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A Critical Study on the Corporate Criminal Liability in India

ABHISHEK BHUSHAN SINGH[1]

ABSTRACT

In the light of rapid capitalism, the modern era companies are often found dirtying their hands in the race for profit and competition. This furious yet determined attitude of the firms often gives rise to civil and criminal liability either due to the company's lack of reasonable foresight or negligence to follow the standards set by the respective regulatory mechanism. The failure to follow such regulatory measures coupled with negligence gives rise to liability. This paper will examine the extent of this liability under the current Indian law and will attempt to assess the body of law with an eye to possible reform proposals. Two basic themes will be apparent throughout; first, the criminality behind corporate criminal liability and need for a flexible means of regulating the activity of corporations, given the diversity of uses to which the corporate form may be put and the ubiquity of corporations in the commercial life of our society; and second while criminal law can provide such a regulatory device, the conceptual framework upon which it is based is one of the individuals personal fault. The paper aims to analyze Corporate Criminal Liability with a significant emphasis on relevant criminological theories.

Keywords: *Company, Corporate, Criminal liability, Competition.*

I. INTRODUCTION

A company is considered a different legal entity from its shareholders. It can be described as a group of people working together to achieve a common goal, and it has no legal or technical significance. It is understood that criminal liability is attached where there is a violation as per criminal law. The Latin maxim *Actus non facit reum nisi mens sit rea* states that to hold a person or an entity accountable, it must be demonstrated that there was an act or omission that was prohibited by law, along with *mens rea*, which is legally defined as having a guilty mind. It is classified as a type of white-collar crime.

Corporate criminal liability can be defined as a crime committed by an individual or group of individuals who, for the purpose of pursuing a common goal of making a profit in the course of their occupation, commit acts or omissions that are prohibited by law and are done with a

[1] Author is a student at School of Law, Christ deemed to be University, India.

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guilty mind for the benefit of the Corporation or any individual within the group. Previously, when the notion of holding a corporation accountable had not been created, no corporation could be held culpable for any criminal act because it is an artificial legal person that could not be imprisoned, and there was no mens rea because the Corporation was not a natural person. When a corporation is declared criminally accountable, it impacts not only the Corporation's business, but also the individuals who are involved in criminal activity; they may face criminal and financial consequences. However, in the instance of corporate punishment, it has been suggested that a fine rather than jail be imposed.

The first initial attempts to impose corporate criminal liability were taken by common law countries, such as England, the United States, and Canada, who had seen an enormous contribution and a significant role in the economy due to the earlier beginning of the industrial revolution in these countries. Despite an earlier reluctance to punish corporations, one of the English courts' recognition of corporate criminal liability started in 1842 when a corporation was fined for failing to fulfill a statutory duty.2 There were a number of reasons for this reluctance. One, the Corporation was deemed to be a legal fiction, and under the rule of ultra vires, could only carry out acts that were specifically mentioned in the corporation "s charter. Secondly, how could the corporate be physically brought to court and punished? These factors hold true even today. The law has seen a lot of growth in many areas, but yet the global acceptance of criminal liability is not established in its zenith.

II. HISTORICAL JURISPRUDENCE

Initially, corporations were created as not-for-profit entities to build hospitals and universities for the public good. Their constitutions detailed their duties overseen by governments. Breach, if any, was punishable by law. [2]During the 17th century, corporations became profit-orientated. Their wealth was applied to finance European colonial expansion. As such, companies were used by the imperial powers to maintain draconian control of trade, resources, and territories in Asia, Africa, and the Americas. At the beginning of the eighteenth century, incorporated companies were formulated on a large scale, but most of them had a short span of life and busted like water bubbles. The investors suffered losses because of business failures or malpractices. In Britain, rather than regulating the conduct of these companies, the Bubble Act, 1720 declared such entities illegal and void. The partnerships were exempted from the ambit of the Bubble Act. However, the British Parliament enacted unique Acts for activities like Banking, Insurance, etc.

[2] A Short History of Corporations – New International http://newent.org/features/2002/ 07/05/ history.

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The Bubble Act, 1720 was repealed in 1825. The industrial revolution required a change in the law to facilitate business activities. The regulation of the corporations started with the enactment of the Joint Stock Companies Act, 1844. Limited liability was provided under the Limited Liability Act, 1855. The registration and limited liability provisions were consolidated in the Companies Act, 1856. The landmark decision of the House of Lords in *Saloman v. Saloman & Co.*[3] confirmed a separate legal entity to the company. Thus, the liabilities of the company were to be treated as separate and distinct from the shareholders. The very concept of corporations and their functioning, duties, and responsibilities has developed at the different stages of history. In this chapter, a humble effort has been made to study such developments during the ancient, medieval, and modern eras to understand corporate liability under the law.

III. DEVELOPMENTS IN CIVIL LAW COUNTRIES

The growth of corporate criminal liability has been more visible in common law countries, whereas civil law jurisdictions have been more hesitant towards corporate criminal liability. The reasons for this are many, like nobody- no soul theory, the dependence on statutory provisions, etc., including the pre-historic idea that the clan or the association cannot be held blameworthy of guilt. Hence, these associations or social families are not the subjects of corporate criminal liability and punishment for a crime.[4] But the past few years have made us witness such dangerous acts by these associations that the no-blameworthy approach has seen a nosedive. Many civil law jurisdictions started the process of execution of guilt against the companies for the criminal liability of their acts by the late twentieth century. Plenty of legal policies to incorporate criminal liability against the corporates, countries like Austria (2006),[5] Belgium (1999)[6], Denmark (1996)[7], Finland (1995)[8],

IV. LEGAL ENTITY AND CORPORATE CRIME

The corporate body has no actual existence outside the brick-and-mortar structures, and it is incapable of thinking for itself. Its directors or workers are in charge of the actions it takes or

[3] (1897) AC 22

[4] The principle of societas delinquere non potest is commonly described as encompassing two assertions contrary to the principle of corporate criminal liability. First, the notion that corporations have the capacity to

[5] The Law on the Responsibility of Associations was introduced in 2005 and came into effect on 1st January 2006

[6] Corporate criminal liability was reintroduced after it had been removed in 1934. See also, Robinson A. A., 'Corporate Culture' as a Basis for the Criminal Liability of Corporations (2008).

[7] Denmark first introduced corporate criminal liability for certain offences with the passage of the Butter Act in 1926. The current scheme of corporate criminal liability was introduced in 1996 and is governed by chapter 5 of the Danish Criminal Code. In 2002 corporate criminal liability was extended from specific crimes to all offences within the general Criminal Code under S. 306 of the Danish Criminal Code.

[8] Beale Sara S. and Safwat Adam G., "What Developments in Western Europe Tell us about American Critiques of Corporate Criminal Liability", Buffalo Criminal Law Review 89 (2004), p. 113.

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the acts it performs and the reasoning that goes into these actions. There is a belief that the Corporation's culpable servants should be punished. When the blame must be placed on someone, the matter becomes more complicated. Due to corporate organizations' domination in several fields of human activity, present economic changes necessitate a high demand for this type of liability.

Within complex organizations, it becomes complicated to track down the individual offender. An official can very quickly shift the whole blame or responsibility on another worker of lower rank. In case of any such event, other branches of the law, such as the law of contract, recognize that a corporate body can think and exercise a will. This form of acceptance of liability is essential for the answerability where failure to perform a specific duty imposed by the statute on a corporate body, for example, the responsibility to draw up and submit the tax returns or annual report submissions etc., constitutes a crime.[9]

Most criminal statutes the world over are applicable for whoever or to any ―person‖ who violates the legal preventions. Although in ordinary language, the word ―person‖ usually refers to a human being, the law gives it a much broader ambit and meaning.[10] The Dictionary Act of United States lays down that; ―In determining the meaning of any Act of Congress, unless the context indicates otherwise the words ‗person' or ‗whoever' include corporations, companies, associations, firms, partnerships, societies, and joint-stock companies, as well as individuals. Many courts have used the above-said definition to award meaning to the words person in the context of a criminal statute under federal legislation. It provides enough space to incorporate the wrongs of a company.[11]

V. TYPICAL FEATURES OF CORPORATE CRIMINAL LIABILITY

There is a wide range of corporate crimes which otherwise contain certain typical features. Corporate crimes are generally committed within an anonymous structure of action and communication and within a framework of generally legal activity.[12] There are, therefore, not easy to detect and are characterized by their low visibility. The other characteristic is that in

[9] Sadhana Singh, Corporate Crime and the Criminal Liability of Corporate Entities, Resource Material Series No.76, 137th International Training Course Participants' Papers (2010).
[10] Clinton v. City of New York, 524 U.S. 417, 428 n.13 (1998
[11] United States v. A & P Trucking Co., 358 U.S. 121, 123 (1958) (Violation of Interstate Commerce Commission Safety Regulations, former 18 U.S.C. 835 (1958 ed.); United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974) (Violation of the Travel Act, 18 U.S.C. 1952); Western Laundry and Linen Rental Co. v. United States, 424 F.2d 441, 443 (9th Cir. 1970) (Antitrust violations under the Sherman Act, 15 U.S.C. 1); United States v. Hougland Barge Line, Inc., 387 F.Supp. 1110, 1114 (W.D.Pa. 1974) (conspiracy, 18 U.S.C. 371).
[12] Johannes Kaspar, "Corporate Criminology Causes and Prevention of Corporate Crime" Legal Research Bulletin Kyustin University, Vol. 3 (2013) (online edition) quoted Eisenberg, Kriminologic, 6 Aug. 2006, §. 47 marginal No. 6

many cases, there is no personal contact between the offender and the victim and is described as delinquency of distance. There may not be an individual victim in many cases. The collective victims could be other corporations, agencies, the State, or the society in general. Corporate crime is also considered to be an essential part of economic crimes. Because of the peculiar characteristic complaints against the corporates do not generally come from individuals but are only revealed when there are certain inquiries or investigations by the law enforcement agencies.

VI. WHITE-COLLAR CRIMES

'Edwin Sutherland coined white Collar Crime.' Sutherland primarily focused on the realm of criminal activities perpetrated by those at the top level of society, contrary to the popular notion that criminal acts are solely committed by people in the lowest strata of society. Corporate crime is linked to white-collar crime because white-collar crimes are associated with the professional and privileged classes. The corporate crime deals with a company as a distinct entity. It benefits the Corporation as a whole, including investors and individuals in a high position in the company. White-collar crime and corporate crimes are similar as both are involved with the business. The difference is that white-collar crime benefit individual and corporate crime benefit the Corporation

Sutherland asserts that corporate crime is a large-scale version of white-collar crime because it involves people of high-class society committed in their occupation. The two forms of crime overlap because they all happen within similar environments in which incentives are high for an individual or group to engage in bribery, money laundering, inside trading, forgery and embezzlement, etc. Presently corporations focus on the prevention of white-collar crimes through their policies and procedure. Because of the detrimental effect of corporate crimes as financial, reputational, etc., there is a need for specific policies and procedures to prevent and detect corporate crimes.

VII. CORPORATE CRIME AND OCCUPATIONAL CRIMES

Incorporate crime both organizations and individuals may be illegal actors and could be liable for their criminality. Occupational crimes can be labeled as a crime against the organization as such corporations become victims of crime when they suffer a loss due to an offense committed by anyone, including employees and managers. On the other hand, corporations become perpetrators of crime when managers or employees commit a financial crime within a legal

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organization.[13]

VIII. STATE CORPORATE CRIME

State corporate crime is a concept that refers to crimes committed in a relationship with policies of the State and the policies and practices of commercial corporations.[14] State corporate crime is distinguished from corporate crime, which refers to deviance within the context of the Corporation and by the Corporation. It is also different from political crime, which is directed at State. It is also not 'State Organized Crime,' which is a crime committed by Government Organisations.[15]

IX. GLOBAL PRESENCE OF CORPORATE CRIMINAL LIABILITY

The liberalized economic policies and globalization provided a boost to trade and commerce at the global level. The corporations also went through mergers and acquisitions at the national and international levels to increase their capabilities. By now, the power of many transnational corporations is more significant than many nation-states. The enormous economic power of corporations has also given rise to unethical and unlawful practices. In the present era, crime, in general, is getting international dimensions, and there is a need for mutual support and co-operation between the nations in judicial and administrative matters. But, sadly, a considerable gap exists between the different legal systems that the countries across the world have developed. While few countries have developed a linear approach to counter corporate criminal liability, some countries still do not follow this concept. These countries have imposed faith in the statutory provisions and other regulatory provisions to handle corporate criminal liability. These legal systems believe that criminal law cannot provide solutions to the problem that the companies create. They go by the doctrines of corporate being fiction and the theory of ultra-vires to negate the fact that corporates can do criminal wrong. Society can do no wrong for them, the culture here being the social entity or the association.[16] Few countries believe that only the human being is the subject matter of criminal law and not the body corporate as it is very difficult to punish the company physically and when the statutory provisions are there to take care of the wrong done by a company, then why bring it under the ambit of criminal law principle. According to these theories, it becomes redundant to apply the criminal law

[13] Peter Gottschalk, Lars Glaze, "Corporate Crime does pay! The Relationship between Financial Crime and Imprisonment in White Collar Crime", International Letters of Social and Humanistic Sciences (online) Vol. 5, pp. 63-78 at p. 65 (2013).
[14] The term was coined by Kramer and Michalowski (1950) and redefined by Autette and Michalowski (1993) see enwikipedia.org/wiki/state-corporate-crime
[15] Chambliss, W., "State Organised Crime", Criminology, 27 : 183-208 (1989).
[16] United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118 (D.C.Cir. 2009)

principles of rehabilitation and retribution on the acts or omissions of the company which are guilty. More importantly, many countries practice distance from corporate liabilities for criminal wrongs as it is a way of keeping the shareholders safe from being prosecuted for the acts of a company.[17] Civil liability for the acts of a company has been long recognised and many nations who have common legal systems practice the imposition of corporate criminal liability. Countries like; Bulgaria, Slovak Republic, and Luxembourg do not accept the applicability or existence of criminal liability principles for the wrong done by a company. Countries like Brazil are newly shifting their stands from non-acceptance to acceptance. Whereas, countries like Hungary, Germany, Greece, Sweden, and Mexico do not support the concept of corporate criminal liability but have strict statutory administrative controls and provisions to handle the breaking of law by corporate action.

X. THEORIES OF CORPORATE CRIMINALITY

(A) Learning Theory

Criminal behavior, like all other types of behavior, is the outcome of a learning process. The hypothesis of 'differential association' was popularised by Edwin Sutherland. When a person is involved with individuals who think that behavior is positive, criminal behavior evolves. The intensity of interaction with such persons affects the learning process. This type of contact is more common in small groups. The motivations and tactics of deviant behavior are covered in this learning process.

Though this refers to all kinds of criminal behavior yet, it can also be applied to corporate criminal conduct. It is said that even large corporations are divided into smaller groups where a certain number of people work together collectively. In such groups, the new employees learn from the seniors as they need assistance from the more experienced colleagues. In a corporate setting, a senior individual may influence a junior. The critic, on the other hand, points out how the teaching person's behavior arose in the first place.[18]

(B) Theory of Anomy

Emile Durkheim, a French sociologist, coined the term 'anomy' to characterize a state of lawlessness caused by significant social and moral change. When there is a gap between a society's commonly proclaimed aims and the legal means a community member has to fulfill these goals, crime rises. As a result, people may resort to criminal tactics to attain their objectives. It is explained in corporate crime that a significant amount of corporate crime is

[17] United States v. LaGrou Distribution Systems, 466 F.3d at p. 591.
[18] Karper op. cit., at p. 3.

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committed within smaller businesses that are trying to stay afloat. When people compare themselves to others of their like, they naturally desire to grow and gain. As a result, it is probable that in the competitive corporate world, the 'cultural objective' is not only a significant economic success but maximum profit at all costs to compete. As a result, this is the product of a learning process that includes a group's internalization of motives and ideals.

(C) Neautralisation Techniques

Gresham Sykes and David Matza's notion of 'techniques of neutralization,' promulgated in 195824, is considered parallel to the thesis of 'delinquent subculture.' According to the theory of delinquent subculture, deviant organizations such as juvenile gangs have their own set of values and standards distinct from those of the rest of society. According to Sykes and Matza, most offenders do not generally reject social principles but rather excuse their violations in specific circumstances. Such justifications may be presented within a corporation when several persons execute numerous activities through division of labor, and a sense of individual accountability is lost under such circumstances. Furthermore, corporate infractions frequently affect a group of people, and the damage is not as evident as when it involves a single person. As a result, denying victimization is also simpler. There is a "business subculture" among corporations that not only tolerate but even encourage breaking the law to achieve economic success. As a result, a "culture of disobedience" with neutralizing tactics as a fundamental feature is possible. As a result, it is suggested that a person's persistent acceptance of illegal behavior within their social milieu is a crucial component in explaining future criminality.

(D) Theory of Self Control

Self-control theory explains a more significant impact on occupational versus corporate crime. The lower the individual's self-control, the greater is the likelihood of their involvement in criminal behavior

(E) Economic Theory

The cost-benefit theory is more plausible in the context of economic crimes than in violent crimes. The loss could be damage to reputation, risk of civil action by victims, risk of prosecution, and punishment. When there is low visibility and fewer chances of detection and prosecution of white-collar crimes, then the benefit may overweigh the anticipated costs

(F) Theory of Control Balance

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It Suggests that too much control but also too common control is a cause of delinquency.[19] There could be insufficient supervision of the upper management of the big corporations. There could also be a lack of proper maintenance concerning economic crimes by the State agencies or regulatory mechanisms.

(G) Theory Of Opportunity Structure

The theory of opportunity structure speaks about situations with low external control, which provides more opportunities for the crime without detection and punishment. It is observed that if one is to act according to cost-benefit consideration, then according to the economic theory of crime, most people would commit the crime in the given circumstances.[20]

XI. DILEMMA IN PUNISHING THE CORPORATE

The company is taken to be a separate entity from the employees and employers of that company. The most significant lacuna is that the company itself cannot have mens rea to commit a crime. The crime is said to contain two elements- guilty mind and guilty act. Even though the guilty act can be attributed to the company buy the component of guilty intent or guilty mind can never be figuratively attributed to the company. Even in the case of natural persons, the guilt or intent is inferred from the circumstances keeping in view their act and conduct.

The Supreme Court said in Gujarat Travancore Agency v. Commissioner of Income-Tax Kerala[21] that unless the statute expressly states that the element of mens rea must be established, it is often sufficient to show that a failure to comply with the regulation has happened.

However, in the previous case of State of Maharashtra v. Mayer Hans George[22], the court found that mens rea is a well-established common law element that is required for a criminal offence. Certainly, a statute can eliminate that ingredient, but it is a sound rule of construction in England and India to read a statutory provision constituting an offence in accordance with the common law rather than against it, unless the legislature expressly or by essential implication excluded mens rea.

Mens rea is undoubtedly the main component of the crime, but if the statute does not infer it or requires it then the act may be punished even if mens rea is not proved.

[19] Tittle, Control Balance Towards a General Theory of Deviance (1995)
[20] Karpar op. cit., at p. 7
[21] AIR 1989 1671
[22] AIR 1965 722

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The companies cannot be physically punished. Since the company is an artificial person, it cannot be physically punished to a term of imprisonment. At the same time, it is understood that a corporation is virtually in the same position as an individual and may be convicted under common law as well as statutory offenses, including those requiring mens rea. Even though it is not possible to imprison a company but many other punishments like fines, economic sanctions, rehabilitation of victims, loss of goodwill, etc., can be awarded to the company for deterrence.

Then the central dilemma is who should be punished? Should it be the company, or should it be the shareholder, the director, or the agents who committed the crime? The theory of corporate veil tells us that the company is a separate entity, but the theory of vicarious liability at the same time lays down that one can be punished for the actions of another if the act was done in consonance of the orders during the course of employment. There is a strong opinion of scholars who say that when a Punishing Corporate company is punished, it's the shareholders who are disciplined and not the company itself. When it is required to find the real hands who have done the wrong within a company, the courts also face a challenge when dealing with criminal liability cases. It gets challenging to find the real culprit in a complex hierarchical structure of multinational or other companies having complex organizational systems. Thus the further question which remains to be answered is whether the liability of the Corporation and management is to be dealt with distinctly and independently. An emerging trend is to keep the Directors' liability distinct and independent.[23]

XII. CONCLUSION

There has been a significant increase in corporate activities in the recent past. The corporations have increased in size and reach with globalization and liberalized economic policies. The present-day structure of the corporations is complex, with various organizational hierarchies. The overall corporate culture makes a significant departure from the activities of an individual. At the same time, the remedial measures applied in the case of the corporations also need to be different from those applicable to individuals.

Imprisonment as a punishment is excluded from corporate criminal liability. In contrast, most of the penal statutes prescribe a sentence of imprisonment of various durations keeping in view the gravity of the offense. The only alternative punishment for corporations remains a corporate fine. However, the penalty could be counterproductive without a proper sentencing policy, i.e.,

[23] See Sunil Bharti Mittal v. C.B.I. (2015) 4 SCC 609 (when a company is accused its Directors can be roped only if (a) there is sufficient incriminatory evidence against them coupled with criminal intent or (b) statutory regime attracts the doctrine of vicarious liability

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the heavy fine may have a crippling effect. In other cases, the big Corporation may not mind paying an inevitable penalty to buy immunity. This also may be harsh on the shareholders or investors. As a rehabilitative measure, the court may provide probation on certain remedial conditions. However, in severe cases where corporate continuity is not desirable, a heavy fine could be imposed, resulting in the shutting down of the Corporation. In India, we lack behind in developing corporate sentencing policy; it is only the judicial interpretation where courts punishing the Corporate have the power to levy a fine instead of the prescribed punishment of imprisonment. Therefore, the corporate sentencing policy is required to be framed in India.

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