LIABILITY OF DIRECTORS IN CORPORATE ARENA: AN ANALYSIS

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ABSTRACT

In the ever-evolving world of corporate governance, the role and responsibilities of company directors, particularly with regards to their corporate actions, continue to generate much debate and be under legal scrutiny. This research work seeks to understand and examine the civil and criminal liabilities of a director who has ceased to act for a company, where the company has subsequently been found guilty of a compliance violation.[1] The issue that the researcher seeks to address is particularly pertinent in modern corporate law, which no longer looks at a director's liability for the company's actions, as being co-terminus with their tenure. This research is quite significant for the legal fraternity, as it aims to bring clarity to the legal and ethical boundaries of directorial responsibilities post-tenure. Additionally, the study also aims to contribute to the broader discourse on corporate governance in a world where legal setups are rapidly evolving and there is an increasing emphasis on director accountability.[2] In this way, the researcher aims to understand the practical implications of these liabilities on the conduct of directors both during and after their tenure in the corporate entity. The findings of this research are expected to provide a rich, nuanced and in-depth understanding of the liabilities of directors, making a significant contribution both to the academic community and to practical guidance in the arena of corporate laws.[3] By separating the legal obligations of directors upon their departure from the corporation from the broader group of nonfiduciary terminations consequences, this research offers a critical vantage from which to appraise the implications for corporate governance and ethical business behavior.

[1] "Ramaiya, A. 'Guide to the Companies Act', 18th edn (LexisNexis 2015)."
[2] "Srinivasan, R. 'Corporate Governance in India: An Evaluation', (Taxmann Publications Pvt. Ltd 2017)."
[3] "Bainbridge, Stephen M. 'Corporate Governance after the Financial Crisis', (Oxford University Press 2012)."

INTRODUCTION

1.1 Introduction

Liabilities are the legal obligations or responsibilities that may be attributed to the directors due to their actions or inactions while serving the board. There are various sources of the directors' liabilities from the corporate perspective. First, such liabilities are covered in statutory provisions that outline the directors' responsibilities and liabilities. Second, economically developed countries usually address the directors' liabilities within the boundaries established by common law principles. Finally, the company's articles of association or bylaws may elaborate on the directors' rights and responsibilities, as well as the conditions under which they may be held accountable. As for the corporate governance, it is a set of rules, practices, and processes that define the manner in which a company is governed and controlled. In other words, corporate governance is primarily concerned with the relationships between a company's management and a board of directors and between the shareholders. Corporate governance as a methodological approach is concerned with ensuring businesses' long-term sustainability and optimal performance through increased transparency, accountability, and open conduct. As such, the legal concept of the duty of care states that the director should act in good faith and with care, skill, and diligence. Hence, the duty of care requires that the director not dissent and inform themselves about the company on various levels.[4]

In addition, the duty of loyalty indicates that the director should always be in the best company interests and do not commit self-dealing. A corporation also has some statutory duties such as maintaining accounting standards and financial reports.[5] The violation of these standards may lead to specific criminal or civil liability. Finally, the corporate director is also responsible for his or her own direct actions including merger, acquisition, or IPO. The size of directors' liabilities depends on the situation and specific country legislation. Courts consider various factors affecting the director and his or her responsibility. Courts evaluate the director's participation in decision-making, the director's level of experience, and the reasonableness of the director's decision. Corporate governance can contribute to mitigating these risks. It is possible to introduce clear policies and procedures, enhance the internal control system, and

[4] "Gunther Teubner and Klaus J. Hopt (eds), Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility (De Gruyter 2012) eBook."
[5] "Section 128, 129 of Companies Act, 2013"

provide training to the directors. The concept of directorial liability is firmly based on the spirit of corporate law which distinguishes the legal personality of a company from its shareholders and directors. In this regard, one of the leading cases that have shared this distinction is Salomon v. Salomon Co Ltd 1897[6]. In this case, the House of Lords affirmed that once a company is incorporated, it becomes a legal entity on its own, separate from the members. This concept is known as the corporate veil or personality, and it protects members from personal liability against the debts and other obligations of the company. However, the veil can be lifted in exceptional circumstances when the individuals are found responsible for fraud or when the company's legal status is considered a sham. In a nutshell, the case set the basis for the doctrine of lifting the corporate veil that allows the piers to hold directors personally liable for acts done by the company. As a ruling concern, the court has it that directors are fiduciaries with certain obligations to the company and its shareholders. Such includes the obligation of due diligence or care, which involves doing reasonable care, skill, and diligence when exercising their powers. It also includes the obligation to act in the best interests of the company, known as the duty of good faith. Further, a breach of such duties can lead to leaders being held liable for losses suffered by the company and shareholders because of their wayward or negligent behavior.[7]

They also hold liability for sorts of states, for example, for failing to maintain suitable books of accounts, filing false financial records, and engaging in fraudulent conduct. The lifting of the corporate veil has its limitations, and it does not extend to directing liability. Courts have found, in their best interest, that the order is not cursed, operates in the best interest of the firm, and where this is not the case, letting the order be on the hook to foster principles within the company.

1.2 Problem Statement

With the current constantly dynamic and complex corporate world, the duties and functions of the directors have been subject to intense scrutiny, particularly concerning their liability. This research seeks to explore the complexities surrounding director liability in corporations, ranging from the legal aspects to the practical application of the liability. By comparing the legal framework of different jurisdictions, the study will identify areas of concern, including

[6] "[1896] UKHL 1, [1897] AC 22"
[7] "Helen Anderson, Directors' Personal Liability for Corporate Fault: A Comparative Analysis (Kluwer Law International 2008) Hardcover."

liability breaches, incongruencies in liability application, and constraints in enforcing director accountability. This paper centers on how the legal tenets of liability are executed in practice and how effective existing legislation is in enforcing liability in corporations. It will also examine the extent of the legal responsibilities and the impact on corporate governance and stakeholders' protection. This comparison supports planning recommendations for improving the legal structural design in guaranteeing robust accountability and governance in corporations.

1.3 Research Questions

- What legal frameworks govern the liability of directors across different jurisdictions, and how do these laws compare in terms of director accountability and protection of stakeholders' interests?
- How effective are the existing legal mechanisms in enforcing the liabilities of directors, and what challenges do corporations face in ensuring compliance with these regulations?
- In what ways can the legal infrastructure be improved to enhance the accountability of directors while balancing the need for effective corporate governance and stakeholder protection?

1.4 Methodology

This research is undertaken in a doctrinal vein and combines elements of both legal theory and legal history. In exploring directorial liability in the corporate context, this research utilizes a doctrinal methodology comprising a comprehensive analysis of legal principles, legislation, case law and regulatory frameworks that circumscribe not just the nature of directorial liability, but also its contours in practice within the corporate sector. This research first commences by locating and systematically collating relevant legal texts including the Companies Act, the series of Corporate Governance Codes that have been promulgated over the years and also the guidelines that have been issued by regulatory bodies such as the Securities and Exchange Board of India (SEBI). The project involves the massive reading of judicial decisions, which form a corpus of legal precedents that has built up over time on the comprehension and interpretation of directors' duties and liabilities.

LEGAL FRAMEWORK GOVERNING DIRECTORS' LIABILITIES

2.1. Comparative Legal Frameworks

Such a concept is primarily defined by the legal basis and legal environment of a specific jurisdiction, under which it may have its characteristics and grassroots. The author will compare Indian law to American and British provisions in this paper. In addition, part of this research is the concept of ultra vires, as with its authority limitation impact it also defines the framework of duties of the directors. In India, the Companies Act, 2013 is the primary source of legislation of directors' duties and liabilities. Under these provisions, a director must comply with honesty, follow the company's lawful and fundamental principles, act with due diligence, and avoid conflicts of interest. Directors also have to ensure due compliance with relevant laws and maintain proper accounting records. Responsibilities of Directors are outlined in Section 166 of the Companies Act, 2013. Directors are obligated to act in good faith and with due care, avoid conflicts of interest, and not seek personal benefits from their duties. The provision emphasizes adherence to company articles and prohibits the assignment of office. It expands directors' duties beyond just protecting shareholders' interests to promoting the welfare of employees, the community, and environmental issues. The potential for both civil and criminal breaches reflects the Act's emphasis on transparent third-party governance. This integrated approach serves as a reminder to directors about the delicate balance between their company interests and the wider societal impact.[8]

Violating these regulations subjects directors to civil liability, which can include fines, disqualification, or compensation to the company and its stakeholders for any harm caused. Additionally, directors can face criminal liability, leading to harsher penalties such as imprisonment or heavy fines. Some of the crucial judicial pronouncements laying down the legal framework for criminal liability of directors are "Maksud Saiyed v. State Of Gujarat (2008)"[9] and "Sunil Bharti Mittal VS CBI (2015)"[10]. The observances nearly reiterate an existing acumen: Corporate directors can be held criminally liable in two main circumstances, the first of which is when proof suggests they were actively involved with mens-rea in a crime committed by or on behalf of the corporation; and secondly are wherein statutory provisions

[8] "Erathi Anudeep, 'Corporate Criminal Liability: Analysis with Respect to Indian Penal Laws' (2024) 12(2) International Journal of Creative Research Thoughts https://ijcrt.org/papers/IJCRT2402049.pdf accessed 30 June 2024."
[9] (2008) 5 SCC 668
[10] (2015) 4 SCC 609

directly refer to vicarious liability. This ensures that criminality by directors will not be able to hide behind the corporate veil, looking for a balance between shields and piercing accountability. These circumstances include the information given to the companies, the production of false information, and a statutory violation. Indian law, in addition to federal regulation, operates within the confines of ultra vires. A director's activity must be within the scope of the memorandum of association and articles of association. Otherwise, it will be considered ultra vires, making the director personally responsible for the damage.[11]

In the United States, the legal framework on directorial duties and liabilities is based primarily on state corporate laws, and many states rely on the Model Business Corporation Act for guidance. Directors owe a fiduciary duty of care and loyalty to the company and the shareholders. Directors are required to act with the care and diligence an ordinarily prudent person would in the same circumstances and promote the best interests of the corporation. breach of these duties may attract civil liabilities including monetary damages and injunctions. In the third legislative proposal, a director could be held personally liable for his failure to comply with the business judgment rule. Although the doctrine is an important component in the U.S. corporate law, it does not guarantee protection and immunity to directors. The legislations involved could be withdrawn if a director acts with gross negligence, bad faith, or violates statutory duties.[12] Other Acts such as Sarbanes-Oxley and Security Exchange Act of 1934 also expose directors to liability, more especially on the financial reporting and corporate governance and internal control. Violating these laws can subject one to criminal sentences involving fines or jail terms. In the UK, the primary legislation is the Companies Act 2006 which provides seven codified duties for directors of companies limited by shares. These duties include a responsibility and duty to act within a director's power, promoting a company's success, independent judgment, care, skill, and diligence, avoiding conflicts of interest, and maintaining proper accounting records. Failure to comply attracts civil implications, including fines, disqualifications, or the responsible person may have to compensate the company or stakeholders. A director can also be held accountable for the doctrine of ultra vires, which prohibits a company from acting beyond the forms established in the memorandum and articles of association. A director can be personally accountable for any loss and damage outside this form. Moreover, the UK recognizes the criminal liability of directors with certain specific

[11] "Alexander Loos (ed), Directors' Liability: A Worldwide Review (Wolters Kluwer 2016) eBook."
[12] "Bidisha Kole, 'Exploring Corporate Criminal Liability in the Indian Legal Context' (2024) IV(2) Indian Journal of Integrated Research in Law https://ijirl.com/wp-content/uploads/2024/04/EXPLORING-CORPORATE-CRIMINAL-LIABILITY-IN-THE-INDIAN-LEGAL-CONTEXT.pdf accessed 30 June 2024."

criminal offenses related to the corporate offense.[13] Whilst relevant statutory provisions and legal systems may differ on a country to state or federal basis, the core concepts that inform directors' duties and liabilities are clearly transnational. These principles themselves are founded on the duties of care and loyalty, with good faith and reasonable care guiding obligations amounted to a director. Breaches in these material duties may result in civil and criminal charges, paired with a range of non-compliance consequences depending on the extent and magnitude of such breaches. The ultra vires doctrine is one of the basic concepts that define how wedge powers, and in which size will be acceptable to see whether director(s) are taking actions within their rights according to constitutional documents of a particular company. Only the acts performed by officers of executive function beyond their powers are regarded as null and void, but may also result in penalties for pecuniary loss on their own or together with those responsible for the entanglement.[14] When it comes to avoiding director liability cases, good governance and organizational internal control, accompanied by the construction of a performance culture within accountability are key. In summary, by understanding and enforcing the statutory rights set forth by directors, one can navigate corporate settings to fulfill fiduciary duties.

2.2. Evolution of Directorate Accountability

Directorial accountability has evolved as a result of the interplay among legal trends, corporate transgressions, and changing societal attitudes in connection with business ethics and good governance. The laws and regulations evolved in response to the necessity to balance protecting the director's independence when developing informed decisions and holding them responsible for decisions that ultimately harm the entity or its stakeholders. More than 100 years ago, industrial development spurred rather complex business models, which was accompanied by an urgent need for legislative regulation of the relationship between the owners of the business, who relied on the state for protection from unfair employers, and the hired directors, who needed protection from the irresponsibility of the owners. In the mid-19th century in Europe and the US, new companies became large-scale commercial enterprises with complex management systems. The need to regulate the relationships between the entrepreneur, the

[13] "Institute of Directors, The Director's Handbook: Your Duties Responsibilities and Liabilities (Kogan Page 2010) eBook."

[14] "Smita Satapathy, 'Corporate Fraud and Criminal Liability of Directors' (2022) 5(3) International Journal of Law and Management, https://www.researchgate.net/publication/362180008_Corporate_Fraud_and_Criminal_Liability_of_Directors-_INTERNATIONAL_JOURNAL_OF_LAW_MANAGEMENT_HUMANITIES accessed 30 June 2024."

management body (directors), and their shareholders became acute. Old, traditional family enterprises that have become the main industrial giants face new challenges. The need to attract capital has led to the emergence of joint-stock companies, the organization of capital-intensive production that cannot be sustained solely based on personal savings. Therefore, to attract more money from non-family people to work in a giant company with a united management structure, with simplicity and ease not to worry about management, they are entrusted with the right to depend on directors, who take on the duties of effective management.[15]

Over time, with the continued evolution of corporate governance practices, the business judgment rule was developed with the main aim being the protection of directors only if they make their decisions in an informed and deliberative manner and with good faith, and with no respect to conflicts of interest. This rule thus ensured that directors were not held personally liable for mere errors in judgment or being held responsible for unsuccessful or bad business decisions. It stipulated therefore that so long as the decision-making process was proper and the relevant considerations taken into account, the decision of the director would not be grounds for personal liability if it later turned to be bad. Although the rule intended to ensure that directors are held accountable only where their conduct is so egregiously wrong when this failed to happen, it led to the survival of the fittest scenario. Currently, the business judgment rule has been adopted by most jurisdictions including the United States, the United Kingdom, and India[16] with a few variations. While the first half of the 20th century saw minimal scandals associated with corporate governance, the second half of the century saw various high-profile cases of corporate scandals with most having different impacts on legal regulations. In the early 2000s, large corporations such as Enron and WorldCom fell because of accounting fraud and corruption schemes that captured headlines with regularity, causing consumer uproar which called for widespread reform. It is in this context that we should consider the business judgment rule, a principle which has been subject to increasing criticism. The courts have been held to be extremely deferential under the business judgment rule, as described by David Rosenberg in Galactic Stupidity and The Business Judgment Rule (2007): "This doctrine prevents shareholders or their representatives from obtaining redress for board decisions which do not breach either of two nomenclature standards: loyalty duty; good faith." Moreover, the corporate scandals prompted even further reforms devoid of any legal implications owing to change in the perceptions of the public and expectations for directors. Shareholders and

[15] "William E. Knepper, Liability of Corporate Officers and Directors (A. Smith Company 1978) Paperback."
[16] "Section 463 of Companies Act, 2013"

employees, in addition to the general public, have been calling for transparency and ethical behavior in the conduct of the corporation's leadership, including the directors. In those days, they were required to ensure that the corporation looked beyond making short-term profit to serving the best interests of the larger constituencies. The demands raised the standard of director's due care and loyalty from a long-time business sustainability, corporate social responsibility, and stakeholder orientation level. Further, the previous years have witnessed an increase in regulation by accountability promoted by investors and the market with their new concerns about environmental sustainability, climate change, and social justice. Over the years, technology and the growth of digital aspects have continued to increase complexity and risks without the responsibility of directors in ensuring these matters. Today, directors have a more proactive role in playing a meaningful role of ensuring that the appropriate firms develop an integration footing or identify such risk exposure to ensure professional conduct in a dynamic corporate sector.[17] Directorial accountability has also increased, shifting from irresponsible control to responsible entrepreneurship. The latter is described from the position that the responsible director is not accountable but only responds to actions that have negatively impacted the company's interest. Even as the secret shifted to transparency and ethics, unraveling of the international dimension has sustained the important functionality of international sovereign control. The business judgment rule was formulated to protect directors from personal liability for a reasoned decision taken in good faith. Ultimately, directorial accountability could be expected to increase even more following corporate scandals that have reshaped public opinion and governmental limitations, affecting more shareholders and public sentiments. Corporate directors must respond to developing issues of ethics and sustainability while maintaining their fiduciary obligations and creating long-term organizational value in the new era.

2.3. Key Doctrines & Principles

Two doctrines and principles strongly underlie the genealogy of the process of directorial accountability and corporate governance – the business judgment rule and Salomon v. Salomon Co Ltd. [18] landmark case. Both define the modern corporate law, the director decision-making process, and, consequently, the director's liability. The business judgment rule implies that directors are protected by the legal principle from personal liability for business decisions as

[17] "Dennis Campbell, Christian T. Campbell, and Center for International Legal Studies, Liability of Corporate Directors (Lloyd's of London Press 1993) Hardcover."
[18] "[1896] UKHL 1, [1897] AC 22"

long as the decisions themselves were made in good faith, with the duty of care and diligence, and lacked conflict of interest. The primary assumption is that directors work and are obliged to make the most crucial business decisions in a very uncertain and risky environment and should not be penalized for their rationale after the event if it was reasonable then. There are two fundamental justifications for the business judgment rule: the court is not likely to make a proper and informed decision about the complex business issue. The director knows the situation, has the needed expertise to see and comprehend all available information – unlike judges. Hence, the courts might avoid claims about business decisions made not in a conflict of interest.[19] The rule seeks to incentivize qualified individuals to serve as directors without the constant fear of facing personal liability for decisions that might turn out to be unsuccessful.

Courts, while applying the business judgment rule, employ a test that allows the judges to determine whether the directors acted on an informed basis and deliberated before the decision was taken. All available material information that had to be reasonably expected to be obtained by the directors at that time should be considered. Thus, the doors are opened for the courts to conclude whether an appropriate process was followed before the decision was made by the directors. To conclude, the application of business judgment has several significant implications. The first and probably the most important one is that it encourages the directors to follow due process while making decisions, such as taking a risk assessment of the decision, securing external advice when appropriate, and investing time into making the deliberative process. In the United States, the business judgment rule is common law and has been adopted in the states. For example, Delaware is a U.S. state the legislations of which are widely adopted for business matters. The business judgment rule is codified in the general corporation law of the State of Delaware and has statutory power in its application. Similarly, in the United Kingdom, the Companies Act of 2006 follows a similar judgment rule, thus preventing the directors from being liable for a wrong decision made without conflicts of interest.

Moreover, the Salomon case established the principle of limited liability, which protected shareholders from liability for the company's obligations exceeding their contribution to the capital. The introduction of the principle of limited liability was instrumental in spurring investors' willingness to take risks and invest in corporations. This is because the only risk shareholders took was the risk of losing their investment in the company. Nevertheless, as much as the Salomon case introduced the concept of a corporate veil, it also perceived the exceptional

[19] "Paul J. Omar (ed), Directors' Duties and Liabilities (Taylor & Francis 2018) eBook."

cases in which courts could pierce the veil. One such case is if the promoters were using the company as a potential façade to achieve some improper or illegal purpose. This means that the courts were given the discretion to disregard the corporate veil and hold the director the promoter personally liable for the companies' obligations. The Salomon case also affirms the fiduciary duty vested in directors, being agents of the company. This means that the directors must act in a fiduciary capacity when managing the company's debts or obligations. The two main fiduciary duties include the duty of care, where the defendant must act in good faith and diligence, and the duty of loyalty, prioritizing the company's interests over personal ones. The doctrine of separate legal personality and the principles in the Salomon case have implications on directorial liability. The concept of the corporate veil affords the directors indemnities from personal loss relative to the company's debt or obligations. Nonetheless, they are not indemnified for cases of misconduct, reckless conduct, and breach of fiduciary duty. Therefore, the doctrine allows the court to pierce the corporate form against tortfeasors. The purpose of equity is to deter the abusive use of the corporate form to conceal the principal or unfair treatment of actors.[20] Ultimately, the interaction of the business judgment rule with Salomon v. Salomon Co Ltd's[21] core precedent creates a measured system of directorial liability and accountability. Through the rule, directors are shielded in quite a few situations where they make deemed reasonable decisions. However, with the aid of the separate legal personality doctrine, and the related penetrating of the corporate veil possibility, the legal system assures that if a violation of law, breach of fiduciary duties, or other serious misdemeanor has occurred, directors can be held personally accountable.

This duality is reflective of corporate law's main objectives: promoting investments, entrepreneurship, risk-taking, and informational policy-making through consideration and regulation of the principle of unanimity, full and careful consideration, and unanimity on the part of directors in parallel to maintaining societal accountability, transparency, and corporate behavior. It is achieved through identifying corporations as separate, legal entities while maintaining tools to hold their leaders responsible when needed. In the context of the ever-evolving business environment and emerging issues such as environmental concerns, social commitment, and technological progressive transformation, these key doctrines and their

[20] "Stephen Griffin, Personal Liability and Disqualification of Company Directors (Bloomsbury Academic 1999) Hardcover."
[21] [1896] UKHL 1, [1897] AC 22

application will continue to play a substantial role in expanding the boundaries of directorial liability.[22]

CHALLENGES IN ENFORCING DIRECTORIAL ACCOUNTABILITY

3.1. Enforcing Directorial Accountability:

The enforcement of directors' liabilities remains one of the most complex and perilous aspects pertaining to corporate governance. Legal frameworks have been developed, but they remain patchy and, in many instances, have not resulted in effective accountability. One of the most prominent cases illustrating the fundamental framings of the tension between shareholder interests and directors' decisions is Dodge v. Ford Motor Company.[23] Needless to say, the American case predates modern corporate governance in terms and structure, but it led to the understanding of the director's fiduciary duty and the conflict it may entail. On the other hand, in Indian jurisprudence, similar tensions have been evident in other company law cases. In Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd.[24] The Supreme Court had to address issues pertaining to corporate governance and the absolute bound of directors' powers. The third output group is the identification of the gap in law regimes. In the Indian context, the Companies Act, 2013 has made remarkable progress in defining duties and liabilities of directors. At the same time, a major hurdle remains the enforcement. For example, the Section 166 of the Act broadly articulates directors' duties, including acting in good faith and in the most advantageous way for the company.[25] At the same time, the concept is based on subjectivity and is often impossible to prove before the court.[26] This fact was evident in Vijay Mallya vs. Enforcement Directorate when it was hard to prove criminality which is due to the financial machinations within the quite sophisticated corporate structure. Another significant gap relates to the effectiveness of corporate governance mechanisms. The Security and Exchange Board of India has adopted quite a few mechanisms to stimulate corporate governance, such as SEBI (Listing Obligations and Disclosure Requirements) Regulations,

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[22] P"eter Loose, Michael Griffiths, and David Impey, The Company Director: Powers, Duties and Liabilities (Jordans 2008) Hardcover."

[23] "204 Mich. 459, 170 N.W. 668 (1919)"

[24] 2021 SCC OnLine SC 272

[25] "Madhav Godbole, 'Public Accountability and Transparency: The Imperatives of Good Governance' (Orient BlackSwan 2004)."

[26] "Arti Aneja, 'Multidimensional Aspects of Corporate Criminal Liability: An Indian Perspective' (2016) Manupatra http://docs.manupatra.in/newsline/articles/Upload/6F57BFED-0D8F-433E-983B-F4E638B4E115.pdf accessed 30 June 2024."

2015. However, in the recent scandal with the United Kingdom-India-based Satyam Computer Services Ltd. where fraud was not detected due to the flawed SBI mechanism, despite corporate governance was seemingly fully-formed.

Compliance is one of the most common issues that can be practical in nature. Significantly, the findings show that price and labor barriers to piecing together a full-spectrum compliance program does not just apply to small businesses. The issues of governance that have dominated headlines in the recent past including those relating to startups such as BharatPe highlight, once again, how traditional frameworks fare inadequately when confronting contemporary corporate governance challenges. Equally important is a balancing act around protecting directors from unmeritorious liability and ensuring accountability.[27] Through few cases, the Business Judgment Rule although is not recognized in laws of India has been echoed. Some examples are the cases of Rajeev Saumitra vs. Neetu Singh & Ors. Further, We also observe that the Delhi High Court in SMS Autozone Pvt. Ltd., In re (2019) has emphasized that a particular claim must be established under Section 66(2) of fraud or malafide against the business judgment calls made by directors. The importance of this should not be underestimated, as without it you always encourage entrepreneurial risk-taking. While sometime hindering the ability of regulators to hold a director responsible. Directors are anyway very difficult to enforce against, given the slow and inefficient legal process. Examples will be cases like those of Vijay Mallya or Nirav Modi who show how big-time directors if involved in severe corporate offences can escape legal implications within short durations and finally flee away to another country. If any, the whole episode not only shattered faith on legal system but also has raised big question in its execution over judgment. In spite of a workable legal architecture enabling the tracing accountability of directors in India, enforcement is rendered nearly impossible. The structurally inefficient law (with 20-year timelines for cases to resolve often) on both a demand and supply side, fiduciary duties being very difficult to clearly outline definitively in many instances given subjective factors and dynamism in the corporate world. These can be rectified by legal changes in addition to ex post enhancement of corporate culture, oversight regime and judicial processes which enforce the liability provisions against directors.

3.2. Focus on Post-Tenure Liabilities:

The post-tenure liabilities of directors are now slowly becoming an important query in

[27] “Andrew Keay, 'Board Accountability in Corporate Governance' (Taylor & Francis 2015).”

corporate law, which is necessary to be discussed more and force Indian laws to require a better benchmark. This category of law governs the degree to which former directors can be held responsible for decisions made while they were at a company. Post-tenure liabilities are legally complex and differ significantly from legal principles in the jurisdiction of enforcement for interpretation. The underlying idea of post-tenure liability in India originates from different arrangements spread out under the Companies Act, 2013. Under Section 168(2) of the Act, a director who resigns does not cease to be liable for an offense committed before he ceased to hold office. This reiterates the belief that the duty of a director continues beyond active service.

One of the landmark cases in this regard was Sunil Bharti Mittal v. Central Bureau Of Investigation (2015)[28], where it was held by the Supreme Court of India that directors could be culpable for offenses committed by the company during their tenure even after they have vacated offices. The case of Iridium India Telecom Ltd v. Motorola Inc. (2011)[29] further substantiates the same notion. The Supreme Court clarified that directors cannot evade liability by resigning from their posts alone. With profound implications for corporate governance, it makes certain that the directors do not get away with their acts just because they are no longer associated with the company. But enforcing post-tenure obligations is problematic. One of the key challenges relates to an observed practical difficulty in identifying the actions or decisions of specific directors (notably when acting collectively). The question of individual responsibility in a decade-long corporate fraud involving multiple directors came up before the Securities Appellate Tribunal (SAT) most recently in Rahul Sharma v. SEBI and so was not alien to the Regulator. A further big issue is the relatively short limitation period for commencing legal proceedings against ex-directors. Each of the Companies Act classifications has a limitation period, but understanding and using these provisions can be quite complicated. In Neeraj Kumar Agarwal v. SEBI (2020),[30] the SAT addressed whether SEBI may commence proceedings against a former director for violations that occurred while he was serving as a director and were detected subsequent to his leaving office. The question that arises from the decision of the tribunal is how such a balance could be achieved in securing rights for former directors but, at the approach level, on the other side, tale holders' interests.[31] The factor of lifting the corporate veil even assumes an important job in implementing post-tenure liabilities. Courts have been known to pierce the corporate veil when directors were hiding behind a

[28] "(2015) 4 SCC 609"
[29] "(2011) 1 SCC 74"
[30] "(2020) SCC OnLine SAT 200"
[31] "Gaurav Pingle, 'Handbook on Securities Laws' (Bloomsbury Publishing 2021)."

corporation and attempting, unfairly or illegally, to avoid personal responsibility. Balwant Rai Saluja & Anr. vs Case v. Air India Ltd. & Ors.[32] The judgment of the Supreme Court in which direction has been issued [2014] where guidelines have been formulated as to when the corporate veil can be lifted and directors may be made personally liable. A comparison jurisdictionally shows that there are a variety of post-tenure liability determinations. An example would be in the United States, where under the Delaware General Corporation Law there is a three-year period of limitations to bring an action against ex-directors. This was however in contrast to the Indian method which usually did not have a definite time frame for such steps. On the other hand, the UK Companies Act 2006 does not follow the time of the director leaving office approach and it relies more on how dishonestly the breach occurred. This has received a great deal of attention post the ASIC v. Healy (2011)[33], better known as the Centro case, that was a landmark decision in Australia finding non-executive directors responsible for not applying due care and diligence in their approval process to release financial statements. The case falls in the category of post-tenure liability as it sheds light on the fact that directors have a continuing role to play in ensuring the accuracy of company reports after they leave. The imposition of post-tenure liabilities also calls into question the balance between accountability and the potential to attract qualified individuals to serve as directors. Overburdening liability would not only discourage qualified candidates from accepting a directorship but also indirectly result in degrading the quality of corporate governance. The issue was considered by the Indian Supreme Court in Pooja Ravinder Devidasani v. State of Maharashtra & Anr The approach adopted must bear this factor in mind- that the Company being an artificial entity under section 3(1)(i) of CA is independent person from its directors and cannot be held criminally liable on account of fiduciary relationship between them vide Dhananjay N Pandit (2014), when it was opined by Bombay High Court Baalu R. Gumanmani Dev v/s State two above-said decisions lay down a broad principle - for employee/agent/commission agent with respect to corporate body, where criminal liability imposed had nexus with company offence; but said foundational officer besides director would not escape criminal liability if she/he directs illegal activity or omission. So what should change for the future in India is more uniform enforcement of post-retirement obligations, with clearer standards.[34] This might involve changes to the Companies Act that pointlessly specify clauses

[32] "(2014) 9 SCC 407"
[33] "[2011] FCA 717"
[34] "Vikrant Yadav, 'Corporate Criminal Liability: A Comparative Analysis of Judicial Trend' (2020) 1(10) International Journal of Applied Research https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656081 accessed 30 June 2024."

on how long and wide post-tenure liability goes Moreover, increasing the investigative and enforcement powers of such regulators as SEBI and Serious Fraud Investigation Office (SFIO) would also make it easier to crack down on previous board members. While India has made significant strides in the legal framework addressing post-tenure liabilities, challenges remain regarding its practical operation and enforcement. Striking a balance between the directorial accountability and practicalities of corporate governance calls for periodic legal and regulatory fine-tuning. Instruments that may cover a variety of structures in the future, assuming corporate structuring become more multifaceted globally; and perhaps require some degree of harmony across jurisdictions post-tenure to facilitate effective governance at the enterprise level funded for stakeholder interests.

RECOMMENDATIONS AND CONCLUDING INSIGHTS

Looking at the space of corporate director liabilities, specifically as regards post-tenure responsibilities and enforcement challenges, illustrates just how many nooks and crannies must be explored for effective change in this field. Given the transitions underway in India to becoming an economic powerhouse at a global level, there is disconcerting need for stronger and more effective corporate governance framework. In this chapter, I offer final comments - some suggestions and insights that we have collected and developed from our complete study.

Legislative answers to the nature, scope, and duration of post-tenure liability are urgently needed in the first place. Though the Companies Act, 2013 provides a framework there are ambiguities that have still not been resolved leading to divergent judgments. We suggest the Ministry of Corporate Affairs may also provide for such amendments in the Act, clearly defining up to what extent a director should be liable post-tenure. This may involve providing for a limitation period within which liability may arise, with reference to international practices such as the three-year limitation provided under Delaware law but customized for Indian conditions.[35]

Secondly, the enforcement mechanism needs a serious boost. Specialized tribunals or benches within existing courts which are meant only for hearing corporate governance matters could be established in order to fast track directorial liability cases. These specialist bodies would become expert in the fine distinctions of corporate law, and their judgments will be better

[35] “Vijay Kumar Singh, 'Corporate Power to Corporate Crimes: Understanding Corporate Criminal Liability in India' (SSRN 2017).”

informed and more consistent. More importantly, their investigative and prosecutorial powers need an upgrade vis-a-vis bodies like SEBI or the Serious Fraud Investigation Office (SFIO). This may entail more budget, new special training courses, or leveraging technology-enabled investigative tools. The third recommendation we offer is to institute a national director education and certification program. This compulsory program of education would teach all directors, and particularly those in listed companies the legal and ethical discipline surrounding their role as a company director. Institute such a program to be delivered by the likes of the Indian Institute of Corporate Affairs with Professional bodies and Leading Law school's having some academic collaborations. This preventative measure would help protect against mismanagement that is the result of failing to comprehend or oversee directorial functions.

Second, transparency and empowerment of shareholders are needed; To achieve this, we suggest imposing additional requirements to disclose information about directors' procedures of their decision-making, focusing on material corporate events. Greater stockholder rights, particularly making it easier for shareholders to bring derivative actions against culpable directors, in this case may well be the most effective brake on misdeed. Only, without allowing the doors of judicial strategies to be thrown wide open such that it could turn into a Pandora's box for all types of unscrupulous litigations which will only cripple corporate functioning. This would also lead to reimaging independent directors as a fifth point Yes, appointing independent directors is mandated under the Companies Act but their practical utility has not been borne out by quite a few high-profile corporate debacles.[36] We propose more stringent definitions of independence, including term limits and a competitive nomination process. In the meantime, it might help to give these independent directors more access to company information and their own staff support. Enabling technology in corporate governance would ultimately reshape the accountability measures, but it is a discussion for another day. Existence of blockchain-based voting for shareholder resolutions, AI-led analysis to detect potential governance concerns and digital platforms giving real-time reporting on directorial events could from thereon result in much improved transparency and accountability. The corridor of director responsibilities under the Indian vacancy is in a precarious spot. Great progress has been made over the last few years, particularly post-Companies Act, 2013 However, there are significant challenges to enforcement and accountability And perhaps even more worrisome - Post tenure liabilities. This has driven such recommendations to include catching all aspects of the challenges through

[36] "Afra Afsharipour and Martin Gelter (eds), 'Comparative Corporate Governance' (Edward Elgar Publishing 2021)."

legal clarity, real enforcement mechanisms, director education, greater partaking and many more facets including a rethink leave alone business independent directorship but even financial interests or expertise for example. The strength of India's corporate governance framework will be immensely instrumental as the country seeks to emerge a global economic champion in attracting investments and nurturing growth. While enacting these suggestions, the aim should be to develop a corporate environment that meets its desire for entrepreneurial liberation as well as tough accountability. This balance is crucial not just for securing stakeholder rights but also to lay the foundation of a robust and trustworthy corporate sector which can propel India's economic ambitions in this century.

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