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CONCEPTUAL FOUNDATIONS OF CORPORATE CRIMINAL LIABILITY

~ *Sakshi Srivastava*

CORPORATE PERSONALITY AND THE SEPARATE LEGAL ENTITY DOCTRINE

When we talk about corporate criminal liability, the first point to note is that the company is a separate legal entity. The doctrine of separate legal entity was established in the case of *Salomon v. Salomon* in 1897. The decision was given by the House of Lords. The decision said that after the establishment of a company, it becomes a separate legal entity, separate even from its shareholders and members.

It was observed by Lord Macnaghten that the company is “at law a different person altogether from the subscribers.” Which basically means that any debts, rights, obligations are owned by the company as a separate entity and not its subscribers. This judgement is significant in the concept of “separate legal entity” because it makes the corporation a separate artificial legal entity that exists separately and independent of its human ownership.

It is because of this doctrine that a company can hold a property in its own name, enter into contracts, borrow and lend money, and be sued as a separate independent entity. Its shareholders and its directors do not automatically become responsible for its debts and the directors are legally separate from the corporate entity that they manage. And so we can derive that company law in India treats a corporate entity as an autonomous with separate rights and liabilities. This principle is significantly important in modern corporate law as it allows big commercial organizations to operate smoothly even when there is a change in management or ownership.

However, the existence of this doctrine creates a problem when trying to determine corporate criminal liability. It is easy to put civil liability on a company because it has contractual obligations, an obligation for payments, and statutory obligations can be attached to the company as a legal person. However, criminal law requires more than just a wrongful act to occur, it also requires the presence of mens rea for most of the criminal offences like fraud, cheating, conspiracy, and money laundering. The requirement of mens rea comprises of having guilty intention, knowledge, dishonesty, or conscious concealment, which is easy to understand and implicant when the wrongdoing is committed by a natural person by analyzing the person's conduct, state of mind, and statement. However, when it comes to a scenario where the offender is a corporate entity, mens rea becomes complicated to attribute to, as the company does not have a physical brain or consciousness and no independent mental thinking of its own.

According to Kaushik Kally, the doctrine of separate entity creates a disconnect between the legal actor and the human minds operating behind it. Even though all the acts of the company are done via its managers, directors, employees, officers, members, etc., the law still insists that the company stands separate from all of these individuals. What this means is that whatever the wrong actions are can be attributed to the company however the guilty intention behind it can exist only in the human agents behind it which creates the difficult question of attribution, which is whose mind is to be treated as the company's mind? Therefore, even though the doctrine of separate entity is in commercial use it makes it much more difficult to place criminal blame because it separates the legal entity committing the crime from the human agents behind it.

TRADITIONAL COMMON LAW RESISTANCE TO CORPORATE CRIMINALITY

There is a common legal doctrine that a corporation has “no soul to be damned, and no body to be kicked”, which reflects the old attitude of the judiciary that since a company is artificially created by law, it does not have the human qualities required to be punished under criminal law. This shows how common law for so long was hesitant to make a company criminally liable. Because a company did not have a physical body or a moral conscience judge did not consider it suitable to put under the ordinary framework of criminal law.

The first reason for this hesitation came from the fact that criminal law requires the existence of “mens rea” or having a guilty mind to punish along with there being a wrongful act committed.

Crimes such as fraud, cheating, conspiracy, and dishonesty require intention, knowledge, or willful misconduct and according to old common law mentality it was only a natural person who had all these abilities, to intend, to have knowledge, and to knowingly commit a wrongful act. A corporation was only an invisible legal entity that existed in fiction. Since it has no mind of its own it cannot independently form criminal intention and because of this courts believed that a company could be sued in common civil proceedings but not be treated as a true criminal offender.

The second reason was the difficulty involved in punishing the company. Traditional punishments in criminal law were imprisonment, corporal punishment, and moral condemnation which involved having a physical body and personal conscience by the offender and since a company did not have these things, judges in early times thought that criminal did not have effective mechanisms to punish them. Even though financial punishments could have been imposed for crimes under criminal law, these penalties were not seen as proper substitutes for the ordinary idea of penal suffering. And so, the inability to impose conventional punishment further strengthened judicial hesitation in extending criminal liability to corporations.

As very aptly noted by Abhimanyu Kumar, the common law initially viewed corporations as incapable of committing offences that involved malicious intent or moral blameworthiness. The legal framework accepted that a company was a commercial person who could facilitate trade and enter into contracts but it did not accept the company as an entity capable of having guilt who could be punished under criminal law and it was this historical resistance that formed the earliest barrier to the development of corporate criminal liability and it delayed the acceptance of corporate entities as being prosecutable offenders under criminal jurisprudence.

SHIFT FROM CORPORATE IMMUNITY TO CORPORATE LIABILITY

This belief that corporate entities could not be prosecuted under criminal law became unrealistic with the growth of industries and businesses in the modern world as businesses started becoming more and more powerful, wealthy, and influential and corporations were no longer small trading companies. They became powerful and influential institutions which controlled banking, employment, investment, money, and production.

In his paper, Vijay Kumar Singh has said that along with the rise of corporations and industries came the rise of cases of criminal conduct as with the power shift of economic power from public

sector and individuals to corporate entities came the rise of new possibilities for deception, illegal profit making, and abuse. In simpler words, with the increase of corporate power came the increase in corporate crime.

The old idea that corporations were to be granted immunity in criminal liability came crashing down with rise in cases of investor deception and market manipulation as corporate entities had gained the power to suppress any liabilities, or artificially increase or decrease share prices, or circulate false information to get investments. There was nothing to be done in these cases because on paper it all appeared legal as all of this was hidden behind a vast number of board resolutions, audited reports, and institutional paperwork but it still led to a lot of economic loss that was suffered by shareholders and the public at large. This was the biggest fact that led to the idea that the conduct by corporations was not just about technical noncompliance but it should be penalized under criminal law.

Along with this problem, the shift was also driven by occurrence of large scale corporate frauds and institution level scandals that caused hard to the public at large where banks would hide bad loans, companies would lie in their books, or financial intermediaries gave way to illegal transactions, and the consequences of these actions would not just be limited to civil or contractual issues but require criminal consequences. Due to these problems the public deposits were were not safe anymore, trust that the investors had was destroyed, and market integrity was weakened,

According to Vijay Kumar Singh, corporations became a way for economic illegal activities to take place through legal ways and therefore not subjecting them to punishment under criminal law would mean letting go of crimes that had a major impact on the economy as a whole and this immunity would provide a way to the corporations to evade accountability and responsibility.

The result of all of these increasing corporate crimes was the shift of legal perspective from granting immunity to corporate crimes under criminal law to wanting for more corporate criminal liability. The system started to accept the fact that civil penalties alone were not sufficient when big crimes such as fraud, money laundering, etc. we're being committed by corporations and since it was clear that the corporate entity being an artificial legal entity could not by itself do harm to the public and benefit from unlawful profit it became necessary to have laws that would put the responsibility and accountability on the people managing the company.

THEORETICAL BASES OF CORPORATE CRIMINAL LIABILITY

It is important to have a clearly written down legal system of how to attach human intention to the company and which human to attach it on because a corporation is an artificial legal entity. And attempts have been made by different theories over a period of time to explain different ways by which a company can be held criminally liable, all of which try to answer one main question which is under what principle can the wrongful act and mens rea be treated as the company's itself whenever any wrongful act is committed? In their paper, Nandini Biswas and Jeetika Aggarwal that these theories are extremely important when trying to determine corporate guilt since there exists no clear legislative framework on the same.

The major theories are explained below.

Identification Theory

This is the oldest and most influential of the doctrines available that try to attribute mens rea onto a corporation. It says that there are certain officers of a company whose mind can be called as the "directing mind and will" of the company itself and whatever their intention is can be considered as the intention of the company as well. The theory says that not every employee of the company can be said to be responsible for the decisions and actions made by it, but only those employees, or officers, or members are who sit at such a position that they have the decision making powers of the company and control its decisions. And therefore it can be said that whenever these people are proven to have a guilty mind it can be said that the company as well had the same guilty mind.

This theory was applied by Lord Reid in the case of *Tesco Supermarkets Ltd. vs. Nattrass* in which he said that certain employees of a company are not just servants of it, but they represent the company's mind and will and their actions are to be treated as the company's actions and not just delegated acts. This theory puts the mens rea to the top management which makes it so important because it solves the problem of attribution of mens rea to a certain extent.

The limitation of the theory is thought to be that it can only work when the guilty mind of the top management can be proven and that is not always the case. According to Nandini Biswas and Jeetika Aggarwal, the structure of modern corporations is complex and decisions are not made by just a few select top individuals, they are spread out across different departments and committees,

And so, while the theory does provide a direct basis for attribution, it cannot practically always be applied in modern complex institutes.

Vicarious Liability Theory

There is a common law principle that says a principal may be held responsible for the acts of its servant and that is where this theory borrows its idea from. It says that a company can be held liable for the wrongful acts done by its employees which were done in the course of their occupation and were for the benefit of the company. So, according to this theory even if the senior management did not personally commit the offence done by the company, they can be held liable because the offence was done by people who were authorized to represent the company. In this case the senior management is considered as the principal and the company its servant. So for any action done by any employee of the company, the senior management is responsible.

This theory is considered important because of how practically flexible it is. As Kartikey Mahajan points out in his paper, it is not enough to simply punish the individuals of the company who committed the crime, it is also important to punish the company itself because in the end the company also made economic benefit from the crime. The company also created a working environment for the crime to occur and if not punished it may encourage further concealment or risk taking. Therefore, criminal law should not just punish the individual for the wrongful act but also punish the company who was the real beneficiary from the individual's act.

The criticism of vicarious liability theory is that it can impose punishment onto the company even in cases when the company had no intention to commit the crime, it was only and only the individual's intention. Abhimanyu Kumar in his paper says that this is in conflict with the entire concept of mens rea because it cannot be proved that the company itself had a guilty intention only because one of its employees committed a wrongful act and therefore this principle extends the powers of the prosecution it does not solve the problem of establishing the intention of the corporate as an individual.

Aggregation Theory

This theory was developed and is mostly used in Australia's criminal jurisprudence. It is a more modern comparative approach. This theory, instead of just looking at the individual's wrongful

act, looks at the company's policies, work environment, politics, culture, whether it encourages or permits unlawful acts or not because according to the aggregation theory only a manager's unlawful act does not give way to criminal liability but focus should be put on the fact that maybe it was the company itself that did not create a lawful work environment, and instead focused on gaining profits illegally, fostered a secretive environment, and put aggressive pressure on its employees to make profits by whatever way necessary.

This theory is significant because it understands the practicality and real life working of corporations. It accepts the fact that corporate crimes are not always committed in one certain order, they happen because the employees are made to realize that their company places profit above all else, and any wrongful act that they commit to achieve that profit will be encouraged, or at the very least ignored. In such a scenario the fault lies in the corporate culture itself instead of an individual and Kartikey Mahajan supports this in his paper. He says that corporations are not just mere legal shells and they create structures, incentives, and organizational behaviour that make these wrongful acts possible to occur.

Nandini Biswas and Jeetika Aggarwal also argue for the same. They argue that the theories of attribution made by judges in India are not enough because they still place the blame only on individual actions and not on the fault of the institution as much as they should.

Even though Indian law has not adopted this doctrine in any of its cases, it still offers a comparative approach where it agrees that a criminal intention can lie in practises of the organization as much as it does in individual decisions made by humans which can be identified.

NEED FOR CRIMINAL SANCTIONS BEYOND CIVIL PENALTIES

In today's legal framework the punishment for corporate crimes is usually first only dealt with by imposing civil penalties on them like fines, suspensions, administrative penalties, or just giving them directions for compliance and even financial regulators like the RBI, SEBI, and all frequently keep on imposing penalties for not disclosing stuff, or defaults in reporting, accounting that does not seem regular, or any violations of procedure. Although such punishments are needed, they present like a simple cleaning up or a mere warning that will not last long enough to punish any serious financial crime such as fraud, institutional deception, or even an organized concealment. In her essay too, Nandini Biswas presents her case that this situation of relying solely on imposing

civil fines and making of warnings without any imposition on a company of any properly criminal liability only serves to weaken the actual responsibility of companies in that too many big financial crimes are indeed merely treated as a compliance violation and not treated as a violation of criminal liability which of course they are.

The first problem that comes up when only imposing fines and giving warnings and treating the company's wrongful act as only civil misdemeanors is that most of the cost for all of these is already previously allocated to by the company. These are large companies that have a large source of economic funds and for these entities paying regulatory fines does not necessarily create moral pressure or make them correct their behaviour. Mostly the fines are nothing in front of the money they have already gained from the wrongful act, like if a company gains market advantage, investor capital, or hidden profits worth hundreds of crores by only paying a very small amount of fine in front of those hundreds of crores, the companies treat it as a manageable expense which creates a very dangerous economic calculation where not complying actually becomes profitable.

The second problem that arises is that civil penalties do not have any social stigma attached to them, and even if they do it is nothing in front of the social stigma that comes with criminal punishment. If a fine is imposed on a company it will be seen by the market as simply that the company did not meet some statutory obligations but it does not make the company a criminal. The crimes committed by companies are too grave as such as fraudulent diversion of money, lying to investors about disclosures, money laundering, intentional concealment of suspicious transactions, and institutional cheating and on committing these crimes a company should not be charged with some technical violations rather should come with moral blameworthiness because such conduct attacks the assumptions of public trust in markets and financial systems. So it renders civil penalties somewhat inadequate as they lack the expressive power of criminal law since prosecution under criminal law demonstrates to people that the action of the company was not merely bad business practise but a punishable communal wrong that is worthy of condemnation.

The other reason why companies should be held liable under criminal law is to deter them and other companies to engage in the same bad act or acts. Internal judgments not to disclose the information and to ignore the red flags or even to allow legal transactions to be conducted are not normally made by chance and in the case when business people were aware that to commit all of that they will just be required to pay their fines in money that can be added to the budget. But when

firms must suffer the penalties of criminal law it will act more effectively to deterring this conduct because it would expose the firms to the permanent effects of the criminal law and they will no longer be able to solve this behaviour with money as they will now face the same penalties as prosecution, judicial scrutiny and destruction of their reputation. Nandini Biswas thus underlines the fact that in the absence of criminal penalties, corporate citizens might still consider regulatory compliance as something that can be negotiated instead of being a binding obligation.

Yet more than all of this, in the purely civil model, there is no recognition of how damaging institutional economically is because corporate crimes do not just involve one individual, but actually in all of them, institutionally based economic harm is done. Whenever a criminal case is filed it is never filed under the name of one of the victims, under the name of the State is given as the victim since it is considered that this crime hurt the masses at large and in case of corporate crimes it is the same thing, this crime hurt the masses at large and so law ought to respond with more than compensatory or administrative remedies. This is the reason why there is the need to have criminal sanctions. They make sure that there is stigma, deterrence and they also send a strong message that even the power bestowed to corporations cannot be deployed as a shield against real penal accountability.