

## **Corporate Crime and Sentencing in India: Required Amendments in Law**

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### **Abstract**

*This paper details out the framework of corporate criminal liability and sentencing. The law has bound the courts to impose only fine as a form of punishment for corporate which needs to be solved by evolving and incorporating new forms of punishments upon the corporate such that the real purpose of punishments i.e. deterrence or reformation such as fine or a penalty is achieved. The author has attempted to put forward these innovative kinds of punishments and a model for the same.*

### **Introduction**

This paper details out the framework of corporate criminal liability and sentencing. It traces the source and final verdict of the Courts with regard to the concept of Corporate Criminal liability and also puts light over the inability of the Court in properly sentencing the guilty corporates due to inadequacy of law. The law has bound the Courts to impose only fine as a form of punishment for corporates which needs to be solved by evolving and incorporating new forms of punishments upon the corporates such that the real purpose of punishments i.e. deterrence or reformation is achieved. The author has tried to put forward these new kinds of punishments and a model for the same.

### **1. Criminal Liability: The Concept**

Criminal Liability is attached only those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions.<sup>2</sup> The basic rule of criminal liability revolves around the basic Latin Maxim *actus non facit reum, nisi mens sit rea*. It means that to make one liable it must be shown that act or omission has been done which was forbidden by law

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<sup>2</sup> Abhishek Anand, *Holding Corporations Directly Responsible For Their Criminal Acts: An Argument*, [www.manupatra.com](http://www.manupatra.com), visited on March 2, 2006.

and has been done with guilty mind. Hence every crime has two elements one physical one known as *actus reus* and other mental one known as *mens rea*.<sup>3</sup> This is the rule of criminal liability in technical sense but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour<sup>4</sup>. Although the general rule as stated above is applicable to all criminal cases but the criminal law jurisprudence has seen one exception to the above said concept in form of doctrine of strict liability in which one may be made liable in absence of any guilty state of mind. This happens in cases of mass destructions through pollution, gross negligence of the company resulting in widespread damages like in the Bhopal Gas tragedy, etc.<sup>5</sup> Hence, there can be no dispute of imposing criminal liability on corporations as regards *no mens rea* requiring offences but however, it used to come to be questioned before the Chartered Bank judgement when *mens rea* was concerned.

## **2. Criminal Liability of Corporates: The Indispensability.**

In the modern day world, the impact of activities of corporations is tremendous on the society. In their day to day activities, not only do they affect the lives of people positively but also many a times in a disastrous manner which come in the category of crimes. For instance, the Uphar Cinema tragedy or thousands of scandals especially the white collar and organized crimes can come within the categories that require immediate concern. Despite so many disasters, the law was reluctant to impose criminal liability upon corporations for a long time. This was for basically two reasons that are<sup>6</sup>:

- That corporations cannot have the *mens rea* or the guilty mind to commit an offence; and that corporations cannot be imprisoned,

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<sup>3</sup> *actus reus* connotes those result of human conduct which is forbidden by law and hence constitutes of Human action; result of conduct and act prohibited by law<sup>2[5]</sup>. One other hand *mens rea* is generally taken as blame worthy mental condition: Russell, W.O., *Russell on Crime* p.17-51 (J.W.C. Turner Ed., New Delhi; Universal Law Publishing Pvt., 2001).

<sup>4</sup> A. Ashworth, *Principles of Criminal Law* p. 79-81 (Oxford: Clarendon Press, 1991) cited by Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. Cal. L. Rev. 1141

<sup>5</sup> *Assn. of Victims of Uphaar Tragedy v. UOI*, 104(2003)DLT234, *Rylands v. Fletcher*.

<sup>6</sup> *Zee Telefilms Ltd. v. Sahara India Co. Corporation Ltd.*, 2001 (3) Recent Criminal Reports (Criminal) 292; *Motorola Inc. v. UOI*, 2004CriLJ1576.

V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477; Beck & O'Brien, *Corporate Criminal Liability*, 37 American Criminal Law Review 261; Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857, 857-58 (1984).

the only other remedy being left is that of fine which merges criminal liability with that of a civil one.

These two obstacles were in the late 20<sup>th</sup> century and very early 21<sup>st</sup> century. The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable. In the early 1700s, corporate criminal liability faced at least four obstacles. The first obstacle was attributing acts to a juristic fiction, the corporation. Eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century. The second obstacle was that legal thinkers did not believe 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. Finally, the fourth obstacle was courts' literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court.<sup>7</sup>

### **3. The solution to Second Obstacle (Corporate Mens Rea).**

Courts in United States were slow to extend corporate criminal liability to crimes of intent<sup>8</sup> and the process in India was even slower. Now, it is well settled that a corporate can be held liable for committing offences that require mens rea as now it has been recognized that a corporate can have a mens rea. Generally, corporations may be held criminally responsible for the illegal acts of its employees if such acts are<sup>9</sup> related to and committed within the course of employment,

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<sup>7</sup> V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477; Beck & O'Brien, *Corporate Criminal Liability*, 37 American Criminal Law Review 261; Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857, 857-58 (1984)

<sup>8</sup> *State v. Morris & Essex Railroad Co.*, 23 N.J.L. 360, 364 (1852); *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 345 (1854). According to Elkins, one reason for this reluctance was simply that intent raised novel issues because it was not a required element in the first cases that extended criminal liability to corporations. Moreover, some nineteenth-century commentators argued that the criminal law required that the convicted defendant be morally blameworthy and have the capacity to suffer from punishment, and corporations could not fulfill either of these requirements. Furthermore, finding corporations guilty of crimes of intent rather than punishing the agents and principals who actually carried out the crimes seemed to support the controversial and unpopular concept of vicarious criminal liability.

<sup>9</sup> *US v. Jorgensen*, 144 F3d 550; *US v. Route 2, Box*, 60 F3d 1523 (CA11 1995); *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co.*, 833 F2d 633 (CA7 1987); The proper standard for jury instruction is that the corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within scope of their authority, or apparent authority, and for benefit of corporation. *United States v. Basic Const. Co.*, 711 F2d 570 (CA4 1983); *State v. Municipal Auto Sales, Inc.*, 222 So 2d 278 *Davis v. State*, 225 Ga App 564, 484 SE2d

committed in furtherance of the business of the corporation and its imbibed culture; for example, if the corporate structure is so organized as to deprive senior managers of the information they need to exercise such powers, this would indicate a corporate culture that is designed to elude law enforcement. Generally, deficient structures for the dissemination of information within the firm would also be suspect. Moreover, in organized crime networks, the culture and the objective of the corporation in itself is to commit crimes, authorized or acquiesced in by the corporation. In these cases, the corporate itself authorizes and sometimes directs its employees to enter into unethical business practices which are sanctioned by the organization structure like in case of recovery wherein hiring of antisocial elements is directed many a times.

Hence, there is no obstacle in the criminal law jurisprudence whatsoever to impose criminal sanction on a corporate since it can have a mind of its own and also an environment wherein crime is nurtured. However, this concept still not contemplated in the statutes in India which the later section explains in more detail.

#### **4. The Statutory Inadequacy**

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

- Sections. 45, 63, 68, 70(5), 203, etc of the Indian Companies Act wherein only the officials of the company are held liable and not the company itself; it is also reflected through the Takeover Code.
- The various sections of the IPC that direct compulsory imprisonment does not take a corporate into account since such a sanction cannot work against the corporation.

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

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284 (1997); Where corporation president was convicted of bribery on behalf of corporation, and statute provided that corporation charged with such conduct would not be awarded state contracts, corporation was properly denied state contract even though president was no longer employee of corporation. *Polyvend, Inc. v. Puckorius*, 88 Ill App 3d 778, 411 NE2d 316.; corporation subject to criminal fine for employee's violation of consent decree: *US v. Twentieth Century Fox Film Corp.*, 882 F2d 656 (CA2 1989)

1. Sec. 141 of the Negotiable Instruments Act, 1862: Balaji Trading Company v. Kejriwal Paper Ltd. and Anr.<sup>10</sup>
2. Sec. 7, Essential Commodities Act: State of M.P. v. N. Singh<sup>11</sup>
3. Section 276-B of the Income Tax Act: M.V. Javali v. Mahajan Borewell & Co.<sup>12</sup>

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

## 5. The International Paradigm

Such legislative changes have already taken place in Australia, France (Penal Code of 1392), Netherlands (The Economic Offences Act, 1950 and Article 51 of Criminal Code), and Belgium (in 1934, Cour de Cassation recognised the punishment of a corporate body by making it a subject of Belgian Criminal Statute). Germany practices a sort of administrative sanction to deviant corporations and doesn't recognize criminal liability of corporations. The Canadian Federal Criminal Code<sup>13</sup> was amended as far back as in 1909 whereby a fine could be substituted for a sentence of imprisonment, made the corporate criminal liability possible. The European Council in 1988 made a recommendation to the member states to carry out necessary amendments in their respective criminal statutes to ensure corporate liability. Whereas, the United Kingdom follows the alter ego or identification approach to fix corporate liability in criminal cases.

In **Australia**, the Criminal Code is based upon the findings of a sub-committee of the Standing Committee of Attorneys-General from Federal, State and Territory Governments, which was formed to consider the development of a uniform criminal code for Australian jurisdictions. The Report favoured adoption of a species of corporate criminal liability which recognised independent corporate fault and would cast a substantially broader and "much more realistic net of responsibility over corporations" than the narrow liability under Tesco. The Committee's primary objective was to develop a liability scheme which "as nearly as possible, adapted personal criminal responsibility to fit the modern

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<sup>10</sup> 2005CriLJ3805

<sup>11</sup> [MANU/SC/0545/1989](#)

<sup>12</sup> [MANU/SC/0975/1997](#)

<sup>13</sup> Section 718 of the Canadian Criminal Code imposes fine to corporate offenders and Section 720 provides special enforcement procedure for fines on corporations.

corporation". The Committee's alternative model of corporate criminal liability is now found in Pt 2.5 of the Criminal Code.

These provisions will be a bellwether for future developments in Australia in the field of corporate criminal responsibility and corporate governance generally. The structures of the provisions under Pt 2.5 of the Criminal Code are as follows. Section 12.1 provides that the Code applies, with necessary modifications, equally to bodies corporate as to natural persons, specifying that a "body corporate may be found guilty of any offence, including one punishable by imprisonment". Section 12.2 imposes vicarious liability upon the corporation for the physical elements (though not the mental element) of the offence when committed by any employee, agent or officer within the actual or apparent scope of employment. Under s.12.3 (1) of the Criminal Code, the requisite element of fault in an offence, characterised by, for example, intention, knowledge or recklessness, is established on the part of the body corporate itself, where the body corporate has "expressly, tacitly or impliedly authorised or permitted the commission of the offence".

The position of law regarding the same in **U.S.** is that the punishment of corporate crime is based on the doctrine of 'Respondent Superior', whereby agent's conduct is imputed to the corporation. A corporation may be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment.<sup>14</sup> The nature of incorporeal legal entities requires courts look to employees of the corporation as a means of imputing intent, or mens rea,<sup>15</sup> as well as the guilty act, or actus reus,<sup>16</sup> to the corporation. Courts hold a

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<sup>14</sup> [N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 491-95 \(1909\)](#) (finding corporation liable because it acts only through its agents or employees whose knowledge and purpose may be attributed to the corporation); see also [United States v. Photogrammetric Data Serv., 259 F.3d 229, 242 \(4th Cir. 2001\)](#) (holding that a corporation can act only through the conduct of its agents). For an in-depth discussion of the development of corporate criminal liability before N.Y. Cent., see generally Shaun P. Martin, [Intracorporate Conspiracies, 50 STAN. L. REV. 399, 406 \(1998\)](#).

<sup>15</sup> See [N.Y. Cent., 212 U.S. at 493](#) ("[A] corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element." (quoting [Telegram Newspaper Co. v. Commonwealth, 52 N.E. 445, 446 \(Mass. 1899\)](#))); see also [United States v. Sain, 141 F.3d 463, 475 \(3d Cir. 1998\)](#) (noting if agent of corporation conspires with another, corporation may take on mental state of agent through doctrine of respondeat superior and be criminally liable for conspiracy); [United States v. Sun-Diamond Growers, 964 F. Supp. 486, 490 \(D.D.C. 1997\)](#) (noting many circuits have required government to "establish, beyond a reasonable doubt, that the agent acted within the scope of his employment with the intent to benefit the corporation" in order to hold corporation liable for acts of its employees).

<sup>16</sup> See [N.Y. Cent., 212 U.S. at 494](#) (holding corporation can be held responsible for illegal act of authorized employee of company). Actus reus, or the "guilty act," is defined as "[a] wrongful deed that comprises the physical



corporation vicariously liable for the acts of its employees if the individual: (i) acted within the scope and nature of his employment;<sup>17</sup> (ii) acted, at least in part, to benefit the corporation;<sup>18</sup> and (iii) the act and intent can be imputed to the corporation.<sup>19</sup>

In an effort to deter corporate crime more effectively, the US Sentencing Commission established a number of sentencing guidelines.<sup>20</sup> The Guidelines promulgate a wide range of sanctions available to the courts.

While corporate offenders are generally punished by way of fines in the United Kingdom, the US Guidelines embrace radical remedial goals.<sup>21</sup> Restitution orders are mandatory for all federal offences. To this end, the offender must make a payment to the victim of the crime, with the aim of "making the victim whole again for the harm caused". The Guidelines also promulgate an appropriate punitive fine range for convicted organisations.<sup>22</sup>

## **6. The Corporate Punishment – Whether only fine is Possible?**

In India, certain statutes like the IPC talk about kinds of punishments that can be imposed upon the convict and as per Sec. 53 include death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine. In certain cases the sections speak only of imprisonment as a punishment like in case of Sec.420 thereby the problem arises as to how to apply those sections upon the companies since a criminal statute needs to be strictly interpreted wherein there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminality, the Courts in India have finally recognized that a corporation can have a guilty mind

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components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act." BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>17</sup> [United States v. One Parcel of Land, 965 F.2d 311, 316 \(7th Cir. 1992\)](#) (stating agent's knowledge of illegal act may be imputed to corporation if agent was "acting as authorized and motivated at least in part by an intent to benefit the corporation" (citing [Zero v. United States, 459 U.S. 991 \(1982\)](#))).

<sup>18</sup> *id.*

<sup>19</sup> [In re Hellenic, Inc., 252 F.3d 391, 395 \(5th Cir. 2001\)](#) ("An agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority.").

<sup>20</sup> FN58. "United States Sentencing Commission Guidelines Manual" (1991), Chap.8 (hereinafter "USSG"). The guidelines were in fact initially for individuals but were expanded to encompass corporations.

<sup>21</sup> FN60. R.S. Gruner, "Beyond Fines :Innovative Corporate Sentences Under Federal Sentencing Guidelines" (1993) 71 Washington University Law Review 261 at 267.

<sup>22</sup> FN63. USSG 8 C1.1.

but still were reluctant to punish them since the criminal law in India does not allow this action. In *The Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors.*<sup>23</sup>, B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The Court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41<sup>st</sup> Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines:

*"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only."*

As per the jurisprudence evolved till then, under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of 'person' in the Indian Penal Code includes 'company'. It is also worthwhile to mention that our Parliament has also understood this problem and proposed to amend the IPC in this regard by including fine as an alternate to imprisonment where corporations are involved in 1972.<sup>24</sup> However, the Bill was not passed but lapsed. Such a fundamental change in the criminal jurisprudence is a legislative function and hence the Parliament should perform it as soon as possible

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<sup>23</sup> AIR2004SC86

<sup>24</sup> The proposed Indian Penal Code (Amendment) Bill, 1972, Clause 72(a) reads as hereunder:

"Clause 72(a)(1) - In every case in which the offences is punishable with imprisonment and fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. (2) - In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. Explanation: - For the purpose of this section, 'company' means any body corporate and includes a firm or other association of individuals."



by also considering the following arguments that the author has brought about.

However, the Apex Court later overruled this decision in *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors*<sup>25</sup> on account of providing complete justice to the aggrieved which could not be prejudiced in the garb of corporate personality. In this case, the Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate. The Court looked into the interpretation rule that that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of.<sup>26</sup> Simultaneously, it also considered the legislative intent and held that all penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. It was of the view that here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to commonsense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes. If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element. These Courts have applied the doctrine of impossibility of performance [*Lex non cogit ad impossibilia*] in numerous cases including the aforementioned.<sup>27</sup>

Finally, the Court decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the

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<sup>25</sup> AIR2005SC2622

<sup>26</sup> *Tolaram Relumal and Anr. v. The State of Bombay* [MANU/SC/0057/1954](#) and *Girdhari Lal Gupta v. D.H. Mehta and Anr.* [MANU/SC/0487/1971](#).

<sup>27</sup> *State of Rajasthan v. Shamsher Singh*, 1985(Supp.) SCC 416; Special Reference No. 1 of 2002 reported in [MANU/SC/0891/2002](#)

same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

The well known maxim '*judicis est just dicere, non dare*' best expounds the role of the court. It is to interpret the law, not to make it. This read with the Doctrine of Separation of Powers has bound the Court's hands in imposing various kinds of punishments and all that it is left with is to impose fines. In order to avoid compelling the Courts to go out of the statute and interpret and therefore define the law which is essentially the task of the legislature<sup>28</sup>, it is advised that the legislature amends the various penal statutes in a way so as to bring in various forms of punishments for the corporations as well, thereby maintaining the separation of powers regime and hence the rule of law.

## **7. Corporate Punishment**

Till now, the Courts have been able to impose only fine as a form of punishment because of statutory inadequacy and lack of new forms of punishments which could be imposed upon corporates.

### **7.1. The Feasibility of Fine.**

Fine is the most common punishment in every part of the world and it is a punishment the advantages of which are so great and obvious that we propose to authorize the courts to inflict it in every case... Imprisonment, transportation, banishment, solitude, compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine it is necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mullet which is ruinous to the labourer is easily borne by a tradesman and is absolutely unfelt by a rich zamindar."<sup>29</sup>

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<sup>28</sup> *Asif Hameed and others v. State of Jammu & Kashmir*, AIR1989SC1899

<sup>29</sup> Ahmed Siddiqui, *Criminology*, page120

The imposition of fines may be made in four different ways as provided in the IPC. It is the sole punishment for certain offences and the limit of maximum fine has been laid down; in certain cases it is an alternative punishment but the amount is limited; in certain offences it is imperative to impose fine in addition to some other punishment and in some it is obligatory to impose fine but no pecuniary limit is laid down. Fines can be an effective punishment in cases of traffic offences or offences against property. But where the offence is grave, in the sense of murder or rape or kidnapping for death etc., it is questionable whether fine can achieve the object of punishment. Another shortcoming of this form of punishment is that it pins the poor and eases the rich. The rich can easily get away by paying a huge fine while the poor may have to toil hard even to get a hundred rupees. Nevertheless, its efficacy in specific crimes has made it a necessary mode of sanction. This shows that biggest drawback in restricting fine as the sole form of punishment to corporates since with their massive bank accounts, it is easy for them to get away with the criminal liability and it also does not solve the purpose of punishment since neither the corporates would be deterred nor would they be retributed for the crimes like corporate killings that they have committed (for instance: using poor quality of material in building dams which would soon collapse thereby dislocating and even killing inhabitants around the area or the labourers themselves).

Looking into the above drawbacks, there is a need to evolve new forms of punishments which could effectively deter the corporates from engaging into any criminal activity.

## **7.2 Towards New Forms.**

Presently, all the sections include only fine as a form of punishment that can be imposed on a company. So is the case with judicial pronouncements on the aspect of sentencing. In addition to this, the Law Commission in its 41<sup>st</sup> Report also speaks of introducing only fine as an additional punishment to be imposed upon corporations in lieu of fines. This restrictive thinking, according to Courts is based on the maxim *lex non cogit ad impossibilia*, which tells us that law does not contemplate something which cannot be done.<sup>30</sup> This reasoning in itself

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<sup>30</sup> *Commissioner of Sales Tax v. Union Medical Agency* [MANU/SC/0396/1980](#); *Kartick Chandra v. Harsha M. Dasi*, AIR 1943 Calcutta 35 at 354; *Edmund N. Schuster v. Assistant Collector of Customs, New Delhi*, AIR 1967 Punjab 189; *State of Maharashtra v. Syndicate Transport*, AIR 63 (1966) Bom 197; *Knightsbridge Estates Trust Ltd. v. Byrne and Ors.*, 1940 (2) All ER 401

shows that the law lacks in a non holistic viewpoint in the concept of corporate criminal liability.

The Courts have no doubt been efficient in evolving the concept of criminal liability of corporates and have imposed the same on the convicts but the only way of imposition that has been thought of is by way of fines. It is now for the legislature to evolve new forms of punishments and incorporate them in the criminal justice system of the land. The legislature may take the following suggestions.

These other forms (including fine), can be classified into the following major heads:

- Economic Sanctions
- Social Sanctions.

These sanctions are all designed keeping in view that deterrence is the ultimate objective of penal law making companies liable since other accepted theories like reformation cannot be introduced where a juristic mind is concerned.

**Economic Sanctions:** these sanctions would include various kinds of monetary and other forms which would cause huge losses to the company as a whole. Apart from fine, they can include the following:

- Corporate Death or order for winding up only in cases of continuous criminal behaviour in the given field. For instance, exit order of the corporate from the division in which its criminal behaviour has been found continuously. For instance, the food department of a corporate can be directed to be shut if despite several warnings, poisonous or objectionable substances are adulterated. Such a sanction could have been imposed in the famous oil adulteration scam that came up around 7 years back causing loss of many lives. It may also ordered at the first instance itself without giving any warning when due to the intentional activities of the corporate, people might lose their lives like manufacture of low quality engines for airplanes which would lead to their crashing thereby causing huge loss of lives.
- Temporary closure of the company for a given period depending upon the gravity of the act till the time compliance with norms can be ensured. This can be an alternative to the above course when the act is not that harmful to the society. For instance, a corporate being closed for causing pollution till the time it does not arrange for a pollution free technology.

- Rehabilitation of victims of crime. In such a form of punishment, the corporate would be ordered to rehabilitate the victims in a manner such as to erase any traces of the effect of the crime. For instance, cleansing of the riverbanks that have been polluted as a result of toxic disposal. Though it would take some time but this would also assure that the crime has been undone.

Such schemes are already operational in Germany. Compulsory welfare or reinstatement activities are to be undertaken in the affected areas over there. Its corporations are subject to administrative sanctions for public welfare or administrative offences.<sup>31</sup>

- Payments of high sum as compensation to the victims of crime as were paid in the Bhopal gas tragedy. Compensation to a victim may be made in three different ways. The State may be made responsible for the payment of compensation, or the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim or the court trying the offender can, in addition, to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence.<sup>32</sup>

Section 357, CrPC, empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, inter alia, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence.<sup>33</sup>

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<sup>31</sup> Anne Ehrhardt, Unternehmensdelinquenz und Unternehmensstrafe: Sanktionen gegen juristische Personen nach deutschem und US-amerikanischem Recht 23 (1994); L.H. Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View, 80 Mich. L. Rev. 1508, 1509 (1982); Gerhard O.W. Mueller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21, 29 (1957)

<sup>32</sup> Ahmed Siddiqui, *Criminology*, page 139.

<sup>33</sup> Sub-section (1) of the section reads: When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

- a. in defraying the expenses properly incurred in the prosecution;
- b. in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
- c. when any person is convicted of any offence for having caused death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death; when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to

The Supreme Court of India while discussing the scope and object of Section 357 Cr.P.C. in *Hari Krishnan and State of Haryana v. Sukhbir Singh*<sup>34</sup> observed that it is an important provision but the courts have seldom invoked it, perhaps due to the ignorance of the object of it. It empowered the courts to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in our criminal justice system.”

However, since Section 357 (1) is subject to some limitations<sup>35</sup>, it should be categorized as a separate form of punishment itself which is not dependent on the quantum of fine or constitutional provisions.<sup>36</sup>

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believe the same to be stolen, in compensation any *bonafide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

<sup>34</sup> AIR 1988 SC 2127

<sup>35</sup> N.K. Chakraborty, *Victim assistance and compensation to crime victims under Indian Criminal Justice System in National Seminar on victimology*, pp.9-10:

1. Compensation to victims can be awarded only when substantive sentence is imposed and not in cases of acquittal.
2. Quantum of compensation is limited to the fine levied and not in addition to it or exceed the fine imposed.
3. Compensation can be ordered only out of fine realized and if no fine is realized, compensation to victim cannot be directed to be realized.
4. In very rare cases under IPC, the maximum amount of fine is imposed. Moreover the maximum fine as prescribed in IPC amount 150 years back is now inadequate in terms of real losses to victims.
5. Compensation to victim under this section can be allowed by the court if it is of the opinion that the compensation is recoverable by such person in a Civil Court.

<sup>36</sup> The right to compensation has also been recognized as an integral part of right to life and liberty under Art. 21 of the Indian Constitution. As early as in 1983, the Supreme Court recognized the petitioner's right to claim compensation for illegal detention and awarded a total sum of Rs. 35000 by way of compensation. In delivering the judgment, Chandrachud C.J. observed: “ Art 21 which guarantees the right to life and liberty will be denuded of its significance content if the power of this Court were limited to passing orders of relief from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Art 21 secured is to mullet its violators in the payment of monetary compensation (Rudul Shah v. State of Bihar AIR 1983 SC 1086). In *Sebastian Hongray v. Union of India* (AIR 1984 SC 1026) two women filed a writ of habeas corpus to produce their husbands who were missing and alleged to have been murdered. The authorities failed to produce them and the Court directed the respondents to pay Rs. 100000 to each of the wives of the missing persons. In several cases thereafter, the apex court has repeated its order, making compensation an integral aspect of right to life.( *Bhim Singh vs. State of Jammu& Kashmir* (1985) 4 SCC 577; *People's Union for Democratic Rights vs. State of Bihar*, 1987 (1) SCR 631; *People's Union for Democratic Rights Thru. Its Secy. vs. Police Commissioner, Delhi Police Headquarters*, (1989) 4 SCC 730; *Arvinder Singh Bagga vs. State of U.P.* (1994) 6 SCC



- Delisting, this is practiced in many cases.

**Social Sanctions:** Goodwill, for any body corporate is its heart and soul. Once, that is lost, the entire strength comes to a standstill. The term 'reputation' carries with it more than one meaning. For individuals, reputation loss connotes both the individual's sense of shame and others' increased reluctance to do business in the future with the individual<sup>37</sup> or corporations, however, reputation loss refers only to the reluctance of others, such as customers and workers, to deal with the corporation in the future. Of course, the managers of the corporation may feel shame about their corporation's conviction. As applied to corporations, reputation refers, for example, to the supracompetitive price that a firm with a good reputation can charge customers for its products or the lower wages that a 'good' employer can pay while still attracting workers.<sup>38</sup>

Once this is harmed, it would create a deep stigmatizing effect on the corporation since its business would come to a standstill with no customers. This can be done by asking the corporate to publish this crime widely compulsorily and fund the publication as well. This will act as a strong deterrence for not to commit crimes and the shareholders also would come in an active role in stopping the active organizational structure from authorizing committal of such crimes. However, in certain situations reputation sanctions are not effective against corporations. Because activities that harm third parties, such as environmental pollution, do not directly affect a firm's customers, the firm will be unlikely to suffer a reputation loss for engaging in those activities.<sup>39</sup> Also, firms that lack reputations, such as 'fly-by-night' firms, cannot really suffer a reputation loss. This would also make the share value less attractive to be invested in thereby leading to huge financial losses also.<sup>40</sup>

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565; In Re: Death of Sawinder Singh Grower (1995) Supp. (4) SCC 450; Inder Singh vs. State of Punjab (1995) 3 SCC 702; D.K. Basu vs. State of West Bengal (1997) 1 SCC 416; State of M.P. vs. Shyam Sunder Trivedi (1995) 4 SCC 262; People's Union for Civil Liberties vs. Union of India (1997) 3 SCC 433; Dr. Jacob George vs. State of Kerala (1994) 3 SCC 430; Paschim Bangal Khet Mazdoor Samity vs. State of West Bengal & Ors.(1996) 4 SCC 37 and Mrs. Manju Bhatia vs. N.D.M.C. (1997) 6 SCC 370.

<sup>37</sup> David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 393-94 (1990).

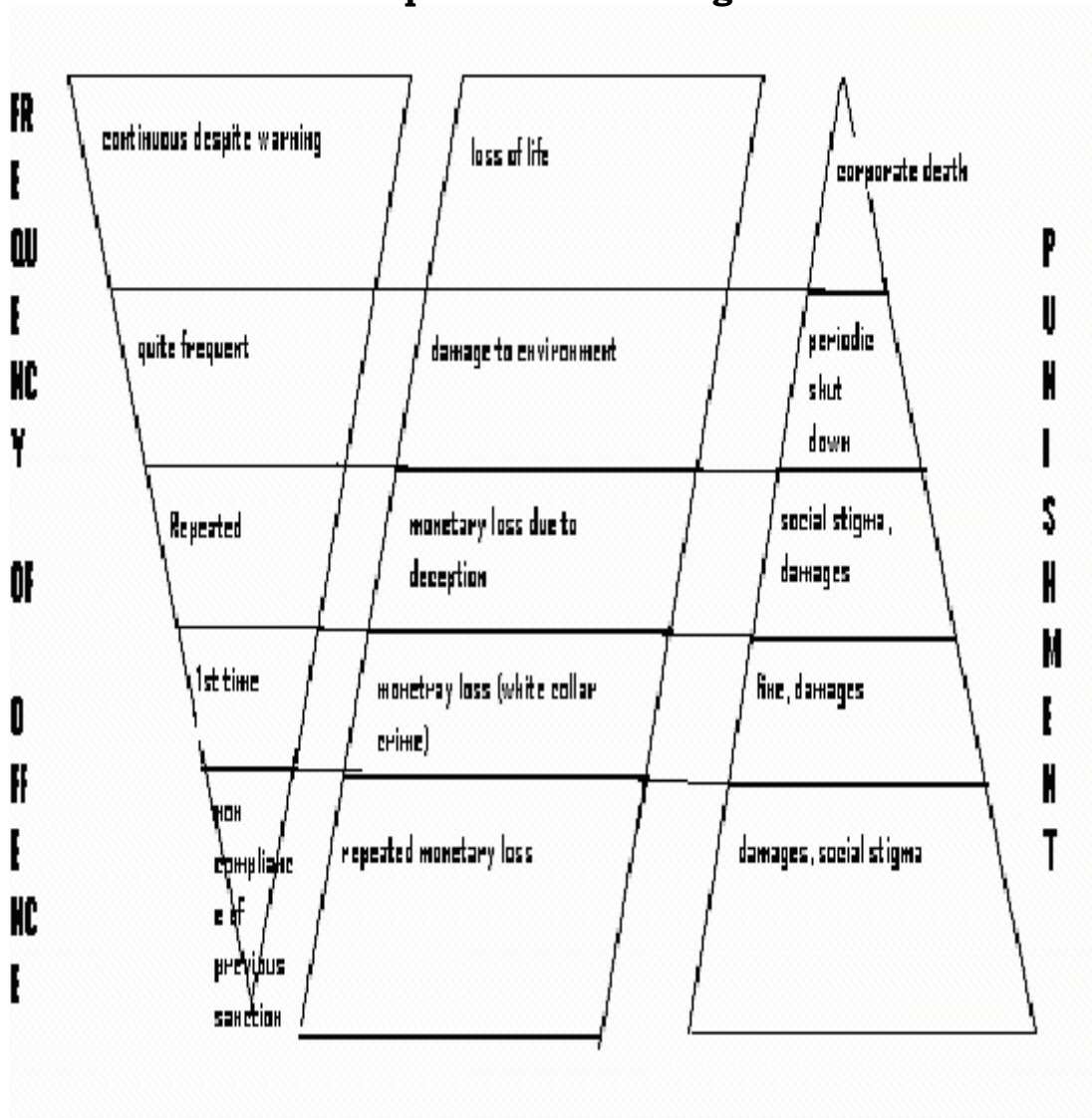
<sup>38</sup> V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477

<sup>39</sup> Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, 71 B.U. L. Rev. 247, 249-50 (1991); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & Eco n. 757, 757-60 (1993) (suggesting that criminal fines do not need to be increased any further).

<sup>40</sup> Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 555 (1984)

Such sanctions should also be incorporated in Sec. 52 for the corporates apart from the traditional forms of punishment that are already there in the section. The other statutes like Essential Commodities Act, Food Adulteration Act, Companies Act, etc., also require such sanctions to be imposed so as to adopt a just approach of punishment which is required for deterrence as fine cannot deter all corporates in all cases. The gravity of each of these punishments should vary with the gravity of the act committed, a reference to which would give us the following model of sentencing:

### The Corporate Sentencing Model



This model of sentencing provides with an illustration as to how the existing penal law of India should be amended so that it would serve the purpose of sentencing corporate bodies in a just manner and simultaneously also keeping pace with the theory of proportionality of crime and punishment.

### **Conclusion**

From the above analysis, it is proved that the criminal law jurisprudence relating to imposition of criminal liability on corporations is settled on the point that the corporations can commit crimes and hence be made criminally liable. However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. It is therefore recommended that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the statutes fit for strict interpretation by providing for infliction of criminal liability on the corporations as also providing for various kinds of sanctions apart from only fines.

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