

CRIMINAL LIABILITY FRAMEWORK OF CORPORATE FINANCING

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ABSTRACT

“Corporate crime is the conduct of a corporation or of its employees acting on behalf of the corporation, which is prescribed and punished by law.”- J. Braithwaite

Corporations have their own legal entity and are treated as such in the eyes of the law. As a result, corporations can be held distinct from any criminal liability that may be imposed on individual members for any crime. The primary concept of criminal responsibility is based on the ‘actus non facit reum nisi mens sit rea’ (Latin maxim) means which effectively means that an act is not incorrect unless it is done with a wrongful state of mind. Only those offences that occur during the course of business operations and for which the corporation bears responsibility are legally accountable. A firm might be involved in omission offences including failing to secure safety mechanisms and other omission offences. Because intent does not play a part in judging claims against corporations, they can be held accountable for crimes that do not require intent.

INTRODUCTION

A company is regarded as a different legal entity from its shareholders. It can be regarded as a group of people working together to achieve a common goal, and it has no legal or technical significance. It is well established that where there is a violation of criminal law, criminal liability is connected. The Actus non facit reum nisi mens sit rea (Latin maxim) states that in order to hold a person or entity accountable, it must be demonstrated that there was an act or omission that was prohibited by law, along with mens rea, which is legally defined as having a guilty mind. It is classified as a type of white-collar crime.

Corporate criminal liability is defined as a crime committed by an individual or group of individuals who, for the purpose of pursuing a common goal or making a profit in the course of their occupation,

commit acts or omissions that are prohibited by law and are done with a guilty mind for the benefit of the corporation or any individual within the group. Earlier in many situations when the concept of holding a corporation liable was not introduced there was not any corporation held liable for any criminal act as the it is an artificial legal person, so it could not be imprisoned, and corporation not being natural person there was absence of mens rea.

When a corporation is hold criminally liable it not only affects the business of corporation but also the individuals in the corporation who are engaged in criminal conduct it may make them suffer criminally and financially. However, it has been suggested in case of punishment to be imposed on corporation it has been suggested that fine should be imposed rather than imprisonment.

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CORPORATION'S LIABILITY FOR CRIMINAL ACTS

A company can be held accountable for its workers' criminal acts as long as the employees are acting within the limits of their job and their actions benefit the company. A company cannot be imprisoned or punished in the same way that an individual may. However, there are various ways to penalise a corporation, including:

- Strict penalties
- Business license(s) being revoked
- Government authorities enforcing regulations

CRIMINAL PENALTIES FOR A CORPORATION HELD LIABLE

A corporation that is held legally accountable for the unlawful activity of its workers may suffer both financially and criminally. Officers, directors, and the corporation itself could all be held accountable for the criminal action. The following sanctions may be imposed:

- State authorities may revoke the corporation's charter.
- Shareholder lawsuits
- Permanent or temporary loss of deposit insurance, conservatorship, and receivership

INDIAN DEVELOPMENT OF CONCEPT OF CORPORATE CRIMINAL LIABILITY-

Corporate crimes are those perpetrated by corporations or members of corporations for which they are held liable for any conduct or omissions that are punishable under the law.

In *Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd.*, a firm was released from liability for defamation because there was no evidence of mens rea, which is an implied condition under the law.

The State of Maharashtra v. Syndicate held that a company could not be prosecuted for offences that entailed corporeal punishment or imprisonment because prosecuting a company for such offences

would result in a trial with a guilty verdict but no effective order could be implemented.

In *Iridium v. Motorola*, the Supreme Court took a different stance than in the previous case, holding that a firm might be held accountable for both statute and common law offences, including those requiring mens rea.

INDIA'S LEGAL STATUS

The Indian Penal Code contains offences that specify significant offences for which a corporate organisation may be found guilty, and the punishment imposed is a mandatory jail sentence.

Saradha 'Chit Fund' Ponzi Scheme

Saradha Group, which collected money from investors by issuing redeemable bonds and secured debentures and promised ridiculously large profits on moderate investments, was exposed as a Ponzi fraud in 2013. Local agents were hired across West Bengal, and they were offered large cash rewards from investor deposits to help them expand swiftly, eventually establishing a conglomerate of over 200 companies. This syndicate was set up to launder money and deceive regulators such as the SEBI. The scheme crashed altogether in April 2013, resulting in a loss of around \$5 billion and bankrupting many of the plan's low-income investors. The CBI has questioned over a dozen TMC MLAs and MPs, including ministers, in connection with the scandal. Many of these leaders were active in the group's operations on a daily basis.

Quasi-Judicial Powers of SEBI

SEBI has the authority to deliver judgements related to fraud and other unethical practices in terms of the securities market. This helps to ensure fairness, transparency, and accountability in the securities market.

Organisational Positioning Functions under S. 11(1) of the SEBI ACT

- Protect the interests of investors in securities.
- Regulate the securities markets.
- Promote the development of securities markets.

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Statutes dealing with Legal Framework of SEBI

- SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018
- SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
- SEBI (Share Based Employee Benefits) Regulations, 2014
- SEBI (Issue of Sweat Equity) Regulations, 2002
- SEBI (Buy Back of Securities) Regulations, 2018
- SEBI (Prohibition of Insider Trading) Regulations, 2015
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- SEBI (Delisting of Equity Shares) Regulations, 2021
- SEBI (Issue and Listing of Debt Securities) Regulations, 2008
- SEBI (Foreign Portfolio Investors) Regulations, 2019
- SEBI (Ombudsman) Regulations, 2003
- SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003
- SEBI (Collective Investment Schemes) Regulations, 1999
- SEBI (Depositories and Participants) Regulations, 2018

Other important powers of SEBI

- Power to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities (Sec. 11A).
- Power to Regulate Collective Investment Schemes (Sec. 11AA).
- Power to issue directions (Sec. 11B).
- Power to levy penalty (Sec. 11B).
- Powers to initiate "Cease and Desist" Proceedings (Sec. 11D).
- Power of adjudication (Sec. 15-I).
- Power to make regulations (Sec. 30).

STATUTORY REGULATION OF SECURITY DEALINGS: LEGAL INSTITUTIONS

- Securities and Exchange Board of India Act, 1992.
- Securities Contracts (Regulation) Act, 1956.
- Depositories Act, 1996.
- Companies Act, 2013.

In *Standard Chartered Bank vs. Directorate of Enforcement*, it was decided that the corporation is subject to criminal prosecution and punishment. The Supreme Court dismissed the idea that the firm could avoid criminal prosecution if a prison sentence was required. Because the company cannot be condemned to imprisonment, the court cannot impose that punishment; but, if both imprisonment and a fine are authorised as punishments, the court can impose a fine against the firm.

In *Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd*, the issue in this case was determining the culpability of a corporation in the event of a cheque being dishonoured. The Supreme Court debated the scope of vicarious responsibility in corporate cases. As a legal entity, the corporation is responsible for the actions of others.

In the case *Iridium India Telecom Ltd vs. Motorola Inc.*, the Supreme Court held that in all jurisdictions across the world which are governed by the rule of law companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing mens rea.

CONCEPT OF CORPORATE CRIMINAL LIABILITY IN INDIA

Courts in India did not punish corporations until the notion of corporate criminal culpability was developed because they believed that vital factor was missing. i.e. Mens rea is absent in corporation it being a fictitious legal entity having no physical existence so also could not be brought physically for the proceedings. However, many legal difficulties

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arose as a result of such a concept, as noted by the Law Commission of India in its 41st Report, where amendments were suggested in the landmark case of Standard Chartered Bank and Ors. v. Directorate of Enforcement, in which the bank was prosecuted for violating provisions of the Foreign Exchange Regulation Act, 1973, where the Supreme Court did not follow the strict penal provisions and held that a corporation can be held liable.

When a company is judged criminally accountable, employees may face criminal and financial consequences as a result of their unlawful behaviour. Officers, directors, and even the corporation are all held accountable, with consequences including civil and criminal penalties, loss of government contracts, permanent or temporary loss of deposit insurance, conservatorship, and more.

In Assistant Commissioner v. Velliappa Textiles Ltd, It was decided that companies could not be imprisoned since they could not be punished or prosecuted under the IPC, which prohibits them from doing so. Under the Companies Act, the notion of corporate criminal culpability was introduced. The Companies Act 2013, which superseded the Companies Act 1956, has raised the responsibility of directors. Under Companies Act 2013, not only the directors are liable, but also the officers in default, which includes in a broad sense a full-time director, key managerial personnel, and such other officers in the absence of KMP who have been specified by the Board of directors, as well as every other director who has information about it or has participated in the act without raising an objection under the concept of corporate criminal liability in India.

The concept of Corporate Criminal Liability under the Companies Act 2013-

- Section 53-Prohibition of shares at a discount.
- Section 118(12)-Minutes of proceedings of General Meeting, Meeting of Board of Directors and other meetings and resolutions passed by Postal Ballot.
- Section 128(6)-Books of Account, etc, to be kept by Company.
- Section 129(7)- Financial Statement.
- Section 134- Financial Statement, Boards re-

port, etc.

- Section 188(5)- Related Party transactions.
- Section 57-Punishment for personation of Shareholder.
- Section 58(6)- Refusal for registration and appeal against refusal.
- Section 182(4)- Prohibitions and restrictions regarding Political Contributions.
- Section 184(4)- Disclosure of Interest by Director.
- Section 187(4)- Investments of the Company to be held in own name.
- Section 447- Punishment for fraud.

Section 21 in Transplantation of Human Organs Act 1994 about Offences by Companies for the purposes of this section.

As per Section 66 of the Food and Safety Standard Act 2006 offences by Companies:

(1) Where an offence under this Act which has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that where a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit.

Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director,

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manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(a) "company" means anybody corporate and includes a firm or other association of individuals

As per section 305 of the Code of Criminal Procedure mentions Procedure when corporation or registered society is an accused.-

(1) In this section, Corporation means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in subsection (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by

the Court.

As per the Section 38 of the NDPS Act, 1985 mentions Offences by Companies-

(1) Where an offence under Chapter V has been committed by a company, every Person, who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this subsection shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to Prevent the commission of such offence.

(2) Notwithstanding anything contained in subsection (1), where any offence under Chapter IV has been committed by a company and it is Proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the Part of, any director, manager/ secretary, or other officer of the company, such director, manager, secretary of other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation- for the purpose of this section, -

(a) "Company" means anybody corporate and includes a firm or other association of individuals.

The corporation can be held criminally responsible for a variety of Crimes namely-

- a. Conspiracy.
- b. Maintaining public nuisance.
- c. Violations of Consumer Protection laws.
- d. The illegal practice of Medicine.
- e. Antitrust laws Violations.

As per the PC Amendment Act Bill 2013, Section 9(1)- A commercial organisation shall be guilty of an offence and shall be punishable with fine, if any person associated with the commercial organisation offers, promises or gives a financial or other advantage to a public servant intending- (a) to obtain or retain business for such commercial

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organisation; and (b) to obtain or retain an advantage in the conduct of business for such commercial organisation: Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person offers, promises or gives a financial or other advantage to a public servant if, and only if, such person is, or would be, guilty of an offence under section 8, whether or not the person has been prosecuted for such an offence. (3) For the purposes of section 8 and this section-

(a) "commercial organisation" means-

(i) a body which is incorporated in India and which carries on a business, whether in India or outside India;

(ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India;

(iii) a partnership firm or any association of persons formed in India and which carries on a business (whether in India or outside India); or

(iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) "business" includes a trade or profession or providing service including charitable service;

(c) a person is said to be associated with the commercial organisation if, disregarding any offer, promise or giving a financial or other advantage which constitutes offence under sub-section (1), such person is a person who performs services for or on behalf of the commercial organisation.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under section 8 and this section shall be cognizable.

Section 10 (1)- Where a commercial organisation has been guilty of an offence under section 9, every person who at the time the offence was committed was in charge of, and was responsible to, the commercial organisation for the conduct of the business of the commercial organisation shall

be deemed to be guilty of the offence and shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under section 9 has been committed by a commercial organisation and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly under this section.

Explanation-

For the purposes of this section, "director", in relation to a firm, means a partner in the firm.

Corporate Culture is the one which comprises of corporate ethics and rules relating to behaviour in a Company. The corporate culture is the one wherein the Culture of the Company depends from organization to organization. It is the beliefs and attitudes which guides the practices of the Company. It can also be termed as the organizational culture.

There are six components of a great corporate culture which can be explained as follows-

1. Vision- One of the components of the great corporate culture is to have a good vision and have a vision or mission statement. It is simple and is considered as foundation element.

2. Values- It is one such element which provides guidelines on the pattern of behaviour to achieve the vision or mission set by the Corporation. Originality of values are to be considered less important than authenticity.

3. Practice- The values which are set by the corporation need to be practised and the company needs to practice what it professes.

4. People- One of the most important elements

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is people wherein if people follow the culture which has been set by the organization it adds to the value structure of that organization. Stringent policies are been followed by the recruiting firms.

5. Narrative- It has been considered as the core element of the Culture Creation wherein every organisation has a unique story and a unique history.

6. Place -Place has been considered as the one which shapes the culture. Place in terms of architecture or Aesthetic design determines the Behaviour and mindset of the people at workplace and the workplace as a whole.

These six components provide for a foundation for shaping the culture of a new organization. When a Company is looking for a change the first step is to identify and understand them carefully when in the existing organization.

CONCEPT OF CORPORATE CRIMINAL LIABILITY IN OTHER COUNTRIES

a) United States of America (USA)-

Earlier in the USA the corporations were considered as a fictitious legal entity and the Mens Rea required to commit a crime was absent in corporations so they weren't held criminally liable but this notion was changed and however in the present scenario although the federal statues may apply but they cannot overrule the state laws in case where it overlaps with state laws and hence a Corporation can be prosecuted for both Federal and State laws. The punishment given under the laws of this country is that there is punishment by fine or confiscate Property which can be levied by the orders of the Court. Generally, when there is violation of a Statue the punishment is either fine or imprisonment or both as per the Courts order but it does it applies to corporation as well and the rule applies that if fine is not paid then punishment of imprisonment can be given.

b) Switzerland-

The concept of Corporate Criminal liability in Switzerland was introduced in the late of 2003 where it was based on the subsidiary liability which

stated that corporations can be held liable when fault cannot be attributed to a specific individual due to lack of organisation within the enterprise and also the Criminal fines range upto five Swiss francs.

c) France-

The concept of Corporate Criminal liability in French law under Article 121(2) of the new French Penal code. According to the law in this country there are three requirements which need to be fulfilled in order to impose a liability on a legal entity. The first requirement is that French legislature must have enacted a substantive criminal offence which the corporation must have contravened, the second requirement being that the actual criminal liability must lie with the agents or representatives of that corporation on which liability of corporate criminal liability will be imposed. The third requirement is that the acts which are criminal in nature and criminal liability can be imposed must be for the benefit of the Corporation. It provides a list Statutory Criminal Liability.

d) Germany-

In present situation in Germany companies cannot be held liable as per the German Law but those individuals who commit crime can be held accountable for their actions even if those actions are for Company's benefit however fines can be imposed on companies under the Administrative offences Act. In order to make a company to hold liable the individuals who commit the criminal or administrative offence must belong to the person mentioned in the group of persons under section 30 para 1.

e) Japan-

In Japan there is a provision of known as dual criminal liability provision wherein the Company as well as the business operator and the perpetrator can be held liable and this provision was introduced in the Act which is the Prevention of Capital Outflow in the year 1932. A company will be held liable when the crime is committed not only by the Senior Executives but also any of the employees of the Company however the company will not be held liable in case the crime has been committed by the Act of Third parties.

f) Russia-

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In Russia the liability of a Company is either Civil or Administrative in case it commits illegal conduct as there is no concept of criminal liability for companies which exists in case of individuals. In this country under their administrative legislation Company is considered as a separate legal entity and may commit acts known as the administrative offences.

g) UK-

The EU General Data Protection Regulation along with the UK Legislation is set to introduce new criminal offences for corporates which will not be relied on the basis of identification principle where prosecutions will be in instances of cybercrime and misuse/manipulation of personal data.

CONCLUSION

It is a well-established legal premise in criminal law doctrine that companies are subject to criminal culpability. A company can commit a crime and be held criminally accountable. However, Indian legislation does not keep up with these changes, and corporations are not held legally accountable. Even if they do, the statutes and court interpretations impose no penalties other than a fine. Even the Supreme Court has stated that a separate law is needed to provide for the imposition of criminal liability on corporations. The 47th Law Commission Report recommended various solutions to deal with corporate criminal liability namely that the judges should have the discretionary powers to impose penalties as it deems fit to them. In case of a corporation, it would be competent enough if it is a corporation to sentence the offender with fine only rather than imprisonment and fine or only imprisonment. Note that corporate criminal liability can arise from various circumstances.

However, with the growth and developments which take place in India the corporations are not made criminally liable and if punishments are given then no other than except fines are to be imposed. There is a need to attach the significance of Corporate Culture in both formal and informal polices, in rules and practices wherein the corporation is considered as a conduct element of offence which has been

committed by it when their cause was encouraged by culture of Corporation. It becomes possible through this concept for a corporation in cases where there is no involvement of individual in committing an offence.

The existing standards in terms of assessing the Corporate Criminal liability has often been criticized and has also been termed unrealistic, inconsistent with the fundamentals of the criminal laws. In terms of corporate context in order to deter crimes the state should induce the firms to take policing measures. In case of professional assessment of the corporation, the court should have the power to appoint suitable person or persons to prepare report on corporation. When a corporation is sentenced in addition to imposing a fine or instead of imposing a fine it should make one or more orders in such a way that it considers that it will achieve the objectives of sentencing. Stricter punishments need to be imposed like corporate dissolution wherein the courts will be able to see whether any reincorporation can happen in cases where there is penalized corporate. The concept of Sustainable Development professed by the Government has substantially failed in its efforts to control such crimes affecting largely the society.

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