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Enchanting Guilt: Mens Rea Revelry in the Corporate Fairy Tale

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ABSTRACT

Corporate criminal liability has become a significant concern globally, as white-collar crimes committed by corporations and their key personnel have far-reaching consequences. This paper explores the complex issue of attributing criminal intent to corporations, a concept known as mens rea. It delves into various jurisprudential models, such as the Organizational and Derivative models, and associated doctrines like the doctrine of Identification, Aggregation Theory, Respondent Superior, Special Vicarious Liability, and the Alternative model of liability. These models differ in their approach to determining a corporation's criminal intent and the individuals within the organization responsible for it. The paper offers a comparative analysis of corporate criminal liability across different legal systems, highlighting the varying interpretations of corporate mens rea, the involvement of senior officers, and the requirement of benefit to the corporation. The French and European systems consider mens rea irrelevant in corporate liability, while systems like the U.S. and Dutch embrace the concept of corporate mens rea. The paper also discusses the shift from vicarious liability to direct liability in English and Canadian law.

Keywords: *Mens Rea, Revelry, Corporate, Crime.*

I. INTRODUCTION

"*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.*"

- William Hazlitt

Corporate entities have now been established as separate legal entities for law in India. Legally as well as economically, the effects of white-collar crimes by corporations and key managerial persons have quite devastatingly affected the entire world and have led to a settled principle of corporate criminal liability being established from a raw form of discourse which started with a question of whether a corporation can possess mens rea as it is a sine qua none of a criminal offence. It was a deliberate thought and much pondered upon question because of the

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established concepts of a company being a separate legal entity and that of limited liability around corporate law. The Satyam scandal can be an instance of such cases which relate to corporate governance and fraudulent practices that seem to be raising the question of 'who is liable'. Malpractices and activities by corporations that lead to environmental degradation and human rights violations cannot be overlooked, especially in the present times and hence, the aspect of corporate criminal liability is of utmost importance and has become indispensable for the legal community as well as the corporate world. Corporate liability arises when an offence is committed by a person or body of persons in control of the affairs of the corporation. Then, it becomes necessary to determine the degree of control of the person or body of persons and if is the degree so intense that a corporation may be said to think and act through the person or the body of persons. For instance, the concentrated shareholding pattern in India may leave open a wide room for such a possibility. Thus, this section of the paper will try to investigate the fact that even though it is well established that corporations are capable of having mens rea, are the methods of proving mens rea adequate in the present system or not?

II. JURISPRUDENCE OF CORPORATE CRIMINAL LIABILITY: ATTRIBUTING CRIMINAL INTENT TO CORPORATIONS

In International Law, we seem to be facing two competing schools of thought Liberals and Romantics. The Liberal school of thought seeks to increase corporate accountability through an expansion and refinement of individual responsibility. It is grounded in the liberal tradition of international criminal justice. On the other side, we have the Romantic school of thought which sees virtue in holding artificial legal persons accountable as collective entities. It is more closely connected to human rights tradition and this view further accepts that the blameworthiness of the behavior of corporations may exceed the responsibility of any one individual. These schools of thought gave birth to two major models on which the Indian concept of corporate criminal liability works, namely, the Organizational model which focuses on the direct liability of the corporation as advocated by the Romantics and the other model the Derivative model believes in deriving the vicarious liability from the employees and attributing it to the corporation like the argument presented by the Liberals. Several doctrines come under these two models that present a way of determining the *mens rea* of a corporation. Some of them are described below:

The doctrine of Identification: This principle of identification, also known as the alter-ego theory, was developed by the English law in the case of *Tesco Supermarkets, Ltd. v. Nattrass*[2] which is the leading case for this approach. This theory imputes the mind, will, acts and intent

[2] *Tesco Supermarkets, Ltd v Nattrass* (1972) A.C. 153, 169-71.

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of the people carrying out the actions to that of the mind and will of the company itself. The underlying reason beneath this rule is that a company being a fictious entity cannot have a mind of its own and thus, the imputation where knowledge and intent on the parts of the directors who have direct control over the company implies knowledge and intent on the part of the company.[3]

Aggregation Theory: The aggregation theory, also known as the theory of Collective Intent, believes in the collective intent approach which is based on the reason that it is difficult to identify a single offender in a complex structure of a corporation and thus, under such circumstances, it becomes necessary and only proper to look for a collective intent because "any other rule would allow a company to compartmentalize information and thereby avoid criminal liability. Thus, if one assumes a crime with elements A, B, and C, where A is known to Officer A, B is known to Officer B, and C is known to Officer C, then, for criminal liability, all elements are known by the corporation."[4] One criticism of this theory when it doesn't seem to work could be when certain actions by a corporation are committed against the will of a minority of shareholders.

Respondent Superior: This principle which primarily evolved from the American courts is a kind of vicarious liability that holds corporations liable for the actions of its agents as the maxim translates into *"let the master answer"*[5]

Special Vicarious Liability: A statement such as this that "persons with managerial positions should be held liable for the acts committed by the company" generally holds. But can the directors be held liable for the acts committed by *other agents* of the company? This is termed as special vicarious liability which has not been much explored yet. This seems to be a case of reversal of alter-ego theory. The theory of alter-ego attributes the will and actions of the directors to the company. But the question here is whether the acts and will of the company (when other agents than the directors are at fault) can be attributed to the directors and can they be made directly liable? This contention came up in the case of *Sunil Bharti Mittal v. Central*

[3] One criticism of this theory is that "Application of the alter ego principle only punishes wrongdoing in the boardroom; it does not cover crimes committed by corporate agents other than top managers. Moreover, it does not include crimes that rely on a defective organization, because the diffusion of responsibility that characterizes the postmodern corporation prevents identification of a single offender."

[4] Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 Wash U Global Stud L Rev 547.

[5] To hold a corporation vicariously liable, three requirements must be fulfilled. Firstly, an agent of the corporation must have committed an act with the essential means rea. Secondly, the act must have been done within the scope of his/her employment. Thirdly, the act of the agent must have been done to benefit the corporation. The courts here have borrowed this concept from tort law and have applied it to criminal law to develop the paradigm of corporate criminal liability.

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Bureau of Investigation as well.[6]

Alternative model of liability: A standard was developed in the United States called the *corporate ethos standard*, to determine criminal intent. It put forward a perspective that said that a corporation has a personality unique to it or rather has its own 'ethos'(culture), and unless its ethos is of such nature which seems to be facilitating the acts of the agent, the company shall not be held liable. Otherwise, it will be averred that the criminal act was in alignment with the policies, ethos, and objectives of the company. This approach is new in developing the field of corporate criminality, as there is a shift in the source of the liability from individual members to the company ethos.

III. Comparative Analysis

While some systems such as the U.S., English, Australian, Canadian, Dutch, and Finnish have accepted and developed the idea of requiring a corporate *mens rea*; in contrast, many such as the French and the European systems that consider *mens rea* to be irrelevant in determining corporate liability. Considering only the systems that acknowledge corporate *mens rea*, it is important to note that this concept has not always been constant in its meaning and an analysis shows that the development of the various constructs of this concept can be broadly categorized into two different forms. "The first group includes the anthropomorphic models, which measure organizational blameworthiness by using the standards traditionally applied to individual culpability. The second group includes the organizational models, which determine culpability based on the characteristics of the corporation, its policies, and its practices. More specifically, the anthropomorphic models include the identification theory and the collective intent theory."[7] When the question of which natural persons can make a corporation liable arises, there seem to be broadly two models. "According to the first, only the acts of certain senior officers of a corporation can be considered in determining the corporation's liability. According to the second model, a corporation is criminally liable for the acts of every individual acting on its

[6] In the said case, certain provisions of Prevention of Corruption Act, 1988 were violated and the special court imputed the acts of Bharti Cellular Ltd. to the Chairman-cum-MD, Sunil Bharti Mittal. The Supreme Court held that "without any statutory backing, there is no concept of special vicarious liability in criminal law, and therefore, Sunil Mittal could not be criminally responsible for the acts of the company." The Court reiterated that the "Criminal Intent of the person(s) controlling company can be imputed to company based on the principle of "Alter-ego", however, the reverse application of this principle is not permissible. When the company is the accused, its directors cannot be implicated automatically and can be roped-in **only** in two situations: -

1. If there is sufficient incriminating evidence against them as to their specific role, coupled with criminal intent on their part; or
2. The statute provides for specific vicarious liability of directors of the acts of the company by way of a legal fiction.

[7] Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 Wash U Global Stud L Rev 547.

behalf.

These are two theoretical models; in practice some "mixed models" exist by which the acts of every corporate officer who meets certain criteria may make the corporation criminally liable."[13] The liability in the first model can be called direct whereas the second model can be called derivative as it is derived from the actions of the employees. The first model can be found in France, Germany, England, Wales, and Canada. The second model can be found in the United States, Dutch and the Netherlands. The English and the Welsh law of corporate criminal liability has developed and shifted from vicarious liability to a system of direct, primary liability of corporations as around 1944, the courts were inspired by the alter-ego theory by which the acts of the senior officers were seen as acts of the corporation itself.[14]

Similarly, the Canadian courts have also used the alter-ego doctrine to develop their understanding of corporate criminal liability. India follows the concept of vicarious liability, and the courts apply approaches of the Identification rule to determine liability. When the question of which natural persons can make a corporation liable arises, there seem to be broadly two models. "According to the first, only the acts of certain senior officers of a corporation can be considered in determining the corporation's liability. According to the second model, a corporation is criminally liable for the acts of every individual acting on its behalf. These are two theoretical models; in practice, some "mixed models" exist by which the acts of every corporate officer who meets certain criteria may make the corporation criminally liable."[8] The liability in the first model can be called as direct whereas the second model can be called derivative as it is derived from the actions of the employees. The first model can be found in France, Germany, England, Wales, and Canada. The second model can be found in the United States, Dutch and the Netherlands. The English and the Welsh law of corporate criminal liability has developed and shifted from vicarious liability to a system of direct, primary liability of corporations as around 1944, the courts were inspired by the alter-ego theory by which the acts of the senior officers were seen as acts of the corporation itself.[9] Similarly, the Canadian courts have also used the alter-ego doctrine to develop their understanding of corporate criminal liability. India follows the concept of vicarious liability, and the courts apply approaches of the Identification rule to determine liability.

As far as the capacity of acting individuals is concerned, the English, Welsh and German courts

[8] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 International and Comparative Law Quarterly <http://www.jstor.com/stable/760646>.
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are of the view that the acts of directors can be attributed to the company only if they have acted in their capacities. On the contrary, in the American and Netherlands criminal systems, the courts encompass other unofficial acts as well. The Canadian system seems to take the middle view in the sense that acts of the employees are attributed to the corporation usually when the employees act within their powers but at the same time, the employees cannot take the defence of breach of internal rules of the corporation when held criminally liable. This question doesn't seem to be answered by the French courts. In India, the requirement is like the English courts in the sense that the act committed must be necessarily under the scope of the employment.

When the aspect of the benefit criterion is concerned, the question which is commonly asked is, 'Should the relevant conduct of the agent have been intended to benefit the corporation?'. The French system only requires for the act to be conducted on behalf of the corporation and this may or may not encompass the benefit. German law requires the act to have violated any legal duties of the corporation or must have resulted in any financial benefit to the corporation. Contrastingly, the Dutch system contains no such requirement of a benefit to the corporation. The Canadian position says that "the acts of a representative can be attributed to the company only if they have, at least in part, benefited and were intended to benefit the company (possibly combined with an intent to obtain personal enrichment"[10] Similar is the case with American federal criminal law. In India, it is a requirement to establish that the criminal act of the employee has given some benefit to the corporation. The corporation doesn't need to get the direct benefit from such acts of the employee, nor the benefit must be completely enjoyed by the corporation. It is just that the illegal or unlawful act of the employee is not contrary to the corporation. As far as English law is concerned, it is contended that no matter if the corporation has been defrauded itself, it would still be liable if the representative was acting within the scope of his duty. This was said in an English case named *DPP vs. Kent and Sussex Contractors Ltd. (1944)* which was criticized immensely.

IV. CONCLUSION

Reducing the criminal intent of the corporation to the *mens rea* of individuals might be the current method but might not necessarily work in large, complex corporations where it is difficult to pinpoint certain individuals. A suggested framework is to shift the focus of the intent inquiry from the individuals to the corporation's internal decision-making structure. This means evaluating the corporation's criminal intent on three parameters:

[10] Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 Wash U Global Stud L Rev 547.

Did a corporate policy/practice violate a law?

If so, was it reasonably foreseeable that the practice or policy would result in a corporate agent's violation of the law?

thirdly, did the corporation adopt the agent's violation of the law?

Another way to go about for the courts in terms of deciding the intent of the corporation can be to look at the compliance programs that the corporation has laid down for its employees. This isn't much different from the above suggestion as this too emphasizes the corporate policies and is known as The Relevant Factor approach. "The absence of upper-management involvement and the existence of an effective compliance program, however, constitutes persuasive evidence that there was no authorization in the first instance to extend the employee's authority to the criminal acts in question. Accordingly, considering the compliance program, the jury might decide that the agent acted outside the scope of his or her authority, so the principal is not bound. Thus, under the Relevant Factor Approach, courts would allow the jury to consider compliance programs in determining whether a lower level "rogue" employee acted against established corporate policies and practices, and therefore not as an agent of the corporation."[11]

The above approaches of focusing on the corporate's intent rather than the individual's intent should be seen as a punitive measure because as far as deterrence is concerned, a better approach would be the Duty Stratification approach which calls for established demarcations of duties in a hierarchical framework by setting up such compliance programs that make it possible to penalize employees personally for criminal acts committed even after they were informed about their duties by the senior officers. If they weren't adequately informed about such duties, then superior liability for senior officials comes into the picture. And if there were no adequate compliance programs in the first place to regulate the behavior of the members, then the corporation would be directly liable. This shows the importance of corporate governance in regulating the criminal actions of corporations.

To sum up the above suggestive frameworks by mentioning the approach of Corporate Ethos which seems to cover the above arguments effectively, "Like the due diligence affirmative defense, the corporate ethos standard considers the corporation's diligence in preventing criminal conduct by its agents. One will examine such facts, along with a corporation's formal and informal corporate hierarchy, its goals and policies, its compensation scheme, and the

[11] Kevin B. Huff, 'The Role Of Corporate Compliance Programs In Determining Corporate Criminal Liability: A Suggested Approach' (1996) 96 Columbia Law Review <https://www.jstor.org/stable/1123405>.

education and monitoring it provides for corporate employees. If this examination shows that a corporation whose employees violated the law perpetuated an ethos that encouraged this violation, the corporation is criminally liable for the acts of its agents. If no such ethos exists, the corporation is not criminally liable even though its agents violated the law."[12]

Indian judiciary should ponder upon the developments and challenges revolving around this subject and apply several frameworks mentioned in the paper as the current trend in the country of letting go of corporations by just imposing a fine is not enough. It is that if the corporations can be fined by making the members liable, then there is also scope of imprisonment which is quite rare in Indian courts.

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[12] Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 109

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