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JUDICIOUS PATH FOR ENFORCING CORPORATE CRIMINAL LIABILITY

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Abstract

Corporate scandals are knocking down the economies of different countries which resulted in the realisation of the importance of corporate administration. The authors have underlined a few questions dealing with the physical presence of the corporation. Whether a company can be held responsible in its capacity or the person dealing with the association should be held liable raises concerns. Thirdly, what measures are to be followed to curb such illegitimate actions in the future is an issue that the research article tries to highlight. This paper outlines the said narratives and further discusses the legislative gaps and judicial stances taken by different courts mainly in the USA and India. The researchers would highlight the history of corporate criminal liability and along with it also cover the startling changes introduced by the USA through Pre-Trial Deferred Agreements between the prosecution and defaulting corporation. The paper also underlines the necessity to formulate a corporate criminal sentencing policy for the uniform application of the law on such liability.

A. Introduction

A Corporation always stands distinct from its governing body which is established through legislative practices in India through registration and incorporation laid down in the Companies Act 2013.¹ It can not only sue but can also be sued in its capacity². Therefore, it is said to be an artificial entity or a separate legal entity. The word corporate criminal liability was discussed in India in terms of wrongful acts or omissions committed by the organisation against its stakeholders. The first question that arose was whether the physical presence of the corporation could be protected. Secondly, whether a corporation can be held liable in its capacity or the person managing the organisation should be held liable for the wrongful act of the entity. Thirdly, even if a corporation is set out to be liable for its act how sanctions can comply afterward?

¹ The Companies Act, 2013.

² *Solomon v. Solomon & Co.*, (1897) UKHL 1 AC 22.

Laying down criminal liability will always be possible if the intention and the wrongful act can be established; be it either a human being or an entity. Though there was no doubt that a corporation should be held liable for its wrongful act the guilty mind cannot be attributed to the entity as the corporation does not have its brain, it functions through its manpower, and even if it is held liable punitive measures could not be regarded. For that reason, many a time this question was addressed by the Indian Judiciary with no possible uniform outcome that could have been followed later on. Certainly, different propositions were laid down but even now challenges created by the corporate world have not been addressed properly.

Corporate criminal liability had no significance in the initial time but later on, it was realized that corporates should be held liable as it was so unfair for the shareholders, customers, creditors, etc. to suffer because of the corporate goons. Certainly, some action was necessary and for that purpose relying on the doctrine of vicarious liability stood correct amongst other various theories of common law to implicate the real people behind the conspiracy which fit well in the corporate world in holding the actual perpetrators liable for their acts and putting them behind bars.³ The advent of technology, infrastructure, privatisation, and globalisation led to the formation of various organisations that only aim at profit, even in various other countries also known as multinational organisations. Crime set out in such organisation had to be controlled because the difficulty begins from failure to prove *mens rea* and leads up to the struggle of imposition of sanctions. Corporations play a vital role in running the economy but this alone cannot be the sole reason for them to be set free to exploit the resources of the nation. Their activities need to be obstructed before it engulfs the whole society. Statutory support was also sought from the Indian Penal Code (IPC) which prescribes criminality of the act in India in which the position of 'person' has been clarified which includes company under section 11 of IPC⁴. Criminal Procedure Code under section 305⁵ lays down the procedure in which companies can be prosecuted when companies or corporations are set out to be accused in a matter. Despite taking help from the aforesaid statutes the present situation of regulating the criminal liability of a corporate body is still not clear.

³ Erin Sheley, "Tort Answers to the Problem of Corporate Criminal Mens Rea," *North Carolina Law Review* 97 (2019).

⁴ The Indian Penal Code, 1860, s. 11.

⁵ The Code of Criminal Procedure, 1973, s. 305.

B. Histograms and Rise of Criminal Liability in the Corporate World

The area of corporate governance is boundless with its prolonged and incredible history that inculcates the right of shareholders, size, formation of the board, and responsiveness in terms of management. The genesis of corporate governance can be traced long back to the history of the 16th century wherein East India companies came into India and infiltrated into the roots of our country.⁶ The word 'Corporate' has its elongated history but it has not been given prime recognition. In the 1970s for the first time, the word was introduced explicitly in the United States. The reason behind such recognition was the exceptional impact on the economy of the United States after the massacre of World War II.⁷

Though, the formation of the Security Exchange Commission (SEC) happened in 1934 for the basic purpose of protecting the investors and promoting the market stability with its said provisions. The emergence of the word 'corporate governance' happened in 1976 in the journal of the federal government that is the Federal Register.⁸ The assortment of the company named Penn Central railway led to its bankruptcy in 1970 which ultimately made a hue and cry amongst the general public. The main cause of action was the manipulation that was done by the outside directors in showcasing the financial statements of the company which eventually ended up in the form of this word. In meanwhile foreign officials were given a huge amount of money for distorting the corporate records which were taken into account by SEC.⁹

The New York Stock Exchange in order to dissuade frauds gave directions to all the listed corporations to frame a committee of auditors which included only the independent directors that were done following the guidance of SEC.¹⁰ Around this span, more and more outside directors were designated for the job of auditors, and a variety of committees were formulated to maintain the balance of power of the board of directors and shareholders.

Criminality has not been a new concept in respect of corporations and has been a focus since

⁶ Mamta Aggarwal, "European Traders in India during 17th and 18th Centuries" History Discussion - Discuss Anything About History, 2013 *available at*: <https://www.historydiscussion.net/history-of-india/european-traders-in-india-during-17th-and-18th-centuries/698> (last visited January 9, 2024).

⁷ Nicholas J. Price, "What Is the History of Corporate Governance and How Has It Changed?" (Diligent Insights, 2018)

⁸ "SEC.gov | Mission," Sec.gov, 2023 *available at*: <https://www.sec.gov/about/mission> (last visited January 9, 2024).

⁹ Price, *supra* note 7, at 3.

¹⁰ "SEC.gov | Mission," Sec.gov, 2023 *available at*: <https://www.sec.gov/about/mission> (last visited January 9, 2024).

the inception of corporate frauds committed by the companies to evade the responsibility and accountability imposed by its stakeholders or by way of misusing the funds of its investors that results in victimizing who are investing their hard-earned input for a profitable output. The development of corporate criminality has evolved distinct theories of law with a creative perspective.

This led to a system that bridges the gap between legal lacunas and criminal infirmities and usually, the produce of such a gap was the formation of a type of organization such as a Limited Liability Company, one-person company, or limited liability partnership around the globe with a preventive criminal measure by putting the burden on the organisation for legislative compliance.¹¹ It was not possible to convict the organisations under the common law system for their criminal offenses and even vicarious liability could not be imposed which holds the real perpetrator liable for the criminal act.

However, at the beginning of the 20th century, individuals were held liable for their criminal acts in the corporation reversing the earlier position where the concept of vicarious liability was not imposed reiterating that one cannot be prosecuted for the acts of another. This clears out that common criminal law has always carried several stumbling blocks in terms of the corporate world.¹² One of the important instances marked in US history was *New York Central and Hudson River Railroad v. US*¹³ where the court held Railroad Company paying rebate violates federal laws the employees are held liable for its actions and the corporation cannot be implicated for the same. Supreme Court, later on, came up with an altogether different proposition stating the corporation benefitted out of such federal criminal breach therefore corporation is liable and courts either imposed fine or forfeiture at its discretion. There have been two extreme approaches concerning corporate criminal liability and that has resulted in the present state of dilemma.

Federal criminal laws relating to the corporation saw changes when the US was hit by some of

¹¹ Richard S. Gruner, "Corporate Criminal Liability and Prevention" *Law Journal Press*, 2004

¹² Vijay Kumar Singh, "Criminal Liability of Corporations – An Environmental Perspective" *Ssrn.com*, 2010 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972053 (last visited January 9, 2024).

¹³ (1909) 212 US 481.

the major scams of top-notch organisations like Enron¹⁴, Worldcom,¹⁵ and Telecom¹⁶ which reflected deep-rooted defects in the governance of the corporate world. The revamping of corporate criminal laws was much needed and so was done to a great extent in the US. The officials formed pretrial diversion agreements (PDA) between the prosecution and the defaulting corporation. The methodology behind this was to ensure compliance of the statutes rather than just tendering a huge amount as a fine and getting away with the whole liability.¹⁷ Now, mandatorily firms are required to formulate a compliance agreement for the governance of the organisation and the area of operation is to be demarcated clearly.¹⁸

PDAs are obligations framed in a contractual form between the prosecution and corporates that allows the government to impose restrictions over the said entity and various clauses of the contract define the limits of working of the organisation and in return, they get an exemption to forego the proceeding against the said entity. It boosts the corporate compliance mechanism to hinder future misconduct in an organisation and solve all the question of infirmities caused by the organisation also reduces the consequences of conviction of shareholders, employees, and other associated parties who are said to be the stakeholders of the company.¹⁹

Corporate scandals are made into breaking news with their spate in developing countries as all the focus lies on the economy. Undeniably economic growth and the corporate world are inherently linked and minor deviation impacts the economy. Satyam scam in India shook the whole country because of the impact on the economy. A strong financial system is a quintessence that is promoted through corporate governance be it any system market-based or bank-based as both unmistakably have an impact on the economy in a positive manner and in terms of reducing poverty in the country.²⁰

¹⁴ Kathleen M. Boozang & Simone Handler-Hutchinson, "Monitoring Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care," 35 *American Journal of Law and Medicine* 96-97 (2009).

¹⁵ Mark Tran, "WorldCom accounting scandal" *The Guardian*, 2002 available at: <https://www.theguardian.com/business/2002/aug/09/corporatefraud.worldcom2> (last visited January 9, 2024).

¹⁶ The Economist, "Megahurts" *The Economist*, 2012 available at: <https://www.economist.com/business/2012/02/11/megahurts> (last visited January 9, 2024).

¹⁷ Jennifer Arlen & Marcel Kahan, "Corporate Governance Regulation through Nonprosecution," 84 *University of Chicago Law Review* 1 (2017).

¹⁸ Cindy R. Alexander & Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements," 52 *American Criminal Law Review* 537, 569, 589–590 (2015).

¹⁹ Wulf A. Kaal & Timothy Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance," 70 *Business Law* (2014).

²⁰ Stijn Claessens, "Corporate Governance and Development" *Social Science Research Network* (2003).

C. Legislative and Judicial Plethora Dressing the Impact of Corporate Criminality

Corporate criminal liability has been a debatable matter when it comes to deciding the *mens rea* and *actus rea*. Even if it displays a logical inference still it could not cover the areas where criminal intent could not be imposed such as in environmental issues. In the past ongoing numerous modern calamities occurred such as The Bhopal Gas Tragedy, in 1984²¹, Chansala Mining Disaster, in 1975²², Jaipur Oil Depot Fire, in 2009²³, The Banqiao Dam Failure, in China, in 1975²⁴, the Korba Chimney Collapse, in 2009²⁵, Mayapuri Radiological Incident, 2010²⁶, Bombay Docks Explosion, 1944²⁷, Ojhri Camp, Pakistan, 1988²⁸, Texas City Refinery Explosion, 2005.²⁹

Environmental disasters are a risk to individuals and to keep a check on it a supportive network should emerge from the interest–supply – creation of products and enterprises. A considerable amount of these episodes leaves a long haul of wellbeing impacts and serious sully on the environment. *M.C. Mehta v. UOI* (Oleum gas leak case)³⁰ introduced the concept of absolute liability,³¹ whereby intent could not be demonstrated on the corporation still liability was still thrust on them. The question of liability becomes tricky to address as a result of which this doctrine was useful for removing the ambiguity of laying down liability.

The basic idea was whether a corporation can be held liable for the intentions and knowledge

²¹ Prabhash K Dutta, “Bhopal gas tragedy: What had happened this day 33 years ago that killed thousands?” *India Today*, 2017 available at: <https://www.indiatoday.in/india/story/bhopal-gas-tragedy-what-had-happened-this-day-33-years-ago-that-killed-thousands-1099247-2017-12-03> (last visited January 9, 2024).

²² Dilip Bobb, “Bihar Chas Nala colliery disaster: 372 coal miners buried alive” *India Today*, 2015 available at: <https://www.indiatoday.in/magazine/indiascope/story/19760115-bihar-chas-nala-colliery-disaster-372-coal-miners-buried-alive-819019-2015-02-18> (last visited January 9, 2024).

²³ Mukta Girdhar, “Jaipur Fire and Its Environmental Effects” *12th Esri India User Conference* (2011).

²⁴ Eric Fish, “The Forgotten Legacy of the Banqiao Dam Collapse,” *The Economic Observer* (Beijing, 2 August 2013). available at: <https://www.internationalrivers.org/resources/the-forgotten-legacy-of-the-banqiao-dam-collapse-7821> (last visited January 1, 2024).

²⁵ Headlines Today, “30 killed in Korba thermal plant chimney collapse” *India Today*, 2009 available at: <https://www.indiatoday.in/latest-headlines/story/30-killed-in-korba-thermal-plant-chimney-collapse-57125-2009-09-22> (last visited January 1, 2024).

²⁶ R. Ramachandran, “Lessons from Mayapuri,” *The Hindu* (New Delhi, 5 May 2010). available at: <https://www.thehindu.com/opinion/op-ed/Lessons-from-Mayapuri/article16297459.ece> (last visited January 1, 2024).

²⁷ Leora Pezarkar, “The Explosion that Shook Bombay in 1944,” *Live History India* (Mumbai, 20 May 2018).

²⁸ Shaikh Aziz, “The Ojhri Camp disaster — Who’s to blame?” *DAWN.COM*, 2016 available at: <https://www.dawn.com/news/1237794> (last visited January 1, 2024).

²⁹ Chinedu Isiadinso, “BP Texas City Refinery Disaster - Accident & Prevention Report,” *ResearchGate* (Berlin, May 2015).

³⁰ *MC Mehta v UOI* AIR 1987 SCR 819.

³¹ Shramana Dwibedi, “Strict and Absolute Liability,” *Legal Services India*. available at: <http://www.legalservicesindia.com/article/2155/Strict-and-Absolute-Liability.html> (last visited January 1, 2024).

that the employees of the specific corporations might show.³² The debate has never left this topic unaddressed and the extension of liability was only to the borderline that person or agent acted during his employment and has benefitted the organisation.³³ The question was also whether we can hold the corporation liable for its actions as the culpability becomes a devious area because a corporation cannot work on its own, it is a manpower-driven entity. According to the principle of criminality, it would be difficult to establish an offence committed by an organisation because being an artificial legal person, it is not capable enough to think on its own and frame an intent to commit a crime.

The practice of making organisation liable for its action is only a way to control the area of governance and obstruct the misuse of powers entrusted to the entity and this not only impacts the corporate world but it would also have a prominent effect on the economic development for the developing countries. The control of such defensive measures is highly important for preventing corrupt practices around the globe.³⁴

Corporate criminal liability is the only redress available out of the other inadequate methods to ameliorate things in the right direction. *Tesco Supermarkets Ltd v. Natrass* was a significant legal case involving the prosecution of a corporation under the Trade Descriptions Act, 1968, for falsely advertising products at lower prices than actually offered. In *DPP v. Kent and Sussex Contractors Ltd*,³⁵ Justice McNaughten ruled that if a responsible agent of a company knowingly presents a false document with the intent to deceive on behalf of the organization, the agent's intent and belief are attributed to the corporation. In this context, the identification theory refers to attributing the state of mind and actions of an individual performing an act to the corporation.³⁶

Both American models for holding associations criminally obligated to utilize the 'distinguishing proof' approach spearheaded in England. This methodology forces vicarious obligation on an association for the acts submitted by operators of the association. *Respondent superior* is the more extensive of the two models. It is a customary law rule created basically in the American government courts and received by a few American state courts. Under the

³² *United States v. Philip Morris USA, Inc.* [2009] 566 F.3d 1095 (D.C.Cir.).

³³ *United States v. LaGrou Distribution Systems* [2006] 466 F.3d 591.

³⁴ *New York Central R. Co. v. United States* [1909] 212 U.S. 481.

³⁵ *DPP v. Kent and Sussex Contractors Ltd* [1944] KB 146.

³⁶ Harvey Yarosky, "The Criminal Liability of Corporation," 10(2) *McGill Law Journal* 144, 145-146.

standards in tort law, it gives that an enterprise ‘might be held criminally subject for the demonstrations of any of its specialists who, perpetrate a wrongdoing, inside the extent of work and with the purpose to profit the enterprise’.³⁷

In the case of *New York Central and Hudson River Railroad Co. v. United States*³⁸, the Supreme Court of the United States addressed the ‘old and exploded doctrine’ of corporate immunity from criminal prosecution. The Court reaffirmed this previously dismissed doctrine while expressing concern that many offenses might otherwise go unpunished. So, it was observed that if the previous belief concerning corporate criminal liability is pursued then it would not only do away with the only means of efficiently regulating the subject matter but also fail in correcting the abuses aimed at.

According to the Indian scenario, criminal mind and unlawful commission or erroneous misdeed are the quintessence of corporate criminal liability. A person can be held liable for any unlawful activity by being a mindful individual. Nevertheless, at the point when an offense has been put together by an association, the request arises with respect to whether the said entity can be prosecuted in matters of crime committed by them. The issue has caused significant concern in Indian courts and in the earlier decades, there have been not many cases whereby the courts have endeavored to characterize a law to base the fault of the ventures.³⁹

The tendentious question was answered to some extent by the Apex Court in *Standard Chartered Bank v Directorate of Enforcement*⁴⁰ and *Iridium India Telecom Ltd v Motorola Inc*⁴¹ by making corporate entities liable for the criminal liability carried out by them and the proceeding can be brought against the organisation. Before these cases, the law was hesitant to drive criminal commitment on corporate bodies since organization can't have the *mens rea* to present an offense and corporations can't be kept behind bars.

Specific liabilities of a director or board person who is responsible for making all the essential decisions in the organisation can be enforced according to the doctrine of vicarious liability which can be mapped out through distinct statutes provided in India. Insolvency Bankruptcy

³⁷ *United States v. A & P Trucking Co.* [1958] 358 U.S. 121.

³⁸ [1909] 212 U.S. 481.

³⁹ V. Vijaya Lakshmi, "Corporate Criminal Liability – A Critical Legal Study," *5 Pen Acclaims* (2019)..

⁴⁰ *Standard Chartered Bank v Directorate of Enforcement* [2005] 4 SCC 530.

⁴¹ *Iridium India Telecom Ltd v Motorola Inc* [2011] 1 SCC 74.

Code, 2016, and the Prevention of Money Laundering Act, 2002 attract provisions where civil and criminal liability can be imposed on the directors. Nevertheless, what was fascinating was Prevention of Corruption Act, 1988 does not thrust the vicarious liability as imposed in the above-mentioned legislature.

The controversy was addressed by the apex court in the case of Sunil Bharti Mittal v. CBI i.e. 2G Scam⁴² which resulted in a criminal charge sheet being dropped against the director of Bharti Cellular Limited as the law prescribed under the Prevention of Corruption Act, 1988 does not provide vicarious Liability which states that a person cannot be held liable for the wrongs committed. The Supreme Court was confronted with the issue regarding when a chief/individual accountable for the issues of the organization can be arraigned for an offense presented by the organization. The three-seat court depended upon the 'standard of attribution' which is applied to credit criminal goals to the organization. The criminal aim is to 'modify conscience' and can't be applied in a turn-around situation to make the chiefs duty-bound for offenses carried out by the organization.⁴³ The trial court must form its opinion with reasoned justification for deciding the criminality of the offense⁴⁴ and there should be enough apparent cause for initiating proceedings under the criminal procedure code.

Recently, there are examples where the executives are summoned to blame in a criminal indictment, in prominent tricks where there is open cash required, with no proof on record of the inclusion of such chiefs. This prompts such chiefs being compelled to thump the entryways of the courts to look for redressal and along with these lines bringing about weight on the criminal equity framework. This is particularly amusing given the way that a trial court is enabled to issue a process at any time of proceeding but the necessary element is that evidence must exist against such person.⁴⁵

The Prevention of Corruption Act⁴⁶ was introduced with certain amendments in 2018 that revamped the act a little with its introduced changes that provide prosecution of the corporation 'if any person associated with such organisation gives or promises to give any undue advantage

⁴² [2015] 4 SCC 609 *Criminal Appeal No. 35 of 2015*.

⁴³ *Iridium India Telecom Ltd v Motorola Inc* [2011] 1 SCC 74.

⁴⁴ *Criminal Procedure Code, 1973, s. 204*.

⁴⁵ *Code of Criminal Procedure Code, 1973, ss. 190, 319*.

⁴⁶ *Prevention of Corruption Act, 2018*.

to a public servant'⁴⁷ and directors are also held liable if it is supported with evidentiary inputs that it was in accordance to the needs of the director or with his permission he will also be punishable.⁴⁸ It further gives resistance to a business association to demonstrate that it had set up sufficient strategies to forestall people related with it from undertaking such direct. The exertion is by all accounts to make a qualification between resistance inferable exclusively to an abnormality/disregard of an individual and a foundational disappointment of an association. This new revision is yet to be tried to put forth a clear stance in the matter.

There are certain provisions in the Companies Act, 2013 supporting the contentions rolled in tort law as the vicarious liability of directors. It has come up with an 'information test' holding Non- Executive Directors and Independent Directors (not including Promoters and Key Managerial personnel) liable for criminal acts.⁴⁹ Though this invulnerability is conceded to non-executive directors and Independent Directors is restricted distinctly for the offenses under the Companies Act and not under some other enactment.

The Supreme Court of India's legal precedent established in 2015, particularly in the Sunil Mittal case, remains the final authority on executive criminal liability. As a result, rather than succumbing to the sensationalism propagated by various actors advocating for the accountability of a 'person' in a sensational public spectacle, each case should be adjudicated considering the criminal liability of executives within the existing legal framework.

D. Corporate Punishment and Pretrial Deferred Agreement

Immediately upon the fault of the association, the accompanying bulky task is to choose the nature and the kind of control that has to be constrained. Despite the way, that conviction itself is disfavor and it impacts the business prospects of an undertaking yet parts of the deals must be met by giving appropriate approvals. When it is an organization, the goal of criminal justice generally requires assessing liability.

When the associations are taken as discrete from individuals inside themselves and they are going about as a rule in a surprising way in contrast with its heads, there is a need they should be repelled especially whether or not physical confinement is past the domain of the human

⁴⁷ *Prevention of Corruption Act, 1988, s. 9.*

⁴⁸ *Prevention of Corruption Act, 1988, s. 10.*

⁴⁹ *Companies Act, 2013, s. 149(12).*

mind. In the recent decade, corporate criminal implementation in the US has experienced a sensational change. Government authorities never again essentially impose liability on publicly held firms that submit violations. Rather, they utilize their requisite position to force commands on these organizations and rely on orders that can require a firm to change its consistency program, administration structure, or extent of tasks.⁵⁰ Firms that carry out wrongdoings are never again essentially required to pay fines. Rather, examiners and firms go into PDAs. Investigators consistently use PDAs to force orders on firms making new obligations that adjust firms' inner tasks or administrative structures. Department of Justice (DOJ) approaches in a way that favours the utilization of such commands for any firm with a lacking consistency program at the hour of the wrongdoing.⁵¹

Deferred Prosecution Agreements (DPAs) regularly involve huge corporate administration changes, for example, commanding new board individuals or new executives, changes in interior controls, refreshed consistency programs or extra self-detailing commitments among others.⁵² Through the expanding utilization of N/DPAs, investigators are improving corporate America by changing the administration of driving open enterprises. The assessment of issues relating to the impact of PDAs on corporate administration is to a great extent dependent on narrative proof and significant case studies⁵³

In the wake of presenting PDAs in the mid-1990s,⁵⁴ examiners extended their application incrementally.⁵⁵ The DOJ customarily handles PDA's though SEC also started entering PDA's against people and corporations in 2013. Further Antitrust Division of the Department of Justice also showed its interest and entered its first DPA in 2013 just like SEC.⁵⁶ Several

⁵⁰ Cindy R. Alexander & Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-prosecution, Deferred Prosecution, and Plea Agreements," 52 *American Criminal Law Review* 537, 569, 589–590 (2015).

⁵¹ Jennifer Arlen & Marcel Kahan, "Corporate Governance Regulation through Nonprosecution," 84 *University of Chicago Law Review* (2017).

⁵² PJ Meitl, "Who's the Boss? Prosecutorial Involvement in Corporate America," 34 *Northern Kentucky Law Review* 2 (2007).

⁵³ Lawrence Cunningham, "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform," 66 *Florida Law Review* 1 (2014).

⁵⁴ Leonard Orland, "The Transformation of Corporate Criminal Law," 1 *Brooklyn Journal of Corporate, Financial & Commercial Law* 45, 57 (2006).

⁵⁵ "Mid-Year Update On Corporate Deferred Prosecution Agreements (DPAs) And Non-Prosecution Agreements (NPAs)" (Gibson Dunn, 2013). available at: <https://www.gibsondunn.com/2013-mid-year-update-on-corporate-deferred-prosecution-agreements-dpas-and-non-prosecution-agreements-npas/> (last visited January 2, 2024).

⁵⁶ Cadwalader Wickersham, "Antitrust Division Enters into First Deferred Prosecution Agreement," *Lexology*, 14 February 2013. available at: <https://www.lexology.com/library/detail.aspx?g=347e5b04-f9c9-49a6-b8b6-d3d1608e7e1d> (last visited January 2, 2024).

variables can help clarify the expansion of PDAs. To start with, investigators and partnerships have solid motivating forces to go into PDAs and dodge a trial.⁵⁷ Once examiners have researched and distinguished corporate bad behaviour, they can utilize PDAs to stay away from a costly preliminary trial against a corporate defendant.⁵⁸

A few centre attributes frequently connected with PDAs have raised concerns about their authenticity in the writing. It has been contended that reorganization of enterprises is outside the domain of the investigator's office, referring to the creation of Sentencing Guidelines as opening the conduit that permitted investigators to change enterprises through prosecution.⁵⁹ Prosecutorial abuse is the core concern area for which everyone is showing their apprehension⁶⁰ and another field of an affair is inconsistent dealing power.⁶¹

Numerous analysts prescribe explicit changes under current PDA principles applied by the DOJ. Some express a craving for more prominent consistency in PDAs⁶² as a strategy for improving oversight and propose a conventional endorsement process for N/DPAs, practically identical to the McNulty procedure for benefit waivers.⁶³ The DOJ's way to deal with PDAs is to concentrate on official strain to actuate representatives' participation as a by-product of tolerance that can be improved with a base-up approach which would give motivating forces to people to help out the DOJ.⁶⁴

The discipline of corporate unfortunate behaviour utilizing PDAs ex-post could likewise be diminished if the DOJ proactively centered around instructing partnerships about consistent follow up of laws *ex-ante*. Others recommend re-evaluating the job of the autonomous screen

⁵⁷ David M. Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability," 72 *Maryland Law Review* 1295, 1301 (2013).

⁵⁸ Erik Paulsen, "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements," 82 *New York University Law Review* 1434, 1458 (2007).

⁵⁹ "Deferred Prosecution Agreements," *Serious Fraud Office*, 2021 available at: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/> (last visited January 2, 2024).

⁶⁰ Preet Bharara, "Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants," 44 *American Criminal Law Review* 53, 112 (2007).

⁶¹ Matt Senko, "Prosecutorial Overreaching in Deferred Prosecution Agreements," 19 *Southern California Interdisciplinary Law Journal* 163, 163–164, 180 (2009).

⁶² Robert J. Ridge & Mackenzie A. Baird, "The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements," 33 *University of Dayton Law Review* (2008).

⁶³ Erik Paulsen, "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements," 82 *New York University Law Review* 1434, 1458 (2007).

⁶⁴ Susan B. Heyman, "Bottoms-Up: An Alternative Approach for Investigating Corporate Malfeasance," 37 *American Journal of Criminal Law* 163, 177–178 (2010).

and finding respectability-based consistency programs.⁶⁵ To decide if PDA changes are accomplished and whether the advantages surpass the cost, some call for expanded straightforwardness simultaneously, from exchange through the finish of guidance.⁶⁶ Finally, considering the expanding centre on restoration and consistency, some prescribe dissolving corporate criminal obligation out, making PDAs futile.⁶⁷ There are concerns about a wide utilization of PDAs, with many contending that PDAs should just be utilized in exceptionally restricted circumstances and free screen arrangements explicitly should just be applied in a limited number of cases.⁶⁸

Narrative proof suggests that PDAs apply impact and are evolving corporate administration in the United States. Corporate administration issues were generally under the domain of proprietorship and the board, however now PDAs are considered to empower the DOJ to reduce corporate misconduct.⁶⁹ Through the expanding utilization of PDAs, government examiners are steadily extending their conventional job and have begun reshaping corporate America by changing the administration of driving open organizations and whole enterprises. The Enron outrage is considered by numerous individuals as the key occasion hastening government affirmation of capacity to improve corporate administration.⁷⁰

E. Corporate Sentencing Model

An elaborate model of corporate sentencing with financial as well as social repercussions can be thought about while framing an intricate and effective condemning model. These authorizations empower to bring into account a legitimate prevention framework that would be the most fitting in the given system as different hypotheses of discipline as examined above can't be relevant in situations where a "juristic brain" is taken into account.

The organization of legal principles in common law involves judicial creativity, academic

⁶⁵ David Hess & Cristie L. Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem," 41 *Cornell International Law Journal* 307, 310-311 (2008).

⁶⁶ Kathleen M. Boozang & Simone Handler-Hutchinson, "Monitoring Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care," 35 *American Journal of Law & Medicine* 89, 96-97 (2009).

⁶⁷ Wilson Meeks, "Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?" 40 *Columbia Journal of Law and Social Problems* 77, 100 (2006).

⁶⁸ Jennifer Arlen & Marcel Kahan, "Corporate Governance Regulation through Nonprosecution," 84 *University of Chicago Law Review* 1 (2017).

⁶⁹ Barry A. Bohrer & Barbara L. Trencher, "Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation," 44 *American Criminal Law Review* 1481, 1486 (2007).

⁷⁰ Kathleen M. Boozang & Simone Handler-Hutchinson, "Monitoring Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care," 35 *American Journal of Law & Medicine* 89, 96-97 (2009).

exploration, and legislative codification, typically in that sequence. This approach has also influenced the scrutiny of the principle '*societas delinquere non-potest*'. Academic studies on corporate crime, alongside ideological influences on criminal law reforms, have challenged the traditional notion of corporate immunity, prompting many common law jurisdictions to reconsider their application of criminal law to corporations. Different models of corporate criminal liability have varied notably in three key aspects: determining which organizations can be held criminally liable, categorizing offenses that apply to corporate entities, and establishing criteria for assigning responsibility to corporations.

i. Choosing the organization

Different legal systems approach corporate criminal liability with significant variations regarding which types of entities can be held criminally responsible.⁷¹ This diversity suggests three primary models or approaches. One approach uses the term "organization" broadly, without specific definitions or limitations. Another method lists specific types of associations subject to criminal liability. The third approach limits liability to entities recognized as 'legal persons' under the law. For instance, Australian law exemplifies the broad approach, as seen in the Criminal Code Act, which applies equally to bodies corporate and individuals without explicitly defining which organizations are covered.⁷²

In contrast, the predetermined liability model, as seen in the United States and Canada, provides a detailed list of entities subject to criminal liability, encompassing a wide range from corporations to non-profit associations.

In India, the interpretation of 'person' in statutes includes corporations, aligning them with individuals in terms of criminal liability. The Indian framework resembles the American and Canadian systems by attributing criminal liability to corporations under specific conditions where individuals controlling the organization act in such a way that the corporation can be said to act through them. Overall, these different models highlight varying approaches to defining and applying corporate criminal liability across legal systems.

ii. Categorization of offences

Various methodologies exist to determine which offenses can be attributed to corporations. Firstly, there is the approach of equating the criminal liability of corporate entities with that of

⁷¹ Joan C. Williams, 'Critical legal studies: The death of transcendence and the rise of the new Langdells' (1987) 62 *NYULR* 429.

⁷² Australia Criminal Code Act 1995, ss 4(B3).

individuals, encompassing all offenses applicable to natural persons. Secondly, some legal systems avoid categorizing corporate crimes comprehensively, addressing each offense on a case-by-case basis. Thirdly, certain jurisdictions specify which crimes can be committed by collective entities like corporations.⁷³

In Australia and Canada, for instance, the first approach is evident in their criminal codes, where corporations can be held accountable for any offense, including those punishable by imprisonment, reflecting a broad and impartial application of criminal law across different subjects.⁷⁴

The United States employs the third strategy with its Sentencing Guidelines, which provide a detailed list of offenses applicable to corporations, such as fraud, bribery, antitrust violations, and tax offenses. This approach is notable for its clarity and specific delineation of corporate criminal responsibilities within the broader criminal code.⁷⁵

In India, a hybrid model draws from these approaches, where corporate criminal liability is determined objectively. While there is no exhaustive list of corporate crimes, Indian courts establish criteria to differentiate offenses for which corporations can be held liable, typically focusing on offenses involving imprisonment and fines that can feasibly be committed by corporate entities, excluding those inherently impossible for corporations to commit, such as sexual offenses or murder.

iii. Assigning responsibility

Across different jurisdictions, there is generally consistency regarding the criterion for attributing actus reus to corporations. The principle of '*Respondeat Superior*,' central to the U.S. legal framework, extends into criminal law, attributing both the actus reus and mens rea of individuals acting on behalf of a corporation to the corporation itself.⁷⁶ This principle, rooted in the organic theory articulated by Otto von Gierke, holds that a corporation is criminally responsible when an agent commits an offense within the scope of their employment and to benefit the corporation.⁷⁷

In the U.S., this definition of 'agent' is broad, encompassing all individuals acting in the corporation's interest, not just managerial staff. Australia's legal interpretation aligns closely with the U.S., where the Criminal Code Act specifies that any physical element of an offense

⁷³ Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *WUGSLR* 547.

⁷⁴ Mirko Bagaric and Theo Alexander, 'A Rational Approach to Sentencing White-Collar Offenders in Australia' (2014) 34 *ALR* 317.

⁷⁶ Rachel E Barkow, 'The New Policing of Business Crime' (2014) 37 *SULR* 435.

⁷⁷ Keith N Hylton, 'Punitive Damages and the Economic Theory of Penalties' (1998) 87 *GLJ* 421

committed by an employee within their employment scope is attributed to the corporation. Courts in Australia have expanded the scope of employment to include acts consistent with general employee behaviour, even if the act was partially motivated to benefit the corporation.⁷⁸

In India, as reinforced by the Supreme Court in *Iridium India Telecom Ltd. v. Motorola Incorporated*, corporations are held liable for acts committed by their officers or agents within authorized powers, regardless of explicit corporate authorization. The Indian legal stance emphasizes that corporations, through their governing bodies, are ultimately responsible for corporate actions, underscoring that the corporate veil does not shield liability.

These perspectives illustrate how different legal systems address the attribution of criminal responsibility to corporations, reflecting varying interpretations of agency and corporate accountability.

F. Conclusion

The utilization and use of PDAs have multiplied since their commencement in the mid-1990s. PDAs are making huge and incredible commitments to the corporate world, embodying a move in prosecutorial ethos from an ex-post centre about discipline to an ex-risk accentuation on consistency. There is a contemplation regarding the utilization, application, and authenticity of PDAs. This examination gives observational proof of corporate administration changes in PDA since the mid-1990s. It could be summarised that corporate administration arrangements in PDAs altogether expanded in the most recent decade, boosting examiners' impact on corporate administration to remarkable levels. According to the scenario prevailing, the corporate exercises are affecting each human action. Thus, inappropriate doing concerning incorporated activities or oversights has genuine results that may now and again extend from grave offenses to abnormalities calling for reformatory authorizations. Corporate culpability is a reason for concern and should be distinguished and decided. Corporate criminal obligation has been created throughout history from vicarious obligation to present-day autonomous corporate issues. Right now, the advancements intending to the issue of corporate guiltiness have been talked about alongside the development of different hypotheses of corporate criminal risk in the present occasions. The advancements in various nations give a strong notion that corporate culpability needs a vast sea of change in the present scenario, especially in a country like India. Particularly in India, the boundless corporate defect has so far not been unequivocally set down definitively or judiciously. Control of the supervision will go about as proof of whether the

⁷⁸ Rachel E Barkow, 'The New Policing of Business Crime' (2014) 37 *SULR* 435.

liability in an association will be maintained or not. At last, it is said that an association of today has a never-ending journey, troublesome encounter from being a gathering asserted substance to being seen as a legitimate person who has countless rights and claims which results in an enormous bit of their general surroundings. The age-old practice that the enterprises did not bore any obligation for any sort of culpable actions was something that was a matter of debate and it has undergone a lot of changes as we see it in the present legal scenario. It was so because the association was seen as a legally designed substance, unequipped for encircling the *mens rea* essential to complete a criminal exhibition. The noteworthy development in considering that a venture can be held reprehensible was taken by the point of reference-based law, countries, where the courts were essentially progressively gallant in interpreting the created words and stepping out of the cut-off points set by the formed words that the association isn't fit for having a point what's increasing, physical proximity, in this way, can't be rebuked or kept. The regular conviction set up through different tenets perseveres that corporate criminal risk remains in strife with the personal character of criminal obligation. There are times when the partners of the corporation suffer and in the remaining occasions, the direct impacts of a criminal approval are looked at by the company alone through fines. There were barely any occurrences when the courts started to grant discipline in the type of severe endorses or fines to an organization that ever tried to harm or cause any kind of difficulty for the public at large. Different case laws that followed this choice built up that even though the corporation shrouds and shields the perpetrator, however, the individuals, through their companies, can't evade any lawful punishments that would result from their activities as individuals. There are certain laws followed by different nations to deal with the disciplines in the event of a corporate criminal risk. New models of criminal risk, for example, the conglomeration of self-personality speculations, have been created and seen by the courts. To date, the American corporate criminal liability system is the most advanced and comprehensive. This model includes a wide range of criminal penalties for corporations, such as fines, corporate probation, negative publicity, and other measures. The goal is to punish corporations effectively when any employee commits a crime while acting within the scope of their employment and on behalf of the corporation. The most calculable actuality comparable to the American model of corporate criminal risk is the selection of the total hypothesis by courts. Traditionally, India also accepted that the organization is not a natural being and that there is no physical discipline that can be granted to it. The impact of the basic lawful nations is unmistakable in India when we see the translation of obligation be managed through vicarious obligation hypotheses and recognizing speculations laid down by the Indian Courts. Dissimilar to Australia which utilizes the

segments of corporate shortcoming hypothesis to see the liable personalities and hands inside the organization, India has not begun thinking on those lines yet. There is a critical need to bring together assents and disciplines under Criminal Laws in India like fines, financial assets, capital punishment for an organization, and so forth with the goal that the liable demonstrations of the organizations can be tended to and rebuffed correctly. There is an absolute necessity to build uniform principles of Corporate Criminal Liability at the International Level not only that but a clear idea of corporate crime is required to create a clear and flawless Corporate Sentencing Policy.

