Corporate Criminal Liability: An Overview

In recent years, economic or white-collar, crime has attracted widespread interest all over the world. Increasingly, we are exhorted to turn our attention from the problems of street crime to those of corporate crime. Corporate crime involves vast sums. It can prejudice not only the financial interest of citizens, but also their lives and their property; it can thwart important state policies, such as controlling pollution, fostering competition, and protecting consumers. These pressures are felt throughout the industrialised world. It is not surprising, therefore, that corporate criminal liability has been discussed extensively by scholars who have addressed the problem of economic crime. Corporate criminal liability is one method by which states seek to control business activities.

Business corporations represent a distinct and powerful force at global, national and regional levels and they wield enormous economic power. The legal structure within which they operate largely serves their interests. Corporate personality protects their owners from the full consequences of failure and the regulation to which they are subjected to assumes their beneficence.

A corporation is a group of individuals deemed in law to be a single legal entity. It is legally distinct from all the individuals who compose it. It has legal personality in itself and can accordingly sue and be sued, hold property and transact, and incur liability.1 Here it is concerned with business corporations, and their reception by the criminal justice system. Strong resistance within the legal system to the notion of corporations as criminal has resulted in an under-developed jurisprudence of corporate liability for crime. Although corporations can be “persons” in certain legal context, they cannot so easily be criminals. Recognition of criminal liability for corporate entities has been slow in coming in the law.

---

Rationale for Prosecuting Corporations

Many factors contribute to the reluctance to look beyond the context of regulation in considering corporations and crimes. A significant underlying constituent is the pervasiveness of philosophical individualism. Problems arise in applying responsibility to corporations for the very reason that they are not human individuals. Contemporary preoccupation with the notion that responsibility derives from and attaches to the autonomous individual renders us benefit of conceptual tools with which to confront corporate accountability.\(^2\)

Why attempt to prosecute a corporation at all? Is it not sufficient to prosecute the individuals involved? A negative answer to this question stems from the assumption that the corporate system itself sometimes helps to produce criminal behaviour.

This assumption has an empirical basis. A policy of solely prosecuting individuals provides an incentive for the corporate management to view particular individuals as “expendable”.\(^3\) Corporate policies may encourage illegal behaviour, often implicitly,\(^4\) then simply allow the individuals who are caught to be jettisoned.\(^5\) In large corporations, for example, individual managers may be considered a “fungible commodity”.\(^6\) In fact, researchers have documented that some corporations have officers who are in essence appointed fall guys—“vice presidents responsible for going to jail”.\(^7\)

---

6. Id., p.410.
A strategy of limiting prosecution to individuals ignores any pressures imposed by the organisational structure. Although an individual has been prosecuted, the incentive system, which led to the criminal behaviour, remains intact within the corporation. Not only does prosecution of individuals in such situations fail to deter the corporation, but also indemnification of employees by the corporation may negate the deterrent effect on the individuals.

Imputing Intent to Corporations

A corporate criminal prosecution is more difficult to orchestrate than the prosecution of a crime perpetrated by an individual. In the latter case, the fact that a crime has occurred is usually obvious, the difficulty lies in apprehending the responsible party. In cases of corporate crime, on the other hand, it is often very difficult to detect the crime because the effect is diffused among a number of workers, all or many of whom may be unaware of the harm. Once the crime is detected, however, proving guilt is very difficult even if the perpetrators' identity is readily apparent. This difficulty may stem from complexities in the law, the facts surrounding the crime, or the organisational structure itself.

9. Brickey, “Rethinking Corporate Liability under the Model Penal Code”, 19 Rutgers L.J. 621 (1988). Of course, indemnification does not have this effect if the individuals are given significant jail terms.
11. Ibid.
15. Id., p.299.
The idea of "intent", a troublesome concept at best, is even more formidable when applied to corporate criminal prosecutions. A number of courts have concluded that the criminal conduct of officers and employees could be imputed to the corporation because they were the "hands" of the corporation. But courts have had a much harder time in deciding if there was a "mind" in a corporation, and if so, who could possibly represent this mind in the context of forming criminal intent.\(^{17}\)

Assuming that in a number of cases the organisational incentive structure causes or at least contributes, to the individual's misconduct, the law should attach blame to the corporation as well as to the individuals. In these situations, the deterrent value of the stigma that results from criminal conviction is as useful against the corporation as it is against the individual. But if only the individual is prosecuted, even with negative publicity, the corporate entity avoids anything more than circumstantial identification with the crime. In addition to the deterrent purpose, identifying the organisational system as responsible also serves to identify the need for reform at the corporate level.\(^{18}\)

**History of Corporate Criminal Liability**

The history of corporate liability is haphazard and incoherent. The introduction of a separate juristic personality for the corporate enterprise shows a legal sophistication unmatched in the later developments of corporate criminal liability. In the formative period for this liability, from about 1870 to 1930, the courts were not particularly heedful of the later distinction between *mens rea* and strict liability offence. *Mens rea* was not regarded as particularly problematic so long as the offence did not fit the (perceived) category of "real" crime.\(^{19}\) So when Cory Bros. was prosecuted for manslaughter in

---


18. *Supra* n.9, pp. 301-305.

1927, the indictment was dismissed more on the ground that a corporation
could not be guilty of an offence against the person than on an objection to
manslaughter in particular.20 That prosecution serves as a reminder that the
idea of attributing a death to the recklessness of a company has a long vintage
and that legal hostility and resistance to such constructions and attributions
are deeply rooted.21

During this period, the combination of the industrial revolution and
improved transportation resulted in changes in corporation and in the function
they played in society. The development of corporate executive structures
clearly challenged a legal response. The one person entrepreneur was being
overtaken by more complex business arrangements, and in terms of activity,
the development of the railways transformed the landscape, the economy and
the specific statutory origin of the early railway companies all played an early
role in the development of liability, followed by particular judicial response to
new forms of statutory liability, dubbed “Public Welfare” offences. It was
only in the early 1940’s that the real beginnings of the modern law of corporate
liability outside the so-called “public welfare” field emerged.22

Common Law Developments of Corporate Criminal Liability

English law established the corporation in the fourteenth century, but it
did not consider a corporation capable of criminal acts until three centuries
later.23 Although English courts originally rejected the very idea of corporate

20. R. v. Cory Bros, [1927] 1 K.B. 810, earlier procedural objections to corporate
liability for felonies no longer obtained. There was no need for the company to
appear in person and the offences were punishable with a fine so there was no
problem about how to imprison a company.

L.R. 550 at p. 558.

22. Ibid.

at pp.86-87 (1976) (tracing the historical development of imputing intent to
corporations).
liability, they would gradually move away from this position. The reasons for the English courts’ refusal to impose criminal sanctions on corporations are well known. Three theoretical grounds prevented them from doing so. As a corporation is a legal fiction, it can do only such acts as it is legally empowered to do (ultravires rules). Further, a corporation could not possess the required mens rea. Moreover, it was difficult to devise an adopted punishment for corporations. Apart from these theoretical objections, practical difficulties impeded the imposition of criminal sanctions. Personal appearance was required at the crown courts or assizes: this was impossible for a corporation. A second practical difficulty arose with regard to punishment; as all felonies were at one time punished by death or deportation, it was simply not legally possible to punish a company.24

The gradual developments of corporate sanctioning knew different stages.25 The first step taken by the courts was to accept corporate liability in the case of a breach of a statutory duty. In 1842, a corporation was convicted for failing to fulfil a statutory duty.26 Four years later,27 the effect of that decision was expanded from nonfeasance to misfeasance. After that, the courts seemed confident enough to impose vicarious liability on corporations in those instances in which natural persons could be vicariously liable as well.28 It was only in 1944, however in three landmark cases,29 that liability was imposed on corporations, i.e. liability because corporations were deemed to have acted themselves and not because their employees had acted (vicarious liability). The corporations were prosecuted and convicted for tax evasion, common law conspiracy and using false documents. Although the ratios for these cases have been criticised for being vague and ambiguous, the three

28. Supra n.24, p.171.
decisions managed to surmount the so-called “mens rea hurdle”. Before these cases, the courts had succeeded in evading this conceptual problem since neither in the case of breach of a statutory duty nor in the case of vicarious liability did mens rea need to be attributed to the company. In the above three cases, however, it was established that mens rea of certain employees of the company was to be considered as that of the company itself.

In another common law jurisdiction, the United States, the evolution of corporate sanctioning started in a similar way but eventually developed itself in a distinct manner. The same theoretical objections were being put forward against the concept of corporate criminal liability as in England. The pressure of the changing economy removed the reluctance of the courts which, just as in England, began by accepting corporate liability in the case of breach of a statutory duty, later expanding it to vicarious liability. This evolution was inspired by the civil tort doctrine of respondeat superior i.e., the principle that an individual is civilly liable for the acts of his agents. Whereas the courts initially confined the application of this doctrine to cases which did not make it necessary to attribute mens rea, early in the twentieth century some American courts changed their attitude and began to expand the concept of corporate criminal liability to mens rea offences, thus radically departing from the position held by their English counterparts.

This radical move was confirmed in the leading case before the American Supreme Court New York Central and Hudson River Rail Road Company v. U.S. Against the background of the economic boom in the United States in the early years of the twentieth century, Congress has specifically provided, in the Elkins Act, that the acts and omissions of an officer acting within the

33. 212 U.S. 481 (1908)
scope of his employment were considered to be those of the corporation. This clear imputation of *mens rea* of natural persons to the corporation was, almost enthusiastically, endorsed by the Supreme Court. The policy reasons for this were formulated by the Court as follows:

"many offences might go unpunished... We see no valid objection in law and every reason in public policy why the corporation... shall be punishable by fine because of the knowledge and intent of its agents".  

Even though, strictly speaking the impact of this decision could have been confined to statutory offences, the lower courts rapidly expanded its scope to offences at common law. Thus, the U.S. courts, at the beginning of nineteenth Century, already applied the concept of corporate criminal liability in a very broad way.

**Which Natural Persons can Make the Corporation Criminally Liable?**

Corporations being legal fictions, they can, notwithstanding their enormous impact in today's society, act only through individuals. Thus an essential element in every model of corporate liability is the question of *attribution*, which acts and which wrongful states of mind of which natural persons can be attributed to the corporation in such a way as to make the corporation criminally liable?

Overall, two models can be distinguished. According to the first, only the acts of certain senior officers of a corporation can be taken into account in determining the corporate liability. Under the opposite model, a corporation is criminally liable for the acts of every individual acting on its behalf. These are the two theoretical models; in practice some "mixed models" exist by which the acts of every corporate officer who meets certain criteria may make the corporation criminally liable.  

34. Ibid.  
36. Supra n.25, pp. 94-95.
The difference between these two models is rooted in two fundamentally different approaches to corporate liability. Liability under the first may be called direct, where as under the second, it may be called derivative, as it is derived from the employees’ acts. The first model starts with the concept of the corporation’s direct liability, in contrast with the second, which relies on the concept of vicarious liability, i.e., the corporation being liable not for its own acts but for those of its employees. This difference explains why under the first model only the acts of the most senior officers are taken into account; it is they who represent the “corporation”; when they have acted, the corporation is deemed to have acted. The second model, on the other hand, does not need to limit itself in such a way as it is based on vicarious liability.

The English law of corporate criminal liability has developed from a system of vicarious liability to a system of direct, primary liability of the corporation. In 1944, the court departed from the vicarious liability approach by imposing corporate liability for mens rea offences. The courts were inspired by the alter ego doctrine of the civil law of tort, by which acts of the most senior officers of the corporation were identified as being acts of the corporation itself. The 1944 decision imported this theory into criminal law. It remained rather unclear, however, which natural persons could make the corporation criminally liable. This was said to depend on “the nature of the charge, the position of the officer or agent and other relevant facts and the circumstances of the case.” Not until 30 years later, in Tesco Supermarkets Ltd. v. Natrass, were the problems clarified. Tesco had been charged with an

---

38. From a certain point of view, it may be said that both models are based on the notion of vicarious liability as, under both, it is the shareholders who will ultimately have to bear the financial consequences of a conviction of the corporation.
offence under the Trade Descriptions Act, 1968. It was clear from the facts that the local manager was responsible for the alleged facts and that Tesco had done everything possible to train its local managers. The House of Lords held that a local manager could not be equated with the Corporation so that Tesco avoided any criminal liability. Reference was made to a dictum of Lord Dennin in a civil case in which he compared a corporation to a human body. While some individuals working in the corporation represent the brains of the corporation, others represent the hands. Only the brains represent the company.

Whether an officer can be said to represent the corporation depends on the controlling officer test; does the person control the corporation as the brain, controls the human body? According to Lord Reid, this is a question of law, once the facts have been proved. The category usually encompasses the members of the board of directors, the managing director, and some other persons responsible for the general management of the corporation. If these persons delegate some parts of their management functions to some one else in the corporation, that person would be a controlling officer as well, provided he was acting independently of any instructions. The determining factor in the controlling officer test thus seems to be whether the senior officer could act independently or not.

In American Federal Criminal Law, since the concept of corporate criminal liability is derived from the civil theory of respondent superior, its roots clearly go back to vicarious liability. This implies that not only act of the management but also those of subordinate employees can impose criminal liability on the corporations. The breadth of the American concept is

44. Supra n.30, pp. 609-610.
46. R.Card, Cross and James, Criminal Law [1992], p.167.
47. Supra n.45, 200 (per Lord Diplock).
expanded by other factors. It is not mandatory that the same individuals provide the *actus reus* and *mens rea*.\(^4^9\) It is not even required that the management knew about the illegal activities in the corporations.\(^5^0\)

The American federal law concept of criminal liability thus contrasts the first model. One of the major explanations for this difference is the influence of the Model Penal Code. On the question of corporate liability, the Code has especially been inspired by the English alter ego doctrine. The Code stipulates that corporations are to be held criminally liable only if one of the top managers of the corporations has acted. By way of exception though, the code accepts the theory of *respondent superior* in those instances in which the legislation clearly intended to punish corporations.\(^5^1\)

The development in Indian law is similar to that in English law. Earlier, courts viewed that a judicial entity was incapable of having *mens rea*, and therefore a corporation cannot be indicated for an offence involving *mens rea*.\(^5^2\) However, in *Gopal Khaitan v. State*\(^5^3\) courts have adopted a changed view and stated that a corporation can be held liable for *mens rea* offence referring to a dictum of Lord Denning. Courts in India like in England, while trying to attribute criminal liability to corporations for *mens rea* offence, have attempted to identify the *mens rea*, in a single individual, who is to be a high ranking official. In *Esso v. Udharam Bhagwandas*,\(^5^4\) the courts have held that the knowledge of the corporation could be manifest in a general body meeting or at the meeting of the board of directors or the memorandum or articles of association of the company.

---

49. *Supra* n.35, p. 1856.
54. *Esso v. Udharam Bhagwandas*, (1975) 45 Comp. Cas. 16 at 32 (Bom.).
Under Indian Law Section 11 of the India Penal Code (I.P.C.) defines the word ‘person’ as including a company, association or body or persons whether incorporated or not. Corporate criminal liability is thus recognised under I.P.C. However, the courts have read in certain limitations. In *State of Maharashtra v. Syndicate Transport Co. (P.) Ltd*, the court identified some limitation to corporate liability that, there are several offences under the Code which can be committed only by an individual human beings, e.g. murder, treason, rape, perjury, etc.

However, the relevance of these limitations today needs to be re-examined in the light of recent trends in corporate law. These limitations were borrowed from English law. However, English courts have subsequently adopted a more liberal approach and brought in various other situations within the scope of corporate criminal liability. Unfortunately, the same cannot be said of Indian law, which in the context of increasing corporate influence remains archaic.

**Sanctioning Corporations**

Certain traditional criminal sanctions (e.g. imprisonment) are by their nature not applicable to corporations, while others (e.g. winding up) are specifically targeted at corporate criminality. Special attention should be paid to sanctions that result in the deprivation of the process of crime, the ill-gotten gains. As corporate criminality often involves crimes without a victim, it is material that criminal law itself provides sufficient means to deprive the offenders of the fruits of their crimes. Civil compensatory suits which at least in some legal systems, are available to victims of crime, are of no avail here; in most cases of corporate criminality these are no identifiable victims.

57. *Supra* n.32 pp. 515-516.
In England fines are the most common sanctions. It should be noted, however, that the amount of the fine is often not high enough to have a real deterrent effect on corporations.\textsuperscript{58} Confiscation of the proceeds of crime and withdrawal of licences are also possible.\textsuperscript{59}

In the United States as well, the criticism is often heard that fines are far too low to have any deterrent effect on corporations. It may be, however, that the stigma that accompanies a criminal conviction is an important deterrent factor to corporations, regardless of the amount they can be fined.\textsuperscript{60}

Apart from fines, an alternative sentencing system has been developed in the case law of U.S. courts aimed not so much at punishing (i.e. inflicting harm on) corporation as at restructuring them. The retribution and deterrent aspects of a fine are thus replaced by a more positive, rehabilitative sanctioning system. This alternative approach is especially warranted in that corporate crime is often a structured crime, i.e. crime which finds its origin in a structural malfunctioning of the corporation.\textsuperscript{61} This "corporate probation" can take different forms.\textsuperscript{62} Certain control procedures or reporting systems can be ordered or the company may be required to establish safety committees (or appoint safety officers). The court may also appoint a consultant to investigate the situation that gave rise to the offence and recommend appropriate


\textsuperscript{59} G. Williams, \textit{Text Book of Criminal Law} (1978), pp.159-160

\textsuperscript{60} E.g. in the much publicised Pinto case (\textit{State v. Ford Motor Co.} 47 USLW 2178), Ford could be fined a maximum of 30,000/- for reckless corporate homicide because of the dangerous construction of the Pinto automobile. This did not prevent Ford from spending 3 million on their defence, trying to prevent any damage their corporate image. (\textit{Supra} n. 51,p.158).


\textsuperscript{62} \textit{Ibid.}, pp 353-371. The term "Probation" means for a certain period of time the corporate offender is required to comply with certain conditions laid down by the court.
(restructuring) measures. In *U.S. v. Atlantic Richfield Co.*, for example, the court ordered the company to set up a programme to stop the oil pollution within 45 days.\(^63\)

The sentencing policy under Indian legislations is directed towards individual offenders. The same framework has been used to sentence corporations as well. As a result, the court is left with only two sentencing options *viz*, imprisonment and fine. A company cannot be subject to any bodily punishment such as imprisonment and, therefore fine remains the only effective option. In this regard, the Indian courts have been confronted with problems in convicting a company for offences for which there is a mandatory punishment of both imprisonment and fine.\(^64\)

In several cases, the courts have held that a company cannot be convicted for an offence where both imprisonment and fine ought to be imposed, on the ground that the legislature could not have contemplated a company being imprisoned on being found guilty of the offences.\(^65\) The courts in these cases relied on the decision of the Supreme Court in *State of Maharastra v. Jugmantar Lal*,\(^66\) where the Court stated that, where it has been made mandatory to impose both punishment, the Court is bound to award the sentence of imprisonment. The courts have denied themselves the power to impose a sentence of fine alone in these cases as ‘this would amount to usurpation of legislative function’.\(^67\)

---


64. See for e.g. Ss 193 and 420 of the Indian Penal Code 1860; Ss.276 (1) & 277 of Income Tax Act 1961; S.16, Prevention of Food Adulteration Act 1954; S.10 of the Employees’ State Insurance Act 1948.


On the other hand, some courts have held that where the sentence is one of both imprisonment and fine, it does not mean that the company is granted exemption from liability, as it can be sentenced to a punishment of fine only.\textsuperscript{68}

If the prescribed sentence is both imprisonment and fine, it would be illegal to award only part of the punishment to natural person. In the case of a company however, awarding only part of the prescribed punishment, namely fine, cannot be held to be illegal, as the company cannot suffer imprisonment. This appears to be the correct view. At the same time, the legislature should also look towards new modes of sentencing designed to deter corporate offenders specifically.\textsuperscript{69}

**Cumualtive Prosecution of Corporate and Individual Offenders**

One of the arguments most frequently put forward against corporate criminal liability is that it provides a free ride to individuals acting within the capacity of a corporation as it will always be the corporation that would be punished. This assertion does not hold water, however, as most systems that recognise corporate criminal liability, provide for both the corporation and the relevant individuals to be prosecuted.\textsuperscript{70} In England the possible sanctioning of company directors acknowledged by the courts is often confirmed by provisions to be found in statutes that create offence likely to be committed by corporations.\textsuperscript{71} Here the criticism is heard that too often prosecutors indict only natural persons and leave the corporation untouched.\textsuperscript{72} Also in the

---


69. See Monopolies and Restrictive Trade Practices Act 1969 S.48. This provides for a sentence of fine alone on the corporation and sentence of imprisonment or fine or both on the individual officers of the company.

70. *Supra* n.32 p.517-518.

71. *Supra* n.24 p.175.

72. *Supra* n.36 pp. 932-934.
United States the possibility of sanctioning company directors is generally accepted.\textsuperscript{73}

**Conclusion**

In India through the penal law had recognised the concept of corporate liability long before, the conceptual confusion still exists. As it is rightly analysed:

“The non-clarity of the concept of corporate liability, in India, may be due to the fact that there has not been much demand made to the legislative or the judiciary to deal with corporate crimes and so opportunities to debate and develop an effective mode of controlling corporate crimes were not provided to them. But, the advent of free market economic policy and the consequential changes in the role of corporations in the Indian society is certainly going to provide fresh opportunities to test the sufficiency of the law in this area.”\textsuperscript{74}

The fact that an important part of crime nowadays takes through corporations, compels every legal order to take action. The only effective way to combat corporate crime is to direct punitive sanctions against corporations. To prosecute individuals only is not simply unfair, it is inefficient too. Even if the prosecution of a corporate officer results in a conviction, it will seldom affect the way the corporation will behave itself in the future; structural flaws in the functioning of an organisation will not cease to exist because one of its members has been brought to trial. It follows from this that the best way to impose punitive sanction on corporations is through a model of corporate criminal liability.

---


* B.A., LL.M; Lecturer, University College of Law, Karnataka University, Dharwad, Karnataka.