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# Corporate Crime and Penal Policy in India: An Analytical study

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## ABSTRACT

*Corporates are an important part of our society. The growth and development of an economy is largely based on these corporations. Any negative act of corporates has a huge impact on the society. Therefore, crimes committed by corporations needs to be eradicated as they exploit society directly or indirectly. Corporate crime is also known as organizational crime or white-collar crime. Corporates has a distinct personality and is different from natural persons. The concern is whether a corporate can commit a crime being a non-natural person? Under the concept of vicarious liability companies are held guilty and not the personnel's working for such corporates. The scope of vicarious liability to offence involving mens rea give rise to company criminal liability. However, the Indian statutes are not in pace with different doctrines and concept which makes the corporate criminally liable. Thus, they do not make corporations criminally liable. There is no other punishment except fine. This paper assesses the legal policy associated regarding the issue of corporate criminal liability. It also compares the criminal liability of corporates in Indian, USA, UK, and Australian legal system.*

**Keywords:** Corporates, Corporate Crime, Legislations, Corporate Veil, Mens rea.

## I. INTRODUCTION

Just like other legal system, India also spent its considerable time in developing a system of company law which encourage incorporations, and which grants key privileges to those who establish corporations and to the corporation itself. The idea of separate legal entity and distinct personality which is given to the corporations without properly addressing the danger which the corporate poses, put them at an advantage to get indulged in criminal activities also. Since its incorporation's company law in India has seen many changes. Since independence there has been tremendous change in the structure of Indian society, social, cultural, political, economic, and also in the values and philosophy of life. The result is that the revolution of crime has taken place. New types of crimes like white collar crime and socio-economic crimes which were

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unknown to Indian society have emerged and are multiplying at an alarming pace.

These crimes have become a dominant feature of powerful section of modern Indian society. And this either aids or abets criminal activity or engages in it directly.

#### Modus operandi of Corporate Crimes:

There are different methods to commit Corporate crimes. In the present day societies the offences by corporations includes Fraud like Cheque Fraud, Insurance Fraud, Master Card Fraud etc., Money Laundering where money is stolen is taken to financial institutions and to firms which deals with asset management etc. for concealing the origin of money obtained by illegal activity, Corruption where public officers take advantage of their positions by accepting rewards and corruptly providing undue supports by illegal means, Insider Trading in the Financial Markets where shares of money market are privately sold without public knowledge, Companies sometimes avoid paying tax to the government or for the purpose of tax evasion they understate their business transactions.

#### Different Types of Corporate Crime:

The corporate offenders siphon off crores of rupees by exploiting the weakness exist in economic world. Until and unless the loopholes are detected by the law makers these offenders will continue to exploit the economy. But the economic offenders have the capability of exploiting weaknesses in any system. They track a new territory or undermine the system which is their field of specialization. Off late number of scams have cost the exchequer and millions of Indians, exorbitant sums of money. In the recent past, some major economic offences, which have badly affected the economy are:

Money Laundering: It has a close connection with organized crime. In this huge amount of money obtained by unlawful manner (mainly from organized crimes<sup>2</sup>) is shown to have originated from the legal source. It involves the conversion of black money into white money. Criminals maintain control over their proceeds by using this method as this provides a legitimate cover for their illegitimate source of income.

Money laundering must be eliminated from the society as it has a destructive impact on economy & political stability of country. The money laundering has a power to contaminate and corrupt the structure of the State which leads leads to corruption. Moreover, huge profits from different activities can be generated through this which aids the criminals in the expansion

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<sup>2</sup> Dr. Anuradha Gupta, *Money Laundering and Financing of Terrorism-A Study on Methods to Fight Money laundering in India and USA*, Journal of the Institute of Chartered Accountants of India, volume 58, April (2010).

of new criminal activities.

Insider Trading: Company's officers, directors and any beneficial owners who owns more than ten percent of a class of the company's equity securities are company's insiders. Insiders violates their fiduciary duties towards the shareholders by disclosing important non-public information of the corporate to the outsiders for trading in the company stock. When the insider trade shares based upon company owned information, he violates his obligation to the shareholders<sup>3</sup>. Insider trading is becoming quite uncontrollable in the present time. Regulatory effectiveness is often doubted when insiders are caught while misusing private information through insider trading. Number of insider exploitations even under strict insider trading laws shows that more empirical study is required to deal with this issue.

Bank Frauds: Nationalized and cooperative banks are the target of economic offenders and cores of rupees are siphoned off by having criminal connections with the bank management. For the huge non-performing assets, the big borrowers of the nationalized banks are responsible.

Import-Export Frauds: These frauds are done by corrupt traders by way of money laundering scheme by showing under invoicing of imports and over invoicing of exports and thus converting black money into white, obtaining liberal incentives of exempted tax on the profits offered by the government. These frauds are also committed by using forged and fictitious documents.

Dishonor of cheques- The Supreme Court ordered in *Anil Hada v. Indian Acrylic Ltd.*, under section 138 of the Negotiable Instrument Act, 1881, related to the dishonor of cheques: There are 3 categories of persons discerned from this provision who are brought within purview of penal liability.

- (1) the defaulter company,
- (2) Everyone in charge of and was responsible for the affairs of company,
- (3) other persons who is the manager, secretary, director or officer of the company because of whose negligence the company has committed an offence.

Therefore, there is no doubt in finding that the offence was committed by the company is an essential condition for convicting those other persons. The latest position on this matter is expressed by Supreme Court in *Aneeta Hada (2012)*.

Computer corporate crime- The computer cannot institute the instrument of crimes like murder.

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<sup>3</sup> <http://www.gamblingcontrol.org/userfiles/file/bs.pdf> (Last accessed 24/04/2021)

Computer and networks help the criminals to perpetrate their crime specially frauds, forgery, pornography etc. There can be corporate crime of theft of data which the competitor companies utilize for its own purpose, manipulation of data in accounting document, then there is securities fraud which can be committed through computers. In India, the case related to computer crime was highlighted in 2004 in bazee.com an online auction site. The CEO Mr. Avinash Bajaj of the same company was arrested by Delhi police for the circulation of lewd multimedia messaging service clip which depicts two students of a public school in asexual act.

Following legislations are there to control the menace of Corporate crimes in India:

1. Prevention of Corruption Act<sup>4</sup>
2. SEBI Act<sup>5</sup>
3. Insurance Act<sup>6</sup>
4. Banking Regulation Act<sup>7</sup>
5. Reserve Bank of India Act<sup>8</sup>
6. Code of Criminal Procedure<sup>9</sup>
7. The Telecom Regulatory Authority of India Act, 1997
8. Indian Companies Act<sup>10</sup>
9. Public Accountants and Auditors Act<sup>11</sup>
10. Indian penal code<sup>12</sup>
11. Prevention of money laundering Act<sup>13</sup>
12. Right to Information Act<sup>14</sup>
13. Central Vigilance Commission Act<sup>15</sup>
14. Lok Ayukta Acts of the state.

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<sup>4</sup> Prevention of Corruption Act, 1988 (Act No. 49) of 1988.

<sup>5</sup> SEBI Act, 1992 (Act No. 15) of 1992.

<sup>6</sup> Insurance Act, 1938 (Act No. 4) of 1938.

<sup>7</sup> Banking Regulation Act 1949, (Act No. 10) of 1949.

<sup>8</sup> RBI Act, 1934 (Act No. 2) of 1934.

<sup>9</sup> The Code of Criminal Procedure, 1973.

<sup>10</sup> Companies Act, 2013 (Act No. 18) of 2013.

<sup>11</sup> Public Accountants and Auditors Act, 1991 (Act No. 80) of 1991.

<sup>12</sup> The Indian Penal Code, 1860 (Act No. 45) of 1860.

<sup>13</sup> The Prevention of Money Laundering Act, 2002 (Act No. 15) of 2003.

<sup>14</sup> Right of Information Act, 2005 (Act No. 22) of 2005.

<sup>15</sup> Central Vigilance Commission Act, 2003 (Act No. 45) of 2003.

Despite number of measures taken by the government these economic crimes are not reducing, also number of scams are occurring with regular frequency in the country. The menace of economic crimes is very serious and needs to be addressed with a holistic approach.

## **II. CORPORATE CRIMINAL LIABILITY IN INDIA**

A company is an artificial juristic person and incapable of being sent to prison. The issue is whether it can be prosecuted for an offence where imprisonment is necessary for sentence or not. When fine is the only option left for punishment as prescribed under any statute, there will be no controversy. Supreme Court in 2003, in a landmark case<sup>16</sup> observed that an artificial juridical person like a company could not be physically punished by imprisonment, so any section which makes minimum term of imprisonment as mandatory punishment, such section cannot be applied in the case of artificial person. But this view has been overruled in a case<sup>17</sup> and it was observed that the companies are not exempted from prosecution merely because the prosecution of crimes for which the punishment prescribed is mandatory imprisonment and fine. Thus, if a person has to be prosecuted with vicarious liability for the acts of the company, the company has to be made an accused. It is a fair thing to do in any event as legal fiction is raised against both company and person responsible for the wrongful acts of the company.

### **Companies Act and Criminal Liability**

Companies are important part of our society. Companies Act, 1956 as amended by Companies Act, 2013 is the key legislation which governs the company in India. It regulates the range of activities right from the formation to the liquidation and winding up of a company. The Act prescribes the regulatory framework for number of aspects including organizational, financial, and other managerial aspects of company. It empowers central government to inspect the books of accounts of a company, to direct special audit, to order the investigation into the affairs of the company and to launch prosecution for the violation of companies Act, 2013.

Talking about criminal liability, a section which expressly speaks about criminal liability in the companies Act is section 34 which tells about the criminal liability for misstatements in prospectus.<sup>18</sup> There are other many sections in which only imprisonment has been prescribed or it is along with the fine. An analysis of the offences and punishment provisions under the

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<sup>16</sup> Asst. Commr. v. Velliappa Textiles Ltd. AIR 2004 S.C. 86 (India).

<sup>17</sup> Standard Chartered Bank v. Directorate of Enforcement AIR 2005 S.C. 2622 (India).

<sup>18</sup> Where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorizes the issue of such prospectus shall be liable under section 447. Provided that nothing in this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

Companies Act makes it amply clear that companies Act is regulatory in nature and does not encourage criminal prosecution for violation of its provisions.<sup>19</sup>

When prosecutions are launched the company law board attaches importance to cases of persistent defaults, when they occur in companies with substantial public participation. Prosecutions for minor technical lapses are usually avoided and the board prefers to get such lapses rectified by the management on the basis of advice tendered by the regional directors and the registrar of companies.<sup>20</sup> Thus, the approach is rehabilitative rather than deterrent, the penalties appear to be more in the nature of administrative sanctions and the true criminal law is not applied.

**Officers in default-** For the officer who is in default, proving that the default has been committed by the officer knowingly or willfully is not necessary. Thus, mens rea is not an essential ingredient for the establishing the offence in question.

**Finding default-** Bowen L.J. explained default as meaning “nothing more, nothing less than not doing what is reasonable under the circumstances- not doing anything which you ought to do, having regard to the relation which you occupy towards the offer persons interested in the transaction.<sup>21</sup> So, if a prima facie case is made out court would not go into the details of finding whether the concerned officer was in default or not.

**Finding the right defaulter-** when an offence is committed by the company, liability is not imposed upon all the officers of the company. Those who are guilty are separated from those who are not guilty. The companies Act makes a slight departure from this situation. It gives an opportunity to the board of directors to distribute the work between the members of the board or to appoint the managerial personnel like managing director or whole- time director or manager. If nothing is like that, then the whole board will be liable to be prosecuted. However, no officer is immune from being prosecuted. Anyone can be brought into the accusation if his role was there in any default. Default should be occurred during the tenure of officer concerned. And this confines itself to the provisions of the Companies Act.

### **Corporate Liability**

The default is enough to make a Company liable with penalty, mens rea or negligence is not a relevant factor to determine its liability as a company is a corporate body and an artificial person so it is impossible for a company to have a mens rea or have a will to do certain acts.

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<sup>19</sup> Lalita Jalan & Anr Vs. Bombay Gas Co. Ltd. & ors., 2002 (India).

<sup>20</sup> MCA Annual Administrative Report to Parliament, chapter- II, 1969-70.

<sup>21</sup> *Re Young and Harstons Contract*, (1886) 31 Ch D 168 (India).

The company is always liable when the return is not filed before the registrar in time, but the officers are liable only if they knowingly or willfully commit or permit the default. The disparity results in unfairness on the part of the individual offender and there is no mechanism to equate the imprisonment part for companies under the companies Act. The big problem is that the company or corporate body cannot be sent to jail. This aspect was emphasized by Justice G.P Mathur in the case of Velliapa Textiles, as follows,

“Courts would be shirking their responsibility of imparting justice by holding that prosecution of a company is unsustainable *merely on the ground that being juristic person it cannot be sent to jail to undergo the sentence.... It will be wholly wrong to allow a company to go away scot free without even being prosecuted in the event of commission of a crime only on the ground that it cannot be made to suffer part of the mandatory punishment.*<sup>22</sup>(emphasis supplied)

As regards criminal liability involving proof of mens rea, the present position, as recognized by courts is that the mental state of those in control and/or management of the company are attributed to the company itself as its “directing mind and will” therefore the company may be indictable for their authority.<sup>23</sup>

It is quite evident that a company generally cannot be tried for the case in which mens rea is an essential element and where the only punishment for the offence is imprisonment as it is impossible to send a company to prison<sup>24</sup>. This position has now changed by the landmark decision in the case of Iridium/Motorola<sup>25</sup>. *It was held that any natural person should be accountable and attribute liability to the company as a result of their actions. The only requirement is that the person should be in charge of the affairs of the company. The court also held that non-disclosure of material information would be treated as mis-representation and this constitutes the criminal offence of cheating for which the company can be held liable. The court ruled out that criminal liability can be attributed to the company since it is capable enough to possess the requisite mens rea for commission of the offence.*

The question whether a corporation can be prosecuted without prosecuting the officers of corporation who are in default and whether an officer can be prosecuted without prosecuting a

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<sup>22</sup> Minority View of Justice G.P. Mathur.

<sup>23</sup> For a review of the authorities on the subject see *Esso v. Udharam Bhagwandas Japanwalla*, (1975) 45 Com Cases 16 (Bom-DB: D.M. Rege and Vaidya, JJ.) It was held in this case that law attributes to company intention of officers of company under certain circumstances- company’s intention could be ascertained only when company in general body or at meeting of Board of Directors or in accordance with memorandum or association or articles of association has expressed that intention – in absence of such averments complaint against applicant company is not maintainable in law under general principles of criminal liability.

<sup>24</sup> *Anath Bnadh Samanta v. Corporation of Calcutta*, (1952) 22 Com Cases 175,177(Cal).

<sup>25</sup> *Iridium India Telecom Ltd. v. Motorola Inc.* (2011) 1 SCC 74 (India).

corporation was an important issue. There have been divergent views on this issue<sup>26</sup>, which got settled with the decision of Supreme Court in Aneeta Hada case.<sup>27</sup>

### **III. ROLE OF JUDICIARY IN MAKING THE CORPORATE CRIMINALLY LIABLE**

The judicial decisions have set the tones for tackling issues of corporate mis governance, which have destroyed millions of innocent investors and their families. The courts opined that the public has to be protected against many finance companies<sup>28</sup>. Thus, Supreme Court stated, ‘to protect socially & economically weaker segments of society against the exploitation by corporation is the constitutional obligation of the state.’<sup>29</sup>

Judiciary is also conscious about the power these corporations enjoy and how these need to be utilized in favor of larger public good. In this regard Justice G.P. Mathur stated:

“Companies are growing in size and have huge resources and fiancés at their command. During their business activity, they may sometimes commit breach of the law of the land or endanger others’ lives. More than 4000 people lost life and thousand others suffered permanent damage in Bhopal on account of gross criminal act of a multinational corporation.”<sup>30</sup>

Likewise, K.G. Balakrishnan J. (as he then was, later the CJI) remarked thus:

The corporates are indulged in wide range of activities that affect the life, liberty & property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies large fraction of the industrial, commercial, and sociological sectors that inclination of the corporation to a criminal law is essential to have a peaceful society with stable economy.<sup>31</sup>

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<sup>26</sup> It was held that the directors could not be made liable under section 53 of the MRTP Act 1969 unless the company was itself prosecuted (M.L Lakotia v. state, (1988) 66 Com cases 118 (Del)). Conversely a director, who signs or authorize signature on a cheque which bounced can be prosecuted alone without joining the company as co-accused (Anil Hada v. Indian Acrylic Ltd., (2000) 99 Com Cases 36).

<sup>27</sup> Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 (India).

<sup>28</sup> Paramount Bio Tech Industries Ltd. V. Union of India, (2004) 120 Com Cases 18 (the state is empowered to regulate trade or business with the view to protect the public and its welfare) and also MJ Shivram v. State of Karnataka, (1995) 6 SCC 289 (India), UK Trivedi v. State of Gujarat, (1986) suppl. SCC 20 (India); Satpal & co. v. Ltd. Governor of Delhi, (1979) 4 SCC 232 (India); Quarry Owners Association v. State of Bihar, (2000) 8 SCC 655 (India).

<sup>29</sup> Delhi cloth & General Mills Co. Ltd union of India, MANU/SC/0377/1983: (1983) 4 SCC166 (India) [CORAM: D.A. Desai, R.B. Mishra, and V. Balakrishnan Eradi, JJ].

Let the camouflage of alleged violation of fundamental rights in these petitions not deceive anyone; let no one be in the doubt that the petitions are filed to vindicate some fundamental rights encroachment on which is resented. At the root lies the fierce and unending battle royal between political power and economic power to gain ascendance one over the other. Piercing the veil of legalese, the core-question is the degree of social control imposed by the state and resisted at every turn by the corporate sector in the internal administration of corporate sector.

<sup>30</sup> Velliapa, MANU/SC/0721/2003, at Para 69 (India).

<sup>31</sup> Standard Chartered, AIR 2005, Para 63 (speaking for majority) SC 2622 (India).

The question of criminal liability of an artificial juristic person has troubled legislatures and judges for long. While the criminal liability of corporate bodies as a jurisprudential issue was gaining far greater momentum in western countries, approach of Indian judiciary was still on anthropomorphism. In *Aligarh Municipal Board and Others*<sup>32</sup> Court observed for the first time: The law as it exists today admits of no doubt that a corporation is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent court directed against them. A command to the corporation is in fact command to those who are officially responsible for conduct of its affairs. If they intentionally fail to comply with the court orders, they and the corporate body are both guilty of disobedience and may be punished for contempt.

Hence, we can say that Indian jurisprudence on corporate liability revolved around two issues. 1. *Mens rea* and 2. ‘what to do when mandatory sentence is imprisonment?’ On the first aspect the judiciary follows the common law principles, the latest view on this taken in *Iridium/Motorola* where it was held that corporation can be liable for offences involving *mens rea* (cheating in this case). For the answer of the second question there were contradictory views until the case of *Standard chartered*, wherein it was held that mandatory imprisonment is not a restriction on the prosecution of the corporation.

**Crimes Involving ‘Mens Rea’**- Initially it was supposed that a corporation could not be made criminally liable for offences where mental element was requisite. The current judicial thinking appears to be that the *mens rea* of any person in charge of the affairs of the company, the alter ego, is liable to be extrapolated to the corporation, enabling even an artificial person to be prosecuted for such an offence.<sup>33</sup> The common law tradition of alter ego i.e., identification doctrine is applicable under our existing laws.

*Justice Mathur* in his opinion in *velliapa textiles* held that company can be attributed with *mens rea* on the basis of those persons who works for it, have committed a crime and can be convicted in a criminal case. In India, proof of *mens rea* or guilty mind is not essential in each and every case. *Mens rea* may not be necessary in its strict sense as has been decided earlier by a bench of 7 Judges for economic crimes and departmental penalties in the case of *R.S. Joshi v Ajit Mills Ltd.*<sup>34</sup> Proof of *mens rea* is necessary only for prosecution cases.<sup>35</sup>

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<sup>32</sup> *Aligarh Municipal Board and Others v. Ekka Zonga Mazdoor Union*, AIR 1970 SC 1767 (India).

<sup>33</sup> *Velliapa*, MANU/SC/0721/2003, AT Para 17 (India).

<sup>34</sup> *R.S. Joshi v. Ajit Mills Ltd* (1977) 4 SCC 98 (India); also see *Gujarat Travancore Agency v CIT* (1989) 177 ITR 455 (C) (India).

<sup>35</sup> *Union of India v. Dharmendra Textiles Processors* (2008) 306 ITR 277 (SC) (India).

In a case<sup>36</sup> the court held that vicarious liability can be secured by reason of a provisions of statutes and not otherwise and for this purpose a legal fiction has to be created and for that the company must be considered as an accused, as legal fiction is raised both against the company as well the person liable for the acts of the company.

Although the issue is settled at present regarding the penalty proceedings, but still there is problem of imposing corporate criminal liability. Till date, unfortunately, the appropriate cases do not have adequate interpretation of true corporate criminal liability in India. Iridium case holds the ability of a company to have mens rea and thus its ruling on different aspects must be accepted in measured terms and it helps as guidance for further judicial determination.

### **Constitutional Rights of Corporations**

A corporate being a legal person cannot claim the fundamental rights of constitution like a citizen. Hidayatullah J. Observed that, they are amply protected by our constitution. There can be no discrimination, no taxation, without authority of law, no curbs involving freedom of trade, commerce or intercourse, and no compulsory acquisition of property. There is sufficient guarantee there and if more is needed then any manner (if citizen) is free to invoke Article 19(1) (f) & (g) and there is no doubt that companies in most cases will share the benefit.

So, a body corporate under the companies Act is an artificial legal person and has distinct personality. The corporate veil is lifted in certain situations. Whenever a corporate entity is abused for an unjust and inequitable purpose, the court will lift the veil and look into the realities of the company to identify such persons who is liable for the same. The veil can indisputably be lifted when the corporate is found to be opposed to justice and interest of the revenue or against public interest.

## **IV. CORPORATE CRIMINAL LIABILITY: AN INTERNATIONAL APPROACH**

The first attempt to impose corporate criminal liability was adopted from common law countries like, England, the United States, and Canada. Another important jurisdiction which has seen a shift in the law of corporate criminal liability is Australia. The changes to corporate criminal liability in Australia are interesting from both practical as well as theoretical perspective.

**United Kingdom-** The corporate criminal liability was recognized by English Courts in 1842, when a corporate was fined for failing to fulfill a statutory duty.<sup>37</sup> The United Kingdom since

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<sup>36</sup> R. Kalyani v. Janak C. Mehta and ors (2009) p. 527, 529 (1) SCC 516, (India).

<sup>37</sup> Birmingham and Gloucester Rly Company, 9 QB 315 (1846).

1940 has dealt criminal liability of corporates on the basis of doctrine of ‘identification’. The doctrine originates from a civil case.<sup>38</sup> It establish that the acts and state of mind of those who represent the “directing mind and will of the company” is said to represent the company itself. In the year 1971, the decision in the house of lords in a case<sup>39</sup> was that the most senior personnel in a company (generally those at the main board level or equivalent) fall within this category. Attempts was made to redress this situation, with the introduction of new statutory corporate criminal offences, in section 7 of the Bribery Act 2010 (i.e., failing to prevent bribery) and the Corporate Manslaughter and Corporate Homicide Act 2007, together with new investigative tools such as the introduction of deferred prosecution agreements (DPAs) into UK law on the 24 February 2014 by the Crime and Courts Act.

Since the case of Tesco, there is a reform in the scope of the class of persons who are considered to be senior in order to to constitute the company’s directing mind and will. The Privy council in the case of *Meridian Global Funds Management Asia Ltd v Security Commission*<sup>40</sup>, held that, in case of statutory offences, the language of the provisions, their content & policy, served to signify that any person’s state of mind who works for the corporation would constitute the state of mind of the corporation. Therefore, in order to identify them, it becomes essential to engage in a circular inquiry about their status or authority in law to make their acts the acts of company.<sup>41</sup>

**United States**- The American system to deal with corporate crimes is the most developed system created so far. At first corporate criminal liability of United States was that of English courts, but soon afterwards it departed from the position taken by English courts. At the beginning of the century some American courts started to widen the scope of corporate criminal liability which includes mens rea offences and was confirmed by US Supreme Court in a very famous case.<sup>42</sup>

The American model includes number of criminal sanctions for corporation like fines, corporate probation, order of negative publicity, etc. Efforts were made to punish the corporations when employees commit a crime while working within the scope of their employment and on behalf of the corporation. The most distinguishing element of the American model of corporate criminal liability is the adoption of the aggregation theory.<sup>43</sup>

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<sup>38</sup> Lennards Carrying Co. Ltd v Asiatic Petroleum Co Ltd, AC 705 (1915).

<sup>39</sup> Tesco Supermarkets Ltd v Nattrass, AC 153 (1972).

<sup>40</sup> Meridian Global Funds Management Asia Ltd v Security Commission, 2 AC 500 (1995).

<sup>41</sup> PINTO, AMANDA and MARTIN EVANS, CORPORATE CRIMINAL LIABILITY, p.66 (2<sup>nd</sup> ED, London: sweet & Maxwell 2008).

<sup>42</sup> New York Central & Hudson River Railroad Co. v. U.S 212 U.S 481 (1909).

<sup>43</sup> This theory provides that the corporation can be held criminally liable based on the act of one employee and on

United States has criminal laws at state and federal laws. Most prosecutions are brought under State Criminal laws. The liability of corporations is based on *respondeat superior* or *vicarious liability* under federal criminal law. The position of state criminal laws is very complicated. Some states have adopted sophisticated statutory provisions concerning corporate liability, based on the *Model Penal Code*<sup>44</sup> in some cases. In developing sentencing regimes that are adapted to corporate defendants, U.S is more advanced as compared to Australia, U.K, or India. Under federal sentencing guidelines manual, ‘corporate culture’ are considered in assessment of the suitable fine and other orders to be imposed on corporate defendants. Department of justice is increasingly relying on “deferred and non- prosecution agreements’, which allows corporate defendants to avoid indictment at all by taking a range of steps, which usually includes payment of monetary penalty and more importantly for present purposes, making changes to their corporate governance.<sup>45</sup>

There should be a strong compliance program where a company takes all reasonable steps to prevent and detect crime by its employees. There should be self-regulation.<sup>46</sup> The test of corporate criminal liability in US was discussed in *US v Potter*<sup>47</sup>, a case where the general manger has paid the bribe to the speaker of *Rhodes Island House of Representatives*, despite the President of the company having considered the proposed course of action and ordered him not to proceed.

The court of appeal observed:

For obvious practical reasons, the scope of employment test does not require specific directives from the board or president of every corporate action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized...the principle is held liable for acts done on his account by a general agent which are incidental to or customarily a part of the transaction which the agent has been authorized to perform. And this is the case, even it is established fact that the act was forbidden by the principal...despite the instructions (the

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the culpability of one or more other employee who, cumulatively, but not individually, met the requirements of actus reus and mens rea of the crime- *United Sates v. Bank Of New England* 821 F 2d 844 (1<sup>st</sup> Cir. 1987), in this case, the bank was convicted of willfully infringing the currency transactions reporting act as it related to Reporting Cash Transaction beyond a threshold limit (\$10,000) by one client. The client made repeatedly cash withdrawal from the account of bank each time using several cheques at different tellers and the aggregate amount went beyond the threshold. The issue was whether the knowledge of each teller can be cumulatively attributed to the bank.

<sup>44</sup> GOBERT, JAMES and MAURICE PUNCH, *RETHINKING CORPORATE CRIME*, p. 59. (Butterworths: LexisNexis, 2003).

<sup>45</sup> Henning Peter J., *The Organizational Guidelines: R.I.P.?* Yale Law Journal Pocket 116 Part 312 (2007).

<sup>46</sup> Weissman, Andrew, *A New Approach to Corporate Criminal Liability*, American Criminal Law Review, Vol. 44:1319 (2007).

<sup>47</sup> U.S v. Potter 463 F 3d 9 (1<sup>st</sup> Cir., 2006).

individual in question) remained the high ranking official centrally responsible for lobbying efforts and his misdeeds that effort made the corporation liable even that he overstepped those instructions.

So, under the U.S law, A corporation is prosecuted under both state laws and federal laws. Punishment –A corporation can be punished by imposition of fine or seizure of its property. It is levied by an execution order which is issued by the court. When there is a provision in a statute for imprisonment as a punishment for a particular offence, it may be read in conjunction with a general statute that allows for the imposition of fine. In such a case, the fine may be imposed on the corporation in lieu of imprisonment.<sup>48</sup>

### **US Sentencing Guidelines**

In the late 1991, the United States Sentencing Commission promulgated the first general sentencing guidelines (USSG) for the determination of criminal sentences to be imposed on corporations convicted of crimes in the federal courts<sup>49</sup>. Four assumptions are there under the guidelines:

1. That an offender should have to remedy the harm caused by its offence,
2. Companies that operated for criminal purposes should be divested of all their assets,
3. The companies that are not operated for criminal purposes should be fined according to the seriousness of the offence and the culpability of offender,
4. And probation may be appropriate if needed to ensure that other sanctions are followed or that the convicted organisation reduces the likelihood of future violations.

Amongst other things, the guidelines rationalize the system of setting fines for organisational offenders that commit certain federal offences. Under the guidelines, judges must set the fine according to formula whereby a “base fine”<sup>50</sup> is multiplied by a multiplier, which is intended to reflect organisations culpability. This multiplier method gives certainty in sentencing<sup>51</sup> that at the same time sharply constraint judge’s discretion in the setting of fines.

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<sup>48</sup> Dharam Veer Singh, *Corporate Criminal Liability: A Jurisprudential and Comparative approach* <sup>4</sup>[http://www.legalserviceindia.com/articles/cor\\_dr.htm](http://www.legalserviceindia.com/articles/cor_dr.htm) (Last Accessed 30/04/2021).

<sup>49</sup> United states sentencing commission, sentencing of organizations, as added by Amendment 422, Effective November 1,1991, Ch. 8, in guidelines manual (Nov. 1997).

<sup>50</sup> The first component of the formula, the base fine is the greater of: 1. the guidelines prescribed the minimum base fine or 2. The organizations pecuniary Gain from having committed the offence, or 3. The pecuniary loss from the offence caused by the organization to the extent the loss was caused intentionally, knowing or recklessly. United States sentencing commission, guidelines manual 2002.

<sup>51</sup> The fine provisions in the guidelines are not mere policy statements, but mandatory provisions that impose the precise formula judges must used in determining the range of fine imposed on organizational offenders. The guidelines also codify the factors that indicate the offender’s level of culpability, an assign a specific value to each factor.

**Australia-** Criminal law in Australia mostly is state law.<sup>52</sup> Federal criminal offences are constricted to the enactment in which commonwealth have a legislative power. Criminal laws of state vary across the jurisdictions, some of the Australian states have comprehensive criminal codes while others depend jointly upon statute as well as on the common law.

In Australia, the courts follow identification theory as it was developed in UK in 1940s. The statutory provision of Australian corporate criminal liability provides for organizational liability in relation to federal offence. And it is based on ‘corporate culture’. It is defined as attitude, policies, rules that exists within the corporation where the act takes place. So, if a whole corporation is law abiding and if one of its units commits an offence then in that situation the corporation will be held criminally liable. As per the recommendation made by the Australian law reform commission (ALRC) in the year 2006, the government had to expand all kinds of penalties for body corporates to include orders for corrective action, service of community and publication of the offence committed. The ALRC advocated that section 16A (2) of the Crimes Act 1914(cth), which sets out factors to be considered in sentencing, be amended to include- ‘the size, type, financial conditions & internal corporate culture, and existence or absence of an effective compliance program which helps in prevention and detection of criminal conduct.’<sup>53</sup>

## V. CONCLUSION AND SUGGESTIONS

Initially the concept of corporate criminality faced many difficulties in finding the evidence, standard of proof etc. to make the corporation criminally liable. But now this concept is evolving and gradually with time the courts started filling up the gaps. The courts have clarified this concept of corporate criminal liability. The case of Iridium made it very clear that mens rea can be imputed to the body corporates and immunity cannot be claimed by them on the ground of artificial legal personality. However, national laws are not adequate to deal with this crime. Also, we lack comprehensive law to prevent this economic offence. The government should strive to establish a special penal code to stop corporate crimes and other economic crimes. In India, an effective legal as well as regulatory environment to prevent and prosecute corporate crime is required. However, it cannot be said that legislature has not acted at all on this front. The legislature took efforts in controlling corporate illegality and establishing a

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<sup>52</sup> Much effort is now being made by activists, legislators, social reformers and trade unionists, to institute changes at state level. Bills have been presented in Victoria, Queensland, New South Wales and Australian Capital Territory.

<sup>53</sup> Australian Law Reform Commission, Same Crime, Same Time: The Sentencing Of Federal Offenders (tabled 13<sup>th</sup> September 2006), Recommendation 30, <http://www.austlii.edu.au> at (Last accessed 30/04/2021); see similar recommendation in NSW Law Reform Commission, Sentencing: Corporate Offenders (2003) [4.52]- [4.53] <http://www.lawlink.nsw.gov.au> (Last Accessed 30/04/2021).

better corporate governance norm. Generally, the norms are made quickly but the enforcement is not so prompt. Number of scams happened because the enactment of laws is not researched properly and not directed towards curing the mischief in true sense.

The laws of India like other countries must envisage the concept of mens rea and make it clear that the corporates will be criminally liable and punished for their acts. The legislatures should incorporate the judicial principal in clear terms in the material statutes. One should not ignore the individual players in corporate crimes while deciding the corporate liability. The problem of mens rea cannot be overcome as it was undeveloped for corporations but was devised for individual. As the corporations acts through the individuals only or through its agents in the form of directors, manager etc. therefore, an intention or mens rea of such key managerial personnel's when acting within the scope of their employment are considered as the mens rea of corporation, making the whole corporation criminally liable. The criminal courts as a punishment for repeated criminal offence of corporations should direct compulsory winding of the same. There should be corporate death of a company which should be made as a part of penal statutes. There is also a need to impose independent liability of person who is responsible for corporation affairs. We know that vicarious liability makes the corporation liability for the unlawful acts of its officers if an offence has been committed during the course of their employment. But this should be shifted by directly imposing criminal liability on the managerial persons for the corporate crimes as we know that the corporation acts only through the natural person.

If we talk about sentencing regimes that are adapted to corporate defendants, United States is more advanced as compared to United Kingdom, Australia, or India. Also, Indian policies are inadequate to deal with extra territorial challenges involving multiple jurisdictions and different laws. Global response is necessary to deal with the speedy growth of Corporate crime all over the world. It is a high time to increase cooperation between the world's law enforcement agencies which will help effectively in countering global corporate crime. There should be uniform principles of corporate liability in different jurisdictions globally. There is also a need for greater control, monitoring and accountability of corporate activities in a globalized economy to save the environment and to curb the environmental crimes.

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