

## CORPORATE CRIMINAL LIABILITY: THE IDENTIFICATION PRINCIPLE

*Talin. V*

Tamil Nadu National Law School, Tiruchirapalli

---

### Introduction

---

“Corporate criminal Liability” is attached to only those acts where there is a violation of Criminal Law, i.e. there cannot be any liability without a criminal law which prohibits certain acts or omissions. It means that in order to make one liable, it must be shown that an act or omission has been done which was forbidden by law with a guilty mind. Thus, in each criminal liability, there has to be two essential elements:

---

*Actus Reus {actus non facit reum nisi mens sit rea} + Mens Rea = Crime*

---

Earlier, as a general rule, criminal liability on Corporations was not imposed as per Common Law because it was considered that the Company lacked moral blameworthiness which is an essential element of crime. There was the belief on the existence of a common question that “*the company does not have a soul to damn or a body to kick*”. Eventually, it was from the beginning of the twentieth century that the Courts in India and abroad began to recognize ‘Corporate Criminal Liability’ of the Corporations for the very first time under Criminal Law. Even today, a major setback of criminal laws is its inability to only impose fine as a form of punishment for Corporates without proper sentencing of the guilty due to inadequacy of sufficient laws. Hence, most Corporations are scot-free because of laxity in Criminal Laws. In the following sections, the author at the outset has discussed the concept, unsettled meaning and purposes of Corporate Criminal Liability (hereinafter *CCL*) by detailing the numerous reasons why some jurisdictions adopted CCL and others still refuse to accept it. Additionally, the author elaborates the American Model of CCL (which is most accepted worldwide) for determining CCL. The second vector discusses the landmark cases on CCL and its development differently in different jurisdictions with the Doctrine of Identification Principle. The last leg of this paper deals with the possible solutions to CCL under criminal jurisprudence and practical ways to overcome legal loopholes through other associated contemporary developments.

---

### The Saga of Corporate Criminal Liability

---

In the modern era of technological revolution, the impact of activities of Corporations is tremendous on the society. In their day to day activities, not only do they affect the lives of people positively but also many a times in a disastrous manner which come in the category of Crimes. Despite so many disasters, the law was initially reluctant to impose criminal liability upon Corporations for a long time. But later on, classical developments

led to change of stance by the Courts of Law in holding a Corporation criminally liable. Now, there is no obstacle in the Criminal Law jurisprudence whatsoever to impose criminal sanction on a Corporate since it has a mind of its own and also an environment where crime can be nurtured. However, this concept still has not been contemplated in the Indian statutes.

In determining the applicability of CCL, it is necessary in delineating the types of entities that it applies to and there is no unitary view regarding this aspect. Corporations are identifiable persona as they have “ethos” that makes them unique and different from the individuals controlling or working for the Corporations. The ethos can be derived from the Corporation’s dynamic structure, monitoring system, aims, policies, promotion of compliance with the laws and discipline of the employees. Moreover, Corporations are recognized as passive legal subjects in Criminal Law; a Corporation has a cause of action against an individual who harmed it and vice versa. Thus, private entities are also equally subject to criminal liability.

In the United States, for the past fifty years, Corporate scholars have opposed to the idea of CCL by arguing that it should be strictly eliminated or at least strictly limited<sup>1</sup>. Accordingly, if the reform of CCL is to be made a priority, there should be asking about not only the need for restrictions but also whether there is a need to expand liability or enforce existing offenses more vigorously<sup>2</sup>. Similarly, in Canada and the UK, the adoption of *Corporate Manslaughter and Homicide Act, 2007* has circumscribed about CCL. Also, the Australian Federal Code created multiple bases for CCL as per the *Australian Criminal Code, 2002* in Australia.

The first goal of Corporate Criminal punishment is ‘deterrence’—effective prevention of future crimes. The second consists in Retribution and reflects the society’s duty to punish those who inflict harm in order to “affirm the victim’s real value<sup>3</sup>.” The third is the Rehabilitation of Corporate Criminals. Fourth, CCL should achieve the goals of clarity, consistency and predictability with the criminal law principles in general. The fifth goal is Efficiency keeping in mind the general fairness. The ‘*American System of CCL*’ has been the most developed and extensive system of CCL created so far which includes a large variety of criminal sanctions for Corporations such as fine, Corporate probation, etc. The most distinguishing and bold element of the American model of CCL is the adoption of the “aggregation theory” which provides that Corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, meet the requirements of *actus reus* and *mens rea* of the crime. Some argue that adoption of the aggregation theory, in particular, lacks

---

<sup>1</sup>Sara Sun Beale, *A Response to The Critics Of Corporate Criminal Liability*, 46 American Criminal L.R, p. 1481 (2009)

<sup>2</sup>*Ibid*

<sup>3</sup>See Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 130 (1988) cited in Joshua Dressler’s Cases and Materials on Criminal Law 33 (2d ed. 1999), pp. 46-47

consistency with the traditional principles of Criminal Law. Hence, the English and French models refused to accept the aggregation theory.

In Germany, the Criminal Liability of Corporations is non-existent but implemented a comprehensive administrative-penal system that regulates Corporate Criminal wrongdoing. Thus, the German Law pays tribute to the traditional concepts of Criminal Law and refuses to accept the Criminal Liability of Corporations by remaining loyal to the old maxim *societas delinquere non potest*. Some of the reasons for refusal have been the alleged Corporations lack of capacity to act, lack of culpability and inappropriateness of criminal sanctions<sup>4</sup>. But France has abandoned the old maxim *societas delinquere non potest* and adopted a comprehensive, yet restrictive, system that addresses CCL which was a much needed response to the increasing corporate crime phenomenon, especially when France lacked the very well developed and established system of administrative law. On the other hand, the Anglo-American legal system has adopted the concept of CCL as soon as it became necessary (due to the increasing Corporate crime and lack of adequate civil or administrative sanctions) without thinking and re-thinking the old doctrinal traditions. The American and English Law Systems incorporated CCL models easily although the English model is still much more restrictive than the American one. So, the development of CCL in different countries reveals CCL is only at its inception and is open to continuous improvement.

---

### Corporate Criminal Liability & The Identification Principle

---

In India, certain sections of the Criminal Procedure Code speak only of imprisonment as a punishment for CCL like in case of Sec. 420 (*Warrant with whom to be lodged*). The problem arises regarding the applicability of those sections upon the Companies since a Criminal Statute needs to be strictly interpreted where there is no scope for Corporations to be imprisoned. In further determining CCL, various theories govern it such as Optimal Penalty Theory for Corporate Crime, Deep Pocket Hypothesis, Theory of Vicarious Liability and the Identification Principle. Of all these, the Identification Principle stood the test of time and is of prime focus in this paper.

The “Doctrine of Identification” finds its roots in English Law. A Corporate entity can sue and be sued in its own individual name. In Criminal cases, the Company can be prosecuted against but it is quite ineffectual as the Company cannot be punished with imprisonment or death. The only punishment that can be levied on the Company is by way of fine, which at times is quite minimalistic. The question then raised was whether a Company can ever be prosecuted for Criminal offences and be punished with more than just a monetary fine. The Doctrine of Identification was promulgated in this connection so as to affix liability of the crimes committed by the people in charge of running the Company. It states that the liability of a crime committed by a corporate entity is attributed

---

<sup>4</sup>Richard Gruner, *Corporate Criminal Liability and Prevention*, 2-7 (Law Journal Press ed., 2<sup>nd</sup> release, 2005) (2004)

or identified to a person who has a control over the affairs of the Company and that person is held liable for the crime or fault committed by the Company under his supervision.

The most recent judgment of the Supreme Court in the *Reliance Natural Resources Limited v. Reliance Industries Limited*<sup>5</sup> extols the Doctrine of Identification. This case is a dispute between two brothers' viz., Mukesh Ambani (who led RIL) and Anil Ambani (who led RNRL). After the death of their father Mr. Dhirubhai Ambani, the entire Ambani Group of Companies was divided between the two brothers. An arrangement was reached between the parties, with their mother as the mediator. Mukesh Ambani had in this family arrangement made certain concessions on behalf of the RIL, which RNRL had sought to rely upon in the present case. The Supreme Court finally in respect of the Identification Doctrine observed that the family arrangement was between three parties, viz., the mother and the two sons. The legal entity of the Company was different than the individual entity and the Company having more than a million shareholders, one person could not be said to have had the knowledge with respect to the Company, which knowledge he had in his personal capacity. The Court discarded this doctrine on the fact that the facts of the case did not fall into their preview.

In the celebrated case of *Dredge & Dock*, the Supreme Court of Canada had characterized the Theory of Identification<sup>6</sup>:

☒ A Corporation may have several directing mind. Where Corporate activities are wide spread, it will be inevitable that there will be delegation and sub delegation of authority from the center and thus leading to several directing minds.

☒ If the action and intent of the directing mind is merged with the intent of the Corporate entity, then there exists no defence for the Company to claim.

☒ It is the Court adopted rule that the mental state of mind is equally same to that of the virtual body that is the Corporate entity.

☒ If the agent's directing mind and will is assigned of the duties and responsibilities of the Corporation, then it shall be intended to be the act of the Company itself.

☒ The main essence of the test is to identify the existence of the meeting of the minds of the Company with that of the agent.

In the case of *Iridium India Telecom Ltd. v. Motorola Inc.*, a criminal complaint was filed under Section 420 of the Indian Penal Code along with Section 120B against Motorola Inc. by Iridium India Telecom Ltd. It was issued that cheating was an offence which is punishable with mandatory imprisonment and hence any further proceedings would be absurd. It was finally held that Corporations can be made liable with mandatory

---

<sup>5</sup>(2010) 7 SCC 1

<sup>6</sup>See V K Aggarwal, *Corporate Criminal Liability*, Journal on Contemporary Issues of Law, Vol. 2, Issue 2, p. 7

punishment of imprisonment. The Court had imported the Identification Principle and concluded that Corporations are capable of having *mens rea*.

Normally, the Penal Statutes are to be strictly construed. *Lex non cogit ad impossibilia* (Law forces not to impossibilities) and *Impotentia excusat legem* (Impossibilities excuses the law) are exceptions under Criminal Jurisprudence.

---

### Corporate Punishment: A Practical Feasibility?

---

Till now, the Courts have been able to impose only fine as a form of punishment because of statutory inadequacy and lack of new forms of punishments which could be imposed upon Corporates. The mullet which is ruinous to the labourer is easily borne by a tradesman and is absolutely unfelt by a rich zamindar<sup>7</sup>. In imposing a fine it is necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. A shortcoming of this form of punishment is that it pins the poor and eases the rich. The rich can easily get away by paying a huge fine while the poor may have to toil hard even to get a hundred rupees. Nevertheless, its efficacy in specific crimes has made it a necessary mode of sanction. The biggest drawback in restricting fine as the sole form of punishment to Corporates is that they can get away with the criminal liability with their massive bank accounts and it also does not solve the purpose of punishment since neither the Corporates would be deterred nor would they be retributed for the crimes that they have committed.

In *Tesco Supermarkets v. Natrars*<sup>8</sup>, TESCO was a Company offering washing powder at a discounted rate in a store and it had displayed in a poster. Once they ran out of stock, the Company withdrew the offer and replaced the price stock. The manger failed to inform and the customers were charged with higher price. Hence, TESCO was charged under the Trade Description Act, 1968 for falsely advertising the price of washing powder. But TESCO stated that the Company had taken all reasonable precautions and all due diligence and that the conduct of manager is not attached to the Corporation. It was held that the manager was not the directing mind of the Corporation and therefore he was not attributable to the act of the Corporation.

Similarly, in *Oswal Vanaspati & Allied Industries v. State Of Uttar Pradesh*<sup>9</sup>, the appellant Company had sought to quash a criminal complaint, arguing that the Company could not be prosecuted for the particular criminal offense in question as the sentence of imprisonment provided under that section was mandatory. It was held by the Allahabad High Court that it is settled law that sentence or punishment must follow conviction; and if only corporal punishment is prescribed, a Company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine

---

<sup>7</sup>See Ahmed Siddiqui's *Criminology*, p. 120

<sup>8</sup>[1972] AC 153

<sup>9</sup> (1993) 1 Com LJ 172

is prescribed for natural persons and juristic persons jointly, then, though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it.

Also, in *Zee Telefilms Ltd. v. Sahara India Company Corp. Ltd*<sup>10</sup>, the complaint alleged that Zee had telecasted a program based on falsehood and had defamed Sahara India and the latter had filed the complaint under Section 500 of IPC. The Court held that the Company will not be held liable for the criminal acts as it doesn't have the requisite *mens rea*.

In yet another famous case of *Assistant Commissioner v. Velliappa Textiles Ltd*<sup>11</sup>, it was found that the Textiles violated certain provisions of the Income Tax Act, 1961 where the Sections 276-C and 277 provided for a mandatory term of imprisonment coupled with certain amount of fine. It was held that a Company cannot be prosecuted for offences which required imposition of a mandatory term of imprisonment and fine. The Supreme Court stated that the legislative mandate of the Court is to prohibit the deviation from the minimum rate of punishment and was further of the view that it is to favor the construction of a statute that exempts a penalty rather than to impose another penalty.

In the celebrated case of *Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors.*<sup>12</sup>, the Standard Chartered Bank had violated certain provisions of the Foreign Exchange Regulation Act, 1973. The general rule is that the Corporation may be criminally be liable for the act of an officer or agent and it has been clearly stated in The General Clauses Act, 1897 that the term "Person" included 'Companies and Corporations'. Thus, the Company was held liable. This case had overruled the Velliappa case and stated that the Court can only impose fine and excuse the part of the imprisonment

---

### The Conundrum of Corporate Crime: The Way Forward

---

Presently, all the Criminal Statutes include only 'fine' as a form of punishment that can be imposed on a Company. So is the case with judicial pronouncements on the aspect of sentencing. In addition to this, the Law Commission in its 41<sup>st</sup> Report also speaks of introducing only fine as an additional punishment to be imposed upon Corporations. Economic Sanctions and Social Sanctions are other forms of fine that are designed in order to deter a Company in committing any Corporate Crimes.

#### *Economic Sanctions:*

1. Corporate Death or order for winding up only in cases of continuous criminal behaviour in the given field.
2. Temporary closure of the company for a given period depending upon the gravity of the act till the time compliance with norms can be ensured.

---

<sup>10</sup>(2001) 3 Recent Criminal Reports 292, available at [www.supremecourtindia.nic.in/](http://www.supremecourtindia.nic.in/) (Last viewed on 13<sup>th</sup> September, 2016 at 22:55 IST)

<sup>11</sup>(2004) 1 Com LJ, 21

<sup>12</sup>(2005) 4 SCC 530

3. Rehabilitation of victims of crime.
4. Delisting in serious cases.

***Social Sanctions:***

Goodwill, for a body Corporate is its heart and soul. Once, that is lost, the entire strength comes to a standstill. Once reputation is harmed, it would create a deep stigmatizing effect on the Corporation since its business would come to a standstill with no customers. This can be done by asking the Corporate to publish this crime widely compulsorily and fund the publication as well. This will act as a strong deterrence for not to commit crimes and the shareholders also would come in an active role in stopping the active organizational structure from authorizing committal of such crimes. Such sanctions should also be incorporated in Sec. 52 of the Indian Penal Code for the Corporates apart from the traditional forms of punishment and the gravity of each punishment should vary with the gravity of the act committed. Various Corporations commit large-scale financial irregularities. In this age of globalization, the large-scale Corporations form a defining force on the globe because the Corporate vehicle now occupies a large portion of the industrial, commercial and sociological sector. Corporate criminality “challenges or nags at our sense of reality<sup>13</sup>”. Many critics of CCL have argued that undue extension of CCL would ultimately result in deviation from the purpose and scope<sup>14</sup>. The Common Law view is that the owner or manager is representative of the Corporate mind in the current scenario of modern giant Corporations with wide spread global operations.

The sanctions applicable to Corporate offenders vary from country to country. The French system has the advantage of being clear but may also be less rehabilitative because it lacks the corporate probation sanction. The American system not only achieves the goals of deterrence, retribution and rehabilitation but it also offers incentives for self-policing and avoidance of costly trials. The English system lacks all such sanctions.

Civil liability of Corporations for criminal fines imposed on corporate officers is another alternative to CCL but it contravenes the principle of individual punishment<sup>15</sup>. A very frequently used alternative to CCL has been the imposition of administrative sanctions. They are usually imposed by administrative bodies which are part of the executive branch, the Courts playing a limited role in some countries when so allowed. Some of the reasons why different countries chose to impose administrative sanctions by administrative bodies, as opposed to criminal sanctions imposed by Courts are: the belief that moral stigma is superfluous, the flexibility of the concepts of guilt and individual responsibility in the administrative law, and the specialized nature of the administrative bodies that could handle the matters more efficiently<sup>16</sup>.

---

<sup>13</sup>Vidya Vishnu Kamblle, *Corporate Criminal Liability: An Overview*, 2008, p. 71

<sup>14</sup>Celia Wells, *Corporation: Culture, Risk and Criminal Liability*, Cr. LJ 1993, pp. 551 & 599

<sup>15</sup>Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 Int'l & Comp. L.Q. 493, 494 (1994)

<sup>16</sup>Kathleen Brickey, *Corporate Criminal Liability*, 64 (2d ed. 1992)

---

## Conclusion & Suggestions

---

Although the American System of CCL is the most advanced in the world, it has a major drawback: significant spill-over effects on innocent employees and shareholders, the possible over-detering effect and the high costs of implementing CCL. On the other hand, the French and English systems are also clear, predictable and consistent with the general principles of Criminal Law. Moreover, they do not have significant side effects on innocent individuals and are not over-detering. However, these systems seem to be less detering and sometimes unfair. The prosecution of Corporations is very difficult due to the significant restrictions of these models. Thus, the retributive goal of the Criminal Law cannot be effectively achieved. Prosecution of individuals only is unjust not only to Corporations, but to society at large because convictions of individuals will rarely affect the way Corporations will conduct their business in the future. Moreover, civil and administrative liability of Corporations is not sufficient.

Finally, Criminal law is the only one that reaffirms all the values trampled on by Corporate Criminals. Criminal Law punishes justly; its irreplaceable retributive, deterrent and rehabilitative characteristics satisfy the public demand for vengeance. Criminal punishment of Corporations sends a symbolic message: no crime goes unpunished. A just punishment includes the moral condemnation of society.

Since CCL is still uncanny, there are no effective suggestions to this effect. But the Model Penal Code, adopted only by a few American jurisdictions has proposed a different model which contains three systems of CCL. The first system is similar to the English alter ego CCL. Corporations are liable for the ordinary or true crimes, such as theft or manslaughter, committed by managers or other high corporate officers whose acts represent the acts of the Corporation. This is a direct criminal liability of Corporations. Under the second system, Corporations are liable for price-fixing, securities fraud, or other crimes for which there is an apparent legislative intent to impose liability on Corporations, "committed by any employee acting within the scope of his employment on the corporation's behalf". However, Corporations can defend themselves by showing that their managers used due diligence when attempting to prevent the crime. Finally, under the third system, Corporations are generally liable for "violations" or regulatory offenses for which the law imposes strict liability. The offences can be committed by any employee within the scope of his employment. The "due diligence" defence is not available.

Though no model on CCL that has evolved till now is perfect, the Model Penal Code is not any exception but comparatively it is an ideal model which strikes a balance between Criminal Law on the one hand and protecting the interests of the Corporate identity on the other hand. It is settled on the point that 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. It is therefore recommended that amendments should be



carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the statutes fit for strict interpretation by providing for infliction of Criminal Liability on the Corporations also by providing for various kinds of sanctions apart from only fines.