A CRITICAL ASSESSMENT OF THE ROLE OF DIRECTORS IN CORPORATE OFFENSES

A book titled "A Critical Assessment of the Role of Director in Corporate Offenses" would typically explore the legal responsibilities and liabilities of company directors in cases where corporations commit unlawful acts. This study would assess how directors' decisions and actions contribute to corporate misconduct, evaluate the regulatory framework that holds them accountable, and examine various cases to highlight issues of corporate governance. It would also critically analyze whether existing laws sufficiently deter misconduct and recommend improvements for holding directors accountable for corporate offenses, ensuring ethical corporate governance, and safeguarding stakeholders' interests.

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CONTENTS

Chapter-I

INTRODUCTION 1-16

Chapter-II

PROCEDURE FOR APPOINTMENT OF DIRECTOR UNDER COMPANY ACT 17-41

Chapter-III

POWERS, DUTIES & LIABILITIES OF THE BOARD OF DIRECTORS OF A COMPANY IN INDIA 42-65

Chapter-IV

CORPORATE GOVERNANCE AND DIRECTORS' DUTIES: INDIA 66-71

Chapter-V

CORPORATE CRIME, FRAUD AND INVESTIGATIONS: INDIA 72-111

Chapter-VI

CORPORATE CRIME AND SENTENCING IN INDIA: REQUIRED AMENDMENTS IN LAW 112-137

Chapter-VII

CONCLUSION 138-148

BIBLIOGRAPHY 149-152

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Chapter-I

INTRODUCTION

The contemporary crisis of crony capitalism springs up from the basic issues of the privatization of public institutions, and unilateral consumption of natural resources for the elusive economic advantage by all nations. The present trend by many nations is that they are giving primacy to artificial or juristic persons, such as multinational companies, public-private partnerships and joint ventures etc, as against the life and liberty of individual human being. The justification though sounds good, in practice it resulted in a spurt of economic offences and corrupt society infested with nepotism. The liberalization of economy in 1991 opened the flood gates of family controlled corporate governance businesses in the latter years, the corporate sector in India dominated by families who continued to keep all decision-making authorityin their hands in the name of directors and at the cost of equity share holders. The general trend has been to create as many as subsidiary companies or independent dummy companies manned by their family members and transfer company funds into other family owned businesses. India witness a plethora of scams involving hooping an aggregate Rs. 91060323,43,00,000. Indian Scams starting from Harshad Mehta Stock market scam in 1992 who engaged in a massive stock manipulation at

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the instance of sinking financial and public limited companies and the scandal valued at ₹5,000 crore (US$910 million) which took place on the Bombay Stock Exchange (BSE). No doubt, it has given a wakeup call as to the inadequacy and the loopholes of India's legal system as to the corporate offences. But it is unfortunate that the successive governments failed to protect the people of the country who invested in equity shares. The governments came up with many legislations, but they failed in reducing the incidence of scams instead the multiplicity and complexity of legislations paved way for much bigger scams to name a few Telgi scam dealing with fake stamp paper that penetrated in 12 states involving 20,000 crores. the most important corporate scam where a CEO and Directors of a company were straightly participated in fraud was Satyam scam that took place in 2009 and involved in the manipulation of share value and is a worth Rs 14,000 crores.

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The number of scams of the last decade is the glaring example of this crony capitalism that is eating the roots of our democratic fabric woven by the founding fathers of the Constitution of India. Thus the present day economic polices exposed the poor peoples savings money to the perils of corporate sharks and left with no choice except leaving their fate to the virtue. Today the nation faces a basic question about the role of the government and the role of the State which

is challenging the sustainability of future generations of and the dignity of human person.

Globalization its effect on Industries

Globalization means the dismantling of trade barriers between nations and the integration of the nations economies through financial flow, trade in goods and services, and corporate investments between nations. Globalization has increased across the world in recent years due to the fast progress that has been made in the field of technology especially in communications and transport. The government of India made changes in its economic policy in 1991 by which it allowed direct foreign investments in the country. The benefits of the effects of globalization in the Indian Industry are that many foreign companies set up industries in India, especially in the pharmaceutical, BPO, petroleum, manufacturing, and chemical sectors and this helped to provide employment to many people in the country. This helped reduce the level of unemployment and poverty in the country. Also the benefit of the Effects of Globalization on Indian Industry are that the foreign companies brought in highly advanced technology with them and this helped to make the Indian Industry more technologically advanced.

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The negative Effects of Globalization on Indian Industry are that with the coming of technology the number of labor

required decreased and this resulted in many people being removed from their jobs. This happened mainly in the pharmaceutical, chemical, manufacturing, and cement industries.

Impact on Financial Sector:

The economy of India was under socialist-inspired policies for an entire generation from the 1950s until the late 1980s. The economy was characterized by extensive regulation, protectionism, and public ownership, policies vulnerable to pervasive corruption and slow growth. In 1960s, Chakravarthi Rajagopalachari suggested License Raj was often at the core of corruption.

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The Vohra Report, submitted by the former Indian Union Home Secretary, N.N. Vohra, in October 1993, studied the problem of the criminalization of politics and of the nexus among criminals, politicians and bureaucrats in India. The report contained several observations made by official agencies on the criminal network which was virtually running a parallel government. It also discussed criminal gangs who enjoyed the patronage of politicians — of all political parties — and the protection of government functionaries.

According to Jitendra Singh, "in the bad old days, particularly pre-1991, when the License Raj held sway, and by design, all kinds of free market mechanisms were hobbled or

stymied, and corruption emerged almost as an illegitimate price mechanism, a shadowy quasi-market, such that scarce resources could still be allocated within the economy, and decisions could get made. ... These were largely distortions created by the politico-economic regime. While a sea change has occurred in the years following 1991, some of the distorted cultural norms that took hold during the earlier period are slowly being repaired by the sheer forces of competition. The process will be long and slow, however. It will not change overnight." One of the major problems and obstacles to development in India has been endemic corruption and political inertia to change.

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Reforms of the financial sector constitute the most important component of India's programme towards economic liberalization. The recent economic liberalization measures have opened the door to foreign competitors to enter into our domestic market. Innovation has become a must for survival. Financial intermediaries have come out of their traditional approach and they are ready to assume more credit risks. As a consequence, many innovations have taken place in the global financial sectors which have its own impact on the domestic sector also. The emergences of various financial institutions and regulatory bodies have transformed the financial services sector from being a conservative industry to a very dynamic one. In this process this sector is facing a number of challenges. In this changed context, the financial services

industry in India has to play a very positive and dynamic role in the years to come by offering many innovative products to suit the varied requirements of the millions of prospective investors spread throughout the country. Reforms of the financial sector constitute the most important component of India's programme towards economic liberalization.

Globalization and Corporate Crime

With the advent of Globalization and Industrialization taking place at a rapid pace the world over today, we are faced with Crimes of a nature which is becoming institutionalized and hard to detect. Corporate Crimes is a major challenge to the legal fraternity, the law makers, and the law enforcers.

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Corporate crimes in a globalize economy has no borders and can affect the economies of countries on a large scale and on a smaller scale can cause huge losses to Corporate houses and bring to halt the functioning of their businesses. Keeping in view the disadvantages brought by the changing economy we render our expert advice to corporate houses and also leading corporate personalities in mitigation of Corporate Crimes like:

- Antitrust violations,
- Computer and internet fraud,
- Credit card fraud,
- Phone and telemarketing fraud,
- Bankruptcy fraud,

- Healthcare fraud,
- Environmental law violations,
- Insurance fraud,
- Tax evasion,
- Financial and securities fraud,
- Insider trading
- False and misleading advertising,
- Illegal exploitations of employees,
- Mislabeling of goods,
- Violation of weights and measures,
- Selling adulterated foodstuffs
- Evading corporate taxes
- Misappropriation of funds
- Embezzlement
- Black marketing,
- Profiteering and hoarding
- Work place crimes
- Smuggling and violation of foreign exchange
- Data theft

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Role of the Directors in Company administration

The principal Acts that deal with artificial persons in India are Companies Act, 1956, partnership Act, Charitable trusts Act Societies Registration Act which plays vital role in our economy. As the scope of the present study is the role of directors in corporate offences primacy was given to The Companies Act and other related acts dealing with corporate governance.

The Companies Act, 1956 primarily ment to know the economic activity of an artificial person who proclaimed himself to undertake the commercial activity with responsibility and transparency. Thus it regulates the formation, financing, functioning and winding up of companies. The Act prescribes regulatory mechanism regarding all relevant aspects including organisational, financial and managerial aspects of companies. The winding up matters, presently are largely within jurisdiction of High Courts. Regulation of the financial and management aspects constitutes the main focus of the Act. In the functioning of corporate sector, although freedom of companies is important, protection of investors and shareholders is also equally important. The Companies Act plays the balancing role between these two competing factors, namely, management autonomy and investor protection.

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The Companies Act defines a Director as including any person occupying the position of a Director, by whatever name called. Thus, a person who has been validly appointed or elected to the Board of Directors of the company and on whose behalf the relevant form has been filed with the concerned authorities, is considered to occupy the position of a Director, irrespective of any title that may have been agreed to between the company and such person.

Generally, a Director plays a dual role, (i) as an agent of the company; and (ii) as a person with a fiduciary duty to the company, while discharging his duties. A Director rarely has powers to discharge his duties as an individual Director. It is the Board that has the power and authority to carry on the activities of the company and to meet the business objectives of the company as a team.

Since the emergence of various corporate scandals in India over the past few years, there has been much attention and debate on the role of company Directors. There has been a lot of focus on independent Directors (and also, on nominee Directors). In particular, with India emerging as a preferred investment destination, there has understandably been a need to clarify the responsibilities of nominee Directors. As covered in this Note, the principles to determine the liabilities of Directors are, in large measure, common to all Directors, varying in degree depending on their respective roles and involvement in the company's affairs. Company law has known directorial duties and liabilities for decades and the principles of such obligations have been distilled for many years. To illustrate, the Supreme Court of India, while considering who is said to be responsible for the conduct of a company's business, especially the role of non-executive Directors, had this to say in 1973 (in the case of *Official Liquidator, Supreme Bank Ltd.* v. *P. A. Tendolkar*, AIR 1973 SC 1104); words that are of no less relevance today:

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> "It is certainly a question of fact....whether a director....had acted reasonably as well as honestly and with due diligence....A director may be shown to be so placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of, but liable for, fraud in the conduct of the business of a company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially."

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This Note seeks to highlight the key principles of Directors' duties and liabilities in simple, easy-to-understand language even for a non-legal audience. It places this discussion of Directorial roles, duties and liabilities in its proper context, namely, within the company organization and with reference to the appointment process (including, qualification and disqualification criteria and benchmarks). The Note also summarizes the principal statutory duties of Directors and indicates key liabilities in various circumstances. Lastly, the Note addresses what types of actions can be taken against errant Directors and oppressive majority shareholders.

Only when businesses appreciate the roles and responsibilities of Directors, and understand the basis on which liabilities can attach to Directors as a result of their acts or omission, can they be in a better position to critically evaluate and properly structure their investments in India, or appreciate legal advice on such matters arising in respect of their commercial arrangements in this country. We hope that

this Note will prove to be a useful overview of, and guide to, the Indian legal position on this important subject.

Regulation of Companies

The Companies Act, 1956 empowers the Central Government to inspect the books of accounts of a company, to direct special audit, to order investigation into the affairs of a company and to launch prosecution for violation of the Companies Act, 1956. Books of accounts and other documents of the companies are inspected by the officers of the Directorate of Inspection and Investigation and the Registrars of Companies. These inspections are designed to find out whether the companies conduct their affairs in accordance with the provisions of the Companies Act, 1956 to see whether any unfair practices prejudicial to public interest are being resorted to by any company or a group of companies and to examine whether there is any mismanagement which may adversely affect any interest of shareholders, creditors, employees and others. Wherever inspection reports disclose any information that may be of interest to other Departments or agencies like the Ministry of Commerce and Industry, Central Board of Direct Taxes, Enforcement Directorate, State Government or Provident Fund Authorities, such information is passed on to them. If an inspection discloses a prima facie case of fraud or cheating, action is initiated under provisions of the Companies Act, 1956

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or the same is referred to the Central Bureau of Investigation.

Sections 235 and 237 of the Companies Act empower the Central Government to order investigation into the affairs of a company under circumstances specified therein. The power to appoint inspectors, to conduct investigation and to act on report of investigation remains with the Central Government. The Company Law Board is also empowered to consider application of members for conducting investigation into the affairs of a company. The powers to order investigation arise in circumstances where the business of a company is being conducted with an intent to defraud its creditors, or for unlawful purposes, or in a manner oppressive to any of its members or that if the company was formed for any fraudulent or unlawful purposes.

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The companies are prosecuted for committing default in filing their documents or for contravening the provisions of the Act. The Companies (Amendment) Act, 1988, introduced a new Section 621A empowering the Company Law Board and the Regional Directors to compound offences of prosecution. The power to compound is not exercisable in relation to offences, which are punishable either with imprisonment only or with imprisonment and fine.

To ensure better management of companies, the Central

Government accords approval for the appointment and re-appointment of persons as Managing Directors, whole-time Directors or Managers of a public limited or private limited company which is a subsidiary of a public limited company, under Section 269 read with Section 388 of the Companies Act, 1956.

Investor Protection

Investor Protection Cell (IPC) of the Ministry of Company Affairs was set up in 1993 to deal with investors' grievances. It receives a large number of complaints from the aggrieved investors. The complaint relates to the following broad issues.

1. non receipt of annual report
2. non receipt of dividend amount
3. non refund of application money
4. non payment of matured deposits and interest thereon
5. non receipt of duplicate shares
6. non registration of transfer of shares
7. non issue of share certificates
8. non receipt of debenture certificates
9. non issue of right bonus shares
10. non issue of interest on late payment
11. non redemption of debentures and interest thereon
12. non receipt of share certificates on conversion.

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With a view to improving the processing of investors grievances, a new system for online lodging of complaints by

investors and depositors has been jointly developed by the Ministry and the National Informatics Centre (NIC). The new system facilitates investors and depositors to electronically lodge their complaints with the IPC without the requirement of sending their grievances in writing through post. The system issues complaint number, as acknowledgement online for future reference.

The new systems for lodging online complaints of investors and depositors was released on 11th January 2005 on the website of Ministry of Company Affairs (http://dca.nic.in) now (http://mca.gov.in).

In order to actively associate the field offices in investor grievances redressal function, a nodal team headed by a designated officer has been set up in each office of Registrar of Companies/Regional Directors and their names have been given wide publicity through leading newspapers and on website so that public can approach them for redressal of their grievances.

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Corporate Crime and Punishements

This study details out the framework of corporate criminal liability and sentencing. The law has bound the courts to impose only fine as a form of punishment for corporate which needs to be solved by evolving and incorporating new forms of punishments upon the corporate such that the real purpose of punishments i.e. deterrence or formation such as fine or a penalty is achieved. The author has attempted to put forward

these innovative kinds of punishments and a model for the same.

The present study details out the framework of corporate criminal liability and sentencing. It traces the source and final verdict of the Courts with regard to the concept of Corporate Criminal liability and also puts light over the inability of the Court in properly sentencing the guilty corporate due to inadequacy of law. The law has bound the Courts to impose only fine as a form of punishment for corporate which needs to be solved by evolving and incorporating new forms of punishments upon the corporate such that the real purpose of punishments i.e. deterrence or reformation is achieved. The author has tried to put forward these new kinds of punishments and a model for the same.

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Chapter-II

PROCEDURE FOR APPOINTMENT OF DIRECTOR UNDER COMPANY ACT

Generally, a Director plays a dual role, (i) as an agent of the company; and (ii) as a person with a fiduciary duty to the company, while discharging his duties. A Director rarely has powers to discharge his duties as an individual Director. It is the Board that has the power and authority to carry on the activities of the company and to meet the business objectives of the company as a team.

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Since the emergence of various corporate scandals in India over the past few years, there has been much attention and debate on the role of company Directors. There has been a lot of focus on independent Directors (and also, on nominee Directors). In particular, with India emerging as a preferred investment destination, there has understandably been a need to clarify the responsibilities of nominee Directors. As covered in this Note, the principles to determine the liabilities of Directors are, in large measure, common to all Directors, varying in degree depending on their respective roles and involvement in the company's affairs.

Board composition and remuneration of directors

The management/board structure of a company

In particular:

- Is there a unitary or two-tiered board structure?
- Who manages a company and what name is given to these managers?
- Who sits on the board(s)?
- Do employees have a right to board representation?
- Is there a minimum or maximum number of directors or members of the managerial and supervisory bodies?

- **Structure.** The board structure is unitary.
- **Management.** A company is managed by its board. Every public company or a private company which is a subsidiary of a public company with a paid-up share capital of more than INR50 million (as at 1 April 2011, US$1 was about INR45) must have a managing director or whole-time (full-time) director or manager for managing the affairs of the company. A private company may or may not have a managing director. (For the appointment of independent directors.
- **Board members.** The board of a public company comprises management directors, representatives of shareholders and independent directors. A private company's board comprises shareholders' representatives. A private company may or may not have independent directors or a management director.
- **Employees' representation.** There is no mandatory requirement for employees' representation on the board.

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- **Number of directors or members.** A private company must have a minimum of two directors and two members, whereas a public company must have a minimum of three directors and seven members.

Age Restrictions

Generally, a director must be at least 18 years old. However, an independent director must be at least 21 years old and a managing director of a public company must be at least 25 years old.

There is no restriction on the maximum age of a director, except that a managing director of a public company cannot be older than 70 years.

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Nationality restrictions

There are no nationality restrictions on the appointment of directors, except in certain sectors. For example, companies engaged in the telecommunications sector and the defence sector must have a majority of Indian directors, and companies providing security services (in the private sector) cannot have foreign directors.

5. In relation to non-executive, supervisory or independent directors:

- Are they recognised?

- Does a part of the board have to consist of them? If so, what proportion?
- Do non-executive or supervisory directors have to be independent of the company? If so, what is the test for independence or what makes a director not independent?
- What is the scope of their duties and potential liability to the company, shareholders and third parties?

- **Recognition.** Non-executive, supervisory and independent directors are recognised under Indian law.
- **Board composition.** In the case of a listed company, at least 50% of the total number of directors must be non-executive directors. If the chairman of a company is a non-executive director, the non-executive directors can form one-third of the total number of the company's directors. There are no similar requirements in relation to private companies and unlisted public companies.
- **Independence.** Clause 49 of the Listing Agreement sets out the following criteria for determining independence of directors:
    - apart from receiving director's remuneration, an independent director should not have any material monetary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates that may affect the director's independence;

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- an independent director is not related to promoters of the company or persons occupying management positions at the board level or at one level below the board;
- an independent director should not have been an executive of the company in the preceding three financial years;
- an independent director is not a partner or an executive, or was not partner or an executive during the preceding three years, of any of the following:
  - the statutory audit firm or the internal audit firm that is associated with the company; and
  - the legal firm(s) and consulting firm(s) that have a material association with the company.
- an independent director is not a material supplier, service provider or customer, or a lessor or lessee of the company;
- an independent director is not a substantial shareholder of the company (that is, owning 2% or more of the block of voting shares);
- an independent director must be at least 21 years old.

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- **Duties and liabilities.** The duties and liabilities of an independent director are as follows:
  - duty of care (although the extent of responsibility of an independent director may differ from that of an

executive director). A director must exercise independent judgment with reasonable care, diligence and skill which should be reasonably exercised by a prudent person with the knowledge, skill and experience that may reasonably be expected of a director in his position and any additional knowledge, skill and experience that he has;

- to contribute to, and constructively challenge, development of the company strategy;
- to scrutinise management performance;
- to satisfy himself that the financial information of the company is accurate and ensure that robust risk management is in place;
- to have a greater exposure to major shareholders (this particularly applies to senior independent directors).

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The roles of individual board members

One of the board members can be the chairman and the chief executive provided this authorised by the articles of association and the board. Recommendations have been made that the chairman and chief executive should not be the same person but these recommendations are not binding.

Appointment of directors

Directors can be appointed at a board meeting. The appointment of a director must be confirmed by the shareholders in the shareholders' annual general meeting following the board meeting.

In a public company with a paid-up capital of INR50 million or more and which has 1,000 or more small shareholders (that is, a shareholder holding shares with a nominal value of INR20,000 or less in a public company), the small shareholders can appoint a director. Small shareholders intending to appoint a director need to propose a person and provide a notice to the company of their intention to appoint a director within the prescribed time frame. The notice must be signed by at least 100 small shareholders.

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Removal of directors

A director can be removed if he (*Act*):

- Does not hold the required shares as specified in the articles of association of a company within two months from the date of his appointment.
- Is found to be of an unsound mind by a court of competent jurisdiction.
- Applies to be adjudicated as insolvent or is adjudged insolvent.

- Is convicted of an offence involving moral turpitude and the punishment exceeds six months of imprisonment.
- Is absent from three consecutive board meetings or from all the meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board.

In addition to the above:

- Directors can be removed by the shareholders in a shareholders' meeting by an ordinary resolution.
- Directors can resign from the board.

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Director's term of appointment and restrictions

In the case of public companies and private companies which are subsidiaries of public companies, one-third of the total number of directors are permanent directors and two-thirds of the directors are rotational directors. One-third of the rotational directors must retire by rotation at every annual general meeting. The term of any director required to retire by rotation cannot exceed three years and this term can be extended by re-appointment only. A director retiring by rotation can be re-appointed at the same annual general meeting.

The above provisions do not apply to private companies, unless the articles of association of a private company specifically provide for a term of the directors' appointment.

Directors employed by the company

Directors do not become employees of a company simply by virtue of directorship. However, if a director has been appointed for a dual role (for example, of a manager and a director or a managing director), the director will be considered to be an employee of a company.

Shareholders' inspection

The shareholders cannot inspect directors' service contracts.

There is no mandatory requirement for directors to own shares in the company. However, the articles of association can provide that the director must procure the required shares within two months from the appointment.

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Determination of directors' remuneration

The Act sets out provisions relating to the remuneration of a whole-time director or a managing director of a public company (*Schedule XIII*). If a listed company or its subsidiary does not make profits and the remuneration exceeds the limits set out in Schedule XIII, the prior approval of the central government is required.

There are no limits on the managerial remuneration of directors of private companies. However, if a director is also an

employee of the company and his remuneration exceeds the prescribed limits set out in section 217 of the Act read with Companies (Particulars of Employees) Rules 1975, that must be disclosed in the directors' report.

Disclosure

Listed companies must disclose the remuneration of the directors. In relation to a private company or an unlisted company, if the director is an employee of the company, the remuneration must be disclosed in the directors' report if it exceeds the prescribed limits.

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Shareholder approval

The shareholders' approval is required for the remuneration of a whole-time director or a managing director of a public company.

Management rules and authority

Indian law does not prescribe the minimum length of notice for a board meeting. However, there is a requirement to give prior notice of a board meeting to all the directors.

The quorum is two directors or one-third of the total number of directors, whichever is higher. All resolutions at a board meeting can be passed by simple majority, subject to certain exceptions.

Directors' powers

The directors of a company acting through the board can exercise all powers relating to the management of a company's affairs, subject to the following:

- Certain powers require the shareholders' approval.
- Restrictions on the directors' powers under the memorandum or articles of association of a company.

There are certain powers which can be exercised by the board only at an actual board meeting.

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The board can delegate responsibility for specific issues to individual directors or a committee of directors. Every listed company and unlisted public company with a paid-up share capital of more than INR50 million must have an audit committee. The audit committee must:

- Periodically discuss with the auditors internal control systems and the scope of the audit, including the auditors' observations.
- Review the half-yearly and annual financial statements before submission to the board.
- Ensure compliance with the internal control systems.

Since the directors are normally appointed at a board meeting, there is typically no committee formed for the appointment of directors.

A company may have a remuneration committee. A remuneration committee should consist of at least three directors, all of whom should be non-executive directors (the chairman of the committee must be an independent director).

Duties and liabilities of directors

- General duties.
- Theft and fraud.
- Securities law.
- Insolvency law.
- Health and safety.
- Environment.
- Anti-trust.
- Other.

- **General duties.** Broadly, the duties of a director can be divided into those of good faith and of skill and care. Almost every duty imposed on a director by the Act can be categorised under either of these two broad heads. As a general rule, a director is answerable to the company.

  A director must:

  - act bona fide and in the interests of the company; and
  - use his powers for the purposes for which they are intended to be exercised.

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He is expected to exercise utmost good faith towards the company and to act honestly in the exercise of the powers conferred on him.

- **Theft and fraud.** The directors of an Indian company are liable for breach of their fiduciary duties. Fiduciary duties are not defined by statute. However, Indian courts have interpreted them to include:
  - the subjective duties of honesty and good faith in relation to all the actions which the directors believe are in the best interest of the company; and
  - the objective duty of not placing themselves in a position of conflict between their fiduciary obligations to the company and their personal interests.

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One instance in which the directors were held personally liable for breach of their fiduciary duties was where the directors condoned the use of company funds in a manner and for a purpose forbidden by law. Similarly, if directors of the company enter into an unlawful agreement, they would be liable to the company for a breach of their fiduciary duty.

Under Indian law, the directors are regarded as trustees of the company' assets. For example, directors receiving secret profits, accepting bribes or gifts, or utilising confidential information of the company in an

unauthorised manner would be liable to the company for damages it incurs in connection with their receipt of such personal benefits.

In addition to the above, a director can be held criminally liable for the fraud or making a misrepresentation about the company's affairs.

- **Securities law.** If a company commits an offence under securities law, every person (including a director or the managing director) who at the time the offence was committed was in charge of the conduct of the company' business, as well as the company, will be deemed guilty of an offence. The punishment under securities law extends to imprisonment and/or fine.

  No person is liable under securities law, if the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

- **Insolvency law.** On a members' voluntary winding-up (that is, a winding-up approved by a member's extraordinary resolution (at least 75% majority)), the directors or, if the company has more than two directors, the majority of the directors, must make a declaration verified by an affidavit stating that they have:
  - made a full enquiry into the company's affairs; and

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  - formed the opinion that the company has no debts or that it will be able to repay its debts in full within a period not exceeding three years from the date of the winding-up, as specified in the declaration.

  If a director makes a declaration without having reasonable grounds to believe that the company will be able to pay its debts in full within the period specified in the declaration, he can be subject to imprisonment of up to six months and/or a fine of up to INR50,000.

- **Health and safety.** The Factories Act 1948 (Factories Act) contains provisions relating to health and safety requirements of workmen employed in a factory. If the provisions of the Factories Act are breached, the occupier and manager of the factory will each be guilty of an offence and subject to imprisonment and/or fine. In relation to a company, an occupier means a director of the company who has the ultimate control over the affairs of the factory (*Factories Act*).
- **Environment.** If a company commits an offence under the environment statutes, and such an offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer will also be deemed to be guilty of the offence.

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No person is liable to any punishment provided under the environment statutes, if the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

- **Anti-trust.** If a company commits offence under the Competition Act 2002 and the offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer will also be deemed to be guilty of the offence.

  No person is liable to any punishment provided under the Competition Act 2002, if the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

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- **Other.** Directors may be liable to the company under the tort of negligence. Proving negligence is a matter of fact. A director's role in relation to the alleged tortious act must be examined.

Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

In a limited company the memorandum may provide that the liability of the directors or of any director or manager is unlimited (*section 322(1), Act*). Otherwise, in a limited company, the director is not liable to the extent that it can be proved that the offence was committed without the knowledge of the director and that the director conducted necessary due diligence to prevent the commission of the offence.

A company cannot indemnify a director against any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company (*section 201, Act*). However, section 633 of the Act extends special protection against a liability that may have arisen pursuant to an act of a director done in good faith.

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Transactions with directors and conflicts

The general rules relating to conflicts of interest between a director and the company

Directors have a fiduciary position towards the company. They must ensure that their personal interests do not conflict with the company's interests. A director must disclose any interest he may have in a contract or arrangement (*section 299, Act*). In relation to public companies, an interested director must not participate or vote in the proceedings of the board concerning a contract or an arrangement in which the director is interested, nor will his presence count for the purposes of

quorum at the time of any such discussion (*section 300, Act*). The provisions of section 300 of the Act are not applicable to a private company.

A public company is subject to certain restrictions when granting a loan to its directors. A private company can freely grant loans to its directors.

Further, the following cannot enter into a contract with a company for the sale, purchase or supply of any goods, materials or services or for underwriting the subscription of any shares, or debentures of the company, except with the consent of the board (*section 297, Act*):

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- A director of a company or his relative.
- A firm in which such a director or relative is a partner, or any other partner in such a firm.
- A private company of which the director is a member or director.

A person cannot deal in securities of a company listed on a stock exchange if he (*SEBI (Prohibition of Insider Trading) Regulations 1992*):

- Has received or has access to unpublished price sensitive information.

- Is connected with the company and is reasonably expected to have access to such unpublished price sensitive information in relation to securities of a company.

Disclosure of information

Listed companies must comply with the mandatory provisions set out in Clause 49 of the Listing Agreement. The annual report of a listed company comprises the company's financial statements, the directors' report and such other disclosures as are required under Clause 49 of the Listing Agreement.

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In relation to unlisted public companies and private companies, the directors must disclose in the directors' report (which is provided to the shareholders) information relating to the following:

- The state of the company's affairs.
- Any material changes and commitments affecting the financial position of the company which have occurred between the end of the financial year of the company to which the balance sheet relates and the date of the report.
- The conservation of energy, technology absorption, foreign exchange earnings and outgoings and so on.

The directors' report for all companies must be filed with the MCA.

Company meetings

A company must hold an annual general meeting (AGM) within six months from the date of close of a company' financial year. At this meeting the shareholders must:

- Adopt the financial statements, the directors' report and the auditors' report.
- Appoint the auditors.

If a director has been appointed between two AGMs, his appointment must be confirmed by the shareholders at the AGM.

The board must call a shareholders meeting if it is requested by members whose shareholding is equal to or exceeds 10% of the company's paid-up share capital. The shareholders can propose the resolutions they intend to pass at the shareholders meeting provided that if there are two or more distinct matters, each proposed resolution must be supported by shareholders whose combined shareholding is equal to or exceeds 10% of the company's paid-up share capital.

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Minority shareholder action

A minority shareholder can file an application before the Company Law Board in the following circumstances:

- The company's affairs are being conducted in a manner which is prejudicial to the public interest.
- The company's affairs are oppressive to a member or members of the company.
- There has been a material change in the management or control of the company, whether through alteration in its board or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, provided that:
    - is not a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders of the company; and
    - by reason of the change, it is likely that the company's affairs will be conducted in a manner prejudicial to public interest or to the interests of the company.

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An application before the Company Law Board can be brought by:

- Not less than 100 members.
- Not less than 10% of the total number of members.
- Any member(s) holding less than 10% of the total paid-up share capital of a company, provided that the shares of such member(s) are fully paid up.

Internal controls, accounts and audit

At present, there are no formal requirements or guidelines relating to the internal control of business risks.

In relation to the company's accounts, the board of directors must (*Act*):

- Provide at every AGM the balance sheet and profit and loss account for the specified period. If the directors breach this requirement, they can be subjected to a fine and imprisonment.
- Authenticate the balance sheet and profit and loss account and approve it in a board meeting. If the board does not authenticate and approve the balance sheet and profit and loss account, then every director is subject to a fine.
- Attach a company's balance sheet and profit and loss account to the directors' report which is laid before the shareholders at the AGM. Non-compliance on the part of the directors is punishable with a fine and imprisonment.

All companies' accounts must be audited in accordance with the prescribed accounting standards.

The company's auditors are appointed by the board of directors, subject to the approval of the shareholders. The auditors are appointed from one AGM until the next AGM.

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An auditor must be a chartered accountant within the meaning of the Chartered Accountants Act 1949. The following persons cannot be appointed as the company's auditor:

- A body corporate.
- An officer or employee of the company.
- A person who is a partner of, or who is employed by, an officer or employee of the company.
- A person who is indebted to the company for an amount exceeding INR1,000 or who has given any guarantee or provided any security in connection with the indebtedness of any third person to the company for an amount exceeding INR 1,000.
- A person holding any security of the company after a period of one year from the date of commencement of the Companies (Amendment) Act 2000.

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Auditors cannot undertake non-audit work for the company they audit accounts for. An auditor may be liable if, in any return, report, certificate, balance sheet and so on, he makes a statement which:

- Is false in any material respect, knowing it to be false.
- Omits any material fact.

A company cannot indemnify an auditor against any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company (*section 201, Act*).

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Chapter-III

POWERS, DUTIES & LIABILITIES OF BOARD OF DIRECTORS OF A COMPANY IN INDIA

Since the emergence of various corporate scandals in India over the past few years, there has been much attention and debate on the role of company Directors. There has been a lot of focus on independent Directors (and also, on nominee Directors). In particular, with India emerging as a preferred investment destination, there has understandably been a need to clarify the responsibilities of nominee Directors. As covered in this Note, the principles to determine the liabilities of Directors are, in large measure, common to all Directors, varying in degree depending on their respective roles and involvement in the company's affairs. Company law has known directorial duties and liabilities for decades and the principles of such obligations have been distilled for many years. To illustrate, the Supreme Court of India, while considering who is said to be responsible for the conduct of a company's business, especially the role of non-executive Directors, had this to say in 1973 (in the case of *Official Liquidator, Supreme Bank Ltd*. v. *P. A. Tendolkar*, AIR 1973 SC 1104); words that are of no less relevance today:

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> "It is certainly a question of fact....whether a director....had acted reasonably as well as honestly

> and with due diligence....A director may be shown to be so placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of, but liable for, fraud in the conduct of the business of a company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially."

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This Note seeks to highlight the key principles of Directors' duties and liabilities in simple, easy-to-understand language even for a non-legal audience. It places this discussion of Directorial roles, duties and liabilities in its proper context, namely, within the company organization and with reference to the appointment process (including, qualification and disqualification criteria and benchmarks). The Note also summarizes the principal statutory duties of Directors and indicates key liabilities in various circumstances. Lastly, the Note addresses what types of actions can be taken against errant Directors and oppressive majority shareholders.

Only when businesses appreciate the roles and responsibilities of Directors, and understand the basis on which liabilities can attach to Directors as a result of their acts

or omission, can they be in a better position to critically evaluate and properly structure their investments in India, or appreciate legal advice on such matters arising in respect of their commercial arrangements in this country. We hope that this Note will prove to be a useful overview of, and guide to, the Indian legal position on this important subject.

POWERS

The directors' powers are normally set out in the articles. The shareholders cannot control the way in which the Board of Directors act provided its actions are within the powers given to the Board.

Section 291 of Companies Act, 1956 provides for general powers of the Board of directors. It mandates that the Board is entitled to exercise all such powers and do all such acts and things, subject to the provisions of the Companies Act, as the company is authorized to exercise and do. However, the Board shall not exercise any power and do any act or things which is required whether by the Act or by the memorandum or articles of the company or otherwise to be exercised or done by the company in general meeting.

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Power of the individual directors – Unless the Act or the articles otherwise provide, the decisions of the Board are required to be the majority decisions only. Individual

directors do not have any general powers. They shall have only such powers as are vested in them by the Memorandum and Articles.

Section 292(1) of the Companies Act, 1956 provides that the Board of directors of a company shall exercise the following powers on behalf of the company and it shall do so only by means of resolution passed at meeting of the Board:

(a) the power to make calls on shareholders in respect of money unpaid on their shares; (aa)the power to authorize the buy-back referred to in the first proviso to clause (b) of sub-section (2) of section 77A;

1. the power to issue debentures;
2. the power to borrow moneys otherwise than on debentures;
3. the power to invest funds of the company; and
4. the power to make loan.

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DUTIES

1. Statutory Duties:

(A) To file return of allotment: Section 75 of the Companies Act, 1956 requires a company to file with the Registrar, within a period of 30 days, a return of the allotments stating the specified particulars. Failure to file such return shall make the directors liable as 'officer in default'. A fine up to Rs. 5000/- per day till the default

continues may be levied.

(B) Not to issue irredeemable preference share or shares or share redeemable after 20 years: Section 80, as amended by Amendment Act, 1996, forbids a company to issue irredeemable preference shares or preference shares redeemable beyond 20 years. Directors making any such issue may be held liable as 'officer in default' and may be subject to fine up to Rs. 10,000/-.

1. To disclose interest (Section 299-300): In respect of contracts with director, Section 299 casts an obligation on a director to disclose the nature of his concern or interest (direct or indirect), if any, at a meeting of the Board of directors. The said Section provides that in case of a proposed contract or arrangement, the required disclosure shall be made at the meeting of the Board at which the question of entering into the contract or agreement is first taken into consideration. In the case of any other contract or arrangement, the disclosure shall be made at the first meeting of the Board held after the director become interested in the contract or arrangement. Every director who fails to comply with the aforesaid requirements as to disclosure of concern or interest shall be punishable with fine, which may extend to Rs. 50,000/-.

- To disclose receipt from transfer of property (sec. 319): Any money received by the directors from the transferee in connection with the transfer of the company's property or

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undertaking must be disclosed to the members of the company and approved by the company in general meeting. Otherwise, the amount shall be held by the directors in trust for the company. This money may be in the nature of compensation for loss of office but in essence may be on account of transfer of control of the company. But if it is bona fide payment of damages for the breach of contract, then it is protected by sec. 321(3). Even no director other than the managing director or whole time director can receive any such payment from the company itself.

- To disclose receipt of compensation from transferee of shares (Sec.320): If the loss of office results from the transfer (under certain conditions) of all or any of the shares of the company, its directors would not receive any compensation from the transferee unless the same has been approved by the company in general meeting before the transfer takes place. If the approval is not sought or the proposal is not approved, any money received by the directors shall be held in trust for the shareholders, who have sold their shares. Any such director, who fails to take reasonable steps as aforesaid, shall be punishable with fine, which may extend up to Rs. 2500/-.
- Duty to attend Board meetings: A number of powers of the company are exercised by the Board of directors in their meetings held from time to time. Although a director may not be able to attend all the meetings but if he fails to attend

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three consecutive meetings or all meetings for a period of three months whichever is longer, without permission of the Board, his office shall automatically fall vacant [Section 283(1)(g)].

- To convene statutory, Annual General meeting (AGM) and also extraordinary general meetings [Section 165,166 &169]
- To prepare and place at the AGM along with the balance sheet and profit & loss account a report on the company's affairs including the report of the Board of Directors (Section 173, 210 & 217).
- To authenticate and approve annual financial statement (Section 215).
- To appoint first auditor of the company (Section 224).
- To appoint cost auditor of the company (Section 233B).
- To make a declaration of solvency in the case of Members' voluntary winding up (Section 488).

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General Duties:

Duty of good faith: The directors must act in the best interest of the company. Interest of the company implies the interest of the present and future members of the company on the footing that company would be continued as going concern.

Duty of care: A director must display care in performance of work assigned to him. He is, however,

not expected to display an extraordinary care but that much care which a man of ordinary prudence would take in his own case. Any provision in the company's Articles or in any agreement that excludes the liability of the directors for negligence, default, misfeasance, breach of duty or breach of trust, is void. The company cannot even indemnify the directors against such liability.

Duty not to delegate: Director being an agent is bound by the maxim 'delegatus non potest delegare' which means a delegatee cannot further delegate. Thus, a director must perform his functions personally. However, he may delegate his in certain conditions.

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LIABILITES

1. Liability to the company:

(A) Breach of fiduciary duty: where a director acts dishonestly to the interest of the company, he will be held liable for breach of fiduciary duty. Most of the powers of directors are 'powers in trust' and therefore, should be exercised in the interest of the company and not in the interest of the directors or any section of members.

(B) **Ultra vires acts:** Directors are supposed to act within the parameters of the provisions of the Companies Act, Memorandum and Articles of Association, since these

lay down the limits to the activities of the company and consequently to the powers of the Board of directors. Further, the powers of the directors may be limited in terms of specific restrictions contained in the Articles of Association. The directors shall be held personally liable for acts beyond the aforesaid limits, being ultra vires the company or the directors.

(C) **Negligence:** As long as the directors act within their powers with reasonable skill and care as expected of them as prudent businessman, they discharge their duties to the company. But where they fail to exercise reasonable care, skill and diligence, they shall be deemed to have acted negligently in discharge of their duties and consequently shall be liable for any loss or damage resulting therefrom.

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(D) **Mala fide acts:** Directors are the trustee for the moneys and property of the company handled by them, as well as exercise of the powers vested in them. If they dishonestly or in a mala fide manner, exercise their powers and perform their duties, they will be liable for breach of trust and may be required to make good the loss or damage suffered by the company by reason of such mala fide acts. They are also accountable to the company for any secret profits they might have made in course of performance of duties on behalf of the company. Directors can also be held liable for their acts

of 'misfeasance' i.e., misconduct or willful misuse of powers.

Liability to third parties:

Liability under the Companies Act:

(A) **Prospectus:** Failure to state any particulars as per the requirement of the section 56 and Schedule II of the act or mis-statement of facts in prospectus renders a director personally liable for damages to the third party. Section 62 provides that a director shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue or misleading statement included therein.

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(B) With regard to allotment: Directors may also incur personal liability for:

(a) Irregular allotment, i.e., allotment before minimum subscription is received (Section 69), or without filing a copy of the statement in lieu of prospectus (Section 70) - [Section 71(3)] - Under section 71(3), if any director of a company knowing contravenes or willfully authorizes or permits the contravention of any of the provisions of section 69 or 70 with respect to all allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs

which the company or the allottee may have sustained or incurred thereby.

(b) For failure to repay application monies in case of minimum subscription having not been received within 120 days of the opening of the issue: Under section 69(5) read with SEBI guidelines, in case moneys are not repaid within 130 days from the date of the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of 6 % per annum on the expiry of 130th day. However, a director shall not be liable if he proves that the default in repayment of money was not due to any misconduct or negligence on his part.

(c) Failure to repay application monies when application for listing of securities are not made or is refused: Under section 73(2) – where the permission for listing of the shares of the company has not been applied or such permission having been applied for, has not been granted, the company shall forthwith repay without interest all monies received from the applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay, the company and every director of the company who is an officer in default

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shall, on and from the expiry of the eighth day, be jointly and severely liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

c. **Unlimited liability:** Directors will also be held personally liable to the third parties where their liability is made unlimited in pursuance of section 322(i.e., vide Memorandum) or section 323(i.e., vide alterations of Memorandum by passing special resolution). By virtue of section 322, the Memorandum of a company may make the liability of any or all directors, or manager unlimited. In that case, the directors, manager and the member who proposes a person for appointment as director or manager must add to the proposal for appointment as a statement that the liability of the person holding the office will be unlimited. Notice in writing to the effect that the liability of the person will be unlimited must be given to him by the following or one of the following person, namely: the promoters, the directors, manager and officers of the company before he accept the appointment.

Further, in case of limited liability Company, the company may, if authorized by the articles, by passing

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resolution alter its Memorandum so as to render the liability of its directors or of any director or manager unlimited. But the alteration making the liability of director or directors or manager unlimited will be effective only if the concerned officer consents to his liability being made unlimited. This alteration also, unless specifically consented to by any or all directors will not have any effect until expiry of the current term of office.

(D) Fraudulent trading: Directors may also be made personally liable for the debts or liabilities of a company by an order of the court under section 542. Such an order shall be made by the court where the directors have been found guilty of fraudulent trading. Section 542(1), in this regard, provides that if in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the company or any other person, or for any fraudulent purpose, the court, on the application of the Official Liquidator, or the liquidator or any creditor or contributory of the company may if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on business in the manner aforesaid shall be personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

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Further, section 542(3) provides that every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a

term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both.

Liability for breach of warranty:

Directors are supposed to function within the scope of their authority. Thus, where they transact any business in resect of matters, ultra vires the company or ultra vires the articles, they may be proceeded against personally for any loss sustained by any third party.

2. **Liability for breach of statutory duties:**

The Companies Act, 1956 imposes numerous statutory duties on the directors under various sections of the Act. Default in compliance of these duties attract penal consequences. The various statutory penalties which directors may incur by reason of non-compliance with the requirements of Companies Act are referred to in their appropriate places.

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3. **Liability for acts of co-directors:**

A director is the agent of the company except for matters to be dealt with by the company in general meeting and not of the other members of the Board. Accordingly, nothing done by the Board can impose liability on a director who did not participate in the Board's action or did not know about it. To incur liability he must either be a party to the wrongful act or later consent to it. Thus, the absence of a director from meeting

of the Board does not make him liable for the fraudulent act of a co-director on the ground that he ought to have discovered the fraud.

4. **Criminal liability:**

Apart from the civil liability under that Act or under the common law, directors of a company may also incur criminal liability. Some of the provisions of the Companies Act, which make directors criminally liable, are as follows:

(i) Section 44(4) – filing of prospectus or statement in lieu of prospectus containing untrue statement. Penalty – Two years imprisonment or / and fine up to Rs. 50000.

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36 Section 58A(5) – failure to repay deposits within the prescribed time limit as specified under sub sections (3) and (4) of section 58A. Penalty – Up to five years imprisonment and fine.

37 Section 58A(6) - Accepting deposits or inviting deposits in excess of the prescribed limits. Penalty – up to five years imprisonment and fine.

38 Section 63 - Issuing a prospectus containing untrue statement. Penalty – Imprisonment upto two years or/ and fine upto Rs. 50000.

39 Section 68 - Knowingly making a false, deceptive or misleading statement and there by inducing persons to invest money. Penalty – Imprisonment upto five years or/ and fine upto Rs. 1,00,000.

40 Section 73 – Failure to repay excess application money. Penalty – Default in repayment of application money and interest is punishable with fine upto Rs. 50000 but if repayment is not made within six months from the expiry of eight day, also with imprisonment for a term upto one year.

41 Section 84(3) – Fraudulently renewing a share certificate or issuing a duplicate share certificate. Penalty – Imprisonment upto six months or/ and fine upto Rs.1,00, 000.

42 Section 105 – Concealing name of creditor or misrepresenting the nature and the amount of the debt or claim of any creditor. Penalty – Imprisonment upto one year or/ and fine or both.

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43 Section 202(1) – Undischarged insolvent acting as director. Penalty – Imprisonment upto two years or/ and fine upto Rs. 50000.

44 Section 207 – Default in distributing dividends. Penalty – Simple imprisonment upto three years and fine up to Rs. 1000 for every day during which the default continues.

45 Section 209A – Failure to assist Registrar or any officer so authorized by Central Government in inspection of books of account, etc., of the company. Penalty – Imprisonment for a term not exceeding one year and fine to be not less than Rs. 50000.

46 Section 210(5) – Failure to lay balance sheet, profit & loss

account, etc., at the annual general meeting. Penalty – Imprisonment upto six months or/ and fine upto Rs. 10000.

47 Section 211(8) – Failure to comply with section 211 regarding form of balance sheet and matters to be stated therein and the content and disclosures to be made in the profit and loss account. Penalty – imprisonment upto six months or/ and fine upto Rs. 10000.

(xiv) Section 217(5) – Failure to attach to balance sheet a report of the Board of directors. Penalty – Imprisonment upto six months or / and fine upto Rs. 20000.

(xv) Section 221(4) – Failure to supply information to auditors. Penalty – Imprisonment upto six months or / and fine upto Rs. 50000.

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(xvi) Section 233B(11) – Audit of cost account of the company - Default in complying with the requirements of the section. Penalty – Imprisonment for a term that may extent to three years or with fine which may go upto Rs. 50000 or with both.

(xvii) Section 250(9) – Failure to honour restrictions upon shares and debentures imposed by the CLB. Penalty – Imprisonment upto six months or / and fine upto Rs. 50000.

(xviii) Section 293A(5) – Contribution to political party or for political purpose in contravention of section 293A. Penalty – Imprisonment upto three years and fine.

(xix) Section 295(4) – Grant of loan to directors without obtaining previous approval of the Central Government. Penalty – Simple imprisonment upto six months or fine upto Rs. 50000.

(xx) Section 299(4) – Failure to disclose interest in a contract or arrangement. Penalty – Fine which may extend to Rs. 50000.

(xxi) Section 308(3) – Failure to disclose shareholdings. Penalty – Imprisonment upto two years or / and fine upto Rs. 50000.

(xxii) Section 371 – Giving loans to other bodies corporate in excess of the limit prescribed under section 370. Penalty – Fine upto Rs. 50000 or simple imprisonment upto six months.

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(xxiii) Section 407 – Any person, whose agreement has been terminated or set aside under section 402, knowingly acts as a managing or other director before expiry of a period of five years from the date of termination, without approval of the CLB, attracts criminal liability. Penalty – Imprisonment upto one year or / fine upto Rs. 50000 [Section 407(2)].

(xxiv) Section 488(3) – False declaration of company's solvency. Penalty – Imprisonment upto six months or / and fine up to Rs. 50000.

(xxv) Section 209(8) – Non-compliance with the requirement of maintenance of proper books of account. Penalty – fine not

less than Rs. 50000 and also with imprisonment not exceeding one year for each offence committed.

The subsidiary will not be a “pure” private company but a “private company, which is a subsidiary of a public company”. Further, under the Companies Act, if the holding company is an overseas body corporate, and would be regarded a public company if it were incorporated in India, then the private Indian company being its subsidiary will lose its status as a “pure” private company and will be subject to various other compliance requirements pursuant to the Companies Act, which are to be met by, as if it were, a “private company, which is a subsidiary of a public company”.

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Interestingly, if the private Indian company is a one hundred percent (100%) subsidiary of the overseas body corporate then its status, under the Companies Act, is not changed to that of a subsidiary of a public company. A “private company, which is a subsidiary of a public company” is required to comply with several provisions of the Companies Act not otherwise ordinarily applicable to “pure” private companies; in many respects, a “private company, which is a subsidiary of a public company” represents a halfway house, arising from its shareholding status, as distinct from being incorporated as a public company.

The Companies Act defines a Director as including any person occupying the position of a Director, by whatever name called. Thus, a person who has been validly appointed or elected to the Board of Directors of the company and on whose behalf the relevant form has been filed with the concerned authorities, is considered to occupy the position of a Director, irrespective of any title that may have been agreed to between the company and such person.

A Director is a person charged with the conduct and management of the company's activities. The Directors (as a body, the "**Board of Directors**" or the "**Board**"), act as a team, under the authority of a meeting that is properly convened and is duly quorate, without improper exclusion of any of the Directors. The Board, then, as a team, conducts and regulates the affairs of the company. The Companies Act empowers the Board to do all such activities as the company is authorized to exercise, unless any law or the constitutional documents of the company requires the exercise of the power, or the doing of any act or thing, to be by the company in general meeting.

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Generally, a Director plays a dual role, (i) as an agent of the company; and (ii) as a person with a fiduciary duty to the company, while discharging his duties. A Director rarely has powers to discharge his duties as an individual Director. It is the Board that has the power and authority to carry on the activities of the company and to meet the business objectives of the company as a team.

Acting individually, a Director has no power to act on behalf of the company in any matter, except to the extent to which any power or powers of the Board have been delegated to him by the Board, within the limits prescribed under the Companies Act or any other law. Contracts entered into by a Director are binding on the company only if they are within his actual authority or if the articles of association of the company, or the company's bye-laws or internal rules of management ("**Articles**"), provide for the delegation of such power by a Board resolution, whether or not such power has actually been delegated. The exception is a Managing Director, who has ostensible authority to enter into contracts on behalf of the company.

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This may be done by signing under the seal of the company, and specifically mentioning along with the signature that the individual signing the document is the authorized signatory of the company. For certain transactions, appropriate resolutions may have to be passed by the Board and the shareholders. Directors do not automatically, by virtue only of their position, have the right to enter into contracts on behalf of the company. They need to be duly authorized in this regard by the shareholders or the Board.

Under the Companies Act, liability for any default is usually not attributed to all *default'* members of the Board. In most instances under the Companies Act, liability is attributed for non-compliance with the provisions of the Companies Act

only to an '**officer in default**'. The term 'officer in default' can cover the Managing Director, the Whole-time Director, the Manager, the Secretary of the company, or any person in accordance with whose instructions the Board is accustomed to act (oftentimes called a '*Shadow'* Director) and any person charged by the Board with responsibility for any such compliance. Where a company does not have a Managing Director, a Whole-time Director or a Manager, any Director specified by the Board, or where no such Director has been specified, all the Directors may be deemed to be 'officers in default'.

In certain circumstances, the Companies Act imposes a liability on all Directors. For example, in case of winding up of a company, the Directors must ensure that the books of account of the company are completed and audited up to the date of winding up order and submitted to the concerned court at the cost of the company, failing which, such Directors shall be liable for punishment for a term of imprisonment not exceeding one (1) year and fine for an amount not exceeding one hundred thousand rupees (Rs. 100,000/-).

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Chapter-IV

CORPORATE GOVERNANCE AND DIRECTORS' DUTIES: INDIA

Corporate entities

There are three kinds of corporate entities:

- Private companies.
- Listed public companies.
- Unlisted public companies.

Legal framework

The regulatory framework for corporate governance and directors' duties

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Corporate governance in India is still developing. The first major corporate governance reform proposal was launched by the Confederation of Indian Industry (CII) in 1996 and a corporate governance code for Indian companies was developed and set out in Clause 49 of the Listing Agreement in 2000.

The Companies Act 1956 (Act) sets out the provisions relating to directors' duties and typically these provisions apply to directors of all corporate entities.

Clause 49 of the Listing Agreement sets out the provisions relating to corporate governance applicable to listed companies. The Securities Exchange Board of India (SEBI) is the regulatory

body responsible for the enforcement of corporate governance in relation to listed companies.

In addition to the above, the Ministry of Corporate Affairs (MCA) has released a set of voluntary guidelines for corporate governance. The MCA Guidelines for Corporate Governance address a myriad of corporate governance matters including independence of the board of directors (board), responsibilities of the board, the audit committee, auditors, secretarial audits, and mechanisms to facilitate whistleblowing and protect the individuals concerned. Important provisions include the following:

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- Issuance of a formal appointment letter to directors.
- Separation of the office of chairman and chief executive office (CEO).
- Formation of a nomination committee for the appointment of directors.
- Limiting the number of companies in which an individual can be a director.
- Tenure, remuneration, training and performance evaluation of directors.
- Additional provisions for statutory auditors.

2. Has jurisdiction adopted a corporate governance code? If yes:

- What is the name of the code? What areas are covered by it (for example, board composition and committees, remuneration, audit and risk)?
- How is the code structured (for example, a set of rules or principles and provisions)? What type of companies must comply with the code?
- Is the code based on the comply or explain principle? How are companies required to report their application and compliance with the code (for example, in their annual report)?
- What are the consequences of non-compliance with the code?
- What has been the general response of companies, regulators and shareholder groups to the comply or explain approach? Has it been popular or controversial? Are there plans to reform it?

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India has not adopted a specific corporate governance code for all companies. For listed companies, Clause 49 of the Listing Agreement sets out provisions relating to board composition, committees and the disclosures which must be made by a company.

Clause 49 of the Listing Agreement contains mandatory and non-mandatory provisions relating to corporate governance. The mandatory requirements concern the following, among others:

- The formation of audit committees.
- Disclosure requirements in relation to related party transactions.
- Accounting treatment.
- Risk management.
- Remuneration of directors and CEO/chief financial officer (CFO) certification.

In addition to the above, companies must submit a quarterly compliance report (signed by the compliance officer or the CEO) to the stock exchange on which the company is listed within 15 days of the end of a quarter.

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Listed companies must comply with the mandatory provisions set out in Clause 49 of the Listing Agreement. The annual report of a listed company must have a separate section on corporate governance with a detailed report on corporate governance. Non-compliance with the mandatory provisions and the extent to which the non-mandatory requirements have been complied with by a company must be highlighted in the annual report. Contravention of the provisions of the Listing Agreement or of any rules or regulations made under it may attract a fine or imprisonment for the persons responsible for the company's affairs (*sections 23, 23A, 23C, 23E and 23H, Securities Contracts (Regulation Act) 1992*).

Some of the non-mandatory requirements set out in Clause 49 of the Listing Agreement are as follows:

- Independent directors should serve on the board of a company for a period not exceeding, in the aggregate, nine years.
- A remuneration committee may be set up by the board to determine on their behalf and on behalf of the shareholders, with agreed terms of reference, the company's policy on specific remuneration packages for executive directors, including pension rights and any compensation payment.
- A half-yearly declaration of financial performance including a summary of the significant events in last six months may be sent to each shareholder at his home address.
- A company may move towards a regime of unqualified financial statements.
- A company may train its board members in the business model of the company as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them.
- A company may establish a mechanism for employees to report to the management concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy.

Clause 49 of the Listing Agreement was welcomed by companies, regulators and the shareholders as it provided for more transparency in the affairs of a company.

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Chapter-V

CORPORATE CRIME, FRAUD AND INVESTIGATIONS: INDIA

India has a quasi-federal political structure comprising of 28 states and seven centrally administered union territories. It has a democratically elected central union government (central government) and each state has its own democratically elected state government. Each state establishes and maintains its own police force. Investigations are normally handled by the police force of the state where the crime was committed.

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The central government has established a central investigative agency called the Central Bureau of Investigation (CBI). Typically, the CBI investigates and prosecutes cases of serious fraud or cheating that may have ramifications in more than one state. Where needed, the CBI can be assisted by specialised wings of the central government especially in economic or cross-border crimes. It also gets involved in serious crimes where it is necessary to use an agency that is independent of local political influence.

FRAUD

Regulatory provisions and authorities

The Serious Fraud Investigation Office is a multi-disciplinary organization under the Ministry of Corporate Affairs, consisting of experts in the field of accountancy,

forensic auditing, law, information technology, investigation, company law, capital market and taxation. It detects, prosecutes or recommends for prosecution of white-collar crimes/frauds.

In addition, the central government under the Department of Revenue has set up various agencies to fight economic crimes. Some of the significant ones are:

- Central Economic Intelligence Bureau (for economic offences and implementation of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA)).
- Directorate of Enforcement (for foreign exchange and money laundering offences).
- Central Bureau of Narcotics (for drug related offences).
- Directorate General of Anti-evasion (central excise related offences).
- Directorate General of Revenue Intelligence (customs, excise and service tax related offences).
- The Securities and Exchange Board of India (SEBI). This was established on 12 April 1992 under the Securities and Exchange Board of India Act 1992 (SEBI Act). SEBI deals with securities fraud and aims to, among other things:
    - protect the interests of investors in securities;
    - promote the development of the securities market;
    - regulate the securities market.

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India has a unified (all India) legislation under the Indian Penal Code 1860 (Penal Code) and the Code of Criminal Procedure 1973 for substantive and procedural laws relating to crime.

OFFENCES

The specific offences relevant to corporate or business fraud

Specific offences relating to business or corporate fraud include insider trading, money laundering, fraud and misrepresentation related with sale of securities, forgery, falsification of accounts, dishonest misappropriation of property, criminal breach of trust, cheating and tax crimes.

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Fraud and misrepresentation related with sale of securities.

This includes offences such as buying, selling and dealing in securities fraudulently, or manipulation or deception. These are covered under the:

- SEBI Act.
- Securities and Exchange Board of India Rules 1993 (SEBI Rules).

Regulation 3 and 4 of The Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations 2003 lay down the list of prohibited acts as follows:

- The prohibitions on dealings in securities include:
    - buying, selling or dealing in securities in a fraudulent manner;
    - using or employing, in connection with the issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the Act or its rules and regulations;
    - employing any device, scheme or artifice to defraud in connection with dealing in or issue of securities that are listed or proposed to be listed on a recognized stock exchange;
    - engaging in any act, practice or course of business that operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities that are listed or proposed to be listed on a recognized stock exchange, in contravention of the provisions of the SEBI Act or the SEBI Rules.
- Manipulative, fraudulent and unfair trade practices are prohibited. Dealing in securities is a fraudulent or an unfair trade practice if it involves fraud. This may include all or any of the following:
    - indulging in an act that creates a false or misleading appearance of trading in the securities market;

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- dealing in a security not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the price of such security for wrongful gain or avoidance of loss;
- advancing or agreeing to advance any money to any person thereby inducing any other person to offer to buy any security in any issue only with the intention of securing the minimum subscription to such issue;
- paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money's worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;
- any act or omission amounting to manipulation of the price of a security;
- publishing or causing to publish or reporting or causing to report by a person dealing in securities any information that is not true or that he does not believe to be true prior to or in the course of dealing in securities;
- entering into a transaction in securities without intention of performing it or without intention of change of ownership of such security;

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- an intermediary reporting trading transactions to his clients entered into on their behalf in an inflated manner in order to increase his commission and brokerage;
- an intermediary not disclosing to his client transactions entered into on his behalf including taking an option position;
- circular transactions in respect of a security entered into between intermediaries in order to increase commission to provide a false appearance of trading in such security or to inflate, depress or cause fluctuations in the price of such security;
- encouraging the clients by an intermediary to deal in securities solely with the object of enhancing his brokerage or commission;
- an intermediary buying or selling securities in advance of a substantial client order or whereby a futures or option position is taken about an impending transaction in the same or related futures or options contract;
- planting false or misleading news that may induce sale or purchase of securities.

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Forgery (*section 463, Penal Code*). Forgery is defined under the Penal Code as making any false documents or false electronic record or part of a document or electronic record, with the intention to either:

- Cause damage or injury, to the public or to any person.
- Support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, with intent to commit fraud.

Falsification of accounts (*section 477A, Penal Code*). An employee is guilty of falsification of accounts if he willfully and with an intention to defraud either:

- Destroys or falsifies any book, electronic record, paper, writing, valuable security or account that belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer.
- Willfully, and with intent to defraud, makes or facilitates the making of any false entry in, or omits or alters or facilitates the omission or alteration of, any material particular from or in, any such document.

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Dishonest misappropriation of property (*section 403, Penal Code*). A person commits the offence of dishonest misappropriation of property if he dishonestly misappropriates or converts to his own use any movable property.

Criminal breach of trust (*section 405, Penal Code*). Criminal breach of trust is when a person who is entrusted with property or any dominion over property is dishonestly misappropriating, converting the property to his own use, or dishonestly using or

disposing of that property in violation of any direction of law or legal contract.

Cheating (*section 415, Penal Code*). This offence consists of deceiving any person and either:

- Fraudulently or dishonestly inducing the deceived person to deliver property to a person or allow a person to retain property.
- Intentionally inducing the deceived person to do or omit to do anything that he would not do or omit if he were not so deceived, and that causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

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Tax crimes. Various tax crimes (such as tax evasion, smuggling, customs duty evasion, valued added tax evasion, and tax fraud) can be prosecuted under the:

- Income Tax Act 1961.
- Customs Act 1962.
- Central Sales Tax Act 1956.
- Central Excise Act 1944.

These offences require a deliberate act by the accused rather than an act of negligence.

Managers, officers and directors may have personal liability for aiding, abetting, counseling or procuring the commission of an offence. Typically, most statutes have a section titled "Offences

by Companies", which contains a template provision making any person who, at the time the offence was committed, was directly in charge of and responsible to the company for the conduct of its business, guilty of an offence committed by the company, unless either:

- The offence was committed without his knowledge.
- He exercised all due diligence to prevent the commission of the offence.

ENFORCEMENT

The regulator's powers of investigation, enforcement and prosecution in cases of corporate or business fraud

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The CBI derives its legal powers of investigation from the Delhi Special Police Establishment Act 1946 (DSPE). They enjoy the same investigation powers as the Police and also have the power to launch prosecutions under a separate wing.

Under the Companies Act 1956 the central government can inspect the books of accounts of a company, direct special audits, order investigations and launch prosecutions for any offence.

SEBI has the powers of a civil court, such as ordering discovery and production of books of account, summoning and enforcing the attendance of persons and examining the inspection of

books, registers and other documents and issuing commissions for the examination of witnesses or documents.

SANCTIONS

The potential sanctions or liabilities for participating in corporate or business fraud

The prescribed sanctions are as follows:

- **Fraudulent and unfair trade practices relating to securities.** The higher of either:
  - a fine of INR250 million (as at 1 August 2012, US$1 was about INR55);
  - three times the amount of profits made out of such practices.
- **Forgery.** Two years' imprisonment and/or a fine.
- **Falsification of accounts.** Seven years' imprisonment and/or fine.
- **Dishonest misappropriation of property.** Two years' imprisonment and/or fine.
- **Criminal breach of trust.** Three years' imprisonment and a fine.
- **Cheating.** Simple cases of cheating are punishable with one year's imprisonment and a fine. Cheating accompanied with delivery of property or destruction of any valuable security is punishable by seven years' imprisonment.

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BRIBERY AND CORRUPTION

Regulatory provisions and authorities

The following regulations govern bribery and corruption in India:

- **The Prevention of Corruption Act 1988.** This is a central government law enacted by Parliament to combat corruption and bribery among public servants. Under this Act there is a presumption that a public servant or a person expecting to be a public servant, who accepts or obtains or agrees or attempts to obtain from any person any recompense as a motive or reward for doing or forbearing to do any official act, or for showing favour or disfavor, is guilty of the crime of taking a bribe.
- **Public service rules.** These are applicable to various categories of public servants. They prescribe a code of conduct to be observed by public servants and outline the rules pertaining to, among other things, accepting gifts and hospitality.
- **Penal Code.** Sections 171B and 171E penalize bribery in relation to the exercise of any electoral right. Section 169 pertains to a public servant unlawfully buying or bidding for property, rendering him liable for imprisonment and/or a fine. If the property is purchased, it will be confiscated.

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- **The Benami Transactions (Prohibition) Act 1988.** A "benami" transaction is a transaction under a false name or identity. The Act prohibits any benami transaction except when a person purchases property in his wife's or unmarried daughter's name. (This Act was necessary as benami real estate purchases were historically part of the law in India).

Other legislation that is proposed and pending before Parliament includes:

- The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill (2011).
- The Citizen's Ombudsman Bill 2011 (*Lokpal* and *Lokayukta* Bill).

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The three main regulators responsible for inquiring, investigating and prosecuting corruption cases are the:

- Central Vigilance Commission.
- CBI.
- Anti-Corruption Bureau of each state.

The CBI and the Anti-Corruption Bureaus of each state investigate cases related to corruption while the Central Vigilance Commission is a statutory body that supervises corruption cases in governmental departments. It has

supervisory powers over the CBI but does not have authority to prosecute individuals.

Similarly, the state ombudsman (*Lok Ayuktas*) advises state government departments on actions against offending government officials. They are fully empowered to initiate investigations against public functionaries in corruption cases and can recommend punishments.

In addition, the Prevention of Corruption Act provides for various classes of police officers who are eligible to investigate offences under the Act.

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The international anti-corruption conventions and jurisdiction

India is an active participant in the cross-border fight against corruption and has signed and ratified the UN Convention against Corruption. The purpose of the Convention includes:

- Promoting and strengthening measures to prevent and combat corruption efficiently and effectively.
- Strengthening internal co-operation and technical assistance to check and fight corruption and promote the integrity, accountability and proper management of public affairs and property.

A trilateral India-Brazil-South Africa co-operation agreement has been established for the purpose of covering various public-

policy sectors, including ethics and combating corruption, and social responsibility and transparency.

India is an executive member of International Association of Anti-Corruption Authorities. It is also actively involved with the Organisation for Economic Co-operation and Development in its Anti-Corruption Initiative for Asia-Pacific.

OFFENCES

The specific bribery and corruption offences and jurisdiction

Bribery involves any public servant (person in pay or service of the government):

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- Receiving illegal recompense in relation to an official act.
- Receiving illegal recompense by corrupt or illegal means for influencing a public servant.
- Receiving illegal recompense for the exercise of personal influence over a public servant.
- Obtaining a valuable thing free of charge from any person concerned in a proceeding or business transacted by the public servant.

The acceptance or agreement to accept or attempt to obtain such recompense is enough to constitute an offence. Under the Prevention of Corruption Act, a public servant or a person expecting to be a public servant, who accepts or obtains or agrees or attempts to obtain from any person any recompense

as a motive or reward for doing or forbearing to do any official act, or for showing favor or disfavor, is guilty of the crime of taking a bribe.

A public servant commits the offence of criminal misconduct if he:

- Habitually accepts, or obtains or agrees or attempts to obtain from any person or for any other person any recompense other than legal remuneration as a motive or reward.
- Habitually accepts or obtains or agrees or attempts to obtain any valuable thing without consideration or for consideration that he knows to be inadequate, from any person concerned with an official act.
- Dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so.
- Obtains for any person or for himself, any valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant.
- Obtains (or any person obtains) any valuable thing or pecuniary advantage while holding office as a public servant, if he or any person on his behalf has at any time during the period of his office pecuniary resources or

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property disproportionate to his known sources of income and for which he cannot satisfactorily account.

The Penal Code also defines offences of bribery/corruption in relation to elections.

At present there are no regulations relating to private business/commercial bribery. However, there are ongoing efforts to combat bribery in the private sector. The emerging trend is to make the sector transparent, accountable and at par with the mechanisms that are in place for the public sector.

DEFENCES

Defenses, safe harbours or exemptions

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Diplomats enjoy immunity under the Vienna Convention on Diplomatic Relations 1961. The Prevention of Corruption Act applies to only public servants and does not cover the private sector. "Grease" or facilitating payments amount to bribery under the Act. Any person who facilitates bribery whether or not an offence is committed in consequence of that abetment is liable to be punished under the Prevention of Corruption Act.

ENFORCEMENT

The regulator's powers of investigation, enforcement and prosecution in cases of bribery and corruption

In order to detect corrupt or improper practices the central vigilance commissioner and the state vigilance commissions have, among other things, the power to:

- Summon and enforce the attendance of any person.
- Examine on oath.
- Order discovery and production of documents.
- Receive evidence on affidavit.
- Requisition public records.
- Issue commissions.
- Conduct surprise inspections.

The CBI and police officers have the power to arrest persons if they reasonably suspect that a person is guilty of an offence under the Prevention of Corruption Act. In addition, the officers of the anti-corruption bureau of each state have the powers of a police officer and therefore the power to arrest.

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On conviction, the Prevention of Corruption Act allows for the confiscation of the assets of a public servant that are in excess of his known sources of income. Additionally, a police officer can investigate offences under the Act and can, in the course of investigation, seize or prohibit the operation of a bank account if the funds therein have a direct link with the commission of an offence under investigation.

The Prevention of Corruption Act applies to all citizens of India, whether residing in India or abroad. The provisions of the Penal Code apply to any offence committed by any citizen of India

outside of India and any person on any ship or aircraft registered in India wherever it may be.

SANCTIONS

The potential sanctions for participating in bribery and corruption

Special judges are appointed to try offences of bribery/corruption committed under the Prevention of Corruption Act. Facilitating the offence is also punishable. The prescribed punishment is imprisonment of between six months and five years along with fine. This penalty applies to all offences, other than habitual offenders for whom an enhanced punishment applies of imprisonment for between two and seven years, and a fine to be decided by the court.

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TAX TREATMENT

Any expenditure incurred for any purpose that is an offence or that is prohibited by law is not deemed to have been incurred for the purpose of business or profession and no deduction or allowance can be made in respect of such an expenditure (*section 37 (1), Indian Income Tax Act 1961*). Therefore, blackmail, ransom or bribe payments are not allowed as a tax deductions.

INSIDER DEALING AND MARKET ABUSE

The main regulatory provisions and authorities responsible for investigating insider dealing and market abuse

SEBI prohibits insider trading. "Insiders" must not (directly or indirectly) deal in securities of a listed company when in possession of unpublished price-sensitive information. An "insider" is any person who is connected with the company and expected to have access to unpublished price-sensitive information in relation to the company's securities. An insider also cannot communicate, counsel or procure unpublished price sensitive information to or for any person. Prosecutions for insider trading in securities are launched by SEBI.

The SEBI (Prohibition of Insider Trading) Regulations 1992 (Insider Trading Regulations) have been framed under Section 30 of the SEBI Act and are intended to prevent and curb insider trading in securities.

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The Share Dealing Code is a procedure adopted by companies in furtherance to the Insider Trading Regulations and aims to prevent insider trading activity. It restricts the directors of a company and other specified employees from dealing in securities of the company on the basis of any unpublished price-sensitive information that is available to them by virtue of their position in the company.

SEBI is responsible for dealing with insider trading and market abuse in accordance with the provisions of the SEBI Act.

OFFENCES

The specific insider dealing and market abuse offences

Insider trading can be committed in three ways (*Regulation 3, Insider Trading Regulations*):

- Dealing in securities the price of which will be affected by the inside information that is in that person's possession.
- Encouraging another person to deal in such securities.
- Disclosing the inside information to another person.

However, these restrictions are not applicable to any communication required in the ordinary course of business or profession, or employment or under any law.

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Regulation 3A prohibits any company from dealing in the securities of another company or associate of that other company while in possession of any unpublished price-sensitive information. Therefore, misuse of information, making misleading statements and encouraging market abuse all fall under the ambit of insider trading.

The Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, prohibit manipulative, fraudulent and unfair trade practices. Dealing in securities is a fraudulent or an unfair trade practice if it involves fraud. This may include

any act or omission amounting to manipulation of the price of a security.

Defences

Defences, safe harbours or exemption

A defence is available to a company dealing in the securities of another company while in possession of any unpublished price sensitive information if cumulatively (*Regulation 3B, Insider Trading Regulations*):

- The decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee who was in possession of the information.
- The company has put in place such systems and procedures that demarcate the activities of the company in such a way that the person who enters into a transaction in securities on behalf of the company cannot have access to information that is in possession of other officers or employees of the company.
- The company had in operation at that time, arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transactions or agreement was given to that person or any of those persons by that officer or employee.

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- The information was not communicated and no relevant advice was given.
- That acquisition of shares of a listed company is as per the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (Takeover code 1997). The Takeover code, among other things, governs the acquisition of shares and voting rights in public listed companies.

SEBI has recently published the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (Takeover code 2011), which has been in effect from 22 October 2011.

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This exemption is only available for companies.

Section 24B of the SEBI Act empowers the central government to grant immunity from prosecution to any person who is alleged to have violated the provisions of the Act but who has made a full and true disclosure in respect of the alleged violation, subject to certain conditions as it may deem fit. This immunity can be taken away by the central government if the person has given false information or failed to abide by the imposed conditions.

ENFORCEMENT

The regulator's powers of investigation, enforcement and prosecution

SEBI has the powers of a civil court, such as ordering discovery and production of books of account, summoning and enforcing the attendance of persons and examining the inspection of books, registers and other documents and issuing commissions for the examination of witnesses or documents.

SEBI can also, either during or after completion of the investigation/inquiry, in the interest of the investors or securities market:

- Suspend the trading of any security in a recognized stock exchange.
- Restrain persons from accessing the securities market and prohibit any person associated with the securities market from buying, selling or dealing in securities.
- Suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position.
- Impound and retain the proceeds or securities in respect of any transaction that is under investigation.
- Direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction that is under investigation.
- Appoint one or more officers to inspect the books and records of insider(s) or any other persons.
- Appoint a qualified auditor to investigate into the books of account or the affairs of an insider.

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SANCTIONS

The potential sanctions for participating in insider dealing and market abuse

Insiders who violate the SEBI Regulations are liable to a penalty of up to INR250 million or three times the amount of profits made out of insider trading, whichever is higher.

SEBI may, in addition to the above, pass directions to the defaulting insider not to deal in the concerned shares in any particular manner and/or prohibit him from disposing of the concerned shares and/or declaring the concerned transactions as null and void, and so on.

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In addition, any person indulging in fraud and unfair trade practices relating to securities), is liable to a penalty of INR250 million or three times the amount of profit made out of these practices, whichever is higher.

MONEY LAUNDERING AND TERRORIST FINANCING

Regulatory provisions and authorities

Money laundering is dealt with under the Prevention of Money Laundering Act 2002. The Act is an endorsement of various international conventions to which India is a party and seeks to declare laundering of monies through specified crimes as a criminal offence.

The Prevention of Money-laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules 2005 impose an obligation on banking companies, financial institutions and intermediaries to verify the identity of investors and maintain records of transactions with each investor.

The Unlawful Activities (Prevention) Act deals with terrorism and combating terrorist funding.

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The Reserve Bank of India (RBI) issued Know-Your-Customers (KYC) Guidelines Anti-Money Laundering Standards on 16 August 2005, under which Banks are advised to follow certain customer identification procedures for opening of accounts and monitoring transactions of a suspicious nature and reporting it to the appropriate authority.

In addition, the Indian Government has established a central national agency called the Financial Intelligence Unit (FIU-IND) responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for coordinating and strengthening national and international intelligence, investigation and enforcement agencies in pursuing global

efforts against money laundering and related crimes. FIU-IND is an independent body, which reports directly to the Economic Intelligence Council (EIC) headed by the Finance Minister of India.

In 2010, India became the 34th member of Financial Action Task Force and is also a member of the Asia/Pacific Group on Money Laundering. In December 2010, India joined the Eurasian Group on Combating Money Laundering and Terrorist Financing as a member state. India ratified the UN Convention against Transnational Organized Crime in May 2011.

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OFFENCES

The specific money laundering and terrorist financing offences

Money laundering consists of (directly or indirectly) knowingly assisting, being a party to or actually involved in any process or activity connected with the proceeds of crime and the presentation of it as legally obtained property (s*ection 3, Prevention of Money Laundering Act*). The Prevention of Money Laundering Act details 156 offences under 28 statutes as scheduled offences. Money laundering is an offence only if it is related to an activity connected with the proceeds of a crime specified as a scheduled offence.

The Unlawful Activities (Prevention) Act deals with terrorism and terrorist funding. It also covers terrorist offences such as conspiracy and commission of a terrorist act, and harboring a person who is a terrorist. The Unlawful Activities (Prevention) Amendment Bill 2011 was introduced in the Parliament on 29 December 2011 to amend the Unlawful Activities (Prevention) Act and make it more effective in preventing terrorist and other unlawful activities. The bill increases the period for which an association can be declared as unlawful from two years to five years. It also expands the definition of "terrorist act" to include acts that threaten the economic security of India through the production, smuggling or circulation of "high quality" counterfeit currency.

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The offences of money laundering and terrorist financing are strict liability offences. The offence need not necessarily have been committed and even an attempt to commit a crime would constitute a punishable offence.

DEFENCES

Defences, safe harbors' or exemptions are available and who can qualify

There are no exemptions or qualifications applicable to such offences.

ENFORCEMENT

The regulator's powers of investigation, enforcement and prosecution

Investigation can be initiated only by authorities designated by the central government such as the Directorate of Enforcement. These authorities can carry out interim measures such as the survey, search, seizure and arrest of the accused. The Prevention of Money Laundering Act gives the requirements for:

- Financial institutions' disclosure requirements in relation to reportable transactions.
- Confiscation of the proceeds of the crime.
- Declaring money laundering as an extraditable offence.
- Promoting international co-operation in investigation of money laundering.

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Section 13 of Prevention of Money Laundering Act confers powers on the Director (appointed by the Central Government and entrusted with powers of a civil court) to ensure compliance and to call for records and make appropriate inquiries where necessary. It also prescribes a list of officers (such as officers of the Customs and Central Excise Department, police officers, officers of the RBI, and so on) who are expressly required to assist the authorities in enforcing of the Act. The enforcement agency has extensive powers to discharge its duties under the Act. The adjudicating authority for the purposes of the Act is vested with powers of a civil court.

Under the Unlawful Activity (Prevention) Act, the central government has the power to prohibit any person from using the funds of an unlawful association. These prohibitory orders normally entail an arrest warrant/summons. The designated authority, in addition to having the powers of a civil court, can also arrest persons or search any building, conveyance or place. The officers competent to investigate such offences are the Delhi Special Police Establishment not below the rank of a Deputy Superintendent of Police (or not below the rank of an Assistant Commissioner of Police in the metropolitan areas).

The courts/regulators do not have extra-territorial jurisdiction to try these offences.

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SANCTIONS

The sanctions for participating in money laundering or terrorist financing offences

The punishment for money-laundering is imprisonment for between three and seven years and a fine of up to INR500,000 (*section 4, Prevention of Money Laundering Act*). For offences specified under paragraph 2 of Part A of the Schedule (Offences under the Narcotic Drugs and Psychotropic Substances Act 1985) the punishment is up to ten years.

Chapter IV of the Unlawful Activity (Prevention) Act provides for the following sanctions:

- **Unlawful activities.** Individuals who take part, commit or abet the commission of an unlawful activity face imprisonment for up to seven years and a fine. In addition, individuals who assist in any unlawful activity face imprisonment of up to five years and/or a fine.
- **Terrorist activities.** The sanctions applicable are:
    - **Terrorist acts.** Acts that result in death are punishable with death or life imprisonment. Other cases range from five years to life imprisonment;
    - **Raising funds for terrorist activity and conspiracy.** Imprisonment from five years to life and a fine;
    - **Harbouring terrorists.** Imprisonment from three years to life;
    - **Membership of a terrorist organisation.** Life imprisonment and a fine;
    - **Holding proceeds of terrorism.** Life imprisonment and a fine.

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These sanctions apply to both individuals and corporate bodies.

FINANCIAL RECORD KEEPING

The general requirements for financial record keeping and disclosure

Banks, financial institutions and intermediaries must (*section 12 (1), Prevention of Money Laundering Act*):

- Maintain records detailing the nature and value of prescribed transactions.
- Furnish information on prescribed transactions under the Prevention of Money Laundering Act.
- Verify and maintain the records of the identity of all its clients.

Records must be maintained for ten years after the transaction concludes. Banking companies, financial institutions and intermediaries must also furnish information to FIU-IND when required to do so (*section 12 (2) Prevention of Money Laundering Act*).

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The maintenance and disclosure of records is specifically provided for in the Prevention of Money-Laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules 2005.

Rule 3 provides that every banking company or financial institution or intermediary must maintain a record of:

- Cash transactions of more than INR1 million or its equivalent in foreign currency.

- Series of cash transactions integrally connected to each other that have been valued below INR1 million or its equivalent in foreign currency where such series of transactions have taken place within a month.
- Cash transactions where forged or counterfeit currency notes or bank notes have been used as genuine and where any forgery of a valuable security has taken place.
- Suspicious transactions whether or not made in cash.

Rule 10 provides that banking companies, financial institutions or intermediaries must maintain records of the identity of its clients in hard and soft copies. The records must be maintained for a period of ten years from the end date of the transaction between the client and the banking company or financial institution or intermediary.

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The sanctions for failure to keep or disclose accurate financial records

To ensure compliance the Director has powers to (*section 13, Prevention of Money Laundering Act*):

- Call for records and make appropriate inquiries.
- Levy fines of between INR10,000 and INR100,000 on a banking company, financial institution or intermediary that fails to comply with any provisions of section 12 of the Act.

The financial record keeping rules used to prosecute white-collar crimes

The financial record keeping rules are used to prosecute white-collar crimes. Violations of the rules may be used as evidence and trigger the prosecution of other crimes, such as bribery and/or tax evasion.

Due diligence

Banks are required to undertake customer due diligence (CDD) measures depending on the type of customer, business relationship or transaction. CDD measures typically comprise the following:

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- Obtaining sufficient information in order to identify persons who beneficially own or control a securities account.
- Verifying the customer's identity using reliable, independent source documents, data or information.
- Identifying beneficial ownership and control. That is, determining which individual(s) ultimately own(s) or control(s) the customer and/or the person on whose behalf a transaction is being conducted.
- Verifying the identity of the beneficial owner of the customer and/or the person on whose behalf a transaction is being conducted, corroborating the other information.

- Conducting ongoing due diligence and scrutiny. That is, performing ongoing scrutiny of the transactions and account throughout the business relationship to ensure that the transactions being conducted are consistent with the registered intermediary's knowledge of the customer, its business and risk profile, taking into account, where necessary, the customer's source of funds.

Corporate liability

Various judicial decisions have made clear that a company/legal entity is broadly in the same position as any individual and may be convicted of breach of statutory offences including those requiring mens rea (a guilty mind).

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However, there is no law specifically governing corporate manslaughter in India

Immunity and leniency

The power to grant a pardon can be exercised by a magistrate during the investigation of an offence. The provision for pardon applies only to cases friable by the Sessions Court, that is, where the offence would attract a punishment of imprisonment of seven years or more.

A pardon may be granted in order to obtain evidence from any person supposed to have been directly or indirectly concerned with or privy to an offence. A condition for the grant

of a pardon is that the person makes a full and true disclosure of all facts within his knowledge. Any person who accepts an offer of a pardon would be examined as a witness in the trial.

Where a person has accepted an offer of a pardon but it is alleged by the public prosecutor that he has wrongfully concealed an essential fact or given false evidence, or not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was offered or for any other offence for which he appears to have been guilty and also for the offence of giving false evidence.

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The concept of plea-bargaining is recognized in India by a 2005 amendment to the Code of Criminal Procedure. Plea-bargaining is available only for offences that are punishable by imprisonment of under seven years.

CROSS-BORDER CO-OPERATION

Obtaining evidence

The formal mechanisms for co-operating with foreign prosecutors are given under section 166A of the Code of Criminal Procedure. One such mechanism is through a *letter rogatory* or formal letter of request.

During the course of an investigation into an offence, an application can be made by an investigating officer that evidence is available in a country or place outside India. The

court may then issue a letter of request to a court or authority outside India to:

- Examine any person acquainted with the facts and circumstances of the case and record his statement.
- Require such person or any other person to produce any document or thing that may be in his possession pertaining to the case.
- Forward all the evidence to the court issuing the letter.

The CBI serves as the national central bureau for the purpose of correspondence with ICPO-INTERPOL (an international police organization to extend co-operation between member countries and their police forces, which may furnish or request information or services for combating international crime) to co-operate and co-ordinate with each other in relation to collection of information, location of fugitives and so on.

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India has negotiated double tax avoidance agreements and finalised tax information exchange agreements with various countries to strengthen exchange of information relating to tax evasion, money laundering and so on.

In addition, mutual legal assistance treaties facilitate co-operation in matters relating to service of notice, summons, attachment or forfeiture of property or proceeds of crime, or

execution of search warrants under section 105 of the Code of Criminal Procedure.

India has adopted the Convention on Mutual Legal Assistance in Criminal Matters and has operational agreements with 31 countries. The Ministry of Home Affairs carries out these agreements.

WHISTLEBLOWING

The law relating to whistleblowers is fairly recent. The Parliament (*Lok Sabha*) passed the Public Interest Disclosure and Protection to Persons Making the Disclosures Bill 2010 on 27 December 2011. The Bill is pending before the Upper House (*Rajya Sabha*). The Bill aims to set up a regular mechanism to encourage persons to disclose information on corruption or willful misuse of power by public servants, including ministers. It also aims at providing adequate protection to persons reporting corruption or willful misuse of discretion that causes demonstrable loss to the government, or commission of a criminal offence by a public servant.

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In the interim, the government has issued recommendations to safeguard the interests of whistleblowers and the Central Vigilance Commissioner has been designated as the agency to act on complaints from whistleblowers until the Parliament passes appropriate legislation.

Reform

The Companies Bill 2011 is pending before Parliament. Among other things, the Bill will provide for self-regulatory mechanisms to combat corruption. It also provides for stringent compliance provisions.

MARKET PRACTICE

The main steps of foreign and local companies are taking to manage their exposure to corruption/corporate crime

Many companies have become far more mindful of the need to combat corruption and ensure that there are no rogue elements within their ranks that could disrupt the company and drag it into controversy. Companies have started voluntarily complying with the Code of Conduct mooted by the Government for private entities (though this has not yet come into force). The Code covers best practices such as whistleblower protection, empowering shareholders' committees, using remuneration committees and so on.

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Chapter-VI

CORPORATE CRIME AND SENTENCING IN INDIA: REQUIRED AMENDMENTS IN LAW

Introduction

This study details out the framework of corporate criminal liability and sentencing. The law has bound the courts to impose only fine as a form of punishment for corporate which needs to be solved by evolving and incorporating new forms of punishments upon the corporate such that the real purpose of punishments i.e. deterrence or formation such as fine or a penalty is achieved. The author has attempted to put forward these innovative kinds of punishments and a model for the same.

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The present study details out the framework of corporate criminal liability and sentencing. It traces the source and final verdict of the Courts with regard to the concept of Corporate Criminal liability and also puts light over the inability of the Court in properly sentencing the guilty corporate due to inadequacy of law. The law has bound the Courts to impose only fine as a form of punishment for corporate which needs to be solved by evolving and incorporating new forms of punishments upon the corporate such that the real purpose of punishments i.e. deterrence or reformation is achieved. The author has tried to put forward these new kinds of punishments and a model for the same.

1. Criminal Liability: The Concept

Criminal Liability is attached only those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions.[2] The basic rule of criminal liability revolves around the basic Latin Maxim actus non facit reum, nisi mens sit rea. It means that to make one liable it must be shown that act or omission has been done which was forbidden by law has been done with guilty mind. Hence every crime has two elements one physical one known as actus reus and other mental one known as mens rea.[3] This is the rule of criminal liability in technical sense but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour[4]. Although the general rule as stated above is applicable to all criminal cases but the criminal law jurisprudence has seen one exception to the above said concept in form of doctrine of strict liability in which one may be made liable in absence of any guilty state of mind. This happens in cases of mass destructions through pollution, gross negligence of the company resulting in widespread damages like in the Bhopal Gas tragedy, etc.[5] Hence, there can be no dispute of imposing criminal liability on corporations as regards no mens rea requiring offences but however, it used to come to be questioned before the Chartered Bank judgement when mens

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rea was concerned.

2**. Criminal Liability of Corporates: The Indispensability.**

In the modern day world, the impact of activities of corporations is tremendous on the society. In their day to day activities, not only do they affect the lives of people positively but also many a times in a disastrous manner which come in the category of crimes. For instance, the Uphar Cinema tragedy or thousands of scandals especially the white collar and organized crimes can come within the categories that require immediate concern. Despite so many disasters, the law was reluctant to impose criminal liability upon corporations for a long time. This was for basically two reasons that are[6]:

- That corporations cannot have the mens rea or the guilty mind to commit an offence; and that corporations cannot be imprisoned, the only other remedy being left is that of fine which merges criminal liability with that of a civil one.

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These two obstacles were in the late 20th century and very early 21st century. The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable. In the early 1700s, corporate criminal liability faced at least four obstacles. The first obstacle was attributing acts to a juristic fiction, the corporation. Eighteenth-century courts and legal thinkers approached corporate liability with an

obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century. The second obstacle was that legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent. The third obstacle was the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters. Finally, the fourth obstacle was courts' literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court.[7]

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3. The solution to Second Obstacle (Corporate Mens Rea).

Courts in United States were slow to extend corporate criminal liability to crimes of intent[8] and the process in India was even slower. Now, it is well settled that a corporate can be held liable for committing offences that require mens rea as now it has been recognized that a corporate can have a mens rea. Generally, corporations may be held criminally responsible for the illegal acts of its employees if such acts are[9] related to and committed within the course of employment,

committed in furtherance of the business of the corporation and its imbibed culture; for example, if the corporate structure is so organized as to deprive senior managers of the information they need to exercise such powers, this would indicate a corporate culture that is designed to elude law enforcement.

Generally, deficient structures for the dissemination of information within the firm would also be suspect. Moreover, in organized crime networks, the culture and the objective of the corporation in itself is to commit crimes, authorized or acquiesced in by the corporation. In these cases, the corporate itself authorizes and sometimes directs its employees to enter into unethical business practices which are sanctioned by the organization structure like in case of recovery wherein hiring of antisocial elements is directed many a times.

Hence, there is no obstacle in the criminal law jurisprudence whatsoever to impose criminal sanction on a corporate since it can have a mind of its own and also an environment wherein crime is nurtured. However, this concept still not contemplated in the statutes in India which the later section explains in more detail.

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4. The Statutory Inadequacy

This developed jurisprudence does not find a place in the Indian statues as they still make only the officials responsible for the act criminally liable and not the corporate itself. Instances of this are:

- Sections. 45, 63, 68, 70(5), 203, etc of the Indian Companies Act wherein only the officials of the company are held liable and not the company itself; it is also reflected through the Takeover Code.

The various sections of the IPC that direct compulsory imprisonment does not take a corporate into account since such a sanction cannot work against the corporation. These are the major statutes in their respective field that are devoid of necessary legal aspects. On the other hand, law has also developed to an extent with regard to certain other statutes and their respective penal provisions wherein a fine has been imposed on the corporations when they are found to be guilty. Some such examples are :

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Sec. 141 of the Negotiable Instruments Act, 1862: Balaji Trading Company v. Kejriwal Paper Ltd. and Anr.[10]

2. Sec. 7, Essential Commodities Act: State of M.P. v. N. Singh[11]
3. Section 276-B of the Income Tax Act: M.V. Javali v. Mahajan
   Borewell & Co.[12]

The statutes mentioned in the first point need to be amended soon to include corporate criminal liability and not merely restricting criminal liability to its personnel.

5. **The International Paradigm**

Such legislative changes have already taken place in Australia, France (Penal Code of 1392), Netherlands (The Economic Offences Act, 1950 and Article 51 of Criminal Code),

and Belgium (in 1934, Cour de Cassation recognised the punishment of a corporate body by making it a subject of Belgian Criminal Statute). Germany practices a sort of administrative sanction to deviant corporations and doesn't recognize criminal liability of corporations. The Canadian Federal Criminal Code[13] was amended as far back as in 1909 whereby a fine could be substituted for a sentence of imprisonment, made the corporate criminal liability possible. The European Council in 1988 made a recommendation to the member states to carry out necessary amendments in their respective criminal statutes to ensure corporate liability. Whereas, the United Kingdom follows the alter ego or identification approach to fix corporate liability in criminal cases.

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In Australia, the Criminal Code is based upon the findings of a sub-committee of the Standing Committee of Attorneys-General from Federal, State and Territory Governments, which was formed to consider the development of a uniform criminal code for Australian jurisdictions. The Report favoured adoption of a species of corporate criminal liability which recognised independent corporate fault and would cast a substantially broader and "much more realistic net of responsibility over corporations" than the narrow liability under Tesco. The Committee's primary objective was to develop a liability scheme which "as nearly as possible, adapted personal Criminal responsibility to fit the modern corporation”.

The Committee's alternative model of corporate criminal liability is now found in Pt 2.5 of the Criminal Code. These provisions will be a bellwether for future developments in Australia in the field of corporate criminal responsibility and corporate governance generally. The structures of the provisions under Pt 2.5 of the Criminal Code are as follows. Section 12.1 provides that the Code applies, with necessary modifications, equally to bodies corporate as to natural persons, specifying that a "body corporate may be found guilty of any offence, including one punishable by imprisonment".

Section 12.2 imposes vicarious liability upon the corporation for the physical elements (though not the mental element) of the offence when committed by any employee, agent or officer within the actual or apparent scope of employment. Under s.12.3 (1) of the Criminal Code, the requisite element of fault in an offence, characterised by, for example, intention, knowledge or recklessness, is established on the part of the body corporate itself, where the body corporate has "expressly, tacitly or impliedly authorised or permitted the commission of the offence". The position of law regarding the same in U.S. is that the punishment of corporate crime is based on the doctrine of 'Respondent Superior', whereby agent's conduct is imputed to the corporation. A corporation may be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment.[14] The nature of incorporeal legal entities requires courts look to employees of

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the corporation as a means of imputing intent, or mens rea,[15] as well as the guilty act, or actus reus,[16] to the corporation.

Courts hold a corporation vicariously liable for the acts of its employees if the individual: (i) acted within the scope and nature of his employment;[17] (ii) acted, at least in part, to benefit the corporation;[18] and (iii) the act and intent can be imputed to the corporation.[19]

In an effort to deter corporate crime more effectively, the US Sentencing Commission established a number of sentencing guidelines.[20] The Guidelines promulgate a wide range of sanctions available to the courts. While corporate offenders are generally punished by way of fines in the United Kingdom, the US Guidelines embrace radical remedial goals.[21] Restitution orders are mandatory for all federal offences. To this end, the offender must make a payment to the victim of the crime, with the aim of "making the victim whole again for the harm caused". The Guidelines also promulgate an appropriate punitive fine range for convicted organisations.[22]

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6. **The Corporate Punishment – Whether only fine is Possible?**

In India, certain statutes like the IPC talk about kinds of punishments that can be imposed upon the convict and as per Sec. 53 include death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine. In certain cases the sections speak only of imprisonment as a punishment like

in case of Sec.420 thereby the problem arises as to how to apply those sections upon the companies since a criminal statute needs to be strictly interpreted wherein there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminality, the Courts in India have finally recognized that a corporation can have a guilty mind but still were reluctant to punish them since the criminal law in India does not allow this action. In the Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors.[23], B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The Court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine
and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law

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Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines:
"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only."

As per the jurisprudence evolved till then, under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of 'person' in the Indian Penal Code Includes 'company'. It is also worthwhile to mention that our Parliament has also understood this problem and proposed to amend the IPC in this regard by including fine as an alternate to imprisonment where corporations are involved in 1972.[24] However, the Bill was not passed but lapsed. Such a fundamental change in the criminal jurisprudence is a legislative function and hence the Parliament should perform it as soon as possible by also considering the following arguments that the author has brought about.

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However, the Apex Court later overruled this decision in Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors[25] on account of providing complete justice to the aggrieved which could not be prejudiced in the garb of corporate personality. In this case, the Court did not go by the

literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate. The Court looked into the interpretation rule that that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of.[26] Simultaneously, it also considered the legislative intent and held that all penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. It was of the view that here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to commonsense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.

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If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element. These Courts have applied the doctrine of impossibility of performance *Lex non cogit ad impossibilia* in numerous cases including the aforementioned.[27]

Finally, the Court decided that as the company cannot be

sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

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The well known maxim *'judicis est just dicere*, non dare' best expounds the role of the court. It is to interpret the law, not to make it. This read with the Doctrine of Separation of Powers has bound the Court's hands in imposing various kinds of punishments and all that it is left with is to impose fines. In order to avoid compelling the Courts to go out of the statute and interpret and therefore define the law which is essentially the task of the legislature[28], it is advised that the legislature amends the various penal statutes in a way so as to bring in

various forms of punishments for the corporations as well, thereby maintaining the separation of powers regime and hence the rule of law.

7. **Corporate Punishment**

Till now, the Courts have been able to impose only fine as a form of punishment because of statutory inadequacy and lack of new forms of punishments which could be imposed upon corporate.

7.1. The Feasibility of Fine.

Fine is the most common punishment in every part of the world and it is a punishment the advantages of which are so great and obvious that we propose to authorize the courts to inflict it in every case... Imprisonment, transportation, banishment, solitude, compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine it is necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mullet which is ruinous to the labourer is easily borne by a tradesman and is absolutely unfelt by a rich zamindar."[29]

The imposition of fines may be made in four different ways as provided in the IPC. It is the sole punishment for certain offences and the limit of maximum fine has been laid down; in certain cases it is an alternative punishment but the amount is limited; in certain offences it is imperative to impose fine in

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addition to some other punishment and in some it is obligatory to impose fine but no pecuniary limit is laid down.

Fines can be an effective punishment in cases of traffic offences or offences against property. But where the offence is grave, in the sense of murder or rape or kidnapping for death etc., it is questionable whether fine can achieve the object of punishment. Another shortcoming of this form of punishment is that it pins the poor and eases the rich. The rich can easily get away by paying a huge fine while the poor may have to toil hard even to get a hundred rupees. Nevertheless, its efficacy in specific crimes has made it a necessary mode of sanction. This shows that biggest drawback in restricting fine as the sole form of punishment to corporate since with their massive bank accounts, it is easy for them to get away with the criminal liability and it also does not solve the purpose of punishment since neither the corporate would be deterred nor would they be reattributed for the crimes like corporate killings that they have committed (for instance: using poor quality of material in building dams which would soon collapse thereby dislocating and even killing inhabitants around the area or the labourers themselves).

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Looking into the above drawbacks, there is a need to evolve new forms of punishments which could effectively deter the corporate from engaging into any criminal activity.

7.2 **Towards New Forms.**

Presently, all the sections include only fine as a form of punishment that can be imposed on a company. So is the case with judicial pronouncements on the aspect of sentencing. In addition to this, the Law Commission in its 41st Report also speaks of introducing only fine as an additional punishment to be imposed upon corporations in lieu of fines. This restrictive thinking, according to Courts is based on the maxim lex non cogit ad impossibilia, which tells us that law does not contemplate something which cannot be done.[30] This reasoning in itself shows that the law lacks in a non holistic viewpoint in the concept of corporate criminal liability.

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The Courts have no doubt been efficient in evolving the concept of criminal liability of corporate and have imposed the same on the convicts but the only way of imposition that has been thought of is by way of fines. It is now for the legislature to evolve new forms of punishments and incorporate them in the criminal justice system of the land. The legislature may take the following suggestions.

These other forms (including fine), can be classified into the following major heads:

- Economic Sanctions
- Social Sanctions.

These sanctions are all designed keeping in view that deterrence is the ultimate objective of penal law making

companies liable since other accepted theories like reformation cannot be introduced where a juristic mind is concerned.

Economic Sanctions: these sanctions would include various kinds of monetary and other forms which would cause huge losses to the company as a whole. Apart from fine, they can include the following:

- Corporate Death or order for winding up only in cases of continuous criminal behaviour in the given field. For instance, exit order of the corporate from the division in which its criminal behaviour has been found continuously. For instance, the food department of a corporate can be directed to be shut if despite several warnings, poisonous or objectionable substances are adulterated. Such a sanction could have been imposed in the famous oil adulteration scam that came up around 7 years back causing loss of many lives. It may also ordered at the first instance itself without giving any warning when due to the intentional activities of the corporate, people might lose their lives like manufacture of low quality engines for airplanes which would lead to their crashing thereby causing huge loss of lives.
- Temporary closure of the company for a given period depending upon the gravity of the act till the time compliance with norms can be ensured. This can be an alternative to the above course when the act is not that harmful to the society. For instance, a corporate being

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closed for causing pollution till the time it does not arrange for a pollution free technology.

- Rehabilitation of victims of crime. In such a form of punishment, the corporate would be ordered to rehabilitate the victims in a manner such as to erase any traces of the effect of the crime. For instance, cleansing of the riverbanks that have been polluted as a result of toxic disposal. Though it would take some time but this would also assure that the crime has been undone.

Such schemes are already operational in Germany. Compulsory welfare or reinstatement activities are to be undertaken in the affected areas over there. Its corporations are subject to administrative sanctions for public welfare or administrative offences.[31]

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- Payments of high sum as compensation to the victims of crime as were paid in the Bhopal gas tragedy. Compensation to a victim may be made in three different ways. The State may be made responsible for the payment of compensation, or the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim or the court trying the offender can, in addition, to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by

repairing the damage

done by the offence.[32]

Section 357, Cr.P.C, empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, inter alia, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence.[33]

The Supreme Court of India while discussing the scope and object of Section 357 Cr.P.C. in Hari Krishnan and State of Haryana v. Sukhbir Singh[34] observed that it is an important provision but the courts have seldom invoked it, perhaps due to the ignorance of the object of it. It empowered the courts to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in our criminal justice system."

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However, since Section 357 (1) is subject to some limitations[35], it should be categorized as a separate form of

punishment itself which is not dependent on the quantum of fine or constitutional provisions.[36]

- Delisting, this is practiced in many cases.

Social Sanctions: Goodwill, for anybody corporate is its heart and soul. Once, that is lost, the entire strength comes to a standstill. The term 'reputation' carries with it more than one meaning. For individuals, reputation loss connotes both the individual's sense of shame and others' increased reluctance to do business in the future with the individual[37] or corporations, however, reputation loss refers only to the reluctance of others, such as customers and workers, to deal with the corporation in the future. Of course, the managers of the corporation may feel shame about their corporation's conviction. As applied to corporations, reputation refers, for example, to the supra competitive price that a firm with a good reputation can charge customers for its products or the lower wages that a 'good' employer can pay while still attracting workers.[38]

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Once this is harmed, it would create a deep stigmatizing effect on the corporation since its business would come to a standstill with no customers. This can be done by asking the corporate to publish this crime widely compulsorily and fund the publication as well. This will act as a strong deterrence for not to commit crimes and the shareholders also would come in an active role in stopping the active organizational structure from authorizing committal of such crimes. However, in certain situations reputation sanctions are not effective against

corporations. Because activities that harm third parties, such as environmental pollution, do not directly affect a firm's customers, the firm will be unlikely to suffer a reputation loss for engaging in those activities.[39] Also, firms that lack reputations, such as 'fly-by-night' firms, cannot really suffer a reputation loss. This would also make the share value less attractive to be invested in thereby leading to huge financial losses also.[40]

Such sanctions should also be incorporated in Sec. 52 for the corporateapart from the traditional forms of punishment that are already there in the section. The other statutes like Essential Commodities Act, Food Adulteration Act, Companies Act, etc., also require such sanctions to be imposed so as to adopt a just approach of punishment which is required for deterrence as fine cannot deter allcorporatein all cases. The gravity of each of these punishments should vary with the gravity of the act committed. This model of sentencing provides with an illustration as to how the existing penal law of India should be amended so that it would serve the purpose of sentencing corporate bodies in a just manner and simultaneously also keeping pace with the theory of proportionality of crime and punishment.

From the above analysis, it is proved that the criminal law jurisprudence relating to imposition of criminal liability on

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corporations is settled on the point that the corporations can commit crimes and hence be made criminally liable. However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. It is therefore recommended that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the statutes fit for strict interpretation by providing for infliction of criminal liability on the corporations as also providing for various kinds of sanctions apart from only fines.

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14. See N.Y. Cent., 212 U.S. at 493 ("[A] corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element." (quoting Telegram Newspaper Co. v. Commonwealth, 52 N.E. 445, 446 (Mass. 1899));

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Chapter-VII

CONCLUSION

As, this study seeks to highlight the key principles of Director's duties and liabilities. It examined the Directors roles, duties and liabilities in its proper context, namely, within the company organization and with reference to the appointment process (including, qualification and disqualification criteria and benchmarks). The principal statutory duties of Directors indicates key liabilities in various circumstances under different statutes and the errant Directors shall be punished sevearly and the law shall be amended to remove the oppression of majority equity shareholders .

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Only when businesses appreciate the roles and responsibilities of Directors, and understand the basis on which liabilities can attach to Directors as a result of their acts or omission, can they be in a better position to critically evaluate and properly structure their investments in India, or appreciate legal advice on such matters arising in respect of their commercial arrangements in this country. We hope that this Note will prove to be a useful overview of, and guide to, the Indian legal position on this important subject.

Directors will also be held personally liable to the third parties where their liability is made unlimited in pursuance of

section 322(i.e., vide Memorandum) or section 323(i.e., vide alterations of Memorandum by passing special resolution). By virtue of section 322, the Memorandum of a company may make the liability of any or all directors, or manager unlimited. In that case, the directors, manager and the member who proposes a person for appointment as director or manager must add to the proposal for appointment as a statement that the liability of the person holding the office will be unlimited. Notice in writing to the effect that the liability of the person will be unlimited must be given to him by the following or one of the following person, namely: the promoters, the directors, manager and officers of the company before he accept the appointment.

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Further, in case of limited liability Company, the company may, if authorized by the articles, by passing resolution alter its Memorandum so as to render the liability of its directors or of any director or manager unlimited. But the alteration making the liability of director or directors or manager unlimited will be effective only if the concerned officer consents to his liability being made unlimited. This alteration also, unless specifically consented to by any or all directors will not have any effect until expiry of the current term of office.

Liability for breach of warranty:

Directors are supposed to function within the scope of their authority. Thus, where they transact any business in

respect of matters, ultravires the company or ultravires the articles, they may be proceeded against personally for any loss sustained by any third party.

Liability for breach of statutory duties:

The Companies Act, 1956 imposes numerous statutory duties on the directors under various sections of the Act. Default in compliance of these duties attracts penal consequences. The various statutory penalties which directors may incur by reason of non-compliance with the requirements of Companies Act are referred to in their appropriate places.

Liability for acts of co-directors:

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A director is the agent of the company except for matters to be dealt with by the company in general meeting and not of the other members of the Board. Accordingly, nothing done by the Board can impose liability on a director who did not participate in the Board's action or did not know about it. To incur liability he must either be a party to the wrongful act or later consent to it. Thus, the absence of a director from meeting of the Board does not make him liable for the fraudulent act of a co-director on the ground that he ought to have discovered the fraud.

Criminal liability:

Apart from the civil liability under that Act or under the common law, directors of a company may also incur criminal liability.

The subsidiary will not be a “pure” private company but a “private company, which is a subsidiary of a public company”. Further, under the Companies Act, if the holding company is an overseas body corporate, and would be regarded a public company if it were incorporated in India, then the private Indian company being its subsidiary will lose its status as a “pure” private company and will be subject to various other compliance requirements pursuant to the Companies Act, which are to be met by, as if it were, a “private company, which is a subsidiary of a public company”.

Company secretary

The role of the company secretary in corporate governance

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Every company with a paid-up share capital of INR50 million must have a company secretary who does the following:

- Maintains the corporate and statutory records of a company.
- Sends out the notices for the board and shareholders meetings and drafts the minutes thereof.
- Co-ordinates with the statutory auditors and the internal auditors.

Institutional investors and shareholder groups

Active participation by the shareholders in monitoring and enforcing good corporate governance is still emerging in India.

Institutional investors with a significant shareholding in Indian companies are developing the practice of questioning the corporate governance practices of a company.

The present study details out the framework of corporate criminal liability and sentencing. It traces the source and final verdict of the Courts with regard to the concept of Corporate Criminal liability and also puts light over the inability of the Court in properly sentencing the guilty corporate due to inadequacy of law. The law has bound the Courts to impose only fine as a form of punishment for corporate which needs to be solved by evolving and incorporating new forms of punishments upon the corporate such that the real purpose of punishments i.e. deterrence or reformation is achieved. The author has tried to put forward these new kinds of punishments and a model for the same.

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Finally, the Judiciary decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of

imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. It is therefore recommended that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the statutes fit for strict interpretation by providing for infliction of criminal liability on the corporations as also providing for various kinds of sanctions apart from only fines.

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Holistic Value based societal perspective

CSR today is an institutionalized activity in most business organizations. Though management generally perceives CSR activities as a good business practice that enhances brand image and value, it seldom recognizes its contribution in appealing to the higher need of the employees; needs such as meaningful work, sense of community, and so on .The ancient

India idea of "Loksangraha" or human welfare implying individual and corporate actions need to be driven by the objective of overall benefit to the society and welfare of all stakeholders. It implies "welfare of all" and "survival of all" in contrast to the Darwinian idea of "survival of the fittest" Current business dialogue opines that one needs to address the wider concerns of social justice, environmental sustainability; spiritual renewal, positive human evolution and global peace, apart from financial results and many of these aspects involve non-quantifiable parameters.

There is a need to shift desired work experience from a career, to earn a living, to a vocation through which employees can express themselves and make positive difference in the world. This has roots in Indian perspective of spirit at work-Karma yoga which treats work as worship(to the higher self).This would result in enhanced productivity, goods quality and timely delivery-all of which makes business sense to any organization.

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All work needs to be performed with all energy focused upon execution, that is work without being attached to the outcome (Nishkama Karma)

To sum it up, spirit at work enhances meaning to work, enables an individual to progress from lower order to higher

order needs, activates employees towards excellence and perfecting, integrates individual values with organizational values, enhances sharing and caring and caring among ll. and in an all inclusive manner safeguards the overall interests of all the stakeholders.

Corporate social responsibility

In India, most leading companies are involved in corporate social responsibility (CSR) programmes in areas such as education, health, creation of employment, development of skills and empowerment of weaker sections of the society.

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The MCA has issued Voluntary Guidelines for Corporate Social Responsibility. These Guidelines intend to encourage best practices in corporate social responsibility and state that the CSR initiatives of Indian companies should become integral to the overall business policy and aligned with the companies' business goals.

Corporate Social Responsibility (CSR) is a relatively recent phenomenon imbibed in corporate business culture today; although the thought that organizations do have social responsibilities had begun earlier The narrow self-seeking interest of profit maximization of the private enterprises often led to significant harm to society as well as the environment (natural). This has been the catalyst in the emergence of diversity of stakeholders demanding accountability about the

impact of corporate activity in the life of the planet as a whole.

Corporations cannot elude their social responsibilities because their activities exert a 'tri dimensional impact' (social, economic, and environmental). Governments, activists, and the media have become adept at holding companies to account for the social consequences of their activities. Heightened corporate attention to CSR has not been entirely voluntary. Many companies awoke to it only after being surprised by public responses to issues they had not previously thought were part of their business responsibilities.

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Gradually CSR emerged as inescapable task for business leaders in every country. On the one hand, the wealth and assets of a small section of people on the earth had been increasing while more and more people were deprived of the basic amenities of life.

CSR has come to encompass a company's responsibility towards the environment in which it operates, as well as the ethical responsibilities it has towards society. The need to manage a company's reputation, including its profitability in the global arena, has become a priority. The corporate are losing their ethics to survive in the era of globalization. There is cutthroat competition to survive and to be the leader in the global market.

In view of the above, there is a great need of rethinking of Corporate Social responsibility(CSR) and understand that at the basic level, CSR is about companies integrating a "human face" in their corporate strategy and practice, and about taking responsibility for sustainable human and environmental development and ultimately move towards incorporating holistic value-based societal perspective. There is a need to develop values, ethics among the corporate so that they can build an applied CSR policy.

Whistleblowing

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Clause 49 of the Listing Agreement imposes a non-mandatory requirement on listed companies to have a whistleblowing policy. A company may establish a mechanism for employees to report to the management concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy. This mechanism could also provide adequate safeguards against victimisation of employees who use the mechanism and direct access to the chairman of the audit committee in exceptional cases. There is no other statute in force, which provides statutory protection for whistleblowers.

Reform: Clause 49 of the Listing Agreement is amended from time to time but there are no immediate plans to introduce a new corporate governance code.

However, SEBI has indicated in a press release of February 2011 that it proposes to make a recommendation to the MCA to "suitably amend" the Companies Bill 2009, "to disallow interested shareholders from voting on special resolutions in relation to prescribed related party transactions". Advised the world's largest retailer regarding entry strategy in India and its joint venture with an Indian company.

- Advised Corning Inc. USA, which is the world leader in the manufacture of optical fibre, in relation to their 50:50 joint venture with Finolex Ltd.
- Advised Del Monte Pacific Ltd., one of the largest manufacturers of packaged fruits and vegetables in the world in establishing a joint venture with an Indian partner for the purpose of producing packaged fruits and vegetables.
- Advised extensively on the restructuring of trusts and societies running educational institutes in India. The advice included establishment of a special purpose vehicle to outsource certain activities for the better functioning of the educational institutes, merger/demerger aspects of trusts and societies and land issues connected with it.

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