

Criminal provisions in economic and business laws raise concerns amongst directors, young entrepreneurs as well as domestic & foreign investors, reducing ease of doing business

## WHY WE NEED TO DECRIMINALISE ECONOMIC LAWS

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**A** stable, predictable and technology-enabled regulatory framework is imperative for a sustainable and attractive business environment. The key for economic and business legislations is to facilitate streamlined regulatory ecosystems and promote business. More so, laws should be enabling and encourage entrepreneurship rather than act as a deterrent. There is a need to decriminalise commercial disputes and civil offences in business and economic laws in India, especially with respect to technical offences, unless it includes an element of fraud or wrongdoing. Offences that are of a technical nature, do not affect public interest prejudicially or are not serious offences may be considered to be decriminalised. For such business and economic legislations that fall within the domain of arbitration or civil courts, the government may consider decriminalising the laws. The punishment ought to be limited to penalties instead of fines and imprisonment. Periodic or habitual offenders may be punished with higher penalties as may be decided by the adjudicating authority.

The intent is to encourage a system where penalties are in place rather than criminal proceedings; only serious offences continue to be liable for such sanctions. Serious non-compoundable offences and actions where mala fide intent is prov-

en would naturally continue to be liable for criminal recourse. Thus, a balance between ease of business and adequate deterrence for serious contraventions is the need of the hour. The way forward is responsible decriminalisation and not recommending blanket changes.

It is important to discuss how criminal provisions in economic and business laws raise concerns amongst directors, young entrepreneurs, and domestic and foreign investors. With respect to framework for the settlement of offences, liability of independent directors and vicarious liability against the backdrop of Covid, bona fide decisions taken during exceptional times may not be unduly challenged with the benefit of hindsight. Members of the board may ask for a Directors & Officers (D&O) liability insurance and spend time to understand the scope and coverage of it and evaluate its adequacy with respect to the company and individual directors.

There is a need to create legal and procedural safeguards relating to personal liability of independent directors. Initiation of prosecution itself should be an exception rather than the rule, to keep the risk and rewards of being an independent director proportionate. The idea of decriminalising civil duties is essential to conserve faith in the institution of independent directors.

A much-needed reform in the Indian Penal Code, 1860 (IPC), is the provision of appropriate protections for company officials in cases instituted against companies. At present, the IPC does not contain provisions dealing with this aspect. Often, it happens that in the absence of any statutory protection, independent and non-executive directors are regularly served summons by magistrates and are frequently made parties to false and malicious prosecutions. Therefore, there is a pressing need for statutory amendments either in the IPC itself or in the relevant special statutes carving out exceptions and safeguards for personnel who are not involved in the day-to-day affairs of the company in line with the judicial precedents on the subject.

The CII has been engaging extensively with the Government of India. Till date, detailed recommenda-



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tions on the decriminalisation of business and economic legislations have been submitted to various ministries covering more than 40 laws, including the Companies Act 2013, Insolvency and Bankruptcy Code, Competition Act, Consumer Protection Act, Patents Act, Trademarks Act, Legal Metrology Act, etc. Recently, a case for broader need for limitation to be applied for criminal offences and some important changes in CPC, CrPC and IPC were also highlighted.

It is encouraging to note that in response to CII advocacy, several offences under the Companies Act, 2013, have been decriminalised. By way of the Companies (Amendment) Act, 2019, the government re-categorised 16 compoundable offences as civil defaults, covering lapses such as prohibition on issue of shares at discount, failure to file a copy of the financial statement with the Registrar, etc. This was followed by the Companies Amendment Bill, 2020, which decriminalised 48 sections. The Bill re-categorised 23 compoundable offences to In-house Adjudication Mechanism instead of adjudication by courts, covering offences of non-maintenance of company records at a registered office, non-issuance of statutory notices, etc. About seven compoundable offences, where alternative remedies are available,

were omitted, including non-compliance of NCLT orders, which would now be dealt under the contempt jurisdiction of the court. Amendments were also announced to the Limited Liability Partnership Act to decriminalise provisions therein and provide LLPs an equal playing field, compared to large companies under the Companies Act. About 12 offences were decriminalised, including those related to timely filings of annual reports, change in the partnership status of the LLP, etc.

Pursuant to CII recommendations, the government had suggested changes to the Legal Metrology Act to do away with imprisonment for repeat offences and instead increase fines imposed, appoint a nominee officer for probe, etc. States are expected to respond to these changes prior to their enforcement.

The CII appreciates the Centre's endeavour for improving the business environment, which in turn not only has the potential of attracting investment but also improving the quality of corporate boards and reducing concerns of criminal prosecution for non-material matters. The CII will continue to engage with the Government of India and other stakeholders in taking forward the agenda for decriminalisation of such offences.

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