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   RESEARCH METHODOLOGY

   RESULTS & DISCUSSION

   FINDINGS

   RECOMMENDATIONS/SUGGESTIONS

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- Sharma T., Kwatra, G. (2008) Effectiveness of Social Advertising: A Study of Selected Campaigns, Corporate Social Responsibility, Edited by David Crowther & Nicholas Capaldi, Ashgate Research Companion to Corporate Social Responsibility, Chapter 15, pp 287-303.

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- Garg, Sambhav (2011): "Business Ethics" Paper presented at the Annual International Conference for the All India Management Association, New Delhi, India, 19–22 June.

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- Kumar S. (2011): "Customer Value: A Comparative Study of Rural and Urban Customers," Thesis, Kurukshetra University, Kurukshetra.

ONLINE RESOURCES

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THE DICHOTOMY BETWEEN CORPORATE CRIMINAL LIABILITY AND DIRECTORS' INDIVIDUAL CRIMINAL LIABILITY: AN APPRAISAL OF TWO JURISDICTIONS (THE PEOPLE'S REPUBLIC OF CHINA & UNITED KINGDOM) VIS-A-VIS THE SCENARIO IN INDIA

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ABSTRACT

A "responsible corporate citizen" has become a catchphrase amid heated debates on corporate social responsibility in recent times. As many cases have shown, irresponsible corporate practices can plunge a company into a downward spiral of distrust by the community at large, which undermines confidence in the company and ultimately hurts the company itself. Legitimacy may be maintained – at least to some extent by holding someone accountable to the offended publics. The questions become: who can be held responsible and for what should they be held responsible? Therefore, the objective of this research is to describe, analyze and appreciate the legal regimes governing the duality of directors' liability vis-à-vis that of the corporate for corporate faults across different jurisdictions. And for the purposes for this research subject-matter, three jurisdictions have been reviewed and analyzed and an appraisal to that effect has been attempted, i.e., The People's Republic of China, United Kingdom and India. The research shows that Indian legislation needs to draw level with the other jurisdictions in relation to strengthening its legal responsibility wherein the company can be arraigned as an accused separately for the offences it is capable of committing. To be able to prosecute such conglomerates of wealth and power, a system, succinct and sound in law, has to be adopted to that effect. Laws drafted with the purpose of holding the offender liable for the offences committed should not have major exceptions as in the nature of immunity which these corporations are afforded.

KEYWORDS

Corporate, Criminal, Director, Individual, Liability.

INTRODUCTION

Corporate Crime is usually studied as the economic product of a free market society. The centrality of corporations to market capitalisms cannot be overestimated. They are everywhere. For centuries, the corporation has been the preferred vehicle for investment and economic development. A "responsible corporate citizen" has become a catchphrase amid heated debates on corporate social responsibility in recent times. As many cases have shown, irresponsible corporate practices can plunge a company into a downward spiral of distrust by the community at large, which undermines confidence in the company and ultimately hurts the company itself. A corporation is the very opposite of the atomized self-seeking individual posited by Adam Smith as the fulcrum of his idealized economy. Corporations are associations – collectives bringing assets and people together under one legal umbrella. The synergy of capital and coordinated human activities is what makes them as efficient as organisations dedicated to the generation of wealth.

If the means to achieve the end, if the ways in which profits are pursued come to be called in question because corporate conduct and/or its outcomes offend, legitimacy may be maintained – at least to some extent by holding someone accountable to the offended publics. The questions become: who can be held responsible and for what should they be held responsible?

Such questions have plagued researchers, scholars and policy makers ever since it has been acknowledged that associations of one kind or another are integral to social organization. In 1897, Ernst Freund observed that, from time immemorial, the group of persons who had come together for a common purpose was instinctively perceived as having rights that did not belong to individual members of the group.

The capacity of a corporation to exercise its rights and to fulfill its duties stems from its self-standing reality. How then should an association's/corporation's liability be determined? Should there be different kinds of rights and duties for associations than for human beings? John Dewey once opined that, *[t]he fact of the case is that there is no clear cut line, logical or practical, through the different theories, which have been advanced in behalf of the 'real' personality of either 'natural' or associated persons.*

This gives decision-makers room to manoeuvre when, as judges, they have to decide whether or not liability attaches to a corporate body or to some or all of the human actors within the association and when, as policy-makers, they have to determine the best way to attain public goals by providing corporate actors with appropriate incentives and disincentives. If one was to trace the evolution of English corporate criminal law development, then great reliance can be laid on a case, as early as 1846. Here, the Court added to a speciously reasoned doctrine the judiciary already had developed to hold corporations responsible in their own right. It had been decided that corporations could be held responsible for omissions because this required neither an act, nor a thought, to be proved. This justified holding a corporation, a legal device not capable of acting or thinking, criminally responsible for offences that did not require the usual criminal elements to be proven. The court wanted to demonstrate that the corporations were not to be given *carte blanche*.

In recent times, the fact that a corporation, being merely a person in law only, and not a real one, can act only through its employee inevitably inherits an omnipresent bogey haunting every pronouncement – the ancillary and incidental liability of the directors. A delicate balance has to be sought between the liability of company and that of its directors. The directors of a company are considered the limbs of that company. Directors, like all other individuals within and without the corporation, always have been personally for their own conduct, but this has been questioned on occasion. The notion is that for a corporation to think and act, some people have to do that thinking and acting, and when this occurs, there may be an argument that these human beings are not acting on their own identities but as the corporation. Thus, it has been understood that a contract entered into on behalf of the corporation by its directors, is a contract between the corporation and the third party. In this sense, directors like shareholders, are enveloped with a corporate veil around their actions. The vexing issue is whether directors and other officers and agents of the corporation, who, while acting in a non-contractual setting on behalf of the corporation, inflict harms on others, should be entitled to claim the protection of that veil, making the corporation the sole person responsible. So, should it follow that these thoughts and acts are not also the thoughts and acts of those corporate actors as human beings in their own capacity?

Although the corporate veil doctrine extended ordinarily only to the shareholders, courts in many jurisdictions extended similar immunity to corporate directors by means of parallel doctrines that directors' actions to the company if the directing minds and wills of the company act in their capacity as company directors. However, this immunity has receded to varying degrees in different jurisdictions as legislatures gradually recognized that the imposition of personal liability on directors for corporate faults can be resorted to, to control the behaviour and conduct of corporations.

Therefore, the objective of this research is to describe, analyze and appreciate the legal regimes governing the duality of directors' liability vis-à-vis that of the corporate for corporate faults across different jurisdictions. In an increasingly globalized economy, one might expect to find a growing convergence in this area of law. But this proves not to be the case, in many aspects. The particular significance of such a finding can be that there are many ways that the several dynamic economies can frame laws to influence the conduct of directors, and through that, the conduct of companies. This also invites further exploration into the political, economic, practical, legal and evolutionary factors that may explain the convergence and divergence of both statute law and judicial pronouncements/precedents/doctrines and the desirability and inevitability of one path over others.

And for the purposes for this research subject-matter, three jurisdictions have been reviewed and analyzed and an appraisal to that effect has been attempted, i.e., The People's Republic of China, United Kingdom and India.

THE PEOPLE'S REPUBLIC OF CHINA

In canvassing and assessing directors' and corporation's liability under certain laws for corporate fault in China, it shall be expedient to first delve into China's existing and erstwhile economic framework and corporate composition and arrangement in brevity before exploring further as regards to the objective of this research.

A BRIEF BACKGROUND

In China, companies are established pursuant to the Company Law of the People's Republic of China (hereinafter "Company Law"), which was most recently amended by the National People's Congress in 2006. Companies are classified as:

- Limited Liability Companies or LLCs (analogous to private companies in some common law jurisdictions)
- Stock Limited Companies or SLCs (analogous to public companies under some common law jurisdiction)

Companies can also, by reference to the place of incorporation by the shareholders, be divided into:

- Foreign-invested Enterprises (where the shareholders include foreign legal persons)
- Domestic Companies (where all shareholders are Chinese legal persons)

Foreign-invested enterprises can be set up in the form of wholly foreign owned enterprises (WFOEs), where all shareholders are foreign entities; Sino-foreign equity joint venture companies (CJVs).

Special rules have been enacted with respect to corporate structure and corporate governance in relation to foreign-invested companies. However, the provisions of the Company Law concerning directors' liabilities are uniformly applicable to foreign-invested companies and domestic companies as well.

Since the reform and opening-up policy was adopted in 1978, the Chinese government has promoted the establishment of a "modern enterprise system" to transform the governance and operation of inefficient State-Owned Enterprises in a bid to propel the development of Chinese economy. Since this reform, China has experienced rapid economic development accompanied by a vast increase in the number of companies and growth in the scale of their operations.

However, the rapid development of China's market and companies has not been matched by an appropriate level and scope of regulation. The quality of corporate governance of companies remains a challenge and the impact of corporate activities on outsiders such as on the environment has been viewed quite negatively.

BOARD STRUCTURE AND COMPOSITION

Under the Chinese Company Law, a company is required to have a three-tiered corporate governance body, namely:

- The Shareholders
- The Board of Directors or an Executive Director, and
- A Board of Supervisors

The shareholders are the highest authority at a company and exercise their authority at shareholders' meetings. However, there are exceptions to this rule. Wholly State Owned Companies, EJVs and CJVs are not required to hold shareholders' meetings, in which case, the board of directors is the highest authority. The Company Law is silent on how often the shareholders of a company should meet to transact business in relation to LLCs. This is left to be set out in the articles of association of the company. SLCs are required to hold annual shareholders‟ meetings.

The Board of Directors or the Executive Director is the highest business-decision making body of a company. The Company Law grants certain statutory powers to the Board or to the Executive director. In theory, the statutory powers cannot be delegated to others, such as non-board members or third parties. Nonetheless, the resolutions of the Board can be overridden by a resolution of a shareholders' meeting, in which case, the matter will be returned to the Board for reconsideration. The Board of directors can be granted additional powers as set out in the Articles of Association of a company, there is no rule prohibiting any restriction of non-statutory powers.

The Board of Supervisors is the supervisory body responsible for monitoring the conduct of the directors and other senior managerial personnel. They have been conferred several powers under the Company Law as well. The Company Law also allows the Articles of Association to provide for additional powers to be granted to the Board of supervisors.

The Board of Directors must have a Chairman, who is elected by the shareholders or the board members in accordance with the Company Law and the Articles of Association. Chinese laws do not make any distinction between executive directors and non-executive directors. Listed companies must have at least one-third of the board consisting of independent directors. Chinese financial regulators also require certain financial institutions to have independent directors as well.

LIABILITY ISSUES

A. Directors' Duties:

Under Chinese law, a director owes a duty of fidelity such is similar to the concept of fiduciary duty in some common law jurisdictions (hereinafter "Fiduciary Duty") and a duty of care to the company. There are certain acts which a director is prohibited from engaging in and those acts constitute the fiduciary duty of the director. Any gains thus made in the breach of such fiduciary duties are recoverable by the company.30 Chapter VI of the new revised Company Law (Amendment of 2006) refers to the 'Qualifications and Obligations of the Directors, Supervisors and Senior Managers of a Company'.

A director owes a duty of care to the company under the Company Law and the General Provisions of the Chinese Civil Code32, which is supplemented by the Torts Liability Law of the People's Republic of China, which is in effect from July 1st, 2010.

B. Types of Liability:

There are three types of liability that can be imposed on directors, i.e., administrative sanctions, civil liability and criminal liability. Administrative sanctions are at present the dominant sanctions in enforcement. Administrative and civil liabilities are meant to deter, compensate or remedy certain unlawful activities whereas criminal penalties are mainly for punishment purposes.

Administrative sanctions may be imposed on directors by various regulatory bodies. As far as this aspect is concerned, the authorities which impose such liability are-

- China Securities Regulatory Commission (CSRC)
- Environmental Protection Authority (EPA)
- Labour Protection Agencies (MOLSS)
- Taxation Bureau

According to Article 8 of the *Law of the People's Republic of China on Administrative Penalty*, types of administrative penalty include:

- Disciplinary warning
- Fine
- Confiscation of Illegal gains or confiscation of unlawful property or things of value
- Ordering for suspension of production or business
- Temporary suspension or rescission of permit or temporary suspension or rescission of license
- Administrative detention

- Others as prescribed by laws and administrative rules and regulations

Civil liability is one of the most important types of liability that can be used to protect the injured and restore justice. The first Company Law of 1993 only contained two relevant provisions: one was that a company in contravention of the law shall bear civil liability for compensation. The other was that where companies present false financial reports to shareholders and the public or make material omissions, the person in charge of the company or other persons directly responsible shall be fined between CNY 10, 000 and CNY 100, 000 and criminal charges shall be laid. The first Securities Law, 1998 states that a company is subject to civil liability if it engages in falsifying records, making misleading statements or material omissions which result in trading losses. The Supreme People's Court (SPC) has also stepped in provided interim provisions on civil remedies for false statements to alleviate investor anxiety about the market environment. The SPC Rules allow investors‟ actions against directors who have been administratively sanctioned or found liable in a criminal proceeding. Directors can be jointly liable to compensate investors with their companies for making false statements. According to the SPC Rules, persons involved in making false statements concerning securities face civil liability for the loss suffered by investors resulting from those statements. While the liability imposed on issuers, listed companies, promoters or controlling shareholders is strict liability, the liability imposed on others including directors is based on personal fault. Therefore responsible directors, supervisors, and managers of listed companies are jointly liable for investors‟ loss caused by false statements made by companies unless they can prove the non existence of fault on their part.

According to the amended Company Law, if the financial accounting reports and other such materials provided by a company to the competent departments in accordance with law contain false entries or conceal material facts, the person in charge and other directly responsible persons shall be fined between CNY 30, 000 and CNY 300, 000 by the competent department. This provision subjects directors who are in charge or otherwise directly responsible to an administrative fine.

The Criminal Law imposes criminal liability on directors involved in false statements but the penalties are quite light. While companies and enterprises (which are subject to obligations of information disclosure in accordance with the law) provide investors with a false accounting report or a report in which material information has been concealed, or fail to disclose other important information, hence seriously harm the interests of investors and others, the person in charge of the company or other persons directly responsible shall be subject up to three years imprisonment and/or CNY 20, 000 to CNY 200, 000 fine. It does not clearly define circumstances under which imprisonment and/or fines shall be imposed, which will give rise to enforcement difficulties.

Apart from the ones abovementioned, directors' liabilities for corporate fault in China are impliedly or expressly specified in certain other central legislations of China as well. Some of them which contain provisions in reference to directors' individual liability are the Environment Protection Law, 1989, the Labour Law, the Safe Protection Law, the Labour Contract Law, Occupational Health and Safety Regulation in the Mining Sector, Taxation Law, Enterprise Bankruptcy Law etc.

Directors' liability for corporate fault is an under-developed area of law in China. While administrative sanctions have been extensively used with mixed effect, the criminal sanctions are only invoked in extremely serious cases. Civil liability remains weak and requires a much broader scope of application and detailed provisions on elements of liability and specific remedies.

'CORPORATE CRIME' AND CORPORATION AS A 'CRIMINAL' IN CHINA

Now that a succinct idea of directors' individual liabilities under various Chinese legislations for corporate fault can be ascertained, it is time to shift focus to an area of law which can be rightly termed as its alter-ego, i.e., the issue of corporate crime in the People's Republic of China and whether a corporation can be treated, punished and held liable as a criminal within its jurisdiction.

Corporate Crime is a new type of crime which is not clearly defined in China's legal statutes. Currently, "corporate crime" is still not clearly defined under China's criminal or civil laws. Under China's current legal definition, "company crime" generally describes and includes corporate crimes as the forms are similar in nature. Under China's Criminal Law Section 30, "when companies, corporations, firms, enterprises, or other forms of organizations commit harmful social behavior, under the law it is defined as company crime and therefore the organization must bear legal responsibilities and criminal liabilities.

China's corporate crime can be divided into the following categories:

- Start-Up Structural Corporate Crime
- Production-Operational Corporate Crime
- Unfair Competition in the Consumer Market
- Fiduciary and Security Fraud
- Organized Illegal Smuggling of Goods and Tax Evasion
- Corporate Fraud "

China's Criminal Law, Section 30, specifically defines a company or a corporation as a perpetrator of a crime as long as it is an enterprise or an organization, regardless of the type of ownership (state-owned, collectively-owned, or privately owned) or how it is organized (state-invested, collectively invested, or privately invested). It is defined as a single perpetrator of a crime under this definition and therefore can be prosecuted under the criminal law and receive criminal punishment. In China, both the individuals who are directly in charge of the corporation and the organization itself are charged as perpetrators of a corporate crime.

Monetary punishments and such pecuniary forms of economic retribution turn the crime around. The victims are compensated and perpetrators are punished as a result of the crime. As for amount of monetary fines, under China's Criminal Law, Section 52, they depend on the specific crime. There are three types of fines under the criminal law:

- Preset amounts
- Multiplied amount, and
- Unlimited amount

There are five ways of collecting these monetary fines in China:

- One-time full payment with a specific due date
- Multiple payment (e.g., monthly, yearly) with a specific due date
- Forced payment
- Anytime collection, and
- Reduced or forgiven payment

There are non-criminal punishments for corporate crimes as well apart from the criminal sanctions as discussed hereinabove. The administrative punishments meted out to the corporations are generally in the nature of warnings, confiscation of illegal gains and illegal goods, administrative monetary fines, forced stopped production, temporary cancellation of Licenses and Revocation of permits for operation, barred or forbidden participation, dissolving and disbanding the corporation, public rendering of a court verdict etc.

UNITED KINGDOM

A BRIEF BACKGROUND

The foundational principles which underpin the modern company, such as the doctrine of corporate personality, were laid down in the mid-nineteenth century through the enactment of the Joint Stock Companies Act, 1844, which introduced a regime of free incorporation by registration, followed by the availability of general limited liability in 1855, by the Limited Liability Act. Inevitably, it was not before the judges began framing the nature of the company as a juristic person. In tandem with these legislative and judicial developments, the courts were also being called upon to consider the relationship between the company and its principal organs, and its dealings with outsiders. In November 2006, the Companies Act, 2006 (the "Act") became law, but it was not until October 1st, 2009, that the Act came fully into force, the previous three years seeing a staggered implementation of its provisions.

The Act brought about a substantial reform and modification to company law in the United Kingdom, including the codification of law relating to directors' duties and substantive changes to the law relating to derivative actions. The obligations set out in the UK Corporate Governance Code (the "Corporate Governance Code"), which replaces the Combined Code on Corporate Governance, includes a number of additional corporate governance obligations that the corporations and its directors must comply with.

BOARD STRUCTURE/COMPOSITION

In UK, there are two types of companies, public and private. Both public and private companies have a single board of directors comprising of all the directors of a company. It is common, especially for the listed companies to see a mix of both executive and non-executive directors on the board. Such an arrangement is called as two-tiered or unitary company structure.

DIRECTORS' DUTIES AND LIABILITIES

The government therefore believes that codification of directors' duties will make the law in these areas more consistent, certain and accessible. Companies Act 2006 ("the Act"), which received Royal Assent on the 8th November 2006, codifies directors' duties including the long-established fiduciary duties as well as the common law duty of care and skill into a statutory statement of seven general duties. Below are the seven general duties set out in ss.170 to 181 of the Act with particular reference to the new additions introduced by the Act:

- Duty to act within their powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third parties
- Duty to declare interest in proposed transaction or arrangement with the company

These new codified duties are based on the common law rules and equitable principles that were in force prior to the Act.62 In the recent ruling of *East Ford Ltd. V. Gillespie*, the Scottish Court of session commented that section 170 (4) of the Act, which requires the codified directors' duties to be interpreted and applied in the same way as the common law and equitable principles, is aimed at ensuring that the codification of directors' duties does not render the law inflexible and does not prevent the courts from developing the law in order to deal with "changing commercial circumstances".

There are also a number of other statutory provisions under which the directors can be personally sued, including legislations and regulations relating to securities, insolvency, pensions, health and safety, the environment, and antitrust issues etc.

In the UK, corporate governance is provided by a combination of:

- Common law rules
- Statute
- The Articles of Association of a company
- The Listing Rules that apply to all companies listed on the main market of the London Stock Exchange
- The Corporate Governance Code
- The City Code on Take-Overs
- The Code of Market Conduct
- Non-binding guidelines issued by institutional investors such as pension-funds and insurance associations.

Directors owe their duties to the company and it is therefore the company that must bring an action against the director (though in limited cases a shareholder may instigate a derivative action). This rule does not prevent a third party bringing an action directly against the director if the director has assumed personal responsibility for the actions of the company. A director may also be held liable to third parties as a result of a breach of a statute.

At present, English law does not have a developed concept of "class actions", so while similar cases are sometimes joined in the courts for administrative convenience, the plaintiffs must be known as individuals.

Under the Act, a company is prohibited from exempting a director from a liability that results from the directors' negligence, breach of duty, default, or breach of trust in relation to the company. However, a company may provide an indemnity (termed as a "qualifying third-party indemnity") against any such liability provided that it does not indemnify a director against any liability to the company; any fines imposed in criminal proceedings; any sums payable to a regulatory authority by way of penalty for non-compliance with any regulatory requirement; or for any costs incurred in defending any criminal proceedings in which the director is convicted or any civil proceedings brought by the company in which judgment is given against the director.

A company can also purchase directors' and officers' insurance to protect a director from liability in connection with any negligence, default, breach of duty or breach of trust by that director to the company.

Therefore, to summarize directors' individual liabilities for commission of corporate fault in UK, it is pertinent to note that, despite the introduction of the new Corporate Governance Code, the rules of corporate governance are likely to continue to change and develop over the course of next few years. The OECD Convention, the Corporate Governance Task Force of Basel Committee, and the International Association of Insurance Supervisors are each conducting a review of corporate governance principles, and the Financial Services Authority in the UK is actively engaging in each of these organizations as they develop their work.

THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT, 2007

The Corporate Manslaughter and Corporate Homicide Act 2007 (**the Act**) was passed by Parliament on 26 July 2007. It came into force on 6 April 2008. The Act was created with the intention of remedying a defect in the common law offence of "gross negligence manslaughter", which meant that successful convictions were difficult to secure against larger organizations. The new offence takes account of this by creating collective culpability among senior management and eliminating the need to identify specific guilty individuals.

The Act creates the criminal offence of **corporate manslaughter** (for England and Wales) or **corporate homicide** (for Scotland) and puts the law of corporate manslaughter on a new and statutory footing. The offence must be tried in the Crown Court, by jury. An organization affected by the act is guilty of an offence if the way in which its activities are managed or organized causes a person's death and if this amounts to a gross breach of a relevant duty of care owed by the organization to the deceased. However, an organization is guilty of an offence only if the way in which activities are managed or organized by senior management is a substantial element in the breach of the relevant **duty of care.**

The organizations affected are:

- Corporations
- Most governmental departments and governmental agencies (including by implication local authorities)
- Police forces
- Partnerships, trade unions or employers' associations that act as employers

An organization found guilty under the act faces an unlimited fine. Prosecution costs can also be awarded against the organization, and the court may also order the breach to be remedied and order the conviction to be publicized. The Sentencing Advisory Panel, which advises on sentencing issues in England and Wales, has suggested that punishment include, but not be limited to, a fine of 2.5% to 10% of annual turnover and mandatory publicity orders. The common law offence of manslaughter by gross negligence is abolished in its application to corporations and to any other organization subject to the act.

Further, while an individual cannot be held liable for aiding, abetting, counseling or actively sponsoring the commission of an offence under the act, directors and senior managers remain liable to prosecution under the common law offence of gross negligence manslaughter.

The new legislation will affect the following classes of insurance:

- Employers' Liability (EL)

- Public and Products Liability (PL/Prods)
- Motor

Although there are already near about eight hundred cases of „corporate manslaughter‟ already before the different courts in UK with competent jurisdiction to try such cases, but so far, only one conviction (as recent as February, 2011) has generated world-wide interest and has established its purpose.

Winchester Crown Court while deciding *R. v Cotswold Geotechnical Holdings Ltd*., imposed a fine to the tune of GBP 385,000 on the company, representing 116 per cent of its annual turnover, after being convicted of **corporate manslaughter** following the death of a geologist, Alexander Wright, when a trench collapsed. As stated above, this company is the first to be convicted under the Corporate Manslaughter and Corporate Homicide Act 2007, and it may herald more prosecutions of larger organizations. The jury was told to assess the conduct of the director of the company, Peter Eaton in reaching a verdict, since he had been alleged of ignoring a ruling on the danger of unsupported pits.

Therefore, such a legislation can potentially be the harbinger of many such prosecutions against corporate giants and can ensnare and prosecute them subsequently, thereby, being one of its kind, in the history of all legislations world-over, in holding a corporation directly and criminally liable for the faults committed by it therein.

INDIA

The criminal liability of the Directors for the acts of the Company is one area of interface between the corporate veil and its lifting, that evokes passionate responses from both sides of the divide and renders judicial pronouncements on this point highly crucial. The fact that a corporation, being merely a person in law only, and not a real one, can act only through its employee inevitably inherits an omnipresent bogey haunting every pronouncement – the ancillary and incidental liability of the directors.

A BRIEF BACKGROUND

In India, an Anglo-Saxon board structure is maintained whereby executive and non-executive directors are organized into a unitary board. The historical analysis of emergence of Corporate Governance in India can be divided into two eras, Pre Liberalization and Post Liberalization.

When India attained independence from British rule in 1947, the country was poor, with an average per-capita annual income under thirty dollars. However, it still possessed sophisticated laws regarding “listing, trading, and settlements.”It even had four fully operational stock exchanges. Subsequent laws, such as the 1956 Companies Act, further solidified the rights of investors.

In 1992, in a defining moment in India’s corporate-governance history, the Indian Parliament created the Securities and Exchange Board of India (”SEBI”) to “protect the interests of investors in securities and to promote the development of, and to regulate, the securities market.” In the years leading up to 2000, as Indian enterprises turned to the stock market for capital, it became important to ensure good corporate governance industry-wide. Additionally, a plethora of scams rocked the Indian business scene, and corporate governance emerged as a solution to the problem of unscrupulous corporate behaviour.

In 1998, the Confederation of Indian Industry (”CII”), “India’s premier business association”, unveiled India’s first code of corporate governance. However, since the Code’s adoption was voluntary, few firms embraced it. Soon after, SEBI appointed the Birla Committee to draft a code of corporate governance. In 2000, SEBI accepted the recommendations of the Birla Committee and introduced Clause 49 into the Listing Agreement of Stock Exchanges. Clause 49 outlines requirements vis-à-vis corporate governance in exchange-traded companies.

Then, Chandra Committee, under the Chairmanship of Naresh Chandra, reported on December 23, 2002 and opened by noting the advances that had been made as a consequence of the Birla Report and cl.49 of the listing agreement. In 2003, SEBI instituted the Murthy Committee to scrutinize India’s corporate-governance framework further and to make additional recommendations to enhance its effectiveness. SEBI has since incorporated the recommendations of the Murthy Committee, and the latest revisions to Clause 49 became law on January 1, 2006.

An Expert Committee on Company Law was established by the Ministry of Company Affairs under the chairmanship of Dr Jamshed J. Irani, a director on the board of Tata, on December 2, 2004, on the same lines as the previous committees but with a broader scope of review.

LIABILITY ISSUES (DIRECTORS AND COMPANIES)

The duties of a director have not been codified under the Companies Act, 1956. However, the Companies Bill, 2009 does have a clause which exclusively deals with the duties of a director. Sec. 147 talks about the duties of a director. Under the Indian Laws, a director is deemed to be an officer in default, which implies that he/she shall be held responsible for default, non-compliance, failure, refusal, or contravention of any statutory obligation of the company. Each director shall be individually held liable for punishment or penalty for any such default.

Various Indian legislations in respect of Labour Code, environment, consumer protection, taxation, foreign exchange, and negotiable instruments deem directors to be liable for the violations of the provisions. However, interestingly, a director is not automatically liable for the torts of the company irrespective of the size of the company or of the degree of his or her control over its affairs. There are several defenses available to the director under such circumstances.

Even the judiciary has adopted an approach where it does hold the director liable for acts of the company. The case of *Maksud Saiyed v. State of Gujarat*, decided by a two judge bench of the Supreme Court in September 2007, is an important judgment dealing with the criminal responsibility of directors for offences committed by their companies.

The observation of the Apex Court in the *Maksud Saiyed* case which is of paramount importance is that the Directors can be held vicariously liable for offences committed by their companies only where the governing statute permits that by way of an express provision.

But the Indian corporate jurisprudence faces a major setback when it doesn’t have any express or implied provision in any central or state legislation, holding the corporation directly and/or criminally liable for its commission of corporate faults, unlike The People’s Republic of China and the UK. Be it China’s Criminal Laws or UK‟s Corporate Manslaughter and Corporate Homicide Act, 2007, these contrasting jurisdictions have legislations which address the concern of holding the corporation strictly liable as an entity, separate from that of its directors.

CONCLUSION

The Company and the individuals acting, behind its magical cloak, have always been slotted into separate pigeonholes, as far as corporate law jurisprudence is concerned. It has been well settled principle throughout a catena of judicial pronouncements that a company, although an artificial creation, is nevertheless a separate entity in the eyes of law. However, this is where Indian legislation needs to draw level with the other jurisdictions in relation to strengthening its legal responsibility wherein the company can be arraigned as an accused separately for the offences it is capable of committing. To be able to prosecute such conglomerates of wealth and power, a system, succinct and sound in law, has to be adopted to that effect. Laws drafted with the purpose of holding the offender liable for the offences committed should not have major exceptions as in the nature of immunity which these corporations are afforded. Although certain elements will always be difficult to reconcile, like the fact that at the end of the day, it is the people’s money which is affected (be it in the form of fraud committed by the company or any pecuniary penalty imposed for the same offence), but legal wisdom and immaculate drafting will ensure that the money changes correct, deserving, rightful hands, both behind and in obverse of the necessary evil, which is the “corporate veil”.

Or else, as opined by a Supreme Court judge in reference to the Bhopal holocaust, “*the Bhopal case took 25 years to fix responsibility on the convicts; it may take another 25 years if it starts all over again and* **none of the victims would be alive by then**.”

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