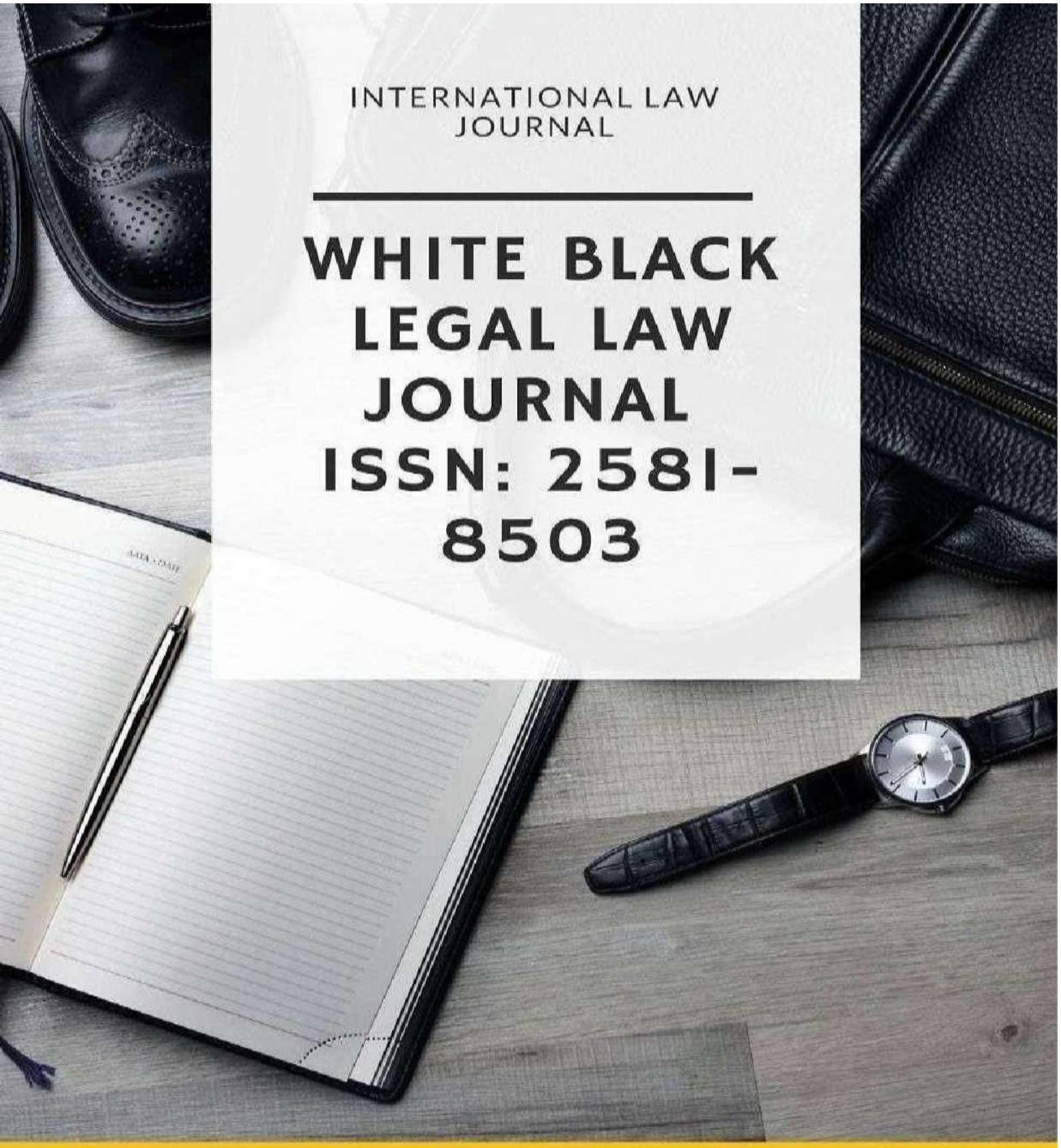

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CRIMINAL LIABILITY OF CORPORATE BODIES IN INDIA: AN ANALYTICAL STUDY

AUTHORED BY: TOUQEER AJAZ QAMAR

LLM (BUSINESS LAW)

Enrolment No.: A0319324053 Batch: 2024-25

Research Dissertation submitted to Amity Institute of Advanced Legal Studies
Amity University Uttar Pradesh

In Part Fulfilment of Requirement for the Degree of Master of Laws (LLM)

Under the Supervision of Dr. Ankita Shukla (Associate Professor)

DECLARATION

I, **Touqeer Ajaz Qamar**, hereby declare that the dissertation titled **"Criminal Liability of Corporate Bodies in India: An Analytical Study"** submitted to the **Amity Institute of Advanced Legal Studies**, **Amity University Uttar Pradesh**, is a result of my original work and has been completed in partial fulfilment of the requirements for the degree of **Master of Laws (LLM)**. The work presented in this dissertation is entirely my own, and no part of it has been copied from any other source, except for references duly acknowledged.

I also declare that the work is based on the study, analysis, and research carried out by me, under the supervision of **Dr. Ankita Shukla** (Associate Professor), and has not been submitted for any other degree or award at any other institution.

I hereby declare that the dissertation is my original work and has been carried out independently.

Signature: Touqeer Ajaz Qamar Enrolment No.: A0319324053

LLM (Business Law) Batch: 2024-25

CERTIFICATE

This is to certify that this dissertation entitled "Criminal Liability of Corporate Bodies in India: An Analytical Study" which is being submitted by Mr. Touqeer Ajaz Qamar En No: A0319324053, LLM (Business Law) for the award of degree of Masters in Law is Bonafide research. He has worked on the above topic under my constant supervision and guidance to my entire satisfaction and his dissertation is complete and ready for submission. I am satisfied that this dissertation is worthy of consideration for the award of Degree of Masters in Law. As this dissertation meets the requirements laid down by Amity University, Noida for awarding the Degree of Masters in Law, I recommend that this dissertation may be accepted for the evaluation by the University.

Date:

Place: Noida

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Thank you all for your contributions and support.

Signature: Touqeer Ajaz Qamar Enrolment No.: A0319324053 LLM (BUSINESS LAW)

Batch: 2024-25

LIST OF ABBREVIATIONS

1. **A.D.** - Anno Domini (In the year of our Lord)
2. **Act** - Legislative Act
3. **B.C.** - Before Christ
4. **C.C.** - Criminal Code
5. **C.L.A.** - Criminal Liability of Corporations
6. **CRR** - Corporate Criminal Responsibility
7. **E.g.** - Example
8. **e.g.** - Exempli gratia (for example)
9. **EPA** - Environmental Protection Agency
10. **JSC** - Joint Stock Company
11. **L.C.** - Law Commission
12. **LTD** - Limited
13. **Ltd.** - Limited (company structure)
14. **M.N.C.** - Multinational Corporation
15. **MNC** - Multinational Corporation
16. **No.** - Number
17. **P.C.** - Penal Code
18. **R.C.** - Regulatory Control
19. **S.C.** - Supreme Court
20. **UK** - United Kingdom
21. **US** - United States

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ABSTRACT

This research paper delves into the evolving legal framework surrounding the criminal liability of corporate bodies in India. Traditionally, corporations were considered mere legal entities, shielding them from criminal prosecution. However, recognizing the significant role of corporations in modern society and the potential for them to cause immense harm, the Indian legal system has gradually moved towards holding corporations accountable for criminal offenses.

The paper begins by examining the historical evolution of corporate criminal liability in India, tracing the gradual shift from the traditional "no-liability" approach towards recognizing corporate culpability. It then analyses the landmark judgments of the Supreme Court of India, which have played a crucial role in shaping the contours of corporate criminal liability. Key legal provisions, including those under the Indian Penal Code, 1860, the Companies Act, 2013, and other relevant statutes, are scrutinized to understand the mechanisms for imposing criminal liability on corporations.

The paper further explores the various theories of corporate criminal liability, such as the identification doctrine, the corporate culture theory, and the vicarious liability doctrine. It critically analyzes the applicability of these theories in the Indian context and their implications for corporate governance. Challenges and limitations in effectively enforcing criminal liability on corporations, such as difficulties in identifying responsible individuals within the corporate hierarchy, the complexities of corporate structures, and the need for robust investigative mechanisms, are also discussed.

Finally, the paper concludes with a critical analysis of the current legal framework and offers recommendations for further reforms. These recommendations may include strengthening investigative agencies, enhancing corporate governance mechanisms, and exploring alternative models of corporate criminal liability, such as deferred prosecution agreements.

The paper emphasizes the need for a balanced approach that ensures that corporations are held accountable for their criminal actions while also protecting legitimate business interests and fostering a conducive environment for economic growth.

Keywords: *Corporate Criminal Liability, India, Supreme Court, Companies Act, Indian Penal Code, Corporate Governance, Identification Doctrine, Vicarious Liability, Legal Reforms*

CHAPTER-1

INTRODUCTION

1. INTRODUCTION TO THE TOPIC

Large-scale corporations are coming up throughout the world and are acquiring dominant position since the past two centuries. They are everywhere. They influence almost every aspect of our lives. Parallel to this subtle or not so subtle dominance that they have acquired, sometimes corporations become notorious criminals as well, when they solely aim at on economic gain ignoring social responsibility. However, Corporations being non-human entities, their criminal behavior is difficult to be attributed by applying the present prevalent principles of liability. Hence, the new referendums are required to make them accountable in the eye of law for their criminal intents and acts.

The first initial attempts to impose the corporate criminal liability were taken by common law countries, such as England, the United States and Canada, who had seen a large contribution and a very important role in the economy due to the earlier beginning of the industrial revolution in these countries. Despite an earlier reluctance to punish corporations [1], the recognition of corporate criminal liability by the English courts started in 1842, when a corporation was fined for failing to fulfill a statutory duty[2]. There were a number of reasons for this reluctance. One, the corporation was deemed to be a legal fiction, and under the rule of ultra vires could only carry out acts which were specifically mentioned in the corporation‟s charter. Secondly, how could the corporate be physically brought in the court and punished? These factors hold true even today. The law has seen a lot of growth in many areas but yet the global acceptance of criminal liability is not established in its zenith.

The contenders of rejection of corporate liability have raised many objections including the lack of the necessary mens rea, and recognition of its separate legal entity. Finally, the difficult situation of punishing the corporation for want of adequate sanctions those could be applied to corporations. Over time, the English courts followed the doctrine of respondent superior, or vicarious liability, in which the acts of an employees are attributed to the

[1] Markus Wagner, „Corporate Criminal Liability: National and International Response International Society for the Reform of Criminal Law 13th International Conference Commercial and Financial Fraud: A Comparative Perspective Malta, 8-12 July 1999
[2] Re-Birmingham & Gloucester Railway Co. (1842) 3 Q.B. 223.

corporation[3]. However, vicarious liability was only used for a small number of offences, and later on replaced with the identification theory. In the United States, the approach was different. Instead of holding the corporation indirectly liable, the federal courts applied the concept of vicarious liability [4]. While the courts initially made use of this doctrine solely in cases where mens rea was not required, later decisions also included this category of offences. This meant a radical departure from the stance English courts had taken. The continental European systems‟ penal codes are based on the finding of individual guilt, and therefore, the incorporation of corporate criminal liability into their criminal codes has met a wide range of criticism in these jurisdictions[5].

Hence, every crime has two elements one physical one known as actus reus and other mental known as mens rea. This is the rule of criminal liability in the technical sense but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about individual actions and behaviour[6].

1.2 STATEMENT OF THE PROBLEM

The average person today sees a fresh wave of crime every morning when he wakes up and looks at the world through the lens of a newspaper. A crime that is perpetrated by a brick wall or occasionally a structure rather than a man. A new period is upon us, one in which the corporate titans' bricked walls enclose the entire planet. Compared to their traditional counterparts, these massive commercial enterprises have a completely different face. They may now easily destroy a nation in addition to dominating its economic circles.

By upholding peace and order, the criminal law's primary goal is to safeguard both individual and societal interests. The task was considerably simpler in the traditional culture, since it was not difficult to hide the identity of the perpetrator from the public. Considering people who have a fixed identity, a residence, and movements in the vicinity of the crime or close to it, the rules of criminal law have been created with reference to the notions of liability for the crime and its punishment.

[3] Supra note 1
[4] The details have been discussed in the subsequent parts of this the sis.
[5] Markus Wagner, „Corporate Criminal Liability: National and International Response International Society for the Reform of Criminal Law while referring Stessens, Guy. “Corporate Criminal Liability: A Comparative Perspective.” International and Comparative Law Quarterly, v. 43, July 1994, pp. 496-497.
[6] Braithwaite, John. To Punish or Persuade, Enforcement of Coal Mine Safety. Albany, N.Y.: State University

But today, this is a visible shift in the way a crime is being undertaken and by whom. It is no longer an arena of individual criminal activities. Body corporate is now not only a part of the socialized society but is also becoming a mafia in itself where no action is considered illegal by them in the name of acquiring power and money. From making profits through the process of buy and sell, some of them have also shifted to the sphere of terror activities and organized crime undertakings.

However, there is now a discernible change in the manner and perpetrator of criminal activity. Individual criminal activity no longer takes place there. In addition to being a part of the socialized society, body corporate is now evolving into its own mafia, where nothing is considered unlawful in the pursuit of wealth and power. Some of them have relocated to the realm of organized crime and terrorism in addition to making money through buying and selling.

Since these corporate entities have contested the notions of portraying the liability of a criminal conduct, committing a crime becomes very manageable.

Up until now, the focus has been on establishing rules to ensure organizations operate smoothly. However, in order to prevent corporate criminality, it is now necessary to establish and acknowledge standards of accountability. The creation of tools and strategies to combat such criminality is a further effort. The conditions and conditions under which companies function make the conventional forms of punishment inappropriate. When dealing with corporations and the individuals in charge of their activities, the criminal justice system must adapt to the evolving situation.

Thus, it is time for revising our criminal law, so as to make it equipped to rope in the malefic corporate activities in the greater interest of the society, the nation and the international community as a whole. There is an imminent need to study the principles of corporate criminal liability and their different penal aspects thereof. This research has been undertaken as a humble effort in this direction.

1.3 SCOPE OF STUDY

The Scope of the study is very relevant and vast, as corporate criminality challenges are testing our sense of reality. The various elements of offenses committed under the guise of the corporate veil and name make corporate crime a tricky issue to handle. The unknown identity of the violators and their power(s) to harm collective peace should be dealt with due diligence.

The development of corporate crime and the absence of principles of criminal liability of corporations has become an issue that a number of prosecutors and courts have to deal with. In the common law world, following standing principles in tort law, English! Courts started sentencing corporations in the middle of the last century for statutory offenses. This was the beginning of recognition of the fact that the bricked walls of the company can do wrong too!

On the other hand, a large number of European continental law countries neither have been able to nor been willing to incorporate the concept of corporate criminal liability into their legal frameworks for a multitude of reasons. Few believe that corporations can never be wrong and others believe that administrative law should deal with such offenses and not criminal law. The fact that crime has shifted from individual perpetrators only 150 years ago, to white-collar crime organized at international levels on an ever-increasing scale has not yet been accounted for in many legal systems.

The logical framework of criminal law is based on criminal liability. A principle of criminal responsibility is each component of a crime that the prosecution must establish following the presentation of facts. Over the past few decades, the issue of whether a corporation can be held criminally liable for the crimes committed by its directors, managers, officers, and other staff members while they are going about their daily business has become a significant topic in criminal law jurisprudence. Additionally, a corporation's autonomous legal personality—which may not have an ego or soul, but it certainly has enough hands to be handcuffed—is the foundation for the potential to hold it criminally liable.

This study concentrated on the new developments in several nations regarding corporate liability and criminality. This necessitated examining global developments, acknowledging different concepts and their rationales, and recognizing the inadequacies that persist in our approach to corporate criminal culpability.

Therefore, this study aims to examine the criminal laws that are in place in various nations

concerning a corporation's criminal liability and to determine what changes should be made to each legal system to control the increasing threat of multinational corporations and limit their practices that encourage criminal activity through their policies, procedures, and actions.

1.4 RESEARCH METHODOLOGY

The present study is analytical and diagnostic. Research material has been collected from various primary and secondary sources, which include relevant statutes, commentaries, textbooks, law journals, periodicals, newspapers, magazines, web sources, etc.

The majority of research is analytical and includes the application of pure and applied research to understand the concepts and underlying issues in determining the criminal liability of corporate organizations. The researcher has studied and analyzed principles of criminal law by exploring the origin and development of corporate liability. The study also includes a comparative analysis of development in other nations on the same subject. The review of case laws and case studies has been an essential part of this research work.

Various international documents linking the theme and study of the topic to the legal documents adopted at the national and global levels have been reviewed to highlight the necessary amendments to the existing legal framework of India for developing principles to identify corporate criminal liability and the means and methods to tackle the problem.

1.5 RESEARCH QUESTIONS

1. Whether the corporations are capable of committing crime? If so, what is the nature of such crimes?
2. What are the developments in determining the criminal liability of corporations in different jurisdictions?
3. What principles of fault attribution are to be applied to determine corporate criminal liability?
4. Whether there is a need to define corporate crimes separately?
5. Whether there is a need to lay down separate penal sanctions for the corporations?
6. Is the criminal justice system adequately equipped to trace, try, and treat corporate crime and criminality?

7. Do corporations get involved in organized crimes at the national and international levels? If so, whether criminal justice system is capable of controlling and combating such activities?

8. What measures are required to be adopted to deal with the criminal liability of Multi- National Corporations?

9. Whether the corporations are criminally liable for industrial disasters and environmental damage?

10. What reformative measures are required to be incorporated in the criminal justice system to effectively deal with corporate crimes and criminality?

1.6 HYPOTHESIS

Corporate entities are capable of committing crimes. Depending on the circumstances, the motivation could be either power or money. The question of whether a business without a soul or body should be held liable for a crime has been debated in the legal system for many years. Companies may commit a wide range of crimes in the current situation, from financial irregularities to violent crimes of varying severity. Principles of liability have developed in many jurisdictions by attributing actus reus and mens rea to businesses, acknowledging their involvement in criminal activity. Nonetheless, in order to treat companies as wrongdoers, it is necessary to define corporate criminality and establish criminal penalties.

The current criminal justice system must keep up with the new circumstances in which businesses are using their malicious actions to influence people and society at large. Additionally, companies occasionally have a part in organized crime, which puts the criminal justice system under even more strain. The criminal justice system is now ill-prepared to handle such circumstances. The growing number of multinational firms necessitates the implementation of efficient policies worldwide. Human existence and environmental preservation are directly threatened by industrial distress and environmental degradation brought on by dishonest practices that amount to criminal activity.

1.7 REVIEW OF LITERATURE

To pursue research on this topic articles, and books related to the concerned topic, which are part of the literature (on our topic of concern) have been taken into consideration for holistic understanding and analysis of the topic. A summarized elicits review of a few of the studied articles and books is given below:

Carlos, Gomez-Jara Diez, "Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay Between Self-Regulation, Corporate Compliance, and Corporate Citizenship", 14 New Crim. L. R. 78, 2011

In this above article a very well thought perception of over criminal ization of corporate criminal liability has been presented. The author draws out a very well balanced approach here, whereby he points out that how corporate criminal liability has become a huge threat to American legal regime and also to thee other legal systems too. But he too pinpoints that this principle has been over criminal ized. For every disaster now the public takes into account the actions of a corporate and become that to the corporate that has to be balanced and for every disaster the companies face an outrage from the public. In this article the author has stressed upon the fact that if new legal mechanisms are not developed to deal with the doctrine of corporate criminal liability then it's bound to disappear because it's impossible to deal with it through traditional standards of criminal law.

Andrew Weissmann, ""A New Approach to Corporate Criminal Liability , American Criminal Law Review, Vol. 44, No. 4, 2007

In this article the author has analyzed the standards for handling corporate criminal liability by the American congress and the American Supreme Court. He analysis this doctrine and concludes that the current parameter of state laws home failed to handle the doctrine of corporate criminal liability as it portrays all the companies in the same light. The author proposes through his were and responsibility should be taken out of the ambit of the criminal liability as they maintain regulatory standards. He observes that such a policy will encourage the companies to do better in taking care of their employees and surrounding environment.

Khanna, V.S., "Corporate Crime Legislation: A Political Economy Analysis"", Columbia Law and Economics, Boston Univ. School of Law. No. 03-04

In this article the author portrays his disappointment in the way the U.S. legislature handled the issue of corporate criminal liability . He says that he has failed to understand that how could the corporates, whose main function was to create a beneficial situation in the society have become the biggest instruments that can damage the society with a single act of theirs and sadly, are damaging the society without any guilt, overstepping their main functions. The author through his work is looking for the real answers behind this role reversal of the companies looking for these answers become more pertinent and legislature because that exist in handling the concept of corporate criminal liability . He points out that maximum legislatures related to corporate criminal liability are drafted and implemented when there is a need to court of the public outrage resulting from the corporate misconduct and damage. This gives an impression of growth of civil remedies instead of comprehensive policies and legislature measures which is the real requirement to handle corporate criminal liability .

Khanna, V.S., "Corporate Criminal Liability : What Purpose Does it Serve?"", Harvard Law Review, Vol. 109, No. 7, p. 1477, 1996

In this article the author has discussed in detail the rapid growth of corporate criminal liability in the past two decades. He observes that there has to be an element of corporate liability related to crime and of crime and criminal acts of a company in the statutes so that the government can differentiate between the companies that take total precautions in following the rules and the who do not. He advocates that this approach will narrow down the scope of corporate criminal liability which is the real requirement today as it creates a problem for civil corporate vicarious liability to be fully applied by the courts. He further analysis that corporate criminal liability takes into account the goodness of civil liability but keeps the undesired policies like stigma, punishment, sanctions etc. away which rather should be the strength of a powerfully enforced criminal liability . He proposes that the civil liability should be strengthened rather than stressing the need of corporate criminal liability as it would be rather tough to punish the corporate and it is still not clear if corporate criminal liability can inference and correct the corporate behavior.

Weissmann, A., "Rethinking Criminal Corporate Liability "", Indiana Law Journal, Vol. 82, No. 2, Spring 2007

This article is an attempt of the author to apply the logic behind the cases where there is a criminal content on behalf of the corporate, there the rethinking of this doctrine is required.

He lay down that however small the company may be, it is still corporate of committing a

crime when that crime is committed by an employer during the course of employment for the benefit of the company. The author advocates through this article that the government can and should device such strategies which inspire the board rooms to make decisions which keep them away from breading the rules and none of the acts writing corporate criminal liability are undertaken by their.

Desislava Stoitchkova, "Towards Corporate Liability in International Criminal Law, School of Human Rights Research", BISAC LAW, 2010.

This book is an attempt to analysis the need strict rules to hold the Multi National accountable for their actions in the international area. There is a strong need to protect the human rights by these multinationals. The private sector violates the policies related to human rights fully because there is no comprehensive nexus of international law to regulate this violation. There has to be a policy of publication in place so that these multinational giants can be continued. They misuse the concept of a separate legal entity to same themselves from punishments and this needs to checked and controlled at a global level. There are crimes like genocide crime against humanity, grave human right violation which need immediate attention so that methods to uncover these organizational faults can be established. The look also discusses a model to counter corporate criminal liability with the help of Rome Statutes.

Brickey, K.F., "Corporate Criminal Liability", 2 ed, Clark Boardman Callaghan, 2011

This book is a bold attempt to analyses the concept of corporate criminal liability through various case studies and major federal statutes of America like RICCO, CERCLA, the RLRA, Foreign concept practices act etc. to analysis the pursuit statutes and how they can civil, corporate crime. The author discusses crimes like fraud, perjury, false, statements, bribery, tan crimes etc. and the strategies to control such acts and minimize corporate criminal liability . In this work, the author has tried to set laws and what is the corporate intent behind these corporate crimes and the new strategies that are need to in today"s world to control corporate crime.

Llaufer, William. S., "Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability """, University of Chicago Press Books, 2006

The author in his book discusses an era where corporates are covered with greed to earn benefits and to fulfill this greed there are series of acts and omissions that they undertake like

frauds, evasions of tax, money laundering etc. there is no visible inhibition on the part of the corporates while they undertake to commit such acts. He states that we live in such times where companies have criminal intentions and are guilty of over stepping their official functions and duties. He states further that high level inquires follow these acts and mishappenings but there is hardly any use of these inquiries as even after the amendments, analytical deliberations and thinking, the modern criminal law has failed to punish these wrongful acts as they should be tried and punished. He calls for the law to give up the deficient and lenient approach so that effective enforcement of policies can be undertaken to prosecute the guilty under the doctrine of corporate criminal liability . He further advocates the implementation of strong laws so that the liability of a company for the criminal acts can be computed. He says that creating efficient laws to strengthen the concept of corporate criminal liability should be the priority of all law makers today. Till the time all policy makers will not comprehend this issue in the same manner with urgency, till then there would be an incomplete and insufficient check on the corporate crime and its liability .

Richard S. Gurner, „Corporate Criminal Liability and its Prevention", ALM Publishing, 2004.

In this book, the author details out a very comprehensive discussion on corporate crime. He says that with the present day prosecutions of corporate crimes being on the rise, there is a perpetual danger of fines and sanctions that engulf the owners, trustees or the employers of a company including the legal advisors of the company who get the role of defending the acts of the company and to save the company from sanctions and prosecutions. The author observes through his work that corporate criminal liability not only provides prevention from this danger of being prosecuted but at the same time the apt knowledge of this concept will save the company , the managers and the directors from facing the collateral consequences of penalties, regulations, sanctions and prosecution in the courts. The author provides a comprehensive guidelines as to how corporate liability of a crime should be understood by a company and handled at the same time. He talks about the prevention of corporate criminal liability providing the analysis of law and legal advice related to it along with it he brings out the impact and effect of corporate criminal liability on the market in a very well researched manner.

Mark Peith, Radha Ivory (Ed.), „Corporate Criminal Liability : Emergence, Convergence and Risk (Ius Gentium: Comparative Perspective on Law and Justice), Springer, 2011

In this book the authors have examined the differ types of corporate criminal liabilities that are present in the world. And the various laws and procedures that are required to achieve the punishments, the sanctions and the proper convictions of these liabilities. These needs to be addressed because the industrialization and the globalization have converted the corporates into necessary evils. The world cannot sustain without them and their criminal acts do not allow the world to prosper. They can only be controlled if there are policies in place for strict adherence of corporates to follow law. The authors observe that the traditional criminal law has been challenged by the new age multinationals of today. These multinationals have reduced the difference between the natural persons and the juristic persons to zero. They can be said to have intentions and are fully capable to carry out those intentions. They have a mind of their own. The book is an attempt to study the various regimes in the world and how they are handling the corporate criminal liability, its cases and prosecutions. The authors say that the companies can learn a lot from these prosecutions and create policies to save their skins from legal sanctions and punishments with proper adherence of law. They conclude that every jurisdiction has its own notions to prosecute the corporate crime and the offenders of these crimes but there is a need to evaluate these prosecutions better so that the differences of civil and common law jurisdictions can be sorted out and the concept of criminal liability of a corporate can be handled efficiently in a professional manner.

1.8 STUDENT LEARNING OUTCOMES

i. The Current Research will allow us to gain comprehensive knowledge on the subject i.e. Business Laws. Further, with respect to the research title, upon the completion of the study the answered research questions and the proved or disapproved will significantly increase the knowledge on the subject.

ii. Through this engagement, students will enhance their research and communication skills, demonstrating proficiency in synthesizing key findings, proposing recommendations, and contributing meaningfully to the academic discourse on the topic.

iii. Students will develop critical thinking, problem-solving and an awareness of the social, Cultural, and global influences that have shaped legal systems, positioning them to make informed contribution to the field.

1.9 CHAPTERIZATION

The chapters, which cover the procedure and guiding principles in depth, comprise the thesis. of criminal culpability for corporations.

The thesis's introduction is covered in Chapter One. A brief overview of the study's history has been provided. The introductory chapter has also included the study's mission and purpose, scope, significance, database, research methodology, research questions, and chapter. The chapter addresses the necessity of researching this subject in order to start the necessary modifications to our legal system.

Chapter Two explains the history of the legislation that are currently in place to address corporate criminal liability, as well as the origins and evolution of corporate criminal liability in various global eras. It talks about how common law concepts were prevalent in the past and how courts in various nations adopted corporation liability standards.

Chapter Three includes a thorough examination of the respondent superior's strict and statutory branch culpability under the Principles of Corporate Criminal culpability. From the early days of vicarious liability to the extremes of strict liability to the most recent strategy of absolute liability, identification and corporate culpability principles have changed in response to the growing influence of corporations in all areas of society.

Chapter Four researcher has attempted to provide a thorough overview of the Indian and international perspectives on corporate criminal liability in this chapter. The viewpoints and legal systems of both common law and civil law nations are examined. These nations' parallel legal systems have been examined, with one faction enforcing stringent criminal responsibility rules for corporate crimes and the other believing that administrative regulations should be used to address a company's criminal wrongs.

Chapter Five focuses on the sorts and nature of corporate offenses as well as how they affect society. Corporate criminality poses a severe concern due to its wide range of activities and reach at both the national and international levels. Various theories of corporate criminality

and the types of corporate crimes are discussed in this chapter.

Chapter Six discusses theories that distinguish corporate penalties from those that apply in specific situations. In order to address corporate criminality, new penological principles are being developed. This chapter discusses the many corporate sentencing policies that have been implemented in various nations.

Chapter Seven contains the findings of the research as Conclusions and Suggestions

CHAPTER 2

CORPORATE CRIMINAL LIABILITY:HISTORICAL PERSPECTIVE

2. INTRODUCTION

First of all, corporate organizations were first created as non-profit organizations with the goal of advancing the public welfare by establishing establishments like hospitals and universities. Constitutions outlined their governmental-supervised responsibilities. If there was a breach, it was penalized under the relevant legislation or laws. Corporate entities began acting in a rent-seeking manner in the 17th century. European colonial expansion was facilitated by their wealth. The imperial powers employed these organizations to keep strict control over resources, trade, and territory in Asia, Africa, and the Americas. Large-scale incorporated businesses were founded at the start of the eighteenth century, but the majority of them failed quickly, like water bubbles. Due to malpractices or company failures, the investors suffered losses. In Britain, the Bubble Act of 1720 ruled that these businesses were unlawful and invalid rather than regulating their operations. The partnerships were not subject to the Bubble Act's provisions. Nonetheless, the British Parliament passed unique Acts for industries like banking and insurance, among others.

In 1825, the 1720 Bubble Act was repealed. Laws had to be changed throughout the Industrial Revolution to make company operations easier. The Joint Stock Companies Act of 1844 marked the beginning of corporate regulation. The Limited Liability Act of 1855 established limited liability. The Companies Act of 1856 combined the provisions pertaining to limited liability and registration. The House of Lords' historic ruling in Saloman v. Saloman & Co.9 affirmed the company's status as a distinct legal entity. As a result, the company's liabilities were to be viewed as different from its stakeholders.

The idea of companies itself, as well as their roles, responsibilities, and functions, have evolved over time.

[7] A Short History of Corporations – New International http://newent.org/features/2002/ 07/05/ history.
[8] Ibid.
9 (1897) AC 22.

2.1 CORPORATE LIABILITY IN ANCIENT ERA

The world has seen societal responses to corporate wrongdoing in one form or another. Contrary to popular belief, contemporary society did not create the acceptance of criminal culpability for business groupings. The general practice in ancient civilization was to attribute the clan's collective liability. This clan may consist of a family or a group of people who share any kind of status or obligation.[10] Numerous scriptures attest to the fact that collectives were originally thought of as an assembly of families rather than a group of people in ancient culture. This distinction was crucial in how the laws were framed at the time.

The law was modified to accommodate a system in which clans or families—small, autonomous groups—existed for a variety of societal functions.[11] The actions of the group to which the individual belonged were linked and confused with the moral and ethical behavior and moral deterioration of the individual. According to the ancient standards, a community's culpability for committing a sin is far more than the total of all the offenses done by its members[12] . The transgression was an indication that peace had been disturbed and shattered within a clan or society. Therefore, it was the clan's responsibility to restore the harmony that had been lost.

1. The Ancient Romanic Era

The interpretation of Roman law, which represents an individual's duty to the society, stands in opposed to the ancient law mentioned above. There was a catastrophic period of internal strife and disintegration among the ancient Romans in the fourth and third centuries BC. Families and other social organizations, like the gentes14, were disintegrating during this period. It was a time of personal freedom. In this instance, the individual emerged from the clan's shadows. The earliest corporate structures, however, were emerging at the same period and were being given the clan law's protection. It was impossible to overlook the importance of these organizations or the wrongdoing of any of their employees.

[10] Sir Henry Sumner Maine, Ancient Law, 10th ed., London: John Murray (1930), at p. 143.
[11] Id., at 142.
[12] Supra note 19.
[13] F. McAuley, & J. P. McCutcheon, Criminal Liability, Dublin: Round Sweet & Maxwell (2000) at p. 273.
[14] A group of families in ancient Rome who shared a name and claimed a common origin.

The balancing solution to this problem was found by Roman Scholars and there was reconciliation between the individualist roots and the existence of corporations and such corporate bodies were regulated without corresponding them up with individuals[15].

Apart from the existence of the strong Roman State and its regional units called civitas or coloniae[16], the right of individuals to undertake trade, religious practices, and working of charitable associations to help the needy of the society has been known since the early development of the Roman law[17]. The Roman entities were called universitates personarum[18] which were included within the Roman State and other entities and undertook administrative, political and even religious activities and these univesritates personarum acted like mini corporate bodies with independent functions which even included the charity works. Upon being created by the powerful authorities, these entities later on adopted their own identities, separate from their creators and even had proprietary rights along with a set of rules and duties to follow. Although these entities were regarded as fictitious entities under the law, yet even after their separate role and identity, the roman jurisprudence considered that these separate entities lacked independent will to operate on their own. Few scholars stood with the view that the independent entity could commit a crime and be punished for it unlike the strong wave of opinions against this view.[19]

Improvised from the concept of a clan, the earliest known forms of corporations were civil organizations only, serving as the associations of individuals[20]. The main functions of these associations were different from the functions and operations served by the current corporations . They were obeying the duties of protectors of property and civil discipline in the name of being a separate entity rather than being a business entity[21]. With the passage of time, when these entities started adopting the administrative roles too and were becoming

[15] Crystalinks, The law in Ancient Rome, The Twelve Tables, available at http://www.crystalinks.com/romelaw.html
[16] A Roman outpost or colony.
[17] William Byrenes, "Ancient Roman Munificence: The Development of Practice and Law of Charity", Rutgers Law Review, 2005, Vol. 57, No. 3, p. 1043.
[18] A corporation with separate identity under Roman law.
[19] Florin Streteanu & Radu Chirita, Raspunderea penala a persoanei juridice 7 (Rosetti ed., 2002) (one example is the action against the City of Cheronea; the city was found not-guilty, which saved it from destruction). [20] These associations included: municipalities (civitas, municipium, respublica, communitas), colleges of priests and vestal virgins, corporations of subordinate officials such as lectors and notaries (scribae, decuriae), industrial guilds such as smiths, bakers, potters, mining companies (aurifodinarum, agentifodinarum, salinarum, societas), revenue contractors (vectigalium publicorum societas), social clubs (sodalitates, sodalitia), and friendly societies (tenuiorum colegia)
[21] George Birbeckl Hill & Lawrence Fitzroy Powell, , eds., Boswell‟s Life of Johnson I (Oxford: Clarendon Press, 1934) at 89

important social players, it was then that the Roman Jurists adopted the concept of Juristic Person, in order to regulate these social actors. These collectivities or the separate entities were also considered as juristic persons, so they were invested with rights of ownership of property but because they were mere fictions or ideal entities, they were incapable of making a disposition and were restricted to the obligation of being a caretaker for the property. They were not supposed to have an intention and accordingly could not commit crimes.

The individualistic view of Roman law did not inhibit Roman Jurists from attributing liability to collective entities. Romans did not develop a theory of collectivities or of the ability of groups to commit crimes, even though they considered the possibility of attributing criminal liability to a collective entity such as the city state. According to the theorist Ulmann, "[T]hey [Roman Glossators] were bold enough to proclaim the corporate criminal liability , without however attempting to justify it on the strength of the sources available[22]". There was freedom of these entities but at the same time they were not totally oblivious of the responsibilities. The maxim societas delinquere non potest, which reflects the view that corporations do not have the capacity to act nor to be guilty or can be held blameworthy, did not prevail in Roman law. Roman law instituted rules that precisely dealt with the rights and duties, civil obligations, accountability and punishments applicable to the social entities or ciutates[23]. For example, it was possible to prosecute the municipium as the personification of the group of its citizens[24]. Still the principle of individualism prevailed over the guilt of these collective social entities, a glimpse of what can be seen in modern day Germany now.

2.2 THE CORPORATE LIABILITY IN MEDIEVAL ERA

The existence of autonomous and self-governing entities with socio- political rights and obligations constituted the very basis for the evolution and recognition of corporate institutions in the medieval times[25]. The Germanic law has also promoted and contributed to the development of these independent associations. The land was shared among families only and not among individuals. However, unlike the Roman universitas, which were fictitious

[22] W. Ulmann,."The Delictual Responsibility of Medieval Corporations" (1978) 64 The Law Quarterly Review, at p. 78, quoted in Anca Iulia Pop, Criminal Liability of Corporates- Comparative Jurisprudence, King Scholar programme submission, 2006
[23] Ciutates – collectivities, entities, cities
[24] Aquiles Mestre, Les personnes morales et le probleme de leur responsabilite penale, quoted in Fausto Martins de Sanctis,Responsabilidade Penal da Pessoa Juridica Sao Paulo: Saraiva (1999), at p. 26, quoted in D H Branco, Towards a new paradigm of corporate criminal liability in Brazil: Lessons from Common law Developments, LL.M. The sis, (University of Saskatchewan Saskatoon) 2006
[25] Anca Iulia Pop, Criminal Liability of Corporates- Comparative Jurisprudence, King Scholar programme

submission, Michigan State University College of Law, 2006.

creations of the law, the Germanic law considered that both the corporations and the individuals were both real subjects of law. In 595, Coltaire II created the centuries and curies which were the territorial units and these territorial units were liable for the crimes committed on their territory collectively[26].

By the end of Roman Empire, the Church had become all powerful in place of the senate and was the influential institution in terms of the law creation and execution. It was in the Church and not in the State that the device of legal personality was first used as an instrument of political policies related to property, family obligations and also the petty crimes and their punishments being awarded to the citizens[27]. The medieval society was not firmly established but had a richer structure with a plenty of ordered and organised groups such as cities, villages, ecclesiastical bodies, universities which were all majorly under the control of church via the State.

Like the Roman Jurisprudence, a theory was required to meet the regulatory criteria for these institutions as well. It is established through earlier documented history that during this phase, Pope Innocent IV, who was the head of the Catholic Church and was the one who taught that the foundation of faculties and colleges was fiction, established a Fiction theory during the first meeting of Council of Lyon. In 1245 he introduced the principle that corporate bodies were a fiction only and not a natural person. He "was the father of the dogma of the purely fictitious and intellectual character of juridical persons[28]." This theory embraced the notion that "the corporate body is not in reality a person, but is made a person by fiction of the law"[29]. In his research work M Lizzie elaborates that Pope Innocent established the principle by a decree pronounced at the first council of Lyon in 1245, in which the universitas[30] did not have to be excommunicated, because it is an amoral being, without soul and it isn"t part of the Church. At this point it would be to say that the legal entity doesn"t exist in reality and it constitutes nothing more than a fiction][31].

[26] Geminel, De la Responsibilite Penale des Associations 8, Librarie Arthur Rousseau ed. (1899).
[27] Leicester C Webb, ed., Legal Personality and Political Pluralism, Victoria: Melbourne University Press (1958) at p. v.
[28] Gierke, 3 Das deutches Genossenschaftrecht at 279-285, cited in J. Dewey, „The Historic Background of Corporate Legal Personality" (1926) 35 Yale L. J. 655 at 665.
[29] W.M Geldart, "Legal Personality" (1911) 27, The Law Quarterly Review 90, at p. 92
[30] Universitas in this case means corporate body, community.
[31] M. Lizée, "De la capacité organique et des responsabilités délictuelle et pénale des personnes morales" (1995)

41, McGill Law Journal 131, at p. 134. Le pape Innocent IV pose le principe, par une decrétale rendue au

Even though this was the time of feudalism in medieval Europe but then, it was here that the modern body corporate had started taking shape as an autonomous unit being operated by the church. The property was being held not by the families in their name but were called the church lands. The development of this fictitious theory was a successful attempt by the medieval Church to bring some order into the groups under its jurisdiction and to establish the supreme authority of the papacy under Pope Innocent IV[32]. This theory later on trickeled down to the successor of Roman law; i.e. the common law as well. It appears that the doctrine that corporate bodies were persona fictae[33] who were intended for clergyman collegium[34], in form of church owned universities or capitulum[35], which could not be excommunicated, or be guilty of a delict because they had neither a body nor a will. With the presumption that corporate bodies were personae fictae the ecclesiastic bodies were placed in such a privileged and protective position[36].

The justification of the collective responsibility in the Germanic law relied upon the imprints of Roman Laws policies of individualistic responsibilities and the role of the sanction. These sanctions were imposed, based not upon the concept of guilt, but on the consequence of the action undertaken. Therefore, if damages resulted from an individual action, a sanction was imposed on the individual to repair that damages. These sanctions were viewed more as reimbursement than a punishment, and when the property was owned by the collective entity, it was only logical that the collective should pay the damages. Later, in the 12th-14th centuries, the Romanic law clearly imposed criminal liability on the universitas, but only when its members were acting collectively on that particular decision that created the fault[37].

At the same time, Pope Innocent IV created the basis for the maxim societas delinquere non potest, a prominent principle of the Roman Criminal Law that unlike the natural person , who can be punished as per the instructions of the lord; the universities have no soul, hence no intent to do wrong and cannot be punished. However, this view was rejected by majority of jurists, who admitted the existence of these entities as juristic persons and their ability of

[32] W. Ulmann,."The Delictual Responsibility of Medieval Corporations" (1978) 64, The Law Quarterly Review 77, at p. 78.
[33] A juridical or artificial person has a legal name and has certain rights, protections, privileges, responsibilities, and liabilities in law, similar to those of a natural person. The concept of a juridical person is a fundamental legal fiction.
[34] Collegium can be understood as college/board (priests)
[35] Capitulum in this case refer to a cathe dral or othe r important religious building
[36] William H. Jarvis, "Corporate Criminal Liability: Legal Agnosticism" (1961), Western Law Review 1, at p. 10.
[37] G. Richier, De la Responsibilite Penale des Personnes Morlaes 53 (1943) (dissertation).

being sanctioned for their crimes. The emperors and popes during this period used to frequently sanction the people of villages, provinces, and corporations [38]. The sanctions imposed could be in shape of personal or proprietary fines, the loss of specific rights, dissolution of the association, and spiritual punishments in form of communes upon the members of the corporations , such as the loss of the right to be buried, or excommunication from the religious group or church[39].

However, the practical need to handle the existence and operations made the canonists accept the ideal notions about existence of criminal liability of legal persons. After the 17th century, the Bologna School specialising in the powers and role of Vatican on the State and its people, began to stipulate the sanctions required to be imposed on communities where ever they were involved in a wrongful act or omission. One of such provisions stipulated that a city that gave asylum to criminal s or that did not help in getting the criminal s arrested were to be held guilty collectively[40].

The canonist at last accepted the liability of corporate entity, but with certain conditions. The most important of these was that the community could not be held responsible for the act of one individual alone. They believed that the community would be held responsible in the eye of the lord only if the individual act was a consequence of the collective will, or it was a result of the will of the majority of the community members, only then should they be punished[41]. As a result of the blame of irresponsibility, some of the sanctions adopted against the collective entity were the fines etc. along with spiritual sanctions like excommunication[42].

In medieval era under the English law, liability was imposed on the group conduct instead of the person who had committed the crime. The group was to be held responsible for the misconduct and offence of one of its members, but it could avoid criticism by the Church by capturing the individual wrongdoer and delivering him to the authorities as the common

[38] Supra note 18
[39] Id., At 13
[40] Supra note 19
[41] The re are two moral persons that exist by divine institution. The y are the Catholic Church; established on earth by Jesus Christ, true God, and the Apostolic Sea, established by the same divine authority. A moral person means a juridical entity, a subject of rights, distinct from all physical or natural persons. Such a person comes into being only when constituted by public authority" [T. L. Bouscaren & A. C. Ellis, Canon Law: A Text and Commentary, Milwaukee: The Bruce Publishing Company (1957) at p. 86)].Can 115 § 1 - Juridical persons in the Church are eithe r aggregates of persons or of things. Can 117 - No aggregate of persons or of things seeking juridical personality can acquire it unless its statutes are approved by the competent authority. (The Code of Canon Law in English Translation, London: Collins Liturgical Publications (1983) at pp. 19-20.
[42] Daniela H Bronco, Towards a New Paradigm for Corporate Criminal Liability in Brazil: Lessons from Common

Law Developments, University of Saskatchewan, Saskatoon (2006) (dissertation).

belief still prevailed that the criminal law should be based upon human conduct. Prior to the French Revolution, businesses were recognized as having criminal liability in France as a legacy of canon law. Prior to the Revolution, it was acknowledged that the community actually existed and that certain groups might commit crimes and need to be punished regardless of the groups[43].

The primary conflict in England has been the presentation of the guilt's motivations and the guilt itself. Examples of how the church punished great city governments include Toulouse, Bordeaux, and Montpellier, which were condemned for their wrongdoings, had their right to community taken away by the parliament, and had their patrimony seized. In line with this perspective, the jurisprudence of denying the ability to form a community meant that it was acknowledged as a collective entity with collective rights rather than as an autonomous community obligations[44].

The French criminal law laws of 1670 replaced the Church's policies and their impact on Roman law. The recognition of collective criminal culpability was one of its basic tenets. According to Title XXI, Article I of the regulation, cities, villages, organizations, and businesses that have engaged in any form of violence, revolt, or other crime might be subject to the criminal procedure. According to the legal code, the term "body" pertained to educational institutions, religious councils, and convents, while the phrase "company" referred to associations of attorneys, judicial officials, and prosecutors. It was required that the behavior had resulted from group discussion in order to assign accountability to such collectivities. The mens rea aspect, according to researchers like Mestre[45], took on particular significance at this time. He believed that the group's will had to be present as a necessary component of the crime[46]; the action alone was insufficient.

[43] This acceptance was not unanimous. According to Charondes, if the crimes were not committed through a common deliberation, the re would not be any responsibility. Othe r authors said that because the fiction the ory prevailed at that time, the liability was not admitted. See, F. McAuley, & J. P. McCutcheon, Criminal Liability, Dublin: Round Sweet & Maxwell (2000) at p. 273.

[44] João Marcello Araújo Jr., "Societas Delinquere Potest – Revisão da Legislação Comparada e Estado Atual da Doutrina" in Luiz Flávio Gomes, Responsabilidade Penal da Pessoa Juridica e Medidas Provisórias e Direito Penal, São Paulo: Revista dos Tribunais (1999) 72, at p. 80. (Quoted in supra note 18)

[45] Aquiles Mestre, Les personnes morales et le probleme de leur responsabilite penale, quoted in Fausto Martins de Sanctis, Responsabilidade Penal da Pessoa Juridica, Sao Paulo: Saraiva (1999), at p. 26

46 See Supra note 18.

2.3 CORPORATE LIABILITY DURING THE MODERN ERA

The principle of societas delinquere non potest which means that a legal entity cannot be held blameworthy[47] held a significant place in the legal frame work in the world, particularly in countries like Italy and Germany, where it was understood that the corporate cannot be excommunicated or held for felony or treason[48]. An anonymous case, which even William Blackstone has quoted, demonstrated clearly the judiciary‟s reluctance to extend criminal liability to corporations where the landmark opinion of Holt CJ states "A corporation is not indictable but the particular members of it are[49]." However, reasons behind Lord Holts' decision are not clear because case consists of only of this single sentence. The commentators had cited the case as precedent but they also observed that the general rule against corporate criminal liability contained some exceptions[50].

By the early 1800s, courts began to hold the corporations criminal ly liable for the sorts of public nuisances that were previously inflicted by quasi-public corporations like the old age universities or collectives or the modern day municipalities[51]. But there were two parameters to be crossed, first; "no individual agent of the corporation was responsible for the corporation‟s omission46"and secondly, "there was no imputation of guilt from agent to principal" because "only the corporation was under a duty to perform the specific act in question.[52]" By the early 19th century, corporations had become more prevailing and governing in the society and with this dominance also increased significantly their potential to cause significant harm to more number of people. The civil sanctions and the punishments via the judicial decisions increased to control and punish the corporations where they omitted their duty to take care or created public disorder or nuisances like deterioration of roads[53], decaying of bridges[54], and river basin pollution by the companies[55]. Public enforcement of punishment and sanctions became pertinent as few individuals of the society had started pursuing these acts to get justice through private litigation where the government would end

[47] Edward Diskant "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" (2008) 118 Yale LJ 126, at p. 129.
[48] Mark Pieth and Radha Ivory "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in Corporate Criminal Liability, Springer, London (2011) 3, at p. 4.
[49] Anonymous (1701) 88 Eng Rep 1518 (KB)
[50] See Joel P. Bishop, The Criminal Law, 1st Edition 1856 contained pp. 273-284; L.H. Leigh, The Criminal Liability of Corporations (1956), pp. 1-13.
[51] John C. Coffee, Jr., "Corporate Criminal Responsibility", in Encyclopaedia of Crime and Justice 253, Sanford H. Kadish ed. (1983).
[52] Ibid.
[53] Ibid.
[54] Commonwealth v. Hancock Free Bridge Corp (1854) 68 Mass 58

[55] State v. Morris Canal & Banking Co (1850) 22 NJL 537

up being the guilty party[56]. These cases would become public good oriented cases rather than the privately fought cases because of the large number of people being affected by these wrongs or nuisances. Rather than a private inquiry, these cases attracted a more scrutinised role of government in sanction applications.[57]

Corporate criminal liability was originally restricted to crimes of nonfeasance where the failure to satisfy a duty required or assigned by law was overlooked or not complied with[58]. However, by the middle of the 19th century, this liability was extended by the courts to the acts of misfeasance by the companies too. Here the acts of companies involving the inadequate performance of a legal act or provision were being punished by the courts[59]. In 1846 in The Queen v Great North Of England Railway Co, Lord Denman provided that,

„the corporations could be criminal ly liable for misfeasance in a case where the corporation had failed to build a bridge over a highway in accordance with statutory requirements"[60]. The courts started recognising the distinction between nonfeasance and misfeasance as false and extremely hollow since the illegal act or omission could often be characterised as both nonfeasance and misfeasance as both involved the overstepping of law[61]. In the United States in 1834 "the City of Albany was indicted for failing to cleanse the basin of the Hudson River, which had become „foul, filled and choked up with mud, rubbish, and dead carcasses of animals[62]."

Kathleen Brickey, undertook a study of how courts in both England and the United States started imposing corporate criminal liability and not civil liability provision as they used too, especially in cases involving nonfeasance"s or disobedience of legal duty by quasi-public corporations, such as municipalities, that resulted in public nuisances[63]. Brickey in this study

[56] People v. Corporation of Albany II Wend 539 (NY Sup Ct 1834) at 543.
[57] Vikramaditya Khanna "Corporate Crime Legislation: A Political Economy Analysis" (2004) 82, Wash U LQ 95, at p. 101.
[58] Charles Doyle, Corporate Criminal Liability- An Overview of Federal Law, CRS Report prepared for members of Congress, October 30, 2013.
[59] See Case of Langforth Bridge 79 ER 919 (KB 1635).
[60] Ibid.
[61] The Queen v. Great North Of England Railway Co [1846] EngR 803, at pp. 325-327.
[62] Commonwealth v. Proprietors of New Bedford Bridge 68 Mass 339 (1854).
[63] V. S. Khanna, Corporate Criminal Liability, What Purpose does it Serves? Harvard Law Review, Vol.109.

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of judicial reactions analyzed the paradigm shift from civil liability to the corporate criminal liability[64].

With the change in political structures of a State, the corporates grew out of the control of the church and a new genre of joint ownership of venture capital started growing. Because a lot of capital was being invested and required to control these corporates, there arose a need to get money from investors and creditors. As a result of lack of money investment controls, these independent joint stock companies increased in power and dominance in the trade guild[65]. Legally, these businesses resembled partnerships associations more than an incorporated company[66].

In the 18th century, many of these independent joint stock companies began to indulge in wild stock frauds[67] like the South Sea Company, which got established in 1711 and wounded up in 1720 because it was heavily involved in trade and money speculations and insider trading. In this manner, it managed to raise its share price five times of its original price. The unethical gains that the company made in South America ran in millions at that time. This scandal caused heavy economic loss to the national government and was destroyed hundreds of individuals[68].

Due to this scandal, the share price of the company crashed which resulted in one of the worst financial crashes in world history[69]. An inquiry was initiated by the government to look into the whole issue and the outcome was the enactment of the Bubble Act, 1720 by the Parliament of United kingdom in 1720[70]. This Act laid down strict adherences that a corporation could only be established by the Parliament by passing an Act and the corporations were prohibited to act ultra vires of their approved constitutions[71]. It took these corporations more than a century to acquire the trust of the government and the policy makers[72]. The Bubble Act 1720 was repealed in 1825, resulting in a rapid growth of business

[64] Kathleen F. Brickey, "Corporate Criminal Accountability: A Brief History and an Observation", 60 WASH. U. L.Q. (1981), 393, at p. 396.
[65] Id., 398.
[66] People v. Corporation of Albany, 11 Wend. 539, 539 (N.Y. Sup. CL 1834)).
[67] Id., 398.
[68] Paddy Ireland "Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality" (1996) 17(1), JLH 41, at p. 43.
[69] Supra note 58, p. 399.
[70] Julian Hoppit "The Myths of the South Sea Bubble" in Ian Archer and Arthur Burns (eds) Transactions of the Royal Historical Society: Volume 12, Cambridge University Press, Cambridge (2002) 141, at p. 143
[71] Ron Harris "The Bubble Act: Its Passage and Its Effects on Business Organization" (1994) 54 J Econ Hist 610 at 610
[72] Supra note 58, p. 399

houses being established. The South Sea Company made the government to sit up and set a watch on these corporations as prior to this in the eighteenth century, the corporate entity was thought to be incapable of committing a crime as they had insufficient intent, power and physical force to do wrong[73].

By the middle of the 19th century, Corporate Criminal Liability was extended to all offences committed by the company which did not require evidence of criminal intent[74]. The judicial interpretations of wrongs moved from quasi-judicial decisions to the decisions requiring proof for a fault element such as intention or recklessness were being recognized in the USA from 1909[75] and in Britain in 1917 onwards[76]. However, despite their common traditions, the current models that have developed across common law jurisdictions are not similar.

The courts in America, even at the federal levels have largely adopted the applicability of principle of vicarious liability while attributing criminal liability to corporations for the offences including those involving intent. The American courts also follow the principle of respondeat superior, which means that the commandant of the corporation is liable for the wrongful acts of any of its agents or employees when that act had been committed during the course of employment by that worker with the intention of making profit for the company[77].

Even though there has been recognition of criminal liability of the corporate in majority of the countries, yet there is a great number of luminaries who are advocates of strict adherence of this liability or of no adherence at[78]. These experts belonging to areas of criminal law and corporate law believe that the concept of corporate punishment for a wrong is highly questionable[79]. They are of the opinion that the civil liability and its provisions are enough to handle the punishments to be awarded to a company when it commits a wrong, hence there is

[73] Id., 396
[74] Stessens Guy, Corporate Criminal Liability: A Comparative Perspective, International Comparative Law Quarterly 43, 1994, pp. 495-498
[75] New York Central and Hudson River Railroad Co. v. United States 212 US 481, 1909
[76] Wells identifies the King‟s Bench decision of Mousell Bros v. London and North Western Railway in 1917 as the first indication in English law that corporate liability might move beyond strict liability or nuisance, although the implications of this decision did not eventuate until some time later. For a detailed description of the development of corporate criminal liability in England and Wales see: Wells C., Corporations and Criminal Responsibility, Second Edition, Oxford University Press, 2001, pp. 120-149.
[77] Id., 130-134
[78] Beale Sara Sun, "Is Corporate Criminal Liability Unique?", American Criminal Law Review 44, 2007, pp. 1503-1504
[79] Alschuler Albert W, "Two Ways to Think About the Punishment of Corporations", American Criminal Law

Review 46, 2009, at p. 1359

little or no scope of criminal liability [80]. The United States of America being a capitalist nation has a huge presence of giant multinationals. There is a plethora of individuals who are associated with these companies and the experts believe that when a corporate gets punished, then it is this whole set of individuals who get affected like - the shareholders, the stakeholders, the employees, the consumers etc., who bear the brunt of the sanctions or the punishment awarded for the crime. These experts hence propagate that there should be restricted or minimum use of criminal liability principles of a compan[81]y. But there are so many repercussions that the community faces when a corporate does a wrong that the voice of such experts fade away.

2.4 English Law Concepts

English jurisprudence had many firm believers that the corporate lacked a soul and had no body to kick, hence it cannot have a malafide intent[82]. The view was further supported by the doctrine of ultra vires which repressed the expansion of the principle of corporate criminal liability because according to this doctrine, the corporations can neither commit nor authorise its workers, agents or employees to commit any actions outside the scope of the corporation‟s objects[83]. The courts, therefore, refused to attribute such ultra vires actions to companies for crimes where the specific intent was required to be proved as an essential element of crime[84].

This doctrine was finally rejected in law of tort in the case, Citizens Life Assurance Company Ltd v. Brown[85]. The Privy Council held that corporations , like employers, were capable of being liable for torts involving malice committed by their employees in the course of their employment‟[86]. This explanation of liability of a company expounded by the law of torts was later extended to corporate criminal law as well by way of inferences[87]. These inferences were necessary as due to the advent of industrial revolution and connectivity through the rail

[80] Arlen Jennifer and Kraakman, Reinier, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes", New York University Law Review 72, 1997, pp. 687-692
[81] Alschuler Albert W, Two Ways to Think About the Punishment of Corporations, American Criminal Law Review 46, 2009, 1366-1367
[82] State v. First National Bank (1872) 2 SD 568 at 571 cited in Andrew Weissmann and David Newman “Rethinking Criminal Corporate Liability” 2007 82, Ind LJ 411, at p. 420.
[83] L.H. Leigh, The Criminal Liability of Corporations in English Law, Weidenfeld & Nicolson, London (1969), at p. 17.
[84] Ashbury Railway Carriage and Iron Co. v. Riche [1875] LR 7 HL 653 and People v. Rochester Railway & Light Co. 88 NE 22 (NY 1909).
[85] Citizens Life Assurance Company v. Brown [1904] UKPC 20 (NSW).
[86] Clerk and Lindsell, Torts, 1908, pp. 60-63.
[87] Harker v. Britannic Assurance Co. Ltd. [1928] 1 KB 766.

road facilities, the threat, impact and the harm caused by the actions of the companies increased many folds[88].

Corporations became more powerful and started accumulating prosperities not only through the property and the profits but also through the acts of insider trading, bribery, stock manipulation, and exploitation of labour which included below average or no safety measures for the labourers[89]. It was getting difficult for the courts to be oblivious to these facts and readily accept the ultra vires theory or the corporate being a fictitious entity notions and overlook the huge damages being caused by the corporate giants.[90] This force led the courts to apply the civil law doctrine of vicarious liability for the crimes being committed by the companies, mainly in the common law countries[91]. The main initiatives were being undertaken by the courts of United Kingdom, where unlike the American courts the liability was only being applied to the regulatory offences only[92].

The dominance of neo-liberal philosophies of privatization of the business world along with the propagation of the free market ideas in the 1980s led to the de-regularization of companies who were slowly moving out of the governmental restrictions and this hindered the applicability and development of corporate criminal liability [93]. The UK Parliament has only in the past decade introduced legislation dealing with corporate crime after several stark mishaps occurred where no corporation or individual could be held accountable or guilty for the mishaps[94]

2.5 Developments in Civil Law Countries

The growth of corporate criminal liability has been more visible in the common law countries where as the civil law jurisdictions have been more hesitant towards the existence of corporate criminal liability . The reasons for this are many, like no body- no soul theory, the dependence on statutory provisions etc. including the pre historic idea that the clan or the

[88] Supra note 71
[89] Mary Ramirez "Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority" 2010 93 Marq L Rev 971 at 980.
[90] George Skupski "The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability" (2012) 62 Case W Res L Rev 1 at p. 3.
[91] Kristen Wong, Breaking the cycle- development of Corporate Criminal Liability, University of Otago (dissertation) 2012
[92] Ibid.
[93] Laureen Snider and Steven Bittle "The Challenges of Regulating Powerful Economic Actors" in James Gobert and Ana-Maria Pascal (ed) European Developments in Corporate Criminal Liability, Routledge, Oxon (2011), at p. 57.
[94] The Corporate Manslaughter and Corporate Homicide Act 2007 was enacted after the Herald of Free Enterprise

sunk in the port of Zeebrugge, Belgium killing 193 people and many fatal railroad accidents.

association cannot be held blameworthy of guilt. Hence, these associations or the social clans are not the subjects of corporate criminal liability and punishment for a crime[95]. But the past few years have made us witness such dangerous acts been done by these associations that the no-blameworthy approach has seen a nose dive[96] and many civil law jurisdictions started the process of execution of guilt against the companies for the criminal liability for their acts by the late twentieth century. A great deal of legal policies to incorporate criminal liability against the corporates, countries like Austria (2006)[97], Belgium (1999)[98], Denmark (1996)[99], Finland(1995)[100], the Netherlands (1976)[101], Norway (1991)[102], Spain undertaken by these corporates in form of forfeiture of that property[103], or by the direct confiscation of the asset[104].

Corporations are legal entities and under this shield they tend to gain in a twin folded manner many benefits which are given to natural persons. One they get the rights and duties similar to the natural person and secondly, they get to safe themselves because of the corporate veils and getaway with any crime that they might do and never get caught or punished like a natural person can be. Like for example, in New Zealand, the company gets equal rights as an individual will get under the laws like Interpretation Act, 1999 which defines a person inclusive of a corporation sole, a body corporate, and an unincorporated body and the ambit of the New Zealand Bill of Rights Act, 1990 is applicable for the benefit of legal persons as well as natural persons[105]. Hence the dual benefit being awarded to the body corporate as the Crimes Act, 1961 clearly outlines that crimes like homicide is the killing of a human being by another and the company according to this provision of criminal law cannot be found guilty of manslaughter or murder[106].

[95] Id., pp. 110-111
[96] Id , pp.111.
[97] At present, only very limited corporate criminal liability provisions have been introduced in Spain in relation to specific bribery offences. The se provisions allow for sanctions to be imposed on a corporation when a relevant individual has been convicted of an offence and are described by the OECD Working Group on Bribery as involving criminal liability.
[98] Dr. Hans Bollmann, Criminal Liability of Companies, Lex Mundi Ltd. Report, 2008
[99] Chance Clifford, Corporate Liability in Europe, (2012), at p. 13.
[100] Ibid.
[101] 143 Criminal Liability of Companies Survey, Lex Mundi Ltd. (2008), at p. 125.
[102] Ibid.
[103] Böse Martin, Corporate Criminal Liability in Germany, Ius Gentium-Comparative Perspective on Law and Justice, Volume 9, Springer (2011), at p. 227
[104] Id., 126
[105] New Zealand Bill of Rights Act, 1990 (NZ).
106 Ibid.

2.6 Developments in Australia

What is noteworthy in Australia, is the development related to the conceptual growth of corporate liability and accountability. Australian laws clearly demonstrate a tendency towards acceptance of the concept of corporate criminal liability in terms of corporate being guilty. At the same time there are significant development s in the Australian legal system in relation to in the range and in the harshness of sanctions employed to hold the accountability of a corporate for criminal misconduct[107]. There is a visible growth in adoption of techniques to tackle the corporate misconduct like a wide range of non-monetary sanctions[108] enforceable against corporate offenders like the dissolution of the company, disqualification of the firm from government contracts, adverse publicity, corporate probation[109] and punitive injunctions being awarded to the firm[110]. Innovative practices to impose such penalties which are much damaging than the punitive fines or injunctions is the special ability of this legal system to address the organizational action and accountability against the wrongful act of the company. There is also a visible shift in the practices of levying fines or punitive sanctions to handle the corporate misconduct. Traditionally, negligible fines were levied against the firm which were hardly serving as a deterrence[111], but now, there is a general legislative trend towards imposing greater penalties on the corporations for criminal wrongs[112]. But the most important step that the Australian legal system has undertaken in establishing the accountability of the firms for criminal acts is that they have brought the governmental authorities too under the scanner of corporate criminal liability, thus limiting their scope of protection being limited to statutory obligations only[113].

[107] Jennifer Hill, "Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?", Journal of Business Law 1 (2003), at p. 6

[108] Australian Law Reform Commission, Sentencing Penalties, Discussion Paper No. 30 (Canberra, 1987), 170ff on Alternative Non-monetary Sanctions.

[109] Corporate probation is the oretically possible under the Crimes Act 1914 (Cth), S. 19 B, although it does not appear to have been used in practice.

[110] Fisse and Braithwaite, "Sanctions Against Corporations: Dissolving the Monopoly of Fines" in Tomasic (ed), Business Regulation in Australia (CCH, Sydney, 1984), ch 5

[111] Ibid.

[112] The Trade Practices Act 1974 (Cth) S. 76 now imposes penalties of up to 10 million on corporations.

[113] In 1993, the National Competition Policy Review, Report by the Independent Committee of Inquiry (the Hilmer Report), August 1993, 116ff, recommended that "the Crown should cease to enjoy immunities to the extent it is competing with private firms" and that "the shield of the Crown doctrine should have no place in the competitive conduct rules of a national competition policy" (at 120). See Bropho v. Western Australia (1990) 64 ALJR 374, 379 and Work Cover Authority of NSW v. State of NSW (2000) 50 NSWLR 333, 345. Cf Bass v. Permanent Trustee Co. Ltd. (1999) 198 CLR 334, 343ff on the extent to which the Trade Practices Act 1974, as a matter of construction, binds the State Crown. A recent statutory example of abolition of State Governments‟ Crown imunity is found in the Competition Policy Reform Act 1995 (Cth), which imposes an “access regime”

for both private and public essential services.

Another exceptional feature of this legal system is that here the law targets both real and fictitious people represented by natural persons and establishments equally in the field of corporate regulation, hence declining the doctrines of extreme individualism or enterprise liability alone. These two mentioned types of liabilities under attack in Australian law are totally independent of each other and the applicability of either is a choice of the prosecution and is not a matter of personal discretion of the wrongdoer.[114]

2.7 Developments in India

Section 11 of the Indian Penal Code, 1860 includes in the definition of 'Person' any Company or Association of persons whether incorporated or not. It means the penal provisions are equally applicable to wrongs committed by corporations . However, difficulty arises in attributing the wrongful acts to the company and determining the guilty state of mind. The common law principle of vicarious liability are followed in India. The common law tradition of 'alter ego' or identification is judicially followed in India[115]. The generally accepted rule is that except for such crimes, as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents[116].

The penal policy has not yet been specifically adopted for punishment corporations in the penal statutes prescribe punishment keeping in view the natural persons. The Law Commission of India in its 41st and 47th Report has recommended to empower the courts to punish the corporations with fine where other punishment prescribed in imprisonment or imprisonment and fine[117]. The detail is discussed in the following chapter IV of this work.

In India history of company law started with the enactment of Joint Stock Companies Act, 1850. The cumulative process of amendment and consolidation continued resulting in enactment of the Companies Act, 1956. Even then it was not exhaustive of all modes of incorporation of business concerns. There is also the process of incorporation by Special Acts of Parliament[118]. The 1956 Act was amended several times and now it has been replaced by

[114] See Fisse, 9.2 "Ancillary Liability", Chapter 4, "Corporate Liability" [130], Laws of Australia (Law Book Company, Sydney, 1993). On enforcement policies of Australian business regulatory agencies regarding prosecution of the company or individuals.
[115] Assistant Commissioner Assessment-II v. M/s Velliappa Textiles Ltd., AIR 2004 SC 86.
[116] Standard Chartered Bank v. Directorate of Enforcement (2005) Cri.L.J. 4917 SC para 7.
[117] See Law Commission of India 41st Report (1969) para 24.7 and Law Commission of India 47th Report (1972) para 8.3.

[118] See Avtar Singh Company Law, 14th Ed., Eastern Book Company, Lucknow, (2004), pp. 2-3.

the Companies Act, 2013. Still common law principles are also followed in different matters pertaining to conduct of companies, for example the rule in Derry v. Peck[119].

In general penal liabilities are dealt under the Indian Penal Code, 1860 alongwith special enactments like the Prevention of Corruption Act, 1988, The Money Laundering Act, 2002, The Narcotic Drugs and Psychotropic Substance Act, 1985, The Prevention of Unlawful Activities and many others. However, the criminal liability of corporations has not been specifically dealt. As such whatever, well defined principles of Criminal Justice have developed in India are not adequate to squarely fix the criminal liability of the corporations .

In India Bhopal Gas leak incident in 1984 has been one of the worst industrial disasters in the world. This disaster raised various issues regarding liability of multinational corporations both civil and criminal , when such corporations are engaged in inherently hazardous activities. The Supreme Court of India in the later case[120] laid down the principle of Absolute Liability as an extension of common law principle of strict liability in Rylands v. Fletcher[121]. The court laid down the when n enterprise is carrying on inherently dangerous activity then in the event of any damage its liability is strict rather absolute as it is not subject to any exceptions laid down in the rule of strict liability under Rylands v. Fletcher. Further to have deterrent effect the court laid down that such enterprise can be held liable to pay damages to the extent of its capacity. The civil liability of the union carbide corporation in Bhopal case was decided on compromise decree.

[119] Derry v. Peck (1889) 14 AC 337, directions liability for making false representation knowingly; or without belief in its truth, or reckunly carelessly whethe r it be false or true.
[120] M.C. Mehta v. Union of India, AIR 1987 SC 1086.

[121] [1868] UKHL 1

CHAPTER 3 PRINCIPLES AND THEORIES OF

CORPORATE CRIMINAL LIABILITY

3.1 INTRODUCTION

Corporate criminal liability as a valid principle under the criminal law and rule is a debatable topic. Even though there is a lot of contemplation regarding the real extent of its application and its feasibility in many countries yet, to an extent, these disagreements and debates can be narrowed down to three basic and pertinent questions. Firstly, the researchers indulge into the query that weather there is a conceptual explanation for using the same system of criminal justice for punishing the individual‘s misbehavior and misconduct as for punishing the nonliving entities, which are lifeless and fictitious in nature. Secondly, what significant contributions could corporate criminal liability add to the already existing regulatory mechanism of civil redressals in the form of sanctions against the companies; and Thirdly, whether corporate criminal liability does significantly add value over and above the individual criminal responsibility, which is extendable by law towards the corporate agents, employees or other officers[122]?

Although the western countries have laid down a parameter to counter and define corporate liability under the criminal law but the same has to be followed by the rest of the world. First and foremost among these issues is the trouble that the legislature and the courts need to address and handle is how to draw a direct analogy between a body corporate and human beings who commit crimes? While a corporation might have been considered as a "person" capable of committing a crime by many legal systems yet, the portrayal of fault on the same psychological processes which can be applied to human beings along with the kinds of punishments for those acts will still be a complicated issue. The biggest challenge would be the applying the concept of mens rea and criminal intent on the guilty corporates. A very holistic approach is required for making corporations criminal ly accountable for their misdeeds. What is a relief is that the traditional common law theories have an imprint on the new contemporary theories and that various legal models today have not shied away for

[122] James G. Stewart, "A Pragmatic Critique of Corporate Criminal The ory: Atrocity, Commerce and Accountability", A paper presented at the University of Toronto Workshop on Corporate Criminal Liability, 2012.

accepting that a thread connects the guilty act of the company and the minds and hands of the company[123].

There has been a growing menace in our society because of the acts of the corporations and there are plenty of researchers who have given open calls for corporations to be brought within the full scope of the criminal law[124]. There are numerous theories and mechanisms according to which a company may be held liable for committing a criminal offence. This issue has been continuously debated by legal jurists, judges, academicians, lawyers, socialists and legislative representatives. But, all of the above cannot negate the fact that the indispensable difficulty with indicting a company branches from the very fact that there are great dissimilarities between a natural person and a corporation and the way they commit an offence.

3.2 REQUISITES OF CRIME AND CRIMINALITY

A crime is said to be committed when a person has committed a voluntary act prohibited by law, together with a particular state of guilty mind. A voluntary act means an act performed consciously as a result of effort or determination of an individual with an active intent. The state of mind referred here can be an act committed after due deliberation alone or deliberation and with intent together or recklessly with criminal negligence. The main concern here is that the proof of the act alone is not sufficient to prove that the wrongful act committed by a person had the required guilty state of mind. Under the criminal laws, the state of mind is very much an element of the crime, as the act itself, and must be proven beyond a reasonable doubt in the court of law, either through direct or incidental evidence[125].

It cannot be denied that the criminal liability is what unlocks the logical structure of criminal law. Each element of a crime that the prosecutors needs to prove beyond a reasonable doubt requires a principle of criminal liability to be fixed for that criminal act. There are some crimes those only involve a subcategory of the principles of liability , but such incidences are rare and are called crimes of criminal conduct. Theft or kidnapping, for example, are such crimes because all you need to prove beyond a reasonable doubt is the presence of actus reus

[123] Corporate Criminal liability Discussion Paper, Department of Justice, Government of Canada, March 2002, available at; http://www.justice.gc.ca/eng/rp-pr/othe r- autre/jhr-jdp/dp-dt/iss-ques.html
[124] T Woolfe, "The Criminal Code Act 1995 (Cth) - Towards a Realist Vision of Corporate Criminal Liability" (1997) 21 Criminal Law Journal 257.
[125] 4 "Requirements for Criminal Liability - In General", State of Colorado judicial Department [US], available at; https://www.courts.state.co.us/userfiles/ File/Court_Probation/Supreme_Court/Committees/Criminal_Jury_Instructions/CH APTER_G1Culpability.pdf

along with mens rea. It is this concept of intent or guilty mind called the mens rea, which along with other principles , is taken into account that is the principle of strict liability . Here the liability without fault may arise in cases of corporate crimes or environmental crimes. In such evident acts of strict liability , the mens rea needs not be specifically proved. Many legal systems follow the general rule that the corporations may be held liable for the specific intent offences based on the knowledge and intent of their employees[126].

3.3 LEGAL ENTITY AND CORPORATE CRIME

It is debated most of the times; whether or not it is feasible to hold responsible for crime a non-natural entity such as a corporate body which unlike a natural person, is not capable of thinking for itself or of creating any intention of its own. It is also contemplated that the very idea of fault and blameworthiness inherent in the concept of criminal culpability of a corporate presumes personal responsibility. This is an element which an abstract entity such as a corporate body lacks. The corporate body has no physical existence except the mortar buildings and it does not thinks for itself. The actions that it takes or the acts that it undertakes and the thinking that goes behind these acts is done for it by its directors or employees. There is a view that guilty servants of the corporate ought to be punished. The situation is otherwise complex when the guilt has to be fixed on some one. The present development s in the economics require that there is a great need for this form of liability due to dominance of corporate bodies in different spheres of human activities. Within complex organisation it becomes very difficult to track down the individual offender. An official can very easily shift the whole blame or responsibility on another worker of lower rank. In case of any such event there are other branches of the law like the law of contract, who recognize that a corporate body is very much capable of thinking and of exercising a will. This form of acceptance of liability is especially necessary for the answerability where failure to perform a specific duty imposed by the statute on a corporate body, for example the duty to draw up and submit the tax returns or annual report submissions etc. constitutes a crime[127].

Most criminal statutes world over are applicable for whoever or to any ―person‖ who violates the legal preventions. Although, in ordinary language, the word ―person‖ usually

[126] United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118 D.C.Cir. (2009), citing, N.Y. Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909), and United States v. A & P Trucking Co., 358 U.S. 121, 125 (1958); see also, United States v. LaGrou Distribution Systems, 466 F.3d 585, 591 (7th Cir. 2006).
[127] Sadhana Singh, Corporate Crime and the Criminal Liability of Corporate Entities, Resource Material Series

No.76, 137th International Training Course Participants' Papers (2010).

refers to a human being, but the law gives it a much broader ambit and meaning[128]. The Dictionary Act of United States, lays down that; ―In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words _person' or _whoever' include corporations , companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[129].‖ Many courts have used the above said definition to award meaning to the words person in the context of a criminal statute under the federal legislations as it provides enough space to incorporate the wrongs of a company[130].

3.3 MENS REA IN CORPORATE LIABILITY

But, today when the components of the acts done by a company are broken down to understand what the corporate is doing today, in many cases its mens rea is evidently involved and the principles of criminal ity can be easily associated with these acts. Issues like; Intent: specific or general, the circumstantial proofs, the confessions of workers etc. may be clearly present to demonstrate the acts or omissions done by the corporate in furtherance of its actions. The basic contention being the fact that the world is divided over the implications of these acts. There are number of approaches adopted by different countries all over the world to decipher and decode the acts of a corporate and find the intent behind it. The civil law and common law countries, all have different means to handle the criminal intent of a body corporate. But the underlying principle here is that the criminal intent and the crime of the corporation in no case is overlooked.

If we have a look at the common law countries then we have instances where jurists like Baron Thurlow, the Lord Chancellor of England and a great lawyer and politician at the same time, have expressed the presence of guilt on the part of the corporate body. He towards the late eighteenth century took up this issue and laid down that, "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked and, by God, it ought to have both[131]." There are other opinions too like the significant stand

[128] Clinton v. City of New York, 524 U.S. 417, 428 n.13 (1998).
[129] 1 U.S.C. 1.
[130] E.g., United States v. A & P Trucking Co., 358 U.S. 121, 123 (1958) (Violation of Interstate Commerce Commission Safety Regulations, former 18 U.S.C. 835 (1958 ed.); United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974) (Violation of the Travel Act, 18 U.S.C. 1952); Western Laundry and Linen Rental Co. v. United States, 424 F.2d 441, 443 (9th Cir. 1970) (Antitrust violations under the Sherman Act, 15 U.S.C. 1); United States v. Hougland Barge Line, Inc., 387 F.Supp. 1110, 1114 (W.D.Pa. 1974) (conspiracy, 18 U.S.C. 371).
[131] Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. Rev. 386 at n.1 (1981). Quoted in Micheal E. Tigar, _ It Does the Crime but Not the

Time: Corporate Criminal Liability in Federal Law', American Journal of Criminal law, Vol 17:211, 1990

taken up regarding the onus of guilt on the part of the corporation by judges like Chief Justice Holt who in stated that "A corporation is not indictable, but the particular members of it are."[132] Blackstone's Commentaries also picked up the same version as depicted by Justice Holt to the same effect[133].

The disjunction between individual and corporate criminal liability became the need of the hour. Even though the menace of the body corporate was increasing yet the inhibition in the courts to take up this issue was quite visible. Like for example under the law of torts, judges did not re-define the principles of respondeat superior. The changes were only visible during the nineteenth century only when the federal laws of America started extending the theory of respondeat superior towards the corporates and started holding them accountable under criminal law as well for the acts of agents done within the scope of their employment, but also allowed them to escape this liability , if the agent was working on his own without the employers knowledge[134]. Such acts are not covered within the ambit of 'course of employment'.

3.4 NATURE OF CORPORATE CRIMINALITY

The rule extends only to those instances when an employee or agent acted, or acquired knowledge, within the scope of his or her employment, seeking, at least in part, to benefit the corporation[135]. The law is somewhat uncertain when a corporation‘s liability is fixed not upon the knowledge or the intent of a single employee but upon cumulative actions or knowledge of several others who have acted upon in a collaborative thought[136]. According to one view it is said that "A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability . The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations

[132] Micheal E. Tigar, _ It Does the Crime but Not the Time: Corporate Criminal Liability in Federal Law‘, American Journal of Criminal law, Vol 17:211, 1990 referring Anonymous (No. 935), 88 Eng. Rep. 1518 (1701)
[133] Ibid.
[134] Supra note 11, referring Joel v. Morison, 172 Eng. Rep. 1338, 1339 (1834) (Parke, B).
[135] United States v. LaGrou Distribution Systems, 466 F.3d at 591; United States v.Route, 2 Box 472, 136 Acres More or Less (Dyer‘s Trout Farms, Inc.), 60 F.3d 1523, 1527 (11th Cir. 1995); United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir. 1987).
[136] United States v. Bank of New England, 821 F.2d at 856)

into smaller components. The aggregate of those components constitutes the corporation‘s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation: A corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly[137].‖

―Like Defendants and other courts, The US Court has also observed that "we are dubious of the legal soundness of the ―collective intent‖ theory[138]. _Corporate knowledge of certain facts [can be] accumulated from the knowledge of various individuals, but the proscribed intent (willfulness) depends[s] on the wrongful intent of specific employees[139]‘‖ and ―For purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation‘s officers and employees acquired in the course of their employment‖).

The modern day corporation is also serving long with its objective of marketing goods, the objective of accumulating capital for its owners and this legal fiction has become an energetic part of every countries economic growth and development [140]. This is a reality irrespective of the fact that the money matters of that company are in private or public hands. These entities are a part of legal ideologies in all form of systems, be the socialist, the capitalist or even socialist legal systems. While so many of these analogies exist, allowing us to justify a wide range of approaches to test, try and implicate corporate criminal liability , but ironically they do not give us a rational basis for choosing one approach over the other. There is no single universal rule as how to declare that a corporation should be held as a criminal defendant. The aggregation of mass capital it represents, caters a bigger risk of harm if that power is used for criminal purposes. Such a rationale would for sure support a decision to make the

[137] United States v. Philip Morris USA, Inc., 566 F.3d at 1122
[138] Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996)
[139] Southland Securities v. Inspire Insurance Solutions, 365 F.3d 353, 366 (5th Cir. 2004)

[140] See generally M. Tgar, Law & The Rise of Capitalism (1977).

corporation not only civilly liable for its misconduct and misdeeds, but also step a little farther towards its criminal implications.

This rationale however reinforces the practices of holding a company for its criminal misconduct by many American federal Laws[141]. The decision to criminal ize cannot be made so casually keeping in view the role and position a corporate enjoys in our lives. Jurists like Henry Hart reminded us, "Criminal conduct is the conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community[142]." At the same time it cannot be overlooked that holding a corporate criminal ly liable for offences otherwise acceptable in the business conduct belittles the criminal sanction in place and breeds contempt for them openly.

It is important to seek to clarify the notion of corporate crime which is the basis of this part of the undertaken research and discussion regarding the establishment of theories and principles of criminal liability of the corporate. Over the years some sociologists and criminologists have sought to broaden the concept of corporate crime to include any misconduct involving a corporation, whether it is a breach of a criminal or civil law or regulatory rule. Some have even seen the concept of corporate crime as covering any announced legal actions against a corporation[143]. Thinkers like Kip Schlegel have clearly pointed out the dangers of creating a very wide parameter of the concepts of corporate liability will nullify the impact of it and believes in the confinement of its definition to the bare minimum. He lays down in his book the simple and short boundaries of the concept of corporate crime as; "any act that violates the criminal law[144]."

Thinkers like Bauchus and Dworkin take the similar view forward in the twenty-first century and argue on the same lines that the ambiguity in relation to the concept of corporate criminal liability is because of the confusion that lies in the handling of definitions of corporate misconduct and illegal behaviour of the companies[145]. It can also be said so because, justifiably it is clear that all illegal corporate acts or misconduct is criminal in

[141] Michael E. Tigar, "It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law", Am. J. Crim. Law Vol. 17:211 (1990)
[142] Id., at p. 213
[143] Roman Tomasic, "Corporate Crime and Corporations Law Enforcement Strategies in Australia", A Discussion Paper based upon an empirical research project on "Corporate Law Sanctions and the Control of White Collar Crime" funded by the Criminology Research Council and issued by the Centre for National Corporate Law Research,1993
[144] Schlegel, K, Just Deserts for Corporate Criminals, Boston, Northe astern University Press, 1990 at p 5.
[145] Baucus, MS and TM Dworkin, "What is corporate crime? It is not illegal corporate behavior," 13 Law &

Policy (1991) 231 at pp. 232-34.

nature. It's been long that the principles of the Criminal law have distinguished between the so called petty crimes and the white collar crimes prevalent in the society including their differentiation from the other street crimes as well[146]. It becomes pertinent to note that many convictions of research believe in separate existence of the corporate crime as a branch but eventually it remains a sub-set of white collar crime with occupational crime on the other hand being taken as the other important sub-category of white collar crimes[147]. The notion of the ambit of corporate criminal liabilities definition is clearly defined by Kramer in his book where he concluded that the corporate crime involves: "criminal acts (of omission or commission) which are the result of deliberate decision making (or culpable negligence) by persons who occupy structural positions within the organization as corporate executives or managers. These decisions are organizational in that they are organizationally based - made in accordance with the operative goals (primarily corporate profit), standard operating procedures, and cultural norms of the organization - and are intended to benefit the corporation itself[148]"

The problem arises when at times the dividing line between criminal and civil provisions phases out of clarity and it gets difficult to differentiate between the two. For example, under the regulatory sanctions for commercial statutes, such as the Company Laws there are provision drafted for both civil and criminal actions which can be taken in relation to the same acts of misconduct by the company. Where a director of a company has evidently misrepresented their power and position as a director or acted in contravention to the rules, then a civil action can be brought against him or her by the company to recover the punitive damages suffered or a criminal case of fraud or misrepresentation may be sought against the director. Such incidences of overlapping of law may at times blur the distinction by seeking to have matters dealt civil law jurisdictions instead of the criminal law. This blurriness many a times takes away the strictness of applicability of the principles of corporate liability [149].

Over the years the companies have learnt new tactics whereby they bring in a whole team of their advisors and the use of some of their finest lawyers and accountants to wriggle out of a situation where they have been charged of misconduct. Their whole agenda is to save their

[146] Suthe rland, E, White Collar Crime, New York, Dryden (1949)
[147] Clinard, M and R Quinney, Criminal Behavior Systems: A Typology, New York, Holt, Rhinehart and Winston (1973) at p 188.
[148] Kramer, R.C., "Corporate Criminality: The Development of an Idea", Corporations as Criminals (Ed by E Hochstedler), Beverley Hills, Sage (1984) at p 18, also see Roman Tomasic, Corporate crime and Corporation Law Enforcement Strategies in Australia, discussion paper for CNCLR, University of Canberra, 1993.
[149] Ibid.

skins by accepting the fines and compensations due or to comply with any other regulatory measure so that they can steer away from the ambit of criminal law. They take every recourse possible through administrative or legislative regulations to keep the clutches of criminal law away[150]. There are ample examples available in the legislative histories of the countries world over where a strong lobbying has been used to keep the corporate illegal behaviour and misconduct under the preview of the civil jurisdictions only[151].

The juxtaposition that corporate liability crates between the civil and criminal law in many cases have led to the action of the company and its misconduct being judged by the courts by applying criminal law principles even though the punishment of the misconduct lied under the civil regulations. This brave initiation was only possible because of the intervention of the courts, who were brave enough to read between the legislations to stay clear from any confusion and punished the acts of corporates with severe punishments. The courts could have been saved from this confusion, had the legislations been drafted so as to pronounce clarity on the principles of corporate liability and the criminal implications of the misconduct of the employees or the owners of the company who deliberately commit wrongs. The legislations have not yet clearly laid down the punishments where the companies are doing criminal wrongs with an intent to gain profits and increase the margins of corporate gains[152].

3.5 THEORIES OF CORPORATE CRIMINAL LIABILITY

It‘s true that the principles of criminal law were developed in the traditional times to punish the guilty and to deter the wrongdoing of an individual. Whereas at the same time, a company is traditionally and authoritatively said to be a fictitious and a nonfigurative social entity which is incapable of a physical action or any knowledge or intention to commit wrong[153].

[150] Snider, L, "The Regulatory Dance: Understanding Reform Processes in Corporate Crime", (1991) 19 International Journal of the Sociology of Law 209; Snider, L, 'Towards a Political Economy of Reform, Regulation and Corporate Crime", (1987) 9 Law 6- Policy 37 referred in Micheal E. Tigar, _ It Does the Crime but Not the Time: Corporate Criminal Liability in Federal Law‘, American Journal of Criminal law, Vol 17:211, 1990

[151] Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions", (1992) 2 Australian Journal of Corporate Law at p 82. For analysis and critique of the argument that business regulatory offences should be decriminalized see: Levi, M, "Business Regulatory Offences and the Criminal Law", (1984) 5 The Company Lawyer at p 252.

[152] Supra note 11

[153] A Beck and A Borrowdale, Guidebook to New Zealand Companies and Securities Law, 7th ed. (2002) 85; R Grantham and C Rickett, Company and Securities Law- Commentary and Materials (2002), p. 287; Smith and Hogan, Criminal Law 10th ed. (2002), p. 201.

The Commonwealth jurisdictions[154] so far have traditionally approached this difficulty through a nominalist perspective[155] that is, by treating the corporation as a mere collection of individuals and locating its criminal culpability as a derivative of the guilt of its individual players of the firm. The widely accepted common law bases of corporate responsibility where the courts and legislations of these countries have used many theories like the theory of vicarious liability of a company and the likes of identification theory to establish the guilt of the corporate for the criminal offences that it undertakes as an extension of the nominalist view only. The principles adopted by different countries to interpret the concepts and principles of corporate criminal liability have been established by certain theories[156]. Therefore, keeping in view the foregoing discussions the emergence and recognition of various theories of corporate criminal liability are discussed as under:

3.6 Vicarious Liability/Respondent Superior Theory

The Western countries acknowledged the presence and impact of corporate crimes and the criminal liability arising out of it. The courts of England were the pioneers in establishing so. They adopted and practiced through their case laws the theory of vicarious liability or what the American jurisprudence later on called the theory of respondeat superior. England was the torchbearer for establishing that the companies are vicariously liable for the acts committed by the employees and agents of that company. Respondeat Superior as a principle has a broader outlook out of the two standards. Its derivative lies in the common law theories of torts and contract law and it outlines that; ―a corporation may be held criminal ly liable for the acts of any of its agents who (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation[157]." This parameter lays down a very wide angle to incorporate, even that agent or employee for a wrong that has been committed, who works at the lowest level of operations in a company vicariously liable for the acts undertaken by the company[158].

[154] The Commonwealth Countries adhering to the jurisdiction.
[155] E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Criminal Law Forum 1, pp. 1-2.
[156] [1902] 2 KB 1, 11 (Channell J): '...the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done...[t]he master, who...has done the forbidden thing through his servant is responsible and is liable to a penalty...[E]xactly the same principle applies in the case of a corporation'.
[157] United States v. A & P Trucking Co., 358 U.S. 121, 124-27 (1958)
[158] Corporate-Criminal-Responsibility-American-standards-corporate-criminal- liability.html">Corporate Criminal Responsibility - American Standards of Corporate Criminal Liability, available at; http://law.jrank.org/pages/744.

3.6.1 Under English Law

This doctrine of corporate liability which believes that a company is vicariously liable for the actions of any employee wherever the company commits an illegal act which harms an individual or the society or vice-versa. There was a traditional reluctance in the English courts regarding the application of principles of civil law jurisdictions to be made applicable in the sphere of criminal law implications of crime and punishment[159] as it was considered unjust to condemn and punish one person for the conduct of another irrespective of the fault[160]. The most important exception here which was believed by the courts was that relating to certain regulatory and statutory offence where the legislature has already forced a duty by law on the employer or principal, then this absolute duty renders an employer or principal liable for the acts of its employees or agents even if it has not authorized or consented to the commission of those acts[161].

In Mousell Bros Ltd v London and North-Western Railway Co Lord Atkin articulated the general principle:

…[P]rima facie a principal is not to be made criminal ly responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. The question whether a particular provision imposes vicarious liability is one of construction, depending upon the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstance be performed, and the person upon whom the penalty is imposed[162].

3.6.2 Under American Law

It can be clearly articulated that the criminal law model of vicarious liability of the corporates too was modified from the law of torts. In the American jurisprudence a body corporate may be held criminal ly liable. This liability may arise out of any act that has been

[159] A full scale vicarious liability principle is endorsed in the federal law of the United States: i.e. for offences involving both strict liability and subjective knowledge a corporation may be criminally liable for the acts of it officers, agents or servants who are acting within the scope of the ir employment and for the benefit of the corporation: See A Geraghty, 'Corporate Criminal Liability' (2002) 39 American Criminal Law Review 327.
[160] 'It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of his deputy, as he is in civil cases; the y must each answer for the ir own acts, and stand or fall by the ir own behaviour': Huggins (1730) 2 Ld Raym 1574, 92 ER 518.
[161] Chisholm v Doulton (1889) 22 QBD 736.

[162] [1917] 2 KB 836, 846.

committed by officers, agents or servants of that corporate, who were acting within the scope of their employment and for the advantage of the corporation. Therefore it can be said that the rule of vicarious liability is just another method of imputing the illegal acts of employees to the corporation itself. Vicarious liability when applied in its true meaning, casts a very extensive net, although the attribution of liability to the corporation is not as automatic as some researchers would have suggested while interpreting its meaning and scope. For the rule of vicarious liability to be implemented and executed, firstly it must be found that an individual employee committed the crime. That crime should have been committed with the requisite state of mind. If that state of guilty mind is established then, mens rea element established can be imputed to the corporation itself or not. The mens rea established may too be shown on the basis of collective knowledge on the part of employees as a group, even though no single employee possessed sufficient information to know that a crime was being committed. The blocks have to fit in. The employee must have acted within the scope of employment, which has been held to include any act that occurred while the offending employee was carrying out the assigned job. Finally, the employee must have intended to benefit the corporation. This requirement of profit orientation has been very broadly interpreted by American courts whereas the English courts have looked into the factors of damage and public nuisance caused more widely[163].

By the early twentieth Century, what was a contemplation was taken up as a rule by the English courts, who had developed a doctrine of identification under which corporations could be prosecuted for crimes of possessing an intent of doing wrong[164]. In the United States, although some earlier state cases recognized corporate criminal liability , the seminal case in the development of federal criminal law was New York Central & Hudson River Railroad Co. v. United States, decided in 1909[165]. Under this new civil doctrine of attributed liability , an organization shall be held vicariously liable for those torts that have been committed by its agents within the scope of employment[166].

[163] Corporate Criminal Liability Discussion Paper, Department of Justice, Government of Canada, 2002.
[164] Pamela H. Bucy, "Corporate Criminal Responsibility", in 1 Encyclopedia of Crime and Justice 259, Joshua Dressler et al. eds., 2d ed. (2002).
[165] 212 U.S. 481 (1909).

[166] F. Harper, F. Jaiaes & 0. Gray, The Law of Torts § 26.2, at 9 2d ed. (1986).

3.6.3 Rationale of Vicarious Liability

Courts have provided numerous reasons to justify an organization's liability for the acts of its agents[167]. But the most widely accepted rationale is loss distribution[168]. This rationale means the losses caused by an organization's employees are to be positioned upon that company itself as it is appropriate enough that it should be the organization who should bear the loss and not the victim or the innocent party. The loss should go to the same pocket, which was eager to take the profit[169]. Moreover, the organization is better able to absorb the losses as a cost of doing business since it can distribute the losses to society through increased prices for its products or by procuring insurance[170].

At the same time another justification for vicarious liability originated under the modern law which also laid the influence upon the conduct of the employer only. Although, it was seen as a counterbalance argument by many[171], who propagated that vicarious liability as a rule of implication is bound to give an organization much bigger motivation to be careful in the selection and supervision of its employees. Like this the companies will take every required step of precaution to see that their business is carried with safety[172].

Under the common law the agents and employees were prosecutable for criminal acts committed in their course of employment[173]. But what is noteworthy that the employing

[167] [The principal] has a more or less fictitious "control" over the behavior of the servant; he has "set the whole thing in motion," and is the refore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rathe r than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ anothe r at all, and the re should be a corresponding responsibility as the price to be paid for it-or, more frankly and cynically, "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Kfmon on Torts § 70, at 500 5th ed. (1984).

[168] Ibid.

[169] 48 Id., at p. 501. The unstated premise underlying this justification is, of course, that the agent is likely to be judgment proof. See Note, An Efficiency Analysis of Vicarious Liability Under the Law of Agency, 91 YALE L.J. 168, 172 (1981) ("[a]nothe r proposed justification for vicarious liability is that it spreads the costs of torts to principals with 'deeper pockets' than the ir agents").

[170] W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Kfmon on Torts § 70, at p. 500 (5th ed. 1984)

[171] Ibid.

[172] See P. Atiyah, Vicaious Liability in the Law of Torts 16 (1967) (liability on employer encourages safer workplace); (liability imposed on employer is "pressure put in the right place to avoid accidents");Harper and James, Vicarious Liability, 28 TuL. L. Rev. 161, 163 (1954). "[I]n more modern times it has been suggested that control is an important factor because the person in control is the person best placed to take precautions against accidents."

[173] K. Brickey, Corporate Criminal Liability § 3:04, at 57-58 (1984) (because of corporate power to delegate authority to lower level employees, corporation must remain responsible for their acts)

corporates were however immune from criminal liability [174]. They were viewed as abstractions that lacked both the physical and moral capacity to engage in criminal conduct and were unable to suffer punishment, such as jail or death, typically accorded to violators of the criminal laws[175]. The increased economic and social role played by business organizations in the seventeenth and eighteenth centuries began to erode the doctrine, just as it had under the civil law[176].

It took until the beginning of this century that the visible outlook of this theory emerged which openly stated that it's the body corporates who shall be liable and responsible for crimes that require a general or specific intent of guilt[177]. In New York Central & Hudson River Railroad Co. v United States[178], the Supreme Court of the United States, in an opinion written by the Court, expressly gave up what it termed the old and exploded doctrine of corporate immunity from criminal prosecution and established by emphasizing its concern that many offenses might otherwise go unpunished[179].

The United States judiciary acknowledged and applied the theory of liability through the principles of respondeat superior standard as appropriate for imposing corporate criminal liability on the body corporates for intentional crimes in New York Central & Hudson River Railroad (supra) (1909). The facts of the case laid down that the New York Central Railroad was convicted of bribery because an assistant traffic manager gave rebates on railroad rates to certain railroad users. As a result of the rebates, the effective shipping rate for some users was less than mandated rates; this violated the Elkins Act, which imposed criminal sanctions. In affirming the conviction of New York Central the US Supreme Court applied the respondeat superior standard, holding that since an agent of New York Central committed a crime while carrying out his duties, New York Central was liable[180].

In New York Central the US Supreme Court did state in its obeita dicta that there are ―some crimes which, in their nature, cannot be committed by corporations [181].‖ But, there are legal

[174] Garry Feguson, _Corruption and Corporate Criminal Liability', paper presented at International Colloquium on Criminal responsibility of Collective Entities, Berlin, 1998
[175] K. Brickey, Corporate Criminal Liability § 3:04, at 15 (1984)
[176] W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Kfmon on Torts § 70, at p. 70, 5th ed. (1984), F. Harper, F. James & 0. Gray, The Law of Torts § 26.2, at p. 219 2d ed. (1986).
[177] See Supra note 53
[178] 53 L. Ed. 613 (1909)
[179] Id., at pp. 495-96
[180] Corporate Criminal Responsibility - American Standards of Corporate Criminal Liability, available at; http://law.jrank.org/pages/744.

[181] N. Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909).

researches in America that there have been no federal decisions identifying such offenses. To the contrary, corporate liability has been imposed for a very wide variety of federal offenses, including offenses like the currency reporting prosecution etc. that require specific intent[182].

Criticism

The vicarious liability doctrine, is criticized for distorting the concept of fault, particularly in relation to mens rea offences, since the fault of an individual is readily transferred to the company without proof of the latter's misfeasance or malfeasance. A corporation's efforts to prevent illegal activity by employees may be ignored in the application of the vicarious liability doctrine[183].

A crime requires the combination of an actus reus–the performance of a legally prohibited act–with a mens rea–a particular state of mind with respect to that act. But corporations have no bodies or limbs with which to perform actions and no brains in which mental states can reside. How then can corporations commit crimes? The US Supreme Court answered that question in New York Central (Supra) by importing the tort doctrine of respondeat superior into the criminal sphere[184]. Recognizing that corporations were civilly liable for the acts of their employees taken within the scope of their employment, the Court proceeded to ―go only a step farther[185]‖ and permit corporations to be held criminal ly liable for the conduct of their employees as well. The Court held that for purposes of criminal punishment, both the actions and the mental states of individual employees who were acting within the scope of their authority could be attributed to the corporation[186], even though the employee was acting ―against the express orders of the principal[187].‖

In United States, the subsequent cases tried over the past decades have revisited and revised the New York Central standard by, first by making it clear

[182] Kathleen F. Brickey, "Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, the ir Officers and Agents" § 2.09, 2nd ed. (1992) (describing extension of corporate criminal liability to a variety of specific intent crimes including contempt of court and various forms of conspiracy, including conspiring to violate state and federal antitrust laws). Brickey‘s three volume treatise explores corporate criminal liability for conspiracy, racketeering, various forms of fraud, foreign corrupt practices, violations of the election laws, bribery, tax offenses, currency reporting offenses, money laundering, obstruction of justice, perjury, and false statements.
[183] "Corporate Criminal Liability," Discussion Paper, Department of Justice, Government of Canada, 2002
[184] Supra note 4 at p. 494
[185] Ibid.
[186] Id., at pp. 494-95
[187] Id., at p. 493

(1) that the employee must act, at least in part, for the purpose of benefitting the corporation[188] or with the belief that the corporation will benefit from his or her conduct[189], and

(2) that the employee need have only apparent authority to act on behalf of the corporation[190]; and

(3) then by underscoring that the employee's actions and mental states will be attributed to the corporation despite being in violation of corporate policy and explicit instructions to the contrary[191].

Thus, in US since 1909, the law has been that a corporation commits a crime whenever an employee acting within the scope of his or her employment for the benefit of the corporation commits a crime[192].

US v. Potter[193] a general manager had paid a bribe to the Speaker of the Rhodes Island House of Representatives, despite the President of the company having considered the proposed course of action and ordered him not to proceed[194]. The Court of Appeals observed that,

…_for obvious practical reasons, the scope of employment test does not require specific directives from the board or president for every corporate action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized … The principal is held liable for acts done on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal. … Despite the instructions [the individual in question] remained the high-ranking official centrally responsible for lobbying efforts and his misdeeds in that effort made the corporation liable even if he overstepped those instructions'[195].

As regards the requirement that the individual's actions be intended to benefit the corporation, all that this requires is that benefit to the company be one motivation of the individual's

[188] John Hasnas, _The Centenary Of Mistakes: One Hundred Years of Corporate Criminal Liability, American Criminal Law Review, Vol. 46, 1329, 2009.
[189] Ibid.
[190] Id., at p 1331
[191] Ibid.
[192] Supra note 67
[193] 463 F 3d 9 (1st Cir, 2006)
[194] Ibid.

[195] Id., at 45-46

conduct[196]. In reality, whether a particular statute imposes corporate liability and whether the vicarious (or identification) doctrine will apply, is 'rarely if ever spelt out' so the process of interpretation is ongoing[197]. The purpose of the particular statute will be an important consideration as vicarious liability , it is argued, is always appropriate where to fail to hold an employer liable for the acts of its employee would be to 'render nugatory' the statute and thus defeat the will of Parliament[198].

Fault is Ignored in Vicarious Liability

The general principle is that under the law of torts and under statutes creating liability employers are made liable vicariously for the acts and omissions of their employees occurring within the scope of their employment[199]. Where the corporation is vicariously liable it does not matter whether the employee (or agent) occupies a senior or junior position in the company[200]. There is no pretense that the act or omission is actually that of the company itself; the company is simply made liable for the fault of another[201]. This is the reason why Commonwealth jurisdictions have basically rejected vicarious liability in criminal law. It distorts the concept of fault, since the fault of an individual is readily transferred to the company without proof of the company's misfeasance or malfeasance[202].

3.7 The Identification Theory

This 'identification' approach differs from the normal rules of agency in that it 'effectively merges for legal purposes the individual and the company into one entity. There is thus only ever a bipartite relationship: the company and the third party'[203]. The identification theory has

[196] Allens Arthur Robinson, "Corporate Culture' as a Basis for the Criminal Liability of Corporations", A report prepared for the United Nations Special Representative of the Secretary General on Human Rights and Business, February (2008).
[197] Wells, "Criminal Responsibility of Legal Persons in Common Law Jurisdictions",
[198] Allen, Textbook on Criminal Law, 3rd ed. (1991) in Simester and Brookbanks, p. 188.
[199] Note that in New Zealand it is settled that the re need not be a formal employer/employee or principal/agent relationship, provided authority has been vested in a 'substitute': Gifford v Police [1965] NZLR 484 (Court of Appeal). If the substitute acts outside the scope of authority conferred, the defendant will not be liable: Jull v Treanor (1896) 14 NZLR 513.
[200] H.A.J. Ford, R P Austin and I M Ramsay, Ford's Principles of Corporations Law, 9th ed. (1999), p. 673.
[201] Id., at p. 675. This is the difference between vicarious liability and liability as a party to an offence; in the latter case, although the offence is committed by anothe r, liability of the party arises from his or her own actions.
[202] Department of Justice Canada, Corporate Criminal Liability — Discussion Paper (2002) 3.
[203] R Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2000) 19 Company and Securities Law Journal 168, 171.

at various times also been called the 'alter ego'[204], the 'organic'[205], and the 'directing mind and will' approach.[206]

The origin of the identification principle actually lies in a civil case — Lennard 's Carrying Co Ltd v Asiatic Petroleum Co Ltd86 — where it was held that, in order to prove that a corporation had 'actual fault or privity' the privity of the company's manager was the privity of the company itself. Viscount Haldane LC based identification on a person 'who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation'[207]. An even more vivid metaphor was drawn by Denning L J in H L Boulton (Engineering) Co. Ltd v. T J Graham and Sons Ltd (another civil case) where his Lordship held:

A company, being a legal institution, cannot operate without human intervention. It cannot take action or have a state of mind. The principle, which is sometimes known as the alter ego doctrine, was established in a trilogy of cases from 1944. In DPP v Kent & Sussex Contractors Ltd, Macnaghten J said: If a responsible agent of the company puts forward on its behalf a document which he knows to be false and by which he intends to deceive and his intention and belief must be imputed to the company. The decision in Kent & Sussex was approved in ICR Haulage Ltd[208]. A company was held liable for conspiracy, then a common law offence. A natural person cannot in general be liable vicariously for a common law crime (the exceptions are criminal libel and public nuisance), yet the company was liable. The court adopted the test of identification. The acts and state of mind of the managing director were held to be those of the company. Unlike the doctrine of delegation, there is no need for an absolute or personal duty to be delegated before the company is liable.

Under the doctrine of identification the company is personally liable. It is not liable vicariously. It is deemed to have committed the offence by itself. A term which is coming to be used in this context is direct liability [209]. The doctrine makes a company liable for mens rea offences. The knowledge of the person to whom full delegation is made is treated as being

[204] 'Alter ego' is in fact an inapt word for the doctrine - the central feature of the identification approach is that those committing the crime are not the 'other self' of the company, but the only self, as the company has no other physical existence: J Dine, Criminal Law in the Company Context (1995) 146. Also, Tesco Supermarkets Ltd v Nattrass [1972] AC 153, 171-2; [1971] 2 All ER 127, 132-3 (Reid L) (House of Lords): 'The person who speaks and acts as the company is not alter. He is identified with the company'
[205] 'Organic' refers to the 'organs' of a company: the board of directors and the members in general meeting
[206] Wells, 'Criminal Responsibility of Legal Persons in Common Law Jurisdictions', p. 5.
[207] [1915] AC 705
[208] [1944] KB 146
[209] [1944] KB 551 (CCA)

the knowledge of the company. Under this doctrine a company is liable even when a natural person would not be liable[210]. The methods of founding corporate liability in are the same as for natural persons but this head marks a break from orthodox theory and penalizes companies as companies, not as substitutes for natural persons. Where vicarious liability applies, the company is liable no matter what the status of the employee but the identification thesis governs only when the employee is a controlling officer. This doctrine applies to both common law and statutory offences[211].

3.8 Determining Directing Mind and Will

The basis of the doctrine is that a living person has a mind which can have knowledge or intention or be negligent and has hands to carry out his intentions. A corporation has none of these it must act through living persons. Then the person who acts is not speaking or acting for the company. He is acting as the company itself. He is not acting as a servant, representative, agent or delegate. If his mind is a guilty mind, then that guilt is the guilt of the company[212].

Such person could only be 'the board of directors, the managing director and perhaps other superior officers of a company who carry out the functions of management and speak and act for the company'[213]. The question needs to be answered by 'identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company'[214]. A company should only be identified with a person 'who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders'[215].

In the English case of Tesco Supermarkets Ltd v. Nattrass[216], Tesco was prosecuted under the Trade Descriptions Act 1968 for displaying a notice that goods were being offered at a price less than that at which they were actually being offered. A customer was sold a packet of washing powder at a price higher than that stated on the display notice after the shop

[210] Michael Jefferson, Criminal Law, Pearson Longman, 9th edition,2009
[211] Ibid.
[212] [1972] AC 513 ER 127
[213] Ibid.
[214] [1972] AC 153, 200
[215] Id., at p. 187.
[216] [1972] AC 153

manager of the particular supermarket branch had negligently failed to notice that he had run out of the specially marked low-price packets. The Act provided a defence for a shop owner who could prove that the commission of the offence was caused by' another person' and that he took 'all reasonable precautions... to avoid the commission of such an offence by himself or anyone under his control'. Tesco sought to distance itself from the store manager and submitted that it was his acts that had led to the breach. In examining the identity of the manager and whether he was in fact identified with the company itself the House of Lords applied the theory first developed in Lennard's case[217].

One overriding criticism has been directed at the Tesco version of corporate liability : it is too restrictive. The personnel with whom the corporation is identified are those at the centre of corporate power. Any delegation of responsibility to a lower-level employee must be total with supervision over the particular area no longer supervised by those at the top[218]. It is also understood that corporate structure is generally too complex and the responsibility for any particular area of decision making difficult to determine. The underlying thread in all the judgments in Tesco is that the individual who is the directing mind and will of the company will be very high up in the chain of command, if not a company director. However, many important decisions in large corporations are made at the level of branches or units or at the level of middle management[219].

3.9 Attribution Liability

In Meridian Global Funds Asia Ltd. v. Securities Commission[220] Lord Hoffmann advised that the question whose act and state of mind was to be attributed to the company was answered _by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy‘. This response was especially problematic in respect of common law crimes but later authority on corporate manslaughter is to the effect that common law crimes are still governed by Tesco v. Nattrass and are not affected by Meridian, though there is civil law authority that Meridian is of general application[221].

[217] [1915] AC 705.
[218] Wells describes the Tesco approach as imposing a 'straitjacket' on corporate responsibility, with its 'tight pyramidal view of corporate decision making': C Wells, 'A quiet revolution in corporate liability for crime' (1995) 145 New Law Journal 1326.
[219] E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Criminal Law Forum 1, pp. 1-2.
[220] [1995] 2 AC 500.

[221] Michael Jefferson, Criminal Law, Pearson Longman, 9th edition,2009

Lord Hoffman said that there existed rules which determined whose acts and states of minds were to be attributed to the company. These he called the 'rules of attribution'[222]. It was stated that there are two main bases for attributing acts and knowledge to a company. Firstly, the primary rules of attribution which are provided by the company constitution and company law generally, enable acts of organs of the company usually the board of directors or unanimous members to be attributed to the company. So the acts of those identified as having the authority to bind the company under, the Companies Act 1993[223] will prima facie bind the company. There are then secondary rules of attribution which are provided by general principles of attribution such as the law of agency and vicarious liability . These more general rules are equally applicable to natural persons.

The two categories of attribution rules, taken together, are usually sufficient to enable the company's rights and obligations to be determined. However, it was recognized that there are further special cases, typically in the criminal context, where the law requires that the state of mind of the company itself be shown. This is where the directing mind and will principle has come to be used. Such a principle is, however, just one of the special rules of attribution that may be used by the courts, and should not be misinterpreted as being a general principle for application in all cases[224].

The rule of attribution in these special cases should depend upon the relevant substantive rule of law in each case. If it is decided that a duty was intended to apply to companies but vicarious liability is excluded (by the requirement of a mental element) and it is obvious that insistence on the primary rules of attribution would defeat the intention of the Act, then the courts must design a special rule of attribution to make the Act work. In doing this, the court must ask the question: 'given that [the substantive rule] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company[225]?' So it is all a matter of construction. Whether a company is liable will depend on the interpretation of the statute and the policy behind the Act in question[226].

[222] [1995] 3 NZLR 7.
[223] The rules governing the way in which a company may enter contracts and incur other obligations are set out in the Companies Act 1993 (NZ) s 180, quoted in Wilkinson, Meaghan --- "Corporate criminal liability. The move towards recognizing genuine corporate fault" [2003] Canter Law Review 5; (2003)
[224] Ibid.
[225] Id., at p. 12

[226] Id., at p. 13

Thus we can understand from the takings of Meridian that questions of corporate criminal liability arising under statute are context-specific and must ultimately be governed by the terms and purposes of the offence creating provision, and that it is not necessarily the case that the relevant person whose acts are to be attributed to the company will be the most senior person in the organization. It is the nature of the functions performed by the individual that seems crucial[227]. A leading text opines that, as a result of Meridian, the identification approach is a 'potentially powerful tool' for holding companies liable[228]. Another commentator also states that the decision has led to a considerable widening of the potential scope for criminal prosecutions to be brought against companies[229]. The advantages Meridian has brought to the identification doctrine are obvious. There is no longer a 'hunt for high managerial agents[230]' — unless of course a proper construction of the relevant law provides that only the acts and intentions of those embodying the directing mind and will of the company can be said to be those of the company. The Meridian approach does examine the corporate structure in more detail and seeks to ascertain those responsible for the area of activity in which the offence took place and to attribute responsibility to the corporation for the conduct of relevant individuals[231]. Also, the decision on the facts demonstrates that where formal and effective authority within a company differ, the courts are able to attribute responsibility to the corporation based on actual as well as legal management structures[232].

In Tesco v. Nattrass the manager was simply one manager out of some 800. The larger a company is, the easier it will be to say that a person is a _hand'. It does seem unfair that a large company would escape liability when a smaller one would not. Lord Reid postulated that the test of identification applied where there was a substantial delegation of the functions of management. Only a few people such as the managing director and the members of the board are in such positions. The majority looked for those who _represent the directing mind and will of the company and control what it does'. The phrase

_directing mind and will', which is often used nowadays, comes from a civil case, Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd[233].. It was only in Tesco that the civil law

[227] Wilkinson, Meaghan, "Corporate criminal liability. The move towards recognising genuine corporate fault" [2003] Canter Law Review 5; (2003) 9 Canterbury Law Review 142.
[228] Ibid.
[229] Id., at p 94
[230] Ibid.
[231] Australia Law Reform Commission, Civil and Administrative Penalties in Australian Federal Regulation, Discussion Paper 65 (2002) 5
[232] A. P. Simester and W. J. Brookbanks, Principles of Criminal Law (1998), p. 187.

[233] [1915] AC 705

alter ego doctrine was used to impose the criminal liability on corporations ; this is now known under the name of ―identification theory[234].‖ The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person[235].

3.10 Criticism of Identification Theory

The identification theory has been criticized for its limited application. It is premised on the court being able to ascertain key managers who not only have control over making corporate policy, but have also actually committed an offence. The US Supreme Court, while acknowledging the geographical and operational decentralization of many corporations , has ruled that there may be more than one directing mind, the identification theory goes only part way towards addressing the manner in which large corporations function. Its focus on individual decisions by individual manager‘s contrasts with the fact that companies are complex and may -- in a very negative scenario -- create group norms and systemic pressures that lead to lawbreaking[236].

Yet as is always the case, the greater flexibility of the Meridian approach has brought with it greater uncertainty regarding who will be deemed the relevant person within the corporate hierarchy in any particular case[237]. The Meridian formula is likely to lead to difficulties. The policy behind the statute may, as in any case of statutory interpretation, be hard to find, and it is unlikely that the words of the specific provision will clearly state who constitutes the company for the purposes of the offence[238]. It is clear that for offences requiring mens rea not just any agent or employee acting within the scope of their authority or employment can be identified as the company; recourse to special rules of attribution is only necessary when it has already been determined that the general rules of agency and vicarious liability 'will not provide an answer'[239].

[234] C. Harding, Criminal Liability of Corporations-United Kingdom, in La Criminalisation du Comportament Collectif: Criminal Liability of Corporations 369, at p. 382 (H. de Doelder & Klaus Tiedemann (eds.), Kluwer Law Int’l (1996)
[235] Tesco Supermarkets Ltd. v. Natrass, [1972] A.C. 153
[236] "Corporate Criminal Liability" Discussion Paper, Department of Justice, Government of Canada,2002
[237] Supra note 108
[238] Ibid.

239 Id., at p. 102

3.11 Aggregate Theory

The theories of corporate liability discussed above do not satisfaction only cover all the circumstances. There could be cass where a corporate wrong may be the result of a combination of guilty state of mind of many persons. In 1987, the first circuit court of United States of America, propagated the theory of 'Aggregate' collective knowledge or the Aggregate Theory where by establishing that a corporation can be held criminal ly liable even though no 'one' employee could be held holding the full knowledge and information about the act.[240] In this case, the government had charged a bank and its two tellers for failing to file the currency transaction reports. At the trial, the two tellers were acquitted but the bank was convicted. The trial court instructed the jury that they could find if the bank had the requisite knowledge, even if no one employee knew of the reporting requirement. The court said that, 'As such, its knowledge is the knowledge of all of the employees'. This decision was upheld by the circuit court who further explained this theory by adding that, the corporations compartmentalize knowledge, subdivides the elements through duties and operations into smaller components. It‘s the aggregate of those components which constitute the corporations knowledge of a particular operation.

This theory has largely helped the courts to prosecute corporations for guilty acts especially in case of frauds and revenue evasion cases. The drawback that this theory faces is that even though an aggregate of knowledge is deducted by the courts through fragmented knowledge of employees, it yet cannot establish intent of the corporations .

The theory combines the elements of vicarious liability principle and identification theory by portraying the knowledge of agent and identifying it with that of the owner. Through this mechanism, it gets a little difficult for the corporations to save themselves from being liable for a crime by shielding behind the lines of multiple departments that exist within the companies. They cannot deny the responsibility of one segment of the company is not aware of the decisions of the other department. Through this theory, the interest of the shareholders was given a priority over the managerial responsibilities of the firm. This theory provides more appropriate strategy to understand the corporate structure and its liabilities.

240 United States v. Bank of New England, 1987 821 F. 2nd 844 (1st Cir).

3.13 Corporate Fault Theory

The four principles under which fault is ascribed to persons are accountability, fair opportunity, answerability, and justification or excuse.[241] These help to explain why ascription of fault to corporations has been problematic. These principles underlie the doctrine of mens rea, are describes as follows:

"Criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have, [such] that they can fairly be said to have chosen the behaviour and its consequences…" "There is indeed a fundamental principle underlying the mens rea concept: in criminal law there should normally be no responsibility without personal fault. ... Criminal responsibility without personal fault removes the choice of lawful behaviour"[242]

The notion of individual choice, therefore, animates the understanding of when it is appropriate to ascribe fault for behaviour. The impact of this concern for preserving individual liberty has been a focus of subjective fault, in other words, the fault of the individual offender. Only where a defendant has intended or knowingly risked the consequences can responsibility be ascribed.[243] Added to the mens rea principle are the belief principle and the principle of correspondence. The former ensures that criminal liability is based upon the consequences the a person believed, at the time, would result from it. The principle of correspondence requires that the fault element of a crime correspond to the conduct element of the crime.[244]

The most radical conception of mens rea, however, is that which Fisse calls strategic.[245] This is mens rea manifested through corporate structures and policies. Such a view clearly conforms with the emerging understanding of how a significant number of corporations operate.[246] Organization theory emphasizes that corporations have an existence which transcends those of its employees, directors, agents and original incorporators. Moreover, corporate decisions are the result of procedures and internal bargaining processes which cannot be traced back to the individuals who contributed to them. Strategic mens rea

[241] A. Ashworth, Principles of Criminal Law (Oxford: Clarendon Press, 1991) at 80-81.
[242] Ibid.
[243] Id., at p. 129
[244] Id., at pp. 128-129
[245] B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 S. Cal. L. Rev. 1141 at p. 1177
[246] See B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 Sydney L.R. 277, pp. 289-90

therefore reflects the truly corporate nature of the acts of corporations . It is conceptually appropriate to develop a notion of corporate fault which, like the corporation itself, is dependent on no single person, but which is also distinct from any individual.[247] The nuance is significant because it means the concept is more discerning and precise than aggregation. Thus discrete pieces of information or knowledge cannot be added together and imputed to the corporation unless they have been subsumed into the body of corporate knowledge through internal procedures and communication. Only those types of fault which are the product of corporate mens rea can result in corporate liability .[248]

The latter approach is the one preferred by Fisse. In his proposed statutory model of corporate fault, he broadly defines the conduct element as the commission of the external elements of the offence by a person for whose conduct the corporation is vicariously liable."'

It is crucial to note Fisse's suggestion for a novel type of flaw that will get over the practical challenges of demonstrating strategic mens rea, even without going into great detail about his model.[249]

It is believed that even if strategic mens rea is a truly corporate concept of mental state, corporate mens rea would be more challenging to prove if the prosecution had to establish a criminal company policy at or before the actus reus of an offense is committed. Boilerplate anticrime policy instructions may make it extremely difficult to prove the existence of implied criminal practices, since corporations usually never explicitly support criminal behavior. If the corporate defendant is given a reasonable opportunity to formulate a legal compliance policy after the actus reus of an offense is brought to the attention of the policymaking officials, the corporation's fault can be assessed on the basis of its present reactions rather than its previously designed formal policy directives.[250]

While analyising the role of the corporate in the crime the faults have to be anaylised. Fault based on an aware state of mind is a general label covering several types of fault. Despite its varied content, it is a useful shorthand to describe fault based upon a guilty mind.

[247] Ibid.
[248] J. A. Quaid, The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis, 43 McGill LJ. 67(1998)
[249] See B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 Sydney L.R. 277 at 289
[250] Id., 1162.

However, there is a lot of ambiguous terminology (this level of fault is sometimes known as mens rea), and the analysis and classification of intention-based fault levels are hampered by an artificial division between regulatory and actual criminal law offenses.[251] Although it is common knowledge that regulatory offenses frequently call for lower standards of culpability than crimes, this distinction is meaningless when discussing fault levels in general.[252] Examining how the corporate model of fault might function within the numerous categories of fault acknowledged by the criminal law is the main goal. The explanation of the various forms of intention-based fault will therefore be succinct, concentrating instead on the aspects that are particularly relevant to corporate liability. For the sake of simplicity, remarks will be separated into two categories: recklessness and intentional blindness on the one hand, and intention and knowledge on the other.

Australia as a whole followed the identification philosophy until 1995. Only crimes against the Commonwealth and Commonwealth personnel and organizations, such as environmental contamination and espionage, are under the criminal jurisdiction of Australia's national government, the Commonwealth of Australia. The states are primarily in charge of the criminal code when it comes to crimes against private citizens, such as assault and manslaughter. The Commonwealth of Australia adopted a more expansive definition of "corporate culture" as the foundation for corporate criminal liability with the passage of the Australian Criminal Code Act in 1995. [253]

Years of research on the subject were capped by the new law.[254] The 1995 measures were also a part of a broader national government criminal law reform push. The Act begins by applying the Model Criminal Code's general concepts of criminal accountability to corporations in order to address corporate liability.[255] Crucially, the new rule was presented as an attempt to base culpability on how the company's explicit or implicit principles influenced its activities and the results of those acts.[256]

[251] Supra note 130
[252] Ibid.
[253] Corporate Criminal Liability Discussion Paper, Department of Justice, Government of Canada, 2002
[254] Including the Review of Commonwealth Criminal Law (Gibbs Committee) in 1987, study by the Standing Committee of Attorneys General, and the Model Criminal Code Officers Committee proposals in 1992
[255] The Model Criminal Code Officers Committee stated that it was trying to "develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation". The new Act states: "This Code applies to bodies corporate in the same way as it applies to individuals", and "A body corporate may be found guilty of any offence….".

[256] Corporate Criminal Liability Discussion Paper, Department of Justice, Government of Canada, 2002

For mens rea offences (those requiring intention, knowledge or recklessness as a fault element), the Act attributes fault to the body corporate where it expressly, tacitly or impliedly authorizes or permits the commission of such an offence. Such authorization or permission can be established by any of the following four means, as set out in s. 12.3(2):[257]

a. Proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or

b. Proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

c. Proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

d. Proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision

The preventive-fault model of criminal culpability finds liability when a corporation fails to insert and implement an adequate internal system of controls to prevent the commission of a crime. Requiring such a compliance and ethics program allows a finding of corporate liability ―for failing to take reasonable steps to prevent or detect criminal conduct.‖[258] This model of culpability is found in the U.S. Sentencing Guidelines. Under this model, the implementation of an effective compliance and ethics program by a corporation acts not only as a mitigating factor in determining the fine assessed to a corporate offender; it also represents a strong incentive for monitoring corporate policies and for modeling a law abiding corporate ethos. In the United States, the existence of an effective compliance and ethics program has become virtually prerequisite to avoiding a finding of corporate negligence.[259]

In 1995, Australia adopted a modern and complex model of corporate culpability, expressly addressing the problem of corporate culture as a fault element. According to the Criminal

[257] Australian Criminal Code Act, 1995,
[258] U.S. Sentencing Guidelines § 8 B 2.1 (a) (6) (B).
[259] Cristina de Maglie, Models of Corporate Criminal Liability in Comparative Law, Washington University Global Studies Law Review Volume 4 Issue 3 Centennial Universal Congress of Lawyers Conference— Lawyers & Jurists in the 21st Century, 2005

Code Act, ―corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.‖[260]

i. Defence of Due Diligence

Due diligence would be the defense used by a business that faces criminal culpability under a corporate fault model. The renowned scholar Gobert, who has extensively researched corporate liability in connection with the fault theory, has advanced the idea that the corporation itself should bear the responsibility for demonstrating due diligence. In order to satisfy the due diligence test, Gobert recommends that the courts use a test that is obviously derived from health and safety law, balancing the risk created against the activity's social utility against the cost and feasibility of removing the risk. However, Gobert is not entirely sure if the judiciary or Parliament should define due diligence by rigorous statute or interpretation. He makes it obvious that the whole hierarchy, not only senior management, should demonstrate due attention.[261]The work of French and Dan Cohen is cited by those who make a strong case for corporate fault.[262] According to their methodology, businesses with a high level of organizational complexity gradually acquire an intentionality and justifications for their actions that are distinct from the personal goals and motives of the people who are currently employed by the company.[263]

Conventional criminal criteria might not be effective in identifying corporate blame in the absence of personal responsibility. Despite being recently established, the criminal liability frameworks in France and the European corpus juris are already antiquated and insufficient to combat corporate crime. When a company does not respond appropriately to the actus reus of a crime, it is at fault. One type of corporate fault is the failure to implement efficient preventative and corrective measures in response to the identification of an external component of a crime. A corporate criminal liability model must be founded on the existence of corporate crime in order to manage it.

[260] Criminal Code Act, 1995, c.2 Div. 12.3 (6) (Austl.).
[261] Gobert, "Corporate Criminality: New Crimes For The Times", 1994, Crim LR 722-734 at pp. 723-4
[262] French, Collective and Corporate Responsibility(1979); French, 'The Corporation as a Moral Person', 1979, 16 American Philosophical Quarterly 207 - 215; Dan-Cohen, Rights, Persons and Organizations (1986).
[263] Sullivan, 'Expressing Corporate Guilt', 1995, IS Oxford Journal of Legal Studies 281-293 at p 284; French ,suggests the following method of determining whethe r a corporation is sufficiently organised: 1- internal organisation and/or decision procedures by which courses of concealed action can be chosen; 2-enforced standards

of conduct different and more stringent than those applying in the wider community; 3- members

tilling differing defined roles by virtue of which the y exercise power over othe r members.

of a corporate mens rea. In determining corporate liability , it is necessary to establish that the corporation itself is criminal ly liable; and that liability does not derive merely from an individual‘s guilt.[264]

When Gobert, puts forth his views about corporate fault and says, companies should bear responsibility for crimes occurring in the course of their business without the need for the Crown to attach fault to specific persons within the company. It should be the company's responsibility to collect information regarding potential dangers possessed by employees, collate the data, and implement policies which will prevent reasonably foreseeable risks from occurring. If the company is derelict in this duty and a crime has resulted, it must share in the responsibility of the resulting harm.[265]

The shift of judicial attention from individual to corporate fault would have several side benefits. It would avoid the evidentiary problem of tracing the strands of responsibility to particular individuals, with its inherent dangers of scapegoating. Shifting the onus of responsibility to the company would also avoid the conundrum of aggregating a number of negligent acts into a sum which is claimed to warrant a finding of recklessness or gross negligence. If there is fault to be attributed to the company, it is to be found in the way that the company organizes or operates its business affairs. It is often argued that a company cannot act except through real persons - directors, officers and employees. This may be so, but it need not control the law's approach to corporate criminal ity.[266]

It is argued that if there is, for example, an unavoidable situation in an optimally organized corporation with an optimally working board of directors, the problem concerns why exactly the shareholders (who are affected by penalties for corporations in the end) should be fined for something they had nothing to do with, and especially for something they could not have influenced at all. Such coincidental liability is not only unfair but would also defeat the object of prevention of harm through control.[267]

[264] Cristina de Maglie, Models of Corporate Criminal Liability in Comparative Law, Washington University Global Studies Law Review Volume 4 Issue 3 Centennial Universal Congress of Lawyers Conference—Lawyers & Jurists in the 21st Century, 2005
[265] Gobert, 'Corporate Criminality: Four Models Of Fault' , 1994, 14, Legal Studies 393- 410 at p 409-411 et seq
[266] Ibid.
[267] Ronald Hefendehl, Corporate Criminal Liability: Model Penal Code Section 2.07 and the development in

Western Legal systems, 4 Buffalo Criminal Law Review 283 at p 295, 2000

ii. Reactive Fault Theory

A somewhat different approach to corporate criminal liability has been proposed by influential writers Fisse and Braithwaite, who accept the idea of an exclusively corporate culpability.[268] One of their central arguments is that an important perspective is lost if we always seek to represent corporate conduct as a function of human conduct.[269] The suggested approach is one of 'reactive fault', which focuses not so much on the commission of the actus reus but rather on the company's reaction, or lack of reaction, to it. 'Reactive fault' is an 'unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the actus reus of an offence'.[270] Liability would arise, after the criminal conduct had been committed and would be based on what the company did not do to fix the wrongdoing. This is obviously a radical departure from general principles of criminal law; the mens rea and actus reus would not be contemporaneous and the time frame for the commission of the crime appears to be open-ended. Fisse and Braithwaite describe the model as being both workable and uniquely corporate in its orientation:

Corporations can and do act intentionally in so far as they enact and implement corporate policies. Frequently, however, a boilerplate compliance policy will be in place, and it is rare to find a company displaying a criminal policy, at least not a written one, at or before the time of the commission of the actus reus of an offence. The position is different if the time frame of inquiry is extended so as to cover what a defendant has done in response to the commission of an actus reus of an offence. What matters then is not a corporation's general policies of compliance, but what it specifically proposes to do to implement a programme of internal discipline, structural reform, or compensation. This reorientation allows blameworthy corporate intentionality to be flushed out more easily than is possible when the inquiry is confined to corporate policy at or before the time of the actus reus.[271]

If the court decides that a company has taken appropriate measures after, for example, charging a customer more than the advertised price of a product, then under the reactive fault analysis no liability will actually arise. Although this model may satisfy one of the main aims

[268] B Fisse and J Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 468; B Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 Sydney Law Review 277, pp. 284-6;
[269] Fisse and Braithwaite, Corporations, Crime and Accountability, (1992) p. 70
[270] Id., at p. 48
[271] Supra note 146 at p. 506

of corporate criminal liability - ensuring that companies remedy their defective policies and practices so as to prevent a recurrence of the wrongdoing.[272]

The reactive fault model is realistic in its acknowledgement of the need to examine the actions (which would accordingly evidence the intent) of the company as a whole. It would be effective in assessing true corporate policy as opposed to the corporation's written rules which are not, in reality, adhered to. Fisse and Braithwaite's recommendation that a company be subject to the same criminal offences as natural persons is, it is submitted, the right basis of any mechanism of corporate criminal liability .

[272] W. S. Laufer, "Corporate Bodies and Guilty Minds" (1994) 43 Emory Law Journal 647.

CHAPTER 4

CORPORATE CRIMINAL LIABILITY – NATIONAL AND INTERNATIONAL PERSPECTIVE

4. INTRODUCTION

The concept of corporate limited liability might be taken and treated as relatively a new one as compared to the existing traditional laws. The newness may be contributed to the factor that with the changing times the role that the multinational corporations play in our daily lives have taken up a whole new meaning. Directly or indirectly we have become the stakeholders of these concerns. The damage that the activities of these entities cause can has humongous effects. The entities at present are not just suppliers of goods and services but, they are the new tools of global development too. Quantum of gain that they can acquire from their interstate operations is at times unimaginable. And many a times there is serious impact on the overall economic system.

The legislative bodies and the courts world over had a lot to deal with the corporate world. From the non-registered firms to legal entities, many new facets of the corporation have emerged especially with the advent of industrial revolution and the present day economic development s. The global legal regimes were not fully adaptable to these new paradigms. Many countries accepted that the corporate was capable of committing a crime and hence be punished for it and yet many countries struck to the idea that civil sanctions and regulations are enough to tackle the wrong doings of the companies. In this chapter, the researcher has tried to compile the various judicial and legislative development s that been taken place in different legal system all over the world to incorporate the principles of corporate criminal liability.

a. Global Presence of Corporate Criminal Liability

The liberalised economic policies and globalisation provided boost to the trade and commerce at the global level. The corporations also went through merger and acquisition at the national and international levels to increase their capacity and capabilities. By now the power of many transnational corporations is greater than many nation states.

Enormous economic power of corporations has also given rise to unethical and unlawful

practices. By now the involvement of national and multinational companies in crimes has

become one of the biggest challenge to the every Criminal Justice System and places a huge question mark on accountability of these firms.[273]

In the present era, crime in general is getting international dimensions and there is a need for mutual support and co-operation between the nations in judicial and administration matter. But, sadly, a huge gap exists between the different legal systems that have been developed by the countries across the world. While few countries have developed straight system to counter corporate criminal liability , there is a portion of the world which still does not follow this concept. These countries have imposed faith in the statutory provisions and other regulatory provisions to handle corporate criminal liability . These legal systems believe that criminal law cannot provide solutions to the problem that are created by the companies. They go by the doctrines of corporate being a fiction and the theory of ultra-vires to negate the fact that criminal wrong can be done by the corporates. For them society can do no wrong, the society here being the social entity or the association.[274]

Civil liability for the acts of a company has been long recognised and many nations who have common legal systems practice the imposition of corporate criminal liability . Countries like; Bulgaria, Slovak Republic, and Luxembourg do not accept the applicability or existences of criminal liability principles for the wrong done by a company. Countries like Brazil are new shifting their stands from non-acceptance to acceptance. Whereas, countries like Hungary, Germany, Greece, Sweden and Mexico do no support the concept of corporate criminal liability but have strict statutory administrative controls and provisions to handle the breaking of law by a corporate action.

4.1 Theory Based Approaches

As discussed in the preceding chapter the models or mechanisms are based upon different theories and tactics of handling the concept of corporate criminal liability . The different theories being adopted by various countries lead to the judicial and legislative provisions related to criminal liability being applied by these countries. The theories can be the derivative liability theory, where the corporation in itself is the sole responsible entity for the actions of the individual, or it could be the vicarious liability approach or the respondeat superior approach that many common law countries are practicing. The theory on which a

[273] "Requirements for Criminal Liability - In General", State of Colorado judicial Department [US], available at; https://www.courts.state.co.us/userfiles/File/ Court_Probation/Supreme_Court/Committees/Criminal_Jury_Instructions/CHAPT ER_G1Culpability.pdf

[274] United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118 (D.C.Cir. 2009)

country would establish its corporate criminal ity model may even be the identification theory, but the crux here is that the company should be held accountable for the actions that the agent or the employee, the director or any other person who holds a position in the corporate, who has acted in the course of his duty to earn profit or benefit for the company would be held accountable for his action and it should also be seen if his intent or guilt was a derivative of the corporate mind set or corporate action.

To further highlight the guilty employee existing within the highly complex structure of the company, many legal systems have adopted the theory of expanded identification.[275] Whereby the hunt is on for the exact epicentre of the criminal mind-set who has caused the damage through the execution of a criminal wrong. Europe, South Africa, United States of America and United Kingdom are few of the countries which have adopted one or the other approach to handle corporate criminal liability .

4.2 Issues in Applications of these Theories

The problem is not limited to the identification of the act and the wrong doer only. It further trickle downs to the way the prosecutors have to handle it and the courts have to interpret it. The English Courts become the first protagonists in applying the law of torts to the public nuisance caused by the companies and then in the holding the corporation guilty of the criminal wrong committed by an individual. This view of the English Courts have not been adopted or appreciated by many countries where the prosecutor still carry the umbrella of regulatory or statutory provisions to handle the corporate wrongs and to cover up the punishments for these wrongs. There is another facet to this issue that now white collar or the organised crimes are becoming more and more expanded in terms of the domains that they operate in. Many a time they are not restricted to just one country. The courts in many countries still struggle with the jurisdictional and implementation issues of the liability of corporate crime.

The reasons for inhibition can be many. The few can be outlined as; the notion that a company being a fictions person cannot do or enact the whole sequence of a crime, the rigid constitution of the company and how such rigidity can also one step the limits set by theory of ultra-vires etc. It was after a lot of deliberations that the ambit of vicarious liability was getting applicable to the damage caused by wrongful acts or omissions by the body

[275] Charles Doyle, Corporate Criminal Liability: An Overview of federal Law, CRS Report prepared for Members and Committee of Congress, October 30, 2013.

corporates. Even though the lack of sanctions against the criminal wrongs done by a company were still hindering the judicial process.[276]

France reversed its position whereby it took these associations as liable of being held guilty under the Penal Code of 1670 to the belief that the corporation cannot be held guilty after the French Revolution happened as these provisions of the penal law where a person was being held guilty along with a non-living association had met with a stern dissent from the French Jurists.[277] Throughout the world the journey of development of various theories of holding the company guilty has seen many ups and downs in the legal jurisprudential history in different countries. Like any other law, the law of implicating a company for a wrong too is territorial, even though the bounds that it has is international in nature. The territorial area may differ and so may the sanctions by which the liability of a corporate is acknowledged. The forms may be different in which the concept of criminal liability of a corporate is applied by the countries but the provision of acceptance that the company can do wrong is accepted by the majority of them. In the background of foregoing discussion an attempt is made to discuss the legal mechanisms adopted by different countries in handling corporate criminal liability .

1. CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

Roman law dictated the world with its power and via its execution but when the common laws overtook the Roman legal system, it denounced its ways. When the tribes came together to create a common legal system, they choose to create law which was different from the Roman concepts. The Common Law took a detour from the usual practices of civil law and rather than making the legislative decisions as its base of operation, the common laws were based upon the interpretation of judicial decisions and then the legislative Acts. The execution and acceptance of the notion of criminal liability of a corporation has followed a very traditional path in the English legal system.[278]

In the beginning, English laws did not accept existence of concepts of corporate criminal liability for varied reasons. Firstly, the business entities or the corporations were considered to be a fiction, existing only in the eye of law, and Secondly based upon the ultra-vires

[276] Anonymous (No. 935), 88 Eng. Rep. 1518 (1701).
[277] Stessens, Guy. "Corporate Criminal Liability: A Comparative Perspective." International and Comparative Law Quarterly, v. 43, July 1994, pp. 496-497.
[278] C. Harding, "Criminal Liability of Corporations-United Kingdom", in La Criminalisation du Comportament Collectif: Criminal Liability of Corporations 369 at p. 382 (H. de Doelder & Klaus Tiedemann (eds.), Kluwer Law Int"l, 1996.

theory, these associations or artificial persons could do nothing more than what their constitution legally empowered them to do.[279] The legal luminaries believed that the body corporate lacked soul, they could not have guilty mind or the required mens rea to be held blameworthy and more importantly, could not be punished.[280] Jurists like, Chief Justice Holt decided way back in 1864, that the corporations could not be held criminal ly liable, but their members could be.[281] In addition, to this the fact that the fictitious entities or corporations during these times were very less in number and their incorporation was done under the orders of the crown and was considered a privilege. The interference of these corporates in the daily lives of people was bare minimal then and their work relations existed mainly with the Crown.[282]

It was only during the early stages of seventeenth century that the mechanical invents over took the manual labour and the corporations became more prevalent and common in their existence and importance. They were now beginning to get more and more associated with lives of people as their socio-economic roles increased in the form of buyer-seller-worker bonds. With such a great presence the need for regulating the conduct and punishing the misconduct became more and more recognisable. As even then the corporations were taken to be separate legal entity by law which held an identity distinct from its members.[283]

4.3 Development as Vicarious Criminal Liability

The first stride under the English law regarding the growth of corporate criminal liability being acknowledged was taken in 1840s when the courts started to impose liability on companies under strict liability principles .[284] Lord Bowen took the heritage of Justice Holt even further and held that the most efficient way of forcing a corporation to be held accountable for its misconduct was by introducing the concept of corporate criminal liability in the English law,[285] which he did by borrowing the theory of vicarious liability from the tort law where by the companies were being punished for creating public nuisances,[286] the major step was taken where by the courts imposed the rules of vicarious criminal liability on

[279] See Supra note 14
[280] Anca Iulia Pop, Crimina Liability of Corporations-Comparative Jurisprudence (dissertation) Michigan State university College of Law, 2006
[281] Ibid.
[282] Id., at p 14
[283] Id., at p 69
[284] Regina v. Birmingham & Gloucester R. R. Co., (1842) 3 Q. B. 223
[285] Regina v. Tyler, 173 Eng. Rep. 643 (Assizes 1838)

[286] Kathleen Brickey, Corporate Criminal Liability 62 (2d ed. 1992).

corporations in those cases where the natural person could be clearly held vicariously liable.[287] Another huge step was taken in the year 1944, when in England the High Court of Justice defined through three landmark cases[288] that the criteria to impose criminal liability directly on the corporations was to take the mens rea of employees or agents as that of the company itself. Even though these decisions were a great motivating factor in the growth of the principles of criminal liability of the corporations but the rules of implication and punishment were still undefined and vague because the guilty intent and elements of mens rea could not be easily and clearly attributed to the companies.[289]

4.4 Recognition of Alter Ego Doctrine

These important issues were clarified through a case decided in 1972[290] in which the courts used the principles of alter ego doctrine mainly prevalent under the civil law jurisdictions to impose the criminal liability on corporations . The concepts of alter ego theory were taken and refined in the form of identification theory by the courts where by the shareholders could be held as the alter ego of the company or the company could be identified with the actions of the shareholders.[291] The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person (e.g. the directors and managers represent the brain, intelligence, and will of the corporation). The willpower of the corporations ‟ managers represented the willpower of the corporations . This theory was later criticized and slightly modified, but this decision still represents the landmark precedent in the English corporate criminal liability .[292]

4.4.1 Latest Laws related to Corporate Criminal Liability

Although the identification doctrine remains the cornerstone of corporate criminal liability in the UK, the recently passed the Corporate Manslaughter and Corporate Homicide Act, 2007 (UK) (Corporate Manslaughter Act) provides for a form of organisational liability in relation to the offence of manslaughter. The Corporate Manslaughter Act came into force on 6 April 2008. The organizational liability provisions contained in the statute apply to only the

[287] Regina v. Stephens, (1866) L.R. 1 Q.B. 702
[288] Supra note 12
[289] Supra note 9
[290] Tesco Supermarkets Ltd. v. Natrass [1972] A.C. 153.
[291] Supra note 10
[292] Anca Luila Pop ,""‟Criminal Liability of Corporations- Comparative Jurisprudence", MSU College of Law

(dissertation) 2006

particular offence of manslaughter. However, these provisions might theoretically be adopted in relation to other offences.[293]

The corporate liability for manslaughter by gross negligence required the identification of an individual sufficiently senior to constitute the 'directing mind and will' of the corporation and who had the requisite mens rea.[294] No large corporation had ever been successfully prosecuted for manslaughter by gross negligence, and, of the 34 prosecutions for work- related manslaughter brought since 1992, only seven had been successful.[295] In most cases, the companies were of a size and structure in which it was very easy to identify a 'directing mind and will'.[296]

4.5 CORPORATE CRIMINAL LIABILITY IN UNITED STATES OF AMERICA

Along with England, countries like United States of America and Canada also took lead in accepting and applying the concept of corporate criminal liability . Industrial revolution came first to these countries, hence they were the first few ones who started facing the menace of the corporate wrongs in terms of the damage that they could do. Even though the courts of England were a little vary of awarding the punishment to the companies in the beginning, yet it was these courts only which started the acknowledged the principle of liability through criminal law and started firing the corporation when it failed to do a statutory duty in 1842.[297]

Initially the pattern of courts in the United States with regard to corporate criminal liability were Parallel to that of the English courts. They soon departed from the position taken by the English courts. At the beginning of the century, some American courts started to expand the concept of corporate criminal liability to include mens rea offences, a move which was confirmed by the U.S. Supreme Court in New York Central & Hudson River Railroad Company v. U.S.[298] This confirmation came after Congress had passed the Elkins Act, which stated that the acts and omissions of an officer acting within the scope of his employment

[293] Allens Arthur Robinson, 'Corporate Culture' as a basis for the Criminal Liability of Corporations, A Report for the United Nations Special Representative of the Secretary General on Human Rights and Business, February 2008
[294] Attorney-General's Reference No 2 of 1999 [2000] 3 All ER 182.
[295] Supra Note 30
[296] R v. Kite and Oll Ltd (unreported, Winchester Crown Court, 8 December 1994). The defendant company had only two directors: discussed in England and Wales Law Commission, Legislating the Criminal Code: Involuntary Manslaughter (1995–96), 82–3, available at http://www.lawcom.gov.uk/lc_reports.htm>
[297] Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. Rev. 386 at n.1 (1981) (discussing extensively competing the ories of corporate criminal liability).

[298] New York Central & Hudson River Railroad Company v. U.S. 212 U.S. 481 (1909).

were considered to be those of the corporation, thus promulgating the concept of vicarious liability .[299] Although the case before the Supreme Court was concerned with a statutory offense, the lower courts rapidly expanded its scope of offenses at common law.[300] Several decades later, in 1983, the 4th Circuit Court stated that "a corporation may be held criminal ly responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if … such acts were against corporate policy."[301]

4.6 Application of Principles of Corporate Criminal Liability by the Federal Courts

In the United States, corporate criminal liability developed in response to the industrial revolution and the rise in the nature and scope of corporate activities. The federal law, which bases corporate criminal liability on the respondeat superior doctrine had developed under the aegis of tort law. Federal law dominates the principal fields in which corporate prosecutions arise, and federal prosecutions are much more numerous and significant than state prosecutions. In the federal system, the doctrine of corporate criminal liability was applied in the early twentieth century, when Congress dramatically expanded the reach of federal law, responding to the unprecedented concentration of economic power in corporations and combinations of business concerns as well as new hazards to public health and safety. Both the initial development of the doctrine and the evolution in its use, reflect a utilitarian and pragmatic view of criminal law.[302]

Before the Civil War, there were very few federal crimes and little overlap between federal and state criminal jurisdiction. The United States Constitution created a federal government with only limited delegated powers, and federal authority was confined to matters granted to the central government. The Constitution explicitly authorized the federal government to prosecute only four kinds of offenses: treason, counterfeiting, crimes against the law of nations, and crimes on the high seas, such as piracy. Additionally, the Constitution authorized Congress to pass laws it found to be "necessary and proper" to effectuate other delegated powers. Because the federal government"s programs and activities were relatively few, the

[299] Supra note 9
[300] Ibit.
[301] U.S. v. Basic Construction Co., 711 F. 2d 570 at 573 (4th Cir. C.A. 1983).
[302] Sara Sun Beale, "The Development and Evolution of the U.S. Law of Corporate Criminal Liability," A version of this paper was presented at the German

Conference on Comparative Law, Marburg German September 2013, and a German version published in Zeitschrift für die gesamte Strafrechtswissenschaf,2014

laws that rested on this authority were correspondingly narrow. In contrast, general police powers (including the bulk of criminal law) were reserved to the States.[303]

After the Civil War, Congress significantly expanded the scope of federal criminal law.[304] The earliest federal statutes were quite narrow. For example, Congress made it a federal crime to transport explosives and cattle with contagious diseases in interstate commerce. At the end of the Nineteenth Century, however, Congress employed its authority to enact sweeping legislation aimed at handling and controlling the anticompetitive activities that restricted the interstate commerce. This was a great step in recognizing the malice within the operations of the companies.

The Interstate Commerce Commission Act of 1887,[305] the first federal law to regulate private industry, regulated the railroad industry and required that railroad rates be "reasonable and just."[306] It prohibited price discrimination against smaller markets, such as farmers, and it created the Interstate Commerce Commission (ICC). In 1890, Congress enacted the Sherman Act, which outlawed attempts to monopolize and conspiracies to restrain commerce.[307]

As early as 1891, the ICC asked Congress to supplement the law that authorized criminal liability for individuals with corporate criminal liability . Noting that the federal courts had held that corporations could not be prosecuted for criminal violations under the 1887 Act, the ICC argued that the 1887 Act was "defective at an important point" requiring immediate correction.

On the other hand, the Supreme Court unanimously rejected New York Central‟s claim stating in detail that, "the imposition of criminal liability was unconstitutional because it punished innocent shareholders without due process, and its opinion endorsed corporate criminal liability and provided a standard for the imposition of such liability . Acknowledging an early statement by Blackstone that a corporation cannot commit a crime, the Court commented that "modern authority" accepted corporate criminal liability , and it quoted with approval the following passage from an American criminal law treatise:

[303] Ibid.
[304] Sara Sun Beale, "Federal Criminal Jurisdiction", in 2 Encyclopedia of Crime and Justice, Joshua Dressler et al. eds., 2d ed. (2002), pp. 695-696.
[305] The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379
[306] Id. § 1

[307] The Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, codified as 15 U.S.C. §§ 1-7 (2006)

Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously."[308]

The New York Central case reflects a utilitarian and pragmatic use of criminal law by both Congress and the Supreme Court during a period of major social and economic change. The unprecedented concentration of economic power in corporations and combinations of business concerns (called "trusts") that developed after the Civil War produced a demand for new laws– including criminal laws–to respond effectively to increasingly powerful corporate entities. Due to absence of public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability ."[309] The 1887 Interstate Commerce Commission Act and the Elkins Act were enacted during the same period as the Sherman Antitrust Act, 1890[310] the first federal statute to limit cartels and monopolies. Like the Elkins Act, the Sherman Act applied to both natural and corporate persons;[311] section 1 expressly provided for the imposition of felony penalties on a corporation for entering into combinations, trusts, or other conspiracies in restraint of trade.[312]

Although it has not been adopted by US Congress, several States have implemented a more limited form of corporate criminal liability based on the American Law Institute"s Model Penal Code (MPC).[313] With limited exceptions, the American Law Institute rejected respondeat superior but preserved a more limited role for corporate criminal liability .[314]

[308] N. Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 490–91 (1909).
[309] V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?", 109 Harv. L. Rev. 1477, 1486 (1996).
[310] Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, codified as 15 U.S.C. §§ 1-7 (2006).
[311] Id., § 8 (defining "person" to include U.S. corporations and associations).
[312] Id. § 1. (establishing that contracts, trusts, or conspiracies in restraint of trade were felonies). The original Act set the maximum punishment at a fine not exceeding 5,000 and imprisonment of one year. As amended, § 1 now provides for punishment by a fine not exceeding 100 million for a corporation, and imprisonment for up to three years and a fine not exceeding 350,000 for an individual).
[313] Model Penal Code § 2.07 cmt. 2(a) nn.6 & 7 lists state laws that adopt various features of the proposed Code or are similar to the proposed code. The research reflected in the Commentary ended in 1979.
[314] The Code permits the imposition of liability on the basis of respondeat superior if the offense is one outside the Model Code and "a legislative purpose to impose liability on corporations plainly appears." Model Penal Code § 2.07(1)(a). Liability may also be imposed whenever "offense consists of an omission to discharge a

specific duty of affirmative performance imposed on corporations by law." § 2.07(1)(b).

Although later on, the respondeat superior test was applied in Hilton Hotels[315], the problem of the nonconformist employee arises even under the narrower Model Penal Code standard since the Code also relies on vicarious liability . Thus, for example, if the Hilton Hotel purchasing agent had "duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association," the agent would be a "high managerial agent"[316] and Hilton Hotels Corporation would be criminal ly liable.

Courts also have interpreted the second requirement, "with intent to benefit the corporation," almost out of existence. As one court noted, "[t]here have been many cases . . . in which the corporation is criminal ly liable even though no benefit [to the corporation] has been received in fact" as stated in Standard Oil Co. v. United States[317]. Courts have found this element of corporate criminal liability existed, even when the corporation is a victim of its agent's act which was clearly established in United States v. Sun-Diamond Growers of California[318].

Acknowledging that Sun-Diamond "looked more like a victim than a perpetrator," the court nevertheless rejected Sun-Diamond's argument, finding that the jury could have concluded that the vice president acted with an intent, "however befuddled," to further his employer's interest.[319] The court explained its holding by noting the policy justification for holding corporations criminal ly liable for acts of their agents: "to increase incentives for corporations to monitor and prevent illegal employee conduct".[320]

This critical analysis of a corporate‟s criminal liability is a characteristic judicial creation and application of corporate criminal liability . In addition to watered-down interpretations of "within the scope of employment" and "for the benefit of the corporation," adoption of the notion of "collective intent" has rendered the respondeat superior and Model Penal Code standards extremely broad. The doctrine of "collective intent" allows courts to find intent on the part of a corporation even when it is not possible to identify a corporate agent with criminal intent[321]. United States v. Bank of New England[322], it was argued on behalf of the bank that there was no single bank employee with sufficient mens rea to which could be

[315] Ill. 459 U.S. 1036, 103 S. Ct. 446, 74 L. Ed. 2d 602 (1982)
[316] Supra note 51, Model Penal Code § 2.01
[317] 307 F.2d 120 (5th Cir. 1962), p. 128
[318] 138 F.3d 961 (D.C. 1998)
[319] Id., at p. 970
[320] Id., at p. 971
[321] Corporate Criminal Responsibility - American Standards Of Corporate Criminal Liability http://law.jrank.org/pages/744/Corporate-Criminal-Responsibility- American-standards-corporate-criminal-liability.html"

[322] 821 F.2d 844 (1st Cir. 1987),

imputed to the corporation. The court rejected the bank's argument because there was "collective intent" of the bank employees. The court explained that "the bank's knowledge is the totality of what all of the employees knew within the scope of their employment"[323] Hence, it established a new parameter of criminal liability.

4.7 THE CRIMINAL LIABILITY OF A CORPORATE IN AUSTRALIA

Corporate crime has assumed significant dimensions as a matter of public and official concern in Australia. Although by the early 1990s there were over 850,000 Australian registered companies which occupy a significant position in the economic and social structure of this country,[324] systematic analysis of corporate misconduct and control has received relatively little attention from lawyers and criminologists, at least when a comparison is made with other types of criminal conduct. Whilst this has begun to change, the complexity of corporate life and corporate law has meant that few have sought to assess the nature and consequences of corporate criminal ity in Australia, especially as it applies to large or complex corporate groups.[325]

In Australia, it is worth mentioning that over the last two decades the manipulations involved on behalf of the corporation or of the corporate form itself and have not been taken as separate acts committed for the corporation's benefit. In other words, not only is the corporation responsible for the commission of what is termed as a corporate crime, the corporation has as often been the arena in which corporate crimes such as insider trading, corporate tax evasion and the manipulation of corporate treasuries, has taken place. Abuse of the corporate form by officers, associates or advisers of the corporation in situations involving an element of moral immorality therefore calls for a more complex definition of corporate crime than might otherwise arise. Most of the academic literature on corporate crime has tended to focus upon criminal actions by the corporation or its agents and not upon corporate crimes which rely upon the corporation or its securities as a vehicle for corporate crime.[326] It is of course just as important to focus upon the use of the legal form of the corporation as a means of criminal activity.

[323] Id., at 855
[324] Australian Securities Commission, Annual Report 1991/92, Canberra, AGPS, 1992, at p 80.
[325] Tomasic, R, "Corporate Crime: Making the Law More Credible", (1990) 8 Company and Securities Law Journal, p. 369.

[326] Fisse, B, "Sentencing Options against Corporations", (1990) 1, Criminal Law Forum 211 at p. 212.

The inquiries into these intra-circulated fund transfer prevalence of "round robin" transactions between the members of the group of companies or between associated companies has long been documented and was evident in the late 1950s and early 1960s, such as with the Korman group of companies.[327] Similar transactions occurred with the Spedley and Bond group of companies during the 1980s. In case of the Qintex[328] and Bond companies, significant service fees were paid to the officers of the companies controlling the group itself. The McCusker investigation into Rothwells,[329] the TEA investigation by the National Companies and Securities Commission[330] and the Royal Commission of Inquiry into the State Bank of South Australia,[331] also exposed the amount to which a corporation's accounts could be mishandled, miscounted and manipulated, especially where the question was of questionable financial transactions with other related corporations . The somewhat cavalier manner in which funds were channelled within a group of companies was especially evident in relation to the Qintex group of companies as was illustrated in the 1990 case of Qintex Australia Finance Ltd v Schroders Australia Ltd,[332] a case in which there was great difficulty in identifying which company in the Qintex group had been the company on whose behalf a future contract had been entered into. However, the very complexity of these cases has meant that criminal proceedings have rarely been completed.[333] Many of the cases involving the abuse of the corporate form involved some misuse of audited accounts and some involved allegations of lack of an arm‟s length relationship between management and the supposedly independent auditors of the company.[334] In some cases, the auditors were simply extraordinarily negligent.[335] Another common abuse of the corporate form which occurred over the last decade or so has been the action of directors moving their activities from one company to another after each company is financially wrecked. Although laws were eventually

[327] Victorian Legislative Assembly, Final Report of an Investigation under Division 4 of Part VI of the Companies Act 1961 into the Affairs of Stanhill Development Finance Ltd and Othe r Companies, Votes and Proceedings, 1967-68
[328] Gotterson, QC, RW, Report of a Special Investigation into the Affairs of Ariadne Australia Limited and Ors, Vol 1, Canberra, 1989.
[329] McCusker, MJ, Report of Inspection on a Special Investigation into Rothwells Limited, WA Government Printer, Perth, 1990
[330] NCSC Special Investigations into Affairs of the Trustees Executors & Agency Company Limited and Related Corporations and Affairs of Petane Holdings Pty Limited and Lenlord Nominees Pty Limited; Fourth Interim Report, 18 November 1985, Melbourne, National Companies and Securities Commission
[331] Supra note 67
[332] (1990) 3 ACSR 267 at p. 269.
[333] Yuill v. Spedley Securities Ltd (in lit]) and Othe rs (1992) 8 ACSR 272.
[334] Tomasic, R, "Auditors and the Reporting of Illegality and Financial Fraud" (1992) 20 Australian Business Law Review 198.
[335] AW A Limited v. Daniels (1992) 10 ACLC 933.

introduced to facilitate the banning of directors who engaged in such conduct from the management of companies, few criminal proceedings have been brought for breach of what are known as the insolvent trading provisions, although the disqualification proceedings have been heavily relied upon in some jurisdictions. An increasing number of criminal actions for insolvent trading have been under investigation of the Australian Securities Commission.[336]

4.8 Shift from Vicarious Liability to Corporate Culture

After applying the concept of vicarious liability until 1995, the Australian legislature changed the criminal code to base corporate criminal liability on a test of the "corporate culture." This term is defined as "[meaning] an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place."[337] It is thus a departure from earlier approaches, and has been termed to be more direct and realistic than the more mechanical and abstract identification doctrine.[338]

The corporate culture approach which forms the underlying principle of the Australian Criminal Act provides four ways in which corporate fault may be proven. It may be that:

(1) it is a corporate culture which directed, encouraged, tolerated or led to a noncompliance with the relevant provision; or

(2) that the corporation failed to create and maintain such a corporate culture.[339]

(3) It is also sufficient to establish that the board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence, or

(4) that a high managerial agent knowingly or recklessly engaged in relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence.[340]

[336] Supra note 67
[337] Criminal Code Act, 1995, §12.3(6) (Austl)
[338] Stuart, Don. "Punishing Corporate Criminals with Restraint." Criminal Law Forum, v. 6, n. 2, p. 253.
[339] Criminal Code Act, 1995, §12.3(2)
[340] Ibid.

With regard to 4th, within the Act a defense of due diligence exists, if the "body corporate can prove that it exercised due diligence to prevent the conduct, or the authorization or permission."[341]

4.9 APPLICATION OF CORPORATE CRIMINAL LIABILITY IN REPUBLIC OF GERMANY

The question of whether German law should be amended to include criminal liability for corporate entities has long been debated. Corporate scandals and large fines levied against corporate entities by foreign authorities keep this debate alive, despite repeated contentions that such liability is incompatible with the essence of German criminal law.[342] While a number of European nations could serve as appropriate foils to the American regime, for the purposes of this discussion, Germany serves as a particularly apt model for comparison. France, England, Italy, and several other European countries have recently begun cautiously to experiment with corporate criminal liability , but Germany has remained steadfast in refusing to hold corporations criminal ly liable. The contrast between the German and American systems, thus, is most stark.[343]

4.10 Corporate Criminal Liability as a varied concept

The broad understanding on corporate criminal liability in Germany is that it does not exist, could not exist, and did not exist. This take has been prevalent there since past many decades. The scholars who study German legal history, however, note that the corporate criminal liability did exist in one phase of history in Germany. The more cultured stories refer to the times when the Roman Laws were prevalent there and due to the Romanic faith in the concept of liability of the social entity, it is then that German corporate criminal liability , existed at some point but today, it no longer does.[344]

As German criminal law only applies to natural persons, a legal entity cannot commit a criminal offence under German law. However, criminal or regulatory sanctions like the forfeiture orders or regulatory fines may be imposed on the entity itself because of criminal

[341] Id., § 12.3 (3)
[342] A Report by Clifford Chance LLP, Corporate Liability in Europe,publishes in 2012, available at http://www.cliffordchance.com/content/dam/cliffordchance /PDFs/Corporate_Liability_in_Europe.pdf.
[343] James Q. Whitman, Consumerism Versus Producerism: A Study in Comparative Law, 117 YALE L.J. 340 (2007).
[344] Markus D. Dubber, "The Comparative History and The ory of Corporate Criminal Liability, University of Toronto". This paper was written for Corporate Personhood and Criminal Liability, a workshop held at the

University of Toronto, May 11-13, 2012.

or regulatory offences committed by its officers or employees. Such regulatory sanction can be imposed irrespective of whether fines or imprisonment are also imposed on individuals. Whilst the imposition of a forfeiture order or a regulatory fine does not necessarily require any prior conviction of an individual, it does require some finding of wrongdoing. Under the German Code of Administrative Offences, a regulatory fine of up EUR 1 million can be imposed on a corporate entity if the prosecution authorities and courts find that a senior executive or an employee of the entity committed a criminal or regulatory offence and thereby either enriched or violated specific legal obligations of such entity. The fine can be increased if the alleged offence led to economic benefit of more than EUR 1 million. Alternatively, a court can make a forfeiture order called the Verfallsanordnung against a corporate entity if the court finds that the entity was enriched by a criminal or regulatory offence committed by an individual most likely by an officer or employee of the entity.[345]

There has been a great deal of debate in legal circles about the incorporation of corporate criminal liability in Germany with arguments both for an inclusion and against such a move. This debate is due to the increase in economic and also environmental crimes. Reasons for "true" corporate criminal liability include the inadequacy of existing sanctions and of the deterrent effect of an administrative fine. A further problem is the "organized absence of responsibility."[346]

[345] The German Code of Administrative Offences, Section 17.

[346] Id., at p 5

CHAPTER 5

CORPORATE CRIMES: NATURE AND TYPES AND IT'S IMPACT ON THE SOCIETY

5. INTRODUCTION

The corporates have come a long way from being accused of creating public nuisances or being a culprit under the law of torts. They can today easily be seen creating a grave dent in the working of any society. They have become the necessary evils today. The society cannot survive without them and at the same time it is becoming difficult to survive with them. The difficulty lies not only in the fact that it is way too difficult to put the blame on the companies for a criminal wrong committed by them rather the most challenging part is to put the blame on the right shoulders when a wrong has been done. Who carried the plan out, who drafted the plan to why the plan was drafted? What profits would be achieved are the few questions which keep the investigators of the corporate crimes busy.

Even though a separate legal presence and existence of the company has long been established by the courts yet, the complex hierarchy of todays' mainstream body corporate make it a tiresome process to find out the real culprit who acted on behalf of that legal personification. The employees, the directors, the agents, the other stakeholders, all of them can be held liable guilty on behalf of the criminal acts of the company.

Money laundering, privacy frauds, nuclear disasters, human trafficking, environmental disasters, corruption, bribery, violence etc.

are the few of the crimes which have been associated with the modern day multi-national giants. Their new characters have forced the courts to give newer interpretations about the concept of criminal liability of the corporates and also has led to new legislations being adopted where by the governments have incorporated new jurisprudence of handling the corporate crime and corporate guilt. In this chapter the researcher has attempted to analyse the concept and theories of corporate crime and criminal ity, that who are perpetrators of a corporate crime and who may be held liable for them and what are the various types of corporate crimes and their impact on the society.

5.1 Meaning of Corporate Crimes

The Australian criminologist John Braithwaite defined corporate crime as "the conduct of a corporation or employees acting on behalf of a corporation, which is proscribed and punishable by law.[347] This definition stands the test of time as these crimes can be categorised into two sub sects. In the first subsect the employees or the company commits the wrong and in the second subsect the company faces the wrong against itself. Both these categories lead to corporate crimes. In many cases the face of the criminal is separate from the company but over the past decades it is visible that the corporate veil has hidden quite a few faces behind it and saved them from being punished. Corporate conduct has been regulated by the corporate laws since long. It's time that the liability of a company for criminal wrongs be addressed. The common laws make a corporation liable for the actions of its agents when employees/ agents act within the scope of their employment and create a profit for the corporation with that act.

The corporate environment of any company today, effects and includes many aspects. Every aspect here is indeed affected when this environment gets vitiated. There are so many people who get affected by the acts of the company both directly and indirectly. The first party that gets effected are the consumers or stakeholders who are its main beneficiaries and are at maximum risk. Then comes the Employees of the Corporate; who are in twin roles; one role is of the victim and on the other hand it is the main protagonist of crime. Then comes the State; who receives the economic returns from it and also faces a dual loss when corporate is guilty of a crime in the shape of employment and revenue loss and the loss faced by the society. There are many other categories also who are involved in the corporate environment and get effected by the corporate crime like the International community, the NGO working in those areas, the independent contractors, the shareholders, the creditors, the close society where the company operates and the environment surrounding the company etc. Hence, it becomes more and more pertinent to understand the nature of crime and criminal ity in the corporate sector.

The theories put forward that the corporate crimes are offenses committed by corporate officials for their corporation. The offenses are committed for corporate gain or to bring harm to any other corporate. Like any individual, a company is fully capable of committing many

[347] See, John Braithwaite, Regulatory Capitalism: How it Works, Idea For Making It Work Better, Edward Elgar Publishing (2008).

criminal acts like, bribing a national or international public servant or government to attain business, dumps toxic industrial waste into rivers or pollute the underground water resources, indulge in money laundering, human or drug trafficking, monetary frauds etc. Corporate crimes are often quiet acts because in maximum cases people don't know whom to blame and are not even aware about the fact that they have been victimized until a massive damage has been done to them, their families or their surviving environment.

These organized and white collar crimes are also committed by individuals for themselves in the course of their occupations for personal gain. It may be committed with or without the knowledge of the employer or owner of the company. Monetary frauds and tax frauds are the most common corporate crime. The white collar crimes which were defined by Sutherland have seen a drastic change today. They have become more institutionalized and organized. The modern Corporate has become a giant who is pilfering not only from the buyer alone but from the society at large and that too without a glitch.

5.2 Nature of Corporate Crime:

Corporate crimes are a subset of **White Collar Crimes**, with a distinction between corporate and occupational crimes. Corporate crime refers to criminal acts committed by corporate managers for the benefit of the corporation, while occupational crimes are committed by individuals against the corporation or its consumers for personal gain.

5.3 Corporate Crime vs. Occupational Crime:

- Corporate crimes are committed by executives at higher levels of the organization, impacting society, the state, or other corporations . They are often harder to detect due to their low visibility and lack of direct personal contact with victims.
- Occupational crimes, such as embezzlement or fraud, are committed by employees at all levels for personal gain, impacting the corporation itself.

5.4 White Collar vs. Corporate Crimes:

- **White Collar Crimes** (coined by Edwin Sutherland) involve crimes committed by individuals in positions of respectability, usually for personal gain. Corporate crimes are a large-scale form of white collar crime, benefiting the corporation as a whole rather than individuals.

- The main difference is that corporate crimes benefit the corporation and involve collective actions, whereas white collar crimes typically benefit individuals.

5.5 State Corporate Crime:

- This involves crimes committed by corporations in connection with state policies or actions. The state's economic and political relationship with corporations may enable or overlook corporate crimes, creating a situation where corporations evade laws related to environmental protection, health, and safety.

5.6 Corporate Crimes and Organized Crimes:

- **Corporate crime** involves "clean" crimes like insider trading or financial manipulation, whereas **organized crime** involves illegal street activities (e.g., drug trafficking). However, both types share characteristics such as significant financial resources and influence. Organized crime may even use corporations for money laundering, blurring the lines between the two.

CHAPTER 6 CONCLUSION AND SUGGESTIONS

The corporations of today have travelled a long distance from being a clan owned entity to being recognized as a legal person, which has legal rights and owns half the world around them. The companies in the early times were taken to be fictitious entities those could not be held criminal ly liable for any guilty act. It was so because the corporation was considered to be a legally fictitious entity, incapable of forming the mens rea necessary to commit a criminal act. The major step in considering that a corporation can be held guilty were taken by the common law countries where the courts were much more braver to step out of the boundaries set by the written words that the company is not capable of having an intent and a physical presence, hence cannot be punished or imprisoned.

It is high time that the never ending debate of can and should the corporate should be criminal ly liable and dealt under the criminal justice system should end. There is need to develop law and jurisprudence world over to deal with the corporate criminal liability . Almost in all the jurisdiction there is a concern about the criminal activities of the corporations . The problem is being addressed in different manner and different means are being adopted to meet the ends of justice. In this study the researcher has traced the different development s that have taken place in different jurisdictions and the legal systems. As such emergence of various theories of corporate criminal liability has been studied. The approach adopted by different countries/legal systems has been separately studied and analysed. Further criminological aspect of corporate crime, emergence of new form of criminal ity in corporate culture, their nature and impact have also been studied. Finally the question of how to meet the ends of justice has been dealt in the second last chapter dealing with the aspects of punishment of corporations and other related matter. Thereafter the study is being concluded as hereunder.

Corporate criminal liability is a legal concept that holds organizations accountable for crimes committed by their employees, agents, or officers in the course of their business activities. Historically, the idea of collective responsibility can be traced back to ancient societies, where communities or classes were held accountable for wrongs committed by their members. Over time, this idea evolved as institutions like the Roman Empire, medieval church, and early legal systems developed the concept of a "legal personality," which allowed groups or entities to be

treated as individuals in the eyes of the law. In the modern era, corporate criminal liability developed in tandem with the growth of business entities, particularly during the Industrial Revolution. In the early 19th century, companies engaged in fraudulent activities, leading to the passage of laws like the Bubble Act (1720) and the Joint Stock Companies Act (1844) in England, and similar legal development s in other jurisdictions.

Theories of corporate criminal liability include vicarious liability , where a corporation is held accountable for the actions of its employees, and the "identification" or "alter ego" theory, where the company's liability is tied to the actions of its directors or decision-makers. Other theories, such as "aggregation" and "corporate fault," have emerged, emphasizing the role of corporate culture and collective knowledge in determining liability .

Internationally, countries have adopted varying approaches to corporate criminal liability . Common Law countries like the UK and the US have long recognized corporate liability , while Civil Law countries were slower to adopt such measures. For example, Germany historically rejected the notion of corporate criminal liability , while countries like Australia and France have moved toward more comprehensive frameworks for holding corporations accountable for misconduct.

In India, corporate criminal liability gained prominence after events like the Bhopal Gas Tragedy, leading to judicial recognition of corporate responsibility for criminal acts. However, there is still a need for comprehensive legal reforms to ensure more effective corporate accountability in India.

Despite the differences in approach across legal systems, the evolution of corporate criminal liability reflects a growing understanding of the need to hold corporations accountable for their actions, particularly in the face of unethical practices and large-scale harm caused by corporate activities.

SUGGESTIONS

On the basis of the conclusions arrived at in the foregoing discussion the researcher is of the view there is need to recognize corporate criminal liability distinctly apart from the corporate functionaries; there should be an endeavour to develop uniform principles of corporate liability in different jurisdictions globally; keeping in view the corporate functioning and activities the corporate crimes need to be appropriately defined; the corporate sentencing policy needs to be evolved and developed to effectively deal with corporate culpabilities, and there is also need to develop means and measures to deal with corporate misdoings in an effective manner. These points are further elaborated as under:

Recognizing Corporate Fault as a Distinct Principle of Liability

Corporate criminal liability has traditionally been based on vicarious liability , where a corporation is held accountable for the actions of individuals within it. However, this indirect approach does not fully address the growing complexity of corporate crimes. Instead, liability should be based on corporate fault, where the actions or omissions of the corporation itself, especially within its corporate culture or decision-making structures, result in criminal conduct. This concept is similar to the Australian Criminal Code, which holds corporations accountable when their management knowingly or recklessly engages in or authorizes criminal behavior.

Need for Uniform Principles of Corporate Criminal Liability

In the era of globalization, multinational corporations operate across borders, making it challenging to apply national laws consistently. There is a need for international uniformity in both substantive and procedural law to prevent and control corporate crime, particularly transnational crimes. This calls for international cooperation in the detection, investigation, and prosecution of corporate offenses.

Defining Corporate Crimes

Current legal frameworks often focus on individual liability but do not adequately address corporate criminal ity. Corporate crimes differ in nature and context from crimes committed

by individuals, and thus, specific legal provisions are needed to address corporate wrongdoing effectively.

Developing a Corporate Sentencing Policy

India has yet to develop a robust corporate sentencing policy, unlike countries like the United States, which has clear guidelines on corporate punishment. India should adopt a comprehensive corporate sentencing framework that includes fines, rehabilitation programs, and in severe cases, winding up the corporation. This framework should consider the impact on various stakeholders, such as employees, shareholders, and the public.

Types of Corporate Punishment

i. **Economic Sanctions:** Economic penalties, confiscation of assets, and restrictions on business operations can be effective deterrents.
ii. **Corporate Death or Winding Up:** Severe penalties, such as compulsory winding up, can be applied in extreme cases.
iii. **Temporary Closure:** Companies can be temporarily shut down until they comply with regulatory standards.
iv. **Compensation to Victims:** Corporations should be mandated to compensate victims of their crimes.
v. **Public and Social Censure:** Corporations can face public shaming, which can damage their reputation and goodwill.
vi. **Corporate Social Responsibility (CSR):** Corporations may be required to invest in social causes as part of their punishment.

Independent Liability of Responsible Individuals

There is a need to move beyond vicarious liability and hold individuals directly responsible for corporate wrongdoing. This would ensure that high-level managers and directors are accountable for their role in corporate crimes.

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