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# Corporate Criminal Liability And the Way Forward

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## ABSTRACT

*In the era of modernisation and technological evolution, corporate criminal liability has emerged as an area that needs a definite determination. A huge outrage in malfeasance on the part of large corporations, and the difficulty in attributing 'mens rea' to an artificial person like a company, has resulted in great lacunas in contemporary criminal law. Even where this is overcome by treating corporations as 'natural person' for the purpose of the criminal act, limitations like no deterrence value by means of punishment prove to be challenging. This paper seeks to explore the role of corporations in economic crime and answer the question as to whether a corporation can vicariously be held liable for the actions of its employees and agents, especially when both the corporation and its shareholders materially profit from the criminal act. This question regarding the criminal liability of corporations opens doors to an extensive interpretation of corporate responsibility. The paper propounds upon the various theories on corporate criminal liability applicable worldwide. The paper seeks to show the transformation in the sphere of corporate criminal liability by elaborating upon judicial precedents over the course of time.*

**Keywords:** Corporation, Criminal liability, Legal person, mens rea, vicarious liability, deterrence.

## I. INTRODUCTION

The global marketplace is dominated by large- and small-scale corporations, comprising of a vast majority of the international economy. Our lives remain impacted by the activities of these organisations, be it actively or passively. With this great power, comes a corresponding responsibility, and when corporations ignore this social responsibility, and solely concentrate on maximising their economic gain, they sometimes become notorious as criminals.<sup>2</sup> The advancement in information and communication technologies has led to a borderless world, making the commission of corporate crimes easier, more complicated and more sophisticated.

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Attributing criminal liability to corporations has its own merits and demerits. The Indian legal system is built upon the moral accountability of individuals.<sup>3</sup> The criminal jurisprudence revolves around the maxim, “*actus non facit reum, nisi mens sit rea*”, which means, “the act will not make a person guilty unless the mind is also guilty”.<sup>4</sup> A corporation is recognised as a separate legal entity, enjoying its own rights, privileges and liabilities, distinct and separate from that of its members.<sup>5</sup> For the longest time, the belief was that corporation were mere legal fictions incapable of committing a crime, since they could not have a guilty state of mind. However, with time, corporations have increasingly been identified as having a persona in their ‘ethos’, which makes them unique and separate from its members or employees.<sup>6</sup> Corporations occupy a prime position in the society, and are just as capable as humans, if not more, to cause harm. Corresponding with the principle of equality, they should be treated like natural persons and be held liable for the crimes they commit.<sup>7</sup>

## II. RESEARCH OBJECTIVE

The objective of this research paper is to understand the concept of corporate criminal liability. Additionally, it seeks to critically evaluate the existing laws, while suggesting recommendations for a better corporate criminal liability system.

## III. RESEARCH METHODOLOGY

The research encompassed in this paper primarily comprises of secondary data collected from international journals, articles, online libraries and websites. The literature reviewed and books referred give an idea of the topic and the scope of research. The secondary sources of research are cited in the reference section of this paper.

## IV. HISTORICAL BACKGROUND

The evolution of corporate criminal liability has undergone three consecutive stages, overcoming a new obstacle at each one:<sup>8</sup>

1. *Public Nuisance*: English and US courts, at the first instance, imposed corporate criminal liability upon quasi-public corporations, like municipalities, etc., that were

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<sup>3</sup> Shouvik Kr. Guha & Abhyudaya Agarwal, Criminal Liability of Corporations: Does the Old Order Need To Change?, 1 NUJS Law Review, 329, (2008).

<sup>4</sup> Kousini Gupta, Actus Non Facit Reum Nisi Mens Sit Rea- Legal Maxim, Law Times Journal, (June 2019).

<sup>5</sup> Daniel R. Fischel & Alan O. Sykes Corporate Crime, 25 The Journal of Legal Studies 319, 320, (Jun., 1996).

<sup>6</sup> Talin V., Corporate Criminal Liability: The Identification Principle, The World Journal on Juristic Policy 1, 2, (2017).

<sup>7</sup> VK Aggarwal, Corporate Criminal Liability- The Issue Revisited in the Context of Recent Supreme Court Decision, 33<sup>rd</sup> National Convention of Company Secretaries, pg. 9, (2005).

<sup>8</sup> Sumit Baudh, Corporate Criminal Liability: A Review in Light of Tata-Ulfa Nexus, SCC OnLine, 10 Stud Asv (1988) 44.

guilty of nonfeasance, resulting in public nuisance.<sup>9</sup>

2. *Crimes not necessitating criminal intent:* With the increased outreach of corporations, courts extended the principle of corporate criminal liability from public nuisance to all those cases of crime which did not require a criminal intent to be proved. This trend started with the case of *Queen v. Great North of England Railways Co.*,<sup>10</sup> where a corporation was held liable for misfeasance, and soon spread to the rest of the world.<sup>11</sup>
3. *Crimes necessitating intent:* This was a tricky area and the courts were reluctant to expand the doctrine of corporate criminal liability to crimes necessitating the existence of intent. The need for an effective enforcement of law against crime by corporations, resulted in the courts holding a corporation liable for a crime of intent for the first time in *New York Central & Hudson River Railroad Co. v. United States*.<sup>12</sup> Corporate identity had resulted in a large vacuum in the application of criminal law to corporations, however, this to some extent was overcome by extending corporate criminal liability to corporations.

## V. TWIN MODELS OF CORPORATE CRIMINAL LIABILITY

The legal systems in different countries, apply corporate criminal liability in different ways. These ways can be categorised into two distinct models:

### (A) Derivative Model

In this model of criminal liability, corporations are held liable for the acts of individuals. The corporations enter at the secondary level, and the liability of the individuals is attributed to the corporation.

i. ***Vicarious Liability:*** Vicarious Liability is a common law principle, which doesn't find much significance in criminal law. It has always been considered to be unjust as it holds someone else responsible and accountable for the wrongdoings of another, without any justification as to whether the person was actually at fault or not. Vicarious Liability follows the concept of master-servant relationship, making the master, here the company, liable for the acts of the servants, the people working under the corporation.<sup>13</sup> This is the principle of

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<sup>9</sup> *R. v. Inhabitants of Lifton*, 101 ER 280 (KB 1794), *Rex v. Inhabitants of Great Broughton*, 98 ER 418 (KB 1771), *Case of Langforth Bridge*, 79 ER 919 (KB 1635).

<sup>10</sup> *Queen v. Great North of England Railways Co.*, 115 ER 1294 (QB 1846).

<sup>11</sup> *State v. Morris & Essex Railroad Co.*, 23 NJL 360 (1852); *Commonwealth v. New Bedford Bridge*, 68 Mass (2 Gray) 339 (1854).

<sup>12</sup> *New York Central and Hudson River Railroad Co. v. United States*, 53 L Ed 613: 212 US 481 (1909).

<sup>13</sup> Sahana D. & Arya R, *Corporate Criminal Liability in India*, 120 International Journal of Pure and Applied Mathematics 87, 92, (2010).

respondeat superior.<sup>14</sup> In the case of *Commonwealth v. Beneficial Finance Corp.*,<sup>15</sup> three corporations were vicariously held liable for criminal conspiracy for the acts of its employees, Director and Vice-President of a wholly owned subsidiary. This same principle has been applied in Indian context as well.<sup>16</sup> In the case of *Sunil Bharti Mittal v. CBI*,<sup>17</sup> the Supreme Court held that without any statutory foundation, people in charge of a corporation, cannot be held criminally liable for the acts of the corporation.

ii. **Identification Doctrine:** Identification Doctrine is an enhanced term for vicarious liability, which limits its inclusive scope, to certain range of persons, whose actions can be used to make the corporation liable.<sup>18</sup> The category of people who can make a corporation liable under this doctrine are those with directorial or managerial authority. These people are considered to be the 'directing mind' of the corporation, and their state of mind and conduct are attributed to be that of the company.<sup>19</sup> The conducts of these people may be with unauthorised particulars, but it must be within the assigned area of operation.<sup>20</sup> Identification doctrine can also be referred to as the *alter ego theory*, which has explicitly been laid down in *Tesco Supermarkets Ltd. v. Nattrass*.<sup>21</sup> This theory majorly relies upon the assumption that all acts, be it legal or illegal, carried out by members in high-level positions, are the acts of the corporation itself, as these members are not mere agents of the corporation, but the corporation itself.<sup>22</sup>

### (B) Organisational Model

While the derivative model revolves around individuals, the organisational model is centred upon the corporation. Some criminal acts require the presence of a mental intent and the attribution of such mental intent to corporations, is a challenging task. One of the ways in which this mental element is attributed to the corporation is through the identification doctrine. An alternate method to attribute this mental element is through the corporate culture, by showing that the fault was in the way the activities were directed, encouraged and tolerated, in the organisational culture, leading to non-compliance with the law.<sup>23</sup> The physical act is the act of

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<sup>14</sup> Cristina de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 Washington University Global Studies Review 547, 553, (2005).

<sup>15</sup> *Commonwealth v. Beneficial Finance Corp.*, (1971) 360 Mass 188.

<sup>16</sup> *State of Maharashtra v. Syndicate Transport Co. (P) Ltd.*, AIR 1964 Bom 195.

<sup>17</sup> *Sunil Bharti Mittal v. CBI*, AIR 2005 SC 2622.

<sup>18</sup> Smith and Hogan, *Criminal Law*, 178 (1992).

<sup>19</sup> *Tesco Supermarkets Ltd. v. Nattrass*, [1971] 2 WLR 1166; (1971) 2 All ER 127 (HL).

<sup>20</sup> *Moore v. I. Brester Ltd.*, (1944) 2 All ER 515.

<sup>21</sup> *Ibid* 17.

<sup>22</sup> Cristina de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 Washington University Global Studies Review 547, 557, (2005).

<sup>23</sup> Criminal Law Officers Comm. [Code Committee] of the Standing Comm. of Attorneys-General, Austl., *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility Section 501* (1992).

its members, employees, agents or board of directors.

Corporate culture encompasses both the formal rules and policies of the organisation and the informal code of conduct, attitude and practices at the organisation. The corporate culture may be responsible for the commission of the crime in two ways, either by actively encouraging the commission of the crime or by passively providing psychological support or tolerance for the illegal act. Just like an individual, the corporation would also be held responsible for this active or passive state of mind.<sup>24</sup>

This organisation culture doctrine is a new addition to the scheme of attributing criminal liability to corporations. However, the same is yet in the process of developments, and has not found its way into Indian scenario. The current Indian scenario is an amalgamation of vicarious and identification doctrine principles, undergoing a fast pace of development.<sup>25</sup>

## VI. CORPORATE CRIMINAL LIABILITY IN INDIAN SCENARIO

Corporate Criminal Liability gained its importance in the Western countries and then gradually moved into India. The Indian Judiciary has been grappling with the interpretation of this doctrine since the past few decades. Section 11 of the Indian Penal Code, 1860, defines “person” and includes company within its scope.<sup>26</sup> Therefore, a corporation can be held liable if it commits a crime. However, due to it being a juristic person, there are certain obstacles in attributing criminal liability to corporations.<sup>27</sup>

In order to deter people from engaging in unlawful acts, the society uses punishment as an aid, showing that the prime purpose of the criminal law is to induce external conformity with the set rules.<sup>28</sup> In relation to this, an obstacle arises when a company is accused of a crime for which imprisonment is a mandatory penal provision. This question was answered in the case of *Velliappa Textiles*,<sup>29</sup> wherein it was held by a majority decision that a corporation cannot be prosecuted for offences which require imprisonment coupled with fine as a mandatory punishment. Furthermore, it was stated that where the punishment prescribed was both imprisonment and fine, the court could only impose a fine.<sup>30</sup> The same was recommended by

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<sup>24</sup> V. Umakanth & Mihir Naniwadekar, Corporate Criminal Liability and Securities Offerings: Rationalizing the Iridium-Motorola Case, (2013) NLSIR (Special Issue) 144.

<sup>25</sup> Mihailis E. Diamantis, Corporate Criminal Minds, 91 Notre Dame Law Review 2049, 2052, (2016).

<sup>26</sup> Section 11, The Indian Penal Code, 1860, Act 45 of 1860.

<sup>27</sup> Anca Iulia Pop, Criminal Liability of Corporations- Comparative Jurisprudence, Michigan State University King Scholar Program, pg. 51, (2006), [http://www.law.msu.edu/king/2006/2006\\_Pop.pdf](http://www.law.msu.edu/king/2006/2006_Pop.pdf).

<sup>28</sup> William McVick, Toward a Rational Theory of Criminal Liability for the Corporate Executive, 69 Journal of Criminal Law and Criminology 75, 77, (1978).

<sup>29</sup> The Assistant Commissioner, Assessment-II, Bangalore and Ors. Vs. Velliappa Textiles Ltd. and Ors.; AIR 2004 SC 86.

<sup>30</sup> Sanskriti Singh, Lipsa Dash, Criminal Liability of Corporations, 21 IOSR Journal of Humanities and Social Science 22, 23, (2016).

the Law Commission in its report seeking an amendment in Section 62 of the Indian Penal Code, but the same could not be achieved.<sup>31</sup> In *State of Maharashtra v. Syndicate Transport*,<sup>32</sup> the Court held that a corporation cannot be prosecuted for a crime which necessitates the infliction of a corporal punishment or imprisonment, as it would negate the judicial process, because even if a guilty verdict was achieved, the punishment can't be inflicted.<sup>33</sup>

The status of application of corporate criminal liability in the Indian scenario has been explained by the Supreme Court in *Standard Chartered Bank & Ors. v. Directorate of Enforcement*,<sup>34</sup> which overruled previous decisions and revamped the said doctrine. It laid down that if a company is found guilty of a crime punishable with imprisonment and fine, the court can exercise its discretion to just impose the fine on the company, despite the fact that the company cannot be imprisoned, however, this discretion can only be exercised if juristic persons are found guilty.<sup>35</sup>

A corporation cannot be found to be guilty of crimes that require a malicious intent,<sup>36</sup> other than that, it can be subject to criminal prosecution for act done by it itself or through its employees. However, despite the fact that a corporation cannot be penalised for certain acts, the authority which works on its behalf, can be punished. For example, where an industry acted in contravention of the Water (Prevention and Control of Pollution) Act, 1974, its authorities were prosecuted and punished for discharge of wastes in a drain, since the company could not be prosecuted for the same.<sup>37</sup>

In *Iridium India Telecom Ltd. v. Motorola Inc. & Others*,<sup>38</sup> the Supreme Court held that a corporation is virtually at the same footing as that of any individual, and it may be prosecuted and convicted for any common or criminal law violations, including those that necessitate existence of mens rea.

## VII. THE WAY FORWARD IN THE CONUNDRUM OF CORPORATE CRIMINAL LIABILITY

One of the biggest challenges to corporate criminal liability is the lack of deterrence factor. Mere fine does nothing to deter large corporations from engaging in unlawful conduct, and yet

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<sup>31</sup> 41<sup>st</sup> Law Commission Report, <http://lawcommissionofindia.nic.in/1-50/Report41.pdf>.

<sup>32</sup> *State of Maharashtra v. Syndicate Transport*, 1963 Bom LR 197.

<sup>33</sup> *Kusum Products Limited v. S.K. Sinha*, [1980] 126 ITR 804 (Cal).

<sup>34</sup> *Standard Chartered Bank & Ors. v. Directorate of Enforcement*, AIR 2005 SC 2622.

<sup>35</sup> M. Arshiya Thansum & M. Kannappan, A Critical Study on Corporate Criminal Liability with Reference to Indian Case Laws, 119 *International Journal of Pure and Applied Mathematics* 681, 684, (2018).

<sup>36</sup> *Anath Bandhu v. Corn. of Calcutta*, AIR 1952 Cal 759.

<sup>37</sup> *U. P. Pollution Control Board v. Modi Distillery*, (1944) 1 All E.R. 691.

<sup>38</sup> *Iridium India Telecom Ltd. v. Motorola Inc. & Others*, (2011) 1 SCC 74.

fining them is the only punishment available currently. In this conundrum, economic and social sanctions have emerged as an alternative form of fine, which can deter the corporations from abusing their power and resources.<sup>39</sup>

I. **Economic Sanctions:** In order to deter other corporations from engaging in unscrupulous acts and set an example, corporations guilty of a crime on more than one occasions can be winded up or subjected to corporate death. Corporations can temporarily be shut down and not permitted to start operations again, unless they comply with the set norms. In grave cases, corporations can be delisted.

II. **Social Sanctions:** Goodwill is a company's greatest asset. The entire corporation is dependent upon this, and if the goodwill or reputation of the company falls in front of the society or marketplace, its business will come to an end. One of the ways to deter corporations from committing crime is to make it mandatory for them to publish their wrongdoing publicly. This would strongly deter the corporations as they would be in fear of losing their customers and the board of directors and shareholders would be afraid of besmirching their reputation. A just criminal punishment involves moral condemnation in society.

## VIII. CONCLUSION

Corporate Criminal Liability transmits a message of fairness, that no crime goes unpunished. The concept of corporate criminal liability is an evolving one, and there is a need to strike a balance between the need to punish wrongdoings and to protect the separate legal identity of corporations. For obvious reasons, corporations must not be allowed to hide behind a veil of ignorance in the garb of separate existence, however, at the same time, the law should not make unreasonable demands out of the members of the corporations and attribute every wrongdoing of the company to them.<sup>40</sup> There is no longer a debate as to whether or not corporations will be held liable for their criminal acts, the only question remaining to be elaborated on, is the extent of this liability. Moreover, the only punishment imposed upon these corporations is a fine, which does not serve the purpose of deterrence which criminal law emphasises upon. It is recommended that amendments in the statues like the Indian Penal Code, Companies Act, are necessary, to avoid contradictory judgements by courts and preventing them from entirely defining the scope of corporate criminal liability themselves. There is a need to take effective and strict action against corporate perpetrators, and strengthening the regulatory mechanism in

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<sup>39</sup> Talin V., Corporate Criminal Liability: The Identification Principle, The World Journal on Juristic Policy 1, 2, (2017).

<sup>40</sup> Markus D. Dubber, The Comparative History and Theory of Corporate Criminal Liability, pg. 12, (2012), <https://tspace.library.utoronto.ca/bitstream/1807/87912/1/Dubber%20Comparative%20History.pdf>.



the sphere of corporate criminal liability.

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