

**CRIMINAL VICARIOUS LIABILITY OF CORPORATIONS: A PRAGMATIC VIEW  
IN LIGHT OF THE CORPORATE FRAUDS**NIDHI NANDE<sup>18</sup>**ABSTRACT**

*We live in a society that is governed by interaction between various laws and rules. One of the major controversies from the interaction between two laws that has emerged from time immemorial but still remains disputed is the principle of Criminal Vicarious Liability's application to the company law. With all the differences in the opinions of jurists and scholars, the author in this paper aims to analyze the principle of Criminal Vicarious Liability for corporations from a pragmatic view considering the growing number of corporate frauds and the issue of fixing the liabilities in such instances. The paper also analyzes the concept from a global perspective by doing a benefit analysis of foreign models to the Indian scenario. Another part of the paper deals with an empirical research based on a survey from various professionals regarding the state of law in practical scenario. The main question that the paper aims to analyze is the cases of implementing vicarious criminal liability to corporations and how have the famous corporate frauds helped evolving the clear concept of vicarious liability for corporations.*

**KEYWORDS-** Corporations, Vicarious Liability, Corporate Criminal Liability, Corporate Frauds

**A. INTRODUCTION**

The corporations have a distinct feature of being a separate legal entity apart from its members with its own rights and liabilities along with the right to sue and be sued on its own name<sup>19</sup>. The growth of businesses globally through corporate model have along with enhanced powers for the corporations, brought accountability for their actions to the society and their employees.

In Indian Scenario, the criminal accountability of the corporations is mainly based on the model of shifting the liability on the company i.e. Vicarious Liability, as most of the criminal form of

<sup>18</sup> Nidhi Nande, Student at Symbiosis Law School, Pune. Email- nande.nidhia@gmail.com.

<sup>19</sup> Section 2(20), Companies Act, 2013

vicarious liability issues emerge from corporate crimes<sup>20</sup>. Even after increasing number of such issues there are still no clarity in the state of law and its application when it comes to fixation of criminal vicarious liabilities on corporations. The inconsistency of the legal provisions with that of the judicial interpretations and research is also a major concern in the paper. The situation becomes greyer when it comes to the application of this concept for the corporate crimes and scams. In light of these gaps in the existing literature, the author has made an attempt to present a practical scenario based analysis for the application of the principle.

## **B. LITERATURE REVIEW**

### **1. Corporate Criminal Liability: What purpose it serves?<sup>21</sup>**

(Vikramaditya S. Khanna)

In: Harvard Law Review (1996)

The study focuses on cost and benefit analysis of corporate criminal liability and other strategies that can be used in place of corporate criminal liability. The study also includes aspects and relevance of vicarious liability concept in corporate sector.

The study although covers most of the corporate criminal liability perspectives but it fails to establish a connection between the corporate frauds and vicarious liability concept of criminal law. The study is good in theory but has not incorporated practical aspects of the issue.

### **2. Corporate Criminal Liability: The Need to Look Beyond the Vicarious Liability<sup>22</sup>**

(Constantine Ntsanyu Nana)

In: The Journal of African Law, 2011

This paper analyses the extent to which the Corporate Criminal Liability is based on the exceptional principle of Vicarious Liability. It studied the need to change the current model of making the corporations liable for the intentional acts of its employees. It criticized the principle of vicarious liability in the corporate field.

In the process of criticizing the principle, the author failed to analyze the practical problems that could be faced by the courts in ascertainment of liability when the act is performed under the name of the corporations as it has ignored the corporate frauds that have come a long way to interrupt the practical implementation of the laws and order.

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<sup>20</sup> Vijaya Lakshmi, Corporate Criminal Liability- Critical Legal Study, Pen Acclaims Journal, Vol. 5 (2019)

<sup>21</sup> Vikramaditya S. Khanna, Corporate Criminal Liability: What purpose does it serve?, Harvard Law Review, Vol.109 (1996)

<sup>22</sup>Constantine Ntsanyu Nana, Corporate Criminal Liability: The Need to Look Beyond Vicarious Liability, Journal of African Law, Vol. 55 (2011)

### 3. Corporate frauds in India- Perceptions and Emerging Issues<sup>23</sup>

(P K Gupta, Sanjeev Gupta)

In: Journal of Financial Crime, 2015

The paper analyzes the various corporate frauds that have happened in India and the ineffectiveness of corporate governance and regulations mechanisms to avoid these corporate frauds which impact a major portion of the economy.

The paper discussed on various aspects of corporate frauds but it did not discuss one of the major areas of current structuring of the law by these frauds. It also failed to incorporate the aspect of fixing the corporate liability and vicarious liability of the corporations.

### 4. Corporate Criminal Liability in India<sup>24</sup>

(Sahana D, Arya R)

In: International Journal of Pure and Applied Mathematics 2018

The paper has discussed in detail about the Corporate Criminal Liability and various provisions related to it in the Company Law and Indian Penal Code. It has also made a comparative analysis on the Indian law and USA laws in this aspect.

The paper analyzed the principles and laws in theory but failed to connect it to practical scenarios by the cases that have occurred which have helped the principle evolve to the way it is interpreted today.

After analyzing the existing literature on the topic, it has been observed that one of the most important areas of practical importance of the concept through emerging corporate frauds has not been researched and studied about. Therefore the current paper acknowledges the gap in the existing literature and aims to analyze the concept and evolution of the concept of criminal vicarious liability from corporate fraud's perspective along with other practical areas.

### C. SCOPE AND OBJECT OF RESEARCH

The scope of the research is limited to discussing Corporate Criminal Liability and the application of vicarious liability in Indian context through various practical problems that is posed in order to establish the liability to the corporations. The lack of proper guidelines to

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<sup>23</sup> P K Gupta, Sanjeev Gupta, Corporate Frauds in India- Perceptions and Emerging Issues, Journal of Financial Crime, Vol-22 (2015)

<sup>24</sup> Sahana D, Arya R, Corporate Criminal Liability in India, International Journal of Pure and Applied Mathematics, Vol. 120 No. 5, 2018, 87-98, ISSN: 1314-3395(2018)

fasten the vicarious liability principle in the corporate crimes has presented many problems in deciding the guilt.

The major objective of this research is to analyze the gap between the state of law and its judicial interpretations with respect to Criminal Vicarious Liability for Corporations. The research also aims to add to the existing literature about the practical application of the concept through analyzing corporate frauds and empirical research on the practicalities of the law.

#### **D. RESEARCH QUESTIONS**

The research questions for the study are formulated as-

1. Which are the cases of implementing vicarious criminal liability to corporations?
2. How have the famous corporate frauds helped evolving the clear concept of vicarious liability for corporations?

#### **E. RESEARCH HYPOTHESIS**

- There are improper and unclear guidelines for implementation of vicarious liability principle to corporations in Indian Law.
- Corporate frauds in the context of India have helped evolve the practical implementation of the laws with respect of establishing the guilt of the corporations using the vicarious criminal liability principle.
- There are variations in the provisions and state of law related to criminal vicarious liability for corporations and its respective judicial interpretations.

#### **F. RESEARCH METHODOLOGY**

The methodology adopted for the research is twofold- the first part is an empirical research where a questionnaire has been circulated to various professionals and students registered with ICSI, ICAI and ICMAI and their opinion has been taken on this issue which is further analyzed and interpreted by the author to present a holistic view on the practical aspects of the concept. Another part of the research is descriptive, doctrinal and analytical and is mainly based on the sources like legislations, books, articles, journals and other research works in this area and thereby analysis and criticism to the information gathered by the author. The author has analyzed different corporate frauds and scams of India and analyzed its outcome to present the idea of fixation of liability in such scenarios. A comparative analysis is also made to better understand the position of Indian Legal System vis-à-vis the Legal System of other countries which also helped the author to recommend various alternatives for the country. Wherever

there has been any remark about any institution it has been made only with the motive of upholding the dignity and better corporate governance in the country.

## **G. CRITICAL ANATOMIZATION OF CRIMINAL VICARIOUS LIABILITY**

### **a. Criminal Vicarious Liability for Corporations: The Indian Model**

The tort law originated principle of vicarious liability in terms means that an accused is to be blamed for the offence of another person who is working under him. This principle is mainly based on the Latin maxim 'Respondeat Superior' which means that principle will be liable for the acts done by his agent who was working for him.<sup>25</sup> Interpreting the Vicarious liability doctrine with the separate entity principle of the corporations it can be derived that a corporation which is considered a separate legal personality will be held liable for the actions of his employees as if the act is done by the company itself. But this interpretation is disfavored by various researchers and intellectuals as being opposed to the basic principle of criminal law that is '*actus non facit reum nisi mens sit rea*'<sup>26</sup> as the corporation having no mind of its own cannot be called as having guilty intentions of committing a crime. This conflict of opinion has emerged the debate over the vicarious liability of corporations as the law is silent on this particular issue.

#### **1. Corporate Jurisprudence on fixation of liability**

In order to solve the two major issues which the Indian Courts faced since inception, the first being, establishing the criminal intention to artificial legal entities and secondly, deciding the mode of punishing such corporations where imprisonments cannot be possible, the principle of corporate criminal liability was formulated which enabled the fixation of criminal liabilities on the corporations as a separate entity when the act was performed by an individual working under the company<sup>27</sup>. This marked the evolution of Criminal Vicarious Liability for Corporations. The doctrine was further modified as a theory of Attribution or Identification theory which made the directing minds of the company answerable for its intentions<sup>28</sup>.

<sup>25</sup> Brickley, K , *Corporate Criminal Accountability*, Melbourne, Law Books House(1986)

<sup>26</sup> Sullivan, *The Attribution of Culpability to the Limited Company*, Cambridge Law Journal, Vol.6 (1995)

<sup>27</sup> Godwin , *The Case of Corporate Criminal Liability*, Uganda Christian University Journal (2016)

<sup>28</sup> Phillips, *The Economics of Crime Control*, London Sage Publication (1981)

## 2. Legislative Framework under Companies Act, 2013

The new act enhanced the scope of corporate criminal liability by defining the guilt and imposing various fines and punishments. The major development in this issue was acknowledging the 'Officers in default' which is defined under Section 2(60) as a inclusive of directors who are full time, Key Managerial Personnel, normal directors and other officials who shall be liable for any fine or punishment in pursuance of any acts committed under the name of the Corporation. This is generally interpreted by the courts for establishing the accountability to the officers immediately in charge of that particular activity or those who have consented to the actions in the board meeting to be accountable for the compliance with provision related to the project. Some of major instances in the Companies Act, 2013 where the officer in default will be held liable if particular provisions are not complied with, such as Sections 57, 58, 118(12), 128(6), 129(7), 134 188(5), 182(4), 187(4), 447 etc<sup>29</sup> and moreover there is restriction on the company to make any attempts to indemnify these officers in default for the acts caused from avoiding the compliances of legal provisions<sup>30</sup>.

In essence from all the provisions of the Companies Act, 2013 and the Concept of Corporate Veil<sup>31</sup>, it can be interpreted that the corporations will be held liable for the acts done by its directors and other officers in the course of business the personality of the corporation is different from its employees. In extension to it, the legal concept of corporate veil which hides the directors and other employees from being personally liable for the acts by a veil to only present the accountability of the company as a separate personality except in certain cases where the corporate veil is lifted.

## 3. Prevention of Corruption (Amendment) Act, 2018: A Path Ahead

The Act has proved to be a major foundation for solving the conflict of vicarious criminal liability in the corporate structure. It aims to include the vicarious criminal liability for corporations along with the individual who indulged in giving bribe to the public officials<sup>32</sup>. Section 10 of the Act provides for punishment both to the corporations or commercial organization and the individual who committed the offence. These provisions were majorly added to make the Indian laws in tandem with International standards of anti-corruption and anti-bribery rules.

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<sup>29</sup> Abhinandan Bassi, *Corporate Criminal Liability: An analytical study with special reference to the penal laws*, Rajiv Gandhi National University journal (2016)

<sup>30</sup> Section 197 (13), Companies Act, 2013

<sup>31</sup> Eddy Rivai, *Prevention the Acts of Corruption*, Journal of Social Studies Education Research (2018)

<sup>32</sup> Section 9, Prevention of Corruption Act, 2018

**b. Evolution of the Concept through Judicial Acumen**

The common notion in the early 16<sup>th</sup> and 17<sup>th</sup> Century held that a corporation was unable to establish mens rea or “mala animus<sup>33</sup>” which was necessary for the commission of a crime and thus could not be made criminally liable<sup>34</sup>. In the meanwhile, the difference of specific and general intent emerged from the Courts of England<sup>35</sup>. In the 19<sup>th</sup> Century, the Supreme Court for the first time made it clear that a company can be held liable for the acts of his members<sup>36</sup>. This set an example for courts across the globe to establish the guilt of the corporations. But the development in Indian Parlance was very slow. The court held in a case named *State of Maharashtra v Syndicate Transport Co*<sup>37</sup> that it would entirely depend on the nature of the act to decide whether a corporation can be held guilty or not for the criminal acts of its members. It was until late 1970s that the courts in India decided to impose fines on the corporation when they were proved guilty of any offence.<sup>38</sup> In the case of *Aligarh Municipal Board v Ekka Mazdoor Union of India*<sup>39</sup> it was held by the court that both the members as well as the company will be punished for disobedience and contempt but only for fine. Finally, in one of the most significant case of *Standard Chartered Bank and Ors v. Directorate of the Enforcement*<sup>40</sup> the corporate can be prosecuted and punished irrespective of the mandatory imprisonment provided for the offence. In the recent case before the Supreme Court *Iridium India Telecommunication Ltd. v. Motorola Incorporated and Others*<sup>41</sup>, it was held that a corporation could be held liable for all the offences as an individual even those requiring mens rea.

**c. Corporate Frauds: A different perspective of Criminal Vicarious Liability for Corporations**

With the increased globalization and ease of doing business, the corporate form of business has spread widely across the globe. Corporate include within its purview all the directors, KMPs, Shareholders and other members. Establishing corporate vicarious liabilities wholly on the company for the frauds committed by some of its members is suffered by the entire company. Therefore in such scenario there is a need to deviate from the criminal vicarious liability principle for corporations in case of corporate frauds.

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<sup>33</sup> *State v Morris & Essex*, 23 NJL 360 (1852)

<sup>34</sup> *A. K. Khosla v. Venkatesan* (1992) Cr. L.J. 1448

<sup>35</sup> Manjeet Kumar Sahu, *Criminal Liability of Corporation: An Indian Perspective*, SSRN-id 2192308

<sup>36</sup> *New York Central & Hudson Railroad Co. V United States*, 212 US 481 (1909)

<sup>37</sup> AIR 1964 Bom 195

<sup>38</sup> *Delhi Municipality v J B Bottling Co.*, ILR 1978 Delhi, 428

<sup>39</sup> AIR 1970 SC 1767

<sup>40</sup> (2005) 4 SCC 530

<sup>41</sup> AIR 2011 SC 20

In the **A K Khosla v Venkatesan Fraud**<sup>42</sup>, the liability was denied as the two requisites of mens res and the ability to undergo mandatory sentence of imprisonment were not present. One of the major corporate frauds in the history of India has been the **Satyam Scam** where a couple of directors and auditors were involved in falsifying the accounts of the company but the company as whole was held vicariously liable along with Ramalinga Raju who was the main hand behind the fraud<sup>43</sup>. The absurdity of vicarious criminal liability was removed after this case to an extent by allowing a class action suit by a part of directors against the actual fraud committing promoters and directors, in order to avoid their vicarious liability. Such changes made a way for better corporate governance. Another major scam was the **Sahara Scam** which dealt with Money laundering; the case was filed against the company in which Subhrato Roy and other directors arrested along with SEBI cancelling the license of the company after its total dues went up to Rs. 40,000 Crores in 2015<sup>44</sup>. A different perspective of vicarious liability was noticed in this case where the person committing the offence is personally liable along with certain liability for the company. The most recent fraud in the case of **Punjab National Bank Scam** where the bank will be held vicariously liable for the actions of its employees in the course of their employment and RBI provided with the guidelines that the concerned branch should at once acknowledge its liability and pay the claim<sup>45</sup>. In this case a clear version of vicarious liability was applied.

#### d. Criticism to the Indian Model

The framers of law and jurists try their best to make the law fool proof but even after their best endeavors there are still some legal and application based lacunas which pave the way for some major controversies and criticisms. Some of the major criticisms are-

- It weakens the Criminal Justice System by incorporating the criminal vicarious liability principle to corporations without being able to check the mens rea of the company and inability to get imprisonment.
- The Model of imposing heavy fines is very ineffective in deterring the corporate frauds and crimes as it covers-up the acts of the members by the company who have actually committed the crime.

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<sup>42</sup> (1992) Cr. L.J. 1448

<sup>43</sup> Madan Bhaseen, Corporate Accounting Fraud: The case study for Satyam Computers, Open Journal of Accounting (2013)

<sup>44</sup> Vijaya Lakshmi, Corporate Social Responsibility :A case analysis on Sahara Group, Paripex- Indian Journal of Research, Vol 4, Issue 5 (2015)

<sup>45</sup> Paresh Wagh, Ashutosh Kolte, Analyzing Punjab National Bank Scam, Researchgate Publication (2019)



- The Criminal Vicarious Liability takes within its purview all the innocent shareholders and directors who were not involved in committing a crime but just because the company gets punished, they also suffer.
- The Model is very unclear from the legal perspective and gives very little guidance to the court to decide the matter based on law and precedents.

#### e. Fastening Criminal Vicarious Liability: Global Perspective

The Fixation of Criminal Vicarious Liability to Corporations has been an issue for almost all the countries and different approaches have been taken by them. Analyzing such approaches in an international scenario might help in incorporating a clear law in India.

- *GERMAN LAW*- The principle of “*societas delinquere non protest*”<sup>46</sup> is followed in Germany which means a corporation will not be guilty of a criminal offence but it has a structured model of imposing fines to the companies from administration.<sup>47</sup>
- *AUSTRALIAN LAW*- The law here recognizes the criminal vicarious liability of the corporations along with its directors and the fines imposed here are very high.<sup>48</sup>
- *AMERICAN LAW*- It is well accepted principle there that the company is held criminally liable even for intentional crimes like manslaughter. It encompasses within its scope the criminal intent of the directing minds of the corporations.<sup>49</sup>
- *FRENCH LAW*- Article 121-2 incorporates the Criminal Vicarious Liability for Corporations for offences which fulfill three essentials, firstly a law must be contravened, secondly the act must be committed by the agent or representative of the Company and lastly the act must be for the benefit of the corporation.<sup>50</sup>

### H. ANALYZING THE EMPIRICAL SURVEY

A research survey was conducted on a sample size of 20 students and members of India's largest professional institute related to companies, the ICAI, ICAI and ICMAI. The major outcome of the survey showed the ambiguity in the state of law and the need for appropriate amendments in the current model of fixing criminal vicarious liability. From the research

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<sup>46</sup> Susan Watson, Enforcement Instruments in the transnational Corporate bribery, International Company and Competition Law Review 271 (2012)

<sup>47</sup> Markus Wagner, Corporate Criminal Liability and its International Responses, 13<sup>th</sup> International Conference on Commercial and Financial Fraud (1999)

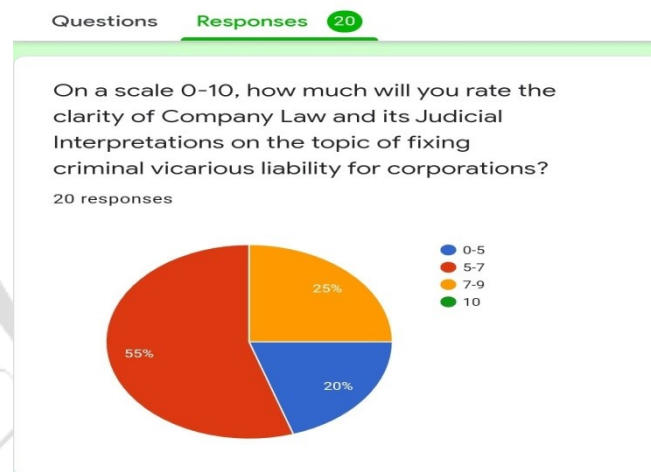
<sup>48</sup> Anca Pop, Criminal Liability of Corporation: Comparative Jurisprudence, Michigan Law Journal (2006)

<sup>49</sup> H L Boltan Co. Ltd v T J Graham and Sons, (1957) 1 WLR 454

<sup>50</sup> Guy Stessens, Corporate Criminal Liability- Comparative perspectives, 43 International and Competition law Review Journal (1994)

survey, the whole population sample understood about the separate legal existence of the company but only 25% people actually understood the concept of establishing vicarious liability on corporations to the clarity due to ambiguity of law and variations in the judicial interpretations.

Another part of the questionnaire dealt with the concept from the perspective of corporate frauds in India. Almost 95% of the population sample was well read about the major corporate frauds and scams in India like Satyam Scam, Sahara Scam, Punjab National Bank Fraud etc. Their opinion about the use of vicarious liability in such case was totally different than in normal instances. Almost 95% population sample opined that in case of corporate frauds the person actually involved in such frauds should not be allowed to hide behind the corporate veil thus by fixing the liability on the whole company. On a scale to rate the clarity of Company Law and its Judicial Interpretations on the topic of fixing criminal vicarious liability for corporation, majority of them rated the law to be below seven ratings which is shown in the figure below.



## I. CONCLUSION

After detailed understanding and analyzing the provisions, jurisprudence and judicial interpretations of the concept of vicarious criminal liability for corporations, it can be concluded that the Indian Model of Criminal Vicarious Liability for Corporations is two-fold, firstly, the company shall be held liable for any criminal acts done by its members in the course of its business and secondly, some of the major managerial members liable for creating intent and are directing minds will be held liable for the criminal actions. The liability here is a strict no fault liability which is mainly the outcome of the responsibility assigned to them. It is also

noticed that the law in the particular concept is not full proof and there is need to amend the laws based on the judicial interpretations all these while. The current model followed in India is highly derived from the models of other nations and is also the outcome of various corporate frauds which made the scholars think twice about the model.

### **J. RECOMMENDATIONS**

The interpretations of the corporate jurisprudence, legal provisions and judicial reasoning have paved the way for various controversies and therefore there is a need to enhance the clarity of the legal situation. Some of the recommendations to improve the existing model can be-

- Incorporating a clear and specific provision related to liability of corporations in the form of vicarious criminal liability and not depending on the precedents
- Increasing the impact of class action suit by the innocents members and shareholders in case of corporate frauds to save themselves from unnecessary vicarious liability
- The perpetrator of corporate frauds instead of being saved by the corporate veil and vicarious liability must be sentenced strictly with heavy penalties.
- Addition of provisions related to corporate culture and how such liability issues should be dealt with in the firm should be included in the primary rules of the company and compulsory publication of policies regarding preventing the frauds in a corporate set-up.

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**ANNEXURE- QUESTIONNAIRE<sup>51</sup>**

**CRIMINAL VICARIOUS LIABILITY OF CORPORATIONS: A PRAGMATIC  
VIEW IN LIGHT OF THE CORPORATE FRAUDS**

Greetings!

This is an online survey regarding the fixation of liability in a corporate set-up. I would request you to participate in the Survey by giving your valuable input about the theory and application of Company Law through your experience as professionals and students of ICAI and ICSI.

This Survey is purely for Academic Purposes and no information will be used for any other purpose.

1. Email address \*

Your email

2. Which Professional Institute are you registered with? \*

ICAI

ICSI

ICMAI

3. What do you know about the personality of a Company? \*

Company and its members have one and the same existence

Company is a separate legal entity distinct from its members

Company's personality is derived from the personality of its owners

4. Who do you think is liable for criminal offence of a company? \*

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<sup>51</sup>Please refer to the link to access the Google Form-  
[https://docs.google.com/forms/d/e/1FAIpQLSfdZv4vhUv8KNV-4FFyd5\\_ACi2g\\_QSGWOhrwyxqwpIxEeEIQ/viewform](https://docs.google.com/forms/d/e/1FAIpQLSfdZv4vhUv8KNV-4FFyd5_ACi2g_QSGWOhrwyxqwpIxEeEIQ/viewform)

Company

Directors and Promoters

Key Managerial Personnel

All the above

5. What do you understand from the concept of Criminal Vicarious Liability for Corporations? \*

Company as a separate legal entity will be held liable for the criminal acts of his employees as the act is done by the company itself

Directors and Promoters will be held liable for the criminal acts of the company's member

Key Managerial Personnel will be held liable for the criminal acts of the company's member

All the above

6. Do you know about corporate frauds like Satyam Scam, Sahara Scam etc. ?\*

Yes

No

Very Little

7. Who do you think should be held liable in such corporate Frauds? \*

The Promoters and Directors

Company

Both A and B

8. In your opinion, Is it okay to allow the criminal actions of the members to hide under the veil of Corporation's Vicarious Liability? \*

Yes

No

Maybe

9. On a scale 0-10, how much will you rate the clarity of Company Law and its Judicial Interpretations on the topic of fixing criminal vicarious liability for corporations? \*

0-5

5-7

7-9

10

Would you suggest any Amendments in the current standing of law?