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THE COMPANIES ACT, 2013: INDUCTION OF BALANCE FOR BUSINESS AND CRIMINALITY

AUTHORED BY - INDRANI MUKHERJEE*¹

“There has always been crime among businessmen. There have always been instances of violation of trust. Most of us have read of chicanery and plunder in the history books and such acts have often constituted the central theme of the fiction of earlier times.”²

An excerpt from the observation by Barnes and Tettters.

The very core of crime can be categorically found ranging from individuals to companies, which means, it potentially is a norm for individuals and the motive in any case comes from the very need of over and above the usual profit.

It has been an observation and not a new observation that attributes and the feeling of “**less than other**” has been a cause of most of the crimes.

“Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set and the means of attaining those objectives and monitoring performance”.³

“Corporate crime is by a wide margin the most genuine of a wide range of crime so it needs to understand why the most extravagant, most remarkable corporations on the planet routinely,

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² Vol 7 Ahmad Siddique, *Criminology, Penology And Victimology* 73 (2021)

³ OECD April 1999, Available at <http://www.oecd.org/dataoecd/41/2/2956774.pdf>. This OECDs definition is consistent with the one presented by Cadbury [1992, page 15]. OECD Committee also linked good governance to participatory development, human rights and emocrarisation, and identified the rule of law, public sector management, controlling corruption and ucmg excessive military expenditure as important dimensions of good governance.

efficiently disregard the law”.⁴The first half was marked with two major world economic crises (The Great Depression) and another with an increasing number of heavy corporate scandals. “What is important is that this type of fraud is spreading, and as a result, there has been a need to study this concept from a scientific and professional point of view, able to find a solution and prevent corporate crime.”⁵ The history and its significance with regards to the corporate crimes have seen enough, where if one portion of the employee set are suffering in times of crisis, there one set of secured employees who on the face of it is not dealing with a grave crisis, and here sets the tone and clouds of suspicion for the company pertaining to some.

Before the idea of holding a corporation accountable was introduced, there were many instances in which no corporation was held accountable for any criminal act because it was an artificial legal person and could not be jailed, and because it was not a natural person, there was no mens rea. “When a business is found criminally culpable, it not only has an impact on the company's operations but also has the potential to negatively impact the criminal and financial well-being of the individuals involved in the illegal activity. However, it has been proposed that a fine be levied rather than incarceration in the event that a business is to be punished”.⁶ Therefore comes the concept of **Corporate Criminal Liability**. “The Corporate Criminal Liability means and draws a sufficient degree of action from those who have the corporation's crime tied to the acts of its officers.”⁷ “Prior to the establishment of the theory of corporate criminal liability, Indian courts did not punish corporations on the grounds that they lacked the necessary element, mens rea, because they were fictitious legal entities that could not be physically brought into court.”⁸ “The first of its kind definition for the criminality in these organized workspaces was brought into the public sphere by social science by the American scientist Edwin Sutherland in his 1939 Presidential Address to the American Sociologists Association.”⁹

⁴ Bharat Patel, *Corporate Crimes in India and Corporate Criminal Liability under Legal System*, vol 5, IJAR, 41, 2020, <https://www.multidisciplinaryjournal.net/assets/archives/2020/vol5issue4/5-4-18-692.pdf>

⁵ *Ibid*

⁶ Erathi Anudeep, *Corporate Criminal Liability: Analysis with respect to Indian Penal Laws*, vol 12, IJCRT, 4, <https://ijcrt.org/papers/IJCRT2402049.pdf>

⁷ *Supra Note 2*

⁸ Kunal Kaushik Kally, *A Critical Study on Corporate Criminal Liability with Special Reference to US and Indian Laws*, vol 6, SSRN, (January 23, 2020).

⁹ *Supra Note 3*

CORPORATIONS AND THE CRIMINAL LIABILITY BEARING

“Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.”¹⁰

-Hazlitt

As in her book she puts forth the idea of the actus rea and mens rea rational and necessary to constitute crime in any domain of the corporation, she writes “ “although when attention is turned to the corporation as perpetrator, economic crime is the most obvious example, what comes to the mind is rarely an offence of straightforward dishonesty but some complex tax or price-fixing violation.”¹¹

What has been the lack of attention has been the only pain of not distinguishing between conventional crime and corporate criminality. The sole reason that the idea of the corporate crimes were mere abstract ideas, but the only time when it was ought to be a part of the entire legal fiction would have been when the prosecution along with respective representation started to take place, now the fundamentality of this issue comes when the elimination process for the specific corporate crimes are either made a hue and cry because the ease of doing it with regards to corporation crimes makes it difficult to segregate.

By way of the characteristics of a company the working is as a “juristic person”, which means it has a separate identity of its own and so can sue and be sued. Therefore these accrue certain difficulties. Although the corporate is a personality, “the necessity of personal physical appearance in the majority of criminal trials was one of them¹², “then comes in the question “ can a corporate committ an act of crime as it is empowered same as any person, the **concept of Lifting the Corporate Veil**” to know the real hands behind the act¹³, since the empowerment of this juristic personality is limited it can be suggested that it is ultra virus. “Thirdly, tracing mens rea

¹⁰ Celia Wells, *Corporations and Criminal Responsibility 1* (2001)

¹¹ Sally simpson, *Corporate Crime, Law and Social Responsibility 6* (2002)

¹² Indian legislature has sought to address this problem, at least partially, by prescribing that personal attendance may be dispensed with only in a summons case, if allowed by the Magistrate under S. 205 of the Code of Criminal Procedure (Act 2 of 1974).

¹³ David Ormerod, *Smith and Hogan’s Criminal Law 234* (2005)

or a guilty state of mind in an abstraction like the corporation posed a formidable challenge.”¹⁴ “Lastly, owing to the non-human form assumed by corporate bodies, it was outside the ambit of the obvious criminal sanction of imprisonment.”¹⁵ “Nonetheless, there are many criminal activities which a corporation can and unfortunately does get involved in, starting from workplace death and hurt to injury to the person and damage to the property of consumers and other members of the public.”¹⁶

The take by the Indian Courts has always been grappling with the laws overlapping with the conventional way of dealing with its liabilities. “A company, association, or even an unincorporated body is expressly included within the definition of ‘person’.”¹⁷ The flow of the events of recognising the corporate crimes have been acknowledged since the 1860s itself, however, “the judiciary has not been amenable to such an expansive understanding of the law with respect to the liability of companies and corporate accountability was restricted to crimes in which two considerations were met, namely, where mens rea was not essential as an ingredient, and imprisonment was not mandatory as a punishment.”¹⁸ “The restrictive interpretation was justified by implicitly assuming that every definition in the Indian Penal Code was subject to the qualifying clause, “unless there is anything repugnant in the subject or context”, even in the absence of an express stipulation to that effect and therefore a corporation was to be excluded from liability for certain kinds of offences.”¹⁹ “The requirement of the first consideration was dispensed with in 1964 when the possibility of a corporation committing a crime requiring mens rea was recognised by an Indian Court.”²⁰ “Under statutory provisions of the Indian law, the liability prescribed, at least for economic or strict liability offences committed by a company is threefold, as per the express provisions of the statutes”.²¹

To this effect, certain provisions have been made to customize in order to cater to the needs of the business. One such step is the Decriminalisation of Offences Under the Companies Act, 2013.

¹⁴ Id., at 235. eg., a company cannot very well be a principal offender in rape even today as it requires a very specific and subjective state of mind which is perhaps impossible to attribute to a corporation.

¹⁵ Shouvik Kr. Guha & Abhyudaya Agarwal, Criminal Liability Of Corporations: Does The Old Order Need To Change? eg., a company cannot very well be a principal offender in rape, although whether a corporation could aid or abet a rape is a different point altogether lying beyond pertinence at this juncture,

¹⁶ *Supra Note 9 at pg 3*

¹⁷ Indian Penal Code, No. 45 of 1860, §11.

¹⁸ Sunil Chandra Banerji v. Krishna Chandra Nath, AIR 1949 Cal 689; Punjab National Bank v. A. R. Gonsalves, Bunder Inspector, Karachi Port Trust AIR 1951 Sind 142.

¹⁹ Kartick Chandra v. Harsha Mukhi Dasi AIR 1943 Cal 345 (FB) and Darbari Lal v. Dnaram Wati, AIR 1957 All 541, relied on in State of Maharashtra v. Syndicate Transport, AIR 1965 Bom 195

²⁰ State of Maharashtra v. Syndicate Transport, AIR 1965 Bom 195 (not holding the company liable because the said act was committed by a “...mere shareholder who was only a stranger so far as the administration of the company was concerned”).

²¹ One can refer to the Prevention of Food Adulteration Act, No.37 of 1954, §17, Foreign Exchange Regulation Act, No. 46 of 1973, §68, Income Tax Act, No. 43 of 1961, §278B

“The argument of inherent flaw whereby a company could be convicted of less severe offences where imprisonment was not mandatory”²², but would be immune from prosecution for graver offences where imprisonment was mandatory, this aspect has now been considered by the legislature and thus has been made out for the ease of carrying out the business.

1st Feb,2023 marked that day when the budget speech mentioned the articulation of better corporate governance. In verbatim “[f]or *enhancing ease of doing business, more than 39,000 compliances have been reduced and more than 3,400 legal provisions have been decriminalized. For furthering the trust-based governance, we have introduced the Jan Vishwas Bill to amend 42 Central Acts. This Budget proposes a series of measures to unleash the potential of our economy.*”²³

The objective of any Act specifies and ensures the doctrine deterrence which would result in penal consequences under criminal law, and so did the Company’s Act did. “In totality, the Companies Act, originally, consisted of **134 penal provisions, of which only 18 non-compliances fell under the purview of in-house adjudication mechanism and the remaining 116 non-compliances would entail initiation of criminal proceedings.**”²⁴

“With the advent of ease of doing business in India, there has been a shift from penalizing regulatory non-compliances to decriminalization of offences under the Companies Act. Decriminalization, in literal sense, means the legislative act or process of legalizing an illegal act”.²⁵ “However, in context of the Companies Act, the reforms *qua* decriminalization are two-fold: first, changing the nature of certain criminal offences into civil wrongs and second, omitting certain other redundant offences altogether”.²⁶

IMPOSITION OF PENALTY IN LIEU OF FINE/ IMPRISONMENT:

²² *Supra Note 14 at pg 4*

²³ Government of India, February 2023, *Speech of Nirmala Sitharaman, Minister of Finance*, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.indiabudget.gov.in/doc/budget_speech.pdf, last accessed on 11 March, 2024.

²⁴ Agma Law, <https://agamalaw.in/2023/05/23/a-balancing-act-ease-of-doing-business-vis-a-vis-offences-under-companies-act-2013/> (Last Visited on 11th March, 2024)

²⁵ *Black’s Law Dictionary* 473 (9th ed. 2009).

²⁶ *Boost to Ease of Doing Business and Investment in the country – Decriminalization of offences under the Companies Act, 2013*, Ministry of Information and Broadcasting, Government of India, available at <https://transformingindia.mygov.in/wp-content/uploads/2021/09/Ease-of-doing-business-eng.pdf>, last accessed on 11 March 2024.

<u>SI No.</u>	<u>SECTION</u>	<u>OFFENCE</u>	<u>POST- DECriminalizatio N PENALTY</u>
1.	56(6)	Post-decriminalization PenaltyNon-compliance of procedure for registration of transfer or transmission of securities.	Penalty of fifty thousand rupees.
2.	86(1)	Non-compliance of provisions pertaining to registration of charges provided under Chapter VI.	Penalty of five lakh rupees on company and of fifty thousand rupees on officer in default.
3.	88(5)	Failure to maintain a register of members or debenture holders or other security holders.	Penalty of three lakh rupees on company and of fifty thousand rupees on officer in default.
4.	89(5)	Failure to declare beneficial interest in any share by any person.	Penalty of two hundred rupees for each day till default continues, subject to a maximum of five lakh rupees.
5.	89(7)	Failure of company to file the return in relation to declaration of beneficial interest in any share.	Penalty of one thousand rupees for each day till default continues, subject to a maximum of five lakh rupees. Penalty of two lakh rupees on officer in default.
6.	90(10)	Failure to declare significant beneficial ownership in a company by any person.	Penalty of fifty thousand rupees and in case of continuing failure, one thousand rupees per day till default continues, subject to a maximum of two lakh rupees.

7.	90(11)	Failure of company to maintain register of significant beneficial owners in a company.	Penalty. of one lakh rupees and in case of continuing failure, five hundred rupees per day till default continues, subject to a maximum of five lakh rupees with further penalty on officers in default.
8.	92(6)	Certification of annual return by company secretary not in compliance with Section 92 or rules made thereunder.	Penalty of two lakh rupees.
9.	105(5)	Invitation to appoint any particular person as proxy or any one of a number of persons is issued to a member.	Penalty of fifty thousand rupees.
10.	124(7)	Failure to comply with provisions pertaining to unpaid dividend accounts.	Penalty of one lakh rupees and in case of continuing failure, five hundred rupees per day till default continues, subject to a maximum of ten lakh rupees with further penalty on officer in default.
11.	134(8)	Failure to comply with provisions pertaining to approval and filing of financial statements, board's report and so on.	Penalty of three lakh rupees on the company and of fifty thousand rupees on officer in default.
12.	135(7)	Non-compliance of corporate social responsibility policy.	Penalty of twice the amount required to be transferred by the company to the Fund or one crore rupees, whichever is less and further penalty on officer in default.

13.	143(15)	Failure of the auditor to report any matter pertaining to fraud to the Central Government.	Penalty of five lakh rupees on listed company and of one lakh rupees on other companies.
14.	172	Non-compliance of any provisions of Chapter XI, i.e., Appointment and Qualification of Directors, where specific penalty is not provided.	Penalty of fifty thousand rupees and in case of continuing failure, five hundred rupees per day till default continues, subject to a maximum of three lakh rupees with further penalty on officer in default.
15.	178(8)	Failure to comply with section 177 and 178 pertaining to the audit committee, nomination and remuneration committee and stakeholders relationship committee.	Penalty of five lakh rupees on company and of one lakh rupees on officer in default.
16.	184(4)	Failure of director to disclose interest as provided under Section 184(1) and (2).	Penalty of one lakh rupees.
17.	187(4)	Failure to comply with the requirement of investment of the company to be held in its own name.	Penalty of five lakh rupees on company and of fifty thousand rupees on officer in default.
18.	188(5)	Non-compliance of provisions in relation to related party transactions.	Penalty of twenty-five lakh rupees in case of listed company and penalty of five lakh rupees in case of any other company.
19.	204(4)	Failure to comply with terms of secretarial audit.	Penalty of two lakh rupees.
20.	232(8)	Failure to file certified copy of order, pertaining to merger and amalgamation of a company, with the Registrar within thirty days.	Penalty of twenty thousand rupees and in case of continuing failure, one thousand rupees per day till

			default continues, subject to a maximum of three lakh rupees.
21.	247(3)	Non-compliance of Section 247 by valuers undertaking valuation of any property, stocks, shares, debentures and so on of the company.	Penalty of fifty thousand rupees.
22.	405(4)	Failure to furnish adequate information as sought by order of the Central Government.	Penalty of twenty thousand rupees and in case of continuing failure, one thousand rupees per day till default continues, subject to a maximum of three lakh rupees.
23.	450	Non-compliance of any provision of Companies Act and/ or rules thereunder, wherein specific penalty is not provided.	Penalty of ten thousand rupees and in case of continuing failure, one thousand rupees per day till default continues, subject to a maximum of two lakh rupees with further penalty on officers in default.

**REDUCTION OF PUNISHMENT, VIZ., IMPOSITION OF FINE
IN LIEU OF IMPRISONMENT:**

<u>SI No.</u>	<u>SECTION</u>	<u>OFFENCE</u>	<u>POST- DECriminalizati ON FINE</u>
1.	8(11)	Non-compliance of provisions pertaining to formation of companies with charitable objects.	Fine of minimum ten lakh rupees extending to one crore rupees on the company and at least fine of twenty thousand rupees which may extend to twenty-five lakh rupees on officer in default.
2.	26(9)	Failure to issue prospectus in compliance with Section 26.	Fine of minimum fifty thousand rupees extending to three lakh rupees on the company and on every person party to issuance of prospectus.
3.	40(5)	Failure to apply for permission to deal with securities in stock exchanges, prior to making a public offer and other non-compliances of Section 40.	Fine of minimum five lakh rupees extending to fifty lakh rupees on the company and at least fine of fifty thousand rupees which may extend to three lakh rupees on officer in default.
4.	68(11)	Non-compliance of provisions pertaining to buy-back of shares as provided under Section 68 read with regulations made by Securities and Exchange Board.	Fine of minimum one lakh rupees extending to three lakh rupees on the company and on officers in default.

5.	128(6)	Failure of managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person of a company in complying with provisions pertaining to maintaining books of accounts and other relevant books.	Fine of minimum fifty thousand rupees extending to five lakh rupees.
6.	147(1)	Violation of compliances in relation to auditors, as provided under Section 139 to 146.	Fine of minimum twenty-five thousand rupees extending to five lakh rupees on the company and at least fine of ten thousand rupees which may extend to one lakh rupees on officer in default.
7.	167(2)	Person continues to function as a director despite being disqualified under Section 167(1).	Fine of minimum one lakh rupees extending to five lakh rupees.
8.	242(8)	Alteration of memorandum or articles of company, in contravention of Section 242(5).	Fine of minimum one lakh rupees extending to twenty-five lakh rupees on the company and at least fine of twenty-five thousand rupees which may extend to one lakh rupees on officer in default.
9.	243(2)	Acting as managing director, other director or manager of a company in contravention of Section 243(1)(b) and (1-A).	Fine which may extend to five lakh rupees.
10.	347(4)	Contravention of rules, if any, in relation to	Fine which may extend

		disposal of books and papers of the company wound up and about to be dissolved.	to fifty thousand rupees.
11.	392	Non-compliance of provisions of Chapter XXII by a foreign company.	Fine of minimum one lakh rupees extending to three lakh rupees on the company and at least fine of twenty-five thousand rupees which may extend to five lakh rupees on officer in default. In case of continuing offence, additional fine will be levied.

As the above-mentioned list enumerates certain provisions to the light of the public eye, that to continue the process of justice whereby a revised process of assessing the crimes and the lookout to come to a common consensus, makes good as per the new amendments. “In R. v. Howe and Son (Engineers) Ltd.”²⁷ “There was an observation that fines have to be large enough to have a deterrent effect on the corporation, and small enough so as not to imperil the earnings of employees”.²⁸ “The view on which these lists are based is the fact that “fines should, however, reflect the criteria of the gravity of offence and the capacity of the offender to pay them, so as to determine the appropriate amount for a deterrent effect”.²⁹

In addition this article will also find yet another list which carries the omitted penal provisions under the latest amendment under the Company Amendment Act 2020, whereby “the Companies **Amendment Act, 2020 lastly has omitted various penal provisions**, wherein, the omission may be categorized into three parts: (a) offences rendered redundant as the same may be adjudicated under contempt jurisdiction of Tribunal under Companies Act; (b) offences which can be dealt through other laws; and (c) offences to be dealt with under alternate framework and/ or

²⁷ [1999] 2 All ER 249

²⁸ *Supra Note 21 at pg 5*

²⁹ Australian Commonwealth Crimes Act §4B (3). The provision stipulates that if a corporate body is convicted of an offence, the court may impose a pecuniary penalty equal to five times the amount which may be imposed on a natural person convicted of the same offence.

mechanisms.”³⁰

SI No.	SECTION	OFFENCE	REASON FOR OMISSION/ SUBSTITUTION
Offences Rendered Redundant			
1.	48(5)	Non-compliance of order of Tribunal in relation to variation of shareholder’s rights.	Breach of order of Tribunal may be dealt with under contempt jurisdiction of the Tribunal.
2.	59(5)	Non-compliance of order of Tribunal pertaining to rectification of register of members.	
3.	66(11)	Non-compliance of order of Tribunal in relation to reduction of share capital.	
4.	71(11)	Non-compliance of order of Tribunal pertaining to redemption of debentures.	
Offences Which Can Be Dealt Through Other Laws			
5.	342(6)	Prosecution of delinquent officers and members of the company.	Instead of imposing a criminal penalty, the non-compliance may be dealt with by mandating cooperation.
Offences To Be Dealt With Under Alternate Framework / Mechanisms			
6.	16(3)	Failure to comply with the direction of the Central Government to rectify the name of the company.	The non-compliance of this provision may be dealt with by auto-generating a neutral name.
7.	441(5)	Non-compliance of order of Tribunal or Regional Director in relation to	In place of imposing separate penalty,

³⁰ Ministry of Corporate Affairs, November 2019, *Report of the Company Law Committee*, p. 15, available at https://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf, last accessed on 12 March 2024.

		compounding of offences.	maximum fine for initial offence, shall be doubled.
8.	284(2)	Non-cooperation with the company liquidator.	Instead of affixing criminality to non-cooperation, direction of cooperation may be passed by the Tribunal.
9.	302(4)	Failure to file order of Tribunal declaring dissolution of company with the Registrar.	It was considered that the copy of order may be forwarded to Registrar by Tribunal, in lieu of affixing criminality to non-compliance.
10.	356(2)	Failure to file order of Tribunal declaring dissolution of company as void with the Registrar.	

“As per data collected from the Registrars of Companies, more than 1,000 company law default cases have already been disposed of by the Adjudicating Officers (Registrars of Companies) during the financial years, 2018-19, 2019-20 and 2020-21, in a summary manner.”³¹ “Moreover, decriminalization has encouraged establishment of more businesses in India whereby more than 1,55,000 companies were registered in India in the financial year 2020-21 which is almost 3 times more than the average number of companies registered annually, six years ago.”³²

CONCLUSION

“In this regard, Garland’s persuasive thesis that the social institution of punishment “communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations and a host of other tangential matters”.³³

In the opinion of Fisse, “These approaches are promising because they increase the variety of deterrent, retributive, and rehabilitative measures available against corporations and in doing so

³¹ *Supra Note 25*

³² *Ibid*

³³ *Supra Note 15 at pg 4*

circumvent some of the major limitations of monetary sanctions...”³⁴

“In a short span of two years, it is seen that decriminalization has fast-tracked disposal of company law defaults. It is in view of this success of decriminalization of offences under the Companies Act, that 42 Acts are sought to be amended wherein 3,400 provisions would be decriminalized. It is pertinent that decriminalization is not equated with deregulation and the extent of decriminalization is such that it instills faith in investors and businesses in the Indian economy”.³⁵



³⁴ Brent Fisse, *Sentencing Options Against Corporations*, 1 CRIM. L. FORUM 211 (1990)

³⁵ *Supra* Note 23 at pg 5