

“Corporate Criminal Liability”

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ABSTRACT

The basic principle behind the functioning of a Company is its separate legal entity, a position accorded to it by law. This legal entity is run by an association of people for carrying on commercial or industrial enterprises. However, due to a lack of morality or a soul, a ‘company’ cannot be held criminally liable for its criminal acts. This is because a very important facet behind the commission of any crime is intent which is impossible to establish in order to prosecute the ‘company’ itself. Hence, justice system prosecutes the minds behind these companies for any criminal act that is committed by the company. This paper draws on the concept and extent of corporate criminal liability of the directors of the company, further restricting its scope to environmental wrongs and the subsequent criminal liability of the company’s directors, in the backdrop of corporate companies contributing towards aggravating the environmental scenario in India.

The paper will first evaluate the Corporate Criminal Liability of Directors as the decision-making body of a company is its Board of Directors. Secondly, the paper will dive into the concept of vicarious liability of Directors and the extent to which they should be held responsible for the acts of their subordinates. Third, the paper emphasizes the provisions, under the water act, air act and the environmental protection act, according criminal liability to the Directors of a company for environmental wrongs. Conclusively, the paper illumines the issues prevalent in the current scenario suggesting possible solutions for the same.

Keywords: Criminal Liability, Directors, Corporate Liability, Sustainable Development, Environmental Damage

INTRODUCTION

Criminal Law forbids and prevents conducts that unjustifiably and inexcusably inflict substantial harm over individual or public interests¹. Corporate crimes are criminal practices by individuals who are legally authorized to speak for the corporation², including directors or any other individual, acting on behalf of the firm.³ Corporate accountability is being accountable to the organization’s stakeholders which includes the local community as well as the country that the firm is in⁴. Company Law’s history shows that companies blanket their offences by resorting to the umbrella called a “Separate Legal Entity”. Hence, in order to curb the crimes committed behind this garb of incorporation, the lifting of corporate veil

¹ Proposed Official Draft, American Law Institute’s Model Penal Code, art. 1, 1.02 (1)

² Tanu Shree gavel & Swagat Sekhar Baidyanath, “*Dilemma of Corporate Criminal Liability: Is There An End?*”

³ William S. Laufer, “*Corporate Bpdiess and Guilty Minds: The Failure of Corporate Criminal Liability*”.

⁴ supra

becomes extremely essential.⁵ This paper focuses on the corporate criminal liability attached to environmental wrongs. Such crimes mostly have economic motivations behind them, the offence being commercial in nature in order to increment profits⁶.

ISSUES AND QUESTIONS RAISED

1. What is the outset, essence and scope of the Corporate Criminal Liability of Directors?
2. How can the Doctrine of Corporate Criminal Liability of Directors be outlined vis-à-vis Environmental Crimes, especially, under the Air and the Water Act?

HOW DID CORPORATE CRIMINAL LIABILITY EVOLVE?

Although it was settled in the landmark judgement of *Salomon v. Salomon*⁷, that a Company is a separate legal entity independent of its members, it was believed until the 16th and the 17th centuries that corporate companies could not be held criminally liable. In the 17th century, fixing criminal responsibility was easy since the corporations were small. It was not until the Industrial Revolution that the complexity of corporations made attributing accountability to a company, a problem. The Courts of Justice would not hold companies criminally liable because,

- the judges believed that corporations lacked the moral blameworthiness essential to commit crimes⁸;
- the courts could not hold corporations accountable for actions which their charter made no mention of, owing to the ultra vires doctrine; and,
- the criminal procedure was interpreted literally.

Ultimately, the turn of 19th century saw courts recognise corporate criminal liability. For example, in *DPP v. Kent & Sussex Contractors Ltd.*⁹, the company was charged with actions that were deceiving in nature and for making a false statement knowingly. In *R v. ICR Haulage Ltd*¹⁰, the company's conviction for conspiracy and default was upheld, attributing the criminal act of an agent, including the state of his mind, intention and knowledge or belief to the act of the company, depending upon the nature of the charge, the position of the agent and other relevant facts and circumstances of the case. It was in this period that the principle of vicarious liability emerged. But in the landmark judgement of *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*¹¹, a new principle called "Doctrine of

⁵ T.K. Bhaskar and V. Umakanth "*Corporate Criminal Liability and Law*", Journal of the Indian Law Institute

⁶ Dharm Veer Singh, "*Corporate Criminal Liability: A Jurisprudential and Comparative Approach*"

⁷ [1896] UKHL 1

⁸ *Edward v. Midland Railway Co.* [1887] 6 Q.B.D. 287; *Cornford v. Carlton Bank Ltd* [1899] 1 Q.B. 392

⁹ [1994] K.B 146

¹⁰ [1994] K.B. 551

¹¹ (1915) A.C. 7

Identification” was introduced for corporate criminal liability, rejecting the principle of vicarious liability. The same was defined by Lord Viscount Haldane in the following words,

“ My Lord, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; then 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.”

It was held in *Tesco Supermarkets Ltd v. Natrass*¹², applying the identification principle, that the directors of the company must be considered the company as they are the agency/mind behind the company’s workings. It was held subsequently in *Moussell Bros v London and North Western Railway Co.*¹³ that even if the offences need to prove the intent of the crime, i.e., the mens rea, then also the company can be held criminally liable.

DEVELOPMENT IN INDIA

Having become a settled law, the development in the Indian Law has been similar to that in the English Law. This can be corroborated by Section 11 of the Indian Penal Code, 1860 which defines the word “Person” as “including a company, association or body of persons whether incorporated or not.” Obviously, a company cannot serve in prison¹⁴ and hence, the courts have adjudged owing to these limitations to corporate criminal liability¹⁵. However, because of the changing trends, the courts, recognizing the ‘directing minds’ of the company by virtue of the company’s MOA and AOA, started indicting corporations for ‘crimes of intent’. Therefore, for acts where criminal intent was necessary, the company’s directors were deemed answerable.¹⁶

In *Iridium India Telecom Ltd. v Motorola Inc*¹⁷, the Apex Court stated that in the absence of any statutory or common law exception, the liability was based on attribution rather than vicarious liability. The case of *Standard Chartered Bank v. Directorate of Enforcement*¹⁸, is important as it diverged the judiciary from imposing only fine for corporations to imposing imprisonment. In *Asst. Commissioner v Velliappa Textiles Ltd.*¹⁹, it was held that companies could be held liable for criminal wrongs, as opposed to the earlier stance taken by the courts that companies could not possess mens rea. It was also made clear that the judiciary could apply its discretion and prosecute a company for offences involving both imprisonment and fine. In *Sunil Bharti Mittal v Central Bureau of Investigation*²⁰, it was said that criminal

¹² 1971 1 AALL ER 127

¹³ (1917) 2 K.B. 836

¹⁴ *CIT v Kusum Products Ltd* [1984] 149 ITR 250/19 Taxman 60 (Cal.)

¹⁵ *The State of Maharashtra v Syndicate Transport Co. (P) Ltd.*, AIT 1964 Bom. 195

¹⁶ Team NovoJuris, “*Jurisprudence of Corporate Criminal Liability of Directors*”

¹⁷ (2010) 14 (ADDL) SCR 591

¹⁸ AIR 2000 SC 2622

¹⁹ [2003] 263 ITR 550/132 Taxman 165 (SC)

²⁰ AIR 2015 SC 923

liability can be attributed to the company, identifying its 'alter ego', the one who holds the control. Hence, in the wake of the Chairman Sunil Mittal become the prime accused, it was held, *"When the company is the offender, vicarious liability of the directors cannot be imputed automatically, in the absence of any statutory provision to that effect."*

IMPORTANCE OF ENVIRONMENTAL JUSTICE VIS-À-VIS CORPORATE CRIMINAL LIABILITY

Despite India's rich environmental heritage, the environment is getting affected because of industrial expansion and population explosion. Destruction of environment at an alarming rate due to over-exploitation of resources is not just in order to meet the basic needs but has become a way of life in order to enhance profits. Increased felling of trees has led to extinction of wildlife, degradation of land, soil erosion and pollution of both air and water, in which factories play a huge role as they discharge untreated sewage water into rivers and pollutants in the air, through the chimneys. Not only that but agricultural aids to cause irreversible damage to water sources, worsening the problem of already existing water shortage. As per statistical reports, 51 out of the 100 largest economies are global corporations and only 49 are countries.²¹ Globalization has led to the growth of National, Multinational and Transnational companies alike, creating an even bigger problem of regulating these corporate giants whose budget exceeds the budget of a small underdeveloped company. It needs no affirmation that these corporations pose a serious threat to the environment. Hence, corporations need to be held accountable for their criminal activities, without fail.

CORPORATE LIABILITY UNDER ENVIRONMENTAL LAWS

Environmental laws in India are taken from principles expatiated in different International Conferences, such as The Stockholm Declaration, 1972. Although quick legislative measures were taken but there was no effective implementation. The functioning of environmental laws may appear administrative in nature but instead it is actually criminal in nature.²² Hence, environmental legislations lay down certain measures that need to be taken by corporations, for instance, permitting only a specific amount of pollution emissions or the theory of waste management, etc. Failing to meet these expectations attracts liability. The Environmental Protection Act, 1986 also identifies many industries that necessarily cause pollution owing to their inherent nature.²³ Apart from the EPA, we also have various legislations relating to air, water, forests, coasts, wildlife, biodiversity, etc but we will only discuss legislations relating to water and air, which are as follows:

²¹ Sarah Anderson and John Cavanagh, *"Top 200" The Rise of Global Corporate Power*

²² Singh, Vijay Kumar, *"Criminal Liability of Corporations- An Environmental Perspective"*

²³ The Environmental (Protection) Rules, 1986- Schedule I (Section 3)

LEGISLATIONS RELATING TO WATER

- The Water (Prevention and Control of Pollution) Act, 1974
- The Water (Prevention and Pollution Control) Rules, 1975
- The Water (Prevention and Control of Pollution) (Procedure for Transaction of Business) Rules, 1975
- The Water (Prevention and Control of Pollution) Cess Act, 1977
- The Water (Prevention and Control of Pollution) Cess Rules, 1978

LEGISLATIONS RELATING TO AIR

- The Air (Prevention and Control of Pollution) Act, 1981
- The Air (Prevention and Control of Pollution) Rules, 1982

These legislations have provisions which penalize companies that cause pollution, either by complaint or upon discovery. For example, Section 47 of The Water (Prevention and Control) of Pollution Act, Section 40 of the Air (Prevention and Control) of Pollution Act and section 16 of The Environment Protection Act provide for imprisonment and fine for corporate companies that violate its provisions. The Air Pollution Act under Section 21 lays down restrictions on companies over the usage of certain industrial plants. Section 22 of The Air (Prevention and Control) of Pollution Act says that persons carrying on industry, etc., are not allowed to emit air pollutants in excess of the standards laid down by the State Board. Section 31-A of the same act penalizes companies guilty of non-compliance with the directions that the Central Government may give. These legislations recognise the human agency behind the actions of the company, imputing liability to any person against whom knowledge and intent can be proved.

ENVIRONMENTAL PROTECTION AND LEGISLATIVE MEASURES

The three major legislations with respect to ‘anti-pollution’ enacted by the Parliament of India, in order to protect and address the issue of environmental degradation are; (i) The Water Prevention and Control of Pollution Act of 1974; (ii) The Air Prevention and Control of Pollution Act of 1981 and, (iii) The Environmental Protection Act of 1986.

As per the Rio Declaration²⁴, any developmental project undertaken by a corporation requires “environmental clearance” combined with an “environmental impact assessment”. After that, they are required to submit environmental audits for clearance, on an annual basis. Apart from this, the Central Government, under the Environmental Protection Act²⁵, is vested with the sole power to take steps necessary for environmental protection and improvement. Also, Central Pollution Control Board, the State Pollution Control Board and the Joint Pollution Control Board have been created under The Water and The Air acts. The provisions relating

²⁴ United Nations Conference on Environment and Development, Rio Declaration. 1992

²⁵ 1986

to the composition of the boards, their powers and functions and sanctions for violations of provisions under the Act have also been laid down.

PENALTIES AGAINST VIOLATIONS

All the three major anti-pollution statutes lay down penalties in case of violations of their provisions. For instance, The Water and The Air act provide for “(i) fines of up to 10,000 rupees; (ii) imprisonment of a term ranging from 3 months to 6 years, and imprisonment for up to seven years for violations after conviction; and (iii) additional fines up to 5,000 rupees per day for continuing violations.” The penalties imposed under the Environment Protection Act are more severe, including imprisonment up to five years or a fine up to one lakh rupees or both for each violation. If violations continue beyond one after year post conviction then the act imposes a mandatory prison term lasting seven years. Corporate officials who are directly in charge of a company too are held liable if it’s established that the offence was committed with their knowledge. An individual may even file a complaint with a court alleging a violation, under the said act.

In *Uttar Pradesh Pollution Control Board v. Mohan Meakins*²⁶, the case was one of discharge of trade effluents in Gomathi river by an industry. Under Section 43 of The Water (Prevention and Control of Pollution) Act, 1974, it was held that lapse of a long period of time cannot be reason enough to absolve the directors from the trial. Likewise, in *Haryana State Board v Jai Bharat Woollen Finishing Works*²⁷, it was held that when an offence is committed by the company, every person who was in charge of the company while the offence was committed, was responsible for the conduct of the company’s business, hence, both the company and such persons shall be held guilty of such an offence.

EXISTING PROBLEMS WITH CRIMINAL LIABILITY

The current legislative framework is faced with certain issues owing to a lack of environmental cases against corporations. For instance,

- Penetration of the Corporate Veil in order to recognise the ‘alter ego’ is difficult.
- The penalties are provided under various legislations and hence, there is no coherency.
- The attribution of mens rea to individuals in corporate entities is not an easy task.
- Punishments that are imposed in terms of cost-profit analysis are not appropriate. As inadequate fines are imposed.
- It’s a very rare case that the alter ego is imposed and hence, there is no deterrence.

²⁶ AIR 2000 SC 1456

²⁷ 1992 (1) RCR 128

SUGGESTIONS FOR IMPROVEMENT

- The concept of mens Rea must be interpreted more liberally in order to bring about environmental justice.
- There should be a strict application of the Doctrine of vicarious liability in order to hold the minds behind the actions of the company accountable.
- It would be better if there were a single, comprehensive, coherent legislation that covered corporate liability with respect to environmental crimes.
- A higher cost should be accorded to evaluating the damage caused to the environment.
- If there were incentives and benefits attached to complying with the environmental laws then it would act as a leverage for the companies to adhere to these laws in the very first place.

CONCLUSION

According to Bruntland Report, the act of making profits and the need to preserve the environment need to be balanced but in reality, the former empowers the latter. Attempts need to be made in order to reach an equilibrium so that the culprits are taught deterrence. No doubt, there has been an initiation of comprehensive legislative measures by the Government of India, in order to protect the environment. The Judiciary's intervention too has increased vis-à-vis environmental crimes by corporates and the awareness has multiplied. But despite all that, there is a lot of disorientation with respect to their implementation. This leads the corporations into dodging accountability and responsibility. Also, there has been speedy dilution of environmental laws under the garb of development. The way forward is truly not it but rather effective and stringent adherence and implementation of the laws and standards that are already in place.

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