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# **Corporate Criminal Liability With Respect To Environment**

**Authored By- Muskan Sethi**

## **Introduction**

According to the 2000 data for the first time in the history of humanity among the 100 largest economies of the world 51 are global corporations. These are serious threat to the environment which has also been demonstrated by the FOEI (Friends of the Earth International) in the study where the ExxonMobil produced almost 20.3 billion tons of Carbon Dioxide (CO<sub>2</sub>) emissions since its 120 years of existence. This measures around 3 times the annual global emissions thereby meaning that it has since its foundation of the Standard Oil Trust in 1882 caused almost 5.3% man-made CO<sub>2</sub> emissions across the globe.<sup>1</sup>

The 'environmental crime' term is a relatively recent addition to the lexicon of criminal law. Until the 1980s (mid), environmental enforcement was only like the civil enforcement. But with the advance of the modern environmental legislations in the 1980s a new era of increased public and congressional support for sending polluters to the jail began. As the Congress (US) began transforming the environmental law by importing criminal law principles, the Justice Department too established an Environmental Crimes Section which is concerned with the effective criminal law enforcement of the environmental laws. The EPA (Environmental Protection Agency) acquired the criminal investigation power and created an Office of Criminal Enforcement. The violations of air/water quality standards, hazardous waste regulations became subject of prosecution as felonies. These events heralded a sea change in the environmental law enforcement jurisprudence.<sup>2</sup>

The concerns for the preservation of the environment have gained momentum recently. The courts have also adopted various policies and principles to restore the environmental degradation and damages. However the matter with regard to the imposition of the sanctions for the violation of the environmental laws has still remained a dream. Though some efforts have been made and imposition of fines/imprisonment is done but most of the cases have viewed the problem more from the civil perspective than that of criminal responsibility.<sup>3</sup>

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<sup>1</sup> Dorsey, Michael K., "A Plan for Democratic Control of Corporate Crime." Citing Anderson, Sarah and John Cavanagh "Top 200: The Rise of Global Corporate Power" 2000 IPS:DC.

<sup>2</sup> H:\Henderson\_Shelly\_Share folder\Environmental Crime Book Project\Chapters\Chapter 01\Chapter 01\_Current\_12-06-07.wpd.

<sup>3</sup> Dube, Indrajit, Environmental Jurisprudence: Polluters Liability, LexisNexis-Buttersworth (2007) at p.114.

*Sarah D. Himmelhoch* said that the current environmental problems fall into 3 general categories: Resource depletion, Climatic changes and Waste disposal. Traditional criminal law is inappropriate to control the above problems. This is because they are the result of the millions of small actions that are not prone to prevention through the use of traditional law. The effort and time to address each individual action would outweigh the benefits of such program. People and organisations release toxic waste and also engage in actions that harms significantly the environment.<sup>4</sup>

Now we come to the question as to what is corporate crime. With the varying degrees of seriousness, crimes impacting the environment are happening all the time and are being committed not only by the individuals but also by the businesses/corporate bodies/organizations.<sup>5</sup> The term 'corporate environmental crime' can be defined as any environmental crime which is committed by the corporate body. This includes fly-tipping (illegal dumping of the waste), fly-posting (plastering public spaces with advertising posters thereby ruining the area). It also includes other pollution incidents whether as a result of chemicals/general sewage of waste/farm slurry being discharged into the water.

Corporate Green-washing is the term used by the civil society activist/environmental activists to expose the dirty game played by the large corporations. It is a kind of reputation washing under the cover of environmental concerns. Blue-washing is another kind of reputation washing by using an affiliation with the United Nations. It simply means that the corporate violator of the environmental laws would become the greatest saviour of the environment with the help of money infused into media campaigns. *Kenny Bruno* (environmentalist) said that the world's leading ozone destroyer takes the credit for the leadership in ozone protection. A major agrichemical manufacturer trades in a banned hazardous pesticide and implies that it is actually helping in feeding the hungry. A petrochemical firm uses the waste from one polluting process as raw material for another hazardous process and still boasting it as a recycling initiative. Big MNCs cuts timber from virgin rainforest and replaces it with monoculture transplantations thereby calling it as sustainable forest development project.<sup>6</sup>

The green-washing is basically the mechanism to fool the regulators and innocent public as

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<sup>4</sup> "Environmental Crimes: Recent Efforts to Develop a Role for Traditional Criminal Law in Environmental Protection Effort", *Environmental Law Review*, No. 22, (1992), p. 1469, 1471.

<sup>5</sup> Corporate Environmental Crime, Second Report of Session 2004-05, House of Commons Environmental Audit Committee (26 January 2005) UK.

<sup>6</sup> The World of Greenwash, CorpWatch, January 1, 1997 available at [www.corpwatch.org/campaigns/PCD.jsp?articleid=244](http://www.corpwatch.org/campaigns/PCD.jsp?articleid=244), cited in *Laufer, William S., Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability*, Chicago: The University of Chicago Press (2006) at p. 164.

they get carried away by the false claims made by these corporations about their environment friendly measures. These games are played with the regulators and the compliance done is with the objective of making a good image initially and violating the rules/regulations later. For example a company having many industrial units may show a strict compliance and gain confidence of the authorities. Through the corporate social responsibility they have also gain the confidence of the local people. Under the garb of this many other units would be passed unchecked or with minimum checking. Company even does not hesitate to bribe the official which opens up another channel of crime. Even India has incorporated the provisions of Corporate Social Responsibility in the Companies Act through the 2013 amendment.<sup>7</sup>

Environmental crimes are not easy to understand. This could be because of the lack of information about the legislations, reckless/negligent/intentional/deliberate violation. To assess the situation from each of these perspectives it is important to tackle the environmental crime problems. Most of the environmental damage arises not from malice but from ignorance of the environmental impact of one's actions/one's obligations under the law. Unless and until there is a real threat of being detected, the offender will continue to commit the crime. Other problems are like inconsistent approach of the enforcement agency, low penalties etc. According to the Environmental Industries Commission (UK), low fines sends a wrong message in trying to create a culture where environmental compliance is taken seriously by the industry. The experience says that companies are willing to pay a fine than to properly address their environmental performance because it serves economical to them. Current fines are low and inconsistent therefore the need of the hour is to raise it so that it deters the companies from polluting the environment. Those companies who are not dissuaded from their illegal activity by the threat of detection, prosecution and sentencing (financial penalty/custodial sentence) other means must be searched in order to ensure their compliance with the environmental legislations/regulations. More expansive conception of environmental crime control which would harness the institutions is the need of the hour. A comprehensive approach is required which will improve the environmental performance and also prevent the environmental crimes.<sup>8</sup>

On 3<sup>rd</sup> December, 1984 the gas leak at a Union Carbide agrochemical plant in Bhopal (Central India) took place. Bhopal Gas Leak Disaster (India) involves a gas leak in an Indian Subsidiary of Union Carbide claimed more than 8000 in its immediate wake. Even today the death toll is

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<sup>7</sup> The Companies Act, 2013 (Act 18 of 2013), s. 135.

<sup>8</sup> Grabosky, Peter and Frances Gant, "Improving Environmental Performance, Preventing Environmental Crime" Australian Institute of Criminology Research and Public Policy Series No. 27 (June 2000).

well over 20,000. 120,000 survivors are in desperate need of medical help for chronic exposure induced diseases, breathlessness, persistent cough, loss of appetite, recurrent fever, early age cataracts, back/body aches, loss of sensation in limbs, weakness, depression, anxiety, fatigue, menstrual irregularities etc. this leak was found to be due to the negligence and recklessness of the higher officials. This crime took an International dimension as the US holding company was evolved.<sup>9</sup> Exxon Corporation paid around \$125 million for the 1991 Valdez oil spill for the unforeseen and direct damage to the Alaskan Wilderness and fisheries. It is contesting another 5 million dollars as punitive damages. Others in line were Chevron, Marathon oil, Unalocal Corporation. They pled guilty to criminal violations under the Clean Water Act. This shows that the major violations related to environmental pollution is done by oil companies.<sup>10</sup> Between February 2000 and August 2001, DLH Nordisk (an importer in Denmark) purchased the Mahogany from 5 companies at the forefront of an illegal chain of supply in Brazil.<sup>11</sup> TCR case is an illustration of the crime-facilitative industries in which one can discern a disproportionate and recurring pattern of criminal activity. The actions of the TCR were not only that of breach of the contracts but also causing serious environmental offences. Even lax government enforcement of regulatory laws hampered the obstruction of such crimes. The company was able to receive substantial subsidies despite the warning to the officials regarding the criminal records of the principal managers. The individuals were finally tried and convicted for sentences ranging from 3 to 6 years. The Norlisk Mining Company produces a 7<sup>th</sup> of all factory pollution in Russia (2 million tons of waste gas and 85 million cubic meters of dirty water annually). The effect of the same is also felt in Norway and Canada. Thus the life-expectancy of factory workers in the sub-Arctic Siberia is 10 years below the Russian average.<sup>12</sup>

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<sup>9</sup> "Corporate Crime Wave: The Facts," The New Internationalist 358 (July 2003).

<sup>10</sup> [www2.exxonmobil.com/Corporate/Newsroom/Newsreleases/xom\\_nr\\_061202.asp](http://www2.exxonmobil.com/Corporate/Newsroom/Newsreleases/xom_nr_061202.asp).

<sup>11</sup> <http://www.archive.greenpeace.org/>.

<sup>12</sup> 'Hell on Earth', Nick Walsh, The Guardian, 18 April 2003.

## Corporate Criminal Liability Under The Environmental Legislations

The Bhopal Gas Leak disaster<sup>13</sup> raised the very pertinent issue of the environmental pollution in a grand way. It even hit the International news stands and discussions as corporate crimes. Today degradation/pollution of environment has become a global problem. India being a party to the global environment consciousness has enacted three anti-pollution legislations (Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981, Environment (Protection) Act, 1986). These laws have included both natural as well as legal persons as the potential polluters of the environment and subjected them to criminal liabilities for failing to adhere to the prescribed environmental standards.<sup>14</sup> However the quantum of liability imposed on the individuals appears to be adequate and appreciable but the same is not true in case of corporations. The liabilities in case of corporations for curbing their injurious activities to the environment are grossly inadequate. It is failed to deter the huge enterprises and transnational corporations and is not able to thus prevent them from causing deterioration of the environment.<sup>15</sup> There is inconsistency in the punishments in the different laws. This raises a conflict thereby hindering the proper functioning of such enactments. This inconsistency is taken advantage by the corporations and they get through the crime by paying minor penalties.

Pollution Control Boards and Environmental Protection Agencies are empowered to prosecute environmental offenders and to prevent the further degradation of the environment. The Supreme Court in case<sup>16</sup> directed the Sterlite Industries to deposit 100 crores rupees as a compensation for its copper plant on Tuticorin which was ordered by the Madras High Court to be closed down. Due to the political interference these Boards are restrained from discharging their functions. The political parties are reluctant to prosecute the MNCs, TNCs and domestic corporations since the country receives huge taxes from them which add to the economic development of the country.

This inadequate legislative response was many times cured by the judicial wing of the State but

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<sup>13</sup> *Union Carbide Corporation v. Union of India*, 1989 SCC (2) 540.

<sup>14</sup> Vijay Kumar, "Criminal Liability of Corporations-An Environmental Perspective", G. Radha Kalyani (Ed), Criminal Law and Environment, Amicus Books: ICFAI Press, 2009.

<sup>15</sup> Indrajit Dube, Environmental Jurisprudence: Polluter's Liability, LexisNexis-Buttersworth (2007) at p. 140.

<sup>16</sup> *Sterlite Industries (India) Ltd. v. Union of India (UOI) and Ors.*, (2013) 4 SCC 575.

it has its own limitations. In case<sup>17</sup> the Orissa High Court categorised the environmental law liabilities as follows:

- Criminal liabilities- In recent years the regulatory agencies have shown increased willingness to prosecute the environmental offenders. The number of criminal offences for non-compliance is huge. Private prosecution is also possible. Generally fines are charged from the offenders. For serious offences even imprisonment is incurred on directors and senior managers of the corporations.
- Clean up Costs- The environmental laws gives the power to the authorities to clean up the premises after the pollution incident and to incur the costs from the polluter.
- Civil Liability- There is a growing trend of tort claims and environmental actions against the perpetrator of the environmental crimes.
- Administrative Sanctions- The regulator has been given the power to suspend vary or revoke the license of the corporation which helps the environment in the long run.
- Adverse Publicity- The bad publicity leads to great economic damage to the company's reputation thus deterring it to be cautious in the future and to adhere by the strict norms of the environmental laws.

The criminal liability for environmental offences has been adhered to only in few cases. On the other hand after the formation of National Green Tribunal there has been effective and expeditious disposal of environment related cases. It has helped in protecting, preserving and conserving the environment including the natural resources.<sup>18</sup> The infamous Bhopal tragedy shows the drawback of our legal system. It is the biggest instance of corporate crime. This highlights that the law is only a part of the equation and the determination on the part of those applying/enforcing the same is also important. The Indian government insisted on the conjoining of all claims against the Union Carbide into a single action. The criminal case of culpable homicide against the officials and Union Carbide were dropped. In India the criminal law proved wholly inadequate and indeed was largely swept aside by focusing on the civil law claims. The Indian government was simply lacking the fortitude to take on the Union Carbide and its lawyers in either the civil courts (US) or in the civil/criminal courts (India). Thus the Indian criminal law remains substantially underdeveloped in dealing with the corporate criminal liability.

Even the Judiciary has avoided the question of the applicability of mens rea to the corporations

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<sup>17</sup>Centre for Environmental Law World Wide Fund for Nature, *India v. State of Orissa*, AIR 1999 Ori 15.

<sup>18</sup>The National Green Tribunal Act, 2010 (Act 19 of 2010).

on the ground that it is not the appropriate case to answer the question. The case<sup>19</sup> held that even the corporations can be held liable under the criminal law and huge fines as a penalty can be incurred from these corporations. Though the corporation has no mind/body of its own still by way of the alter-ego theory, the Board of directors, officers, etc. can be imprisoned under the criminal law since they are the directing minds of the corporations. This case overruled the case<sup>20</sup> in which it was held that the corporations cannot be held criminally liable since they have no mind/body of their own.

Section 58<sup>21</sup>, section 47<sup>22</sup>, section 40<sup>23</sup>, section 16<sup>24</sup>, section 16<sup>25</sup> and section 27<sup>26</sup> talks about the liability of the offences committed by the companies under the various environmental enactments. The environmental law incorporates the principle of strict, absolute and vicarious liability. There is a general and common definition given under the environmental laws for the company. The company means body corporate and includes firm/other association of individuals. The various sections states that where any environmental offence is committed by the company then every person (who at the time when the offence was committed) was directly in charge and was responsible to the company for the conduct of the business would be deemed to be guilty along with the company. Thus they are liable to be prosecuted and punished accordingly. It further states that where the offence committed by the company is done with the consent/connivance or neglect can be attributed to any director, manager, secretary, officer of the company then they would also be held liable along with the company. There is a general presumption of guilt on their part and the burden of disapproving the same lies on them. They can take the defence of due diligence or no knowledge. The accused in such cases has to prove that the offence committed under the environmental enactments by the company was without his/her knowledge and even when he/she became aware of the same he/she exercised due diligence to prevent the commission of the said offences. It is not enough that they took the normal standard of care but they must show that they took every reasonable precaution. The law expects every person to act freely, reasonably and diligently.

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<sup>19</sup> *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*, AIR 2005 SC 2622.

<sup>20</sup> *Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors* AIR 2004 SC 86.

<sup>21</sup> The Wild Life (Protection) Act, 1972 (Act 53 of 1972).

<sup>22</sup> The Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974).

<sup>23</sup> The Air (Prevention and Control of Pollution) Act, 1981 (Act 14 of 1981).

<sup>24</sup> The Environment (Protection) Act, 1986 (Act 29 of 1986).

<sup>25</sup> The Public Liability Insurance Act, 1991 (Act 6 of 1991).

<sup>26</sup> *Supra* note 18 at s. 27.

## Conclusion

The 42<sup>nd</sup> Amendment<sup>27</sup> to the Indian Constitution added Article 48A and Article 51A (g) thereby leading to the evolution of environmental jurisprudence. Article 48A of the Constitution of India gives the directions to the State that it shall endeavour to protect and improve the environment and also to safeguard the forests and wild-life of the country. Article 51A (g) is the fundamental duty of every Indian citizen to protect and improve the natural environment (including rivers, forests, lakes, wildlife) and to have compassion for living creatures. The various environmental legislations were founded in compliance with these constitutional ideals. The environmental legislations are very fine in our country. The legislative intent is reflected in every provision. The general legislation like Environment (Protection) Act, 1986 and the various special legislations like Air Act, 1981, Water Act, 1974 cover every aspect of the environment. Even the Forest Act, 1927 and Forest (Conservation) Act, 1980 protects and preserves the flora of our country. Fauna on the other hand is protected by the Wildlife (Protection) Act, 1974. National Green Tribunal is working greatly and is incorporating various principles like polluter pays, precautionary principles in dealing with the preservation and protection of the environment. The Public Liability Insurance Act, 1991 is providing immediate relief to the victims of the accident by making the public liability insurance mandatory.

Despite the above constitutional and statutory safeguards the environmental degradation does not stop. In meeting the challenges of the Globalisation, environmental laws are relaxed. This provides a favourable environment to the Multi-National Companies and they exploit the environment without giving it enough time for rejuvenation. The discharge of pollutants in the air/water affects the health not only of the animals/fishes but also of the plants which in the long run affects the food-chain. The diseases and other health issues among the humans also increase. The debate between the choice of development and environment protection always rises. But seeing the scenario we are ignoring the basic premise of sustainable development that is the development must not be done in a manner that future generations would be left with nothing. The laxity on the part of the government shows that it is only concerned with the filling of their coffers and is not concerned with the environment.

The poor regulation on the part of the government, corruption and lack of awareness among the

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<sup>27</sup> The Constitution (Forty-second Amendment) Act, 1976.

public encourages these big shot companies to commit environmental violations. The Environmental Impact Assessment (EIA) which is to be mandatory carried down before the construction of industries/factories is not complied with and even if it is done then the reports gets manipulated. This is done by bribing the Indian officials directly or through political interference. No matter how well drafted the legislation is but its success depends upon how well it is implemented. Implementation becomes a problem. The Supreme Court by relaxing the locus-standi rule have evolved the principle of 'public interest litigation' where by a highly public spirited individual can file a PIL under the Supreme Court for preservation and protection of the environment. But recently it has been seen that PIL is used as a tool to get publicity or for personal vendetta against the respondent. If we want to improve as a Nation the need of the hour is to sensitize ourselves to the environmental chaos we are living in.

Another problem lies with the inadequate fines under the environmental legislations. The MNCs prefer to pay the fine as penalty than by complying with the requirements of the enactments since it serve more economical to them. Therefore the need of the hour is to increase the penalties to a huge amount and huge discretion must be given to the Court so that it can impose such fines meeting the demands of the justice in particular facts and circumstances of the case. The problem often comes with the dealing of corporates since there is no proper jurisprudential understanding regarding the crimes. But with the above enactments and judicial decisions it is clear that the directors etc. along with the company can be punished either or both with the imprisonment and fines. These white collar criminals are also dealt in the socio-economic legislations and the standard for punishing them has been changed. Strict and absolute liability principle governs the environmental statutes. The procedure and evidence is not entirely governed by the general statutes like the Code of Criminal procedure, 1973 and Indian Evidence Act, 1872 and the NGT can also take help of precautionary and polluter pays principle.<sup>28</sup> When it is believed that irreparable damage will be caused to the environment the enterprise can be held liable even when as a matter of scientific certainty the same cannot be validated. The developer/occupier of the factory is presumed to be guilty and he/she has to prove that his/her acts are environmentally benign. The polluter has to pay to the victim for all the damage caused and also the restoration costs that will be incurred for restoring the environment to a state prior to the damage caused by the polluter.

Another issue is that not very much significance is given to environmental crimes as it is given to other traditional crimes. This could be because of the imagination one has due to what one reads or sees. Even movies, fictions and novels focus more on the traditional crimes than on

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<sup>28</sup> *Supra* note 18 at s. 20.

the environmental ones. Even today most of the jurists see environmental law as largely covering civil liabilities and even if some criminal liability is recognised then that is largely of huge fines. This has given lot of incentives to the corporates and big Trans-National Corporations to work secretly and exploit the environment unscrupulously. Afforestation and reforestation must be adhered to especially on sites where large deforestation has been caused for the construction of factories/industries. Right to healthy environment has been recognised as a fundamental right under Article 21 of the Indian Constitution. Article 21 states that no person shall be deprived of life and personal liberty except according to the procedure established by law. It not only means a mere animal existence but includes everything that makes the life of an individual worth living or meaningful. Thus everyone should realise that it not only that they have the right to healthy environment but also have the duty to protect/preserve the environment for others. The State is also obligated to preserve and protect the natural environment. As a welfare state it has to keep the balance between the economic needs of the Nation and the environmental protection. Development must not bring along with it the ill-effects on the environment. The State must ensure that the corporate social responsibility as mandated by the Companies Act, 2013 must be done by the corporations in a manner improving the environment and preventing the environmental damage.

Though it is true that the corporations don't have the body on which imprisonment can be incurred. They even don't possess the mind by which the intention to commit a crime can be imputed. But none the less the directing mind is the Board of Directors. Even other officers like manager, secretary can be punished if they had sufficient knowledge of the acts committed by the company thereby damaging the environment. This is clear at least on text of the law but the practical implication of the same becomes difficult especially when the corporation is very big and huge both in size and reputation. Thus there is a need of effective amendments in the environmental legislations for adequate fines, for sensitizing the public of how grave the environmental damage can be in the long run and also for inculcating the ethical values in the regulatory authorities so that they can also shoulder the burden of protecting/preserving the environment and don't fall into the hands of the greedy powerful business enterprises.

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