BEYOND THE CHEQUE BOOK - ANALYSING THE "EXPENDITURE-ONLY" FALLACY OF CSR UNDER SECTION 135 OF THE COMPANIES ACT AND THE RISE OF STATUTORY GREENWASHING IN INDIA

Bavya. B, Dr. Aman Kumar Sharma & Mahesh Sharma, Symbiosis Law School, Pune (SLS-P), Symbiosis Centre for Advanced Legal Studies and Research, Pune, India (SCALSAR), Symbiosis International (Deemed University), Pune, India (SIU)

ABSTRACT

The compulsory Corporate Social Responsibility (CSR) regime in India by Section 135 of the Companies Act 2013 is being hailed around the world as an innovative statutory intervention. However, this article claims that the framework upholds a structural paradox in that it has conditioned corporate social responsibility but virtually and solely on financial spending as opposed to operational responsibility, the law has institutionalised what the authors call the expenditure-only fallacy. With this type of design, a corporation can meet its legal CSR requirements by donating to the unrelated charitable programs, including schools, sanitation, or rural development and at the same time continue running industries that do not comply with environmental norms and community rights. The paper discusses statutory framework of Section 135 and Schedule VII, identifies the flaw in the design that allows statutory greenwashing, evaluates judicial disposition of CSR compliance in environmental liability cases, and determining the effectiveness of penalty provisions as deterrents. The article uses comparative models such as the French Duty of Vigilance Law, the German Supply Chain Due Diligence Act and the EU Corporate Sustainability Due Diligence Directive to suggest a normative reform model that requires corporate legitimacy to be based on demonstrated Human Rights Due Diligence, turning CSR into an operational rather than a philanthropic accounting concept.

Keywords: Corporate Social Responsibility, Section 135, Companies Act 2013, greenwashing, Human Rights Due Diligence, Schedule VII, environmental constitutionalism, corporate accountability, India

Introduction

India stands in a peculiar place in the history of corporate governance in the world. In making the Companies Act, 2013[1] and entrenching a compulsory CSR requirement on companies in Section 135[2], Parliament became part of a small and ambitious club of jurisdictions that had opted to be compulsorily rather than only aspiringly voluntary. International community noticed: here was the largest democracy in the world legislating that the corporations with a certain number of financial resources should invest a significant part of their profits in the social development. Formally, the provision was radical; substantively, structurally flawed as this article will argue, a flaw that it inherently had at birth.

The compromise is a design compromise. Section 135[3] fundamentally is an expenditure mandate. It mandates qualified businesses to establish a CSR Committee[4]; develop a CSR policy and. most importantly expend at least two per cent of their average net profits of the three financial years preceding the date of the report on activities listed in Schedule VII[5] of the Act. The thing it does not expect is any causal connection between spending decisions made by a company and the type of social or environmental damages created by the industrial or commercial activities of a particular company. A petrochemical firm that releases effluents in the water body of a river community might meet its legal CSR requirement by building a school three districts away. A mining conglomerate that has forced the indigenous communities may fulfil his/her statutory obligation by contributing to a national heritage project. The law does not inquire whether the beneficiary of the generosity of the company was initially a victim of its activities.

It is this structural aspect, the decoupling of the spending obligation and harm causation that this article refers to as the decoupling of the expending obligation and harm causation. The error is two-fold. At the legal level it merges the concept of financial compliance with the substantive responsibility to allow the companies to meet the letter of CSR law without meeting the spirit of the law. On reputational level, it creates what this article refers to as statutory greenwashing: the use of CSR spending, which is both legally authorized and publicly reported,

[1] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).
[2] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 135 (India).
[3] Id.
[4] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 135(1) (India).
[5] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, sch. VII (India).

as a reputational buffer which covers ongoing operational damage.

This query is energized by five interrelated questions. The former is an operational responsibility question - what is the effectiveness of the mandatory CSR activities under Schedule VII to push companies to address and minimize the targeted adverse human rights and environmental effects of their direct industrial or commercial activities? The second one is a structural design question - to what degree is the legislative emphasis on expenditure compliance over process compliance such that the CSR mandate is susceptible to greenwashing practices, which degrade human dignity? The third question is judicial accountability -how have Indian courts applied the compulsory CSR framework and constitutional principles to impose corporate accountability and does the CSR record of compliance meaningfully contribute to a compensation or punitive award to a rights violation? The fourth is a deterrence question: do the financial penalties against non-compliance with CSR suffice to prevent systematic non-compliance and deliberate misreporting, or are they seen only as a small regulatory cost to the corporate person? The fifth and normative question focuses on what legal reforms are possible to incorporate the mandatory CSR framework with the internationally recognised Human Rights Due Diligence obligations, and create a legal model of the conditioned corporate rights on demonstrated due diligence.

Five objectives are produced by these questions. The first is to undertake a critical statutory review of Section 135 and Schedule VII to ascertain whether the law commits corporations to allocate CSR expenditure to reduce harms caused by core business operations of that corporation. The second one is to identify the design flaw of the CSR mandate and examine disclosure mechanisms to determine the connection between the expenditure-oriented design and the occurrence of corporate greenwashing. The third goal is to provide a case law study on environmental and social liability decisions, capture influences on judicial reasoning on compensation or punitive liability. The fourth is to evaluate the deterrence impact of CSR penalties, determining whether statutory penalties against non-compliance have a meaningful deterrent effect or is simply a cost of compliance institutionalised. The fifth goal is normative: to come up with a model of reform of the Companies Act that incorporates CSR obligations and Human Rights Due Diligence [6]and turn CSR into a corporate accountability instrument.

[6] Office of the High Comm'r for Hum. Rts., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011).

Statement of Problem

The compulsory Corporate Social Responsibility (CSR) framework in India through section 135 of the Companies Act, 2013 indicates a central conceptual fault of a lack of alignment of corporate responsibility and corporate accountability. Setting compliance in terms of financial spending as the primary framework, the law will allow the corporations to absolve their statutory responsibility in terms of a philanthropic donation that may have no connection to the environmental and social damages caused by their main activities. This spending-based model allows to provide the situation when companies are legally compliant but still have a chance to continue their activities that hamper environmental sustainability and human rights. Consequently, CSR is rather a reputational management tool than a substantive accountability tool which casts serious doubts on the relevance of the legal framework in dealing with corporate-induced harm.

Research Gap

The literature on the CSR regime in India has predominantly focused on measures of compliance, sectoral distribution of CSR funds[7] and its role in developmental goals. Nevertheless, it is clear that there is a huge deficiency of critical dogmatism analysis that looks at the structural decoupling of CSR spending and operational harm. The idea of CSR as a possible means of greenwashing[8] that is legally recognised or even statutory is under-theorised. Furthermore, little has been done to address the relationship between CSR compliance and constitutional environmental jurisprudence, especially as it pertains to the determination of liability and Polluter Pays principle[9]. There is also a lack of comparative involvement with new international structures concerning Human Rights Due Diligence (HRDD), which focus on operational responsibility as opposed to financial input. This lack of synthesis brings a significant gap which this paper aims to fill by reconceptualising CSR in an accountability-focused legal framework.

Research Questions

1. How far does Schedule VII of the Companies Act impose upon corporations the duty

[7] The Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 135(5) (India).
[8] Sec. & Exch. Bd. of India, *Disclosure Norms for ESG Support Services*, Circular No. SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2023/028 (Feb. 20, 2023) (India).
[9] Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647 (India).

to correct harms that occur due to their own actions?

2. Does expenditure-oriented structure of CSR under Section 135 support statutory greenwashing and compromise substantive corporate responsibility?

3. What has the Indian court done in regards to CSR compliance on the issues of environmental liability and constitutional requirements like the Polluter Pays doctrine?

4. Would incorporating Human Rights Due Diligence models within the Indian CSR system change it into an accountability model, rather than a philanthropic model?

Research Objectives

1. To critically examine the statutory framework of Section 135 and Schedule VII.

2. To determine and conceptualise the fallacy of expenditure-only in the CSR framework of India.

3. To assess judicial practices in CSR in environmental and corporate liability cases.

4. To find out the effectiveness of the CSR penalty provisions as a deterrent.

5. To create a comparative and normative reform framework that incorporates CSR and HRDD requirements.

Research Methodology

The research paper follows a mainly doctrinal and analytical research approach to analyse the structural constraints of the CSR model in India under the Section 135 of the Companies Act, 2013. It also entails a close textual and interpretative examination of statutory requirements, such as Section 135, Schedule VII and the Companies (CSR Policy) Rules, with the inclusion of the amendments to determine the conceptual design of CSR as an expenditure-based requirement. To review alternative models of corporate accountability[10], this doctrinal approach is complemented by a comparative legal analysis of new Human Rights Due Diligence (HRDD) frameworks, specifically the French Duty of Vigilance Law[11], German

[10] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* 15 (2023).
[11] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses

Supply Chain Due Diligence Act[12], and the EU Corporate Sustainability Due Diligence Directive[13]. The paper also includes a judicial review of rulings by the Supreme Court of India and the National Green Tribunal [14]in order to determine the interplay between the principles of CSR compliance and environmental liability. Furthermore, a regulatory economics approach is used to examine the penalty effectiveness of CSR provisions. The study will not conduct primary empirical data collection but will use only secondary sources, such as legislative materials, case law, policy reports, and publicly available data on CSR.

Literature Review

The current legal discussion of Section 135 of the Companies act is largely concerned with how voluntary philanthropy can be converted into compulsory compliance, but there is a very real gap in the literature when it comes to exploring how an obsession with the 2 percent spend metric enables corporations to avoid substantive changes in ethical practices in Favor of performative, statutorily oriented greenwashing.

Books

Milton Friedman (1962), Capitalism and Freedom [15]- Friedman elaborates the classical shareholder primacy thesis that the corporations have no social responsibility except to maximise profits within the law. His model theorises the corporate responsibility as a financial concept hence eliminating the overall social or environmental responsibility. This journal is the conceptual basis by which contemporary theories of CSR and accountability are judged.

R. Edward Freeman (1984), Strategic Management[16]: A Stakeholder Approach - Freeman is opposed to shareholder primacy by making the corporate responsibility expand to include stakeholder responsibilities, such as employees, communities, and the environment. He conceptualizes corporate governance as a relationship system, which offers the theoretical framework of the modern CSR discourse but is not comprehensive in addressing the

d'ordre [Law 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and instructing companies], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 28, 2017 (Fr.).
[12] Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, Bundesgesetzblatt [BGBl. I] at 2959 (Ger.).
[13] Directive 2024/1760, of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 2024 O.J. (L 1760) (EU).
[14] The National Green Tribunal Act, 2010, No. 19, Acts of Parliament, 2010 (India).
[15] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).
[16] R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

enforceable accountability mechanisms.

The recognition of human rights is a crucial ethical and moral issue of the modern world[17]-This article resumes the debate that corporations have direct human rights obligations under international law. It also emphasizes due diligence as a means of instilling responsibility in the company business and provides a normative approach that is in sharp contrast with expenditure based CSR regimes like the one found in India.

Journal Articles

- Gary Becker (1968), Crime and punishment: an economic approach [18]- Becker develops a model of regulation by deterrence, which says that the willingness to comply depends upon the relationship between the punishment to non-compliance and the payoffs of non-compliance. His model is essential to the CSR penalty provisions analysis, where weak sanctions can offer a motivator to strategic compliance but not to change behaviour.

• Michael Porter and Mark Kramer (2011) Creating Shared Value (Harvard Business Review)[19] - Porter and Kramer re-brand CSR as shared value, and social impact is a component of the core business strategy. Though this approach is beyond philanthropy, it is voluntary and market based and lacks the binding accountable instruments necessary to address structural issues like statutory greenwashing.

• John Ruggie (2011), Guiding Principles on Business and Human Rights (Journal Commentary Literature)[20] - The work of Ruggie introduces the idea of protect, respect, remedy, and the idea of corporate responsibility is operational due diligence and not charity. However, academic discussions are not inclined to connect this framework to such national frameworks of statutory CSR as the Indian Section 135.

Reports and Institutional Publications

• Ministry of Corporate Affairs, National CSR Data Portal Reports[21] - These reports

[17] Theodor Schilling, The Recognition of Human Rights: A Threefold Myth, *Human Rights Law Review*, Volume 20, Issue 2, June 2020, Pages 210–235, https://doi.org/10.1093/hrlr/ngaa016
[18] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, (1968).
[19] Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, 89 Harv. Bus. Rev. 62, (2011).
[20] Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011) (by John Ruggie).
[21] Ministry of Corporate Affairs, *National CSR Data Portal*, Gov't of India, https://www.csr.gov.in/

include empirical data on CSR spending, which reveals that it is concentrated in education and health and is growing in aggregate spending. They, however, concentrate more on financial compliance and do not examine the connection in between CSR expenditure and mitigation of corporate harm.

Securities and Exchange Board of India (2021), Business responsibilities and sustainability reporting (BRSR) Framework [22]- BRSR framework strengthens corporate disclosure requirements of ESG parameters. Although it enhances transparency, it is more process oriented and does not hold a company accountable in substance to any harm done due to corporate activities.

• **Organisation for Economic Co-operation and Development, Guidelines on Multinational Enterprises [23]-** The OECD Guidelines focus on responsible business practices as a result of due diligence procedures. Although they set international standards, they are not enforceable domestically, such as India, relying instead on voluntary compliance mechanisms.

• **United Nations Human Rights Council (2011), UN Guiding Principles on Business and Human Rights [24]-** The UNGPs set a global normative model of corporate responsibility that business must avoid and respond to human rights impacts by operational due diligence. This is a turning point in favor of obligatory responsibility rather than generous CSR.

French Duty of Vigilance Law - This act requires large companies to recognize and address human rights and environmental risks in their businesses and supply chains. It creates civil liability of inaction and this accountability is put right at the heart of corporate governance.

• **German Supply Chain Due Diligence Act, EU Corporate Sustainability Due Diligence Directive -** These laws embed due diligence as a mandatory requirement, with the risk assessment, mitigation and reporting of risks and failure to comply heavily punished. They indicate a shift to regulation that is more oriented to operational accountability, and they emphasize the shortcomings of the expenditure-based model of CSR such as that of India.

[22] Sec. & Exch. Bd. of India, *Business Responsibility and Sustainability Reporting by Listed Entities*, Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562 (May 10, 2021) (India).
[23] Org. for Econ. Co-operation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023).
[24] Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011) (by John Ruggie).

CHAPTER II – THE EXPENDITURE ONLY FALLACY: A CONCEPTUAL FRAMEWORK

The concept of Corporate Social Responsibility is not a recent one that has an uncertain genealogy. It was formulated in classical style, and is credited to Milton Friedman[25] in a famous 1970 essay, which declares that the sole social responsibility of a business is to make as much money as it can in the limits of the game. Stakeholder theorists within the tradition of R. Edward Freeman[26] have based their proposals on this libertarian basis, arguing that corporations should have a responsibility towards a broader audience: towards employees, communities, suppliers and the natural environment. The third and latest twist, which was inspired by the crisis in the global governance and the introduction of Environmental, Social and Governance (ESG) indicators[27], views corporate responsibility not as a charity but as the duty to run the business in a rights-respecting and sustainability-focused way: as the integration of rights-respecting and sustainability-oriented behaviour into the business model. The section 135 of India was passed when this third turn was already being apparent in the international soft law, most notably in the United Nations Guiding Principles on Business and Human Rights [28](UNGPs) adopted by the Human Rights Council in 2011[29]. The UNGPs propose three-pronged framework the state obligation to protect in regard to the human rights abuses involving the business; the corporate obligation to respect human rights; and the need to access the remedy. The corporate responsibility to respect is clearly operative in nature: it requires companies not only not to cause or contribute to the adverse human rights impacts of their own activities but also to act in reaction to them. Donations to charities even not related do not suffice to fulfil it. The reasoning of Section 135, which was not enacted until two years later than the UNGPs, was very different. It did not ask the question whether corporations were damaging, it asked whether they were using money. Through this, it institutionalised a philanthropic conception of CSR precisely at the time in history when the international community was transforming into an accountability conception.

[25] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.
[26] R. Edward Freeman, Strategic Management: A Stakeholder Approach (1984).
[27] Global Reporting Initiative [GRI], *GRI 1: Foundation 2021* (2021).
[28] U.N. Office of the High Comm'r for Hum. Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011).
[29] Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

The expenditure only fallacy can be defined as the legal and discursive assumption that money spent on charitable or developmental activities are the same as responsible corporate conduct whether the activities are connected or not to the harms created by the activity of the spending party. The fallacy is effective in three ways. Decoupling: Section 135 breaks the logical connection between CSR spending and harmful activities. The CSR of a company is identified based on its financial size and profitability, but not on its footprint of the damage. The more the pollution of a very profitable company, the more the CSR costs[30]; the less the pollution of a low profit-making company, the less the CSR costs. The amount of expenditure has no relation to environmental or human rights impact of the company. The second mechanism is substitution: operation reform is permitted to be replaced by CSR spending. Companies may invest in high profile CSR projects, clean water projects, renewable energy programmes or the conservation of wildlife when they are audited by environmental authorities on the breach of their regulations and the outcome of such audits is a positive reputational message that does not require the business practices which caused the harm to be altered. The responsibility optics take the place of the responsibility content. The third is legitimation: whereby the statutory compliance is adhered to, a form of legal imprimatur which gives the reputational shield is enhanced. Unlike voluntary CSR programmes, the expenditure under Section 135 can be reported as socially obligatory which increases the greenwashing effect.

Traditionally, greenwashing refers to the practice of falsely and/or misleadingly claiming the environmental benefits of a product, service or organisation. The term was developed in 1986 by environmentalist Jay Westerveld and it has since been expanded to encompass a vast array of various approaches to reputational manipulation. The statutory greenwashing, as applied in this article, refers to the application, in particular, of CSR expenditure, which is legally mandated and reported and utilized formally to generate reputational benefits, which mask or hinder continued operation harms. Statutory greenwashing is at least three times worse than conventional greenwashing. First, it has a legal basis: a company that complied with the provisions of Section 135 cannot be charged with the involvement in illegal practices simply because its CSR spending is not connected with the harms to its operations. Second, it possesses the benefit of official disclosure: obligatory reporting generates paper trail of purported social responsibility which can be used as an evidence source by stakeholders of actual accountability. Third, it is strategically motivated: the system of penalties in case of CSR non-compliance

[30] Companies (Corporate Social Responsibility Policy) Rules, 2014, Gazette of India, pt. II sec. 3(i) (Feb. 27, 2014).

creates logical corporate incentives to spend something rather than nothing, regardless of whether the expenditure is causally related to the harm footprint of the company.

CHAPTER III – THE STATUTORY ARCHITECTURE OF INDIA'S CSR FRAMEWORK

The mandatory CSR clause has its antecedents in various voluntary and semi voluntary corporate governance codes that have preceded the law itself. The Department of Public Enterprises issue guidelines on CSR[31] of central public sector enterprises as early as 1992, which were revised in 2010 to include sustainability objectives. Under the Companies Bill 2009 [32]also existed a provision of the comply or explain on CSR which would have required the listed companies to report their CSR activities[33], however not to spend at a specific level. With the introduction of the Companies Bill 2011[34], however, parliamentary debate had turned to a more definitive mandate and the resultant formulation of a spend or explain finally found its way into the Companies Act 2013. The parliamentary arguments about the Section 135 reveal two concepts of the intent of the provision. The dominant opinion that was voiced by the government officials was the view that mandatory CSR was a tool mostly to channel corporate wealth to the national development agendas, a sort of legislated philanthropy that would supplement state investments in education, health and environmental sustainability. One of the minority conceptions expressed by some of the opposition members tried to bring CSR requirements closer to the evils that were generated by industrial activity. The popular imagination prevailed and the resulting provision is tainted with the indelible imprint of a developmental, rather than an accountability-oriented vision of corporate responsibility.

CSR is put on those companies, which meet one of three financial criteria found in the companies Act 2013 section 135 which are: net worth of rupees five hundred crore or above; turnover of rupees one thousand crore or above; and net profit of rupees five crore or above. The eligible companies should establish a CSR Committee of the Board that comprises of at least three board directors with at least one independent director. The Committee will be in charge of creation of CSR Policy[35], the recommendation of the amount of spending to be

[31] Dep't of Pub. Enters., *Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises*, O.M. No. 15(13)/2013-DPE(GM) (Oct. 21, 2014) (India).
[32] The Companies Bill, 2009, Bill No. 59 of 2009 (as introduced in Lok Sabha, Aug. 3, 2009) (India).
[33] Companies Act, 2013, Schedule VII, No. 18 of 2013 (India).
[34] The Companies Bill, 2011, Bill No. 121 of 2011 (as introduced in Lok Sabha, Dec. 14, 2011) (India).
[35] Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, Gazette of India, pt. II sec. 3(i) (Jan. 22, 2021).

incurred on the activities to be undertaken in Schedule VII and monitoring of CSR Policy.

The minimum financial condition is determined in Section 135(5): any company, which satisfies all the requirements, must ensure that it will incur expenses of at least two per cent of the average net profits of the three financial years before. In 2021, the Companies (Amendment) Act 2019 and the Companies (CSR Policy) Rules 2014 that amended this structure were substantially narrowed. Unused CSR funds must now be transferred to either a schedule account or a government fund within specific times and the failure to do so was accompanied by fines. Notably, the 2021 amendments clarified that the CSR activities are not to be undertaken as part of the regular operations of the company, which formally excludes companies that regard minimization of their own operation as qualifying CSR expenditure, which adds to the above decoupling still further.

The schedule VII under the Act contains the activities that may be called CSR. The first Schedule that was enacted in 2013 contained eight categories. It has since been included in other activities that relate to the elimination of hunger, poverty and malnutrition, the encouragement of education, gender equality, environmental sustainability, safeguarding national heritage, actions on behalf of armed forces veterans, sports promotion, contributions to the Prime Minister National Relief Fund, technology incubators and rural development initiatives. The list of eligible activities in the amendment of 2020 included disaster management and COVID-19 relief. Special analysis is warranted to the environmental sustainability category, as far as this article is concerned. The fourth schedule, (iv) concerns environmental sustainability, ecological balance, protection of flora, fauna, animal welfare, agro forestry, conservation of the natural resources and preservation of soil, air and water including contribution to Clean Ganga Fund. Preferably, the business can fulfil its CSR obligation by investing in environmental rehabilitation related to its business. However, Schedule VII is not structured so. Even a company that has a big foot print on environmental degradation has a CSR responsibility to fulfil by contributing to the learning institutions, gender equality or rural development. The Schedule provides a list of approved forms of expenditure; it does not give precedence between redress caused by harm and other forms of non-harmful philanthropy. This is the fallacy of expenditure-only in the form of a law.

Section 135(4)[36] requires Board of Directors to include the contents of the CSR Policy in the

[36] Companies Act, 2013, § 135(4), No. 18 of 2013 (India).

board report and on the company site. They would require an annual report on CSR activities as a part of the Board report in section 135(5). Even though this disclosure form is enhanced over most jurisdictions, the inherent weakness of accountability lies in the fact that disclosure is not of effect, but of spending. The companies are required to declare their expenditures and expenditures on which the companies are not required to declare whether their expenditures had any quantifiable social or environmental impact, or whether the impact was causally related with the harms they caused as a result of their operation. This gives a greenwashing breeding ground: on the one hand, the companies can record the appearance of a significant amount of CSR expenditure on environmental items, and on the other hand, the environmental performance of their activities is getting worse.

CHAPTER IV – THE EMERGENCE OF STATUTORY GREENWASHING: LAW AND PRACTICE

The analysis of the dynamic of CSR expenditure by eligible companies supported by evidence suggests that there are various traits that may be aligned with the statutory dynamic of greenwashing. Firstly, the CSR spending is concentrated in few sectors, education, health and rural development that do not have much relation with the vast footprint of the harm of large industrial sectors. Second, there is no overrepresentation of extractive, chemical and heavy manufacturing businesses, which have the largest environmental and community implication, in environmental CSR expenditure; they are distributed throughout the spectrum of Schedule VII. Third, annual reports of large industrial and conglomerates tend to begin with high profile projects that do not require operational change, yet which do create reputational capital, in their CSR reports. Aggregate expenditure on CSR has recorded a steady increase since the regime of mandatory was enforced in 2014-15 by the National CSR Data Portal of the Ministry of Corporate Affairs[37]. The aggregate spending on the CSR activities of the eligible companies during the 2021-22 financial year was over rupees twenty-six thousand crore which is substantial against the aggregate amount of expenditure prescribed. This score that is significantly higher than average shows that big business does not consider CSR spending a compliance aspect but as a reputational investment strategy. Section 135 is spending-only, and this will encourage it: a reputational advantage to spending, but not dependent on its harm-reducing impact, will cause rational companies to spend more than the minimum not out of

[37] Ministry of Corporate Affairs, *National CSR Data Portal*, Gov't of India, https://www.csr.gov.in/

greater responsibility but because it is more commercial.

The most graphic instance of statutory greenwashing is the tendency according to which the companies, which are said to have committed regulatory crimes, or have been accused of community issues, record a high sum of CSR expenditure and generate favourable media on sustainability. Industrial harm-reputational benefit loop is an anticipated cycle where the industrial activity creates environmental or social harm, which is addressed minimally and at minimum cost; CSR funds is invested in high-visibility projects in other areas; sustainability reports and ESG disclosures boost the CSR narrative; reputational benefits are reaped; regulatory pressure is relieved; and operational practices remain unchanged. This follows not out of corporate bad faith secluded, but as a structural implication of the legal structure. Section 135 does not require companies to ask: Who has my business wronged, and am I using my CSR resources to right their wrong? It asks: did I spend on Schedule VII activities two per cent of my average net profits? The law has been so designed that it gives a positive response to the second question, and makes the first question a legal irrelevancy.

The advent of ESG investing has compounded the statutory dynamic of greenwashing. The ratings of the sustainability reports and CSR spending of Indian companies are presented in the ratings of the sustainability reports by the ESG rating agencies, MSCI[38], Sustainalytics and the domestic providers. Because these agencies generally lack the resources to evaluate the nature of the relationship between CSR spending and operational harm themselves, they can systematically overestimate sustainability performance of firms that can take advantage of the expenditure-only character of Section 135. The use of ESG ratings by institutional investors can therefore be used to direct capital towards those businesses whose compliance with statutory CSR standards is a cover-up of continued environmental and social malpractice. In 2021, the Securities and Exchange Board of India (SEBI)[39] established Business responsibility and sustainability reporting (BRSR)[40] framework, requiring the 1,000 largest listed companies by market capitalisation to report on sustainability performance in relation to a range of environmental, social, and governance performance indicators. The BRSR framework, however, despite being a welcome change to the old disclosure requirements, is by no means a

[38] MSCI ESG Research, *MSCI ESG Ratings Methodology: Executive Summary* (2023), https://www.msci.com/our-solutions/esg-investing/esg-ratings

[39] Sec. & Exch. Bd. of India, *Master Circular for Listed Entities*, Circular No. SEBI/HO/CFD/PoD2/CIR/P/2023/120 (July 11, 2023) (India).

[40] Sec. & Exch. Bd. of India, *Business Responsibility and Sustainability Reporting by Listed Entities*, Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562 (May 10, 2021) (India).

full solution to the accountability gap: the environmental indicators are much more focused on the inputs and processes, rather than on the causality of corporate activity and the damage to the community.

CHAPTER V – JUDICIAL TREATMENT OF CSR AND CORPORATE ACCOUNTABILITY

Constitutional Environmental Jurisprudence

Indian Supreme Court has developed a rich constitutional environmental jurisprudence since the 1980s, which creates a normative situation against which the adequacy of adherence to CSR should be gauged. Art. 21 of the Constitution[41] has been construed, starting with the landmark case of Subhas Kumar v. State of Bihar (1991)[42], followed by M.C. Mehta v. Union of India (the Oleum Gas Leak case, 1987)[43] and Vellore Citizens Welfare Forum v. Union of India (1996)[44] to interpret the right to a healthy environment These decisions affirmed that the state has a constitutional responsibility of protecting the citizens against environmental pollution, even though control of the private sector of industry. Notably in the present analysis, the Supreme Court environmental jurisprudence has been mostly operated on the Polluter Pays Principle and Absolute Liability doctrine which are harm-based rather than expenditure-based. The Court in the case of M.C. Mehta v.Union of India (the Shriram Fertilizer case)[45] came up with the concept of absolute liability: a company, which is somehow involved in some hazardous or otherwise dangerous activity, is obliged to compensate money to the individuals who are injured in the given activity and the compensation cannot be decreased by means. The doctrine was applied to the establishment of vital compensatory and remediation liability in subsequent judgments.

CSR Compliance and Liability: The Courts are Ambivalent.

It is against this constitutional backdrop that one of the main empirical issues of this paper is whether the adherence to CSR is an element, as taken into account by the Indian courts, in determining the corporate liability on environmental or social damage. A summary of the

[41] *The Constitution of India*, art. 21.
[42] *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598.
[43] *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.
[44] *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.
[45] *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

largest environmental liability cases of the Supreme Court and the National Green Tribunal (NGT) in the past decade reveals a truly revealing trend: with a handful of exceptions, CSR compliance is irrelevant in judicial terms with regard to the establishment of a liability. This was found in a large sample of NGT decisions, where the respondents were industrial parties, the expenditure on CSR was not raised by corporate respondents as a mitigating factor, or by the Tribunal as a relevant factor.

The quantum of the environmental damage, cost of remediation, use of the Polluter Pays Principle, which has no logical relationship with a company compliance history under Section 135 has always been the basis of reasoning in compensation cases. This court non-concern about the CSR compliance as a liability mitigant is doctrinally sound. The constitutional environmental jurisprudence is founded on harm as well; the harm violates the right of Article 21 and not the lack of adequacy of philanthropy expenditure. Because an organization is paying a lot of money to a school in one area does not reduce the harm it is causing to a community because of its activities in the water supply in another.

Exception and New Trends.

There are also indications that some courts are beginning to move towards a more integrative approach to CSR in liability cases, but at an infantile stage. The track record of a CSR in broader accounts of corporate behaviour has been considered in some High Court decisions on environmental matters, and some NGT orders have demanded that companies undertake some form of environmental clean-up as part of their CSR responsibilities. The latter, which directs CSR expenditure towards operational harms remedies is a judicial attempt at attempting to seal the structural gap between the expenditure requirement of section 135 and the accountability of environmental constitutionalism[46]. These judicial corrections however are ad hoc and inconsistent. They are not viewed as a structured doctrine system that determines the establishment of liability based on the CSR compliance documentation. Courts can only take this far with the status quo of the current arrangements of the existing Section 135: they can direct companies to spend CSR funds on remediation, but they cannot direct the entire CSR arrangement to be restructured to focus on harm mitigation. Legislation is therefore needed to intervene.

[46] J.R. May and E. Daly, *Global Environmental Constitutionalism*, Cambridge University Press, 2014, p. 25

CHAPTER VI – DETERRENCE FAILURE: CSR PENALTIES AND REGULATORY ECONOMICS

The Penalty Regime

The Companies (Amendment) Act 2019 also introduced financial penalties on non-compliance with CSR, the first time ever. The statutory system, prior to the amendment, was on a comply or explain basis: those companies that failed to spend the sum of money required by the statute had to explain why they failed to spend the amount of money in the report made by the Board, but were not liable to financial penalty. Under the existing regime, a company, failing to fulfil the CSR obligations is to pay a fine which is twice the amount that must be transferred to the fund or account or the amount of rupees one crore, whichever is lesser. The penalty to be paid by all the company officers in default is one-tenth of the amount to be transferred or rupees two lakh, which is less.

The Economic Control of Non-Conformance.

The classical theory of crime and punishment [47]by Gary Becker stated that the deterrent effect of a sanction When this deterrent is applied to the CSR scenario it is not favourable. There is low risk of detection since the administrative strength of the Ministry of Corporate Affairs to carry out a CSR-specific review of compliance is minimal relative to the number of companies that are eligible. The penalty is very small in comparison with the scale of profit of major industrial corporations, the size of which is limited to twice the amount not used or rupees one crore. The CSR- spending that is recommended of a company with an average net profit of rupees one thousand crore is twenty crores. The penalty of non-compliance is not exceeding rupees one crore, five per cent of the amount. Such a system of penalties will be more likely to generate strategic management of compliance costs instead of behavioural change as would occur under normal regulatory economics.

Enforcement Gaps

Besides the quantum of penalty, the CSR obligations are not imposed with structural gaps. The Ministry of Corporate Affairs does not issue systematic enforcement statistics of Section 135 and thus it is difficult to find out whether penalties are indeed applied on a regular basis. The

[47] C. Beccaria, *On Crimes and Punishments*, trans. R. Bellamy, Cambridge University Press, 1995 [1764], p. 19.

CSR reporting form involves the self-disclosure of non-spent funds and it will result in the creation of a compliance architecture in which companies will self-disclose non-compliance and be subject to penalty, which will probably induce under-reporting of non-compliance. The combination of light penalties, inadequate enforcement capacity and incentives to under-report in the structure also offers a regulatory environment in which statutory greenwashing is not discouraged appropriately and, in a real sense, it is facilitated by the penalty structure of Section 135.

CHAPTER VII – A COMPARATIVE PERSPECTIVE: HUMAN RIGHTS DUE DILIGENCE AND OPERATIONAL ACCOUNTABILITY

The introduction of the so-called mandatory Human Rights Due Diligence (HRDD) law in several European countries is perhaps the most striking international trend in the corporate accountability law in the post-UNGP era. The HRDD gets its legislative foundation on a radically different interpretation of corporate responsibility than the Indian Section 135. In the part of the Section 135 which asks: how much is the corporation giving? The issue of the HRDD legislation is: what injuries is the corporation inflicting, and what is it doing to avoid or to redress the injuries? The paradigm related to the HRDD is changing operational accountability to philanthropic.

The Loi de Vigilance adopted in France in 2017 requires companies that employ more than certain specified numbers of employees to provide and enforce a plan de vigilance, identifying risks to human rights, fundamental freedoms, health, safety and the environment by their operations, their subsidiaries, and by subcontractors and suppliers with whom they have an established commercial relationship. The plan should involve the risk identification and risk assessment process, mitigation of the risks identified, a system of alertness of the risks identified and a system of monitoring effectiveness of measures implemented. Loi de Vigilance The civil liability is the Vigilance liability of those companies which fail to develop or implement a vigilance plan and which consequently contribute to or cause preventable damage. The French regime is similar to Section 135 of India in all structural respects: it is more process- than expenditure-oriented, it must cause harm, rather than be financially substantial; and it imposes civil liability on failure to prevent foreseeable harm to companies.

The Lieferkettensorgfaltspflichtengesetz (Supply Chain Due Diligence Act, LKSG) which will take effect in January 2023 establishes mandatory due diligence liability on large corporations

based in Germany in their operations, and of their direct suppliers. The companies that fall under the LKSG are required to perform risk analysis, preventive measures, drafting complaint measures and clean up the violations that are found. The Federal Office for Economic Affairs and Export Control (BAFA)[48] can check compliance, issue orders, and fines of up to two per cent of annual turnover worldwide to larger companies. The penalty system that is applied in the LKSG is in a way that it is rated on global turnover, yet not only on a nominal level, which will greatly discourage large multinationals. One of the global companies with a total income of ten billion euros has to pay a fine up to two hundred million euros when LKSG is not adhered to; in computing the deterrent, the calculation principle is also different in principle to the one in Section 135 of the Indian Act.

The most ambitious, and thus to date the most ambitious, mandatory HRDD mechanism instituted on a supranational level is the EU Corporate Sustainability Due Diligence Directive (CS3D)[49], which was adopted by the European Parliament in April 2024. The CS3D requests large companies and companies with a significant impact in the industry within the EU, to conduct a due diligence of the adverse human rights and environmental impacts of their businesses, their subsidiaries and already-established business relationships. It involves application of climate transition plan in line with objectives of the Paris Agreement and establishes civil responsibility on those companies that fail to prevent or end adverse effects caused or caused by them. The CS3D will have extraterritorial implications on the Indian firms that are dealing with the EU market with de facto HRDD responsibilities, which goes way beyond what is required of Section 135.

Comparative Synthesis

The comparative analysis indicates that crudely there is a disparity in the philosophy of regulation. The systems of European HRDD are founded on the fact that the issue of corporate responsibility is, in essence, an issue of operational conduct and its consequences, and not an issue of charity. They bring to life the conception of CSR accountability that the UNGPs had articulated in soft-law terms. Section 135 of India, in its turn, is full of a developmental state logic according to which corporations are considered the means of supplying the national good,

[48] *Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)*, *Guidance on Risk Analysis under the Supply Chain Due Diligence Act*, BAFA, 2023, p. 12.
[49] *Directive (EU) 2026/470 of the European Parliament and of the Council of 26 February 2026 amending Directive (EU) 2024/1760 as regards thresholds and simplification of sustainability reporting*, [2026] OJ L 2026/470.

rather than possible sources of evil, which should be brought to life. This transgression is not an issue of regulatory form alone, but in fact, tangible impacts on the communities, which are the victims of corporate malpractices. In European models of HRDD, societies that are affected by business activities have legal means of seeking a change in operation and seeking damages. India can enable the relevant communities in Section 135 to exploit the CSR expenditure of the same companies who have brought harm to them- a form of paternalistic restitution that does not require a change in how the companies operate and leaves no communities with a right-holder status.

Reform Proposal: Conditional Corporate Legitimacy Model.

The reform model proposed in this section has three theoretical commitments. The former is the responsibility principle of corporate responsibility: corporations not only owe a duty to deliver to the social good but to avoid and correct the evils of their actions. The second is conditionality of the corporate legitimacy: rights and protection that the legal system grants corporate persons, limited liability, separate legal personality, access to social and environmental resources and contracts is conditional on meeting similar social and environmental responsibilities[50]. The third is the integration imperative: a major CSR framework cannot be existing in a vacuum of the entire range of legal requirements that corporations owe; it must be integrated with human rights, environmental and labour law.

A. The blend of CSR and Human Rights Due Diligence.

The first and the simplest of reforms is the inclusion of Section 135 and HRDD statutory requirement. This would require the qualified businesses to conduct regular risks appraisal which would identify the adverse human rights and environmental impact of their own business, subsidiaries, and their key business relationships. The risk assessment would also require minimum standards of methodology established by the Ministry of Corporate Affairs in consultation with the National Human Rights Commission[51] and the Ministry of Environment[52], Forest and Climate Change. Businesses would be required to form part of their current CSR report with independent verification with those businesses that pass a larger

[50] P. Bansal and K. Song, 'Responsibility and Governance in the 21st Century Corporation', *Business & Society*, vol. 56, no. 1, 2017, p. 110.
[51] National Human Rights Commission (NHRC), *Annual Report 2024-25*, NHRC, India, 2025, p. 45.
[52] Ministry of Environment, Forest and Climate Change, *Solid Waste Management Rules, 2026*, Notification No. G.S.R. XXX, Gazette of India (Apr. 1, 2026).

financial threshold to include an annual HRDD report. What is more important is that the HRDD requirement would be pegged on CSR spending: the businesses that would find material adverse human rights or environmental impacts in their HRDD risk assessment would feel obliged to focus CSR spending on mitigation and remediation of such impacts. This would not rule out spending on unrelated social development purposes, but would provide a statutory precedence, in favour of harm remediation, as opposed to reputational philanthropy.

B. Forced Impact-Based CSR.

As a further development of the HRDD integration, the second reform proposal is to introduce impact-linked CSR: an obligation that a certain percentage, suggested to be half that amount of CSR that a company must spend on, is to be allocated to activities that have a causal relation in the negative effects identified in the HRDD risk assessment of the company. This reform would directly fight the expenditure-only fallacy as it would mean that at least part of the CSR funds would have to be used to undo the harms that the company has done to itself, and not to fund a disconnected philanthropy. An impact-linked CSR requirement would be implemented by a more detailed CSR reporting format that would require the disclosures of the identified material adverse impact, the actions taken in response to the impact, the percentage of the recommended expenditure allocated to impact-linked activities, and an independent review of the effectiveness of impact-linked spending.

C. Better Disclosure and Checking.

The third reform is related to the lacking accountability gaps within the existing regime of disclosure. The current system of self-reporting whereby one is expected to report on expenditure without independent validation on impact is unsatisfactory in its design to facilitate any significant accountability. The proposed reform would require the companies that have a larger financial restriction, whose net profit exceeds rupees one hundred crore, to have their annual CSR and HRDD report examined by independent third-party companies. The check would assess the truthfulness of the disclosures of expenditure, in addition to the relation of the CSR activities and harm footprint of the company. Authenticated entries would be registered to a central registry maintained by the Ministry of Corporate Affairs and made accessible to the public.

D. Penalties to Turnover in the World.

The fourth reform concerns the ineffectiveness of deterrence as in Part VII. Existing penalty in non-compliance of one crore rupees on corporate is not in line with the commercial scale of large industrial enterprises and would not create any tangible deterrence. The reform proposal would replace the existing cap with progressive penalty system which would be modified according to the global annual turnover as per the path taken by the LKSG, and under consideration of the CS3D. The maximum penalty to be paid by companies with annual turnover exceeding rupees five hundred crore in the event of material CSR and HRDD breach of the rule would be the same as the penalty architecture of the Indian country to that of the international world, that is two per cent of global turnover.

E. Tying Corporate Rights to Verified Due Diligence.

The fifth and the most significant reform is the proposal of a system of conditioning exercise of certain corporate rights and privileges on the adherence to HRDD verification. Specifically, any business interested in obtaining or renewing environmental clearances and mining licences, and any large public procurement contract would be required to demonstrate confirmed compliance with the above-suggested HRDD and impact-based CSR requirements. The companies, whose material violation of the HRDD requirements, identified by the HRDD test and verified by the independent verifier, would not have been permitted to get some particular set of public assistance until the violations are removed. This reform implements the conditional nature of corporate legitimacy, harmonising the extension of privileges and contracts by the state to operational accountability, on the basis of a pre-existing principle of Indian administrative law.

CONCLUSION AND RECCOMENDATIONS

Recommendations

1. **Combination of CSR and HRDD -** Amend Section 135 to impose Human Rights Due Diligence, which obliges companies to detect, avert and correct harms in their operations.

2. **Impact-Linked CSR Spending -** Have a statutory provision that at least half of CSR spending be focused on reducing the harms inflicted by the operations of the company

itself.

3. **Improved Disclosure and Checking -** Go beyond expenditure reporting to impact-based reporting where big corporations are required to have third-party audits.

4. **Penalty Reform -** Substitute the existing capped system of penalties with a turnover-based system of penalties in accord with international standards.

5. **Judicial Integration -** Promote the use of CSR compliance with environmental liability through the courts and tribunals; more so in the remedial guidance.

6. **Regulatory Co-ordination -** Co-ordinate Align CSR regulations with environmental law, labour law and ESG disclosure regimes to remove fragmentation.

7. **Conditional Corporate Benefits -** Conditional access to public contracts and subsidies as well as environmental clearances based on compliance with CSR and HRDD requirements.

Conclusion

The CSR regime in India is an ambitious piece of legislation, but the form it currently takes indicates a misunderstanding of the use of financial spending as a proxy of corporate responsibility. The expenditure-only fallacy enables corporations to meet legal requirements without considering the damages they cause, and institutionalises statutory greenwashing. Although the judicial practice is based on the harm-based constitutional principles, it is structurally unrelated to the CSR compliance. Comparative analysis shows that the international regulatory systems are decisively shifting towards operational accountability by Human Rights Due Diligence. India needs to change its model of CSR, which is based on philanthropy, into an accountability-based regime to become normatively consistent and as a country competitive globally. The suggested Conditional Corporate Legitimacy Model suggests an avenue to achieve this change by combining CSR with due diligence, reinforcing such enforcement, and balancing corporate privileges and responsible actions. Finally, the basis of corporate legitimacy in a constitutional democracy cannot be charity, but rather should be based on responsibility, accountability, and respect of human dignity.

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