Privatization of Welfare State –Mandatory Corporate Philanthropy Under Companies Act

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Abstract

The Companies Act 2013 has made it mandatory for companies operating above the given threshold, to mandatorily commit to Corporate Social Responsibility (CSR). The given CSR framework under Companies Act, tends to promote corporate philanthropy. While there are arguments for and against corporate philanthropy, the mandatory nature of CSR is strongly contested. It is argued that there are sufficient business and financial justifications for the companies to indulge in CSR activities. It is in their long term interest to resort to corporate philanthropy. The market forces incentivize the companies to be ethical, by affording social legitimacy to the company and its products. On the other hand, it is argued that creating philanthropy mandatory through laws is neither economically optimum nor socially desirable nor politically appropriate. The corporate philanthropy tends to create a nexus amongst business, civil society and ruling class, which may affect the independent voice of civil society. Further, the mandatory nature of CSR tends to make state shirk its responsibility towards welfare and shift it to the private entities. Furthermore, it is undemocratic to place public money in the hands of private entities without providing for sufficient mechanism to hold them accountable to the public.

Keywords*: financial, welfare private entities.*

Introduction

The immediate prompt for me to deliberate upon the issue of corporate social

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responsibility from the legal perspective is the recent controversy that erupted regarding Venkatapa Art Gallary, Bengaluru. The state government in the beginning of 2016 launched a scheme for the adoption of heritage sites for the purposes of updation and maintenance by the private entities under their corporate social responsibility. Tasveer Foundation, which has commercial 'for-profit' business in paintings and sculputures, presented its expression of interest for the adoption of VAG under its CSR program. Tasveer Foundation's proposal was accepted. After the MOU was signed between the government and the Foundation, the controversy erupted and the artists, writers and theatre personalities started to protest against the adoption plan demanding cancellation of MOU. The controversy threw open many issues regarding CSR law, in India.

It is important to note that the companies Act 2013, has inserted provisions relating to CSR, in the form of corporate philanthropy (CoPh). The key drivers behind CSR provisions *inter alia* include growing awareness over establishing trustworthy and sustainable relationship by business with community. This indeed is laudable and imperative. This is a win-win situation for both business and community. In fact the businesses in their long term interest must invest in social activities. The issue, however, is should it be made mandatory by the state through laws. There is hardly any country where CSR is mandatory under the commercial laws and that too in the form of philanthropy. The present article attempts to show that mandatory corporate philanthropy is the improper, if not illegal, way to demand social responsibility on the part of the businesses. If not, it only lacks any sound theoretical justification and therefore falls short on practical reasons.

While making arguments for and against corporate social responsibility and mandatory nature of it, the articles also analyzes the recent VAG controversy erupted in Bengaluru. Essentially, the article argues that companies must fulfil social responsibilities and they have the business and financial justifications to do that. It is in their long term interest that they indulge in such socially responsible and relevant behaviour. Market forces should incentivize the companies to be ethical in order to gain social acceptability. But making corporate philanthropy mandatory is not optimum. It is undemocratic to place the public money in the hands of private entities without accountability, in order to achieve welfare goals. State's responsibility under Indian Constitution to be a welfare state cannot be shifted to private hands. There are no sound reasons, which justify this.

The article necessarily explores the meaning, scope and jurisprudential basis of corporate philanthropy, a form of CSR. The second part of the article examines the context and concept of CSR. The definition of CSR is not very clear and it means different things

to different people depending upon the time, space and context. The third part analyses the stakeholder theory, which supplies the key justifications for CSR. Being a part of stakeholder approach, and broad in conception, the section attempts to etch out the essence of corporate philanthropy. The fourth part of the article lays out the arguments for and against the CSR including corporate philanthropy. The fifth part examines the question whether social responsibility should have mandatory character. The next part of the article analyzes the law on corporate philanthropy as it exists in India under the companies Act, 2013. Last part with few reflections concludes the article.

Context and Concept of CSR

The Corporate Social Responsibility (CSR) is part of the larger debate over corporate governance. The CSR draws heavily from the stakeholder theory of corporate governance. The relationship between corporate governance, stakeholder approach and CSR can be shown through following depiction:

CSR has emerged as an umbrella term, which embraces various perspectives, practices, activities and programmes. Though there are many other competing, contrasting and overlapping concepts such as business ethics, stakeholder management, corporate citizenship etc., but CSR has emerged as the dominant if not the exclusive phrase in academic literature and business practices. It incorporates both descriptive and normative aspects of the field.

Defining CSR precisely is beleaguered with complications. It has been defined differently by various scholars,[1] institutions[2] and nations depending upon the purpose and context. Definition of CSR ranges from the basic to most demanding, from specific reference to a number of necessary responsibilities, to general call for a comprehensive, integrated and committed pursuit of social and environmental sustainability.[3] Gallie in 1956 proposed a theory of Essentially Contested Concept (ECC) to refer to those concepts, which have perpetual dispute and are inevitably contested.[4] Applying the theory of Gallie, Okoye has

1 Archie Carroll, "Social Issues in Management Research"33(1) *Business and Society* 5-25 (1994); E.M. Garriga and D. Mele, "CSR Theories: Mapping the Territory"53 *Journal of Business Ethics 51-71* (2004).

2 Economic Intelligence Unit, "The Importance of CSR" White Paper (2005); World Bank, "Public Sector Roles in Strengthening CSR: Taking Stock, Washington DC (2002); World Business Council for sustainable Development, "CSE: The WBCSD's Journey" (2002)

3 Guler Aras and Crowther (ed.), *Global Perspectives on Corporate Governance and CSR* (2009)

4 Also see W.B. Gallie, "Essentially Contested Concepts" 56*Proceedings of the Aristotelian Society*(1956) reprinted in M. Black (ed.), *The Importance of Language*(1962). Gallie proposed a theory of Essentially Contested Concepts to mean those concepts, which by their very nature, invite perpetual disputes and are

classified CSR as an ECC due to the factors like (in)describability, internal complexity, open character, aggressive and defensive uses.[5]

Being ECC, it is obvious that there is no common established definition of CSR. Even Carroll recognized the difficulty in defining CSR. He pointed out that CSR is an "*eclectic field with loose boundaries, multiple memberships, differing training/ perspectives and multi-disciplinary*."[6] It would not be appropriate to consider CSR as "concept with variable content" if I may borrow the phrase from Immanual Kant. Votaw, very aptly wraps up the sundry facets of CSR and the dilemma inherent, in the following para:

> *Corporate social Responsibility means something, but not always the same thing to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means socially responsible behaviour in the ethical sense; to still others, the meaning transmitted is that of 'responsible for in the causal mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for legitimacy in the context of belonging or being proper or valid; a few see a sort of fiduciary duty imposing higher standards of behaviour on businessmen than on citizens at large.*[7]

Even today, there is no single settled definition of CSR. It means different things to different people. Diversity of issues addressed under CSR umbrella renders it difficult to arrive at a singular universal definition.[8] However, a widely accepted definition is given by Commission of European Communities in 2001 as:

> *"… A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis… Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing ''more'' into human capital, the environment and the relations*

inevitably contested.

5 Adaeze Okoye, "Theorising Corporate Social Responsibility as an Essentially Contested Concept: Is a Definition necessary" 89 *Journal of Business Ethics* 613-627 (2009). Okoye applied the theory of Essentially Contested Concepts proposed by Gallie, who in 1956 prescribed seven criteria for evaluation of contested concept.

6 Archie Carroll, "Social Issues in Management Research"33(1) *Business and Society* 5-25 (1994).

7 D. Votaw, "Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt 1' 15(2) *California Management Review*(1972) 25–31.

8 Seema Sharma, "Corporate Social Responsibility in India" 46(4) Indian Journal of Industrial Relations 637-649, 638 (April 2011)

with stakeholders."

What is unambiguous about the definition is that it does not suggest that pursuit of profits is the most important and over-riding consideration of business. Instead, it suggests investment in stakeholders. However, it is vague, is the concept of stakeholders and the kind, nature and scope of responsibilities of business towards them. Another thing, which comes out clearly from the above definition and general discussion about the concept of CSR is that, the protection of the interests of stakeholders, other than shareholders, amounts to 'being socially responsible.' Responsibilities towards stakeholders depend upon how the stakeholders and their interests are perceived.

Stakeholder theory and CSR

CSR is a derivative of stakeholder theory of corporate management.[9] This theory has intuitive, management and socio-ethical justification. The theory views corporations as social entities and thus, considers pursuing shareholders' interests exclusively, as narrow and unfair. The theory requires the corporations to follow certain principles of good governance such as inclusiveness, responsiveness, transparency and accountability to cater to the expectations and interests of all the stakeholders,[10] shareholders being one amongst them. The stakeholder theory got momentum with the works of R. Edward Freeman who contributed immensely to the development of stakeholder theory as a theory of organizational management and business ethics.[11]

Stakeholder theory is in contrast to shareholders primacy theory, which has its basis in historical events, economics and pragmatism and which due to its strong basis, is upheld by law too. The legitimacy of shareholders' primacy theory is based on the concept of right and freedom to private property. This theory emerged in response to the failure of corporations in USA and played an important role in establishing the capitalist economy during 17th to 19th century. This theory is still widely prevalent in legal and business circles. SC of Michigan in *Dodge v. Ford Motor*[12] famously held that:

9 Kristel Buysee and Alain Verbeke, "Proactive Environment Strategies: A Stakeholder Management Perspective" 24(5) *Strategic Management Journal* (May, 2003) 453-470 is of the opinion that implementation of CSR standards require engagement of stakeholder management principles.

10 Stakeholders are loosely defined as those who affect and are affected by the decisions of the corporations. Stakeholder broadly include employees, suppliers, customers, competitors, local community, creditors/ financiers/ government, political parties, media, trade associations etc.

11 R. Freeman & D. Reed, "Stockholders and stakeholders: A new perspective on corporate governance 25(2) *Californian Management Review* (1983) 88–106.

12 170 N.W. 668 (Mich. 1919)

> *"A business corporation is organized and carried on primarily for the profit of the stock holders. The powers of the directors are to be employed to that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself."*

The stakeholder theory emphasizes that corporations look beyond profit making and economic performance. There is where CSR fits in the context of stakeholder theory.

Essence of CSR

According to McGuire, the idea of social responsibilities supposes that the corporation has not only economic and legal obligations but also certain responsibilities to society, which extend beyond these obligations.[13] Carroll in 1991 expanded the categories of business' responsibilities from (earlier) three in 1979 to four, to include ethical and discretionary/ philanthropic categories. A.B. Carroll explicitly spelled out what McGuire referred to as the responsibilities beyond the economic and legal obligations. According to Carroll, "the social responsibility of business encompasses the economic, legal, ethical and discretionary (philanthropic responsibilities, (CoPh)) expectations that society has of organizations at a given point of time."[14]

> *So, the essence of CSR is the responsibilities of the corporations beyond economic and legal[15] responsibilities. Kotler and Lee also conceive CSR essentially in this context only. According to them CSR is "commitment to improve community well-being through discretionary business practices and contributions of corporate resources."[16]*

Corporate Philanthropy (CoPh) as CSR

It looks natural to club all responsibilities beyond economic and legal as social responsibilities. Carroll has, however, classified such social responsibilities into two – ethical and discretionary. Discretionary responsibilities were later clarified as philanthropic

13 J. McGuire, *Business and Society* 1963

14 A. B. Carroll, "The Pyramid of Corporate Social Responsibility: towards Moral Management of Organizational Stakeholders" 1991 *Business Horizon* 39-48.

15 Economic responsibility of business is to produce goods and services that society desires and to sell them at a profit whereas legal responsibilities refer to those obligations which are imposed on businesses by the laws and regulations of the society where it operates.

16 P. Kotler and N. Lee "Corporate Social Responsibility: Doing the Most Good for Your Company and your Cause" 2005 *Hoboken* (NJ: Wiley)

activities. Carroll further clarified on perception of the society towards responsibilities on the part of the business. According to him, economic and legal responsibilities are demanded (required), ethical responsibilities are expected and philanthropic responsibilities are desired by society. CoPh comes last in the order of importance. Jacquie cautions[17] went on to the extent of cautioning against confusing charity with CSR. According to her, charity cannot be demanded. There cannot be a right to charity. According to her, the difference between corporate social responsibility (ethical responsibility in scheme of Carroll's classification) and corporate philanthropy is that the former refers to activities company ought to carry out from a sense of duty or obligation whereas later suggest a voluntary action done out of generosity and beneficence.[18] Though both share some feature as they both create relations of dependence between donor and recipient.[19] Even Carroll was sceptical about terming philanthropic activities as responsibilities. Since, according to him, philanthropic activities are not expected by the society but are merely desired. These are completely discretionary activities on the part of the business.[20]

Why Corporate Philanthropy (CoPh)

There are arguments for and against CSR including Corporate Philanthropy. The arguments against CSR typically find their justification in the notion of corporation as a private entity the purpose of which is mobilization of resources and generate profits for those who contribute to the capital. Milton Friedman had forcefully argued that management of a corporation has one responsibility and that is to maximize profits of its owners and shareholders. He pitched against any kind of social responsibility beyond economic and legal responsibility. According to him, there are three reasons why CSR should not be adopted by businesses. One, it is the job of the free market to take of social issues. If free market fails, then it is the government and not the businesses that should be made responsible. Two, businesses are not equipped to handle social activities. Three, CSR dilutes businesses' primary purpose.[21] A related argument is that there is no point in giving business opportunity to wield additional (social) power in addition to economic power.

The arguments for CSR have strong intuitive force in addition to the empirical data,

17 Jacquie L'Etang, "Public relations and corporate social responsibility: some issues arising" 13(2) *Journal of Business Ethics* (1994)111-123.

18 *Id* at 117.

19 Ibid.

20 Supra Note 13 at 500.

21 F A Hayak, "The Corporation in a democratic society in whose interest ought it and will it be run?" in H Ansoff (ed.) Business Strategy 1969 (Harmondsworth: Penguine Books) 225.

which shows that corporate do indulge in CSR activities, selectively though. Businesses and corporations do realize and recognize that CSR is in their long term self-interest called enlightened self-interest. The reasons being CSR help in creating healthy social climate in it becomes easy for them to function. Another argument in favour is escaped argument so to say. Some argue that CSR shall ward off governmental regulation or at least the pressure from the public over government for regulation of business shall be warded off. Two more arguments in favour of CSR are resource and capability and opportunity arguments. According to resources arguments, CSR should be adopted by businesses because they have the resources (capital and human) at their disposal for the purpose. Whereas opportunity argument implies that since others (free market and government) have failed, "let businesses try." Indeed it is in businesses' interest to act rather than react when the problems surface.

Should Social Responsibility be mandatory

Social responsibility is an overarching term as it embraces whole lot of activities, programmes, practices and perceptions. The question, however, arises is whether social responsibilities of businesses be made mandatory and if yes, how. Or is it optimum to leave discharge of social responsibilities to the market forces. There are strong arguments in favour of corporations indulging in social responsibilities on their own, but very weak arguments for making these social responsibilities mandatory that could be enforced through system of laws.

Whilst intuitively and theoretically, it appeals that there should be government regulation to ensure ethical treatment of various stakeholder. However, to implement, this requires clear cut identification of stakeholder and the nature of interest, which needs protection. It turns out that the only effective way is to make specific laws for specific category of stakeholders and protect specific or general interest. There are numerous examples of such legislations in all the jurisdictions, including India, which implement ethical social responsibility. The nature and scope of protection, however, differs from country to country. These laws include laws governing labour or employees, industrial relations, environment, food safety, health issues etc. These laws draw their justification from the fact that protection of common interests of stakeholder(s) is a 'public good' teemed with 'free rider' problem.

However, there are difficulties in the proper enforcement of even these minimally ethical-social-obligations-enforcing laws. First and preliminary difficulty is the chances

of 'non-market failure' (i.e. government failure).[22] While protection of common interests through laws by state, assumes that people in the government always work in the 'public interest' and are well informed about the implications of particular legislation. But this may not always be the case. According to G. J. Stigler, the government official may allow 'self-interest' to influence their actions and they might introduce legislation to garner support from particular constituents or benefactors.[23] Even according to Andersson, the government generally respond to political pressures rather than maximize social welfare. He gives an example of environmental pollution, which tends to hurt large number of people, who are uninformed and unorganized and future generations, where there is likely to be 'government failure' resulting in too little protection of the environment.[24]

Apart from this, those who oppose governmental regulation argue that there are sufficient business drivers, which motivate the companies to be socially responsible. These drivers are employees' recruitment, motivation and retention, reputation management, risk profile and risk management, competitiveness and market positioning, investor relations and access to capital etc. Apart from this, Carroll and Shabana[25] have advanced 'business-case' arguments for CSR practices. They have demonstrated that businesses have strong incentive to indulge in CSR activities as it helps in reduction of cost and risk, gaining competitive advantage and mustering legitimacy and reputation and finally in creating win-win situation for both company and society. In short, according to Carroll and Shabana, it makes great economic sense for companies to indulge in ethical and philanthropic activities. In some sense, this reflects instrumental approach as the factors/ incentive are tied to maximizing the value of business.

Especially against CoPh, critics extend theoretical argument that philanthropy distracts companies as well as the attention of the public from the economic role of businesses. On a more practical note, it is shown that CSR is characterized by piecemeal and fragmented reforms and window dressing.[26] Critics also argue that philanthropic activities afford companies opportunities to green-wash the blue-wash.[27] Radical political economy

22 Craig Deegan and Marita Shelly, "Corporate Social Responsibilities: Alternative perspectives about the need to Legislate" 121 *Journal of Business Ethics* 508(2014) (499-526)

23 G. J. Stigler, "The theory of economic regulation" 2(1) *Bell Journal of Economics and Management Science,* 2–21 (1971)

24 B. M. Mitnick, *The Political Economy of Regulation* (1980)

25 A B Carroll and Kareem M. Shabana, "the Business Case for Corporate Social Responsibility: A Review of concepts, Research and Practice" 2010 *IJMR* 85-105.

26 Peter Utting, "Corporate Responsibility and the Movement of Business" 15(3&4) *Development in Practice* 383 (June 2005) 375-388.

27 J. Greer and K. Bruno, "Greenwash: The Reality behind Corporate Environmentalism," Penang: Third

perspective on CSR is not only sceptical about the effectiveness of CSR but also raise concerns regarding CSR policies being deliberately designed by corporations to deflect attention away from external regulation and control of corporate behaviour.[28]

Another argument is related to 'regulatory' or 'institutional capture.' Historically, corporate philanthropy has been used as a tool to avoid state regulation and expand the reach of corporate world.[29] Since corporate philanthropy gives enormous autonomy to corporation to design and execute the philanthropic programs, it is seen as an attempt to pre-empt the role of governments as a watchdog over the powerful businesses/ corporations. Some go to the extent of arguing that mandatory corporate philanthropy will enable the companies to eventually appropriate role of the state in the domain of welfare.[30] Evidently, the increasing penetration of large corporations in public-policy process through PPPs and other formal and informal consultation and dialogues and other mechanisms has enabled them weaken the attempts to raise standards of regulations.[31]

CSR in the form of corporate philanthropy not only has the tendency to become a tool for public relations functions[32] but has in fact become important to public relations. This is because philanthropic programs afford corporations opportunity to build good will by promoting the benefits of the company to its stakeholders. CSR suitably falls within the public relations portfolio because it affects a company's image and reputation and bring marketing-type benefits to business.[33] CoPh may be seen as an investment against the crisis that may occur in future.[34] The argument that CSR programs fetch good will to the business and company is also evident from the way CSR programs are publicized. It raises

World Network (1996). Greenwash implies ability of companies through PR and minimal adjustments to policy and practice to project an image of reform while changing little in terms of actual corporate conduct.

28 Ray Broomhill, "Corporate Social Responsibility: Key issues and Debates" Dunstan Papers Series at8 (1999) 1-52.

29 *Ibid*.

30 Mallen Baker, "Are businesses mad dogs that must be controlled?"Available at http://www.mallenbaker.net/csr/page.php?Story_ID=2793. Last visited on 18th August 2015.

31 *Supra* Note 22 at 383.

32 According to Public Relations Society of America's Task Force on the Stature and Role of public Relations, Public relations may be identified as planned, deliberate communication directed towards target publics with the purpose of achieving an understanding. The key issue in public relations is that of the direction of the communication and the extent to which this informs shapes and manipulates those who receive the communication. Public relations in that sense may be distinguished from propaganda as the former focuses more on two-way communication, while later is one-way communication. It shows the mutuality in public relations. The two-way model incorporates feedback into its framework. This is a means to undertake dialogue between an organization and its publics to achieve mutual understanding.

33 *Supra* Note 18 at 117.

34 *Ibid*.

questions over moral motivation of the programs at the outset. Large scale publicity of CSR programs shows that they are motivated by the self-interest and not by the sense of duty towards society. These are the reasons, which Carroll and Shabana term as 'business-case arguments' for companies to discharge social responsibilities by themselves. And thus, there is no need for government to make CoPh mandatory.

But there are certain arguments in favour of mandatory CoPh too. First and foremost, CSR is a tool to take the wealth to the down of the pyramid. It is based on the premise that wealth generated does not 'trickle down' automatically. As Gray pointed out'[35]

> *It is disturbing...to discover that there is no direct evidence to support this precarious construction. The view relies, for its empirical support, on the generalised argument that, for example, we are all better off than we have ever been; that we are all getting better off all the time; and that this increase in wellbeing has coincided with the triumph of international capitalism. Such arguments are, at best, contestable. Whilst for many in the West this statement has a superficial veracity, it ignores the growing gap between rich and poor...and it entirely ignores the increasingly parlous state of the environment.*

This is indeed true. But the mechanism of mandatory CoPh is effective way to re-distribute wealth, and is also contestable. Another argument is that, since government is failing in eradication of poverty or bridging the gap between rich and poor, it makes sense for the companies or private wealth to take up the responsibility. In the process, the companies would be able to garner trust and reciprocity from the society,[36] which is good for the overall business environment of the economy. This argument has as economic angle too. Corporate philanthropy would enable to the companies to avoid inefficiencies caused due to regulatory mechanisms and ever present spectre of government corruption and mis-feasance.[37] From Indian perspective, it is argued that since voluntary CSR on the part of the companies has not been successful, the intervention by State is not unreasonable.[38]

35 R. Gray, "Social, environmental and sustainability reporting and organisational value creation? Whose value? Whose creation?" Paper presented at European Accounting Association annual congress—*Symposium on New Models of Business Reporting*, Gothenburg, 18–20 May. (2005)

36 Tom R Tyler, Peter Dogoey and Heather Smith, "Understanding Why the Justice of Group Procedures Matters" A Test of the Psychological Dynamics of the Group-Value Model" 70 *J. Personality & Soc. Psych*. 913 (1996) 913-930.

37 Carolina Van Zile, "India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism meets Creative Regulation in Global Market" 13 APLPJ **291** (2012) 269 -303

38 *Supra* Note 33 at 291.

Moreover, business will get the opportunity to create positive externalities in the form of schools and health care systems.

CSR and CoPh in India

Any discussion on CSR in the form of CoPh in India is held against the backdrop of environmental and human-rights related corporate disasters in the past. The two incidents are 'Bhopal Gas' tragedy and 'Dhabol' fiasco, which took place within a span of ten years. These two corporate disasters not only made the foreign companies wary of social and political risks involved with the investment in India but have also put the Indian public on guard. Even today people remain suspicious of major foreign investment. These disasters have, however, not prevented many other foreign direct investments such as by majors like IBM, Coca Cola or many automobile and consumer goods companies etc.

In India there are number of legislations that relate to a variety of social responsibility-related issues. These laws include those relating to occupational health and safety, environmental performance, industrial relations, labour laws, competition law and so forth. The justification of these legislations is found in socialist orientation of the Indian Polity. However, to fit these legislations in the definition of CSR by Carroll, these legislations would qualify as enforcing ethical responsibilities. What is interesting is that these legislations apply to all forms of business organizations and not just the corporations.

As far as the corporations are concerned, the conduct of companies and their managers is governed by the Companies Act. It contains various provisions which cater to the social responsibility. The Act along with Securities laws in India provide for disclosure requirements, mainly financial. These disclosure norms, though minimum and limited in scope, purports to protect the interests of shareholders principally. The disclosure requirements do not make is mandatory to disclose information regarding compliance of environmental laws or other social responsibility-enforcing laws.

Another guiding principle under the corporate laws in India pertains to liability of corporate officers coupled with the jurisprudence developed in the field of directors' duties.[39] Directors could be held liable for violating principles such as '*best interests of the company*' and '*proper purpose*' doctrine. The condition is that the companies need to consider the requirements of a broad group of stakeholders. This is based on the premise

39 Duties of Directors are now codified in section 166 of the Companies Act, 2013. As an overarching duty, the directors are to keep the interest of company and the stakeholders in consideration while acting on behalf of the company.

that failure to protect the interests of the stakeholders would not be 'in the interests of the company.'

Corporate Philanthropy under the Companies Act

The Companies Act 2013 is the first major attempt at overhauling the fifty years old companies Act. Despite India's left-leaning polity, the Act is extremely economically liberal and pro-business. It imports legal structures from the west. But some argue that the mandatory CSR provisions seem something of a regulatory oddity.[40] The provisions under the Companies Act are essentially in the nature of corporate charity. This is first of its kind in the world. In no other country, philanthropy is made mandatory. This is most blunt and audacious example of state regulation of what should appropriately be left to the discretion of the corporations. In effect, the Indian CSR law is a 'self-administered tax' on business. It essentially focuses not on how companies make profits but on how they spend the profits.

The CoPh provisions under the Companies Act, 2013 essentially, makes it obligatory for the companies to spend 2% of the average net profits made during the last three financial years. The obligation is to be discharged through a CSR committee consisting of 3 or more directors with at least one independent director. Company need to make a CSR policy containing activities to be undertaken based on Schedule VII of the Companies Act. The annual CSR report containing particulars as specified by CSR rules 2014 need to be given out. Even the CSR policy is to be disclosed in the CSR report and on companies' website. CSR rules mandate that activities must be in the form of projects or programs. They must be based on the CSR policy and Schedule VII. The activities must be carried on preferably in local region of operations. The companies may undertake the projects or programs either through a not-for-profit of repute or own foundation.

Companies must also establish strong monitoring and reporting mechanism. For this and capacity building of CSR personnel and other administrative expenses, the companies may spend an amount not exceeding 5% of the total CSR expenditure.

The rules also specify what is 'not' counted as CSR. It says, expenses on activities required for any compliance, on activities in pursuance of normal course of business; activities benefitting only the employees of the company and their families; one-off events such as marathons/ awards/ charitable contributions/ advertisements or sponsorships etc.

The CoPh under the Companies Act can be differentiated from the socially

40 *Supra* Note 33 at 291.

responsible behaviour (ethical in sense of Carroll's definition) mandated under other laws on the grounds of substance, scope and extent. For instance, Companies Act is applicable to only one form of business organization i.e. companies, where as other laws are applicable to all business entities irrespective of the form. Further, Companies Act mandates only certain categories of companies (selected on the basis of profitability and turnover) whereas other laws are applicable to all irrespective of the size of their business or profitability. Yet another difference could be the standard of socially responsible behaviour under other laws, which are at times, industry specific (food industry; effluent treatment plant for certain industries) whereas CSR under Companies Act is applicable to all irrespective of the industry.

Conclusion and remarks

CSR provisions under the Companies Act, 2013 are quite audacious to say the least. India is perhaps the first and only country that has made corporate social spending/ philanthropy mandatory. According to a rough estimate around 8,000 companies put around $2bn into the charity to the causes of development and poverty eradication programs.

First and foremost, mechanism of CoPh to realize social goals through welfare activities by private companies is thoroughly undemocratic in nature. Authority to use public money is invested in the private entities without having strict accountability norms in place. Where state machinery may be held accountable for non-performance, there is no means by which private entities may be held liable for non-performance of CoPh activities. Private entities are not only desired but are required to perform the role of a welfare state. This is nothing but 'privatization of welfare state.'

The arguments against making corporate philanthropy mandatory are not merely theoretical but also show practical difficulties. It is an open secret that there is endemic corruption at every level of the government. The welfare programs of the government do not reach the beneficiaries in the manner in which they are expected. But the very corruption in governance may be responsible for diverting the private funds of the companies, ear marked for CoPh activities, into the wrong hands.[41] There is also a possibility that CoPh funds will be diverted to the NGOs, which may belong to politicians or bureaucrats. The reverse is also possible. The private entities further their private interests from the CSR funds with the help of government officials. It may eventually develop a nexus between the corporate and those responsible for governance in such a way where both are benefitted from each other, marginalizing the interests of general public. CoPh law, in that sense, is a step backwards, not a step forwards in the direction of CSR.[42]

41 Mallen Baker, "Should CSR be made compulsory after all?" available at http://www.mallenbaker.net/csr/page.php?Story_ID=2800.Last visited on 26th July, 2015.

42 *Ibid.*

The recent controversy surrounding Venkatappa Art Gallary (VAG) in Bengaluru is the classic case of government machinery being used by private entity to its benefit. The essential argument by those who are opposing the adoption of VAG by Tasveer foundation, relates to the conflict of interest. Where Tasveer Foundation's central business is relating to cultural artefacts, adoption of VAG would afford Tasveer the opportunity to use the public facility for its private benefits and to the exclusion of other. Where the public facilities are for the promotion of welfare of all without any distinction, the VAG case presents the situation of some parties benefitting over others.

Corporate philanthropy is an improper way to make companies socially responsible. This is an arbitrary and lopsided mechanism. One the one hand private entities are forced to spend money in social and environmental issues on the other hand, they may probably get involved in worsening labour standards, increasing pollution levels, indulging in wastage and depletion of resources by way of use of non-renewable natural resources or indulging in lobbying[43] for reduction of taxes and relaxed implementation of environmental and labour welfare legislations. Philanthropic activities have the tendency to not only distract attention away from core business practices and conduct but to actually militate against unreasonable business practices.[44] Demanding socially responsible behaviour by way of ethical business processes, conduct and behaviour would be much more meaningful than mandatory corporate philanthropy. CoPh may rather prove to be counter-productive.

Another challenge could come from the implementation side. Without a coercive enforcement mechanism, there is a possibility that the spirit of the law may not be complied with. There is no formal review process in place. Alternatively, it is better to impose tax so that government get funding to reform its infrastructure in a systematic manner and democratic way.

Lastly, it is difficult to imagine that good and fair society can be created by companies, but certainly, the one cannot be created without them. Their role is important but how they benefit society must be determined by people through government or through other democratic means and not by the business or corporations themselves. They may invest in something which is not particularly the pressing need of people but which may bring desired goodwill for the company. There is natural justice principle, which says "*justice should not only be done but seem to be done*." In case of corporate philanthropy as a form of CSR, it is not inappropriate to say, "*Corporations should not merely be seen ethical but in fact be ethical*." Corporate philanthropy will make corporations only seem ethical.

43 *Supra* Note 22 at 383.

44 *Supra* Note 22 at 383.