

CORPORATE CRIMINAL LIABILITY: AN ANALYTICAL STUDY

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Abstract

“Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.”

The development of an economy is largely dependent on the corporate sector, though its stability must not depend on it. Corporate criminality seriously threatens the welfare of the society, considering its presence and impact in most aspects of social and community life, and the number of people it affects. India is not an unknown territory as far as Corporate Crimes are considered. In fact, it is a serious contemporary concern due to multidimensional aspects involved in nature of such kind of crimes, given the number of corporate scams emerging every day and threatening the overall economy and welfare of the State. Corporate Entities are in a position of causing massive physical and economic harm, thus, Corporate Liability in the present context must be strengthened.

The traditional perspective towards crime did not include corporate criminality and it was only during the 20th Century that the phenomenon of Corporate Criminality and consequently Corporate Criminal Liability emerged. In India, Laws pertaining to Corporate Criminal Liability are being strengthened, particularly after the Bhopal Gas tragedy. However, they are still in a nascent stage. Considering the penetrative reach of Corporates in the various spheres of social existence, and the commercial outlook in our value systems, it becomes even more important to ascertain the Criminal Liability of Corporates.

Keywords: Corporate Criminality, Corporate Criminal Liability, Corporate Crimes

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INTRODUCTION

Due to the nonstop advancements and breakthroughs in science and technology, the world has become borderless which has made dealings and transactions global. This has resulted in the development of sophisticated ways to commit crimes. Large Corporations dominate the global business and are present in every sphere of our life. However, a corollary of this dominance is that large companies have started indulging in criminal activities, and since they are not natural human entities, their activities, and criminal or otherwise, are also not ordinary. Therefore, the concept of Corporate Crime must be clearly defined to enable the ascertainment and affixation of liability to be imposed on them.

According to sociologist David Friedrichs, Corporate Crimes are “illegal and harmful acts committed by officers and employees of corporations to promote corporate and personal interests” (Friedrichs, 2010). Similarly, sociologist David Simon refers to Corporate Crime as “acts of economic domination” (Simon, 2002). According to most definitions, Corporate Crimes victimize the general public, consumers, a corporation’s employees, or a corporation’s competitors. Offences often include acts like corporate stealing, corruption, or fraud and have broad domestic or, in some cases, international implications.

India is not an unknown territory as far as Corporate Crimes are considered. “It is a serious contemporary concern due to multidimensional aspects involved in nature of such kinds of crime, given the number of corporate scams emerging every day and threatening the overall economy and welfare of the state” (GOEL, 2015).

According to Salmond, “*he who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of wrong.*” The word ‘liability’ means the “*quality or state or condition of being legally obligated or accountable.*” In other words, it connotes the legal responsibility or obligation of one person to another or to society, enforceable by civil remedy or criminal punishment. However, the Latin maxim *Actus non facit reum nisi mens sit rea* (the act does not constitute guilt unless done with a guilty mind) implies, there must be a guilty intention or knowledge, *mens rea* behind the act or omission, *actus reus*. But, when it comes to corporate entities, who are recognized by Law as an entity on their own, apart from their individual members in every respect, it becomes difficult to ascertain and affix criminal liability as *mens rea* is not affixable on any one person for the acts of the corporate.

Corporate Criminal Liability¹ has been a subject of great relevance in the contemporary legal world. It is significant to note that in the common law jurisdictions as well as in India, the law governing CCL has been mainly, Judge made law. Therefore, the evolution of the concept of CCL in India can be classified as a long processing effort from the judiciary to fix responsibilities on non-fictitious persons and hold them accountable. The doctrine of CCL is primarily based on the doctrine of *respondent superior* which was brought into Criminal Law from Law of Torts. The doctrine states that a corporation can be made liable criminally, prosecuted and convicted for any act or omission, which can be termed unlawful, of any of its agents, provided agents were acting within the scope of their authority, actual or apparent.

EVOLUTION OF CCL

The history of corporate liability is haphazard and incoherent. Legal thinkers did not believe that corporations could possess the moral blameworthiness necessary to commit crimes of intent.(Elkins J, 1976).

It was the common intent of the people that a corporation has no soul; hence, it cannot have “actual wicked intent”(Brickley, 1981). It cannot, therefore, be guilty of crimes requiring “*malus animus*”.²

Doctrine of CCL became important among doctrinal discussions in the end of 19th century. The introduction of a separate juristic personality for a body corporate shows a legal sophistication unmatched in the later developments of CCL. In the early stages for this liability, from around late 1860s to early 1930s, the Courts were not aware of the distinction between strict liability and *mens rea* offence. *Mens rea* was not regarded as particularly problematic so long as the offence did not fit the perceived category of real crime.³

The laws, history, politics and economics unique to different countries have had a phenomenal influence on the development and adoption of the doctrine of CCL. This influence has further resulted in different models of CCL. The doctrine has been developed in a different way to reflect the socio economic and historical realities of different nations of the

¹ hereinafter referred to as CCL

² *State v. Morris & Essex R.R.*, 1852

³ *Mousell v. London and North Western Railway*, 1917

world. The evolution of CCL shows that it is consistent with the principles of criminal law and the nature of corporations. (Pop, 2006)

Furthermore, the development of theories of CCL reveals that criminal liability of corporations is part of an important public policies bargain. The bargain balances privileges granted upon the legal recognition of a corporation, such as limited liability of corporate shareholders and the capability of a group of investors to act through a single corporate form, with law compliance and crime prevention pressures on the managers of the resulting corporate entity (Gruner, 2004).

The Courts in early 20th century began to strip the corporations from the immunity provided by the criminal law by questioning and interpreting the fact that words like “everyone” mentioned in various criminal statutes can possibly include corporations as well. However, the most challenging problem to imposing CCL on corporations was of attributing *mens rea* to a juristic person i.e. the corporation. The breakthrough came in 1915 when the English House of Lords laid down the principle of identification theory⁴ wherein it was held that “corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will, must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation”.

Under the principles of civil as well as criminal laws, a corporation can be held directly as well as vicariously liable for the offensive acts or omissions done by agents if they are within the scope of employment even if they are by subordinate agents for example truck drivers, clerical workers and salesmen etc. even when those agents violate express instructions given by the corporation.⁵ The general rule is that a corporation will be criminally liable for the illegal acts of its employees if the employees are acting within the scope of their authority and their conduct benefits the corporation.⁶

“A corporation may be held criminally responsible for the illegal conduct of its employees if: (1) the illegal act was committed while the employee was acting within the scope of

⁴ *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co.*, 1915

⁵ *USA v. Basic Construction Co.*, 1983

⁶ *USA v. MacDonald & Watson Waste Oil Co.*, 1991

employment, and (2) the employee's conduct was undertaken, at least in part, for the benefit of the corporation.”⁷

In India, the history of formation of Laws governing the conduct of companies began with the passing of the Joint Stock Companies Act, 1850 (hereinafter known as ‘JSCA’). The continuous process of amending and consolidating of JSCA to improve the provisions in order to keep the companies in check resulted in the passing of the Companies Act, 1956. However, it was still not competent enough to deal with all the possible business concerns and effectively cover all modes of incorporation and regulate the conduct of companies. The 1956 Act was further amended several times and was successfully succeeded by the Companies Act, 2013.

Section 11 of IPC, 1860 defines the term “person” which includes any company or association of people whether incorporated or unincorporated. Thus, penalties under IPC are equally applicable to wrongful acts committed by corporations, however, difficulty surfaces in attributing crimes to the company and in determining the guilty mind.

In *Oswal Vanaspati & Allied Industries v. State of U.P.*⁸, it was held that “a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. It was further held that a company cannot enjoy immunity from prosecution on the ground that mandatory punishment of imprisonment cannot be awarded to it and, if found guilty, a sentence of fine alone can be awarded. It is observed by the Hon’ble Court that a sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal.”

THEORIES OF CORPORATE CRIMINAL LIABILITY

Some theories which have been developed through Judicial interpretations and by Scholars exploring the concept of Corporate Criminal Liability are briefly discussed below:

1. Theory of Vicarious Liability/ *Respondent superior*:

Courts in England were the pioneers and explorers in setting up this concept. They developed and applied the theory of vicarious liability through their case laws. The

⁷ *USA v. Sun-Diamond Growers of Cal.*, 1998

⁸ (1993), 1 Comp LJ 172

American legislation later developed a similar concept and gave it the name of the doctrine of *respondeat superior*. England was the first to establish that the companies can be vicariously liable for the criminal acts committed by the employees, employer and agents of that company. It is pertinent to note that *respondeat superior* as a principle has a wider scope among these doctrines. “It derives from a mixture of law of torts and contractual law outlining that; a corporation may be held criminally liable for the acts of any of its agents who (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation.”⁹ The English Courts focus on the harm done to society whereas the US Courts consider the benefits in order to find liability.

2. Theory of Identification:

The doctrine of identification is different from the general rules for finding liability as it “effectively merges for legal purposes the individual and the company into one entity. There is thus only ever a bipartite relationship: the company and the third party” (Grantham, 2000). The doctrine of identification developed in the case *Lennard’s Carrying Co. Ltd v. Asiatic Petroleum Co.*¹⁰ where it was held that the fault or wrongdoing of the managing officer of the conduct of the corporation was wrongdoing of the corporation and, therefore, the corporation shall be held liable for such wrongdoing. It was also held that identification theory is based on a person who is the “directing mind and will” of the corporation.

3. Theory of Aggregation:

In the late 1980s, in the case of *USA v. Bank of New England*¹¹, the Court developed and undertook the Aggregate Theory where it was established that a corporation can still be liable for a criminal act even when not a single agent could be particularly made responsible for complete knowledge and info about such act. The Court held that “the knowledge of the corporation, in this case the bank, is the cumulative knowledge of every employee combined.”

⁹ *USA v. A & P Trucking Co.*, 1958

¹⁰ (1915 AC 705 at 713)

¹¹ (821) F. 2nd 844 1987

4. Corporate Fault Theory

According to this theory, only those types of fault which are the product of corporate *mens rea* can result in corporate liability (Quaid, 1998). Fault is attributed to any person based on four factors namely, fair opportunity, answerability, accountability and justification. These principles underlie the doctrine of *mens rea* (Ashworth, 1991). The most radical conception of *mens rea*, however, is that which Fisse calls strategic.¹² This is *mens rea* manifested through policies and corporate structures. Corporate decisions are a result of bargaining processes and procedures which are very difficult to be traced back to the individuals who contributed to them. According to Fisse, corporate fault is not dependent on any single person, but is distinct from any individual (Fisse, 1991). Strategic *mens rea* thus reflects the true corporate nature of the acts of the corporation.

ESTABLISHING CORPORATE CRIMINAL LIABILITY

For the purpose of establishing CCL, two requirements must be fulfilled:

1. The act of the person shall be in the scope of his employment: i.e. the employee, agent or manager committing the wrongful act shall be performing such act in the scope his employment. In other words, he must be carrying on the official tasks which have been designated to him by the corporation.
2. Benefit to the Corporation: that the employee's or agent's act must, in one or the other way, benefit the corporation. The corporation shouldn't reap the benefits directly nor the benefits should be received or enjoyed completely by the corporation alone; it's just that the illegal act which is performed must not be contrary to the interests of the said corporation.

LEGAL PROVISIONS RELATING TO CORPORATE CRIMINAL LIABILITY

The need and necessity of the criminal liability of corporations in India has been questioned very often. Another thing that has been asked frequently is that when we refer to CCL, are we talking about criminal organizations or corporate criminals and there is no fixed answer to

¹² (Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 1983)

these questions. Each case must be judged and examined differently as no two cases are the same.

There are numerous Statutes that have been enacted to legislate specific areas which include provisions for offences committed by corporations, for example, Transplantation of Human Organs Act, 1994, The Food and Safety Standard Act, 2006, The Narcotic Drugs and Psychotropic Substances Act, 1985, The Income Tax Act, 1961, Code of Criminal Procedure, 1973, The Prevention of Money Laundering Act, 2002, the Prevention of Corruption Act, 2018 etc.

Besides these specific Statutes, there are various provisions in the Companies Act, 2013 which deal with criminal offences of corporations and their liabilities. These provisions include the offences namely, Section 53 i.e. Prohibition on issue of shares on discount, Section 57 i.e. Punishment for personation of shareholder, Section 58 i.e. Refusal of Registration and Appeal Against Refusal, Section 118 i.e. Minutes of proceedings of General Meeting, meeting of Board of Directors and other meetings and resolutions passed by postal ballot, Section 128 i.e. Books of account, etc., to be kept by Company, Section 129 i.e. Financial Statement, Section 134 i.e. Financial statement, Board's report, etc, Section 182 i.e. Prohibitions and restrictions regarding political contributions, Section 184 i.e. Disclosure of interest by the director, Section 187 i.e. Investments of Company to be held in its own name, Section 188 i.e. Related party transactions, Section 447 i.e. Punishment for fraud, Section 449 i.e. Punishment for false evidence etc

Furthermore, IPC also prescribes for punishment of certain offences by corporate entities. For example, Section 2 of the IPC states that "Every person shall be liable to punishment under this code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India." Section 11 of the IPC states that "the word person includes any Company or Association or body of persons, whether incorporated or not."

The use of the phrase "every person" in section 2 as contrasted with the use of the phrase "any person" in section 3 as well as section 4(2) of the IPC is indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code.¹³

¹³ *Mobarik Ali Ahmed v. State of Bombay*, AIR 1957 SC 857

By reading section 2 and section 11 together, the concept of CCL can be derived. A corporation can be liable for committing any criminal act which has been mentioned in the IPC. The problem arises with the punishment of these criminal acts. As it has been mentioned time and again, a corporation is a juristic person which has no physical presence and therefore cannot be imprisoned. Some of these criminal offences have imprisonment as punishment and some offences have imprisonment as well as fine. Corporations can only be punished where fine is available as an option of punishment.

EVOLUTION OF CCL THROUGH JUDICIAL PRONOUNCEMENTS

In India, the Bhopal Gas leak tragedy in 1984 was one of the most terrible industrial calamities in the whole world. This tragedy raised various issues about the liability of MNCs, both civil as well as criminal, when these MNCs are engaged in intrinsically harmful activities. The Apex Court of India in the case *M.C. Mehta v. Union of India*¹⁴ laid down that Absolute Liability is an extension of the principle of strict liability which was given in the case of *Rylands v. Fletcher*¹⁵. The Court stated that when a corporation is carrying on an intrinsically harmful activity, then, in the event of any damage, it shall have absolute liability and it shall not come under any exceptions which are provided in the case of *Rylands v. Fletcher*.¹⁶

The Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement*¹⁷, considered the question as to whether a corporation, being a juristic entity, could be prosecuted for a wrongful act which is punishable with mandatory imprisonment and fine and if such corporation is found guilty of the wrongful act, can the Court impose a punishment which comprises of fine only. The Apex Court stated that there is no doubt that a corporation can be prosecuted, and punishment can be imposed for such wrongful acts which may be deemed criminal. The Court observed that, "Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted rule is that except for such crimes, as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents. "The Apex Court

¹⁴ AIR 1987 SC 1086

¹⁵ (1868) UKHL 1

¹⁶ Ibid.

¹⁷ (2006) 4 SCC 278

further observed that just like in the Law of Torts, the general principle exists that a corporation shall be liable for the wrongful acts or omission of an employee or agent, done by him while exercising powers authorized to him by the corporation, and without proof that his act was expressly authorized by the corporation.

Various decisions of the Supreme Court reflect the view that the Court should punish a body corporate with such a punishment, which it would have given to a person if the person had committed such offence as the body corporate. Even if corporations cannot be punished for certain criminal acts, the authorities acting on behalf of it shall be punished. For example, in the case of *U.P Pollution Control Board v. Modi Distillery & Others*¹⁸ an industry discharged its toxic wastes in the nearby drain. This act was in breach of the Water (Prevention and Control of Pollution) Act, 1974. Thus, the Court held that the authority responsible for this act of the company shall be prosecuted and punished, even if the company cannot be prosecuted. This decision of the Court was reinforced in the case of *Anil Hada v. Indian Acrylic Ltd.*¹⁹

In the landmark case of *Iridium India Telecom Ltd. v. Motorola Inc.*²⁰ the Supreme Court laid down the law that a company may be indicted even in respect of the offences where *mens rea* is essential. By stating this, the Supreme Court changed the prevalent view of the High Courts and said that it was erroneous.

Later in the case of *Sunil Bharti Mittal v. Central Bureau of Investigation and Others*²¹, the Supreme Court brought the concept of alter ego and held that “the principle of alter ego can only be applied to make the company liable for an act committed by a person or group of persons who control the affairs of the company as they represent the alter ego of the company.”

CONCLUSION AND SUGGESTIONS

Even though the legislations governing CCL in India have come a long way from where these used to be, these still have a long way to go. Many corporations get acquitted from liability because of technical doubts and uncertainties. Even if a corporation is convicted of criminal

¹⁸ 1988 AIR 1128

¹⁹ 1999 Supp(5) SCR 6

²⁰ (2011) 1 SCC 74

²¹ (2015) 4 SCC 609

offence the only punishment which can be awarded is of fine as it cannot be imprisoned. The corporations are of the mind frame that they can commit or omit any activity which is a criminal offence and get away with it by paying the fine prescribed to them.

There are a number of suggestions which can be implemented by the legislature of India so as to make the concept of CCL more effective:

- As it was stated in the 47th Report of the Law Commission, the Courts in India shall be given some authority as to give penalties as it deems appropriate based on the facts of the case.
- The concept of Corporate Culture should be introduced by the Legislature in India. Corporate culture includes amalgam of policies, standing orders, regulations and institutionalized practices of the corporation. The Corporate Culture reflects the pervasive values, beliefs and attitudes that characterize the corporation and reflects its practices.
- A legislation which is similar to the “The Corporate Manslaughter and Corporate Homicide Act, 2007” of the United Kingdom should be introduced in India which states that a corporation can be held liable for the offence of manslaughter.
- The range of penalties should be expanded and it should be inclusive of dissolution of company, judicial supervision, closing premises which were used for wrongful acts, disqualification from public tenders and confiscation of assets, orders for corrective action by the corporation, community service and publication of such offence committed.