

**COMPANIES ACT, 2013 & CSR RULES, 2014,
viz-a-viz CORPORATE SOCIAL RESPONSIBILITY IN INDIA:
A CRITICAL OVERVIEW WITH SPECIAL REFERENCE TO ENVIRONMENT POLLUTION**

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*Human survival is menaced by another equally homicidal missile euphemistically described as
environmental pollution.' V.R. Krishna Iyer¹*

INTRODUCTION:

Great ideas are usually simple ideas. While the specific analysis of any important topic will necessarily involve complexity and subtlety, the fundamental concepts which underlie powerful paradigms of thought are usually relatively straightforward and easy to grasp. In the area of social science, ideas which affect millions of people and guide the policies of nations must be accessible to all, not just to elite. Only thus can they permeate institutions from local to the global level, and become part of the human landscape, part of the fabric within which we define our lives. Such is the concept of sustainable development.²Sustainable development³ has always been the agenda of the governments of development almost all countries over the world. To achieve the target of sustainable delicate balance between the industrial growth and environment preservation needs to be maintained, for which the corporate sector needs to be responsible. The idea of this balance commonly known as corporate social responsibility⁴ sets a realistic agenda of grass-root developments through alliances and partnerships with sustainable development approaches. At

¹ V. R. Krishna Iyer, *Environmental Pollution and the Law*, Vedpal Law House, Indore, 1984, p.2.

² Jonathan M. Harris, *Basic Principles of Sustainable Development*, Tufts University Press, Medford; USA, 2000, p-10.

³ P. B. Sahasranaman, *Handbook of Environmental Law*, Oxford University Press, New Delhi, 2009, pp. 21-33; Brundtland Report, World Commission on Environment and Development (WCED), *Our Common Future*, Oxford University Press, Oxford, 1987, p.43.

⁴ **Corporate Social Responsibility** is a continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.

Lord Holme, Richard Watts, *Making Good Business Sense*, *World Business Council for Sustainable Development*, January 2000, p.10.

the heart of solution lies intrinsic coming together of all stake holders in shaping up a distinct route of an equitable and just social order.⁵ To obtain the target of sustainable development the concept of Corporate Social Responsibility has gained growing recognition as a new and emerging form of governance in business, because conscious efforts to save environment and right to clean environment are fundamental targets of all around the world.

COORPORATE SOCIAL RESPONSIBILTY AND SUSTAINABLE DEVELOPMENT: A LEGAL PERSPECTIVE OF INDIA

“Probably more than any other jurisdiction on Earth, the Republic of India has fostered an extensive and innovative jurisprudence on environmental rights.” Anderson

Conceptualising Legal Right to Environment Environmental rights do not fit neatly into any single category or generation of human rights. They can be viewed from at least three perspectives, straddling all the various categories or generations’ of human rights. First, existing civil and political rights can be used to give individuals, groups and NGO’s access to environmental information, judicial remedies and political processes. On this view their role is one of empowerment, facilitating participation in environmental decision-making and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm. Second, possibility is to treat a decent, healthy or sound environment as an economic or social right, comparable to those whose progressive attainment is promoted by the 1996 UN Covenant on Economic, Social and Cultural Rights. The main argument for this approach is that it would privilege environmental quality as a value, giving it comparable status to other economic and social rights such as development, and priority over non rights-based objectives. Like other economic and social rights it would be programmatic and in most cases enforceable through relatively weak international supervisory mechanisms. Third option would treat environmental quality as a collective or solidarity right, giving communities rather than individuals a right to determine how their environment and natural resources should be protected and managed.⁶ The first approach is essentially anthropocentric insofar as it focuses on the harmful impact on individual humans, rather than on environment itself: it amounts to a ‘greening’ of human rights law, rather than a law of environmental rights. The second comes closer to seeing the environment as a good in its own right, but nevertheless one that will always be vulnerable to trade-offs against other similarly privileged but competitive objectives, including the right to economic development. The third approach is the most contested. Not all human rights lawyers favour the recognition of third generations, arguing that they devalue the concept of human rights,

⁵ Indu Jain, Corporate Social Responsibility: Indian Legal Perspective, *Legal Services India*, March 26, 1011, p.1.

⁶ Awasthi & Kataria, *Law Relating to Protection of Human Rights*, Orient Publishing Company, New Delhi, 2005, pp. 450-525.

and divert attention from the need to implement existing civil, political, economic and social rights fully. The concept in general adds little to an understanding of the nature of environmental rights.⁷

Generally, global and regional treaties on environmental rights since 1991 contain at least some reference to public information, access or remedies, although this practice is not usually followed in the case with watercourse agreements. Such agreements tend to focus on interstate management and utilization of freshwaters without reference to public information and participation.⁸ Human rights treaties of the past decade are fewer in number than the total of environmental agreements adopted during the same period and most of those that have been concluded have been at the regional level. In general, global treaties have not included specific reference to the environment or to environmental rights. In contrast, even prior to the Rio Conference, regional instruments contained provisions on environmental rights.⁹ However, environmental rights in India do not really exist in written form. They were rather created from lawyers, activists, and from other available resources. In the proceeding part of the paper the general provisions of the Constitution of India is discussed and the attitude of the Indian Courts on environmental related grievances has been argued.

Constitutional Right and Duty towards Environment

According to the Indian Constitution '*The State shall Endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.*'¹⁰ Here, the duty to protect and improve the environment is imposed on the State. Moreover, the Indian Constitution also says '*It shall be the duty of every citizens of India – [...] g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures,*'¹¹

Human rights protect individuals against the arbitrary action of the state; however, according to Article 51A (g), of the Constitution of India the protection of the environment is a fundamental duty not only of the State, but also of every citizen. Many environmental crimes are thus committed not only by the state, but by private actors as well. The Constitutional right to environmental in

⁷ *ibid.*

⁸ See, e.g. the *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (Chiang Rai, April 5, 1995), the *Protocol on shared Watercourse Systems in the Southern African Development Community Region* (August 28, 1995), the *Convention on the International Commission for the Protection of the Oder* (Wroclaw, April 11, 1996), and the U.N. *Convention on the Law of the Non-Navigational Uses of International Watercourses* (New York, May 21, 1997)(the last does contain a requirement of non-discrimination in respect to any remedies that are provided). The exceptions in this regard are the regional *Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes* (Helsinki, March 17, 1992), as discussed below and the *Convention on Cooperation for the Protection and Sustainable Use of the Danube River* (Sofia, June 29, 1994).

⁹ *Convention on the Rights of the Child* and *I.L.O Convention No. 169*.

¹⁰ Article 48A, Constitution of India.

¹¹ Art. 51A (g), Constitution of India.

India could therefore also be indirectly claimed against private. In other words, the State has to prevent the private persons from damaging the environment, because the rights of other could be affected. Even if no direct damage or no injuries were caused to the population, or has been caused by any act still the court can give order in favor of the protection of environment rights. The dimension of the interpretation for environmental rights can be thus understood with the perceptive of Article 48A and 51A (g) of the Constitution of India.¹² The Indian Constitution is a landmark in itself. It contains variety of rights and duties for the overall dignified life of a human being. Right to clean environment is one of such right and duty enshrined in the Indian Constitution.

The Judicial Approach

In India, the jurisdiction of the Supreme Court has widened the scope of the Right to Life under Art. 21 and included the Right to a wholesome environment. One of the most explicit and most cited cases in this regard is *Subhash Kumar v. State of Bihar*¹³. The Supreme Court ruled that 'Article 32 is designed for the enforcement of the Fundamental Rights of a citizen by the Apex Court', and the 'Right to live is Fundamental Right under Art 21 of the Constitution and it includes the right to enjoyment of pollution free water and air for full enjoyment of life'. The Court even went that far in saying that a petition for Art.21 in connection with Art.32 can be invoked by 'social workers or journalist'. In other words, any third person, doubtful that the environmental conditions at some place are sufficient to live a life in dignity, can call upon the Courts. This decision of the Supreme Court is revolutionary, because it set a precedent. In case there is an allegation that natural resources are polluted, the High Court or Supreme Court can be induced to investigate and eventually issue a writ petition. The authorities and private persons will have to act in compliance with minimum environmental standards. Interesting to note is that the Supreme Court uses international 'soft law', in order to emphasize its decision. Hence, international environmental law, albeit vague, has an influence on the interpretation of rights through the Indian Courts. The Supreme Court has decided similarly in other cases related to the right to life.

The Constitutional right to clean and healthy environment was developed and encouraged by the Indian Judiciary from time to time. However, apart from this various international environmental principles declared legal by Stockholm and Rio Declaration were introduced and enhanced by the judiciary in India. These principles not only protected environment from depletion but also protected by fixing corporate social and legal responsibility. Some of these principles are discussed in the proceeding part of the paper.

Principle of Sustainable Development: In India, three basic elements of implementing

¹² Koolwal v. State of Rajasthan, AIR 1988 Raj. 2

¹³ (1991) 1 SCC 598

sustainable development¹⁴ can be identified: sustainable and equitable utilization of natural resources, integration of environmental protection and economic development, and the right to development. The definition of sustainable development in India integrates a quality of life that is economically and ecologically sustainable. In India, albeit the case law failed to produce a clear definition, it did manage to come out with an applicable definition of sustainable development. During the 1980's, most of the Indian cases¹⁵ were concerned with the cancellation of mining leases and closure of national development projects, in order to protect the depletion of environment.

In 1994, the Supreme Court of India directly mentioned the principle of sustainable development and tried to balance the social, economic and ecological aspects. The 1990's¹⁶ definition of sustainable development emphasized the relationship between development and environment, and tried to maintain a balance between the two. More sophisticated challenges were made where the Indian Courts were asked to deal with polluting industries such as the leather factories, to prevent encroachment of wetlands, and to preserve forests and vegetation. It gave priority to sustainable use of the natural resources and to a right to a healthy environment for the present, and to a certain extent, to future generations. The national environmental policy and legislation reflect the concern for a balance between development, planning and environment.

Principle of Intergenerational Equity: In India, inter generational equity principle¹⁷ has been considered as a part of achieving sustainable development. However, the nature of the right and how to achieve it has not been discussed by the Courts. Exempli gratia, in the cases dealing with reserved forests, the Court decided the case based on the need of the present generation and the rational use of natural resources. Therefore the vertical application of equity has been established¹⁸. Moreover, the notion of equity has been connected with the concept of public trust

¹⁴ **Rio Declaration, 1996- Principle-1:** Human Beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

¹⁵ Sania v Konderi, 1984 (2) Civil LJ 377 (Ker); M.C. Mehta v Union of India, AIR 1987 SC 965; Shri Sachidanand Pandey v State of West Bengal, AIR 1987 SC 1109; Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh, AIR 1988 SC 2187.

¹⁶ V. S. Damodaran Nair v State, AIR 1996 Ker. 8; S. Jagannath v Union of India, AIR 1997 SC 811; Om Prakash Bhatt v State of Uttar Pradesh, AIR 1997 All. 259; Burrabazr Fire Works Dealers Association v Commissioner of Police, Calcutta, AIR 1998 Cal 121; Mahabir Coke Industry v Pollution Control Board, AIR 1998 Gau. 310.

¹⁷ **Inter-Generational Equity Principle:** The principle states that it is the right of each generation of human beings to benefit from the cultural and natural inheritance of past generations as well as the obligations to preserve such heritage for future generations. S. Divan and A. Rosencranz, Environmental Law and Policy in India, Cases, Materials and Statutes, Oxford University Press, New Delhi, 2001, p.53.

¹⁸ Vellore Citizen's Welfare Forum v Union of India, AIR 1996 SCW 3399:1996 (5) SCC 647; State of Himachal Pradesh v Ganesh Wood Products, AIR 1996 SC 149; Indian Council for Enviro- Legal Action v Union of India (The CRZ Notification Case), (1996) 5 SCC 281; A.P. Pollution Control Board v MV Nayudu, AIR 1999 SC 812 at 819: 1999 (2) SCC 718.

and depended on people's right to enjoy a healthy environment¹⁹.

The *Vellore Citizen's Welfare Forum*²⁰ recites the Brundtland Commission definition of sustainable development which 'meets the needs of the present without compromising the ability of the future generations to fulfill their own needs'.

In *People United for Better Living in Calcutta v. State of West Bengal*²¹, it was stated that 'The present day society has a responsibility towards the posterity of their proper growth and development so as to allow posterity to breathe normally and live in a cleaner environment and have consequent fuller development.'

In *S. Jagannath v. Union of India*²², the court while dealing with commercial shrimp farming held that a strict environmental test is required before permission is granted for the installation of such farming in fragile coastal area. It added that there must be a compulsory Environmental Impact Assessment (EIA) which would consider intergenerational equity and rehabilitation cost.

Principle of Precautionary Principle: In India, most of the cases²³ of the 1990's on environment deal with the definition of the precautionary principle²⁴. Adopted to prevent the inter-jurisdictional damage, the Indian court decided that the burden of proof would shift and the allegation would require to be proved beyond reasonable doubt. Applying as part of customary law, the court, in some cases wanted to avoid the stringent rules and procedures of evidence and causation. In 1996, the Indian court laid down the meaning of precautionary principle (PP). It stated that environmental measures, adopted by the State Government and the statutory

¹⁹ **United Nations Framework Convention on Climate Change, 1992**, Article 3: The parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities (entered into force on 21st March 1994).

²⁰ (1996) 5 SCC 647

²¹ AIR 1993 Cal. 215

²² (1997) 2 SCC 87

²³ A.P. Pollution Control Board v MV Nayudu, AIR 1999 SC 812 at 819: 1999 (2) SCC 718; Vellore Citizen's Welfare Forum v Union of India, AIR 1996 SCW 3399:1996 (5) SCC 647.

²⁴ **Precautionary Principle:** When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is:

- Threatening to human life or health or;
- Serious and effectively irreversible or;
- Inequitable to present or future generations or;
- Imposed without adequate considerations of human rights of those affected.

United Nations Educational, Scientific and Cultural Organization (UNESCO), The Precautionary Principle: World Commission on the Ethics of Scientific Knowledge and Technology, UNESCO Press, New York, 2005, p.14; Barton, The Status of the Precautionary Principle in Australia, Harv. Envtt. Law Review, 1998, Vol. 22, pp. 509-11.

authorities, must *anticipate, prevent and attack* the causes of environmental degradation. Following the definition provided in the Rio Declaration²⁵, the court stated that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

The court again followed the 'anticipate, prevent and attack' approach in *M.C. Mehta Case*²⁶. In this case, the precautionary principle was invoked to prevent construction within one kilometre of two lakes located near Delhi and the principle was accepted as a part of the law of the land.

Thereafter, in the *Taj Trapezium Case*²⁷, the Supreme Court ordered a number of industries in the area surrounding the Taj Mahal to relocate or introduce pollution abatement measures in order to protect the Taj Mahal from deterioration and damage. Following the decision of *Vellore Citizen's Case* and *Indian Council for Enviro-Legal Action Case*²⁸, the Supreme Court described the Precautionary Principles as environmental measures which must 'anticipate, prevent and attack' the causes of environmental degradation.

In *S. Jagannath Case*²⁹, the precautionary approach was relied on to curtail commercial shrimp farming in India's coastal areas. The commercial user of agriculture lands and salt farms were discharging highly polluting effluents, and causing pollution of water. Normal traditional life and vocational activities of the local population of the coastal areas were being seriously hampered. In *M.C. Mehta (Tanneries) Case*³⁰, this principle was used when the court wanted to relocate 550 polluting tanneries operating in Calcutta.

An application of the Precautionary Principle is found in *Suo Motu Proceedings in Re: Delhi Transport Department*, where the Supreme Court dealt with air pollution in New Delhi. In the Supreme Court's view, the precautionary principle' which is a part of a concept of 'sustainable development' has to be followed by state governments in controlling pollution. According to the Supreme Court, the State government is under a constitutional obligation to control pollution and, if necessary, by anticipating the causes of pollution and curbing the same. The Supreme Court added that principle is entrenched in the Constitution as well as in various environmental laws.

In *Th. Majra Singh v. Indian Oil Corporation*³¹, it was held that the court could only examine as to whether authorities have taken all precautions with a view to see that laws dealing with environment and pollution have been given due care and attention.

²⁵ **Rio Declaration, 1992, Principle 15:** in order to protect the environment, the precautionary principle approach shall be widely applied by states according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty, shall not be used as a reason for postponing cost- effective measures to prevent environmental degradation.

²⁶ (1992) 3 SCC 256

²⁷ (1997) 2 SCC 353

²⁸ (2000) 2 SCC 293

²⁹ (1997) 2 SCC 87

³⁰ *M.C. Mehta v. Union of India* AIR 1998 SC 1037

³¹ AIR 1999 J&K 81

In *A.P. Pollution Control Board v. Prof. M.V. Nayudu*³², the Supreme Court commented that, although Polluter Pay is accepted as part of international customary law, it is still evolving and applies according to the situation and circumstances of each case. The Supreme Court also stated that the burden of proof in environmental cases is reversed and 'burden as to the absence of injurious effect of the proposed action is placed on those who wants to change status quo.'

Polluter Pays Principle: In India, the principle of absolute liability has been applied in pollution cases to determine environmental liability and has been applied against the public bodies. This arose from the tort concept of 'strict liability' and does not allow any exception. Number of cases³³ discussed above in various principles also highlights polluter pay principle. The courts have taken action against the Government as well as against private corporations or companies. Most of the time, it has been defined as an integral part of sustainable development. The Indian Court applied the Polluter Pays Principle (PPP)³⁴ in cases related to accidental pollution and environmental damage caused by industrial waste and ordered compensation for the harm caused as well as the obligation to pay for the preventive control.³⁵ Hence, in the context of environment, the Supreme Court has performed a yeoman service by taking cognizance, in a number of cases, of various environmental problems and giving necessary directions to the Administrations. The court has thus compelled an inactive and inserts administration to make some movement towards reducing environment pollution. In this way, the court has promoted a broad social interest. For this purpose, the court has depended upon such Directive Principles as those contained in Article 47, 48A and fundamental duties contained in Article 51(A) (g) of the Constitution.³⁶

³² (1999) 2 SCC 718

³³ Indian Council for Enviro-Legal Action v. Union of India (1995) 3 SCC 77; (1995) 5 Scale 578; Pravinbhai Jashbhai Patel v. State of Gujarat (1995) 2 GLR 1210; (1995) 2GLH352; Cambridge Water Co. v. Eastern Counties Leather, pl 2 WLR 53; (1994) 1 All ER 53; Burnie Port Authority v. General Jones Pty Ltd (1994) 68 Aus LJ331; Union Carbide Corp. v. Union of India (1991) 4 SCC 584; MC. Mehta v. Union of India (1987) 1 SCC 395; 1987 SCC (L&S) 37; Ballard v. Tomlinson (1885) 29 CH. D. 115; (1881-5) All ER Rep. 688.

³⁴ **Polluter Par Principle** is the principle according to which the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to the society or the exceeding of acceptance level (standard) of pollution. Glossary of Environmental Statistics, Studies in Methods, Series F, No. 67, United Nations Press, New York, 1997, p.2.

³⁵ **Rio Declaration, 1992: Principle 16:** National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

³⁶ M.P.Jain, Indian Constitutional Law, Wadhwa and Company Nagpur, New Delhi, 2003, p.1330.

COORPORATE SOCIAL RESPONSIBILTY (CSR) AND INDIAN COMPANIES ACT, 2013: A CRITICAL OVERVIEW

In August 2013, the Indian Parliament passed the Indian Companies Act, 2013 (the "New Act"), which has replaced the Companies Act of 1956. The New Act has made far-reaching changes affecting company formation, administration and governance, and it has increased shareholder control over board decisions. The New Act is being implemented in stages, and we have been monitoring its progression.

Corporate Social Responsibility: One of the New Act's most startling changes—which came into effect on April 1, 2014—has been to impose compulsory corporate social responsibility obligations ("CSR") upon Indian companies and foreign companies operating in India. These obligations mainly come in the form of mandatory amounts companies must contribute to remediating social problems. This is a wholly new requirement; although companies were permitted, within certain limits, to make charitable contributions in the past, the New Act is essentially a self-administered tax. The Indian Ministry of Corporate Affairs recently has published, or "notified," detailed rules implementing the CSR requirements.

Entities Covered by the CSR Obligations: The threshold coverage levels for CSR are low. Companies are subject to the CSR requirements if they have, for any financial year:

- a net worth of at least Rs. 5 billion (approximately U.S.\$80 million);
- a turnover of at least Rs. 10 billion (approximately U.S.\$160 million); or
- Net profits of at least Rs. 50 million (approximately U.S. [\$800,000]).

Companies meeting these thresholds are required to develop a CSR policy, spend a minimum amount on CSR activities and report on these activities, or prepare to explain why they didn't.

Required Amount of CSR Spending: An entity or business that meets these specified thresholds must spend on CSR activities no less than two percent of its average *net profit* for its preceding three financial years. *Net profit* means a company's profits as per its profit and loss account prepared in accordance with the New Act, but excludes profits from a company's operations outside India or dividends received from an Indian company that has itself met its CSR requirements.

Permitted CSR Activities: There is a long list of permissible areas for CSR funding under the said Act. They include such purposes as ending hunger and poverty; promoting public health; supporting education; addressing gender inequality; protecting the environment; and funding cultural initiatives and the arts. All CSR funds must be spent in India. The New Act encourages companies to spend their CSR funds in the areas where they operate, but money cannot be spent on activities undertaken that are part of the normal course of the company's business or on projects for the exclusive benefit of employees or their family members.

Contributions of any amount to a political party are not a permitted CSR activity. However, the New Act has an exception allowing companies to use their CSR funds to support development

projects initiated by the prime minister or central government. It is important to note, as discussed further below, that such projects in India have had a troubling tendency to become vehicles for political patronage, and they can raise legal issues in other jurisdictions if they come to be seen as political payoffs.

CSR Committee and CSR Policy: The New Act requires companies to appoint a Corporate Social Responsibility Committee consisting of at least three directors. If a company is one that is required by the New Act to appoint independent directors to its board, then the CSR committee must include at least one independent director. The CSR committee is required to recommend a formal CSR Policy. This document, which is to be submitted to the company's board, should recommend particular CSR activities, set forth a budget, describe how the company will implement the project, and establish a transparent means to monitor progress.

Administration of CSR Projects: A company can meet its CSR obligations by funneling its activities through a third party, such as a society, trust, foundation or Section 8 company (i.e., a company with charitable purposes) that has an established record of at least three years in CSR-like activities. Companies may also collaborate and pool their resources, which could be especially useful for small and medium-sized enterprises.

Reporting Requirements: Unfortunately, the New Act imposes significant bureaucratic requirements. It requires companies to prepare a detailed report, in a particular format, about the company's CSR policy, the composition of the CSR committee, the amount CSR expenditures, and the specifics of individual CSR projects. A company's board must include this report in its annual report to shareholders and publish it on the company's website.

The report must also include a statement from the CSR committee that the implementation and monitoring of the board's CSR activities is, in letter and spirit, in compliance with its CSR objectives and CSR Policy of the company.

Failure to Comply: If the minimum CSR amount is not spent, the board is required to disclose this fact, with reasons therefore, in its annual Director's Report to the shareholders.

It is still not clear whether failure to comply is a legal offense of any sort. Thus, the new Act may be the advent of a new regime in Indian corporation law of the concept of "comply or explain." What is clear, however, is that failure to explain non-compliance is a punishable offence under the New Act. It is therefore likely that any company that fails to comply with its CSR obligations will be subject to investigation by the Indian authorities.

Other Important Areas: One of the most applauded aspects of the new Company Law regime is the mandatory [social spending requirement](#). Faced with innumerable economic and social challenges as our country is, our lawmakers could not have ushered in a more revolutionary change through the new law. The new Companies Act, 2013, has made it mandatory for companies to be socially responsible by introducing the '[corporate social responsibility](#)' regime. Section 135 of the new Companies Act, read with the CSR Rules, mandates companies meeting certain criteria to set aside two per cent of their net profits for undertaking and promoting socially beneficial

activities and projects in India. The Ministry of Corporate Affairs (MCA) also issued the CSR Rules, 2014, to implement this legislative mandate, which came into effect on April 1, 2014.

- Every company with a net worth of at least Rs 500 crore, or a minimum turnover of Rs 1,000 crore, or a minimum net profit of Rs 5 crore, is obligated to constitute a CSR committee dedicated to undertake a mixed spectrum of initiatives, such as promoting education, gender equality, women's empowerment, improving maternal health, or ensuring environmental sustainability. The company's net profit would, however, exclude any profit from its overseas branches or companies, and would also exclude any dividend received from other companies in India. The law does not treat foreign companies differently, and includes foreign companies doing business in India, whether by themselves, or through an agent or even electronically.
- The company can choose the social cause or project it wants to support from the list of activities specified in the Act. The CSR committee will then have to frame a CSR policy in accordance with the rules and implement it. The company's board of directors will have to play an active role by participating in the CSR initiative at various stages, including the identification of the activities, approving the policy, and disclosing its contents in the board's report and on the company website. Surplus funds in respect of the CSR projects cannot form a part of the company profits. The rules specifically exclude contributions or donations made to political parties from CSR activity.
- The CSR regime complements the efforts of the government and non-government organisations by requiring companies in India to initiate activities for the economic well-being of the underprivileged and for the environment. Companies can also join hands to undertake CSR projects.
- Social and economic initiatives, as a responsibility of the companies, are gaining popularity internationally. The Financial Reporting Council in the United Kingdom is in the process of introducing guidelines for disclosures regarding environmental, social and governance (ESG) issues by a company. The intention is for these to replace the existing 'business review' section of annual reports, and companies would be required to provide complete disclosure about their business activities, including social efforts. Also, the European Parliament's Legal Affairs Committee approved draft legislation on corporate non-financial reporting, which requires some companies to disclose information about their environmental, social and employee-related impact, as well as their diversity policy. A more practical and sensible approach to implementing the CSR regime in India is to make efforts to support a good cause in every move made by a company. The principles of social responsibility can be incorporated into the business strategy of the company. The company can make efforts to internally create awareness about ethical business practices and principles.

- Charity events sponsored by companies can promote the cause they support, rather than a brand. Employees can be made more aware of alternative uses of office resources, and about saving paper, electricity, water and so on. Employees who believe in contributing to the society should be encouraged to assist the CSR committee in formulating a socially beneficial CSR policy.

CRITICAL ANALYSIS: A bare reading of the new CSR rules may indicate simplicity and reader-friendliness. But close analysis of the fine print leaves ample room for ambiguity at various places.

- While the Companies Act, 2013 prescribes a specific method for computing net profits and the CSR contribution, the CSR rules take a step backwards in carving out exclusions from the net profit so calculated. Most shockingly, one of the exclusions provides that the profits of a branch of an Indian company located outside India cannot be merged into the profits of the parent company for the purpose of computing the two per cent contribution. This exclusion goes against the very mandate of Section 135 and is, to that extent, ultra vires.
- Moreover, there appears to be a major contradiction in the rules in respect of the meaning of the words 'corporate social responsibility'. The Companies Act, 2013, defines CSR activities to mean an identified set of activities set out in the separate schedule to the Act. However, a reading of the definition in the rules indicates that the list of CSR activities provided in the rules (which also includes the schedule activities) is only illustrative and not exhaustive. At the same time, an overall reading of the rules strongly suggests that the scheduled activities alone will be considered for the purpose of CSR. Whether or not social activities falling outside the purview of the schedule form a part of CSR activities still remains doubtful.
- Another aspect of ambiguity in the new law that was expected to be corrected through the rules was the 'local area preference'. The Act provides that a company should give preference to the local area in which it operates for CSR spending. How would this work if a company has more than one operational office in the same city, or even otherwise? Is the location of a factory, as opposed to the corporate office, the target of preference?
- The CSR rules have rightly excluded contributions directly or indirectly made to a political party from the scope of CSR activity. But, what about contributions made to institutions affiliated with one or more politicians or those located in a constituency represented by a politician who has some form of regulatory supervision or leverage over that company? What about activities/institutions being run under the trusteeship or office of a politician?
- Another aspect of the rules that may be abused is the carve-out made in respect of CSR activities undertaken 'only' for the benefit of the employees and their families. Could the intent of the legislation have been to mean activities undertaken 'primarily' to benefit the employees? If a company undertakes a project primarily but not exclusively benefiting its employees, should that be considered CSR activity? While the new rules are well-meaning, there is definitely room for further clarity and certainty. The last thing anyone wants is a select group of people with vested interests benefiting from this noble legislative initiative.