

Corporate Criminal Liability- A Global Perspective¹

The process of globalization and the growth of interdependence in economic, social and environmental activities by corporate entities require greater international cooperation between countries. At the same time, the amount of economic and white-collar-crime has grown substantially. One of the most pressing global issues is the predominance of national and multinational corporations in economic transactions and their accountability.

In this context, the development of corporate criminal liability has become a problem which a growing number of prosecutors and courts have to deal with nowadays. In the common law world, following standing principles in tort law, English courts began sentencing corporations in the middle of the last century for statutory offenses. On the other hand, a large number of European continental law countries have not been able to or not been willing to incorporate the concept of corporate criminal liability into their legal systems.² The fact that crime has shifted from almost solely individual perpetrators only 150 years ago, to white-collar crimes on an ever increasing scale has not yet been taken into account in many legal systems. At the same time, crime has also become increasingly international in nature.

Criminal liability of legal bodies has been an issue on the legal agenda since the mid-nineteenth century, when corporations began to play a role in social and economic life in the wake of the urbanization process and the Industrial Revolution.³ In the course of time, this liability turned from a narrow exception to the prevailing rule that prohibited the imposition of penal liability on corporations into a general doctrine, subjecting various kinds of legal bodies, almost without any limitation, to the authority of criminal law. In general,

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³ Leonard H. Leigh, *The Criminal Liability of Corporations in English Law* (1969); Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*

extending the scope of the criminal system to include corporations may be said to have developed along three lines, all of which are linked closely. First, the doctrine of liability was expanded from offenses of omission to include offenses of active behavior. At a later stage, the doctrine was broadened from absolute liability offenses to include offenses of criminal intent and, at the same time, it developed from a basis of vicarious liability to principles of direct liability. The result of this process is that, at present, corporations are routinely charged and convicted for almost every known offense against property and person.

Historical overview

The approaches that have been taken by common law jurisdictions and continental European jurisdictions differ notably in a number of ways.

The first attempts to impose corporate criminal liability were taken by common law countries, such as England, the United States and Canada, which is at least in part due to the earlier beginning of the industrial revolution in these countries. Despite an earlier reluctance to punish corporations,⁴ the recognition of corporate criminal liability by the English courts started in 1842, when a corporation was fined for failing to fulfill a statutory duty.⁵ There were a number of reasons for this reluctance. The corporation was deemed to be a legal fiction, and under the rule of *ultra vires* could only carry out acts which were specifically mentioned in the corporation's charter. Other objections included the lack of the necessary *mens rea*, and the ability to appear in court personally. Finally, it proved difficult to punish the corporation for lack of adequate sanctions. Over time, the English courts followed the doctrine of *respondeat superior*, or vicarious liability, in which the acts of a subordinate are attributed to the

⁴ In this context, the famous quote by Baron Thurlow, who was Lord Chancellor of England in the 18th century, is exemplary for the situation at the time. "Did you ever expect a corporation to have conscience, when it has no soul to be damned and no body to be kicked?" Quoted in: Coffee, John C. "No Soul To Damn: No body to kick. An Unscandalized Inquiry into the Problem of Corporate Punishment." *Michigan Law Review*, v. 79, p. 386.

⁵ *Birmingham & Gloucester Railway Co.* (1842) 3 Q.B. 223.

corporation.⁶ However, vicarious liability, was only used for a small number of offenses, and later on replaced with the identification theory. In the United States, the approach was different. Instead of holding the corporation indirectly liable, the federal courts applied the concept of vicarious liability. While the courts initially made use of this doctrine solely in cases where mens rea was not required later decisions included this category of offenses. This meant a radical departure from the stance English courts had taken.⁷

The continental European systems' penal codes are based on the finding of individual guilt, and therefore, the incorporation of corporate criminal liability into their criminal codes has met a wide range of criticism in these jurisdictions.⁸ Nevertheless, sanctioning the corporation in these jurisdictions also follows the principles of either vicarious liability or the identification theory.

As a result of this legal policy, the approach to corporate criminal liability has undergone significant changes, the most far-reaching of which were registered in several European countries. The socio-political-economic transformations affecting Europe with the establishment of the European Community also left an imprint on this issue.

In 1988, the Council of Europe recommended to members of the Community that they should endorse an approach allowing the imposition of criminal liability on

⁶ This doctrine prescribes that the master is responsible for the acts carried out by the servant in the course of the servant's employment. This doctrine was created in the law of torts in the 17th century in order to provide compensation for third parties, when the servant acted for the master, and caused an injury to the third party. It was justified because the master acquires the benefits and should therefore also carry the burden for wrongdoings.

Furthermore, servants were impecunious and therefore the third party should be able to hold someone liable. See Ferguson, Gerry. "Corruption and Corporate Criminal Liability," p. 4. Paper presented at *Corruption and Bribery in Foreign Business Transactions: A Seminar on New Global and Canadian Standards*. 4-5 February 1999. Vancouver, Canada.

⁷ A third approach, which is promulgated by legal theorists, is to locate fault in the corporation's organizational structure, policies, culture and ethos,

⁸ However, it should be noted that before the French Revolution, the French *Grande Ordonnance Criminelle* of 1670 provided for the punishment of a corporation. This idea was rejected and ultimately disposed of during and after the French Revolution. See Stessens, Guy. "Corporate Criminal Liability: A Comparative Perspective." *International and Comparative Law Quarterly*, v. 43, July 1994, pp. 496-497.

legal bodies. The Dutch courts had seemingly anticipated this recommendation and, in the mid-1970s, shifted course in this direction. France, on the other hand, changed its criminal law on this issue following the recommendation, and in the early 1990's erased the prohibition against rendering corporations (personnes morales) criminally liable.

In Anglo-American law, which had acknowledged the imposition of this liability, changes are perhaps less prominent but still very important and should be viewed as further corroboration of the prevailing approach, extending it to include distinctly non-economic offenses. In the last decade, legal bodies in England have been charged with manslaughter, and some have even been convicted.

Times however have changed. The last two decades have created a new socio-political-economic reality, characterized by a thriving common market in Europe, changes in the political regimes of Eastern Europe, intensive privatization processes in many countries that shifted many areas of activity to the non-governmental sector, and the creation of mega-multinational-corporations that are the result of acquisitions, mergers and takeovers.

In a process that peaked in the second half of this century, legal bodies have actually assumed control of all forms of commerce and industry, to the extent that no economic endeavor is deemed possible without their involvement.

This socio-economic reality has dictated, to a large extent, the change in the law's approach to the imposition of penal liability on corporations. Policy setters in various legislative and law enforcement bodies sensed that attaining effective, and mainly trouble-free, control of the economy through criminal law depends on a sweeping subordination of the legal bodies themselves, as far as possible, to criminal proceedings. All this without restricting the scope of the personal criminal liability incumbent on management ranks or on those actually involved in breaking the law.

At present, a motion is being considered in England to legislate a special manslaughter offense—corporate killing—relating to death caused by the failure of a corporate board to adopt necessary precautionary measures, thereby significantly departing from reasonable standards of care.⁹ In Israel also, this struggle has finally been decided. For the first time, an explicit provision concerning corporate liability has been legislated in the general section of the criminal code,¹⁰ and the Supreme Court has stated that “in principle, there is no reason for failing to impose criminal liability on a corporation for the perpetration of manslaughter.”¹¹ In the United States, where rendering legal bodies criminally liable for manslaughter has become a matter of routine,¹² an even more far-fetched option was considered when corporate directors were charged with murder, following a fatal work accident resulting from serious breaches in workplace safety regulations. Such a charge could pave the way for charging the corporation with murder as well. A further expansion of criminal liability in the United States also seems possible in another context, where permission was granted to press charges against a corporation after it had been dissolved.

Corporate criminal liability in today’s legal systems

United Kingdom

Despite the pronouncement of a judgment in 1842 to that end, “true” corporate criminal liability was not firmly established until this century in the UK. Corporate entities could only be held liable for crimes which did not require mens rea, since the mere existence of a master-servant relationship was not a sufficient

⁹ See Law Commission, Report No. 237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996); Celia Wells, *Corporate Killing*, 147 *New L.J.* 1467 (1997); Valerie Hall, *Company Directors and Criminal Charges*, *Estates Gazettes* (1997).

¹⁰ *Isr. Penal Law*, (1977) (as amended in 1994), § 23 (3d ed. 1999) (English translation) [*Israeli Criminal Code*].

¹¹ *Cr.A. 3027/1990 Modiem Constar. & Div. Ltd. v. State of Israel*, 35(4) P.D. 364, 381 (Per CJ Aaron Barak) (Hebrew) (Isr.).

¹² *Commonwealth v. Penn Valley Resorts Inc.*, 494 A.2d 1139 (Pa. 1985); *Granite Constr. Co. v. Superior Court*, 197 Cal. Rptr. 3 (Cal. Ct. App. 1983); *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. 1983); *Commonwealth v. Fortner LP Gas Co., Inc.*, 610 S.W.2d 941 (Ky. 1981);

basis for imputing personal fault to the master.¹³ There were, however, three common law crimes, which did not require mens rea - public nuisance, criminal libel and contempt of court. An additional category where mens rea was not required were regulatory offenses created by statutes, and which were held to be absolute liability offenses.¹⁴

The final obstacle that needed to be overcome was the criminalization of the corporation for mens rea offenses. In 1915, the House of Lords, in a civil liability case entitled *Lennard's Carrying Co. Ltd.*, laid down a general principle for attributing fault to a corporation – the directing mind principle. Under this concept, the acts and state of mind of certain senior officers of the corporation - the directing minds - are deemed to be the acts and state of mind of the corporation. That means that the directing minds are identified as the corporation, and thus the corporation is directly liable, rather than vicariously liable.¹⁵

United States

While the pattern of courts in the United States with regard to corporate criminal liability paralleled that of the English courts at first, they soon departed from the position taken by their English counterparts. At the beginning of the century, some American courts started to expand the concept of corporate criminal liability to include mens rea offenses, a move which was confirmed by the U.S. Supreme Court in *New York Central & Hudson River Railroad Company v U.S.*¹⁶ This confirmation came after Congress had passed the Elkins Act, which stated that the acts and omissions of an officer acting within the scope of his employment were considered to be those of the corporation, thus promulgating the concept of vicarious liability.¹⁷ Although the case before the Supreme Court

¹³ Ferguson, Gerry. "Corruption and Corporate Criminal Liability"

¹⁴ Ferguson, Gerry. "Corruption and Corporate Criminal Liability"

¹⁵ *Tesco Supermarkets v Natrass*, [1972] A.C. 153, [1971] 2 All E.R. 127

¹⁶ *New York Central & Hudson River Railroad Company v U.S.* 212 U.S. 481 (1909).

¹⁷ Stessens, Guy. "Corporate Criminal Liability: A Comparative Perspective."

was concerned with a statutory offense, the lower courts rapidly expanded its scope of offenses at common law. Several decades later, in 1983, the 4th Circuit Court stated that “a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ... such acts were against corporate policy.”¹⁸

Japan

Corporate criminal liability is an integral part of Japanese law. There are currently more than 700 criminal provisions on the national level alone, which can punish entities other than individuals, and this number is likely to increase in the coming years. In addition, the Japanese Supreme Court decided that corporate entities must establish and implement policies and systems that prevent their subordinates or employees from committing crimes in the course of doing business. If such policies are not implemented or not updated accordingly, the entities can be held criminally liable on grounds of negligence on the part of the directing minds in supervising the subordinates.¹⁹

China

China’s Criminal Code, which was first introduced in 1979, did not contain a provision on corporate criminal liability until 1997. Prior to the introduction of “unit crime” into the Criminal Code in Article 30,³⁷ the Customs Law of the People’s Republic of China was the first law to stipulate that “enterprises, institutions, state organs or public organizations” could commit a crime. Between 1987 and today, more than 50 kinds of unit crimes have been put into place in over 20 criminal, civil, economic and administrative regulations. The large number of unit crimes in different laws has led to some criticism, mainly because of the (1) vagueness of the responsibility of individuals in the context of unit crime; (2) the large number of designations that exist in the context of unit

¹⁸ *U.S. v Basic Construction Co.*, 711 F. 2d 570 at 573 (4th Cir. C.A. 1983).

¹⁹ Ito, Kensuke. “Criminal Protection of the Environment and the General Part of Criminal Law in Japan.” *International Review of Penal Law*

crime, such as “enterprises, institutions, organs or public organizations,” or “enterprises and institutions” or simply “units;” and (3) inconsistencies with regard to the punishment of unit crimes, since some laws provide for a dual-punishment system, while others rely on a single-punishment system.²⁰

Corporate Criminal Liability in India

The development of the law relating to corporate criminal liability in India is not only similar to that in English law, but also greatly influenced by the English Law. At one point of time, ‘corporations’ were viewed as a convenient shield to evade liability. However, under our present penal structure, for an offence by the corporation, both the corporation and its officer can be made liable. The law on corporate criminal liability is however, not confined to the general criminal law in the penal code but it is, in fact, scattered over a plethora of statutes with specific provisions for the same. The need for proper law relating to corporate criminal liability in a legal system, specially in the developing countries like India was observed by the Supreme Court in the following terms:

“In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and under-takings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a 614 number of laws of our country, there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident.”²¹

²⁰ Liu, Jiachen. “The Legislation and Judicial Practice on Punishment of Unit Crime in China,” p. 1. Paper presented at the *International Colloquium on Criminal Responsibility of Legal and Collective Entities*.

²¹ Singh.K.N.J, in Charan Lal Sahu v U.O.I, AIR 1990 SC 1480.

This developed jurisprudence does not find a place in the Indian statutes as they still make only the officials responsible for the act criminally liable and not the corporate itself. Instances of this are:

- Sections. 45²², 63, 68, 70(5), 203, etc of the Indian Companies Act wherein only the officials of the company are held liable and not the company itself; it is also reflected through the Takeover Code.
- The various sections of the IPC that direct compulsory imprisonment does not take a corporate into account since such a sanction cannot work against the corporation.

These are the major statutes in their respective field that are devoid of necessary legal aspects. On the other hand, law has also developed to an extent with regard to certain other statutes and their respective penal provisions wherein a fine has been imposed on the corporations when they are found to be guilty. Some such examples are:

1. Sec. 141 of the Negotiable Instruments Act, 1862: Balaji Trading Company V. Kejriwal Paper Ltd. and Anr.²³
2. Sec. 7, Essential Commodities Act: State of M.P. v. N. Singh²⁴
3. Section 276-B of the Income Tax Act: M.V. Javali V. Mahajan Borewell & Co.

The major law relating to Corporations in India is codified in The Company Act, 1956 and the definition of "Corporation" as given in the Act under Section 2 (7) includes a company. Hence under Indian law the liability of the corporation is

²² If at any time the number of members of a company is reduced, in the case of public company, below seven, or in the case of private company, below two, and the company carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

²³ 2005CriLJ3805

²⁴ MANU/SC/0545/1989

essentially liability of the company only.²⁵ Further, under Indian law as well as under the English law, a Company is a creation of the law. It is not a human being but is an artificial person. On incorporation, the company acquires a separate legal entity distinct from and independent of its members. When a company is incorporated, all dealings are with the company and all persons behind the company are disregarded, however important they may be. Thus, a veil is drawn between the company and its members. Normally, the principle of corporate personality of a company is respected in most of the cases. The separate personality of the company is, however, a statutory privilege; it must be used for legal and legitimate business purposes only. Where a fraudulent, dishonest or improper use is made of the legal entity, the concerned individual will not be allowed to take shelter behind the corporate personality. The court will break through the corporate shell and apply the principle of “Lifting of the corporate veil”. The court will look behind the corporate entity and take action as though no entity separate from the members existed. In other words, the benefit of separate legal entity will not be available and the court will presume the absence of such separate existence. The Companies Act, 1956 contains certain provisions²⁶, which empower the courts to lift the veil to reach the persons who are in fact responsible for the culpable or wrongful act. The corporate veil can be lifted in the following cases:

- (1) Where the doctrine conflicts with the Public policy,
- (2) Where corporate veil has been used for fraud or improper conduct,
- (3) Where the corporate facade is only an agency instrumentality,
- (4) For determining the real character of the company,
- (5) Where the veil has been used for evasion of taxes,
- (6) In quasi-criminal cases,

²⁵ Corporate criminal liability in India by Geeta Narula

²⁶ Sections 45, 147, 212, 242, 247

- (7) For investigating the ownership of the company,²⁷
- (8) For investigating the affairs of the company,
- (9) Where the company is used as a medium to avoid various welfare and labour legislations,
- (10) In case of economic offences,
- (11) Where the company is used for some illegal and improper purpose, etc.

The following provisions of the Companies Act, 1956 provide that the Members or the Directors/officer(s) of a company will be personally liable if:

- (1) A company carries on business for more than six months after the number of its members has been reduced below seven in the case of a public company and two in the case of a private company. Every person who was a member of the company during the time when it carried on business after those six months and who was aware of this fact, shall be severally liable for all debts contracted after six months,²⁸
- (2) The application money of those applicants to whom no shares has been allotted is not repaid within 130 days of the date of issue of the prospectus, then the Directors shall be jointly and severally liable to repay that money with the prescribed interest,²⁹
- (3) an officer of the company or any other person acts on its behalf and enters into a contract or signs a negotiable instrument without fully writing the name of the company, then such officer or person shall be personally liable,³⁰

²⁷ Section 239

²⁸ Section 45

²⁹ Section 69

³⁰ Section 147

(4) The court refuses to treat the subsidiary company as a separate entity and instead treat it as only a branch of the holding company,³¹

(5) In the course of winding up of the company, it appears that the business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, all those who were aware of such fraud shall be personally liable without any limitation of liability.³²

Thus, the protection of separate legal entity cannot be claimed in these cases and the limited liability of the shareholder becomes unlimited if he is engaged in these activities. The concept of “limited liability” restricts the liability of a shareholder to the nominal value of the shares held by him. If he has paid the entire amount which is payable towards his shares, he cannot be held liable for the debts of the company, even if he holds almost the entire share capital of the company. This rule, however, does not apply if the court lifts the corporate veil and finds the shareholder responsible for the wrongful act. Not less recently, in the landmark judgment of *Kapila Hingorani v State of Bihar*,³³ the Supreme Court analyzed the rights and liabilities of a company vis-à-vis the Fundamental rights and Human Rights of the individuals. The Court observed:

“A company incorporated under the Companies Act is a juristic person and has a distinct and separate entity vis-à-vis its shareholders. The corporate veil, however, can in certain situations be pierced or lifted. Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof. The veil can indisputably be lifted when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest”. It has also been observed that a corporation deemed to be “State” within the meaning of Article 12 of the Constitution and acting as agency of the government, would be subject to the

³¹ Section 212, 214

³² Section 542

³³ 2003 (4) SCALE 712.

same limitations in the field of Constitutional or administrative law as the government itself, though in the eyes of law they would be distinct and independent legal entities.³⁴

Conclusion

The statutes mentioned in the first point need to be amended soon to include corporate criminal liability and not merely restricting criminal liability to its personnel.

So it can sufficiently be proved from the above discussions that corporations and corporators will be liable for any crime so committed. It is well known that the companies are legal persons in their own capacities and they have the power to sue and be sued. But the fact still remains that much has been written on the appropriateness of attributing criminal liability to corporations, and the debate is still far from over. It has come as an accepted notion now that the corporations are not mere fictions. They exist, occupy a predominant position within the organization of our society, and are as capable as human beings of causing harm. It is only just and consistent with the principle of equality before the law to treat them like natural persons and hold them liable for the offences they commit. Such organizations, which have a major impact on our social life, must be required to respect the fundamental values of our society upheld by the criminal law. In the case of corporate criminal liability, the approach has changed over the years from there being no concept of a liability for criminal acts for corporations to liability based on the identification of some persons as the alter ego of the company.

Today, corporate criminal liability is a subject of concern for a wide range of groups campaigning on issues including human rights, environment, development and labor. Corporate crimes committed on all continents across a range of industrial activities in various sectors (e.g. chemicals, forestry, oil, mining, genetic engineering, nuclear, military, fishing, etc.) clearly point towards

³⁴ R.D.Shetty v. International Airport Authority, AIR 1979 SC 1628.

the need for greater control, monitoring and accountability of corporate activity in a globalised economy.

Corporate criminal liability is complementary to individual liability. Especially after the Bhopal Gas Tragedy we had new amendments in the Industrial Disputes Act and the Companies Act and we hope that the Indian government has finally put us in a safe position by holding even the corporators responsible for their positions and even the government undertakings cannot shrug off responsibility and the public stands at the helm of democracy.