



EXPLORING THE DEBATE ON CRIMINALIZING CORPORATE OFFENCES IN INDIA

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Abstract:

When we think of crime, our minds often conjure up images of murder, theft, robbery, rape, or assault - crimes that are more visible and sensational. However, the narrow perception of crime solely in terms of these violent acts overlooks the reality of economic and corporate offences, commonly known as white collar crimes. These types of crimes are often complex and technical in nature, and do not require physical presence for their commission. According to Australian criminologist John Braithwaite, corporate crimes can be defined as "the conduct of a corporation or its employees, acting on behalf of the corporation, which is prohibited and punishable by law." Corporate crimes have indirect effects on the public, and dealing with them in court can be challenging as determining appropriate penalties for corporations can be perplexing.

This paper delves into the position of Indian jurisprudence on corporate offences and the ongoing debate around their decriminalization. The authors also highlight the impact of corporate crimes on the general public and the role of corporate governance in their commission and prevention. The paper sheds light on the fact that corporate offences are not victimless crimes, and their consequences can be far-reaching, affecting not only shareholders and investors but also employees, consumers, and the overall socio-economic fabric of society. The complexities involved in prosecuting corporate crimes and imposing penalties are also discussed, as the technical nature of these offences can make it difficult to hold corporations accountable.

The paper emphasizes the need to recognize the seriousness of corporate offences and to ensure effective deterrence against corporate misconduct. It also explores the concept of decriminalization of corporate offences, considering the pros and cons of such an approach. While some argue that decriminalization may reduce the burden on the criminal justice system and facilitate ease of doing business, others caution against diluting the deterrence effect of criminal sanctions. The role of corporate governance in preventing and addressing corporate offences is also examined, as strong corporate governance practices can play a crucial role in minimizing the risk of corporate misconduct.

In conclusion, this paper highlights the need for a nuanced and balanced approach towards corporate offences in India. It underscores the importance of acknowledging the impact of white collar crimes on society, and the need for effective mechanisms to hold corporations accountable for their actions. The paper calls for further research and discussion on the topic to arrive at a comprehensive and well-informed approach towards addressing corporate offences in India, while upholding the principles of fairness and justice.

Index Terms - Corporate crimes, criminal offence, Corporate Governance, civil wrong, white collar crime.

INTRODUCTION

“The grandeur of thieving falsity is larceny, the fall of cities.”^[1]

The word crime mostly invokes a tachistoscopic visual of murder, theft, robbery, dacoity, rape or assault etc in our minds and perhaps the most probable reason for this peculiarity is that the above-mentioned activities feel daunting to mankind and are immediately discerned as something morally wrong by our conscience. People collective as a society feel an urge to curb them and therefore these kind of horrendous activities have been penalized by the laws of nation. However the problem with limiting the perception of crime to the conscience is that society fails to acutely acknowledge the white collar crimes specifically economic and corporate offences due to their technical nature and also on the grounds that there is no physical presence required in commission of white collar crimes. These economic miscreants are usually savvier than their street crime counterparts. Monetary offenses are undeniably more alarming for general public as enormous companies have become a kind of private government, for their activities and strategies have impact on zillions of individuals and networks. Also not to mention corporations have the ability to influence a region's economy and politics thus making corporate crimes a major problem.^[2]

Common public bears financial consequences of corporate and economic crimes, which are largely indirect, such as the loss of resources due to tax evasion and public frauds, which affect spending on public amenities and services. For instance the major capital market scam done by Harshad Mehtain 1992 amounted to total sum of rs.4,000 crores^[3] which was followed by another capital market scam done by C R Bhansali that took place in the same time period was of worth rs.1,200 crores resulting in siphoning a sum of total rs.5,200 crores from market. If we take a closer look at the money sanctioned by union government of India for rural development program in the budget of 1992 and then again looking back at money lost in capital market scam, it can be concluded that union government allocated rs.2, 610 crores for rural development program whereas the capital market scam was of worth rs.5, 200 crores which is nearly double of what union government gave for rural development program. Additionally these fiscal affect foundations of small financial backers can endure an extraordinary loss, including mental agony brought about by the deficiency of resources and monetary stability.

AFFECTS OF CORPORATE CRIMES

Earlier in the paper authors gave a mere glimpse of what corporate crimes can do to society and people, for instance people are affected by health and safety concerns resulting from the disregard for regulations, which include industrial operations such as construction sites where passers-by are harmed by risky practises. Residents and people have been killed and injured in explosions, as well as being harmed by toxic chemicals released, the most well-known of which occurred in Bhopal, India where 3000-5000 people were killed and many more were affected by the leak of methylisocyanate in the air.^[4]

According to the World Health Organization, more than 138 million people have died as a result of medical negligence, which includes things like hospital workers giving the wrong therapy to patients, injecting the wrong medicine into a victim, and so on. Another sort of hospital negligence is the incorrect and unlawful dumping of medical waste, which causes problems for persons as well as the environment due to its hazardous qualities.^[5] As indicated by the World Health Organization (WHO), improper clinical garbage removal (mostly the utilization of tainted hypodermic needles and needles) brought about 21 million diseases of Hepatitis B, 2 million contaminations of Hepatitis C, and 260,000 instances of HIV in the year 2000. White collar crimes were clearly visible during the serious condition of covid-19, many people took advantage of pandemic in pharmaceutical and medical industry which affected the public at large which also raises questions about the government. For instance Himachal PPE Scam is one of the scams in which political parties were also involved in order to profit from the provision of PPE rather than taking remedial actions.^[6]

Many places of recreation are likewise affected by white-collar crime. Consumers may suffer financially as a result of having to pay higher costs as a consequence of fraud in sports, and the 'quality' of sport may suffer indirectly as a result of corruption. Many consumer frauds take place at recreational facilities, such as overcharging for beverages at large-scale gatherings when it is expected that people will be less watchful.

Companies are now involved in a considerably broader spectrum of crimes than previously thought. Price fixing, stock market manipulation, insider trading, anticompetitive market manipulations, the formation of illegal cartels, the manufacture of highly dangerous products, employment offences, bribery, tax evasion, industrial espionage, and now even corporate manslaughter^[7].

ON PENALIZATION OF CORPORATE OFFENCES

“Unhindered corporate force creates exorbitant social harm.”

Since organizations are more powerful than people, it has been determined that organizations can do more prominent damage than people acting individually. Australian criminologist, John Braithwaite simply defines corporate crimes as “The conduct of corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law.”^[8] Although corporate offences are not authentically defined anywhere under Indian laws, its elemental structure is derived from Section 11 of Indian Penal Code, 1860 which states that “the word person includes any Company or Association or a body of persons, whether incorporated or not.”^[9] Implicating the idea that businesses shall be penalized in the same way as a natural person. Although it is very obscure to understand that how a business (unit) can be imprisoned as a natural person.

The aforementioned fallacy of Indian jurisprudence on penalization of corporate illegalities was addressed in the judgment of *The Assistant Commissioner v. M/S. Velliappa Textiles Ltd. & Anr* by Hon’ Justice B. N. Srikrishna, he stated that “The first respondent is a company, a juristic person, and therefore, incapable of being punished with a sentence of imprisonment, which is mandatory under the provisions of Sections 276C and 277. Hence, the prosecution under these Sections against a juristic person like a company is not maintainable, even if by reason of Section 278B some other persons connected with it and responsible for running the business of the company can be held liable for the offence.”^[10] This legal difficulty arising in penalization of corporate offences was also noticed by Law Commission of India and in its 41st report suggestion for amendment of section 62 of IPC was made. The law Commission recommended adding the following lines in section 62 of IPC “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.”^[11] To clarify this subject a bit more, Law Commission again in its 47th report recommended via paragraph 8 that: In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in the case of economic laws. We, therefore, recommend that the following provision should be inserted in the Penal Code as, say, Section 62:-

"(1) In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

(2) In every case in which the offence is punishable with imprisonment and any other punishment not being fined, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

(3) In this section, 'corporation' means an incorporated company or other body corporate, and includes a firm and other association of individuals.”^[12]

Relying on these recommendations by Law Commission of India Supreme Court in the landmark judgment of *Standard Chartered Bank & Ors v. Directorate of Enforcement & Ors* ^[13] said that there is no blindfold immunity for any organization from the prosecution of offenses in light of the fact that the offence committed requires a mandatory imprisonment. The apex court hereby concluded that in instances of offenses which command both detainment and fine, the corporate shall be liable for the payment of fine only. This historic judgment set the precedent for all forthcoming cases against corporate crimes in India, until recently in 2019 when Ministry Of Corporate Affairs decriminalized 16 out of 81 compoundable offences listed under Companies Act, 2013^[14] through the Companies (amendment) Act, 2020. To further decriminalize Company offences following changes were also made under Companies (amendment) Act, 2020:-

- 23 offences that related to minor illegalities were re-categorized from criminal offences to issues that can be resolved by In-House Adjudication Mechanism.
- 7 offences were omitted from the Companies Act as they were better dealt by other provisions of law.
- 11 offences that have subjective determination and are not of very grievous nature may contain the penalty of just offence rationalized fine.

Even though these latest amendments in Companies Act, 2013 decriminalized most of the offences listed under the act. Offences which are non-compoundable and grave in nature still attract criminal liability.

The issue of criminalization of illegal acts of corporations has always been of controversial nature and with ever evolving status of Indian jurisprudence; corporate criminal liability has always attracted conflict of opinions among legal fraternity. Enforcement of Companies (amendment) Act, 2020 by Government of India has again ignited a spark in the contemporary debate that should a company be penalized under criminal laws of India or should its offences be treated as civil breaches of law as company is not a real person and it cannot be imprisoned.

Authors further in paper discuss pros and cons of decriminalization of corporate offences.

Arguments in favor of decriminalization of corporate offences:-

Easing the workload of Indian Judicial Forum

Disproportionate ratio between numbers of cases per court has left Indian justice system overwhelmed with plethora of pending cases. According to data collected by National Judicial Data Grid (NJDG) in June, 2021 a ginormous total of 2, 85, 23,812 ^[15]criminal cases still remain pending before Indian courts. To lighten the burden on judicial forums and to ensure speedy trials to corporate, Companies (amendment) Act, 2020 under section 454 introduced In-house Adjudication Mechanism (IAM)^[16].

According to the IAM Framework, a mediating official ("AO") is given authority to settle offenses by charging the applicable penalty from the defaulting organizations and additionally from officials' in-default. Orders of the AO are appealable to the local chief ("RD") of the MCA. NON-compliance of such orders (of the AO or the RD) draws in criminal consequences. As a compelling obstruction, rehashed defaults within a period of 3 (three) years from the date of settlement under the IAM Framework attract higher penalty.

Legislative introduction of IAM has reduced the burden on special courts such as NCLT by eliminating minor and technical offences such as non maintenance of registers^[17], etc from their jurisdiction. This framework also provides cost and time effective disposal of cases as opposed to traditional prosecution method.

Civil prosecution of company offences would be more proficient.

A few professionals contend for corporate criminal offenses to be totally replaced by civil prosecution as criminal trials are complex and time consuming and it is very strenuous to establish corporate criminal liability. Essential pre conditions for a criminal trial are presence of mens rea i.e. guilty mind and actus reus i.e. the wrongful act. As for manifesting corporate criminal liability prosecutors and the authorities struggle to demonstrate mens rea of a non natural person, a company. Therefore imposition of a civil suit for procedural defaults of a company benefits organizations as well as the controllers, since it would eliminate the necessity of demonstrating mens rea which is a precondition in criminal trials. In Director of Enforcement v. MCTM Corporation^[18] Supreme Court held that civil liability is imposed for 'blameworthy conduct' and that guilty intention is not a *sine qua non*. In addition, the threshold for burden of proof is higher for criminal offences, which must be proved 'beyond all reasonable doubt' whereas it is sufficient to establish 'preponderance of probability' for imposing civil liability.

Ease of doing business

The main raison d'être of government behind decriminalization of offences under company law is to attract foreign investments and promote small businesses growth through relaxed and liberalized business laws. The ambiguity and tediousness of lengthy court procedure required for doing business in India has been a major discouragement for foreign investors establishing business in India. The agitation of attracting criminal ramifications for minor and frivolous matters among the business owners additionally go against the policy of ease of doing business. Decriminalization of such matters will fundamentally urge business owners and probable investors to undertake business ventures in the nation, without dreading of any criminal consequences.

Arguments against decriminalization of corporate offences:-

Scrapping of criminal sanctions may increase corruption.

The existence of stringent penal provisions keep corporate sector of the nation in check. Decriminalization of company wrongs and replacing rigor punishments with mere fine may adversely affect corporate responsibility towards state and public. It could likewise trigger intentional infringement of law with the agreement that the punishment forced would be significantly less than the benefit acquired from the law breaking.

Fixed penalties are prejudiced towards businesses with huge turnover.

India is a land of diverse businesses with different turnovers, ranging from rupees fifty thousand to fifty thousand crores and imposition of a fixed penalty on companies of varying sizes is restrictive and arbitrary in nature. As Supreme Court pointed out in *Adamji Umar Dalal v. State of Bombay* ^[19] situations related with the incident of wrongdoing ought to be considered while choosing a specific punishment for a offense. If not, there can be cases with extraordinary conditions, which if not considered would prompt an inordinate punishment being forced, accordingly making colossal damage to an individual. Imposition of fine for commission of crimes is only beneficial if it has repercussions. A company with huge turnover suppose of twenty million may consider payment of rupees 1 lakh as penalty a minimal fee it has to pay for achieving its desired objective. While on the other hand a penalty of 1 lakh may make a company with turnover of rupees 50 thousand bankrupt. Moreover imposition of a fixed penalty may have adverse effect on investors and financiers of a company contradicting the basic aim of attracting foreign investors.

ROLE OF CORPORATE GOVERNANCE IN CORPORATE CRIMES

Corporate crimes have an indirect concerning effect on the public, and dealing with cases of corporate crimes in court is also a tedious task as it is confounding to decide how to penalize corporate. As an outcome, the quote "prevention is better than cure" holds relevance over here and how corporate governance should be given high priority in order to prevent corporate crimes.

Corporate governance in a concise way can be defined as a framework for managing and supervising companies.^[20] In this sense, corporate governance is a set of processes that allow a corporation to function where ownership and management are separate, it establishes a framework within which the company's goals are set, methods for achieving them are developed, and the owner's oversight of the company's operations is exercised. If the corporate governance structure is sound, it will provide effective incentives to achieve the objectives in the company's and hold shareholders' best interests. This in turn will help to improve the efficiency of operations oversight, which as a consequence will have a direct impact on resource utilisation.

Corporate governance is the way in which the shareholders, directors, management, and suppliers, as well as employees, primary clients engage with one another in a limited liability corporation. Corporate governance principles, both formal and informal, can be found in every nation's legal, institutional, and regulatory structure. Great corporate governance ought to give legitimate incentives to the Board of Directors and the executives for accomplishing goals that are to the greatest advantage of the firm and its investors, and make management activities simpler and more proficient

Corporate governance is subject to a steady and proficient general set of laws just like an institutional climate that takes into consideration the arrangement of organizations and their suitable activity. In any case, such an atmosphere might be set up by sure turn of events, which will prevent abuse of power, and speculations won't be made until enterprises are sure that the undertaking's danger and the "state's" hazard are both reasonable.

Considering the corporate governance framework, the OECD recommended (1998) to national governments and other relevant international institutions such as the World Bank and the private sector to define corporate governance rules and principles. The principles constitute a broad framework that governments consider essential for the development of good governance practices. They should be concise, comprehensible, and accessible to the international community, and they should concentrate on the following:

1. Establishing a foundation for effective corporate governance
2. Shareholder rights and their involvement
3. Transparency
4. Board responsibility ^[21]

However weak corporate governance can create frictionless way for corporate crimes. One such paradigm of weak corporate governance can be seen in the case of '*Satyam Scam*'. Satyam scam was India's largest corporate fraud carried out by manipulating the company's income statements, cash flows, and balance sheet for over seven years as admitted by B. Ramalinga Raju, the founder and chairman of Satyam Computer services.

Overstated revenues and earnings were part of the \$1.47 billion fraud on Satyam's balance sheet, which was conducted by the company's founder and his brother, the CEO, in order to attract more business and avert a hostile takeover. "It was like being on a tiger and not knowing how to get off without getting eaten," said Raju in his confession statement [22]. Satyam had been widely praised for exceptional corporate governance, and Raju had been regarded as a role model for successful business and entrepreneurship. The founder and his co-conspirators recorded fraudulent cash deposits, misstatements of accounts receivables and payables, understated liabilities, and exaggerated assets; these deceptions were only exposed when Raju attempted to buy two additional family-owned businesses. Shareholders were outraged by the proposed acquisition because they saw it as an attempt to prop up other struggling family firms by siphoning funds from the thriving software company.

Indian shareholders have already lost more than \$2 billion in corporate crimes and weak governance since 2003, [23] even before the Satyam affair broke. Only 4 out of 68 Indian companies were found to adhere to "highly desirable" disclosure standards in a report released on January 7, 2009 by an analyst at one of India's leading investment houses; more than half of the companies on the list that did not make the grade were well-known companies with significant global presence. [24]

In all authors contend that corporate government has a major role to play in a company illegal activities. Ethical governance may keep irregularities on part of the firm under check while bad corporate governance with rampant opportunist behavior may feloniously affect company activities.

CONCLUSION

Corporate offences and government efforts to curb them are not new in India. What started with liberalization policy in 1991 is being carried forward with CAA, 2020. The motive of government behind all the efforts to decriminalize the offences of corporations is to de clog the justice system and to increase growth of businesses in India. The maxim "*lex non cogit ad impossibilia*" i.e. law does not contemplate which cannot be done precisely defines the situation of Indian courts on criminal liability of corporate units.

Keeping in view the above stated legal maxim authors of this paper believe that Companies Act (Amendment), 2020 with help of good corporate governance can curtail corporate offences to a great extent.

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