BRSR AND CORPORATE LIABILITY: A CRITICAL APPRAISAL

By Tanushree Gupta & Dr. Khushboo Natholia***

ABSTRACT

SEBI introduced the Business Responsibility and Sustainability Reporting in 2021 and it marked an important milestone for India's corporate when it comes to their governance system. These new rules replaced the erstwhile Business Responsibility Report (BRR). This paper will focus on how far the 2021 rules make the difference and fill the vacuum in comparison to the earlier ones and whether it moves beyond the procedural form and translates it into the real legal responsibility and its effect can be felt per se or not creating any legal liability. The BRSR rules on paper looks to have strengthened transparency in reporting by the corporation of their environmental, social and governance practices but this paper argues that there is over-emphasis on self-reporting and the rules do not talk about taking independent audits nor do they have strong penalties for violations which defeats the purpose of ensuring accountability. The paper would further make an attempt to analyze how the judiciary might interpret the BRSR rules in relation to director's fiduciary duties, interest of the shareholders and corporate social responsibility. The paper would conclude with suggestions for reforms which could ensure disclosure by the corporations and their accountability.

Keywords: BRSR, accountability, sustainability, CSR, SEBI.

---

* Research Scholar, Bennett University, Greater Noida. Email: tanushree.gupta91@gmail.com.
** Assistant Professor, Bennett University, Greater Noida. Email: khushboo.natholia@bennett.edu.in.

I. Introduction

Corporate governance is no longer just restricted to the financial performance and shareholder profitability. Corporate responsibility has grown in length and breadth with the growing concerns about the working conditions of labour, environmental harm, climate change and ethical business practices. It is not just about profit maximization anymore (OECD, 2020). Much emphasis is being paid by the regulators across the globe on sustainability and ethical business practices. This shift has been adopted and reflected through the Business Responsibility and Sustainability Report (BRSR) in India. The Securities Exchange Board of India (SEBI) introduced these rules in 2021 reflecting the shift and India's support in adopting such sustainable practices for its businesses here.

The new BRSR rules supplanted the previous Business Responsibility Report (BRR) which was majorly voluntary in nature. So, even though the BRR specified the companies to divulge their business practices, the voluntary nature of the rules made such reporting very much erratic and superficial (Ministry of Corporate Affairs [MCA], 2011). Since the reporting lacked any kind of standardization and the enforcement was also to a limited extent, these rules failed in ensuring corporate accountability.

The new framework requires the top 1000 listed companies by market capitalisation in India to disclose and provide comprehensive information on their environmental, social and governance (ESG) activities (Securities Exchange Board of India [SEBI], 2021). The new rules which are based on National Guidelines on Responsible Business Conduct (NGRBC) has made such disclosures mandatory with the aim of providing a structured, comparable and comprehensive sustainability information to all the stakeholders involved. The disclosure requirements are basically grouped into nine categories including environment protection, human rights, integrity, employee well-being, inclusive growth, sustainable goods and services, responsible consumer engagement, stakeholder responsiveness and responsible public policy engagement. SEBI through BRSR wants to align and upgrade the practices in the Indian capital market to be of international standards when it comes to sustainability reporting and responsible investments.

Although introduction of BRSR is a major regulatory development but in spite of that the implementation of these rules raises substantial legal questions. And though the mandatory natures of the rules require compulsory disclosures by the companies but whether such disclosures are creating any kind of substantive legal obligation or it merely strengthens a reporting culture that is focused on compliance is still unclear. The rules lack any kind of explicit measures like liability of companies, penalties etc. There is a concern that these rules merely work as a transparency mechanism and not as the much-needed accountability mechanism. And with the increasing cases of 'greenwashing' wherein the companies showcase that their practices are sustainable and in compliance with the standards without really making any meaningful changes in their operations, the question of accountability in these rules becomes more pertinent.

With this view in the background, this paper will critically analyse the BRSR framework in the context of corporate liability and enforceability. The study will examine the BRSR in relation to the current corporate laws and principles under the Companies Act 2013 and SEBI regulations and will assess whether these rules generate any real legal accountability by the companies. The paper will also discuss the growing difficulties of misreporting and 'greenwashing' and assess the role of judiciary and regulators in strengthening corporate liability under such circumstances. The paper ultimately seeks to determine whether the BRSR is actually efficient and capable of bringing a shift in India's corporate governance system or is it merely procedural and just a farce.

II. Identification of Statement of Research Problem

In spite of bringing in BRSR as a mandatory ESG disclosure framework, the lack of any clear enforcement and liability mechanism raises concerns regarding the effectiveness of these rules I ensuring corporate liability. The main problem that will be dealt in this paper is whether BRSR, in its current form, can move beyond just procedural formality and to actually address corporate responsibility for environment and social harms.

III. Research Methodology

The paper adopts a doctrinal research methodology. It will rely on the analysis of statues, regulatory frameworks, judicial pronouncements and policies relating to corporate sustainability and ESG reporting in India. Major and primary focus will be placed on SEBI's Business Responsibility and Sustainability Rules (BRSR) framework, and comparisons are drawn from international reporting regimes.

IV. Analysis & Findings

A. *Evolution from BRR to BRSR*

India officially started with the formal sustainability reporting in 2012 with the introduction of Business Responsibility Report (BRR). The reporting mechanism was created by the Securities Exchange Board of India (SEBI) and these rules were based on the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business provided by the Ministry of Corporate Affairs (Ministry of Corporate Affairs [MCA], 2011). BRR was mainly aimed for the companies to voluntary disclose their practices in context of ethical conduct, environmental responsibility, and social impact. The BRR created moral obligation rather than any kind of legal obligation for the companies at the time.

BRR's effectiveness was greatly affected due to its voluntary nature. As the compliance in BRR was not compulsory, the companies adopted different approaches to disclosure as they deem fit which led to conflicting and varying information in both quality and depth (SEBI, 2021). Since the reporting was voluntary, the companies treated them merely perfunctory and submitted reports which were primarily descriptive in nature. The reports merely gave broad and general statements focusing on the intent and goals of the company rather than disclosing any kind of verifiable quantifiable facts.

The usefulness of BRR was further undermined by its lack of standardised indicators. This inconsistency made it difficult for the regulators, investors and other stakeholders to efficiently assess the sustainability performance of businesses and industries across (OECD, 2020). Since there was no standard indicator, it made any kind of comparative assessment impossible which is the main aim of such sustainability reporting. The BRR failed in facilitating any kind of decision making and creating corporate liability and thus they were heavily criticized for being perfunctory in nature. BRR failed to establish any meaningful form of corporate liability.

In order to overcome these flaws, SEBI came up with Business Responsibility and Sustainability Report (BRSR) in 2021. BRSR brought in significant shift in India's sustainability reporting mechanism by requiring the top 1000 listed companies by market capitalization to mandatorily report their ESG practices (SEBI, 2021). This again marked a shift in India's attitude and showcased how as a country we are committed to correspond with the global ESG standards (European Commission, 2021).

As compared to BRR, BRSR uses more structured, organized and through reporting style. The BRSR tries to encompass the weaknesses of BRR by putting more emphasis on quantitative disclosures and fact based reporting and by making the report more comparable and transparent by bringing in sector-specific indicators.

Whether the BRSR are truly effective will be apparent only if they are able to create actual corporate responsibility. Although on the face of it BRSR rules are more advanced and improves the scope of reporting by the companies but its dependency on self disclosure mechanism and lack of adequate enforcement measures is still worrisome. Thereby, the efficacy of BRSR is still a little unclear.

B. *Regulatory and Legal Context of BRSR*

1. *SEBI's Regulatory Authority*

The Securities and Exchange Board of India gets its authority to make rules on sustainability from the parent act SEBI Act, 1992 which allows the SEBI to regulate and control securities market and to safeguard investor's interests. Section 11 of the SEBI Act states that SEBI has the authority to warrant fair disclosure of important information and to foster transparency and openness in the operations and practices of the listed companies (SEBI Act, 1992). Nowadays, environment, social and governance (ESG) risks have been increasingly recognized as risks which can affect a company's long-term financial efficiency and their market price (Gibson Brandon et al, 2021). Thereby, expectation of sustainable practices by the corporations has been adopted within the regulatory mandate of SEBI.

SEBI through a circular issued in 2021established the BRSR framework which has mandated the top 1000 listed companies by market capitalization to report their ESG practices (Securities Exchange Board of India [SEBI], 2021). The BRSR framework ensures that corporations make disclosures across environmental, social and governance parameters and make the reporting standardized across all sectors and thus help the investors in making an informed choice.

Despite the fact that the BRSR framework is mandatory in nature, the framework is primarily disclosure oriented. The BRSR framework through SEBI's circular lays out the prescribed format, indicators and the structure of the report but fails to lay down any legal penalties or any consequences in case the disclosures are unclear, inaccurate or falsified.

Many scholars believe that when such rules and regulations are not backed by concrete penal provisions then such framework becomes only compliance on paper without having any actual benefit or result in the ground reality (Krawiec & Oh, 2020). Lack of robust penal mechanism in the BRSR framework makes one question the efficacy of these rules to achieve its objective of inculcating corporate liability so that India can meet the ESG quality standards and requirements that exist globally.

There are certain powers in the hands of SEBI wherein under broader anti-fraud and disclosure anomalies, SEBI can initiate action against the perpetrators. But such enforcement is very indirect in nature and depends on the discretion of the Board which again mkes accountability mechanism weak. Thereby, the question on the robustness of BRSR in enforcing corporate liability and accountability and not just be a compliance mechanism for the companies to through.

2. *BRSR and Companies Act 2013*

The Companies Act 2013 brought in a significant shift in the Indian corporate law when it recognized the interest of other stakeholders apart from the shareholders. Section 166 of the Companies Act states that directors of the company are under fiduciary obligation to work in best interest of the company, its workers, its shareholders etc., while also taking steps to protect and safeguard the environment (Companies Act, 2013). Moreover, Companies Act 2013 introduced Section 135 which imposes mandatory corporate social responsibility on eligible corporations which further helped in incorporating social responsibility into India's statutory corporate governance.

In spite of having these progressive provisions in the Act, the Act does not specifically talk about sustainability or ESG reporting. The Act only lays down mandate to disclose certain information including financial statements, board reports and CSR expenditure; it does not require any kind of thorough reporting on environmental or social impacts of the corporations. Thereby, we see that any obligations under BRSR are majorly outside the ambit of the statutory law.

The separation that we see here has significant legal ramifications, since the BRSR are not in the ambit of Companies Act, it becomes quite challenging to directly link corporate or director liability for any kind of false reporting under BRSR. There has been an argument that unless non-financial disclosures are also included under statutory obligations and company law framework, they are likely to remain secondary to the enforcement and accountability mechanisms (Choudhury, 2021). Only the courts have the potential to bridge this gap.

3. Corporate Liability and Enforceability under BRSR Framework

The BRSR framework has certain major drawbacks including the lack of a robust enforcement mechanism and absence of explicit liability provisions. The rules only mandates that the top 1000 listed companies shall disclose their sustainability practices as prescribes, it never mentions the legal consequences for corporations in case they submit false, incomplete or misleading ESG disclosures (Securities and Exchange Boards of India [SEBI], 2021). This gap makes us question whether BRSR can really be successful in translating sustainability reporting into actual corporate responsibility.

The liability that arises under BRSR framework is primarily indirect from a legal standpoint. As mentioned earlier under certain general provisions of SEBI, misleading or false disclosures may raise action of SEBI's broader anti-fraud and disclosure related provisions, especially those which are meant to stop unfair trade practices and market manipulation (SEBI Act 1992). But again the nature of this enforcement is largely discretionary and not specific to sustainability reporting. Consequently, any kind of false representation under ESG reporting may not face as much scrutiny as financial misrepresentations.

The deterrence effect of BRSR framework is further diluted by the fact that the framework does not provide for any kind of explicit penal provisions. There are no defined penalties or sanctions for wrongdoings under BRSR. This creates a gap wherein the companies may see ESG reporting as symbolic and merely a compliance mechanism with very little risk associated (Choudhury, 2021).

Another issue that we see in BRSR framework is its heavy reliance on self-disclosure by the companies. Companies themselves are charged to evaluate and disclose their companies ESG performance with no need for verification by any independent external source. Self reporting makes the mechanism more flexible but it also gives rise to the risk of selective disclosure and may also exaggerate their sustainability accomplishments. Various scholarly discourse are of the opinion that such data frequently shows that it is rather biased, inconsistent and suffer from lack of comparability standards especially when then are no third party audits conducted (Gibson Brandon et al., 2021).

It is this dependency which leads to instances of *greenwashing,* wherein the corporations portray a very socially and environmentally conscious image without actually making any significant modifications to their corporate model and their practices. *Greenwashing* has become a significantly common cause of concern in sustainability reporting world over. Absence of any mechanism prescribed for third party audits makes India even more susceptible to the risk of *greenwashing*. Additionally, since there is no external verification, the stakeholders have no way of knowing whether the information reported is accurate or not and thus cannot make informed choices. Countries where ESG enforcement is strong, it is found that third party audits have been introduced in order to address the problem of *greenwashing*.

BRSR Principle	**Disclosure Focus**	**Key Gap Identified**
Ethics & Accountability	Ethical conduct and governance disclosures	No clear penalty for misleading disclosures
Environmental Protection	Emissions, resource use, and environmental impact	Not linked to environmental law enforcement
Employee Well-being	Labour welfare and workplace practices	Reporting not tied to labour law compliance
Human Rights	Human rights policies and due diligence	No mandatory disclosure of violations or remedies
Stakeholder Engagement	Stakeholder identification and consultation	Qualitative and largely unverifiable
Social Impact & CSR	Community development and CSR activities	Focus on activities, not measurable impact

4. Judicial Interpretation and BRSR

It has been noticed that although the judiciary has not yet actively interpreted or evaluated the BRSR framework but the recent trends suggest that the courts are increasingly expanding the scope of corporate liability beyond purely fiscal considerations. Indian courts are gradually acknowledging that the companies and the directors have an obligation not just to their shareholders but also to the society as a whole especially when it comes to environment protection, public health and social welfare (Rajamani, 2016).

Companies Act under Section 166 provides a basis for the broader interpretation of director's duties. It states that the director must act in good faith and in the best interest of the company, its employees, its shareholders, society and also work for the protection of environment at large (Companies Act, 2013). This provision gives the courts the right to state that directors have fiduciary obligations that go beyond the scope of profit maximization. The judiciary has indirectly made corporate responsible for failing to exercise due care and diligence by reinforcing directors obligations to uphold and engage in sustainable business conduct (*M.C. Mehta v. Union of India, 1987*).

Judiciary has played a proactive role in shaping corporate liability when it comes to the matters of environment protection. There have been numerous public interest litigations where the courts have taken help of international environment principles like sustainable development, precautionary principle and the polluter pays principle to assess the role of corporate in environment damage and their corresponding liabilities (Rajamani, 2016). Judiciary also evolved the principle of strict liability into absolute liability and made the corporation absolutely liable for any damage arising out of their business practices (*M.C. Mehta v. Union of India, 1987*). While we see that these cases are not directly linked with sustainability reporting under BRSR but they do provide a pathway to the courts wherein the corporations can be judged on such parameters as those made under BRSR framework to assess a corporate and director's conduct for their impact on environment and the public interest.

There is a possibility that the disclosures made under BRSR framework may be used as evidence in future lawsuits. The courts may use sustainability reports to assess whether the director and the company acted in good faith and exercised due diligence especially where a ga can be seen in the reported facts and the actual business practices. If courts treated disclosures under BRSR as representations made to the stakeholders then in those cases any kind of falsified or misleading report may give rise to an action under civil liability under general principles of misrepresentation and breach of fiduciary duty (Choudhury, 2021)

Even so, such judicial development faces many challenges currently especially when there is no direct statutory link between ESG reporting under BRSR and director's liability under Companies Act 2013. Courts would need to make active interpretation to link disclosure obligations with substantive fiduciary duties. But the scholars are of the opinion that unless and until there is explicit guidelines in the legislation, judiciary can do only so much, the judiciary reliance on disclosure will remain inconsistent and case-specific (Varottil, 2019).

V. Conclusion

There is no question that the BRSR framework is a landmark shift in India's corporate governance wherein it tries to bring in regulatory initiative which particularly aims at improving transparency in corporate sustainability practices. Although the new BRSR rules have greatly improved the quality and the scope of ESG disclosures in India, this paper argues that the rules lack robust accountability mechanism and thus falls short of creating any substantial corporate liability.

The current BRSR framework as we have seen above places heavy dependency on self-reporting by the companies itself and lacks a steady enforcement mechanism. Consequently, it fails to achieve the very objectives for which it was established as the accountability still remains limites and there is a risk of sustainability reporting becoming a mere compliance exercise. The BRSR framework needs to have better legal integration with statutory laws, comprehensive liability provisions and effective enforcement mechanism in order to be truly effective in developing corporate liability with respect to environment protection in India.

****

References

1. Organisation for Economic Co-operation and Development. (2020). *Corporate Governance and Sustainability: Towards better corporate practices.* OECD Publishing. https://doi.org/10.1787/ebac1a2f-en
2. Ministry of Corporate Affairs. (2011). *National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business.* Government of India.
3. Securities Exchange Board of India. (2021). *Business Responsibility and Sustainability Reporting by Listed Entities.* (SEBI Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562, paras. 4-7). https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html
4. European Commission. (2021). *Directive (EU) 2022/2464 of the European Parliament and of the Council Amending Directive 2013/34/EU as Regards Corporate Sustainability Reporting.* Official Journal of the European Union.
5. Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992 (India).
6. Securities and Exchange Board of India. (2021). *Business responsibility and sustainability reporting by listed entities* (SEBI Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562).
7. Krawiec, K. D., & Oh, S. (2020). The limits of disclosure. *Harvard Business Law Review, 10*(2), 337–379. https://hblr.org/2020/06/the-limits-of-disclosure/
8. Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).
9. Choudhury, B. (2021). Sustainability as corporate accountability: A stakeholder perspective. *Journal of Business Ethics, 170*(2), 245–259. https://doi.org/10.1007/s10551-019-04317-z
10. Gibson Brandon, R., Krueger, P., & Schmidt, P. S. (2021). ESG rating disagreement and stock returns. *Financial Analysts Journal, 77*(4), 104–127. https://doi.org/10.1080/0015198X.2021.1963186
11. *MC Mehta v. Union of India*, (1987) 1 SCC 395 (India).
12. Rajamani, L. (2016). *Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics*. *International and Comparative Law Quarterly, 65*(2), 493–514. https://doi.org/10.1017/S0020589316000130
13. Varottil, U. (2019). Corporate governance in India: Evolution and challenges. *National Law School of India Review, 31*(1), 1–26. https://ssrn.com/abstract=3366360