

Do Companies Commit Felonies? A Legal Analysis on Corporate Criminal Liability

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Abstract - The Corporate Social Responsibility (CSR) is a guiding light to the companies in the process of protecting human rights. Although the concept CSR is supportive in the maximization of profits while addressing the societal expectations, the companies are often involved in the infringement of rights of the people and the surrounding environment. Such infringements have brought forth the idea of Corporate Criminal Liability. The acts committed by companies which become detrimental to the society can be identified as crimes, but controversies exist regarding the imposition of criminal liability on such acts. The author's attempt in this study is to analyse the contexts in jurisdictions namely United States of America (USA), United Kingdom (UK) and India in relation to the recognition of corporate criminal liability. This study identified that the Sri Lanka's company law does not provide adequate remedies to the injustice caused by the company operations. This has been considered as a loophole in the domestic legal framework. The study further recommends the enactment of a separate legislation on corporate crimes by taking Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) as an example. CMCHA is of significance since it imposes criminal liability on companies for causing death of people. The methodology of this study is normative and qualitative in nature. The use of primary and secondary sources of law in the research has resulted in a comprehensive comparative analysis.

Keywords— *company, corporate criminal liability, human rights, infringement*

I. INTRODUCTION

The companies which operate in Sri Lanka contribute to the economic development in a great deal. The economic development which is achieved through the contribution of companies extended to the upliftment of the Gross Domestic Production (GDP) of the country and the provision of employment opportunities to the public. With the development of such contributions to the economy, the companies

have been granted with the honour of separate legal personality. This situation has involved in providing legal exemptions to the companies.

The Corporate Social Responsibility (CSR) is a concept which deals with the companies and guides the way to protect the human rights and avoid infringements of laws. The present version of CSR stands to the creation of profits, while working for the societal expectations. (Crane, Mitten & Spence, 2014). This does not prove a sufficient solution to the companies which commit serious crimes. It is apparent that, most companies in Sri Lanka have engaged in different types of offences which ultimately influence the public in a negative manner. Jankowska (2016) brings forth an opposing argument on the corporate criminal liability which signifies that an individualistic notion of responsibility cannot be imposed on a company. But, this contention does not prove perfect truth. A company stands to an entity entitling rights and obligations, with a legal capacity. If the bad action of a company affects the societal expectations, such an action attracts repercussions (Adeyeye, 2012). Thus, it can be justified that, a company incurs culpability in relation to the offences of pollution and financial irregularities etc. The study consists of two main objectives namely the identification of the incidents of human right violations result due to company operations and the recommendation of a new legal framework to introduce corporate criminal liability.

A. Criminal jurisprudence

Satria (2018) explains the perceptions of Von Savigny and Hans Kelsen. As per the view of Savigny, the personality is with the humans, and making the companies liable over the crimes is problematic. Kelsen upheld the preservation of the principle of criminal law; *societas delinquere non potest* (a corporation can not commit a crime). The grounds propounded by Savigny and Kelsen were subordinated by the view of Granville Williams.

William's contention in this regard was different, where he saw the evolution of corporate responsibility as a result of the judicial evolution. The very perceptions emerged in the history have already been eroded and now entrusted the companies with the wide purview of duty of care.

II. METHODOLOGY

The methodology in this study is qualitative in nature. The author has analysed primary and secondary sources of law including the domestic legislations & the enactments of foreign jurisdictions. The analysis of case law jurisprudence is predominantly considered throughout the study. Further, the author has adapted a comparative approach while analysing the jurisdictions of United States of America (USA), United Kingdom (UK) & India.

III. RESULTS & DISCUSSION

A. *United States of America (USA)*

Doyle (2013) states the very perception that companies are unable to commit the felonies but committed by the individuals is outdated. It has clearly been accepted that, the criminal liability can be imposed on a company on two major grounds namely nonfeasance and malfeasance. Nonfeasance stands to an instance where the company is failed in the fulfillment of obligations which are legal. Malfeasance stands to the inadequacy of the performed obligations legal in nature. In *New York Central & Hudson River Railroad Co v. United States* 212, US, 481, 494-495, the Supreme Court's view was that, there are situations which exempt the corporations from liability due to the fact that, corporations are unable to commit such offences. Contrary to this, it is apparent that, there exists a class of offences which clearly amount to the contravention of legislations. The Supreme Court of USA emphasized that, the exemptions granting to the corporations from the criminal liability, impliedly support the circumvention of justice permitting certain acts to remain unpunished. Thus, the enactment of a legislation to regulate corporate crimes facilitates the corporate persons to refrain from violating the law. As Beale (2013) states, the Corporate criminal liability in USA arose as a result of the industrial revolution and the increased corporate activities. The USA justifies the imposition of

corporate criminal liability due to the expansion of companies and the wielding power. A certain extent of negative influence is exerted by the vastly expanded companies on the health, safety and the life of the citizens. When taken as a whole, there is an anticipatory risk to the economy of USA, by the constant misconducts of the companies. Thus, both the federal and state laws have recognized and justified the adoption of criminal liability connected to companies.

Muhwezi (2016) clearly explains the purposes of corporate criminal liability. The purpose in its predominance is knitted with the globally recognized principles of criminal law, which has the effects of deterrence and retribution. The deterrent effect has a positive influence on the companies in curbing the crimes with the incentives to monitor the deeds of the employees. Retributive effect does influence the wrongs of companies in a negative manner. The companies which profit from the illegal activities clearly exert a negative influence on the society. Retribution interferes in the imposition of fines on the companies which illegally benefit from the illicit transactions.

In USA, the Justice Department has the power to take decision whether it is apt to prosecute a corporation. The criteria used for the prosecution is based on the strength of the case, the historical record of the misconduct, compliance programme and the supportive nature to the investigation. In addition to the above facts, the law sees into the fact whether the corporation has made any restitution or taken any remedial measures. Doyle (2013). Further, there is a strong constitutional rights framework granted to the corporations. Thus, all the corporations are entitled to the right to free speech (under the 1st amendment), protection against the searches and seizures which are unreasonable (under the 4th amendment), right to due process and freedom from double jeopardy (under the 5th amendment), right to legal representation, fair and speedy trial (under the 6th amendment) and protection from excessive fines imposing (under the 8th amendment). The federal and state laws in USA have harmoniously accepted that the corporations cannot be imprisoned, but can be imposed a fine or subjected to the confiscation of property.

B. *United Kingdom (UK)*

The case law jurisprudence in UK has accepted that the criminal liability of companies. In Brentnall and

Cleland Ltd v. London County Council [1945] 2 All ER 552, the guilt of a company was accepted for common offences. This is further reiterated by R v. I.C.R. Haulage [1944] K. B 551.CA, where it was recognized that, a company can be held liable under statutory offences. Jankowska (2016)'s explanation on the emergence of corporate criminal liability in English Law does bear a similarity to the context of USA. Thus, according to Jankowska, the liability of companies was decided by considering the impact on the environment, food, justice and employment of the citizens. The industrial revolution granted corporations, the right to own property and selling goods (Berger, 2011). In most circumstances, the products produced by companies are tainted with the risks. The companies in return engage in the misconduct of falsifications and the continuous violations of laws in relation to environment, safety and health. One of the achievements in the context of corporate criminal liability in English Law is the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007). The act introduced the offence of corporate manslaughter which constitutes a serious breach of duty of care by the companies. The gravity of the offence lies on the fact that the acts of companies harm and cause death of the people. The significance of the act is clear as at the instance of imposing the liability, which does not make any difference as to the victims (employees, servants or third parties). If the mismanagement of the company is apparent, that constitutes an offence under the act. The operation of CMCHA emphasized the obligation of companies to be responsible and cautious in the matters connected to the safety of people. As per the section 1 of CMCHA, the act requires the specific company to be a recognizable organization owing a duty of care to the public. Then, the company becomes liable upon the proof of the victim's death constituting a gross violation of duty owed.

The Bribery Act 2010 does perform a supportive function to the English Law on corporate criminal liability. The act specifically considers the management of companies. The company becomes liable on the failure to prevent the acts of bribery. The exception lies on the proof of adequate procedures to prevent such acts. The significance of the act is clear, as it has an extra territorial application to the English companies.

C. India

Judicial activism

Sahana & Arya (2018), state the Indian context of adapting the corporate criminal liability with the expansion of corporate sector with the advent of globalization and technology. The Indian Penal Code by its section 11 accepted that company includes in the definition of person. In Assistant Commissioner v. Velliappa Textiles Ltd (2003) 11 SCC 405, the view of the Supreme Court revealed that, the companies have become lethargic and knowing that there is no imprisonment, tend to commit crimes. This is seen as injustice, where the court allows a company to move passively and freely, even after the commission of a crime. Thus, the court justified the imposition of the criminal liability on companies. The case was overruled by Standard Chartered Bank v. Directorate of Enforcement AIR 2005 SC 2622, where the court held that, when the punishment to a specific crime becomes imprisonment, a company cannot be exempted from the liability. A fine is seen as the substitution to the imprisonment.

The case law jurisprudence has elaborated on the fact that a company deserves punishment at the instance of a wrong doing. Granting of exemptions is not accepted. Iridium India Ltd v. Motorola Incorporated 2004(1) Mn LJ 532 elaborated that, either under common law or statutory law, the liability of a company is the same when compared to an individual. A company is driven by a person. Thus, in the simplest way, a company acts through a person. The court's view that, even if the company cannot be held liable for a certain act, the authority acting itself becomes liable. This view was accepted in U.P Pollution Control Board v. Modi Distillery (1944) 1 All E.R. 691. In this case, a company involved in the act of discharging waste water into a drain. This contravened the Water (Prevention and Control of Pollution) Act 1974. As per the court's perspective, the authority in charge of this conduct is liable even there is no prosecution against the company.

The Indian judicial perspective differentiated between the employees/ employers and company in the purview of corporate criminal liability. In Aneeta v. M/S Godfather Travels & Tours Ltd (2012) 5 SCC 661, the court's viewpoint was that, in an instance where the company is proved to be a criminal, no prosecution is maintained against the employer or employee. If such an individual is to be prosecuted, the specific criminal act involved must be carried out with the intention of benefitting the company.

The Indian law has recognized the offences which come under the corporate criminal liability namely

conspiracy, disobeying the court orders/ decrees, public nuisance, illegal practices of medicine, violation of consumer protection and antitrust laws, larceny, extorting money with false pretences, selling of obscene matters, violations of laws related to health and occupational safety.

Singh (2018) has identified that the corporate criminal liability is imposed on a corporation upon the fulfillment of two requirements namely, the act must be fallen within the purview of the employment and it has the effect of benefiting the company.

D. The context in Sri Lanka

Sri Lanka does not possess an established legal framework for the corporate criminal liability. The situation in Sri Lanka is similar to USA, UK and India, where the growing economy and industrialization made the corporate sector more powerful. Simultaneously, Sri Lanka has experienced the behaviour of companies committing serious crimes against the public and environment. The situation in Sri Lanka is not optimistic in the context of investigation and the prosecution of the crimes committed by the companies. Zubair (2001) states that, the Environmental Impact Assessment procedure in Sri Lanka (as introduced by the National Environment Act No.47 of 1980) involves in the identification of the ventures of corporations or other projects which need review prior to the commencement. But still, the procedure is violated by the political interference and fabrication of data (Zubair, 2001). This circumvention from the accepted procedure does amount to the regulatory offences (Green 2006). This situation insists on the need to have a separate legislation to address the corporate crimes in Sri Lanka in addition to the legislations which are commonly applicable.

The controversies as to the making companies criminally liable are in existence. As previously discussed, it is in general belief that, a company does not have an individualistic notion of responsibility as a human possesses. In addition to this, the decision making structure of a company is always complex as there are several directing minds in the process of making decisions. Thus, the imposing criminal liability on companies is considered as difficult and problematic.

E. Justification for the introduction of a new legal framework

1) *Companies threatening the public life and the environment:* The corporate community is obliged to consider the overall interests of the public. (Hartley, 2008). In Sri Lanka, the companies have involved in the commission of crimes against the environment and the public in numerous ways. It is clear that during the last decade, a number of environmental crimes have been reported. Ravindra Gunawardena *Kariyawasam v. Central Environment Authority & others* (SC/FR Application No.141/2015) was recently decided by the apex court of Sri Lanka. The case being famously known as the Chunnakam case revealed a crime committed by a company. Northern Power Company Ltd being the respondent of the case has operated a thermal power plant which caused the pollution of ground water of the area. The ground water was unfit for the consumption. His Lordship the Justice Prasanna Jayewardene delivering the landmark judgment of the case identified the suitability of applying the polluter pays principle where the company was ordered to pay Rs.20 million of compensation to the villagers in Chunnakam where each chief occupant was entitled to Rs. 40.000 from the company. In addition to the Chunnakam Case, the public protests were directed to a crime committed by a company in Rathupaswala area, Sri Lanka. As Bulathsinhala & Thoradeniya (2018) explained, the ground water of Rathupaswala area was contaminated with the effluents discharged from a latex glove factory; Dipped Products PLC, which affected the PH level of water as intermixed with acids. This was considered as one of outrageous incidents in Sri Lanka, ended up with public clashes and untimely deaths. The inception was at the factory which operated with utmost negligence over the lives of the people and the environment, while discharging toxic chemicals. This incident resembles the very situation in Kelani River which was polluted by the discharge of diesel from the Coca – Cola Company, which was multi- national in nature. This amounts to the contravention of the right to water of millions of people in Sri Lanka.

2) *Omissions in relation to the safety of the workers:* It axiomatic that, the companies work with the utmost aim of the maximization of profits. The companies are entitled to provide protection to the employees. As Philipsen (2009) observed, the employers have an obligation to invest in safety and health precautions. In Sri Lanka, it is clear that, the companies have worked in such a manner to avoid the concern on the safety of employees. This is further emphasized by the tragedy happened in a rubber factory in Horana. A worker was fallen in to a

tank collecting ammonia waste. The worker has confronted the tragedy in the course of his employment while attempting to clean it. The death of the worker is considered as a consequence of the evasion of company's basic obligation of providing a conducive environment to the employees with sufficient safety and precautions.

3) *Contravention of the right to health and life of the public:* Minkes & Minkes (2008) identified that, corporate crimes become directly influential on consumers where their health and safety are at a risk. (Sri Lanka Medical Association 2015) has identified the category of food born diseases cause due to the presence of chemical contaminants and bio toxins in the ingested food. The negligence of companies as to the food safety does amount to the violation of Food Act No: 26 of 1980. It is clear that, the recent case of Edna Chocolate Company is the best example for this. The company was charged for utilizing melamine contained milk powder in the productions, which had a serious impact on the health of children. Gossner et al (2009) state that, the melamine brings forth negative health effects namely kidney, urinary tract effects and kidney stones. This shows the fact that, the company manufacturing chocolates has committed a grave offence against the public and the children.

IV. RECOMMENDATIONS

The Companies Act 2007 being the substantive law on company matters does not address the issues of the crimes and imposition of punishments. As revealed by this study, there exists a necessity for the separate legislation on corporate crimes. Thus, the report proposes to enact a legislation which has its resemblance to the Corporate Manslaughter and Corporate Homicide Act 2007 in UK. The significance of the act is that it makes a company liable to the death of the people. It is obvious that, in Sri Lanka, the companies involved in the criminal behaviour harming the life of the people, environment and also the tough negligence on the industrial workers. Thus a legislation which makes the companies directly liable and imposing sanctions is imperative. The purview of the proposed legislation should be extended beyond that of UK by including serious offences. This is further to be incorporated with the remedial orders and public orders.

The environmental crimes committed by the companies are grave in nature. Thus, it is

recommended that, the corporate criminal liability is extended not only to the company as an entity but also to the profits derived by the ventures deteriorating the environment.

The right to life and right to a healthy environment deserve to be enshrined in the chapter III constitution of Sri Lanka as fundamental rights. Generally, the access to the Supreme Court of Sri Lanka is given under Article 126, to redress the infringements of fundamental rights by the government. The report recommends to effect an amendment to the constitution of Sri Lanka that, the purview of article 126 to be extended to the actions of private companies in the context of the violations of the right to life and right to a clean and healthy environment.

As the Indian judicial activism in Assistant Commissioner v. Velliappa Textiles Ltd (2003) 11 SCC 405 explained, the companies should not be allowed to walk freely without facing a punishment for the crimes. Thus, the imposing of punishments to the companies is recommended while differentiate it from the individual liability of directors. Further, as Gobert & Punch (2003) described, the organizational fault has the effect of supplementing corporate liability.

Enhancing the framework of corporate governance in companies. Muchlinski (2007) identified that, the avoidance of environmental pollution by the companies experienced through eco- efficiency developed by the sound environmental management practices. It must be realized by the companies that, there are responsibilities than the making of profits. (Zerk, 2006).

V. CONCLUSION

The companies in Sri Lanka commit serious offences against the public and environment. Sri Lanka does not possess an effective legal framework to impose corporate criminal liability. The report suggests the recommendations to the enactment of a separate legislation to make companies liable for the deaths and the grave crimes. Further, recommends on the constitutional amendments for the recognition of rights and extending the purview of Article 126 of the constitution.

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