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# White Collar Crime: Corporate Criminal Liability

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## ABSTRACT

*It is a fallacy to believe that only humans are capable of committing a crime. An artificial person, like a firm, company or corporation, is a separate legal entity that can also commit a crime.*

*When it comes to white collar crimes, India is not an unknown territory. In fact, considering the number of corporate scams appearing every day and affecting the general economy and welfare of the state, it is a serious contemporary issue due to the multifaceted components involved in the nature of such crimes.*

*In the current environment, corporate criminal liability must be enhanced. The phenomenon of corporate criminality arose in the 20th century. The corporate world has a significant impact on our lives, whether directly or indirectly. With the growth of corporations, they do play an important role in our economy. Nevertheless, our society faces the risk of being exploited by these corporations, thus they must be deterred too. Laws pertaining to corporate criminal liability are being strengthened, notably in the aftermath of the Bhopal gas tragedy. However, it is still in its infancy.*

*The issue of corporation's criminal liability for offences committed by its directors, managers, officers and other personnel while doing corporate business has attracted a lot of attention in criminal law jurisprudence. The prospect of establishing criminal liability on a corporation is predicated on its independence. The paper identifies if whether a corporation, as an artificial person, is capable of committing a crime and hence subject to criminal liability under the law and also examines the place of the legal maxim 'actus non facit reum nisi mens sit rea' which means that act is not wrongful unless it is done with a wrongful state of mind.*

*The traditional belief was that a company could not commit a crime since criminal liability needed intent, which could not be formed by a corporation without a mind. A corporation also lacked a body that could be imprisoned. The paper seeks to shade light on the evolution of corporate criminal liability in India and its various legal facets. It further determines the jurisprudential standing in contemporary India. Ultimately, it provides suggestions to curb white collar crimes.*

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## I. INTRODUCTION

*“Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.” - Hazlitt*

A company or corporation is known to be an artificial legal person, that enjoys a separate existence from its owners and from those who manage its day-to-day affairs. Such company not being a natural person, there was absence of mens rea. The criminal liability of any act is based on the Latin maxim ‘*Actus non facit reum mens sit rea*’ which basically means that to make a person or any entity liable it must be shown that there is an act or omission which is forbidden by law and with mens rea which means to have a guilty mind.

It comes under the category of corporate crime also known as organizational or occupational crimes, in White-collar crimes which are considered to be non-violent crime where the primary motive is typically financial in nature, generally committed by businessmen and government professionals who are high profile individuals and occupy important positions in a company or corporation.

Earlier, the concept of holding a corporation liable for any criminal act was not introduced. It was believed that a company or corporation does not have a mind of its own and therefore would not have a guilty mind or criminal intent. Under such circumstances, a corporation could not be imprisoned and hence would not be held liable for any criminal act.

Corporate criminal liability is defined as a crime that has been committed by association of individuals or individual who commit such acts or omission in course of their occupation which is forbidden by law and with a criminal intent or guilty mind where it is for the benefit of the corporation or such individual out of the association of individuals.

The struggle to legislate in this area, as well as the ongoing struggle of the judiciary to solve this dilemma, prompted legislators to come up with laws relating to corporate criminal liability. This is especially important under a legal system that emphasis individual and corporate moral responsibility. The purpose of criminal law is to strike a balance between the goals of the law and the economic inefficiencies caused by ineffective corporate legislation. A surge in white collar crimes indicates a perceived failure of corporate governance, necessitating more stricter rules.

## II. NATURE AND TYPES OF CORPORATE CRIMES

Corporate crimes are considered to be general styles of the white-collar crimes and that is

moreover grasp regarding such wrongdoings and crimes. The differentiation between corporate crimes and the occupational crimes is that the corporate crimes allude to the criminal act of the corporate managers for the benefit of the companies or corporations, on the other hand, the occupational crimes allude to the individual employees who are against the company or corporation itself.<sup>2</sup>

When it comes to ‘corporate crime’ the wrongs committed by management or employees for the advantage of the firm as well as personal gain are referred to as ‘acts against the corporation’. Individually committed crimes are not the same as those perpetrated by corporations.

Corporate crime is different from the traditional crimes which are committed by the individuals. As a result, there is no special division for the offenses perpetrated by the corporation. There are numerous kinds of corporate crime. Corporate criminality is a serious problem. Bribery, counterfeiting, embezzlement, bank fraud, extortion, blackmail etc are some of the major types of corporate crimes.

Two corporations were accused with fraud under the Indian Penal Code (IPC) in the case of *A. K. Khosla v. S. Venkatesa*.<sup>3</sup> The corporations were served with legal papers by the Magistrate. During this case, the Court learned that there are two prerequisites for the prosecution of corporate bodies, the first being provision, and the second being mens rea and the ability to impose the required punishment/mandatory sentence of imprisonment.<sup>4</sup>

### III. DEVELOPMENT OF CONCEPT OF CORPORATE CRIMINAL LIABILITY

The corporation or company was established in the 14<sup>th</sup> century and was created granted only by the crown or by an act of the parliament. The crown endeavoured to develop the thoughts and it urged associations to turn out to be lawfully authorized.<sup>5</sup> During the sixteenth and seventeenth centuries, the enterprises were grown up as hospitals, universities and other similar affiliations which were adjusted to the corporate structure. Toward the end of the period the company or corporation was developing as a joint stock company. This joint stock company was most valuable in the advancement of new industries. In the underlying stage, companies or corporations were made as not-for-benefit, however later in the 17<sup>th</sup> century the company became profit oriented.

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<sup>2</sup> Professor Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability* (2013)

<sup>3</sup> AIR 1991 SCC 703

<sup>4</sup> <http://crg.aic.gov.au/reports/2-91.pdf>

<sup>5</sup> Dharm Veer Singh, *Corporate Criminal Liability: A Jurisprudential and Comparative Approach*: Legal Service

By the end of the 17<sup>th</sup> century, such incorporated companies or corporations were formed on a large scale, however a large portion of corporations were run for the benefits of the investors as well as the benefit of the employee benefit and majority of them had a limited span of life<sup>6</sup> due to which the investors endured losses in the business and they were engaged with the malpractices. Notwithstanding, the British parliament sanctioned special acts for the business activities.

The essential rule of criminal liability revolves around the fundamental Latin maxim *actus non facit reum mens sit rea*. It infers that to have one to be liable it ought to be shown that act or omission has been done that was impermissible by law and has been through with guilty mind or criminal intent.

There was an inability to distinguish presence of mens rea in company or corporation as there was absence of criminal intent by partnerships who are fictitious in nature and artificial legal person in the eyes of law. A company or corporation could not be imprisoned or given death punishment which is typically given in criminal law. According to the Courts, the accused should be truly present in the proceedings which is unimaginable in the vent of companies as them being artificial legal persons.

During the first 20<sup>th</sup> century, the courts were started to convey reprehensively liable in varied areas among which the social control would be blocked while not corporation liability. Without a doubt, courts were in a little while ready to convey that the company reprehensively chargeable for all wrong-doings aside from assault, murder, rape and other various crimes and violations.

Nevertheless today, the director or officers are made liable for the acts carried in authority to execute it when they direct their subordinates to commit such crimes or wrongdoings and neglected to practice any due care or manage their demonstrations which falls under the classification of accomplice theory and further this theory additionally expresses that because of the idea outlined of responsible relation that an individual will be made criminally liable because of responsible relation established notwithstanding of whether he had the knowledge that the act was criminally liable. In spite of that it can be said that apart from being an asset, companies or corporations can also be hazardous to the general public.

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<sup>6</sup> Geeta Nerula, CORPORATE CRIMINAL LIABILITY IN INDIA: AN INFORMATION TECHNOLOGY PERSPECTIVE

#### IV. DOCTRINES ESTABLISHED IN CORPORATE CRIMINAL LIABILITY

##### The Doctrine of Vicarious Liability:

The doctrine of vicarious liability, which is found in tort law, states that the Master is vicariously liable for the acts of his subordinates. In the case of *Ranger v. The Great Western Railway Company*<sup>7</sup>, it was held that the firm is vicariously liable for the acts committed by its employees if they occur while they are in the course of employment. In the case of *Guston and Tee Ltd v. Ward*<sup>8</sup>, this doctrine applies in the same way that Respondent Superior did in civil law, but it does not apply in criminal law, which holds that everyone is responsible for their own actions and not for the actions of others.

##### The Doctrine of Identification:

It mandates that corporations take responsibility for those with decision-making authority over the corporation's policies, rather than those who carry out those policies. The doctrine emphasises the reality that the company's aim and actions are the consequence of the company's personnel. The detection of the guilty mind is the core principle of this doctrine.

##### The Doctrine of Collective Blindness:

Courts have found that, under the doctrine of Collective Blindness, corporations can be held liable even though no single individual was at fault, and that the sum total knowledge of all employees can be used to hold a corporation guilty.

##### The Doctrine of Wilful Blindness:

The notion of wilful blindness applies if an illegal or criminal act is undertaken and the corporate agent does not take action or precautions to prevent such acts from occurring.

##### The Doctrine of Attribution:

The mens rea, or guilty mind, is attributed to the controlling mind and will of the corporations under the doctrine of attribution, as in the case of sentencing or imprisonment in the event of an act or omission resulting to a breach of criminal law. Although this doctrine is applied in India, it was originated in the United Kingdom.

##### The Doctrine of Alter Ego:

It is defined as someone's personality that is not visible to others, according to this doctrine of alter ego. The company's alter ego is comprised of the company's owners and

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<sup>7</sup> [W1838 R11]

<sup>8</sup> [1902] 2 K.B. 1

management personnel. Because the corporation has no mind of its own, body, or soul, the directors and other persons who manage the company's activities can be held liable for the acts committed by or on behalf of the corporation under this doctrine, because the people are the controlling mind and will.

## V. CORPORATION CAN BE HELD CRIMINALLY RESPONSIBLE

The corporation can be held criminally liable for a variety of crimes like conspiracy, maintaining public nuisance, violations of consumer protection laws, the illegal practice of medicine, antitrust laws violations.

According to Section 9(1) of the P C Amendment Act Bill 2013, a commercial organization<sup>9</sup> commits an offence and is subject to a fine if any person associated with the commercial organization<sup>10</sup> offers, promises, or gives a financial or other advantage to a public servant<sup>11</sup> with the intent to:

- a) Obtain or retain business for such commercial organization; and
- b) Obtain or retain an advantage in the conduct of business<sup>12</sup> for such commercial organization:

Provided, however, that the commercial organization must prove that it had proper procedures in place to prevent anyone associated with it from engaging in such conduct as a defence.

*The offence under Section 8 and this section shall be cognizable, notwithstanding anything in the Code of Criminal Procedure, 1973.*

*Section 10(1) – where a commercial organization commits an offence under Section 9, every person who was in charge of, and responsible to, the commercial organization for the conduct of the commercial organization's business at the time offence was committed is deemed guilty of the offence and is punishable by imprisonment for not less than three years, and is also liable to fine, if he establishes that the offence was committed without his knowledge or that he has exerted all necessary diligence to prevent the conduct of such an infraction, nothing in this*

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<sup>9</sup> Section 9(3)(a) – 'commercial organization' means – (i) a body which is incorporated in India and which carries on a business, whether in India or outside India; (ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India; (iii) a partnership firm or any association of persons formed in India and which carries on a business (whether in India or outside India); or (iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India.

<sup>10</sup> Section (c) - a person is said to be associated with the commercial organisation if, disregarding any offer, promise or giving a financial or other advantage which constitutes offence under sub-section (1), such person is a person who performs services for or on behalf of the commercial organisation.

<sup>11</sup> Section 9(2) – only if, such person is, or would be, guilty of an offence under Section 8, whether or not the person has been prosecuted for such an offence.

<sup>12</sup> Section (b) – includes a trade or profession or providing service including charitable service.

*sub-section shall render him liable to any punishment.*

*(2) notwithstanding sub-section (1), where a commercial organization commits an offence under Section 9 and it is proven that the offence was committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director<sup>13</sup>, manager, secretary, or other officer of the commercial organization, such director, manager, secretary or other officer shall be deemed guilty of the offence and shall be liable.*

### **Essential requirement for establishing the criminal liability of corporations**

There are some necessary elements which must exist in order to impose criminal liability on a corporation. These are as under:

#### 1. Act within the scope of employment –

There are certain conditions must be met before a corporate criminal liability arises. The first requirement that must be met is that the employee committing the offence must be acting within the scope of his or her employment. This means they must have a master and servant relationship, which generates a vicarious liability between them, i.e., Master and servant and he must be doing the duties which are authorized to them and permitted by their parent firm.

*‘This ticket was sold, not by either Mr. Shah or Mrs. Shah, but by their employee Mr. Hob day. Unfortunately, but inevitably, his offence was, at once, their offence, given the principles of vicarious liability’ as explained in *Monsell Bros Ltd v. London and North-western Railway Co*<sup>14</sup>.*

#### 2. Benefit to the corporation –

The second condition that must be met in order for a corporate criminal liability to arise is that the corporation shall have benefited from the employee’s or agent’s actions. It is not necessary for the firm to gain any advantage, all that is required is that the act be performed by the employee or agent for the benefit of the corporation.

The collective and wilful blindness doctrines are two approaches by which corporations can be held accountable or liable. In the doctrine of collective blindness, it is not required for an individual to be held accountable and liable for a conduct that benefits the corporation; instead, a group of persons can be held liable by proving that each member of the group has complete awareness. Whereas, in the wilful blindness doctrine, the corporation is aware of illegal practices but chooses to turn a blind eye towards it, in such a case, the employee and agents will be held liable for illegal practices. Apart from that, in corporate criminal liability, both

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<sup>13</sup> Explanation – for the purposes of this section – ‘director’, in relation to a firm, means a partner in the firm.

<sup>14</sup> [1917] 2 K.B 836

workers and agents can be held accountable for conspiracy.

### **Tests to determine the corporate criminal liability**

#### **Identification Test**

*'The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. It is a guilty mind then that guilt is the guilt of the company'*, Lord Reid observed in the case of *Tesco Supermarkets Ltd v. Natrass*<sup>15</sup>. This test is also known as the alter ego test or the directing mind and will hypotheses. This test is used in English courts to evaluate the criminal liability of companies by identifying the controlling and directing mind of the corporations.

#### **Aggregation Test**

There may be instances where a corporate wrong is the result of a group of people's guilty minds working together. The actus reus and mens rea can be extracted from the conduct and knowledge of numerous individuals by combining the acts of two or more people. The court of appeals in the case of *United States v. Bank of New England*<sup>16</sup> confirmed that a collective knowledge is permissible since companies would share responsibilities and minimise liabilities. This test has been used in Australia; however, it has been rejected in England.

#### **Respondeat Superior Test**

Various grounds have been given by the Courts to support a corporation's liability for the activities of its agents. A corporation can be held liable for the actions of its agents if they

- i. Commit a crime
- ii. Act within the scope of employment
- iii. Do so with the intent to benefit the corporation.

In the case of *United States v. A. P. Trucking Co.*<sup>17</sup>, this was clearly established.

## **VI. JURISPRUDENTIAL POSITION IN INDIA**

Under the Indian Criminal Justice System, prosecution for the crimes committed is governed by the provisions of the Indian Penal Code, 1860. The term 'person'<sup>18</sup> includes any company, affiliation, or group of people and it may or may not be incorporated. As a result, businesses can be prosecuted for committing crimes. Regardless, the position of corporation's criminal

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<sup>15</sup> [1972] A.C 153

<sup>16</sup> 821 F.2d at 854

<sup>17</sup> 1958 SCC Online US SC 195

<sup>18</sup> Section 11 of the Indian Penal Code, 1860

obligations must be determined when they commit offences that require mandatory imprisonment and fines under the penal code. This issue was settled by some landmark decisions, which contributed in the expansion and development of corporate criminal liability.

A majority judgement in the case of *Assistant Commissioner v. Velliappa Textiles Ltd & Anr.*<sup>19</sup> found that a company cannot be punished for offences that demand a mandatory sentence of imprisonment and a fine. When the penalty involves both jail and a fine, the court cannot just impose the fine. The Law Commission of India recognized this difficulty and in its 41<sup>st</sup> report, it proposed amending Section 62 of the Indian Penal Code by adding the lines: ‘*In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only*’.<sup>20</sup>

In the case, *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*<sup>21</sup>, the Supreme Court made the situation plain apparent. With regard to the principle of corporate criminal obligation, it had overruled previous positions. In view of the fact that the arraignment asks a mandatory detention, the court held that there is no blanket immunity for any corporation or company from being charged with a crime. The Supreme Court decided that in cases when both detainment and fine are required, the firms should be penalized with a fine.

‘A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea,’ the Supreme Court stated in the case of *Iridium India Telecom Ltd v. Motorola Incorporated Co.*<sup>22</sup> When a criminal offence is committed in relation to the corporation’s business by someone or a group of people on top of its affairs, the corporation faces criminal liability. In such cases, it would be required to determine whether the degree of control of the person or group of people is such that a corporation can be considered to assume and act through the person or the body of persons.

In 47<sup>th</sup> report, the Law Commission also made the following recommendations<sup>23</sup>:

1. When the offence is punishable by imprisonment and fine, and the offender is a corporation, the court has the authority to sentence the corporation to a fine only.

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<sup>19</sup> (2003) 11 SCC 405

<sup>20</sup> Section 62 of the Indian Penal Code, 1860.

<sup>21</sup> AIR 2005 SC 2622

<sup>22</sup> (2011)1 SCC 74

<sup>23</sup> Paragraph 8(3) of the report

2. When an offence is punishable by imprisonment and any other punishment other than a fine, and the offender is a corporation, the court has the authority to sentence the offender to a fine.
3. In this section, the term ‘corporation’ refers to an incorporated company or other body corporate, and includes a firm and other association of individuals.

However, the bill drafted in response to the law commission’s recommendations lapsed and did not become law. Although, only a few of these recommendations were approved by parliament, and several taxation legislations were altered as a result of appropriate amendments.

**The concept of Corporate Criminal Liability has been recognized under the Companies Act 2013 under –**

Section 53 – Prohibition of shares at a discount.

Section 118(2) – Minutes of proceedings of General Meeting, Meeting of Board of Directors and other meetings and resolutions passed by Postal Ballot.

Section 128(6) – Books of Account, etc, to kept by Company.

Section 129(7) – Financial Statement.

Section 134 – Financial Statement, Boards report, etc.

Section 188(5) – Related Party transactions.

Section 57 – Punishment for personation of shareholder.

Section 58(6) – Refusal for registration and appeal against refusal.

Section 182(4) – Prohibitions and restrictions regarding Political Contributions.

Section 184(4) – Disclosure of interest by Director.

Section 187(4) – investments of the Company to be held in own name.

Section 447 – Punishment for fraud.

Other provisions of offences by companies are –

- Section 21 in the Transplantation of Human Organs Act, 1994
- Section 66 of the Food and Safety Standard Act, 2006
- Section 305 of the Code of Criminal Procedure
- Section 38 of the NDPS Act, 1985

## **VII. CONCLUSION & SUGGESTIONS**

Corporations clearly rule the world today, and as a result, corporate crime is on the rise. Corporate crime, according to many studies, causes more financial harm to society than any other crime. India being a developing country, corporate crime not only stifles economic growth but also tarnishes the country's reputation.

It is a well-established legal principle in criminal law jurisprudence that companies are subject to criminal liability. a company can commit a crime and he held criminally liable. However, Indian legislation does not keep up with these changes, and corporations are still not held criminally liable. Even if they do, the statutes and court interpretations impose no penalties other than a fine. Even the Supreme Court has stated that a separate law is needed to provide for the imposition of criminal liability on the corporations.

Currently, the majority of countries agree that companies or corporations can be prosecuted under both civil and administrative laws. Corporate crimes, on the other hand, are contentious. In its 41<sup>st</sup> and 47<sup>th</sup> reports, the law commission recommended that the punishment for criminal liability be imprisonment or a fine, the corporate should be fined, particularly for white collar crimes. Regrettably, these suggestions were never implemented. Despite the fact that many Indian laws contain provisions for fraud, corruption, bribery, insider trading, and other civil violations, no penal statutory provisions have been incorporated or introduced into the Indian laws which punish the companies or corporations.

Corporate crime has existed for generations, it is understandably difficult to eradicate, yet, we should work together with governments and legal bodies to reduce such crimes. As previously said, strong rules and special tribunals should be established and enforced so that the offenders fear the consequences and think twice about committing any crime. Furthermore, government entities must collaborate in order to eradicate such crimes in our country.

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