

Corporate Social Responsibility (CSR) and the Law – Ideas for Developing Dynamic Elements in Indian Mandatory CSR

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28 January 2015 at 10 AM at IDF

Introduction – New Indian CSR rules

- Mandatory
- 2 % from the net profit
- Big companies only
 - Companies with a net worth of Rs 500 crore (\$100 million) or more, or turnover of Rs 1,000 crore (\$200 million) or more, or a net profit of Rs 5 crore (\$1 million) or more during the past three financial years
- Clear rules on institutional arrangements inside the companies (CSR committees etc.)
- Rules on sanctions in case of omission (non-compliance)
 - But the application of these rules is not totally clear

Introduction – New Indian CSR rules (cont.)

- Schedule VII of Indian Companies Act (in its original form) on activities which may be included by companies in their Corporate Social Responsibility Policies:
 - Eradicating extreme hunger and poverty
 - Promotion of education
 - Promoting gender equality and empowering women
 - Reducing child mortality and improving maternal health
 - ...

Introduction – New Indian CSR rules (cont.)

- ...
- Combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria, and other diseases
- Ensuring environmental sustainability
- Employment enhancing vocational skills
- Social business projects
- Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government of 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, women
- Such other matters as may be prescribed

Introduction – New Indian CSR rules (cont.)

- Under the new Schedule VII, CSR now **also** includes
- (i) preventive healthcare and sanitation,
- (ii) providing safe drinking water,
- (iii) protection of national heritage, art and culture,
- (iv) rural development projects,

Introduction – New Indian CSR rules (cont.)

- (v) measures to benefit armed forces veterans and war widows,
- (vi) rural development projects,
- (vii) promoting rural sports, nationally recognized sports, and paralympic sports,
- (viii) setting up homes and hostels for women, orphans and senior citizens,
- (ix) reducing inequalities in socially and economically backward groups and
- (x) supporting technology incubators in government approved academic institutions

About Legal Transplants ...

- Societies are made of economic, political, and cultural dimensions of activities
- Comparative Law as a discipline compares the different legal systems, legal institutions and norms with each other
- Legal Transplants can be whole legal systems, certain legal institutions or singular legal norms which have been taken from one country and “transplanted” in another which did not know such legal “thing” before

Local reactions to foreign Legal Transplants

- Three main reactions to foreign Legal Transplants:
- Adapt, refuse, transform (“Funktionswandel”)
- Reasons to adapt: economic, political, cultural
- Reasons to refuse: economic, political, cultural
- Reasons to transform: economic, political, cultural

Comparative Law Theories and Legal Transplants

- Legal Origins Theory
 - Law and Economics style of arguments in comparative law
 - For example: adaptation happens if and because of economic efficacy
- Legal Pluralism Theory
 - Radical transnationality instead of commonly agreed internationality
 - Just accept (more) variations and less coherence in law!
- Politically oriented functional comparative law theory
 - Adaptation = power + time
 - Transformation = power + need

Is CSR in India a Legal Transplant?

- No
 - Cultural No: Already *Kautilya* in 4th Century BC favoured business practices based on moral principles; Hinduism, Buddhism, Islam all contain an ethical condemnation of usurious businesses
 - Political No: "Actually this is the first mandatory CSR in the whole world!"
 - Economic No: Developing economies are economies where business and social developments are intertwined – CSR with Indian characteristics?
- Yes
 - Cultural Yes: Again something taken from North to South
 - Political Yes: "Climate change is not an issue for India", etc.
 - Economic Yes: The idea of indirect business benefits of CSR is unproven – and therefore should be left to business judgment

“Funktionswandel” of CSR in India?

- “Yes / No” discussions are not very fruitful; better to ask “How to implement the new Indian CSR in the best ways?” and “What does CSR enable in India?”
- CSR tensions in general
 - Global: North v South
 - Social: Social development v business
 - Entrepreneurship: Big v medium, small & micro

About Human Rights ...

- HR duties are connected to international and national norms created by nation states
- Some HR duties "spill over" states to other participants of global activities like multinational corporations
- HR have already for a long time been understood not only as negative freedoms. Besides civil liberties there are economic and social rights, cultural rights, and environmental responsibilities
- Methods of implementing HR are respect, protect, and remedy

CSR is actually legalized HR!

- Structural similarities – HR & business in general / CSR & business in particular
- The old idea of generations of HR, and at the same time legal importance (priority), is reflected in the discussions concerning CSR duties of corporations.
- Focus in CSR discussions should also be in the protection and enabling dimensions and not only in the respect dimension

Amartya Sen and Legalized HR

- Amartya Sen and new perspectives for HR in developing countries
- Key idea: even (and especially) general norms (like HR) have (and require) room for contextual understandings
 - The same HR norm can give rise to both perfect and imperfect (direct and indirect) obligations in the Kantian sense

Example of perfect and imperfect obligations by Sen

- “The perfectly specified demand not to torture anyone is supplemented by the more general—and less exactly specified—requirements to consider the ways and means through which torture can be prevented and then to decide what, if anything, one should, thus, reasonably do in any particular case.”

“HR are never only a legal issue” (Sen)

- “The relationship between law and human rights does require a closer examination. I shall distinguish between three different types of legal connections, in particular that human rights are (1) post-legal, or (2) proto-legal, or (3) ideal-legal. I would argue that while each of these connections can be contingently important, they fail—individually and jointly—to do justice to the nature and use of human rights. **We need to see human rights, I would argue, over a much bigger arena, of which legal motivation, actual legislation, and judicial enforcement form only one part.**” (emphasis added)

Contextualization of CSR in India

- Ideas to include – or “smuggle” – economic and social dynamic elements in the implementation of the New Indian law on CSR
- Law is seen as an ongoing process and not (only) as a (final) outcome by the decision of a Parliament
- Actually a profound idea for all case law systems – but now discussion is open for “non-lawyers” also!
 - Judge-made law -> people made law

Grey areas in the law as possibilities

- Grey areas (areas open for various interpretations) of Indian law and Indian legal framework around CSR to be taken seriously:
 - What about SME's and the constitutionality of the separation between companies under the legislative duty and companies not under the legislative duty (also in relation to INDIA CONST. art. 4, § 38, cl. 2 ("The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities"))?;
 - What about ways to mark CSR expenditure in the corporation accounting and what about tax redemption, and the coherence of the tax law (tax benefits for donations to common good purposes)?;
 - What about corporations making losses?;
 - What about "social corporations" which already have CSR in their own by-laws?;

Standards adapted to Indian circumstances

- The “Senian attitude” when it comes to international and Western standards etc. – contextuality of CSR in India;
- Best practices in India; “no” to an automatic adaptation of (transplanting of) international standards of CSR;
- Sen on a general level: “However, well-established practices in a rich and advanced country, which receive widespread support within the country, might be subjected to serious criticism—and rejection—in many other countries, where public dialogues may bring in other considerations that are ignored in the first country.”
- “Perhaps scholars and NGOs should encourage these developing countries to entertain audacious and hitherto unthought-of innovations. While not every proposal may be immediately viable, as economies develop and the global climate shifts, hybrid proposals like India’s may become widely practicable solutions.”

Market driven frameworks in CSR?

- Would “A Marketplace of CSR projects” be possible?
- With the involvement of targeted social groups and regions
- This could be a possibility for the involvement of also local / regional micro, small and medium size enterprises for CSR

Openness for variations

- India is more a continent than a country -> “Testing” with CSR: Regional based, local based, industry branch based, implementation method based (for example combination of CSR and microfinance), in Public Private Partnership projects; etc. –
 - For example activities related to training of company’s own (present or future) labor force – let’s see the results before judging!

Summary

- Indian CSR Law as a means and as an end
- Indian CSR Law as a means is served best if high priority is given to contextual Indian applications
- Indian CSR Law as an end is kept up by synchronizing the application of Indian Company Law CSR rules with Indian Constitution and HR praxis of other developing economies