

# CORPORATE CRIMINAL LIABILITY: A REVIEW IN LIGHT OF TATA-ULFA NEXUS

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## I. INTRODUCTION

It may be some time before the Tata Tea Ltd. can get out of the ULFA controversy. Although the story goes back several years, it began to unfold in August-September 1997 when an ULFA associate was discovered having connections with the company. Tata Tea Ltd. was found to have fully sponsored the medical expenditure of a top ULFA associate. As the inquiry intensified, it became apparent that this incident was only the tip of the ice berg. It soon followed that Tata Tea Ltd. had been supporting and assisting the outlawed terrorist organisation.

This article is not about political battles, neither is it a fact giving dossier of some commission. The article merely analyses the likelihood of fixing criminal liability on the company based on the presumption that it did support an antinational terrorist organisation. In doing so, the author has taken the opportunity to review the conceptual understanding of a much debated issue - corporate criminal liability.

At a preliminary level there are four obstacles in attaching criminal liability to corporations.

1. Attributing acts to a juristic person; since a corporation is only a legal entity it cannot "act" as a human being does.
2. Corporations cannot possess the moral blameworthiness necessary to commit crimes of intent.
3. The *ultra vires* doctrine under which courts have refused to hold corporations accountable for acts such as crimes, that were not provided for in their constitutional documents.
4. A literal understanding of criminal procedure which requires the accused to be brought physically before the court.

## II. HISTORICAL BACKGROUND

The growth of corporate criminal liability can be traced in the terms of the following four stages. This is also a chronological account of how the courts overcame the following obstacles:

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1. *Public Nuisance* - Courts in England and the United States first imposed corporate criminal liability in cases involving non-feasances of quasi-public corporations such as municipalities, that resulted in public nuisances.<sup>1</sup>
2. *Crimes not requiring criminal intent* - As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisance to all offences that did not require criminal intent. In the *Queen v. Great North of England Railways Co.*<sup>2</sup> Lord Denman ruled that corporations could be criminally liable for misfeasance and American courts soon began following this trend.<sup>3</sup> This development eventually encouraged courts to extend corporate criminal liability to all crimes not requiring intent.
3. *Crimes of intent* - Courts were slow to extend corporate criminal liability to crimes of intent. Not until *New York Central and Hudson River Rail Road Co. v. United States*<sup>4</sup> in 1909 did the Supreme Court clearly hold a corporation liable for crimes of intent. The motivating factor of this result was the need for effective enforcement of law against corporations. Creation of corporate personality had otherwise created too large a vacuum vis-a-vis application of criminal law to corporations.
4. *Expansion of corporate criminal liability* - Various historical developments in Western Europe as well as United States further contributed to the growth and expansion of corporate criminal liability. However one of the most important factors favouring criminal liability over civil liability was that the public civil enforcers did not possess as much enforcement power as criminal enforcers did.

There emerged specific statutes, rules, regulations and notifications which spelt out corporate criminal liability in clear terms. However, even in western countries, standards vary with each legal system applying a different model of corporate criminal liability.<sup>5</sup> The following part discusses two categories of these models.

### III. TWIN MODELS OF CORPORATE CRIMINAL LIABILITY

#### A. *Derivative Model*

This model seeks to attach liability to a corporation as a derivative of

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1 *The King v. Inhabitants of Lifton*, 101 Eng Rep 280 (KB 1794), *Rex v. Inhabitants of Great Broughton*, 9B Eng Rep 418 (KB 1771), *Case of Lanford Bridge*, 79 Eng. Rep. 919 (KB 1635).

2 115 Eng Rep 1294 (QB 1846).

3 *State v. Morris & Essex Rail Road Co.*, 23 N J L 360 (1852); see *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass (2 Gray) 339 (1854). American Courts followed English precedents and indicated corporations for affirmative acts (misfeasance) that resulted in public nuisance.

4 212 US 431 (1909).

5 G. Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 ICLQ 493 (1994).

individuals liability. This is an individual centered model wherein the corporation enters only at the secondary level.

i) *Vicarious Liability*

In *Commonwealth v. Beneficial Finance Co.*,<sup>6</sup> three corporations were held criminally liable for a conspiracy to bribe, the first company, for the acts of its employee, the second, for the act of its Director, and the third, for the acts of the Vice-President of a wholly owned subsidiary. The Court felt that corporate criminal liability was necessarily vicarious, since a corporation is a legal fiction comprising only of individuals.

Vicarious liability has generally been rejected in criminal law. In the context of criminal law, it has ~~been~~ considered unjust to condemn and punish one person for the conduct of another without reference to whether the former was at fault of what occurred. Nevertheless, vicarious liability has been an important part of the history of the law of corporate criminal liability. Even the Indian Courts seem to have adopted the same.<sup>7</sup>

ii) *Identification Doctrine*

The doctrine of identification equates the corporation with certain key personnel who act on its behalf. Their conduct and states of mind are attributed to the corporation. These personnel are said to represent the "directing mind" of the corporation.

As with vicarious liability, the persons who are identified with the corporations must be acting within the scope of their employment or authority. The conduct must occur within an assigned area of operation even though particulars may be unauthorised.<sup>8</sup> In comparison with vicarious liability, the identification doctrine narrows the scope of corporate criminal liability by restricting the range of persons who can make the corporations liable. It thus eliminates much of the over inclusive effect of vicarious liability. Moreover, the identification doctrine addresses issues of culpability more appropriately than does vicarious liability.

Identification liability is a modified term for vicarious liability, under which the liability of a restricted range of personnel is imputed to a corporation.<sup>9</sup> Instead of all employees and agents having the capacity to make the corporation liable, only some category of persons with directorial or managerial responsibilities have this capacity.

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6 *Scoff Massachusetts*, 1971 360 Mass 188, cf *WR Lafare*, *Modern Criminal Law* (West Publishing Co., 775).

7 *State of Maharashtra v. M/s. Syndicate Transport Co.* AIR 1964 Bom 195.

8 *Moore v. Brisler*, [1944] 2 All ER 515.

9 *Smith and Hogan*, *Criminal Law* 178 (1992).

Identification liability differs from vicarious liability in the sense that it does not involve the imputation of liability from one person to another, because the directing mind is the corporation. The two persons have merged.<sup>10</sup>

### **B. Organisational Model**

If the derivative model is centred around the individual, the organisational model is centred around the corporation, as such. Some offences require an intention to commit the offences or some other subjective mental state such as knowledge with respect to the conduct elements. The idea of attributing these subjective mental states to corporations is indeed troublesome.

One method of attributing these mental states has already been discussed in terms of identification doctrine. Another method is by proof that the "corporate culture... directed, encouraged, tolerated or led to non-compliance" with the law.<sup>11</sup> The physical element of the offence is attributed from the conduct of officers, employees, and agents acting within the scope of their authority or employment.<sup>12</sup> The fault element can be located in the culture of the corporation even though it is not present in any individual.

"Corporate culture" is defined in broad terms that encompass informal conduct and practices, as well as stated policies and formal rules. Corporate culture is an attitude, policy, rule, course of conduct or practice, existing within the body corporate generally or within the area of body corporate in which the relevant activities take place.<sup>13</sup> The corporate culture must have positively favoured the commission of the offence in one of two ways. The culture may have caused the offence to occur, either because the offence was actually directed or because the nature of the culture led its commission. Alternately the culture may have given psychological support for the commission of the offence, through either active encouragement or passive tolerance. A corporation would be held responsible because of this positive feature, just as an individual would be responsible because of some positive state of mind.

The mode of assistance given to ULFA by Tata Tea Ltd. was so well structured and organised that it formed a part of the very culture of the company to aid and abet the terrorist group. All that happened was not a matter of one or two instances. It was the company's policy, thereby qualifying such a practice as corporate culture. The knowledge and commission of such a practice permeated to every level of the company. The status or designation of any one person, like the Managing Director - Mr. Krishna Kumar, becomes irrelevant.

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10 *Tesco Super Markets Ltd. v. Natrass* 1972 App Cas 153; cf Smith and Hogan, *supra* n. 8 at 174.

11 Criminal Law Officers Comm. [Code Committee] of the Standing Comm. of Attorneys-General, Austl., *Model Criminal Code*: Chapter 2, General Principles of Criminal Responsibility Section 501 (1992) [hereinafter Austl. Model Criminal Code].

12 *Ibid.*, 'Sections 501.2.2, codified in Australian Criminal Code Act, Sections 12.3(6).

13 *Ibid.*, 'Sections 501.1, Codified in Australian Criminal Code Act, Sections 21.2.

Corporate culture doctrine is a new addition to the models of attracting criminal liability to corporations. Elements of the same are yet to filter through the Indian Judiciary. What Indian Cases do reflect is a combination of vicarious liability and identification doctrines. This will become more apparent in the following parts of this article.

#### IV. DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY VIS INDIAN JUDICIARY

Indian Judiciary confronted the issue only in a few decades back. By then, corporate criminal liability as a jurisprudential issue had gained far greater momentum in the Western countries. Our judiciary's response can be classified as follows:

A. *Crimes not requiring criminal intent* - Just as the development in Western Europe started with crimes not requiring criminal intent, the Indian Judiciary reacted similarly. In *Ananth Bandhu v. Corporation of Calcutta*<sup>14</sup> the Court observed that if there is anything in the definition or context of particular section in the statute which will prevent the application of the section to a limited company, certainly a limited company cannot be proceeded against. For example rape cannot be committed by a limited company. There are other sections wherein it will be physically impossible for a company to commit the offence. It is also quite clear that limited company will not be tried for offences which require *mens rea*. It cannot be tried where the only punishment for the offence is imprisonment because it is not possible to send a limited company to prison by way of sentence.

Except in the above cases, a limited company can be proceeded against on the question of sentence also need not stand in the way of trial of this kind, because except in the case where no other sentence than imprisonment or transportation or death is provided, there is nothing to prevent a court from inflicting a suitable fine and a sentence of fine need not carry with it any direction of imprisonment in default. It is optional for the magistrate to proceed against the limited company instead of the officer.

This was further established in *Punjab National Bank v. A.R. Gonsalves, Bunder Inspector, Karachi Port Trust*.<sup>15</sup> It was held that a company can commit an offense only in a limited class of cases. These must be cases in which *mens rea* is not essential and must be cases in which it is possible for the court to pass a sentence of fine.

It was further held that it is necessary that the act charged against the company should be one contemplated in the Charter or Articles of corporation as

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14 AIR 1952 Cal 759.

15 AIR 1951 Sind 142.

being capable of being performed by the corporation or must be ultimately connected with its statutory or legal obligations.

*B. Crimes of intent* - It was not until much later that the judiciary evolved a jurisprudence to charge corporations of crimes of intent as well. This was largely on the basis of vicarious liability and identification doctrine combination. In *State of Maharashtra v. Messers Syndicate Transport Co. (P) Ltd. and others*<sup>16</sup> the Court held that ordinarily a corporate body like a company acts through its Managing Directors, Board of Directors or authorised agents and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the acts or omissions, including the state of mind, intention, knowledge or belief of the company.

A company cannot be indictable for offences like bigamy, perjury, rape which can only be committed by a human individual or for offences punishable with imprisonment or corporal punishment. Barring these exceptions, a corporate body ought to be indictable for criminal acts or omissions of its directors, or authorised agents or servants, whether they involve mens rea or not provided. They have purported to act under authority of the corporate body or in pursuance of aims and objects of the corporate body. This case obviously stands out from the previous two cases - it includes mens rea offences within the realm of corporate criminal liability.

Until now the jurisprudence had only reached High Court levels. The Supreme Court of India addressed the issue for the first time in *Aligarh Municipal Board and Others v. Ekka Zonga Mazdoor Union*.<sup>17</sup> The court held that the law as it stands today admits of no doubt that a corporation is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent court directed against them. A command to the corporation is in fact command to those who are officially responsible for conduct of its affairs. If they intentionally fail to comply with the court orders, they and the corporate body, are both guilty of disobedience and may be punished for contempt of court.

### *Critique*

The Indian case law lacks any confirmation to a single model of corporate criminal liability. The only logical flow existent is the move from offences not requiring mens rea to incision offences that do require mens rea to be proved. Thereby the Indian Courts have ascribed to a combination of vicarious and identification doctrine without drawing the necessary distinction. These are mere adhoc decisions depending more on facts of each case rather than a set jurisprudence.

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16 AIR 1964 Bom 195.

17 AIR 1970 SC 1767.

#### V. CORPORATE CIVIL LIABILITY: A SUBSTITUTE?

V. S. Khanna, an ardent opponent of corporate criminal liability, has suggested that corporate civil liability serves the purpose adequately and thus attaching criminal liability to corporations ought to be given up.<sup>18</sup> His arguments revolve around American Legal System, wherein the concept is fairly well developed, discussed and debated. It would be too early a stage to consider swapping corporate criminal liability for corporate civil liability in the Indian context. This is mainly because of two reasons:

- i) In India, the civil enforcement mechanism is not as efficient and powerful as the criminal enforcement system. It is preferable that powerful entities like corporation should as much as possible remain within the hard hands of criminal sphere.
- ii) There is hardly any development of law in India over this issue. We are at a stage where there is no clear jurisprudential understanding of the concept within our system. At this stage it would be inappropriate to consider such arguments.

#### VI. LAYING THE FOUNDATION FOR INDIAN JURISPRUDENCE

The law of corporate criminal liability has traditionally adopted a nominalist theory of corporate personality, under which corporations are viewed as fictional entities and individuals are treated as the only true subjects of the criminal law. The result has been the development of models of corporate criminal liability. The model of vicarious liability and the model of identification share this requirement, despite the competition between them in other respects.

The assumption that corporate liability must be derivative has come under increasing attack in academic writings and in reform proposals. As yet however there is no clear consensus about how far one must move towards organisational liability and about how much of the traditional framework of the law of criminal responsibility can be retained in the shift. The Indian Judiciary is yet to so much as consider the organisational theory. Hence not much can be said about it in the Indian context.

The Indian jurisprudence on corporate criminal liability is limited to a few cases. The 47th Law Commission report has recommended that all criminal liability and punishment should be linked with the corporation and not merely with the name of the director or manager.<sup>19</sup>

As far as punishment is concerned, the Law Commission suggested that Section 62 of IPC be amended to read "in every case in which the offence is

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18 V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 Marv L Rev 1477 (1996).

19 *Law Commission of India. 47th Report: Trial and Punishment of Socio-Economic Offences*, para 8.1.

punishable with imprisonment only and not any other punishment, and the offender is a corporation it shall be competent for the court to sentence such offender to fine."<sup>20</sup> Besides this, punishing the individual concerned would be in order. The Draft Amendment Bill to the IPC also contains provisions relating to corporate criminal liability but the amendment is yet to see the light of the day. The present scenario in India is indeed at the most formative of stages.

### VII. CONCLUSION

Given the presumption that Tata Tea Ltd. did aid and abet terrorism in the State of Assam and given the inchoate development of law, the company can well be attached with criminal responsibility. The courts are capable of affixing joint liability between the company and the officials involved. What has started as a political battle, may lead to a jurisprudential analysis and debate amidst the legal scholars. Hopefully the courts will see this as an opportunity to lay down a lucid model for corporate criminal liability in India.

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20 *Id.*