



CORPORATE CRIMINAL LIABILITY IN INDIA: AN ANALYSIS

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Abstract

Corporations are as much part of our society as are any other social institution. Corporations represent a distinct and powerful force at regional, national and global levels and they wield enormous economic powers. Besides governments and governmental agencies, it is the corporations that are the more and more effective agents of action in our society. But, corporations, as we understand today, have not been same in the past. The multitude of roles the corporations play in the present day human life have been necessitated by the demands of the society, as it kept on „developing“. This paper attempts to explore the basis and extent of corporate criminal liability in India and tries to answer the questions regarding mens rea and when the corporation will be held liable and the basis upon which such liability attaches to a corporation. In India, Criminal Liability is attached only those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions. In view of imposing role of corporations in economic, political and social spheres, the jurisdictions 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 and other related cases. In this paper the researcher has made an attempt to focus on the meaning of corporation, applicability of mens rea and criminal liability of corporations, theories of corporate criminal liability in the light of decided cases.

Keywords: Corporation, Criminal liability, Necessity, Corporation role, Liability and Punishments.

Introduction

Corporations are considered to be an integral part of the society. Besides the governmental agencies, the corporations are deemed to be the effective agents of action in our society. But, corporations, as it is understood today, have not been same in the past. But over a period of time, the development of society has had a direct influence on the structure and functions of the corporation. This has led to an ever increasing demand for the law to recognize the change and suit its applications.¹ Over the last few decades, lot of complexities has evolved in the corporate sector because of globalization and privatization of different kind of business entities all over the world. The word 'corporation' has no strictly technical or legal meaning. It may be described to imply an association of persons for some common object. The purposes for which the people may associate themselves are multifarious and includes economic and non-economic objectives. But in common parlance, the word corporation is normally reserved for those associated for economic purposes i.e to carry on a business for gain. A corporation is an artificial entity that the law treats as having its own legal personality, separate from and independent of the persons who make up the corporation. Corporation has an independent existence which is separate from the shareholders constitution it. The corporations are run by natural persons and these people's actions can be criminal in nature and can sometimes even result in great economical as well as human loss to the society.²

Corporations: Meaning and concept

A corporation may be defined as a body of persons (in the case of corporation aggregate) or an office (in the case of corporation sole) which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question. There are many associations and bodies of persons that are not corporations. Some of these, such as registered friendly societies, may be quasi-corporations, as they have some of the usual attributes of corporations, such as the possession of a name in which they may sue or be sued, and the power (independently of any contract between the members) to hold property for the purposes defined by their objects and constitutions.³

In common parlance, corporation means a group of individuals coming together to carry on a business. It is a creation of law, a business organisation recognised by law or having the legal sanctity or the right and duties entrusted through law. Though, Common law establishes the origin of modern corporation in the 14th century or so, yet some author are of the view that the origin of corporation could be sought in the twelfth century or perhaps in the Roman law where, juristic person or

¹ Balakrishnan K, " Corporate Criminal Liability-Evolution of the concept" (1998) Cochin University Law Review, p. 255

² Sibani Panda, Research Associate, "Analysis of Corporate Criminal Liability in India". Also available at lex-warrior.in/2014/02/analysis-corporate-criminal-liability-india/

³ Smt. Prabharani Viswakarma vs. State of Madhya Pradesh and Others, AIR 1999 MP 223



personality was said to have been recognized.⁴ Sir Henry Maine opined that a sort of corporate responsibility was at the very heart of the old legal system. Society was not what it is assumed to be at present, a collection of individuals. In fact, and in view of the men who comprised it, it was an aggregation of families.⁵ The law recognized this system of small independent corporation. Corporations are divided into two parts, such as

(a) Corporation Aggregate, and
(b) Corporation Sole.

Corporation aggregate has been defined as a collection of individuals united into one body under a special domination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and exercising a variety of political rights, more or less extensive, according to the design of its institution, of the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.⁶

So, it means it is an incorporated body having membership of several persons. It is constituted by number of persons known as share holder who pool their resources to create a fund known as capital to start with and it works for common interest of all the share holder and prime motive is profit making. It was the industrial revolution of the seventeenth century and improvement in the transportation system thereby, which brought about the previously unanticipated changes not only in the size and structure of the corporations but also in the role and functions corporations play in the society. Over the past century, the concept of a corporation has shifted from the notion of an enterprise headed by one entrepreneur, who both owns and runs the going concern, to that of an organisation where stock ownership becomes separated from the control of the corporation's affairs, the latter being managed by a professional, hired and self-perpetuating bureaucracy. Further, the individual shareholder's role has changed from part-owner to investor, and its importance has diminished in large corporations where the most significant shareholders are collective entities. The attachment of the shareholder to the corporation is becoming secondary and indirect, reflecting the fact that corporations serve a variety of interests besides those of shareholders, including those of their employees, customers and the community at large. And hence, it has been observed that "the corporation can no longer be identified with a single homogeneous group of individuals. Its decisions and activities are the resultant of and are responsive to a complicated set of interests and conflicting claims". This is the more significant change for the purposes of the criminal law and for imputing corporate criminal liability on the corporations.

A corporation sole is a body politic having perpetual succession, constituted in a single person who in right of some office or function, has a capacity to take, purchase, hold and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alienate) real property, and now, it would seem, also to take and hold personal property, to him and his successors in such office for ever, the succession of being perpetual, but not always uninterruptedly continuous; that is, there may be and often are, periods in the duration of a corporate sole, occurring irregularly, in which there is a vacancy, or on one in existence in whom the corporation resides and is visibly represented.

Unlike corporation aggregate, a corporation sole has a double capacity, namely, its corporate capacity and its natural or individual capacity so that a conveyance to a corporation sole may be in either capacity.

A corporation sole appears now to be capable of taking personality in possession. the occupant of a corporation sole is presumed to have been duly in possession of his office until the contrary is proved.⁷

In today's economic and social structure, a corporation possesses functional structures, it is permanent, large, formal, complex and goal-oriented, and has decision-making structures. Although not all corporations share the characteristic of being large-scale operations involving many individual participants, it should be noted that small corporations do not generally raise the same problems for prosecutors as large ones. Moreover, the social importance of an organization's policies and decisions increase with the magnitude of its resources, reflecting the greater potential of large organizations to cause substantial harm. It has also been observed that the large corporations tend to breed the conditions for disaster. The larger the corporation, the greater the diffusion of responsibility, and the greater the possibility for disaster, and for disaster of greater reach.

⁴ Available at on http://www.naavi.org/geeta_narula/corporate_criminal_liability_ov.html. Accessed on 4-4-2016 at 7.45 a.m.

⁵ *Ibid.*

⁶ *ibid.*

⁷ See [indiankanoon.org/search?forminput_corporation sole](http://indiankanoon.org/search?forminput_corporation+sole). Accessed on 5/5/2016 at 9.35 p.m



A corporation sole is a legal entity consisting of a single incorporated office, occupied by a single person. A corporation sole is one of two types of corporation, the other being a corporation aggregate. This allows corporations to pass without interval in time from one office holder to the next successor-in office, giving the positions legal continuity with subsequent office holders having identical powers to their predecessors.⁸

Most corporation sole are church-related but some political offices of the United Kingdom, Canada and the United States are also corporation sole. In the United Kingdom, for example, many of the Secretaries of State are corporation sole. In contrast to a corporation sole, a corporation aggregate consists of two or more persons, typically run by a board of directors. Another difference is that corporations aggregate may have owners or stockholders, neither of which are a feature of a corporation sole.

Growth of corporate criminal liability

Criminal liability is only attached to those acts in which there violation of criminal laws. The basic rule of criminal liability revolves around the basic Latin maxim *actus non facit reum, nisi mens sit rea* which means in order to make a person or entity criminally liable, it is required to establish that an act or omission has been committed which forbidden by law and it has been done with guilty mind. So every crime constitutes two elements.⁹

- Actus reus: Actus reus connotes those result of human conduct which is forbidden by law and hence constitutes of Human action; result of conduct and act prohibited by law.
- Mens rea: On the other hand, mens rea is generally considered as blame worthy mental condition.

Corporations play a significant role in creating and regulating the business activities and also in managing the lives of the common people, as a result of which, the modern criminal law systems overlooked the possibility of holding the corporations liable for the commission of a criminal offence.

The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule.¹⁰ It is very difficult to define corporate criminal liability in the present day scenario as it covers wide range of offences. However, for understanding its purpose it can be defined as an illegal act of omission or commission, punishable by criminal sanction committed by an individual or group of individuals in the course of their occupation.¹¹ It can be even defined as socially injurious acts committed in course of occupations by people who are managing the affairs of the company to further their business interest.¹² Corporate criminal liability also represents a kind of instrumentalities through the trust of the people continues to be betrayed by persons in position of responsibility, authority and power in business sector. Corporate crime has been defined as 'the conduct of a corporation or of employees acting on behalf of a corporation, which is prescribed and punishable by law.'¹³ Thus, the corporate criminal liability refers to the imposition of criminal liability on either the corporation or its employees and agents and it is also referred to as white-collar crime.

So far the origin of corporate criminal liability is concerned, during the early sixteenth and seventeenth centuries, the general notion was that corporations could not be held criminally liable. In the early 1700s, corporate criminal liability faced four obstacles:

- First obstacle was attributing acts to a juristic fiction, the corporation. During Eighteenth-century, courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century.
- The second obstacle was that legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crime of intent.
- The third obstacle was the ultra vires doctrine, under which the courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters.
- The fourth obstacle was court's literal understanding of crime procedure; for e.g the judges required the accused to be brought physically before the court.¹⁴

⁸ Available at http://en.wikipedia.org/wiki/corporation_sole. Accessed on 8/5/2016 at 8.55 p.m

⁹ Russel, W.O, *Russel on Crime* p.17-51(J.W.C

¹⁰.Thiyagarajan, T, Sivanathan, "Corporate Criminality-concept", Available at <http://www.manupatra.com/Articles/artist.asp?s=corporate-commercial>.

¹¹ Williams, K.S, "Text Book on Criminology", Universal Law Publishing Pvt. , New Delhi, 2001, p.64

¹² Siegal, L.J "Criminology", Wadsworth/Thomson Learning , London, 2000, pp.398-99.

¹³ Braithwaite, John; *Corporate crime in the Pharmaceutical Industry*, 1st Edition, Routledge and Kegan Paul, London, 1984, p.6

¹⁴ V.S.Khanna, *Corporate Criminal Liability: What Purpose Does It Serve ?*, 109 *Harvard Law Review*. 1477



In the modern era, the activities of the corporations has had a tremendous impact on the society and it has also helped in the development of the society to a large extent but at times, the activities of the corporation has also been proved disastrous to the society which then falls under the category of corporate crimes. Despite those disastrous activities of the corporations, the law was not willing to impose criminal liability upon corporations¹⁵ because:

- Corporations cannot have the means or the guilty mind to commit an offence.
- Corporations cannot be imprisoned.

Even the common law did not impose criminal liability on corporations because it was based on the belief that a corporation lacked moral blameworthiness and the requisite mens rea, which is an essential element of a crime. Further, the thought that was prevalent was that a corporate has 'no soul to damn and no body to kick'. But from the early 29th century onwards, the importance of the criminal liability of the corporation was recognized by various courts.

Theories of corporate criminal liability

There are four theories of corporate criminal liability which can be discussed briefly.

1. Theory of Vicarious Liability:

The doctrine of vicarious liability recognizes 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 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 other.

2. Identification Theory-

In this theory, the corporations are held criminally liable for true crimes and regulatory offences. This theory recognizes that the acts and state of mind of certain senior officers in corporations are the directing mind of the corporation and thus deemed to be the acts and state of mind of the corporation itself. The corporation is considered to be directly liable under this category.

3. Aggregation Theory

Under the aggregation theory, the corporation aggregates the composite knowledge of different officers in order to determine liability. The company aggregates all the acts and mental elements of the important or relevant persons within the company to establish whether in to they would amount to a crime if they had all been committed by one person. According to Cella Wells, aggregation of employee's knowledge means that corporate culpability does not have to be contingent on one individual employee satisfying the relevant culpability criterion.¹⁶

The growth of corporate criminal liability can be identified through the following stages.

1. *Public Nuisance* - Courts in U.K and the U.S.A first imposed corporate criminal liability in cases involving non-feasances of quasi-public corporations such as municipalities that resulted in public nuisances.¹⁷
2. *Crimes not requiring criminal intent* - As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisance to all offences that did not require criminal intent. In the *Queen v. Great North of England Railways Co.*¹⁸ Lord Denman ruled that corporations could be criminally liable for misfeasance and American courts soon began following this trend. This development eventually encouraged courts to extend corporate criminal liability to all crimes not requiring intent.
3. *Crimes of intent* - Courts were slow to extend corporate criminal liability to crimes of intent. Not until *New York Central and Hudson River Rail Road Co. v. United States*¹⁹ in 1909 did the Supreme Court clearly hold a corporation liable for crimes of intent. The motivating factor of this result was the need for effective enforcement of law against corporations. Creation of corporate personality had otherwise created too large a vacuum vis-a-vis application of criminal law to corporations.
4. *Expansion of corporate criminal liability* - Various historical developments in Western Europe as well as United States further contributed to the growth and expansion of corporate criminal liability. However one of the most important factors favouring criminal liability over civil liability was that the public civil enforcers did not possess as

¹⁵ *Zee Tele films Ltd. vs. Sahara India Co. Corporation Ltd*, 2001 (3) *Recent Criminal Reports (Criminal)* 292;

¹⁶ Cella Wells, 'Corporations and Criminal Responsibility', 2nd ed.(Oxford University Press, 2001) p.156

¹⁷ A. Ashworth, *Principles of Criminal Law* p. 79-81 (Oxford: Clarendon Press, 1991) cited by Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. Cal. L. Rev. 1141

¹⁸ *Assn. of Victims of Uphaar Tragedy v. UOI*, 104 (2003) DLT 234, See also: *Rule of Strict Liability Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330.

¹⁹ 212 U.S 481



much enforcement power as criminal enforcers did.

There emerged specific statutes, rules, regulations and notifications which spelt out corporate criminal liability in clear terms. However, even in western countries, standards vary with each legal system applying a different model of corporate criminal liability. The following part discusses two categories of these models.

Concluding observations

In the case of corporate criminal liability, the approach has changed over the years from there being no concept of a liability for criminal acts for corporations to liability based on the identification of some persons as the alter ego of the company. Today, corporate criminal liability is a subject of concern for a wide range of groups campaigning on issues including human rights, environment, development and labour. Corporate crimes committed on all continents across a range of industrial activities in various sectors (e.g. chemicals, forestry, oil, mining, genetic engineering, nuclear, military, fishing, etc.) clearly point towards the need for greater control, monitoring and accountability of corporate activity in a globalised economy. Corporate criminal liability is complementary to individual liability.

The present liability regime that makes both corporate and individual prosecutions available to regulatory authorities has undeniable advantages over one that does not. Where crime arises from intra organizational defects, the dismissal or discipline of a few individuals is clearly an inadequate response. Further, where individual liability is difficult to determine, prosecution of the corporation is an attractive alternative. There are many other situations where the prosecution of the corporation may be the only way to allocate responsibility for white-collar crime. Where both a corporation and its officers can be prosecuted, the prosecution of one over the other, or both, is a matter that is largely left to the discretion of the prosecuting authority.

The prosecution's choice should be aimed at achieving the effective regulation of corporate activities, as well as the general objectives of sentencing. The criminal law jurisprudence relating to imposition of criminal liability on corporations is settled on the point that the corporations can commit crimes and hence be made criminally liable. However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. Apart from fines, punishments such as winding up of the company, temporary closure of the corporation, heavy compensation to the victims, by stepping on the weakness of the corporation i.e., its goodwill, etc. Such means of punishment would have a deterrent effect on the corporate and the sole aim of punishment under criminal jurisprudence would be achieved.