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THE COMPANIES ACT, 2013 THROUGH THE JURISPRUDENTIAL LENS OF NATURALIST POSITIVISM

AUTHORED BY - HRISHI KAPADIA¹

Abstract

The Companies Act, 2013 is the foundational legislation which governs all companies in India. This paper aims to study the jurisprudential foundation of this statute, mainly in light of the concept of Naturalist Positivism which combines the two main Schools of Jurisprudence; Natural Law School and Positive Law School. The paper shall focus particularly on the most widely acclaimed, recognised and respected theories of some of the most influential jurists of these respective schools. From Aristotle and Lon Fuller in the Natural Law School, to John Austin, Hans Kelsen, Jeremy Bentham, H.L.A Hart and John Rawls in the Positive Law School of Jurisprudence. While conversations around jurisprudence and interpretations of the various theories thereof are largely focussed on crimes and social behaviours, corporate actions and behaviour are often overlooked and hence, this paper shall analyse the jurisprudence underlying the foremost corporate legislation in India. This paper will focus on the aspects of good corporate governance, shareholder interest, stakeholder interests and the general public interests covered through the statutory framework of the Companies Act, 2013. As this statute is a fairly young legislation, drafted and enacted in the last decade, and is widely considered one of the most well-framed legislations in the Indian Legal System, it forms the perfect subject to be analysed from a jurisprudential point of view, in order to identify and analyse how relevant and applicable the various theories and Schools of Jurisprudence are, in the modern scenario, especially as most widely accepted theories were promulgated centuries, if not millenniums ago.

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1. Introduction

The Companies Act, 2013, acts as the foundational statute governing and regulating all forms of companies in India, be it Unlimited Companies, Guarantee Companies, Private Limited Companies including One Person Companies, Unlisted Public Limited Companies or Listed Public Limited Companies²; ever since its implementation in 2013³ when it replaced the Independence Era Companies Act, 1956. Through its 29 Chapters, the Companies Act, 2013 lays down the statutory framework which governs *inter alia* the incorporation of companies⁴; corporate governance including appointment⁵ and powers of the board of directors⁶ and prevention of oppression and mismanagement⁷, the investigation into non – compliance and breach of the legislative framework⁸, adjudication of disputes⁹ and the winding up of companies¹⁰ – thereby regulating the entire lifecycle and all the actions and procedures contained therein. Such corporate matters are often left out of the realm of discussion and interpretation of Jurisprudence and the theories thereof, as the focus is primarily on criminal action, social behaviour, sovereign actions and fundamental rights. Therefore, studying the Jurisprudence of the foundational corporate statute in India posits an intriguing proposition. This study incorporates the two main schools of Jurisprudence, Natural Law and Positive Law, under the integrated concept called Naturalist Positivism.

2. Natural Law

Natural Law is dubbed the ‘god-given law’ as it is largely perceived as the rules of society and mankind given by a supernatural authority. Natural law is said to stand on the two pillars of morality and justice while reason and common sense are the guiding principles.

These principles are fundamental to the existence and operation of any law; as immoral law cannot be a law, one of the key purposes of the law is justice and reasoning and common sense must be applied in framing, enforcing and interpreting laws, for without them, the purpose of law

² The Companies Act, 2013, S.3

³“The Ministry of Corporate Affairs – Companies Act, 2013, [https://www.mca.gov.in/mca/html/mcav2_en/home/actsandrules/companies+act++2013/companiesact2013.html#:~:text=The%20Companies%20Act%2C%202013%20has,1956%20is%20still%20in%20force.](https://www.mca.gov.in/mca/html/mcav2_en/home/actsandrules/companies+act++2013/companiesact2013.html#:~:text=The%20Companies%20Act%2C%202013%20has,1956%20is%20still%20in%20force.,”)” accessed 22 April 2023

⁴ The Companies Act, 2013, Chapter II

⁵ The Companies Act, 2013, Chapter XI

⁶ The Companies Act, 2013, Chapter XII

⁷ The Companies Act, 2013, Chapter XVI

⁸ The Companies Act, 2013, Chapter XIV

⁹ The Companies Act, 2013, Chapter XXVII; The Companies Act, 2013, Chapter XXVIII

¹⁰ The Companies Act, 2013, Chapter XX

and the operation of society fails.

While Natural law is criticised for being too vague, idealistic, and subjective, the basic principles are interpreted in the same manner by the majority of humankind, which creates a largely consistent body of principles and beliefs/morals which should be and are reflected in the laws of most civilised nations. Morality, while subjective to a large extent, is fundamentally based on what the majority of the concerned people in the relevant society believe to be right and wrong, and therefore, is likely to be fairly similar across the masses which the concerned legislation impacts.¹¹ This view was originally expressed by Plato in his philosophy wherein he believed that the right thing will be the same everywhere.

1.1.Aristotle

The work of Aristotle can be applied quite aptly to the Companies Act, 2013. His concept of two types of justice – distributive and corrective, is reflected in the provisions of the Companies Act, 2013. Distributive Justice, as presented by Aristotle, is concerned with the distribution of honours/rights amongst everyone,¹² which in the context of companies, would entail all shareholders. Corrective Justice, on the other hand, presents a corrective principle in private transactions, voluntarily entered into, such as contracts and the transactions one is subjected to involuntarily¹³ such as embezzlement of shareholder/company funds by the management of the company.

The aspect of Distributive Justice can be seen through the legal requirement that all shareholders of the same class have the same rights with regard to receiving dividends¹⁴ and voting on company actions/decisions, as per their shareholding¹⁵. Aristotle spoke about shares being allotted to members of the community either equally or unequally, which carry their rights.¹⁶

This can be interpreted quite literally in regard to the shares of the company carrying the package of rights and the inequality in shareholding represents the quantum of rights distributed amongst the shareholders. The aim of Distributive Justice is to bestow rights and protect such rights, which

¹¹ “Mark Murphy, ‘The Natural Law Tradition in Ethics’, (*The Stanford Encyclopedia of Philosophy*, Summer 2019 Edition), <https://plato.stanford.edu/archives/sum2019/entries/Natural-law-ethics>,” accessed 22 April 2023

¹² “David Miller, ‘Justice’, (*The Stanford Encyclopedia of Philosophy*, Fall 2021 Edition), <https://plato.stanford.edu/archives/fall2021/entries/justice>,” accessed 22 April 2023

¹³ Ibid

¹⁴ The Companies Act, 2013, S.123(5); The Companies Act, 2013, S.127

¹⁵ The Companies Act, 2013, S.47(1)

¹⁶ Supra Note 12

is precisely what shares of a company represent, not just in terms of the shareholder's right to dividends and voting powers, but also in reference to the obligations of the company towards the shareholders or the shares. These obligations extend uniformly across the board irrespective of shareholding and include the facets of good and transparent corporate governance, legally sound operations, protection of shareholder funds and interests and proper management with a focus on shareholder profits and company growth. Furthermore, the company has obligations towards the government, particularly in regard to compliance filings, procedural aspects, taxation etc.

When there is a breach of these duties/obligations of the company towards its shareholders or the government, Aristotle's Corrective Justice comes into play. The shareholders and the Registrar of Companies, as the Ministry of Corporate Affairs assignee to regulate the company on the ground level,¹⁷ have the right to seek restorative and punitive action against the company upon breach of the duties, through the judicial system and more specifically through the National Company Law Tribunal¹⁸ and its appellate authority, the National Company Law Appellate Tribunal¹⁹, constituted under the Companies Act, 2013.

The power vested with the shareholders and government to hold the company liable for any wrongs it may commit presents the corrective aspect of justice. This also brings into the picture the principle of morality which underlies the Natural Law School's theories. The morality and ethics, which determine which actions by the company are right and which are wrong, are empowered with the force of law through the Companies Act, 2013, and therefore, going against these principles would enable the aggrieved party to seek correction of the wrongs.

These rights are seen pertinently in the provisions relating to oppression and mismanagement, where if any shareholder or the government, believes the affairs of the company to have been/be carried out in a manner detrimental to the interests of the concerned shareholder/group of shareholders/public or the company itself; a whistleblower mechanism can be triggered and proceedings can be initiated against the company and/or its management to hold them accountable for their actions²⁰. The bestowing of these procedural rights and the formation of specific tribunals under the Companies Act, 2013, to deal with these matters, represent Aristotle's Corrective Justice concept.

¹⁷ The Companies Act, 1956, S.609

¹⁸ The Companies Act, 2013, S.408

¹⁹ The Companies Act, 2013, S.410

²⁰ The Companies Act, 2013, S.241

1.2.Lon Fuller

Moving to from the ancient period to the contemporary period of Natural law Jurisprudence, the ideologies of Lon Fuller are resonated in the Companies Act, 2013. Specifically, his 8 Principles of Rule of Law, which lay down the guiding principles for what law ought to be²¹, in order to coincide with the principles of morality, justice, reason and common sense. These rules elaborate upon the four principles of Natural law, by providing concrete guidelines for framing laws, which acts as a solution to the vagueness for which Natural law is criticised. These principles are as follows:

i. Law must be general, specifying rules permitting and prohibiting behaviour of certain kinds.²²

This principle, through its generality and the generality of which it speaks, is visible through the bulk of legislations including the Companies Act, 2013. The very purpose of any law is to permit and prohibit, and the Companies Act, 2013 permits and mandates actions compliant with the statutory framework and prohibits actions detrimental to the interests of any stakeholders²³.

ii. Law must be widely promulgated and publicly accessible.²⁴

The Indian Government has made great strides in this arena in the past two decades, owing largely to the advent and wide usage of the internet, which enables the statutory framework governing companies to be accessible at ease through the Ministry of Corporate Affairs portal²⁵ and other government websites as well as private websites. This acts in addition to the official gazette notifications and the publishing of the bare act and rules thereto, undertaken by the government or by private entities under the license of the government. Furthermore, to ease the understanding of older companies, the Ministry of Corporate Affairs has provided a comparison of the Companies Act, 2013 with its corresponding provisions in the Companies Act, 1956²⁶; which goes to show the extent of importance given to public access and understanding of the statute.

iii. Laws should be prospective, specifying how entities ought to think and act in the future instead of prohibiting past actions.²⁷

²¹ “Lon Fuller, ‘The Morality of Law: Revised Edition.’ (Yale University Press, 1969), <http://www.jstor.org/stable/j.ctt1cc2mds>,” accessed 22 April 2023

²² Ibid

²³ The Companies Act, 2013, S.450

²⁴ Supra Note 21

²⁵“The Ministry of Corporate Affairs – Companies Act, 2013, <https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/acts.html?act=NTk2MQ==>,” accessed 22 April 2023

²⁶ Ibid

²⁷ Supra Note 21

the Companies Act, 2013 is an entirely prospective legislation with no retrospective or retroactive provisions. While the Indian Legal System does present retrospective and retroactive laws, especially in the realm of taxation²⁸, the Companies Act, 2013 does not fall within that category. All the provisions are prospective and govern the actions of companies post the enactment and implementation of the statute. The powers, rights, duties and obligations are all forward-looking and therefore do not posit any complications or uncertainty with regard to ensure compliance of past actions with the provisions of the Companies Act, 2013. Though, actions predating the enactment would fall within the scope of the Companies Act, 1956 and be subject to repercussions thereunder.²⁹

iv. Laws must be clear and unambiguous.³⁰

The Companies Act, 2013 is amongst the most easily understandable statutes, detailing even the complex procedures and requirements in a comprehensible manner, which is more than what can be said for many other statutes in the Indian Legal System, especially the pre-independence laws which are still in operation today. While certain ambiguity may exist in the Companies Act, 2013, it is regularly clarified through the Rules framed under the Act, the amendments to the Act and The Ministry of Corporate Affairs notifications/informal guidelines/explanatory notes.

v. Laws must be non-contradictory.³¹

The Companies Act, 2013 provides a cohesive framework of provisions which are interconnected and mutually supportive.

vi. Laws must not ask the impossible and unpragmatic.³²

Various legislations in India are criticised for being too idealistic, but the Companies Act, 2013 is very practical in its approach and imposes logical rights and corresponding liabilities/obligations upon the company and its management, which is essential to be met in the interest of upholding the four principles of Natural law.

²⁸ “Harish Salve, ‘Retrospective Taxation – The Indian Experience’, (*British Institute of International and Comparative Law*), https://www.biicl.org/files/6722_panel_two_harish_salve.pdf,” accessed 22 April 2023

²⁹ Supra Note 3

³⁰ Supra Note 21

³¹ Supra Note 21

³² Supra Note 21

vii. Laws should be relatively stable/constant – not frequently amended/altered.³³

The benefit of a well-drafted legislation is that it does not require constant modification, which is the case with the Companies Act, 2013. However, a law cannot be stagnant and needs to learn from the dynamic market scenario in order to remain efficient and effective. Since its enactment in 2013, it has been amended four times, each with very minor alterations for the purpose of eliminating any difficulties that may arise, or clarifying any confusion in the interpretation³⁴. The changes brought in through the amendments were largely related to definitions and terminology changes in the provisions³⁵, while some significant changes included change in certain time frames³⁶ and penalties.³⁷

viii. Consistency between written statute and enforcement by officials.³⁸

Proper enforcement of legislations is essential to the operation of an efficient legal system. Inconsistency usually arises out of vagueness which leaves room for interpretation by the enforcement authorities, which if inconsistent can lead to inefficiency and unwarranted uncertainties and difficulties for the subjects of the legislation. The provisions of the Companies Act, 2013 are constructed in such a way that they leave very little room for interpretation if at all, the enforcement authorities like the Registrar of Companies etc. are bound to follow the law as is, owing to the clarity of the framework. Therefore, the companies are benefited from a solid and unwavering framework which has to be and is enforced uniformly.

1.3.Evaluation of Natural Law Applicability

The application of Natural law principles is visible in the Companies Act, 2013, insofar as the four principles of morality, justice, reason and common sense are concerned. The application of specific theories promulgated by respected jurists, is limited as these theories are focussed on civil rights, political systems and rules of society primarily³⁹, and do not speak about corporate law, largely owing to the fact that most of these theories were proposed prior to the existence of the concept of a company or an artificial legal entity.

³³ Supra Note 21

³⁴ “The Ministry of Corporate Affairs – Companies Act, 2013 – Amendments, <https://www.mca.gov.in/content/mca/global/en/acts-rules/companies-act/companies-act-2013.html>,” accessed 22 April 2023

³⁵ The Companies (Amendment) Act, 2017, S.2

³⁶ The Companies (Amendment) Act, 2020, S.4

³⁷ The Companies (Amendment) Act, 2020, S.20

³⁸ Supra Note 21

³⁹ Supra Note 11

3. Positive Law

Positive Law or Positivism, rejects the postulate of Natural law that law is given by a supernatural authority and is derived from a superior power which guides our intrinsic belief system and decisions. Rather, Positivism postulates that law is the outcome of the sovereign or controlling political authority ruling/governing the concerned State, be it a monarch, democratically elected parliament, president (in a Presidential form of government) or dictator. As the father of Positivism John Austin said, “*the existence of law is one thing, its merit and demerit another*”, which suggests that law exists as it is, regardless of its merits.⁴⁰ Therefore, in the Indian context, Positivism states that the source of law is the Parliament which draft and enacts and therefore legislates any law. Ergo, Positivism states that law is the unwavering and enforceable body of rules backed by the power and authority of the sovereign/political entity creating it, thereby binding the people to it. It can be summed up rather crudely in the line, ‘*law is law because it is the law.*’

The ideology is, as was defined by Austin, “*Law is a rule laid down for the guidance of an intelligent being, by an intelligent being having power over him.*”⁴¹ This statement posits that the political authority is a superior being in terms of knowledge and power and hence the subordinate being must adhere to the instructions of the superior, for the superior knows better.

This ideology is reflected across societal relationships and interactions, be it an employer and an employee, a parent and a child, a teacher and a student or a ruler/political authority and its subjects/subordinates.

With regard to the Companies Act, 2013, it creates a binding set of rules laying down rights, obligations and penalties for contravention, as it has been enacted by the parliament and therefore has the sanction of the political authority. Companies are bound to follow the Companies Act, 2013 as it is the body of rules promulgated by the political authority having power over the companies, and is hence the superior to which companies are subordinate.

a. Austin

Austin defined law as “*the general command of the sovereign, issued to those in subjectivity and enforced by the physical powers of the State.*”⁴² The Companies Act, 2013 can be dissected to

⁴⁰ “Green, Leslie and Thomas Adams, “Legal Positivism”, (*The Stanford Encyclopedia of Philosophy*, Winter 2019 Edition), <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>,” accessed 22 April 2023

⁴¹ “John Austin, ‘The Provenance of Jurisprudence Defined’, (1832)”

⁴² Ibid

reveal the application of this definition. the Companies Act, 2013 is the foremost legislation for companies, enacted by the democratically elected and constitutionally empowered parliament and is therefore, “*the general command of the sovereign*”. The application and extent of the Companies Act, 2013 covers the entire territorial jurisdiction of the political authority, i.e., all of India and therefore, all companies existing within India⁴³; thereby constituting the aspect of “*those in subjectivity*”. The power of the Registrar of Companies and the National Company Law Tribunal/National Company Law Appellate Tribunal to impose severely burdensome fines/penalties and award terms of imprisonment⁴⁴ create the “*physical powers of the State*”. This is the most crucial part of this definition, is the aspect of the physical power of the state. No law will be effective if it does not present sanctions and punitive effects for contravention, and such power needs to be exercised in the physical realm in order to create fear in the minds of the subjects, forcing them to adhere to the law.

For example, car loans would become a free-for-all method of purchasing cars simply by paying the minimal down payment, if it weren't for the power of the lender to repossess the car if the loan instalment is not paid, and this power is backed by the legally enforceable loan agreement and the hypothecation of the title of the car.

In the context of the Companies Act, 2013, there would be no incentive for companies and their management to adhere to the provisions of the Act, if there were no sanctions and punitive consequences that could be enforced against them in the physical world, by the government or the aggrieved party⁴⁵. If shareholders and the government did not have the power to hold the company and its management pecuniarily and criminally liable for their actions, there would be no inclination for the company and its management to adhere to the compliance framework, to ensure proper management of funds and returns to shareholders, to disclose true information etc. and such actions could lead to the collapse of the economy and by extension society. The force of physical power to enforce laws and punish contraveners is imperative for the effective operation of law.

b. Hans Kelsen

Hans Kelsen's Pure Theory of Law posits that law is an independent body, uninfluenced by

⁴³ The Companies Act, 2013, S.1(2); The Companies Act, 2013, S.1(4)

⁴⁴ The Companies Act, 2013, S.42(10); The Companies Act, 2013, S.26(9); The Companies Act, 2013, S.424

⁴⁵ Supra Note 20; The Companies Act, 2013, S.424

extrinsic factors such as economic, sociological, political and historical facts. Kelsen isolated law as a solitary field of study which is derived from itself, not a supernatural authority or a political power. Further, he classified law into two categories, 'Is Law' and 'Ought Law'. 'Is Law' refers to the reality of a situation, a pure and unbiased existence of law as it is; whereas 'Ought Law' refers to an idealistic situation detailing how law should be and how society should function on the basis of the law. 'Is Law' takes a direct approach wherein it studies and applies law as it is and 'Ought Law' leaves room for interpretation and inference, enabling the judiciary to interpret and apply laws as per the varying circumstances of the case at hand. As per Kelsen, only 'Is Law' is valid and should be followed as the law is a pure and unbiased body.⁴⁶

Ironically, Kelsen's theory is in itself idealistic if not impractical, as nothing in society or humankind exists independent of other factors and law is no exception. Law is based on past experiences in history, the ideologies and political situation at present, the needs of society and the functioning of economics. Law is not and cannot be a rock-solid impenetrable fortress, there has to be room for manoeuvrability and interpretation to serve the interests of justice, as no two situations are ever the same. For example, a person who steals from the poor and a poor person who steals from the rich to feed his family, cannot be viewed in the same light even though the offence committed by both is theft.

The Companies Act, 2013 is operating in real society and hence is influenced by extrinsic factors. The very purpose of the statute is to regulate commercial entities which invariably brings in the power and influence of economics. The Companies Act, 2013 cannot exist independent of economics. Furthermore, it aims to protect the interests of society, specifically the shareholders of the company, which brings in the aspect of sociological influence. It could be argued that the fundamental purpose of the Companies Act, 2013 is to prevent any wrongful practices or actions by the company and its management detrimental to public interests and shareholder interests, as explicitly provided for in the provisions on oppression and mismanagement in the Companies Act, 2013⁴⁷. Therefore, the sociological influence is phenomenal.

That being said, the Companies Act, 2013, as a norm, deriving its power from the *grundnorm* of the Constitution of India, under Schedule 7, List I, Entry 43⁴⁸, is in consonance with Kelsen's

⁴⁶ "Hans Kelsen, 'Pure Theory of Law', (1934)"

⁴⁷ Supra Note 20

⁴⁸ The Constitution of India, Schedule 7, List I, Entry 43

Normative Theory⁴⁹. Further, the Rules framed under the Companies Act, 2013, can also be viewed as sub-norms deriving their authority from the explicit provisions of the Companies Act, 2013⁵⁰, as the norm (or comparative *grundnorm*) Additionally, the internal rules of the company, through their Articles of Association etc. are also sub norms deriving their power and authority from the norm (comparative *grundnorm*) of the Companies Act, 2013⁵¹. Only if the Companies Act, 2013 permits and empowers the company to frame certain rules and regulations, are such rules and regulations valid and binding upon the company and its stakeholders.

Furthermore, the Companies Act, 2013 is an 'Is Law' as it is pragmatic and realistic, and the subject matter it regulates is fairly well carved out with little need or scope for interpretation in the application by the subjects of the statute. But it is not entirely exempt from interpretation by the judiciary, as disputes arising under the Companies Act, 2013 are complex and as with any case, present varying factors which do call for individualistic interpretation and application by the adjudicating authority, be it the NCLT/NCLAT or any other conventional court.

Therefore, the work of Kelsen is applicable to the Companies Act, 2013 in a very limited scope, as the theory itself is too idealistic for any statute or body of laws. It can be used as a theoretical yardstick to study law but cannot be applied in reality. Therefore, the few principles of his theory that do carry into the reality of the Companies Act, 2013, are the fact that the Companies Act, 2013 is an 'Is Law' and is therefore valid, and it is a subordinate norm to the superior *grundnorm* of the Constitution.

c. *Herbert Lionel Adolphus Hart (H.L.A. Hart)*

H.L.A Hart presented 5 fundamental human conditions which influence and guide law. These are;

i. Human Vulnerability⁵².

As discussed hereinabove with respect to *Aristotle, Fuller and Kelsen*, one of the fundamental purposes of the Companies Act, 2013 can be isolated to protecting the interests of the public and the shareholders, with regard to the actions of the company and its management. This is built on the foundational principle that the shareholders and the public are vulnerable to the actions of the company and its management and can therefore be severely detrimentally affected in the absence

⁴⁹ Supra Note 46

⁵⁰ The Companies Act, 2013, S.469

⁵¹ The Companies Act, 2013, S.5

⁵² H.L.A Hart, 'The Concept of Law', (1961)

of law safeguarding their interests.

ii. Approximate Equality⁵³

Hart spoke about all being inherently equal, which is not the reality, as discussed by Thomas Hobbes with regard to individuals. In the perspective of interactions between people and an artificial entity like a company, the company is stronger even though it is a front backed by people, who are inherently stronger by virtue of their position, again tying in with the principle of Thomas Hobbes. The public and the shareholders are seemingly weaker entities as compared to the powerful company and management. This is derived from the facts of the equation which are that the shareholders simply invest money with the hope of getting a return from the company which uses their money to operate, and these operations affect the public at large by virtue of their nature.

Further, this is reflected in the various provisions dictating disclosure of information by the company to the shareholders, the government and the public at large through prospectuses for potential investors⁵⁴, annual reports for shareholders and the government⁵⁵, form filings with the Registrar of Companies⁵⁶ and publications/advertisements for the government and the public at large⁵⁷, with the aim of eliminating information asymmetry.⁵⁸ Additionally, to combat this imbalance of power, the supposedly weaker entities in the transaction are empowered with the force of law, providing for them to be protected and impose consequences for violating their interests, through the penal provisions⁵⁹ and adjudicating authorities⁶⁰ under the Companies Act, 2013.

iii. Limited Altruism⁶¹

Hart rightly stated that as human beings we have a limited sense of altruism, as selfish interests taking priority is human nature, but for society to survive and thrive, humans need to look beyond their selfish interests and towards the greater objectives of society as a collective singular entity. The Companies Act, 2013 reflects this ideology through the fact that the companies' interests are

⁵³ Ibid

⁵⁴ The Companies Act, 2013, S.26

⁵⁵ The Companies Act, 2013, S.92

⁵⁶ The Companies (Incorporation) Rules, 2014, S.12 (INC-32)

⁵⁷ The Companies Act, 2013, S.12(3)(c)

⁵⁸ Supra Note 54

⁵⁹ The Companies Act, 2013, S.26(9)

⁶⁰ The Companies Act, 2013, S.408; The Companies Act, 2013, S.410

⁶¹ Supra Note 52

subordinate to that of the general public and the government; the larger interests of the company are put before the interests of the management or any individual/group of shareholders, and the fact that all shareholders are given equal rights and protection of their interests⁶², as a unified body of entities.

iv. Limited Resources⁶³

Scarcity is the fundamental economic problem, too few resources to meet unlimited wants and desires⁶⁴. From a sociological perspective, nobody can have everything, be it a real person or an artificial person like a company. The Companies Act, 2013 acknowledges this fact and sets reasonable limits on certain actions and operations, such as the rights of shareholders, the strength and powers of the board of directors etc.

v. Limited Understanding of Strength and Will⁶⁵

Hart postulated the paternalistic view that persons do not know the full extent of their strength and needs, and therefore, it is the prerogative of the government to protect persons through the law, as the government as the superior political authority knows better.⁶⁶ Through the Companies Act, 2013, the legislature has imposed curbs on the powers of the company, its management and even its shareholders and has empowered these same entities with rights to correspond with the liabilities towards each other. The need for a statute to regulate companies is, because unchecked, there is a massive potential for abuse and misuse.

As Hart himself stated, these five principles correlate with the doctrines of Natural law, morality, justice, reason and common sense, and therefore, together, provide for a holistic framework of law.⁶⁷

In addition to these five principles, Hart classified law in a manner similar to that of Aristotle's concept of justice. Hart considers law as a body of rules, which he divided as follows;

⁶² The Companies Act, 2013, S.47

⁶³ Supra Note 52

⁶⁴ "Daniel M. Hausman, 'Philosophy of Economics', (*The Stanford Encyclopedia of Philosophy*, Winter 2021 Edition), <https://plato.stanford.edu/archives/win2021/entries/economics>," accessed 23 April 2023

⁶⁵ Supra Note 52

⁶⁶ Supra Note 52

⁶⁷ "William C. Starr, 'Law and Morality in H.L.A Hart's Legal Philosophy', (*Marquette Law Review*, Volume 67, Issue 4, Summer 1984), [https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1941&context=mulr#:~:text=Hart%20stated%20that%20law%20and,desirable%20in%20any%20legal%20system.](https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1941&context=mulr#:~:text=Hart%20stated%20that%20law%20and,desirable%20in%20any%20legal%20system.,)," accessed 23 April 2023

- i. Primary rules which regulate conduct through rights, duties and obligations, similar to that of Aristotle's Distributive Justice;
- ii. Secondary rules, which he further divided into
 - a. Rules of Adjudication to resolve disputes, which links up to *Aristotle's Corrective Justice*,
 - b. Rules of Change to allow the legislature to make changes in the law whenever required as law cannot stagnate for it will then fail, as discussed hereinabove with regard to *Fuller's 7th Principle of Rule of Law*,
 - c. Rules of Recognition which provide for the interpretation and application of law by the judiciary to the cases before it, as per the circumstances presented, as discussed hereinabove with regard to *Kelsen's Pure Theory of Law*.⁶⁸

Hart posited that secondary rules are integral and imperative for the existence and operation of primary rules and to enable enforcement via an authoritative statement⁶⁹, which ties up to *Austin's definition of law highlighting the importance of the physical power of the state*, as discussed hereinabove. Furthermore, his theory answered the question of why people follow the law, with three crucial factors; the non–optional character of law, the pre-declaration of law and the compliance required for the compulsory membership of the state. He also highlighted the importance of clarity of primary rules, in order to prevent uncertainty about obligations, powers and jurisdiction,⁷⁰ which links up to *Fuller's 3rd principle of Rule of Law* discussed hereinabove. When these ideologies are applied to the Companies Act, 2013, it is evident that the Companies Act, 2013, when viewed jointly with the Rules framed thereunder⁷¹, is a combination of primary and secondary rules, which lays down rights, duties and obligations as well as rules for adjudication of disputes⁷² and provides for the interpretation and application of the primary rules by the adjudicating authority⁷³; while the powers to change the law are embedded in the grundnorm of the Indian Constitution⁷⁴.

Companies and their management have to follow the Companies Act, 2013 as it is non–optional by nature and is a fundamental essential to exist as a company or retain the post of management/exist as a free individual respectively. Non – Non-compliance results in punitive

⁶⁸ Ibid

⁶⁹ Supra Note 52

⁷⁰ Supra Note 67

⁷¹ The Companies Act, 2013, S.469

⁷² The National Company Law Tribunal Rules, 2016

⁷³ Ibid; The Companies Act, 2013, Chapter XXVII

⁷⁴ The Constitution of India, Article 245(1)

consequences and eventual disbarment from operating as a company⁷⁵ or managerial personnel⁷⁶ and hence the law is a binding framework.

d. Jeremy Bentham

Jeremy Bentham was the creator of the concept of utilitarianism, which simply put, prioritises the maximum happiness or benefit of the maximum number of people. It posits that maximising utility is the ultimate aim of law.⁷⁷ This principle is glaringly prominent in the Companies Act, 2013 as already discussed hereinabove.

The maximum benefit of the majority is the determining factor in the law and is what guides the actions of the company as per the law. The needs of the government and the public at large, trump the needs of the company; the happiness/satisfaction of the needs of the shareholders trumps the needs of the management and the desires of the majority shareholders, generally trumps that of the minority as the decisions of the company are made on the basis of a board of directors' vote⁷⁸ and a shareholders' vote which works on the principle of majority shares' votes. Every share gets a vote and the vote of the majority of the shares, regardless of the number of shareholders, creates a decision.⁷⁹

Furthermore, the required quorum for a meeting of the board of directors is atleast 2/3rd of the Board⁸⁰, and for the shareholders' meetings, a substantial number of members need to be present.⁸¹ Throughout the Companies Act, 2013, this principle of majority is seen, which reflects Bentham's principle of maximum benefit of the majority of people.

To further safeguard the interest of the majority, against the actions and motivations of the company, the Companies Act, 2013 mandates the appointment of 1/3rd of the board as independent directors⁸² who are completely devoid of any additional relationship with the company outside the realm of their directorship⁸³, to ensure the elimination of any bias or prejudice that may arise in the management out of their personal interests. This links up to **John**

⁷⁵ The Companies Act, 2013, S.248(1)

⁷⁶ Companies (Appointment and Qualifications of Directors) Rules, 2014, R.11

⁷⁷ "Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation'," (1789)

⁷⁸ The Companies Act, 2013, S.179

⁷⁹ The Companies Act, 2013, S.114

⁸⁰ The Companies Act, 2013, S.174(1)

⁸¹ The Companies Act, 2013, S.103

⁸² The Companies Act, 2013, S.149(4)

⁸³ The Companies Act, 2013, S.149(6)

Rawls' concept of separating the body from the people behind it as discussed hereinbelow.

e. John Rawls

John Rawls' philosophy spoke about justice as an essential fundamental of society and he postulated that those creating the laws should be rational individuals acting from behind a 'veil of ignorance' with regard to their personal interests, with a focus on equal rights being bestowed upon all, leaving any inequalities to the responsibility of the individual's utilisation and exercise of such rights.⁸⁴

Furthermore, he built upon **Aristotle's concept of Distributive Justice** by applying it through the social contract theory, which states that persons exist in harmony and hence must act with regard to each other and living in society.⁸⁵ This view was diametrically opposite to that of **Bentham**, who spoke about the purpose of law as ensuring maximum benefit of maximum people⁸⁶, as compared to social contract theory which promotes maximum self-benefit without detrimentally affecting the rest of society. Social contract theory acknowledges the differences in values, morals, ethics and desires but allows the peaceful coexistence of different groups by enabling each to prioritise themselves in a manner that does not harm the interests of others.⁸⁷

Applying this concept to the Companies Act, 2013, the principle of a separate corporate entity can be seen as reflecting Rawls' principle of separation. While Rawls spoke about separating the lawmaker from the law, which is undoubtedly present in the Companies Act, 2013, it can be further interpreted to mean separating the interests of the promoter and management from that of the company. Similar to Rawls' 'veil of ignorance', companies are said to exist with a 'corporate veil', which means the company and the people behind it, be it promoters, management or shareholders, are separate legal entities, with separate interests.⁸⁸ Interpreting this concept further, the management of the company is mandated to act in the best interest of the company and its shareholders, independent of their personal interests.

⁸⁴ "John Rawls, 'The Theory of Justice', (1971)"

⁸⁵ "Leif Wenar, John Rawls, (*The Stanford Encyclopedia of Philosophy*, Summer 2021 Edition, <https://plato.stanford.edu/archives/sum2021/entries/rawls>," accessed 24 April 2023

⁸⁶ Supra Note 77

⁸⁷ "Fred D'Agostino, Gerald Gaus, and John Thrasher, Contemporary Approaches to the Social Contract, (*The Stanford Encyclopedia of Philosophy*, Winter 2021 Edition, <https://plato.stanford.edu/archives/win2021/entries/contractarianism-contemporary>," accessed 24 April 2023

⁸⁸ The Companies Act, 2013, S.9

Pursuant thereto, whenever the company is entering into a Related Party Transaction, i.e., a transaction with an entity related to the management of the company, be it through an actual relationship with the person or through a business or pecuniary interest in the artificial entity⁸⁹; the doctrine of 'Arm's Length Basis' is applied which states that discussions of the board of directors revolving around the concerned transaction, should exclude the related director and the business should be carried out in the same manner as if the related party were any other non – related entity, with no additional benefits.⁹⁰ The Doctrine of 'Arm's Length Basis' with regard to Related Party Transactions of the company, is a projection of Rawls' concept of separating the person behind the creation, from the purpose of the creation. As per Rawls, this creation is the law, and in this interpretation, it is the company. The management of the company must carry out the business of the company without any regard to their personal interests in consonance with the principles of good corporate governance. This ties in with Rawls' philosophy of the laws being created without any regard for the personal interests of the lawmaker.

In addition thereto, the idea of eliminating bias and framing laws from an entirely neutral standpoint links up with *Kelsen's Pure Theory of Law*, as he too spoke about the law existing independently, free from the influence of extrinsic factors.

Rawls' ideology of equal rights and opportunities is also seen in the Companies Act, 2013 insofar as the legislation, while protecting the interests of the shareholders and the government, is by no means a social legislation, as it is simply regulating the company by giving it rights and imposing upon it, liabilities which do restrict their operations but not their business. This means that all companies of the same type are treated equally by the regulator and are given equal rights and liabilities, but how they utilise such rights and honour such liabilities in the pursuit of business growth and success, is entirely dependent upon the company and its management. As Rawls said, rights and opportunities should be equal in a manner that any inequalities that arise should be the product of the subjects' own making.⁹¹ The Companies Act, 2013 does not impose any curbs on the nature, volume and extent of business, companies can grow as much as they want to, can generate the maximum revenue and profitability possible etc. and hence the disparity in the size and success of different companies, if of their own making.

⁸⁹ The Companies Act, 2013, S.2(76)

⁹⁰ The Companies Act, 2013, S.188

⁹¹ Supra Note 85

Therefore, the application of Rawls' theory is fairly significant with regard to the Companies Act, 2013, admittedly so, with a liberal but not overreaching interpretation.

4. Analysis

There remains the undeniable perspective that the law is not the final limit on guiding behaviour, there exists morality over and above that. While all laws should be morals, all morals cannot be the law but that does not mean morals should not be adhered to. This was a crucial point of view presented by many jurists, but more notable so, by Aristotle, who stated that law is not the limit to restrict actions, morals set a limit higher than law.⁹²

In the perspective of the Companies Act, 2013, while the actions and decisions of companies and their management are restricted by the law in the bigger picture, the ground-level operations are regulated by the morality of the management. It is their moral and ethical belief system which shapes the nature of their actions, as the world operates in the grey and there are always means and methods to circumvent the law and furthermore, not all actions are regulated by the law. These facts bring into the picture the Naturalist view of the imperative of morality in guiding actions, be it of a person or a company. This concept of morality is ignored by the Positivist School for the most part, but clearly, in reality, morality does play a crucial role in the existence, operations and actions of companies.

Prima facie, Positivism seems to have a far greater impact on the Companies Act, 2013 than Naturalism. The scope of application is wide, varied, creative and coherent. However, the everlasting argument surrounding Positivism sustains – Positivism is not itself self-sustaining and independent. While Positivism does acknowledge the source of law as the statute, the statute itself stems from individuals, it does not exist on its own. These individuals are guided by their own morality, ethics, beliefs etc. which brings in the aspect of Naturalism. As evidenced by the discussions hereinabove, the influence of Naturalism in the Positivist theories, confirms the idea that Positivism cannot exist without Naturalism.

While naturalism largely presents that morality stems from a supernatural authority and is hence 'god-given' so to speak, in reality, the influences on the thinking of the legislators are varied. These influences can of course be resultant of their belief system in a supernatural authority or

⁹² Supra Note 12

the principles of their religion, or they may be the past experiences, both negative and Positive, their own and that of humankind and society as discussed in the *Historical School of Jurisprudence* or through judicial pronouncements on similar matters, as spoken about in the *Realist School of Jurisprudence*; they may be derivations from the needs of society, as posited by the *Sociological School of Jurisprudence* or they may be the inspiration of existing statutes in other States or the predecessor statute which the current statute is replacing.

Each of these influences can be traced back further to the people behind them and their moral and ethical belief system, which can again be scrutinised in the same manner detailed hereinabove, and so on and so forth. The chain of backtracking is endless and leaves one with the question of where it all really began, which has been the criticism for most theories under most Schools of Jurisprudence. The fundamental question of where it all began, remains largely subjective and uncertain, if not unintelligible, and hence the constant subject of debate.

5. Naturalist Positivism

Hence, it is fair to conclude that the Companies Act, 2013 bears significant influence of both Naturalism and Positivism, though the balance tilts further in favour of Positivism. But as discussed hereinabove, Positivism cannot be viewed in isolation, as behind Positivism, there lie the principles of Naturalism. Yet Naturalism is definitely not the sole pillar upon which the Companies Act, 2013 stands. Therefore, merging and marrying the two ideologies, under the nomenclature of Naturalist Positivism, tends to present a more rounded and wholesome analysis of the Companies Act, 2013. Naturalist Positivism refers to the integrated view of combining the morality and ethical belief system from Naturalism, along with the other core principles of justice, reason and common sense, with the structured legislative framework of Positivism.

Companies are regulated by the Companies Act, 2013, which is a statute enacted by a competent political authority and is, therefore, the outcome of Positivism, however, the competent political authority derived the provisions of this statute from the Naturalist principles of their own moral and ethical belief system, in the interest of promoting and protecting justice, by applying reason and common sense and urging the companies to do the same.

There is ofcourse the undisputed fact that the Companies Act, 2013 adopts and builds upon the provisions of its predecessor legislation, the Companies Act, 1956, which brings in the aspect of

the Historical School of Jurisprudence, however, if one takes a step further back, the predecessor legislation was also enacted by the same competent political authority and ergo would have reflected the moral and ethical belief system of the members of the legislature at that point of time.

Moving down the hierarchy, on a ground level with the company, it and its management are bound by the Companies Act, 2013, which empowers them to form their own binding internal rules through their Articles of Association etc. which are based on the moral and ethical belief system of the founder and/or the management and shareholders. Building upon that, the actual actions of management and the company are guided by the binding nature of the Companies Act, 2013 and their Articles of Association etc. but the application and daily operations are dependant upon the actions of the management which are guided by their own personal morality.

6. Conclusion

Evidently, the principles of Naturalism and Positivism, or Naturalist Positivism is laced through the entire Indian legal system and specifically so through the Companies Act, 2013 and the operations of the company. Therefore, it all boils down to the same fundamental, the Companies Act, 2013 is empowered and binding due to its codified nature under the Positivist School, but this codification is based on the principles of Naturalism; and these same principles trickle down through the hierarchy of legal power, to the company and its management. Therefore, the Companies Act, 2013 is a prime example of Naturalist Positivism.