

Journal of Law & Commerce

Vol. 33, No. 2 (2015) • ISSN: 2164-7984 (online)

DOI 10.5195/jlc.2015.83 • <http://jlc.law.pitt.edu>

ARTICLES

INDIA'S JOURNEY WITH CORPORATE SOCIAL RESPONSIBILITY—WHAT NEXT?

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*Arjya B. Majumdar**

ABSTRACT

One of the causes for raised eyebrows to the Companies Act, 2013 is Section 135. The provision mandates companies meeting certain requirements to compulsorily contribute to corporate social responsibility (CSR) activities, or explain the failure to do so. While this has been the subject of an ongoing debate ever since the provision was suggested in 2009, the provision in question has been met with considerable resistance from the industry. Arguments against Section 135 range from specific critiques of the semantics of the statute to critiques of the failure of India as a welfare state altogether.

What this paper seeks is to attempt a definitive outline of the CSR law and practice in India, its roots in Hinduism, Buddhism and Islam, Gandhian philosophies and the pre-2013 position on CSR. It shall also attempt to provide a critical analysis of Section 135 of the Companies Act, 2013 and how the provision may be ignored, or worse—misused.

Three arguments are presented in this regard. Firstly, that Section 135 constitutes a departure from the accepted position that CSR needs to be imbibed into the business and management principles of a company and is

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heading towards a potentially destructive conversion of the principles of CSR into corporate altruism. Secondly, the provisions of Section 135 make the Board of Directors liable to show to their shareholders—the compliance of the company’s social responsibilities. Instead, if the company is to have and comply with social responsibilities, the same should be ascertained by the society, or at least a representative of society. Finally, there is a slew of extant laws in India which also mandate certain companies to take into account their social responsibilities.

I. INTRODUCTION

Corporations have emerged as one of the foundations of modern global society.¹ In a recently published book, Dr. Amartya Sen argues that India should invest more in its social sector outcomes to boost the productivity of its people and thereby raise growth.² Given the ever-widening gap between economic classes in India,³ the lack, or deficit of social investment may lead to social protest or even unrest in the fairly foreseeable future.⁴

The responsibility of social investment and development has traditionally been that of the state. However, in recent times, rising voices have called for corporations to also participate in the social development of the nation,⁵ in some cases specifically, the local areas where such corporations carry out their activities.⁶

India has had a long-standing relationship with social responsibility, whether at the individual or the entity level. Religious and philosophical texts make it clear that individuals and families must engage in charitable activities—activities that do not provide for returns in terms of profits, food, or shelter, but do provide for returns for the soul and social acceptance.

¹ Morgan P. Miles & Linda S. Munilla, *The Potential Impact of Social Accountability Certification on Marketing: A Short Note*, 50 J. BUS. ETHICS 1 (2004).

² See generally JEAN DRÈZE & AMRATYA SEN, *AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS* (2013).

³ Angus Deaton & Jean Drèze, *Poverty and Inequality in India: A Re-Examination*, 37 ECON. & POL. WKLY. 3729, 3744 (2002) (showing that while development indicators have shown improvement in post-liberalized India, the quantum of such improvement has been diverse—ranging from accelerated progress to regression in some areas).

⁴ Sanghamitra Bandhopadhyay, *Why inequality in India is on the rise*, London School of Economics and Political Science (last visited June 26, 2013), <http://blogs.lse.ac.uk/indiaatlse/2013/03/27/why-inequality-in-india-is-on-the-rise>.

⁵ For a brief account of the historical development of corporate social responsibility, see Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 61 PITT. L. REV. 605 (2001); see also C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2003).

⁶ *The Companies Bill 2011*, Indian Ministry of Corporate Affairs, http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2011.pdf (last visited Feb. 22, 2015) (Clause 135(5) of the new Companies Bill, 2011, as tabled before the Lok Sabha, specifically mentions that a corporation “shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities”).

Irrespective of the fact that companies cannot, by any stretch of imagination be expected to have souls,⁷ religion and ancient philosophy have had an indelible mark on the manner in which Indian businesses are run. Inspiration from traditional notions of social acceptance and behavior gave rise to the Gandhian principles of trusteeship. It was these principles that further paved the path for voluntary guidelines on corporate social responsibility and eventually, Section 135 of the Companies Act of 2013. Section 135 makes it mandatory for certain companies to contribute at least 2% of their net profits to CSR initiatives. However, the lack of a specific penal provision for its non-adherence makes it easy for companies to circumvent this measure. This provision has been met with considerable, yet understandable, resistance from the industry.⁸ There is a strong argument that Section 135 of the Companies Act of 2013, in its present form, is susceptible to misuse and at best, is reduced to a “mere checkbox.”⁹

However, the concept of CSR can be found in a variety of other laws prevalent in India—depending upon what CSR is defined as. While there have been a great number of definitions of CSR from time to time,¹⁰ often one seems to be relevant for the purposes of this paper. According to McWilliams and Segel, CSR refers to “actions that appear to further some social good, beyond the interests of the firm and that which is required by

⁷ Daniel Fishel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) (arguing that corporations are “incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations”).

⁸ There has been a widespread protest against the move to include compulsory spending on CSR; see Anirudha Dutta, *Corporate India and CSR*, FORBES INDIA (Aug. 18, 2013), available at <http://forbesindia.com/blog/beyond-the-numbers/corporate-india-and-csr/> (last visited Feb. 21, 2015); Premji Protests Govt's CSR Move, TIMES OF INDIA (Mar. 25, 2011), available at http://articles.timesofindia.indiatimes.com/2011-03-25/india-business/29187790_1_csr-wipro-chairman-azim-premji-corporate-social-responsibility (last visited Feb. 21, 2015); Aman Malik, *Company Law to Change CSR Landscape*, LIVEMINT (Aug. 12, 2013, 12:16 AM), <http://www.livemint.com/Companies/tOGwGAPjhQs1QautjLAGEL/New-company-law-to-change-CSRlandscape.html> (last visited Feb. 21, 2015); and *Mandatory CSR Not a Great Idea, Feels India Inc.*, Moneycontrol (Aug. 6, 2010), http://www.moneycontrol.com/news/business/mandatory-csr-notgreat-idea-feels-india-inc_475926.html (last visited Feb. 21, 2015).

⁹ Somasekhar Sundaresan, *Govt's approach to CSR gives scope for corruption*, BUS. STANDARD (Sept. 10, 2010), available at http://www.business-standard.com/article/economy-policy/govt-s-approach-to-csr-gives-scope-for-corruption-110091300034_1.html (last visited Feb. 21, 2015).

¹⁰ For a review of a large number of definitions of the term “Corporate Social Responsibility,” see Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESP. ENVTL. MGMT. 1, 7–11 (2008).

law.”¹¹ However, the Companies Act of 2013 does not define CSR as such. Schedule VII of the Act sets out a number of activities that are to be considered as CSR activities. Indeed, one of the major issues pertaining to CSR is the lack of a universally accepted definition,¹² as well as an inability to measure its efficacy and relationship with corporate profitability.

If the activities set out in Schedule VII of the Companies Act of 2013 were to be taken into account, it would echo the sentiment shared by McWilliams and Segel, sans the requirement that CSR activities are necessarily non-mandatory by law.¹³ Therefore under the provisions of the Companies Act of 2013, CSR activities do “appear to further social good, beyond the interests of the firm.” Indian corporate jurisprudence is replete with a number of laws mandate corporations which do exactly that—“appear to further social good, beyond the interests of the firm.” The list of activities set out in Schedule VII of the Companies Act of 2013 is by no means exhaustive,¹⁴ but does offer some insight into what the Government of India considers Corporate Social Responsibility. For the purposes of this paper, Schedule VII attains some importance on this attribute. The last section of this paper explores certain aspects of the extant laws of India which place CSR-like liabilities on corporations.

In spite of any shortcomings that the concept and practice of CSR may have, there remains a worldwide opinion that corporations should take into account, the needs of the society with which they have a symbiotic relationship.¹⁵

¹¹ Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 ACAD. MGMT. REV. 117 (2001).

¹² Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268, 269 (1999).

¹³ G.S.R. 130(E), Regd. No. D. L.-33004D9, Schedule VII, *The Companies Act, 2013*, Indian Ministry of Corporate Affairs, http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification3_2014.pdf (last viewed Feb. 22, 2015) (Section 135 mandates CSR activity for certain firms).

¹⁴ *Id.* (Schedule VII, subpart (x) provides for “such other matters as may be prescribed”).

¹⁵ The call for greater corporate participation in the well-being of society was first raised in ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932), and echoed specifically in the context of CSR in Merrick Dodd, *For Whom Are the Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). *But see* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> (last visited Feb. 21, 2015).

II. A RELIGIOUS BASIS OF CORPORATE SOCIAL RESPONSIBILITY¹⁶

Laws relating to acceptable social behavior are not new to India. Ancient texts lay down the manner in which society was to function, the boundaries of inter-personal relationships and even detailed descriptions as to how members of a particular class or community were to carry out their lives. It is not without much surprise that these texts are invariably borne out of a religious ideology.

The tradition of charity finds itself in every religious text across the world. There seem to be few other principles which are so globally accepted. Whether it is the Zakat, the Islamic practice of giving and consequent self-purification, or the Dāna, the practice of giving in Hinduism,¹⁷ the concept of gratuitous transfer of wealth to the less privileged, strikes a common chord between the two most prevalent religions in India.¹⁸

It would be worthwhile to first identify the traditions relating to charity within religious texts such as the Hadith and the Manusmriti. In the absence of institutions, including the concept of the corporation, during the time when such religious texts were envisaged, the directions mandating charity are by default, applicable to individuals.

A. Zakat

Islamists attribute the development and fulfillment of society to not only individual needs but more so, the needs of the society and the goal of

¹⁶ Arjya B. Majumdar, *Zakat, Dana, and Corporate Social Responsibility* 1–15 (Jindal Global Law School 2014), available at <http://ssrn.com/abstract=2421001>.

¹⁷ John H. Barnett, *A Business Model of Enlightenment*, 4 J. BUS. ETHICS 57–63 (1985).

¹⁸ *Census Data 2001, Census of India, Religious Composition* (2001), http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx.

social justice with tranquility in the social order.¹⁹ Followers of Islam must adhere to the following fundamental tenets, or pillars of Islam²⁰—

- *Shahadah*: The recognition that there is only one God and that Muhammad is his Prophet
- *Salat*: Regular, daily devotional acts of prayer
- *Sawm*: Fasting during Ramadan;
- *Zakat*: The payment of obligatory charity
- *Hajj*: Pilgrimage to Mecca at least once in a lifetime

Zakat literally means “purity.”²¹ It is an obligatory alms tax which Muslims are obligated²² to pay.²³ Contrast this with “*sadaqa*,” a broader term which encompasses charitable offerings²⁴ and is a voluntary act. The primary source of the theological mandate for the payment of Zakat can be found in

¹⁹ Geoffrey Williams & John Zinkin, *Islam and CSR: A Study of the Compatibility Between the Tenets of Islam and the UN Global Compact*, 91 J. BUS. ETHICS 519 (2010); see also (Al Qur’an 62:9–10) (“O ye who believe! When the call is proclaimed to prayer on Friday, hasten earnestly to the remembrance of Allah and leave off your business. That is the best for you if ye but knew. And when the prayer is finished, then may ye disperse through the land and seek of Allah’s bounty and remember Allah frequently that ye may prosper.”).

²⁰ SAHIH BUKHARI, HADITH, Vol. 1, Book 2, No. 7, available at http://www.sahih-bukhari.com/Pages/Bukhari_1_02.php (“Allah’s Apostle said: Islam is based on [the following] five [principles]: 1. To testify that none has the right to be worshipped but Allah and Muhammad is Allah’s Apostle. 2. To offer the [compulsory congregational] prayers dutifully and perfectly. 3. To pay zakat (i.e. obligatory charity). 4. To perform Hajj. (i.e. Pilgrimage to Mecca) 5. To observe fast during the month of Ramadan”); see also SAHIH BUKHARI, HADITH, Vol. 6, Book 60, No. 40, available at http://www.sahih-bukhari.com/Pages/Bukhari_6_60.php (“A man came to Ibn ‘Umar and said, ‘O Abu Abdur Rahman! What made you perform Hajj in one year and Umra in another year and leave the Jihad for Allah’ Cause though you know how much Allah recommends it?’ Ibn ‘Umar replied, ‘O son of my brother! Islam is founded on five principles, i.e. believe in Allah and His Apostle, the five compulsory prayers, the fasting of the month of Ramadan, the payment of zakat, and the Hajj to the House [of Allah].’”)

²¹ Suliman Bashear, *On the Origins and Development of the Meaning of Zakat in Early Islam*, 40 ARABICA 84, 87–94 (1993).

²² See Wells, *supra* note 5.

²³ Amy Singer, *Serving Up Charity: The Ottoman Public Kitchen*, 35 J. INTERDISC. HIST. 481 (Winter 2005); see also ENCYCLOPEDIA OF ISLAM (C.E. Bosworth ed., 2004) (“The obligatory payment by Muslims of a determinate portion of specified categories of their lawful property for the benefit of the poor and other enumerated classes or, as generally in Quranic usage, the portion of property so paid.”); see “Sadaqa” (“has among its meanings that of voluntary alms, often referred to in Islamic literature as . . . ‘alms of spontaneity,’ or . . . ‘alms of supererogation,’ in distinction to obligatory alms, frequently also termed sadaqa, but more commonly known as zakat.”).

²⁴ JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 92 (3d ed. 1998) (“This is not regarded as charity, since it is not really voluntary but instead is owed, by those who have received their wealth as a trust from God’s bounty to the poor.”).

the Hadith and the Qur'an.²⁵ The Qur'an refers to Zakat on 32 occasions²⁶ and identifies eight beneficiaries of Zakat²⁷ including:

- the poor;²⁸
- the needy;²⁹
- those who collect them;³⁰
- those whose hearts are to be reconciled;³¹
- for purchasing freedom for slaves;³² and
- for those burdened by debt;³³
- to support the "cause of Allah";³⁴
- to benefit travelers³⁵ and those who temporarily do not have access to their wealth.³⁶

As mentioned earlier, Zakat is a requirement for all believers of Islam.³⁷ The Hadith³⁸ specifies that if a person does not pay Zakat, then

²⁵ NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 55–61 (1964).

²⁶ See The Quran, *Surah* 2:43, 83, 110, 177, 277; 4:77, 162; 5:12, 55; 7:156; 9:5, 11, 18, 71; 18:81; 19:13, 31, 55; 21:73; 22:41, 78; 23:4; 24:37, 56; 27:3; 31:4; 33:33; 41:7; 58:13; 73:20; and 98:5.

²⁷ See The Quran, *Surah* 9:60 (Abdullah Yusuf Ali trans.) ("The alms are only for the poor and the needy and those who collect them and those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of Allah, and [for] the wayfarer; a duty imposed by Allah. Allah is Knower, Wise").

²⁸ HANNA E. KASSIS, A CONCORDANCE OF THE QUR'AN 431 (1983).

²⁹ See ENCYCLOPEDIA OF ISLAM, *supra* note 23, at article on "Miskin."

³⁰ This term is used to refer to the cost of those who collect and distribute alms. See KASSIS, *supra* note 28, at 266. It was also used to justify the tax levied by Muslim states as an administrative cost. See Wells, *supra* note 5, at 49.

³¹ See The Quran, *Surah* 9:60 (Abdullah Yusuf Ali trans.) ("those whose hearts have been recently reconciled" refers to recent converts to Islam) and to those who are potential converts and those who do not fully believe in the message of Islam (Pickthall trans.) ("[H]ere reconciliation is not completed").

³² Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 43 (1998). But see Wells, *supra* note 5, at 52 (arguing that that slaves were considered an investment in production and therefore exempt from payment of zakat).

³³ ABU HAMID AL-GHAZALI, MYSTERIES OF ZAKAT 65 (Nabih Amin Faris trans., 1974) (Al-Ghazali limits the amount that a debtor may receive to the extent of indebtedness in a separate discussion from manumission payments.).

³⁴ See Wells, *supra* note 5, at 50; see also ZIAUDDIN AHMED, ISLAMIC STUDIES 343–355 (vol. 10, No. 4, Dec. 1971) (The seventh class has very wide connotations and can include a plethora of activities. A historic interpretation of this was to help those engaged in the defence of Islam.).

³⁵ NICOLAS P. AGHNIDES, MOHAMMEDAN THEORIES OF FINANCE 527 (1916).

³⁶ See Wells, *supra* note 5, at 53.

³⁷ Mohammed I. Khalili, *A Comment on Heat-of-Passion Crimes, Honor Killings, and Islam*, 2 POL. & LIFE SCI. 38 (2002).

Allah will withhold his blessings from that person.³⁹ Zakat also makes it obligatory to keep property productive and distribute a part to others for common good.⁴⁰

Before determining the percentage of Zakat to be given, it is essential to calculate what proportion of wealth Muslims need for their sustenance and living. This is known as *nisab*. *Nisab*, is a limit that is set forth for a person's wealth which includes a person's living costs.⁴¹ If one's wealth triggers the *nisab* limit, the payment of Zakat is obligatory.⁴² Further, Zakat is paid on the excess wealth which has not been used for over a year.⁴³ There are clearly specified limits for *Nisab* and Zakat:⁴⁴ 200 dirhams for cash value and commercial capitals; 5 camels, 30 cows and 40 goats/sheep for pasturing herds; 5 *Wasqs* (camel loads) or 300 *Sa's* for grains and essential food stuffs. Sahih Al Bukhari also adds that property worth less than five *uqiyas* of silver will not be subject to Zakat.⁴⁵ Crops that are irrigated are subject to a 5% Zakat,⁴⁶ while crops that do not require irrigation are subject to a 10% Zakat.⁴⁷ Pearls, ambergris as well as found buried treasure⁴⁸ is subject to Zakat at the rate of 20%.⁴⁹ However, the default rate for other taxable goods is 2.5% of their value.⁵⁰

³⁸ The Hadith is considered a report of the sayings and deeds of the Prophet Muhammad as bestowed upon his followers and is an important jurisprudential resource to understanding and placing the Qur'an in context.

³⁹ SAHIIH BUKHARI, HADITH, Vol. 2, Book 24, No. 513, available at http://www.sahih-bukhari.com/Pages/Bukhari_2_24.php. Narrated by Asma ("The Prophet said to me, Do not withhold your money, (for if you did so) Allah would withhold His blessings from you."); Vol. 2, Book 24, No. 515, available at http://www.sahih-bukhari.com/Pages/Bukhari_2_24.php. Narrated by Asma' bint Abu Bakr ("That she had gone to the Prophet and he said, Do not shut your money bag; otherwise Allah too will withhold His blessings from you. Spend (in Allah's Cause) as much as you can afford.").

⁴⁰ See ABDUL AZIZ BIN MUHAMMAD, ZAKAT AND RURAL DEVELOPMENT IN MALAYSIA 79–101 (1993).

⁴¹ See THE TRANSLATION OF THE MEANINGS OF SAHIIH AL-BUKHARI (Taqi-ud-din Al-Hilali et al. eds., Dr. Muhamad Muhsin Khan trans., 1996).

⁴² Ziauddin Ahmad, *Nisab of Zakat*, 20(3) ISLAMIC STUD. INST. 239 (Autumn 1981).

⁴³ Salma Taman, *The Concept of Corporate Social Responsibility in Islam*, 21 IND. INT'L & COMP. L. REV. 481, 489 (2011).

⁴⁴ See Ahmad, *supra* note 42, at 239.

⁴⁵ See BUKHARI, *supra* note 20, at 876–1772.

⁴⁶ *Id.* at 1483.

⁴⁷ *Id.*

⁴⁸ *Id.* at 336.

⁴⁹ *Id.* at 335.

⁵⁰ *Id.* at 1454.

Non-compliance with regard to the payment of Zakat results in numerous unwanted results including transformation of the person's wealth into a bald-headed poisonous male snake.⁵¹ Further, if a person hoards wealth and does not pay Zakat, according to the Hadith, he will be subject to brutal punishment and a searing hell fire.⁵²

B. Dana in Buddhism

Buddhist scriptures are described in the Triptika meaning "three baskets."⁵³ These include the Vinaya Pitaka, the Sutta Pitaka and the Abhidhama Pitaka.⁵⁴ Each Pitaka is divided into Nikāyas or volumes.⁵⁵ The Sutta Pitaka⁵⁶ consists of five Nikāyas—the Dīgha-nikāya, the Magghima-nikāya, the Samyutta-nikāya, the Anguttara-nikāya, and the Khuddaka-nikāya.⁵⁷ It is under the Anguttara Nikaya that the Dana Sutta (or teachings pertaining to gifts) is provided.⁵⁸

The concept of Dana loosely refers to the act of charitable contributions.⁵⁹ Of course, this may not be restricted to currency only—food, medicine, kindness, compassion and knowledge may all be bestowed

⁵¹ *Id.* at Vol. 2, Book 24, No. 486; Vol. 6, Book 60, No. 88; Vol. 6, Book 60, No. 182.

⁵² See BUKHARI, *supra* note 20, Narrated by Al-Ahnaf bin Qais Vol. 2, Book 24, No. 489; Narrated by 'Adi bin Hatim Vol. 2, Book 24, No. 494; Narrated by 'Adi bin Hatim Vol. 2, Book 24, No. 498; Narrated by Aisha Vol. 2, Book 24, No. 499; Narrated by Abu Said Al-Khudri Vol. 2, Book 24, No. 541; Narrated by Az-Zubair bin Al'Awwam, Vol. 2, Book 24, No. 550.

⁵³ LEWIS LANCASTER, *Buddhist Books and Texts: Canon and Canonization*, in *ENCYCLOPEDIA OF RELIGION* 1252 (2d ed. 2004).

⁵⁴ Nak Choon Paik, *Tripitaka Koreana*, 32 *TRANSACTIONS OF THE KOREA BRANCH OF THE ROYAL ASIATIC SOCIETY* 62 (1951).

⁵⁵ *The Pali Text Society's Pali-English Dictionary*, <http://dsal.uchicago.edu/cgi-bin/philologic/getobject.pl?c.2:1:6.pali> (last visited Mar. 30, 2014).

⁵⁶ Paik, *supra* note 54 (the Sutta-pitaka professes to record the discourses uttered by the Buddha during his lifetime).

⁵⁷ See generally LUCIEN STRYK, *WORLD OF THE BUDDHA: AN INTRODUCTION TO BUDDHIST LITERATURE* (1994).

⁵⁸ Tipitaka, *Anguttara Nikaya* 7.49.

⁵⁹ VIJAY NATH, *DĀNA, GIFT SYSTEM IN ANCIENT INDIA, C. 600 BC–C. AD 300: A SOCIO-ECONOMIC PERSPECTIVE* (1987); ELLISON BANKS FINDLY, *DĀNA: GIVING AND GETTING IN PALI BUDDHISM* (2003); TOSHIGHI ENDO, *DĀNA: THE DEVELOPMENT OF ITS CONCEPT AND PRACTICE* (1987); MARIA RUTH HIBBETS, *THE ETHICS OF THE GIFT: A STUDY OF MEDIEVAL SOUTH ASIAN DISCOURSES ON DĀNA* (1999); K. Lakshmi, *Altruism and Dāna: Impact on Self and Well-being*, 19(1) *J. HUM. VALUES* 65 (2013); Gunaseela Vitanage, *Buddhist Ideals of Government* (2014 ed. 1961).

as gifts.⁶⁰ It may sound paradoxical but one indeed possesses something worthwhile not by hoarding but by sharing with others. The more he gives to others, the more he has for his own.⁶¹

The concept of Dana is a purely discretionary, in the sense that there is no obligation to give—and that it should result out of the donor's free will.⁶² With regard to the circumstances under which a gift should be given, Buddhist scripture states, "Wherever the mind feels inspired."⁶³

However, that is not to say that Dana is unimportant in the realm of Buddhist texts. The primary ethical activity which a Buddhist learns to develop is giving, *dāna*, which forms a basis for further moral and spiritual development is not only practiced towards the community, but it is a pervading value of Buddhist societies.⁶⁴ Further,

assuming a steady rate of diligent wealth accumulation (and no debt), reduced consumption permits greater opportunity for giving. This is desirable not simply because generosity is a householder virtue, but because giving allows Buddhists to practice non-attachment to material objects as well as possessive feelings; it is training in selflessness, non-self or *anattā*.⁶⁵

Under Buddhism, the only path to prosperity is by overcoming poverty. One of its appropriate tools is the perfection of giving, the above-mentioned *Dāna Pāramī*.⁶⁶

C. Dana in Hinduism

Hinduism one of the oldest of the major religions also subscribes to the concept of Dana, as a practice of virtue. Compassion and assistance to others in need is a highly cherished value in Hinduism and has been recognized as a most potent source of *punya* (merit).

⁶⁰ Siri Perera, *Charity or Dana in Buddhism*, 93 THE MAHA BODHI 17 (1985).

⁶¹ K.S. Dhammananda, *How to Practice Buddhism*, BUDDHIST MISSIONARY SOCIETY (1989).

⁶² FINDLY, *supra* note 59.

⁶³ Thanissaro Bhikkhu, *No Strings Attached: The Buddha's Culture of Generosity*, ACCESS TO INSIGHT, <http://www.accesstoinsight.org/lib/authors/thanissaro/nostringsattached.html> (last visited on Apr. 6, 2014).

⁶⁴ PETER HARVEY, AN INTRODUCTION TO BUDDHISM: TEACHINGS, HISTORY AND PRACTICES (INTRODUCTION TO RELIGION) (1990).

⁶⁵ Juliana Essen, *Buddhist Economics*, in HANDBOOK OF ECONOMICS AND ETHICS 35 (Jan Peil & Irene Van Staveren eds., 2009)

⁶⁶ Glen Alexandrin, *Elements of Buddhist Economics*, 20(2) INT'L J. SOC. ECON. 3 (1993).

The tenets of Hinduism are not crystallized into a single body of literature.⁶⁷ Rather, it is spread over a number of texts, which have been created at various points of time. These texts include the Vedas, their accompanying Upanishads, the Bhagavad Gita, the Manusmriti, amongst others. The Rig Veda suggests that “The person who has no concern (for others) earns his food in vain. I tell you the truth—it is as good as his death. He, who feeds neither the good and the learned nor a friend and eats all by himself, only sins all by himself.”⁶⁸

The principles of these religious texts were further made applicable to govern Hindu society and polity as guidelines. One of the best known guidelines is the Manusmriti.⁶⁹ The Manusmriti makes a number of references to the act of giving. One should give, according to one’s ability, wealth to Brahmanas learned in the Vedas and living alone; (thus) one obtains after death heavenly bliss.⁷⁰ Let him, without tiring, always offer sacrifices and perform works of charity with faith; for offerings and charitable works made with faith and with lawfully earned money, (procure) endless rewards.⁷¹ “Let him always practise, according to his ability, with a cheerful heart, the duty of liberality, both by sacrifices and by charitable works, if he finds a worthy recipient (for his gifts).”⁷²

The Manusmriti goes on to describe, in some detail, the resulting benefits of gifting various items including water, food, gold, silver, property, grain, cows, amongst others.⁷³ It is also believed that these benefits would be gained in the birth succeeding the one in which the gift was given.⁷⁴

⁶⁷ Letter addressed to Melchior Cochet de Saint Vallier by Father Boucher, dated circa 1714, as cited in J.H. NELSON, A PROSPECTUS OF THE SCIENTIFIC STUDY OF HINDU LAW 1188 (1881).

⁶⁸ M.V. Nadkarni, *Does Hinduism Lack Social Concern?*, ECONOMIC AND POLITICAL WEEKLY (2007).

⁶⁹ Literally translated as “what was remembered by Manu.” Under Hindu belief, Manu is the progenitor of mankind upon the commencement of each yuga (cycle) of the universe and is responsible for the transference of divine mandate from the old yuga into the new. GEORG BUHLER, 25 THE LAWS OF MANU (1886). Further, the manner in which the Manusmriti is constructed, giving unity to the entire body of Hindu jurisprudence, makes it an extremely popular source of Hindu law, Patrick Olivelle, *Renouncer and Renunciation in the Dharmasastras*, in STUDIES IN DHARMASUTRA 102 (1984).

⁷⁰ Manusmriti XI.6 BUHLER.

⁷¹ Manusmriti IV.226 BUHLER.

⁷² Manusmriti IV.227.

⁷³ Manusmriti IV.228–233.

⁷⁴ Manusmriti IV.234.

Under the Manusmriti, while business and industry were encouraged, earning wealth had to be subject to dharma and unfair dealings had to be banned.⁷⁵ For Hindus *dana* (giving)⁷⁶ is an important part of one's dharma (religious duty). *Dana* is inextricably linked to the Hindu concept of dharma, which has a wide variety of meanings such as eternal law, duty, conduct, behavior, morality and righteousness.

The four primary objectives in the practice of *Dana* are:⁷⁷

- ***Punya***—Merit, the polar opposite of *paap* or sin which helps us attain *moksha* or liberation.
- ***Prayaschita***—Act of repentance, compensation and confession by a religious or social sinner. This is the second most important philosophical motive behind *Dana* in India. This could take on the form of monetary taxation or performance of rituals, community feast and giving alms to the poor. Temples in India utilise *prayashchita* as an effective fundraising tool.
- ***Aparigriha***—Non-accumulation of wealth; living with bare essentials. This is most difficult to follow and is practised by spiritual people and those who have renounced the world.
- ***Karuna***—Compassion for the poor and destitute.

Of the four, *punya* and *prayashchita* imply self-interest (therefore motivating individuals to donate), whereas *aparigriha* and *karuna* imply selfless duty towards others.⁷⁸

Interestingly however, certain forms of debt financing in medieval India were considered as almsgiving as well. In certain parts of India, the moneylending practice involved the payment of interest as well.⁷⁹ Depending upon the interest rate charged upon debts, the practice of moneylending could be virtuous, sinful or neither. A virtuous interest is that of 1% a month or 12% a year. It was considered an act of virtue on the basis

⁷⁵ Nadkarni, *supra* note 68.

⁷⁶ Sandeep Singh, *Spirituality and the Role of Ego: Insights for Management*, 4(1) PURUSHARTHA: A JOURNAL OF MGMT. ETHICS AND SPIRITUALITY 11 (2012).

⁷⁷ P. Anand, *Hindu Diaspora and Religious Philanthropy in the United States* (presented at the 6th International Society for Third Sector Research, Toronto, July 2004).

⁷⁸ Rakesh Kapoor & Amit Kumar Sharma, *Religious Philanthropy and Organized Social Development Efforts in India* (Occasional Paper No. 3, Sampradaan—Indian Centre for Philanthropy, 2000).

⁷⁹ Contrast this with Islamic forms of finance.

that in spite of the small profit made by the financier, the debt itself alleviated the misery of one in need.⁸⁰ This form of financing was akin to almsgiving.

Similar to the concept in Buddhism, Dana is discretionary in Hinduism as well. This is in contrast to Zakat in Islam, which is mandatory.

D. Whether Religion May Be a Driving Factor of CSR

One of the key issues addressed by this paper is the applicability of religious beliefs in the process of corporate decision making. Section II of this paper argues that in family and individual run firms, the propensity of inculcating personal beliefs and values increases. So why not religious beliefs?

The idea of a corporation being run keeping in mind religious beliefs cannot be any more unfamiliar than a corporation being run keeping in mind racial ones. While there is enough evidence to support the existence of racial discrimination in corporations, sadly, no such empirical evidence exists for religious sentiment.⁸¹

The question that then arises is of the incentives of a majority shareholder/owner to induct his/her own religious beliefs into the workplace. In many extremes, doing so would result in a form of religious intolerance which may run afoul of an applicable equal employment opportunities rule. However, if we are to consider the firm as an extension of the primary shareholder, then it stands to reason that the religious beliefs of the individual in near total control of the firm will also be transferred to the firm.

There have been occasions when the state mandates, under religious diktat, that certain norms be followed. An example of this would be the practice of Zakat in Islamic nations. Corporate Social Responsibility is an

⁸⁰ Ludo Rocher, *Father Boucher's Letter on the Administration of Hindu Law*, in *STUDIES IN DHARMASUTRA* 32–33 (1984).

⁸¹ Lisa A. Keister, *Religion and Wealth: The Role of Religious Affiliation and Participation in Early Adult Asset Accumulation*, 82(1) *SOCIAL FORCES* 175 (2003) (Specifically with regard to wealth distribution, researchers have documented extreme inequalities in wealth ownership, but the processes that create these inequalities are not well understood. One important contributing factor that attracts little attention is religion.).

obligation for Muslim citizens⁸² and corporations too, being artificial persons, are required to pay Zakat.⁸³ The amount of Zakat to be paid by Malaysian corporations on assets is 2.5%.⁸⁴ Zakat, in the corporate sector is based on the principle that anything obtained to trade for a profit is subject to it.⁸⁵

Corporations in Pakistan are required to pay Zakat at the rate of 2.5% on the following 11 assets—

1. Savings Bank Accounts;
2. Notice Deposit Receipts/Accounts;
3. Fixed Deposit Receipts and Accounts;
4. Savings/Deposit Certificates, Accounts and Similar Certificates/Accounts;
5. NIT Units;
6. ICP Mutual Fund Certificates;
7. Government Securities;
8. Shares of Companies and Statutory Corporations;
9. Annuities;
10. Life Insurance Policies;
11. Provident Funds

Buddhism and Hinduism on the other hand, do not make acts of charity mandatory. Both follow a doctrine of causality—good causes and intentions leads to good results; evil causes lead to evil results. By encouraging followers to follow good deeds, it may be argued that Buddhism creates harmony in society.⁸⁶

If we were to consider the various definitions of Corporate Social Responsibility,⁸⁷ one common thread that seems to bind most opinions is

⁸² See Taman, *supra* note 43, at 483.

⁸³ *Id.* at 489.

⁸⁴ Nur Barizah Abu Bakar, *A Zakat Accounting Standard (ZAS) for Malaysian Companies*, 24(4) AM. J. ISLAMIC SOC. SCI. 79 (2007); Medani Ahmed & Sebastian Gianci, *Zakat*, in ENCYCLOPEDIA OF TAXATION AND TAX POLICY 479 (2005).

⁸⁵ YUSUF AL-QARADAWI & FIQH AZ ZAKAT: A COMPARATIVE STUDY: THE RULES, REGULATIONS AND PHILOSOPHY OF ZAKAT IN THE LIGHT OF THE QURAN AND SUNNA (Kahf Monzer trans., 1999).

⁸⁶ JOANNA MACY, MUTUAL CAUSALITY IN BUDDHISM AND GENERAL SYSTEMS THEORY: THE DHARMA OF NATURAL SYSTEMS (1991).

⁸⁷ For a review of a large number of definitions of the term “Corporate Social Responsibility,” see Alexander Dahlsrud, *How Corporate Social Responsibility Is defined: An Analysis of 37 Definitions*,

that—in order for a corporation to undertake effective CSR activities, it must build socially responsible processes and considerations into its very structure and operations. Buddhism does not condemn wealth as long as such wealth is not exploitative. Moreover, people who are charitably inclined can use their wealth in ways that are beneficial for society as a whole.⁸⁸

These ethical instructions⁸⁹ in Buddhism point beyond the realization of well-being in the society, to the ensuring of the prospects of future generations. Further, Buddhism aims the cessation of suffering, which precedes the economic aim of the profit motive. This intrinsic motivation can fill the gap between the deficiencies of CSR and effective social responsibility.⁹⁰

There seems to have been some application to Buddhist principles to corporations Ahimsā or “without harm” in accordance with Buddhist business practices requires a threefold responsibility—towards human beings, society and the environment—because “*these principles are related to the three interconnected aspects of human existence.*” In accordance with this statement, economic activities must not harm oneself, the well-being of the actor, and must not harm others, by causing social problem or environmental imbalance.⁹¹ There are a number of new approaches to business all over the world, wherein the aim is neither profit-maximization, nor the cessation of suffering, but these businesses function in accordance with the above mentioned five principles of the Buddhist economic strategy—in a sense they are “Buddhist” companies. Examples of such businesses include community supported agriculture, a variety of “slow” movements, eco-tourism, ethical fashion and ethical banking, etc. They

15(1) CORP. SOC. RESP. & ENVTL. MGMT. 1, 7 (2008). According to McWilliams and Siegel, CSR refers to “actions that appear to further some social good, beyond the interests of the firm and that which is required by law,” A. McWilliams & D. Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, ACAD. MGMT. REV. 117 (2001); see also Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38(3) BUS. & SOC. 268, 269 (1999) (One of the major issues pertaining to CSR is the lack of a universally accepted definition.).

⁸⁸ PHRA THEPWETHI & P.A. PAYUTTO, BUDDHIST ECONOMICS—A MIDDLE WAY FOR THE MARKET PLACE 39 (Bruce Evans & Dhammavijaya trans., 1994).

⁸⁹ VEN. PATEGAMA GNANARAMA, AN APPROACH TO BUDDHIST SOCIAL PHILOSOPHY 1–7 (1996).

⁹⁰ L. Lahiri, *Buddhism and Social Harmony*, in BUDDHISM AND SOCIAL HARMONY: PROCEEDING OF THE 12TH INTERNATIONAL BUDDHIST CONFERENCE, 1986, at 64 (1986).

⁹¹ THEPWATHI & PAYUTTO, *supra* note 88.

contribute to the realization of well-being for all as they operate beyond the market, employ handicapped people, realize two-way bilateral relations, aim the satisfaction of basic needs, protect nature, and re-establish trust in society.⁹² Buddhism has also been identified as a potent resource for combating the miseries associated with living in an advanced economy. Most importantly, the economic system should serve the whole of society and protect the environment and its diversity.⁹³

Some difficulty arises in applying tenets of Hinduism to businesses. While some anecdotal evidence suggestive of the Hindu principles of contentment and fatalism being responsible for the slow rate of GDP growth in India in the seventies exists,⁹⁴ corporate and economic stability may be explained in terms of cultural characteristics specifically associated with Vedic Hinduism.⁹⁵

All three religions as discussed above do have a common strain of thought with regard to charitable giving. While Islam mandates it and Islamic nations implement the same through state regulation, Buddhism and Hinduism adopt a more discretionary approach—citing causality for what is referred to as “good karma.”

The question that then arises is that whether decision makers of companies would inculcate religious principles. On this point, it may be argued that ethical principles are valuable only if there is a desire on the part of individual decision-makers for them to be applied.⁹⁶ Thus, in spite of any religious or moral pressures, the application of such religious or moral guidelines are personal choices and absent state intervention, individuals may choose either way. However, need to recognize the complex structure

⁹² Julie Nelson, *The Relational Firm: A Buddhist and Feminist Analysis*, in BUSINESS WITHIN LIMITS: DEEP ECOLOGY AND BUDDHIST ECONOMICS 195–219 (Laszlo Zsolnai & Knut Johannessen Ims eds., 2006).

⁹³ Ian Harris, *Buddhism and Good Governance: Doctrinal Resources, Institutional Problems*, in SELECTED PAPERS ON BUDDHIST CONTRIBUTIONS TO GOOD GOVERNANCE AND DEVELOPMENT 26–45 (2007).

⁹⁴ This is referred to as the “Hindu rate of growth”—the term is attributed to Professor Raj Krishna, an economist who retired as Member of the Planning Commission of India, see Montek Singh Ahluwalia, *First Raj Krishna Memorial Lecture, 1995: Economic Reforms for the Nineties*, available at <http://planningcommission.gov.in/aboutus/speech/spemsa/msa033.pdf>.

⁹⁵ Surendra K. Kaushik, *Hindu Rate of Growth as the Global Growth Rate*, 4(2) INT’L RES. J. APPLIED FIN. 272 (2013).

⁹⁶ Archie B. Carroll, *Principles of Business Ethics: Their Role in Decision Making and an Initial Consensus*, 28(8) MGMT. DECISION 24 (1990).

of business principles and the extensive reach of moral sentiments by using theoretical considerations and a careful interpretation of Japan's remarkable economic success as a result of inculcating traditional values in business practices.⁹⁷ The presence or absence of particular features of business ethics can influence the operation of the economy, and even the nature of the society and its politics.⁹⁸

In the event that shareholders and management do choose to imbibe traditional values and religious diktat into their everyday business practices, would there be an incentive to do so? Possibly. If one were to consider a corporation as an extension of a majority shareholder or group of shareholders, then any action taken on part of the corporation would be an action on part of the shareholders.⁹⁹ In which case, a corporate action that qualifies as one with good intentions or good effects, including the act of charity, for example, would be considered as an action on part of not just the company, but the shareholders as well. Thus, the benefits derived from a good action would also, under religious edict, be distributed between the company as well as the shareholders.

However, it has been seen that, broadly, religious individuals do not prioritise the responsibilities of the firm differently, but do tend to hold broader conceptions of the social responsibilities of businesses.¹⁰⁰

We may now examine the creation of the modern-day corporation through the lens of independent corporate personality as well as a nexus of contracts.¹⁰¹ In the absence of a large number of shareholders, Indian corporations tend to be family and individual driven¹⁰²—such families and individuals would have a propensity to inculcate their individual traditions into inanimate and juristic bodies such as the corporations they run and

⁹⁷ Amartya Sen, *Economics, Business Principles and Moral Sentiments*, 7(3) BUS. ETHICS Q. 5 (1997).

⁹⁸ *Id.*

⁹⁹ See The Quran, *supra* note 27.

¹⁰⁰ S. Brammer, Geoffrey Williams & John Zinkin, *Religion and Attitudes to Corporate Social Responsibility in a Large Cross-Country Sample*, 71(3) J. BUS. ETHICS 229–43 (2007).

¹⁰¹ See Mitu G. Gulati, William A. Klein & Eric M. Zolt, *Connected Contracts*, 47 UCLA L. REV. 887 (2000); Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 681–82 (1995) (describing the “nexus” or “web” theory of corporate governance).

¹⁰² Randall K. Morck & Lloyd Steier, *The Global History of Corporate Governance* (NBER Working Paper 11062, 2005).

control.¹⁰³ In family run firms, particularly in India, most families owning such businesses also play a significant role in the management of such businesses. It is not unusual to see family members of the promoter on the Board of Directors of a family run corporation, despite the absence of qualifications or experience required to manage a company. Further, certain managerial positions within the company are often vested within the family itself—passing on from generation to generation.¹⁰⁴ In the absence of a true separation of powers between shareholders and company management, the regular rules and processes of corporate decision making no longer apply.

In such cases, businesses tend to be run with a heavy influence of the owner's (or the family's) personal preferences. Most such influences may be innocuous, for example, the observance of certain religious festivals, but not others,¹⁰⁵ the prohibition of non-vegetarian food¹⁰⁶ within the company premises, or even the manner in which the managerial staff are addressed.¹⁰⁷ Other influences, such as discriminatory practices in employment, may not be that harmless.¹⁰⁸ Therefore, while it is true that the primary aim of a business establishment is to generate profits, it is possible that the ideologies inherent in the promoters' lives filter into the manner in

¹⁰³ The social capital invested in family run businesses also bring to the forefront, familial relationships in the governance of such family run businesses. See Mikko Mustakallio, Autio Erkkö & Shaker A. Zahra, *Relational and Contractual Governance in Family Firms: Effects on Strategic Decision Making*, 15 FAM. BUS. REV. 205 (2002).

¹⁰⁴ This practice seems to transcend international boundaries as well. Consider the case of James Murdoch, son of Rupert Murdoch, who was appointed as Deputy Chief Operating Officer of News Corporation. The Murdoch family holds approximately 40% of the voting rights in News Corporation. See *James Murdoch: A chip off the old block?*, BBC NEWS (Nov. 4, 2003), available at <http://news.bbc.co.uk/2/hi/business/3132678.stm> (last accessed on Jan. 19, 2014).

¹⁰⁵ The distribution of gifts to employees during Diwali (the Festival of Lights) is a commonplace occurrence in businesses in North-India.

¹⁰⁶ A number of Indian communities and religious sects have strict dietary requirements that prohibit the consumption of animal products, particularly meat.

¹⁰⁷ Sahara India Pariwar's majority shareholder and Chairman, Mr. Subroto Roy, insists on being referred to as a "Managing Worker" and as "Sahasri."

¹⁰⁸ Rasheeda Bhagat, *Muslims' dilemma in Modiland*, BUSINESS LINE (Nov. 19, 2012), available at <http://www.thehindubusinessline.com/opinion/columns/rasheeda-bhagat/muslims-dilemma-in-modiland/article4112041.ece> (last accessed on Jan. 19, 2014) (arguing that Indian Muslims are underprivileged—without homes, education, employment). See also Shaikh Azizur Rahman, *Muslims masquerade as Hindus for India jobs*, ALJAZEERA (Dec. 10, 2013), available at <http://www.aljazeera.com/indepth/features/2013/12/muslims-masquerade-as-hindus-india-jobs-2013129134443863250.html> (last accessed on Jan. 19, 2014) (noting that facing religious discrimination in the Hindu-dominated job market, many Muslims are forced to assume fake identities).

which the business establishment is run.¹⁰⁹ Given that Indian family-run businesses are prone to imbibing practices based on religious diktat, we must therefore, consider whether the tradition of giving, as mandated by religion may be a significant factor to boost CSR in India. A recent report even suggests that 75% of Indian consumers would be willing to spend more on products manufactured by socially responsible companies.¹¹⁰ Perhaps the tradition of giving, spurred by religious mandate, does make CSR more relevant in India.

III. THE PRE-2013 POSITION

In its original form, CSR in India was borne out of a Gandhian model of trusteeship and included charitable donations by business houses.¹¹¹ A formal expression of CSR came in 2009, when the Indian Ministry of Corporate Affairs introduced the Voluntary Guidelines for Corporate Social Responsibility.¹¹² Along with the Corporate Governance Voluntary Guidelines which were also notified in the same year, 2009 was a watershed event in the development of corporate law in India. Fresh out of the Satyam Computer Services accounting scandal,¹¹³ the Indian

¹⁰⁹ See Harvey S. James, *Owner as Manager, Extended Horizons and the Family Firm*, 6 INT'L J. ECON. BUS. 41 (1999) (arguing that family ties, loyalty, insurance and stability often play a significant role in decision making in family run firms).

¹¹⁰ *Consumers Who Care*, NEILSEN (Aug. 2013), available at <http://www.nielsen.com/us/en/reports/2013/consumers-who-care.html> (last accessed Nov. 30, 2013).

¹¹¹ Seema G. Sharma, *Corporate Social Responsibility in India: An Overview*, 43 INT'L LAW 1515 (2009).

¹¹² Hereinafter referred to as the "2009 CSR Guidelines."

¹¹³ In January 2009, Mr. Ramalinga Raju, the promoter of Satyam Computer Services (Satyam), one of India's largest information technology companies voluntarily confessed to major financial wrong-doings committed by him over the years to inflate the profits in his resignation letter to the Board of Directors. This included, inter alia, showing inflated revenues, non-existent debtors and earnings from interest in the magnitude of Rs 7000 crores (approximately USD 1.4 billion). See *It Was like Riding a Tiger, Not Knowing How to Get Off Without Being Eaten*, FINANCIAL EXPRESS (Jan. 8, 2009), available at <http://www.financialexpress.com/news/it-was-like-riding-a-tiger-not-knowing-how-to-get-off-without-being-eaten/407917> (accessed Aug. 18, 2013); Mandar Nimkar, *How much is Satyam's stock actually worth?*, ECON. TIMES (Jan. 8, 2009), http://articles.economictimes.indiatimes.com/2009-01-07/news/27644211_1_chairman-b-ramalinga-raju-cash-and-bank-balances-satyam-computer-services (accessed Aug. 18, 2013); Heather Timmon & Jeremy Kahn, *Indian Company in a Fight to Survive*, N.Y. TIMES (Jan. 9, 2009), available at <http://www.nytimes.com/2009/01/09/business/worldbusiness/09outsourc.html> (accessed Aug. 18, 2013).

government strove to quickly revise the transparency and accountability norms applicable to companies.¹¹⁴

A. Gandhian Principles of Trusteeship

Through scattered writings and speeches, Mohandas Karamchand Gandhi espoused the idea of trusteeship, a socio-economic philosophy which encouraged the wealthy to retain the equivalent of an “honorable livelihood” and to utilize the remainder of their wealth for the welfare of the less fortunate.¹¹⁵ Although private property is not prohibited under the trusteeship theory, whatever wealth one holds beyond one’s needs (to be judged by average people), one holds as a trustee for the people and should, therefore, spend it for their benefit. To put it differently, trusteeship “does not recognize any right to private ownership of property except in so far as it may be permitted by society for its own welfare” and “an individual will not be free to hold or use his wealth for selfish satisfaction or in disregard of the interests of society.”¹¹⁶

This was met with considerable resistance from socialist thinkers who found this concept to be in favour of landlords and capitalists. However, Gandhi’s overall idea of non-violent independence included economic equality, which, according to him was the key aspect of such independence. For him, a non-violent system of government was an impossibility as long as the gulf between the rich and the hungry existed. In spite of reservations against the idea, he mentioned that “I adhere to my doctrine of trusteeship in spite of the ridicule that has been poured upon it. It is true that it is difficult to reach. So is non-violence. But we made up our minds in 1920 to negotiate that steep ascent. We have found it worth the effort.”¹¹⁷

¹¹⁴ Along with the Voluntary Corporate Governance Guidelines and the Voluntary CSR Guidelines, the Ministry of Corporate Affairs also undertook an exercise to completely revamp and amend the Companies Act, 1956, which was replaced by the new Companies Act, 2013.

¹¹⁵ GANDHI: THE MEANING OF MAHATMA FOR THE MILLENNIUM 164 (Kuruwila Pandikattu ed., 2001).

¹¹⁶ MAHATMA GANDHI, TRUSTEESHIP 5 (Ahmedabad, Navajivan Publishing House 1960).

¹¹⁷ MAHATMA GANDHI, “HIND SWARAJ” AND OTHER WRITINGS 177 (Cambridge Univ. Press 1997).

The concept of trusteeship has been echoed as a moral basis on which business could be run¹¹⁸ as well as a founding principle of corporate governance in India.¹¹⁹

B. Guidelines on CSR—2009–2013

The 2009 CSR Guidelines set out a fundamental principle that each business entity ought to formulate a CSR policy to guide its strategic planning and provide a roadmap for its CSR initiatives, which should be an integral part of overall business policy and aligned with its business goals. Further, it also set out six core elements as follows:

- Care for all stakeholders—including shareholders, employees, customers, suppliers, project affected people, society at large
- Ethical functioning
- Respect for workers' rights and welfare
- Respect for human rights
- Respect for the environment
- Activities for social and inclusive development

The 2009 Guidelines also set out proposed recommendations for the implementation of the CSR activities. These recommendations included partnering with local authorities, business associations and civil society, allocation of specific budgets for CSR expenditure, engaging with fora and other businesses to encourage CSR activities and to disseminate information on the CSR policy adopted by the company.

The 2009 CSR Guidelines were replaced in 2011 with the National Voluntary Guidelines on Social, Environmental and Economical Responsibilities of Business¹²⁰ issued by the Ministry of Corporate Affairs and drafted under the aegis of the Indian Institute of Corporate Affairs. The

¹¹⁸ C. Gopinath, *Trusteeship as a Moral Foundation for Business*, 110 BUS. & SOC. REV. 331–44 (2005).

¹¹⁹ One of the definitions for corporate governance in India is “the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders.” Report of the SEBI Committee on Corporate Governance, Feb. 8, 2003. Do note however, the usage of the term “shareholder”—referring to members of a corporation reposing their trust and investment in a board of directors as opposed to “stakeholder” who in all likelihood, do not have any pecuniary relationship with the board of directors.

¹²⁰ Hereinafter referred to as the “2011 CSR Guidelines.”

2011 CSR Guidelines were drafted taking into account significant inputs and reactions received on the 2009 CSR Guidelines. The 2011 CSR Guidelines “urges businesses to embrace the triple bottom-line¹²¹ approach whereby its financial performance can be harmonized with the expectations of society, the environment and the many stakeholders it interfaces with in a sustainable manner.” It further develops on the six core elements of the 2009 CSR Guidelines to set out nine principles as follows:

- Businesses should conduct and govern themselves with ethics, transparency and accountability
- Business should provide goods and services that are safe and contribute to sustainability throughout their life cycle
- Businesses should promote the well-being of all employees
- Businesses should respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized
- Businesses should respect and promote human rights Business should respect, protect, and make efforts to restore the environment
- Businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner
- Businesses should support inclusive growth and equitable development
- Businesses should engage with and provide value to their customers and consumers in a responsible manner

There are two aspects to the 2009 and the 2011 Guidelines which are of prime importance for the purposes of this paper. The first is that the approaches of both the erstwhile guidelines urged firms to embrace the idea of CSR as part of their business strategy—that businesses should include concerns for the natural and social environment that they operate in. While there have been recommendations for earmarking funds required to carry out such CSR activities, the said earmarking was part of a larger

¹²¹ The phrase “the triple bottom line” refers to a concept wherein companies prepare three different (and quite separate) bottom lines. One is the traditional measure of corporate profit—the “bottom line” of the profit and loss account. The second is the bottom line of a company’s “people account”—a measure in some shape or form of how socially responsible an organisation has been throughout its operations. The third is the bottom line of the company’s “planet” account—a measure of how environmentally responsible it has been. The triple bottom line (TBL) thus consists of three Ps: profit, people and planet. *See generally* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (Capstone 1997).

encouragement to adopt socially responsible strategies as part of their operating and management practices.

The second aspect is that, at the core of the 2009 CSR Guidelines lay the fact that compliance with the provisions therein was not mandatory. Traditionally, the hallmark of any CSR activity has been its voluntary nature.¹²² However, with the evolution of the concept of CSR and growing voices calling for more participation by companies in the well-being of the society, there has been an ongoing demand to make CSR mandatory.¹²³

However, by applying CSR as mandatory would increase production costs, weaken the competitiveness of the company's products and the responsibility to develop infrastructures and economic empowerment would be partially transferred from the government to companies. Further, the absence of tax incentives for the companies engaging in CSR would unduly burden companies more. In contrast mandatory CSR would provide legal certainty and clear guidelines in implementing the CSR programs.

In India, this shift from a voluntary CSR participation to a mandatory one came about as a consequence of a thorough examination of the Companies Bill in 2009 by the Standing Committee of Parliament on Finance which resulted in a recommendation to include provisions for mandatory CSR expenditure.¹²⁴

¹²² See McWilliams & Siegel, *supra* note 11.

¹²³ See Patricia Ringiwati Waagstein, *The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications*, 455 J. BUS. ETHICS 455–66 (2011), for an overview of the debate as to whether CSR should be made mandatory or should remain voluntary. Referring to the 2007 Indonesian Law No. 40 which makes it mandatory for certain companies to engage in CSR activities, it is argued that on one hand, the adoption of such a law represents a legal recognition of the existence of CSR, and this clarification on the legal nature of a concept is necessary for understanding the obligation and responsibility. On the other hand, it has created much confusion surrounding its substance and procedures.

¹²⁴ Afra Afsharipour, *Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34 SEATTLE U. L. REV. 996–1024 (2011); see also Standing Committee on Finance, Fifty-Seventh Report on The Companies Bill, 2011, Ministry of Corporate Affairs 2012, 14–15.

IV. SECTION 135 OF THE COMPANIES ACT OF 2013

Taking up this recommendation, the new Companies Act,¹²⁵ contains provisions that make it mandatory for companies having a net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year to develop a corporate social responsibility policy.¹²⁶ Such companies are further required to contribute at least 2% of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its corporate social responsibility policy.¹²⁷ The Companies Act also set out the activities that a company may undertake in order to satisfy the requirement under Section 135 which are as follows:¹²⁸

- (i) eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and making available safe drinking water;
- (ii) promoting education, including special education and employment enhancing vocation skills especially among

¹²⁵ The Companies Bill, 2009 was introduced in the Lok Sabha on August 5, 2009, but failed to be passed. A revised version was introduced in 2011 and was passed in 2013.

¹²⁶ Clause 135, Companies Bill, 2011. The corporate social responsibility policy indicates the activities to be undertaken by the company in carrying out of its social responsibility.

¹²⁷ *Id.*

¹²⁸ Schedule VII of the Companies Bill sets out the following activities which may be included by companies in their Corporate Social Responsibility Policies. This list was amended on February 27, 2014 vide a notification by the Ministry of Corporate Affairs, Government of India. Originally, the list of entries under Schedule VII read as—

- (i) eradicating extreme hunger and poverty;
- (ii) promotion of education;
- (iii) promoting gender equality and empowering women;
- (iv) reducing child mortality and improving maternal health;
- (v) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
- (vi) ensuring environmental sustainability;
- (vii) employment enhancing vocational skills;
- (viii) social business projects;
- (ix) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and
- (x) such other matters as may be prescribed.

- children, women, elderly, and the differently abled and livelihood enhancement projects;
- (iii) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
 - (iv) 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;
 - (v) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;
 - (vi) measures for the benefit of armed forces veterans, war widows and their dependents;
 - (vii) training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;
 - (viii) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;
 - (ix) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;
 - (x) rural development projects.

In February 2014, the Ministry of Corporate Affairs, Government of India issued the Companies (Corporate Social Responsibility) Rules, 2014 (the "Rules") which *inter alia*, clarifies a number of uncertainties surrounding Section 135. The Rules clarify that CSR programmes and activities that solely benefit employees and their families would not be considered as CSR activities within the meaning of Section 135. While it is apparent that the intention of the legislature is to ensure that CSR

obligations are more widely undertaken, it undermines the general principle that employees stakeholders in corporations.¹²⁹ This should not result in a scenario where companies carry out CSR activities that benefit other stakeholders, but their own employees are unable to enjoy these benefits.¹³⁰ Further, any activities undertaken outside India are excluded. This would have considerable impact on Indian multinational companies, where CSR activities conducted in other jurisdictions would not be taken into account for the purpose of fulfillment of obligations under Section 135.

Unfortunately, apart from addressing the few issues discussed above, the Rules merely expand or elaborate the aspects set out in Section 135. As a subordinate legislation, it cannot deal with the several principal concerns that have been voiced over the last couple of years in India regarding how CSR activities would be accomplished from an operational standpoint such as the true goals of this concept are realized rather than an effort that amounts to mere lip service.¹³¹

Further, in June 2014, the Ministry of Corporate Affairs clarified that the “entries in the said Schedule VII must be interpreted liberally so as to capture the essence of the subjects enumerated in the said Schedule. The items enlisted in the amended Schedule VII of the Act, are broad-based and are intended to cover a wide range of activities as illustratively mentioned in the Annexure.”¹³² While this clarification enlarges the scope of CSR activities, the prescriptive nature of the regulation continues to be demonstrated further. For example, several limitations have been placed. One-off events are excluded from being part of CSR. Expenses incurred in compliance with statutes and legislation are excluded. These indicate that the approach of heavily regulating CSR will be accompanied by its own set of problems. While lack of clarity in the regulation will give rise to uncertainties as witnessed in the need for MCA to issue clarifications, but it

¹²⁹ See Section 166(2), Companies Act, 2013—“A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.”

¹³⁰ Umakanth Varottil, *Draft Rules under the Companies Act; CSR*, <http://indiacorplaw.blogspot.sg/2013/09/draft-rules-under-companies-act-csr.html> (last accessed on July 16, 2014).

¹³¹ *Id.*

¹³² Clarifications with regard to provisions of Corporate Social Responsibility under Section 135 of the Companies Act, 2013, General Circular No. 21/2014, Ministry of Corporate Affairs, Government of India.

is also likely that industry players may come out various structures that may have to tested against the touchstone of the regulation. In the ensuing contest between regulators and the industry, the focus is likely to be on the micro-level aspects of regulation rather than the overall philosophy of social responsibility of corporations, which one would lose sight of in the process.¹³³

Interestingly enough, the failure to adhere to the provisions of Clause 135 do not result in a specific penalty. The causes for the failure to spend such amount would instead, have to be explained by the board of directors in their report to their shareholders.¹³⁴ It may be argued that failure to meet with the CSR requirements as well as a failure to explain the reasons for the same may be penalized under Section 450 of the Companies Bill.¹³⁵

India's corporate social responsibility laws are by no means the first of its kind. In 2007, Indonesia made the first move by introducing mandatory provisions for LLCs.¹³⁶ It was then followed by Denmark where CSR activities were made mandatory in 2008.¹³⁷

It has been argued that creating a mandatory requirement for companies to compulsorily suffer expenditures on CSR activity may open up a slew of opportunities to misuse funds earmarked for CSR activity and reduce the compliance to a mere checkbox.¹³⁸ Further, there are three

¹³³ Umakanth Varottil, *MCA Clarification on CSR*, <http://indiacorplaw.blogspot.in/2014/06/mca-clarification-on-csr.html> (last accessed on July 16, 2014).

¹³⁴ Under Section 134(3)(o), Companies Bill, 2011, the annual report of board of directors to the shareholders must include the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year.

¹³⁵ Clause 450 of the Companies Bill provides for a general penalty applicable where no specific penalty has been provided (If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to ten thousand rupees, and where the contravention is continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.). One of the ramifications of the absence of a specific penalty clause is that contraventions of Clause 135 may be overlooked.

¹³⁶ Waagstein, *supra* note 123.

¹³⁷ Section 14(1) Danish Financial Statement Act.

¹³⁸ Somasekhar Sundaresan, *Govt's approach to CSR gives scope for corruption* (Sept. 10, 2010), http://www.business-standard.com/article/economy-policy/govt-s-approach-to-csr-gives-scope-for-corruption-110091300034_1.html (accessed Aug. 18, 2013). *But see* Umakanth Varottil, *Viability of Mandatory CSR* (Aug. 7, 2010), <http://indiacorplaw.blogspot.com/2010/08/viability-of-mandatory->

glaring fallacies in the provision itself, which, it is argued, would eventually contribute to a less than optimal implementation.

The first of these fallacies is the restriction of Section 135 to two primary requirements namely:

1. The creation of a Corporate Social Responsibility Committee; and
2. The mandatory expenditure of two percent of the previous three years' average net profits.

As mentioned above, both the 2009 and the 2011 guidelines presented a view that CSR was to be included in a holistic manner, into the strategy, management and operation of the company. Merely ensuring that companies set aside funds for CSR activities would hardly contribute to the spirit in which the concept of CSR was brought about. It harks back to ideologies of "corporate altruism," wherein a corporation, upon payment of a suitable sum of money to charitable causes, would be absolved of its social responsibilities. The Gandhian principles of trusteeship are somewhat lost in the drive to provide altruistic benefit to society.

The natural and social environments are not merely charitable causes. Companies do not act independently from the societies in which they operate.¹³⁹ There exists a symbiotic relationship between firms and their environments. Companies are dependent upon society for supply of human capital and consumption of goods and services just as much as society is dependent upon industry for employment and said goods and services. Similarly, companies are dependent upon the natural environment¹⁴⁰ to provide resources used in the production of goods and services just as much as the natural environment is dependent upon industry for protection from degradation and conservation.

There is a plethora of literature which challenges the traditional notion that companies exist merely to create wealth for its shareholders.¹⁴¹ It has

csr.html (accessed Aug. 18, 2013) (arguing that the CSR requirements would help vigilant investors, particularly socially responsible and ethical investors, to either engage with the companies to ensure they operate in a socially responsible manner or alternatively to exit such investments).

¹³⁹ Ira M. Millstein et al., *Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets*, ORG. ECON. COOPERATION DEV. (1998).

¹⁴⁰ The Declaration of the United Nations Conference on the Human Environment at Stockholm, June 1972 includes the warning that "Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend."

¹⁴¹ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305-60 (1976) (coining the idea of the firm as a nexus

been traditionally held that the owners or shareholders of a corporation would hire employees who would run the company and enter into contracts on behalf of the company. These employees, or directors, are deemed to owe a fiduciary obligation to serve selflessly the interests of the shareholders or the corporation.¹⁴² However, the changing nature of corporate personality must necessarily include a departure from serving shareholder interest solely and must also embrace social responsibility by companies.¹⁴³

Jensen and Meckling's 1976 paper¹⁴⁴ laid the foundations of an alternative view on corporate personality.¹⁴⁵ It was suggested that a firm is not an individual but a legal fiction in the form of a complete process. Many individuals having conflicting interests are bound within the firm by way of contractual obligations and thus, as a process, serve to regulate each other. A corporation cannot operate in isolation and is dependent on society which provides human capital and consumers. Therefore, the need of the hour is that of "corporate inclusiveness" and not "corporate altruism." Irrespective of the nature of CSR activities, whether voluntary or mandatory, in the event that CSR is made mandatory, it is submitted the scope of such CSR activity should go beyond the annual charitable donation. Section 135 seems to be more concerned with the form of CSR, rather than the substance. By suggesting that a company's CSR activity need only be extended to setting aside and incurring expenditures on

of contracts). Consider also the arguments made in Mitu G. Gulati, William A. Klein & Eric M. Zolt, *Connected Contracts*, 47 UCLA L. REV. 887 (2000); and Stephen M. Bainbridge, *The Board of Directors as a Nexus of Contracts: A Critique of Gulati, Klein and Zolt's "Connected Contracts" Model* (UCLA School of Law, Research Paper No. 02-05, 2002), <http://papers.ssrn.com/abstract=299743> (accessed June 21, 2013).

¹⁴² See Roberta Romano, *Corporate Law and Corporate Governance*, 5:2 INDUS. & CORP. CHANGE 277, 279 (1996). This is the shareholder primacy model which has been widely and traditionally accepted view taken of corporations and corporate governance.

¹⁴³ Merrick E. Dodd, *For Whom Are the Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

¹⁴⁴ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305-60 (1976) (coining the idea of the firm as a nexus of contracts). See also the arguments made in Mitu G. Gulati, William A. Klein & Eric M. Zolt, *Connected Contracts*, 47 UCLA L. REV. 887 (2000); and Bainbridge, *supra* note 141.

¹⁴⁵ The traditional view of a corporation has been that of an artificial body—an association of persons too numerous to be a firm—which is united for profit. See Arjya Majumdar, *Corporate Personality in India*, INTERNATIONAL LAW OFFICE, NEWSLETTER (Dec. 17, 2007), available at SSRN: <http://ssrn.com/abstract=2256140>.

specific types of projects, the Companies Act, 2013 seems to have taken a tremendously regressive step in the development of CSR jurisprudence in India and must be reviewed at once. Steps must be taken to ensure that the true intent and spirit of CSR—that of the inclusion of CSR in the core strategies of the company—is reflected in the legislation. Failure to do so would result in the provisions of Section 135 being reduced to an eyewash.

Given that the idea of the society at large is also involved in a company as a stakeholder, it would not be difficult to appreciate that the corporation is obligated to the society.¹⁴⁶ This brings about the second fallacy in Section 135.

Section 135 of the Companies Act, 2013 suggests that corporations are indeed, responsible to civic society and that civic society should be one of the beneficiaries of corporate activity over and above the intrinsic value that corporations offer in terms of creation of products, provision of services and employment.¹⁴⁷ However, the mechanism of compliance to Section 135 of the Companies Act, 2013 may require some revisiting.

Presently, companies that fall within the category defined under Section 135 are required to set up a CSR committee. This committee of directors must undertake, on behalf of the company, CSR activities and such activities must be reported in the Annual Report of the company. This report must, *inter alia*, show that a sum equivalent to at least 2% of the annual profit of the company has been diverted to CSR activities.¹⁴⁸ In the event that such expenditure is not made, the Annual Report must explain in the Annual Report why such expenditure was not made.¹⁴⁹

The Annual Report of a company is presented to shareholders at each Annual General Meeting.¹⁵⁰ Company shareholders then have the opportunity to raise questions as to the content, veracity and accuracy of the report, as well as the activities of the directors in the preceding financial

¹⁴⁶ Theresa A. Glandon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538 (taking this argument a step further by suggesting a progressive view that the fiduciary—and not just contractual—obligations of directors extend to a wide variety of stakeholders and that the corporation is organized for the benefit of society at large).

¹⁴⁷ The Companies (Corporate Social Responsibility) Rules, 2014 (hereinafter referred to as the “CSR Rules, 2014”) provide that expenditures on the welfare of employees and their families would not be counted towards their CSR requirements.

¹⁴⁸ Rule 8, CSR Rules, 2014.

¹⁴⁹ Proviso to Section 135(5) of the Companies Act, 2013.

¹⁵⁰ Section 134 read with Section 129(2) of the Companies Act, 2013.

year. However, consider the position of a shareholder of a company which has been profitable and has declared a dividend. At the same time, the company has not undertaken any CSR related expenditures under Section 135 but has offered an explanation as to why such expenditure was not undertaken. The question that then arises is—would a shareholder, who is the beneficiary of the declared dividend, raise questions as to the veracity of the explanation? Bear in mind that any expenditure made under Section 135 would be deducted from the divisible profit of the company, therefore reducing the dividend declared. It may be argued that this is the largest fallacy of the “comply or explain” approach of Section 135—that the entities adjudicating the legitimacy of the explanation, curiously enough, stand to benefit from upholding the legitimacy of the explanation. Therefore, there is a possibility of a mutually beneficial transaction between the board and the shareholders, creating more profit for shareholders. In the event that companies and their shareholders choose to enter into such transactions, the entire point of Section 135 may be lost.

The absence of an independent, unbiased agency which examines the failure of companies to undertake expenditures under Section 135; and penalizes the company for unacceptable failures (i.e., when the explanation for non-expenditure is unsatisfactory) renders Section 135 an almost irrelevant provision. Additionally, a company’s survival may be dependent, not just upon a court of law, but also the court of public opinion.¹⁵¹ The absence of social accountability or any provision by which a company’s CSR activities may be scrutinized by society or at least a representative of society is a rather glaring omission in Section 135.

Perhaps a fresh approach to Section 135 may be required. While Annual Reports of a company are submitted to the Registrar of Companies, Ministry of Corporate Affairs, there is no specific provision for the Registrar to examine the Annual Report in detail.¹⁵² In order to lend teeth to the provisions of Section 135, it is suggested that the examination of CSR activities be carried out by an independent agency—perhaps the Registrar itself or certifying agencies authorized by the Registrar—as a representative

¹⁵¹ Morgan P. Miles & Linda S. Munilla, *The Potential Impact of Social Accountability Certification on Marketing: A Short Note*, 50 J. BUS. ETHICS 1–11 (2004).

¹⁵² Unless if an investigation has been specifically ordered for by the Registrar under Chapter XIV of the Companies Act, 2013.

of society. This will possibly ensure better compliance with Section 135. The CSR certification would in turn, benefit the company itself—placing it in a favorable light with consumers and future investors. A recent report suggests that 75% of Indian consumers would be willing to spend more on products manufactured by socially responsible companies.¹⁵³ Similarly, there is plenty of scope for credit channels and private equity to promote socially and environmentally desirable activities and to discourage detrimental activities in the companies that they invest in.¹⁵⁴

V. INDUSTRY BASED CSR

The Companies Act sets out a number of activities which may be considered as socially responsible and therefore satisfying the requirements of Section 135. Curiously enough, while poverty eradication, enhancing vocational skills and education and promotion of gender equality all form part of socially responsible activities, initiatives to boost the welfare of a company's own workers are specifically excluded from being considered as CSR activities.¹⁵⁵ Additionally, activities undertaken by the company in its ordinary course of business are not considered part of CSR, even if a social benefit is derived from such activities.¹⁵⁶

It is interesting to note that there exists a plethora of extant legislations that provide for similar goals as set out under Section 135 and Schedule IV of the Companies Act, 2013. These legislations essentially promote the same ideals as Section 135 and Schedule IV, albeit in different mechanisms. As a result, companies engaged in certain industries, particularly those involving compulsory acquisition of land and extraction of minerals, would be required to engage in CSR practices far more than others. An argument could be made that the CSR liability of these industries under the Companies Act, 2013 may be offset against similar liabilities under other legislations. It is unfortunate to note that expenses incurred by companies for the fulfillment of any Act/Statute of regulations

¹⁵³ *Consumers Who Care*, *supra* note 110.

¹⁵⁴ Bert Scholtens, *Finance as a Driver of Corporate Social Responsibility*, 68 J. BUS. ETHICS 19–33 (2006).

¹⁵⁵ Rule 4(5), CSR Rules, 2014.

¹⁵⁶ Rules 4(1) and 2(e), CSR Rules, 2014.

(such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act.¹⁵⁷ A view may be taken that this stand is somewhat onerous and disadvantageous to companies engaged in such industries.

A. Land Acquisition

The recently enacted Land Acquisition, Rehabilitation and Resettlement Act, 2013 provides for a number of social development measures in the event of land being acquired by private parties, through a state mechanism and with state assistance for its own use, hold and control—usually for infrastructure projects. For such acquisition prior consent of at least 80% of the affected persons is required.¹⁵⁸ Affected persons include not only the titleholders of the lands which are being acquired but also the families whose primary source of livelihood gets affected by the acquisition of land.¹⁵⁹ These affected persons are paid compensation for the loss of property and livelihood. Additionally, measure to resettle and rehabilitate affected persons, including development of basic infrastructure and amenities at the resettlement areas are also mandated. Under the Third Schedule of this act, various infrastructural facilities such as roads, community centre, panchayat ghar, etc. and basic minimum amenities such as places of worship, proper drinking water and sanitation facilities, etc. are required to be provided for under the rehabilitation and resettlement programmes and measures prescribed by relevant laws. This list is merely indicative and not exhaustive in nature.¹⁶⁰

The costs of state-assisted land acquisition in India include the costs of measures to be undertaken by project developers as mentioned above. These costs are undoubtedly detrimental to shareholder value, but if implemented correctly, would provide huge benefits to social value. These

¹⁵⁷ Clarifications with regard to provisions of Corporate Social Responsibility under Section 135 of the Companies Act, 2013, General Circular No. 21/2014, Ministry of Corporate Affairs, Government of India.

¹⁵⁸ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, § 2(b)(i).

¹⁵⁹ *Id.* § 3(c).

¹⁶⁰ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Schedule III.

provisions impose a higher obligation towards taking up social responsibility on part of private companies who acquire land for their projects. The essence of the Land Acquisition, Rehabilitation and Resettlement Act, 2013 thus focuses on guaranteeing the social development of affected families along with the concurrent growth and development targeted by developers who acquire lands for infrastructure projects.

It may be argued that the Land Acquisition, Rehabilitation and Resettlement Act, 2013 provides a clear mechanism and requirements to reconstitute families who will and have been affected by the project—as opposed to the Companies Act, 2013 which sets out general guidelines and an overall framework within which a company's social responsibilities may be met. Of course, the nomenclature of the provisions in the Land Acquisition, Rehabilitation and Resettlement Act, 2013 are not referred to as social responsibilities. However, the compliance of these provisions is a clear indication of the social responsibilities imposed on companies undertaking a project which involves the displacement of human populace. Under the Land Acquisition, Rehabilitation and Resettlement Act, 2013, companies contribute to the welfare of local community groups affected by such land acquisition thereby contributing to their social obligations.

B. Extractive Industries

Mining companies in India are governed and regulated presently by the Mines and Minerals (Development and Regulation) Act, 1957 (the “MMDR Act”), the Mineral Conservation and Development Rules, 1988 (the “MCD Rules”) and the Mineral Concession Rules, 1960 (the “MC Rules”), in respect of mining rights and the operations of mines in India. However, in 2005, a High Level Committee (the “Hoda Committee”) was appointed by the Planning Commission,¹⁶¹ Government of India to make recommendations on the regulations of the mining industry. As a result of the Hoda Committee Report, a National Mineral Policy, 2008 was

¹⁶¹ The Planning Commission is responsible largely for the formulation of each of India's Five Year Plans. For a detailed list of functions that the Planning Commission carries out, see <http://planningcommission.nic.in/aboutus/history/function.php?about=funcbody.htm> (last accessed Feb. 15, 2014).

notified.¹⁶² Some of the salient features of the National Mineral Policy, 2008 included designing of a framework of sustainable development which takes care of bio diversity issues and special care to be taken to protect the interest of host and indigenous (tribal) populations through developing models of stakeholder interest based on internationally accepted best practices.¹⁶³

In order to implement the National Mineral Policy, 2008, the Ministry of Mines, Government of India, in consultation with State Governments and other stakeholders, is in the process of enacting the Mines and Minerals (Development and Regulation) Bill, 2011, which, if passed, is scheduled to replace the MMDR Act. Mines and Minerals (Development and Regulation) Bill, 2011 aims to provide a strong framework for amending the laws related to the scientific developments and regulation of mines and minerals.¹⁶⁴ An in-depth study of the Mines and Minerals (Development and Regulation) Bill, 2011 shows the amount of responsibility that has been bestowed upon the holders of mining leases towards the persons or families earning a livelihood or having traditional rights of the surface of the land over which the mining license has been granted.¹⁶⁵

Under Clause 43 of the Mines and Minerals (Development and Regulation) Bill, 2011, the holder of a mining lease shall, in respect of any person or persons holding occupation or usufruct or traditional rights of the surface of the land over which the lease has been granted be, liable to an annuity equal to 26% of the profit (after deduction of tax paid) on account of annual compensation and provide employment and or other assistance in accordance with the rehabilitation and resettlement policy of the concerned State Government. The Bill further states that the holder of a mining lease shall, in respect of any person or family earning livelihood or having traditional rights of the surface of the land over which the lease has been granted, be liable to provide employment or other assistance in accordance

¹⁶² A full text of the Hoda Committee Report is available at http://planningcommission.gov.in/reports/genrep/rep_nmp.pdf (last accessed Feb. 15, 2014).

¹⁶³ See National Mineral Policy, 2008, Ministry of Mines, Government of India, paras. 2.3 and 7.11, available at http://mines.nic.in/writereaddata/filelinks/88753b05_NMP2008.pdf (last accessed Feb. 15, 2014).

¹⁶⁴ Mines and Minerals (Development and Regulation) Bill, 2011, <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/Mines%20110%20of%202011.pdf> (last accessed Nov. 20, 2013).

¹⁶⁵ Mines and Mineral (Development and Regulation) Bill, 2011, cl. 43.

with the rehabilitation and resettlement policy of the State Government concerned.¹⁶⁶ Further, the Bill lays down that the amount payable under Clause 43 shall be in addition to any other amount or compensation payable to the person or family earning livelihood or having traditional rights of the surface of land under any other law for the time being in force.¹⁶⁷

Needless to say, profits generated by mining companies are substantial. Companies such as Coal India Limited and NMDC Limited generated INR 9794.32 and 6342 crores as net profits respectively last year.¹⁶⁸

It is interesting to note the aims of Clause 43 of the Bill which include community development, eradicating extreme hunger and poverty and employment opportunities for affected families.¹⁶⁹ The same aims find their way into Schedule 7 of the Companies Act, 2013.

It is therefore clear to see how the aims of the Companies Act, 2013 and the Mines and Minerals (Development and Regulation) Bill, 2011 overlap in certain instances. Both have been drafted keeping in mind the social welfare of local communities—one in general and the other specifically affected by mining operations.

While the Companies Act, 2013 mandates a 2% of net profits as expenditure on CSR activities, the Mines and Minerals (Development and Regulation) Bill, 2011 prescribes a comparatively mammoth 26% of net profits as expenditure on what are essentially CSR activities for communities affected by mining operations. Further, while the Mines and Minerals (Development and Regulation) Bill, 2011 would apply to all mining companies, irrespective of revenue and turnover, the Companies Act, 2013 applies to certain companies meeting revenue and turnover requirements irrespective of industry.

For a company engaged in mining operations and having a revenue or turnover which meets trigger points under Section 135 of the Companies Act, 2013, this is an additional burden. It may be argued therefore, that if

¹⁶⁶ *Id.*, cl. 43(5).

¹⁶⁷ *Id.*, cl. 43(6). Note the costs of land acquisition involved under the Land Acquisition, Rehabilitation and Resettlement Act, 2013.

¹⁶⁸ *Coal India and NMDC Net Profit*, <http://www.moneycontrol.com/stocks/top-companies-in-india/net-profit-bse/miningminerals.html> (accessed on Jan. 15, 2014).

¹⁶⁹ Mines and Mineral (Development and Regulation) Bill, 2011, cl. 43(5).

the Mines and Minerals (Development and Regulation) Bill, 2011 does come into effect in its present form, mining companies would be liable to engage in CSR activities at levels much higher than those mandated under the Companies Act. As such, mining companies should be excluded from the purview of Section 135 of the Indian Companies Act, 2013.

Of course, it remains to be seen when the Mines and Minerals (Development and Regulation) Bill, 2011 comes into effect and whether the present form of Clause 43 is retained. The Bill is subject to changes based on debates and discussions before the Parliament of India and if approved, shall be the law which will apply to the mining sector in India.

C. Urban Real Estate

Real estate has emerged as one of the most vital sectors of the Indian economy. Even though real estate is the second largest generator of employment after agriculture,¹⁷⁰ this sector has so far not been regulated by the adequate and appropriate legislature which can ensure a uniform and centralised set of rules. However, as an area of legislation under the authority of the States, and not the Union,¹⁷¹ respective State Governments have from time to time, regulated the real estate industry in their respective states. One such example is of Haryana, where the real estate sector is regulated by The Department of Town & Country Planning (DTCP), Haryana. The DTCP is charged with regulating the urban development in the state of Haryana, through the granting of licences to private colonizers for development of residential, commercial, industrial and IT park/cyber park Colonies in accordance with the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 and rules framed thereunder.¹⁷²

In Haryana, licenses are granted to the private colonizers for development of residential plots and group housing colonies.¹⁷³ Licensees are subject to various DTCP notifications concerning the allotment of

¹⁷⁰ http://www.ficci.com/sector/59/Project_docs/real-eastate-profile.pdf.

¹⁷¹ Entry 18, List II, Part XI, Constitution of India.

¹⁷² <http://tpharyana.gov.in/>.

¹⁷³ Memo No.-LC-147-7/16/2006-2TCP dated Chandigarh, Feb. 3, 2010.

plots/flats for economically weaker sections in such colonies.¹⁷⁴ In case of residential plots, every real estate developer is required to reserve 20% of the total plots for allotment to economically weaker sections/lower income groups in a residential plotted colony. The department has also specified different sizes of the plots for allocation and these plots are to be allotted at a flat rate of Rs.500/-per square yards. Within one year from approval of zoning plan/Environmental clearance, whichever is later, the licensee is required to at least complete the development works of road, water supply and electricity in the area earmarked for EWS plots. In the case of group housing colonies, every developer is required to reserve 15% of total number of residential flats for allotment to economically weaker section in a Group Housing colony. Further it is specified that the area of these flats should not be less than 200 square ft. The flats reserved for EWS are to be allotted at a maximum cost of Rs.1,50,000/-per flat, i.e. Rs.750/-per square ft.¹⁷⁵ Apart from subsidizing the cost of the plot and/or flat, additional charges such as annual maintenance charges, security deposit or refundable contingency deposit have also been waived for EWS group so as to make the purchase economically feasible for them.¹⁷⁶ In case of any violations on part of the developer, the same is subject to penalty.¹⁷⁷

Analysing the above provisions issued by DTCP through various notifications, it has to be noted that the developers by complying with the mandatory requirements relating to EWS group are fulfilling a social responsibility. It is not mere reservation but even the price of the plots and flats are fixed by the government. This clearly indicates that compliance with such provisions is over and above the profit enhancing motive. The developer by such compliance stands tall and addresses the issue of social responsibility and acts in a socially responsible manner. Since such compliance is mandatory and leads to socially responsible behaviour, there exists no further need for an identical clause under a different legislation. An identical clause would be mere an additional burden on the real estate company. In the light of the above argument, the real estate companies

¹⁷⁴ Policy for Allotment of Plots/Flats earmarked for Economical Weaker Section in the Licensed Colony, Memo No. LC-147-7/16/2006-2TCP dated Chandigarh, July 8, 2013.

¹⁷⁵ Memo No. LC-147-7/16/2006-2TCP dated Chandigarh, July 8, 2013.

¹⁷⁶ Order Endst. No. 5977-6024 dated May 5, 2011.

¹⁷⁷ Memo No. 7/16/2006/2TCP dated Aug. 16, 2013.

should be excluded from the purview of Section 135 of the Indian Companies Act, 2013 as they are already contributing to the communities in a socially responsible manner.

Section 135 of the Companies Act, 2013 presupposes the absence of other, effective forms of legislative reform undertaken to promote the social responsibility of corporations. As an additional measure, the Ministry of Corporate Affairs specifically excludes expenses under other legislations, including statutes on land acquisition and labour welfare.¹⁷⁸ This approach by the Ministry of Corporate Affairs seems to be somewhat untenable.

CONCLUSION

India's somewhat mandatory CSR law is a refreshing new way to look at an age old problem of companies offering relevance to society.¹⁷⁹ However, Section 135 of the Companies Act, along with its subordinate Rules, is far more concerned with form and less with the substance. There are three aspects to the CSR law which in the author's view, require revisiting. The first is that of the reporting requirements under the CSR law. If companies are required to be socially responsible, then they must also be socially accountable and any report of their CSR activities must be made available for scrutiny to society or at least its representative, and not just its shareholders. The absence of a provision requiring companies to be accountable to society, or at least a representative of society is an aspect which could possibly be reviewed. Second, similar extant legislations for certain industries provide for corporate requirements similar to those that have been enumerated in Schedule VII of the Companies Act, 2013. Thirdly, a macro-level issue that arises is that of the true intent and spirit of CSR—that of the inclusion of CSR in the core strategies of the company—

¹⁷⁸ Clarifications with regard to provisions of Corporate Social Responsibility under Section 135 of the Companies Act, 2013, General Circular No. 21/2014, Ministry of Corporate Affairs, Government of India. (Expenses incurred by companies for the fulfillment of any Act/Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act).

¹⁷⁹ Refer to the call for greater corporate participation in the well-being of society which was first raised in ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Transaction Publishers 1932) and echoed specifically in the context of CSR in Dodd, *supra* note 143.

is not reflected in the legislation. Perhaps the Indian Parliament will have an occasion to revisit the provisions of Section 135 in the future.

The impending CSR provision in the recent Companies Bill, 2011 has been criticized for being a mechanism that redistributed funds from firms to the public, a mechanism that is also undertaken by taxation.¹⁸⁰ This has been met with considerable resistance and protest. However, if one could be persuaded to expand the narrow view of CSR being an expenditure, to an opportunity for socially beneficial and profitable investment, the presence of Clause 135 would be rendered moot.

Any mandatory governance reforms intended to spur more corporate altruism are almost sure to have general institutional costs within the corporate system itself.¹⁸¹ The question then arises as to whether the anticipated benefits of these reforms will outweigh the costs.¹⁸² Perhaps the solution lies in the manner in which we view these benefits.

In terms of further research, there are a number of issues that have been touched upon briefly in this paper, without delving into details. The first is that of the applicability of the three most popular models of corporate governance—i.e., shareholder primacy, connected contracts and stakeholder primacy—in light of family-run businesses wherein the owner/shareholder and the management are, for all practical purposes, one and the same individual or set of related or connected individuals. The second pertains to the difficulty in empirically establishing a correlation between religious proclivity and CSR. A third possible issue which could be considered in further detail is the manner in which investors view social responsibility in corporations.

¹⁸⁰ Catherine Liston-Heyes & Gwen C. Ceton, *Corporate Social Performance and Politics: Do Liberals Do More?*, 25 J. CORP. CITIZENSHIP 95–108 (2007).

¹⁸¹ Todd M. Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism* (Chicago Working Paper Series No. 399, University of Chicago, 2008).

¹⁸² David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979–1980) (in a critique of a call for more corporate social responsibility).