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CORPORATE CRIMINAL LIABILITY AND ISSUE OF GOVERNANCE

Abstract

"A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings" **- Glanville Williams**

Corporations have now became an integral part of our society, and with development of corporations they have become significant actor in our economy. Our society runs the risk of getting victimized by these corporation, and therefore they should be deterred too. In this day and age of scams, crime by corporate entities throws a lot of challenges at multiple levels. The level of crime may be extraordinary owing to the magnitude, powers and reach of such corporations as opposed to an individual committing any crime. Once it is found that a corporation has committed a crime, the next question is *whether corporations can be held guilty of such crimes since they do not have minds of their own.*

Criminal liability encompasses two elements: *actus reus* (guilty act) and *men srea* (guilty mind). There is no dispute that a company is liable to be prosecuted for criminal offences.

Imposition of punishment, upon offenders of any kind, can be understood by various rationale of criminal law jurisprudence, but deterrence is the rationale that is applicable to such economic entities as corporations. Corporations have their own identity, they have separate legal personality and they are different from their members, and this is sufficient to hold them liable and censure them. However, the company being an artificial person cannot have the

requisite *mensrea*, hence further question arises *whether a company could be prosecuted for an offence for which the mandatory sentence is imprisonment.*

The law has evolved from the position that a company cannot be prosecuted for offences that require imposition of a mandatory imprisonment, to the position that the *mensrea* of the 'alter ego' of the company (i.e. the person or group of people that guide the business of the company) will be imputed to the company as laid down by the Supreme Court in Iridium India Telecom case.

This paper has been divided into different chapters so as to provide a meaningful and in depth understanding of the whole topic. It starts with focusing on Common Corporate Crimes and why it is necessary to address them. The next chapter deals with the liability in cases of Corporate Crimes and how the concept of Actus Reus and Mens Rea is proved in such cases. Since it is a difficult task to hold a Corporation Criminally liable the researcher also looks into various theories of Corporate Criminal Liability and how these theories helped Courts to affix liability on corporations. The next chapter of paper provides space to landmark decisions of Supreme Court. This chapter deals with judicial approach towards corporate liability and how it changed through the course of time. It also brings into light the current law of the land as held by apex court.

As we know Deterrence and Financial Penalty are two most important objectives of punishment in such cases, so the paper ends by suggesting some alternative models of punishment and their merits and de-merits.

KEYWORDS: Corporate Criminal Liability, Supreme Court, Company, Offences, Directors, Corporate Governance.

What is Corporate Crime?

Braithwaite defines corporate crime as the “conduct of a corporation, or of employees acting on behalf of the corporation, which is proscribed and punishable by law.”

Corporate crime not only includes acts in violation of criminal law, but civil and administrative violations as well. Second, both corporations (as “legal persons”) and their representatives are recognized as illegal actors. Which or whether each is selected as a sanction target will depend

on the kind of act committed, rules and quality of evidence, prosecutory preference and offending history among other factors.

Why is it important to address Corporate Crimes?

A limited liability corporation is the perfect vehicle for a crime. A company can poison an entire reservoir or river, or wipe out a town, run away with your grandmother's term deposit, or convert the sacred lands of native people to radioactive wastelands. For the worst of these, the liability is limited to civil damages not exceeding the assets of the company. And, any creative accountant will tell you how to manage your assets in times of liability.

Corporations usually have other powerful allies on their sides - the law, the law-makers and the law-enforcers. The courts have had a difficult time coming to grips with the corporation as a criminal. The company's criminality is seen to arise from the criminal acts of those who manage or direct it.

Even worse, awareness about or acknowledgement of the seriousness of corporate crimes is yet to permeate the corridors of power. The National Crime Records Bureau, for instance, has little data on white-collar or corporate crimes. Such crimes, however, represent a monumental loss of public money - the bank scams, the bankrupt NBFCs, the non-performing assets in public sector banks, illegal lockouts, and the numerous violations of food, product, environmental and workplace safety regulations.

Ralph Nader, an American consumer activist, identifies corporate crime as one of the most pressing issues facing society. Citing various governmental and industry sources, Nader establishes that white-collar and corporate crimes in the US are far more damaging than street-level crimes.

In India, this pattern is not likely to be vastly different. Efforts to tackle such crime are grossly inadequate. To a great extent, companies provide the food we eat, the water we drink, the necessities and luxuries of everyday living. Increasingly, particularly with growing privatization, it is not the State that provides these amenities - but companies. Such companies generate wealth for the economy and their shareholders and provide employment for much of the population. Short of a revolutionary restructuring of the economy and the political institutions of the country, it is certain that the power and influence of companies will grow

and not diminish in the foreseeable future, with corporate crimes emerging as the new face of criminal law.

But, with great power comes great responsibility. Just as individuals owe a duty not to harm or injure others in society without justification, so do companies owe a duty not to poison our water and food, not to pollute our rivers, beaches and air, not to allow their workplaces to endanger the lives and safety of their employees and the public, and not to sell commodities, or provide transport, that will kill or injure people.

Common Corporate Crimes

While dealing with the "corporate crime" the acts which are against the corporation are the wrongs which are done by the managers or employees for the benefit of the company as well as for the individual benefit.[1]

Corporate crime is different from the traditional crimes which are committed by the individuals. As such there is no separate branch for the crimes which has been committed by the corporate. Major types of corporate crimes are bribery, counterfeiting, embezzlement, bank fraud and blackmail etc. Let us have a look at Major Corporate Scams in India;

1. **Sahara Scam[2]**

In this cases, Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) floated an issue of option of fully convertible debenture (OFCD's) to more than million investors and termed their issued debenture as private placement, with a defence that the company did not intend to get their OFCD's listed because the security which have been issued is a Hybrid Security.

During this period, the company had total collection of over Rs. 17,656 crore. This amount was collected from 30 million of investors.

[1] http://www.oxfordlawtrove.com/view/10.1093/he/9780199590278.001.0001/he-9780199590278-chapter21
[2] *Sahara India Real Estate Corporation and Ors. v. SEBI*, [2012] 174 Comp Cas 154 (SC).

The Hon'ble Supreme Court on 31st august, 2012 in one of the most anticipated judgment of recent times has directed the Sahara Group and its two group companies SIRECL and SHICL to refund around Rs. 17,400 crore to their investors within 3 months.

2. **Saradha Chit Fund Scam**[3]

One of the biggest Ponzi schemes in West Bengal that enjoyed political patronage and lured millions of investors to deposit money with the promise of abnormally high returns including fancy holidays etc. The chit fund eventually collapsed leading to defaults after a crackdown by SEBI and the Reserve Bank of India. The default, apart from leaving small depositors high and dry, also led to 10 media outlets owned by Saradha being forced to wind up, leaving 1000 journalists jobless.

3. **Speak Asia Scam**

An online business survey firm that collected thousands of crores of rupees from over 24 lakh investors, asking them to fill surveys and guaranteeing to quadruple their income in one year, Speak Asia was accused of running a Ponzi scheme. A criminal case was registered against the firm in 2011, some accounts frozen and its business shutdown.

4. **Satyam Scam**[4]

An accounting scandal where Ramalinga Raju confessed to having cooked up the accounts of Satyam Computers and inflated its bank balances. He has, along with his family members, also been accused of laundering money through a mesh of hundreds of companies.

5. **Ketan Parekh Securities Scam**[5]

Parekh was involved in circular trading and stock manipulation through 1999-2001 in a host of companies. Like his mentor Harshad Mehta, Parekh too borrowed from banks like Global Trust Bank and Madhavpura Mercantile Co-operative bank, and manipulated a host of stocks popularly known as K-10 stocks.

[3] *SubrataChattoraj v. Union of India*, (2014) 8 SCC 768.
[4] *Union of India v. Satyam Computer Services Ltd.*, 2009 (148) CC 629.
[5] *Ketan V. Parekh v. Enforcement Directorate*, (2011) 15 SCC 30.

In the recent past, several cases of prosecution being launched by SEBI against companies have surfaced. Several other cases of bankruptcy, mass violations of SEBI investor protection guidelines etc. have also surfaced.

Concerns over corporate crimes have also been deeply expressed by the Indian Judiciary and the Law commission of India. In its 47th report on the trial and punishment of socio-economic offences, has dealt comprehensively with the issue of corporate criminal liability and made several recommendations on the issue of company's and principal officer's liability. The same have been incorporated at various points in this research paper.

Theories of Corporate Criminality

Criminal liability encompasses two elements: *actusreus* (guilty act) and *mensrea* (guilty mind). There is no dispute that a company is liable to be prosecuted for criminal offences. However, the company being an artificial person cannot have the requisite *mensrea*, hence the question whether a company could be prosecuted for an offence for which the mandatory sentence is imprisonment.

Over a period of time, there have been several obstacles in holding a corporation criminally liable and necessary theories have been evolved time and again to overcome these hurdles. Some of these obstacles were:

- The first obstacle was attributing acts to a juristic fiction.
- The second obstacle was that legal thinkers did not believe that corporations could possess the moral blameworthiness necessary to commit crimes of intent.
- The third obstacle was the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters.
- The fourth obstacle was courts' literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court.

The following theories help us resolve these dilemmas –

1. Vicarious Liability
2. Corporate Fault
3. Identification Doctrine

4. The Aggregation Theory
5. Corporate Culture.

1. Vicarious Liability

A company would be charged with a criminal offence only if it could potentially be vicariously liable for the wrongdoing of its senior management. The significant feature about vicarious liability is that it is not necessary to identify the principal offenders in order for their employer to be held vicariously liable.

The criminal law model of vicarious liability was adapted from the law of torts. In the American context, a corporation may be criminally liable for the acts of its officers, agents or servants who are acting within the scope of their employment and for the benefit of the corporation. Vicarious liability, therefore, is another method of imputing the illegal acts of employees to the corporation itself.

Vicarious liability casts a wide net, although the attribution of liability to the corporation is not as "automatic" as some have suggested. First, it must be found that an individual employee committed the crime with the requisite state of mind and, if that mens rea element is established, it is imputed to the corporation itself; the mens rea can also be shown on the basis of collective knowledge on the part of employees as a group, even though no single employee possessed sufficient information to know that a crime was being committed.

Secondly, the employee must have acted within the scope of employment. This has been held to include any act that occurred while the offending employee was carrying out job-related activity and, accordingly, this is a very wide, perhaps easily met standard. Finally, the employee must have intended to benefit the corporation; this requirement has been very broadly interpreted by American courts.

Aside from the sheer breadth of this vicarious liability doctrine, it may be criticized for distorting the concept of fault, particularly in relation to mens rea offences, since the fault of an individual is readily transferred to the company without proof of the latter's misfeasance or malfeasance. A corporation's efforts to pr event illegal activity by employees may be ignored in the application of the vicarious liability doctrine.

2. Identification Theory

It is a legal fiction in that it focuses on the actions of the "directing mind" of the corporation and merges individual and corporate persons in order to assign criminal liability to the latter.

The theory is narrower than vicarious liability. It requires that the corporation take responsibility for those with decision-making authority over matters of corporate policy (rather than only implementing policy). It is not sufficient merely to establish that any employee or agent acted criminally. In the United Kingdom, the target group is confined to the board of directors, the managing director and other highly-placed managers.

The identification theory has been criticized for its limited application. It is premised on the court being able to ascertain key managers who not only have control over making corporate policy, but have also actually committed an offence.

3. **Attribution or Alter-Ego Theory**

The doctrine of attribution implies that the criminal intent of the “alter ego” of the company / body corporate, i.e., the person or group of person that guide the business of the company, would be imputed to the corporation. Mens rea is attributed to the company on the basis of the alter ego of the company.

4. **Corporate Culture**

With the Australian Criminal Code Act, 1995, the Commonwealth of Australia adopted a broader concept of "corporate culture" as the premise for corporate criminal liability.

For mens rea offences (those requiring intention, knowledge or recklessness as a fault element), the Act attributes fault to the body corporate where it expressly, tacitly or impliedly authorizes or permits the commission of such an offence. Such authorization or permission can be established by any of the following four means:

- Proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or
- Proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or

- Proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- Proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

There are thus two major ways of attributing criminal liability to the corporation: proving that senior management carried out the relevant conduct with the requisite degree of intent; or, through a "corporate culture" analysis. The former approach resembles the identification doctrine, with its emphasis on the "directing mind", except that the Australian Act codifies a definition of "high managerial agent" as "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy".

The Act also explicitly provides a due diligence defence to where "the body corporate proves that it exercised due diligence to prevent the conduct, or the authorization or permission" of the high managerial agent. This defence could exonerate the corporation where a director acts illegally and contrary to the explicit orders of the board of directors.

The expansive definition of "corporate culture" in the Act invites the court to delve deeply into corporate operations. The court can be expected to examine such factors as: management structure, policy directives, monitoring of compliance by employees regarding legal requirements, patterns of compensation and rewards for behaviour, etc. It may probe beyond official policies into actual practices that encourage law-breaking, for example, pressure to meet production schedules that leads to violations of the law.

5. Reactive Corporate Fault

The "corporate mens rea" argument, however, is undermined if corporate delinquency is viewed as largely negligent behaviour, or perhaps "gross negligence", in the criminal law context. The mens rea, from this perspective, receives little attention in the "corporate fault" model. Instead, rather than a requirement of proof of a unique, corporate mens rea, some have suggested that a "reactive corporate fault" theory be applied. It would stress the existence of an actus reus in combination with the remedial measures taken by the company. As a legal construct, it would only assess "fault" after the company was given a chance to fix the problem.

In effect, mens rea and actus reus would not be contemporaneous. Offences against the person would be treated as offences of "reactive non-compliance".

This approach obviously represents a departure from traditional approaches to criminal liability. It also raises the significant question of whether or not the mens rea will ever (need to) be established at any time in the process. Nevertheless, this model does raise the important factor of compliance as an objective of the criminal law.

6. Theory of Corporate Organs or Aggregation Theory

This doctrine, which was specifically developed for the purpose of imposing liability on corporations, seeks, in fact, to imitate the imposition of criminal liability on human beings. The direct doctrine relies on the notion of personification of the legal body. It identifies actions and thought patterns of certain individuals within the corporation called corporate organs who act within the scope of their authority and on behalf of the corporate body, as the behaviour of the legal body itself. Hence, the name of the doctrine: the theory of corporate organs or the alter ego doctrine referring to these individuals as the embodiment of the legal body. In its wake corporation can be rendered criminally liable for the very perpetration of the offences, resembling the liability imposed on a human perpetrator, subject to the natural limitations that follow from the character of the corporations as a legal personality.

Apart from these, there are two more theories regarding corporate criminal liability– 'Nominalistic' and 'Realistic'. Nominalistic theory of corporate personality view corporations as nothing more than collectives of individuals. In this an individual first commits the offence; the responsibility of that individual is then imputed to the corporation. According to Realist approach corporations have an existence, which is to some extent independent of the existence of its members. Here, the responsibility of corporation is primarily. The 'Realist' theory looks more convincing and practically applicable.

So far as the guilty mind of the company is concerned to prove the mental element portion of offence the Courts considered the guilty mind of the directors or managers of the company

assist of the Company. The liability of the company was considered as a statutory or vicarious liability.[6]

Supreme Court on Liability of Corporation and its Officials

The law has evolved from the position that a company cannot be prosecuted for offences that require imposition of a mandatory imprisonment[7], to the position that the *mens rea* of the 'alter ego' of the company (i.e. the person or group of people that guide the business of the company) will be imputed to the company as laid down by the Supreme Court in ***Iridium case***[8].

Now, a corporation can be convicted of offences involving *mens rea* by applying the doctrine of attribution. Thus, the corporation can be held responsible for offences committed in relation to the business of the corporation by the persons in control of its affairs. The legal position in the US and UK has also crystallised to ensure a corporation can be held liable for crimes of intent. In the UK, the courts have adopted the doctrine of attribution to the corporation liable for acts committed by the directing mind, i.e., the directors and managers.

It is now clear that the criminal intention of the company's directors or officials can be attributed to the company to make the company liable. However, the question then arises whether the reverse is possible – i.e. whether the officials of the company can be held responsible for acts of the company? This question was recently answered by the Supreme Court of India in ***Sunil Bharti Mittal* v. *Central Bureau of Investigation***[9]. The Apex Court in this case in no uncertain terms held that an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company. However, to make an individual liable, there must be sufficient evidence of his active role coupled with criminal intent and/or a provision must be specifically incorporated into the statutory regime that attracts the doctrine of vicarious liability. It may thus be noted that when the company is the offender, vicarious liability of the directors cannot be imputed automatically, in the absence of any statutory provision to this effect.

[6]*H.L.Bolton Company v.T.J.Graham& Sons,* (195603 All.E.R.624);*Tesco Supermarkets Ltd v.Nattrass,*(1971)2 All.E.R.127(HL).
[7]*Asstt. Commr. v. Velliappa Textiles Ltd.,* (2003) 11 SCC 405.
[8]*Iridium India Telecom v. Motorola Incorporated and Others,* (2011) 1 SCC 74. *Also see Standard Chartered Bank v. Directorate of Enforcement,* (2005) 4 SCC 530*; Lee Kun Hee, President. Samsung Corpn., South Korea v. State of U.P.,* (2012) 2 SCC 132*; Aneeta Hada v. Godfather Travels and Tours (P) Ltd.*,(2012) 5 SCC 661.
[9](2015) 4 SCC 609.

It is worth clarifying that a person cannot be held liable merely on the basis of the designation. No presumption can be drawn against the person occupying the position of a chairman or managing director only on the basis of their position. There is no universal rule that a director of a company is in charge of its everyday affairs. A person should fulfil the 'legal requirement' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfil the 'factual requirement' of being a person in charge of the business of the company.

Certain legislations have a provision titled as 'Offences by Companies', which makes the person in charge of and responsible at the time of commission of the offence liable for that offence along with the company unless the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commissioning of such offence. Under the said provision, the director, manager, secretary or any other official of the company may also be held liable if it is shown that the offence was committed with his consent or connivance.

With regard to the criminal liability of a non-executive directors (NED) and independent directors (ID) specifically, the Companies Act has introduced the 'knowledge' test (including through the Board's processes) for IDs and a NED[10] (not being a promoter or a KMP) similar to a standard vicarious liability of directors' provision. However, this immunity granted to NEDs and IDs is limited only for the offences under the Companies Act and not under any other legislation. A few recent episodes of the Supreme Court passing certain drastic interim orders to attach bank accounts of IDs of certain real estate companies appear to be cases of judicial reaction to bad facts in those cases.

Corporate Criminal Liability under Companies Act, 2013

Companies Act, 2013 which has replaced the Companies Act, 1956 has increased the corporate liability of the directors. The Act has also increased the monetary penalties and imprisonment. Not only corporate criminal liability under Companies Act, 2013 is recognized but the act also recognizes civil liabilities. The Companies Act, 2013 not only makes the director criminally liable but also include officers in default under the concept of corporate criminal liability in India.

[10]Section 149(12), Companies Act, 2013.

The term Officer in a default is a broad term and can include whole-time director, key managerial personnel and such other directors in the absence of KMP who has been specified by the Board of Directors and every other director who is aware of the default which is being done by virtue of receiving of board proceedings or by participating in same without raising any objection or where non-compliance has taken place with his consent or connivance.

The corporate criminal liability is recognized under the following sections of the Companies Act, 2013 -

- *Section 53 - Prohibition on an issue of shares on discount* – The company will be fined for the amount not less than one lakh but which may extend up to five lakhs. Further, the officer in default may be imprisoned for up to six months or fine of minimum one lakh which may extend to five lakhs or both.
- *Section 118(12) - Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot*- If a person is found tampering with the minutes of meeting then such an officer in default may be imprisoned for the term which may extend to 2 years or with fine of not less than twenty-five thousand but may extend to one lakh.
- *Section 128(6) - Books of account, etc., to be kept by Company- Officer in default- Maximum imprisonment of 1 year or Fine*- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
- *Section 129(7) - Financial statement - Officer in default- Maximum imprisonment of 1 year or Fine*- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
- *Section 134 - Financial statement, Board's report, etc- Company-Fine*- Not less than Rs. 50,000 and may extend to Rs.25 lakhs and Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
- *Section 188(5) - Related party transactions*- In case of unlisted Company, be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.
- *Section 57 - Punishment for personation of shareholder*- Such person in default- Minimum 1 year to Maximum 3 years imprisonment or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs.

- *Section 58(6) - Refusal of registration and appeal against refusal*- Such person in default- Minimum 1 year to Maximum 3 years imprisonment or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs.
- *Section 182(4) - Prohibitions and restrictions regarding political contributions.*- Company-Fine- 5 times of the amount of contribution in contravention and Officer in default- Maximum imprisonment of 6 months and Fine- 5 times of the amount of contribution in contravention.
- *Section 184(4)- Disclosure of interest by the director* - Such person in default- Minimum 1-year imprisonment or Fine- Not less than Rs. 50,000 and may extend to Rs. 1 lakh or both.
- *Section 187(4)- Investments of Company to be held in its own name* - Company-Fine- Not less than Rs.25,000 and may extend to Rs.25 lakhs and Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both.
- *Section 447- Punishment for fraud* - Any person who is found to be guilty of fraud- Maximum imprisonment of 6 months may extend to 10 years. Such person also liable to fine which may extend up to 3 times the amount involved.

Conclusion

One of the main objects of corporate criminal liability is to ensure that companies improve their work practices. If no individual who has committed a crime can be identified and no mechanism for corporate prosecution was to exist, the harmful practices would continue unabated. Companies should be prosecuted and convicted for the same general offences as individuals and subject to the same general rules for the construction of criminal liability. The law should recognize and give effect to the widely held public perceptions that companies have an existence of their own and can commit crimes as entities distinct from the personnel comprising the company. Prosecution of companies, particularly when accompanied by media attention, can provide a significant impetus to companies to improve their practices or can prompt law reform to improve safety standards.

However, without prejudice to the above argument, pinning liability on principal officers is also a very important component of corporate criminal liability and is only like to assume greater importance in future. Behind the corporate ceil, one can always find the human agents carrying out the activities of the corporation.

Since a corporation has no physical body on which a pain of imprisonment could be inflicted, traditional punishments prove ineffective and new and different punishments have to be devised. The real penalty for a corporation in my opinion is the diminution of respectability i.e. the stigma.

In the public mind the offence should be linked with the name of the corporation and not merely the director or the manager. As regards punishment, imposition of a hefty fine in lieu of imprisonment does solve the problem to a certain extent, but in my opinion it is also necessary that there should be some kind of a procedure, like a judgment of condemnation, to be available in the case of socio-economic offences. This could be analogous to the concept of public censure in the case of individuals. It goes without saying that confiscation and similar penalties would naturally ensue.

In many cases it has been seen that corporation itself, through its policies or practices has done wrong and prosecution and punishment should be directed at the real wrongdoer. In many cases there is no individual who, alone, has committed a crime. It is the conjunction of the practices of several individuals, all acting in compliance with a company's sloppy or non-existent procedures, that has caused the harm. Alternatively, in many cases companies have complex structures with responsibility buried at many different layers within the corporate hierarchy making it difficult, if not impossible, to determine where the true fault lies.

It is concluded that since the company enjoys all rights and privileges as a separate legal person, it is only fair that it also undertakes responsibility for its actions instead of hiding behind the corporate veil.

Required Amendment

It is well established that the burden of proving the required mental element is on the prosecution which, in accordance with the general rule applicable to criminal proceedings, is required to prove its case beyond reasonable doubt.

It may appear at times by looking at the facts of a particular case relating to economic offence that it is of only minor significance, however there is behind the curtain, a ring of associates engaged in committing a number of crimes. It is difficult to prove these crimes before the court in conformity with the traditional principles of standard of proof. The moral conviction of

responsible enforcement officers is difficult to be translated into legal conviction in the minds of the judicial agencies operating in the traditional manner. The mental element undoubtedly exists; however, it is difficult to prove the same. The act that has caused damage has been unearthed; the mind behind it remains unproved. Such a situation in the opinion of the Law Commission is highly harmful.

For these reasons, the **47th Law Commission** came up with a solution which, while preserving the requirement of *mensrea* shifted the burden of proof on the accused. They further suggested that petty cases causing minor injuries did not require the creation of a special rule as to burden of proof, however for acts causing substantial damage a departure as to the burden of proof was justified. Thus, what should ideally be required for such major offence is that prosecution requires proving that the accused committed the *actusreus* of the particular offence and then, it is upto the accused to prove that he committed the *actusreus*innocently.

Alternate Models of Compliance

1. **Enforced Self- Regulation**

Enforced self-regulation combines the benefits of voluntary self-regulation with the coercive power of the state. Businesses are in a much better position to keep a check on themselves than the state. This is because the inspections can be more regular and in-depth. Internal auditors will be better informed about business practices and the thus the potential for misconduct will be minimized. Self-regulation thus avoids excessive governmental intrusion into business, which may create 'delay, red tape, costs and stultification of innovation.

Hence to enforce self-regulation with external pressure can be suggested as one of the alternate models for corporate governance.

The basic components that Enforced Self- Regulation seeks to include are:-

1. Each firm required to put together a set of rules or standards that are relevant to its transaction contingencies.
2. Internally developed rules to be evaluated and approved by the relevant regulatory agencies.
3. Third parties have sufficient opportunity to comment on the proposed rules.
4. Compliance responsibilities and costs to be assumed by the firm.

5. Rule violations punishable by law.
6. Compliance Officer to report to relevant regulatory agencies whenever management overrules compliance group directives; neglecting this duty may result in the criminal prosecution of the officer.
7. Prosecutorial resources will be directed towards firms that systematically and irresponsibly disregarded compliance group recommendations.

However, it is important to note that every company's compliance structure and operation has to vary according to the unique 'contingencies facing that firm'. Also, for enforced self-regulation to be an effective technique for corporate governance, there needs to be just and effective internal compliance system. It has been suggested by Braithwaiteand Fisse as to what characteristics an ideal internal compliance system should incorporate. They are as follows:

1. Compliance personnel granted intra-organizational influence and top management support.
2. Compliance accountability clearly articulated and resting with line managers.
3. Compliance monitored and deviations reported to responsible personnel.
4. Compliance problems effectively communicated to persons who are in a position to do something about it.
5. Adequate compliance training and supervision.

2. Occupational Disqualification

It is argued that for effective deterrence a more serious, credible and threat of punishment is required. Most business crimes are not spontaneous and managers as a rule are sensitive to changes in risks. Courts can presumably dissuade them from employing the corporate form in an illegal manner if the personal objectives they seek to attain through illegality are sufficiently jeopardized by the deprivations levied upon them after conviction.

Disqualification penalizes the convicted executive in several ways as a sanction which bars the offenders from pursuing his chosen occupation and it is thus tantamount to a fine because it imposes costs in terms of lost work opportunities. It offers a way to extract a fine from an executive who has for whatever reasons no present ability to pay a substantial fine and also a means of extracting a fine in those instances where corporate indemnification would reimburse executives for judicially imposed fines.

Disqualification may also serve to prevent corporations from informally indemnifying a convicted executive through use of added benefits and bonuses. Moreover, because the media might spotlight an unusual corporate disclosure, such as an increased salary or benefit package to a disqualified executive, the risk of embarrassment may serve to prevent the corporation form shifting formally unindemnified fines of a disqualified employee over to the corporation.

Disqualification in a way may also assist in changing the attitude of the corporation towards crime. Vaguely perceived legal threats will not promote organizational re-evaluation of company policy, especially when the criminal actions were tacitly supported, or at least not strongly condemned by the organization.

Deterrence is however not the only theory of punishment underlying disqualification. Society must also justifiably protect itself by incapacitating those who have demonstrated their readiness to succumb to illegality.

Further, at times locating criminal responsibility within the firm is a daunting task, imprisonment thus becomes rare and fines are indemnified- then only indirect consequences- such as the executive's fear of losing his position or the tarnishing of his good reputation- comprise the main deterrent against executives.

The inadequacy of corporate internal sanctions indicate the need for external limitations on who may serve in a particular executive capacity, it is argued that disqualification represents an unprecedented intrusion into the prerogative of private sector business management. Essentially, what is thus happening is that all state corporation statues are for instance assigning to the corporation the right to decide what measure if any should be taken to ensure against future employee misconduct.

Disqualification besides deterring and incapacitating directors also aims at upholding the community values and the expectations are also served by the imposition of punishment against executives who violate laws designating as criminal certain modes of business behavior.

3. Informal Social Control

A majority of us act in law abiding manner because to do otherwise would violate personal values and collective sensibilities. Significant others would be disappointed in us if they were to learn of our acts. This sense of shame and embarrassment can go along way in ensuring

corporate compliance. Essentially informal social control exercises more power over human behavior, than does formal social control.

Braithwaite and Fisse define informal social control as “behavioral restraint” by means other than those formally directed by the court or administrative agency. The two mechanisms proposed by these writers are adverse publicity and stigma or public censure. These things can either be done informally i.e. generated by sources external to the legal system or levied formally also i.e. as part of a legal sentence.

Public Censure is also a recommendation of the 47th Law Commission. Unlike street criminals, reputation is a rather prized possession for the companies, and thus the rationale of such a mechanism of corporate compliance is hardly in dispute.