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CORPORATE CRIMINAL LIABILITY: A LEGISLATIVE DEADLOCK FOR THE SWINDLERS

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Abstract

The extension of the corporate sphere through globalization and innovative improvement has prompted the advancement of the doctrine of Corporate Criminal Responsibility. Once in the past, there were no criminal liabilities over organizations, however, today the world has gone to a circumstance where corporates are expected to take responsibility for their wrongdoings. Being an artificial person, a corporation gets its life through its directors, agents and employees. Its objects are stated in its charter documents but are performed through human interference acting for or on behalf of the corporation. The Criminal liability of the Corporation is settled based on the degree to which it tends to be considered liable for the wrongs of its representatives, employees or agents.

The institution of the doctrine is with the guidance of several milestone judicial decisions has been discoursed by Courts that apply the doctrine of Corporate Criminal Liability. The advancement of this doctrine from when there was no criminal responsibility to the present time, is expressly explained in this paper. The study is descriptive in nature. In the course of conducting this research, the author has relied mainly on secondary sources such as Books, Case Analysis, Statutes, International Treaties, Articles and Journals. (Methodology added) The paper is structured in a theoretical perspective whereby it discusses the jurisprudential position of the United Kingdom, United States and India. Also, the paper discourses the Legislative landscape in India regarding the doctrine of Corporate Criminal Liability and provision of fraud under the Companies Act 2013 reflecting the same.

Keywords: Corporate Criminal Responsibility, Corporate Personality, White-collar crimes, Companies Act, Development.

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Literature Review

The vital role of business corporations is in ameliorating the economic welfare and development of the society. However, on the flip side, there are corporations that are utilized to carry out the wrongdoings and create misfortunes for the economy. From the Company Law Jurisprudence, it is evident that an enterprise has its own legal personality which is independent and distinct from that of its members, Board of Directors and employees.

This Separate Legal Personality has awakened many indisputable rights to these corporations; such as holding property, entering into contracts, legal capacity in suing or being sued and even they are capable of committing criminal offences as well. These corporations may also be actors to crimes which can only be committed by natural persons. So, foisting off the Doctrine of Corporate Criminal Liability has given a positive impact in the field of Criminal jurisprudence.

The judicial literatures pertaining to this doctrine is developing multifaceted; such as, Criminal Law, Penology, Business and Commercial Law and even in International Law. Hence, what is found in any of these areas is very helpful to understand the issues in association and working of corporate bodies, and the causes and aftermath of their involvement in corporate crimes. Specifically with regards to Criminal law, applying this doctrine against the corporations can bring about challenges. The main confusion is that companies don't "act" by themselves – their Promoters, directors, employees carry on behalf of companies.

The second is that while a few offences are made exclusively or mainly in light of corporations, most criminal offenses were made at first or principally considering natural persons in mind, and as often as possible it demands for a psychological component that is prefaced on the wrongdoers having a solitary "mind". Having said these challenges, the researcher in this literature review will discuss the idea of corporate entity, theories of corporate criminal liability, its international criminal law aspects, position in various legal systems, and analyzing the doctrine through the eyes of "Individualism".

Idea of Corporate Personality

The prime focus in this research is about corporate personhood. Corporate personality is a distinct status provided to companies that have complied with laws for its recognition as a legal entity and that has an independent legal existence from that of its members. Corporate personality is the creation of law and this recognized both in English and Indian laws. This hypothesis plays an important role in the evolution of corporate criminal liability.

The article on Corporate Personality authored by John Dewey[2], an American philosopher who has dissected the Conception of a 'legal person' and approached the notion of corporate legal personality from a philosophical angle.

Also, Otto Von Gierke in his work[3] has defined Corporations as: - *"Universitas [or corporate body] is a living organism and a real person, with a body and members and a will of its own. Itself can will, itself can act, it is a group-person, and its will is a group-will."*

Theories of Corporate Criminal Liability and International Criminal Law Aspects

The underwriting of criminal responsibility of corporations has generally been a 20th century legal turn of events, impacted by the common law developments. In the textbook on Criminal Law authored by David Brody and James Acker, they pointed out that; "The majority of theories of corporate criminal liability are typical of common law developments; they have been constructed on a case-by-case basis. Despite their importance, these theories have proved to be ineffective, for their lack of strong theoretical basis and them individualistic roots."[4]

Coming to International Criminal Law aspects, the need for holding Corporations accountable for their crimes under international criminal law is highly a debatable issue. Late improvements in the 21st Century exhibit more transparency toward the acknowledgment of corporate criminal liability in the international sphere. The very first attempt by an international organization to acknowledge corporations within their jurisdiction is the African Court of Justice and Human Rights (ACJHR) by adopting a protocol called the Malabo protocol.

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[2] Dewey, J. (1926). The Historic Background of Corporate Legal Personality. *The Yale Law Journal*, *35*(6), 655. https://doi.org/10.2307/788782

[3] Dunning, W. A., Gierke, O., & Maitland, F. W. (1901). Political Theories of the Middle Age. *Political Science Quarterly*, *16*(1), 175. https://doi.org/10.2307/2140461

[4] Brody, D. C., & Acker, J. R. (2015). *Criminal law*. Jones & Bartlett .

Position of the Doctrine under Legal Systems of the U.S, UK and India

The researcher has taken a sincere effort analysing the approach to the doctrine of corporate criminal liability adopted by various courts in different countries. This paper embraces the perspectives by the English courts, and afterward proceeds to the United States and Indian Courts. In many judicial pronouncements we can see that the Courts have taken an independent stand while applying the Doctrine of Corporate Criminal Liability.

Examining the Doctrine through the eyes of "Individualism"

Western Societies it is perceived that Individual Accountability for a crime is pertinent for social control, but in modern times this is more the expectation than the position in the case of crimes committed by corporations. Conversely with Individual liability, the state can't actuate the ideal corporate conduct by holding them criminally obligated at whatever point a wrongdoing happens. Also, there is an accountability problem persisting in society for making corporations criminally liable. In the article written by Miller, S. he pointed out that:

We are not concerned here with the problem, formidable as it is, of corporate crime in the context of smaller organisations (e.g., leveraged currency dealers) where the main concern is not the balance to be struck between corporate and individual responsibility but rather the difficulty of taking timely and effective action against individual persons who act fraudulently under corporate guise.[5]

Also, in a Journal article published in the University of Chicago Law Review, it states that: -

Where corporations are authorized for offenses, in hypothesis they should respond by utilizing their inside disciplinary frameworks to sheet home individual responsibility, however the law currently makes practically no endeavour to guarantee that such a response happens.[6]

[5] Miller, S. (1997). Individualism, Collective Responsibility and Corporate Crime. *Business and Professional Ethics Journal*, *16*(4), 19–46. https://doi.org/10.5840/bpej19971647

[6] Criminal Law. Director and Corporate Crime. Principal and Accessory. (1936). *The University of Chicago Law Review*, *4*(1), 142. https://doi.org/10.2307/1596767

Discussion

A thoughtful review of the literature revealed the corporate criminal liability is a legislative deadlock for the swindlers. According to the literature evidence base, many jurists, writers and experts believe the activities of corporations can lead to the hazard of social damages. stakeholders inside the corporations may have motivations to overstep the law in quest for their own and additionally for the corporation's advantages. So, this doctrine plays a very important role in mitigating the corporate crimes and other defaults done by the companies. Also, doctrine has been stretched to serve the purposes of the criminal laws.

A corporation which is into committing fraud cannot take shield under the concept of corporate personality anymore. In the present literature review, a major limitation discovered is the relevant interpretation of Indian statutes in upholding the corporate criminal liability of corporations. This may be because the research area has not been generally canvassed in India thus there might not be many publications of books or articles on something very similar.

Conclusion of the discussion

The criminal law jurisprudence recounting the burden of criminal responsibility on corporations is chosen to the point that the corporations can perpetrate violations and consequently be made criminally liable. The criminal justice system both at national and international levels explicitly considers the criminological and penological viewpoint keeping in view the corporate criminal activities accountable. This doctrine holds back corporations from becoming a danger to society in any event, for the act of the directors or employees for the benefit of the company. The idea of corporate criminal liability is predictable and consistent.

Introduction

The term "Person" for the purposes of law has been widely interpreted by many jurists in different ways. As a legal conception, 'Person' implies what law makes it imply. For a layman, the term connotes a living soul in his/her flesh and blood. Conversely, if we venture into the mind's jurists, this word is interpreted beyond the corporeal concept. It implies a right and duty bearing unit. Personality should be dissected from the human species.

Human beings have life and are caught up in the Birth-Death cycle, yet personality has a specialized significance and it incorporates lifeless things too. Hence, the law recognizes two forms of 'Person' viz. natural and juridical persons. The latter includes Idols[7], Guru Granth Sahib[8], Corporations, Sovereign states etc.

Corporation as an artificial person

Corporation is one among the most recognized artificial persons under the law. As an opening we may take the following revelation from Maitland, an English historian, who has done so much to bring the question of the nature of corporate legal personality: "the corporation is a right-and-duty-bearing unit. Not all the legal propositions that are true of a man will be true of corporations. For example, it can neither marry nor be given in marriage; but in a vast number of cases, you can make a legal statement about x and y which will hold good whether these symbols stand for two men or for two corporations, or for a corporation and a man"[9]. Therefore, such a unit would be a person; such a proclamation would be tedious, repetitious. Henceforth it would pass on no ramifications, then again, actually the unit has those rights and obligations which the courts discover it to have. Geldart, an upholder of the doctrine of "real personality", asserts that "To say that all legal personality-whether of so-called natural or so-called juristic persons-is equally real because the law gives it an existence, and equally artificial or fictitious because it is *only* the law which gives it an existence, is really to confound personality with capacity".[10] With the change in times, there emerged a new notion of artificial or juridical personality in the sphere of Legal philosophy.

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[7] *Yogendra Nath Naskar v. Commissioner of Income Tax* AIR (1969) SC 1089
[8] *Pritham Das Mahant V. Siromani Gurudwara Management Committee* (1984) 2 SCC 600
[9] Maitland, *Collected Papers* (1911) 307.
[10] Geldart, *Legal Personality* (1911) 27 L. QUART. Ruv. 90.

The Development of Corporate Personality Concept

Before separate legal personality became a key tenet of company law, it was used by religious organizations to hold property in their own right[11]. Prior to the landmark reforms of 1844, there were two types of legal structures: joint stock companies and corporations. A joint stock company was in fact a large partnership in possession of company attributes such as transferable shares, a constitution and a board of directors[12]. However, it lacked one essential attribute, a separate legal personality. Corporations, on the other hand, were either formed under an Act of Parliament or a Royal Charter[13]. Even prior to this period, there was a roman law of easements that provides examples of legal personality, but let's keep that aside.

For a joint stock company to possess the legal status of corporations, it has either been made by the intervention of the Parliament or by a Royal Charter issued by a monarch. Many Joint Stock Companies were mushrooming in spite of the fact that the South Sea Company (established through royal charter in 1711 met with less success. The authorities were muddled with the two major impediments of seeing partnerships and Joint stock companies alike. Firstly, in any case, a Joint stock company had thousands or even many individuals hence extending an individual working relationship between them is difficult.

Secondly, infusing laws governing partnership to Joint stock companies is impossible. This evokes a grave need for parliamentary interference as regards to regulating the Joint stock companies. The waybill guiding to separate legal personality for joint stock companies began in 1844 when Parliament passed the Joint Stock Companies Act. It provides for registration and transferability of shares. It granted companies a separate personality upon registration under the Act. Incorporators were provided with a quick route to gaining corporate status without the need to bargain for a Royal Charter or an Act of Parliament.

[11] RB.Ekelund,, Jr., R F. Hébert, R D. Tollison, G M. Anderson, and A B.Davidson (1996). *Sacred Trust: The Medieval Church as an Economic Firm*. New York: Oxford University Press

[12] P. Margaret and D.Reiffen, (1990), "The Effect of the Bubble Act on the Market for Joint Stock Shares",*The Journal of Economic History*, 50(1):163-171

[13] S. Williston, (1888)." History of the Law of Business Corporations before 1800*", Harvard Law Review*, II: 114

However, lawmakers at the time were also aware that separate legal personality alone cannot attract traders to engage in commercial trade for fear of failure to repay the debts, whether at fault or not[14]. A year later, limited liability theory was adopted hand in hand with corporate personality in the Companies Act of 1956. Hence a company incorporated under the law is clothed with a corporate character so it bears its own name, acts under name, has its very own seal and its resources are independent and unmistakable from those of its individuals.

It is an *alter ego* of the individuals who form it. Accordingly, it is fit for claiming property, creating debts, holding wealth, employing people, going into contracts and suing or being sued in a similar way as a person. However, a member can't be expected to take responsibility for the conduct of the organization regardless of whether he holds essentially the whole majority of the capital. As companies are recognized Juristic persons, they have certain rights and obligations to be performed in the limits which it operates.

In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law.[15] As identified in the landmark decision of *Salomon v. Salomon and Co. ltd., (1897) A.C. 22, once a company has been validly constituted under the Companies Act, it become a legal person distinct from its members and for this purpose it is immaterial whether any member holds a large or small portion of the shares, and whether he holds those shares as beneficially or as a mere trustee.* Companies were offered independence to raise wealth and participate in hazardous endeavors by allowing them a juridical personality and outside financial stakeholders were urged to put their monies into companies by giving them limited liability.

[14] W.Carney, (1995). Limited Liability Companies: Origins and Antecedents, *University of Colorado Law Review*, 66 pp. 855-880;

[15] *Shiromani Gurdwara Prabandhak Committee v. Shri Sam Nath Dass* AIR (2000) SCW 139

Criminal Liability of a Corporation

It was believed a corporation or a body incorporated, which is having a juridical personality, cannot be charged with offences because of procedural difficulties. The obvious obstacles were firstly, the basic rules of criminal liability i.e., guilty act or omission (actus reus) and prohibited state of mind or guilty mind (mens rea) cannot be traced in an artificial person. Secondly, no bodily punishments could be wreaked on it.

A corporation is devoid not only of mind, but also of body; and therefore, incapable of the usual criminal punishments. 'Can you hang its common seal?' asked an advocate in James, K.K.'s days (8 St Tr 1138). Thus, the fact that a corporation cannot be hanged or imprisoned sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine"[16].

By the late 19th century, corporations began burgeoning and had become further central in society. Gradually the Courts identified the potential of corporations that can cause significant harm to the public. Thus, the old view that they had no soul and, therefore, could not have the necessary "wicked intent" to commit a crime was backed down. The evolution of corporate criminal responsibility is a judicial change in the law. In the earlier stage of this doctrinal development, corporations were only made liable for non-feasance (an omission to act).

Through various judicial pronouncements, the courts have stretched criminal liability for misfeasance (wrongful exercise of a lawful authority). Lord Denman in *Queen v Great North of England Railway Co [1846] EngR 803* observed that corporations could be criminally obligated for misfeasance for a situation where the company had neglected to construct a bridge over an interstate as per legal prerequisites. In decades, this principle has been well recognized.

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

[16] Review: Kenny's Outlines of Criminal Law. (1959). *The Journal of Criminal Law*, *23*(1), 77–78. https://doi.org/10.1177/002201835902300112. Accessed 17 May 2021

The alter-ego otherwise known as organic theory based on this assertion was applied in a landmark case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd (1915) AC 705*, Learned Chancellor Viscount Haldane observed that; *A corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. So, the Board of Directors are the brains of the company which is the body, and the company can and does ats only through them.* A corporation therefore can be held responsible for committing an offence by a 'person' who, at the relevant time, was 'the directing mind and will' of the corporation[17].

Opponents to this doctrine contend that the corporate criminal liability is totally pointless on the accompanying two grounds: Initially, they oppose that it isn't the companies that carry out violations with unruly intents, the people acting on behalf of it do. Next, the retributive impact is borne by the stakeholders. It implies that the expense of corporate criminal fines and endorsements is borne by the investors and the other stakeholders for the wrongdoings of corporations.

[17] Wells, C. (2001). Corporate liability in England and Wales. *Corporations and Criminal Responsibility*, 84–105. https://doi.org/10.1093/acprof:oso/9780198267935.003.0005. Accessed 17 May 2021

Theories of Corporate Criminal Responsibility and Views under International Law

The views of jurists find expression through different theories of corporate personality which they have propounded from time to time. Even though there are several theories which attempt to explain the nature of corporate personality can be set to be dominant it is claimed that while each theory contains elements of truth but none by itself sufficient interpret, the phenomenon of juristic criminal liability. there are five theories of corporate liability mainly[18];

1. **Vicarious liability Theory: -** The principle of vicarious criminal liability allows a corporation to be convicted of a criminal offence by imputing the actus reus (the performance of a legally prohibited act) and the mens rea (criminal intent) of an individual to a corporation. The corporation's liability is derived from the fault of their employee, officer or agent[19].

   Celia Wells opines that; "Vicarious liability has been criticised for including too little (in demanding that liability flow through an individual, however great the fault of the corporation), and for including too much (in blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault)"[20]

2. **Identification Theory: -** The identification doctrine asserts that "those who control or manage the affairs of a company are regarded as embodying the company itself"[21] Generally, the board of directors, the managing director or other superior officers of a company carry out the functions of management and speak and act as the company.

[18] Paranjape, N. V. (2016). *Studies in jurisprudence and legal theory*. Central Law Agency.

[19] Canadian Dredge & Dock Co v R [1985] 1 SCR 662 at [20]

[20] Wells, C. (2001). The role of criminal law. *Corporations and Criminal Responsibility*, 13–39. https://doi.org/10.1093/acprof:oso/9780198267935.003.0002. Accessed 17 May 2021.

[21] Ormerod, D., & Laird, K. (2018). 14. Involuntary manslaughter. *Smith, Hogan, & Ormerod's Criminal Law*. https://doi.org/10.1093/he/9780198807094.003.0014. Accessed 17 may 2021.

This generates primary criminal liability where the corporation itself is held to commit the offence although some argue that it is essentially a form of vicarious liability limited to those who control or manage the corporation's affairs.[22]

3. **Aggression Theory**: - The aggregative theory regards the corporation as the vital wrongdoer, yet does as such by adding together the various demonstrations, exclusions, and perspectives of stakeholders, and ranking directors. It contends that the lead, perspective and culpability of personal delegates of the organization ought to be collected in order to establish in whole the components of the wrongdoing and this would be valuable particularly where none of the delegates of the organization would exclusively be liable. In *United States v Bank of New England 484 US 943 [1987].,* it was recognized that collecting the knowledge of a number of employees is often appropriate since corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation'.

4. **Direct liability Theory:** - This theory has more prominent capability of guaranteeing that an offense inferable from a company doesn't go unpunished, particularly for the situation where no person inside the organization may handily be nailed down on the offense. Further, courts for this situation would discover no trouble forcing fines on the partnership that is proportional to the gravity of the offense, all the more so where the fine would be messed up with regards to the methods for the person that would somehow or another be responsible. Indicting the company would go about as a notice and hindrance to different companies and furthermore to the general population of the unfair demonstrations that are submitted in the company's name.

5. **Holistic Theory: -** The holistic theory views companies as themselves equipped for carrying out violations through set up inside examples of dynamic (corporate culture or corporate (dis)organization). The theory centres around the authoritative direct and shortcoming of the company in general to fulfil the necessities of the criminal law. Corporate fault can be found in the methodology, working frameworks or culture of an organization.

[22] Neil Cavanagh "Corporate criminal liability: an assessment of the models of fault" (2011) 75 J Crim L 414 at 416.

Views under International Law

It is an undeniable truth that international business activities boomed with the ubiquitous happening of globalization. The increasing international scope of the domestic business houses has prompted the advancement of the doctrine of Corporate Criminal Responsibility. The idea of this doctrine has a combative history in international law. Even though States remain the kernel of international law, Multinational Companies are equally recognized as non-state entities, but only as an object of international law.

Contrarily the International Criminal law is still undeveloped in the criminological inquiry for the wrongdoings committed by these MNCs. It was first during the United Nations Rome Conference 1998, the French plenipotentiaries proposed to stretch out the International Criminal Court's jurisdiction over legal entities. But this proposal was met with huge resistance among other national jurisdictions. Thus, the consensus was never reached at the conference.

The need for holding Corporations accountable for their crimes under international criminal law is highly a debatable issue. Late improvements in the 21st Century exhibit more transparency toward the acknowledgment of corporate criminal liability in the international sphere. The very first attempt by an international organization to acknowledge corporations within their jurisdiction is the African Court of Justice and Human Rights (ACJHR) by adopting a protocol called the Malabo protocol.

Following this inclusion, in 2016, a Draft Articles was released by the UN International Law Commission on the Prevention and Punishment of Crimes Against Humanity. It is still to be seen whether the provision on corporate liability will make it to the last draft. Regardless, its selection in first perusing addresses effectively a significant advancement in the field of corporate criminal responsibility for international wrongdoings committed by MNCs.

Glancing through the Jurisprudential Position in various countries

Many legal systems in the World have constituted in some way or the other for corporate bodies to be the subject of criminal law. In this section, the approach to the doctrine of corporate criminal liability adopted by various courts in different countries will be noted. We shall look first at the perspectives embraced by the English courts, and afterward proceeds to the United States and Indian Courts.

Position in the United Kingdom

The danger of reparations brought about by corporate indulgence in the country expanded fundamentally because of the industrial revolution and the improvement of the railroad businesses. Corporations gathered tremendous fortunes and perpetrated numerous violations including payoff, hoarding, misuse of labour, and the support of hazardous working conditions. The courts could necessarily at this point take cover behind the "corporate as a fiction" hypothesis and overlook the potential for corporations to make generous harm to society.

Drifting from the mens rea concept the English Courts have developed the recognition theory. In HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd (1957) 1 QB 159, Denning LJ likened a corporation to a human body:

It has a brain and a nerve centre that controls what it does. It also has hands that hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

Unlike the US, the United Kingdom stringently neglected the principle of vicarious liability to quasi-criminal offenses. The UK Parliament even has introduced legislation dealing with corporate crime after a few serious mishaps happened where no company or human individual could be considered responsible.

Position in the United States

In the US, the principle underlying corporate criminal liability is respondent superior. In essence, an organization is responsible for all its employees' actions done in the course and scope of their employment and, at least in part, for the benefit of the corporate. Although some American states have different rules, in federal jurisprudence it is not necessary that the employee have a certain level of corporate responsibility, such as being able to speak for the corporate, being part of a control group, or being a directing mind. It has long been US law that a corporation can be criminally liable based on any of its employees' actions, despite not having a soul to damn nor body to kick, as the saying goes. And the same applies to partnerships, closely-held companies with a small group of controlling shareholders, and limited liability companies.[23]

The principle of vicarious liability is the dominant form of corporate criminal liability in the United States of America (the US). At the federal level in the US, a corporation may be criminally prosecuted for approximately 4000 different federal regulatory offences.[24] Vicarious liability in the US has settled since the milestone *New York Central* case, the conversion of civil liability to criminal liability is applied here.

Position in India

The Indian courts almost took a similar position as that in the United States. In *State of Maharashtra v Syndicate Transport Company ltd AIR (1964) Bom 195,* the High Court didn't perceive any justification excluding a body corporate from responsibility for wrongdoings committed by its directors, agents or employees while acting for on behalf of the corporation.

In 2004, the Supreme Court of India, delved into the question as to whether a company can be held criminally liable by attributing it the mens rea of those who work or are working for it, has also unequivocally endorsed that the alter ego theory is applicable in India. It held that men rea of the persons in-charge of the activities of a corporation can be imputed to the corporation for imposing liability on it.[25]

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[23] Srere, Mark A. "Corporate Criminal Liability - Perspectives from the US, UK and France." *Lexology*, 13 Apr. 2018, www.lexology.com/library/detail.aspx?g=a87d8ace-7b5e-482b-a907-9a69e20f02cd. Accessed 17 May 2021

[24] Vogel, J. (2014). Rethinking Corporate Criminal Liability. *Regulating Corporate Criminal Liability*, 337–341. https://doi.org/10.1007/978-3-319-05993-8_27. Accessed 17 May 2021

[25] Assistant commissioner, assessment-II, Bangalore v M/s Velliapa Textiles Ltd AIR 2004 SC 86

Soon after a year this dictum was overruled by a five-judge Constitution bench of the Supreme Court in *Standard Chartered Bank & ors. v. Directorate of Enforcement & Ors. AIR (2005) SC 2622.* The bench observed that; *"A corporation or a company, by virtue of Section 2 & 11 of the Indian Penal Code is a 'person' and it, theoretically, can be prosecuted for any offence punishable under law, the apex court ruled that there is no immunity to a company or corporation from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory punishment."*

The ruling is very clear as the bench stressed, should not be permitted to go scot-free merely on the reason that it technically cannot be punished by way of imprisonment. The apex court held that a company or corporation can be charged with offence punishable with mandatory fine and a term of imprisonment, but the punishment can only be limited to a fine. Also, in *Iridium India Telecom Ltd v. Motorola Incorporated Co. [2010] 160 Comp Cas 147 (SC),* is again one such decisive step in congealing the doctrine for criminal responsibility of corporations.

The apex court emphasized: "… *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 criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons are so tense that a corporation may be said to think and act through the person or the body of persons."*

Until the Iridium telecom case, as we noted before, whether or not a corporation is equipped for having mens rea is one which was uncertain under Indian law. The fact that Indian courts have displayed ambivalence in holding a corporation guilty of acts involving mens rea raises an element of a surprise given the robust developments in English law on the subject matter, which have been extensively relied upon by Indian courts. Under principles of corporate law, in certain situations, the acts or mental state of certain individuals can be attributed directly to the company, where the company carries the primary or direct liability.

Corporate Criminal Liability through the lens of Individualism

In Western Societies it is perceived that Individual Accountability for a crime is pertinent for social control, but in modern times this is more the expectation than the position in the case of crimes committed by corporations. The strategy of individualism is upheld by various judicial commentators and also, they advocated for abolishing the corporate criminal liability. Since these artificial persons lack soul to damn and body to kick, punishing corporations is an uphill task. In an extensive critique, Eliezer Lederman has contended that recognition of corporate criminal liability challenges "the ideological and normative basis of criminal law and its mode of expression and operation"[26] There are mainly two assumptions associated with the concept of Individualism, firstly, the methodological individualism, where the corporations are frequently respected as reprehensible at the same time, as per the rationale of methodological individualism, such accountability diminishes to culpability on the part of individual delegates or on the other hand to causal obligation (rather than moral duty) on the part of corporation. This Analytical thinking is hard to acknowledge. Secondly, Individualism guesses that the theory of deterrence infers the requirement for, or the adequacy of, the criminal liability of individuals.

The problems here are, the utilization of corporate criminal liability as an alternate route which subverts individual liability at the degree of social enforcement of corporate defaults; and the disappointment of the law to demand individual liability inside corporations that are expected to take responsibility and exposed to fines or money related punishments. The technique of Individualism attempts to determine these issues by nullifying corporate criminal liability by consequently applying tension on the legal system to arraign corporate personnel who are behind the wrongdoing. It has been contended that this system is unconvincing on the grounds that, at the most basic degrees of request, Individualism tirelessly neglects to catch the corporate importance of the corporate realm over which the law looks to practice control. Individualism in this way proposes revolutionary procedures by cutting off the corporate leg of criminal liability as the solution for the current social illness of non-accountability for corporate wrongdoings, frauds and defaults.

[26] Lederman, E. (1985). Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle. *The Journal of Criminal Law and Criminology (1973-)*, *76*(2), 285. https://doi.org/10.2307/1143611 Accessed 09 July 2021

Corporate Criminal Liability and the Legislative Landscape in India

Across the world, there have been significant developments in corporate criminal liability through legislation. Political, social, and cultural beliefs about how the law should attribute blame to organizations are beginning to change[27]. As a result, several jurisdictions across the world have attempted to move away from the individualist model of corporate criminal liability to more holistic models, with various levels of success.

The corporate sector has attempted to influence the content and enforcement of corporate criminal legislation worldwide and undermine its practical effect. This has resulted in significant deficiencies in each piece of legislation. Regardless of the practical effect of the legislation, the reform has been somewhat useful in generating considerable dialogue and attempting to reinforce the political message that the legal system can control corporations[28].

A corporation cannot be sentenced for the offences, which by nature, cannot be committed by a corporation (e.g., Murder, Perjury, offences against marriages, treason, sexual offences etc) but can only be committed by an individual human being. In this regard, the legislative literatures should not interpret corporations and natural persons *pari passu*. However, the Supreme Court, by the majority, ruled that a court cannot impose criminal liability on a corporation if the Penal provision provides for imprisonment only or a minimum term of imprisonment plus fine.

We have a separate terminology as

well to define the crimes committed by companies i. e Socio-economic offenses. Edwin Sutherland wrote in '*Crimes and Corporation'* as follows: *"It is very clear that the criminal behaviour of businessmen cannot be explained by poverty, in the usual sense, or by bad housing or lack of recreational facilities or feeblemindedness or emotional instability. Business leaders are capable, emotionally balanced, and in no sense pathological."*

[27] Wells, C. (2001). Criminal responsibility and the corporate entity. *Corporations and Criminal Responsibility*, 63–83. https://doi.org/10.1093/acprof:oso/9780198267935.003.0004. Accessed 17 May 2021

[28] Colvin, E. (1976). REVIEWS. *The British Journal of Criminology*, *16*(2), 201–202. https://doi.org/10.1093/oxfordjournals.bjc.a046729. Accessed 17 May 2021.

These crimes were "very serious in nature and deserved punishment even if there was no express intention to do the crime". The 'approximate' definition, formulated by Sutherland has been a subject of criticism from several quarters. There has been no official or legal decision on the definition anywhere, and the term remains ambiguous, uncertain, and controversial. Sutherland himself had to defend his thesis because of the controversial conclusions of his study.

His argument was that as (a) they were recognized in law as injurious to the public, (b) there were appropriate legal sanctions prescribed as penalties for such violations, and (c) the behaviour involved in the violations was generally 'wilful' and 'intentional' in the sense of not being accidental and as not happening without awareness on the part of the offenders[29].

Under the Directive Principles of State Policy[30] (Part IV) of the Indian Constitution imposes an embargo on the State regarding ownership and distribution of nations wealth and resources as follows, 'the State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.'

Taking reference from the above philosophy is what led to the various regulatory legislations. A dozen of social legislations were enacted to curb the menace of exploitations by the companies in the society. Apart from these laws, we have provisions in the Indian Penal Code as well. Conversely, increased corporate participation in society leads to a spike in crimes and frauds committed by them.

They are hassled by the Governments to follow good corporate governance. Social practices with law becoming more stringent with severe penalties for non-compliance, but at the same time decriminalization of compoundable offences under the laws for ease of doing business in India is one of the most remarkable things that the Indian corporate fraternity is facing. Hence, consolidating all the legislative weapons against delinquent companies is necessary. In this milieu the Companies Act, 2013 [ACT NO. 18 OF 2013} was enacted.

[29] LawTeacher. November 2013. Exclusion of Mens Rea and Socio-Economic Offences in India. [online]. https://www.lawteacher.net/free-law-essays/criminology/exclusion-of-mens-rea-in-india-law-essay.php?vref=1 [Accessed 17 May 2021].
[30] INDIA CONST. art. 39, cl. (b) & (c).

Companies Act 2013 – Fit as a Fiddle

The Companies Act 2013 (hereinafter referred to as 'the Act'), has undergone a rampant updating from that of its predecessor (erstwhile Companies Act 1956). This latest law has introduced concepts supporting enhanced disclosure, accountability, better board governance, better facilitation of business, and so on. Criminal liability may be imposed under the company law. The new law also transplants a western mode of investors rights in India. Of particular importance is *section 447* of the act which provides that: Any person who is found guilty of fraud involving an amount of tens lakhs or more, or at least one percent of the turnover of the company, shall be punishable with imprisonment for a term which shall not be less than six months, which can even extend to 10 years and shall also be liable to fine of not less than the actual amount involved, also it can extend to three times of the said amount. Apart from the punishment of fraud as envisaged under the Companies Act 2013, there are other regulatory mechanisms as well to overlook the activities of a company. Some of them include: -

. Appointment of Independent Directors: - Under Sub-section 6 of Section 149 of the Act, S. 149(6) of Companies Act makes a mandate for those companies as prescribed by the Act, shall appoint an Independent Director mainly with the objectives of increasing the corporate credibility and governance quality. He acts as a whistle-blower when there is a suspect on fraud or on violation of ethics policy.

. Establishment of Serious Fraud Investigation Office: - Serious Fraud Investigation Office (SFIO) is a body established by the Central Government under section 211 to investigate the matters of frauds and other white-collar crimes committed by the corporations.

· Vigil Mechanism: – As envisaged under section 177, Vigil Mechanism is an instrument for employees and Directors to answer to the administration worries about unscrupulous practice of business, genuine or associated fraud or infringement with the Codes of Conduct or any Policy of the Company.

. Auditor(s) Obligation: - The Companies Act cast an obligation under Section 143 on the auditor (s) whether Secretarial Auditor or a Financial Auditor of the company to report directly to the Central Government, if there is a reason to believe that an offence amounting to corporate fraudis committed or being practiced by the incumbent officers (including Directors) against the company.

Recommendations and Conclusion

Even though the Indian legislative vista is inclined in promoting ease of doing business, parallelly it should focus on revamping the existing corporate sentencing guidelines. The restrictive thinking behind fine imposed punishments to the defaulting corporations, other new forms of punishments shall also be incorporated in the criminal justice system of the nation. This will do the trick in achieving the ultimate objective of penal law- deterrence. Also, the Ministry of Corporate Affairs (MCA) should join hands with Securities and Exchange Board of India (SEBI) in creating a strong corporate governance infrastructure among Indian companies which helps in shaping their actions and decisions.

The criminal law originated from an individualist model designed to capture human defendants. As the potential for corporations to cause significant harm increased, the criminal law attempted to anthropomorphize corporations to bring them within the individual paradigm. The enduring reluctance of the criminal law to depart from the individual model and embrace a truly organisational model of criminal liability has continued to cause significant difficulties in holding corporations criminally liable. Several jurisdictions have addressed this issue through legislative reforms including the United Kingdom, United States, and even India. The United Kingdom and Indian legislatures were satisfied with merely expanding the identification doctrine to encompass the actions of 'Directors' or 'senior management' respectively.

The issue of the criminal responsibility of corporations for corporate behaviours has been dubious. The lawful position of corporate criminal liability has developed throughout the long term and still yet advancing and with time. The courts in India have attempted a severe methodology in deciding the liability of a corporate body for the acts done with intention done by its Agents, Directors and employees. The Indian Legislature should make a few strides as a new reformatory authorizes to control the criminal nature of the companies in the country. Courts then again have set out reasonable guidelines regarding how to force criminal liability on corporate personalities. They have kept on indicting or absolving corporations with clear standards whereupon their choices are established. They have continued to assert that corporate criminal liability is not the same as that of natural persons. Conversely, the expanding presence of multinational companies calls for setting up more viable measures to tackle the menace of corporate exploitations and the state needs to guarantee that there should be balanced governance on companies and promising laws.