

Section 135 and Corporate Social Responsibility in India: Analyzing Issues and Suggesting Reforms through a Global Lens

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Abstract

With an increasing threat of climate change and social issues, and a strengthening global commitment towards sustainable development, the spotlight has increased on businesses to also play their part for people and planet. India's introduction of Section 135 to the country's Companies Act comes at a crucial time, albeit with criticism. The law, which took effect on 1 April 2014, requires companies earning above a certain profit (5 crore Rupees) to create a Corporate Social Responsibility (CSR) Committee, in charge of formulating, carrying out, and reporting the company's CSR policy. This brings with it a variety of unprecedented challenges, as CSR which originated as a charity act and later developed as a business strategy, is suddenly being forced to be an integral component of business. This research paper aims to explore these problems associated with both the language and the implementation of Section 135. It also discusses whether it is against the very spirit of CSR to mandate it or not. Towards the end, the paper provides suggestions to further amend Section 135 based on previous real-world examples of successes and failures of business-targeted government policies.

1 Introduction

"We need business to understand its social responsibility, that the main task and objective for a business is not to generate extra income and to become rich and transfer the money abroad, but to look and evaluate what a businessman has done for the country, for the people, on whose account he or she has become so rich."- Vladimir Putin

As defined by the United Nations Industrial Development Organization, Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the

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way through which a company achieves a balance of economic, environmental, and social imperatives (Triple-Bottom-Line- Approach), while at the same time addressing the expectations of shareholders and stakeholders. Apart from advantages to the business in terms of brand value, increased profits, and employee retention, CSR offers significant advantages to sustainable development and society. There is growing consensus now among scholars and even businesses that society can no longer be ignored in commerce. There are mainly 2 points of view- organizations are responsible as long as their shareholder profit is maximized, and organizations should respond to the situation in the country due to environmental, moral, and ethical reasons. Both views agree that companies must give back to society. [Ter12]

With this background, India launched a landmark policy in 2013 with the addition of Section 135 to the Companies Act. The law, which took effect on 1 April 2014, requires companies earning above a certain profit (5 crore Rupees) to create a Corporate Social Responsibility (CSR) Committee, in charge of formulating, carrying out, and reporting the company's CSR policy. With this, India becomes one of the first countries in the world to mandate CSR. There remain massive gaps in the vague literature of the law and the on-ground implementation by companies [Hig19]. All of these issues have implications on the actual benefits of CSR for society with questions arising on spatial and sectoral inequalities [KPM18]. These questions are only recently explored by scholars and policymakers. This study focuses on expanding their research and providing recommendations for possible amendments in Section 135 based on prior experience in countries other than India. Although various factors influence the overall success of the policy, this paper focuses on the spatial and sectoral inequalities in the implementation of CSR by businesses and reporting of the CSR activities, as these issues can be directly compared with other nations. The purpose of this study is to better align Section 135 with the success of CSR in promoting the welfare and sustainable development in India, through analyzing examples of the success of CSR in other nations.

2 Discussion

Certain key problems related to the policy are discussed in detail below. It is important to note that all the problems related to the act have not been explored here, as that is not the primary purpose of the paper. The overarching key problems have thus been discussed through broadly classifying problems into those relating to the language of the paper, with inequalities, and the implementation of the law. A brief of the problems is given below in Figure 1 -

While discussing the definition of CSR, it is prudent to look at the main purposes and objectives of CSR. The history behind the concept also provides insight into the complexity of defining the term and also into the morality of it being imposed. This makes it valuable to examine the history of CSR and the historical reasons behind it-

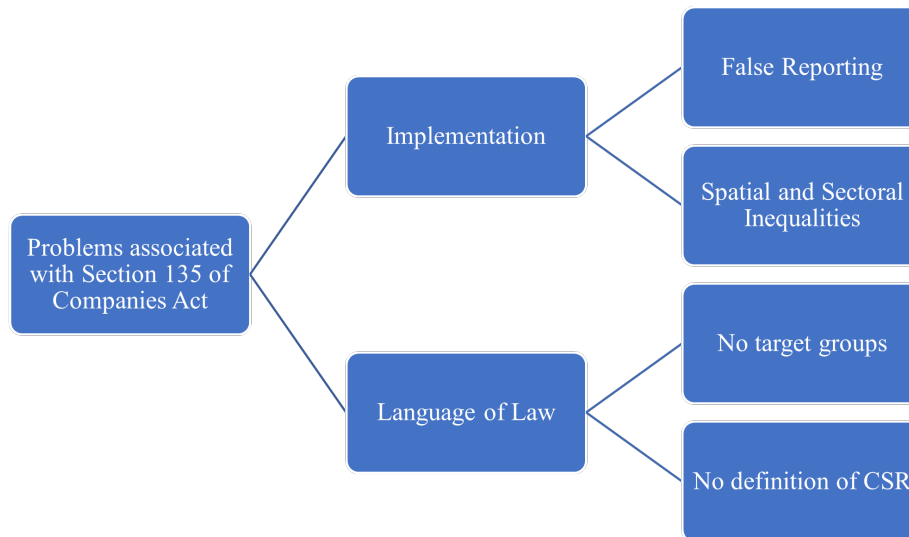


Figure 1: Overview of the problems discussed concerning Section 135

2.1 History of CSR

In the rapidly industrializing society of the 1800s of the West, there was an increasing focus on worker productivity and well-being in order to overall increase the output of the industry. At the same time, there were increasing tensions among the workers about their employment conditions. Philanthropy among industrialists was also increasing during the same period. There were questions then as there are now on whether these activities were carried out for the benefit of the business or the benefit of the society (which relates to the argument made in the introduction on the 2 prevalent points of view on the role of business in society). Soon by the turn of the century, a more pluralistic society started to form with managers being seen as “trustees” due to an increase in stock ownership. Works and publications mentioning the social responsibility of businesses also started to originate during this period. After the 1950s, many companies started to take a more active role through organizational actions such as studying corporate ethics and altering director boards. William C. Frederick, one of the early pioneers of CSR, argued that there were three core ideas for this phenomenon in the 1950s: the idea of corporate managers as public trustees, the idea of balancing competing claims to corporate resources, and the acceptance of philanthropy as a manifestation of business support of good causes. In the 1970s, the Committee for Economic Development (CED), which comprised of business folk, introduced the concept of a “social contract” between business and society. CSR soon became a base for other complementary theories such as business ethics and sustainability to emerge in the 1990s. Research also began to take place on financial performances and CSR policies. Since the onset of the

21st century, CSR is rapidly turning into a global phenomenon. [Car09]

Discussion on the definition of CSR and the morality of mandating are given below. It is important to note that the discussion on morality is given as background into the various arguments made against the law. There cannot be an amendment discussed for the same as it challenges the core of the existence of Section 135. It is discussed to give structure to the subsequent problems which have adapted solutions in the following sections.

2.2 Problems associated with Section 135

2.2.1 Lack of a Proper Definition

Section 135 of the Companies Act of 2013 defines Corporate Social Responsibility (CSR) policy as “activities to be undertaken by the company as specified in Schedule VII to the Act and the expenditure thereon, excluding activities undertaken in pursuance of the normal course of business of a company” [20114]. The act thus gives the definition of CSR policy by enlisting the activities which shall not be considered as CSR. Section VII of the article mentioned in the definition only lists developmental activities such as eradicating hunger, promoting education, and ensuring environmental sustainability. It does not provide a holistic definition of what comes under CSR, apart from failing to specify the role of companies in those developmental activities further.

This lack of a proper definition has led to both misuse by and confusion of companies. The extent of the situation can be gauged by noting how the frequently asked questions sections on the web portal of the Ministry of Corporate Affairs of India focuses mostly on what qualifies as corporate social responsibility and what does not. This approach of listing activities has also come under criticism (discussed further in the section “No defined target group”).

2.2.2 The Morality of Mandating CSR

This is a more subjective problem related to the Section; however, it relates to the very existence of the section, not simply its phrasing or contents. The argument here states that it is not right to force companies to contribute to CSR. It can be presented in the following ways-

- Review of Definitions- A review of 37 definitions of Corporate Social Responsibility by Alexander Dahlsrud all point to the voluntary nature of CSR being central. Dahlsrud defines Voluntariness as “Actions not prescribed by law” which goes against what Section 135 states. This character of voluntariness was included in 21 of the 37 definitions analyzed by Dahlsrud [Dah08]. Therefore, the very essence of Section 135 goes against the nature of CSR itself. This makes it of even more importance for the Section to define CSR for all the actors involved.
- Experience of Industrialists- The section on the history of CSR (as detailed above) details that CSR originated as a means to increase worker productivity; a decision that is solely for the business to make based on their

production targets. Later it became a philanthropic action Experience of Industrialists- The section on the history of CSR (as detailed above) details that CSR originated as a means to increase worker productivity; a decision that is solely for the business to make based on their production targets. Later it became a philanthropic action and a business strategy. This reasons that CSR originates as a decision within the company itself, and there has been no evidence of CSR being mandated. Since the enforcement of the law, it has seen some resistance from businesses, with the confederation of Indian industry making efforts to replace the mandate with a more voluntary provision. Many leading businessmen such as J.J. Irani of the Tata Group of Companies have also spoken out in opposition to Section 135. [Kin16]

- R. Pillay writes in her book regarding the Mauritian model of mandating CSR that the legislation views CSR as an externality imposed on businesses, rather than an idea that comes from within. She argues that this does not lead to an increase in accountability for the business’s way of conducting itself. Pillay says- “it endorses the view that ‘the business of business is business“.

However, it is also important to regard the key differences between CSR adoption in developed nations and a developing nation such as India. Various studies have pointed to a difference in results of CSR in developed nations and developing nations with the latter often not experiencing the same success [JM07]. The weak motivation and infrastructure for CSR adoption in developing countries leads many researchers to argue for the state to drive CSR in these nations.

The nature of CSR in developing countries is quite often described through the use of Carroll’s pyramid (Figure 2) by various researchers. The pyramid effectively displays the complexity of CSR where economic, legal, ethical, and philanthropic dimensions need to be balanced. Carroll says that companies should be operating in a fashion that is in harmony with the government and law by, amongst others, abiding with local and international regulations, acting as law-abiding corporate citizens, satisfying their shareholders while making available satisfactory goods, and services. [Car91]

The opposing nature of these 2 views points towards a need for further amendment and improvement of Section 135 of the Companies Act to ensure that business success and socio-environmental advantages go hand in hand. Certain overarching problems associated with the policy are discussed further.

2.2.3 No Defined Target Group

There is no defined target group for who benefits from a company’s corporate social responsibility activities. The report required as per the act does not need the profile of those who are benefitted. An annexure attached to the act only requires companies to submit few details of their policy in their annual (refer Figure 3) CSR report (apart from the company website)- Overview of



Figure 2: Carroll's Pyramid

CSR policy, Composition of CSR committee, Average net profits of previous 3 financial years, Prescribed CSR expenditure, and details of the amount spent on CSR. The company must also provide reasons for non-compliance in case of failure to spend the prescribed expenditure. [20114]¹

A report by a government formulated a high level committee to suggest recommendations to make the policy better noted that the filed financial statements of the companies (Designated e-forms AOC-4) and the annual board report have inconsistencies as all particulars of CSR activities are not being captured efficiently [Hig19]. The reporting needs to be both holistic to capture impact, as well as machine-readable to increase information dissemination. A step towards this was taken in January 2018 when the National CSR Data Portal was launched, however enhancing disclosures is still of the need, in order to improve upon the relatively new landmark law.

Schedule VII of the Companies Act, 2013 does specify the areas which can be undertaken by the companies as CSR activities. This list has been subject to contention as the act does provide any provision to expand beyond this list. The High level committee mentioned above reports receiving maximum queries in relation to Section VII. The committee suggested using broader principles concerned with holistic development rather than an activity-based approach,

¹Refer Annexure

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
S.No	CSR project or activity identified.	Sector in which the Project is covered.	Projects or programs (1) Local area or other (2) Specify the State and district where projects or programs was undertaken.	Amount outlay (budget) project or programs wise	Amount spent on the projects or programs Sub-heads: (1) Direct expenditure on projects or programs. (2) Overheads:	Cumulative expenditure upto to the reporting period.	Amount spent: Direct or through implementing agency
1							
2							
3							
	TOTAL						

*Give details of implementing agency:

Figure 3: CSR reporting requirements in India

declaring that there cannot be a fixed list of permissible activities.

2.2.4 Inequalities

The act states – “Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities”. [20114]

However, the term “local area” is very loosely defined. On different scales or maps, a local area can be termed as a district, a city, or even a state. Also, for companies that operate in multiple states or operate through the service sector online, it becomes an even longer leash. There are thus many states of India which are receiving less attention. Bihar, Uttar Pradesh, Karnataka, Himachal Pradesh, Odisha, and Chhattisgarh account for more than 60 percent of backward districts concentration in India, however, they accounted for only 15 percent of CSR projects and spending in 2017. Maharashtra, Haryana, Gujarat, Karnataka, and Andhra Pradesh account for more than 70 percent of expenditure whilst having only 15 percent backward districts concentration [KPM18]. The primary reason identified for this spatial inequality is the disparity in the number of companies contributing to CSR activities in various areas. Maharashtra, Tamil Nadu, Uttar Pradesh, Karnataka, and Gujarat have a higher number of companies that contribute towards CSR, whereas the North-East Indian states which receive one of the lowest levels of CSR expenditures have the least number of companies that contribute towards CSR. This is made clear by the fact that between 2017 and 2019, there was an increase of 1223 companies with CSR expenditures in the top 5 states while only an increase of 17 was reported in Northeast India. The states in the North East depend on companies located elsewhere in the nation. [TIC21]

2.2.5 Implementation

The act also offers companies free will to conduct the activities, only mandating the financial expenditure in essence. This leads companies to take a top-down approach without conducting a community-based needs assessment analysis. The Indian Responsible Business Index which measures 100 companies on this criteria found that only 11 companies were conducting needs assessments before initializing CSR programs [Pra17]. An EY survey suggests that 75 percent of its respondent companies do not have a governance structure to address ethical lapses or fraud in CSR programs. 20 percent of respondents reported that there are no clear roles for the CSR committee outlined in their organization. 15 percent of the respondents had no knowledge of the nature of the CSR expenditure, as to whether it was real or fictitious [EY 20]. This highlights a clear need for businesses to improve reporting and put in place mechanisms to monitor the usage of CSR funds. With this, there also is a requirement for the government to provide more support in the form of clarity of the legislation. A survey conducted by the Federation of Indian Chambers of Commerce and Industry revealed that a primary obstacle faced by businesses in implementing CSR projects is inadequate clarity on laws and tax related regulations posed by Section 135 of the companies act [Fed16]. The same report also discusses the problem of the lack of a strong definition of CSR terms faced by businesses while implementing their policies. This reflects the interconnected and complex nature of the problem which stems from the basic language of the law itself.

Proper implementation becomes even more important as it is well recognized that there is a much greater requirement for the creation of systems to serve societal, social, and environmental needs in India, than as compared to the western, more developed countries. [Mai04]

2.3 Experiences of Countries with Similar Provisions

Independent India has a history of building itself up through taking the positive aspects of other government's policies. The Indian constitution was also created similarly, adopting aspects from other countries' governance systems, and has been widely recognized as one with strong foundations [Nat21]. This makes it prudent to learn from the experiences of other nations who have tackled CSR with partial provisions relating to the Indian model.

2.3.1 Reporting in Denmark

In 2008, the parliament of Denmark (Folketinget) passed an amendment to the Danish Financial Statements act which made reporting of CSR a legal requirement for over a thousand businesses. This is a good measure to compare performances with India as both countries have some sort of a legal measure, and the companies act can improve based on the comparatively longer experience the Danish amendment has had. A key difference between the two policies is that Denmark does not mandate CSR but only the reporting of CSR activities (if they are carried out).

Key aspects where Companies Act can improve through the Danish experience-

- Various surveys report that the legal requirement has encouraged some businesses to start working with CSR in more systematic ways. This has led to achieving the objective of the law in the first place that is encouraging businesses to take up a more active role in society. A facet where India can improve based on this experience is reporting.
- The majority of businesses in Denmark make use of the Danish Commerce and Companies Agency's guide "The CSR Report- practical guidelines and inspiration" which apart from being a structure to help in reporting, also acts as a medium to understand the scope of the legislation [Dan10]. This is in sharp contrast to the reporting requirements of India which often lead to inconsistencies (discussed above). The only support system which comes close to a guide is the Frequently Asked Questions document prepared by the Institute of Company Secretaries of India and a guide created by the Confederation of Indian Industry which is a non-governmental organization [Con13]. The creation of a similar official guide such as that in Denmark can reduce cases of non-compliance and also create a more uniform reporting experience for all companies. This can also fulfill the need for explaining the definition of CSR in the Companies Act.
- KPMG has created a checklist based on general questions of companies to aid them in complying with the Danish Financial Statements Act [KPM17b]. A checklist of required details can be created by the Indian commerce ministry as well which can act as a check for companies to judge compliance before submission. This can be included in the above-mentioned guide itself. Government support and transparency for companies faced with a mandate can improve compliance.
- The reporting in Denmark is also much more holistic as compared to India. Companies in Denmark need to report on three dimensions- CSR policies, Actions on these policies, and achievements and expectations from these actions. Failure to report on any one of these aspects is seen as a failure in reporting by the auditor. In India, no impact assessments such as these are required. There is no follow-through on the effect the channeled money is creating on the ground. This has led to multiple cases of inconsistencies and inefficiencies in company CSR systems.
- Denmark also provides companies multiple means to publish their report (apart from the compulsory inclusion in the annual report of the company) such as through a UN global compact report, a report on the website, or as a supplement to the annual report. There is considerable freedom in the creation of the report as well. This allows the report to be more holistic and cover the 3 dimensions. To implement such a policy, India must expand its disclosure form with further questions, or create a requirement of a CSR report.

2.3.2 The similar case of Mauritius

Mauritius is the pioneer in mandating corporate philanthropy as it came out with the first piece of legislation regarding the same. CSR can be traced back to Mauritius as primarily philanthropic CSR in sugar production factories. The economic councils of the country had regular debates at the start of the 21st century about the irregular and inconsistent nature of CSR by companies, and the government budget of 2007 proclaimed that CSR is being carried out on an “ad hoc” basis [Ram18]. In 2009, the Finance Bill of 2009 mandated CSR requiring all profitable companies to contribute 2 percent of their profits towards CSR. [Par09]

- There is no discrimination between companies as the bill mandates CSR policies for each and every profitable company. This means that every company is on an equal platform. This is in contrast with the Indian model which qualifies those companies for CSR earning above a certain threshold of profit. Many researchers argue that this is a better model as it does not disadvantage any particular firm by taking a part of their profits [Ram18]. This equal footing is further strengthened by the model of using percentages of profit and not delineated amounts. Adoption of a similar model in India can boost the number of companies involved as well as possibly the percentage of companies complying with the Section 135 because of the equal footing. According to the Indian Institute of Corporate Affairs, a minimum of 6,000 Indian companies will be included in the Companies Act of India. This number and thus the associated welfare can be significantly increased by including every company. Since this amended provision will be applicable to only profitable companies (such as done in Mauritius), it will also ensure that economic and financial health in the long term is considered. This is derived from Carroll’s model which puts economics as the base stone for further build-up.
- This requirement of each company needing a CSR policy in Mauritius has also led to the increase in knowledge about CSR in the country, with more roles of CSR managers coming up and increased understanding among the general public about the definition of CSR [Pil15]. This is largely a result of the majority of businesses in Mauritius being owned by a small number of shareholders or families. This leads to the spread of CSR through the very roots of society, quite often ingraining the relation of business in society, in the minds of people. As said by Pillay, CSR in Mauritius ‘has become firmly entrenched as a development strategy within a broadly neoliberal worldview’.
- However, it is also important to regard that many researchers point towards a fault in the Mauritian system which is quite similar to that faced by India- the CSR is focused on activities rather than outcomes and results [Pil15]. There is a clear need for impact assessments in both the models (such as suggested in the example of Denmark), though Mauritius

has made steps towards bettering its model through the formulation of a guide to aid businesses in understanding the scope of the legislation. It is worthwhile to note that both countries which pioneer the mandating of CSR movement have similar issues with the implementation of the law. [Mau21]

2.3.3 The Standard Set by South Africa

The King Codes in South Africa mandate upon reporting and disclosure of CSR activities by companies listed on the Johannesburg stock exchange. The four codes launched till now have been widely hailed as one of the world's leading stakeholder-oriented corporate governance frameworks, integrating economic, social, and environmental concerns. [Kin16]

The case of South Africa is especially worth noting as the business community had little to no resistance to these set of guidelines, which is in sharp contrast with the case in India and Mauritius. Daniel Kinderman in his book cites a key reason for this being the legacy of the Apartheid era which increases a more equitable and developmental point of view in South African Business, however, there are still key lessons that can be applied to India's case.

A primary reason often cited for the success of the adoption of these codes in South Africa includes the 'Apply and Explain' model of the codes. The King Report IV was released as a revision to the previous 3 reports. A central driving force was also the attempt to revise the King Report III, in order to make it more accessible and understandable for private companies and non-profit organizations. There are similar challenges faced by NGOs and relatively smaller companies in India with adapting Section 135 to their unique situations. With India having one NGO for every 400 citizens, there is a considerable gap in the governance systems, quality of work, and most of all credibility of all these NGOs. There has been, in fact, the creation of a paradox in India with multiple NGOs building their capacity in order to receive funds, while the companies are unable to choose among the NGOs due to the lack of credibility [RK15]. The King Report IV aims to reduce problems related to differences in implementation by attaching a supplement to the main report for non-profit organizations, small and medium enterprises, and State-owned entities [KPM17a]. These supplements include best practices and recommendations for achieving ideal governance outcomes. India should also aim to provide these 'sector supplements' with interpretations regarding terms that may not easily translate into the workings of companies other than the listed giant corporates.

The King IV also makes an active attempt to stay in line with new technologies, governance structures, and corporate responsibility developments. Principle 12 of the set of codes states- "The governing body should govern technology and information in a way that supports the organization setting and achieving its strategic objectives". A set of recommendations for the same are also mentioned. There have been considerable global developments in the field of CSR with advancements in rating, reporting, and governance. India must also incorporate a more modern system, either incorporating the support of third

parties such as the UN Global Compact (as done by Denmark) or following South Africa's lead by amending existing provisions through the government's own interpretation. India will be suited to following South Africa's lead by not changing the fundamental philosophy of the main codes but by adding to it in terms of ease, interpretation, and development.

It must be noted that India should alter some of these provisions to suit its system of mandating CSR, as South Africa does not legally compel a company to carry out CSR activities, with fines and penalties.

A summary of suggestions based on the above analysis is given below in Figure 4-

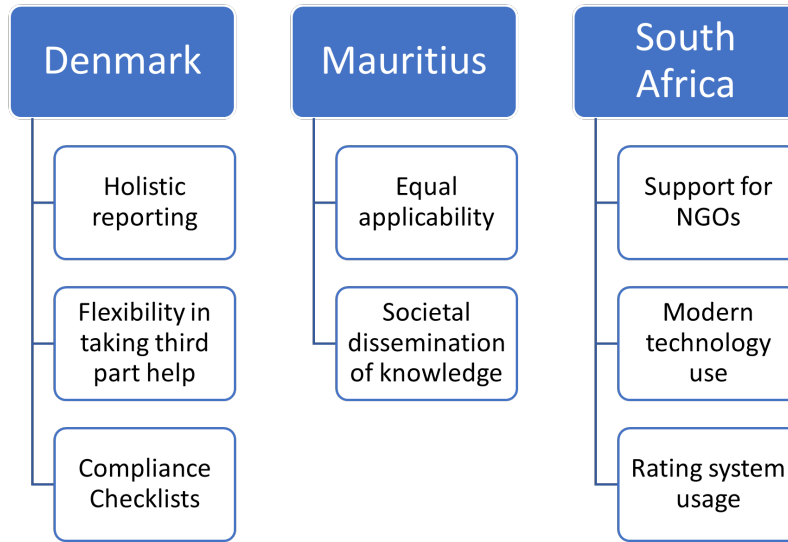


Figure 4: CSR reporting requirements in India

3 Conclusion

Section 135 of the Companies Act is proving to be a landmark law and a bridge between business and society. The act can aid in solving society's major problems ranging from environment and health to education and equality. This is even more crucial in a developing country like India where inequalities are rampant with the Indian industry becoming richer and the poor being left behind. This paper attempts to outline the basic issues at the core of the law, and suggest changes based on the implementation of similar policies in other countries.

The paper discusses the issue at the heart of Section 135 that of the morality of mandating CSR. The paper uses a review of definitions, experiences of industrialists, and arguments made as per the development levels of the country.

Based on this, the paper concludes CSR to be permissible if managed without disrupting business. Other issues of the section are also discussed with emphasis on the problems with the lack of specificity in the language of the policy, which leads to the measurement of the benefits being vague. Aspects of the section which promote regional and sectoral inequalities are also discussed with the use of statistics. Problems with the implementation of the section are discussed with an aim to discuss the actual on-ground realities. This highlights the key loopholes of the policy including vague terminologies, inefficient reporting requirements, and lack of clearly specified governance structures.

The paper moves on to then discuss versions of similar laws enacted in other countries. The paper analyses briefly the general product of the laws and takes from the same key aspects which can be reproduced in India. Based on this methodology, the paper suggests India adopt reporting requirements from Denmark, compliance guides for “non-mainstream” (small private companies and non-governmental organizations) units from South Africa, and equality arrangements from the Mauritian model. A similar approach was followed in the drafting of the Indian Constitution, with aspects taken from other countries.

Through using a methodology of discussing problems based on literature review and statistics, followed by analyzing possible solutions which have been tested in other nations, leads to procurement of possible viable effective amendments for Section 135. This research can thus help in increasing the effectiveness of the law and reducing the gap between its aims and the actual practice of the same. The research thus adds to the existing pool of literature through the usage of the above-mentioned novel approach.

Upon the implementation and consideration of these suggestions, corporate social responsibility can act as an effective tool for aiding the government in combating social and environmental problems, apart from adding less to the same. It would be a major step forward in helping business, society, and nature move together in an increasingly ‘volatile, uncertain, complex, and ambiguous world’.

Further empirical research can be done on comparing the statistics on the countries, and those statistics available for Indian companies. This can aid in identifying patterns and thus providing further recommendations and amendments to Section 135. In addition, there are other countries with similar laws (a key example being Indonesia) which can be examined under a similar lens for more conclusions.

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