. The review did not reveal a dual-board structure that would reconcile domestic governance norms with the expectations of Hong Kong listed firms. Instead, the findings point to a transition: Geely, as a Mainland Chinese firm listed in Hong Kong, adapted its governance practices to align with international capital market standards. Institutional realignment took place, moving away from traditional mainland governance norms toward a more market-oriented, globally recognizable governance structure.

Geely's internal controls and compliance management have undergone substantial changes from 2016 to 2022. Geely focused on providing anti-corruption training, adding compliance positions (Geely ESG Report 2016: 21), establishing committees to oversee compliance, and ensuring product quality and safety (Geely ESG Report 2017: 27-30). The company also established a dedicated CSR department to manage social responsibility initiatives and stakeholder engagement in social impact activities (Geely ESG Report 2022: 20).

By 2022, the company significantly upgraded its compliance and risk management system by adopting internationally recognized frameworks such as COSO's Internal Control Integrated Framework and ISO 19600 compliance management guidelines. It also established a clear "Three Lines of Defence" structure involving business units, internal control, and internal audit. The compliance scope expanded to include complex areas such as anti-monopoly regulations, intellectual property rights, export controls, ESG-related risks, and human rights obligations throughout the global supply chain. Geely implemented a robust whistleblowing policy aligned with international best practices, emphasizing confidentiality and protection against retaliation. This evolution reflects Geely's strategic alignment with global standards and enhanced governance expectations driven by international capital markets (Geely ESG Report 2022: 54-60).

Geely also enhanced its governance framework to include external validations through the Science Based Targets initiative, which authenticated the company's climate-related targets and progress (Geely ESG Report 2022: 6). This step marked Geely's dedication to transparent and scientifically measurable sustainability. Table 3 illustrates the changes in the board structure and governance mechanisms during this period.

Table 3: Comparison of Geely's board structures, compliance management and risk control systems (2016 v 2022).

Dimensions	2016	2022	Key Changes
Board Structure and Governance	Board combined executive oversight with administrative management; limited distinction between supervisory and executive roles; minimal emphasis on board independence or diversity.	Clear separation between Chairman and CEO roles; increased independence of the board (Audit Committee 100% independent; 36% independent non-executive directors overall); implemented explicit diversity policies (gender, expertise, age).	Shifted from domestic-oriented governance to international, HKEX-aligned standards emphasizing independence, transparency, and diversity.
Compliance Framework	Established Chief Compliance Officer (CCO), compliance office, and internal compliance management structure.	Adopted international standards (COSO Integrated Framework, ISO 19600); structured "Three Lines of Defense" model involving business units, internal control, and internal audit.	Enhanced from domestic structure to international compliance framework.
Compliance Training	Anti-corruption and integrity training (27,348 attendees).	Comprehensive training covering anti-monopoly, export control, ESG, intellectual property, human rights, and continued anti-corruption education.	Expanded scope and increased specialization of training.
Risk Assessment and Internal Control	Multi-department collaboration (internal audit, legal, quality, internal control) with basic risk mapping.	Independent Internal Audit Department reporting directly to Audit Committee; systematic monthly audits; ESG risk included in assessments; formal internal control self-evaluation mechanism.	Professionalization and international standard alignment.
Business Partner Compliance	246 business partners required to sign integrity agreements to prevent corruption.	Comprehensive supplier compliance guidelines, including anti-corruption, human rights, IP rights, anti-monopoly, and export controls; released formal Code of Conduct and Supplier Code of Conduct.	Shift from simple integrity agreements to detailed, global-standard compliance systems.
Whistleblowing Mechanism	Basic anti-corruption education; lack of detailed whistleblower protection mechanisms.	Established clear "Whistleblowing Policy," ensuring confidentiality, protections against retaliation, and formal reporting channels.	Increased protection, transparency, and aligned with international best practices.
Anti-corruption Training	General anti-corruption education integrated into annual compliance training.	Regular and systematic anti-corruption training across all major business units, emphasizing continuous awareness and prevention.	More structured, regularized, and embedded anti-corruption training programs.

Responsible supply chain

Geely's 2016–2022 ESG reports reveal an intriguing shift toward more interconnected and sustainable supply chain management. In its 2016 ESG report, Geely did not disclose sufficient information on supply chain management, except for the policy of supplier selection and consistent quality control practices through supplier management (Geely ESG Report 2016: 48). In 2017, Geely's supply chain management began to emphasize responsible procurement and maintaining long-term partnerships with suppliers (Geely ESG Report 2017: 52). The company concentrated on ensuring supplier accountability and continuity in its network, primarily driven by operational needs such as consistent production quality and cost management.

By 2022, Geely introduced several sustainability-related mechanisms to manage its supply chain. Notably, the governance structure evolved from basic procurement management toward a robust, cross-functional Supply Chain System Management Committee, with direct oversight by the board of directors. Risk management has transformed from initial supplier quality audits to a sophisticated, multi-tiered risk-prevention system that addresses both controllable and *force majeure* risks. Geely introduced comprehensive ESG criteria into the supply chain by implementing explicit supplier standards and certifications covering human rights, environmental performance, and ethical governance. Specifically, the company implemented traceability systems for key raw materials, and suppliers had to meet the sustainability criteria established by the company across full cycles (Geely ESG Report 2022: 8). The system ensures that the environmental and social risks associated with key raw materials are identified, traced, avoided, or mitigated. The aim was to achieve 100% traceability of critical materials (eg conflict minerals) and to perform due diligence on suppliers with high sustainability risks by 2024 (ibid: 9-10). Moreover, Geely collaborates globally with suppliers and dealers to provide training on ESG practices and encourages environmentally and socially responsible products through responsible marketing systems (ibid: 10).

Employee development

Geely's employee engagement mechanisms evolved from basic contractual protection and welfare delivery to a more institutionalized and participatory governance framework. This reflects a strategic shift toward recognizing employees not only as human resources but also as co-governance stakeholders whose participation contributes to organizational resilience, innovation, and legitimacy.

Between 2016 and 2022, Geely significantly evolved its approach to employee engagement from a foundational model focused on fairness and welfare to a strategic data-driven system that integrates talent development, employee wellbeing, and organizational transformation. In 2016, Geely's employee engagement concentrated mainly on information distribution and basic response mechanisms for interacting with employees. The company established a basic governance structure for employee safety, training, and general wellbeing. In 2017, Geely's employee development strategy focused on basic welfare programmes, such as health protection and work–life balance initiatives (Geely ESG Report 2017: 45-47). Employee training programmes were mainly operational to enhance the skills of workers and improve production efficiency and safety. These efforts were meant to address temporary workforce issues and fulfil related legal requirements.

By 2022, Geely had significantly strengthened its employee engagement mechanisms through a more institutionalized, inclusive, and strategic approach. A lifecycle-based employee care system was established, covering onboarding, career growth, health support, and retirement, while long-term incentive schemes, such as restricted shares, were introduced to link individual and organizational performance. Diversity, equity, and inclusion have become emerging priorities with clear targets for increasing female representation in management and supporting employees from various cultural and regional backgrounds. Geely set a target of having 20% female managers by 2025, which shows that diversity and inclusion have become key facets of organizational development (Geely ESG Report 2022: 8). The company also continued to enhance occupational health and safety standards, achieving 100% training coverage and expanding ISO 45001 certification across its manufacturing sites. In addition, Geely expanded its training and development systems through the Geely Auto Academy, internal mentorship programmes, and industry–university collaborations, fostering technical expertise and cross-generational talent development.

Community and social impact

From 2016 to 2022, Geely's community engagement strategy developed from primarily localized, direct poverty-reduction initiatives to more strategic efforts that focus on global and local collaborations.

Geely's approach in 2016 and 2017 was provincial and *ad hoc*; that is, the company addressed community requirements through direct contributions to socio-economic development, particularly education programmes and philanthropic donations (Geely ESG Report 2016: 57-

64). In 2016 and 2017, the community initiatives of Geely focused on poverty alleviation through direct support programmes for employment, education, and agriculture. The company helped financially struggling students and offered employment opportunities to mitigate the socio-economic issues of the moment (Geely ESG Report 2017: 12-16). These community efforts were mainly centred in locations where the company operated.

By 2022, Geely went further to encompass a more comprehensive and sustainable approach based on global supply chain cooperation and local development programmes (Geely ESG Report 2022: 114). The company continued to echo the Government's policy and contributed to poverty alleviation, education equity, rural revitalization, and assistance. The company forged partnerships to deliver social value to its supply chain and employees through its global presence.

To conclude, Geely's ESG strategic shift is closely related to the company's internationalization orientation. Geely's listing on the HKEX demonstrates how capital market access can incentivize firms to integrate global sustainability principles into their business operations, particularly through sustainable financing, responsible supply chain management, and cross-border partnerships.

[E] DISCUSSION AND CONCLUSION

This study provides an extensive review of the ESG regulatory environments in Mainland China and Hong Kong in the context of Chinese companies' outbound development. It begins by explaining how the challenges that Chinese firms encounter in the process of internationalization today are quite different from those of earlier globalization waves. To achieve legitimacy and competitiveness in sustainability terms at the global level, Chinese companies must catch up with the prevailing trends of globalization. Today, these values of business sustainability are to be incorporated into core ESG strategies and practices.

Using a unique dataset from the HKBSI developed by the CUHK, we compared the ESG strategies and performance of companies from Hong Kong and Mainland China that are looking for business opportunities and resource consolidation through listings on the HKEX. Our findings show that both Hong Kong and Mainland China experienced ESG regulatory shifts. On the one hand, Hong Kong has a robust market-driven approach, while ESG performance of companies from Mainland China is policy-driven with compliance as the focus. In recent years, Mainland Chinese companies listed in Hong Kong have increasingly adopted market-oriented

ESG practices, gradually narrowing the gap between Hong Kong firms and international standards.

Managerial implications

As a representative case of a Chinese firm listed on the Hong Kong Stock Exchange with significant overseas expansion in acquisitions, R&D, branding, and marketing, this study analysed Geely Automobile's ESG journey in depth. Between 2016 and 2022, we detected a significant transformation in ESG strategies, performance, and reporting behaviours. The two ESG reports issued in 2016 and 2022 show that Geely started with domestic ESG standards and localized initiatives. However, over time, it has shifted toward long-term value creation throughout its entire value chain to embrace global ESG standards. This transformation is visible in several key areas of ESG strategies and reporting, especially supply chain management, employee and community engagement, and corporate governance.

This study has several important qualitative implications. First, ESG is a strategic enabler of firms' globalization strategies and operations. It encapsulates the core values of globalization and is the gateway to overseas market access. This is evidenced by the Geely case, where ESG strategies and internationalization are inseparable, and its sustainable practices improve the firm's global competitiveness.

Second, the evolution of ESG practices in Chinese companies highlights the importance of a dual-adaptation strategy that aligns domestic and international sustainability expectations. As illustrated by the Geely case, companies that initially focused on meeting domestic ESG compliance requirements progressively subscribed to global standards through mechanisms such as listings on the HKEX. This adaptation process requires firms to simultaneously adhere to Mainland China's policy-driven ESG mandates while aligning with Hong Kong's market-oriented and stakeholder-driven ESG framework. A smooth transition between these two paradigms is critical for sustained success in international markets. Firms that navigate this dual approach effectively are better positioned to secure access to international capital.

Policy implications

This study has several policy implications. First, the review of regulatory frameworks and case study highlight the need for enhanced cross-border regulatory coordination to reduce the divergence between Mainland

China's policy-driven ESG framework and Hong Kong's market-oriented approach. Harmonizing regulations between the two jurisdictions may reduce friction and uncertainty for companies operating in both regions and help them adapt smoothly to global ESG standards. To this end, greater coordination of ESG disclosure requirements, governance standards, and sustainability benchmarks can facilitate more consistent and effective ESG integration, thereby promoting policy coherence and improving business efficiency.

Second, regulatory consistency is needed, as it is a foundation for fostering trust among companies, regulators, and investors. By promoting structured dialogue among policymakers, industry leaders, and global sustainability organizations, firms with international ambitions can better align their operations with stakeholder expectations. This would facilitate resource mobilization and foster stronger long-term commitment while reducing decoupling and short-termism. Consistent policy initiatives that help align local regulatory mandates with international ESG norms can provide Chinese companies with a strong foundation of stakeholder trust and credibility.

Third, from our analysis, it is clear that overseas ESG is beyond social and environmental concerns, but more of a political and economic strategy. Given the increasing alignment between corporate ESG practices and national strategies such as the BRI, it may be valuable for policymakers to provide more explicit regulatory expectations and matching mechanisms around overseas stakeholder engagement. For instance, authorities could consider issuing detailed guidelines or sector-specific frameworks that require listed companies, especially those involved in state-backed overseas projects, to disclose structured stakeholder engagement research and processes, including how local community concerns, labour interests, and environmental risks are identified, addressed, and monitored over time. Incorporating local community feedback mechanisms into ESG disclosure templates may also strengthen the accountability of companies operating in sensitive regions (such as mining projects in the Democratic Republic of Congo, infrastructure development under the China–Pakistan Economic Corridor, or pipeline construction in Myanmar), ensuring that their ESG efforts not only meet reporting requirements but also contribute to social legitimacy and long-term policy credibility.

Finally, as a related issue, when companies seek overseas expansion in high-impact investment contexts, it may be beneficial for policymakers to promote more transparent reporting behaviours on ESG-related trade-offs. Rather than emphasizing only positive outcomes, regulatory

frameworks could encourage firms to explicitly acknowledge tensions, such as those between environmental compliance and project delivery timelines or between local labour integration and cost efficiency. Thus, ESG disclosures would provide a more realistic and accountable picture of a company's contextual challenges. This will allow policymakers to calibrate support measures, identify systemic conflicts in ESG goals, and develop targeted governance mechanisms for future cross-border investments.

This study has several limitations. First, although the investigation focused on the ESG strategies of Mainland Chinese companies during their overseas expansion, it does not contain industry-specific observations, which may reduce generalizability. Second, the Geely Automobile case study offers comparative insights over time through an in-depth interpretation of its 2016 and 2022 ESG reports. However, the analysis does not examine the progress and dynamics that occurred between these years. Did any recurring challenges hinder the transition process? How have these challenges been addressed or mitigated? Finally, this review could be further strengthened by future studies that incorporate a quantitative dataset to provide empirical evidence, thereby increasing the rigour and breadth of the findings.

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Legislation, Regulations and Rules

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Company Law 2006 (PRC)

Guideline to State-Owned Enterprises Directly under the Central Government on Fulfilling Social Responsibilities 2008 (PRC)

Guidelines for Environmental, Social, and Governance (ESG) Reporting (Revised Edition) 2019 (PRC)

Guidelines for the Standardized Operation of Listed Companies 2009 and 2010 (Shenzhen Stock Exchange)

Examining Environmental, Social, and Governance Practices in Nigeria

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Abstract

This article examines the evolution and development of environmental, social and governance (ESG) in Nigeria. In Nigeria, there is no unitary legal framework that articulates all ESG obligations that companies are required to comply with, and this is not unusual given the breadth of the ESG pillars. However, the article outlines the multilayered regulation and the multistakeholder approaches within the emerging framework. It highlights that the private sector has been identified as a significant driver of ESG but also suggests that some improvements in ESG reporting frameworks and more robust legal frameworks to discourage greenwashing would enhance ESG practice. It suggests that Nigeria must shift from isolated successes to a systemic framework to fully realize the potential of ESG practice.

Keywords: Nigeria; business; corporate; governance; social; responsibility; environment; accountability.

[A] INTRODUCTION

Nigeria is a country with a diverse multi-ethnic population of approximately 229 million people located in West Africa. (United Nations Population Fund 2024). It is one of the most populous countries in the world. It has an emerging economy and a significant impact in the African markets. It is ranked as the second biggest capital market in Africa (Imhanzenobe 2023; Martin 2023). It is also a key global energy sector country: as well as being a major oil and gas producer and a member of

the Organization of Petroleum Exporting Countries (International Energy Agency 2024).

Yet, there are limited opportunities for Nigeria's young population with World Bank estimates of a poverty rate of 38.9% in 2023 and the seventh lowest human capital index in the world (World Bank 2024). Nigeria has state recognition of the duty towards environment and social development objectives enshrined within Chapter 2 of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) as amended, although these are framed as "fundamental objectives and directive principles". The responsibility for these objectives can only be actualized in partnership with key economic actors, such as businesses and other stakeholders. This corresponds with recognition of the importance of the business contribution to the development sphere, in the United Nations (UN) Sustainable Development Goals (SDGs) and the African Union's Agenda 2063. This is also what prompted an earlier Bill, which attempted to mandate corporate social responsibility (CSR) in Nigeria (Okoye 2012).

Therefore, environmental, social and governance (ESG) standards in Nigeria are recognized as a key issue for development and the country is growing its regulatory instruments and policies as a result. Like many countries, Nigeria does not have a single unitary ESG framework to guide all sizes of companies, instead the country's ESG strategy can be found in some laws and regulations which recognize a duty to consider environmental, social and governance issues in the company framework and decision-making.

These include: the Central Bank of Nigeria (CBN) Sustainable Banking Principles 2012; the Nigerian Exchange Group (former Nigerian Stock Exchange) Corporate Governance Rating System (CGRS) launched in 2014; the Nigerian Exchange Group Sustainability Disclosure Guidelines 2018; the Nigerian Code of Corporate Governance (NCCG) 2018; the Nigerian Company and Allied Matters Act (CAMA) 2020, section 305(3) on environmental impact in the community; the Nigerian Security Exchange Commission (SEC) Sustainable Finance Principles 2021; the Nigerian Climate Change Act 2021; and the Nigerian Petroleum Industry Act 2021.

Nigeria is a federation of 36 states and a federal capital territory (Okechukwu & Kuna 2016), so there are other internal state regulations which may have an impact on companies' ESG policy at a subnational level, especially with large commercial states such as Lagos State (Adebisi & Ors 2015). This subnational regulation plays an important role in the ESG policy of small and medium enterprise (SME) companies.

This article outlines a detailed overview of ESG in Nigeria and proposes that the current direction appears to be one of increasing ESG regulatory instruments. However, there is a need to measure the efficacy of the multilayered regulatory approach, and the results may then drive towards an integrated systemic regulatory approach to ESG. This could be enshrined in an identifiable purposive instrument.

[B] EVOLUTION OF ESG RULES IN NIGERIA

Historically, Nigeria had a prominent role in the publicity of wider CSR issues globally because of the dominance of oil exploration and production in the economic life of the country. This publicity had specific focus on the environmental and social—including community and human rights issues. The Shell in Nigeria case study became the trigger for a rethink in how large corporations addressed social responsibility. (Boele & Ors 2001b; Edoho 2008). The embrace of sustainability reporting by these large corporations operating within Nigeria could be traced back to community concerns with human rights and environmental issues. Shell, for example, voluntarily embraced sustainability reporting with the "People, Planet and Profits" report following both the 1995 Brent Spar crisis and the 1995 Ogoni–Ken Saro Wiwa crisis (Shell 1999; Boele & Ors 2001a; Elkington 2012).

Nigeria had an early enactment of environmental laws such as the Associated Gas Re-injection Act 1979, banning gas flares subject to a fine, and the Environment Impact Assessment Act 1992 (EIA Act), requiring an environment impact assessment (EIA) for projects. There were also other laws which covered social protections for those such as employees and consumers (Udo Udoma & Belo-Osagie 2024). However, robust implementation of these laws was lacking due to issues with capacity, political will, and processes (Ogunba 2004; Frynas 2009; Afinotan 2022).

CSR and ESG as concepts are inter-related, although there is a difference in the context of the emergence of the terminology, "ESG" and the emphasis on "governance" as a distinct aspect (Gillan & Ors 2021). Globally, modern ESG terminology can be traced to the "Who Cares Wins" initiative of the UN in 2004, focused on connecting financial markets to a changing world (World Bank 2017; Golden 2023; Idowu & Ors 2023). The history of ESG regulation in Nigeria mirrors the global trends because ESG emerged from financial-sector regulation such as the CBN Sustainable Banking Principles 2012.

Viewed as the first initiative of its kind globally, the CBN Sustainable Banking Principles, launched on 24 September 2012, enjoined "banks, discount houses and development finance institutions to develop a management approach that balances the environmental and social risks identified with the opportunities to be exploited through their business activities" (Amaeshi & Ogbechie 2013). Principle 6 of the CBN Sustainable Banking Principles specifically mentions the implementation of robust ESG practices within the institution and an assessment of the ESG of clients. The guidance provided further details on implementation including assigning responsibility, developing practice, establishing audit procedures and increasing public dialogue, among others. The Sustainable Banking Finance Network (SFBN) which collates data on ESG indicators in this sector, shows significant progress on the ESG indicator for the Nigerian sector in 2024 (SFBN 2024).

In Nigeria there has been a long history of different sectoral and regulatory corporate governance codes. Marshall identified the following list of codes in 2015:

> Code of Corporate Governance for Public Companies, 2003 issued by Securities and Exchange Commission (SEC); Code of Corporate Governance for Banks Post Consolidation, 2006 issued by CBN; Code of Corporate Governance for Licensed Pension Operators, 2008 issued by Pension Commission (PENCOM); Code of Good Corporate Governance for Insurance Industry, 2009 issued by (National Insurance Commission) NAICOM; enactment of FRC Act, which among others created FRC; Code of Corporate Governance for Public Companies, 2011 issued by SEC and its recent amendment 2014 and the Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry 2014 (Marshall 2015: 50).

The Nigerian Exchange Group also launched a corporate governance rating system (CGRS) for listed companies in 2014 (Onyema 2014) as a driver for improved practice. The CGRS was done in conjunction with the Convention on Business Integrity.

Overall, this has resulted in a landscape with multifaceted diverse governance codes. However, there have been recent attempts by the Financial Reporting Council of Nigeria (FRCN) to create an all-encompassing NCCG for various corporate entities. This includes a three-tiered corporate governance code, in 2016, which was not well received (Herbert & Durosomo 2019) and the current NCCG was unveiled in 2018, which adopts the apply-and-explain philosophy.

The landscape for large companies will therefore include the CAMA 2020, the NCCG 2018 and the SEC Code of Corporate Governance for

Public Companies 2020. The potential for ESG to act as a framework which could lead to a more streamlined approach is a theme to be exemplified by the review of regulations and the sections on implementation that follow.

[C] REGULATION OF ESG IN NIGERIA

In Nigeria, ESG as a composite framework of concepts and principles has been mostly driven by the private sector, though there are various policies and legislative instruments at both federal and state levels that prescribe rules that can be compiled to articulate the foundation of the ESG requirements for corporate or business entities. There is no unified legislation that materially addresses ESG. There are several legislative instruments at the federal and state levels that separately address persistent challenges like environmental degradation, social inequalities, and governance deficiencies, which are all subject matters that ESG seeks to encapsulate for the benefit of a myriad of stakeholders such as investors, relevant communities, society at large, international stakeholders, governments, and other organizations. The application of these legislative instruments differs depending on the subject, sector or industry involved in terms of whether they are mandatory obligations or recommendations for voluntary compliance.

Environmental pillar

Some of the key laws enacted at the federal level create obligations which have impact on the environmental issues. These are summarized below.

The Climate Change Act 2021, a landmark legislation on climate change and environmental sustainability in Nigeria, was enacted to honour and implement Nigeria's commitments to the Paris Agreement 2015 and the updated Nationally Determined Contributions made at the 26th Conference of Parties to the UN Framework Convention on Climate Change (UNFCCC) in Glasgow (COP 26) (Aluko & Oyebode 2022). The Act imposes a broad obligation on private companies or legal entities with 50 employees or more to establish measures to achieve Nigeria's annual carbon emission reduction targets and designate a climate change officer or environmental sustainability officer who will submit to the National Council on Climate Change annual reports on efforts taken by the organization in meeting self-designed carbon emission reduction and climate adaptation plans.

The Petroleum Industry Act 2021 imposes environmental protection obligations, including a requirement for licensees or lessees in the

upstream and midstream sector in Nigeria to: submit an environmental management plan for projects which require EIAs to the Nigerian Upstream Petroleum Regulatory Commission or Nigerian Midstream and Downstream Petroleum Regulatory Authority, as is applicable, and further prescribes more stringent prohibition on gas flaring; the payment of a financial contribution to the environmental remediation fund; and the establishment of host communities development trust funds.

The Electricity Act 2023 provides for the continued obligation to promote the generation of electricity but also from renewable sources and, in granting licences, offers tax breaks and other incentives for the generation and consumption of energy from renewable sources.

The EIA Act 1992 was enacted to require EIAs in specific circumstances and sets out general principles, procedures, and methods for the prior consideration of the environmental impact of proposed projects that may have significant effects on the environment.

There are other guidelines and policies under the environmental pillar arising from Nigeria's international agreements and commitments which include: the 2018 revised Environmental Guidelines and Standards for the Petroleum Industry in Nigeria which outline the requirements for environmental management and pollution abatement at all stages of the petroleum production process; National Climate Change Policy for 2021–2030 detailing Nigeria's commitment and policy direction to achieving low-carbon emissions and climate resilience; Sectoral Action Plans for Nigeria's nationally determined contribution (NDC) to the UNFCCC which outline Nigeria's plan for NDC implementation, including the High Level Roadmap to guide work across government to take forward the commitments made under the Paris Agreement.

Also notably, in June 2023, Nigeria became the first African country to adopt the International Financial Reporting Standards Sustainability Disclosure Standards (IFRS Standards) (Nwachukwu 2023). The FRCN released a Roadmap Report for Adoption of IFRS Sustainability Disclosure Standards in Nigeria 2024 to guide its phased adoption of the IFRS Standards (FRCN 22 April 2024). The first phase was completed in December 2023 by the following public listed companies in Nigeria: Access Bank plc, Fidelity Bank plc, MTN Nigeria plc and Seplat Energy plc (FRCN 28 August 2024). Nigeria is currently in its second phase of voluntary adoption spanning 1 January 2024 to 31 December 2027 requiring entities to build capacity and prepare for mandatory adoption to subject themselves to the readiness test assessment.

States also have specific laws, regulations, and policies such as the Lagos State Environmental Management Protection Law 2017, Lagos State Waste Management Authority Law 2007, and Rivers State Environmental Protection Agency Law 2014, all addressing pollution control, waste management, and resource sustainability.

Sector-specific regulators, especially in the financial sector, have also introduced regulations and guidelines such as the CBN Sustainable Banking Principles 2012, Nigerian Stock Exchange Sustainability Disclosure Guidelines 2018, Securities and Exchange Commission (SEC) Green Bond Rules 2018 and Guidelines on Sustainable Financial Principles for the Nigerian Capital Market 2021 to drive and incentivize investments and businesses that align with the regulations.

Social pillar

The principles that underly the "social" pillar in Nigeria have developed, underscoring its importance beyond mere CSR to a necessity for business sustainability. Social issues such as high unemployment and poverty rates, corruption, inadequate and poor infrastructure and social amenities, insecurity, terrorism and banditry, host communities' agitation, and so on portend real risks to the sustainability of businesses and corporate entities as well as an opportunity to be involved, contribute to the development of the communities they operate in and drive innovation for the resolution of such issues.

Laws and regulations govern multiple facets of the social pillar, which includes employment and labour rights, fundamental human rights, diversity, equity, and inclusion, consumer protection, data privacy and protection, social security and welfare, community relations, and the SDGs.

The CFRN provides a solid foundation for the social pillar with provisions for the protection of traditional rights such as fundamental human rights and establishment of the courts and access to justice. The CFRN also permits the direct implementation and enforceability of international labour agreements and standards. Furthermore, the Labour Act 1971 which establishes minimum standards for wage protection, employment contracts, and working conditions; the Factories Act 2004, aimed at safeguarding the health, safety and welfare of workers in industrial environments to reduce workplace accidents; and the Employees Compensation Act 2010, which mandates compensation for employees or their dependants in cases of work-related injuries, illnesses, or fatalities, and creates the Employee Compensation Fund, financed by employer

contributions, to support compensation, rehabilitation, and workplace safety programmes.

There are also other relevant statutes, such as the Federal Competition and Consumer Protection Act 2018, which prohibits anti-competitive practices and aims to ensure consumer protection, and the Nigeria Data Protection Act 2023, which addresses data privacy and protection. Recently, the intensified activism from stakeholders and civil society along with the enforcement actions of regulators have led to a greater emphasis on social factors, thereby reinforcing the social pillar within the ESG frameworks of private entities.

Governance pillar

The Governance pillar encompasses ethical leadership, accountability, and effective management practices, such as board diversity, transparency, anti-corruption measures, and adherence to regulations.

The CAMA 2020 prescribes provisions regarding company administration, along with the roles, powers, and responsibilities of directors, auditors, and other officers, establishing essential standards for accountability and transparency integral to the governance framework.

The NCCG 2018 prescribes minimum corporate governance standards for entities while sector-specific regulators have also established corporate governance guidelines such as the Corporate Governance Guidelines for Commercial, Merchant, Non-Interest and Payment Service Banks in Nigeria issued by the CBN in 2023, the SEC Corporate Governance Guidelines for Public Companies in Nigeria 2020, the National Insurance Commission Corporate Governance Guidelines for Insurance and Reinsurance Companies in Nigeria 2021 and the National Pension Commission Guidelines on Corporate Governance for Pension Fund Operators 2021.

Nigerian corporations have adopted various corporate governance best practices tailored to organizational size and industry. These include the appointment of independent directors, addressing gender diversity issues, conducting corporate governance audits and board performance assessments, term limits for directors, separation of chairperson and chief executive officer roles and providing directors' training. These measures have aligned Nigerian governance standards with global best practices while addressing local industry needs.

Companies are now required to hold themselves accountable and apply best practice even where there are no rules or regulations compelling

them to, and when companies fail to do so, their customers or other stakeholders may apply punitive measures through product or service boycotts, social media backlash and reputational damage, all of which may impact the financial position of the organization significantly. Finally, investor demands and participation in transactions or arrangements that involve international organizations that require ESG reporting such as the UN Principles of Responsible Investing and the UN Global Compact also significantly influence the ESG frameworks of corporate entities operating within the Nigerian jurisdiction.

[D] CASE STUDIES

The implementation of ESG in Nigeria has been driven by sustainability reporting regulations and legislation, by the funding prescriptions of investors or financial institutions and through the adoption of ESG best practice or policies by organizations especially multinationals or corporates with international exposure. Implementation strategies therefore range from voluntary initiatives and sector-specific practices to compulsory provisions in the legislations.

Organizations in Nigeria are starting to recognize the importance of balancing sustainability with profitability and so seek to create a positive impact through their operations, which can be measured using ESG metrics.

This section examines the implementation of ESG in Nigeria and explores case studies of successful and unsuccessful ESG implementation. Some implementations will be discussed under categories of sustainability reporting and sustainability financing.

Successful ESG implementation

Sustainability reporting

Lafarge Africa PLC (Lafarge)

Lafarge demonstrates a comprehensive approach to sustainability reporting that involves critical areas such as climate and energy, circular economy, nature, people, and net-zero targets in its latest sustainability report (Lafarge 2023).

Lafarge reported that it employs a combination of industrial waste, agricultural waste, tyre chips and biomass as alternative fuels to energize some facilities, and Lafarge's Ashaka plant operates entirely on the national grid to reduce reliance on outdated, inefficient diesel generators.

Lafarge's Stakeholder Management and Communication Policy underpins its stakeholder engagement strategy. In its 2023 Sustainability Report, the company identifies stakeholders as individuals or entities that influence the company's business activities or are impacted by them (Lafarge 2023). Lafarge states that it is committed to upholding human and labour rights in its operations and business activities and, as such, actively engages with stakeholders to address or remediate any adverse consequences generated by its activities. Lafarge's CSR is focused on stakeholders within its operating communities. It includes educational initiatives that offer scholarships at the primary, secondary and tertiary levels to members of its host communities and supplies of educational materials to underprivileged students within the community; health programmes that focus on construction of health centres and provision of care to the older members of the host community; economic empowerment programmes centred on skill acquisition for local youth; and the development of infrastructure, like community halls for meetings and restoration of dilapidated buildings.

Dangote

Dangote Cement plc is a Nigerian corporate entity that has made significant pronouncements regarding its ESG practices articulating its commitment to climate change in its policy, recognizing the UNFCCC Paris Climate Change Agreement's objective to limit global warming and undertaking to mitigate the impact of its energy consumption and other CO_2 sources in its operations. In 2023, CO_2 reduction initiatives were implemented with an emphasis on thermal energy substitution, alternative fuels and raw materials, clinker substitution (CK ratio), electrical energy management, operational efficiency, and tree-planting campaigns (Dangote 2024).

Dangote Cement is also driving efforts to implement and enforce some of its commitments to the "S" aspect of the ESG. Its 2024 Sustainability Report revealed that incentives and long-service awards were provided to employees who have maintained the company values while rendering exceptional customer service.

Dangote engages in open discussion with stakeholders to assess its focus and ensure alignment with the most pressing concerns. In 2023, Dangote conducted a materiality assessment by engaging in discussions with employees, host communities, investors, and supply chain partners. The conversations mostly centred around the stakeholders' problems and their expectations from the organization. To enhance these discussions, this assessment examined the company's sustainability performance, operational processes, responsible supply chain practices, investment

decisions, and stakeholder views. The survey results identified critical themes including employee welfare, responsible sourcing, infrastructure development, enhanced vendor participation, and customer privacy. As a result of the survey and subsequent stakeholder engagement, Dangote successfully integrated the identified topics into its business strategy and sustainability action plans.

The company reported in its Sustainability Report that it is dedicated to assessing its operations and the possible environmental and social repercussions of these operations on its stakeholders. The organization has recognized stakeholder participation to mitigate social incident disruptions, thereby influencing business operations. In its Sustainability Report, Dangote noted a 6% rise in community participation in 2023, rising from 763 in 2022 to 810 in 2023. This facilitated a 9% reduction in social incident disturbance. The company also recorded a 13% decrease in hours lost due to social situations. The corporation recorded a 61% decrease in the rate of grievances filed. Due to proactive grievance management strategies, 71% of reported community grievance complaints in 2023 were successfully resolved (Dangote 2024). The company has recognized its stakeholders as employees, distributors, consumers, vendors, host communities, investors, regulators, and industry peers, as these groups significantly impact its operations.

Sustainability financing

In December 2017, Nigeria became the first African nation to issue a sovereign green bond, raising NGN10.69 billion to finance projects aimed at reducing greenhouse gas emissions and fostering a low-carbon economy. This milestone aligned with Nigeria's commitments under the Paris Agreement and demonstrated a commitment to achieving the UN SDGs. The proceeds were allocated to projects in renewable energy, afforestation, and transportation, setting the stage for sustainable development.

Access Bank

Long before major financial institutions in Nigeria began to incorporate ESG into their business strategies, Access Bank had an existing framework that embedded sustainability into the fabric of its own business operations (World Finance 2024).

In May 2019, Access Bank expanded its product and service offerings with sustainable financing, with the issuance of a NGN15 billion corporate green bond designed to help investors meet environmentally sustainable

investment goals and provide an avenue for customers to realize growth opportunities of developing a low-carbon economy.

In 2022, Access Bank successfully closed a second green bond issuance, to a tune of USD50 million to fund eligible green assets that align with the Climate Bonds Initiative guidelines and the Green Bond Principles of the International Markets Association (Access Bank 2024).

In the social sphere, Access Bank partnered with Nigerian social enterprise SME Funds to develop the Green Social Entrepreneurship Programme which provided households with clean energy stoves to replace the traditional cooking stoves which often posed a health risk to human health and the environment (World Finance 2024). The new stove converts waste-based biomass into biofuel.

Chapel Hill Denham

In May 2021, Chapel Hill Denham, an asset management organization, became a signatory to the UN-supported Principles of Responsible Investment (PRI), joining a global network of about 4000 signatories representing over USD100 trillion in assets under management who are committed to incorporating ESG measures into their investment decision-making and practices (Chapel Hill Denham 2021). The company joined the PRI because it represents how they invest and have operated the firm (Bolaji Balogun, quoted in Vanguard 2021).

ESG in the telecommunications sector

MTN Nigeria Communications plc (MTN)

MTN has taken steps in the implementation of ESG strategies within the telecommunications sector with the introduction of eco-friendly SIM cards in 2023. Globally, over 6 billion SIM cards are produced annually, generating 18,000 kilograms of plastic waste. These SIM cards are non-biodegradable and, when disposed of at the end of their life cycle, cannot be broken down by natural substances therefore MTN's paper-based SIMs mitigate this environmental burden. It is expected that the mobile subscriber base in Nigeria will surpass 200 million by 2025 therefore paper-based SIMs will mitigate the environmental burden the SIM cards would have caused. The biodegradable SIMs are in line with the company's Project Zero goals which seek to reduce emission and achieve net zero emissions by 2040 (Egwuatu 2024).

Unsuccessful ESG implementation

Some organizations in Nigeria have encountered challenges in implementing ESG strategies and some have fallen short of meeting their own sustainability commitments.

Coca-Cola

In December 2024, Coca-Cola announced new 2035 environmental goals, updating, and revising previous targets and, in some cases, deferring its prior sustainability commitments. Coca-Cola had earlier announced its goal to increase the use of recycled materials, a goal which has now been moved to a target of 35% to 40% by 2035, compared to its prior goal of 50% by 2030. Coca-Cola announced most of its prior packaging ambitions in 2018 as part of its "World Without Waste" initiative (Segal 2024). This included making 100% of its packaging recyclable by 2025, using at least 50% recycled content in its packaging by 2030, and to collect and recycle a bottle or can for each one sold by 2030. In 2022, it announced that it intended to have at least 25% of all its beverages globally sold in refillable and returnable glass or plastic bottles or in refillable containers. However, in its 2023 Environmental Update Report, Coca-Cola revealed that it was still on track to meet most of its environmental sustainability goals but was behind on its recycled content and collection goals. The company also lowered its collection ambition from 70%-75% by 2035, against its initial "collect and recycle a bottle or can for each one sold by 2030" (Segal 2024).

The decision by Coca-Cola to scale back on some of its voluntary environmental initiatives is a corporate-level shift, however, this move is likely to impact the environmental sustainability efforts and commitments of affiliates in Nigeria, particularly for the Nigeria Bottling Company, which holds the franchise to bottle and sell Coca-Cola beverages in the country. The impact of this decision at the global level is likely to trickle down across the local market, affecting the environmental sustainability initiatives within this market as it relates to disposable plastics or PEP bottles and cans.

Corporate governance failures in the banking sector

Corporate governance failures may have drastic consequences that extend to national economies, businesses, and the larger society, and regulatory agencies continue to exercise and assert their oversight powers to identify incidents or areas where entities they regulate have not met required governance standards.

The CBN has repeatedly had to step in from time to time to address corporate governance failures within the banking sector. In January 2024, the CBN dissolved the boards and management of Union Bank plc, Keystone Bank plc, and Polaris Bank. It was reported that the actions became necessary due to non-compliance of these banks and their respective boards with some of the provisions of the Banks and Other Financial Institutions Act 2020 (CBN 2024). The banks' infractions were reported to vary from breaching licence conditions, regulatory non-compliance, engaging in activities that threaten the financial health of the bank and corporate governance failures.

The CBN also, in June 2024, revoked the banking licence of Heritage Bank plc. This decision was allegedly made due to the bank's failure to improve its financial performance (Adaji 2024), despite several opportunities given and commitments made by its management.

There is a recurring thread of failures of corporate governance on the part of the boards and management identified in these bank failures—validating the importance of governance and ESG—ultimately resulting in critical interventions by the CBN to ensure the protection of the financial system and maintenance of public confidence.

Cadbury Nigeria plc

The Cadbury Nigeria plc scandal highlighted the damaging effects of corporate governance failures. It was reported that the financial statements released by the company were altered through stock buybacks, cost deferrals, trade loading, and fraudulent supplier stock certificates. The board and top management were also said to have exhibited a lack of transparency, and the company's corporate oversight mechanisms and systems were found to have been compromised. The auditor's performance was inadequate, as the company's accounts, which underwent regular audits, were overstated from 2002 to 2006. The profit forecasts were overly optimistic, and there was insufficient professional scepticism regarding the authenticity of the documents submitted by the company.

The incident resulted in a 68% decline in the company's share price, a financial penalty imposed on the company, and the termination of both the managing director and finance director. Additionally, there were significant layoffs at the director level, and some were prohibited from assuming directorship roles in any public company in Nigeria. The British parent company of the firm made a provision of GBP15 million for the impairment of goodwill associated with the company. The

regulators imposed penalties and reprimanded the external auditor and the registrars.

Though the scandal dates to 2006, it is significant as an ESG case study for multiple governance failures in a publicly traded multinational company with the facade of a strong governance pedigree, along with governance and professional failures by its well-respected auditors.

The Oil and Gas Sector

The exploration and production of fossil fuels has had major and lasting negative impacts on the environment across the globe, including in Nigeria. There has been a recent wave of international oil companies divesting from onshore assets in Nigeria for reasons attributed to insecurity, oil theft, and entrenched hostilities in host communities, all of which ultimately contribute to the high costs and risks of continued operations (Stakeholder Democracy Network 2022). Some of these divestments appear to have been the outcome of failures in one or more of the ESG pillars.

There have also been cases where companies create a façade of ESG consciousness. The Centre for Constitutional Rights, in its article "Shell's Environmental Devastation in Nigeria" (2009) reported that despite Shell's questionable ESG record in Nigeria and elsewhere, the company continues to try to falsely portray itself as "green" in its advertising. This seemed to align with the United Kingdom's Advertising Standards Authority (ASA) finding in 2007 that Shell's environmental claims violate its advertising rules, when Friends of the Earth filed a complaint against Shell for falsely claiming that its carbon dioxide waste was used to grow flowers. The ASA condemned Shell's actions and forced it to withdraw the advertisement (Tryhorn 2007).

State-level ESG implementation

Lagos State is Nigeria's largest commercial hub. It has been instrumental in advancing ESG strategies as it serves as a benchmark for other states, owing to its economic importance and pro-active policy approach. Lagos State had issued and published a ban on styrofoam and other single-use plastics in January 2024 given that increasing polystyrene and plastic waste pollution has significantly hindered drainage systems and caused urban flooding along with other concerns including the costs of cleaning and evacuation. The ban aligned with section 18 of the National Environmental (Sanitation and Waste Control) Regulation 2009 which provides that plastic bags made from plastic films having a wall thickness of less than 80 micrometres cannot be manufactured, traded, or sold.

The ban was, however, not implemented. In October 2024, after engagement and consultation with stakeholders, Lagos State published a staged enforcement strategy and expanded the focus to include styrofoam plates, cups, straws, cutlery, and nylon bags under 40 microns. Starting in January 2025, the staged strategy aims to limit the impact of plastics pollution on urban infrastructure and public health.

Challenges and policy recommendations

The widespread adoption and implementation of ESG strategies remains in the early stages for most SMEs in Nigeria. Large businesses have the necessary awareness and have moved towards increased adoption compelled by law, the need for funding or by influential business stakeholders. As the Nigerian economy grows and appropriate legalization and regulations come into force, ESG will become a business imperative. For meaningful implementation, legislation and regulations in Nigeria providing consistent standards and guidance for measurement of ESG metrics will be useful for evaluations and investments decision-making so that businesses can be compared and assessed on the same set of criteria.

Selected policy recommendations could improve effectiveness of ESG practice in Nigeria, and this includes, firstly, establishing standardized ESG reporting guidelines that organizations are mandated to comply with when reporting on ESG. A standardized reporting framework will promote consistent disclosures, enhance transparency and enable effective monitoring and accountability. Secondly, there should be mandatory ESG impact forecasting which could mean that companies operating within sectors and industries with high environmental and social impact, such as oil and gas, manufacturing and construction, may be legally required to submit quantifiable ESG commitment plans. These plans should include specific initiatives targeting environmental protection and community preservation, a timeline and financial allocation for each initiative and independent audit to validate proposed figures. This will ensure proactive accountability and verification of ESG efforts, particularly within sectors that have higher negative impact on the communities or society that they operate in. Thirdly, there should be a legal framework to enforce ESG commitments. Nigeria could benefit from the introduction of a regulation that penalizes ESG backtracking on certain classes of activities where companies scale back on such ESG commitments without regulatory approval and prior public disclosure. This regulation would oblige companies that intend to alter or scale down their already declared ESG commitments to go through a specified

procedure which will include a thorough explanation that justifies the scale-back or alteration. Such regulation will protect the integrity of ESG disclosures, discourage greenwashing and ensure that companies do not make lofty and ambitious ESG declarations for the sole purpose of branding themselves in glowing terms, thereby attracting investors and other stakeholders. Finally, the legal framework could incentivize the adoption of ESG practices by SMEs.

[E] RELEVANCE OF ESG IN NIGERIA

Global trends indicate that this is a period of significant interest in ESG, with the development of disclosure regimes, framework and regulatory instruments. Edmans points out that "now is the peak of ESG. It's front and center in the minds of executives, investors, regulators, business students, and even the public" (2023: 3). Nevertheless, the field is still developing and complex but gives a potential roadmap. This is the case in Europe (PWC (Belgium) nd) and the United States (US) (Cifrino 2023). Although the roadmap for the US has become somewhat uncertain (Engler 2024).

The global regulatory landscape is still a patchwork of disclosure regulations, environmental regulations, corporate governance codes, and self-regulatory mechanisms drawn from international standards. This aligns with the landscape in Nigeria where significant activity in this area is driven by the private sector in anticipated response to issues of investment, growth and sustainability. It also ties in with studies which show potential for "consumer satisfaction, market acceptance, lower cost of debt and the societal values it brings to its stakeholders" (Mohammad & Wasiuzzaman 2021: 1). The key issues highlighted in this section include SMEs, sector-specific challenges and the development objective.

There is a vacuum of significant data and examples of the SMEs in this space. SMEs are estimated to constitute up to 80% of Nigeria's business sector, therefore significant impact could be made with encouraging integration of ESG considerations into company practice at this level. Victor-Laniyan observes that SMEs are vital to Nigeria's economies and contribute to social equity, poverty alleviation, environmental protection and have the potential to surpass the contributions of large corporations (2023). There is also evidence that SMEs carry out indigenous ESG practices which could be captured and scaled up (Ekekwe 2021). Such indigenous ESG practice, for example community-based apprenticeship systems and entrepreneurial schemes, could address a key Nigerian social challenge of unemployment. The World Bank suggests that: "Weak

job creation and entrepreneurial prospects stifle the absorption of the 3.5 million Nigerians entering the labor force every year" (2024).

The practices of the SMEs are key to addressing aspects of ESG, but the financial sustainability and the economic survival of these SME businesses themselves are uncertain (Ajibola 2020; Nwosu & Ors 2021; Victor-Laniyan 2023). This highlights the role of ESG regulation specific to SMEs in Nigeria and the role for ESG practice in the banking sector to provide inclusive finance and support to SMEs. Firstly, there is some evidence of the lack of an enabling regulatory environment and this will hamper sustained ESG practice of SMEs (Ufua & Ors 2020). A study in another emerging country, Malaysia, also suggests the need for governmental regulation to incentivize integration of ESG in company practice, especially for SMEs (Mohammad & Wasiuzzaman 2021). Secondly, regarding the banking sector, this is reflected in the emerging examples of banks, such as Access Bank in Nigeria, including strategic inclusive finance in the agricultural sector and towards young entrepreneurs (Victor-Laniyan 2023). This highlights potential that large companies' ESG policy may help foster SMEs' ESG practices.

There are sector-specific challenges as highlighted by the case studies above, which include the banking sector and the oil and gas sector. The banking sector also has a number of successful examples, such as the Access Bank case study, as well as the unsuccessful examples, such as Heritage Bank. This indicates some limitations for a ratings and self-regulated approach for such a vital sector. Banks are uniquely positioned to link financial development to sustainable economic growth and ensure integration of ESG practices in the framework of the banks and their customers. However, Abubakar and Gani highlight some challenges specific to the Nigerian sector from research:

> the results revealed that the credit to private, government expenditure and interest rate spread exert negative influence on growth in the long run. This might be as a result of the fact that, private credit in Nigeria is marred by high interest rate, lop-sidedness in credit allocation in favour of few sectors and the willingness of banks to commit a substantial part of their funds to financing government through the purchase of treasury bills (Abubakar & Gani 2013: 55).

Therefore, the continued integration of ESG in the banking sector will be measured by its impact on relevant stakeholders including customers and community. In 2024 the CBN embarked on another banking sector recapitalization which would have medium-term impacts for the focus of the sector especially on corporate governance and risk management (Odude 2024).

The oil and gas sector is a major sector in the Nigerian economy with heavy reliance on revenues for use at national and subnational levels. However, the oil and gas sector faces significant challenges from environmental risks including climate change and environmental pollution. The issue of remediation of the environment remains a significant challenge for the sector. There is significant need for the adoption of a specific ESG framework for this sector, and this is acknowledged by industry stakeholders (Eze 2024; Ezeoha 2024). There is also need for the inclusion of state-owned enterprises, such as the Nigerian National Petroleum Company Limited which is a key stakeholder in the sector. This was also recognized at a 2024 programme organized by the Centre for Public Sector Governance, affiliated with the Society for Corporate Governance Nigeria (Onyekwere 2024).

Finally, the development goals outlined both by the UNSDGs and the African Union Agenda 2063 can only be achieved with the public–private sector partnership and private-sector engagement, so ESG strategy can support development priorities in the Nigerian context. The Agenda 2063 objective of economic progress with a people-centred approach would benefit a strategy that embeds ESG within the framework of doing business as this would create mutual benefit and foster sustainability.

[F] CONCLUSION

The effective integration of ESG principles in Nigeria will signify a crucial step in the country's pursuit of sustainable development and accountable corporate governance. Nigeria is already emerging as a leader in ESG implementation in Africa, amidst considerable environmental challenges, socio-economic disparities, and global sustainability commitments.

Nigeria has signalled its capacity to reconcile economic growth with environmental stewardship and social equity through initiatives such as the issuance of sovereign green bonds, corporate sustainability reporting and deploying innovative financing models. These milestones indicate the potential of development of a robust ESG framework that will progressively integrate sustainability into the fundamental aspects of governance and commerce. The journey presents various challenges including regulatory inconsistencies, capacity constraints, and the current voluntary nature of numerous ESG commitments hindering progress. The examined case studies demonstrate the significant positive impact of effectively implemented ESG strategies and the consequences of failing to meet commitments, highlighting the necessity for some mandatory rules sitting side by side with voluntary commitments.

Nigeria must shift from isolated successes to achieving systemic impact to fully realize the potential of ESG. A cohesive legal framework is necessary to establish clear reporting standards, promote innovation in sustainable financing, and ensure accountability at all levels. Collaboration among stakeholders, including government, private-sector entities, and civil society, must transition from mere rhetoric to quantifiable actions. The recommendations include a standardized reporting framework, mandatory ESG impact forecasting, a legal framework to enforce ESG commitments and a legal framework to incentivize ESG practices across SMEs.

ESG initiatives should align with Nigeria's distinct socio-economic context, emphasizing inclusivity and long-term resilience rather than temporary benefits. The potential to transform governance, enhance environmental stewardship, and promote social responsibility is attainable. Through the conversion of ambition into actionable outcomes and the targeted addressing of systemic barriers, Nigeria has the potential to establish itself as a global model for ESG-driven transformation. The future requires a clear purpose, ongoing commitment, and a consistent alignment of business practices with societal advancement. Nigeria will thus safeguard its future and establish a benchmark for others in the global pursuit of sustainability.

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Integrating Sustainability in an Emerging Economy: Evolving ESG Frameworks in Ghana

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Abstract

This article critically examines Ghana's journey toward integrating environmental, social, and governance (ESG) practices to advance sustainable development. It assesses the political, economic, and regulatory dynamics shaping ESG adoption, highlighting Ghana's progress through targeted policymaking, international commitments, and sector-specific regulations. The analysis emphasizes the necessity of robust governance structures and regulatory oversight, using the banking industry as a key example of the practical challenges and opportunities in ESG implementation. By situating Ghana's experiences within the broader context of emerging economies, the article identifies shared obstacles and outlines strategic solutions, offering actionable insights for enhancing sustainability, resilience, and inclusive growth.

Keywords: environmental, social and governance (ESG); sustainable development; Ghana; regulatory frameworks; banking sector; gender equality; corporate social responsibility (CSR); renewable energy; international agreements; small and medium enterprises (SMEs).

[A] INTRODUCTION

Environmental, social, and governance (ESG) principles are crucial in steering companies and governments toward sustainable development. These principles have evolved beyond mere ethical considerations to foundational frameworks that profoundly shape global business operations and governance. In the context of public–private partnerships for national development, aligning business strategies with economic, social, and environmental concerns is essential for enhancing a nation's sustainability and resilience and contributing to its socio-economic development and sustainability (Lotsu 2024). ESG also acts

as a metric for investors to assess potential and ongoing investments to ensure their capital is placed with organizations committed to responsible practices.

The individual components of ESG represent a wide array of critical issues. The environmental aspect of ESG deals with an organization's interaction with the physical environment. It addresses challenges such as climate change mitigation, energy efficiency, biodiversity preservation, pollution control, waste management, and the reduction of impacts of deforestation (Lotsu 2024). The social aspect is equally comprehensive and focuses on enhancing community relations, poverty alleviation, and the promotion of employee diversity, equity, and inclusion (Li & Ors 2021: 2). It also emphasizes the importance of adhering to robust human rights and labour standards that respect the dignity and rights of workers. Governance, the third pillar, ensures that companies operate with high levels of transparency and ethical integrity by maintaining diverse and independent boards, implementing stringent anti-corruption measures, and adopting responsible tax strategies (Li & Ors 2021: 2). These governance practices are crucial for building trust and credibility with stakeholders, ensuring that companies strictly apply responsible practices (Forcadell & Aracil 2017; Saxena & Ors 2021).

In driving ESG integration, states play a crucial role by implementing policies and regulations that mandate or encourage responsible business practices. For instance, governments can set environmental standards, enforce labour laws, and promote corporate governance transparency, creating an ecosystem where ESG considerations are integral to legal compliance (Solberg & Ors 2024). The international discourse reinforces the need for state participation in the sustainability agenda, with global agreements and initiatives such as the United Nations (UN) Sustainable Development Goals (UN 2015b) and the Paris Agreement on Climate Change (UN 2015a), stressing the vital role of ESG integration at both domestic and global scales and the necessity for collective action (Lotsu 2024).

As a key African player on the international stage, Ghana has embraced the global ESG discourse and demonstrated a longstanding commitment to integrating these principles into its national framework (Ayee 1998). Since participating in the 1972 Stockholm Conference on the Human Environment, Ghana has recognized the critical importance of aligning economic growth with environmental sustainability, social inclusion, and sound governance. This commitment was reinforced at the 1992 UN Earth Summit in Rio de Janeiro, where Ghana endorsed the Convention on

Biodiversity Climate Change and Desertification (CBD/Rio Conventions). These engagements have laid the foundation for Ghana's approach to addressing the interconnected challenges of resource management, social equity, and environmental preservation.

The nation's reliance on natural resources such as gold, oil, and cocoa has been both a blessing and a challenge. As a result of resource extraction, the country often faces environmental degradation and social displacement, underscoring the need for sustainable solutions. With the support of organizations such as the UN Development Programme and the African Development Bank, Ghana has responded to these sustainability challenges by implementing initiatives to embed ESG principles into its developmental strategies. Key milestones in implementing ESG in Ghana include establishing the Environmental Protection Agency (EPA) in 1994 and adopting the first National Environmental Policy in 1995, which integrated environmental concerns into national planning. The Renewable Energy Act 2011 (Act 832) further advanced efforts to transition toward cleaner energy sources, while the "Ghana Sustainable Banking Principles" (SBPs) of the Bank of Ghana (BoG), introduced in 2019, have steered financial institutions toward responsible and inclusive banking practices.

Despite Ghana's efforts to establish legal frameworks for incorporating ESG principles into private and public sectors, there are still substantial challenges in integrating these principles into government practices, business models and corporate reporting practices. Although there is an attempt to adopt international standards, the regulatory landscape is complex, with businesses having to navigate varying local and international ESG laws (Ayee 1998; Hilson & Ors 2022). This complexity often creates uncertainty, particularly for small and medium-sized enterprises (SMEs), that lack the resources and expertise to implement ESG frameworks effectively. For many businesses, especially SMEs, sustainability initiatives are confined mainly to corporate social responsibility (CSR) activities focusing on philanthropy rather than adopting structured, outcome-oriented ESG frameworks (Armah & Ors 2011; Halkos & Nomikos 2021; Ros-Tonen & Ors 2021).

Additionally, aligning ESG principles with corporate strategy remains a significant challenge for many organizations in Ghana. This difficulty often arises from ambiguous definitions of sustainability and inconsistent reporting requirements within the country. These challenges are further exacerbated by the uneven enforcement of ESG standards, especially in sectors like agriculture and manufacturing, which typically experience less direct regulatory oversight in Ghana. The lack of clear, uniform

guidelines and variable enforcement efforts across these industries can hinder the effective integration of ESG principles, complicating efforts to achieve genuine sustainability and compliance within the Ghanaian business landscape.

This article addresses the following central question: to what extent has Ghana successfully integrated ESG principles into its national governance and development frameworks, and what challenges and opportunities remain for strengthening these efforts across key sectors? Through an examination of the evolution of ESG practices within Ghana's political, economic, and regulatory landscapes, the article offers a critical appraisal of both noteworthy achievements and persistent hurdles. It also discusses ways in which emerging economies can adapt ESG frameworks to foster sustainable growth, economic resilience, and social equity.

Focusing particularly on Ghana's banking sector, the article evaluates how ESG practices are implemented across various industries and emphasizes the importance of robust oversight and monitoring. It contends that clear definitions and consistent enforcement are crucial in ensuring that ESG principles make a tangible contribution to sustainable national development.

The article reviews Ghana's progress in enacting ESG-related legislation, such as the Commission on Human Rights and Administrative Justice Act 1993 (Act 456); the Petroleum (Exploration and Production) Act 2016 (Act 919); and the State Interests and Governance Authority Act 2019 (Act 990). However, it notes that the diversity of laws, the advisory nature of regulations, the slow evolution of reporting standards, and the lack of financial support for capacity-building in SMEs indicate that Ghana has significant work ahead. The article concludes that more streamlined and enforceable regulations are needed to ensure that businesses in Ghana adhere to comprehensive ESG standards.

The ensuing sections of this article will explore the political economy and historical factors that have influenced the development of ESG regulations in Ghana and analyse the current regulatory framework governing ESG in Ghana. Following this, it discusses integrating ESG principles into micro and macro economic development, using Ghana's banking and other sectors as a case study to illustrate these dynamics. The discussion will then critically assess the relevance of ESG within the Ghanaian context, addressing key challenges, potential solutions, and insights from global perspectives.

[B] THE POLITICAL ECONOMY AND HISTORY BEHIND THE EVOLUTION OF ESG RULES IN GHANA

Ghana, located along the Gulf of Guinea and the Atlantic Ocean in West Africa, is renowned for its rich history and vibrant cultural heritage. As the first sub-Saharan African country to gain independence from colonial rule in 1957, Ghana played a pivotal role in catalysing the decolonization movement across the continent. Today, it is recognized for its political stability and democratic governance in a region often facing challenges. The country's diverse economy encompasses agriculture, mining, manufacturing, and services, with substantial gold, cocoa, and oil exports.

Exploiting natural resources while fuelling economic growth has led to significant environmental degradation, social displacement, and economic inequality. Issues such as illegal small-scale gold mining, known locally as "galamsey", have caused severe water pollution and deforestation, threatening water supplies and diminishing cocoa production—a key agricultural export for Ghana. Many farmers have been compelled to abandon their lands due to unsustainable pollution levels and land degradation. These challenges highlight the importance of integrating ESG principles into Ghana's development framework.

Ghana's journey toward embracing ESG principles reflects a complex interplay of political, economic, and social factors rooted in its political economy—a dynamic shaped by its post-colonial development trajectory and the pressures of global economic integration (Whitfield 2018; Nyamadi 2020; Adom 2023). The Ghanaian Government has sought to embed sustainability into its national development strategies, recognizing the environmental and social implications of resource exploitation.

International commitments have profoundly influenced Ghana's ESG landscape. Recognizing that global environmental challenges require collaborative solutions, Ghana has consistently participated in international sustainability initiatives to affirm its dedication to environmental governance. Beginning with its involvement in the 1972 Stockholm Conference on the Human Environment, Ghana demonstrated an early commitment to enhancing environmental management. This dedication was further solidified at the 1992 Earth Summit in Rio de Janeiro, where Ghana endorsed the Rio Conventions, including key agreements on biodiversity, climate change, and combating desertification.

The country has continued to sign and ratify several vital international treaties. Notably, Ghana ratified the Paris Agreement under the UN

Framework Convention on Climate Change (UN 1992), pledging to implement measures to limit the rise in global temperature. These measures include transitioning to renewable energy sources, enhancing energy efficiency, and promoting sustainable land-use practices. Additionally, as a party to the CBD, Ghana has, at least theoretically, committed to conserving biological diversity, the sustainable use of its components, and the fair sharing of benefits arising from genetic resources.

Ghana's commitment to the social dimensions of ESG is exemplified by its adherence to various International Labour Organization (ILO) conventions, which safeguard labour rights, promote safe working conditions, and combat both child and forced labour. Complementing these efforts, the country's ratification of the African Charter on Human and Peoples' Rights underscores dedication to protecting a broad range of human rights—including crucial environmental and socio-economic rights—thus strengthening the governance component of ESG. On the environmental front, Ghana's participation in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (2011) highlights the nation's proactive stance on regulating hazardous waste imports and exports. This commitment is bolstered through Ghana's engagement with other multilateral environmental agreements, such as the Paris Agreement and the CBD, further demonstrating a holistic approach to environmental stewardship within the ESG framework.

Building on its international commitments, Ghana marked a significant domestic milestone in its sustainability journey by adopting the first National Environmental Policy in 1995. This policy established a solid framework for embedding environmental considerations into the nation's development-planning and decision-making processes. It underlined the crucial roles of sustainable resource management, effective pollution control, and comprehensive environmental education in ensuring responsible stewardship of Ghana's natural resources. The policy recognized the necessity of integrating environmental sustainability across all economic sectors, acknowledging that the health of the environment is fundamentally connected to long-term economic prosperity (Ayee 1998; Booth 2011).

A significant factor in the evolution of ESG rules in Ghana has been the increasing political will to integrate these principles into legislation and policy-making. This trend reflects the broader shift in governance models within resource-rich African economies, where state capacity and elite incentives play crucial roles in determining regulatory effectiveness

(Booth 2011). Ghana has implemented several national initiatives to enhance its sustainability efforts. Regulatory bodies such as the BoG and the EPA have been instrumental in formulating and enforcing ESG-related regulations. The Renewable Energy Act 2011, for example, was enacted to foster the development and use of renewable energy sources, such as solar and wind energy. This legislation has attracted investments in renewable energy projects, reducing the country's reliance on fossil fuels (Nyasapoh & Ors 2022). Sustainable forest management has also been prioritized through initiatives like the Forest Law Enforcement, Governance, and Trade 2023 Action Plan. This plan aims to curb illegal logging, promote sustainable timber production, and strengthen forest conservation efforts.

Despite the significant strides Ghana has made in integrating sustainable practices, it still faces considerable challenges that threaten its environmental and economic stability. These challenges illustrate what scholars describe as the "implementation gap" in African governance, where progressive policy frameworks often outpace actual institutional capacity and political commitment to reform (Andrews 2013). The galamsey crisis, which involves illegal small-scale gold-mining, exemplifies such challenges (Participatory Development Associates 2016). This practice has led to severe water pollution and threatens the nation with water shortages as water bodies become contaminated and unsuitable for agricultural or personal use. Additionally, the deforestation linked to galamsey activities has exacerbated the situation, resulting in the loss of cocoa production—a key agricultural export for Ghana. Many cocoa farmers have been compelled to abandon their farms due to unsustainable levels of water pollution and the degradation of arable land (Joy Online 2024).

Another significant difficulty is the advisory nature of Ghana's ESG reporting framework. While Ghana adheres to international ESG reporting frameworks like the Global Reporting Initiative (GRI) Standards (2024) and the Ghana Stock Exchange's Guidance Manual, its approach primarily emphasizes voluntary reporting. This approach stands in contrast to regions like the European Union (EU), where stringent, mandatory ESG disclosures are enforced under frameworks such as the European Sustainability Reporting Standards (ESRS). Ghana's more advisory approach results in less stringent enforcement and potentially less comprehensive ESG disclosures. This discrepancy highlights a gap in Ghana's ability to fully implement and enforce ESG principles effectively, as the lack of mandatory reporting requirements may lead to inconsistencies in how businesses address and report on critical ESG issues.

This limitation is further exacerbated by the prevailing trend in Ghana, where sustainability efforts are predominantly confined to CSR initiatives (Osei & Ors 2019). These initiatives often focus more on philanthropy and less on the rigorous implementation of structured ESG frameworks or adherence to regulatory guidelines. While this approach is beneficial in providing immediate community support, it falls short of driving systemic changes required for long-term sustainability. The emphasis on philanthropy over structured sustainability frameworks means critical issues such as environmental degradation, labour rights, and corporate governance are often addressed superficially (Aguinis 2011).

To conclude this section, a trace of the political economy and evolution of ESG rules in Ghana shows that while Ghana has made significant strides in adopting ESG principles, considerable challenges remain to actualize these standards fully within its regulatory and corporate frameworks. The following section looks at the ESG regulations in Ghana, examining the legal and regulatory landscape that governs the implementation of ESG principles.

[C] REGULATIONS ON ESG IN GHANA

Ghana's commitment to ESG principles is evident across its various sectors, aiming to foster sustainable development and responsible business practices. However, unlike some regions where a consolidated ESG law exists, Ghana utilizes a mosaic of laws and regulations to address specific aspects of ESG. This multifaceted approach includes significant legislation such as the 1992 Constitution of Ghana, the Environmental Protection Act 1994 (Act 490), the Labour Act 2003 (Act 651), and several others pertaining to corporate governance, securities, and human rights.

In Ghana, the principal bodies overseeing ESG compliance include the EPA and the Securities and Exchange Commission (SEC), complemented by the involvement of other agencies like the BoG. The SEC ensures that companies meet ESG disclosure and reporting standards, which is crucial for transparent and accountable corporate governance (Ghana Stock Exchange 2022). Additionally, the BoG reinforces ESG oversight by mandating sustainable banking practices requiring financial institutions to integrate ESG factors into their operational and risk management frameworks (BoG 2019). Together, these agencies form a robust network to regulate and enforce ESG standards, promoting sustainable development and corporate responsibility across various sectors in Ghana.

The EPA plays a pivotal role in enforcing environmental standards, especially in environmentally sensitive industries such as mining and

oil extraction. One of the key regulations introduced by the EPA is the Environmental Assessment Regulations of 1999 (LI 1652) as amended, which mandate comprehensive environmental impact assessments for all new projects. Regulation 3 of the Environmental Assessment Regulations ensures that potential environmental and social effects of proposed projects are thoroughly assessed, mitigated, and monitored, promoting responsible development practices.

The regulatory oversight provided by the EPA and the standards established by the Government have significantly advanced the implementation of ESG principles within Ghana's mining sector, a significant component of the nation's economy. This has marked enhancements in CSR and environmental stewardship among mining companies. Companies like Newmont Goldcorp and AngloGold Ashanti have implemented community development programmes focusing on health, education, and infrastructure in mining regions. They have adopted sustainable mining practices by employing technologies that reduce water usage and prevent toxic waste contamination. Improved tailings management minimizes the risk of environmental disasters, and efforts are made to rehabilitate mined lands post-extraction. These initiatives mitigate environmental harm and enhance the livelihoods of local communities affected by mining activities (Armah & Ors 2011; Mensah & Ors 2015; Ros-Tonen & Ors 2021).

The EPA possesses enforcement authority and has actively pursued actions against companies that fail to comply with its regulations and environmental laws. For instance, Newmont Ghana Gold was fined USD4.9 million for a cyanide spill, with compensation distributed among affected communities, the EPA, and the Inspectorate Division of the Minerals Commission. In September 2023, the EPA ordered the arrest of the owner of Sta Addsams Enterprise, a quarry company, over an explosion at its quarry site (Adzei Boye 2023; Benneh Prempeh & Ors 2025).

In the renewable energy sector, sections 1 and 2 of the Renewable Energy Act of 2011 provide a legal framework for developing and utilizing renewable energy sources such as solar, wind, and biomass. This Act has attracted domestic and foreign investments in renewable energy projects, leading to the establishment of solar farms and mini-grid systems in rural areas. These initiatives have enhanced energy access for previously disconnected communities from the national grid, leading to social development and economic activities. Additionally, by increasing the capacity for renewable energy, these projects support Ghana's efforts to

fulfil its international commitments to reducing greenhouse gas emissions under various climate agreements (Kuamoah 2020).

Despite progress in some areas, the integration of ESG principles in Ghana faces significant challenges, particularly within the agriculture and manufacturing sectors.

Firstly, the agriculture sector, crucial for Ghana's economy and employment, engages in practices such as slash-and-burn farming, excessive use of chemical fertilizers, and poor land management. These activities contribute to deforestation, soil degradation, loss of biodiversity, and increased carbon emissions. Despite its critical impact, this sector remains under-regulated with limited ESG oversight, allowing unsustainable agricultural practices to continue (Acheampong & Ors 2019). Similarly, the manufacturing sector struggles with adopting ESG standards due to resource constraints among SMEs. These challenges manifest in issues like improper waste disposal, energy inefficiency, and substandard labour conditions, leading to pollution that deteriorates air and water quality, adversely affecting public health and ecosystems (Bour & Ors 2023).

The ESG landscape in Ghana faces several significant challenges that complicate the effective integration of these principles across various sectors. One major issue is the lack of clear guidelines for measuring ESG performance. Without standardized measurement frameworks, companies find it difficult to benchmark their ESG initiatives effectively, making it challenging for stakeholders to evaluate and compare corporate efforts accurately. This difficulty leads to data inconsistency, as different organizations may report ESG metrics using varied indicators, resulting in discrepancies that obscure the assessment and comparison of environmental and social impacts. Such inconsistency impedes the ability to gauge the true extent of sustainable development progress across different organizations.

The following section will explore a case study of the banking sector in Ghana, focusing on how it translates ESG principles into tangible, sustainable development outcomes. Particular attention will be given to the implementation of sustainable banking principles, with an emphasis on the gender component. This examination aims to shed light on the practical application of ESG standards within Ghana's financial institutions and assess the impact of these principles on promoting gender equity and broader sustainable practices.

[D] TRANSLATING ESG INTO SUSTAINABLE DEVELOPMENT: GHANA'S BANKING SECTOR

The BoG is part of the Sustainable Banking Network, a voluntary group supported by the International Finance Corporation (IFC) and the World Bank Group. This initiative aims to advance sustainable banking practices in developing countries. In November 2019, the BoG introduced the Ghana SBPs, which were developed under the leadership of the Sustainable Banking Committee. This committee includes key representatives from the financial sector and environmental protection agencies, featuring members from the BoG, the Ghana Association of Bankers (GAB), and the EPA (BoG 2019a; 2019b).

The development of the SBPs involved extensive consultations with a diverse range of stakeholders, including ministries, departments, and agencies, civil society organizations, academia, and international bodies such as the IFC and the UN Environment Programme Finance Initiative. These consultations ensured that the principles were comprehensive and aligned with national and international sustainability goals (BoG 2019).

The SBPs were introduced into the Ghanaian financial sector to address emerging issues such as "socially responsible stewardship" and to guide banks in incorporating sustainability into their operations and reporting practices. The committee overseeing these principles emphasizes that banks in Ghana are crucial in distributing financial resources and, therefore, must strategically integrate "economic, social, and environmental factors" into their decision-making processes. (BoG 2019a: 2)

The SBPs articulate seven fundamental principles, focusing on the management of environmental and social risks, the promotion of internal ESG practices, the maintenance of high standards in corporate governance and ethics, and the advancement of gender equality both within the workplace and in financial practices. Additionally, they emphasize financial inclusion, encouraging banks to expand access to financial services across all segments of society, support sustainable business practices among clients, and ensure transparent reporting on sustainability performance. The BoG, through IFC support, also facilitates continuous improvement and targeted capacity-building initiatives to enhance the staff and boards' understanding and execution of these principles (BoG 2019a: 6; KPMG 2023).

All banks operating in Ghana have pledged to uphold ESG principles in alignment with their institutional mandates. A 2021 Global Progress

Report highlights this commitment, revealing that every commercial bank in Ghana has adopted the SBPs, showcasing a nationwide consensus on the importance of environmental and social sustainability (Sustainable Banking and Finance Network 2021).

Noting the effects of the SBPs on banking operations, the Chief Executive of the Ghana Association of Bankers commented:

> Fortunately, Ghanaian universal banks have refocused their business horizon towards decision-making processes that strategically integrate factors related to society, the environment, and the economy. The change in the business direction of banks has led to a tremendous reduction in social inequality, economic imbalance, value-addition to business operations of banks, mitigation of climate change effect, and the rate of environmental pollution. (PricewaterhouseCoopers 2022: viii)

Board-level leadership has been instrumental in embedding ESG principles throughout Ghana's banking operations. A KPMG survey indicates that 45% of listed Ghanaian companies now incorporate sustainability matters into board responsibilities, reflecting a growing recognition of ESG at the highest levels of corporate governance (KPMG 2023). GCB Bank plc, for instance, treats ESG as a core risk function, with the chief risk officer reporting directly to the board through the managing director, supported by an ESG working committee to guide operational integration (GCB Bank plc 2024). Similarly, Fidelity Bank Ghana has earned multiple awards for its focus on sustainability and social impact (*Business and Financial Times* 2024).

Despite these gains, challenges persist. The 2021 Global Progress Report commends the adoption of SBPs but stresses the need for further capacity-building and technical support to address climate-related risks effectively (Sustainable Banking and Finance Network 2022). The *International Financial Law Review* also highlights the importance of rigorous ESG due diligence, calling for both internal and external mechanisms to ensure meaningful implementation (Essuman & Ors 2024). Thus, it is evident that, while significant strides have been made, ongoing efforts to enhance institutional capabilities and regulatory oversight are vital to ensure the banking sector's adaptability and sustainability.

Promoting gender equality through sustainable banking principles

A notable area where the SBPs have had a clear, tangible focus is in promoting gender equality. The gender equality principle in the SBPs focuses on women as drivers of social change—as women entrepreneurs and business leaders. It also factors in the gender ratio in the top management of institutions (BoG 2019a: 33). This SBP guideline arguably influences banks' decision to include women in different categories of leadership in their women's desk initiatives. In launching its gender action project, Fidelity Bank explains this notion by showing that its gender action plan focuses on supporting women holistically as leaders, entrepreneurs, and employees (Fidelity Bank 2023).

Principle 4 of the SBPs is gender equality (Bog 2019a) drawn from the UN Women's Empowerment Principles (WEPs) (Bog 2019a: 33). The WEPs offer guidance to businesses on integrating gender equality in their business activities in line with international labour and human rights standards. In line with WEPs, SBPs mandate banks to "encourage awareness of, and initiate action to promote gender equality both with our clients and within our business operations" (BoG 2019a: 33). Guideline 5 of this principle encourages banks to "implement enterprise development and marketing practices that empower women". Under this guideline, Ghanaian banks must extend their business relationships to women and women entrepreneurs and offer bank services in a gender-sensitive manner, thus removing all lending barriers that women may face (BoG 2019a: 38).

The commercial banks in Ghana have approached the implementation of enterprise development and marketing practices requirements under the gender equality principle in the SBPs in two different but interconnecting ways. Some banks have solely offered gender-centred capacity-building initiatives, collaborating with academic, governmental, and non-governmental institutions to offer workshops, training, and business incubator programmes for women in Ghana (African Guarantee Fund 2022; Ebale 2023; Fidelity Bank 2023; Stanbic Bank Ghana 2023). These programmes predominantly target capacity-building for women. One example of such capacity-building programmes is GCB Bank's *ad hoc* funding of training programmes for women entrepreneurs in Ghana (Philanthropy Space Ghana 2020). Another example is First National Bank's collaboration with organizations like VeloCiti and British International Investment to implement women's entrepreneurial

development programmes (UVU Africa 2022; British International Investment 2022).

The second way most banks have approached the implementation of enterprise development and marketing practices requirements under the gender equality principle in the SBPs is by creating women's banking departments.

The regulatory policy is driving change and competition within the banking sector and driving the banks to develop innovative product offerings that will be attractive and potentially solve the banking needs of women in Ghana. This regulatory drive of the BoG towards banks' integration of ESG principles in their policies in relation to gender equality is evident in the increase in the number of women's banking desks, which has doubled from five in 2021 to 11.[1]

Banks often label their women-focused services as "initiatives" rather than "products" to align these offerings with CSR rather than direct profit-making activities. By doing so, they position these services as part of their broader commitment to social equity and inclusion, specifically targeting gender parity and providing opportunities for women to actively contribute to the growth and development of the Ghanaian economy (African Business 2022; Absa 2023; Access Bank 2023; FBNBank Ghana 2023a; 2023b; Stanbic Bank Ghana 2023; Zenith Bank Ghana 2023).

The terminology and branding employed—such as "elevate", "lift", "emerge", and "initiative"—are strategically chosen to emphasize upliftment, progression, and empowerment. These terms suggest that the banks' primary aim is to support women's economic advancement, fostering a perception of genuine societal contribution rather than purely expanding profitability or market share. Although bankers acknowledge that such initiatives indirectly benefit the banks through enhanced brand reputation, customer loyalty, and potential growth in their client base, they frequently describe the introduction of women's desks and specialized programmes as a strategic realignment of policies intended to support vulnerable sectors. In doing so, banks intentionally distance these initiatives from being perceived as overtly profit-driven, highlighting instead their role as active contributors to sustainable and inclusive economic development.

Banks' strategic alignment of women-focused services as CSR activities rather than core business operations reveals a fundamental

[1] Ecobank, ABSA and Calbank, Access Bank had women's desks in 2021 while Stanbic, Fidelity and Standard Chartered Banks were in the process of establishing their women's desks.

tension between rhetoric and practice, raising critical concerns about their genuine integration of ESG principles into sustainable development frameworks. By categorizing these services predominantly as peripheral social responsibility initiatives, banks inadvertently marginalize their significance within organizational structures. This positioning suggests that the initiatives are ancillary rather than intrinsic to operational strategies, risking underinvestment, inadequate resource allocation, and limited scalability. Such peripheral treatment undermines the transformative potential of these initiatives, casting doubt on the authenticity of banks' stated commitments to gender equity and inclusivity. It highlights a deeper contradiction: banks profess dedication to societal upliftment and gender parity, yet structurally relegate these initiatives to positions of lesser priority, impeding their capacity to effect meaningful, systemic change.

This framing of women-focused initiatives as non-profit endeavours further entrenches their vulnerability and exposes critical weaknesses regarding their long-term sustainability and impact. In periods of financial strain or shifting corporate priorities, programmes that are explicitly dissociated from profit generation become particularly susceptible to funding cuts or elimination. This precariousness reveals the fragility inherent in CSR-oriented frameworks that lack integration into the banks' essential profit-driven objectives. Consequently, the effectiveness and continuity of these initiatives are compromised, jeopardizing their ability to achieve lasting progress toward gender equality and meaningful inclusion. The treatment of gender-related initiatives as discretionary rather than indispensable not only questions the sincerity of banks' commitments but also signals a broader failure to fully embed ESG considerations into their foundational business models. Banks thus risk perpetuating superficial commitments to sustainability and equity, undermining public trust and ultimately weakening their broader societal impact.

The banks' reluctance to classify their women's offerings as profit-making products may also reflect a missed opportunity to demonstrate that social responsibility and profitability are not mutually exclusive. Integrating women's financial services into the core profit-generating activities could reinforce the idea that empowering women is both a socially responsible and economically sound strategy. Such integration would ensure that these services receive adequate funding and strategic oversight, enhancing their impact and contribution to sustainable development.

Despite the existing challenges, the banking sector in Ghana demonstrates significant progress in embedding ESG principles into everyday banking practices, emphasizing the role of banks in "responsible stewardship" of the economy. The BoG has spearheaded this initiative by implementing structured reporting under the SBPs. A key component of this framework is the mandatory reporting requirement, compelling banks to regularly measure and report their progress in implementing the Ghana SBPs (Sustainable Banking and Finance Network 2020; PricewaterhouseCoopers 2022; *Business and Financial Times* 2024). Currently, the monitoring guidance and reporting framework that banks are required to submit to BoG every two years incorporates the implementation of the SBPs (PricewaterhouseCoopers 2022). As of December 2023, the compliance rate reported was 62.5%, showcasing a commendable alignment with sustainable practices (*Business and Financial Times* 2024).

However, transitioning to sustainable banking practices presents significant challenges. Initially, many banks exhibited a lack of understanding and experience with sustainable practices, indicating a broader difficulty in deeply integrating ESG principles into core banking operations. As illustrated by the case study on Principle 4 of the SBPs, which focuses on gender equality, a cultural shift is required. Banks need to move from traditional profit-focused models to ones that fully incorporate sustainability. Currently, many banks treat their efforts under Principle 4 — which emphasizes gender equality — as mere CSR rather than as integral to their core banking operations.

For regulations to effectively support and enforce the implementation of sustainable practices, adequate financial resources are essential; however, these are currently lacking in Ghana. The BoG itself faces budgetary constraints that hinder its capacity to oversee and enforce these practices. Additionally, there is an ongoing need for capacity building in ESG practices as banks work to align their operations with new sustainability standards. Challenges also include providing long-term credit for green projects and a noticeable lack of expertise within the private sector to assess risks associated with green finance investments (Sustainable Banking and Finance Network 2020; UN Environment Programme 2022; *Business and Financial Times* 2024).

These challenges faced by the banking sector in Ghana highlight the broader difficulty of effectively implementing ESG principles across various sectors. The complexities in embedding these principles into core business strategies highlight the substantial hurdles Ghana faces

as a developing country in translating ESG frameworks into tangible, sustainable development. The regulatory and financial constraints prevalent in Ghana impede not only the banking sector but also other industries from fully integrating ESG initiatives that could significantly benefit the economy at the macro level and communities at the micro level.

[E] RELEVANCE OF ESG IN GHANA: PROBLEMS, SOLUTIONS, AND GLOBAL LEARNINGS WITH GLOBAL CONTEXT

ESG principles are essential for addressing Ghana's socio-economic and environmental challenges. As a country heavily reliant on natural resources such as gold, oil, and cocoa, Ghana faces issues like land degradation, pollution, and community displacement. Integrating ESG principles offers a strategic framework that balances economic progress with environmental protection and social equity.

A significant challenge in Ghana is the inconsistency in regulatory enforcement, stemming from the absence of a consolidated ESG regulatory framework. This challenge leads to a complex and fragmented landscape, complicating compliance for businesses and enforcement for regulators. Furthermore, SMEs, which form a large part of Ghana's economy, often lack the financial resources and technical expertise to adopt ESG practices. This is especially acute in sectors like agriculture and informal mining, where unsustainable practices persist due to these constraints. The broader adoption of ESG principles is hindered, impacting sustainable development at both macro and micro levels.

Ghana's approach to ESG reporting, primarily emphasizing voluntary reporting, contrasts starkly with global practices where mandatory ESG reporting and standardized frameworks are becoming the norm. These global standards enhance the quality and reliability of ESG information and show the importance of legal mandates and clear guidelines in integrating ESG principles effectively. For example, the EU mandates comprehensive ESG reporting through the ESRS under the Corporate Sustainability Reporting Directive of 2022. These legally binding standards cover a wide range of sustainability issues with detailed and prescriptive requirements, including a double materiality assessment that considers both financial and impact materiality (Global Reporting Initiative 2024).

In Asia, countries like Japan have integrated ESG considerations into corporate governance codes, encouraging companies to disclose

ESG information and engage in sustainable practices. The Tokyo Stock Exchange requires listed companies to report on ESG issues, fostering a culture of transparency and accountability. Similarly, Singapore mandates sustainability reporting for all listed companies, aligning with international frameworks like the GRI (Singapore Exchange 2016).

To effectively address the challenges of implementing ESG principles, Ghana could learn from the approach taken by the Netherlands, which differs significantly from Ghana's current framework. The Netherlands has established a consolidated and comprehensive ESG regulatory system that integrates detailed legislation, active regulatory oversight, and clear corporate guidelines. For example, the Dutch Climate Act 2019 sets specific, legally binding targets for emissions reductions, aiming for a 49% reduction by 2030 compared to 1990 levels. Regulatory bodies like the Netherlands Authority for the Financial Markets ensure strict compliance with ESG reporting requirements, fostering transparency and accountability. The Dutch Corporate Governance Code (2022) mandates companies to focus on long-term value creation with explicit attention to social and environmental impacts, ensuring that ESG considerations are deeply embedded in corporate strategies.

In contrast, Ghana's ESG framework is more fragmented and primarily advisory, lacking the legally binding guidelines that characterize the Dutch system. The multiplicity of laws and the voluntary nature of ESG reporting in Ghana lead to inconsistencies in enforcement and compliance. Regulatory bodies often face budgetary constraints and limited resources, hindering effective oversight. Many Ghanaian companies treat ESG efforts as peripheral CSR initiatives rather than integrating them into their core business operations. By adopting a more cohesive and legally binding regulatory framework similar to that of the Netherlands, Ghana could simplify compliance efforts, enhance enforcement consistency, and provide definitive standards for businesses. This shift would encourage companies to integrate ESG considerations into their fundamental strategies, promoting genuine sustainable development and positioning Ghana as a leader in sustainable practices within the region (Ayee 1998; Hilson & Ors 2022).

Furthermore, financial incentives such as tax breaks, grants, or low-interest loans targeted at ESG compliance could motivate businesses to adopt sustainable practices. Investing in capacity-building through technical assistance and training programmes would empower businesses to integrate ESG principles effectively. Establishing dedicated support programs for SMEs would help widen the impact of ESG across the

economy, providing the necessary funding, specialized training, and consultancy services to overcome barriers to ESG adoption.

Learning from global best practices and refining its approach to ESG will allow Ghana to enhance the robustness and effectiveness of its ESG reporting and practices. Adopting elements from advanced ESG frameworks such as the EU's ESRS or aligning with international standards like the GRI and Task Force on Climate-related Financial Disclosures could significantly improve Ghana's ESG framework. This strategic approach will help the country mitigate environmental impacts, improve social equity, and promote economic resilience, positioning Ghana as a leader in sustainable practices in the region.

[F] CONCLUSION

The evolution of ESG principles in Ghana reflects the country's commitment to sustainable development amid significant socio-economic and environmental challenges. Ghana's approach to ESG has been shaped by its political economy, international influence, and the unique demands of its key industries. While progress has been made in sectors like renewable energy, banking, and formal mining, challenges remain, especially in informal mining, agriculture, and smaller financial institutions where ESG adoption is less consistent.

Ghana's experience with ESG highlights both the potential and the complexities of integrating sustainable practices in emerging economies. Successful ESG implementation requires solid regulatory frameworks, consistent enforcement, and resources to support smaller businesses in adopting sustainable practices. Drawing on global best practices and adapting them to local needs can further enhance ESG's impact, positioning Ghana as a leader in sustainable development within Africa.

As Ghana continues its ESG journey, its lessons from successes and failures provide valuable insights. The country's progress in ESG contributes to national development and serves as a model for other developing nations seeking to balance economic growth with environmental and social responsibility. Through continued commitment to ESG, Ghana has the potential to build a more sustainable, equitable, and resilient future.

To further strengthen its ESG framework, Ghana must consider a multi-pronged policy and practice agenda. First, there is a need to consolidate ESG-related legislation into a coherent national framework that provides clarity for both domestic and international stakeholders.

This approach should include the development of unified ESG standards, reporting guidelines, and sector-specific benchmarks that reflect local realities while aligning with international norms. Second, the Government should invest in capacity-building programmes for regulators and SMEs, ensuring that smaller enterprises can access the technical knowledge, tools, and funding needed to implement ESG practices effectively. Third, enforcement mechanisms should be enhanced through better interagency collaboration, digital compliance tools, and more transparent monitoring systems that incentivize good performance and penalize non-compliance.

On the practice side, public–private dialogue platforms should be strengthened to foster innovation, share best practices, and encourage the co-creation of solutions tailored to the Ghanaian context. ESG must also be integrated into public procurement processes and national budgeting to embed sustainability across the public sector. Additionally, there is an opportunity to leverage Ghana's financial sector—particularly through green finance instruments and sustainability-linked loans—to channel investments into sectors and projects that align with ESG priorities.

Ghana can build a more robust, inclusive, and accountable ESG ecosystem by pursuing these targeted interventions. These reforms will enhance the credibility of Ghana's sustainability agenda and improve the country's attractiveness to responsible investors and development partners, ultimately driving long-term socio-economic and environmental gains.

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State Interests and Governance Authority Act 2019 (Act 990).

News and Events

Compiled by Eliza Boudier

University of London

IALS News

IALS Partners on Successful £4.1 Million Social Justice Bid

In April, it was officially announced that the Institute of Advanced Legal Studies (IALS) will be partnering as a co-investigator in the establishment of the Centre for People's Justice. This new Centre is led by the School of Law and Social Justice at the University of Liverpool. The £5.8 million Centre includes a £4.1 million investment by the Arts and Humanities Research Council (AHRC), part of UK Research and Innovation, and is the largest grant it has ever awarded to a Law School. This is in response to the AHRC's national call for proposals to establish a Centre for Law and Social Justice.

The Centre for People's Justice is a coalition of 45 organizations from community, business, philanthropic, cultural, artistic, charitable, legal, government and university sectors. It will work across the UK in partnership with the Universities of Glasgow, Sheffield, Swansea, Wrexham, Ulster and IALS.

Collaborating with household names such as *The Big Issue*, Citizens Advice, National Museums Liverpool and the Royal Shakespeare Company, the Centre will develop a creative programme of research and training aimed at connecting the public more closely with the ways in which the law is made, improving accountability for how the law is put into practice and enhancing people's understanding of their legal rights.

In the announcement, Professor Carl Stychin, Director of IALS, explained that:

> As a national resource for the promotion and facilitation of legal research with a commitment to national research training, IALS looks forward to partnering on the development of the Centre. The Centre for People's Justice is closely aligned both to the IALS Library's ongoing commitment to social justice and decolonisation, led by our Librarian, Marilyn Clarke; and with our new Law and the Humanities Hub, led by Professor Anat Rosenberg. In addition, working with colleagues in the School of Advanced Study, we are ideally

> positioned to engage with those researchers across the arts and humanities with a commitment to social justice and social change.

The Executive Chair of the AHRC, Professor Christopher Smith, said:

> Our commitment to research in and innovation arising from the study of law and justice illustrates our belief in the potential of arts and humanities research to improve the lives of everyone across the UK and represents the growing importance and excellence of sociolegal research across the UK, which is of world class quality. Our legal system is, and has been for centuries, fundamental to a resilient and secure society. It is essential that access to justice is available to all, a principle enshrined already in Magna Carta. That's why this Centre's work is so important, and we look forward to its concrete and significant policy recommendations.

Dickson Poon School of Law Graduate receives Georg Schwarzenberger Prize

The Georg Schwarzenberger Prize in International Law was endowed by friends and former students of the late Professor Georg Schwarzenberger, a distinguished academic who taught international law at the University of London from 1938 to 1975. It is awarded to a student in one of the law schools of the University of London on the basis of outstanding performance in public international law.

This year's winner, Mathies Andreas Beier, has distinguished himself academically and professionally. He began his studies at the Humboldt University of Berlin. He then pursued a degree in public international law at the Université Paris-Panthéon-Assas. In 2024 he completed an LLM in international dispute resolution with distinction from the Dickson Poon School of Law, King's College London (KCL).

Mathies is currently a trainee lawyer at the Higher Regional Court in Berlin, where he is seconded to the Berlin Regional Court II. His LLM dissertation is entitled, 'Criminal law applicable to the merits in international commercial arbitration'. In this work, Mathies combines elements of national criminal law and international commercial arbitration with the principles of public international law.

Mathies' evidence of excellence in international law extended beyond his academic studies at the University of London. He was a driving force behind the KCL team in the 2024 Day of Crisis Competition, organized by the Hague Academy of International Law. He also volunteered at the KCL Human Rights and Environmental

Law Clinic, where he provided legal advice on issues at the intersection of human rights and environmental protection.

Changes in Light wins award at the Berlin Kiez Film Festival

The Institute is very happy to announce that *Changes in Light* has won the award for best short documentary at the Berlin Kiez Film Festival. Created by dance artist and scholar Anna Macdonald, Practitioner in Residence at IALS in 2024, in collaboration with IALS Librarian Marilyn Clarke, library staff and videographer Marisa Zanotti, *Changes in Light* explores the impact of the affective qualities of libraries on those who use them as a way of revealing the colonial complexities of law itself. The film explores staff's embodied responses to colonial legacies alongside an exploration of movement and light within the building, offering a nuanced perspective on the complexity of structural change within institutions. See website for details.

Library News

Fischer Reading Room

The 3rd floor reading room has been officially named the Fischer Reading Room. This is in honour of the very generous donation that has been made to the IALS library by the estate of Professor Thomas C Fischer and Mrs Brenda A Fischer. Professor Fischer was an American legal academic with particular interest in international law and globalization. He spent a year at IALS in 1996 having been awarded an Inns of Court Visiting Fellowship.

Study Rooms

In response to their popularity, three new study rooms have been added to the booking system. The booking system has also been upgraded, so now all six study rooms can be booked online and users can check in and unlock rooms using the keypads. There are now two group study rooms (Rooms 201 and 210), two individual sound-proofed rooms (Rooms 203 and 204) and two individual silent study rooms (Rooms 205 and 206). All rooms are on the 2nd floor and can be booked online for two hours at a time.

Using AI for Academic Work

Katy Radford, the IALS Access Librarian, has created a LibGuide on Using AI for academic work which covers an evaluation of AI including academic integrity, acceptable uses for AI, and weaknesses of AI.

Selected Upcoming Events

Book launch: The Rule of Law in the Islamic Republic of Iran

Date: 9 October 2025

Venue: IALS Council Chamber, Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

This event is a two-hour book discussion of a volume that former IALS fellow Mirjam Künkler worked on during her time at IALS: The Rule of Law in the Islamic Republic of Iran published by Cambridge University Press in 2025.

The book is a comprehensive examination of how the legal and justice systems of the Islamic Republic function and have affected socio-political and cultural life in Iran. The chapters contain not only in-depth discussions of the various legal codes themselves but also provide invaluable insights into their application in practice.

The volume delves, in considerable empirical detail, into the substantive and procedural dimensions of the rule of law and breaks new ground in the socio-legal history of the Islamic Republic. Instead of focusing purely on the formal dimensions of the law, it understands the rule of law as part of the 'social imaginary' of modern Iran with roots in the Constitutional Revolution of 1906/1907. It thus illuminates the social and political context in which the law operates; be this in the deep contestations in the Iranian Parliament over what precisely constitutes Islamization and what does not, the struggles of the legal profession to remain independent and resist attempts at regime incorporation, the debates among legal scholars on the age of criminal responsibility in Islamic law and youth incarceration, the tensions inside the Information Ministry over how the arts should be censored (including film, theatre, music, literature), the attempts of doctors to tackle the opioid addiction crisis together with high HIV infection levels and how the judiciary has responded to these bottom-up initiatives, the role of Islamic medical law in addressing infertility and in vitro fertilization, or in how human rights and women's rights NGOs have impacted reforms of Islamic family law, particularly regarding divorce and custody regulations. The book thus gives the reader a contextual and rich understanding of the ideology and practice of the law, and the political struggles and contestations which are mutually constituted with it. Importantly, it also asks broader questions about what the rule of law means in non-democratic contexts and how comparative research can improve ways of conceptualizing the quality of the rule of law across different areas of the law.

See website for details.

ILPC Annual Conference 2025 Regulating AI in a Changing World: Oversight and Enforcement

Dates: 20-21 November 2025

Venue: IALS Council Chamber, Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

The ILPC Annual Conference will include the ILPC Annual Lecture 2025, and we are delighted to announce that this will be delivered by Marcus Bokkerink.

Marcus Bokkerink was Chair of the UK Competition and Markets Authority (CMA) from 2022 to 2025. During his tenure he oversaw a raft of changes as the CMA took on its new post Brexit role, re-oriented the Authority's strategy to deliver tangible benefits for people, businesses and the UK economy, stepped up its engagement with consumers and businesses, reformed its policies, advocated stronger Parliamentary oversight, and took on significant new powers under the Digital Markets, Competition and Consumers Act. Previously, he was a Senior Partner and Managing Director at Boston Consulting Group (BCG), where he headed the firm's UK and European Consumer Practice and Strategy Practice, led a range of global client teams, and established and developed the firm's China business. At BCG he built up 30 years of experience helping businesses of all shapes and sizes to compete, grow, raise returns and create value.

See website for details.

Podcasts

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Avanced Study are recorded and accessible for viewing and down-loading.

See website for details.

Amicus Curiae

The Journal of the Society for Advanced Legal Studies

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