

Multidimensional Aspects of Corporate Criminal Liability: An Indian Perspective

Arti Aneja*

1. Introduction

LARGE CORPORATIONS dominate the global business and are present in every sphere of our life. However, a corollary of this dominance is that large companies have started indulging in criminal activities, and considering the fact that they are not natural human entities, their activities criminal or otherwise are also not ordinary. Corporate crime has assumed dangerous proposition; particularly considering their criminal behavior defies 'common reality'¹.

Developing countries face a major problem of corruption and bribery, especially among the public officials, and this has resulted in increased criminality in under-developed countries that are already burdened with huge debts from the International Monetary Fund². Therefore, the concept of corporate crime must be clearly defined so that it is possible to ascertain the extent of liability to be imposed on them. This is necessary if the motto of the civilized society has to be 'live and let live'³.

India is not an unknown territory as far as corporate crimes are considered. In fact, it is a serious contemporary concern due to multidimensional aspects involved in nature of such kinds of crime, given the number of corporate scams emerging everyday and threatening the overall economy and welfare of the state⁴. Development of any country depends largely on the corporate sector, although the stability of the economy must not depend on its corporate sector. Corporate criminality⁵ seriously threatens the welfare of the society, considering its presence and impact in most aspects of social and community life, and the number of people it affects. As a result, corporate entities are in a position of causing massive physical and economic harm.

Corporate liability in the present context must be strengthened. The phenomenon of corporate criminality emerged primarily in the 20th century⁶. In India, laws pertaining to corporate liability are being strengthened, particularly after the Bhopal Gas tragedy. However, it is still in a nascent stage. The traditional perspective towards crime never included corporate criminality⁷. Business corporate has become a prominent part of the society. Considering the penetrative reach of the corporate in the various spheres of social existence, and the commercial outlook in our value systems, it becomes all the more important to ascertain the criminal liability of companies.

Laws are being designed to define various acts of companies as criminal if they are harmful for the society even if they are profitable for the business organization⁸. Fraudulent activities and other intentional crimes, particularly in securities and healthcare are dealt under stringent prohibitive laws. Other criminal legislations, like the various environmental regulations, have been framed to ensure that firms adopt measures to rectify or prevent the harmful impact of their operations. Most legislations are enforced by combining both corporate and individual liability on companies indulging in wrongful activities. The moot question confronting the law enforcers is to find ways to impose structured criminal and civil sanctions against individual and corporate which may serve as a deterrent.

*Assistant Professor, Law Centre-I, Faculty of Law, University of Delhi.

¹ Shover, Neal. Wright, John P., *Crimes of Privilege: Readings in White-Collar Crime*, (Oxford University Press, New York, 2001).

² Clinard, Marshall B. Yeager, Peter C., *Corporate Crime* (Transaction Publishers, New Brunswick, 2006).

³ Sharma, Sumit. *Corporate Crimes & Financial Frauds: With Biggest Financial Frauds in the History of India, India* (Authors Press, New Delhi, 2014).

⁴ Goel, Shivam. *Corporate Manslaughter and Corporate Homicide: Scope for a New Legislation in India*, (Partridge Publishing India, Gurgaon, 2015).

⁵ Reddy, P L Jayanthi, *Corporate Criminal Liability: Some Insights* (ICFAI University Press, Hyderabad, 2008).

⁶ Kelly-Kilgore, Sarah. Smith, Emily M., 'Corporate Criminal Liability', 48(2) *American Criminal Law Review* 421-453 (2011).

⁷ Nagarajan, G. Sheriff, J. Khaja, 'White Collar Crimes in India', 1(9) *International Journals of Social Science & Interdisciplinary Research* 157-164 (2012).

⁸ Uhlmann, David M., 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability', 72 (4) *Maryland Law Review* 1295-1344 (2013).

2. Difficulties to Prosecute Corporations under the Criminal Law

There was a time when corporate crime was just an insignificant part of legal considerations more of notional relevance⁹. The reason was that there were not too many corporations in existence and their prosecution was rather difficult. An important consideration was that in case of criminal trials it was necessary to put in personal physical appearance. A company being an artificial person existing only in the eyes of law was unable to perform acts that it had not been authorized to perform, and so by its very definition, such acts would be *ultra vires*.¹⁰ Therefore, whether the company could perform or even support such acts was debatable. Furthermore, it was quite a challenge to determine the *mens rea* or 'a guilty state of mind' in a notional concept like a corporation. Most significantly though was the fact that company was an artificial person, and so punishments like imprisonment etc., were not possible.

Nonetheless, there are many criminal activities which a corporation can and unfortunately does get involved in, starting from workplace death and hurt to injury to a person and damage to the property of consumers and other members of the public. The lack of perception to associate the corporate image with such crimes has been¹¹ instrumental towards the abysmal rate of success in assigning liability for them and prosecuting them. The evolution of the concept of criminal liability of corporations is thus characterized by the relentless struggle of the legislature and the judiciary to overcome the problem of assigning criminal blame to fictional entities in a legal system based on the moral accountability of individuals.

However, there are many ways to categorize corporate criminal liability *viz.*, liability is only of those individuals committing the crime; company alone is to be held liable; or liability rests with both the individual as well as the company. For instance, a corporate vehicle may be used by an individual to commit a crime, wherein the liability definitely rests with the individual using the vehicle. It would be debatable as to the extent and nature of liability to be allocated to the corporate vehicle. Conversely, if it is only possible to identify the vehicle in particular situation, then to what extent will the vehicle be liable as a legal entity separate and independent of its manager or owner is again debatable¹². There are merits and demerits in each of the above discussed scenarios; the only point of consensus is that at least one entity must be held liable for the crime committed using the company's vehicle. Prosecution of corporations under Criminal law is riddled with two types of hurdles *viz.*, theoretical and practical.

2.1 Theoretical Hurdles

The traditional arguments were regarding the need for holding corporations liable for criminal punishment, when the mechanism of civil penalties already existed¹³. This debate was rooted in the social morality in the context of criminal law. It is contended¹⁴ that social morality and criminal law are closely connected. Criminal law is a mechanism to reinforce the social morality and ensure that crime is prevented to avoid causing harm to human. As such, with the intention to prevent harm to members of the society, the State is authorized to use the powers at its command.

Companies have conventionally been seen only as profit-making enterprises. However, in the aftermath of the Industrial Revolution and the two World Wars, the number of corporations just grew tremendously requiring a re-look at the complacent way in which corporate liability was treated in the criminal law. However, the perceptions of the society toward corporations began to change from the mid 20th century, with corporate crimes finding little tolerance among the general public¹⁵. As the activities of the corporations have a huge propensity to harm the social values and interests became clear to everyone, and the society looked up to the State to use its powers to rein in the corporate crime. Corporate entities were now expected to be socially responsible as well. Changing moral standards ensured that corporations were included in the domain of the criminal law¹⁶.

⁹ Pyne, Radhanath, 'White Collar Crime and its Punishment Policy', 49(12) *The Management Accountant Journal* 40-45 (2014).

¹⁰ Husak, Douglas N., *The Philosophy of Criminal Law: Selected Essays*, (Oxford University Press, USA, 2010).

¹¹ Bronitt, Simon. McSherry, Bernadette, *Principles of Criminal Law* (Thomson Reuters, Australia, 2010).

¹² Sutherland, Edwin, H., 'Is White-Collar Crime Crime?', 10 (2) *American Sociological Review* 132-139 (1945).

¹³ Nanda, Ved P., 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' 58 *American Journal of Comparative Law* 605-630 (2010).

¹⁴ Wells, Celia, *Corporations and Criminal Responsibility* (Oxford University Press, Oxford, 2001).

¹⁵ Wells, Celia, 'Corporations-Culture, Risk and Criminal Liability', *Criminal Law Review* 551-566 (1993).

¹⁶ Fisse, Brent, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 *Southern California Law Review* 1141 (1983).

Despite the general idea in place, there were some ground difficulties to be addressed. First, it was a challenge for the courts to attribute *mens rea* in cases to show they were 'intent crimes'. Interpreting the individualistic concept of *mens rea* as established in the traditional criminal law was a challenge in the case of corporations, since attributing intent on a 'juristic person', incapable of acting or thinking for itself, had never been visualized in the domain of *mens rea*. Trying to adapt the concept in corporate context posed severe challenges.

2.2 Practical Problems

A major problem that had to be addressed pertained to the kind of sanctions that can be imposed on a corporation if there was a conviction. The question whether the courts could impose fines in place of the sentence mandated in the law, since for obvious reasons imprisonment was not an option for a corporation¹⁷, thus, other options now had to be considered.

In India, this issue came up with a twist. In many sections of the Indian Penal Code, punishments include fines as well as imprisonment. The moot point was that for such offences that require both imprisonment as well as fine, what should be the punishment meted out to a corporation, since corporation being a 'juristic person' cannot be imprisoned. This issue has been addressed in the ground-breaking cases of *Assistant Commissioner, Assessment II, Bangalore v. Velliappa Textiles*¹⁸ and *Standard Chartered Bank v. Directorate of Enforcement*¹⁹. Companies cannot escape prosecution just because the offense for which they must be prosecuted involves a mandatory sentence of imprisonment. The apex court ruled in the case of *Iridium India Telecom Ltd. v. Motorola Incorporated and Ors*²⁰ that the position of the corporation is same as any individual attracting conviction under common law and statutory offences including even those where *mens rea* is necessary. It was made very clear by the apex court that there is no immunity for corporations from criminal prosecution based on the contention that criminal *mens rea* was missing when the act was committed. Embracing the principles of attribution and imputation has negated the very idea of a corporation not capable of being held liable for the commission of a crime.

The very concept of corporate criminal liability is developing in India since past some years. Amidst increasing the many dimensions of corporate crimes and defaults, authorities are feeling the necessity to have clearer and stricter laws and norms, which could deter them from committing such crimes. Courts have also started adopting stricter approach towards corporate criminal liability and are extending it further beyond its limited traditional scope. The spread of the concept of corporate criminal liability extends beyond IPC, 1860 and is spread across different statutes and legal provisions.²¹ Ever since the concept of corporate criminal liability has come into existence, its understanding has been evolving. Many of the typical difficulties in its application in practical circumstances have been overcome. Understanding of the kind of evidences which would help fix corporate criminal liability and the procedural tests of the same have emerged and have been accepted in Indian legal systems as well as in other countries. Establishing individual criminal liability has been relatively easy but when it comes to corporate, it has not been the same. Indian courts have also redefined corporate criminal liability and its consequences gradually. The *Iridium India Telecom Ltd v. Motorola Incorporated and others*²² and *Sunil Bharti Mittal v. Central Bureau of Investigation ("CBI") and others*²³ are the two recent cases where courts have attempted to clarify legal definition and implications of corporate criminal liability.

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 is so intense that a corporation may be said to think and act through the person or the body of persons.

¹⁷ Gobert, James. Punch, Maurice, *Rethinking Corporate Crime*, (Lexis Nexis Butterworths, London, 2003).

¹⁸ AIR 2003 SC 721.

¹⁹ AIR 2005 SC 380.

²⁰ (2011) 1SCC 74.

²¹ Williams, Franklin P. Marilyn, D. McShane, *Criminological Theory*, (Englewood Cliffs, N.J, Prentice Hall, 2004).

²² (2011) 1 SCC 74.

²³ Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013).

3. Normative Recognition of Corporate Criminal Liability in India: The Companies Act, 2013

India's legal governance atmosphere is evolving just like its understanding of corporate criminal liability. The Companies Act, 2013 is one good example of the same. The law has been reformed considerably to control and deter corporate frauds and standardize governance process more effectively. There are clear provisions under this Act dealing with frequent corporate crimes like fraud, cheating etc. The Act controls frauds and deters their recurrence by bringing in more accountability and responsibility upon independent directors, auditors etc. they are the watchdogs to ensure company's compliance to The Companies Act and other such legal provisions of the law. The Act also prescribes personal liabilities upon Key personnel, auditors, employees etc.²⁴

The present Act has received appreciations from industry experts and legal fraternity alike because it is not only comprehensive but is also strict with practical penalties effective in controlling frauds. Collectively it can be said that India's legal system is evolving and adopting towards the rising need for curbing and controlling multidimensional nature of corporate crimes.

3.1 Punishment for Corporate Fraud

Section 447 of Companies Act defines fraud as an act of omission or commission leading to consequences against the interest the company misusing or abusing his/ her authority by virtue of his position. According to this Act, fraud is an offence punishable by imprisonment not less than six months and can go up to maximum of ten years. The provision for fine cannot be less than the amount of fraud and may extend up to three times the fraud amount. The Act has been effective in controlling corporate crimes and frauds.

The Report of the Companies Law Committee²⁵ received suggestions that the ambit of Section 447 was too broad and would result in minor infractions being punished with severe penalties, which are non-compoundable. However, it was also suggested during the discussions that once the offence of fraud is established, it would not be tenable to provide for a threshold for it to be punishable under Section 447. The Committee observed that *"the provision has a potential of being misused and may also have a negative impact on attracting professionals in the post of directors etc. and, therefore, recommends that only frauds, which involve at least an amount of rupees ten lakh or one percent of the turnover of the company, whichever is lower, may be punishable under Section 447 (and non-compoundable). Frauds below the limits, which do not involve public interest, may be given a differential treatment and compoundable since the cost of prosecution may exceed the quantum involved."*

4. New Dimensions of Corporate Crime

Several new kinds of frauds and crimes are emerging each day and most of the times we are caught unaware²⁶. Different dimensions of corporate crimes as have been witnessed by the world, According to Deloitte India Fraud Survey; in times to come India could witness four common frauds due to emerging trend of using high technology digital media in regular business models. Media scams, e-commerce scams, scams related to cloud computing and virtual currency scams.²⁷ The following are the excerpts from the Deloitte India Fraud Survey and the information given below is taken from the survey only:

(i) E-commerce Fraud

Presently e-commerce is involved in almost every business and numerous transactions are conducted using computer networks, Internet and online media. E-commerce industry has been growing at a very fast pace and presently it is valued at nearly INR 224 Bn. It is expected to grow to nearly twice this figure in next two years.

Travel industry occupies much of the e-commerce space presently with transactions ranging from ticket bookings, hotel bookings, online buying etc. internet penetration in India has been increasing and so is the possibility of transacting online. It is estimated that by year 2014 the total number of Internet users will

²⁴ Chopra, Rajiv, *Companies Act, 2013: An Analysis Of Key Rules*, 5 (7) *International Research Journal of Management* (2014).

²⁵ Ministry of Corporate Affairs (Government of India), *Report of the Companies Law Committee*. Report submitted to Honourable Finance Minister on 1st February, 2016; Available at: http://www.mca.gov.in/Ministry/pdf/Report_Companies_Law_Committee_01022016.pdf (Last Accessed on May 16, 2016).

²⁶ <http://www.fbi.gov/scams-safety/e-scams> (Last Accessed on May 16, 2016).

²⁷ Deloitte India Fraud Survey- 2014; Available at: <http://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-finance-annual-fraud-survey-noexp.pdf> (Last Accessed on May 16, 2016).

increase to more than 243 million. With increasing number of computer literate who are also good prospect for online companies give significant scope for online scammers.

(ii) Cloud Computing Fraud

People are increasingly using and demanding online access to their data and applications which can help them do so. Several devices are being used like desktop PC's, smart phones, laptops, tablets etc. Cloud computing solves this problem very effectively. Not only is the Indian younger generation using cloud solutions, companies are also using cloud access for speedy and simultaneous sharing of internal data. This leaves a large possibility of online frauds²⁸.

Presently, with the use of cloud technology companies can share and edit data and documents and simultaneously viewing and using it from different locations. People on cloud can interact on real time basis at a very low cost. Applications and uses of cloud based computing are so many that it has become target to online scammers risking the data shared on cloud computing. Intellectual property, internal information and several other data are at risk of being stolen or misused. Cloud computing has also increased the risk of identity threat, hacking etc.

(iii) Social Media Fraud

Now-a-days, social media is one greatly popular and used tool. Companies are using it to improve their visibility and popularity among people. Social media is also a platform where companies can come closer to customers and interact with them. Although companies have started using social media as strategic marketing and customer relationship tool, they are still in the process of understanding how it works. Whereas social media is widely used by customers of all ages, gender and all places but at the same time hacker may hijack the data and manipulate it against the marketer. Moreover there are other risks like negative publicity, customer data loss etc. that makes it risky and tempting ground for corporate crimes.

(iv) Virtual / Crypto-Currency Fraud

A crypto currency is a digital or virtual currency that uses cryptography for security. 'Bitcoin' is one virtual currency that is much popular on black market website which was under scrutiny by US authorities. This currency is based on complex systems and networks and is accepted in exchange for goods and services at various online portals. The transactions involving crypto currency range from online transfers, mobile recharges and several online trading or exchanges for goods or services. Whereas production of physical money is regulated and controlled, generation of crypto currency is far less regulated and can be manipulated relatively easily.

5. Conclusion

The concept of corporate criminal liability is still in its emerging stage in India as well as globally. Although attempts are made in terms of legislations like Companies Act, 2013 to control and reduce corporate crime, the very definition and concept of corporate criminal liability is still at nascent stage. Corruption is an evolving menace that Indian government is trying hard to fight. Such offences are of the nature where not only individuals but the companies also need to share the liability.

It is still a matter of debate as to how effectively can laws and regulations control corporate behavior. The extent of strictness of such norms and the most suitable approach towards corporate criminal liability is again debatable. As a result, most courts are trying to find most practical outcome under given circumstances, instead of adopting standardized approach. The legal provisions in their present shape are still ineffective in control many corporate crimes. The crimes are evolving and so is the need to define corporate criminal liability. Presently, it has been observed that companies are not held criminally liable under most circumstances. Companies Act, 2013 are good effort towards improving corporate governance practices and making companies more responsible and answerable.

Clearly, a lot is required to be done in the area but the efforts done so far should not be undermined. Provisions must be made to avoid conflicts in interpretation of corporate criminal liability and its implication for companies.

²⁸ Available at <http://www.rediff.com/business/slide-show/slide-show-1-special-most-competitive-countries-in-the-worldindia-ranks-60/20130905.htm>. (Last accessed on 17 May, 2016).