CHAPTER X

CONCLUSIONS

After going through the various statutory provisions and rules laid down by the Courts in India and England for the protection of public interest through disclosures and other related provisions and rules, or in other words after analysing the legal frame work provided under the Companies Act, 1956 and by the Courts in India and England for the protection of public interest through disclosure, it is intended to devote this chapter to evalute the protection available and to give suggestions wherever it is felt that there are short comings. This does not mean to suggest that the existing provisions are useless. In fact with these provisions the interest of shareholders, creditors, other persons dealing with the company and at the times even of the company at large and also the society in turn is protected.

In the modern industrialised capitalistic society having an intricate, broad based, social structure, probably the mens rea for committing many acts i.e. social and other evils is an inherent lust of power and wealth by whatever means a man can exploit. A person will not hesistate even to represent falsly and defrauding others to enter into a contract or bargain for his own benefit.

The motives or thea objectives for committing fraud are maniforld, but still the accumulation of pelf or property may be the most important motive for committing it.

In the interest of moral and ethical values every society including our own has attempted every now and then to tacke this unwarranted tendencies by enacting laws directing person both natural and artificial to behave properly in their transactions with other party. They are directed to observe certain rules and regulations both moral and legal. The provisions laid down under the laws governing companies and corporations e.g. Companies Act, 1956, Foreign Exchange Regulations Act, Monopolistic and Restrictive Trade Practices Act and others, are incorporated with a view to check and curtail activities which are likely to be injurious to the persons directly or indirectly connected with such organisations, including the society at large.

The provisions studied and analysed in the foregoing chapters are based on the device of disclosure. The aim of this device is to enable the prospective investors, creditors, other persons dealing with the company and general public to judge for themselves the pros and cons of the investment and other dealings with the company. To-day social scientists and thinkers regards a company as a living, vital and dynamic social organism with firm and deep rooted affiliation with the rest of the community in which it functions. The concept of company has undergone radical transformation and the traditional view that the company is the property of the shareholders in now and exploded myth[1]. Further due to growth of institutional shareholdings, professionalisation of corporate management

and increased size of corporate unit, business enterprise is viewed as complex organisation of various groups, including shareholders, creditors, workers consumers of product as also the general public.

So far as doctrine of disclosure is concern, the main aim of the management should be presentation of relevent and useful information and not simply more informations which only leads to confusion. The disclosure of informations should be sufficiently adequate so as not to mislead the users and, therefore, it should be objective and varifiable. Hence full disclosure is needed to constitute true and fair view. However, there is no objective guide to decide as to what constitute the true and fair view, it is left to the discretion of the company management to decide what is full disclosure and what is not. But this discretion of the management is not final and it depends upon the circumstances of the case. In the case of prospectus it was held that there must be full, frank and honest disclosure of all material facts with scrupulous accuracy and no material fact should be withheld. Misstatement and non-disclosure of material facts would be fatal to the contracts or other transactions. The obligation imposed on those responsible for the issue of prospectus are not only to state accurately all the relevant facts, but also not to omit any fact which may be relevant[2]. Same principle is applied by the Court in other cases too.

Whether or not the disclosure were made fully and scrupulously and whether or not the investors or other person had been able to make a prudent appriciation thereof transpires only after the event. The law as it is wakes up only after the mischief has been perpetuated and complainant knocks at its doors,. It is suggested that instead of giving long rope to the violators or offender, preventive measures should be provided for, as it is rightly said that "Prevention is better than cure".

Mere civil or criminal liability is not enough, particularly in case of white collar offenders and more particularly when violation of the provisions of law takes place for acquisition of power and wealth. It is acceptable fact that the lust of power and wealth are the main motive for certain type of behaviour. It is rightly said that lust, wrath and avarice are three gates of darkness. According to Prof. Sutherland, white collar criminal is an avarious person. It is avarice that drag a man to damnation. Islam preaches strongly against avarice. Chritianity regards avarice as the originator of sin.

The rise of white collar criminality in many countries has coincided with the progress made in the economic and industrial area. The Vivian Bose Commission[3] appointed to probe into the working of the Companies in the Dalamia-Jain group, found that there was a loss of an estimated 3.5 crores of rupees as a result of fraud and improper use of funds of

the concerned companies by the management.

Friedman, has explained various causes which have contributed to the white collar criminality as under:

"The Industrial revolution had initiated great social changes of far reaching consequences. The Changes in the economic and social structure of property, comprising the transformation of an increasing proportion of wealth from property intangible, visible and mainly immovable goods into ownership in intangible and invisible powers and rights such as share, trademarks, patents and copyrights, coinsided with the growth of large sized corporations replacing individual enterpreneurs. This development, interalia, led to concentration of economic and consequent political power in a few hands, absentee ownership and impersonal monopoly emphasis on money and credit and decline in the sense of social responsibility on the part of owners of large property"[4].

The Law Commission of India in its 29th Report pointed out the various factors responsible for the rise in white collar criminality. It Observes:

"The advance of technological and scientific development is contributing to the emergence of 'mass-society' with a large rank and file and a small controlling elite, encouraging the growth of monopolies, the rise of managerial class and intricate institutional mechanisms. Strict adherence to a high standard of ethincal behaviour is necessary for the even and the honest functioning of the new social, political and economic processes. The inaoility of all sections

of society to appreciate in full this need results in the emergence of growth of white collar crime and economic crimes[5]....

It may be stated that the rapid industrialisation has also led us to discover new modes of economic offences. Now groups of individuals are engage thermeselve in manipulation of accounts and misuse of government permits and licences to make illegal gains. They leads a person to such an extend, that he will not hesitate to do anything to achieve them. As observed earlier, a person will undergo any sort of physical pain to retain his illgotten wealth. In order to remove this tendency, he must be deprived of his illgotten wealth alongwith other punishment, such as imprisonment, fine etc. The doctrine of restitution, as applied in case of contracts, particularly in the case of Minor's agreement should be made applicable with suitable modification.

In this work, my endouver was to examine the legal frame work, as provided by the Companies Act, 1956 for the protection of public interest through disclosure. In the first chapter I have tried to analyse the concept of public interest and also to point out towards those provisions of the Act which expressly or by implication provides for the protection of public interest. It may be submitted that the concept of PUBLIC INTEREST likes its counter part, the concept of Public Policy, is an elastic and flexible term and it is not capable of precise

definition, as it has no rigid meaning and it takes its colour from the statute in which it occurs. It is a concept which varies or changes its colour with times and state of society and its needs. In case of Companies Act, 1956 the concept of public interest may be interpreted as interest of members of the company, creditors, other person dealing with the company, prospective investors and the public at large. It also includes the interest of workers and consumers etc.

As has been said in Chapter I, one of the primary objectives of the Companies Act, 1956 is to ensure the protection of public interest i.e. the interest of the above mentioned categories of persons. With this objective in mind, the legislature has incorporated sixteen provisions in the Act, which expressly provides provisions for the protection of public interest. In all these provisions, the Central Government has been empowered to take appropriate actions in a given situation for the protection of public interest. In otherwords the Central Government has been rightly considered as a keeper of public interest. Most noteworthy of them are:

(I) Restriction on the transfer of shares etc. (Sections 108 B to 108 D)

(II) Appointment and reappointment of managing director (Section 269 (3) & (4))

(III) Reconstruction and amalgamation of companies (Sec. 394 & 396)

(IV) Rrevention of oppression and mismanagement

(Sections 397, 398 and 408)

The provisons contained in Chapter VI of the Act, are designed to prevent appression and mismanagement and provides an alternate remedy to winding up. While the provisions are well conceived, it is submitted with due respect that, certain anomolies do exist and requires correction:

(a) In the sections dealing with oppression and management particularly sections 397, 398 and 399 the words 'Share-holder/shareholders(should be provided alongwith the words member/members.

(b) The remedy provided by section 397 is considered as an alternate remedy i.e. in place of winding up of the company. It is suggested that the link with the winding up should be broken so that the remedy would be available whether or not it was just and equitable to wind-up. In other words it should be provided as and independent remedy.

(c) The conditions laid down in the sections should be amended to make it clear that the right to apply becomes available to isolated act as well as a course of conduct.

(d) The provision should be made to enable the court to restraint the commission or continuance of any act which would support a petition under the section. This is suggested to enable the court to restraint an anticipated act or course of oppression.

(e) The phrase in manner oppressive should be widen by adding words 'Unfairly prejudice'.

(f) Lastly the Sacher Committee has recommended in para 7.13

that recognised shareholders association would be entitled to avail of the rights prescribed in sections 397 and 409 in place of the members having right to apply, provided that the recognised shareholders association has obtained the consent in writing of the requisite number of members of the company as required under section 399. I would like to add that alongwith this recommendation, the section should expressly enable personal representative, trustee in insolvency and others to whom shares are transmitted by operation of law to present petition or seek other relief.

So far section 408 is concern it may be stated that, the experience of he working of this section has shown that the nominee directors, majority of whom are government servants play very little role in achieving the goal as expected under the law. Accepting this fact, the then Finance Minister Pranab Mukherjee while addressing the Annual General Meeting of the Indian Chamber of Commerce at Calcutta on 25th March 1984, observed that "the directors, nominated by the Government on the board of companies enjoying institutional finances, must be more effective, more functional and keep an eye over the performance of the undertaking..... Most of the nominated directors did not even go through the papers of board meeting in detail.... Even decisions were sometimes taken with their concurrence-passive or tact-which were against the declared policies of the government.... such a situation cannot be accepted"

It may be submitted that reasons for this inactiveness on the part of the nominated directors may be: (a) lack of time, (b) lack of knowledge, (c) lack of liking for management and (d) kakk of interest in the company, having nothing at stack in the company managed by them. Here I would like to suggest that in order to remove this, it is necessary that while making appointment under section 408 the Central Government should take into consideration the back ground of the person, his specific knowledge, experience and liking for the management. The appointment of top ranking officers as directors should be avoided.

In the second part of the Chapter I, I have tried to point out those provisions, incorporated for the protection of public interest, though not directly or expressly but indirectrly or by implication. In all, there are forty provisions, which in my view are incorporated for the protection of public interest, as their object is to protect the shareholders, creditors, other persons dealing with the Company or the company itself or the society at large. For example, the definition of 'Relative' (Sec.6) is very relevant, as certain provisions of the Act prohigits directors and their relatives from holding office of profits or declaration of interest in any transaction to be entered into with the company. The object of this provision is to prevent directors and their relatives from taking undue advantage of their position. Other important provisions

incorporated for the protection of public interest are provisions dealing with the Memorandum and articles of association, prospectus, management, investigation, benami transactions and winding up etc. So far as these provisions are concerned, whatever short comings came to light during my study, I have mentioned them at the respective places. in the chapter I.

So far as Chapter on Registration of documents is concern, it may submitted that right of inspection conferred by section 610 is not an absolute right. The right of outsiders to pry into the indoor managment of a company is limited. Even the right of members are restricted, for they do not have access to the books and records as partners have in a partnership firm. In this connection I would like to suggest that Members of the company should be allowed to inspect books, as practiced in U.S.A. where share holders are allowed to inspect books except to the extent to which this right is curtailed.

In case of Memorandum of Association, I would like to suggest that:

(i) the practice of incorporating powers in the Memorandum should be prohibited,

(ii) in case of alteration of capital clause-under section 95 some time limit should be prescribed for making entry by the Registrar,

(iii) it should be made obligatory for the company to add to

its name, as the last words "and reduced" for a period of two subsequent financial years and non-compliance should be treated as mis-discription of the name of the company.

(iv) the disclosure of reasons for reduction of share capital should be made obligatory.

(v) the Doctrine of Ultra has outlived its utility. The situation suffieiently underlies the need for ligislative move for the abolition of the doctrine with such care as would assure sufficient protection to the unwary third party. What seems to be needed is :-

(a) Abolition of the ultra vires rule in so far affects the capacity of companies, alongwith the abolition of the doctrine of constructive notice,

(b) to provide that a company can carry on any business or other activity and exercise any power to the same extend as a natural person of full capacity, except contract of of personal nature,

(c) the existing provisions in the Memorandum as regards powers and like provisions in the Memorandum in future should operate as a contract between a company and its members.

So far as provisions relating to prospectus are concerned, it may be pointed out that they are based on the philosophy of disclosure. In case of non-compliance, the law as it is, wakes up only after the mischief has been perpetrated. In order to provide full protection, preventive measures should be provided. I would like to suggest that provisions should be made for the approval of draft of prospectus

by the Registrar and prospectus should not be allowed to be issued, unless the Registrar is satisfied, and issues a certificate, within a prescribed time, say of three weeks, that it is in order.

Further existing provisions does not indicate the quantum of minimum subscription and leaves it to the judgement of directors, some quantum in the form of certain percantage of issued capital should be fixed as minimum subscription. for all issues and not only first issue. Section 69 be ammended accordingly.

I would also like to point out to an anamoly. The definition of prospectus has been amended to include an advertisement for deposits. Besides section 58 lays down that the provisions of the Act relating to a prospectus shall so far as may be, apply to an advertisement for taking deposits.

The provisions contained in sections 62, 63 and 68 relating to civil and criminal liability for mis-statement in the prospectus, and penalty for fraudulently inducing persons to invest money, therefore, ought to apply equally to advertisement for deposits. However, on a closer look at these provisions the apparent does not appear to be real. The reason for this anamoly is that section 62 is applicable "where a prospectus invites persons to subscribe for shares in or debentures of a body corporate". Advertisement for deposits is a prospectus. It is, therefore, doubtful whether section 62 which lays down civil liability for mis-statement

applies to advertisement for deposits. Section 62 would better have been amended in line with the amendment for section 2(36), so as to include advertisement for deposits.

In comparision, section 63 is applicable "where a prospectus issued.... includes any untrue statement". This section does not contain any qualifying words as in section 62. Therefore, it appears to apply to advertisement for deposits too.

So far as Chapter on Registerx is concern, the decision of Company Law Board in the case of Miss Nandita Jain v. Bennet Coleman & Co. Ltd. requires to be reconsidered. Here I would like to draw attention to the provisions of Law of Contracts, and particularly the Privy Council decision in the case of Mohribibi v. Dharmodas Ghosh, wherein it was held that minor is incompetent and an agreement with or by minor is void agreement, it is void ab initio.

The recommendation of Sacher Committee in Para 17.29 in repect of section 187-C is, seems to be based on wrong notion. The object of section 187-C is disclosure of interest both by the ostensible and beneficial owners. Therefore, it is not the question of settlement of title between the ostensible and beneficial owners. I would like to submit that it is not advisible to delet section 187-C from the Act.

So far as sections 303 to 306 are concerned, it may be submitted that they serve very useful purpose. However,

the punishment prescribed for non-compliance with these provisions is inadequate. Mere fine is not sufficient, it must be supplemented with imprisonment for a specific term.

So far as insider trading is concern, it is requires to be stopped and for this purpose recommendations of Sacher Committee made in paras 8.23 to 8.29 should be implemented. At the same time stock exchanges in India also requires to be constituted on the line of Tokyo or New Yowk stock exchanges.

So far as disclosure in respect of account and financial position is concernæ,I would like to suggest that;

(i) The preparation of separate trading account should be made compulsory,

(ii) The provision for showing unit-wise or product wise informations should be made obligatory.

(iii) Amount spent on human resources must be shown in the Balance sheet.

(iv) The Companies engaged in diversified activities should be compelled to furnish unit wise & product wise performance of the Company.

(v) In case of inter company ivestment, company should be compelled to furnish returns against each inter company investment.

(vi) ÆÆ ÆÆ financial statement should disclose clearly the position about the financial sickness of the company.

(vii) Quarterly or Half-qearly reports stating important

achievements or events should be provided to the members, creditors etc., particularly to the shareholders Association, if any. For this purpose encouragement should be given for the formation of shareholders association.

(viii) A provision should be made for filling with the Registrar a provisional balance sheet within three months following each of the quarter of the financial year, with the amount of turn over, and in the case of companies which are involved in different sector of industry, the turn over must be broken down sector by sector. This practice is in operation under the French Law. The format of Balancesheet should be changed, AS recommended by the Sacher Committee in para 8.8 should be prescribed as official format of balance sheet.

(ix) To-day, workers are regarded as part and parcel of a company. Under French Law Works Council's members enjoy the same rights of communication and copying as shareholders. In all companies, whatever their form, the head of the firm must give the works council information on (a) future plans likely to affect manpower structure, hours of works, conditions of employment and redundancy; (b) quarterly production and order levels and operating and plant projects; (c) a general report, atleast once a year, on the activities of the firm and the development of wage

structure and levels over the past financial year and plans for the coming year. As a counterpart to these wider rights of information, the law has bound works council members to secrecy in matters concerning information given as confidential by the head of the firm and as in the past, in all questions relating to manufacturing processes.

In this connection I would like to submit that recommendations were made for worker participation in the management but so far no positive action has been taken in this direction. I would like to suggest, to begin, wider participation of workers in the company affairs, by providing them certain information, as provided under the French Law. I hope, it would go a long way in maintaining good and confidential industrial relation in the Country.

(x) At present section 212 does not deal with cases, such as a company entering into partnership/joint venture etc. i.e. company is not require to disclose particular about such partnership/joint venture in the balance sheet. In order to plug this loophole, some provisions are require to to be made. In this connection recommendation of Sacher Committee may be implemented.

(xi) In case of Cost Auditor I would like to suggest that:

(a) Appointment of cost auditor should be made compulsory for certain type of industries.

(b) A time limit should be specified for the appointment of cost auditor and for maintenance of independente of cost auditor, the power of appointment should be given to the Company i.e. to the members in general meeting and provisions should be provided for his removal for specific reasons e.g. misconduct, deriliction in duty etc.

(xii) So far as provisions relating to inspection of books are concerned, at present Registrar is not require to communicate short comings or defects to the company concerned. The provisions should be provided for him bringing such matters, if any found, to the notice of the company, so as to enable the company to improve its functioning.

(xiii) In case of Annual Return, non-compliance with provisions of filing it with the Registrar is increasing. Some measures should be provided for reversing this trend.

Now a days Statutory meeting has become mere formality, and therefore, no harm will be caused by deleting section 165, dealing with the statutory meeting. However, provisions should be made for furnishing all the information, now requires to be incorporated in the statutory report, to all the members of the company within a specified time.

In case of shareholder's meeting, a very important recommendation has been made by the Sacher Committee in para 17.39, wherin it has recommended to give exclusive jurisdiction to the High Court in the matter of application for injunction in respect of holding of meeting. Looking to the present day practice, this recommendation should be implemented

rithout further delay.

Further Sachar Committee's recommendation[6] made for the circulation of the Minutes of the committee of the Board to all Members of the Board should be implemented.

So far as chapter on duty of disclosure of person connected with the management etc. of the company is concern my observations and suggestion are :

(i) The provision of post facto approval of contracts in which directors are interested should be deleted, as it might compel the Board to accord its sanction, as something has already been done under the contract. Further if dealing is found to be unfair or un-reasonable, board might find it difficult to refuse consent.

(ii) Section 297 deals only with the direct interest and not indirect interest of a director, eventhough it may be substantial and real. Whereas section 299 deals with both direct and indirect interest. Section 297 should be amended to include indirect interest for bringing such interest within the purview of the section.

(iii) Disclosure to the board of Directors as provided presently may not serve the real purpose as in many cases the Board may overlook the mischief in the transactions in which a brother director is interested. It is, therefore, suggested that disclosure be provided to the general body of shareholders, at least in the transactions which are of serious nature. This incidentally, will also satisfy the fiduciary obligation of disclosure to whom the duty is owed.

(iv) They must further provide for disclosure of interest/ concern in detail in the prescribed form. It is suggested that the information disclosed should atleast include the extent of profit likely to accrue to the interested director. This is necessary as no purpose is being served by the formality of disclosure prescribed at present, particularly under sub-section(3) of section 299, which requires just a general notice to the board, that a particular director is interested in a particular transaction.

(v) Further, recently, the English Companies Act, 1980 has provided in section 63(3), the applicability of section 199 of the English Act, to a new category of person called SHADOW DIRECTORS. A shadow director is a person, in accordance with whose directions and instructions, the directors are accustomed to act. This could include a controlling shareholder, who may not be formally appointed as director or any other person acting on behalf of the managing director, though lacking the formal authority, but apparently representing the company to outsiders. Under section 63(3) of the English Act of 1980, such shadow directors are required to declare their interest by a notice in writing, before, the date of the meeting of the board, in which, if he had been director, a declaration will be required under section 199. Further, a general notice, according to

section 199(3) corresponding to section 299(3) will be treated as sufficient declaration of interest.

I would like to suggest that similar provisions for person resembling shadow directors, is worth having, as in India quite often the Board of directors is packed with dummy, who act according to wishes of a person not holding any formal position or relationship, which are covered by either sections 297 or 299.

(vi) Further it may submitted that sometime mere presence of person makes a lot of difference in the meeting, particularly, when such person is influential person. In case of a company a director may be a man of power and resources, and in his presence, other directors may not like to displease him. Inorder to avoid such situation, provisions may be made that an interested director should withraw himself from the meeting during the discussion and voting of an item in which he is interested. This type of provisions will also prevent undue influence.

In case of Board Report, the recommendations made in para 8-17 and 8-18 of the Sachar Committee Report should be implemented.

In case of investigation, I would like to submit that as per the existing provisions the power of investigation rest with the Central Government. It would be desirable that this power should be exercised by a quasi-judicial body like

Company Law Board.

Further Section 237(b) empowers the Central Government to appoint inspectors in certain cases where there has been failure on the part of the company to provide information. I would like to suggest that in addition to the power of the Central Government to appoint inspector, members of the company may be given right to apply to the Central Government for the investigation of the affairs of the company by inspectors.

In case of amalgamation the Sacher Committee has recommended for the deletion of the two provisos of Section 391 in Para 17.50 of the Report. In this connection, I would like to submit that these two provisos were added on the recommendation of Vivian-Bose Inquiry Commission, as additional safeguards, there is no reason for deletion of these additional safeguards.

So far chapter on Winding Up is concern, I would like to draw attention to a noticeable discrepancy in section 519. This discrepency is that the title of the section read as "an application of Liquidator" whereas the body of the section referes only to "the report to be made to the court by the liquidator". This requires to be corrected. Further recommendations made by the Sacher Committee in Para 15-48 of the Report may be implemented for providing additional avenue for getting proper information.

It may be concluded that the duty of disclosure begins with the formation of a company, it continues during the life time of the company i.e. when the company is going concern, and also requires to be performed during the proceeding of

its winding up. The object of this legal framework, provided for the protection of public interest, is that the position of the state of affairs of the company in all matters i.e. Formation, Management, Maintenance of documents, Accounts and Financial etc. should be constantly brought to the notice of shareholders/members, creditors, other persons dealing with the company and the society at large and also to the governmental agencies to enable them to form an opinion in respect of working of the company and to take appropriate actions in the given situation, particularly when their interest or public interest is likely to be prejeducial affected.

It may be stated that "informational right to know should be balanced against the company's right to secrecy". Further it may submitted that sometime disclosure is plentiful, at the same time inadequate too from a different angle. This inadquacy exists in respect of quality. For this purpose logical format should be prescribed for providing information.

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3. Vivian-Bose Commission Report (1963) Chapter IV.
4. Friedmann: Law in a changing Society (1951) P.186
5. Law Commission of India, 29th Report (1966) P.3
6. Para 17.38 of the Report