

PM CARES FUND: NEED, SCHEME AND CONCERNS

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ABSTRACT

A public charitable trust, by the name of PM CARES Fund, was created on 28 March, 2020 under the leadership of PM Narendra Modi. Constituted in response to the novel-Coronavirus pandemic hitting India, it calls for voluntary contributions from individuals and organizations to facilitate disaster management. Be that as it may, the Fund has been caught in the crossfires ever since its inception, because of its manager - the government - maintaining a lack of transparency. Making matters worse, accusations of malice have been levelled against the government as donations drift away from State Funds and the PMNRF as a result of its liberalisation of the donation process only for the PM CARES Fund. More critical opprobrium has been generated by its failure to meet demands of countless people who have been pushed to the verge of starvation as also a state of penury, even as the pandemic soars on. The government, however, continues to receive donations in massive sums, the disbursal of which is yet to make an effective impact insofar as alleviation of difficulties in these unprecedented times is concerned. Considering, an attempt is being made to address issues besetting the PM CARES Fund, including but not limited to, its characteristics, powers and general scheme as also the accountability of its management, without losing sight of the fact that only the future handling of the crisis as also the administration of the Fund can tell whether the PM really 'cares' or has he been economical with the truth and created the Fund only to advance message of his magnanimity.

Keywords – PM CARES Fund, corporate social responsibility (CSR), right to information (RTI), charitable trust, accountability

I. INTRODUCTION

The Prime Minister's Citizen Assistance and Relief in Emergency Situations (PM CARES) Fund was created on March 28, 2020, in view of the rising Covid-19 cases in India. In the backdrop of the novel-coronavirus pandemic that originated from Wuhan, China late last year, establishment of the PM CARES Fund is another in a row of contentious steps taken by the Indian government, which has acted fairly quickly qua prevention, mitigation and relief

measures since the dawn of the crisis in India. This Fund is designed to receive voluntary donations from persons and institutions alike and is primarily aimed at addressing the needs of the general public in situations of emergency. Further, the donations assimilated under its aegis are purported to be managed and disbursed in consonance with the objectives set out and as per the directions of the PM (acting as Chairperson) and three ex-officio trustees, all of whom are Cabinet members acting in pro bono capacities.

The official statements elucidate that donations made to PM CARES Fund qualify for benefits under S 80G of the Income Tax (I-T) Act, 1961 and thus receive 100% exemption.¹⁷⁰³ The Ministry of Corporate Affairs (MCA) has further notified that any donation coming to the Fund from companies is eligible for consideration as their Corporate Social Responsibility (CSR) obligation, with additional CSR being offset in subsequent years.¹⁷⁰⁴ Be that as it may, for contributions made wef 1 April 2020, only those companies that stuck with the old tax structure would be eligible for this benefit.¹⁷⁰⁵

The process of creation of the Fund has allegedly bypassed the constitutional framework outlined for assimilation of public funds by the Central Government on a massive scale. The Indian Constitution envisions only three heads of government account for receipt of public money - the Consolidated Fund, the Contingency Fund and the Public Account. While the Consolidated Fund is primarily constituted by income accruing to the government from taxes and non-tax revenues, the Contingency Fund is in the nature of an impress account empowering the President to disburse funds therein and is intended to meet unforeseen expenditures.¹⁷⁰⁶ The former is a repository of government income, expenditure out of which is monitored and requires approval by the Parliament; the latter, as the name suggests, is designed to meet immediate demands in times of emergency and does not require such approval at the time of expenditure. An indirect check, however, is maintained by the Parliament over the Contingency Fund by retaining control over sanctioning of additional

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¹⁷⁰³ 'Donation FAQs' *Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund* <<https://www.pmcare.gov.in/en/web/page/faq>> accessed 25 August 2020.

¹⁷⁰⁴ Ministry of Corporate Affairs, *Covid-19 related Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR)* (General Circular No 15/2020); *ibid*.

¹⁷⁰⁵ Gaurav Noronha, 'Govt. Clarifies on Company's Contributions to PM CARES Fund above CSR Limit' *The Economic Times* (31 March 2020) <<https://economictimes.indiatimes.com/news/economy/policy/govt-clarifies-on-companys-contributions-to-pm-cares-fund-above-csr-limit/articleshow/74907220.cms?>> accessed 25 August 2020.

¹⁷⁰⁶ Controller General of Accounts, Ministry of Finance, Government of India, 'Overview of Accounts' <<http://cga.nic.in/Page/Overview-of-Accounts.aspx>> accessed 25 August 2020.

expenditure from the Consolidated Fund to replenish the corpus of the Contingency Fund. Public moneys (other than those covered under Consolidated Fund) received, by or on behalf of the Government of India, are credited to the public account of India and expenditure from this account generally does not require Parliament's authorization.¹⁷⁰⁷ In contradistinction to and in spite of these, the PM CARES Fund has been created in the nature of a public charitable trust and is based entirely on voluntary donations. Expenditure out of this Fund does not require the Parliament's approval either. Besides, the Comptroller and Auditor General (CAG) of India are precluded from auditing it, unless appointed by the trustees of the Fund.¹⁷⁰⁸

Raising objections on these lines against the creation of the PM CARES Fund, a Public Interest Litigation (PIL) was filed by Advocate Manohar Lal Sharma before the Hon'ble Supreme Court demanding transfer of assimilated funds to the Consolidated Fund of India. His case was that any such Fund could have been created only by the State Legislature or the Parliament, as per the provisions of the Indian Constitution; however, no notification or ordinance was issued prior to its establishment.¹⁷⁰⁹ The petition was dismissed by the Hon'ble Apex Court, holding that it was misconceived since the present case was not about collection of revenue.¹⁷¹⁰ It is averred that this petition may have failed to explicate in detail the issues transcending the matter, but due to the legal charter of the Fund (viz., the trust deed) being out of public domain, the authority of the trustees to assimilate (not only uncapped but also unchecked) public funds remaining in question and the proletariat bearing the brunt of the crisis despite the government receiving handsome donations, exercise of prudence is evermore wanting. While judicial scrutiny is awaited, some issues manifested by official statements have been examined hereinafter.

II. PMNRF V. PM CARES FUND

Caught in the crosshairs since its inception, the PM CARES Fund has attracted one major criticism from all fronts, that being in respect of the needlessness of its creation inasmuch as

¹⁷⁰⁷ *ibid.*

¹⁷⁰⁸ See note 1.

¹⁷⁰⁹ Indian Legal Bureau, 'Supreme Court Dismisses Plea Challenging the Creation of PM CARES Fund' *Indian Legal* (13 April 2020) <<https://www.indialegallive.com/top-news-of-the-day/news/supreme-court-dismisses-plea-challenging-creation-pm-cares-fund-95965>> accessed 25 August 2020.

¹⁷¹⁰ *Manohar Lal Sharma v Narendra Damodardash Modi & Ors*, Diary No 10896/2020 (Unreported, Supreme Court) <https://main.sci.gov.in/supremecourt/2020/10896/10896_2020_31_22_21596_Order_13-Apr-2020.pdf> accessed 25 August 2020; *See also* n 7 (supporting the fact that the case was not about collection of revenue).

the Prime Minister's National Relief Fund (PMNRF) was sufficiently capable of serving the same purpose. As of December 2019, the PMNRF had an unspent balance of ₹3800 crores in its corpus.¹⁷¹¹ Moreover, the Union government sanctioned ₹15000 crores towards Covid-19 response and health system preparedness and also received billions in foreign aid.¹⁷¹² In this backdrop, opposition leaders, among others, have questioned the need for a 'new' Fund, given that the PMNRF and the Chief Minister's Relief Fund(s) have broader-but-similar objectives and have been put at a disadvantage by its creation.

The PMNRF was set up in 1948 by the then Prime Minister, Pandit Jawaharlal Nehru, to receive contributions from the general public that would serve as aid for partition refugees.¹⁷¹³ Repurposed now, the Fund facilitates immediate relief to the families of those killed in natural disasters or major accidents and towards other similar ends. It was initially managed by a committee composed of the Prime Minister and his/her Deputy, the Finance Minister, the Congress President, a representative of the Tata Trustees and an industry representative.¹⁷¹⁴ Post-1985, however, the management of the fund was entrusted in its entirety to the Prime Minister, who now has sole discretion in the matter of funds-disbursal; a joint secretary in the Prime Minister's Office (PMO) is tasked with the administration of the fund on an honorary basis, who is assisted, in turn, by an Officer of the rank of Director enjoined to lend support on an honorary basis.¹⁷¹⁵

Insofar as their striking similarities are concerned, it won't be far-fetched to consider the PM CARES Fund a Siamese-twin of the PMNRF. Both the Funds were set-up by Prime Ministers of the nation for assimilating voluntary donations that could be used to extend relief in times of emergency. The contributions made to them are completely tax exempt, while donations made by the corporates are also eligible for classification as CSR under the Companies Act 2013 (discussed in detail below). Both Funds are further open to foreign contributions and are

¹⁷¹¹ 'About PMNRF' *PMNRF* <<https://pmnrf.gov.in/en/about>> accessed 25 August 2020.

¹⁷¹² Special Correspondent, 'Coronavirus | Union Cabinet Approves ₹15,000-Crore Package for COVID-19 Emergency Response, Health System Preparedness' *the Hindu* (New Delhi, 22 April 2020) <www.thehindu.com/news/national/coronavirus-15000-crore-package-for-emergency-healthcare-system-approved/article31407284.ece> accessed 25 August 2020.

¹⁷¹³ Press Note *Press Information Bureau* (New Delhi, 24 January 1948) <https://pmnrf.gov.in/assets/uploads/downloads/pibpressnotice_20190409131842.pdf> accessed 25 August 2020.

¹⁷¹⁴ Priscilla Jebaraj, 'How Different is the PM CARES Fund from the PM's National Relief Fund?' *The Hindu* (10 May 2020) <www.thehindu.com/news/national/coronavirus-how-different-is-the-pm-cares-fund-from-the-pms-national-relief-fund/article31546287.ece> accessed 25 August 2020.

¹⁷¹⁵ *ibid.*

also ineligible for audit by the CAG of India, much to the chagrin of advocates of transparency. Even so, there are a few notable differences –

A. Disparity Between Contributions

The PM CARES Fund is in receipt of funds from Public Sector Undertakings (PSUs), unlike the PMNRF which does not accept funds flowing out of budgetary sources of the Government or from the balance sheets of PSUs.¹⁷¹⁶ Resultantly, the PM CARES Fund attracted approximately ₹6500 crores (publicly declared) within a week of its establishment, most of which came from the PSUs.¹⁷¹⁷ Many big-shot organizations, public figures and philanthropists, like the Tata Group, the Defence Ministry and Bollywood celebs generously made (and continue to make) voluntarily contributions to it while state authorities have been left to grapple with the inadequate sums in their own Funds.

So far, many public and private-sector employees have ‘had to’ donate a day’s salary to the Fund, in some cases, even without their express will.¹⁷¹⁸ For example, the Finance Ministry’s Revenue Department mandated its employees to donate a single day’s salary towards the Fund every month till March 2021.¹⁷¹⁹ A circular was issued requiring objection(s) to the same to be given in writing, which was frowned upon by government employees for good reason. Few days later, however, a modified circular reversed the burden of application and intimated that those desirous of donating shall make an application in writing.¹⁷²⁰

Many companies too have made contributions to the PM CARES Fund at the cost of their employees’ salaries. Driven by a pursuit of improving their public image and fulfilling CSR contributions simultaneously without having to spend an extra nickel out of their profits, these companies have exacerbated the conundrum by widening the economic divide between the haves and the have-nots; besides, they have failed to make contribution to the public good in terms intended by the Companies Act (discussed below).

¹⁷¹⁶ cf n 1 (accepts funds from PSUs except those flowing from their budgetary sources) with n 9 (does not accept funds flowing from budgetary sources of Government or balance sheets of PSUs).

¹⁷¹⁷ Meryl Sebastian, ‘PM CARES Got Rs 6,500 Cr a Month Ago, Allocates Rs 3,100 Cr to COVID-19 Fight Now’ *HuffPost* (14 May 2020) <https://www.huffingtonpost.in/entry/pm-cares-fund-allocation_in_5ebcb8b6c5b6c498dde75593> accessed 25 August 2020.

¹⁷¹⁸ Press Release *Press Information Bureau* (Delhi, 5 April 2020) <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1611363>> accessed 25 August 2020.

¹⁷¹⁹ PTI, ‘Finance Ministry Issues Modified Circular on Salary Contribution to PM-CARES Fund’ *The Economic Times* (Mumbai, 30 April 2020) <<https://economictimes.indiatimes.com/news/economy/policy/finance-ministry-issues-modified-circular-on-salary-contribution-to-pm-cares-fund/articleshow/75479765.cms?>> accessed 25 August 2020.

¹⁷²⁰ *ibid.*

B. Specificity of Purpose

The PMNRF does not accept funds where the donor specifically mentions that they are meant for a particular purpose.¹⁷²¹ The PM CARES Fund, on the other hand, does not create such a distinction. Ironically, it has been widely advertised as a Fund to tackle the menace of Coronavirus and the commonality of purpose inhering in the cause has led donations to roll in from all over the country into the PM CARES Fund, as opposed to the PMNRF.

C. Micro-Donations

Unlike the PMNRF, the PM CARES Fund accepts micro-donations, which is intended to help channelise all contribution(s) – big and small. This move has been applauded by many in acknowledgment of the fact that ‘every effort counts’; nevertheless, there are those who have discredited it as government’s fetish to rob people of the little that remains in their pockets.

While the PMNRF stipulates a minimum of ₹100, the PM CARES Fund has lowered the bar to ₹10.¹⁷²² But is the ease of contributing in denominations of ₹10 hail worthy at all? Owing to the lockdown necessitated by the pandemic, countless jobs have been lost, businesses shut down and savings devoured. While some people have lost lives, many others have lost their livelihood. It is posited in this backdrop that such comparative ease of contribution only renders the populace open to pressure of all kinds to make contributions in howsoever small amounts possible (eg, employees being asked to make nominal contributions out of their salaries). Seeing the incongruity between the purpose behind lowering the bar for minimum amount of contribution (enabling one and all to contribute) and the need for such measure (assimilation of funds for tactical response against the pandemic), one may not escape the conclusion that the furore, over change in minimum contribution limits empowering all citizens alike to participate in fighting the pandemic, is unmerited.

D. Genesis

¹⁷²¹ Supra.

¹⁷²² Moushumi Das Gupta, ‘PM CARES Gets Rs 6,500 Crore Donation in a Week, 3 Times More than What PMNRF Got in 2 Yrs’ *The Print* (New Delhi, 4 April 2020) <<https://theprint.in/india/pm-cares-gets-rs-6500-crore-donation-in-a-week-3-times-more-than-what-pmnrf-got-in-2-yrs/395172/>> accessed 25 August 2020.

While the PM CARES Fund has its roots in a trust deed¹⁷²³, the PMNRF's genesis lies in a personal appeal made by the then PM Pandit Jawaharlal Nehru via a Press Note in 1948.¹⁷²⁴ The contents of this trust deed and the particulars of its registration remain unknown thus far. Consequently, it is also unclear if the Fund would be subject to scrutiny under the Right to Information (RTI) Act, 2005 and its trustees accountable to the public. At least the PMNRF has evaded the rigours of RTI Act in the past due to the government maintaining that it was created pursuant to Pandit Jawaharlal Nehru making a personal appeal in 1948 and it was not an order/decision given by the Government of India.¹⁷²⁵ In hindsight, the government is not prevented from arguing the same in future; necessitated by circumstances, PM Narendra Modi has made a similar appeal to the nation and merely provided a Fund as was then done by Pandit Nehru so that people can make voluntary contributions. How much difference exactly would it make if our Prime Minister has taken one step ahead and gone to the extent of registering the PM CARES Fund as a trust?

That's not to say that the PM CARES Fund is abominable or the Central government's handling of the Covid-19 pandemic egregious. Only, speculations are rife whether there was a need for a new, separate fund at all - right in the middle of a crisis - especially in the name and style of PM CARES Fund? As it is, there is no substantial foreign precedence for governments establishing central funds in times of crisis, asking people to donate and fill lacunae in their response. Even countries hit far worse than India have not doled out a federal scheme to assimilate funds in the name of charity, least of all, an opaque one. Surely these are unprecedented times and the government can take unprecedented measures; however, the measures it takes forever remain bound by the rule of law and susceptible to questioning in courts for any deviation from the fundamental principles of justice and fairness that must inhere in them.

III. AUDIT OF THE PM CARES FUND

¹⁷²³ Aman Sharma, 'PM-CARES Fund to Have Up to 13 Eminent Experts' *The Economic Times* (3 April 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/pm-cares-fund-to-have-up-to-13-eminent-experts/articleshow/74956414.cms?>> accessed 25 August 2020.

¹⁷²⁴ *Supra*.

¹⁷²⁵ *ibid*.

Since the Fund is based on charitable donations by individuals and organizations, the CAG is prevented from auditing it. Earlier, it was reported that the Fund will be audited in due course by independent auditor(s), the power to appoint whom will rest with the trustees.¹⁷²⁶

Notably, a senior government official was quoted in a newspaper as saying that the quantum of funds assembled would be declared publicly ‘once a respectable amount of money’ had been collected.¹⁷²⁷ Oddly, this came in the backdrop of PMNRF’s annual disclosure of funds assimilated, regardless of the fact that the figures have quite often been modest. An all-time low came in 2011 when the PMNRF assimilated a lowly figure of ₹0.04 lakhs in foreign currency.¹⁷²⁸ Unlike thousands of crores that went into the PM CARES Fund, the PMNRF collected ₹17.59 crores during 2012-13 and did not consider it an amount not worth disclosing.¹⁷²⁹

In a recent development, appointment of M/s SARC & Associates as the independent auditor of the PM CARES Fund is in process, in furtherance of a decision made by the trustees of the Fund in their 2nd meeting.¹⁷³⁰

IV. CORPORATE SOCIAL RESPONSIBILITY

The Companies Act statutorily mandates companies meeting specified financial threshold to divert, every financial year (FY), at least 2% of their average net profits made during 3 immediately preceding FYs towards CSR activities.¹⁷³¹ The corporates have consequently spent ₹12000 crore on an average, every year, on diverse social projects from 2014 to 2018.¹⁷³²

Purportedly, many corporates are now making uncapped contributions to the PM CARES Fund, the driving force being an expressly sanctioned set-off of donations against CSR obligations. This step may be called over-zealous, but it is not entirely misplaced. The government is in dire need of funds to cater to a country with the 2nd highest population in the

¹⁷²⁶ Supra.

¹⁷²⁷ Supra.

¹⁷²⁸ ‘PMNRF FAQs’ *PMNRF* <<https://pmnrf.gov.in/en/faqs/pmnrf>> accessed 25 August 2020.

¹⁷²⁹ *ibid.*

¹⁷³⁰ Supra.

¹⁷³¹ The Companies Act 2013, s 135.

¹⁷³² Sachin Jain, ‘View: Unclutter the Spending’ *The Economic Times* (27 September 2019) <<https://economictimes.indiatimes.com/news/company/corporate-trends/view-unclutter-the-spending/articleshow/71318226.cms?>> accessed 25 August 2020.

world – such responsibility ranging from that of providing for the underprivileged and unemployed to one of assisting the medical industry – as also to prevent any long-lasting impacts of the pandemic lest economic growth and recovery might stagnate during its aftermath. With the production process curtailed, income generation stagnated and demand of non-essentials moderated, it is a no brainer that government reserves have dwindled far below recuperation point. In the backdrop of a 66% rural stratum, this has transcended into a nightmare for India, where the government alone is now tasked with spending not only to ‘fulfil’ demand but also to ‘generate’ it. Considering, the government’s role in the matter may come to be fairly justified if the funds are put to good use in future.

Nevertheless, the Fund has not failed to receive sharp criticism from political opponents of the ruling government in the CSR context. Among other things, it has been alleged that the various benefits conferred by the Fund on donors would cause funds to direct away from State Relief Funds and the PMNRF. Notably, the PM CARES Fund is on the same footing as the PMNRF in so far as provisions for tax benefits and set-off against CSR are concerned. A lesser advertised fact remains that contributions made to State Disaster Management Authorities to combat Covid-19 will also qualify as CSR expenditure under item no (xii) of Schedule VII to the Companies Act.¹⁷³³ In fact, all Covid-19-related spending on activities listed under items (i)-(xii) of Schedule VII, can classify as CSR expenditure.¹⁷³⁴

Therefore, expressly sanctioning a set-off against CSR for corporate donations made to the PM CARES Fund does not lend any particular favour to its donors at the cost of other Funds. It is in fact likely to fulfil its purpose in the short run, if managed properly. But, from a long-term perspective and in light of other differences between itself and other Funds, there are apprehensions, and rightly so, that a wedge may be created between contributions made to the corpus of PM CARES Fund vis-à-vis the PMNRF and the State Relief Funds.

V. NATURE OF THE FUND

¹⁷³³ Supra.

¹⁷³⁴ Remya Nair, ‘Donations to PM CARES Allowed under CSR, But Not to States or CMs: Corporate Ministry’ *The Print* (New Delhi, 11 April 2020) <<https://theprint.in/india/donations-to-pm-cares-allowed-under-csr-but-not-to-states-or-cms-corporate-ministry/399984/>> accessed 25 August 2020; *See also* Ministry of Corporate Affairs, *Clarification on spending of CSR funds for COVID-19* (23 March 2020, General Circular No 10/2020); Supra.

The PM CARES Fund is admittedly in the nature of a public charitable trust¹⁷³⁵ and its trustees, existing and those who may be appointed in future, have been given the power to formulate rules for carrying out any or all of its objectives. According to an Economic Times report, the Fund can have up to 13 eminent experts from fields of research, health, science, social work, law, public administration or philanthropy.¹⁷³⁶ The Prime Minister, who would act as the Chairperson of the Board of Trustees, has been empowered to nominate three trustees to the Board who shall be eminent persons from such fields. Interestingly, however, the appointed trustees shall act only in a pro bono capacity.

Significantly, the Fund has been setup as a 'charitable' trust. S 2(15) of the I-T Act defines 'charitable purpose' as including, inter-alia, relief of the poor, medical relief, and advancement of any other object of general public utility.¹⁷³⁷ Organizations working towards charitable purposes most often work for the advancement and/or alleviation of an underprivileged, deprived segment, a disempowered class or a socio-economically exploited stratum. In recent times, however, there have been growing instances of these organizations being run for profit motive since they receive massive funding (domestic as well as foreign) from government, philanthropists and even from corporates. Opportunistic individuals with a knack for pitching empathy have taken their chances as and when they came; coupled with a lack of accounting and audits and violation of procedures established by law, funds that should ideally go towards a noble cause have consequently ended up getting siphoned off of people they're intended for. For some perspective, it may be noted that licenses of nearly 8000 charitable organizations have been cancelled by the Home Ministry in the past few years.¹⁷³⁸ Under these circumstances, the government should have been circumspect about the nature of the Fund they were creating, and more so, with respect to those entrusted with its management. Independence of the trust is wanting inasmuch as the power to audit does not rest with the CAG, a constitutional authority created with the very purpose of ensuring that audit reports remain uninfluenced. The PM CARES Fund expressly empowers the trustees to appoint an auditor of their choice, rendering the process nugatory, as the auditor so appointed

¹⁷³⁵ Press Release *Press Information Bureau* (Delhi, 13 May 2020) <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1623649>> accessed 25 August 2020; *See also* n 1.

¹⁷³⁶ *Supra*.

¹⁷³⁷ The Income-Tax Act 1961, s 2.

¹⁷³⁸ Dhaval Gusani, 'All about FCRA Registration, Prior Permission, Eligibility & Compliance Requirements' (*TaxGuru*, 18 March 2019) <<https://taxguru.in/corporate-law/fcra-registration-prior-permission-eligibility-compliance-requirements.html>> accessed 25 August 2020.

is likely to refrain from acting in any manner opposed to the government's interests for fear of sanctions.

As noted early on, the PM CARES Fund and the PMNRF are on equal footing in matters of tax exemptions, set-off against CSR obligation and acceptance of foreign aid (with miniscule difference in conditions). Nevertheless, the PM CARES Fund alone has been aggressively advertised as the redeemer in these testing times despite its ambiguously-worded objectives not falling too far from those of the PMNRF. It is guilty also of being unflinchingly opaque notwithstanding the existence of a legal document evidencing more than what has been made known to the public. Historically speaking, pan-India public charitable trusts of its kind remain lesser known (if any) and this has further raised qualms over the government's intention behind creating the Fund. So, while it attracts thousands of crores from all over the country, a responsibility falls on the judiciary to see if the PM CARES Fund is really as charitable as it has been purported to be or the general public is being led up the garden path.

VI. QUESTIONS THAT NEED TO BE ASKED

A. Why is the Government Willing to Accept Foreign Aid Now?

In consonance with a similar scheme of PMNRF [differing however insofar as PMNRF has historically accepted foreign funds only from non-resident Indians (NRIs), persons of Indian Origin (PIOs) and foundations], the PM CARES Fund is accepting donations from individuals and organizations based in foreign countries. Logical on the face of it, this step has ironically given rise to suspicions about whether the PM CARES Fund is really as democratic and bereft of political motive as has been advertised. Why? Because in contradistinction to its present intention to assimilate all help that the nation can get by means of the PM CARES Fund, the ruling government's trajectory is besmirched by its earlier refusal to receive voluntary foreign donations from the likes of UAE and Qatar during the Kerala floods crisis of 2018.¹⁷³⁹ A spokesperson for India's foreign ministry, Mr. Ravesh Kumar was quoted during the time as saying, 'the government is committed to meeting the requirements for relief and rehabilitation through domestic efforts'.¹⁷⁴⁰ Even when the

¹⁷³⁹ Adam Withnall, 'India to 'Politely' Reject Foreign Aid for Kerala Flooding Crisis' *Independent* (Delhi, 22 August 2018) <<https://www.independent.co.uk/news/world/asia/kerala-floods-inida-aid-reject-international-help-dead-rescue-rebuild-a8502406.html>> accessed 25 August 2020.

¹⁷⁴⁰ Kallol Bhattacharjee, 'Govt. Will Meet Kerala's Needs Through Domestic Efforts: MEA' *The Hindu* (New Delhi, 22 August 2018) <<https://www.thehindu.com/news/national/for-now-india-rejects-offers-of-foreign-aid-for-kerala-relief/article24754161.ece>> accessed 25 August 2020.

Centre's relief package fell billions short of what the State affected by the worst flood in a century asked for, voluntarily offered foreign aid was denied citing foreign policy. In similar manner, whenever the country was hit by a crisis in the past, broadly, only NRIs, PIOs and organizations run by them were allowed to make contributions to the PMNRF.¹⁷⁴¹ It may be noted that this foreign policy was put in place years ago only to make India self-reliant.

However, the PM CARES Fund makes no such distinction between NRIs and foreigners for the purpose of donation. In contrast to its earlier position on the matter, the government is not opposed to accepting donations from foreign governments and nationals this time. Oft-cited justifications for not accepting foreign aid (like, its resulting in unnecessary obligations and complicating diplomatic relations) seem to have changed fervour, now that that suits the federal government's purpose. The fact that the government shirked financial responsibility earlier when a crisis hit a particular part of the country renders legally suspect the motivations of the same administration which is now attempting to gather funds for a pan-India crisis. If nothing more, it reflects a Centre-State divide in State response to crisis. In a country based on fundamental principles of equality, the government's inaction in response to 2018 Kerala floods vis-à-vis action in response to 2020 pandemic reflects sheer hypocrisy and necessitates closer scrutiny of motives behind the creation of the PM CARES Fund before people make further donations to it.

Be that as it may, the difference between a subservient nation that depends on foreign aid even in times of manageable crisis and one that assimilates all available help from abroad so that it may save human lives is perhaps still wasted upon the Indian lawmakers who have not yet amended the foreign policy.

B. Why Is A Set-Off Against CSR Obligations Permissible?

Unlike contributors of the PM CARES Fund, those contributing to state governments' initiatives, for example, to Chief Minister's Funds or State Relief Funds (established in response to the pandemic), do not enjoy the benefit of getting their CSR obligations set-off against contributions made by them. Lest it may be construed as a malicious move on behalf of the ruling government, it is pointed out that this differential treatment has its roots in

¹⁷⁴¹ Priscilla Jebaraj, 'PM-CARES | Centre Sends Conflicting Signals on Foreign Donations' *The Hindu* (New Delhi, 3 April 2020) <www.thehindu.com/news/national/pm-cares-centre-sends-conflicting-signals-on-foreign-donations/article31245203.ece> accessed 25 August 2020.

Schedule VII of the Companies Act. Schedule VII, which lists activities that may be undertaken by companies in discharge of their CSR obligations, does not include these Funds as prospective recipient(s). The MCA has clarified that item no (viii) of Schedule VII allows companies to make CSR contributions to the PMNRF or to any other fund set up by the Central government for socio-economic development and relief; the same provision gives legal stimulus to allow contributions made towards the PM CARES Fund to be set-off against CSR obligations.¹⁷⁴²

It may be noted that a 2014 circular by the MCA notified that contribution(s) made by a company to the corpus of a trust will qualify as CSR expenditure as long as the trust is exclusively working towards CSR initiatives or is directed to expend funds for a specific purpose covered by Schedule VII of the Companies Act.¹⁷⁴³ While these government clarifications rally in favour of making CSR contributions to the PMNRF, the PM CARES Fund and/or similar Central government funds, legitimate concerns too have been voiced on numerous occasions against funding of Government Schemes via CSR contributions.

A High-Level Committee (HLC) report of 2015 echoed these concerns, with particular regard to CSR contributions flowing into the PMNRF. As clarified by the Finance Act 2014, tax benefits under the I-T Act are not available to companies for their contributions towards CSR. Even so, companies' contributions to the PMNRF qualify for tax exemptions. The HLC-2015 report noted that lesser compliance issues and comparative ease of diverting funds to the PMNRF vis-à-vis for skill development, or for the rural sector, or for other such purposes enhances the likelihood of substantial CSR contributions flowing towards PMNRF.¹⁷⁴⁴ It further added that the corporates' benefitting from making CSR contributions to the PMNRF, due to tax exemption(s), may be regressive. At the very least, it is opposed to the legislative intent behind the Companies Act which purposefully mandated CSR contributions as a way of infusing a sense of social responsibility into the capitalist corporate sector. The idea was to necessitate usage of managerial skills by the corporates and not just that of its resources, in bringing about a change, which objective is rendered nugatory if

¹⁷⁴² Ministry of Corporate Affairs, *Clarification on contribution to PM CARES Fund as eligible CSR activity under item no. (viii) of the Schedule VII of Companies Act, 2013* (28 March 2020, eF No CSR-05/1/2020-CSR-MCA).

¹⁷⁴³ Ministry of Corporate Affairs, *Clarifications with regard to provisions of Corporate Social Responsibility under Section 135 of the Companies Act, 2013* (18 June 2014, General Circular No 21/2014).

¹⁷⁴⁴ Anil Baijal Committee, *Report of the High-Level Committee (to suggest measures for improved monitoring of the implementation of Corporate Social Responsibility policies)* (September 2015) 19 para 3.6.2-3.6.4.

companies simply fuse funds into Government Schemes. The report also observed that a differential treatment in taxation matters between CSR expenditures made towards PMNRF vis-à-vis those made otherwise might distort allocation of funds across various sectors that are in need of development.

The criticism of funding of government initiatives vide CSR contributions and the questions revolving around it did not end there. Another MCA circular¹⁷⁴⁵ made some pivotally important observations in 2016 – (i) That CSR cannot be interpreted as a source of financing the resource gaps in Government Schemes and the use of corporate innovation and use of management skills in the delivery of ‘public goods’ strikes at the root of codifying CSR laws (Even so, the Board of a Company remains duly empowered to make a contribution to any Government Scheme); (ii) That any amount spent by a company on CSR, in excess of 2% of its average net profit of three preceding years, ‘cannot be carried forward’ to the subsequent years and adjusted against that year’s CSR expenditure (However, the PM CARES Fund allows such carrying forward in violation of this mandate); (iii) That implementation of CSR initiatives is the task of CSR Committees and the government has no role in this regard (Quite ironically, the entire gamut of CSR contributions made to the PM CARES Fund will be at the disposal of the trustees and the CSR Committees will have no role whatsoever in the matter of its spending); (iv) That one-off event such as a charitable contribution will not qualify as CSR expenditure (which is exactly what contributions made to PM CARES Fund are and yet they qualify as CSR).

More recent development includes penning down of a report by a committee constituted in 2018 that made critical evaluation of CSR provisions and corporates’ compliance therewith. It made recommendation(s) that offer a middle ground with regard to funding of Government Schemes vide CSR contributions. Key observations and recommendations include – (i) Transfer of CSR monies to Central Government funds does not serve the intended purpose of CSR (Page 62); (ii) If there comes a situation where certain items in Schedule VII become more important than others for achievement of development goals, the Central Government may, if required, identify a few of them as priority areas and issue specific directions (Page 70); (iii) When situation warrants, the Central Government may give specific directions to Companies to align their CSR expenditures with broader national priority or social inclusion

¹⁷⁴⁵ Ministry of Corporate Affairs, *Frequently Asked Questions (FAQs) with regard to Corporate Social Responsibility (CSR) under Section 135 of the Companies Act, 2013* (12 January 2016, General Circular No 01/2016).

(Page 70); (iv) Contribution to Central Government funds specified in Schedule VII shall be discontinued as CSR spend (Page 71, 91) and (v) All activities listed under Schedule VII shall enjoy uniform tax benefit (Page 92).¹⁷⁴⁶

By any measure, the PM CARES Fund has presented companies with a more lucrative alternative for their CSR contributions. Before this Fund, similar role was being played by the PMNRF, except, the contributions made towards it remained paltry. It is posited that from a legal vantage point, there is no reason for newly created National Funds to not be at par with newly created State Funds in times of unprecedented crisis, especially when they are all targeted towards the same objective (in present case, tactical response against Covid-19 pandemic). There is no dearth of evidence over the government's conflicting views on what should constitute CSR, but the state authorities who are on the frontlines of disaster relief within their jurisdiction should not have their hands cut off by the Centre nor should they have to await Centre's aid. National disasters, by their very nature, affect states in unequal proportions and on first thought, the Central government is best suited to collect funds because of strong variation in the level of economic prosperity across states and disproportionate disaster-impact. However, procedural delay and administrative lapses, which run deep into most administrations, have a penchant to dilute the efficacy of even the finest of Governmental Schemes. Therefore, the government should consider amending the old law(s) and formulating new ones that would bring about more parity in Centre-State response to crisis.

C. On Registration and Applicability of Laws

In a series of instances, government's lack of transparency with regard to the PM CARES Fund was brought to light again when one Vikrant Tongad filed an RTI to the PMO; it was refused citing the Hon'ble Supreme Court's observation that, 'indiscriminate and impractical demands under RTI Act for disclosure of all and sundry information would be counterproductive'.¹⁷⁴⁷ Many RTI queries since have not received a response despite expiry of the statutory period.

¹⁷⁴⁶ Injeti Srinivas Committee, *Report of the High-Level Committee on Corporate Social Responsibility 2018* (2019) 62ff.

¹⁷⁴⁷ Supra.

In the context of the PMNRF, discussion first spurred regarding the applicability of the RTI Act in 2015 before the Delhi High Court.¹⁷⁴⁸ In this case, the petitioner had sought detailed information (about the recipient/beneficiaries and the amount disbursed to each) from the Central Public Information Officer (CPIO), PMO, regarding transactions of the PMNRF for a specific period. Only partly supplying the information sought, CPIO invoked exemption under S 8(1)(j) of the RTI Act and denied the rest. The matter went to the Appellate Authority and then a second appeal was preferred to the Chief Information Commissioner (CIC); the latter ordered the CPIO to furnish details of institutional donors and to place them in the public domain. Aggrieved, the PMNRF filed a writ petition before the Delhi High Court. Against the plea of the petitioner that the PMNRF, being a ‘public authority’, must come under the purview of the RTI Act, the government argued that the Fund was not created as a result of any executive instruction or order and therefore operates in the nature of a ‘private trust’ with high constitutional functionaries as its *ex-officio* ‘trustees’.¹⁷⁴⁹ The matter was dismissed by the Single Bench, upholding the CIC’s order. However, the Hon’ble judge did not rule that the PMNRF was a ‘public authority’ within the ambit of S 2(h) of the RTI Act. When the matter went in appeal before the Division Bench, dissenting opinions were given by the two Hon’ble judges.¹⁷⁵⁰

Interestingly, S 2 of the RTI Act defines ‘appropriate Government’ and ‘public authority’ as follows:

‘(a) ‘appropriate Government’ means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly -

(i) by the Central Government or the Union territory administration, the

Central Government;

(ii) by the State Government, the State Government;

¹⁷⁴⁸ *Prime Minister’s National Relief Fund v Aseem Takyar* WP(C) 3897/2012 (Unreported, Del HC).

¹⁷⁴⁹ Shreenath A Khemka, ‘The Legal Charter of PM CARES is Unsound, the Government Must Frame Rules at Once’ *The Wire* (22 April 2020) <<https://thewire.in/law/the-legal-charter-of-pm-cares-is-unsound-the-government-must-frame-rules-at-once>> accessed 25 August 2020.

¹⁷⁵⁰ *Prime Minister’s National Relief Fund v Aseem Takyar* 2018 SCC OnLine Del 9191.

(h) 'Public authority' means any authority or body or institution of self-government established or constituted –

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any -

(i) body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government.¹⁷⁵¹

(emphasis supplied)

It may be noted that the definition of 'public authority' makes no provision to accommodate a trust brought into existence as a result of a Government initiative, which is what the PM CARES Fund is. Resultantly, there is a good chance that this Fund may fall out of the purview of the RTI Act. While the press releases from the PMO and the official statements have been vocal about the existence of a trust deed with respect to the PM CARES Fund, this public charitable trust created by the Government does not fall within the purview of 'an authority or body established or constituted by any law made by Parliament' by any means. No law made by the Parliament led to the 'establishment or constitution' of PM CARES Fund. It is a public charitable trust constituted by Cabinet members. Additionally, the PM CARES Fund does not receive budgetary support from the Government, either. Since it is not financed, controlled or owned 'by funds' coming from the Government of India, it may well be adjudged as falling out of the purview of 'public authority'.

Making matters worse, the PMO has clarified in response to an RTI filed, that the Fund is not a public authority under S 2(h) of the RTI Act.¹⁷⁵² It was hitherto officially unknown whether the Fund is registered as a trust under any law (example: the I-T Act or the Registration Act 1908). But, the official website of the Fund has now clarified that its trust

¹⁷⁵¹ The Right to Information Act 2005, s 2.

¹⁷⁵² Priscilla Jebaraj, 'Coronavirus | PM CARES is Not a Public Authority under RTI Act: PMO' *The Hindu* (New Delhi, 30 May 2020) <www.thehindu.com/news/national/coronavirus-pm-cares-is-not-a-public-authority-under-rti-act-pmo/article31712146.ece> accessed 25 August 2020.

deed was registered under the Registration Act 1908 on 27 March 2020. While there are some state Acts for public trusts (applicable to their own territorial jurisdiction only), the two Funds (PMNRF and PM CARES) are headquartered in Delhi which is not governed by any such Act. As appalling as it may be, there is also no Central Trusts Act governing public trusts and the Hon'ble Supreme Court has categorically held that the Indian Trusts Act 1882 is applicable only to private trusts by virtue of the Preamble and S 1 thereof.¹⁷⁵³

In this backdrop and in consideration of ongoing litigation as well as RTIs filed, it is highly probable that the relevant Authorities may in the future deny information and accountability by invoking exemption under the RTI Act as claimed in the Aseem Takyar case (supra). Although, a sliver of hope may be seen in the words 'funds provided directly or *indirectly*' by the Government (in the RTI Act). Primarily, it is the PSU-funding that sets PM CARES Fund apart from the PMNRF. Therefore, if subsequent litigation leads to a conclusive result that substantial funding of the PM CARES Fund is owed to the PSUs, the courts may rule in favour of placing transaction details of the Fund in public domain.

Seen in this light, the distinction between a public authority and an authority created at the instance of public office for the purpose of differentiating the PM CARES Fund from the PMNRF assumes great importance. A second crease in the matter is if a trust deed can be seen as a title document conferring ownership of a public trust on the Government of India. The law not being settled on either, the issue remains *res integra*.

Nonetheless, witnessing two major public funds being controlled by the ruling government enjoins a crippling fear of corruption and misappropriation. Therefore, all things considered, the factum of administration of the PM CARES Fund by Cabinet member(s) (even if in their official capacities) must weigh with the courts in rendering it amenable to their writ jurisdiction at the earliest.¹⁷⁵⁴

D. On Availability of Low-Cost Ventilators

A rough estimate reveals that about 40000 ventilators are most likely deployed in hospitals of metro cities, of state capitals and of semi-metro towns in India.¹⁷⁵⁵ The ventilator market of

¹⁷⁵³ *Thayarammal (Dead) by LRs v Kanakammal & Ors* AIR 2005 SC 1588.

¹⁷⁵⁴ See n 47.

¹⁷⁵⁵ Sanchita Sharma, 'As Coronavirus Cases Surge in India, 40,000 Ventilators for 1.3bn People a Worry' *Hindustan Times* (New Delhi, 23 March 2020) <www.hindustantimes.com/india-news/as-coronavirus-cases-surge-in-india-40-000-ventilators-for-1-3bn-people-a-worry/story-2My7VOoMuqHpGmvosK3tvN.html> accessed 25 August 2020.

the country is known to have been historically dominated by foreign manufacturers, whether of components or of devices themselves. Such outsourced ventilators (dominated as they are by imported components) have traditionally cost ₹8-10 lakhs to the nation, on an average.¹⁷⁵⁶ Notably, before the coronavirus pandemic struck India, the ventilators sold in the country had to meet high-quality benchmarks set by the US Food and Drug Administration (USFDA) or European Union (CE) certification. Tenders floated by state governments of Maharashtra and Rajasthan in as late as March 2020 as well as the Health Ministry's earlier specifications insisted on adherence to USFDA/CE certification, which made it difficult for domestic manufacturers to participate in them.¹⁷⁵⁷ Achieving these standards also made the ventilators cost about ₹10 lakhs which in turn rendered mass manufacturing at a short notice impossible when the pandemic started getting worse in the country. In the backdrop of a ventilator market that was valued at ₹444.74 crores in 2019, the government finally took a leaf out of foreign experience and started, at a belated stage, to increasingly permit and promote the manufacturing of specialised ventilators that were maneuverer to efficiently serve Covid-19 patients.¹⁷⁵⁸ Be that as it may, this aspect of the matter is not without concerns. Data shows that a total of ₹29 crores was spent on procurement of 1000 units of indigenous ventilators in 2019, which indicates that these units, which were mostly procured by government-run hospitals, were priced somewhere around ₹290000 during the time.¹⁷⁵⁹ The PM CARES Fund, however, set aside a total of ₹2000 crores for purchasing 50000 units of indigenous ventilators that were designated to be distributed to government-hospitals.¹⁷⁶⁰ Surprisingly therefore, these ventilators were outlined to be purchased at a price of ₹4 lakhs per unit despite the availability of low-cost, indigenous ventilators (priced around ₹1.5 lakhs) in the Indian market that could serve the purpose.¹⁷⁶¹

¹⁷⁵⁶ 'Ventilator Sales Take a Hit in 2019' *Medical Buyer* (January 2020) <www.medicalbuyer.co.in/ventilator-sales-take-a-hit-in-2019/> accessed 25 August 2020.

¹⁷⁵⁷ PB Jayakumar, 'Indian Ventilator Makers Plan 50,000 Units by May with Auto Majors' Help' *Business Today* (1 April 2020) <<https://www.businesstoday.in/current/corporate/indian-ventilator-makers-plan-50000-units-by-may-with-auto-majors-help/story/399776.html>> accessed 25 August 2020.

¹⁷⁵⁸ Darrell Etherington, 'FDA Authorises Production of a New Ventilator that Costs Up to 25x Less than Existing Devices' (*TechCrunch*, 15 April 2020) <<https://techcrunch.com/2020/04/15/fda-authorizes-production-of-a-new-ventilator-that-costs-up-to-25x-less-than-existing-devices/>> accessed 25 August 2020 (countries moving towards specialised ventilators).

¹⁷⁵⁹ *Supra*.

¹⁷⁶⁰ *Supra*.

¹⁷⁶¹ Mayukh Majumdar, 'AgVa Healthcare Comes Up with Low Cost Ventilators to Aid Against COVID-19' (*Man's World India*) <www.mansworldindia.com/more/news/agva-healthcare-covid-19/> accessed 25 August

As cost-cutting measures reduced the cost of indigenous ventilators for the Indian market, the government's setting aside of a substantial amount for merely 50000 units of ventilators raises serious questions that remain unanswered.¹⁷⁶² The scepticism, therefore, around the margin between the cost of newly developed ventilators and the price earmarked per unit of ventilator (under the PM CARES Fund), also needs addressal.

E. Disbursal of Funds – What Gives?

An announcement was made by the authorities in early May 2020 that ₹3100 crores out of the PM CARES Fund were to be allocated as follows - (i) ₹2000 crores towards the purchase of ventilators, (ii) ₹1000 crores to the State Governments/UTs for extending support to migrant labourers (funds to be at the disposal of District Collectors/Municipal Commissioners) and (iii) ₹100 crores to support vaccine development under the supervision of Principal Scientific Advisor.¹⁷⁶³ Still and all, an unspent balance of thousands of crores (based on publicly declared estimates) in the Fund, remains unaccounted for by the government.

With respect to the ₹1000 crores allocated for support of migrant labourers, a criteria for disbursal of the sum (as relief package to states/UTs) was proposed as follows - 50% weightage to be given to the state/UT population (as per 2011 Census), 40% weightage to the number of cases therein and 'a minimum of 10% sum to be allocated to each state/UT'.¹⁷⁶⁴ It is posited that, on this basis, north-eastern states of Mizoram, Manipur, Meghalaya, Nagaland and Arunachal Pradesh and the UTs of Dadra and Nagar Haveli and Daman and Diu (DNHDD), Lakshadweep and Andaman and Nicobar Islands which had little-to-none active

2020; See also Abhaya Srivastava, 'Toaster-Sized Ventilator from India Helps Hospitals in Virus Fight' (*Medical Xpress*, 2 April 2020) <<https://medicalxpress.com/news/2020-04-toaster-sized-ventilator-india-hospitals-virus.html>> accessed 25 August 2020; See also 'India's Toaster-Sized Ventilator to Help in Fight against Virus' *AlJazeera* (2 April 2020) <www.aljazeera.com/news/2020/04/india-toaster-sized-ventilator-fight-virus-200402090302355.html> accessed 25 August 2020; See also PTI, 'Indian Startup, Nocca Robotics, Plans to Ship COVID-19 Ventilator from May-End' *The Economic Times* (New Delhi, 8 May 2020) <<https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/indian-startup-nocca-robotics-plans-to-ship-covid-19-ventilator-from-may-end/articleshow/75626184.cms>> accessed 25 August 2020.

¹⁷⁶² Rohini Singh, 'Behind Ahmedabad's Ventilator Controversy, a Backstory of Connections to Top BJP Leader's' *The Wire* (New Delhi, 21 May 2020) <<https://thewire.in/political-economy/modis-monogrammed-suit-rajkot-ventilator-vijay-rupani>> accessed 25 August 2020 (government procuring ventilators that proved inadequate on Covid-19 patients; alleged ties between ventilator-manufacturing firm's promoters and ruling government's leaders).

¹⁷⁶³ Press Release *Press Information Bureau* (Delhi, 14 May 2020) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1623858>> accessed 25 August 2020.

¹⁷⁶⁴ *Supra*.

coronavirus cases at the time of allocation became eligible to receive donations accumulated by the Centre in the PM CARES Fund, at the cost of other states'/UTs' response to the outbreak. Donations coming to the Fund from denizens of the worst-affected states/UTs like Maharashtra, Delhi, Tamil Nadu and Gujarat which could have well gone into their own tactical response against the pandemic if it wasn't for the PM CARES Fund, became susceptible to inefficient distribution because the government chose to follow the aforementioned criteria. This is not to say that the former states/UTs were not affected at all; there was a ripple effect of the pandemic on them, of course, but it is not as if they were not equipped to survive minor financial upheavals. A more rational approach in the wake of the crisis would have been for the government to disburse funds progressively, keeping in mind the 'needs' of states/UTs.

It may additionally be noted that, any allocation out of the PM CARES Fund was over and above the stimulus package of ₹15000 crores which was set aside by the Centre to help states recuperate from any damage caused due to the pandemic. Under these circumstances, the donations made to this 'dedicated national Fund' should ideally have flown only to states/UTs that were 'indisposed'. The minimum of 10% set by the government for each state/UT that is, ₹100 crores, was at any rate too high, especially in a beat-up economy where states worst-affected by the pandemic were running deficits. Howsoever, the remaining surplus in the Fund can now only be expected to be channelized efficiently so that it may meet the needs of those affected.

Another issue of minor import that is likely to arise in future is one wrt the status of undisbursed monies in the PM CARES Fund. While the PMNRF has been a dependable ally over the years for people affected by disasters, riots and other mishaps of varying magnitudes, the PM CARES Fund has been projected (if not created) solely as a means to tackle the coronavirus pandemic. There are legitimate concerns that when the country will have recovered from the ill-effects of the pandemic, this new, government-favoured fund might continue to divert necessary resources away from grassroot humanitarian efforts, which have hitherto been catered by the PMNRF and State Disaster Management Authorities. It is averred that such notion is not entirely misconceived despite the government's unflinching stand that the objectives of the Funds in question are in contradistinction. While State Disaster Management Authorities are a tad-bit unpopular, one cannot lose sight of the fact that it's primarily the targeted advertisement of the PM CARES Fund that has practically

resulted in the debilitation of states in the face of a major crisis and also adversely affected their response against a pandemic which hit them disproportionately.

Lastly, since the power to make rules and directions for the trust (especially qua disbursement and appointment of auditor(s)) vests entirely with the trustees, there is unfading uncertainty regarding its future administration in the event of fulfilment of its highlighted purpose; more so, as the ruling government continues to dodge questions on transparency and accountability. Becoming part of a common fight against the pandemic may have led the nation to make unprecedented contributions to this unapologetically opaque Fund for now, but how likely is it that the trust will continue to exist given its stated objectives? Supposing it doesn't, what will become of the undisbursed funds? Supposing it does, how different would its objects be from those of the PMNRF?

F. Conditional Contributions to The PMNRF – An Alternative?

Experts have reasoned that the PM CARES Fund is receiving unexpectedly high donations of unprecedented magnitudes because the nation is acting in concert against the pandemic. While this may seem like a positive thing to read at first sight, the lesser obvious conclusion is that the Indian populace has whilom refrained from making contributions to any other Fund, like the PMNRF, in moments of crisis that did not directly affect them. Sincerely, it's a shame that donation figures have historically been dismal only because disasters did not pan all over India.

The biggest reason cited behind the PMNRF's relative failure to secure funds is that it does not accept conditional contributions.¹⁷⁶⁵ This gives the PM (and other managers) a carte blanche to utilise its funds as per the needs of those plunged in an abysmal state, instead of the donor getting to decide how his/her money is utilised. However, the PM CARES Fund does not expressly make a like provision. Be that as it may, it has been sprucely advertised as a joint frontier against the Coronavirus pandemic plaguing the country. Because of the government's say-so, all donations directed towards this Fund are expected to be utilised to fight this pandemic and to resuscitate the nation during its aftermath. From this standpoint, it is posited that the PM CARES Fund is even more redundant, because alternatively, contributions to the PMNRF could have been made conditional; the incoming donations could then have been expended towards management of the present crisis, without having to

¹⁷⁶⁵ Supra.

go through the hassle of establishing a public charitable trust in the dead centre of an adversity.

G. Why Is the Fund Exempted from Applicability of The FERA, 2010?

The PM CARES Fund has received an exemption from applicability of the Foreign Contribution (Regulation) Act, 2010.¹⁷⁶⁶ The legislative intent behind subjecting charitable organizations to special scrutiny under this Act was to prevent misuse of foreign funds for illegal purposes.¹⁷⁶⁷ But, the PM CARES Fund has bypassed scrutiny thereunder for unknown purposes. This implies that the acceptance and utilisation of foreign contributions to the Fund will not be regulated, despite all charitable organizations, which receive foreign contributions, coming under the purview of this Act.

Interestingly, the FCRA exempts all statutory bodies constituted under a Central or State Act, which have their accounts compulsorily audited by the CAG, from its rigours (including inter-alia, the mandate to register).¹⁷⁶⁸ It is shocking then that the PM CARES Fund has been excluded from the purview of FCRA, considering it is also not subject to audit by the CAG. Registration of the trust under the Registration Act, 1908 is also of little avail lest legal issues should arise; it is rather perturbing that the government sought to avoid regulation under the FCRA especially when it has unbridled power to grant 'prior permission' for registration.

VII. CONCLUSION

As noble as the motivations behind creating the PM CARES Fund may be, the Fund in itself is no short of a Daedalian marvel. It was set up under circumstances that offer a plausible explanation for its creation at first thought, but what follows is an insolent lack of dissipation of its particulars which continues to erode public faith by thickening the air around its creation. Any benefits that were to accrue have remained absent for the most part, causing masses deprived of income and resources to suffer in eloquent silence. Further, the intense apathy shown by the Government towards such deprivation has and continues to cost human

¹⁷⁶⁶ Supra.

¹⁷⁶⁷ The Foreign Contribution (Regulation) Act 2010, Statement of Object & Reasons ('An Act to consolidate the law to regulate the acceptance and utilisation of foreign contribution...and to prohibit acceptance...for any activities detrimental to national interest').

¹⁷⁶⁸ Ministry of Home Affairs *The Gazette of India* (New Delhi, 1 July 2011, SO 1492(E)).

lives. Consequently, even the few laudable measures that were timely taken and deserved applause are gradually falling into disfavour.

Notably however, this pandemic still provides a common cause that everyone relates to and feels for, causing hefty amounts to continue to pour in from all spheres. Regardless, India's tactical response has begun to turn disdainful by the day in light of the government doing little to extend benefits of the aid worth billions of dollars that it's been receiving. In this backdrop, it is asserted that donations made to the PM CARES Fund should be subjected to the checks and balances provided for under the Constitution (namely, audit by CAG) and it should not be allowed to escape the rigours of law if found flouting established procedures. In furtherance of like motive, a plea has been filed more recently by Advocate Arvind Waghmare before the Bombay High Court seeking declaration of total sum collected by and expenditure incurred out of the PM CARES Fund, so far.¹⁷⁶⁹ Notices seeking replies of the respondent-trustees have been issued, in response. The petitioner in this case has also argued that guidelines with respect to the Fund entail appointment of three more trustees, but no such appointment has been made.¹⁷⁷⁰ It is posited, in agreement, that even if the appointment of more trustees is a matter of the Board's discretion, it should be made at the earliest so that it may bolster confidence of the public in the Fund's administration, if not in its creation.

WORDS SPEAK

¹⁷⁶⁹ PTI, 'Plea Seeks Declaration of Amount Received, spent by PM-CARES Fund' *The Hindu* (Nagpur, 14 May 2020) <<https://www.thehindu.com/news/national/plea-seeks-declaration-of-amount-received-spent-by-pm-cares-fund/article31582644.ece>> accessed 25 August 2020.

¹⁷⁷⁰ *ibid.*