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Integrating Commercial Interest with Community Concerns: Analysis of India's CSR Policy

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Abstract:

A stocktaking analysis is attempted of the legally mandated CSR provisions and their practical impact on the corporate governance practices and re-orienting the corporate purpose. Along with this the benefit of stakeholder provision is now evident and creates a framework for relooking at the corporate purpose towards a more sustainable business model. The legally mandated CSR provision has led to mainstreaming the Indian thought of business and society being positively co-existing with societal welfare and well-being an end-goal for companies. Indian law and policy experiments could be considered as a significant victory in the context of using the legal tool for ethical business conduct. The analysis in the paper throws light on the fact that the present functioning of the companies displays that the legally mandated CSR provision has led to a shift in the manner corporate philanthropy is viewed by Indian companies.

Keywords: Corporate Social Responsibility, Companies Act 2013, Business and Society, Business Ethics, Stakeholder Theory

1 Introduction

Legally mandated Corporate Social Responsibility (CSR) is one of the most innovative corporate law experiments undertaken in the Indian context. The significance of mandatory spending requires the corporates to perform philanthropy in a regulated manner (Varottil 2018). The contextual use of these provisions could be understood as part of the larger stakeholder perspective in corporate law in India.

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A stocktaking analysis is attempted of the legally mandated CSR provisions and their practical impact on the corporate governance practices and re-orienting the corporate purpose. The practical outlook is envisaged around the business policy formulation, the responses of the companies and the recent policy formulation attempts to reinvigorate the mandatory CSR law. The legally mandated CSR also provides for an avenue to look at the interaction of business and society in the Indian context. It legitimizes the Indian cultural approach towards business as an essential contributor to society.

Along with this the benefit of stakeholder provision is now evident and creates a framework for relooking at the corporate purpose towards a more sustainable business model. One of the significant reforms attempted is to envision CSR as a provision that cannot be ignored and include monetary and penal consequences (Jain et al.,). But such measures could create an atmosphere of an unpleasant business environment. The projects proposed in the CSR activities are also very friendly for environmental and holistic development. More freedom could be provided (Mitra & Schmidpeter 2017) to the corporates in the national building process. The corporate's green-washing problem could be tackled with the mandatory CSR provision. The requirement of mandatory spending on the priority areas identified by the government would be helpful in the scenario of green-washing and strategic CSR, which does not provide adequate attention to the need of the society

1.1 Conceptual Framework/Model

The paradigm shift towards legally mandated CSR from the erstwhile voluntary CSR process marks a regulatory innovation in the field of business law. The statutory mechanism mandated under the Companies Act, 2013, and the legislative objective becomes the conceptual framework for the paper. Section 135 of Companies Act, 2013 provides that “every company having a net worth of Rs. 500 crore or more, or turnover of Rs. 1000 crore or more or a net profit of Rs. 5 crores or more during a year shall be required to formulate a CSR policy to ensure that every year at least 2% of its average net profits during the three immediately preceding financial years shall be spent” on CSR activities.

The statutory envisaged conceptual framework of the Companies Act, 2013 has a significant impact for bringing in an Indian thought process of re-orienting the corporate purpose to serve the society. This is much wider than the western concept of voluntary CSR. The embedding of stakeholder perspective in the Indian corporate law to develop an indigenous conceptualization forms a significant framework for policy experiments.

1.2 Methodology and Data Analysis

The paper envisages exploratory research for the study based on the doctrinal legal method. The primary and secondary legal sources are used for the study. Primary legal sources are sourced from the Government of India website https://www.indiacode.nic.in

Since the paper has adopted a doctrinal legal method, the study is based on qualitative analysis of the relevant provisions of the Companies Act, 2013, Companies (Corporate Social Responsibility Policy) Rules, 2014. Apart from the statute's relevant provisions, the company law reform reports and other academic literature have been used.

2. Overview of pre-2013 CSR Scenario in India

A tradition of voluntary corporate philanthropy existed even before the mandatory CSR provision being introduced through the Companies Act 2013. The nature of voluntary corporate philanthropy was highly influenced by the tradition of business and society being positively co-existing in India. The nature of the positive association of business and society has led to corporate philanthropy in setting up the various educational and social relevant institutions. The fact that during the Independence movement also, the corporate houses were influenced by the Gandhian philosophy. The Gandhian philosophy could be perceived as a major influencer in guiding the business organizations to adopt a more socially relevant role (Mohapatra). The Indian industrialist, such as Tata group, has been instrumental in the setting up of various educational and research organizations.

Pursuant to this thought process, it is significant that the Indian way of corporates contributing towards the society has been attempted to be encouraged through the business policy measures. The push for philanthropy by the Public Sector Units controlled by the government has been evolved by the Indian business policy. Moreover, the public sectors have been earlier adopters of the CSR policy (Shah &Bhaskar 2010). Corporate Social Responsibility Voluntary Guidelines 2009 (Voluntary CSR Guidelines 2009) were adopted as a policy stimulus. This was to encourage the private sector to participate and adopt more pro-active measures with regard to CSR. While the private sector companies in India were not quick to adapt to the corporate social responsibility measures, the voluntary standards indeed were a leap in terms of business policy.

The difficulty of defining the corporate social responsibility is highlighted in the corporate law and governance literature (Varottil 2018, Dharmapala and Khanna 2018). The Voluntary CSR Guidelines 2009 played a major role towards providing in a significant impetus for norm creation in India. Voluntary CSR Guidelines 2009 has been broad in nature, with emphasis on six core elements. The requirement for social and inclusive development activities is a part of the 2009 policy. This is an element that gathered more focus with the Companies Act, 2013. The broader perspective and idea provided by the Voluntary CSR Guidelines 2009 in the policy sphere helped Indian corporate law to garner a policy level understanding of CSR. There was a complete lack of mention of CSR in the business policy and regulation prior to the Voluntary CSR Guidelines 2009 policy. This could be considered as an early point in the direction of moving towards stakeholder conceptualization in corporate law in India. Moreover, the Indian policy has helped in paving the path for discussion on corporate social responsibility reporting and disclosure.

Erstwhile version of the company legislation, the Companies Act, 1956, has worked primarily on the basis of shareholder profit maximization concept. While the focus on shareholder primacy is evident in the Companies Act, 1956, it also attempts to provide adequate protection to the interest of the "non-shareholder constituencies such as employees, creditors and public interest" (Naniwadekar and Varottil 2016) in various situations. But there was no specific focus on the stakeholder responsibility and corporate social orientation in the company law framework for around five decades. This also had led to a lack of a comprehensive approach towards corporate philanthropy by the companies. The CSR Voluntary Guidelines were indeed needed/provided as a policy pathway for introducing and evolving a more structured scheme for corporate stakeholders in India.

The Indian capital market regulator, the Security Exchange Board of India, led a major change in ensuring CSR reporting. SEBI had mandated for business responsibility reporting for the listed companies from the year 2012 (Dharmapala and Khanna 2018). With the regulatory stipulation for mandatory business responsibility reporting the, CSR Voluntary Guidelines 2009 received more prominence. The SEBI stipulation uses the six parameters provided in the CSR Voluntary Guidelines 2009 for the purpose of evolving the business responsibility reporting.

The wind of change happening across other countries was visible in India much later. For example, China adopted CSR provisions in the law around 2004 and the UK Companies Act, 2006 looked at stakeholder perspective in a serious manner. Indian legislative framework moved towards mandatory CSR much later during the 2013 amendment to the company legislation.

3. Companies Act 2013 and the Prescription for Mandatory CSR

3.1 Preparatory ground for Mandatory CSR: Companies Bill 2009

The need for a competitive standard CSR framework to be evolved in India has been pointed out by existing academic literature ( ). The fact that most of the information technology sector firms and multinational firms existing in India never had a comprehensive reporting on the CSR spending provides an appropriate reason for the CSR framework evolution (Isaksson & Mitra 2019). The Companies Bill 2009 had been referred to the Jaswant Sinha headed parliamentary standing committee on finance which also played an important role in the introduction of mandatory CSR provision (Zile 2011). This is evident from the report of the Standing Committee on Finance (2009), which state as follows:

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In response to the Committee's overwhelming concerns on the extent of Corporate Social Responsibility (CSR) being undertaken by corporates and the need for a comprehensive CSR policy, the Ministry of Corporate Affairs have agreed that the Bill may now include provisions to mandate that every company having [(net worth of Rs. 500 crore or more, or turnover of Rs. 1000 crore or more)] or [a net profit of Rs. 5 crore or more during a year] shall be required to formulate a CSR Policy

The Standing Committee on Finance also had played an important role in the stakeholderism to be embedded into the Indian company law framework. The requirement of the specific legal framework on the director responsibility and stakeholder considerations were emphasized by the committee. The Standing Committee on Finance (2009) also felt the need for legislative measures requiring the Annual Reports of the companies to disclose the various efforts taken in implementing the CSR policy. This was perceived as a measure that could help the shareholders and stakeholders, including the regulators, monitor the companies' compliance regarding the CSR policy.

The Indian industry attempted to lobby with the government to not have any provision for mandatory corporate social responsibility built into the company law (Varottil 2018, Dharmapala and Khanna 2018). Here it is significant to note that the Institute of Company Secretaries of India, the official body of company secretaries in India, represented the need to introduce stakeholder provisions in the Indian company law (Prasad 2018). This has a vital role in ensuring the company law reflects the stakeholder provision. Interestingly the Standing Committee on Finance (2009) laid emphasis on the comply or explain concept as it states that "separate disclosures required to be made by Companies in their Annual Report by way of CSR statement indicating the company policy as well as the specific steps taken thereunder will be a sufficient check on non-compliance".

3.2 Analyzing the CSR Provision in the Companies Act 2013

The mandatory CSR provision in the Companies Act 2013 has evidently retained the same textual language as provided in the Companies Bill 2009. The stakeholder's perspective in the Indian corporate law was boosted by section 135 dealing with the mandatory CSR provision along with section 166 which talks about the board of directors' duties towards the stakeholders including the environment, employees and community. Section 135 of the Companies Act, 2013 has provided the architecture of rolling out the corporate's CSR policy by forming a CSR committee with adequate representation of directors, including one independent director. The CSR policy of the company needs to be pursuant to the CSR activities as allowed under the Schedule VII of the Companies Act, 2013. The activities allowed under the Schedule VII of the Companies Act, 2013 inter alia includes, projects to eradicate hunger, promote gender equality, ensure environmental sustainability, preserve national heritage and culture and make a contribution to public funded institutions. The Companies (Corporate Social Responsibility Policy) Rules, 2014 provides adequate flexibility to the corporates in envisaging to roll out the CSR activities by themselves or tie up with existing civil society organizations. The rules also allow for companies to collaborate with other corporates in rolling out the CSR activities.

3.3 Integrating Commercial Interest with Community Concerns

The approach towards business organisations responsibility towards society is witnessing massive change in corporate law, policy, ethics and governance literature. It is significant to note that even from a management perspective CSR is a strategic activity, with an "international business code of conduct along with the voluntary nature of CSR has drifted philanthropic CSR into strategic CSR" (Tamvada 2019). The various dimensions that the legal mandatory CSR integrates together are important. The Indian philosophical outlook towards dharma is one such principle. In Idea of Justice, Amartya Sen (2009) differentiates between the nuances of *nyaya and neeti*. As Amartya Sen reiterates in a recent book, "[I]n contrast with *niti*, the term *nyaya* stands for a more comprehensive concept of realised justice. In that line of vision, the roles of institutions, rules, and organisation, important as they are, have to be assessed in the broader and more inclusive perspective of *nyaya*" (Sen 2015). The wholesome perspective of justice, encompasses in *nyaya* would require bringing in a mandatory legal provision of CSR. In an academic context, the legally mandatory CSR provision mainstreams the corporate purpose of business organisations in India.

Moreover, the Indian idea of business co-existing with society and functioning as a tool for the welfare of the community could be mainstreamed in the true sense through the legally mandatory CSR framework. The public interest and community interest are balanced along with investors' interest and profit-maximisation. Studies have found "significant increases in CSR activity among firms subject to the new provision" (Dharmapala and Khanna 2018). This would be important in a country like India, where we are facing the developmental divide and major income inequity problem. A study conducted by the Indira Gandhi Institute of Developmental Research clarifies that "In particular, CSR contributes to governmental resources and delivery mechanisms either to supplement these, i.e., to chip in, or as a substitute, to fill up "governance gaps" especially where governments are weak, corrupt and under-resourced, and institutions are weak" (Sarkar and Sakar 2015). The study also points out that the benefit that could be accrued due to legally mandatory CSR would far outweigh the few lacunas in the mandated CSR regime. A significant point noted is that the "companies will still have shareholder value maximization as a single objective from which, ex-post, two per cent of the profits can be appropriated towards the CSR activities" (Sarkar and Sakar 2015). Hence the companies are not lodging too away from the requisite need of meeting shareholders need while giving pragmatic significance to stakeholders need.

Moreover, Mahatma Gandhi's significant concept of the trusteeship model is made viable as a model through the adoption of legally mandated CSR. The literature points out that "Mahatma Gandhi advocated that private entrepreneurs run businesses as trustees and use the wealth they create to improve society, after keeping a reasonable profit for themselves" (Balakrishnan et al., 2017). The involvement of Tata Group in the national institution building process is elaborated as an important example for the business organisations playing a trusteeship role in the society. The social value created by the business through its conduct becomes an essential factor in assessing the trusteeship role played by organisations. The integrated approach of law by orienting business towards ethics helps in making corporate organisations a partner in social value building. The inclusiveness in societal orientation would infact also help the managerial decision making to be guided by the moral standard of stakeholder welfare.

4. Evidence from Existing Academic Literature on the Success of Mandatory CSR Law in India

One of the factor major studies pin points is to the fact that the amount that is spent on CSR activities have infact increased due to the mandatory CSR law in India. For example the study titled '*Analysing the CSR Spending Requirements Under Indian Company Law'* based on "several empirical studies as well as hand-collected data comprising CSR spending (and disclosures) by Nifty 100 companies" states that "there has been a significant rise in CSR spending in absolute terms" (Varottil 2018). Another significant study titled '*The Dynamics of CSR, Mandatory CSR Laws, and Corporate Social Performance in India'* points out that "it is estimated that at least 6,000 Indian companies have to under- take CSR projects under the Companies Act, 2013 leading to a CSR spending of INR 140 billion in 2014–15".These figures show the paradigm shift in the CSR and philanthropic activity being visible in the Indian context. The study further clarifies that "Several companies that were not previously pursuing CSR started to undertake CSR initiatives. Companies that never reported or spent on CSR started reporting CSR activities due to regulatory reasons. It is estimated that 5,097 companies in India spent INR 9822 crores, approximately equal to US$1.5 billion, towards CSR activities in the fiscal year 2015–16 under the new CSR regime" (Tamvada 2019).

An exciting factor raised by the study *Corporate philanthropy to mandatory corporate social responsibility (CSR)—a new law for India* is regarding the high compliance factor. It is highlighted that "[t]he compliance rate was reported to be over 95%, and some companies had spent more than the prescribed 2% on CSR activities" (Jain et al.). This is based on the data till the year 2017. Jumde and Plessis (2020), in their study, *Legislated Corporate Social Responsibility (CSR) in India: The Law and Practicalities of its Compliance* highlights that the "preference to the local areas" while deploying the CSR contribution is visible. This disturbing trend has to be revisited and requires to be nudged away by the Companies Act, 2013 through guidelines. Jumde and Plessis (2020) also help in bringing forth the issue of certain areas being neglected by corporates while undertaking the CSR studies. Identified areas include "support for the elderly and aged population, orphans, measures for the benefit of the veterans of the armed forces, contributions for technology incubators in government- approved academic institutions; eradication of malnutrition, infant mortality rates, setting up of public libraries and slum development as focus areas for their CSR initiatives" (Jumde and Plessis 2020). An interesting study titled *Analysis of mandatory CSR expenditure in India: a survey* have found out that "the smaller companies that do not spend on CSR activities, largely because they do not think that it is in the strategic interest of the companies to do so" (Mukherjee & Bird 2016) and post-spending on the CSR activities the companies feel that "that the decision to devote resources to the CSR activities has contributed to their companies being more profitable (Mukherjee & Bird 2016).

In a significant study published in the Journal of Business Ethics, titled *Are We Moving Beyond Voluntary CSR? Exploring Theoretical and Managerial Implications of Mandatory CSR Resulting from the New Indian Companies Act* (Gatti et al. 2019) highlights how mandatory CSR law evolves towards an integrated approach in inducing ethical conduct upon the organisations. The study lauds the legally mandatory CSR under the Companies Act, 2013 and records that "the new conceptualization of CSR as a form of regulation may, therefore, be considered a revolutionary advancement in the conceptual debate about the nature and implications of CSR" (Gatti et. al 2019). The transformation of the concept of CSR from an aspirational to mandatory requirement creates a significant change in the posturing of companies. The study discusses this factor and points that it "involves the transition from the conceptualization of CSR as an internal management initiative toward a new and broader understanding of CSR as a particular type of business and society relationship" (Gatti et al. 2019).

The existing literature on the legally mandated CSR concept attempts to look at the legal effectiveness perspective (Afsharipour 2010, Godfrey 2017, Varottil 2018). Moreover, the factor of forcing the companies to spend two percent of the profits into the government-mandated areas is highlighted in the literature (Maira 2013). The national building step towards which the companies may contribute towards is also highlighted in the literature (Satapathy & Paltasingh 2019, Mitra &Schmidpeter 2017). Moreover, the literature on business ethics has predominantly categorized CSR as a voluntary requirement outside the strict realm of business law (Schwartz & Carroll 2003, Carroll 2016). Recent contributions in the business ethics literature analyzing the Indian CSR law have lauded the concept of mandated CSR as an essential step in the convergence of business law and ethics (Gatti et.al. 2019). It points towards India's CSR view as a "transitory hybrid forms in-between like soft–hard law and hard-soft law" (Gatti et al. 2019). Hence the existing literature also borders around legal feasibility, business ethics, and stakeholder-ism perspective.

The balanced step for taking a holistic perspective of law, business, and society as interacting forces is not yet comprehensively evident in the business law literature. Considering the law, business, and society as inter-related forces would help to gain a perspective of why the India CSR law provides an ideologically sound view towards the role of business in society. The view of considering CSR law as an Indian legal and policy thought experiment is now vivid in the literature. This discussion helps to highlight the need for considering legally mandated CSR as a shift from the western perspective of CSR notion.

5. Conclusion and Way Forward

The legally mandated CSR provision has led to mainstreaming the Indian thought of business and society being positively co-existing with societal welfare and well-being an end-goal for companies. The option of participating in the prioritized activities mandated in the Schedule VII of Companies Act, 2013 provides for inclusive development being in the company's mandate. Thus, the corporate purpose is reoriented towards the stakeholder concept with a major thrust on welfare-oriented business conduct.

While the legally mandated CSR is helpful in pushing forward the stakeholder concept, an analysis of the UK Companies Act 2006 provisions, helps in establishing the fact that the Indian law is much wider in its orientation towards ensuring corporates in taking action regarding inclusive development of the society. The study could also help in clarifying that the law as a tool could be used for nudging effective ethical conduct from business organizations.

Indian law and policy experiments could be considered as a significant victory in the context of using the legal tool for ethical business conduct. The formalization of CSR based on Indian experience could be an essential lesson for Asian and African and other global south countries to follow in the context of corporate philanthropy.

The analysis in the paper throws light on the fact that the present functioning of the companies displays that the legally mandated CSR provision has led to a shift in the manner corporate philanthropy is viewed by Indian companies. Even in the initial period, the impact of the mandatory CSR provision was encouraging, and slowly the benefits are evident with improved compliance by companies.

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