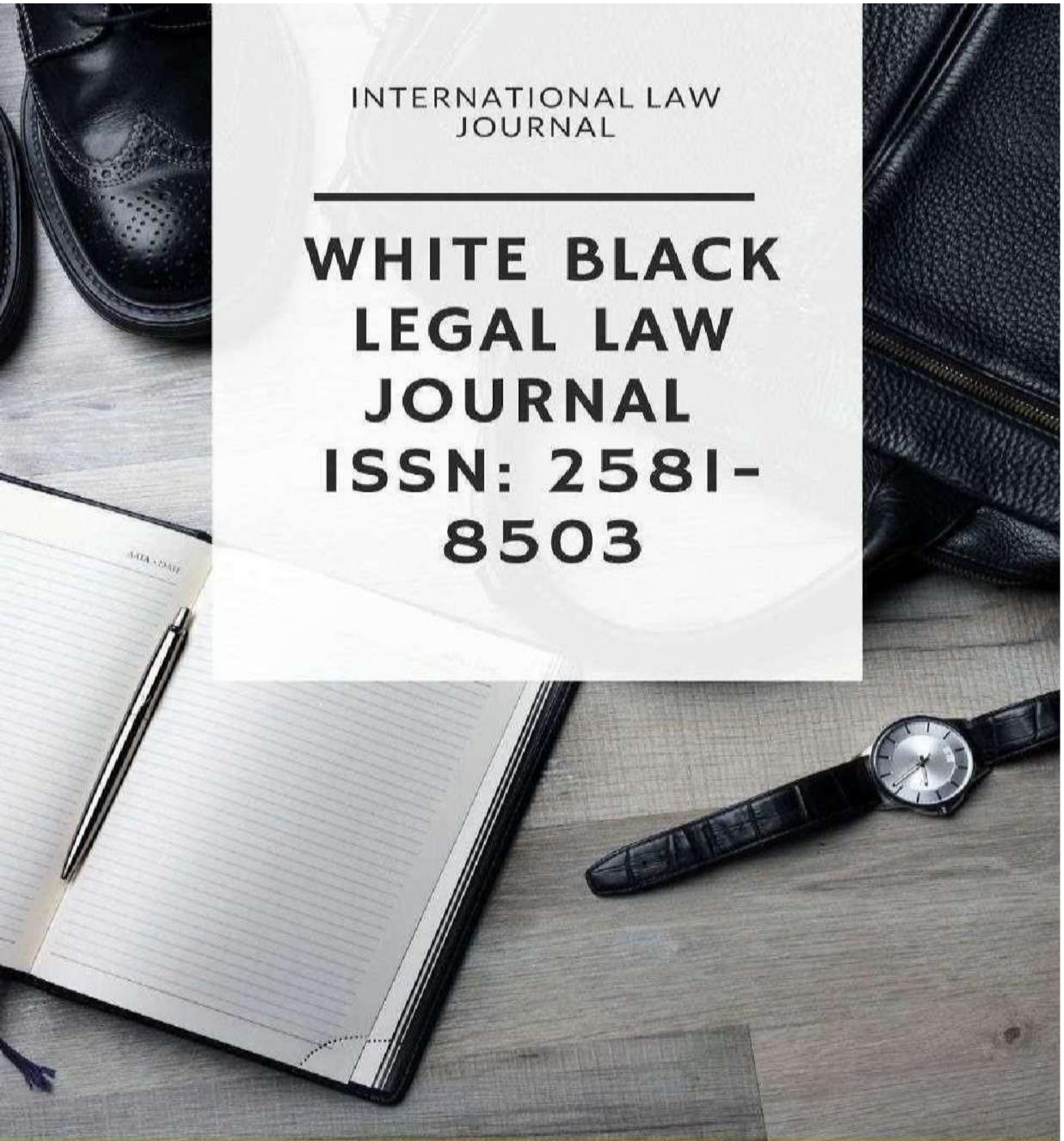
INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503



Peer - Reviewed & Refereed Journal

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Volume 3 Issue 1 | March 2025 ISSN: 2581-8503

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 ISSN: 2581-8503

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 ISSN: 2581-8503

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Volume 3 Issue 1 | March 2025 ISSN: 2581-8503

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LIABILITY OF 'OTHER PERSONS' IN FINANCIAL ESTABLISHMENTS: A COMPARATIVE STUDY UNDER THE COMPANIES ACT AND THE KPID ACT

AUTHORED BY - ADORA MASCARENHAS

I. INTRODUCTION

There has been a noticeable increase in the contribution of the financial sector towards economic growth; however, this has also been accompanied by an increase in financial fraud and misconduct of various kinds[1]. Over the past few years, withdrawal due to financial misbehavior has been a great concern to depositors which implies the existence of stringent deposits' protective laws. Both the Companies Act, 2013, and the Karnataka Protection of Interest of Depositors (KPID) Act are aimed at these sectors but there is an excessive need to also reach out to those beyond the directors and their most senior managers[2]. This change is based on the assumption that instead of being only passive players, as they are in the case of many other institutions, promoters, employees, and agents of financial establishments actively assist in, or even provoke, baseless financial schemes. The Companies Act is mainly concerned with issues pertaining to corporate governance and provision of financial information while KPID Act relates to protection of the consumers, that is depositors in financial institutions within the state of Karnataka and as such, provides a more punitive or protective approach[3].

By introducing measures such as the KPID Amendment Bill, 2022, which makes changes such as upping provisions to make them cognizable and non-bailable, also adjusts the practical operation of the law like consolidating several complaints against financial offenders into one[4]. This paper will look into the aspects of both of them from the perspective of one of their objectives that pertains to the liability of the 'other persons', how it is structured and all the elements associated with it, enforcement aspects and how it relates to financial activities and protection of depositors.

For a long time, these laws have been restricted to directors and senior managerial staff with a growing understanding that other individuals connected to them should also be liable for financial misappropriations. Section 9 of the said Act places liability of default of payment on persons including promoters, directors, partners, managers or any other persons[5]. The definition of 'any other person' has not been clearly demarcated by the legislation and neither by the courts. With a simultaneous reading of the Companies Act and the KPID Act the current paper wishes to discuss the extent of liability of other persons which effectively means promoters of a company and its employees, intermediaries, etc. who are a necessary cog in the wheels of the Financial Establishments.

II. LIABILITY UNDER THE SAID LEGISLATIONS

To begin with, the liability of individuals involved in financial institutions is not premised on the provisions for executive directors and other top management personnel only, as per both the Companies Act, 2013 and the Karnataka Protection of Interest of Depositors (KPID) Act, 2004[6]. These two legislative frameworks are similar in the sense that they are both oriented at safeguarding the interest of depositors and investors against financial wrongdoing. However, they differ significantly in the manner in which they deal with 'other persons' such as promoters, employees, and agents among others[7]. This section seeks to engage with concerned case law and statutes that demonstrate the mechanism of liability understood with respect to these persons under both sets of laws.

The Companies Act, 2013 seeks to address mainly the liability of the directors and other key personnel but it cannot be said that these individuals are the only ones whose actions could cause financial misconduct to occur. It is under Section 447 that the Act prescribes punishment for every individual convicted of the offence of fraud, which includes promoters and anyone else concerned with the operation of such establishments[8]. *Muruga Finance v. State of Tamil Nadu (1999)*[9] is one of the seminal cases where the High Court of Madras considered how far the liability of those managing financial affairs could be stretched. In this instance, the Tamil Nadu Protection of Interests of Depositors Act, which is similar to the KPID Act here, was applied in order to make the managers responsible for the amount due to depositors[10], as they were unable to pay the same back. The court noted that the culpability is broad, reaching out to any individual who controls the institution, even if such individuals are not formally known as directors[11].

In *Muruga Finance*, the court observed that a particular provision of such Acts allowing for a term of imprisonment of up to ten years is meant to serve as a maximum punishment and is dependent on the nature of the breach. This is coherent with the provisions of the Companies

Act in that cognizance is taken by the courts for purposes of sentencing of the level of agency and blameworthiness of 'other persons'.

The KPID Act, especially with the 2022 amendment, seems to be more serrated towards financial wrongdoings. It encompasses responsibility not only to directors but to other promoters, partners, managers, employees, and all and equally blame for any fraudulent defaults. Section 9 of the Act, for instance, goes ahead to state that any person who is 'in charge of, or responsible for the conduct of, the business' is culpable and may due to that conviction serve a prison sentence of three to seven years or pay a fine not exceeding ten lakh rupees[12]. Unlike the Companies Act, under the KPID Act there is no requirement for evidence of direct involvement; mere association with the organisation in the course of the fraud can render that individual liable[13].

This is again relevant to the case of Muruga Finance in this instance, as the court held that an office boy or any employee although liable in theory would be made effective only if there was any proof led that the employee was involved in the mismanagement or failure to return the deposits of the customers[14]. The courts have behaved in a more individual responsibility oriented manner in the cases under the KPID Act in the past and this has was a more liberal approach. These changes made in 2022 enhanced this tendency by changing the offences under KPID Act to cognizable and non-bailable[15] and by providing for the consolidation of several First Information Reports (FIRs) filed against one person, ensuring an efficient system of justice.

In terms of the Companies Act, the courts usually have considered that the liability should not extend to 'other persons.' For example, in relation to reckless fraudulent statement of financial information, those who would be liable must have contributed or turned a blind eye to the misconduct. On the other hand, the KPID Act depicts a very different and austere picture. The courts, under this legislation, operate on the assumption that everyone is a contributor[16].

In the case of *Jolly George Varghese v. Bank of Cochin (1980)*[17], the Supreme Court also elaborated on the civil consequences of non-repayment of the debts and pointed out the need for establishing strong precautions before debtors are imprisoned Nevertheless, within the framework of the KPID Act, such civil safeguards are thrown overboard by the extreme criminal risks imposed on the persons, which is evidently indicative of the Act's intent to prioritize the interests of the depositors at the expense of all other stakeholders.

The Companies Act contains provisions for both civil and criminal liabilities, with the courts very often upholding the ratio of the offence and the purpose in the determination whether the person ought to be criminally charged. In contrast, the KPID Act provides for compulsory sentencing in the event of financial establishment failure. It shows an involvement in Muruga Finance. The KPID Act provides for the freezing of personal properties of promoters, directors or anyone else who is connected with the financial institution[18], by taking the liability off the assets of the individual a step further so that personal assets can be used to meet corporate liabilities.

III. JUDICIAL PRONOUNCEMENTS PERTAINING TO 'OTHER PERSONS'

The concept of 'other persons' as contained in the Companies Act has been influenced by various court rulings. One such ruling is *S.K. Alagh v. State of U.P.*[19], where the apex court observed that vicarious liability of directors or officers of a company cannot be assumed simply because they are changers without anything in the statute to the contrary. The judge stated that some statutes such as the Essential Commodities Act or the Employees' Provident Funds Act create such liabilities, but the Penal Code[20] does not. It was this succinct decision which indicated that simply being a manager or a director does not make one liable unless one is alleged to have committed the offence.

The ruling in *Maksud Saiyed v. State of Gujarat*[21] also added more weight to this stance. The court held that the liability of the crime does not extend to company's officials unless it is shown that they were actors in the crime charged but that they are accused[22]. This concept upheld as a rule meant that to impose criminal liabilities on corporate officers as per the Penal Code, it must be proved that such officers were either needfully involved or were part of the crime itself. Thus, it is wrong to say that ordinary vicarious liability extends to every other person in the company unless there is provision in the law to that effect. These decisions have transformed the dynamics of the internal structure of corporations – particularly in the aspect of personal accountability in the corporations[23]. By so doing, the courts have forward the responsibility of the legislators to provide unambiguity in the statutory provisions by curtailing the principles of vicarious liability. This results in a situation where corporate officers may only be exposed to liability in respect of specific instances and situations thereby protecting them from the wanton harassment of directors or managers[24].

Further, these decisions have helped shape the paradigm of corporate governance by stressing the action of company executives in the violations[25]. The directors are now burdened with the responsibility of not only supervising the employees but also putting in place appropriate measures to ensure that internal controls work as they should[26]. These judicial interventions also find legislative expressions in the establishment of corporate governance regimes, which in turn seek to ensure that the notional power holders are in fact power holders and are working.

Finally, in interpreting the notion of liability of 'other persons' as provided in the Companies Act, the courts have taken a very practical approach which stresses the need for one's active participation in acts of misconduct. This has made a change in corporate governance where directors and officers should tactically and tactically eliminate or reduce risks of possibility of breaching statutory mandates[27]. Additionally, this has created a basis for legislative changes in that it seeks to eliminate gaps that could leave individuals exposed to liability due to the absence of legislation.

IV. MANAGEMENT AND CONDUCT OF BUSINESS

In financial establishments, when defining "management" or "conduct of business" often interpreted to include such people who actually make decisions and supervise the working of the concern[28]. These are typically the directors, officers, and senior management. The courts have always reiterated the fact that just by being in a position within the company does not per se attract any liability. The High Court of Delhi in the case of *National Small Industries Corp. Ltd. v. Harmeet Singh Paintal*[29] stated that directors who are in the business when the illegal acts are committed, and are in control of, and responsible for, the management of the business at the material time shall be liable. Such judgment was that ordinary directors or those who have nothing to do with the daily operations of the company shall not be vicariously liable[30].

In the same manner, in *K.K. Ahuja v. V.K. Vora*[31], the court that the broad assertions of "being in charge of" the business do not meet the requirement of establishing liability under section 141 of the Negotiable Instruments Act. The Reading of sections 5 and 291 of the Companies Act of 1956 by the court showed that a person had to perform a particular function and be involved in the transaction so that he could be made liable for it. This principle of active participation is aimed at protecting individuals who do not possess control or decision-making authority from being prosecuted in some cases[32].

These decisions are of paramount importance regarding the modern corporative governance system above all in the sectors prone to regulatory oversight such as finance. Companies now pay more attention to suppressing the problems by defining the range of appropriate actions and their respective bearers. The vagueness of the judicial interpretation made structure and propose such policies that only the actual controllers can be made liable[33]. This escapes the potential for unwarranted liability to be attached to any figure who merely possesses the titles but are not directly involved in the business operations.

V. CORPORATE CRIMINAL LIABILITY

The concept of corporate criminal liability encompasses the idea that a corporation, in its capacity as a legal person, can be held liable for any crimes committed by its employees, officers, or anyone else acting on its behalf[34]. This idea is especially important today in many financial institutions where the risk of fraud, embezzlement, or other criminal activities may be present. The courts have ruled that it is possible to charge corporations with statutory and common law offenses which include those with a mens rea element such as the case of *Iridium India Telecom v. Motorola (2005)*[35]. The finding emphasized that an organization could be found guilty when the extent of control of the officers or managers of the corporation is such that the corporation in reality does not act except through them[36].

So in accordance with the Companies Act of dmpz, issues pertaining to corporate criminal liability is due to the practical situation of both the firm and its directors being liable for offenses. Under Section 5 of the Act, the following people are said stated to be the persons responsible for the company's conduct: directors, managers, and other office holders who have authority[37]. It has been settled by the Courts on numerous occasions that when those in control engage in commission of crime, there is liability. The Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement*[38] affirmed the position that a corporation is subject to penalties under the law as an individual is under laws such as the FERA; this afirmed the position that both the corporation and the persons controlling its operations are subject to sanctions.

The examples of organizations being held responsible for the actions of so-called 'other persons' bring into focus the complications. For instance, in instances where there are employees or officers who commit a fraud or a regulatory offense, the corporation may also be found liable if such persons were acting within their authority and for the purposes of the corporation's business[39]. This is known as vicarious liability. This does prevent the companies from escaping liability by claiming that there actions are those of ungovernable employees. But the courts have also demanded the presence of a direct relationship between the act of the person and the business of the corporation in question before liability can be imposed[40].

The KPID (Karnataka Protection of Interest of Depositors) Act resists breaches of the law by providing an additional source of enforcement of the corporate criminal liability regime – particularly for fraudulent defaults[41]. Defaulting on repayment obligations under this Act can lead to criminal liability for the financial establishments, and breach of provisions by the officers in charge can also lead to charges against them. The KPID Act permits the cessation of assets as well as the criminal proceedings against the company and its agents - highlighting the gravity of corporate misrepresentation especially with regard to depositors. The provisions of the Act also provide for the imposition of joint liability on the companies and the management in cases of defaults made.

Personal accountability is very important in relation to the corporate criminal liability, particularly with respect to the KPID Act. The Courts have stated that one's being in a position to influence management decisions, even if passively, leaves such a person open to possible criminal prosecution for the company as well as for the individual. This means that any director or officer who conspires to commit fraud or who is simply lazy in preventing wrongdoing, can be held personally liable[42]. The latter is in place so that those who manage corporations do not use the corporate personality to shield themselves from any criminal liability.

VI. CONCLUSIONS AND RECOMMENDATIONS

The comparative analysis of the two legal provisions relating to liability namely the Companies Act, 2013, and the Karnataka Protection of Interest of Depositors (KPID) Act, 2004, also reveals an important transition in the legal regimes regarding the scope of blame in financial indulging activities. The historic approach of risk management in financial institutions placed the blame for any wrong doings at the top of the organization where the directors and senior management resided[43]. However, with increasing financial crimes and crimes involving other non-executives, a broader based approach became inevitable. Both of these regulatory regimes, despite being based on different principles, look at the promoters, employees, agents and other persons associated with financial crime as important contributors or facilitators of financial crime.

The KPID Act especially after the 2022 amendment is highly distinguished due to its repressive and corrective approach[44]. It extends criminal liability to financial institution's affiliates and offenses concerning depositors are cognizable and non-bailable further reinforcing the act as a strong protective measure for depositors. This is quite different with Companies Act which still captures the notions of fraud and other misconducts but gives more burden of proof on the direct participation relationships and is hence less aggressive is exposing people who are decision makers' subordinates. This variance exposes an interesting tension between the arguments of protecting the interests of stakeholders as opposed to protecting the legal status of employees working in the financial institutions.

This study brings out the theme of the changing paradigm of corporate liability with respect to India. Given the increasing prevalence of financial crime, the laws should also evolve. The Companies Act addresses the subject of internal management of companies, but the KPID Act brings more emphasis on deposits indicating that the law needs to balance between individual responsibility and fairness. The growing acceptance of vicarious liability, especially in the financial sectors, is a welcome development in safeguarding depositors' interests and ensuring responsibility at all financial levels of operation[45].

[1] *See generally* Basel Committee on Banking Supervision, *Principles for the Management of Credit Risk* (2000), https://www.bis.org/publ/bcbs75.pdf.
[2] *See* Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India); Karnataka Protection of Interest of Depositors in Financial Establishments Act, 2004, No. 30, Acts of Karnataka State Legislature, 2004 (India).
[3] Umakanth Varottil, *Corporate Governance in India: The Transition from Code to Statute*, 37 Del. J. Corp. L. 215 (2012).
[4] KPID (Amendment) Bill, 2022, No. 15, Acts of Karnataka State Legislature, 2022 (India).
[5] KPID Act § 9.
[6] *See* Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India); Karnataka Protection of Interest of Depositors in Financial Establishments Act, 2004, No. 30, Acts of Karnataka State Legislature, 2004 (India).
[7] *See* Jayati Sarkar & Subrata Sarkar, *Corporate Governance Reforms and Corporate Sector Development in India*, 15 Int'l Rev. Fin. 161 (2015).
[8] Companies Act § 447.

[9] *Muruga Finance v. State of Tamil Nadu*, (1999) 3 MLJ 343 (India).
[10] Tamil Nadu Protection of Interests of Depositors (In Financial Establishments) Act, 1997, No. 44, Acts of Tamil Nadu Legislature, 1997 (India).
[11] *Supra Note* 9.
[12] KPID Act § 9.
[13] *See* Nishith Desai Associates, *White Collar Crimes in India*, (2022) https://www.nishithdesai.com/White-Collar-Crimes-Report.pdf.
[14] *Supra Note* 9.
[15] *Supra Note* 4.
[16] *See* Aparna Ravi, *Regulatory Overreach and Financial Regulation in India*, 53 Econ. & Pol. Wkly. 53 (2018).
[17] *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360 (India).
[18] KPID Act § 14.
[19] *S.K. Alagh v. State of U.P.*, (2008) 5 SCC 662 (India).
[20] *Id.*
[21] *Maksud Saiyed v. State of Gujarat*, (2008) 5 SCC 668 (India).
[22] *Id.* At para 14.
[23] *See* Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6 Indian J. L. & Pol'y 44 (2013).
[24] *See* R. Gandhi, *Corporate Criminal Liability in India: A Critical Analysis*, 12 Nat'l L. Sch. India Rev. 33 (2020).
[25] *See* Organisation for Economic Co-operation and Development (OECD), *G20/OECD Principles of Corporate Governance* (2015).
[26] *See* Securities and Exchange Board of India (SEBI), *Listing Obligations and Disclosure Requirements* (LODR) Regulations, 2015.
[27] *See* Umakanth Varottil, *The Impact of Corporate Governance Reforms in India: A Legal and Economic Analysis*, 10
J. Corp. L. Stud. 285 (2010).
[28] *See* Companies Act, 2013, No. 18, § 2(51), Acts of Parliament, 2013 (India).
[29] *Nat'l Small Indus. Corp. Ltd. v. Harmeet Singh Paintal*, (2010) 3 SCC 330 (India).
[30] *Id.* At para 15.
[31] *K.K. Ahuja v. V.K. Vora*, (2009) 10 SCC 48 (India).
[32] *See* Rajesh Dalmia, *Principles of Corporate Liability in India*, 45 J. Indian L. Inst. 113 (2003).
[33] *See* Arpita Gupta, *Corporate Governance and Liability of Directors in India*, 7 Indian J. Corp. L. 91 (2021).
[34] *See* Salomon v. Salomon & Co. Ltd., [1897] A.C. 22 (H.L.); *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530 (India).
[35] *Iridium India Telecom Ltd. v. Motorola Inc.*, (2011) 1 SCC 74 (India).
[36] *See* K. I. Vibhute, *Corporate Criminal Liability: A Jurisprudential Perspective*, 50 J. Indian L. Inst. 225 (2008).
[37] Companies Act, 2013, No. 18, § 5, Acts of Parliament, 2013 (India).
[38] *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530 (India); Foreign Exchange Regulation Act, 1973, No. 46, Acts of Parliament, 1973 (India).
[39] *See* Anita Shankar, *Corporate Criminal Liability in India: Evaluating the Need for Reforms*, 12 NALSAR L. Rev. 167 (2017).
[40] *See* Siddharth Agarwal, *The Evolving Landscape of Corporate Criminal Liability in India*, 14 Jindal Global L. Rev. 112 (2022).
[41] KPID Act, 2004, No. 30, § 14, Acts of Karnataka State Legislature, 2004 (India).
[42] *See* Ramanuj Mukherjee, *The Principle of Responsible Corporate Officer Doctrine in India*, 13 Nat'l L. Sch. India Rev. 98 (2021).
[43] *See* Jayati Sarkar & Subrata Sarkar, *Corporate Governance and Corporate Sector Development in India*, 15 Int'l Rev. Fin. 161 (2015).
[44] Footnote: KPID (Amendment) Bill, 2022, No. 15, Acts of Karnataka State Legislature, 2022 (India).
[45] *See* Nishith Desai Associates, *Corporate Criminal Liability: Principles and Practice*, (2023).