

AWAKENING CORPORATE CONSCIENCE: THE CSR RESPONSE TO COVID-19

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I. INTRODUCTION

The current Coronavirus pandemic brought forth by the SARS-CoV-2 virus (coronavirus) began with the discovery of the novel virus in Southeast Asia in December 2019. Since then, it has resulted in thousands of deaths and severe disruption in economies all over the world. The novel coronavirus disease has affected everyone including huge corporations, governments and civilians. From social distancing to generating awareness, social responsibility holds intrinsic value in our battle against this deadly virus. How big corporates decide to exhibit morally and socially ethical behaviour, albeit at the cost of short term financial loss, amidst this world crisis will have a profound impact on a country's success to curb the spread of the virus and combat the economic crisis. Given this situation, this essay seeks to analyse the existent Corporate Social Responsibility ("CSR") laws in India and the response of the Government of India ("GoI") to the CSR law post-COVID-19. The essay further evaluates and assesses the move of the GoI and provides policy

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recommendations and suggestions to overcome the present shortcomings in its response.

II. LAW GOVERNING CSR – WHAT IS IT?

International jurisprudence on CSR is found in the United Nations Guiding Principles on Business and Human Rights. The guiding principles contained therein rest on three pillars which are the state duty to protect, the corporate responsibility to respect and access to remedy.² CSR may be seen as self-regulatory approaches adopted by entities to comply and align with human rights and international norms on sustainability backed with sanctions at the national level.³ It is recognized that corporations are not philanthropic organizations, although corporate philanthropy forms an essential component of CSR, and alignment of business objectives with sustainability and growth is an equally important part of CSR.⁴

In 2013, India became the first country in the world to make CSR a mandatory obligation. The law on CSR in India is found in section 135 of the Companies Act, 2013 (“**Companies Act**”) which mandates that every company having a net worth of rupees 500 crore or more, or turnover of rupees 1000 crore or more or a net profit of rupees 5 crore or more during the immediately preceding financial year shall spend, in every financial

² United Nations Office of the High Commissioner, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UNCHR (May 1, 2020, 5:54 PM) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

³ Norms on the Responsibilities of Transnational Corporations Other Business Enterprises with Regard to Human Rights., UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement>.

⁴ Matteo Tonello, *The Business Case for Corporate Social Responsibility*, HARVARD LAW SCHOOL FORUM ON CORP. GOVERNANCE (Apr. 17, 2020), <https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility/#26>.

year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, to perform any of the activities listed in Schedule VII of the Companies Act.⁵ The section also provides that every eligible company must establish a CSR committee, which will formulate the CSR Policy of the company. Schedule VII of the Companies Act includes *inter-alia* promotion of healthcare, sanitation, and disaster management.

Despite having mandatory CSR obligations, a piercing criticism of CSR in India is that this compulsory monetary contribution in the name of CSR merely reduces it to a CSR tax and does not give any positive impetus to businesses to align their business policies with social growth and imbibes the spirit of CSR.⁶

III. THE COVID-19 RESPONSE TO CSR LAWS – CSR CONTRIBUTION MAY BE USED TO FIGHT CORONAVIRUS

In a move aimed at gathering more funds to fight the coronavirus pandemic and encouraging companies to ramp up their efforts in the fight, the Ministry of Corporate Affairs (“MCA”) announced in its circular dated March 23, 2020, that the spending of CSR funds for COVID- 19 will be treated as CSR activity.⁷ For this, companies may spend their earmarked CSR contributions for activities such as promoting healthcare and sanitation, or disaster management as provided in entries (i) and (xii)

⁵ Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 135.

⁶ Aneel Karani, *Why the CSR law is not a success*, LIVEMINT (May 3, 2020, 11:43 AM), <https://www.livemint.com/Opinion/1wIQwFPRyRckBMg5IugW1K/Why-the-CSR-law-is-not-a-success.html>

⁷ Ministry of Corporate Affairs, Govt. of India, General Circular No. 10/2020 (Mar. 23, 2020).

of Schedule VII of the Companies Act, 2013.⁸ This was supplemented by an office memorandum dated 28th March 2020 which stated that contributions to the Prime Minister's Citizen Awareness and Relief in Emergency Situations Fund ("**PM CARES Fund**") will also be included in the ambit of CSR activity.⁹ The clarification explicates that donations to the PM CARES Fund are covered under item (viii) of Schedule VII, which allows companies to make contributions to funds set up by the Central Government for socio-economic development, disaster relief, etc. as it was set up to tackle emergencies such as this pandemic.¹⁰

In furtherance of these notifications, the MCA has also released a list of Frequently Asked Questions ("**FAQs**") intending to clarify which activities would clearly fall within the ambit of CSR related to COVID-19.¹¹ These FAQs exclude payment of salaries and wages to employees and workers from the ambit of recognized CSR contributions. To this effect the MCA clarified that payment of salaries and wages to employees and workers is a statutory, contractual and moral obligation of all companies, and will not be considered as a CSR activity except in the situation that the company makes ex-gratia payments to its employees and workers, specifically to tackle COVID-19; in such circumstance, the payments may be admitted as CSR only as a one-time exception. This must also be coupled with an explicit declaration to this effect by the Board of Directors, which is duly certified by the statutory auditor. All in

⁸ *Id.*

⁹ Ministry of Corp. Affairs, Govt. of India, Clarification on contribution to PM CARES Fund as eligible CSR activity under item no. (viii) of the Schedule VII of Companies Act, 2013, F. No. CSR-05/1/2020-CSR-MCA (Mar. 28, 2020).

¹⁰ *About PM CARES FUND*, PRIME MINISTER'S OFFICE, GOVT. OF INDIA (May 2, 10:14 PM), <https://www.pmindia.gov.in/en/about-pm-cares-fund/>.

¹¹ Ministry of Corp. Affairs, Govt. of India, General Circular No. 15/2020 (Apr. 10, 2020).

all, any amount spent towards payment of salaries/wages would not be included in the calculation of the mandatory 2% CSR contribution under section 135 of the Companies Act.

It is also pertinent to note that the GoI has clarified that contributions made to the fund before March 31 would qualify for exemption under the Income Tax Act, 1961 under section 80G of the Act which allows donations made to specific relief funds to be exempt from tax.¹² Additionally, the MCA has indicated that a company's contributions to the PM CARES Fund over and above the minimum prescribed CSR spends can be offset against its CSR obligations of subsequent years.¹³ However, there has been no official notification regarding any such development. In other words, if the MCA decides to provide such an option, then companies may make tax-exempt contributions to PM CARES now to reduce their CSR liability for subsequent years by an amount equivalent to that contributed at this stage.

IV. AN ASSESSMENT OF GOI RESPONSE TO CSR LAWS IN LIGHT OF THE COVID-19 PANDEMIC

As noted above, the MCA has clarified that salaries/wages to employees, contract labour, etc. during the lockdown period in India cannot be adjusted against the CSR expenditure of companies as it forms a contractual and statutory obligation of the companies and ex-gratia payment made to temporary workers over and above the disbursement of wages specifically to fight COVID-19 shall be admissible towards CSR

¹² Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020, § 4.

¹³ Gaurav Noronha, *Govt clarifies on company's contributions to PM CARES Fund above CSR limit*, THE ECONOMIC TIMES (May 4, 9:17 AM), <https://economictimes.indiatimes.com/news/economy/policy/govt-clarifies-on-companys-contributions-to-pm-cares-fund-above-csr-limit/articleshow/74907220.cms?from=mdr>

expenditure.¹⁴ The authors observe that this clarification is unobservant of the laws governing temporary workforce in India because of the following reason-

The Industrial Disputes Act, 1947 (“**ID Act**”) requires the establishment of an employer-employee relationship to avail various protections granted under labour legislation.¹⁵ Courts rely on an effective control test to determine the employer-employee relationship.¹⁶ The permanency of relationship is an indicative criterion to determine effective control.¹⁷ The Apex court, by a Constitution Bench, held in the case of *Secretary, State of Karnataka v. Umadevi*,¹⁸ that those temporarily employed do not have a right to be absorbed in service. So, while, companies/contractors are obliged to pay their temporary workforce for the period stipulated in the works contract¹⁹, companies owe no obligation to their temporary workforce so long as the works contract does not coincide with the lockdown period. Hence, the observation of the MCA is unfounded in law, although it has moral standing. Consider Uber India for example, which gives its drivers the status of “agents” or “partners” and not employees, the reason behind it being “lack of control” over its drivers.²⁰ Hence, Uber may contend that it has no accountability towards its drivers under Indian laws but only a moral obligation.

¹⁴ *COVID-19 related Frequently Asked Questions (FAQs) on Corporate Social Responsibility*, MINISTRY OF CORP. AFFAIRS, GOVT. OF INDIA (May 1, 2020, 4:48 PM) http://www.mca.gov.in/Ministry/pdf/Notification_10042020.pdf.

¹⁵ *Balwant Saluja v. Air India Ltd.*, (2014) 9 SCC 407.

¹⁶ *Silver Jubilee Tailoring Houses v. Chief Inspector of Shops*, 1974 SCR (1) 747.

¹⁷ *Id.*

¹⁸ *Secretary, State of Karnataka v. Umadevi*, 2006 (109) FLR 826 (SC).

¹⁹ *Payment of Wages Act, No.4, 1936, § 3(2)*.

²⁰ Ariene Reis & Vikram Chand, *Uber Drivers: Employees or Independent Contractors?*, KLUWER INT’L TAX BLOG (May 3, 2020, 1:54 PM),

The authors acknowledge that while payments may be routed towards the benefit of temporary workers as ex-gratia payments, however, the prevailing uncertainty around how these payments shall reach these workers in light of the existent lockdown or the impact of such payments on the CTC (Cost To Company) of companies may be a discouraging factor for corporate entities to utilize these CSR funds towards the welfare of their temporary workforce. The MCA should take into account this persistent problem specifically in relation with companies employing a major portion of their workforce as temporary workforce.

Secondly, it is also important to consider that in India, many companies have established long term programs intended to stretch over multiple financial years in association with implementing agencies such as NGOs, philanthropic foundations, etc. These programs relate to areas mentioned in Schedule VII of the Companies Act, such as women empowerment, promotion of sports, slum development, etc. However, with the onslaught of the novel coronavirus pandemic, these companies now have a tax-exempt²¹ option to meet their CSR obligations in the form of contributions to the PM CARES Fund.

However, if companies seek to spend all their allotted CSR funds for such contribution, then it can mean those NGOs and other implementing agencies that rely heavily on corporate funding may face a severe crunch of aid for their on-going social benefit initiatives. Additionally, the general circular dated March 23, 2020 states that CSR expenditure for activities related to COVID-19 may only be under items (i) and (xii) of Schedule

http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/?doing_wp_cron=1588781989.0741240978240966796875

²¹ *supra* note 9.

VII, i.e. only relating to the promotion of healthcare, including preventable healthcare and sanitation, and disaster management. While these areas do provide companies with a large number of possible activities, it is important to understand that a lot of other CSR activities are equally important and cannot be risked facing a lack of monetary support from companies in these trying times. For example, healthcare facilities focusing on mental health, NGOs that operate old age homes, or organizations running domestic violence helplines, all still need CSR funding to continue their work. In fact, several sports governing bodies, such as the Cycling Federation of India and the Paralympic Committee of India have expressed that they expect a major crunch in CSR funding.²²

In addition to this drawback as noted above the Corporate Affairs Secretary has also hinted at allowing companies to offset additional contributions made this year against their CSR obligations in future years.²³ While this does sound like a lucrative proposition to encourage companies to increase their efforts in battling the coronavirus pandemic, it can also have a dangerous effect on the various social development organizations that are dependent on CSR funding. This is because if companies make large contributions to funds such as the PM CARES Fund this year, and offset these amounts in the coming years, then this will leave them with no incentive or obligation to initiate new CSR programs in the other areas mentioned in Schedule VII. This will mean that welfare projects in other areas like promoting education, eradicating hunger,

²² *Some NSFs feel the pinch of reduced corporate funding due to coronavirus pandemic*, DECCAN HERALD (May 4, 2020, 01:33 AM) <https://www.deccanherald.com/sports/other-sports/some-nsfs-feel-the-pinch-of-reduced-corporate-funding-due-to-coronavirus-pandemic-830090.html>.

²³ *supra* note 10.

agroforestry, etc. will be left with little opportunities to receive CSR funding.

In light of this, the authors believe that companies with long term and on-going CSR projects with implementing agencies should have some obligations towards the existing or pre-planned projects and therefore, prevent these agencies from receiving setbacks in the post-COVID-19 world. For this, an option could be that the companies may be allowed to spend their CSR funds for anti-COVID-19 activities only after they have met their obligations with regard to their other projects.

Along with these concerns, the issue of CSR fraud has also reared its ugly head again, especially in light of the recent COVID-19 measures. In a report titled “Corporate Social Responsibility In India: Re-Engineering Compliance And Fraud Mitigation Strategies”, Ernst & Young has reported that while companies are actively considering allocating their CSR funds towards anti-coronavirus programs, a number of them still do not have any mechanism in place to avoid frauds.²⁴ The report states that lack of due diligence on implementation partners, weak governance and limited management involvement may be major reasons for frauds in CSR programmes.²⁵ In line with the report, the authors also trust that as CSR spends to aid communities in need during the COVID-19 pandemic increase, the integrity, efficacy and success of these programs may be uncertain due to inadequate controls, governance and monitoring.

²⁴ Sachin Dave, *Companies to see frauds in their CSR programs during COVID-19 pandemic: EY report*, THE ECONOMIC TIMES (May 6, 2020, 11:33 PM), <https://economictimes.indiatimes.com/news/company/corporate-trends/companies-to-see-frauds-in-their-csr-programs-during-covid-19-pandemic-ey-report/articleshow/75568307.cms?from=mdr>.

²⁵ *Id.*

V. CSR IN THE COVID WORLD – WAY TOWARDS INTEGRATIVE CSR NORMS

In addition to the possible relook and subsequent redressal of the concerns raised in the previous section of this essay, the authors consider it crucial for the GoI and corporate entities alike to take into consideration the suggestions and proposals discussed here to make CSR an effective weapon to combat the crisis the world community faces as a consequence of this pandemic.

The authors emphasize that India's CSR laws currently are directed towards corporate philanthropy in the sense of the contribution of monetary capital as opposed to generating a positive social impact through ethical business practices. CSR constitutes of more than simply 'writing cheques'²⁶, moreover, the impact of CSR is higher when corporate entities align their corporate core competence with their social impact objectives.²⁷ Some notable examples of various companies across the world using their core strengths to tackle problems related to include AB InBev, a leading global brewer, donating disinfectant alcohol for producing hand sanitizer as reported by the World Economic Forum.²⁸ Closer home, the Mahindra Group is using its engineering ingenuity to develop low-cost respirators.²⁹ The need of the hour is for organizations to find innovative ways to reduce

²⁶ L.R. CRUTCHFIELD ET AL., DO MORE THAN GIVE: THE SIX PRACTICES OF DONORS WHO CHANGE THE WORLD (2011).

²⁷ Klaus Leisinger & Karin Schmitt, *Corporate Responsibility and Corporate Philanthropy*, UNITED NATIONS (May 4, 2020, 8:26 PM), https://www.un.org/en/ecosoc/newfunct/pdf/leisinger-schmitt_corporate_responsibility_and_corporate_philanthropy.pdf

²⁸ Katie Clift, Alexander Court, *How are companies responding to the coronavirus crisis?*, WORLD ECON. FORUM (May 5, 2020, 4:15 PM) <https://www.weforum.org/agenda/2020/03/how-are-companies-responding-to-the-coronavirus-crisis-d15bed6137/>

²⁹ *Id.*

the impact on public health and economies. Hence, the GoI should come out with non-mandatory guidelines and policy papers to sensitize businesses to the struggles of the country and encourage any form of innovative, albeit non-monetary, contribution of entities (irrespective of whether they fall within the ambit of Section 135 of the Companies Act). Within this context, corporate entities may also take note that the March 23, 2020 notification expressly states that items under Schedule VII will be interpreted liberally to allow a greater number of anti-COVID-19 initiatives to be considered as CSR. The authors opine that this incentivizes entities to contribute in the ways they can as companies may be able to consider their core values and weigh it with stakeholder obligations³⁰ to contribute to CSR in ways that has a palpable effect on their business. While the need to generate funds for the government treasury through a fund like PM CARES is important, the role companies play as direct contributors to social growth cannot be ignored.

VI. CONCLUSION

The authors conclude that an analysis of the CSR laws in India and the government response to CSR laws in times of COVID-19 suggests that the laws need significant refurbishment. Till now, companies have been treating CSR obligations under section 135 as a mandatory monetary obligation attracting penal consequences. The authors believe that this should be supplanted with soft instruments and directory provisions to inculcate “good corporate citizenship” principles amongst Indian corporate entities. The authors also highlight that the MCA clarification is

³⁰ Diana Robertson, *Corporate Social Responsibility and Different Stages of Economic Development: Singapore, Turkey, and Ethiopia*, UNIV. OF PENN. (May 4, 2020, 8:57 PM), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1014&context=lgst_papers.

incongruent to the labour laws in India and hence, suggest tweaking the laws to provide the temporary workforce with rights in these testing times. Furthermore, the impact of the changes in CSR laws on implementing agencies, an important stakeholder to the CSR is also proposed for consideration. Additionally, these testing times call for stronger checks on CSR fraud and malpractices which demand stronger diligence and greater management involvement in CSR activities.