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## Introduction and Overview

### I. The Central Argument

#### A. *The New Legal Form*

Social enterprises that combine the pursuit of social mission and profit are on the rise worldwide. They create significant and substantial social and economic impact. A recent survey of 1,030 social enterprises found that they generated more than €6.06 billion in revenue, impacted more than 871 million beneficiaries, employed more than half a million people, and benefitted about 5.5 million people.<sup>1</sup> According to the European Commission, there are 2.8 million social enterprises employing around 40 million people, engaging more than 200 million volunteers, and providing 13.6 million jobs, accounting for 8% of the EU GDP.<sup>2</sup> Further, in a 2019 Deloitte Global Human Capital Trends survey which polled almost 10,000 respondents in 119 countries, 56% of the respondents agreed that social enterprises would play a more important role in society in the next three years, and 40% agreed that social enterprises would continue to play the same important role in the next three years.<sup>3</sup> Moreover, social enterprises have assumed considerable salience: In view of the recent high-profile repudiation of shareholder primacy and the adoption of stakeholder value by business leaders, social enterprises have been hailed

<sup>1</sup> Marieke Huysentruyt et al., “Market-Oriented and Mission-Focused: Social Enterprises around the Globe,” *Stanford Social Innovation Review* (October 19, 2016), [https://ssir.org/articles/entry/market\\_oriented\\_and\\_mission\\_focused\\_social\\_enterprises\\_around\\_the\\_globe](https://ssir.org/articles/entry/market_oriented_and_mission_focused_social_enterprises_around_the_globe).

<sup>2</sup> Richard Summerfield, “The Impact of Social Entrepreneurship on Economic Growth,” *Financier Worldwide Magazine* (May 2020), [www.financierworldwide.com/the-impact-of-social-entrepreneurship-on-economic-growth#](http://www.financierworldwide.com/the-impact-of-social-entrepreneurship-on-economic-growth#). YSRjcC0Rrsc; *Recent Evolutions of the Social Economy in the European Union* (European Economic and Social Committee, 2017) 66, [www.eesc.europa.eu/sites/default/files/files/qe-04-17-875-en-n.pdf](http://www.eesc.europa.eu/sites/default/files/files/qe-04-17-875-en-n.pdf).

<sup>3</sup> “Leading the Social Enterprise: Reinvent with a Human Focus,” *2019 Deloitte Global Human Capital Trends* 3, [www2.deloitte.com/content/dam/Deloitte/cz/Documents/human-capital/cz-hc-trends-reinvent-with-human-focus.pdf](http://www2.deloitte.com/content/dam/Deloitte/cz/Documents/human-capital/cz-hc-trends-reinvent-with-human-focus.pdf).

as innovative business models that can deliver positive social impact and yet be profitable.<sup>4</sup>

Asia, being no exception, has witnessed a significant increase in such businesses. Social enterprises have been regarded as an innovative and vital solution to the pressing problem of socioeconomic inequality and as playing an important role in the delivery of public goods and services.<sup>5</sup> More broadly, social enterprises have been considered an important tool for the provision of public benefit particularly for the disadvantaged and vulnerable. Social enterprises in Asia include but are not limited to sellers of affordable and essential goods and services, microfinanciers, as well as organizations that provide employment and training to the disadvantaged and disabled members of the community.<sup>6</sup> Unsurprisingly, among the top five most innovative and impactful social enterprises in the world, two are from Asia.<sup>7</sup>

In light of the vital social and economic roles played by social enterprises, it is important to assess whether the existing law enables social enterprises to flourish and if not, what legal reforms should be adopted. There is no separate legal form for social enterprises in nearly all of the Asian jurisdictions,<sup>8</sup>

<sup>4</sup> Robert G. Eccles et al., “Purpose with Meaning: A Practical Way Forward,” *Harvard Law School Forum on Corporate Governance*, <https://corpgov.law.harvard.edu/2020/05/16/purpose-with-meaning-a-practical-way-forward/>; The Enacting Purpose Initiative: Report #2 (Directors & Investors: Building on Common Ground to Advance Sustainable Capitalism, July 2021) 9, <https://enactingpurpose.org/assets/epi-report-final.pdf>.

<sup>5</sup> Eric Bidet and Jacques Defourny (eds), *Social Enterprise in Asia: Theory, Models and Practice* (Routledge, 2019), chs 8–13; Bradley Hiller, “How Social Enterprises Can Serve Asia’s Underserved,” *AsiaGlobal Online* (April 11, 2019), [www.asiaglobalonline.hku.hk/how-social-enterprises-can-serve-asias-underserved/](http://www.asiaglobalonline.hku.hk/how-social-enterprises-can-serve-asias-underserved/); Rana Webe, “Meet the Social Entrepreneurs Solving Asia’s Biggest Problems,” *Forbes* (April 12, 2017), [www.forbes.com/sites/ranawehbe/2017/04/12/30-under-30-asia-social-entrepreneurs-solving-issues/#1ed6719b1875](http://www.forbes.com/sites/ranawehbe/2017/04/12/30-under-30-asia-social-entrepreneurs-solving-issues/#1ed6719b1875); DBS, *100 Social Enterprises to Watch For in Asia: 2018*, [www.dbs.com/livemore/100-social-enterprises-to-watch-for-in-asia-2018.html](http://www.dbs.com/livemore/100-social-enterprises-to-watch-for-in-asia-2018.html).

<sup>6</sup> A typology of social enterprise models in Asia consisting of “trading non-profit organisations”; “work integration social enterprise”; “nonprofit cooperative enterprise”; “social enterprise stemming from non-profit/for-profit partnerships”; and “community development enterprise” has been conceptualized by Jacques Defourny and Shin-Yang Kim, “Emerging Models of Social Enterprise in Eastern Asia: A Cross-Country Analysis” (2011) 7 *Social Enterprise Journal* 86.

<sup>7</sup> Lilach Bullock, “2019’s Top 5 Most Innovative and Impactful Social Enterprises,” *Forbes* (March 5, 2019), [www.forbes.com/sites/lilachbullock/2019/03/05/2019s-top-5-most-innovative-and-impactful-social-enterprises/#3278f54a774a](http://www.forbes.com/sites/lilachbullock/2019/03/05/2019s-top-5-most-innovative-and-impactful-social-enterprises/#3278f54a774a).

<sup>8</sup> Among the forty-eight jurisdictions in Asia, it appears that only three have created a separate legal form for social enterprises: These are Thailand (Social Enterprise Promotion Act 2019), Vietnam (Law on Enterprises of Vietnam; Decree No. 96.2015 and Circular No. 04/2016), and South Korea (Social Enterprise Promotion Act 2006; Jongick Jang,

unlike in the UK,<sup>9</sup> US,<sup>10</sup> and Europe.<sup>11</sup> The social enterprises in most of the Asian jurisdictions rely on the existing legal forms, the most common of which is the private company limited by shares.<sup>12</sup>

Using the four leading common law jurisdictions in Asia (Singapore, Hong Kong, Malaysia, and India) as case studies, the central argument in this book is that there should be a new legal form for social enterprises in Asia comprising a framework of five criteria: (1) corporate purpose; (2) directors' duties; (3) decision-making powers; (4) reporting, impact measurement, and certification; and (5) distribution of dividends, assets, and tax benefits. The new legal form should take into account the distinctive social, economic, and political contexts within which different

"Emerging Dual Legal Frameworks of Social Enterprises in South Korea: Backgrounds and Prospects," EMES-SOCENT Conference Selected Papers, no. LG13-10 [2013]; Eric Bidet and Hyung-Sik Eum, "Social Enterprise in South Korea: General Presentation of the Phenomenon," ICSEM Working Papers, No. 06 [2015], Liege: The International Comparative Social Enterprise Models [ICSEM] Project). ASEAN Social Enterprise Structuring Guide (February 2018).

- <sup>9</sup> The Companies (Audit, Investigations and Community Enterprise) Act 2004, Part 2 and Schedules 3–7; The Community Interest Company Regulations 2005; Department for Business Innovation & Skills, Office of the Regulator of Community Interest Companies: Information and Guidance Notes (May 2016). Roger Spear et al., "Social Enterprise in the United Kingdom: Models and Trajectories" (2017) ICSEM Working Papers No. 40, Liege: The International Comparative Social Enterprise Models (ICSEM) Project.
- <sup>10</sup> Model Benefit Corporation Legislation § 102; see also Delaware Public Benefit Corporation, Del. Code. Ann. tit 8; California Social Purpose Corporation, Cal. Corp. Code tit. 1 Div. 15; Washington Social Purpose Corporation, Wash. Rev. Code § 23B.25; Minn. Stat. § 304A, Minnesota Public Benefit Corporation Act. Another legal form for social enterprise is the low profit limited liability companies.
- <sup>11</sup> Joseph S. Liptrap, "The Social Enterprise Company in Europe: Policy, Theory and Isomorphism" (2020) 20 *Journal of Corporate Law Studies* 495. Five European countries have created separate legal forms for social enterprises: UK, France, Italy, Greece, and Poland: see European Commission, *A Map of Social Enterprises and Their Eco-Systems in Europe: Synthesis Report* (2015) at 51. For a good comparative study of the legal frameworks, see Anna Triponel and Natalia Agapitova, "Legal Frameworks for Social Enterprise: Lessons from a Comparative Study of Italy, Malaysia, South Korea, United Kingdom and United States" (World Bank Group, 2016).
- <sup>12</sup> See, e.g., Singapore Centre for Social Enterprise, *raiSE Ltd, The State of Social Enterprise in Singapore* (2017) at 21 (private limited companies accounted for 69% followed by sole proprietorship at 12% and limited liability partnership at 9%); British Council, *The State of Social Enterprise in Malaysia* (2018) at 58 (private company limited by shares accounted for 43%, followed by sole proprietorship at 19%); British Council, *The State of Social Enterprise in India* (2016) at 11 (private limited company accounted for 58% followed by NGO [trust or society] at 23%); but see *Power of Good: Hong Kong Social Enterprise Landscape Study 2012–2013* at 3 (social enterprises registered as limited liability companies accounted for 39% and the other 60% were nonprofit organizations).

types of social enterprises<sup>13</sup> operate in the different Asian jurisdictions, and that is responsive to the evolving needs of social enterprises and the community.<sup>14</sup>

To make this argument, I critically analyze the three principal types of conflicts of interest – between social entrepreneurs and investors; between pro-social investors (or members) and for-profit investors (or members); and between social entrepreneurs on the one hand, and consumers, clients and intermediaries on the other – that affect social enterprises in general. Next, I demonstrate why the existing legal forms used by social enterprises in Asia – company limited by shares, company limited by guarantee, sole proprietorship, society, partnership (including limited liability partnership), as well as cooperative society – fail to address the conflicts of interest. Then, I advance a framework for a new legal form consisting of five criteria that can address the conflicts of interest: (1) corporate purpose; (2) directors' duties; (3) decision-making powers; (4) reporting, impact measurement, and certification; and (5) distribution of dividends, assets, and tax benefits. While I argue that the four Asian jurisdictions should create a new legal form for social enterprises, the precise characteristics that this legal form should take will vary within each jurisdiction. The five criteria consisting of *ex ante* rules and *ex post* standards, mandatory and default rules, should be carefully tailored to the differing needs of different types of social enterprises in different jurisdictions, bearing in mind in particular the integrity and competence of the political and legal institutions responsible for implementing, monitoring, and enforcing the laws.

The five criteria set out in the framework provide a basis for designing the characteristics of the new legal form for social enterprises not only in the four jurisdictions in Asia, but also in other jurisdictions that do not have a separate legal form for social enterprises. Further and importantly, I demonstrate why and how this new legal form for social enterprises in Asia should be different from the existing legal forms for social enterprises

<sup>13</sup> Social enterprises can be distinguished on the basis of the activities in which they engage, the domains in which they operate, the impact they create, and the types of funding on which they rely.

<sup>14</sup> It has been argued that social enterprises have developed in response to market failure, state failure, and the growth of democratic governance that rejects market capitalism: Simon Teasdale, "What's in a Name? Making Sense of Social Enterprise Discourses" (2012) 27 *Public Policy and Administration* 99. The different types of government (liberal, statist, corporatist, and social democratic) that correspond to the level of social welfare have a bearing on social enterprises: Lester M. Salamon and Helmut K. Anheier, "Social Origins of Civil Society: Explaining the Nonprofit Sector Cross-Nationally" (1998) 9 *Voluntas* 213.

in the UK and US – the UK’s community interest company (CIC) and the US’s benefit corporation (including public benefit corporation (PBC)) and social purpose corporation (SPC).<sup>15</sup> These legal forms are critiqued in light of the framework comprising the five criteria.

### B. *Common Law Asian Jurisdictions*

I have selected the common law Asian jurisdictions as case studies for three reasons. First, none of the four Asian jurisdictions (Singapore, Hong Kong, Malaysia, and India) has a legal form for social enterprises. Social enterprises in those jurisdictions have to use existing legal forms, with the limited liability company being the most widely used. On the one hand, there is an assumption in certain jurisdictions that the current legal forms are sufficient. On the other hand, it has been highlighted that arguably the biggest problem facing social enterprises in Asia is the lack of a distinct legal form,<sup>16</sup> and yet there is no critical analysis of what this legal form will entail. I expose the deficiencies of the existing legal forms and make the case for a distinct legal form for social enterprises in Asia by developing a framework comprising five criteria that can accommodate different types of social enterprises in different jurisdictions.

Second, while these four Asian jurisdictions are based on the common law, their distinctive characteristics call into question whether the legal forms for social enterprises in other leading common law jurisdictions, particularly the UK’s CIC and the US’s benefit corporation, can be transplanted to the Asian jurisdictions. This makes it interesting and worthwhile to examine these four Asian jurisdictions. These four Asian jurisdictions can be appropriately compared with the UK and US because the corporate laws of the Asian jurisdictions are based on or derived from the UK. However, the political and legal institutions in the four jurisdictions, which are different from those of the US and UK, have an important bearing on the features of the new legal form for social enterprises. The five criteria of the proposed legal form consist of *ex ante* rules (such as the requirement to have a corporate purpose; decision-making powers; reporting, impact measurement, and certification; as well as distribution of dividends, assets, and tax benefits;) and *ex post* standards (such as directors’ duty to act in the

<sup>15</sup> nn 9 and 10.

<sup>16</sup> British Council, *The State of Social Enterprise in Malaysia*, Foreword from Minister of Entrepreneurship Development Malaysia (2018) at 3, [www.thinknpc.org/resource-hub/social-investment-tax-relief-sitr-two-years-on/](http://www.thinknpc.org/resource-hub/social-investment-tax-relief-sitr-two-years-on/).

company's best interests and to exercise powers for proper purposes; and decision-making powers, i.e. enforcement rights). Ex ante rules require responsive and independent regulators as well as efficient legislators. And ex post standards require an efficient, independent, and competent court system. The quality of the judicial and regulatory regime in the UK and US (particularly Delaware) is generally not in doubt. But this cannot be said for the Asian common law jurisdictions which exhibit varying quality among themselves.<sup>17</sup> The quality of the judicial and regulatory regimes in the Asian common law jurisdictions has crucial implications for the type and scope of the characteristics of the legal form for social enterprises. For example, the judicial system in India is known for its persistent inefficiencies,<sup>18</sup> and the regulatory monitoring and enforcement regimes in India and Malaysia are afflicted with inefficiencies and to a certain extent corruption.<sup>19</sup> By contrast, the judicial and regulatory regimes in Singapore and Hong Kong are generally of a high quality.<sup>20</sup> This suggests that a carefully tailored combination of ex ante and ex post mechanisms is needed for the effective functioning of the new legal form for social enterprises in different jurisdictions. The new legal form for social enterprises in each of the four Asian jurisdictions should encompass all five criteria, but the devil is in the detail. I elaborate on these criteria in this book.

Finally, as I explain in the next section, social enterprises in the common law Asian jurisdictions (especially India, Malaysia, and Hong Kong) play an important role in alleviating pressing socioeconomic problems as well

<sup>17</sup> World Justice Project, *Rule of Law Index* (2020) 27–28 (Singapore, Hong Kong, Malaysia, and India were ranked overall 12, 16, 47, and 69, respectively, out of 128 countries worldwide. In terms of regulations being fairly and effectively implemented and enforced, Singapore, Hong Kong, Malaysia, and India were ranked 3, 12, 40, and 74, respectively. In terms of the civil justice system being fair, efficient, competent, and independent, Singapore, Hong Kong, Malaysia, and India were ranked 6, 11, 35, and 98, respectively), [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf) and <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf>.

<sup>18</sup> Vidhi Doshi, "India's Long Wait for Justice: 27m Court Cases Trapped in Legal Logjam," *Guardian* (May 5, 2016), [www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam](http://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam); Fali S. Nariman, *India's Legal System: Can It Be Saved?* (Penguin, 2017).

<sup>19</sup> See, e.g., H. P. Lee and Richard Foo, "The Malaysian Judiciary: A Sisyphean Quest for Redemption" in H. P. Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 247–252, 258–262; Rehan Abeyratne, "Judicial Independence and the Rise of the Supreme Court" in H. P. Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 183–184.

<sup>20</sup> See the rankings on regulatory enforcement and civil justice for Singapore and Hong Kong: n 17.

as in addressing the problem of inadequate provision of essential goods and services. These social enterprises deliver a range of services that are not provided by the public or private sector. This makes it vital to understand whether current corporate law is adequate to support these business ventures and if not, what reforms should be made. There are numerous domains in which social enterprises have created impact. Examples of three domains are given for now (and more will be discussed in the book): employment, empowerment of women, and education. Social enterprises generate significant employment. More than 50% of the social enterprises in India create direct employment by employing disadvantaged groups in their workforce.<sup>21</sup> In Malaysia, social enterprises have increased job creation by 23% from 2017 to 2018.<sup>22</sup> Moreover, social enterprises play a key role in empowering women. Twenty-four percent of the social enterprises in India are led by women, higher than 8.9% of female-led firms in mainstream business/private sector firms.<sup>23</sup> This is important because Indian women generally face deep-seated cultural prejudice and discrimination and thus, becoming a social entrepreneur can elevate a woman's status in her family and community, develop her confidence, and increase her sense of self-worth.<sup>24</sup> In Malaysia, a Muslim patriarchal society, 54% of social enterprises are led by women.<sup>25</sup> Further, social enterprises have improved marginalized youth's access to education by providing them with life-skill training and mentorship.

Before I examine the social enterprises in Asia in detail – their operational domains, their driving forces, their challenges, the conflicts of interest, and the existing legal forms used by them – it is valuable to provide a broader view of why the study of social enterprises matter for corporate governance. The next section deals with this topic.

## II. Social Enterprises and Long-Term Value Creation

A central and perennial issue in corporate law and governance is for whom companies should be managed. In 1997, the Business Roundtable, an organization of chief executive officers of America's leading companies, issued a "Statement on the Purpose of a Corporation," stating that companies

<sup>21</sup> British Council, *The State of Social Enterprise in India* (2016) at 2.

<sup>22</sup> British Council, *The State of Social Enterprise in Malaysia* (2018) at 72.

<sup>23</sup> British Council, *The State of Social Enterprise in India* (2016) at 2.

<sup>24</sup> *Ibid.*

<sup>25</sup> British Council, *The State of Social Enterprise in Malaysia* (2018) at 14.

should primarily promote the interests of shareholders, usually equated with the maximization of share price.<sup>26</sup> But in a remarkable repudiation, the Business Roundtable in 2019 declared that companies should be managed to promote the interests of all stakeholders.<sup>27</sup> Similarly, in 2019, the British Academy published a report stating that “the purpose of business is to profitably solve problems of people and planet, and not profit from causing problems.”<sup>28</sup> Further, the World Economic Forum has issued the “Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution,” stating that the purpose of a company is to engage all its stakeholders in shared and sustained value creation.<sup>29</sup> The ideology of shareholder primacy has been rejected in favor of long-term stakeholder value creation. The age of “stakeholder capitalism” has arrived.<sup>30</sup>

In 2018, Deloitte carried out an extensive survey of more than 11,000 business and HR leaders and released a report “The Rise of Social Enterprises” in which 65% of the respondents rated “inclusive growth” as a top three strategic concern, more than three times greater than the proportion citing “shareholder value.”<sup>31</sup> And 77% of the respondents regarded “citizenship and social impact” as “very important or important.”<sup>32</sup> It has been argued that companies seeking to operationalize the concept of long-term

<sup>26</sup> Alan Murray, “America’s CEOs Seek a New Purpose for the Corporation,” *Fortune* (August 19, 2019), <https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/>.

<sup>27</sup> Business Roundtable, Statement on the Purpose of a Corporation (August 19, 2019), [www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans](http://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans).

<sup>28</sup> Principles for Purposeful Business: How to Deliver the Framework for the Future of the Corporation. An Agenda for Business in the 2020s and Beyond (British Academy, 2019) at 16, [www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf](http://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf).

<sup>29</sup> Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution (World Economic Forum), [www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/](http://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/).

<sup>30</sup> Vivian Hunt et al., “The Case for Stakeholder Capitalism,” McKinsey & Company (November 12, 2020), [www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-case-for-stakeholder-capitalism](http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-case-for-stakeholder-capitalism); Vivian Hunt et al., “From Principle to Practice: Making Stakeholder Capitalism Work,” McKinsey & Company (April 26, 2021), [www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/from-principle-to-practice-making-stakeholder-capitalism-work](http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/from-principle-to-practice-making-stakeholder-capitalism-work).

<sup>31</sup> “The Rise of the Social Enterprise: 2018 Deloitte Global Human Capital Trends” (2018), 2, [www2.deloitte.com/content/dam/insights/us/articles/HCTrends2018/2018-HCTrends\\_Rise-of-the-social-enterprise.pdf](http://www2.deloitte.com/content/dam/insights/us/articles/HCTrends2018/2018-HCTrends_Rise-of-the-social-enterprise.pdf); Josh Bersin, “The Rise of the Social Enterprise: A New Paradigm for Business,” *Forbes* (April 3, 2018).

<sup>32</sup> *Ibid.*, at 5.



stakeholder value should take a leaf from social enterprises.<sup>33</sup> Social enterprises can provide a valuable, concrete example of how businesses have sought to further the long-term value of stakeholders by promoting inclusive growth and delivering social impact in two aspects: purpose and business models. Social enterprises have also become significant because it has also been said that companies that receive subsidies from the government as a result of the COVID-19 pandemic could be required to become social enterprises.<sup>34</sup>

### A. *Purpose*

The *raison d'être* of social enterprises is to deliver social benefit by identifying and solving social problems through the use of business models. The social problems, often involving the socially and financially vulnerable, include but are not limited to social exclusion or marginalization (related to certain classes of people in society such as ex-convicts, drug users, and delinquent youth), unemployment of vulnerable segments of the community (such as women and the disabled), and deprivation of critical goods and services (such as clean water, housing, healthcare, food, transportation, and loans). Social enterprises deploy existing legal forms (the most common of which is the company limited by shares) to set up businesses involving the production, management, sale, marketing, and delivery of goods and services for the overriding purpose of solving these problems, and delivering social benefit. Given that it is a business, a social enterprise strives to be profitable so that it can continue to effectively deliver social benefit. In short, the fundamental and overriding purpose of a social enterprise is to deliver social benefits by solving social problems, while striving to be financially viable.

However, conventional profit-oriented companies that engage in CSR are not established for the overriding purpose of delivering social benefits by solving crucial social problems. Rather they are set up first and

<sup>33</sup> See, e.g., Leo Strine, “Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy – A Reply to Professor Rock” (2021) *76 Business Lawyer* (forthcoming); Robert G. Eccles, Leo E. Strine and Timothy Youmans, “Purpose with Meaning: A Practical Way Forward” (Harvard Law School Forum on Corporate Governance, May 16, 2020), <https://corpgov.law.harvard.edu/2020/05/16/purpose-with-meaning-a-practical-way-forward/>.

<sup>34</sup> Leo E. Strine and Dorothy S. Lund, “How to Restore Strength and Fairness to Our Economy,” *New York Times* (April 10, 2020).

foremost to deliver profitable goods and services.<sup>35</sup> These conventional profit-driven companies are concerned with the interests of stakeholders insofar as these will impact on shareholders' interests, usually (but not necessarily) equated with stock price and shareholder returns.<sup>36</sup> These companies address stakeholders' interests when they take measures to mitigate negative externalities or more broadly, when they consider the social, economic, or environmental impacts resulting from their business operations, also known as the business case for sustainability.<sup>37</sup> After all, many companies take the view that attending to nonfinancial considerations are either consistent with – or are means to serve the ends of – generating financial returns. This is also known as the enlightened shareholder primacy model that is prevalent in the US<sup>38</sup> and UK.<sup>39</sup>

But if these nonfinancial considerations were to conflict with the financial ones thereby sacrificing shareholders' returns, then it is unlikely that directors of these companies will pursue the former. In other words, conventional companies are unlikely to prioritize the pursuit of stakeholders' interests at the expense of long-term profitability. By contrast, social enterprises prioritize the promotion of social goals over profit-making.

Further, the profits or surpluses generated by social enterprises are primarily used to promote social goals in light of their *raison d'être*, but this cannot be said for conventional profit-driven companies.

Thus, in seeking to operationalize the concept of stakeholder value in its corporate purpose, companies need to consider whether they will follow social enterprises in (a) elevating the identification and resolution of social problems as their *raison d'être*; and (b) prioritizing the delivery of social benefit even if it conflicts with profit-making. The first is less demanding than the second and hence should be more attractive to companies

<sup>35</sup> For example, Colin Mayer asserts that “the purpose of business is to solve the problems of people and planet profitably, and not profit from causing problems”: *Principles for Purposeful Business. How to Deliver the Framework for the Future of the Corporation* (British Academy, 2019), 16.

<sup>36</sup> See, e.g., s 172 UK Companies Act 2006. Cf Oliver Hart and Luigi Zingales, “Companies Should Maximise Shareholder Welfare Not Market Value” (2017) 2 *Journal of Law, Finance, and Accounting* 247.

<sup>37</sup> Ernest Lim, *Sustainability and Corporate Mechanisms in Asia* (Cambridge University Press, 2020), 7–9.

<sup>38</sup> Edward Rock, “For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose” (May 1, 2020) 15–16, ECGI – Law Working Paper No. 515/2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3589951](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951).

<sup>39</sup> Section 172 UK Companies Act 2006.