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Prosecution Architecture under Companies Act 2013

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ABSTRACT

Corporate laws form the bedrock of commercial regulation by governing entry of corporates into the market, regulating their functioning, ensuring accountability to their shareholders, also laying down corporate governance norms. Over the years, India has witnessed a significant shift in its corporate governance framework. In the recent past, the most important legal reforms in India is the enactment of Companies Act, 2013 ("2013 Act"), was aimed at bringing Indian company law in tune with universal values. The enactment of 2013 Act and various legal reforms undertaken since then in the field of companies' law have been intended to promote formation of corporate structures for leading industry, and making such conduct of corporate easier. This paper proposals the stable progress of criminal law into fields that had earlier been addressed by civil statutes, mainly with respect to the concept of corporate criminal liability. The article as well defines that federal government has motivated cooperation among corporations that are being investigated and their investigators. This major shift in how corporate misconduct is treated by federal government has reframed the part of a criminal defense attorney who defends corporations and executives. Any lawyer handling this task should be eager to include fresh policies into daily practice however as well assessing the theoretical considerations governing what it means to "bet the company."

Keywords: Criminal law, Corporate Social Responsibility (CSR), Companies Act, corporate

INTRODUCTION

Corporate fraud is a worldwide scenario which affects all countries and all sectors of the economy. Corporate Fraud includes a wide-range of illegal acts and illegitimate practices involving misrepresentation, intentional deception. (Bhasin M. L., 2013).

The first initiative that US government has taken was the passing of Foreign Corrupt Practices Act in the year 1977 for ensuring sound corporate governance practices. It was mainly dealt with the systems of internal control. As high-profile failures were emerging the Treadway Commission was incorporated in the year 1985 which highlighting the necessary requirement for constituting Independent Boards and Committees. It was constituted for ensuring transparency with regard to the financial position of the company and other vital issues. In the year 2002 After Enron collapse, the US legislator enacted the SOX Act to protect investors from the possibility of fraudulent accounting activities by corporations. SOX mainly dealt with auditor’s independence and financial disclosures.

When corporate governance practices were emerging around the world, India was lagging behind. In India, corporate governance gained prominence in the wake of liberalization during the 1990s. The reform of SEBI was the most significant initiative of 1992. At that time the main role of SEBI was to control and supervise the stock trading activities, with this SEBI also formed many corporate governance rules and regulations. After that it was also introduced as a voluntary measure by the Confederation of Indian Industry (CII) in 1996, at that time it created the set of laws which have rules and guidelines for Indian corporations as to initiate the act towards corporate governance. on May 7, 1999, two committees Narayan Murthy and Kumar Mangalam Birla was formed under Securities and Exchange Board of India in order to deal with insider trading and insider information, and also draft a code for best corporate governance practices. Based on the suggestions provided by these committees, Clause 49 was introduced so that the standards of Corporate Governance can be raised and promote. Timely it was reformed to incorporate and overcome the problems and contained all the regulations and requirement.

As the economic and social context changed, so too did corporate enforcement. The conventional crime monopoly became more fragmented because a variety of specialist agencies were established to police and prosecute corporate wrongs, colonising functions formerly held by government departments and conventional crime fighters. The Office of the Director of Corporate Enforcement (ODCE), for example, created in 2001, was the first agency dedicated to the enforcement of company law. Moreover, it is an interdisciplinary agency, combining lawyers, accountants, and police, and it has more significant resources and extensive powers. Additionally, corporate wrongdoing was further criminalised, such that there were approximately 400 criminal offences in the Companies Acts 1963–2001. Moreover, these offences are more likely to employ regulatory crime strategies, like strict liability and reverse onus provisions. For example, Section 100 of the 2001 Act repealed and replaced Section 383, noted above, removing the need to prove that company officers have acted intentionally in over 90 offences that apply to both companies and to every officer in default. So, while once the State had to prove that the accused had acted intentionally (or "knowingly and wilfully" to use the language of the Act), now the accused must not only prove that he did not act intentionally, but also that he has not acted recklessly or negligently. This blanket reversal of the burden of proof requires officers to prove their own innocence by showing that they did everything they reasonably could have done to prevent the wrongdoing from occurring. Moreover, as noted by Cahill, Section 383(3) specifies that "whenever a company fails to comply with a requirement of the Companies Acts, every director has

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automatically committed a breach of duty. This heightens considerably the likelihood of enforcement of the provisions of the Companies Acts against individual directors".

The Act of 2013 intends to promote self-regulation and has also introduced some progressive concepts like One-Person Company, Small Company, Dormant Company, E-governance etc. The concept of Corporate Social Responsibility has also been introduced to encourage a socially, environmentally and ethically responsible behavior by companies. The Act of 2013 further aims to fortify investor protection and transparency by introducing terms like Insider Trading, Price Sensitive Information, Class Action Suits and other additional disclosures. A National Company Law Tribunal will also be a reality now and therefore the matters which used to linger in courts for years will be swiftly handled by this dedicated tribunal.

The scope and extent of the auditor's liability, has been substantially enhanced under the 2013 Act. Now, the auditor is not only exposed to various new forms of liabilities, however, these liabilities prescribed in the existing 1956 Act have been made more please. The auditor is now subject to oversight by multiple regulators apart from the ICAI such as The National Financial Reporting Authority (NFRA, and the body replacing the NACAS) is now authorised to investigate matters involving professional or other misconduct of the auditors. The penalty provisions and other consequences that an auditor may now be subject to as per the 2013 Act includes monetary penalties, imprisonment, debarring of the auditor and the firm, and in case of frauds, can even be subject to class action suits.

Duties of an Auditor the major duties of an auditor are:

1. To complete audit work papers;
2. To update professional and technical knowledge;
3. To ensure adequate disclosures;
4. To attend general meetings;

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5. To communicate audit findings;

6. To give reasons for qualifications;

7. To sign the audit report; and

8. To ensure compliances of the audit report.

The auditor is bound to fulfil certain duties under the Companies Act, 2013. The followings are the duties of an Auditor while auditing the Financial Statements of an organisation:

1. To ensure compliances with establish internal control procedure by examining records; reports, operating practices and documentation;

2. To verify assets and liabilities with documents;

3. To employ reasonable skills and care;

4. To complete audit work papers by documenting audit tests and findings;

5. To communicate audit findings by preparing a final report and discussing findings with the auditee;

6. To give reasons for qualifications or obligations;

7. To sign the audit report;

8. To attend the general meeting or meeting of audit committees of Directors etc;

9. To make adequate disclosures in the audit report; and

10. To update professional and technical knowledge by attending educational workshops, Seminars, lectures through reading of various publications.

PROSECUTION UNDER COMPANIES ACT 2013

The Companies Act, 2013 passed by the Parliament has received the assent of the President of India on 29th August, 2013. The Act consolidates and amends the law relating to companies. The Companies Act, 2013 has been notified in the Official Gazette on 30th

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August, 2013. Some of the provisions of the Act have been implemented by a notification published on 12th September, 2013. The provisions of Companies Act, 1956 is still in force. It is provided that when the Central Government is of the opinion that it is necessary to investigate the affairs of a company by the Serious Fraud Investigation Office-

(A) on receipt of a report of the Registrar or Inspector under section 208;

(B) On notice of a special resolution passed by a company which requires its affairs to be investigated;

(C) in public interest; Or

(D) On request from the Central Government or any department of the State Government,

The Central Government may, by order, entrust the investigation of the affairs of the said company to the Serious Fraud Investigation Office and its Director, determine the number of such inspectors as it may consider necessary for the purpose of such investigation.

It is also provided that where any matter has been entrusted to the Serious Fraud Investigation Office by the Central Government for investigation under this Act, the Central Government or any other investigating agency of any State Government shall, in relation to any offense, Under this Act shall not proceed with investigation in such kind of case and if any such investigation has been started, it shall not be carried forward and the agency concerned Serious fraud will transfer the relevant documents and records in relation to such offenses under this Act to the Investigation Office.

It is also mandated not only on part of company but as well its officers and employees, who are or have been in employment of company to take responsibility to offer all data, explanation, documents and assistance to Investigating Officer as he may want for conduct of investigation.

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OBJECTIVES OF THE STUDY

a) To compare the Indian Companies Act, 2013.

b) To understand the points where Indian Companies Act, 2013 has got an edge

c) To know the various developments in country related to Companies Acts.

d) To understand the need of having a very comprehensive and revamped Companies Act.

e) To understand their role in ensuring better corporate governance.

RESEARCH METHODOLOGY

The present study is an attempt of exploratory research, based on the information collected from various secondary sources such as books, research journals available online, newspaper articles, various websites, bare acts and magazines in order to achieve its objectives. Our study covers the analysis of Companies Act of India.

SERIOUS FRAUD INVESTIGATION OFFICE (SFIO)

Companies Act 2013 provides for establishment of a Serious Fraud Investigation Office to investigate into the affairs of the Company on an order by the Central Government and where any case has been assigned to the SFIO, no other investigating agency shall proceed with investigation in such case. The Investigating Officer of SFIO shall have all the powers of a civil court while trying a suit.

If the Director, Additional Director or Assistant Director of Serious Frauds Investigation Office authorised in this behalf by the Central Government has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred earlier in this write up as "cascading effect of Section 447, he may arrest such person present him before the Judicial Magistrate or a Metropolitan Magistrate within 24 hours.

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For this purpose the Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a Company.

Therefore under the provisions of Companies Act 2013, SFIO has got statutory status as proposed therein. Investigation report of SFIO filed with the Court for framing of charges shall be treated as a report filed by a Police Officer. SFIO shall have power to arrest in respect of certain offences of the Act which attract the punishment for fraud. Those offences shall be cognizable and the person accused of any such offence shall be released on bail subject to certain conditions provided in the relevant section of the Act. Stringent penalty is provided for fraud related offences.

However it is also provided that until the Serious Fraud Investigation Office is established under subsection (1), the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated the 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

It is provided that when the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office-

(a) on receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government,

the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

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It is also provided that where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.

It has also been prescribed in the Companies act that where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in report to the Central Government within such period as may be specified in the order. In such case the Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.

It is also mandated not only on part of the company but also its officers and employees, who are or have been in employment of the company to take responsibility to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

INFAMOUS CORPORATE FRAUDS IN INDIA

Corporate frauds have shown an unprecedented increase in India in recent years and have posed serious questions before managers, regulators and professionals, on the effectiveness of corporate governance mechanism, regulatory mechanism, and the role of corporate and individual ethics.Probably the first major corporate scam in the Independent India was what is commonly referred to as the Mundhra scam. Hari Das Mundhra, an industrialist and stock speculator, sold fictitious shares to the Life Insurance Corporation of

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India (LIC) and thereby defrauded the corporation by Rs. 1.25 crore, in 1957. He was found guilty and was sentenced to imprisonment for 22 years. The then Union Finance Minister, T.T. Krishnamachary, had to resign from his prestigious post in the face of scathing criticism within and outside Parliament. After the HaridasMundra case of 1957, another major scam in the mid-sixties and early-seventies, was associated with Jayanti Dharma Teja. He took loans from banks and financial institutions and used this easy money to establish a shipping empire, in the name of Jayanti Shipping Company Limited. While he had set up this company with a paid-up capital of a mere Rs. 200/- and took government loans amounting to Rs. 22 crore. The infamous cases are summarised in Table.

S. No.	Name of Fraud/ Scam	Year	Nature of Industry	Fraud Perpetrators	Modus Operandi	Amount Involved (Rs. crore)
1.	Saradha Group	2013	Chit Fund	Promoters	Fake Collective Investment Schemes	4000
2.	Bank of Baroda	2015	Money Laundering	General Manager, Foreign Exchange Officer	Created a fraudulent trade circuit, where exports claim duty drawback on inflated export bills and creation	6172

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					of shell Companies to make payment for nonexistent imports	
3.	PACL	2015	CIS including Ponzi Scheme	Founder and KMP	Lure investors by raising money against bogus land allotment letters.	47000
4.	Vijay Mallya	2016`	Airlines	Promoters	By criminal conspiracy cheated the consortium of banks by way of over invoicing, misrepresentation in diverting the outward remittances, layering and integration through a	9990

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					complex web of financial transaction	
5.	Rotomac	2018	Manufacturer of Pen	Promoters	Cheated consortium of 7 banks by siphoning of bank loan as diverted the s anctioned loan to another fake company from where the money was routed back to Rotomac.	3695
6.	Nirav Modi	2018	Diamond & Jewellery	Promoters & PNB executives	Core banking system of the bank was bypassed as the PNB employees issued fake LoUs to overseas branches of other Indian bank by using the	14356

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					International Financial Common System, SWIFT.	

LEGAL PROVISIONS FOR PENALTIES AND PUNISHMENTS IN INDIA AS PER COMPANIES ACT, 2013

The Indian Companies Act, 2013 also imposes stricter criminal penalties if specific violations including noncompliance made by directors and officers. This Act covers a wide range of violations made by any person either he belongs to officers or not. Under this new Act, there is also a provision for imprisonment along with penalties for any individual who found guilty for any kind of conduct which results into fraud under the Act. There is also provision for monetary penalties which arise in the case of failure to discharge duties as per under section 2(60). Apart from these general duties, statutory duties are also defined in the Companies Act, 2013 which related to statuary requirements fulfilled by the directors including the filing of personal details during incorporation, the disclosure of personal and professional interest, etc

LEGAL PROVISIONS FOR PENALTIES AND PUNISHMENTS IN INDIA AS PER COMPANIES ACT, 2013 (Source: The Indian Companies Act, 2013)

Indian companies Act, 2013	**Related to**	**Penalties and Punishments**
Sec. 447	Punishment for fraud	Imprisonment of not less than six months and may extend to ten years. Fine is not

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		less than the amount involved in and may extend to thrice the amount. If the fraud involves public interest then the imprisonment would not be less than three years.
Sec. 448	Punishment for false statement	The punishment is the same as applicable for fraud
Sec. 449	False proof	There is a provision for a term Imprisonment which will not be less than 3 years and can extend to 7 years and with fine which can increase to rupees 10 lakh.
Sec. 450	If there is no any provision for penalty	Monetary penalty of 10 thousand rupees and if the contravention is an ongoing offence, then further fine extending to 1 thousand rupees for each day
Sec. 451	Repetitive default	Punishable for double the amount of penalty, with any imprisonment for the same
Sec. 452	Unlawfully withholding of property	Fine not less than 1 lakh rupees but it can extend to 5 lakh rupees. There is a provision for imprisonment which is 2 years and when Court may ordered restoration of property and in default thereof

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Sec. 453	Punishment for improper use of the word "limited" or "private limited"	Fine of not less than 500 rupees but it can extend to 2000 rupees for each day during which the title or name has been used

DEVELOPMENTS IN COUNTRY RELATED TO COMPANIES ACTS

According to Van Luijk (1993) the corporation is seen as a party which does have the (social) responsibility to voluntarily contribute to the achievement of a reasonable level of prosperity in society. However, increasing globalization and a growing mistrust has brought some corporate ethical business scandals.

In India, there has been a call for CSR legislation for social development and charitable activities since 2000. However, due to strong oppositions from companies, it was put on hold until 2010. It was replaced by a recommendation for companies to participate in community development and charitable activities. In 2011, the Companies Bill, containing CSR provisions, was passed by the Indian House of Representatives (Lok Sabha). On August 9, 2013, this bill was finally passed by the Upper House of the Indian Parliament (Rajya Sabha) and become the Companies Act, 2013.

The CSR committee within the company will be governed by the companies and have two or more members of the company and one member as an independent director from outside. The role of the CSR committee is defined in Section 135 of the Act. The main functions of CSR committee are to formulate and recommend to the Board a CSR policy that indicates the activities to be undertaken by the company as specified in Schedule VII of the Act; to

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recommend the amount of expenditure to be incurred on CSR activities; and to monitor the corporate social responsibility policy of the company from time to time. So, this committee acts in providing information on CSR norms to the companies, planning CSR activities, assisting and approving CSR policies and activities; and monitoring the same. The Companies Act affirms that companies must disclose any information requested by the government. The Companies Act, 2013, sets up a system of internal and external controlling mechanisms of companies for CSR.

CONCLUSION

There are certain mechanisms that have been cited by the Government by which the frauds can be prevented under the Companies Act 2013.Section 211 empowers the Central Government to establish an office called Serious Fraud Investigation Office (SFIO) to investigate frauds relating to companies. No other investigating agency shall proceed with investigation in a case in respect of any offence under the Act, once the case has been assigned to SFIO. The SFIO has power to arrest individuals if it has reason to believe that he is guilty based on the material in possession. SFIO shall submit a report to the Central Government on conclusion of investigation. Central Government may direct SFIO to initiate prosecution against the company. SFIO shall share information they possess regarding a case being investigated by the latter and vice versa.

Auditors shall report material fraud to the Central Government within 30 days. Immaterial fraud shall be reported to the board or the auditor of the company. Audit committee is required to monitor that every listed company shall establish a vigilance mechanism for directors and employees to report genuine concerns. The vigilance mechanism shall provide for adequate safeguards against victimization of persons who use such mechanism. It shall make provision for direct access to the Chairperson of the Audit Committee in appropriate cases.

Independent directors shall report concerns about actual or suspected fraud. They must also ascertain and ensure that the company has an adequate and functional vigilance mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.

Central Government can order investigation into the affairs of a company on the receipt of a report of the Registrar or inspector; on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or in public interest.

The focus of this study is on Prosecution architecture under companies' act 2013. The paper covers the major corporate companies involved in the crime.Legal Provisions for Penalties and Punishments in India as per Companies Act, 2013 are discussed and the various penalties and punishments related to the act are tabulated. Developments in country related to Companies Acts are also discussed.

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