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INDIA'S DECRIMINALISATION POLICY: The Past, Present, and Future of Governance, Risk Management, and Compliance under the Companies Act, 2013

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INDIA'S DECRIMINALISATION POLICY: The Past, Present, and Future of Governance, Risk Management and Compliance under the Companies Act, 2013

Harpreet Kaur*

[Abstract: *The Companies Act, 2013 was amended twice by the Companies (Amendment) Acts, 2019 and 2020. The main objective of such amendments was to decriminalise certain offences by removing the criminal liability under the Companies Act. The amendments had decategorized certain offences, removed criminal liability, reduced penalties and omitted certain redundant offences. Five years have passed since the efforts were made for the decriminalisation of the Companies Act, 2013 which makes it essential to know and ascertain whether the efforts of decriminalisation have been fruitful i.e. to assess the impact of such exercise. The present paper is proposing to investigate the past and the present impact of such decriminalisation drive on the governance, risk management and compliances under the CA, 2013 and present views to forecast the need, if any for further decriminalisation or to improve the processes involved to make a meaningful impact of the decriminalisation exercise in the future. Part I of the paper introduces the topic, Part II provides a background information how the offences and penalties were dealt by the erstwhile Companies Act, 1956. Part III gives the information about offences and penalties covered under the present Companies Act, 2013. Part IV distinguishes between criminal and civil liability and their treatment in economic legislations. Part V discusses decriminalisation policy regarding GRC (Governance, Risk management and compliance) whereas Part VI informs the readers about the impact of decriminalisation on Governance, Risk Management and Compliances. Part VII critiques the decriminalisation process and final part brings conclusion to the paper.*]

I

Introduction

India enacted the Companies Act in 2013[1] and repealed the old Companies Act, 1956. The Companies Act, 2013 (hereinafter referred to as CA, 2013) was amended twice by the Companies (Amendment) Act, 2019 (hereinafter referred to as CAA,

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1 Th Companies Act, 2013.

2019) and the Companies (Amendment) Act, 2020 (hereinafter referred to as CAA, 2020) to decriminalise certain offences on the recommendations of the Committee to Review Offences under the CA, 2013 constituted in 2018.[2] The amendments had decategorized certain offences, removed criminal liability, reduced penalties and omitted certain redundant offences. Five years have passed since the efforts were made for the decriminalisation of the Companies Act, 2013 which makes it essential to know and ascertain whether the efforts of decriminalisation have been fruitful i.e. to assess the impact of such exercise. In this context, the present paper discusses the need for decriminalisation to set the background, steps undertaken for ensuring decriminalisation and after having perused the past and the present of the decriminalisation process, analyses the impact of such steps on the governance, risk management and compliances under the CA, 2013, and the way forward.

II

Offences and Penalties Under the Erstwhile Companies Act, 1956

The CA, 1956 provided for governance norms, compliance norms for processes and procedures, submission of relevant documents and maintenance of books, registers and records etc to be followed by companies in India. Violations of such governance norms were defined as offences, with associated penalties.[3] Though it was emphasised that law should enable self-regulation with imposition of greater accountability through disclosures and speedy administration of reasonable legal sanctions.[4] However, such emphasis of the CA, 1956 on encouragement of compliance through self- regulation by companies was not successful and therefore, penalties were prescribed for violations defined as offences.

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[2] Press Information Bureau, *MCA has constituted a 10-Member Committee to review the offences under the Companies Act, 2013*, PIB DELHI (15 Jul., 2018) *available at*: https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1538673.

[3] Ministry of Corporate affairs, REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW- OFFENCES AND PENALTIES *available at* https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/offences-and-penalities.html (last visited 09 Mar., 2025).

[4] Ministry of Company Affairs, REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW 1 (2005) *available at*: https://ibbi.gov.in/uploads/resources/May%202005,%20J.%20J.%20Irani%20Report%20of%20the%20Expert%20Committee%20on%20Company%20Law.pdf (last visited 09 Mar., 2025). Regular filing should be made easy efficient and cost effective. 3.10 Non-filing of documents or incorrect disclosures should be dealt with seriously. Delays in filing should be penalized through non-discretionary late fee relatable to the period of default. There should be a system of random scrutiny of filings of corporates to be carried out by the registration authorities, p. iii; Procedures applicable for statutory compliance should be made simpler and declaration based.

Though the need was felt that a clear definition of what constitutes an offence should be provided under the CA, 1956 Act,[5] the offences under the Act were broadly classified in four categories:[6]

i. Offences punishable with fine only;
ii. Offences punishable with imprisonment or with fine or with both;
iii. Offences punishable with imprisonment only; and
iv. Offences punishable with imprisonment and liable with fine.

Compoundable offences under the Act were clubbed in categories (i) and (ii). Most defaults or violations under the Act were found to be of procedural nature. Around 80% of the prosecution cases were noted to be filed under these two categories only. Compounding was done either by the regional director or the Company Law Board based on the amount of penalty awarded for any offence. Cognizance of non-compoundable offences covered by categories (iii) and (iv) was taken only after the complaint was filed before a trial court. All lapses and defaults by the companies and their directors or officers were proceeded against by filing of complaints in the trial courts as criminal offences. The court procedures were formal and rigid irrespective of the nature of the complaint filed even adjudication of offences of serious nature were not given any priority.[7]

Though it was evidenced that almost half of the registered companies were not complying with filing documents as required under the CA, 1956, the Department of Company Affairs was able to initiate actions only against a few of them. The process of prosecution was considered as one of the major reasons for non- deterrence of punishments.[8] There was no legal framework provided in the Act, which could enable the Departmental authorities to levy penalties and enforce compliance.[9]

It was essential to have a regime of penalties commensurate with the offences and procedures to ensure prompt and effective application of penalties. Therefore, an expert committee was constituted by the Ministry of Corporate Affairs (hereinafter referred to as MCA) to provide necessary steps to improve the regime of penalties

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[5] *Id.,* note 3, Expert Committee on Company Law, at 129.

[6] Ministry of Company Affairs, REPORT OF THE EXPERT COMMITTEE ON STREAMLINING PROSECUTION MECHANISM UNDER THE COMPANIES ACT, 1956 10 (2005) *available at* https://www.mca.gov.in/Ministry/annual_reports/annualreport2007/Expert_Group_Rep_October_2005.pdf (last visited 09 Mar., 2025).

[7] *Id.*

[8] *Supra* note 5, Expert Committee on streamlining prosecution mechanism under the Companies Act, 1956 *at* 6. About 45000 cases of prosecution were reported to be pending and every year the pendency was growing by around 2000 cases; The average period of disposal of cases takes about 5 years and the average cost per case awarded to the Government comes to Rs.573/- and the average amount of fine imposed per case comes to Rs.2,247/-. As a result, the disposal of the cases involving serious breaches of law, which adversely impacted the interests of investors and other stakeholders was delayed considerably, Report of the Expert Committee on streamlining prosecution mechanism under the Companies Act, 1956 chaired by Mr. O P Vaish, Oct 2005 at 6.

[9] *Supra* note 5 at 2.

and related processes to improve efficiency in application of penalties. The committee recommended that all fraudulent behaviour and violation of governance provisions that deprive the shareholders of their rights should be treated seriously and should be addressed through stringent penalties. It was further recommended by the committee that other violations such as inadequate, wrong or fraudulent disclosures should be addressed through suitably deterrent provisions. In matters where shareholders democracy is not allowed to operate or a competitive market for corporate control is not allowed to operate suitable deterrent provision should be provided. Other violations which are of procedural nature and do not irretrievably damage stakeholders' rights should be given a different treatment in the opinion of the committee.[10]

The committee suggested that appropriateness of a penalty should also be seen in context of the damage that the violation of law causes to stakeholder rights and the required deterrent impact commensurate with the damage. Importantly, although the CA, 1956 had certain criminal offences which had imprisonment as a penalty, it was felt that the penalties did not create sufficient deterrence to avoid companies from engaging into such violations. Therefore, it was felt that the existing penalty structure needed to be reviewed and enhanced. Furthermore, it was believed that mere enhancement of penal provisions alone may not be adequate to ensure compliance of the law. There was a need for prompt administration of the legal sanctions on detection of an offence to avoid delays in the prosecution of offences. The onus was put on the state to provide the essential wherewithal for quick redressal of the wrongs committed. It was believed that through quick redressal deterrent signals can be given to others indicating and demonstrating consequences of non-compliance clearly.[11]

A provision for an in-house structure for levying non-discretionary monetary penalties only was required in respect of offences not involving imprisonment. It was recommended that the Central Government should be vested with powers to levy such monetary penalties. A suitable mechanism to transfer all eligible proceedings from courts to in-house structure was also required.[12]

III

Offences and Penalties under the Companies Act, 2013

It seems that keeping in view the experience of no deterrence and the recommendations made by the Expert Committee about the offences and penalties under the CA, 1956, the CA, 2013 ended up having more criminal sanctions to have

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[10] *Id.*

[11] *Supra* note 3, Expert Committee on Company Law, at 2.

[12] *Supra* note 3, Expert Committee on Company Law, *at* 14, 15.

more deterrent effect. The Joint Parliamentary Committee also noted that the penalties provided under the CA, 1956 were nominal and offences were easily compoundable.[13] The CA, 2013 was enacted with multi-fold and manifold criminal liability provisions in comparison to the CA, 1956. The CA, 2013 prescribed criminal sanctions and penalties for a wide range of offenses, including those of a procedural and technical nature and almost all violations were viewed as criminal offences.

The following are the types of punishments provided by the CA, 2013:

1. Liable to a penalty or punishment by way of imprisonment, fine or otherwise
2. Punishable with imprisonment or with fine or with both
3. Punishable with imprisonment and with fine.
4. Liable to a penalty by way of fine only.

The CA, 2013 was amended in 2017 by the Companies (Amendment) Act, 2017 (hereinafter referred to as the CAA, 2017)[14] which amended many provisions relating to violations. It amended Sections 76A (punishments in relation to violation of provisions regarding acceptance of deposits), 132 (penal powers of National Financial Reporting Authority), 140 (violations by auditors), 147 (punishment for contravention of provisions regarding auditors) and 447 (penalty for fraud – adding the option of fines as the only penalty) and introduced fines in place of the penalty or reduced the quantum of fines payable. Furthermore, Sections 446A and 446B were added by the CAA, 2017 which provide the list of factors to be considered by the National Company Law Tribunal (NCLT) while deciding the quantum of fines under the Act and for lesser penalties for One Person Companies (OPCs) and small companies, respectively.

After the enforcement of the Act, it was found that such criminal sanctions were causing a heavy burden on criminal justice administration and impacting the ease of doing business also. It was decided to examine if criminal liability can be converted to civil defaults/liability where violations were technical or procedural in nature. After such decriminalisation exercise, only serious offences would have to be dealt by quasi- judicial or judicial machinery. An effort was also made to see if a trust-based approach towards compliance could be created to adopt fair and transparent business practices now. Therefore, a committee was set up in 2018 for reviewing the offences under the CA, 2013 and recommend on the possibility of decriminalisation for improving the corporate compliance.[15]

The committee through its recommendations, aimed to strengthen the enforcement of law against serious offences by de-burdening the courts on matters of routine

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[13] Ministry of Finance, Government of India, ACTION TAKEN REPORT ON THE REPORT OF THE JOINT PARLIAMENTARY COMMITTEE ON STOCK MARKET SCAM AND MATTERS RELATING THERETO, *available at* https://dea.gov.in/sites/default/files/ATRMay2003.pdf (last visited 09 Mar., 2025).

[14] The Companies (Amendment) Act, 2017.

[15] *See, The Committee to Review Offences under the CA, 2013.*

nature. While making such recommendations, the committee wanted to strengthen the enforcement of law only without diluting the rigours or scope of the enforcement action relating to serious corporate offences.[16]

The committee did not recommend any change for non-compoundable offences whereas it classified compoundable offences in eight categories. Category I included offences involving non-compliance of orders of the Regional Director or Registrar of Companies or NCLT or the Central Government. Category II covered offences due to default in maintaining certain records required under the CA, 2013 whereas category III covered offences vitiating the records of the company due to defaults on account of non-disclosures of interest of persons to the company. Category IV contained corporate governance norms related defaults. Category V included offences resulting from technical defaults about intimation of certain required information to be filed with registrar of companies through filing forms or defaults in sending notices to the stakeholders. Category VI had offences occurring due to defaults involving substantial violations. Such violations can affect the going concern nature of the company or are contrary to larger public interest or otherwise involved implications of serious nature in relation to the stakeholders. Category VII had offences related to defaults of liquidation proceedings. Category VIII included offences that resulted from defaults that are not specifically punishable under any provision of CA, 2013 but are made punishable through an omnibus clause.[17]

The committee noted that s. 441 of the CA, 2013 deals with compounding of offences that are not punishable with imprisonment only or punishable with imprisonment and with fine. It recommended for strengthening in house adjudication mechanism by facilitating an e-in house adjudication mechanism for increasing the transparency. It was believed that such in house mechanism will also make good the default at the time of levying penalty for achieving better compliance.[18] It also recommended enlarging the jurisdiction of the Regional Director by enhancing pecuniary limits for compounding of offences. Now after amendments of the CA, 2013 generally the expression 'punishable with fine' is replaced by the expression 'a penalty of'.

IV

Criminal and Civil Liability

Understanding the difference between the criminal and civil liability is necessary before proceeding the decriminalisation policy of governance, risk and compliance.

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[16] Ministry of Corporate Affairs, REPORT OF THE COMMITTEE TO REVIEW OFFENCES UNDER THE CA, 2013 4 (2018), *available at* https://www.mca.gov.in/Ministry/pdf/ReportCommittee_28082018.pdf (last visited 09 Mar., 2025).

[17] *Id.,* Ministry of Corporate Affairs, *at* 15, 16.

[18] *Supra* note 15.

While criminal fines are punitive in nature and require adjudication by courts, civil penalties are regulatory sanctions imposed by authorities like the Registrar of Companies (RoC) or the National Company Law Tribunal (NCLT).

The Black Law's Dictionary defines 'penalty' as, 'a punishment; a punishment imposed by statute as a consequence of the commission of an offense' and 'fine' as 'to impose a pecuniary punishment or mulct' and 'a sum of money paid at the end, to make an end of a transaction, suit, or prosecution; mulct; penalty'.[19]

It was observed in *McHugh* v. *Placid Oil Co.* that 'the word 'penalty' is broader than word 'fine', which is always a penalty; whereas a penalty may be a fine or it may designate some other form of punishment'.[20]

In *Director of Enforcement* v. *MCTM Corporation*,[21] it was held that a civil liability is imposed for a mere blameworthy conduct and not for a crime. Therefore, presence of a guilty intention is not a sine qua non.[22] In case of civil wrongs, the standard of proof is lower which depends upon preponderance of probabilities. In comparison, in criminal offences, the crime is required to be proved against the accused beyond a reasonable doubt. Since employing the standard of 'preponderance of probabilities' involves lesser regulatory burden and costs as compared to the 'beyond reasonable doubt' standard, in cases of corporate misconduct, the effectiveness of criminal law, therefore, can be questioned.

In *SEBI* v. *Shriram Mutual Fund*, the Court ruled that *mens rea* (criminal intent) is not necessary for imposing civil penalties, highlighting the regulatory nature of such sanctions.[23] The following principles have been laid down by Courts, with respect to civil penalties in the Company Law regime in India:

a. *Mens rea* is an essential or *sine qua non* for criminal offence.
b. Strait jacket formula of *mens rea* cannot be blindly followed in every case. Scheme of any statute may be diluted in a given case.
c. If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contra-distinction to criminal or quasi criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penalty' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravener and the delinquency.

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[19] *See* "Penalty" and "Fine," *Black's Law Dictionary* (11th ed. 2019).
[20] *McHugh v. Placid Oil Co* (1944) 19 So 2d 221 (La).
[21] *Director of Enforcement* v. *MCTM Corporation*, AIR 1996 SC 1100.
[22] *Id.*
[23] *SEBI* v. *Shri Ram Mutual Fund*, 2006 (5) SCC 36.

d. *Mens rea* is not essential element for imposing penalty for breach of civil obligations or liabilities.
e. There can be two distinct liabilities, civil and criminal under the same Act.[24]

V

Decriminalisation Policy Regarding GRC (Governance, Risk Management and Compliance)

Accepting the recommendations of the Committee to Review Offences under the CA, 2013 on decriminalisation, the following reforms to decriminalise offences were introduced in the CA, 2013 through the Companies (Amendment) Acts of 2019 and 2020:

Recategorization of Offences

Certain offences under the CA, 2013 that were previously treated as criminal offences were reclassified as civil defaults, ensuring that they do not attract criminal liability but are instead subjected to monetary penalties.

a. *The Companies (Amendment) Act, 2019:* The Companies (Amendment) Act, 2019 was passed to convert 16 offences from criminal liability to in-house adjudication by the Ministry of Corporate Affairs (MCA). It amended s. 92 (failure to file annual return-company and every officer of the company in default shall be punishable with imprisonment), s. 102 (statement to be annexed to notice- nondisclosure or insufficient disclosure- any benefit to promoter /director/key managerial personnel – to hold benefit in trust for company), s. 105 (the offences punishable with fine extending to five thousand rupees, was replaced with the liability to a penalty of five thousand rupees, s. 117 (Resolutions and agreements to be filed), s. 121 (report on AGM), s. 135 (CSR), s. 137 (failure to file financial statement- punishable with fine was substituted with liability of penalty; punishable with imprisonment was amended to liability to a penalty and further penalty in case of continuing failure, with further penalty), s. 159 (penalty for default of certain provisions).[25]
b. *The Companies (Amendment) Act, 2020:* Further decriminalization of 54 compoundable offences was carried out through the Companies (Amendment) Act, 2020. The CA (Amendment) Act amended s. 8 (violations by charitable companies), s. 16 (violation of any orders passed for rectification of names of companies), s. 26 (prospectus violating the requirements of Companies Act), s. 40 (listing of securities on stock exchanges), s. 48 (variation in rights of shareholders – penalty was omitted), s. 59 (rectification in register of members – penalty was omitted), s. 64 (alteration of share capital), s. 66 (reduction of share capital –

[24] *SEBI* v. *Cabot International Capital Corporation*, (2005) 123 Comp. Cases 841 (Bom).
[25] The Companies (Amendment) Act, 2019.

penalty was omitted), and numerous other sections, and penalties were changed from imprisonment to fines, or the quantum of fines was reduced.[26] These amendments were carried out to reduce litigation and enhance compliance through penalties rather than imprisonment.

Elimination of Imprisonment for Certain Offences

Many offences which were punishable earlier with imprisonment as well as with fines, were amended to remove imprisonment, making them non-criminal in nature. The following are the key offences for which penalty of imprisonment was removed:

Section	*Nature of Offence*	*Previous Punishment*	*Revised Punishment*
26(9)	Misstatements in the prospectus	Up to 3 years imprisonment and fine between ₹50,000 and ₹3,00,000	Fine only between ₹50,000 and ₹3,00,000
40(5)	Default in listing securities in a stock exchange	Up to 1 year imprisonment and fine between ₹5,00,000 and ₹50,00,000	Fine only between ₹5,00,000 and ₹50,00,000
68(11)	Non-compliance with share buyback regulations	Up to 3 years imprisonment and fine between ₹1,00,000 and ₹3,00,000	Fine only between ₹1,00,000 and ₹3,00,000
128(6)	Failure to maintain books of accounts	Up to 1 year imprisonment and fine between ₹50,000 and ₹5,00,000	Fine only between ₹50,000 and ₹5,00,000
137(3)	Failure to financial statement	Up to 6 months imprisonment or with fine between ₹1,00,000 and ₹5,00,000 or with both	Fine only between between ₹1,00,000 and ₹5,00,000
167(2)	Continuing as a director despite disqualification	Up to 1 year imprisonment and fine between ₹1,00,000 and ₹5,00,000	Fine only between ₹1,00,000 and ₹5,00,000

Specifically, with respect to provisions dealing with corporate governance, the following changes were made:

Section	*Old Provision*	*Amended Provision*
157(2)	Penalty for not furnishing DIN number--Company and Officer in Default- Fine not less than Rs. 25,000/- and up to Rs. 1,00,000/-.	Company and Officer in Default– Penalty of not less than Rs. 25,000/- and in case of continuing failure, a further penalty of Rs. 100/- for each day after the first during which such failure continues, subject to a maximum of Rs. 1,00,000/-. There is Reduction in penalty for not furnishing DIN of all its directors to

[26] The Companies (Amendment) Act, 2020.

Section	*Old Provision*	*Amended Provision*
		RoC; punishable with fine replaced with liable to a penalty.
159 Compliance with Sections 152, 155, 156	Brief provisions of Ss. 152, 155 and 156 are as under: S. 152- Appointment of directors - subscribers to Memorandum to be deemed first directors until directors are appointed; all appointments to be in general meeting; DIN mandatory; declaration he is not disqualified to become a director; consent to act as a director and consent to be filed with RoC; statement of BOD whether independent director to be appointed fulfils conditions; retirement, vacancy in BOD; S. 155- Not more than one DIN allowed; S.156- intimation of DIN to companies in which individual is a director -Imprisonment for a term which may extend to six months, or fine which may extend to Rs. 50,000/- -Where the contravention is continuing, a further fine which may extend to Rs. 500/- per day.	Such individual or director of the company shall be liable to a penalty which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues. Penalty of imprisonment removed for individual or director.
165(6)	s. 165 dealt with number of directorships -Penalty for continuing offence was made Rs. 5,000 in 2019.	Penalty for continuing offence was changed to Rs. 2,000/- in 2020. There is a change in language and reduction in penalty; maximum penalty capped.
167(2)	S.167 (2) dealt with the Vacancy of office of director -Imprisonment for a period which may extend to one year or with fine which shall not be less than Rs. 1,00,000/- but which may extend to Rs. 5,00,000/-.	Penalty of imprisonment removed.
172	Chapter XI deals with appointment and Qualifications of directors -If a company contravenes any of the provisions of this Chapter and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable with fine	If a company is in default in complying with any of the provisions of this Chapter and for which no specific penalty or punishment is provided therein, the company and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees, and in case of continuing failure,

Section	*Old Provision*	*Amended Provision*
	which shall not be less than fifty thousand rupees, but which may extend to five lakh rupees.	with a further penalty of five hundred rupees for each day during which such failure continues, subject to a maximum of three lakh rupees in case of a company and one lakh rupees in case of an officer who is in default. -Penalty was reduced and separate maximum penalty amount caps provided for default of company and officer in default -Change in terminology was made- 'shall be punishable with fine' has been replaced with 'liable to a penalty'
178(8)	S. 178 provides for Nomination and Remuneration Committee and Stakeholders Relationship Committee -Company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees, or with both.	Company shall be liable to a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of one lakh rupees. -Imprisonment was removed for officer in default; Punishable with fine replaced with a penalty; Minimum fine to maximum fine replaced with a fixed fine which was earlier the maximum cap of fine for both the company and the officer in default
184	S. 184 provides for the disclosure of interest by director -Punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees, but which may extend to one lakh rupees, or with both	Penalty of One Lakh Rupees. Imprisonment was removed; Fine with a minimum cap of 50000/- Rupees to maximum cap of 1 lakh rupee converted to a single penalty of I lakh
191	Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares. -Punishable with fine which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees.	Director in breach of provisions of the section shall be liable to a penalty of Rs. One Lakh. Punishable with fine replaced with a penalty; Minimum fine to maximum fine replaced with a fixed amount of penalty; penalty is fixed to maximum amount of earlier fine imposed

Section	*Old Provision*	*Amended Provision*
197	S. 197 provides for the overall maximum managerial remuneration and managerial remuneration in absence or inadequacy of profits. 197(15) - Punishable with fine which shall not be less than one lakh rupees, but which may extend to five lakh rupees.	Penalty of Rs. One Lakh for person and for company, penalty of Rs. Five Lakhs. Person punishable with fine converted to 1 lakh penalty and for company penalty introduced to 5 lakhs
203	S. 203 deals with the Appointment of Key Managerial Personnel (KMP) The company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every director and key managerial personnel of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.	Company in default – Penalty of Rs. Five Lakhs Director and KMP – Penalty of Rs. 50,000, and where the default is a continuing one, a further penalty of Rs. 1,000/- for each day after the first but not exceeding Rs. Five Lakhs. Company punishable with fine converted to penalty of 5 lakh (maximum amount conversion) For Director and KMP- penalty of 50,000 continuing penalty 1000/- per day maximum 5 lakhs
204	S. 204 provides for the Secretarial audit for bigger companies. Fine not less than one lakh rupees but which may extend to five lakh rupees.	If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be liable to a penalty of two lakh rupees. Fine imposition of minimum I lakh to maximum 5 lakh rupees; the company, every officer of the company or the company secretary in practice, who is in default, shall be liable to a penalty of two lakh rupees

3. Reduction in Penalties: Penalties for several procedural and minor defaults were reduced under the decriminalisation. For instance, previously companies could be fined up to ₹5,00,000 for delayed filings. However, under the amendments, penalties are capped at a lower threshold to encourage voluntary compliance.

4. Omission of penal provisions from certain sections and provision of an alternate mechanism: Certain redundant offences were removed altogether under the decriminalization policy. The penal nature of the following sections was removed:

1. Section 48(5) – Variation of Shareholders Rights
2. Section 59 (5) – The rectification of register of members
3. Section 71(11) – Reduction of share capital, debentures
4. Section 342(6) – Prosecution of delinquent officers and members of the company.

Snapshot of the decriminalisation:[27]

Provisions	*Pre-decriminalisation*	*Post- decriminalisation*
Total penal provisions	134	124
Compoundable offences (mostly fines are imposed	81	31
Non-compoundable offences (serious offences with imprisonment as a penalty)	35	35
Defaults subject to civil liability (through in-house adjudication)	18	58

VI

Impact on Governance, Risk Management and Compliances

It is expected that the decriminalization of offences must have had a positive impact on Governance, Risk Management and Compliances by the companies. In the following paragraphs an attempt is made assess if any such impact is visible:

Governance

Decriminalisation of provisions pertaining to breach of directorial remuneration limits, restrictions on directorships, and non-appointment of Key Managerial Personnels were aimed at relaxing the governance burdens on companies. As the breach of these provisions do not affect the public interest at large, such decriminalisation is considered in the interest of corporate setup.

Decriminalisation has provided an incentive to professionals to take up directorships in companies. For instance, finding independent directors in India became quite difficult due to high penalties provided under different provisions of the Companies Act. However, with the decriminalisation of penalties, there has been a surge in the number of independent directors available for appointment in India.[28]

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[27] Ministry of Information and Broadcasting, BOOST TO EASE OF DOING BUSINESS AND INVESTMENT IN THE COUNTRY DECRIMINALIZATION OF OFFENCES UNDER THE COMPANIES ACT, 2013, *available at* https://www.mca.gov.in/bin/dms/getdocument?mds=nXllAwYIa6uGSNLsmr3CAQ%253D%253D&type=open (last visited 09 Mar., 2025).

[28] Kiran Somvanshi, *Independent directors are jostling at the boarding gate*, THE ECONOMIC TIMES (Aug 23, 2024) *available at* https://economictimes.indiatimes.com/jobs/c-suite/independent-directors-are-jostling-at-the-boarding-gate/articleshow/112727404.cms?from=mdr (last visited 09 Mar., 2025).

Apart from the increase in the number of independent directors, separation of chairmanship and CEOs (leading to enhanced accountability), and better regulated pay to CEOs has been reported.[29]

Decriminalisation of offences has had a positive impact on the flow of investment in India. From the years 2019-20 onwards there has been an increase in foreign direct investment (FDI) in India. While in the last three years, FDI has dipped to a certain extent which can be attributed to several market factors. Moreover, in the years 2019-20 and 2020-21, the years when the Amendments were introduced, there was a major surge in the FDI received. Foreign investors bring with them good governance practices which can be one of the factors contributing to the above-mentioned improvements in the governance landscape.

Compliance

The effect of decriminalisation has been positive with more and more companies voluntarily rectifying mistakes in their filings and procedural compliances, rather than avoiding liability.[30] The enhanced rate of reverse flipping can also be linked to this new facet of reduced penalties for mistakes in compliances on Indian companies.[31] Since reduced penalties limit the cost of compliance and improve the ease of doing business it gives fillip to foreign companies establishing themselves in India.

The effect of these Amendments was further enhanced by the introduction of the Fresh Start Scheme, 2020. The Central government under the scheme gave a one-time opportunity to Indian companies to remedy their delays in filings and other compliances under the Companies Act without the fear of prosecution.[32] It has been reported that more than 4 lakh companies availed this scheme and avoided heavy penalties and delayed prosecution.[33]

Decriminalisation has also provided benefits to Startups and One Person Companies (OPCs). Startups, and OPCs often lack financial and legal resources to handle complex compliance frameworks. The amendments eliminated the fear of criminal prosecution for minor lapses in compliance. Furthermore, there is a

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[29] *Id.*

[30] S. N. Thyagarajan, *Decriminalisation of minor offences prompts 4 lakh companies to rectify defaults: Eco Survey*, MONEY CONTROL (Jan 31, 2023) *available at* https://www.moneycontrol.com/news/business/economy/decriminalisation-of-minor-offences-prompts-4-lakh-companies-to-rectify-defaults-eco-survey-9972021.html (last visited 09 Mar., 2025).

[31] Tanushree Bhuwalka and Viraj Puri, *Reverse-Flipping: Indian startups return 'home' amid regulatory reforms*, MONEY CONTROL (Nov 18, 2024) *available at* https://www.moneycontrol.com/news/opinion/reverse-flipping-indian-startups-return-home-amid-regulatory-reforms-12869503.html (last visited 09 Mar., 2025).

[32] Ministry of Corporate Affairs, Companies Fresh Start Scheme, 2020 (30 Mar., 2020) *available at* - https://www.mca.gov.in/Ministry/pdf/Circular12_30032020.pdf (last visited 09 Mar., 2025).

[33] *Supra* note 25 at 12.

significant reduction in legal costs due to the reduction of prolonged litigation. A more streamlined compliance procedure has been enforced, making it easier for companies to have enhanced focus on business operations. The reduction in regulatory risks also increases investor confidence, thus allowing OPCs and startups to access external funding more easily.

Risk Management

It is observed that the risk management decisions of companies have improved over the last few years.[34] Risk profile of companies has improved as per the ICICI Lombard Corp Risk Index Report, 2022. The Index comprises of 32 risk elements across 6 broad dimensions and draws upon global risk management practices. The Index has shown improvement in almost all sectors. Improvement is believed to be due to better management, government policies and efficient risk handling. Resilience is shown against the challenges of inflation, slow global growth and hiked commodity prices, and tightening global monetary policies.

In the light of the change mentioned in relation to appointment and retention of better professionals, it can be argued that now Indian boards comprise of directors who are better qualified to deal with contemporary risks posed by climate change and technology. Thus, decriminalisation in a way has given to boost to professional risk management of companies.

VII

Critiques of Decriminalisation Process

Dilution of Accountability

First criticism of the decriminalisation measures that can be made is that decriminalisation could lead to lesser accountability in compliance, as monetary fines might not act as a deterrent for a company with a large turnover. High net worth companies may treat penalties as a cost of doing business rather than an incentive to comply. This may also further lead to a rise in white collar crimes.

Adequacy of Civil Penalties

Questions on the adequacy of civil penalties have often been raised, as critics argue that merely imposing monetary fines may not sufficiently discourage corporate misconduct, especially where public interest of substantial financial implications is involved.

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[34] Mayur Shetty, *Risks have increased for businesses but they are better prepared: ICICI Lombard*, TIMES OF INDIA (Apr. 25, 2023) *available at* https://timesofindia.indiatimes.com/business/india-business/risks-have-increased-for-businesses-but-they-are-better-prepared-icici-lombard/articleshow/99758434.cms (last visited 09 Mar., 2025).

In house Adjudication Process Issues

It has been observed that in most in – house adjudication proceedings concerning compliance matters, the maximum possible penalty is routinely imposed, often without adequate consideration of the specific circumstances of the case at hand.[35] This practice raises concerns about fairness, proportionality and the need for a more nuanced approach to adjudication.

As a pilot study, the author has investigated 44 orders of Registrar of Companies orders given under different sections of New Delhi and Mumbai uploaded between November 2024 to February 2025. It has been observed that in most of the cases either the maximum penalty is imposed or maximum penalty based on number of days has been imposed.

To ensure greater transparency and accountability in the adjudication process, it is imperative to establish clear guidelines and mechanisms that promote consistency while allowing for discretion based on the facts of each case. The determination of penalties should not be a mere mechanical exercise but rather a reasoned decision that considers the nature of the non-compliance, its impact on the company and its stakeholders, as well as the overall magnitude of the violation.

A structured framework should be introduced to assess the severity of non-compliance, distinguishing between minor procedural lapses and significant regulatory breaches. Such a framework would ensure that penalties are proportionate, thereby fostering a more just and equitable compliance regime. Additionally, periodic reviews of adjudication decisions could further strengthen accountability, reinforcing trust in the regulatory process.

Issues relating to Compounding of Offences

Compounding of offences allows rectification of inadvertent non-compliances by admitting them and paying a compounding fee. No statutory timelines for Registrar of Companies have been fixed in this regard for compounding. The fear about possibility of inconsistent interpretation has also been raised.

The process of compounding offences serves as an important mechanism for rectifying inadvertent non – compliances by allowing entities to acknowledge their lapses and pay a prescribed compounding fee. This facilitates timely resolution while reducing unnecessary litigation. However, significant concern arises due to the absence of statutory timelines for the registrar of companies to process

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[35] In the matter of M/s Moonlight Associates Limited, No. ROC – Guwahati/ADJ – Order/Sec 454/2024 – 25/1300; In the matter of Global One (India) Private Limited, No. ROC/D/Adj/Order/203/GLOBAL ONE/5224-5226; In the matter of United Technologies Corporation India Private Limited, No. ROC/D/Adj/Order/Section 203/UNITED/5145-5154.

compounding applications. The lack of fixed timelines often leads to delays, causing uncertainty and administrative inefficiencies for companies seeking resolution.

While Section 441 does not explicitly outline prerequisites for initiating compounding, it is essential that the non-compliance or contravention has been rectified. For example, if an application is filed for failing to hold an Annual General Meeting (AGM) within the prescribed time, the default should first be remedied by conducting the AGM. The application is submitted to the Registrar of Companies (RoC), who forwards it along with a report to either the Regional Director or the National Company Law Tribunal (NCLT) if the maximum fine exceeds INR 25,00,000.

The liability for non-compliance under the Act extends to both the company and its officers in default. The National Company Law Appellate Tribunal (NCLAT) has clarified in this regard that the company and officer in default may file a joint application for compounding. Additionally, when the same offence spans multiple financial years, a joint application may be submitted for all such violations collectively.

The Regional Director or NCLT has broad discretion in determining the fine payable by the company and its officers. Various factors influence this computation, including the following:

a. Nature of the offence and whether it was intentional.
b. Maximum punishment prescribed under the Act.
c. Duration of the default and whether the application was filed voluntarily.
d. Financial standing of the company.
e. Repetition of the offence and involvement of public interest.

Furthermore, the possibility of inconsistent interpretation in compounding decisions is also a subject of concern and has often been raised. In the absence of uniform guidelines, similar cases may be treated differently, leading to unpredictability and lack of confidence in the process. Establishing clear timelines and standardized criteria for assessing compounding applications would enhance transparency, ensure procedural fairness and provide greater clarity to stakeholders.

Introducing structured guidelines and period reviews of compounding decisions could further strengthen the system, ensuring the process remains efficient, equitable and aligned with the principles of good governance.

Availability of Adequate Monitoring and Enforcement Mechanisms

Another concern is whether regulatory bodies such as SEBI and the MCA have adequate monitoring and enforcement mechanisms available with them. SEBI is at present investing in multiple key initiatives to promote surveillance. The 2020-21

annual report of SEBI has included the following key initiatives in recognition of the power of emerging technologies:

a. Adoption of AI for surveillance. SEBI is exploring the use of AI to improve its monitoring processes, aiming to detect market anomalies more efficiently.
b. Implementation of data lake at SEBI: The establishment of a data lake is intended to consolidate vast amounts of data, facilitating advanced analytics and more informed decision – making.
c. Setting up a new and modern data centre: A new data centre is being planned, which would support SEBI's technological infrastructure, ensuring robust data management and security.
d. Setting up private cloud infrastructure to facilitate rapid scaling of all systems – This is aimed at the rapid scaling of its systems and enhancing flexibility and responsiveness.
e. Policy initiatives.

VIII

Conclusion

There is no hesitation in accepting the fact that decriminalisation has been brought in to increase the ease of doing business by removing fear of prosecution, reducing penalties and thereby reducing the cost of compliance. The conversion from judicial and quasi-judicial proceedings to in-house adjudication mechanism has been praised though several issues in the execution process have been shared by companies.[36] However, there is a need to develop a proper and simple process that ensures clarity and uniformity, reduces delays, and improves accessibility.

On 5th August 2024, the Companies (Adjudication of Penalties) Rules, 2014 were amended to introduce Rule 3A, which mandates that all proceedings before the Adjudicating Officer and Regional Director would be conducted electronically. This e – adjudication system, developed by the Central Government became operational from September 16, 2024, and extends to various procedural aspects of adjudication such as the issuance of notices, filing of replies, supporting documents, presentation of evidence, conducting hearings, examining witnesses, passing orders and paying penalties. Since its inception, the platform has been utilized and a quantum of cases amounting to approximately 15% of the cases typically adjudicated by the RoCs

[36] *Supra* note 21 at 6. It is settled law that when a penalty is imposed by an Adjudicating Officer, it is done so in adjudicatory proceedings and not by way of fine because of prosecution of an accused for commission of an offence in a criminal proceeding.

annually, and around 20% of appeals, disposed of in 2024 were processed through the e – adjudication mechanism.

For MSMEs, there is a need to remove penalties in several provisions to reduce the burden of compliance. For instance – mandating adherence to high audit standards and the consequent fear of penalties enhances the cost of compliance for these entities.[37]

As recommended by the J. J Irani Committee, penalties may be classified in two self-contained schedules, one covering monetary penalties and the other involving imprisonment, with or without fine. It is essential to lay down the maximum as well as minimum quantum of penalty for each offence. There should be a provision for suitable deliverance in respect of repeat offences.[38]

From a critical perspective, self – regulation, however, raises significant concerns regarding its effectiveness in the Indian corporate governance framework. Some recent experiences such as the Byju's controversy have highlighted the prevalence of financial irregularities and governance failures.[39] In this context, delegating adjudicatory powers, might be an imprudent approach.

The need of the hour is to balance the ease of doing business and maintain regulatory rigour, simultaneously. Further, sweeping changes like the Jan Vishwas Bill (though many questions were also raised in bringing the selected changes by the Jan Vishwas Bill) are needed to achieve the benefits of decriminalisation. Currently, under several other legislations (apart from the labour laws) impose great sanctions on companies for not complying with filing requirements and maintenance of books/registers/records. These need to be tackled with an aim to enhance ease of business.

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[37] India Shipping News, *MSME Ministry to host consultation on reducing compliance burden under Companies Act, 2013,* INDIA SHIPPING NEWS (Jan 08, 2025) *available at* https://indiashippingnews.com/msme-ministry-to-host-consultation-on-reducing-compliance-burden-under-companies-act-2013/ (last visited 09 Mar., 2025).

[38] *Supra* note 3 *at* 2.

[39] Bloomberg, *Byju's faces new probe over financial, accounting practices*, ECONOMIC TIMES (Nov 26, 2024) *available at* https://economictimes.indiatimes.com/tech/technology/byjus-faces-new-probe-over-financial-accounting-practices/articleshow/115684448.cms?from=mdr (last visited 09 Mar., 2025).