

CONTOURS OF CORPORATE SOCIAL RESPONSIBILITY AMIDST COVID-19

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The outbreak of the COVID-19 pandemic has resulted in significant global ramifications. India's health infrastructure as well as the economy are facing serious challenges. Since March 2020, corporates and business leaders have attempted to build a COVID-19 response plan in various capacities. In this note, the authors analyse the initiatives undertaken by Indian companies to alleviate the impact of the pandemic on the Indian population as well as the pandemic response of the Ministry of Corporate Affairs through clarifications and amendments to the corporate social responsibility ('CSR') framework. The note further deliberates upon the limitations of the CSR regime as revealed by the COVID-19 pandemic, and offers recommendations to inspire a more pragmatic, efficient, sustainable, and impactful form of CSR integrated into the organisation and the business of corporates.

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I. INTRODUCTION

“Corporate Social Responsibility was conceived of as an instrument for integrating social, environmental, and human development concerns in the entire value chain of corporate business.”¹

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As the world grapples with the reeling effects of the COVID-19 pandemic, companies have found themselves at the helm of ever-increasing expectations from various stakeholders ranging from employees, investors, and consumers to the community at large. This has translated into a rapidly growing emphasis on the concept of corporate social responsibility ('CSR'), especially in India the only country where CSR is a statutory mandate under the Companies Act, 2013 ('the Act'). §135 of the Act states that companies with net worth amounting to INR 500 crore or more, or having an annual turnover of INR 1,000 crore or more, or net profit of INR five crore or more, during the immediately preceding financial year, are required to formulate a CSR policy which indicates the CSR activities that such companies shall undertake.²

Schedule VII of the Act broadly enumerates the permissible CSR activities which include, *inter alia*, eradication of poverty,³ promotion of gender equality,⁴ and notably, contribution to the Prime Minister's Citizens Assistance & Relief in Emergency Situation's Fund ('PM CARES Fund') or any other fund setup by the central government for specified purposes.⁵ Every qualifying company is obligated to spend, in every financial year, at least two percent of their average net profits made in the preceding three financial years towards CSR activities.⁶

In light of the World Health Organization declaration of COVID-19 as a pandemic and the resolution of the Indian government to regard it as a notified disaster, the Ministry of Corporate Affairs ('MCA') issued a clarification that the spending of funds for COVID-19 relief shall be treated as CSR activity under Schedule VII.⁷ Thereafter, the MCA has issued multiple clarifications on the ambit of eligible CSR activities under the said Schedule.

In this note, the authors review the present CSR framework in India and its limitations in context of the COVID-19 pandemic. Part I of the note introduces the primary legal provision under the Act, and the governmental response to the pandemic in terms of eligible CSR activities. Thereafter, Part II sets out the theoretical underpinnings of CSR and establishes the orientation of the Indian framework towards the narrower peripheral form as opposed to the broader embedded CSR. Part III details the limitations of the framework, specifically its promotion of monetary contribution rather than creative initiatives and its inflexibility with respect to projects connected to the normal course of business of a company or resulting in the benefit of its employees. In Part IV, the note further

¹ Shri Anil Bajjal, REPORT OF THE HIGH LEVEL COMMITTEE TO SUGGEST MEASURES FOR IMPROVED MONITORING OF THE IMPLEMENTATION OF CORPORATE SOCIAL RESPONSIBILITY POLICIES, ¶1.1.3 (September 22, 2015).

² The Companies Act, 2013, §135(3).

³ *Id.*, Sch. VII, (i).

⁴ *Id.*, Sch. VII, (iii).

⁵ *Id.*

⁶ *Id.*, §135(5).

⁷ Ministry of Corporate Affairs, General Circular No. 10/2020 (Issued on March 23, 2020).

explores the restriction on CSR initiatives in the normal course of business. It lays out the concerns underlying the MCA's reluctance to treat such activities as CSR expenditure, the limitations of the resulting peripheral CSR framework as evidenced by the COVID-19 initiatives undertaken by Indian corporates, and makes recommendations towards an embedded framework. Part V of the note offers concluding remarks.

II. THEORETICAL FOUNDATIONS: EMBEDDED VERSUS PERIPHERAL CSR

Before delving into the Indian CSR regime, it would be instructive to establish the theoretical foundations of CSR, particularly the shareholder-stakeholder theory debate and the distinction between embedded and peripheral forms of CSR. The authors briefly lay down these theories, and thereafter proceed to examine the intentions and philosophies underlying the Indian CSR framework.

At the core of the variations in CSR models is the debate between the shareholder and stakeholder theories of corporate governance. The shareholder theory argues that the primary objective of a company is to maximise shareholder wealth.⁸ The theory is based in contractual principles and affords primacy to the economic responsibilities of a company. The stakeholder theory, on the other hand, critiques this singular emphasis on shareholder value, and argues that a company must also give due importance to the interests of its various stakeholders in addition to shareholders, such as its employees, customers, suppliers, and the community at large.⁹ The focus of this theory is on organisational ethics, which links to corporate governance practices and mandates to ensure fairness, transparency and accountability.¹⁰

The stakeholder theory thus holds that meaningful fulfilment of CSR involves active consideration of stakeholders' interests at an organisational level, and that such consideration requires that CSR be integrated into a sustainable business strategy. As per Linna Palmqvist, "The key to being more 'sustainable' is for a business to adopt, demonstrate, and practice more holistic approaches to business, where financial drivers together with sustainable development performance, *i.e.*, social equity, environmental protection, and economic growth, are incorporated into mainstream business strategy and embedded in organisational values."¹¹

⁸ For an assessment of the shareholder theory, see Benedict Sheehy, *Scrooge-The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, Vol. 14, U. MIAMI BUS. L. REV., 193 (2005).

⁹ For an assessment of the stakeholder theory, see R. Edward Freeman et al., *What Stakeholder Theory is Not*, Vol. 13(3-4), BUSINESS ETHICS QUARTERLY, 479 (2003).

¹⁰ *Id.*

¹¹ Linna Palmqvist, *Corporate Social Responsibility and Development-A Case study of the CSR Strategies of International Companies in India - Master's Thesis*, LUND UNIVERSITY, October 2007, available at <http://lup.lub.lu.se/student-papers/record/1334660/file/1646511.pdf> (Last visited on September 22, 2021).

In an embedded form of CSR, a company's fulfilment of CSR directly relates to its core competencies and is embedded into its organisational practices and culture. Conversely, in a peripheral form of CSR, a company's CSR initiatives are not embedded within its ordinary business operations and may involve projects external to their core business in partnership with NGOs or simple contribution of funds to NGOs or eligible government funds.¹² A glance at Intel's CSR strategies can serve as an illustration of an embedded CSR.¹³ Intel's CSR objectives are implemented in a comprehensive manner, across all its departments and activities. For instance, the company's 'design for environment' process boasts of collaborative effort between different departments to ensure that their environmental goals are embedded into their engineering, manufacturing, and research and development activities. This includes efforts to switch to renewable energy at their campuses, actions to measure, report, and reduce their direct climate footprint, and projects to encourage and facilitate employee volunteering through partnerships with NGOs, amongst others.¹⁴

The MCA High Level Committee ('the Committee') Reports ('HLC Reports') on CSR shed light on the origins and objectives of CSR in India. The 2015 HLC Report, in particular, states that CSR was introduced as a tool to integrate social, environmental, and human development issues within corporate business.¹⁵ It highlights that the objective of CSR is to encourage corporate involvement in social development not merely through financial contribution but also through the innovative utilisation of their 'capabilities and managerial skills'.¹⁶ The Committee's conception of CSR reflects a stakeholder oriented, embedded model of CSR. The National Guidelines on Responsible Business Conduct ('the Guidelines') issued by the MCA in 2011 grant recognition to the model, listing nine principles that address, *inter alia*, business ethics, consumer interests, employee well-being, environment protection, and equitable development.¹⁷ Although only the eighth principle of inclusive growth and equitable development has been enshrined under §135 of the Act, other principles have been codified under labour law, environmental law, and various other areas of law.

However, the eligible CSR activities under the Act as previously mentioned, such as eradication of poverty and contribution to certain government funds, orient the CSR regime in India towards a peripheral model of CSR. Within this list, some are afforded preferential tax treatment over others, specifically certain government funds such as the PM CARES Fund, which encourages monetary

¹² Aguinis et al., *Understanding Employee Responses to COVID-19: A Behavioral Corporate Social Responsibility Perspective*, Vol. 18(4), MANAGEMENT RESEARCH, 421 (2020).

¹³ Intel, 2020-21 CORPORATE SOCIAL RESPONSIBILITY REPORT, available at <http://csrreportbuilder.intel.com/pdfbuilder/pdfs/CSR-2020-21-Full-Report.pdf> (Last visited on September 22, 2021).

¹⁴ *Id.*

¹⁵ Baijal, *supra* note 1, 1.

¹⁶ *Id.*

¹⁷ Ministry of Corporate Affairs, National Guidelines on Responsible Business Conduct (March 15, 2019).

contributions over meaningful initiatives.¹⁸ Furthermore, the HLC Report 2015 states that the Guidelines are intended to guide companies in “the conduct of their normal business in a socially responsible and environmentally sustainable manner”, while the Companies (Corporate Social Responsibility Policy) Rules, 2014 (‘CSR Rules’) envisage CSR activities beyond the normal course of business.¹⁹

The 2015 HLC Report lays down the objective of embedded CSR but the legal regime moves away from this model. Recently, the CSR regime in India has witnessed a major shift from a comply or explain approach to a statutory mandate on CSR spending, the non-compliance of which is liable to stringent monetary penalties.²⁰ The said report clearly states that had the purpose of CSR been to merely generate financial resources, the same could have been achieved through the levy of additional taxes or cesses on companies.²¹ The authors argue that the current legal framework of CSR requires structural changes in the direction of embedded CSR in order to inspire the fulfilment of CSR in the broader sense of the term and as envisioned under the 2015 HLC Report. The present legal framework and its amendments in light of the pandemic constitute the theme of the next part.

III. LIMITATIONS OF THE CSR FRAMEWORK

As previously discussed, the Indian framework creates the narrow expectation of peripheral CSR. In particular, it encourages mere financial contribution as opposed to innovative initiative. Moreover, the restrictive nature of the framework prevented meaningful and efficient initiatives during the pandemic, especially with respect to employee benefits. The authors scrutinise these aspects hereinunder.

A. CORPORATE PHILANTHROPY VERSUS CSR

In March 2020, the MCA responded to the pandemic by categorising expenditure toward COVID-19 relief as eligible CSR spend under item (i), which pertains to promotion of healthcare and sanitation, and/or item (xii), which pertains to disaster management of Schedule VII of the Act.²² Later, the MCA included contribution to the PM CARES Fund as CSR spend under item (viii) of Schedule VII.²³ Significantly, contributions to this fund are eligible for 100 percent tax exemption under §80G of the Income Tax Act, 1961.²⁴ The convenience of simple financial contribution and the appeal of the tax exemption prompted many

¹⁸ The Companies Act, 2013, Sch. VII, Item (viii); The Income Tax Act, 1961, §80G(2)(a)(iii).

¹⁹ Baijal, *supra* note 1, 3.

²⁰ The Companies Act, 2013, §135(7).

²¹ Baijal, *supra* note 1, 26.

²² Ministry of Corporate Affairs, General Circular No. 10/2020 (Issued on March 23, 2020).

²³ Ministry of Corporate Affairs, Office Memorandum (Issued on March 28, 2020).

²⁴ PM India, *About PM CARES Fund*, available at <https://www.pmindia.gov.in/en/about-pm-cares-fund/> (Last visited on September 22, 2021).

Indian companies to donate to the fund. ICICI committed INR eighty crores,²⁵ Power Finance Corporation pledged INR 200 crores,²⁶ ONGC contributed INR 300 crores,²⁷ Reliance Industries gave INR 500 crores,²⁸ with several other companies also providing contributions.²⁹

The 100 percent tax exemption granted to contributions to the PM CARES Fund is not extended to any other CSR spend. In the 2015 HLC Report, the Committee anticipated that such differential tax treatment would cause significant inequality in CSR investment across different sectors.³⁰ The Committee also expressed that contribution to such funds would run contrary to the spirit of CSR and its objectives under the Act to encourage companies to employ their distinctive managerial skills and sectorial expertise towards CSR in an innovative and meaningful way.³¹ For these reasons, the Committee emphasised on uniform tax treatment of all eligible CSR activities.

The ambit of CSR activities has recently been expanded to also include contribution of funds to government-funded incubators, research and development project in specified fields, universities, and laboratories, to name a few.³² Upon receipt of funds by the incubator, such incubator has complete discretion as to the utilisation of the funds. This too takes away from corporate responsibility and innovation, giving way to a culture of corporate philanthropy rather than a broader, embedded CSR.

B. EMPLOYEE BENEFITS

Under the present CSR regime, CSR projects or programmes undertaken exclusively for employees or workers of a company and their families are

²⁵ ICICI Foundation, *Group Pledge*, available at <https://icicifoundation.org/covid-19-1/> (Last visited on September 22, 2021).

²⁶ Power Finance Corporation, *Power Finance Corporation Contributes Rs. 200 Crore under CSR to "PM CARES Fund" in Figh Against COVID-19*, March 31, 2020, available at https://pfcindia.com/DocumentRepository/ckfinder/files/Media_Lounge/Press_Release/31st%20March%20Press%20release_Power%20Finance%20Corporation%20contributes%20Rs%20200%20cr.pdf (Last visited on September 22, 2021).

²⁷ ONGC, *ONGC Contributes Rs. 300 Crore to PM CARES Fund to Combat COVID-19*, March 30, 2020, available at <https://www.ongcindia.com/wps/wcm/connect/en/media/press-release/ongc-contributes-300crore-pmcares-fund> (Last visited on September 22, 2021).

²⁸ Reliance Industries Limited, *Reliance Industries Announces Rs. 500 Crore Contribution to PM CARES Fund in Addition to its Multi-Pronged On-the-Ground Fight against COVID-19*, March 30, 2020, available at <https://www.reliancefoundation.org/documents/20182/20857/media-release-reliance-industries-announces-500-crore-contr-toPM-Cares-fund.pdf/2606063e-f33b-4626-b5b5-f981dd09997d> (Last visited on September 22, 2021).

²⁹ CSR Box, *A Live Blog on How Indian Businesses and Civil Society are Responding to COVID19*, available at <https://csrbox.org/how-Indian-companies-responding-COVID19> (Last visited on September 22, 2021).

³⁰ Bajjal, *supra* note 1, 28.

³¹ *Id.*, 26.

³² The Companies Act, 2013, Sch. VII, Item (ix).

strictly not eligible CSR activity.³³ However, the MCA has clarified that an activity that is designed to benefit the public at large and employees or workers and their families are incidental beneficiaries as members of the public, such an activity would be an eligible CSR activity.³⁴

In a set of Frequently Asked Questions (‘FAQs’) on the eligibility of various COVID-19 relief activities as CSR spend, the MCA declared that the payment of salary or wages to employees, workers, contract labourers, and casual or daily wage workers during the lockdown period shall be treated as a contractual or moral obligation of the employer instead of a social responsibility, and accordingly shall not be an eligible CSR activity.³⁵ However, any *ex-gratia* payment made to temporary or casual, daily wage workers, over and above the disbursement of wages, specifically for the purpose of fighting COVID-19, shall be eligible CSR expenditure as a one-time exception.³⁶

This came on the heels of a Ministry of Home Affairs order under the Disaster Management Act, 2005, that compelled State and Union Territory governments to adopt measures to ensure that employers not lay off their employees and workers, and continue to pay full salary and wages to them during the lockdown.³⁷ In usual circumstances, payment of salaries and wages would be covered by contract. However, in the extraordinary circumstances of the pandemic, certain industries were severely affected and also faced increased expectations to maintain employment, provide paid leave, uphold payment obligations to suppliers, ensure the safety of employees, update policies and processes to ensure consumer protection and data privacy as well as safe and timely delivery of products and services.³⁸ In light of these difficulties, companies were compelled to make reduced payments or lay off their employees and workers. In such a case, the grant of allowance for adjustment of salaries and wages against CSR spend may have preserved jobs and ameliorated the situation.³⁹

The Draft Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 (‘Draft CSR Amendment Rules’) proposed that CSR activity that benefits no more than twenty-five percent of a company’s employees may

³³ The Companies (CSR Policy) Rules, 2014, Rule 2(1)(d)(iv).

³⁴ Ministry of Corporate Affairs, General Circular No. 14/2021 (Issued on August 25, 2021).

³⁵ Ministry of Corporate Affairs, General Circular No. 15/2020 (Issued on April 10, 2020).

³⁶ *Id.*

³⁷ Ministry of Home Affairs, Order, 40-3/2020-DM-I(A) (March 29, 2020).

³⁸ *Corporate Social Responsibility: The COVID-19 Stress Test*, VIGEO EIRIS, April 28, 2020 available at <https://vigeo-eiris.com/corporate-social-responsibility-the-covid-19-stress-test/> (Last visited on September 22, 2021).

³⁹ Sukanya Roy, *10 Well-Known Companies that Laid Off Staff Due to Coronavirus*, BUSINESS STANDARD, May 19, 2020, available at https://www.business-standard.com/podcast/current-affairs/10-well-known-companies-that-laid-off-staff-due-to-coronavirus-120051901344_1.html (Last visited on September 22, 2021).

be considered as eligible CSR spend.⁴⁰ However, this provision was not adopted in the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 ('CSR Amendment Rules, 2021').⁴¹

Further, in January 2021, the MCA issued a circular clarifying that expenditure on awareness programs and public outreach campaigns in relation to COVID-19 vaccination fall under items (i), (ii), and (xii) of Schedule VII of the Act as eligible CSR activities.⁴² The approval of COVID-19 vaccines was also followed by calls to permit companies to utilise CSR funds towards vaccinating employees and their families.⁴³ Biocon Chairperson, Kiran Mazumdar-Shaw, urged the government in this direction, pointing out the advantages of utilising the vast resources and capabilities at the command of the private sector, and their reach across the country.⁴⁴

In spite of the inability of the government to vaccinate the Indian population in the foreseeable future, it has held its stance against the CSR eligibility of any activity that benefits employees and their dependents.⁴⁵ The underlying philosophy is found as an exclusion of activities undertaken by companies in the normal course of their business from the ambit of CSR activities, subject to further exploration in the ensuing Part IV of this note.⁴⁶ Presently, several companies are facilitating or planning to facilitate the vaccination of employees and their families, with some even covering or subsidising the costs of vaccination.⁴⁷ The treatment of such vaccination drives as CSR spend may have incentivised more companies to follow suit and enabled us to achieve herd immunity sooner.

⁴⁰ The Draft Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020, Rule 2(i).

⁴¹ The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021.

⁴² Ministry of Corporate Affairs, General Circular No. 01/2021 (Issued on January 13, 2021).

⁴³ Menaka Doshi, *Covid-19: India Inc. Hopes to Use CSR Funds for Public Vaccination*, BLOOMBERG QUINT, April 20, 2021, available at <https://www.bloomberquint.com/coronavirus-outbreak/covid-19-india-inc-hopes-to-use-csr-funds-for-public-vaccination> (Last visited on September 22, 2021).

⁴⁴ Viswanath Pilla, *EXCLUSIVE: Kiran Mazumdar-Shaw asks Govt to Let Companies use CSR funds to Vaccinate Employees*, MONEY CONTROL, November 26, 2020, available at <https://www.moneycontrol.com/news/business/companies/exclusive-kiran-mazumdar-shaw-asks-govt-to-let-companies-use-csr-funds-to-vaccinate-employees-6132581.html> (Last visited on September 22, 2021).

⁴⁵ Ministry of Corporate Affairs, General Circular No. 13/2021 (Issued on July 30, 2021).

⁴⁶ The Companies (Corporate Social Responsibility Policy) Rules, 2014, r. 2(1)(d)(i).

⁴⁷ *Companies in India plan to Facilitate COVID-19 Vaccination for Employees, Dependents: Survey*, THE ECONOMIC TIMES, April 22, 2021, available at <https://economictimes.indiatimes.com/news/company/corporate-trends/companies-in-india-plan-to-facilitate-covid-19-vaccination-for-employees-dependents-survey/articleshow/82199008.cms> (Last visited on September 22, 2021); *Covid-19: India Inc Scrambles to Get Staff Vaccinated*, THE TIMES OF INDIA April 22, 2021, available at <https://timesofindia.indiatimes.com/business/india-business/india-inc-scrambles-to-get-staff-vaccinated/articleshow/82186574.cms> (Last visited on September 22, 2021).

IV. CSR IN THE “NORMAL COURSE OF BUSINESS”

Under the CSR Rules, activities undertaken by companies in the normal course of their business are not eligible for consideration as CSR activity.⁴⁸ In the wake of the pandemic, the government carved out an exception to this rule for companies engaged in research and development pertaining to COVID-19 vaccines, drugs, and medical devices up to 2023, subject to fulfilment of the requisite conditions.⁴⁹ While this is a welcome move, it remains an exception for a particular sector and for a limited period of time. The rule excluding normal business activities from the ambit of CSR is the biggest roadblock to innovative and embedded CSR in Indian companies. This moot point is explored further in this part.

A. MCA CONCERNS AND RESPONSES

The MCA has not provided any definition for what constitutes “normal course of business”, causing ambiguity around whether the free provision of goods or services would qualify as CSR activity. In *Mohd. Ahmed v. Union of India*, (‘Mohd. Ahmed’) the MCA filed an affidavit stating that the donation of medicines or drugs by a pharmaceutical company is not considered as being undertaken in pursuance of the normal course of business, and is therefore an eligible CSR activity.⁵⁰ The MCA further clarified that if an activity falls under Schedule VII of the Act and is undertaken without any profit motive, it is considered as a CSR activity even if it is part of the core business of the company.⁵¹

However, in spite of the affidavit, the MCA has subsequently refused to treat donation of goods or provision of services constituting the core business of a company as CSR.⁵² Moreover, the MCA FAQs on CSR state that contribution in kind cannot be monetised and presented as CSR expenditure, thus a company has to necessarily spend the prescribed amount.⁵³ This exclusion of activities in the normal course of business or activities that are fundamental to the functioning of a business from the ambit of CSR appears, as argued by Bhavik Narsana and Saswat Subasit, to be grounded in the fear that their inclusion would leave wide scope for abuse.⁵⁴ According to the MCA, there is potential for abuse as the company may engage in marketing and promotion under the garb of carrying out CSR activity, and may provide substandard goods or services in superficial fulfilment of its CSR.⁵⁵

⁴⁸ The Companies (Corporate Social Responsibility Policy) Rules, 2014, r. 2(1)(d)(i).

⁴⁹ *Id.*

⁵⁰ *Konatham Sailaja v. Union of India*, 2014 SCC OnLine Del 1508.

⁵¹ *Id.*

⁵² Saswat Subasit & Bhavik Narsana, *CSR: Normal Course of Business in the Times of Coronavirus?*, LEXOLOGY, July 8, 2020, available at <https://www.lexology.com/library/detail.aspx?g=331681aedf66-4466-ae08-0b997c57c7e0> (Last visited on September 22, 2021).

⁵³ Ministry of Corporate Affairs, General Circular No. 14/2021 (Issued on August 25, 2021).

⁵⁴ Subasit & Narsana, *supra* note 52.

⁵⁵ *Id.*

For instance, one can assess Hindustan Unilever Limited's program targeted at increasing awareness about hygiene and sanitation in rural areas.⁵⁶ From the MCA's perspective, Hindustan Unilever, which is in the business of manufacturing, *inter alia*, toiletries and other hygiene and sanitation products, stands to directly gain from the awareness program. Therefore, any resources utilised for such program should be treated as business promotion expenditure instead of a CSR expenditure. Accordingly, the new definition of CSR as inserted by the CSR Amendment Rules, 2021, explicitly exclude "activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services".⁵⁷

The authors are in agreement with the stance taken by the MCA in Mohd. Ahmed and are of the view that the MCA's subsequent reluctance to the treatment of such activities as CSR overlooks the distinct knowledge and capabilities of a company in creating awareness or engaging in impactful projects pertaining to their core business area. It discourages embedded CSR and continues to foster a culture of peripheral CSR. Similarly, the public loses out tremendously when companies such as Biocon are not permitted to utilise their distinct expertise to vaccinate people, including their employees and the dependents of their employees, as a CSR activity.

While financial contributions to NGOs and the like are valuable, CSR activities linked to the company's expertise and embedded in its organisational culture may be far more efficient than mere peripheral activities. In fact, CSR projects outside of a company's capabilities may create problems, as witnessed in the UK when companies attempted to shift to producing ventilators to meet rapidly increasing demand early in the pandemic.⁵⁸ Their design proposals turned out to be impossible to fulfil in the required timeframe. A similar experience marred an attempt to produce testing kits as they were found to be low in accuracy.⁵⁹

Although the concerns regarding potential abuse are legitimate, the government may regulate activities that fall under the normal course of business. For instance, as proposed by Mr. Sudhir Singh and Mr. Abhishek Tripathi, they may insist that such donations be a prescribed upper threshold percentage of a bigger project rather than a one-off activity.⁶⁰ In such a project, for instance the

⁵⁶ Tina Edwin, *CSR: Help Others, not Yourself*, BUSINESS TODAY, May 6, 2014, available at <https://www.businesstoday.in/opinion/new-in-the-new-companies-act/csr-help-others-not-yourself/story/205918.html> (Last visited on September 22, 2021).

⁵⁷ The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 2(1)(d)(v).

⁵⁸ Dr. Gabriela Gutierrez-Huerter, *COVID-19 Poses New Challenges for Corporate Social Responsibility Efforts*, KING'S COLLEGE LONDON, available at <https://www.kcl.ac.uk/news/covid-19-poses-new-challenges-corporate-social-responsibility-efforts> (Last visited on September 22, 2021).

⁵⁹ *Id.*

⁶⁰ Sudhir Singh & Abhishek Tripathi, *Is Donating own Products under CSR Normal Course of Business?*, HINDU BUSINESS LINE, November 3, 2016, available at <https://bloncampus.thehindubusinessline.com/columns/strategy-shift/is-donating-own-products-under-csr-normal-course-of-business/article9300452.ece> (Last visited on September 22, 2021).

donation of medicines and hygiene kits by a pharmaceutical company, the company may pursue a larger project of creating awareness about hygienic practices, studying and addressing the major sanitation issues in the area of the project, and following up with health check-ups. The government may insist that such projects be pursued with a non-profit motive, and impose reporting requirements for any incidental benefits to the company from such projects. Permitting companies to pursue CSR projects in connection with their normal course of business in such manner may encourage innovation and an embedded CSR framework.

The stringency of the current regime reveals a fundamental belief that CSR in the normal course of business is against the spirit of CSR in India, which is restricted to philanthropy and similar peripheral forms. The exclusion of activities benefitting employees from the ambit of CSR is based on the same principle.⁶¹ Yet, the exception carved out by the government for companies engaged in research and development pertaining to COVID-19 vaccines, drugs, and medical devices strongly indicates that the public needs corporates to step-up and utilise their capabilities and expertise in a meaningful way. The Indian government needs to recognise this need beyond the limited scenario of the COVID-19 pandemic and appreciate that CSR is best served when its objectives and principles are embedded into every aspect of a company's business.

B. COVID-19 CSR INITIATIVES

In the wake of the pandemic and its adverse impact on national well-being and economic health, Indian companies have stepped up to the aid of the country. As discussed previously, companies in the public and private sector alike have made sweeping contributions to the PM CARES Fund. Over fifty percent of the CSR fund designated for relief purposes was contributed to the PM CARES Fund or State relief funds, taking away from funding in company-driven or partnered initiatives with NGOs and other entities.⁶² Following an MCA clarification that items (i) and (xii) of Schedule VII of the Act are to be interpreted liberally to include COVID-19 initiatives, companies also provided aid in related areas of healthcare, water, sanitation, hygiene, poverty, and education.⁶³

These initiatives received further impetus when the MCA released two notifications this year, clarifying the ambit of CSR spend on COVID-19 related activities. An April 2021 circular recognised expenditure on the setup of

⁶¹ The Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 2(1)(d)(iv).

⁶² Anita Kumar, *Data and Insights on CSR's COVID-19 Response*, INDIA DEVELOPMENT REVIEW, April 15, 2020, available at <https://idronline.org/data-and-insights-on-csrs-covid-19-response/> (Last visited on September 22, 2021); Vrunda Bansode, *COVID-19 in India CSR Outlook for 2020-21*, SATTVA, May 11, 2020, available at <https://www.sattva.co.in/insight/covid-19-in-india-csr-outlook-for-2020-21/> (Last visited on September 22, 2021).

⁶³ Ministry of Corporate Affairs, General Circular No. 10/2020 (Issued on March 23, 2020); Indian Institute of Corporate Affairs, *Business Response to COVID-19 through CSR*, available at https://iica.nic.in/images/CSR_COVID_Publication.pdf (Last visited on September 22, 2021).

makeshift hospitals and temporary COVID-19 care facilities as a CSR expenditure.⁶⁴ The circular issued in May 2021, recognised expenditure on the creation of health infrastructure for COVID-19 care, establishment of plants for the generation and storage of medical oxygen, the manufacture and supply of ventilators, oxygen concentrators, and other medical equipment to combat COVID-19, and similar activities as a CSR expenditure.⁶⁵

Companies have been manufacturing or importing and providing much needed supplies of personal protective equipment and testing kits, masks, ventilators, oxygen concentrators, and other medical equipment.⁶⁶ Being expenditures outside the normal course of business, these are eligible CSR expenditures. Hindustan Unilever and the like have been donating soaps and sanitisers in partnership with organisations like the United Nations International Children's Emergency Fund.⁶⁷ Although presented in the company's annual report on CSR activities, it is not clear if the same is accepted by the MCA as a CSR expenditure. The authors presume, based on the above discussion on normal course of business, that such product donation does not qualify as CSR expenditure. Some companies have setup quarantine facilities and COVID-19 hospitals, in collaboration with other companies and hospitals or otherwise.⁶⁸ CSR reports of hospitals suggest that these are treated as CSR activities, but in light of the CSR framework and MCA clarifications, the legal position is unclear.⁶⁹

In the area of education, a noteworthy initiative is that of Tata Motors in collaboration with Jawahar Navodaya Vidyalaya.⁷⁰ In response to the pandemic, the company has taken measures to shift to a virtual model to ensure uninterrupted access to coaching. Tata Consulting Services modified the model of its Youth Employment Programme so that students in rural areas could continue to

⁶⁴ Ministry of Corporate Affairs, General Circular No. 05/2021 (Issued on April 22, 2021).

⁶⁵ Ministry of Corporate Affairs, General Circular No. 09/2021 (Issued on May 5, 2021).

⁶⁶ The CSR Journal, *Top CSR Contributions for Covid Relief in India*, May 10, 2021, available at <https://thecsrjournal.in/top-csr-contributions-for-covid-india/> (Last visited on September 22, 2021).

⁶⁷ Hindustan Unilever Limited, *INTEGRATED ANNUAL REPORT 2020-21*, June 22, 2021, available at https://www.hul.co.in/Images/hul-annual-report-2020-21_tcm1255-561812_1_en.pdf (Last visited on September 22, 2021).

⁶⁸ Sourav Kumar Das & Nilanjan Ray, *Corporate Social Responsibility in Times of Covid-19 Pandemic*, *THE ECONOMIC TIMES*, May 16, 2020, available at <https://government.economictimes.indiatimes.com/news/economy/corporate-social-responsibility-in-times-of-covid-19-pandemic/75771467> (Last visited on September 22, 2021); *SBI Earmarks Rs 30 Crore to set up Makeshift Hospitals for COVID Patients*, *THE ECONOMIC TIMES*, April 29, 2021, available at <https://economictimes.indiatimes.com/industry/banking/finance/banking/sbi-earmarks-rs-30-crore-to-set-up-makeshift-hospitals-for-covid-patients/articleshow/82309763.cms?from=mdr> (Last visited on September 22, 2021).

⁶⁹ Narayana Hrudayalaya Limited, *ANNUAL REPORT 2020-21*, May 31, 2021, available at https://www.narayanahealth.org/sites/default/files/download/nh_investor_relations/NHL%20Annual%20Report%20-%202020-21.pdf (Last visited on September 22, 2021).

⁷⁰ Tata, *Beyond the Pandemic*, April 2021, available at <https://www.tata.com/newsroom/covid19/tata-companies-promises-covid19> (Last visited on September 22, 2021).

have access through their phones, even with low bandwidth.⁷¹ This form of virtual learning program utilises the information technology expertise of the company and is thus closer to embedded CSR.

Largely, the CSR measures adopted by most companies are similar and not particularly innovative, with few exceptions of CSR integration within the business. The Indian Hotels Company Ltd. runs a CSR programme for the vocational training of school dropouts and underprivileged youths, geared towards the hospitality and tourism industry in which it operates.⁷² This is another instance of embedded CSR as it utilises the unique skills and capabilities of the company in supporting equitable development in the country, and therefore, the legal framework must encourage such initiatives.

V. CONCLUSION

The objective of CSR, as spelled out in the HLC Reports, was to include corporates in the effort to achieve sustainable development goals and encourage responsible business conduct through not mere philanthropy, but through initiatives utilising the unique skills and resources of corporates. The Indian legal framework is more aligned with peripheral CSR which involves largely financial contribution and initiatives outside of and unrelated to the company's normal course of business. Instances of the CSR activities of various companies in response to the pandemic paint an ambiguous picture of what constitutes "normal course of business" and whether CSR contribution in kind is a subset of the same.

The pandemic has revealed the limitations of the current CSR framework in India. In response, the government introduced exceptions for COVID-19 initiatives, with limited applicability in terms of period and scope. These exceptions did not, however, extend to activities that could benefit employees and workers, which possibly relates to governmental reluctance to treat activities connected with the normal course of business as CSR spend. The regime thus favours monetary contributions, being perhaps easier to monitor and regulate. This discourages creative initiatives both due to its potential ineligibility as CSR expenditure and due to the alternative, more simpler option of financial contribution.

In spite of the narrow CSR framework, there are instances of companies engaging in embedded, impactful projects. The pandemic could have potentially re-prioritised the approach corporations take towards CSR, whether it be in terms of implementational plans or policies governing such plans, to align it seamlessly with the real need of the hour, *i.e.*, the welfare of people. The framework needs to be reformed to inspire more of such initiatives. On this note, the authors

⁷¹ *Id.*

⁷² IHCL, IHCL SUSTAINABILITY REPORT 2019-20, available at <https://www.ihcltata.com/content/dam/tajhotels/ihcl/sustainabilities/IHCL-Sustainability-Report-2019-20.pdf> (Last visited on September 22, 2021).

echo the 2015 High Level Committee's sentiments pertaining to the differential tax treatment of certain items under Schedule VII and urge equal tax treatment of all eligible CSR activities to ensure equitable development across all identified areas.

In relation to employees, companies also stand to face a new wave of CSR dilemmas in the post-pandemic world such as remuneration, mental health, and data privacy rights.⁷³ Therefore, it may be helpful to ease the rules pertaining to CSR in the normal course of business and employee benefits, not merely for the purpose of the pandemic but in the interest of a long-term vision of CSR. It is suggested that the rule regarding the exclusion of activities benefitting employees from the ambit of CSR be relaxed, particularly in consideration of the urgent need for mass vaccination. The proposal of a twenty-five percent upper threshold for employee benefits resulting from CSR activity may be reconsidered. Finally, the authors postulate that the framework of CSR and related laws needs to be revamped to promote the adoption of policies and practices in the direction of an embedded CSR framework.

⁷³ Eiris, *supra* note 38.