Chapter 5: Corporate Social Responsibility and Transnational Corporations: Legislative Endeavours in India

Chapter – 5

Corporate Social Responsibility and Transnational Corporations: Legislative Endeavours in India

‘The corporation is too elusive to be imprisoned, but it never gets sick, it never sleeps, and it does not feel love, pain, anger, or anguish.’¹

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The Frame

This chapter discusses the historical roots of CSR in India and how far the Companies Act 1956 carried it forward. It deals with the circumstances that led to the emergence of debate on corporate governance in India and the manner in which it provided background for emergence of regulatory framework for CSR in India.

The Focus

This chapter focuses on the legislative endeavours in India relating to CSR and its consequences for accountability of TNCs.

The Objective

The objective of this chapter is to understand the relationship between CSR and corporate governance as reflected in the legal provisions relating to CSR in Companies Act 2013 and the extent to which it enhances accountability of TNCs for violations of right to clean and healthy environment in India.

5.1 Introduction

All the nations of the world have permitted incorporation of companies through legislative enactments. However, finding optimal balance to avoid either over-regulation or under-regulation between two competing objectives, namely – facilitating formation of companies and regulating them – has proved to be a profound challenge. India is no exception to this problem. Challenge becomes even more acute when such optimal balance is to be struck in a welfare state established by the Indian Constitution. The need for such optimal balance becomes intensely pressing amidst glaring income inequalities which is showing rising trend. All religions of the world have accorded a highly respectable place to giving money by an individual for philanthropic purposes for the benefit of the whole society.\(^2\) India being home to diversity of religions, such inspiring diversity has give rise to Indian tradition and culture which regards such acts as integral part of human existence.

5.2 Corporate Social Responsibility under British Colonial Rule

Indian people have a long relationship with corporations. British colonial rule started with the rule of EIC (a precursor to modern TNC). Companies are commonly understood as legal entities established for doing business with a view to maximise profits. In this sense, companies were permitted to be incorporated in India with the enactment of Companies Act 1850. It was patterned on English Companies Act 1844. It recognized company as a separate legal entity. However, it kept the registration optional. Companies Act 1857 recognised limited liability of a company on the lines of English Companies Act 1856. Following English Companies Act 1858, benefit of limited liability was also extended to banking companies in 1860. Companies Act 1866 was passed for consolidating and amending law relating to incorporation, regulation and winding-up of trading companies and other associations. It followed English Companies Act 1862. It extended the privilege of limited liability to insurance companies. Indian Companies Act 1882 repealed Indian Companies Act 1866 to bring it in harmony with various amendments made to English Companies Act 1862. It was replaced by Companies Act 1913 following English Companies Consolidation Act 1908. India made amendments through Companies (Amendment) Act in 1936 based on English Companies Act 1929. Till independence, Indian Companies Act 1913 was amended several times to address certain deficiencies as well as to keep pace with Government of India Act 1935.

Being a British colony, regulatory framework for companies in India in the form of Companies Act was structured on the similar pattern as was in England and was changed in accordance with the changes in the English Companies Act. Since these legislations were enacted in pursuance of colonial philosophy, these legislations were not much concerned with CSR in India. Further, during that time Shareholder Theory was holding unquestionable primacy in corporate governance over any other theory. However, Gandhi’s Trusteeship concept provided strong foundations for CSR during the course of national independence movement. Even during that time there were few

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4 Ibid 264.
5 Ibid.
6 Ibid 265.
7 Ibid 266.
companies which voluntarily adopted the policy of CSR e.g. TATA group of companies\(^8\) and even to the cause of freedom movement\(^9\).

### 5.3 Corporate Social Responsibility after Indian Independence

Peoples’ aspirations from Indian independence found their sanctified place in the text of Indian Constitution which was adopted on 16 January 1950. Bitter memories of British colonial rule were fresh in their mind generally and more specifically of EIC rule. They aimed at independence from extremely exploitative foreign rule in all possible ways and in every sense of the term. Consequently, Indian government adopted a policy of self-reliance and accordingly gave preference to heavy industries which were both capital and technology intensive. The regulatory framework legislated by Parliament for regulation of companies in India reflected this desire and was largely restrictive of foreign ownership and resultant control in companies in India. Nevertheless, some big companies have established funds to undertake social welfare programmes of charitable nature voluntarily (in absence of a legal compulsion of any kind).\(^10\) However, it continued to remain exceptional and never really became part of corporate governance.

#### 5.3.1 The Companies Act 1956

Indian government constituted a Committee under the Chairmanship of Mr. C.H. Bhabha in 1950 in order to accommodate the priorities of corporate sector in newly independent India. Bhabha Committee submitted its report in March 1952. Its recommendations became the basis for enacting Companies Act 1956. Companies Act 1956 was enacted by Parliament with the aim to ‘consolidate and amend the law relating to companies and certain other associations’.\(^11\) It is interesting to note that though enacted for independent India, it was largely based on English Companies Act.

\(^8\) Jamsetji Nusserwanji Tata dedicated his steel factory to the nation. He believed to have stated as early as in 1903 ‘We generate wealth for the nation. What comes from the people must, to the extent possible, get back to the people.’ See. AC Fernando (ed), Corporate Ethics, Governance, and Social Responsibility: Precepts and Practices (Pearson 2009) xxv.

\(^9\) Sarojini Naidu (Congress activist and poet) stated ‘It took all Birla’s millions to enable Gandhi to live in poverty. And he gave for free.’ See Randall K Morck (ed), A History of Corporate Governance around the world: Family Business Groups to Professional Managers (University of Chicago Press 2005) 15.


1948 (based on the Report of the Committee on Company Law Amendment under the Chairmanship of Mr. Justice Lionel L Cohen on 11 June 1945). Nevertheless, it continued to cater to changing priorities of Indian economy as well as corporate sector in India for next 57 years. However, it was to be amended frequently and majorly in the last two decades to accommodate fast changing landscape of regulatory framework of business in India. Through these amendments it gradually distanced itself from the English Companies Act in order to suit the changing needs of the Indian society e.g. public interest became ground for seeking remedies regarding oppression and also for challenging any scheme of compromise or arrangement. It permitted TNCs to incorporate their subsidiaries (usual route) in India. However, due to developments taking place at the international level, Indian government imposed restrictions on foreign ownership. Due to adoption of such restrictive regime, TNCs like Coca-Cola, IBM, Mobil and Kodak either left India or applied to do so by 1978. However, such restrictive regime contributed to concentrated ownership structure (business families or State) of companies in India.

Companies Act 1956 was based on Shareholders’ Theory of corporate governance. Accordingly, it protected the interests of shareholders in every aspect of corporate governance including protection of minority shareholders against oppression and mismanagement by the majority shareholders. Similar approach was also adopted by judiciary in interpreting its provisions giving primacy to shareholders interests. However, in certain cases observations made by the judiciary in the course of their judgments have shown judicial inclination towards stakeholders’ interests. Judicial receptivity for protection of stakeholders’ interests became distinctively evident in the following observations of Supreme Court in National Textile Workers’ Union v P.R. Ramakrishnan:

12 Twenty four amendments since 1956 out of which the major ones were made in 1988, 1998, 2000, and 2002.
13 Varottil (n 3) 279.
14 Parliament enacted Foreign Exchange Regulation Act 1974 (FERA) restricting a foreign company from holding more than 40% shares in Indian companies. Any company not in compliance was required to reduce foreign ownership to below 40%. It provided harsh punishment for non-compliance.
16 Varottil (n 3) 280.
The concept of the company has undergone a radical transformation in the last few decades … It is now accepted on all hands, even in predominantly capitalist countries, that a company is not property. The traditional view that the company is the property of the shareholders is now an exploded myth. There was a time when a group controlling the majority of shares in a company used to say: "This is our concern. We can do what we like with it." The ownership of the concern was identified with those who brought in capital. That was the outcome of the property-minded capitalistic society in which the concept of company originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values. Today social scientists and thinkers regard a company as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contributes to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive dominion over the concern, as if the concern belongs to it? A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions.17

Supreme Court was also shocked to notice, through a PIL, that State of Bihar hide behind the technicality of corporate veil despite non-payment of salaries for long time to employees of state-owned corporations. It accepted the PIL considering it a human rights problem resulting in violation of right to life u/A 21 and pierced veil to grant

17 As per Justice Bhagwati [1983 ] 53 Comp Cas 184, 196 (SC).
appropriate relief. Further, in the matter relating to Satyam scam, even Company Law Board (CLB) observed:

[...]therefore, I am fully convinced that in the interests of the members, employees, customers of the company and also in the larger public interest, the interim reliefs sought should be granted ex-parte.

It clearly indicates going beyond shareholders’ interests. But one should not lose sight of the fact that this case involved a fraud of exceptional nature which might have necessitated the tribunal to go that far to consider such interests. These observations do indicate an attempt on the part of judiciary to take into consideration interest of stakeholders along with that of the shareholders. However, the overall judicial approach was to give primacy to the interests of shareholders.

5.3.2 New Economic Policy 1991: Setting the Stage

In 1991, India found herself into serious Balance of Payment (BoP) crisis. Foreign Exchange (FOREX) reserves were not adequate to meet country’s import needs for even three weeks. Realising the gravity of the crisis, Government pledged 46.8 tons of gold with Bank of England to avoid default. Government launched reforms in the form of New Economic Policy (NEP) and also followed Structural Adjustment Programme (SAP) mandated by IMF and World Bank. With the adoption of NEP, India started its journey on the path of liberalisation, privatisation, and globalisation. And such a transformational shift in approach was achieved without amending the constitutional text. Thus, India entered into a paradox of sorts. Consequently, Constitution continued to proclaim India as socialist State, while at the same time it. NEP gave it a substantial capitalist tilt at the functional level.

Two aspects of NEP are particularly noteworthy. Firstly, Indian government encouraged TNCs to invest in India to increase inflow of foreign capital as well as transfer of technology. Such investment took two forms – Foreign Direct Investment

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19 Union of India v Satyam Computer Services Ltd. (2009) 148 Comp Cas 252, 256 (CLB).
20 Jagdish Bhagwati and Arvind Panagariya (eds), India’s Reforms: How They Produced Inclusive Growth (Oxford University Press 2012) 4.
22 ibid.
(FDI) and Foreign Portfolio Investment (FPI). While FDI was facilitated through repealing FERA with FEMA and accompanying FDI policy, FPI was facilitated through relevant SEBI regulations. Secondly, State withdrew itself from many sectors which were hitherto reserved for it, leaving the vacuum to be filled by the companies in private sector both domestic as well as TNCs. Though established for profits, companies were required to do business even in those sectors which had a greater significance as well as relevance for common people of India. Consequently, standard of their governance began to attract systematic attention of policy makers as well as human rights activists at the grass-root level. Since TNCs were welcomed to enter and do business in India, they put pressure on Indian government to ensure the improvements in corporate governance standards in India. The fact that majority of the corporate sector was family based also lead to demand of better standards for corporate governance in India. The crisis perpetrated by the securities market scam (involving Mr. Harshad Mehta) also underscored the need to improve the standards of corporate governance in India. Thirdly, legal regime for regulation of companies shifted from ‘control based’ to ‘disclosure based’ and SEBI was established as the regulator for securities market through enacting SEBI Act in 1992. It conferred jurisdiction upon SEBI over public listed companies in India. Establishment of SEBI bears more resemblance to USA that has established Securities and Exchange Commission (SEC) for securities market in comparison to England. 23 Since its establishment, SEBI has impressively contributed to development and enforcement of standards of corporate governance in India. However, one crucial distinction must be kept in mind. While USA and UK follow outside model of corporate governance (companies show dispersed shareholding having large institutional shareholding), India follow insider model of corporate governance (Indian public companies are either family controlled or State controlled). 24

5.3.3 Emergence of Corporate Governance in India Post-NEP

Due to developments discussed above, Indian government felt the need to strengthen standards of corporate governance in India. Accordingly, it made concerted efforts in order to achieve this objective and was ably supported in this endeavour by SEBI.

23 Varottil (n 3) 284.
Confederation of Indian Industry (CII) took the first initiative in this direction in April 1998 by constituting a Task Force. Its report titled ‘Desirable Corporate Governance: A Code’ outlined a series of voluntary recommendations regarding best-in-class practices of corporate governance for listed companies. This report was largely based on Cadbury Committee Report of UK.  

In the following year, SEBI appointed ‘Committee on Corporate Governance’ on 7 May 1999 under the Chairmanship of Mr. Kumar Mangalam Birla to ‘promote and raise the standard of Corporate Governance’. For the first time, it acknowledged non-shareholders interests as part of concern for corporate governance in India. It became the basis for introducing Clause 49 in listing agreement (agreement which a company needs to enter into with a recognized stock exchange as part of listing process) in 2000. Standards of corporate governance contained in Clause 49 of the listing agreement were substantially the same as those contained in the ‘Combined Code on Corporate Governance’ drafted on the basis of Cadbury Committee Report, though with one marked difference – former was mandatory, latter was not (comply or explain) – indicating shift in Indian approach from that of the English approach.

Department of Company Affairs (DCA) under the Ministry of Finance and Company Affairs appointed a ‘High Level Committee on Corporate Audit and Governance’ under the Chairmanship of Mr. Naresh Chandra on 21 August 2002 to examine various issues pertaining to corporate governance. It was constituted to strengthen the professional relationship between company and auditors. Its ToR also included examination of role of independent directors and the manner in which their independence and efficacy can be preserved. It made comprehensive recommendations covering its ToR. In the same year, US was rocked by Enron and WorldCom scandals and responded by enacting Sarbanes-Oxley Act (SOX) in 2002. Under this backdrop, SEBI again took lead to constitute a ‘Committee on Corporate Governance’ under the chairmanship of Mr. N. R Narayana Murthy to evaluate the adequacy of existing corporate governance practices and further improve these

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25 Varottil (n 3) 285.
27 Varottil (n 3) 286.
practices. It came out with its report on 8 February 2003. Consequently, on 29 October 2004, SEBI amended Clause 49 which came into force from 1 January 2006. Since then, corporate Governance standards in India have been enforced through Clause 49. However, in 2015, SEBI strengthened the regulatory framework for corporate governance of listed companies further by coming out with Listing Obligations and Disclosure Requirements Regulations (LODR) 2015.  

Both Birla Committee not Narayana Murthy Committee favoured shareholder centric approach. Same was the case with the major outcome of their reports i.e. Clause 49. None of the reports clearly defined who encompassed stakeholders. 

Indian government realized that piecemeal approach of frequent amendments to Companies Act 1956 will not work anymore and conditions were ripe for an entirely new approach towards regulating corporate sector in India in order to respond to emerging global business environment. It entrusted the task of suggesting the new form of Companies Act to an ‘Expert Committee on Company Law’ under the Chairmanship of Dr. J.J. Irani (Director, Tata Sons). It submitted its report on 31 May, 2005 after studying the regulatory framework of USA, UK, Australia and Canada. It was another milestone in the evolution of considering non-shareholder interests as part of corporate governance in India. However, Satyam scam shocked India on 16 December 2008. CII responded by setting up a ‘Task Force on Corporate Governance’ under Mr. Naresh Chandra in February 2009 to recommend

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32 ibid.
33 Irani Committee consisted of 13 members and 6 special invitees drawn from various disciplines and fields including trade and industry, chambers of commerce, professional institutes, representatives of Banks and Financial Institutions, Senior Advocates etc. Concerned Ministries of Government as well as regulatory bodies were also represented through special invitees.
34 Satyam Computer Services Limited was a listed company promoted by Mr. Ramalinga Raju. It was the fourth largest IT company in India with around 3 lakh shareholders and nearly 53,000 employees having clients in over 60 other countries. It had received a number of awards for best corporate governance. Mr. Raju, through a written communication to the Board of Directors, SEBI and the Stock Exchanges on 7 January 2009, admitted that the financial statements of the company were manipulated understating its liabilities while overstating its revenues and profit margins. As a result, its share price crashed from ₹ 188 to ₹ 38.40 in one day. See for details Satyam (n 19).
ways of further improving corporate governance standards and practices both in letter and spirit. It focused on listed companies and their wholly owned subsidiaries.

The period of nearly two decades after adoption of NEP, Indian government has consistently reviewed and upgraded the standards of corporate governance. CII and SEBI have led from the front in enabling the government in this regard. The resolve of the government towards strengthening of corporate governance standards is evident by the comprehensive nature of the mandate given to J.J. Irani Committee to recommend a completely new Companies Act. These initiatives and the resultant regulatory framework for corporate governance in India prepared the fertile ground in which seeds of regulatory framework for CSR were sown.

5.3.4 Emergence of Regulatory Framework for CSR in India: A Journey to Statutory Recognition

Indian Prime Minister Dr. Manmohan Singh expressed concerns of Indian government regarding expectations of the role of companies in India during his address at CII Annual General Meeting on 24 May 2007. He emphasised on wider social responsibility of business in a democratic society. He cautioned that the India’s growth story itself will be threatened if better offs do not act in a more socially responsible manner. He identified ‘making growth processes efficient and inclusive’ as common objective for government as well as industry and sought partnership with it towards achieving the same. He went on to suggest that CSR ‘must not be defined by tax planning strategies alone. Rather, it should be defined within the framework of a corporate philosophy which factors the needs of the community and the regions in which a corporate entity functions’. He complemented those companies who were ‘doing creditable work’ but emphasised the need for ‘more such inspiring examples’. He appealed to industry to come forward in a much more substantial manner and engage extensively in activities which benefit society at large.

36 ibid.
37 ibid.
38 ibid.
39 ibid.
40 ibid.
Sincerity of the government towards extended role of the companies in India found expression two years later in 2009 in the form of development of two separate voluntary guidelines for CSR and corporate governance. These guidelines clearly incorporated above-mentioned approach of Indian government. With regard to corporate governance, government adopted two pronged approach – Firstly, aspects that were needed to be incorporated in law were included in Companies Bill 2009. Secondly, aspects that required voluntary adoption were included in Corporate Governance Voluntary Guidelines. These Guidelines contained provisions relating to directors; independent directors; their remuneration; responsibilities of BoD; audit committee; auditors; and whistle blowing mechanism. 41

5.3.4.1 Corporate Social Responsibility Voluntary Guidelines 2009

With the adoption of two separate voluntary guidelines for Corporate Governance and CSR at the same point of time, Government clearly indicated its intent to develop regulatory framework for CSR exclusively. MCA issued ‘Corporate Social Responsibility voluntary Guidelines’ in December 2009. Underlying idea was to deepen the ‘culture of social responsibility’ within the governance of businesses. 42 Nature of the CSR Guidelines were purely voluntary based on ‘comply or explain approach’ with no intention for ‘regulatory or contractual use’. 43 The unique feature was that Indian TNCs were envisaged as beneficiary from adoption of CSR Guidelines in their overseas operations. 44

Guidelines contained one Fundamental Principle, six core elements and Implementation Guidance. The Fundamental Principle required each business entity to formulate CSR policy providing ‘roadmap for its CSR initiatives’ which in turn should constitute ‘integral part of overall business policy and aligned with its business goals’. 45 CSR policy so prepared was required to cover six core elements inter alia including ‘respect for environment’ (as fifth element) which encouraged companies to


43 ibid 10.

44 ibid.

45 ibid 11.
– take measures to check and prevent pollution; manage natural resources in a sustainable manner ensuring optimal use of resources like land and water; promote efficient use of energy and environment friendly technologies; proactively respond to the challenges of climate change by adopting cleaner production methods; and recycle, manage and reduce waste.\textsuperscript{46} Fourth core element required companies to respect human rights for all and avoid complicity with human rights abuses by them or by third party.\textsuperscript{47} Guidelines followed the international framework which also mentions environment as a category separate from that of human rights. Government sought comments and suggestions from various stakeholders to further refine CSR Guidelines and also to include operational guidance on the principles and core elements therein.\textsuperscript{48}

5.3.4.2 National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011

In the light of the feedback received from stakeholders on CSR Guidelines 2009, Indian government revised the same in July 2011. Government preferred to title revised guidelines as ‘National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business’. Although based on international and national good practices, revised Guidelines claimed themselves as reflecting ‘distinctively Indian approach’ which will cater to unique requirements of our land.\textsuperscript{49} Like earlier version, the new version was also voluntary but the title indicated the focus of the new guidelines very clearly – ‘social, environmental and economic’. The term CSR was replaced by the term ‘responsible business’ in order to highlight narrowed scope of CSR.\textsuperscript{50} However, the term is not defined although definitions of other key terms are contained in Annexure-D thereto.\textsuperscript{51} Guidelines are applicable to ‘all businesses irrespective of their size, sector or location’ thereby touching upon the spirit of an enterprise.\textsuperscript{52} Interestingly, Guidelines not only expected MNCs operating in India to

\begin{references}
\item ibid 12.
\item ibid.
\item ibid 8.
\item ibid.
\item National Voluntary Guidelines 2011 (n 49) 5.
\end{references}
consciously make efforts to follow them but also Indian MNCs planning to invest or already operating in other parts of the world, to follow.\textsuperscript{53}

Guidelines consist of nine principles (all equally important and non-divisible) along with core elements to actualize each principle.\textsuperscript{54} Sixth Principle provides that business should ‘respect, protect, and make efforts to restore the environment’.\textsuperscript{55} It encourages business to follow precautionary principle and be accountable for ‘direct and indirect environmental impacts of their operations, products and services and to strive to make them more environment friendly’.\textsuperscript{56} Core elements of this principle \textit{inter alia} entails – assessing environmental damage and bearing cost of pollution abatement with due regard to public interest; developing Environment Management Systems (EMS) and contingency plans; improving their environmental performance through using environment friendly technologies and renewable energy; reporting their environmental performance including assessment of potential risks; equitable benefit sharing; reducing, reusing, recycling and managing waste; and proactively persuading their value chain in adopting this principle.\textsuperscript{57}

Guidelines also contain guidance on implementation of Principles and core elements. It regards compliance with the laws of land as non-negotiable.\textsuperscript{58} It provides non-exhaustive indicators applicable to all Principles and Core Elements.\textsuperscript{59}

Regarding reporting framework, Guidelines classify business entities into three categories. Business entities that are already preparing responsibility and sustainability reports on the basis of internationally accepted reporting frameworks, need not prepare separate report for the purpose of these Guidelines but can submit the existing ones detailing the framework under which they were prepared while mapping nine principles in their disclosures.\textsuperscript{60} Business entities that have decided to adopt these Guidelines completely or in part but not having capacity to prepare a comprehensive Business Responsibility (BR) report, need to communicate their

\textsuperscript{53} ibid.
\textsuperscript{54} ibid 6.
\textsuperscript{55} ibid 19.
\textsuperscript{56} ibid.
\textsuperscript{57} ibid.
\textsuperscript{58} ibid 28.
\textsuperscript{59} ibid 30.
\textsuperscript{60} ibid 34.
adoption to stakeholders. Guideline have suggested a BR reporting framework for those business entities that have decided to prepare a comprehensive report after adopting these Guidelines.

Guidelines are comprehensive yet voluntary in nature. For reporting purpose, they harmonise regulatory framework for CSR at the international level with that of India. Thus, TNCs may continue to adhere to their preferred regulatory initiative regarding CSR at the international level subject to mapping nine principles of Guidelines as part of their disclosure.

5.3.4.3 SEBI Circular on Business Responsibility Reports 2012

SEBI took the lead by taking cognizance of principles adopted in 'National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business'. From 31 March 2012, SEBI made it mandatory for top 100 listed entities based on market capitalization on Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) to include Business Responsibility Report (BR Report) as part of their annual reports. BSE and NSE were required to prepare a list of entities on whom the circular was to apply and to disseminate the same on their respective websites. While SEBI made it mandatory for the top 100 listed entities, other entities may also adhere voluntarily. Those listed entities which were already submitting sustainability reports to overseas regulatory agencies or stakeholders in compliance with internationally accepted reporting frameworks were exempt from preparing a separate report under the present circular. However, they were permitted to submit the same report to their stakeholders along with the details of the framework under which their BR Reports have been prepared and a mapping of the principles contained in these guidelines to the disclosures made in their sustainability reports. It ensured that the TNCs were incentivized for their CSR compliance with regulatory framework for CSR at the international level. Further, it also showed maturity of SEBI in ensuring that both domestic and international CSR standards stay alongside

61 ibid 35.  
62 ibid.  
64 ibid.  
65 ibid 1.  
66 ibid 2.
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each other. Thus, SEBI rightly took benefit of evolution of regulatory framework for CSR at the international level. SEBI made the circular effective from the financial year ending on or after 31 December 2012.\(^67\) However, listed entities which have not yet submitted their Annual Reports for financial year ending on 31 March 2012 were given liberty to comply with the circular voluntarily.\(^68\) In pursuance of the powers conferred on SEBI u/s 11 read with 11A, it amended the listing agreement and inserted Clause 55 which provided that ‘Listed entities shall submit, as part of their Annual Reports, Business Responsibility Reports, describing the initiatives taken by them from an environmental, social and governance perspective.’ SEBI prescribed a format for such submission.

SEBI’s approach towards CSR is similar to the one adopted in the 2011 CSR guidelines. It used same model but with one major difference – former was mandatory whereas the latter was voluntary. This initiative by SEBI included TNCs in its fold and gave distinct focus on environmental initiatives.

5.3.4.4 CSR for Central Public Sector Enterprises

Central Public Sector Enterprises were the first entities brought by the Indian government under the ambit of CSR. It issued guidelines for Central Public Sector Enterprises (CPSEs) in April 2010 requiring such companies to create a CSR budget.\(^69\) Three years later, they were comprehensively revised and re-titled as the ‘Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises’.\(^70\) Guidelines came into effect on 1 April 2013. While focus of earlier guidelines was CSR activities for external stakeholders, revised Guidelines lay equal emphasis on internal stakeholders as well. Guidelines emphasise \textit{inter alia} on environmental protection, promotion of green and energy efficient technologies. Guidelines require CPSEs to undertake at least one major project for development of a backward district. Guidelines require CPSEs to conduct normal business activities in a manner that is beneficial to both business and society. They allow unutilized CSR

\(^{67}\) ibid.
\(^{68}\) ibid.
\(^{70}\) ibid.
activities to be carried forward subject to explaining the reasons for non-utilization of the allocated budget. Further, such unspent amount shall be spent within next two years. In case of failure to do so, the unspent money will be transferred to the ‘Sustainability Fund’ to be created separately for CSR and sustainability activities. Guidelines permit employees to avail infrastructure facilities created by their company.

5.3.4.5 The Companies Act 2013

SEBI circular provided perfect backdrop for CSR initiative through the Companies Act 2013. Top 100 listed entities were already submitting BR Reports as part of their Annual Reports. However, Companies Act 2013 took CSR in India to an altogether different level.

Companies Act 2013 became a reality after long deliberations and many failed attempts. Prior to Irani Committee Report, attempts were made in 1993, 1997 and 2003.\(^\text{71}\) Irani Committee Report became the basis for presentation of Companies Bill 2008 in the Parliament but it lapsed.\(^\text{72}\) Therefore, Companies Bill 2009 was presented to the Parliament. Although, Satyam scam had stunned India in January 2009, like its earlier counterpart, this Bill had no provision relating to CSR. It was referred to ‘Standing Committee on Finance’ (headed by Mr. Yashwant Sinha) which came out with its report in 2010. Committee recommended inter alia adoption of Stakeholders’ approach to corporate law and introduced CSR requirement into the Bill. Committee appreciated the acceptance of its recommendation by MCA to incorporate CSR in the Companies Act itself and also felt that disclosure of CSR statement by the companies in their annual report indicating their policy, will act as adequate check on non-compliance.\(^\text{73}\) Based on this report, Companies Bill 2011 was introduced in the Parliament and was referred back to the Standing Committee of Finance for review. Report of the Committee recommended not only the substitution of the clause ‘shall make every endeavour to ensure’ by the words ‘shall ensure’ but also that the CSR

\(^\text{71}\) Varottil (n 3) 288.
\(^\text{72}\) ibid.
activities shall be in and around the area of their operations. On that basis, Companies Bill 2012 containing corporate governance and CSR provisions was drafted. UPA government succeeded in finally getting it passed by the Parliament as Companies Act 2013 (Presidential assent given on 29 August 2013) after nearly a decade of submission of JJ Irani Committee report.

One of the distinguishing characteristics of Companies Act 2013 is the CSR obligations mandated on companies meeting the prescribed criteria. While Section 135 gave broad outlines of the CSR obligations of companies as mandated by Companies Act 2013. Several ambiguities remained about its finer details leading to confusion amongst the corporate sector as well as the TNCs in India. One year later in 2014, Government brought clarity by coming out with The Companies (Corporate Social Responsibility Policy) Rules 2014 bringing clarity regarding CSR. The characteristic features of the present framework are as follows –

(A) *Eligibility criteria for CSR*

i) Any company that has a minimum – net profit of ₹ 5 crore or more, net worth of ₹ 500 crore or more, or turnover of ₹ 1000 crore or more – during any financial year, is eligible.

ii) Net profit for this purpose means net profit as per its financial statement but shall exclude – any profit arising from its overseas branches whether operating as a separate company or otherwise; any dividend received from other companies in India, which are covered u/s 135. However, net profit for a foreign company means the net profit of such company as per profit and loss account prepared u/s 381 (1) (a) read with Sec. 198.

iii) CSR obligations are applicable on every company meeting the prescribed criteria which includes its holding or subsidiary as well as a foreign company. This rule implies that TNCs like their Indian counterparts are also bound to undertake CSR obligations. However, net profit, net worth or turnover in case of a foreign company shall be calculated in accordance with their balance sheet and profit and loss account prepared u/s 381 and 198.

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iv) A company which fails to meet the prescribed criteria for three consecutive financial years need not comply with CSR obligations u/s 135.

It is mandatory for any company in India, meeting the above-mentioned prescribed criteria, to undertake CSR obligations in the following manner –

(B) **CSR expenditure**

i) Its BoD shall ensure that such company spends minimum 2% of its average net profits made during the last three immediately preceding financial years in every financial year. Such amount should be spent in accordance with the CSR Policy to be developed by it.

ii) CSR expenditure shall include all expenditures including contribution to corpus for CSR projects or programmes as approved by BoD on the recommendations of CSR committee. However, it shall exclude any expenditure on any item not in conformity or in line with activities falling in the purview of Schedule VII.

(C) **CSR Committee**

i) BoD shall constitute CSR Committee which should recommend CSR Policy to the BoD.

ii) CSR Committee shall consist of minimum three directors, at least one of which shall be an independent director. However, CSR Committee of an unlisted or a private company (not required to appoint an independent director to its BoD u/s 149) need not have an independent director. Further, CSR Committee of a private company having only two directors on its BoD shall consists of two such directors.

iii) CSR Committee of a foreign company shall consist of minimum two persons out of which one shall be resident in India and is authorised to accept service of any notice, process or other documents required to be served in India on its behalf [specified u/s 380 (1) (d)] and the other shall be its nominee.

iv) The role of CSR committee is not merely confined to formulating and recommending the CSR Policy but it shall further recommend amount of expenditure to be incurred on CSR activities.
v) CSR committee is also entrusted with monitoring CSR Policy of the company from time to time.

vi) CSR committee shall establish transparent monitoring mechanism for implementing its CSR programmes or projects or activities.

(D) **CSR Policy**

i) CSR Policy shall specify the activities to be undertaken as CSR activities. Schedule VII of Companies Act 2013 lists the activities which may be selected by the company concerned as part of its CSR activities. Schedule VII at present includes eleven activities in total. Environmental protection finds explicit mention as entry (iv) permitting a company to undertake a broad range of activities in its ambit as its CSR activities, namely – ‘ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water (including contribution to Clean Ganga Fund set by Central Government for rejuvenation of river Ganga).’ However, environmental protection will also be implicitly promoted through other activities specified in Schedule VII like eradicating hunger, poverty and malnutrition, (promoting health care including preventive health care) and sanitation, making available safe drinking water, welfare of scheduled tribes, women empowerment, lively enhancement projects etc.

Which activity or combination thereof to choose as part of CSR activity is left to the discretion and wisdom of the CSR Committee. Furthermore, company is required to give preference to area(s) neighbouring its operations which has heightened significance for CSR relating to environment since neighbouring population bears the worst brunt of violation of right to clean and healthy environment.

ii) CSR policy shall *inter alia* include list of specific CSR projects or programmes which company plans to undertake under Schedule VII, specify modalities of their execution and implementation schedules.

iii) CSR policy must specify that any surplus arising out of CSR projects or programmes or activities shall not form part of its profits.
(E) **CSR Activities**

i) CSR activities shall exclude those activities which are undertaken by a company in pursuance of its normal course of business.

ii) Company is given freedom to undertake CSR activities through a trust or registered society or a ‘not for profit company u/s 8’. However, if a company opts to do so and it has not established such trust, society or company, it must not only ensure that such trust, society or company has the established track record of three years in undertaking such programmes or projects but also that it has specified the modalities of fund utilization thereon and monitoring and reporting mechanism thereof. Further, it may do so either –

   a) singly, or

   b) along with its holding or subsidiary or associate company, or

   c) along with any other company or subsidiary or associate company of such company, or

   d) otherwise.

TNCs may use their subsidiaries in India to innovatively design such activities. Thus, the company concerned will continue to be accountable for all aspects of CSR obligations even if the same is outsourced.

iii) A company is also permitted to fulfil its CSR obligation in collaboration with other companies provided they do so in such a manner that their CSR committees can separately report thereon.

iv) CSR activities are required to be undertaken in India only.

v) CSR activities undertaken by a company for the benefit of only its employees and their families shall not be counted.

vi) Companies are permitted to include capacity building of their personnel as well as those of their implementing agencies as part of their CSR activities. However, they shall do it through institutions having established track records of minimum three financial years. Further, such expenditure shall not exceed 5% of their total CSR expenditure in one financial year.

vii) Companies contribution to any political party (whether directly or indirectly) u/s 182 shall not be counted for CSR obligations.
(F) **BoD Accountability**

i) It is the responsibility of the BoD of the company concerned to approve CSR Policy (after considering the recommendations of CSR Committee) and disclose its contents as part of its report on its website and ensure that activities claimed to be undertaken as part of CSR Policy are actually undertaken by the company.\(^{75}\)

ii) If such company fails to spend the prescribed amount, its BoD shall state the reasons for such failure in its report.

iii) BoD of a company is made accountable to ensure that the activities included in its CSR Policy are related to activities mentioned in Schedule VII.

iv) From 1 April 2014, report of BoD of a company is required to include an annual report on CSR containing particulars prescribed in the Annexure to the Rules, namely – composition of its CSR committee; its average net profit for last three financial years; prescribed CSR expenditure; total amount to be spent for the financial year; any amount unspent; manner of spending amount (containing details like CSR project or activity identified); sector in which project is covered; State and district wherein they are undertaken; budget; direct expenditure and overheads, cumulative expenditure up to the reporting period; and amount spent (directly or through implementing agency) details of implementing agency, reasons for non-compliance; and responsibility statement of CSR Committee that the implementation and monitoring of CSR Policy is in compliance with its CSR objectives and Policy. Such report shall be signed by its Chief Executive Officer (CEO) or Managing Director (MD) or Chairman of CSR Committee and person specified u/s 380 (1) (d) (in case of a foreign company). Further, a foreign company is required to contain Annexure regarding CSR report in its balance sheet filed u/s 381 (1) (b).

Although not defined, the term CSR includes (though not limited to) projects or programmes relating to activities specified in Schedule VII or projects or programmes

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\(^{75}\) Sec. 417 (5) (b) of the UK Companies Act 2006 offer more clarity by providing that contents of director’s report to consist of ‘business review’ containing ‘information about environmental matters (including the impact of the company’s business on the environment)’. 
relating to activities undertaken by BoD in pursuance of recommendations of CSR committee as per its declared CSR Policy provided it covers subjects mentioned in Schedule VII. Schedule VII should be interpreted liberally.

The whole regulatory framework of CSR is based on the principle of ‘comply or explain’. It means compliance with the framework is compulsory and non-compliance needs to be explained to the relevant stakeholders.

Although CSR is regarded as mandatory but Companies Act does not specify any penalty on the concerned company for not allocating the stipulated amount of money for CSR activities. This is more in consonance with the approach of MCA that objective behind legislating on CSR is not ‘to monitor but to generate a conducive environment for enabling the corporates to conduct themselves in a socially responsible manner, while contributing towards human development goals of the country’. However, failure of BoD in reporting the same will make company liable to pay a minimum fine of ₹ 50,000/- which may exceed to ₹ 25 lakh and every officer in default will be punishable with maximum imprisonment of 3 years or with minimum fine of ₹ 50,000/- which may extend to ₹ 5 lakh or both. Besides, depending upon the facts and circumstances of the case, non-compliance may invite penalties for breach of director’s duties which may be mitigated by invoking Sec. 463. Also general penalty clause contained in Sec. 450 may also become applicable. It provides that any contravention by a company or its officer or any other person of any provisions of Companies Act 2013 for which no penalty or punishment is provided elsewhere, is punishable with fine extendable to ₹ 10,000/- and in case of continuing contravention with a further fine extendable to ₹ 1,000/- per day, till the default continue.

Although Regulatory framework for CSR reflects dominance of stakeholder interest but the manner in which provision is structured, it is precariously dependent, in its present form, on shareholders for its efficacy. It is left to the wisdom of the

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shareholders to question the company in its Annual General meeting (AGM) about non-compliance and also scrutinize the justification offered by the company in this regard. Institutional investors have a determining role to play in this regard.

5.3.4.6 High Level Committee 2015

Companies Act 2013 along with the relevant rules provides the companies with a detailed framework under which the companies in India are required to perform their CSR. But at the same time, Indian government was fully aware that since India was moving on to a hitherto unchartered territory through legislating on CSR, each stakeholder had to make efforts to learn from the experience. Although TNCs have the track record of adhering to one or the other voluntary guidelines at the international level relating to CSR, even they had no experience of complying with mandatory CSR of the kind developed in India. Therefore, MCA constituted a High Level Committee (HLC) under the chairmanship of Mr. Anil Baijal for suggesting measures to be adopted for strengthening the implementation of CSR Policies u/s 135. Committee submitted its report on 22 September 2015. HLC echoed the sentiment that Objective of CSR is not to generate financial resources for the state’s social and human welfare (which could have been done by levying additional taxes/cess) but to use corporate innovations and management skills in delivery of public goods. It felt the constitution of committee to be pre-matured since the review of implementation should ideally have been conducted after three years. It found the existing regulatory framework sufficient for the time being. Further, it did not favour any change in penalties which it found to be adequate, two/three years being a period of learning for all the stakeholders.

It *inter alia* made following recommendations –

1. One omnibus clause should be included instead of repeatedly amending Schedule VII (amended thrice since its first notification for the purpose of expanding the list of activities and thereby giving more options to companies).

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This is due to the fact that certain development concerns, needs and priorities can never be anticipated.

ii. Since CSR will generate massive funds, BoD should ensure their non-wastage and expenditure on only those CSR programmes/projects that are approved by it on the recommendations of CSR Committee. Any alterations therein should also be made with approval of BoD/CSR Committee.

iii. Tax treatment for CSR expenditures across all eligible activities should be uniform otherwise tax savings can become the sole guiding force for BoD’s decisions instead of furthering the larger public good.

iv. Two different modes of implementation strategies should be followed for companies having CSR expenditure of more than ₹ 5 crore and those small companies with less than ₹ 5 crore and the limit should be adjusted for inflation. Former should be required to take up programme based sustainable CSR activities with some measurable outcome whereas latter can take up project based activities and can combine their CSR programmes with other similar companies.

v. Carrying forward of unspent amount should be allowed with a sunset clause of five years and thereafter such amount should be transferred to one of the funds listed in Schedule VII.

vi. Entities neither incorporated under Companies Act 2013 nor subject to mandatory ‘Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises’ but otherwise meeting eligibility criteria for CSR obligations, should be brought under similar provisions through listing agreement or suitable amendments to their respective statutes.

vii. Ceiling on administrative overhead costs should be increased from existing 5% to 10%. Further, administrative overhead expenditure on CSR should exclude expenditure incurred on capacity building on implementation agencies.

viii. Companies incorporated u/s 8 (i.e. not for profit companies) should be exempted from the application of CSR obligations.

ix. More clarity is needed for applying CSR obligations to foreign companies.

x. Definition of the term ‘net profit’ should be clarified. The term ‘any financial year’ needs re-examination.
xi. Corporate employees services for counting towards its CSR expenditure should not be monetized.

xii. Due diligence of implementing agencies should remain the responsibility of BoD/CSR Committee since it is impossible for government to maintain their databank. Separate independent body should be created for monitoring the implementation. It will be improper to burden either government or individual company concerned with the task of such monitoring.

xiii. MCA should compile all information regarding implementation of CSR including spent amount, activities undertaken, geographical areas covered etc. constituting part of annual disclosures of companies and should be placed in public domain.

xiv. Development of pre-defined methodologies for adoption by companies for systematically monitoring their CSR should be managed by their BoD/CSR Committees and existing safeguards in this regard are sufficient.

xv. BoD/CSR Committees are adequately empowered to engage external experts/firms, if needed. Government should not involve itself in this task.

xvi. Existing Comptroller and Auditors General (C&AG) audit as well as study by Committee on Public Undertakings (COPU) are adequate to monitor CSR policy of CPSUs.

xvii. Annual awards should be established – one for category of large and the other for small companies.

### 5.3.4.7 Companies Law Committee 2016

Present government continues with its keenness to further improve the CSR legislative framework. It made no suggestion ever of any kind of roll back of CSR obligation. On the contrary, it set up the ‘Companies Law Committee’ (CLC) on 4 June 2015 under the chairmanship of Mr. Tapan Ray to recommend to it on issues arising out of implementation of CA 2013 as a whole and *inter alia* on recommendations of HLC on CSR. It submitted its report on 1 February 2016.79 It made the following recommendations regarding CSR –

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a) Sec. 135 (1) (a) should be amended to refer to subjects in Schedule VII within which CSR activities could be taken up.
b) For companies that are not required to appoint independent directors, CSR Committee should consist of two or more directors.
c) Sec. 384 should specifically include the requirement that CSR provisions are also applicable to foreign companies. Thus, CLC agreed with HLC on this aspect.
d) While CLC agreed with HLC that carrying forward of unspent amount is desirable, it disagreed with HLC that mandatorily transferring such amount to one of the funds listed in Schedule VII after five years would defeat the principle of ‘comply or explain’. Thus, it favoured the continuation of existing provisions in this regard.
e) CLC agreed with HLC not to allow CSR expenditure in kind and did not favour amendment.
f) Permitting government companies to deposit CSR funds into state coffers/any CSR authority established by the State Government would defeat the whole purpose of CSR provisions and eliminate flexibilities made available to companies. It favoured continuation of such flexibilities for a reasonable period of time (five years) to experience from the implementation.
g) CLC disagreed with HLC and did not favour exemption for Sec. 8 companies (not for profit companies) for two reasons – firstly, in certain areas like microfinance business, Sec. 8 companies are found to co-exist with other companies. Secondly, having regard to the objective behind establishing Sec. 8 companies, it should not be difficult to undertake CSR activities.
h) The term ‘average net profit’ should be replaced by the term ‘net profit’. Thus, CLC agreed with HLC on this aspect. But it went a step further that while referring to Sec 381, prescriptive powers should be introduced to specify manner of calculation of ‘net profits’ of a foreign company.
i) Term ‘any financial year’ should be replaced by the term ‘preceding financial year’.
j) Sec. 135 (1) should contain prescriptive powers in order to exclude certain sums from the term ‘net profit’.
5.3.4.8 The Companies (Amendment) Bill 2017

The Companies (Amendment) Bill 2016 was introduced in Lok Sabha on 16 March 2016 and was referred to the Standing Committee on Finance on 12 April 2016 for examination. Committee came out with its report on 30 November 2016. It Committee inter alia recommended strict enforcement of the requirement that companies shall prefer local areas of their operations for undertaking CSR expenditure.\(^{80}\) It further recommended that MCA should regularly monitor scrupulous compliance of CSR provisions by the companies and follow it up with them ‘in a structured manner through a proactive Management Information System (MIS)’.\(^{81}\)

Lok Sabha passed Companies (Amendment) Bill 2017 on 27 July 2017 making following changes to CSR framework, namely – substitution of the term ‘any financial year’ u/s 135 (1) by the term ‘immediately preceding financial year’; insertion of a proviso permitting a company which is not required to appoint an independent director u/s 149 to have CSR Committee with two or more directors; more freedom to companies u/s 135 (3) (a) by permitting them to undertake CSR activities ‘in areas or subjects’ specified in Schedule VII; term ‘net profit’ instead of ‘average net profit’ to include such sums as may be prescribed to be calculated u/s 198.\(^{82}\)

5.3.4.9 Merits of Regulatory Framework for CSR

The regulatory framework of CSR is being shaped in the light of experience gained of its actual functioning at the ground level. Experts have pointed out many advantages in its support –

a) It maintains a company’s autonomy and discretion regarding how to utilize funds and monitor the same. Enforcing CSR through levying taxes will take away such autonomy.\(^{83}\) Further, given the level of corruption and poor standards of good governance, funds accumulated through CSR will be more


\(^{81}\) ibid.


effectively utilized at the grass root level by the company itself instead of the governmental machinery.\textsuperscript{84}

b) It requires expenditure by company on social infrastructure in its neighbourhood. The fact of company’s sincere and \textit{bona fide} engagement in activities like constructing schools and hospitals benefiting neighbouring communities will enhance its receptivity in their minds. It will minimise protests by such communities against it even if it ends up making mistake.\textsuperscript{85}

c) India, unlike USA or UK, is home to staggering disparities in income that too without matching social security mechanisms through law and policy.\textsuperscript{86} CSR can be extremely beneficial for people in this context.

d) CSR funds can bolster innovative forms of public-private partnerships for achieving goals set by Indian Constitution.

e) Disclosure requirements of CSR brings transparency and the information may be used by social activists to put pressure on companies through social media and even work with them to implement their CSR Policies in both letter and spirit.

5.3.4.10 Demerits of Regulatory Framework for CSR

Regulatory framework for CSR in India has invited serious criticism from experts, though not all of them hold ground. Some of the significant arguments in brief are as follows –

i) It will deter TNCs from bringing foreign investment and transferring technology in India and as a result, India will cease to be an attractive investment destination slowing down economic growth.\textsuperscript{87} However, India continues to maintain its competitive advantage despite CSR provision and is further reforming business laws and policy to improve ease of doing business.\textsuperscript{88}

\textsuperscript{84} ibid 301.
\textsuperscript{85} ibid 300.
\textsuperscript{86} ibid 302.
\textsuperscript{87} ibid 298.
ii) Stipulating a limit of 2% may incentivise companies who were earlier spending more than this limit to reduce their CSR expenditure only up to the stipulated limit.\(^9\)

iii) Compliance will be weak in absence of any coercive enforcement mechanism and review process.\(^9\)

iv) Government has not provided till date any guidance as to what constitutes a valid explanation by a company for its failure to spend on CSR despite being eligible.\(^9\)

v) Indian approach is not holistic. The approach is very narrow. It has reduced CSR to mere expenditure that too up to a certain limit.\(^9\) Further, excluding activities undertaken in pursuance of normal course of business of company is indicative of narrowness in the overall approach of business.\(^9\) CSR is about how the business is done and integrating sustainability with it. Also excluding activities for the benefit of employees as part of CSR ignores the fact that they are vital stakeholders in the company.\(^9\) In fact, the approach adopted in the ‘National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011’ is more comprehensive in comparison to the latter.

vi) State has abdicated its duty and left it for the companies to do social welfare. However, this argument seems misplaced. There is no evidence of State having reduced its budgetary allocation for social welfare. CSR expenditure is in addition to the social welfare being undertaken by the State. In fact, corporations are expected to develop innovative strategies in their attempt to comply and even State can learn from such strategies.

vii) A corporation can continue to spend not only 2% but even higher and yet alleged to be involved in the violation of right to clean and healthy environment at the same point of time. Approach of Dow Chemical of not cleaning the Bhopal gas site is a classical instance (discussed in Chapter-6).

\(^{9}\) Deva (n 51) 315.
\(^{9}\) Zile (n 83) 299.
\(^{92}\) ibid 223.
\(^{93}\) ibid 224.
\(^{94}\) ibid.
viii) Lack of specific penal consequences for non-compliance may lead to poor adherence.\textsuperscript{95} This is a conscious decision by the government since the idea was never been to punish but encourage corporations to adopt CSR and facilitate by providing conducive environment.

ix) Requiring only companies above a particular threshold (bigger than a particular size) is indicative of elitist approach.\textsuperscript{96} However, such an approach makes sense in the beginning. With more corporations adopting the CSR culture, other businesses may also be included later on.

x) Enforcing Indian CSR framework will be uphill task particularly in the absence of any independent machinery for enforcement or monitoring.\textsuperscript{97} Thus, there is need for establishing independent statutory body for undertaking this task.

xi) In an insider model of corporate governance followed in India, directors see themselves as strategic advisors to the controlling shareholders. Consequently, CSR policies will be designed to further latter’s interests, powers and views about CSR.\textsuperscript{98}

xii) Given the poor state of investor awareness in India, the culture of questioning company’s decision for not spending on CSR and assessing the merits of such justification will take long time to emerge and require conscious efforts in this direction. Further, it is unlikely for a shareholder who is receiving dividend from the company to question the adequacy of the reason for his company’s non-expenditure on CSR.\textsuperscript{99}

The explicit provision u/s 135 mandating compulsory CSR has emerged as one of the most classical features of CA 2013. It drew the attention of the corporate lawyers. But more importantly, for the first time, it made human rights activists all over the world interested in Indian Companies Act. The largest and the most vibrant democracy of the world expected corporations in India (both domestic and TNCs) to be socially responsible. There is nothing unusual about it since all nations in our contemporary world have such expectations. However, India went a step further. It gave such an

\textsuperscript{95} ibid 225.
\textsuperscript{96} ibid.
\textsuperscript{97} ibid 226.
\textsuperscript{98} ibid.
\textsuperscript{99} Majumdar (n 2) 196.
expectation a legislative form and that too as part of Companies Act which has never been seen to have such kind of explicit social orientation in India. Parliament was conscious that India is entering into an unchartered territory. However, India is not the first country mandating CSR through legislation. Indonesia has provided for mandatory CSR in 2007 (nearly six years before India). Further, UK, Denmark, France and Norway too have mandated disclosure by companies about CSR information in their annual reports.  

South African Companies Act 2008 provides that Minister responsible for companies may by regulation prescribe that a company or category of companies shall constitute Social and Ethics Committee, if desirable in public interest.  

Thus, there is nothing uniquely Indian in CSR approach except the 2% CSR expenditure limit. Nevertheless, CSR framework does provide continuity to the tradition of business communities engaging with society which is deeply rooted not only in Indian culture but also teachings of its major religions. CSR clause was extensively debated. Indian government was determined, although uncertain, about the final shape it will take and the manner of its implementation. In this sense, the whole world looks with keen interest as to the success or otherwise of CSR provision as part of Companies Act 2013.

5.4 Directors’ Duties and the Regulatory Framework for CSR

As is clear from the above discussion, CSR framework hinges heavily on directors (particularly independent directors). Therefore, the success or otherwise of the regulatory framework for CSR in India is greatly dependent on them. However, Chairman of SEBI has expressed dissatisfaction with the independence of independent directors in India. Accordingly, SEBI constituted a ‘Committee on Corporate Governance’ on 2 June 2017 under the Chairmanship of Mr. Uday Kotak.
with the objective of improving corporate governance of listed companies.\textsuperscript{105} Its ToR \textit{inter alia} included ensuring ‘independence in spirit of Independent Directors and their active participation in functioning of the company’ and was required to submit report within four months.\textsuperscript{106} Committee submitted detailed report on 5 October 2017.\textsuperscript{107} Thereafter, SEBI put the report in public domain to invite the views of various stakeholders involved till 4 November 2017. The recommendations of the committee represents the most comprehensive and contemporary reflections and in turn paves the way for further reforms in the regulatory framework of corporate governance in India. Now, the onus is on SEBI to decide to what extent it will accept the recommendations of the committee and implement the same for strengthening corporate governance in India which will in turn further strengthen the regulatory framework for CSR.

Sec. 166 has codified the duties of director in India for the first time. Inspiration for this is drawn from the English Companies Act 2006 which also (after a prolonged and fierce debate) codified the duties of director in spite of the same being elaborated by judiciary on case to case basis.\textsuperscript{108} In addition, J.J. Irani Committee has also recommended such codification.\textsuperscript{109} In absence of codification, Companies Act 1956 offered hardly any guidance regarding duties of directors. Similarly, there has not been much judicial deliberation in India on this issue.\textsuperscript{110} Therefore, codification of director duties brings clarity regarding duties amongst all stakeholders concerned – directors, regulators, judiciary etc.

According to Sec. 166 (2) every director is required to act in good faith for promoting company’s objects for the benefit of not only members as a whole and but also in the interest of the company, employees, shareholders, community and \textit{for protection of environment}. Seven years earlier, English Companies Act had already taken the lead


\textsuperscript{106} ibid.

\textsuperscript{107} For relevant recommendations refer Annexure-I.

\textsuperscript{108} Paul L Davies and Sarah Worthington, \textit{Gower’s Principles of Modern Company Law} (10\textsuperscript{th} edn, Sweet & Maxwell 2016) 464.

\textsuperscript{109} ‘The Committee is of the view that this aspect should be exposed to a thorough debate. The law may include certain duties for directors, with civil consequences to follow for non-performance. However, the law should provide only an inclusive, and not exhaustive list in view of the fact that no rule of universal application can be formulated as to the duties of the directors.’ As per Report of the \textit{Expert Committee to advise the Government on the new Company Law} (Dr. J.J. Irani Committee) para 18.2 <http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf> accessed 26 April 2017.

\textsuperscript{110} Varottil (n 3) 314.
to impose duty on director u/s 172 (1) (d) to have regard to impact of company’s operations on the environment while working for promoting its success in good faith. The fact that the duty to protect environment is mentioned separately from interest of the community underscore the significance of environmental protection as a distinct end in itself. Further, it is also legislative acknowledgment of the fact that directors, as distinct from the company, are expected to play a determining role in ensuring that company’s activities are protective of and not damaging to the environment. This duty is coupled with another duty mentioned in Sec. 166 (3) that director should exercise his duties not only with due and reasonable care, skill and diligence but also with independent judgment. When both the duties are read together, legislative intent is that while director is duty bound to promote the objects of the company for environmental protection, he must do so carefully, skillfully, diligently and independently. Even if he is not an independent director, he is duty bound to take independent decision in this regard. Companies Act 2013 also contains a Code for Independent Directors under Schedule IV which shall be abided by the company and independent directors u/s 148 (8). Code consists of Guidelines for their professional conduct; role and functions; duties; Manner of appointment, re-appointment, resignation/removal; separate meetings; and evaluation mechanism. The objective of including such a code is to facilitate independent directors in the fulfillment of their duties in a professional and faithful manner and thereby promote confidence of the investment community, particularly minority shareholders, institutional investors, regulators etc. Having regard to the pivotal role envisaged for them in the regulatory framework for CSR in India, there is no mention of promoting confidence of other stakeholders. Sec. 166 imposes duties on directors of all kinds of companies big or small; Indian or TNC without making any distinction. Thus, CSR provisions should be understood together with director duties.

Any contravention with the above provisions is made punishable u/s 166 (7) with a minimum fine of ₹ 1 lakh which may be extended to ₹ 5 lakh. However, the punishment prescribed falls short. It is silent in case contravention by the director concerned continues which is likely in matters involving environmental protection. There is need to impose fine of ₹ 5,000/- till the contravention continues.
5.5 Chapter Conclusion

Corporate governance was never a focal point for the law or policy makers in India. But Bhopal Gas Leak tragedy triggered government as well as the judiciary to think afresh about the accountability of TNCs in India as is discussed in the previous chapter. However, adoption of NEP in 1991 brought a paradigm shift in Indian approach towards corporate governance. Thereafter, Indian government seriously engaged in the task of setting standards of corporate governance but strengthening them further in the light of the recommendations of various committees constituted for this purpose at various points of time (latest being the Uday Kotak Committee). It was in 2009 that government came out with separate voluntary guidelines for CSR and Corporate governance. It was clear indication of exclusive focus of Indian government on development of regulatory framework for CSR. Government comprehensively revised the guidelines in 2011 while maintaining its voluntary nature. Further, government also issued revised CSR guidelines for CPSEs in 2013.

SEBI deserves credit for introducing element of mandatory requirements into the regulatory framework of CSR wherein top 100 companies were required to include BR Report as part of their annual report. Thus, inclusion of mandatory CSR provision in the form of Sec. 135 of Companies Act 2013 is not at all a sudden development. It was preceded by voluntary guidelines by MCA and a binding circular by SEBI. Further, the clause was seriously debated in the Parliament (including Parliamentary Committee on Finance) before its inclusion in Companies Act 2013. Thus, the shift from voluntary model (like West) to mandatory model of CSR has been made after a lot of deliberation and discussion (a hallmark of Indian democracy).

There are various activities included in Schedule VII that may be taken up by the TNCs to strengthen right to clean and healthy environment. TNCs have also voluntarily subscribed to one or the other CSR guidelines developed at the international level and accordingly are experienced actors in the field of CSR. But the Indian mandate is qualitatively as well as quantitatively different from existing international standards regarding CSR. So their experience of voluntary CSR may be of limited use under Companies Act 2013. Also, Indian mandate is more in the nature of spending on activities enlisted for the purpose and may have only a limited role in strengthening the accountability of TNCs for violation of right to clean and healthy
environment. Therefore, situations wherein a company is compliant with CSR mandate under Companies Act 2013 (spending impressively on activities related to environment) but may otherwise be involved in legal battle for violating right to clean and healthy environment. Thus, their accountability can only be strengthened by plugging loopholes that exists in the regulatory framework for protecting right to clean and healthy environment as discussed in previous chapter.

The support in the favour of mandatory CSR has wide political consensus in its favour which cuts across party lines. Accordingly, change of government at the centre in 2014 has not dented the governmental resolve about the viability of this provision as is reflected in subsequent CSR rules and in recommendations of HLC and CLC.

India is not certainly the first country to adopt mandatory approach towards CSR through legislation. Indonesia provided for mandatory CSR through legislation in 2007. Further, UK, Denmark, France and Norway have provided for disclosure by companies about CSR information in their annual reports. But stipulation of 2% is distinctively Indian. Further, it is in consonance with the Indian tradition and culture of donating for philanthropic cause. Being the largest democracy of the world and a competitive foreign investment destination, such a bold legislative endeavour regarding CSR has caught attention of the world. The whole world (including TNCs) look to India as to how it further develops the regulatory framework for CSR to ensure fulfillment of its intended objectives.