India New CSR Legislation - ‘Forced Voluntary’ Corporate Giving - Setting the Trend for Whom?


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Introduction

Indian philanthropy is growing with the corporate social responsibility (CSR) landscape in India having a major policy shake up. The newly passed Companies Law, 2013, gives new guidelines in terms of corporate social responsibility management in India. The study explores the existing corporate social responsibility practices and the implications of the new Legislation. It analyses the following questions: 1. How do different stakeholders in India see this new CSR guideline? 2. To what extent does new legislation promote accountable CSR? 3. What are the prospects of keeping the voluntary nature of corporate giving? The study explores the implications of the legislation on the broader philanthropy sector. It concludes with recommendations to ensure proper mechanisms for reporting corporate accountability and the need to have a robust governing mechanism to implement the new Company Law. It cautions the NGOs which are excited about the new fundraising opportunities to have realistic expectations. The paper also recommends the need to invest in the capacity strengthening of NGO staff in the country, both for fundraising and demonstrating the impact, and the CSR managers and functionaries of corporate foundations to have more professional approach and attitude to ensure CSR commitments.

Indian Giving Trends

There has been a rising trend in the Government of India’s investment in social welfare services, especially in: education, health, water and sanitation. It is estimated that the Government of India’s annual spend on social services is estimated to be over $60 billion (Government of India, 2013). Given the public investment in the socio-economic development, the Government of India still continues to be main investor in the welfare sector, which cannot be compared with private philanthropy. While it would be difficult to think of a paradigm shift in the public investment pattern, private philanthropy in India is growing.

Philanthropy in India has been on a rising trend since 2006, with large contributions coming from private corporate organisations and high net worth individuals (HNWIs). A recent study shows that the private charity contribution in India is between 0.3 per cent to 0.4 per cent of GDP with a 0.2 per cent in increase in 2006 (Sheth & Singhal, 2011). In real terms, annual philanthropy giving is estimated to be between $5 billion to $6 billion, a high increase from $2 billion in 2006. The wealthy in India have increased their philanthropy contributions from an average of 2.3 per cent of household income in 2010 to 3.1 per cent in 2011 (Ibid). A report shows that 20 per
cent of wealthy Indians are interested in donating money for philanthropy during their lifetime, four times higher than in the United Kingdom and five times the number in the United States (Barclays, 2013). Still, India has got one of the lower ranks of 93 in the World Giving Index (Charity Aid Foundation, 2013), below small countries such as Bangladesh (87) and Nepal (55).

**Analysis of Existing Corporate Giving Pattern**

The corporate giving pattern in India has become more organised in the recent times. A research carried out by the Partners in Change (2007) studying 552 top level companies in 7 major cities in India gives a detailed sectoral analysis of the corporate philanthropy practices in India. The study shows that a majority of the companies had policy or policy elements covering issues like ‘health (62%)’, ‘education (59%)’ and ‘human rights (53%)’ only one fourth of the companies had policies or policy elements covering issues like ‘income generation, micro finance (24%) and ‘resettlement and rehabilitation (26%)’ (Partners in Change, 2007). The study also shows the ‘influence of the various stakeholders in having corporate social responsibility practices, with internal stakeholders having the highest influence, the local communities and the government having the next highest level and NGOs having the lowest influence’ (Ibid; P 79). This is further manifested in the way corporate organisations implement community investment programmes. Pradhan and Ranjan (2010) analyses four models of corporate social giving in India. They are: ‘CSR activities implemented directly by the company; activities implemented by a foundation, activities implemented in partnership with I/NGOs and academic institutions and activities implemented in partnership with the government’ (Pradhan & Ranjan, 2011, p.142). The study, based on the 14 large corporate organisations in India, shows only four of them use NGOs to implement the community investment programmes (Ibid, p.142). Another study (DASRA, 2013) shows\(^1\) that 49% of foundations only fund NGOs while 39% of foundations implement social development programmes directly. The commonly cited reasons for why NGOs are not considered are: lack of transparency, accountability, the capacity to execute at scale, and the inability to deliver to corporate standards (Ibid). Scandals about financial irregularities, as observed in different parts of the globe being reported with some NGOs in India, has also contributed to questions about the trustworthiness of NGOs (Lee & Prakash, 2012). The real and perceived cases of NGOs involved in money laundering or as terrorist political fronts, along with broader stereotypes of non-professionalism, is another reason for the direct implementation approach of corporate foundations (Jansons, 2013). However, there are many professionally managed NGOs delivering need based programmes in India.

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\(^1\) The methodology of the study is not clear and it also does not show how many corporate foundations were studied. For details, please see DASRA (2013): Beyond Philanthropy, Towards a collaborative approach in India, Dasra, GIS and Omidyar Network, New Delhi [http://www.dasra.org/reports_2013/Beyond_Philanthropy_GIZ_dasra_2013.pdf](http://www.dasra.org/reports_2013/Beyond_Philanthropy_GIZ_dasra_2013.pdf) accessed 4/09/2013
Between 2011 and 2012, the Bain report saw a drop from 70 per cent to 53 per cent of philanthropists who mentioned lack of accountability among NGOs as a reason not to give to them. India Philanthropy Report 2013 also concludes that there would be a 26 per cent increase in giving if recipient NGOs were to invest more in impact assessment. (Bukhari, 2013).

This is an area that needs further research, as most NGOs would have different reasons for the lack of partnership with corporate organisations. There is no dearth for the non-profit organisations in India. In 2012, the Indian government’s Central Statistics Office (CSO) of the Government of India, concluded a four-year study, Non-Profit Institutions in India, to measure the broader non-profit sector. The study summarises the result of 694,000 studied organisations out of millions of non-profit organisations. One of the reasons for the lack of corporate partnership with the non-profits would be the interest of companies to channelize the funds through their own foundations. This would give them more control on how the funds are managed and what type of programmes are being implemented. Venkat Krishnan, Founder of GiveIndia views, ‘there is a greater tendency among the ultra high net worth individual (UHNI) philanthropists and corporate foundations to ‘do it on their own’ to set up implementing organisations rather than make grants. Many foundations established by private companies are managed by family or individuals rather than by trained social development professionals (UBS-INSEAD, 2010; Jansons, 2013). The UBS-INSEAD study shows that in 2010, two-thirds of private foundation funding was allocated to cover funders’ own operational activities. This raises another fundamental question about the governance management of corporate foundations and CSR activities.

Some corporate organisations could be motivated by the tax exemptions they get for the CSR contributions than the genuine interest in the social development. In this context, it is worth exploring the newly developed CSR legislation.

**Features of the of New CSR Legislation**

The Company’s Bill 2013, passed by the Indian Houses of Parliament, has received assent from the President of India on 29th August and is the new legislation that is guiding Indian corporate governance. It has replaced by the Companies Act, 1956.

The long awaited new legislation includes sweeping changes in the way companies are defined and governed with stricter standards in governance, auditing and accounting, investor protection, disclosures, shareholders’ rights and self-regulation.

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2 Between 2007 and 2011, the CSO, Government of India conducted the four-year survey of Non-Profit Institutions in India; It studied 694,000 societies, of approximately 3.17 million registered non-profit organizations in India.
What are the salient features of the new CSR guidelines? Clause 135 of the Act explains corporate responsibility and the requirements of the corporate organisations to adhere to this. It says, “every company having net worth of INR Five hundred crore ($80 million) or more, or turnover of INR one thousand crore ($161 million) or more, or a net profit or INR five crore ($800,000) or more, during any financial year, shall be required to spend on CSR in every financial year, at least two per cent, of the average net profits of the company made during the three immediately preceding financial years. It shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director”. The Committee is entrusted with the following responsibilities: a. Formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company; b. recommend the amount of expenditure to be incurred on the activities referred to in clause (a); c. monitor the Corporate Social Responsibility Policy of the company from time to time. The Bill also speaks about the role of the Board in implementing the recommendations made by the CSR Committee. These are: approve the CSR policy for the company; ensure that the activities included in the CSR policy are implemented. The amount required to spend on CSR is, in every financial year, at least two per cent, of the average net profit of the company made during the three immediately preceding financial years. The Board is entrusted with the responsibility to implement this. Schedule VII of the Bill summarises the activities that could be considered by companies in their Corporate Social Responsibility Policies. Some of the recommended activities are: eradicating hunger and poverty, promotion of education, promoting gender equality and empowerment, women, health, employment, empowerment, inclusive and socioeconomic and inclusive development focused activities. The legislation also requires companies to make provisions to spend on social welfare activities, empower investors against any fraud committed by the management, promote the appointment of women directors and facilitate the opportunity for greater transparency in governance matters in addition to limiting the remuneration of a director with not more than 5 per cent of the net profit. If implemented properly, initial estimates are that the new legislation could generate approximately US$2 billion for social development while the current international aid is $2 billion (Bukhari, 2013)

How the New CSR Guideline is Viewed?

While the then governing political party has been very optimistic about the new legislation, the corporate and non-profit sector is divided on the value addition of the new CSR guidelines and its implementation. Sachin Pilot, the Minister of State for Corporate Affairs of the Government of India was excited about the passing of the Bill, which made him the first Minister of the first country in the world to make mandatory corporate social responsibility (CSR) through a statutory provision.

While Gopalakrishnan (2013), President, Confederation of Indian Industry (CII) is supportive of some of the new guidelines, he has also raised some concerns of the
industry on the new provisions introduced and the need to have more transparency (Ibid). The Indian Merchants Chamber (IMC) has already expressed its reservations against the new CSR (The Times of India, 2013).

While some of the Indian NGOs have welcomed the new CSR regulation, some analysts and NGOs are apprehensive of the Bill as it does not seek to change corporate behaviour and makes business operations more ethically, socially and environmentally responsible (Venkatesan, 2013; Maira, 2013) with more emphasis on a tick mark exercise, without proper implementing mechanisms. For example, $11.4 billion UK based mining, oil and gas conglomerate with two thirds of its operations in India, is known for its industrial accidents, human rights abuse, environmental degrading and unsustainable development pattern (Kirschke, 2013). A referendum by Dogria Kondh tribal villagers on 13 August 2013 blocked Vedanta’s efforts to extract bauxite from their sacred Niyamgiri hills, eastern Orissa, mainly on account of forced displacement and environmental degradation (Ibid). However, Vedanta’s website highlights many CSR achievements for many years from primary, secondary and tertiary education to hospital and livelihood support. The new legislation allows for gaps between good programmes and poor corporate citizenship and seems to create the impression that ‘companies can somehow offset negative impacts in one area of their work with corporate philanthropy in another’, Mark Hodge, Director, Global Business Initiative on Human Rights. In this regard, the new legislation does not give enough recognition on the need to promote social, ethical and environmental commitments of corporate organisations.

**Voluntary Enforcement**

The voluntary nature of the enforcement mechanisms is the ‘central to the cynicism regarding CSR’ while international mechanisms of corporate accountability already demonstrated element of regulation in them under the Economic Co-operation and Development Guidelines, integrity measure of the United Nations Global Compact, and compliance monitoring of codes of conduct along with mandatory CSR reporting in certain countries in Europe (Venkatesan, 2013). Some of the reporting guidelines mentioned in the new Indian Company Law is mentioned only as an idea and not as a mandate (Maira, 2013).

While the legislation speaks about self-regulation, the implementation of the guideline does not appear to have a strict enforcement mechanism. For example, the companies that do not choose to comply with these CSR regulations can submit a disclosure about their non-compliance. There is no official penalty clause for the legislation (Lee, 2014). It is assumed that companies will be obliged to fulfil the CSR requirement due to public pressure. Rajiv Gupta of Latham and Watkins observes

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3 Started by Kofi Annan, the then UN Secretary General in 2003, it is the only UN organisation that does not have any governmental representation, but a voluntary organisation, run by business leaders from around the world along with representatives of civil society, to institute a universal corporate code of conduct.
while it is supposed to be a mandatory legislation, the only requirement for non-compliance is to explain why it has not been fulfilled (as quoted in Ibid).

Just before the final legislation was passed, a senior official from a large private steel manufacturing company in India responded to a multi country study on CSR governance and the role of context, especially national governance systems and the value of regulatory mechanisms (Young and Thyil, 2014). Here the study quotes this official’s observation on Securities and Exchange Board of India (SEBI), one of the government bodies in India and how it lacks teeth. “There is no sufficient monitoring backing it (the legislation). If you legislate but you don’t monitor, then that legislation becomes a piece of paper” (Ibid, p12)

As discussed earlier, the majority of Indian corporates tend to implement programmes through their own foundations and a significant amount is spent on their operational cost. There is a need to recognise these factors and enforce a proper mechanism to implement the new legislation to ensure companies are made accountable to their corporate social responsibility in financial and real terms. In this context, the law makers of the country need to be open and have measures in place to have mechanisms to incorporate the lessons and amend the legislation to ensure real corporate social responsibility and not to be overlooked with 2% contribution.

The Government Handing Over its Responsibility- Yes and No

Another area of concern is the perception that the government is handing over its responsibility for social development to the corporates. The suggested CSR activities in the legislation suggests that the government is seeking to develop corporate philanthropy towards public spending to forge corporate partnerships in order to shoulder its welfare responsibilities (Venkatesan, 2013).

A discussion led by the prominent philanthropy experts in India in 2013 has given different dimensions of the new legislation. Rohini Nilekani, Founder of Arghyam (water and sanitation foundation) is of the opinion that government should not ‘outsource its governance’.

Sanjiv Phansalkar, Programme Director, Sir Dorabji Tata Trust and the Allied Trusts argues, there will be lot of “giving without really giving”, companies might reclassify what they are already doing as CSR spending with a preference for “causes within sight” in the large metropolitan cities. Sanjiv does not anticipate the increase in the voluntary giving in India. The notion that the new legislation may not increase the availability of CSR funds could be justified to a great extent. For an evidence based statistical analysis, there is a need to wait for couple of more years.

Luis Miranda, who is associated with NGOs such as Centre for Civil Society, SNEHA and Samhita Social Ventures, observe that the legislation has generated lots

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4 The content of the DASRA, India led discussion is analysed in (Bukhari, 2013). The author has used quotations of the leading philanthropic analysts from this source.
of public debate on philanthropy in the mainstream media in India, with the potential for increasing domestic flows to the sector.

A lot of new wealth in India is illegal or untaxed, making it difficult to incentivise donations to NGOs, which will have to give formal receipts (Jansons 2013). While the source of donations needs to be declared, it is unlikely that companies would allocate illegal or untaxed money for CSR.

In addition to this, the amount of public investment made by the Government of India cannot be compared to that of the estimated cumulative CSR contribution, even if the legislation is implemented in its true spirit. Hence, it is unrealistic to expect that the 2 per cent buzz, would be replacing public expenditure on social development programmes. So on the one hand, it appears that the new legislation is an attempt from the Government to hand over its responsibility, in reality, it would be impossible to think in the Indian context, the companies would substitute the role of the Government to take care of the social welfare and development needs of communities. While companies attempt to make their own contributions to bring positive impact in the community, it would be important to have realistic expectations. While the new legislation is a wake up call, it should be interpreted to ensure that companies are encouraged to reaffirm their commitments to social, environmental and ethical values.

**Cherry Picking CSR**

Most corporates are known to invest in those social development programmes that promote the opportunity for marketing their particular products. Unless the process is regulated, there would be preference to promote a market influenced social welfare programme. For example, a sports brand company might, in the name of CSR, wish to sponsor programmes in a private school to promote health practices. Here the target group is those middle class families which would be better placed to buy their products than poor rural children. The poor rural children have the real need and less opportunity to have better sports facilities and practice better health. It is important to wait and watch, how many companies will invest in CSR programmes without being influenced by the market dynamisms.

Another area of concern is the purchasing power that companies will have to silence people’s movements. While India is known for its vibrant civil society, certain causes such as: human rights violation, labour rights, issues of marginalised communities or advocacy activities for environmental issues would get a second class treatment. It is very unlikely that companies would like to invest in these programmes as part of their CSR commitment. This is another area that the new legislation should have anticipated. The legislation should have included mechanisms to accommodate these issues to minimise the opportunity for a ‘cherry picking CSR’ programmes and promoting more fashionable programmes.
Another area of concern with the new legislation is the potential to damage the ‘silent approach’ to philanthropy. Some Indian philanthropists, like in the West, are known to prefer to have a silent approach to philanthropy and might wish to continue to do so\(^5\). They might also like to support certain causes which are known to generate certain taboos in the society. For example, there are philanthropists who tend to support issues such as: HIV/AIDS, development of Dalits and other marginalised communities, religious ideology influenced welfare programmes. Given the need to declare the CSR allocation, some of the personal values influenced philanthropy might get discouraged.

**Future Opportunities and Challenges**

Given that the Government of India is the main actor for social development investment in the country, there is a strong view which recommends that there is a no need to have a ‘hype buzz’ about the 2% CSR contributions. While NGOs in the country, most of them either national chapters of International organisations or national organisations affiliated international networks, are looking forward to the opportunity the legislation offers for in country fundraising. While the legislation offers some new sources of funding, it would be better to keep the expectations realistic.

There are also challenges associated with the opportunities to access this ‘newly found’ treasure. While the number of corporates setting up new foundations might increase, it would be good to know if they will be giving money to a ‘cause’ which is genuine. Another area of concern is the lack of appropriate fundraising skills (Bukhari p 49) in the country. While traditional approach to fundraising is seen as seeking funds from western grant making bodies, corporate fundraising requires certain unique skills, along with the ability of the NGOs to demonstrate their impact. There are attempts happening: such as the Government of India’s Planning Commission/Indira Gandhi National Open University partnering with the Association of Fundraising Professionals in the US to launch professional fundraising programmes; the UK based Resource Alliance in partnership with the Resource Alliance India, offering tailored fundraising capacity strengthening programmes for Indian NGOs. There is a need to develop more region focused programmes in India and continue to invest in the fundraising skills development for the NGOs.

Another concern is the challenges associated with the governance mechanisms in the country when administering philanthropy fundraising and its management. This is reflected at the national governing mechanisms of non-profit sector and the governance of companies and the corporate foundations.

\(^5\) A Catholic nun, a senior superior of a Catholic congregation in India shared her observation in a personal conversation in 2000 that their convent’s entire medical needs and the essential drugs for the inmates in their Home for the Destitute were supported by a Hindu business man in the State which was known for some religious tension. More over this business man in India was not at all connected to any pharmaceutical companies. This was at a time when CSR was not in the agenda of many of the companies in India. The new legislation does not take into account any of these issues.
As analysed earlier, there is a need to strengthen the professional skills for the CSR managers or the functionaries of corporate foundations. They need to be supported to manage social development programmes, when implemented directly or in partnership with NGOs. The current legislation does not speak about the mechanisms for partnership management or some basic expected standards, if corporate foundations are to manage the programmes directly. If not, it might repeat the similar experiences as observed elsewhere (UBS-INSEAD, 2010; Jansons, 2013).

The governance of non-profit sector in India has been discussed since 2007. The National Policy on Voluntary Sector 2017 has tried to highlight some of the ongoing challenges. In the existing governance management arrangement, the social sector and non-profits come under the jurisdiction of several ministries rather than of one. (Bukhari, 2013). A report of the Steering Committee of Voluntary Sector for the 12th Five Year Plan (20012-17) (Planning Commission, 2012, p17) has recommended the need to strengthen the ‘governance in the voluntary sector through both legislation and self-regulation’. The report also recommends the setting up of a Ministry of Voluntary Affairs (MVA) with functions to pilot Central Law on voluntary agencies and coordinate and monitor the functioning of voluntary sector. It is not sure, how long it would take to implement the above recommendations. Unless some of the basic governance issues are managed, the NGOs would continue to face the existing challenges and would be difficult to monitor how companies adhere to the CSR commitments.

**Conclusion**

The paper analysed the current philanthropy giving pattern in India. While the new legislation tries to set some new guidelines on company management and in particular on CSR mechanisms, it does not offer hope to show how best companies will adhere to their social, environmental and ethical commitments. The hype of 2 per cent allocation for CSR may not add much value, given that there is no mechanism to enforce the guidelines or better manage CSR affairs of companies or corporate foundations. There is a need to ensure that a proper mechanism is in place to implement and monitor the new CSR guidelines with the need to make sure provisions are made to promote voluntary giving than ‘forced giving’.

**References**


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