



## Evolution of corporate criminal liability vis-à-vis idea of identity

Dr. Subhash Kumar

Professor and Principal Geeta Institute of Law, Panipat, Haryana, India

### Abstract

Large enterprises control a large portion of our economy and constitute a danger to our society; thus, they must be discouraged. Multinational firms are businesses with assets and operations in nations other than their home country and are involved in almost every facet of contemporary life. Due to the fact that businesses have their own legal identity apart from their members, it is difficult to hold them responsible and penalize them for any crime. In general, a crime is committed by an individual using their own body and soul, and it was traditionally believed that an organization could not be held liable for its actions. Criminal offences need a purpose, and an organisation without a brain is incapable of developing one. Additionally, a business lacked a self-contained body. However, a business may commit a crime. Accepting corporations' involvement in criminal behaviour, several governments have created liability ideas by imputing actus reus and mens rea to corporations. The courts accomplished this by imprisoning officers-in-charge, chiefs, and other persons acting within the extent of their job. Corporate criminal responsibility is a legal notion that states that a corporation may be held criminally liable and punished "for the illegal acts of any of its agents as long as those individuals acted within the scope of their real or apparent authority". Since a consequence, Corporate Criminal Responsibility is a must-have in today's world, as corporate criminal liability raises a slew of concerns on a variety of levels, owing to the scale, power, and reach of such corporations in comparison to an individual committing a crime. This article will discuss corporate criminal responsibility and its evolution in India, as well as the idea of identity.

**Keywords:** distribution, *Momordica cymbalaria*, plant protection, pollinator ecology, scope for exploitation, topography

### Introduction

A corporation is a different legal entity from its stockholders. It may be defined as an organization of individuals for the purpose of achieving a shared goal, and it has no strictly legal or technical definition. It is believed that criminal culpability attaches if criminal law is violated. Criminal culpability for any conduct is predicated on the Latin adage "Actus non facit reum mens sit rea" <sup>[1]</sup> which indicates that it must be shown that a person or entity committed an "act or omission that was prohibited by law with "mens rea", which is legally defined as having a guilty mentality. It is classified as a white-collar crime" <sup>[2]</sup>.

"Corporate criminal liability <sup>[3]</sup> can be described as a crime committed by an individual or group of individuals who, in the course of their employment, intentionally perform illegal acts or omissions for the profit of the corporation or any member of the association of individuals. Prior to the establishment of the concept of corporate liability, no corporation was held liable for any criminal behaviour, as the company was believed to be an artificial legal entity that could not be imprisoned and there was no "mens rea" because the corporation was not a natural person".

"When a company is held criminally liable, it affects not only the firm's operations, but also the employees who engage in illegal conduct, potentially inflicting them criminal and financial punishment. However, it has been suggested that in the case of corporate punishment, a fine rather than imprisonment should be imposed".

### Development of concept of corporate criminal liability

"Corporate crimes are those perpetrated by companies or their members in which culpability is imposed for any conduct or omissions that are criminal under the law". In

"Zee Telefilms Ltd. vs. Sahara India Co. Crop. Ltd <sup>[4]</sup>, a firm was released from defamation responsibility due to the lack of mens rea, which is an implied necessity under law. In State of "Maharashtra vs. Syndicate" <sup>[5]</sup>, The "High Court determined that a business could not be tried for offences including corporal punishment or jail because a trial would result in a guilty decision, but no effective order could be imposed. However, the Supreme Court ruled in *Iridium v. Motorola* that a company may be held liable for statute and common law violations, even those requiring mens rea".

### Concept of corporate criminal liability in other countries United state of America

Previously in the United States of America, corporations were considered fictitious legal entities, lacking the mens rea required to commit a crime, and thus were not held criminally liable. However, this notion has changed, and while federal statutes still apply, they cannot supersede state laws in cases where they overlap, and thus a corporation can be prosecuted under both federal and state laws <sup>[6]</sup>. The penalty provided by the laws of this nation is a fine or the seizure of property, which may be imposed on the Court's orders. Generally, when a statute is violated, the penalty is either a fine or imprisonment, or both, as determined by the Court, and this applies to corporations as well. However, for corporations, the law states that if the fine is not paid, imprisonment may be imposed.

### Switzerland

Corporate Criminal Liability was implemented in "Switzerland in late 2003 and was based on the subsidiary liability concept, which stated that corporations can be held liable when fault cannot be attributed to a specific individual

due to a lack of organizational hierarchy within the enterprise and stipulated that criminal fine could be up to five Swiss francs”<sup>[7]</sup>.

### France

Article 121-2 of the new “French Penal Code”<sup>[8]</sup> codifies the notion of Corporate Criminal Liability in French law. According to the legislation, three conditions must be met in order to impose obligation on a legal organization. “The first criteria are that the French government must have passed a substantive criminal offence that the company must have violated, and the second need is that the corporation's real criminal guilt must lay with its agents or representatives”. The third criteria are that the illegal activities and the criminal responsibility imposed must benefit the Corporation. It contains a summary of Statutory Criminal Liability.

### Germany

The current scenario in Germany is that although corporations are not responsible under German law, people who commit crimes may be held accountable for their activities, even if such actions benefit the corporation. However, under the “Administrative Offences Act”<sup>[9]</sup>, penalties may be levied on businesses. To hold a Company accountable, the people who commit the criminal or administrative offence must be members of the group of persons described in Section 30 paragraph 1.

### Japan

In Japan, there is a provision called as dual criminal responsibility, which allows for the Company to be held accountable alongside the company operator and the offender. This clause was added to the Act in 1932 to restrict capital outflows. A firm is accountable when a crime is committed not only by Senior Executives but also by any of its workers; however, the company is not liable when the crime is done by third parties<sup>[10]</sup>.

### Russia

In Russia, a corporation's responsibility is classified as either civil or administrative. In the event that it engages in unlawful action, there is no idea of criminal culpability for corporations as there is for people. In this nation, under their administration, a corporation is regarded a distinct legal entity capable of committing what are known as administrative offences<sup>[11]</sup>.

### United Kingdom

The “EU General Data Protection Regulation<sup>12</sup>, in conjunction with UK legislation”, is scheduled to establish new criminal offences for corporations that will not be prosecuted on the basis of identity, but rather on the basis of cybercrime and personal data misuse/manipulation.

### Doctrine established in corporate criminal liability: doctrine of identification

Under the "Doctrine of Identification," the actions of corporate officials are equated to those of the corporation, and because the corporation is a fake legal entity with no physical reality, the senior officers' official actions are held accountable for the corporation.

The identity doctrine has its roots in English law. This mindset has contributed in the investigation and conviction

of various directors/managers of companies for criminal behaviour. The corporate personality of a corporation is separate from that of its founders, directors, and owners. This well-known legal theory developed in the renowned case *Solomon v. Solomon*. In this instance, the Court decided that the corporate entity is different from the firm's managers. The abuse of this concept resulted in the “Lifting of the Corporate Veil,”<sup>[12]</sup> which protects the corporation's shareholders or creditors in the event the company commits fraud or other criminal activity.

A corporate entity has the ability to sue and be sued in its own right. While the corporation may be prosecuted in criminal instances, it remains unaffected since the firm cannot be sentenced to jail or death. The only sanction that may be imposed on the business is a fine, which is often relatively modest. The issue therefore becomes whether a business may ever face criminal prosecution and be penalized with more than a monetary punishment.

### Evolution of the doctrine of identification

In the 1940s, a new method for imputing criminal culpability to corporations was developed in the form of the “identification concept.”<sup>[13]</sup> Until the 1940s, the courts were adamant that a Company could not be prosecuted for common law offences requiring evidence of a subjective mental element. However, during the 1940s, it was found in a number of examples that a corporation is capable of malice, deception, and conspiracy.

Following that was the case of “*R vs. ICR Haulage Ltd*”<sup>15</sup>, in which the Company was accused and convicted of “conspiring to cheat,” and thirdly, “*Moore vs. Bresler*”<sup>[14]</sup>, in which the Company was charged with embezzlement and tax evasion in violation of the “Finance Act No. 2, 1940”.

“Lord Denning justified the position in *H.L. Bolton Corporation vs. T.J. Garham & Sons*<sup>17</sup> by stating that the company may be compared to a human body in many ways. They do possess a brain and a neurological system that regulates their whole body. They have humans as their hands and legs, who direct the work of the nerve core. Lord Denning compared the brain and nerve system to the directives and managers who embody the company's guiding intent. He maintained that”:

“The state of mind of these management is recognised by law as the state of mind of the firm. Similarly, if the law needs a guilty mind as a prerequisite for committing a criminal offence, the directors or managers' guilty minds will declare the firm guilty.”<sup>[15]</sup>

In the well-known case of “*Tesco Supermarkets Ltd. vs. Nattrass*”<sup>[16]</sup>, the Appellant advertised a lower price for a packet of washing powder than the market price. “As a result, the Defendant filed a complaint under the Trade Descriptions Act” against the lowered price shown in the shop. “Lord Reid explored the law governing mens rea and its significance in criminal law”.

“A living individual has a mind capable of knowledge, intention, or negligence, as well as hands capable of carrying out his intentions. A company lacks all of these: it must operate via live individuals, but not usually the same one”. Then the individual speaking or acting does not speak or act on behalf of the firm. He is operating as the corporation, and it is his mind that drives his actions in the firm's mentality. There is no possibility that the corporation will be held vicariously accountable. He is not functioning in the capacity of a servant, agent, or delegate. He is an

incarnation of the company, or one might say that he hears and speaks via the business's personnel inside his zone of influence, and his mind is the company's mind. If it is a guilty mentality, then the firm is also guilty. It must be an issue of law whether, after the facts are established, a person doing specific activities is to be treated as the corporation or just as a servant or agent of the company. In such circumstances, the company's obligation can only be statutory or vicarious".

"Lord Reid" also explored which individuals may be 'associated' with a business. He indicated that the primary concerns are his relative position within the corporation and the amount to which he exerts influence over the firm's activities or a segment thereof without effective superior control. In this instance, the court determined that the store manager could not be associated with the business<sup>20</sup>.

"Lord Hoffman" emphasised the notion of identification in *Meriden Global Funds management Asia vs. Securities Commissioner*, stating that if an individual is deemed to be the "directing mind and will of the firm, the employee should have the ability to behave as he did. In the same instance, the Court concluded in its obiter that convicting a smaller business is simpler since the tie between the perpetrator and the business may be established more easily and definitively". This is not true with bigger businesses.

"Viscount Haldane" advanced the "alter ego" doctrine in *Lennard's Carrying Co. vs. Asiatic Petroleum Co.* and separated it from vicarious responsibility<sup>[17]</sup>. "The House of Lords declared that the managing director's default, as the directing mind and will of the business, may be imputed to him and he might be held liable for the firm's wrongdoings. It was a wellknown axiom that":

"A corporation is a fictitious entity. It has neither a mind nor a body of its own"; as a result, its active and directing will must be found in the person of someone who may be referred to as an "agent for certain purposes, but who is really the corporation's guiding mind and will, the corporation's own ego and centre of personality."<sup>22</sup>

*Tesco Stores Ltd. vs. Brent London Borough Council* included a shop staff selling over 18 film to an underage consumer. The Court determined that the Doctrine of Identification could not be used in this case, and hence that the firm was not responsible". This decision was made because top management could not be expected to know each and every customer, regardless of whether the consumer was a child. In such scenario, locating a person with this information was impossible, and hence the theory of identification was inapplicable.

Again, in *R vs. Redfern & Dunlop Ltd. (Aircraft Division)*, the Court decided that nondecision-making personnel could not be 'identifiable' with the corporation and hence were not regarded to be the governing mind of the company". "The issue that arises is whether if a lower-level employee commits a crime in the business's name, the corporation cannot be held accountable for the same. This may provide an issue in that the corporation may create a separation between top management and workers in order to evade criminal prosecution".

### Scope in India

Additionally, we will discuss the rise and significance of the Doctrine of Identification in Indian Law during the last several years. The Supreme Court's most recent decision, *Reliance Natural Resources Limited vs. Reliance Industries*

Limited, deals with the Doctrine of Identification. This lawsuit involves a conflict between two brothers, Mukesh Ambani's RIL and Anil Ambani's RNRL". Following their father "Mr. Dhirubhai Ambani's, death the Amabani Group of Companies split between the two brothers. The parties reached an agreement via the mediation of their mother. Mukesh Ambani had made significant concessions on behalf of the RIL in this familial arrangement, which RNRL sought to rely on in the current case"<sup>[18]</sup>.

"The Bombay High Court found in its verdict that Mukesh Ambani, as the main shareholder, was therefore the company's "controlling mind and intent". The judges observed that under the "Identification Doctrine", the business was "associated with the important employees with whom it works." These "essential employees" were defined as the company's alter ego, and their activities were thought to constitute the company's actions.

The Supreme Court reversed the Bombay High Court's decision on the "Identification Doctrine". It noticed that the family arrangement included three parties: the mother, the two boys, and the father.

The legal entity of the corporation was distinct from the human entity, and in this instance, with over a million stockholders, one person could not be considered to have had information of the firm in his personal capacity. The court rejected this approach because the circumstances of the case did not fit within their preview.

*Union of India vs. United India Insurance Co. Ltd.* and others and *Assistant Commissioner, Assessment – II, Bangalore and others vs. Velliappa Textiles Ltd.* and others are the other Indian instances in which the courts have used the idea of identity<sup>[19]</sup>.

"The first example was an accident at an unmanned level railway crossing in Kerala, in which a leased car was struck by a passing train, injuring passengers and killing the driver. Claims were brought by the wounded and the surviving families of the dead, and the case reached the Supreme Court after several appeals". The "issue in such circumstance was whether the passengers should be held accountable since the negligent driver had been chosen or retained by them. The court considered the identification or imputation principle and whether the defendant may allege contributory negligence on behalf of the plaintiff or an employee of the plaintiff acting in the course of his company in this instance".

In the second case, the issue was whether workers may face incarceration for criminal offences or if the firm was responsible for a fine and/or imprisonment. The court determined that companies cannot be imprisoned since they are neither punishable or prosecuted under the IPC's imprisonment provisions. "The Companies Act created the notion of corporate criminal culpability. Directors' liability has been raised by the Companies Act 2013, which replaced the Companies Act 1956<sup>[20]</sup>. Under the "Companies Act, 2013"<sup>[21, 22]</sup>, not only directors are liable, but also officers in default, which includes in broad terms a full-time director, key managerial personnel, and such other officers in the absence of KMP who have been specified by the participants to be included in that act without raising an objection under the Indian concept of corporate criminal liability.

The United States Supreme Court held in *New York Central & Hudson River Railroad Company vs. United States*<sup>27</sup> that "it is true that some crimes cannot be

committed by corporations by their very nature.” However, there is a class of offences, among which rebating under Federal legislation is one, in which the crime is committed by purposefully violating the statute's prohibitions. “There are no reasons why corporations cannot be held accountable for and charged with the knowledge and intents of their agents operating within the scope of their power. If this were not the case, numerous offences would go unpunished and acts would be committed in violation of the law, particularly where, as in this case, the statute required all persons, corporate and private, to abstain from certain practices that were prohibited in the interest of public policy.”

### Conclusion

The “47th Law Commission Report called for a range of approaches to Corporate Criminal Liability, including providing judges the option to impose fines as they see fit”. In the case of a corporation, it would be acceptable to sentence the offender to a fine alone as opposed to jail and/or a fine. However, lawmakers have rejected the Law Commission's proposal and failed to include any of this, making it more difficult for courts to impose punishments for law violations. It is important to note that corporate criminal culpability may arise in a variety of circumstances. In India, corporate scandals are wrecking havoc. However, as a result of India's progress and affluence, corporations are not held criminally liable, and sanctions are restricted to fines.

There is a need to emphasise the significance of Corporate Culture in both formal and informal policies, laws, and practises, where the company's action is considered a component of the crime when their purpose was supported by the corporate culture. This concept enables a business to prosecute an offender in situations where no individual was involved in the offence.

Existing rules for assessing Corporate Criminal Liability have frequently been criticised and deemed impractical and incompatible with the fundamentals of criminal law. The state should incentivize firms to implement policing techniques to deter crime in the corporate environment. In the case that a firm requires a professional examination, the court should have the right to appoint an acceptable expert or experts to provide a report on the organisation. In addition to or in lieu of imposing a fine, when a company is punished, it should issue one or more orders that it believes will result in dissolution, allowing the courts to evaluate whether reincorporation is viable for penalised corporations.

### References

- Mario De Caro, "Actus Non Facit Reum Nisi Mens Sit Rea". The Concept of Guilt in the Age of Cognitive Science, Neuroscience and Law: Complicated Crossings and New Perspectives, 2020.
- Emile Kolthoff, "Integrity Violations, White-Collar Crime, and Violations of Human Rights: Revealing the Connection" Public Integrity, 2016.
- MP Ram Mohan, Corporate Criminal Liability in India, 2021.
- (2001) 1 CALLT 262 HC.
- AIR 1964 Bom 195, (1964) 66 BOMLR 197, 1964 CriLJ 276.
- Dr Vikrant Yadav, "Corporate Criminal Liability: A Comparative Analysis of Judicial Trend". SSRN Electronic Journal, 2020.
- Andrew M Garbarski, "Switzerland: Corporate Criminal Liability". International Financial Law Review, 2017.
- Arthur H Sherry, Jean F Moreau, Gerhard OW Mueller, "The French Penal Code" California Law Review, 1961.
- Nadiia Bortnyk, Serhii Yesimov, 'LEGAL Regulation Of Measures Of Administrative And Procedural Coercion' Social & Legal Studios, 2021.
- Mark Fenwick, 'Corporate Wrongdoing and the Limits of the Criminal Law', Facing the Limits of the Law, 2009.
- "Roman V. Minin, Lilia V. Ivanova and Galina V. Perezhogina, 'Model of Criminal Corporate Liability in Russia: Subject of Crime or Subject of Liability to Prosecution?' Astra Salvensis". 12He Li, Lu Yu and Wu He, "The Impact of GDPR on Global Technology Development", 2020.
- Monu Chauhan and Pankaj Shah, "Doctrine of Lifting The Corporate Veil" Review Of Research, 2015.
- Simon Parsons, "The Doctrine of Identification, Causation and Corporate Liability for Manslaughter" [2003] The Journal of Criminal Law. 15 [1944] KB 551.
- 2 All ER 515. 17 [1956] 3 All ER 624, 1944.
- Michael J Kirby CMG, "Lord Denning and Judicial Activism" The Denning Law Journal, 2012.
- Out, Special and Petition (n 7). 20Reed (n 24).
- David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century" The University of Toronto Law Journal. 22Frederick Vaughan, Viscount Haldane, 2016.
- Naveen Kumar, 'A Conceptual and Evolutionary Study of Corporate Social Responsibility in India' International Journal on Integrated Education, 2020.
- Lucy Hooper, "Are Corporations Free to Kill? Rethinking the Law on Corporate Manslaughter to Better Reflect the Artificial Legal Existence of Corporations" Plymouth Law and Criminal Justice Review, 2019.
- Companies Act 1956.
- Companies Act, 2013.
- Ill.212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613, 1909.