

# **CORPORATE CRIMINAL LIABILITY – THE ISSUE REVISITED IN THE CONTEXT OF RECENT SUPREME COURT DECISION**

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## **INTRODUCTION**

The debate on appropriateness of attributing criminal liability to corporations is far from over. There are views expressed in favour and against corporate criminal liability. The opponents argue that a corporation has no mind of its own, so it cannot demonstrate the moral turpitude required to establish criminal guilt. It is completely artificial to treat a corporation as if it had a blameworthy state of mind which, by definition, it cannot have. Furthermore, the impossibility of jailing an organization foils any attempt to attain the goals of deterrence, punishment and rehabilitation pursued by penal sanctions. The view in favour of corporate criminal liability - advocates that Corporations, are not mere fictions. They exist and occupy a predominant position within the society, and are as capable as human beings of causing harm. It is only just and consistent with the principle of equality before the law to treat them like natural persons and hold them liable for the offences they commit. Companies which have a major impact on the social life, must be required to respect the fundamental values of the society upheld by the criminal law.

Today the crime has shifted from almost solely individual perpetrators only 150 years ago, to white-collar crimes on an ever-increasing scale to acquire international character.

With the process of globalization and the growth of interdependence in economic, social and environmental activities by corporate entities, one of the most pressing global issues is the predominance of national and multinational corporations in economic transactions and their accountability. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that

amenability of the corporation to criminal law is as essential in the case of the corporation as in the case of the natural person.

The question of criminal liability of corporations illustrates the increasingly relative and functional interpretation of corporate responsibility. The complexities of corporate personality have nowhere been so troublesome as in the field of criminal law.

Two fundamental postulates of criminal law being presence of *mens rea* i.e. guilty mind and the principle of vicarious liability, the criminal law treats the company liable for an act of its agent or organ done with guilty intentions. It is well settled that in case the company contravenes or does not fulfil any statutory obligations it can be convicted of a statutory misdemeanor and there can be no other way except the indictment of the corporation itself. Although there is generally no vicarious responsibility in crime and people are responsible for their own acts, by means of fiction, a corporation could be made accountable as if it is its own act provided that the act is committed or omission is made by an organ of the company.

## **ORGANIC LIFE OF THE COMPANY AND CAPACITY TO COMMIT CRIME**

Lord Denning in *Botton Engineering Company Ltd. v. Graham and Sons* (1957, 1 QB 15) 9 CA) observed that 'a company, in many cases is linked to a human body. It has a brain and a nerve center, which controls what it does. It has also hands, which hold the tools and act in accordance with directions from the Cenozoic. Some of the people in the company are mere servants and agents, who are nothing 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

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## **BACKGROUND**

directing mind or will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

In *Trustees of Dartmouth College v. Wood Ward* (1819) 17 US (4 wheat) 518, Chief Justice Marshal observed, that a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of creation confers on it. This observation of Justice Marshal led to the concept that a corporation is an entity distinct from its members and officers, and with rights and liabilities of its own.

It was said that the corporate body could not : have criminal intent; be indicted by criminal procedure; be punished corporally; or be capable of certain criminal acts which were either void as *ultra vires* or by their very nature were inherently human. In most instances these barriers to liability have been overcome by judicial decisions and legislative enactments. The impossibility of harboring criminal intent, is a vestige of tradition stemming from the theory that a corporate body, without a mind and a will cannot harbor any intent in its ordinary capacity. However, most courts have now come to the settled position that a corporation may be capable of *mens rea*.

As most corporate crimes stem from economic objectives, it is entirely possible that a corporation might readily subject itself to the fine. But incalculable effect of conviction on the public attitude towards the corporation is probably the most forceful deterrent. There are corporate acts which are *ultra vires* and of no legal effect. The outlook sometimes prevails that a corporation can not be guilty of a particular crime, for that is *ultra vires* in itself, but it is not impossible to tear off logic to reason that no such crime exists. The considered range of these *ultra vires* acts has been so narrowed by the modern extension of corporate liability that the paths of this trend become a prime concern.

#### **CORPORATE CRIMINAL LIABILITY – HISTORICAL PERSPECTIVE**

Generally, the common law did not allow a corporation to be convicted of a crime. There were exceptions and these exceptions were based on the doctrine of respondent superior or vicarious liability – the master is liable for the conduct of his servant in the course of employment. The doctrine of vicarious liability was created in the law of tort in the seventeenth century in order to provide compensation to third parties and

justified on the ground that since the master acquired the benefits of the servant's work, he should also carry the burdens.

While the common law recognized the appropriateness of vicarious liability for tort compensation, it rejected vicarious liability for crimes since crimes required *mens rea* or guilty mind. The mere existence of the master-servant relationship was not considered to be a sufficient criterion for imputing personal fault to the master. However, there were three common law crimes which did not require *mens rea*. These include public nuisance, criminal libel and contempt of court. In these categories of offences, the courts applied vicarious liability, allowing the master (which could be either an individual or a corporation) to be convicted for offences of his servant. Apart from these vicarious liability exceptions, corporations were immune from liability under the criminal law.

The courts in early twentieth century began to dismantle the corporate immunity from criminal law by holding that words like everyone in criminal statutes could include corporations. Courts also rejected the argument that corporations cannot be held criminally liable for offences committed by their officers for reasons of being *ultra vires* unless those employees were expressly ordered to commit the act in question. However, the most challenging obstacle to imposing criminal liability on corporations was the difficulty of attributing *mens rea* to an artificial person - a corporation. The breakthrough came in 1915 when the House of Lords in *Lennard's Carrying Co. Limited, v. Asiatic Petroleum Co.* (1915) AC 705 at 713 (H.L.) laid down the general principle of directing mind (identification theory). In this case Viscount Haldane stated that "corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation". Subsequently, in *R v. Fane Robinson Ltd.*, (1941) 76CCC 196 at 203 (Alla C.A.), the Canadian Court applied the principle of directing mind and held that there is no reason why a corporation which can enter into binding agreements with individuals and other corporations cannot be said to entertain *mens rea* when it enters into an agreement which is the gist of a conspiracy and a false pretence.

#### **THEORIES OF CORPORATE CRIMINAL LIABILITY**

There are two theories, i.e. Theory of Vicarious

Liability and Identification; theories which have been used, in different contexts, to hold corporations criminally liable for true crimes and regulatory offences. The traditional theory of vicarious liability holds the master liable for the acts of the servant in the course of the master's business without proof of any personal fault on the part of the master. Whereas the identification theory recognises that the acts and state of mind of certain senior officers in a corporation are the directing minds of the corporation and thus deemed to be the acts and state of mind of the corporation. The corporation is considered to be directly liable, rather than vicariously liable under this theory. Let us examine, the various components of these two theories.

#### 1. Doctrine of Vicarious liability

Generally the doctrine of vicarious liability recognises that a person may be bound to answer for the acts of another. Similarly in the case of corporations – the company may be liable for the acts of its employees, agents, or any person for whom it is responsible. The doctrine of vicarious liability developed originally in the context of tortious liability, was imported into the criminal law, when this type of offences were essentially absolute liability offences. [See for brief historical account of the importation of this common law doctrine in Canadian Law, *Canadian Dredge & Dock Co. v. The Queen* (1985) 1SC R662].

#### 2. Identification theory

Contemplates an identity between the corporation and the persons who constitute its directing mind - the individuals whose duties within the corporation are such that, in the course of their duties, they do not take orders or directives from a higher authority within the organization. The commission of an offence by such person or group of persons identified with the organization and constitutes an offence by the corporation as well. The criminal liability of the corporation, like that of natural persons, indeed is primary and is not actually based on an application of the theory of vicarious liability.

The identification doctrine developed out of the perceived need to hold corporations liable for *mens rea* offences has created a pragmatic median between the extremes of total vicarious liability for all criminal acts and no corporate liability unless expressly authorized criminal acts. This doctrine stipulates that the actions and mental stage of the corporation found in the actions and state of mind of employees or officers of the corporation who may be considered the directing mind

and will of the corporation in a given sphere of the corporation's activities. A crucial point as to which employees or officers of a corporation are its directing mind for the purpose of the identification doctrine was considered and decided by the Supreme Court of Canada in *Dredge & Dock* case. The Supreme Court described the characteristics of the doctrine of identification theory, which may be summarized as follows :

1. It is a court adopted, pragmatic, but fictional device used to attribute a human element (mental state of mind) to an equally abstract entity called a corporation, for the purpose of including corporations within the control of the criminal law similar to natural persons.
2. If a corporate employee (or agent) is, in the Court's assessment virtually the directing mind and will of the corporation in the sphere of duty and responsibility assigned to the employee by the corporation, the employee's action and intent are the action and intent of the company itself, provided the employee is acting within the scope of his/her authority either express or implied.
3. The essence of the test is that the identity of the directing mind and the company coincide when the directing mind is acting within his/her assigned field of corporate operations i.e. field of operations may be geographic, or functional, or it may embrace the corporation's entire operations.
4. A corporation may have more than one directing mind. Where corporate activities are geographically widespread or diffused, it will be virtually inevitable that there will be delegation and sub delegation of authority from the corporate centre and therefore there will be several directing minds.
5. Since the actions and intent of the directing mind within his or her assigned field are merged with and become the actions and intent of the corporation, it is no defence for a corporation, to claim that,
  - (i) the Board of Directors or other corporate officers issued general or specific instructions prohibiting the criminal conduct;
  - (ii) the corporation and its directing mind are one, and thus the prohibition from one controlling arm of the corporation to

- another controlling arm can have no effect in law;
- (iii) the Board of Director had no awareness of the criminal conduct and did not authorize or approve it.
6. Although the directing mind and the corporation merge as one for the purposes of allowing the corporation to be convicted of an offence, both the directing mind and the corporation can each be prosecuted, convicted and punished for the offence.

Companies Act, 1956, is a juristic person and cannot be awarded the punishment of imprisonment and hence cannot be prosecuted for breach of Sections 277 and 278 of the Act". In *P. V. Pai v. R. L. Rinawma* (1993) 1 Com.LJ 314; (1993) 77 Comp.cas 179 (Kant) it was held that imprisonment alone was the punishment that could be imposed on a person found guilty and that the legislature intended that the offence under Section 277 should be met with punishment of compulsory imprisonment and fine, and courts have no jurisdiction to impose fine only and if that is done it would be altering the very scheme of the Act.

### Corporate Criminal Liability – Indian Context

The question whether a company could be prosecuted for an offence for which mandatory sentence of imprisonment is provided continued to agitate the minds of the courts and jurists and the law continued to be the old law despite the recommendations of the Law Commission and the difficulties were expressed by the superior courts in many decisions.

Different High Courts have taken different views on this question. In *State of Maharashtra v. Syndicate Transport Co. (P) Ltd.* (1964) 66 Bom L.R. 197; AIR 1964 Bom 195, the Bombay High Court held that the company cannot be prosecuted for offences which necessarily entail consequences of a corporal punishment or imprisonment and prosecuting a company for such offences would only result in the court stultifying itself by embarking on a trial in which the verdict of guilty is returned and no effective order by way of sentence can be made. In *Kusum Products Ltd. v. S.K. Sinha* (1980) 126, ITR 806 (Cal.) the Calcutta High Court took the view that even though the definition of "person" under section 2(31) of the Income Tax Act is wide enough to include a company or a juristic person, the word "person" could not have been used by Parliament in Section 277 (Income Tax Act) in the sense given in the definition clause. The Calcutta High Court further held that the intention of Parliament is otherwise because imprisonment has been made compulsory for an offence under Section 277 of the Act and a company being a juristic person cannot possibly be sent to prison and it is not open to a court to impose a sentence of fine or not to award any punishment if the court finds the company guilty under the said section, and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function.

In *Badsha v. ITO* (1987) 168 ITR 332(Ker) Justice Thomas, J., following the decision of the Allahabad High Court in *Modi Industries Ltd. v. B. C. Goel* (1983) 144 ITR 496(AII) held that a company registered under the

The Supreme Court in *Asstt. Commissioner v. Velliappa Textiles Ltd.* (2003) 7SCC 405 held by a majority decision that the company can not be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. The Supreme Court further held that where punishment provided is imprisonment and fine, the court can not impose only fine. The Supreme Court in *ANZ Grindlays Bank Ltd. v. Directorate of Enforcement* (2004) 6 SCC 531 held that the correctness of the decision in *Velliappa Textiles Ltd.* case requires reconsideration by a constitution Bench and thus referred the matters to a constitution Bench for an authoritative pronouncement on the subject.

### Evolution of Corporate Criminal Liability in India

In *Oswal Vanaspati & Allied Industries v. State of U.P.* 1993 1 Comp LJ 172, the Full Bench of the Allahabad High Court held that a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. The question that requires determination is whether a sentence of fine alone can be imposed on it under Section 16 of the Act or whether such a sentence would be illegal and hence cannot be awarded to it. It is settled law that sentence or punishment must follow conviction and if only corporal punishment is prescribed a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly then though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it. Thus, It cannot be held that in such a case the entire sentence prescribed cannot be awarded to a company as a part of the sentence, namely, that of fine can be awarded to it. Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal."

Recently, The Supreme Court in *Standard Chartered Bank & Others v. Directorate of Enforcement & Others* (2005) 4 SCC 530, considered the issue as to whether a company, or a corporation, being a juristic person, could be prosecuted for an offence for which mandatory sentence of imprisonment and fine is provided; and when found guilty, whether the court has the discretion to impose a sentence of fine only. The Supreme Court held that there is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

In the Standard Chartered Bank case the Supreme Court observed that as in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorised powers, and without proof that his act was expressly authorised or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any "person" who commits the prohibited act, and in many statutes the term "person" is defined. Even if the person is not specifically defined, it necessarily includes a corporation. It is usually construed to include a corporation so as to bring it within the prohibition of the statute and subject it to punishment.

### **Distinction between Strict Liability and Absolute Liability**

In as much as all criminal and quasi-criminal offences are creatures of statute, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statute. In the case of strict liability, the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but on the establishment of the *actus reus*, subject to the defence of due diligence. The law is primarily based on the terms of the statutes. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. Therefore, as regards corporate criminal

liability, there is no doubt that a corporation or company could be prosecuted for any offence punishable under law, whether it is coming under the strict liability or under absolute liability

The Supreme Court further observed that it is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. See *Tolaram Relumal v. State of Bombay*, (1955) 1 SCR 158; *Giridheri Lal Gupta v. D.H. Mehta*, (1971) 3 SCC.

In fact, there are a series of offences under various statutes where the accused are also liable to be punished with custodial sentence and fine. As per the scheme of various enactments and also the Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. It could not be the intention of the legislature to give complete immunity from prosecution to the corporate bodies for the grave offences.

If the custodial sentence is the only punishment prescribed for the offence, the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. But when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim i.e the *impotentia excusat legem* law does not compel a man to do that which cannot possibly be performed. And "all civilized systems of law import the principle that *lex non cogit ad impossibilia...*". So also "if an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element". As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company.

The Supreme Court explained that there is no blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy. Therefore, there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment and fine. The Supreme Court in thus Velliappa Case has given new dimension to the corporate criminal liability and favoured the new thinking prevalent in other parts of the world.

In Australia, France (Penal Code of 1992), the Netherlands (the Economic Offences Act, 1950 and Article 51 of the Criminal Code) and Belgium (in 1934 Courde Cassation) as cited in Velliappa case, the Supreme Court observed that in all these jurisdictions, the view that prevailed was that, where a statute imposes mandatory imprisonment plus fine, such a provision would not enable the punishment of a corporate offender. If the legislatures of these countries stepped in to resolve the problem by appropriate legislative enactments giving an option to the courts to impose fine in lieu of imprisonment in the case of a corporate offender, we see nothing special in the Indian context as to why such a course cannot be adopted. Merely because the situation confronts the courts in a number of statutes, the court need not feel deterred in construing the statute in accordance with reason."

## CONCLUSION

There is an apparent need to adapt the notion of fault to the structure and particular *modus operandi* of corporations. The existing mechanisms used to attribute criminal liability to corporations are but a partial solution, and should be improved.

This cannot be achieved in any meaningful way unless some serious thought is given to a number of fundamental questions, including the ability of criminal sanctions to effectively fulfill, in the corporate context,

the objectives of punishment, deterrence and rehabilitation traditionally associated with them. It is often argued in opposition to corporate criminal liability that the imposition of fines provides no guarantee that delinquent conduct will be deterred. The fines imposed on corporations are often minimal in comparison with the devastating effects of their wrongful acts, and virtually amount to a cost of doing business. But there is also a concern that excessive fines can have perverse effects that may have to be borne by innocent shareholders, creditors, employees or consumers. However, the preceding discussion makes it ample clear that in view of imposing role of corporations in economic, political and social spheres, the jurisdiction around the world are thinking in harmonious fashion in imposing criminal liability on corporations. As various jurisdictions have given this a statutory status, in India too the Government will consider the same in the light of Reports of Law Commission and the Supreme Court decision in Standard Chartered case.

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