

# **ENVIRONMENTAL PROTECTION AS A TOOL OF CORPORATE SOCIAL RESPONSIBILITY - A JUDICIAL ANALYSIS**

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**Abstract:** The concept of Corporate Social Responsibility (CSR) is not new in India. It emerged from the 'Vedic period' when history was not recorded in India. In that period, Kings had an obligation towards society and merchants displayed their own business responsibility by building places of worship, education, inns and wells.

India has a history of having a compassionate attitude towards environment. But with the passage of time the ethical values towards society have degraded as a result of which judiciary intervened so as to protect the environment. The concept of corporate social responsibility encompassed the right to pollution free environment and the constitutional duty to protect and improve the environment. The paper introduces the concept of Corporate Social Responsibility in tune with the Constitutional commitment towards environment protection. Judicial decisions bring into light the conception of Corporate Environment Liability as a concomitant of Corporate Social Responsibility by streamlining the defaulting institutions.

**Keywords:** CSR, Environmental protection, Judiciary, Supreme Court.

**Introduction:** Compassionate attitude has been warped in Indian Culture and ideals amalgamated into individual lives. Social Responsibility in ancient India was effectively actuated by appeals and exhortations, not necessarily through stick and sword or king's command. But modern human personality – natural and artificial – is constrained or compelled to care for responsibility not only for self but also for society. The Companies Act of 2013 seeks to exact Social Responsibility of Corporate, probably through coercive mandates since voluntary charity of individuals or institutions appears too remote or too unpredictable. Sec. 135 of the Companies Act, 2013 and related rules of 2014 along with the Sch.VII list seem to comprise the citadel of Corporate Social Responsibility, an interplay between ideals and implementation.

Environmental Protection may be undertaken by the Corporate as an integral part of Corporate Social Responsibility. Formal efforts to promote better environmental practices by TNCs that originate outside of corporate circles have been stepped up in recent years, alongside industry driven efforts (ISO 14000, Responsible Care, individual pledges of corporate social responsibility). Recent efforts along these lines include the UN's Global Compact, the Organization for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises, as well as calls for an international treaty on corporate accountability. Such an agreement would have enormous significance for the countries of the Global South as it is often difficult for these countries to monitor and enforce environmental regulations, particularly in a climate of regulatory chill (Clapp, 2005).<sup>1</sup>

**Corporate Social Responsibility - Companies Act, 2013 vs. Constitution of India:** Corporate Sector express certain concerns in the implementation of CSR though concur with the responsibility for environmental protection.

**Section 135 of Companies Act, 2013 violates Article 14 of the Constitution:** Article 14 of the Constitution guarantees to every person, equality before law and equal protection of law within the territory of India. But CSR spending is made mandatory to only company form of organisation .CSR is

not applicable to partnership firm or LLP or any other form of organisation, even though its net worth or profit or turnover is more than the prescribed limit.

As per Section 135(1), once a company has met any one of the thresholds relating to net worth, turnover or net profits, it comes within the purview of section 135. Thus a company which does not meet the thresholds at a future point in time would nevertheless continue to be obliged to spend on CSR activities<sup>2</sup>. The explanation to Section 135 states that 'average net profits' shall be computed in accordance with the provisions of Section 198. Section 198 (4) (l) permits only accumulated losses incurred after the date of effectiveness of the said Section (but not for periods prior to such effectiveness) to be set-off against net profits for arriving at 'average net profits' for the purposes of Section 135. Thus, a company which has earned profits during the preceding three financial years but is yet to recoup its carried forward losses relating to the period prior to effectiveness of Section 198 will be required to spend on CSR.<sup>3</sup>

A loss-making company's obligation to contribute to CSR is the same as that of a profit-making company so long as the 'average net profits' test is met.

Lastly, Section 135 also applies to companies registered under Section 8 of the Act, which are statutorily obliged to apply their profits only for promoting their objects and Net Profit calculation for foreign company having subsidiary in India is not clear and it is ambiguous.<sup>4</sup> Since, test for classification is not met, as Section 135 treats unequal's as equals is violates Article 14.

**Section 135 violates Article 19 (1) (g) of the Constitution of India:** Article 19 (1) (g) of the constitution of India, vest freedom of trade, commerce and profession. By section 135 of companies Act 2013, CSR activity is made mandatory to certain companies which meet the required criteria.

**CSR is A Restriction:** Section 135 constitutes such a restriction since it requires the company to divert the money which could have otherwise been reinvested into the company's business for incremental returns or paid as dividend to shareholder, for being spent on CSR activities.

CSR does not fall under reasonable restriction: Article 19(1) (g) is subject to the provisions of Article 19(2) to 19(6) which permit the state to make laws which impose reasonable restrictions on the exercise of the right granted by Article 19(1) (g), inter alia, 'in the interests of the general public'<sup>5</sup> The Supreme Court has, by and large, given an expanded meaning to the language of Article 19(6). The fundamental principle that the Supreme Court has enunciated in the matter of interpreting Article 19(6) is that the reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of the general public and not from the standpoint of the persons upon whom the restrictions are imposed.<sup>6</sup>

Section 135 is nothing but the outsourcing by the Government of its duty to provide its citizens with health care, education, housing and other basic life-sustaining amenities. Section 135 is not intended to limit the adverse impact of business on the public.

It applies to companies carrying on all types of businesses and not necessarily those which are harmful to the health and/or well-being of the society. Section 135 is not intended to help achieve the fulfilment of fundamental rights of citizens which, in the absence of it, would be defeated.

**CSR violates Corporate Democracy:** Shareholders are owners of the company. Management is entrusted to Board of Directors. By virtue of introduction of CSR, board of directors is given unrestricted power to decide the CSR expenditure, the CSR activity to be undertaken.

Board of directors can spend company's money in a CSR activity for their own personal benefit. For Example: A director can approve CSR activity, relating to construction of building in a school/or college where he need to get admission for his son. Since shareholder do not have a say in CSR and board of

directors have unrestricted power and there is no check and balance. Therefore Shareholders rights are affected.

**Supreme Court And Corporate Social Responsibility:** Under Corporate social responsibility policy Rules, 2014 "Corporate social responsibility (CSR)" is explained as follows: "corporate social responsibility means and includes but is not limited to:

1. Projects or programs relating to activities specified in schedule VII to the Act; or
2. projects or programs relating to activities undertaken by the board of directors of a company (board) in pursuance of recommendations of the CSR committee of the board as per declared CSR policy of the company subject to the condition that such policy will cover subjects enumerated in schedule VII of the Act.

**Amendments in the Schedule:** Section 467 of the Companies Act gives power to the central government to alter the provisions contained in any of the Schedules. The section is similarly worded as Section 641 of the Companies Act, 1956 which gave power to the central government to make changes in the Schedules.

Since the Schedule forms an integral part of Section 135, the power to alter the Schedule needs to be exercised with an abundant caution. Delegated legislation is a means by which the legislature delegates part of its legislative function to an executive authority. However, there are well-settled constitutional limits on the scope of delegated legislation. In the case of *In Re the Delhi Laws Act, 1912*<sup>7</sup> the legislature cannot delegate essential legislative functions such as the determination of legislative policy and cannot delegate its power to repeal or modify its essential features. In *Raj Narain v. Chairman, Patna Administration Committee*<sup>8</sup> the Supreme Court accepted that "exactly what constitutes an essential feature cannot be enunciated, in general terms". The court held change in policy is not ancillary function.

The Court however, attempted to spell out it in *Harishankar Bagla v. M.P. State*<sup>9</sup> as follows: "The essential legislative function consists in the determination of choice of the legislative policy and of formally "enacting that policy into a binding rule of conduct". And to declare what the laws shall be in relation to any particular territory or locality, is an essential legislative act.

Social business projects forms the core philosophy of corporate social responsibility and Schedule VII<sup>10</sup> of the original Companies Act, 2013 contained 'social business projects' among the list of various activities that a company could undertake. The Central Government vide notification dated February 27, 2014 made amendments to the Schedule while deleting 'social business projects' from the list of activities enlisted under the Schedule. Although Section 467 empowers the government to amend the Schedule through delegation, the power to amend under this section is meant to make simple alterations without affecting the legislative policies enshrined in the Companies Act, 2013. Deletion of 'social business projects' through the notification seems to override the CSR policy as envisaged under the Companies Act<sup>11</sup>. By deleting 'social business projects' through the notification, the central government seems to have exceeded its legislative mandate and the same may be subject to judicial review in future. This was observed in the case of *J.K. Industries Ltd. v Union of India and Ors.*<sup>12</sup>

Legal mandates like allocation of 2% of net profits for CSR reflects compulsive force on the corporate and jettisoning state responsibility towards its citizens in matters of food, clothing, shelter and education. When State's efforts in fields like Right to Education (Article 21-A)<sup>13</sup> fizzled out, it is doubtful whether law could produce love for society. CSR is being dubbed as "Compulsory Social Responsibility".

**Conclusion:** The concept of Corporate Social Responsibility remains porous because of fluid nature of activities to be covered i.e. Sch. VII items and items recommended by the CSR Committee. The list of activities shall be fixed and certain since social responsibility cannot be permitted to be defined by individuals. Social Responsibility may be active as a passion not to be fired through barrel of gun. For

enforcing this humane principle of democracy, what is required is to ensure Equal treatment to all companies without any distinction between big or small companies. Moreover it is pertinent to note that Section 135 does not empower the Central Government to notify any subordinate legislation. There is no legislative competence to enact this provision under the said Act. New Amendments to the Act should articulate the aspiration of the C.S.R.

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