CHAPTER-II

HISTORY AND DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY
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2.1 Introduction

Historically a corporation could not be criminally liable because the corporation was a legal fiction with no independent will. In Anglo-American common law Blackstone wrote that a corporation cannot commit “treason, or felony, or other crime, in its corporate capacity”. In continental civil law this was also true following the maxim “societas delinquere non-potest”. One must distinguish between the two different legal systems. However both the civil law (e.g., France, Sweden, Denmark and Germany) and the common law independently evolved from a principle of no corporate liability toward a principle that recognizes that corporations can be guilty of committing crimes in national and international law.

Corporate criminal liability in both the common law and in civil law evolved from recognizing individual criminal liability for wrongful acts of the

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2. Sara Sun Beale & Adam G. Safwat, What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, BUFF. CRIM. L. REV. Vol.89, No.8, pp.107-16
corporation (first recognizing liability of directors, then of officers and finally of employees) until finally recognizing the criminal liability of the corporation itself. This is an example of the contemporary trend toward a convergence of the common law and civil law.

This evolution may have occurred because until the twentieth century the principle remedy for crime was imprisonment, corporal punishment or execution. Obviously such punishments could not be applied in any meaningful sense to a corporation\textsuperscript{3}. However, punishment for crime now includes lesser penalties such as fines, public service, and other non-carceral remedies.

Corporations can also be punished for crimes by being denied the right to do business with the government or even by revocation of the company's memorandum and articles of incorporation. Thus, as criminal punishment evolved, the principle of "no criminal liability" also evolved dialectically into its opposite. In principle, corporations today are subject to criminal law in the common law, in civilian legal systems, and by extension in international law\textsuperscript{4}. Although it is widely acknowledged that corporations are non-state actors (and for this reason too were not subject to international criminal law like individuals), they can now be liable for crimes under international law. Recognized customary international crimes include piracy, slave trading, war crimes, crimes against

\textsuperscript{3} Ibid, at p.158–59

\textsuperscript{4} ERIC ENGLE, Supra Note.1, p.290-91.
humanity (that are part of systematic conduct), genocide, and torture. At least those crimes are subject to universal jurisdiction and any state may punish them. The United Nations Convention against Transnational Organized Crime defines further international crimes: participation in an organized criminal group, money laundering, corruption, and obstruction of justice. State parties must establish criminal, civil, or administrative liability for legal persons (including corporations) who commit these crimes. Environmental crimes and air piracy may be in the midst of becoming crimes under customary international law.

The ensuing discussion of the history of criminal corporate liability provides a necessary backdrop to understanding the theme of this chapter. It is not intended to be a comprehensive history of the permutation in this area of the law. That history has been extensively documented under different legal systems. The discussion below gives an understanding of the context of the doctrine of criminal corporate liability in order to understand the current doctrine, the recent Supreme Court corporate liability cases, and the limitations proposed herein for criminal corporate liability. Further, this discussion illustrates that the


6. Ibid.

modern state of criminal corporate liability owes more to the historic contingencies that led to its creation, specifically the legal formalisms attendant to the corporation-as-person metaphor, and to the singular context of antitrust laws, than to a coherent theory of how organizational criminal liability ought to be conceptualized differently from individual criminal liability. In a field otherwise fraught with disagreements, even about the parameters of the debate, this is one proposition on which nearly all scholars agree.

2.2 Ancient law

The ascription of criminal liability to groups is not the fruit of modern society, as it is usually assumed. In ancient society, the rule was the ascription of collective liability. Ancient society was not conceived as a collection of individuals but rather as an aggregation of families. This peculiarity made all the difference and framed the law of that time. Law was adjusted to a system of small independent groups which were the clans or families. Responsibility of all kinds was attributed taking into account this reality. The conduct of each member of the society was viewed as the conduct of the society as a whole. The moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and offences of the group to which the individual

10. Ibid, at p.142.
belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members\textsuperscript{11}.

The wrongdoing was a sign that the harmony within a community, or clan, had broken down and the group was uncontrolled. As a result, the clan had the duty of maintaining the control and harmony and to impeding such rupture. The clan was responsible for the conduct of each of its members. The harm caused by a person was attached to the clan the person belonged to and not to the person himself\textsuperscript{12}.

2.3 Roman Law

In opposition to ancient law, Roman law reflected the value of individualism over collectivism. From the 3\textsuperscript{rd} and 4\textsuperscript{th} centuries BC, ancient Roman society witnessed a movement of internal disintegration, social groups, such as the \textit{gentes}\textsuperscript{13} and families, were breaking down. It was a period of individual emancipation. It is, therefore, not surprising that the scholars of that time held an individualistic view of society. However, the earliest forms of corporations were arising, and the law could not simply close its eyes to this fact. The solution found by Roman Scholars to conciliate its individualist roots to the

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11. Ibid at p.143. \\
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existence of such corporate bodies was to regulate these entities without matching them up with individuals.

The earliest forms of corporations were merely civil organizations, associations of individuals. The functions of these earlier organizations were different from the functions of today's corporations; they were essentially passive devices to hold property, sometimes real estate and sometimes special privileges. In order to regulate these social actors that were becoming more and more part of the society, Roman scholars created the concept of "juristic persons". These collectivities were considered juristic persons, so they were invested with rights of property; however, because they were mere fictions or ideal unities, they were incapable of making a disposition (declaration of intention). They could not have intention and consequently could not commit crimes.

The individualistic view of Roman law did not impede Roman Glossators of 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.

14. 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) [translated] Black's Law Dictionary, 8th Ed., 2004.
According to Ulmann, "... they (Roman Glossators) were bold enough to proclaim the corporate criminal liability, without however attempting to justify it on the strength of the sources available\textsuperscript{15}".

In effect, the maxim societas delinquere non potest, which reflects the view that corporations do not have the capacity to act nor to be guilty, did not prevail in Roman law. Roman law instituted rules that precisely dealt with the rights, obligations, accountability, infractions and punishments applicable to ciutates\textsuperscript{16}. For example, it was possible to prosecute the municipium as the personification of the group of its citizens.

Aside from the existence of the Roman state and its territorial units called civitas or coloniae, the right of individuals to constitute trade, religious, and charitable associations has been recognized early in the development of the Roman law. The Roman entities were called universitates personarum (or corpus/ universitas, which included the Roman state and other entities with religious, administrative, financial, or economic scopes) and universitates rerum (which included entities with charitable scopes). Upon creation by authorization, the entities had their own identity, owned property separate from that of their founders, and had independent rights and obligations. Although these entities were viewed as a fiction of the law, and despite the fact that the

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Roman doctrine considered that these associations lacked independent will, in some authors' view, an entity could commit a crime and criminal causes of actions against them existed. The acknowledgement of the existence of independent entities with rights and obligations constituted the basis for the evolution of corporate institutions in the medieval.

Later, in the 12th - 14th centuries, the concept of corporate criminal liability evolved; the Romanic law clearly imposed criminal liability on the universitas, but only when its members were acting collectively. At the same time, Pope Innocent IV created the basis for the maxim societas delinquere non potest by claiming that, unlike individuals who have willpower and a soul, can receive the communion, and are the subjects of God's and emperor's punishments, universitas are fictions that lack a body and a soul, and therefore, cannot be punished. However the majority of the doctrine rejected this argument because of the realities of that time, and admitted the existence of juristic persons and their capacity of being sanctioned for their crimes if certain conditions were met. The Emperors and Popes used to frequently sanction the villages, provinces, and corporations. The sanctions imposed could be fines, the loss of specific


18. Ibid.
In the 14th century, the doctrine recognized that corporations had their own willpower and therefore, their criminal liability was a given. With a few exceptions (such as bigamy, rape, etc.), an entity could commit any crime which could be committed by an individual, regardless of the fact that the crime had no connection with the scope of the corporation. This theory dominated the continental European doctrine until the end of the 18th Century. The medieval conception was based on the belief that all the corporations should be liable, both civilly and criminally, for the acts committed by their members. Cities, villages, universities, trade, and religious associations have been required to pay fines for their crimes. At the same time, the Germanic law was still loyal to the old concept of collective responsibility and, through a 1548 ordinance, sanctioned the cities that did not keep the peace by fines and loss of all liberties.

2.4. German Law

The Germanic law has also promoted the development of associations. The land was shared among families, and not among individuals. However, unlike the Roman universitas, which were fictitious creations of the law, the Germanic law considered that both the corporations and the individuals were real subjects of

19. Ibid.

20. Ibid.
law. In 595, Coltaire II created the centuries and curies (territorial units); these territorial entities were liable for the crimes committed on their territory. The rationale of the collective responsibility in the Germanic law relied on the function of the sanction; sanctions were imposed not based on the concept of guilt, but on the outcome of the action. Therefore, if damages resulted from an individual action, a sanction was imposed to repair the damages. The sanction was viewed more as compensation than punishment, and because the property was owned by the collectivity, it was only logical that the collectivity should pay the damages.

Germany, due to doctrinal issues, still resists the idea of incorporating corporate criminal liability in its legal system. In Germany, corporate criminal liability is still governed by the maxim societas delinquere non potest and corporate misconduct is the subject of a very developed system of administrative and administrative-penal law. Germany's administrative-penal system, called Ordnungs-widrigkeiten (OwiG), is the successor of Ubertretungen, a category

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21. Curies means “a unit of radioactivity, corresponding to $3.7 \times 10^{10}$ disintegrations per second” or “the quantity of radioactive substance that has this amount of activity” in simple sense territorial units, Concise Oxford English Dictionary, 10th Ed., 2001, Oxford University Press, Oxford.


of petty offences. The reason for “this growth of administrative procedures is of course to be found in the evolution of the *Estat-Gendarme* to the twentieth-century welfare State, resulting in an enormous expansion of the domain of the State...”\(^24\)

The administrative fines, called *Geldbussen*, are imposed by specialized administrative bodies which are part of the executive branch of the government. The sanctions can be imposed both to individuals and corporations. Under the administrative-penal law, punitive sanctions can be applied. However, the imposition of administrative sanctions does not imply moral stigma “and this consideration seems to have been the most important for the German legislature in opting for administrative sanctions rather than leaving the matter under the aegis of the criminal law”\(^25\). The main arguments in defence of the lack of corporate criminal liability in Germany are: corporations do not have the capacity to act, corporations cannot be culpable, and the criminal sanctions are appropriate, by their nature, only for human beings\(^26\).

Italy, Portugal, Greece, and Spain followed the German model and refuse to hold corporations criminally liable. For example, Italy imposed a system of

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25. Ibid, at 503.

administrative liability of corporations through the Decree-Law No. 300 of September 29, 2000 and the Decree-Law No. 231 of May 8, 2001. However, the Italian doctrine argues that this administrative liability is, in reality, criminal in nature because it is connected to the commission of a crime and is applied by using rules of criminal procedure.

Due to historical circumstances, the evolution of common law systems has been different and did not embrace the Roman concepts. Unlike the civil law, which has its sources in legislative acts, the sources of the common law are the judicial decisions and the legislative acts.

2.5 French Law

In the field of criminal law there had been room for the coexistence of individual and corporate responsibility, in the 18th century the ideals brought by the Enlightenment and the French Revolution extirpated the concept of corporate liability. One of the core principles of the French Revolution was the humanization of the institutions; consequently criminal responsibility was to be restricted to individuals. Organizations were seen with hostility. The revolution did not favour a concept that interposed any intermediary group between the State and the individuals, for these groups represented a threat to the revolution. Collective bodies other than the State were considered a danger to the sovereignty of the State. More importantly, the revolution needed money and
believed it was crucial to liquidate any collective body, not only to confiscate its properties, but also to prevent its independence.

These values forever changed the face of legal institutions, for the concept of criminal liability humanization meant the attribution of liability was directly linked to human capacities and moral elements such as intention\textsuperscript{27}. Laws had to account for certain capacities and rights of the individual human being. The natural capacities that were to prevail included reason, dignity, will, perfectibility, and freedom.

Groups and all kinds of collectivities as unnatural persons were definitely excluded from the sphere of criminal law since they did not have the individual characteristics necessary to be responsible for their acts. This exclusion of groups from the domain of criminal law was considered a great advance in the doctrine of criminal liability.

Nonetheless, the practice and theory of collective responsibility were so deep-rooted that even after the revolution some laws were promulgated consecrating this old habit. A typical example is one French imperial law that established it was the responsibility of the state if a group of people were responsible for the death of an individual. In this case the state was obliged to compensate the family of the individual.

The ideal brought about by the revolution influenced the Penal Code of 1810, which highlighted the principle of the individuality of punishment. In the same way, the Napoleonic legislation did not recognize any corporate responsibility. Other western countries underwent the same process of individualization of criminal law principles.

Since then, the development of criminal science has taken this individualist conception, on which contemporary criminal law is grounded, for granted. In France, *Ordonnance de Blois of 1579* enacted the criminal liability of corporations. The crime committed must have been the result of the collectivity's decision. Therefore, although the corporations were still considered legal fictions, the existence of corporate criminal liability sustains the conclusion that corporate criminal liability was not incompatible with the nature of the corporations. Before the French Revolution, the *French Grande Ordonnance Criminelle of 1670* established the criminal liability of corporations on similar basis. In addition, the ordinance provided for the simultaneous criminal liability of individuals for committing the same crimes as accomplices.

The French Revolution brought extreme changes in the French law. The corporations, including the provinces and non-profit hospitals, have been

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completely eliminated and all their goods confiscated. The notion of corporation was incompatible with the individualist aspirations of the revolutionary government. Moreover, the new government thought that, due to their economic and political influence, corporations represented a potential threat for the new regime. There was also a financial explanation for this decision; the new revolutionary government was in immediate need of funds. The finances were mainly owned by the corporations and the easiest way of getting those funds was by confiscation from the corporations after their elimination. Therefore, the French Penal Code of 1810 stopped mentioning the criminal liability of corporations, but not because the concept was incompatible with the doctrine, but because such liability was futile as a consequence of the corporations' disappearance from the French system of law.

2.6. European Law

Under the influence of the French Revolution ideals, the majority of the continental Europe changed its view regarding corporate criminal liability. Corporations lost their power and importance and became undesirable entities under the antagonistic coalition of the monarchic absolutism and liberalism. This

29. Ibid.
30. Ibid.
31. Ibid.
32. Ibid.
reality determined the creation of doctrinal theories that tried to find a basis for the lack of criminal liability of corporations. Malblanc and Savigny are the first authors sustaining the principle *societas delinquere non potest* in the 19th century 33.

The main argument was that a corporation is a legal fiction which, lacking a body and soul, was not capable of forming the criminal *mens rea* or to act in *propria* persona. Moreover, corporate criminal liability would violate the principle of individual criminal punishment. German jurists also adhered to the "fiction theory" 34. Thus, E. Bekker and A. Briz argued that corporations have a pure patrimonial character which is created for a particular commercial purpose and lacks juridical capacity. Therefore, corporations cannot be the subjects of criminal liability.

Critics of the "fiction theory," such as O. Gierke and E. Zitelman, argued that corporations are unities of bodies and souls and can act independently. The corporations' willpower is the result of their members' will 35. F. von Liszt and A. Maester were some of the principal authors who tried to substantiate the concept

34. Ibid.
35. Ibid.
of corporate criminal liability in this period. They argued that the corporations' capacity to act under the criminal law is not fundamentally different from that under civil or administrative law; corporations are juristic persons that have willpower and can act independently from their members.

During the time of these doctrinal disputes, the number and importance of corporations in the European society increased significantly. The laws became more flexible and the states' role in the process of incorporation diminished. For the purpose of controlling the corporate misconduct, the Council of Europe recommended that "those member states whose criminal law had not yet provided for corporate criminal liability to reconsider the matter". France responded by making several revisions of its Penal Code for the purpose of modernizing its text.

The revision of 1992 officially recognized the corporate criminal liability because, in the opinion of the French legislators, it made more judicial sense and because it lacked other effective ways of sanctioning criminal corporate


37. Ibid.

38. Ibid.

misconduct. This process culminated with the *Nouveau Code Penale* in 1994.\(^4\) The French New Penal Code established, for the first time in any civil law system, a comprehensive set of corporate criminal liability principles and sanctions\(^{41}\) providing in article 121-2 that, with the exception of the State, all the juristic persons are criminally liable for the offenses committed on their behalf by their organs or representatives. The establishment of the corporate criminal liability attracted the critiques of thousands of corporations that could not believe in "such a revolution". Ever since, France has had a relatively wide practice in this field\(^{42}\).

France's example was followed by numerous other European countries. Thus, Belgium, through the Law of May 4, 1999, modified art. 5 of the Belgian Penal Code and instituted the criminal liability of juristic persons. Netherlands adopted the concept of corporate criminal liability even earlier, in 1976. Art. 51 of the Dutch Penal Code provides that natural persons as well as juristic persons can

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42. See Albert Maron & Jaques-Henri Robert, *Cent Personnes Morales Penalment Condamnees* JCP G 1999, I 123, for a quantitative and qualitative study of the first one hundred decisions cited by the French Chancellery.
commit offenses. In 2002 Denmark modified its Penal Code and established that corporations may be liable for all offenses within the general criminal code.\footnote{Sara Sun Beale & Adam G. Safwat, What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability, Buff. Crim. L.R., Vol.8, 2004, at pp.89-97.}

2.7. English Law

By the end of Roman Empire, the Church had became a powerful and influential institution. It was in the Church and not in the State that the device of legal personality was first used as an instrument of political policy.\footnote{Webb. L, Legal Personality and Political Pluralism, Melbourne University Press, 1958, Melbourne, at p.v.}

2.7.1 Medieval English Law

The medieval society was not firmly established but had a richer structure with an abundance of ordered groups such as cities, villages, ecclesiastical bodies, universities, and within them faculties and colleges. A theory was needed to meet these institutions. Pope Innocent IV, who taught that the foundation of faculties and colleges was fiction, established this theory. In 1245 he introduced the principle that corporate bodies were a fiction. He “was the father of the dogma of the purely fictitious and intellectual character of juridical persons”. 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"\textsuperscript{45} or in the case of some ecclesiastical body, by divine power.

Le pape Innocent IV pose le principe, par une décrétale rendue au premier concile de Lyon en 1245, qu'une universitas\textsuperscript{46} ne eut pas être excommuniée, car c'est un être amoral, sans âme et qui ne fait pas partie de l'Eglise. Il ira jusqu'à dire que la personne morale n'existe pas en réalité et ne constitue qu'une fiction\textsuperscript{47}.

The development of this 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\textsuperscript{48}. It appears that the doctrine that corporate bodies were \textit{persona fictae} was intended for ecclesiastic \textit{collegium},\textsuperscript{49}


\textsuperscript{46} universitas in this case means aggregates of things i.e., corporate body, community [translated], Black's Law Dictionary, 8th Ed., 2004, p.1469.

\textsuperscript{47} Lizee. M. 'De la Capacité Organique et des Responsabilités Délictuelle et Pénale des Personnes Morales', McGill Law Journal, Vol.41, No.1, 1996, pp.131-168. at p.134 [translation: Pope Innocent established the principle by a decree pronounced at the first council of Lyon in 1245, in which the universitas 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].


\textsuperscript{49} collegium can be understood as college/board (priests) [translated]; COLLEGIUM. In the civil law. A word having various meanings ; e. g., an assembly, society, or company; a body of
universitas or capitulum, 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.

Even the recognition of ecclesiastic bodies as moral persons was different from other groups. The ecclesiastic bodies had the status of juridical persons by divine disposition. Therefore, to be recognized as juristic persons, other groups needed the approval of a competent authority, i.e., the recognition by the law.

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50. Capitulum in this case refer to a cathedral or other important religious building. [translated]; A chapter is a congregation of clergy under one dean in a cathedral church, Black's Law Dictionary, 8th Ed., 2004, p.265.


52. “There are two moral persons that exist by divine institution. They are the Catholic Church; established on earth by Jesus Christ, true God, and the Apostolic See, 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, 1957, The Bruce Publishing Company, Milwaukee at p.86]. Can 115 § 1 - Juridical persons in the Church are either 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, Collins Liturgical Publications, London, 1983, at pp.19-20)
However, practical need made the canonists accept the criminal liability of legal persons. After the 17th century, the Bologna Scholl began to stipulate sanctions to be imposed on communities. One of the provisions stipulated that a city that conceded asylum to criminals or that did not help to arrest criminals could be captured. The canonist at last accepted liability, but with certain conditions. The most important of these was that the community could not be responsible for the act of one individual alone; the community would be responsible 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. As a result of the recognition of responsibility, some of the sanctions were adopted.

The canonists adopted fines, rights restrictions and dissolution. Apart from these sanctions, some spiritual sanctions were applicable to the individuals that were members of a group. These sanctions included interdiction of the sacraments and, if the individuals were ecclesiastic members, suspension of the exercise of religion and excommunication.

In medieval English law, liability was imposed on the group instead of the person who had committed the wrongful act. The group was to be held responsible for the wrongdoing of one of its members, but it could avoid condemnation by capturing the individual wrongdoer and delivering him to the authorities.
In France, as a heritage of the canon law, the criminal responsibility of corporations was admitted in France prior to the French Revolution. Before the Revolution it was accepted that the community had factual existence and groups could commit crimes and should be punished independently of the nature of the groups\textsuperscript{53}. In 1331, the City of Toulouse was condemned by the parliament to lose its rights of body and community, and had its patrimony confiscated. Losing the rights of body meant that Toulouse was not represented as an autonomous and concrete entity. It had no right to represent itself. Parallel to this, the denial of the right to be a community meant that it was not recognized as an independent community. Finally, by confiscating the property, the parliament was assuring that the city was not allowed to receive any advantage by the economical use of its patrimony. The same thing occurred with Bordeaux in 1558 and Montpellier in 1739.

The advent of the 1670 regulation created the fundamentals that guided the French criminal law. One of these fundamentals was the criminal liability of groups. The first provision of this regulation (Title XXI, article I) announced that the criminal procedure could be used against cities, villages, bodies and companies that had committed any kind of rebellion, violence or other crime. The term “body” referred to schools, religious councils and convents. The term “companies” referred to lawyers and justice officials and prosecutors’

\textsuperscript{53} This acceptance was not unanimous. If the crimes were not committed through a common deliberation, there would not be any responsibility, because the fiction theory prevailed at that time, the liability was not admitted.
associations. In order to attribute responsibility to such collectivities, it was necessary that the conduct had been the fruit of the collective deliberation. Mestre claims that the mens rea element assumed special importance at this point. The action per se was not enough; the will of the group had to be present as an essential element of the crime. In addition, the doctrine of that epoch indicated that criminal responsibility of groups did not move away or diminish the responsibility of the individual. In this way, the main author and the compliers were not allowed to escape from personal liability.

The adoption of the concept of corporate criminal liability has followed a conservative course under the English law. Initially, England refused to accept the idea of corporate criminal liability for several reasons. Corporations were considered legal fictions, artificial entities that could do no more than what "legally empowered to do (ultra vires theory)". Because corporations lacked souls, they could not have mens rea and could neither be blameworthy, nor punished. Chief Justice Holt decided that corporations could not be criminally liable, but their members could. In addition, corporations were very few in

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During the 16th and 17th centuries, corporations became more common and their importance in the socio-economic life increased. A need for controlling corporate misconduct became more and more obvious. Corporations have been recognized as independent entities which owned property distinct from that of their members\textsuperscript{58}. The first step in the English development of corporate criminal liability was made in the 1840s when the courts imposed liability on corporations for strict liability offenses\textsuperscript{59}. Lord Bowen decided that the most efficient way of coercing corporations was by introducing the concept of corporate criminal liability in the English law\textsuperscript{60}.

Soon after, by borrowing the theory of vicarious liability from the tort law\textsuperscript{61}, the courts imposed vicarious criminal liability on corporations in those

\textsuperscript{57} Ibid, at p.65.
\textsuperscript{58} Ibid, at p.69.
\textsuperscript{60} Regina v. Tyler, 173 Eng. Rep. 643 (Assizes 1838).
\textsuperscript{61} Brickey, K. F., Corporate and White Collar Crime: Cases and Materials, 2\textsuperscript{nd} Edn., 1995, Little Brown, Toronto, at p.72.
cases when natural persons could be vicariously liable as well\textsuperscript{62}. In 1944, the High Court of Justice decided in three landmark cases\textsuperscript{63} to impose direct criminal liability on corporations and established that the \textit{mensrea} of certain employees was to be considered as that of the company itself. The motivation of the decisions was vague and confusing due to the lack of clear and organized criteria for attributing the \textit{mens rea} element to corporations. This issue was clarified in 1972 in a case\textsuperscript{64} in which the civil law \textit{alter ego} doctrine was used to impose the criminal liability on corporations; this is now known under the name of “identification theory”\textsuperscript{65}. The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person (\textit{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.

\textsuperscript{62} Regina v. Stephens, (1866) L.R. 1 Q.B. 702 (nuisance case); Regina v. Holbrook, (1878) 4 Q.B.D. 42 (criminal libel case).


2.7.2. Modern English law

The early modern English law rejected the concept of collective or imputed guilt that was pervasive in medieval law. The principle of no-responsibility of legal persons prevailed. Only individuals who committed a harmful act with a guilty state of mind could be guilty of crimes. The Chief Justice of England confirmed this claim in 1701 when he announced that corporations could not be charged with crimes, but rather the particular members of the corporations could be indicted\textsuperscript{66}.

By the mid-nineteenth century, the common law rule started to shift and the ascription of criminal liability to juristic persons was becoming a reality. Initially, liability was restricted to nuisance. Later it was extended to nonfeasance, such as failure to repair roads or bridges. Some courts held, for example, that corporations that were obligated by their corporate charters to maintain public bridges or highways could be criminally charged if they failed to discharge their duties. In \textit{Regina v. Birmingham and Gloucester Railway}, a company was indicted for disobeying an order of the Justices, directing it to remove a bridge that had been erected over a road\textsuperscript{67}.

\textsuperscript{66} [1701] 12 Mod 559.

\textsuperscript{67} \textit{Regina v. Birmingham and Gloucester Railway} (1842) 3 QB 223.
Court decisions gradually started to challenge the practice of centuries. These decisions were the product of social and cultural changes brought about by the Industrial Revolution. After the 19th century, industrial bodies were considered responsible for statutory crimes, and most of the possible condemnations were fines.

In 1889, the British parliament introduced an imperative that the expression “person”, present in all legislative texts related to criminal infringement, should be interpreted as including both individuals and collective entities. Since then, the jurisprudence began to admit the criminal responsibility of these entities even for intentional acts.

Two models of corporate liability emerged from the work of English courts viz., vicarious liability doctrine and the identification doctrine. These doctrines have been the dominant basis for ascribing corporate criminal liability since then. Although these doctrines challenged the position prevalent at the time they were developed, they have not represented a complete rupture with individualistic principles. The United States initially followed the English example, but later developed differently and more rapidly due to the important role of corporations in the American economy and society.

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The foundation of most forms of political organization in the American colonies was the corporate charter which perpetuated the corporate form of governance. Unlike the English courts, the American courts were much faster in holding corporations criminally liable. Initially, the American courts promoted similar arguments against corporate criminal liability. The courts started by imposing criminal corporate liability in cases of regulatory or public welfare offenses not requiring proof of *mens rea* - nuisance, malfeasance, nonfeasance and vicarious liability cases.

At the beginning of the 20th century, the corporate criminal liability concept was widely accepted in the American society and was expanded to *mens rea* offences.

Vicarious liability became a dominant theory in prosecuting corporations throughout the late 1800s and early 1900s. Most cases involved minor statutory


72. See Brickey, supra note, at pp.75-81 for a detailed presentation of the nuisance, malfeasance, and nonfeasance liability development in U.S.

offenses, which Parliament intended to be strict liability offenses; the master (corporation) was strictly liable for the servant’s (employee’s) criminal conduct\textsuperscript{74}. However, corporations still could not possess the intent required for crimes involving death or personal violence\textsuperscript{75}; at that time, corporations had only been convicted of crimes involving negligence or strict liability. The “directing mind” theory, which developed throughout the 1900s, provided a way for prosecutors to indict and convict corporations for crimes outside the scope of negligence and strict liability.

Lord Denning, in 1956, outlined the directing mind theory, which suggested that the guilty mind of directors or managers could make a company guilty of crimes requiring a guilty mind or culpable mens rea\textsuperscript{76}. Denning, explaining the rationale of the theory, stated:

\begin{quote}
A company may in many ways be likened to a human body. They have a brain and a nerve [center] which controls what they do. They also have hands which hold the tools and act in accordance with directions from the [center]. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be
\end{quote}

\begin{itemize}
\item \textsuperscript{74} R.J. Wickens & C.A. Ong, Confusion Worse Confounded: The End of the Directing Mind Theory, J. BUS. L. at 532 (Nov. 1997).
\item \textsuperscript{75} See R. v. Cory Bros. & Co., 1 K.B. 810 (1927).
\item \textsuperscript{76} H.L. Bolton Co. v. T.J. Graham & Sons, 3 All E.R. 624, 630 (C.A. 1956).
\end{itemize}
said to represent the mind or will. Others are directors and
managers who represent the directing mind and will of the
company, and control what they do. The state of mind of
these managers is the state of mind of the company and is
treated by the law as such. . . . Whether their intention is the
companies intention depends on the nature of the matter
under consideration, the relative position of the officer or
agent and the other relevant facts and circumstances of the
case77.

In 1971, the House of Lords acknowledged Lord Denning’s rationale in an
appeal from the English Court of Appeals, stating that case law showed
companies can be convicted of intent-based crimes: Nevertheless, the court held
that a shop assistant was not a directing mind of a company that owned many
supermarkets78. Thus, the directing mind theory seems to represent a middle-
ground between strict liability and no liability.

77. Ibid.
78. Tesco Supermarkets v. Natrass, 2 All. E.R. 127 (H.L. 1971). Tesco was convicted of a breach of
the Trade Descriptions Act for displaying misleading prices and appealed to the House of
Lords, who reversed the conviction.
Corporations have since been convicted of such crimes as conspiracy to defraud, aiding and abetting regulatory offenses, contempt of court, and, for the first time in 1994, manslaughter\textsuperscript{79}.

The Court held in \textit{New York Central & Hudson River R.R. v. U.S.}\textsuperscript{80} that the defendant corporation can be responsible for and charged with the knowledge and purposes of its agents, acting within the authority conferred upon them. The Court held that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and giving them immunity from all punishment because of the old doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at"\textsuperscript{81}. At the present, corporate criminal liability is virtually as broad as individual criminal liability, corporations being prosecuted even for manslaughter\textsuperscript{82}.

\textsuperscript{79} I.C.R. Haulage, 1 All E.R. 691 (Crim. App. 1944)

\textsuperscript{80} 212 U.S. 481 (1909) (sustaining the constitutionality of the Elkins act which provides that the acts and omissions of an officer acting within the scope of his employment were considered to be those of the corporation).

\textsuperscript{81} Ibid, at p.495.

2.8. Conclusion

Historical development of corporate criminal liability shows that corporate criminal liability is wider than the vicarious liability of natural persons. Corporate criminal liability is founded on attribution to the corporate body of crimes committed by its agents or officers rather than on vicarious liability. This argument is supported when one considers its development and founding principles. The provisions of statute extended the scope of vicarious liability in common law, which had limited vicarious liability to corporations in the same way as natural persons. The extension of criminal provisions to corporate bodies depended on the wording of the penal statute, whether it was such that the artificial person can serve the punishment. Common Law adopted the strategy of punishing both the body corporate and the actual wrongdoer.