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# Corporate Criminal Liability

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## ABSTRACT

*A company or corporation exists independently of its owners and those in charge of its day-to-day operations. Although a company's independent legal personality is a well-established idea, whether a company's misbehaviour can be subject to criminal law sanctions has been a contentious issue. While it is common knowledge that individuals in charge of a company can be held criminally liable for their actions, the more difficult question is whether such actions can be attributed to the company (due to its separate legal existence), making it liable for the consequences of a criminal offense.*

## I. INTRODUCTION

*A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings - Glanville Williams*

In the age of globalization and free markets, various companies have wielded their power throughout the globe and have increased their powerful presence not locally but in an international level. Thanks to this impressive economic power and influence these companies and organizations have huge influence over the multitude and affect them individually on a political, social and economic level. Out of the various business associations, a corporation having limited liability provides with the utmost advantage and protection to carry out businesses at a very large scale and to reach out the maximum population. It provides the ideal conditions necessary for such large organizations.<sup>3</sup> This is attributed to the fact that the company is a legitimate person with its own personality and the company is an independent being which also has a perpetual existence or life. The company has arisen as a social body capable of acting apart from easily recognizable human agents. This has made it difficult to assign criminal liability to a company.

Corporate Criminal liability started becoming more developed as various courts around the

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<sup>3</sup> T.K. Bhaskar & V. Umakanth, *Journal of the Indian Law Institute*, JSTOR, (Apr. 01, 2021, 10.14 PM), <https://www.jstor.org/stable/43927471> JSTOR.

world found it difficult to tackle the issues of assigning criminal charges to fictional entities i.e. companies in the legal system on the basis of moral and legal accountability of individuals. Criminal legislation aims to discourage socially condemnable conduct prohibits behaviour that offends the collective moral conscience as well as the moral conscience of individual members The goal of comprehensive criminal law is to prohibit and punish behaviour that unjustifiably and inexcusably inflicts or threatens significant damage on individuals or the public interest.

Companies having their own separate legal body or entity which is a well-known fact . The enduring question that has long perplexed the world is whether companies should be held legally accountable. This is debatable for a variety of reasons, including the loss of mens rea, the lack of a human body capable of inflicting the pain of incarceration, and so on. Courts have issued several contradictory rulings at various times, and the debate on this subject continues to this day. This liability is the quality or status of being morally bound or liable to someone or to government, and is enforceable by criminal action.<sup>4</sup> As a result, Corporate Criminal Liability refers to the degree of which a Corporation, as a legal person, may be found legally responsible for its own actions and omissions as well as those of natural individuals working by it.

Furthermore, the Corporate Criminal Liability can be further understood as crime or crimes committed by the individual or individuals who represent the company or corporation who commit the crime for carrying out a common mutual purpose for a financial or other gain which is illegal before the law and having a guilty mind. This illegal act or acts is done either for the company per se or for certain individuals. Previously it was difficult to prosecute the corporation for any of these criminal charges as the corporation couldn't be held liable for these acts as company is an artificial legal person, so it could not be imprisoned, and corporation not being natural person there was absence of mens rea.

Many people utilize the advantages offered by the law to their own personal gain and often end up doing illegal and immoral activities behind the shield of limited liability. Many cases can be found regarding the same. The law has to be developed in such a way that it can tackle the crimes done behind the mask of protection offered by the law. This can be viewed in light of the recent exponential growth of businesses. Their progress has been such that they have had a negative impact on civilization in many ways. As a result, criminal legislation should be used to govern business behaviour in public.

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<sup>4</sup> Benjamin Thompson & Andrew Yong, *Corporate Criminal Liability*, 49 AM. CRIM. L. REV. ,489 (2012).

Even though the doctrine of Corporate criminal liability seems like an answer for a few questions but it remains highly controversial among the prosecutors and scholars. Some scholars have argued that imposing criminal liability on business entities is both ineffective and inconsistent with the fundamental individual culpability and moral condemnation underlying criminal law.<sup>5</sup> Prosecutors often become reluctant to pin the charges upon the companies as often the money of innocent shareholders is at stake and also most the companies hold a massive importance economically as they produce a lot of jobs .

## II. ORIGIN AND DEVELOPMENT

The evolution of Indian law is similar to that in English in that it was thought that a judicial body was incapable of making mens corporation cannot be indicted for an offence involving mens later cases courts have followed the identification doctrine corporation can be found responsible for mens rea<sup>6</sup> offence.

It was assumed previously that criminal law could only be used for the crimes done individuals and companies cannot be prosecuted. But as they the companies started growing in power it was noticed that this protection or cover the companies were provided with was misused for individual gains. As a consequence, ordinary criminal law, which includes the principle of individual duty, is used to govern corporate conduct. Individualism-based criminal jurisprudence thereby regulates the conduct of a collectivity. Rather than altering the arrangement, the effort has responsibility into the same system.

From the Section 11 of the Indian Penal Code we can understand that the word ‘Person’ also includes a company, association or body of persons incorporated or not. Therefore we can understand that our penal code recognises liability of companies as well but the courts have read it within some limitations. The court established two levels of criminal responsibility in *State Syndicate Transport Co. (P) Ltd.*<sup>7</sup>. First, there are many offenses that can only be committed by a single human being, such as homicide, perjury, and so on. Second, there are certain such offenses that are punishable by corporal punishment or incarceration. Prosecuting a corporation can only stifle itself by embarking on a trial in which, even though a conviction is reached, no meaningful order in the form of a sentence can be passed.

We tend to have these limitations because our rules and laws are derived from the English law. However, the English courts have since taken a more liberal stance. Courts have since taken a more liberal approach to other cases that fall under the purview of corporate criminal

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<sup>5</sup> Harold Ruvoldt, *Crime Wave*, LEGAL TIMES, Oct. 21, 2002.

<sup>6</sup> *Sunil Chandra Banerjee v. Krishna Chandra Nath*, (1949) A.I.R. Cal. 689 (India)

<sup>7</sup> *State of Maharashtra v. Syndicate Transport Co. (P) Ltd.*, (1964) A.I.R. Bom 195 (India)

liability.

### III. MODELS OF CORPORATE CRIMINAL LIABILITY

#### 1. Derivative Model:

This is an individual-centered model. It derives the liability to the company simply when a person related to the corporation committed some liability for which the person is to be prosecuted, but because the person is associated to the company, the obligation is placed on the corporation to have the person with it and allowing it to incur such liability. An organization's liability is derived liability in terms of Corporate Criminal liability, whereby the burden is placed on the organization when the persons who commit the offense are associated with the organization.<sup>8</sup> Derivative model can be understood in two sub-categorises:

a) Vicarious Liability; b) Identification Doctrine.

##### a) Vicarious Liability

The definition of vicarious responsibility is founded on two latin maxims: first, *qui facit per alium facit per se*, which states that he who acts by another is considered to have behaved on his own, and second, *respondeat superior*, which states that let the owner answer. Lord Chelmsford LC said in *Bartonshill Coal Co. v. McGuire*<sup>9</sup> that 'every act course of employment in the course of his duties is treated as done by his employer's instructions, and therefore is the same as if it were his employer's own conduct.'

In *Commonwealth v. Beneficial Finance CO.*<sup>10</sup>, a Massachusetts court found three companies criminally responsible for a bribery fraud, the first for the actions of its worker, the second for the actions of its Director, and the third for both the activities of the Vice-President of a fully owned subsidiary. The Court appeared to conclude that corporate criminal responsibility was required because a company is a legal fabrication made up entirely of persons. While US courts aren't just the ones to have adopted the principle of vicarious liability in aspects of criminal liability, this model has now been discarded because it is considered unjust to blame one party for the wrongful actions of another.<sup>11</sup>

##### b) Identification Doctrine

This doctrine is an English law doctrine that attempts to recognize main entities of a

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<sup>8</sup>Sumit Baudh, Corporate Criminal Liability, The Student Advocate (Vol. 10), 45-46 (1988).

<sup>9</sup>*Bartonshill Coal Co. v. McGuire*, 3 Macq 300, (1853).

<sup>10</sup>*Id.*

<sup>11</sup> Anon, *Corporate Criminal Liability in India*, IPLEADERS, (Apr. 01, 2021, 10.25 PM), [https://blog.ipleaders.in/corporate-criminal-liability-in-india/#\\_edn5](https://blog.ipleaders.in/corporate-criminal-liability-in-india/#_edn5)

corporation who act on its behalf and whose actions and state of mind can be traced to the corporation. In the case of *Salomon v. Salomon & Co.*<sup>12</sup>, the House of Lords ruled that a private body is distinct from the individuals who work on its behalf. In multiple decisions such as *DPP v. Kent & Sussex Contractors Ltd.*,<sup>13</sup> *R v. ICR Haulage Ltd.*, the English courts found that private corporations should be entitled to criminal liability and that businesses should be held responsible for offences requiring motive. Such decisions resulted in the establishment of the 'identification doctrine.'

Concerning the responsibility of these main individuals who work on behalf of the firm, *Moore v. Brisler* held that the individuals that are identified with the companies must be behaving within the limits of their jobs or jurisdiction. Even if the specifics are not authorized, the actions must take place within an assigned area of service. It is reasonable to conclude that the identity doctrine is more limited in nature than the vicarious liability doctrine; instead of making corporations responsible for the actions of each employee, the identification doctrine limits liability to certain individuals.<sup>14</sup>

## **2. Organizational Model:**

With the exception of the derivative model, which focuses on the entity, the organizational model considers the enterprise. Offenses require a mental state (*mens rea*) as well as a physical act (*actus reus*) to commit a crime, but the issue that emerges when making companies criminally liable is how a company, which is a juristic being, could contain the required psychological state to commit crimes. One method of attributing mental state to a company was to use a derivative model. Another approach may be to demonstrate that there was an atmosphere in the company that guided, permitted, promoted, and also encouraged noncompliance with particular laws that made it an offense.

Furthermore, the physical act necessary to complete the prerequisite of offence committed should be derived rather than proven by the actions of the staff, officers, directors, and so on. Thus, when assessing a corporation's criminal responsibility, the culture must be considered.

## **IV. ANALYSIS OF OFFENCES**

### **Indian Position**

The word offence is not defined in the Companies Act, 2013. Reliance must be placed on other statutes for this matter. As per S. 3(38) of the General Clauses Act, 1897, offence

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<sup>12</sup> *Salomon v Salomon & Co Ltd* (1896) AC 22, (UKHL) 1

<sup>13</sup> *Id.*

<sup>14</sup> John T. Byam, *The Economic Inefficiency of Corporate Criminal Liability*, J.C.L. 2, 582-585 (1982) .

means *any act or omission made punishable by any law for the time being in force*. This definition is also followed in S. 2(n) of the Code of Criminal Procedure, 1973. Offences under the Indian Companies Act can be broadly categorized into 4 on the basis of punishment prescribed, namely;

1. Offences punishable with fine
2. Offences punishable with fine or imprisonment
3. Offences punishable with imprisonment
4. Offences punishable with fine and imprisonment

Offences have been prescribed an early as in S. 4 of the Indian Companies Act, with respect to registration of the name of the company. As many as 101 offences have been defined in the Act prescribing the above-mentioned punishments. These include the likes of failure to repay deposits, non-compliance relating to transfer and transmission of securities, failure of giving notice to registrar for alteration of share capital, default in holding of Annual General Meeting etc. Unless Special Courts<sup>15</sup> are set up by the government, offences are tried by criminal courts as per its pecuniary jurisdiction and power to sentence. Therefore, depending on the offence, courts, ranging from Magistrate's Court to Sessions Court can try offences under this Act. Some offences can be termed as continuing offences, which means an offence which is susceptible of continuance and is distinguishable from the one which is committed once and for all.<sup>16</sup> There has been, however a conflict in judicial decisions with respect to whether an offence is of such nature or not. The Allahabad High Court held that the offence arising out of failure to file annual return under S. 159 of the Companies Act, 1956 (now under S. 92) punishable under S. 162 of that Act is not a continuing offence.<sup>17</sup> The Madras High Court held that the offences arising out of violation of S. 159 and 220 of the Act are continuing offences.<sup>18</sup>

Offences punishable with fine alone and with fine or imprisonment can be compounded as per S. 441 of the Indian Companies Act. The term compounding is not defined in the Act either. The Law Commission of India in its 237<sup>th</sup> Report states *Compounding in the context of criminal law means forbearance from the prosecution as a result of an amicable settlement between the parties*.<sup>19</sup> In this case, it will be between the company or associated persons and

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<sup>15</sup>Companies Act, 2013, § 435.

<sup>16</sup> State of Bihar v. Deokaran Nenshi, (1973) AIR 908 SC.

<sup>17</sup> Pravin Jha and Others v. State of Uttar Pradesh (2001) 44 CLA 145 (All.).

<sup>18</sup> Asst. Registrar v Premier Synthetics Private Limited (1997) 89 Comp Cas 732 (Mad).

<sup>19</sup> 237TH LAW COMMISSION OF INDIA REPORT, COMPOUNDING OF (IPC) OFFENCES, 6 (2011), <http://lawcommissionofindia.nic.in/reports/report237.pdf> (last visited April 6, 2021).

the government. Compounding can reduce the time a dispute spends in court and provides for easy adjudication of such matters. There are 81 compoundable offences and 20 non-compoundable offences in the Companies Act. For the purpose of compounding, for offences where the penal amount is within a sum of ₹ 25,00,000, the Regional Director or an Officer designated by the Central Government would be vested with the adjudicating responsibilities and offences above this limit would be dealt with by the NCLT.

The Government consulted a 10-member panel in 2018 to review the penal provisions in Companies Act.<sup>20</sup> The Companies Act, 2013 introduced more punishments and penalties for non-compliance of various provisions as compared to the Companies Act, 1956. These regulations have created numerous prohibitions and wherein a mere violation of them would attract criminal liability and increase the burden of the Courts. Thus, these penal provisions which are meant to create a regulatory regime ended up being roadblocks in the path of doing business with ease in India. The panel took into consideration three types of offences under the Companies act in order to understand the penal nature of the act. The first was offences where imprisonment was mandatory, the second type involved offences where imprisonment was optional and depended on the discretion of the authorities and the final categories were for offences which no imprisonment was provided for. Further, such offences were classified into both compoundable and non-compoundable in nature. The rationale behind such a move was to ensure a widespread check of imposition of penal provisions under the Act, if certain classes of offences could be decriminalized. The first class regards offences which are punishable with imprisonment mandatory, which can be categorized into offences in which imprisonment be optional or some additional fine in consonance with imprisonment, whereas the second class would comprise of offences for which Imprisonment is a mere option, could be categorized into such offences that impose only fine as a penalty.<sup>21</sup> In furtherance of this, the panel has recommended the re-categorization of 16 of the 81 compoundable offenses by shifting them to an in-house-adjudication framework wherein the adjudicating officer at the Registrar of Companies would levy a penalty on defaults, with the penalties for the remaining compoundable offences and non-compoundable offences of serious nature remaining the same, which is tune with the aim of the panel to reduce the

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<sup>20</sup>AMENDING COMPANIES ACT: PANEL LISTS 83 OFFENCES FOR DECRIMINALISATION, [https://www.business-standard.com/article/companies/amending-companies-act-panel-lists-83-offences-for-decriminalisation-118072001500\\_1.html](https://www.business-standard.com/article/companies/amending-companies-act-panel-lists-83-offences-for-decriminalisation-118072001500_1.html) (last visited April 6, 2021).

<sup>21</sup> *Companies Act overhaul: Panel pitches for decriminalisation of several offences to cut legal wrangle*, BUSINESS TODAY, <https://www.businesstoday.in/current/policy/companies-act-overhaul-panel-for-decriminalisation-of-offences-to-cut-legal-wrangle/story/281691.html> (last visited April 7, 2021).

burden of the courts to decriminalize the other small and non-serious offences.<sup>22</sup> Offences such as making certain disallowed payments to directors for loss of office, breach of overall managerial remuneration limit and non-appointment of key managerial person in case of companies are among the offences proposed to be dealt with by the in-house regulatory authority.<sup>23</sup>

## V. CORPORATE CRIMINAL LIABILITY - PRACTICALITY

Though Corporate criminal liability may seem like an answer to the various crimes conducted by various companies but judges find it difficult to prosecute them because company per se is not a living person but a juristic person. There are certain provisions in the Companies act 2013 that hold a corporation accountable for its misconduct. However, there are clauses that mandate jail for an individual, or a corporation, such as Section 447 of the Companies Act, the 2013 Act, Section 420 of the IPC, Section 276B of the Income Tax Act and so on.

Another issue that the Judges had to deal with was how to prosecute a corporation for offenses where Mens Rea was required. The corporation was only tried in cases where Mens Rea was not necessary, and it was agreed that it should not be tried in cases where Mens Rea was necessary. Another difficulty which was faced was how to punish the companies. Imposing fines and sanctions eventually cause the shutdown of the companies which causes trouble for the innocent shareholders and employees.

In the case of *Motorola Inc. vs. Union of India*<sup>24</sup> the Bombay High Court quashed a proceeding against a corporation for alleged cheating, as it came to the conclusion that it was impossible for a corporation to form the requisite mens rea, which was the essential ingredient of the offense.

Thus, the corporation could not be prosecuted under section 420 of the IPC, but this idea of company not possessing mens rea came to an end Lord Denning's view in the case of *H.R. Bolton (engg.) Co. Ltd. vs. T.J. Graham* was accepted that A company may in many ways be likened to a human body. They have a brain and a nerve centre, which controls what they do. They also have hands, which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing

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<sup>22</sup> *Decriminalising Companies Act Offences – Striking a Balance Between Ease of Doing Business and Corporate Governance*, INDIA CORPORATE LAW, <https://corporate.cyrilamarchandblogs.com/2019/09/decriminalising-companies-act-offences-ease-of-doing-business-and-corporate-governance/> (last visited on April 7, 2021).

<sup>23</sup> *Highlights of The Companies (Amendment) Act, 2019*, INDUS LAW, <https://induslaw.com/app/webroot/publications/pdf/alerts-2019/InfoAlert-Companies-Amendment-Act-2019.pdf>. (last visited on April 9, 2021).

<sup>24</sup> *Motorola Inc. vs. Union of India*, (2004) Cri LJ 1576. (India)

more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is state of mind of company and it treated by law as such. So you will find that in case where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of company.

## **VI. CONCLUSION**

The growing awareness of corporate wrongdoing has not been met by a corresponding change in the criminal law system. So far, the effort has been to incorporate organizational misconduct into the current system. This effort has failed, as shown by the gradual increase in corporate misbehaviour. Corporations have caused significant damage by price fixing, misleading advertising, and defrauding consumers, and have harmed millions with impunity. They are not, however, viewed or interpreted in the same way as actual criminals. Corporations' illegal acts are also not considered traditional offences.

The harms produced by these activities must be recognised as conventional harms. In fact, corporate crimes strike at the very root of the trust and confidence in the political and economic institutions in the country. Social justice would demand that corporate criminal be pursued and prosecuted with as much vigour as traditional criminals. If the guarantee of equality is to be ensured and law were to be enforced equitably, then corporate criminality must be viewed with more seriousness as it can damage the nation's social, economic and political institutions. With corporate controversies on the rise, the time has come to revamp the regulatory regime and laws to make corporate criminal responsibility more robust and purposeful.

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