5.1 Introduction

The debate on appropriateness of attributing criminal liability to Corporations is far from over. Corporations are as much part of our society as are any other social institution. Corporations represent a distinct and powerful force at regional, national and global levels and they wield enormous economic powers. Besides governments and governmental agencies, it is the Corporations that are the more and more effective agents of action in our society. But, Corporations have not been same in the past. The multitude of role the Corporation play in the present day human life have been necessitated by the demands of the society, as it kept on developing. The development of the society, at various points of time, has had a direct influence on the structure and function of the society, at various point of time, has had direct influence on the structure and functions of the Corporation. Over the last few decades nature and form of a corporate sectors has grown complex. In last two decades of 20th century, there has been globalization further paved the way for “Global Village”, Which Considerably made the changes in the form of business organization.

The Corporate Sector has demanded and got monetary benefits, infrastructure facilities from the government however the same Corporate, MNCs are violating statutory laws. These Corporate are bringing the labour tax department and government officials. For the benefit and big profits they are committing crime. Which are called Corporate Crime.

Corporate Crimes have becomes a global phenomenon. In recent years, many events have once again brought the issue of corporate criminal liability
back in to the spotlight. The national and global financial crisis. From Harshad Mehta to Ketan Parekh and further down to Madhupura Co-operatives in 2002 it is a familiar story of a few Corporate heads including in creative accounting with the sole object of enriching themselves at the cost of lower middle class investors.

Almost every corporate giant in India has been accused of violating business ethic and including in corporate mis-governance. “For every fall from virtue”. There is a seducer .Millions can be offended only when billions can be made.

India, however shares the distinction of being in the company of corporate America. Enorm fraud of $591 million, World com graud of $3.8 billion, Adelphia off balance sheet loan of $3.1 billion, Xerox $ 6 billion a host of other Corporate have been caught red handed. British petroleum oil spil and the Pike River mine explosion highlighted the devasting harms that can arise out of a misuse of Corporate Power.

These incidents reignited the debate on Corporate Criminal liability. Unfortunately the arguments raised appear all too familiar as legal system world wide Continue to struggle to hold Corporations to account.

Globally, Corporate Criminal liability has gradually expanded, predominantly through legislative reforms. legislature have attempted to Construct a model of Corporate Criminal liability that better accommodates the organizational framework of Corporations. However the legislature have failed to resolve the inherent deficiencies in Corporate Criminal law and Appear to be content to pass legislation that is largely symbolic.

In India is yet to march in step and act as per the urgent needs of a society plagued by Corporate Crime, Maculay’s Penal Code is incapable of meeting the requirement of this century. Inorder to understand the doctrine of corporate criminal liability researcher takes the current doctrine, the recent Supreme Court civil corporate liability cases, and the limitations proposed herein for criminal corporate liability.
5.2 Historical development of Corporate Criminal Liability.

The present Indian law on the subject being greatly influenced by developments in English law, the historical development of the attribution of mens rea to corporations in English law makes for interesting analysis even to a person undertaking a study of the Indian corporate criminal liability regime alone.¹

The ensuing discussion of the history of criminal corporate liability provides a necessary backdrop to understanding the requirement of new nation of labiality. The history of the development of criminal corporate liability is, at bottom, the story of a practice in search of a theory.² At critical junctures, the decision of whether and when to impose criminal liability on corporations was made not principally as the product of a reasoned policy choice but as a result of shifting trends in legal formalisms. The bottom line is that the criminal law seems to be expanding into a variety of areas where it is infeasible or even irrational to ignore the costs of law compliance. Early enabler of criminal corporate liability, as well as its confounder, was judicial acceptance of the legal anthropomorphism of the corporate form.³.

Eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century.

Initially, the English corporation could only be created by a grant from the Crown or by an act of Parliament⁴. Under the common law, corporations were treated as artificial persons, separate juridical entities distinct in their legal identity and property holdings from the shareholders who created them, but

¹Andrew Ashworth, Principal Of Criminal Law 117(5th Ed,2006)(1991)
²Kathleen F. Brickery, Corporate Criminal Accountability: A Brief History and an Observation, 60 WASH. U. L.Q. 393 (1982).
⁴Brickery, Brief History; supra note 1 at 397.
judges who were asked to apply a criminal law of natural persons to a corporate “person” often found the analogy to be strained.

There were some issues arise such as

- The moral blameworthiness of corporation capable was required for punishment.

- A corporation could whose scope of activity was limited by law truly be said to have “acted” when its agents took steps that went beyond their authorized powers.

- Adherence to the letter of criminal procedure, which gave the accused the right to be physically present at certain stages of trial, to confront his accuser, and to take the stand in his own defense, preclude deploying the criminal process against the corporate form.

Such issues were deemed worrisome not least because corporate liability, as a supplement to individual liability, was often thought to be unnecessary. Corporations, after all, can act only through agents and there was never any question but that the errant corporation’s agents, once found, could be tried and punished for their crimes. The question of the applicability, or lack thereof, of the corporation-as-person metaphor was behind a series of practices that shaped early notions of corporate liability. An appropriate starting point in tracing

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5Such reasoning was presumably behind Lord Holt’s 1701 statement, preserved without fact pattern or analysis, that a “corporation is not indictable but the particular members of it are.” Anonymous Case (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701).

6Indeed, several civil law countries historically took just this approach. To this day, criminal corporate liability remains a new idea in civil law countries. See Sara Sun Beale & Adam G. Safwat, What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 BUFF. CRIM. L. REV. 89, 90 (2004) (“Europe does not have a long history of recognizing corporate criminal liability.”).
the history of American criminal corporate liability is English common law. In the seventeenth century, common law judges, lacking a theory of vicarious liability to impute actions of agents to the corporation, struggled with the question of whether a corporation, being a juridical entity without physical form, was capable of the requisite physical action to substantiate a prosecution for a writ of trespass among other crimes with an element of physical action. At least as far back as 1635, the settled approach was to subject the corporation to liability only for crimes of nonfeasance, such as the failure to make necessary repairs, but to render it immune from crimes requiring misfeasance. It was not until the late nineteenth century, following the assimilation of vicarious liability into tort law, that English courts began to hold corporations liable for the actions of their agents, having recognized that to cling to the nonfeasance/misfeasance distinction had led to “incongruous” results that could not be justified. English courts continued to be constrained by the limits of the corporation-as-person metaphor, finding that corporations could only be guilty of misfeasance in the context of crimes of strict liability and not crimes with a “moral dimension,” including rape and murder but also crimes such as trespass, which required a

7 An even earlier instance of criticism of corporate liability occurred in 1250, when Pope Innocent IV became one of the earliest critics of expansive criminal corporate liability by forbidding the excommunication of corporations on the grounds that corporations are impervious to damnation (to say nothing of the practical point that assets of an excommunicated corporation would thereafter be outside church jurisdiction). See John C. Coffee, Jr., Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction, 1 N. ILL. U. L. REV. 3, 3 (1980).

8 Brickey, Brief History, supra note 1, at 401
mens rea that the corporation was presumed to be incapable of manifesting. 9 Moreover, English courts in the nineteenth century consistently rejected the idea that respondeat superior applied in the criminal context. *Respondeat superior* was rejected during the eighteenth century . . . . Rather, the liability of each actor was determined by the degree of his participation. In the United States, where early corporations were predominantly established to serve public or quasi-public ends, some of the earliest cases to impose liability on a corporation arose in the context of public nuisances. As with English law, these early cases, in addition to making a public/private distinction, also focused on the distinction between misfeasance and nonfeasance. but such a distinction proved to have less traction in American law. In contrast to Lord Holt’s statement that a corporation cannot be prosecuted, two state court case10 decided in the 1850s rejected such a distinction as unwarranted and untenable and began to formulate policy arguments in favor of criminal corporate liability. The more forceful of these was that the corporation, as the beneficiary of the illegal conduct, ought to be made to bear the costs of its criminal conduct (in essence a deserts theory of punishment), although courts also advanced a deterrence rationale, noting it was often easier for law enforcement to punish the corporation as a whole than to arrest and prosecute individual agents who could not be located or whose relative culpability was difficult to ascertain. Yet like their nineteenth-century English counterparts, these and other state court decisions were carefully circumscribed

9 Even today, criminal corporate liability would not normally extend to crimes such as rape and murder. In a legal formalist sense, such a prosecution might arguably go forward along a theory of vicarious liability, so long as the agents acted in the scope of employment and at least in part to benefit the organization. In practice, however, the former requirement would be unlikely to be met in the case of murder and the latter is almost inconceivable in the case of rape. See Khanna, *supra* note 11, at 1484 n.37 (“[T]he normal rules regarding imputation of agent behavior to the principal would probably not allow imputation when the conduct falls outside the agent’s scope of employment.”); Patricia B. Rodella, *Corporate Criminal Liability for Homicide: Has the Fiction Been Extended Too Far?*, 4 J.L. & COM. 95, 105–09 (1984); John M. Hickey, Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 466–67 (1981)

and continued to stop short of holding corporations responsible for crimes requiring evil intent. Two main arguments were advanced in favor of this limitation:

1. Courts opined that a corporation that “has no soul” could not have the “actual wicked intent” required by certain crimes.

2. Invoking the doctrine of ultra vires, courts refused to attribute certain actions to a corporation when such actions were plainly outside the scope of what the corporation was legally empowered to do. Some courts confined this reasoning to specific intent crimes and remained willing to find corporations liable when the charged violation was general intent crime, the theory being that for such crimes, the act itself could evidence the requisite mental state.

These early state cases laid the foundation for the landmark Supreme Court opinion in *New York Central & Hudson River Railroad v. United States*,11 an early twentieth century case widely relied on to this day as endorsing an expansive theory of criminal corporate liability. *New York Central*, notwithstanding a potentially narrower reading, was a turning point in criminal corporate liability. In the decades that followed, federal courts routinely used theories of vicarious liability under civil agency doctrine borrowed from tort law to convict corporate entities. By the middle of the twentieth century, federal courts had accepted that, “there is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose.”

The current hornbook rule is that a corporation is liable for the actions of its agents whenever such agents act within the scope of their employment and at least in part to benefit the corporation. As to the limitation that employees must be acting within the scope of their actual or apparent authority, this requirement has been interpreted so expansively that it is practically invisible in many contexts. Similarly, the requirement that an employee act to benefit the company has likewise been relaxed by a permissive interpretation; under the current

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11 212 U.S. 481 (1909).
doctrine, it “is not necessary that the employee be primarily concerned with benefiting the corporation, because courts recognize that many employees act primarily for their own personal gain.

5.3 Principles of criminal liability

Criminal Liability is what unlocks the logical structure of the Criminal Law. Each element of a crime that the prosecutor needs to prove (beyond a reasonable doubt) is a principle of criminal liability. There are some crimes that only involve a subset of all the principles of liability, and these are called “crimes of criminal conduct”. Burglary, for example, is such a crime because all you need to prove beyond a reasonable doubt is an actus reus concurring with a mens rea. On the other hand, there are crimes that involve all the principles of liability, and these are called “true crimes”. Homicide, for example, is such a crime because you need to prove actus reus, mens rea, concurrence, causation, and harm. The requirement that the prosecutor must prove each element of criminal liability beyond a reasonable doubt is called the “corpus delicti rule”.

Liability needs to be distinguished from the following concepts:

- culpability (purposely, knowingly, recklessly, negligently) - infers intent
- capacity (infancy, intoxication, insanity) - capacity defenses
- responsibility (volition, free will, competency) - presumptions

There are some principles of liability in Criminal Law:

5.3.1. The Principle of Actus Reus: Issues

1) involuntariness — sleepwalking, hypnotic behavior, etc. are seen as examples of acting upon forces beyond individual control, and are therefore not normally included in the principle of actus reus. However, certain “voluntarily induced involuntary acts” such as drowsy driving might arguably be included if the prior voluntary act created the risk of a future involuntary act.
2) manifest criminality — caught red-handed, clear-cut case of actus reus proven beyond a reasonable doubt

3) possession — the law recognizes various degrees of this. Actual possession means physically on your person. Constructive possession means physically under your control. Knowing possession means you know what you are possessing. Mere possession means you don’t know what you are possessing. Unwitting possession is when something has been planted on you. The only punishable types of possession are the ones that are conscious and knowable.

4) procuring — obtaining things with the intent of using them for criminal purposes; e.g., precursor chemicals for making narcotics, “pimping” for a prostitute, and procuring another to commit a crime (“accessory before the fact”)

5) status or condition — sometimes a chronic condition qualifies as action, e.g., drug addiction, alcoholism, on the assumption that first use is voluntary. Sometimes the condition, e.g. chronic alcoholism, is treated as a disease which exculpates an individual. Most often, it’s the punishment aspect of criminal law in these kinds of cases that triggers an 8th Amendment issue. Equal Protection and other constitutional issues may be triggered.

6) thoughts — sometimes, not often, the expression of angry thoughts, e.g., “I’ll kill you for that” is taken as expressing the resolution and will to commit a crime, but in general, thoughts are not part of the principle of actus reus. Daydreaming and fantasy are also not easily included in the principle of mens rea.

7) words — these are considered “verbal acts”; e.g. sexual harassment, solicitation, terroristic threats, assault, inciting to riot.
5.3.2. The Principle of Mens Rea: Issues

1) circumstantial — determination of mens rea through indirect evidence

2) confessions — clear-cut direct evidence of mens rea beyond a reasonable doubt

3) constructive intent — one has the constructive intent to kill if they are driving at high speeds on an icy road with lots of pedestrians around,

4) general intent — the intent to commit the actus reus of the crime one is charged with; e.g., rape and intent to penetrate

5) specific intent — the intent to do something beyond the actus reus of the crime one is charged with; e.g., breaking and entering with intent to burglarize

6) strict liability — crimes requiring no mens rea; liability without fault; corporate crime, environmental crime

7) transferred intent — the intent to harm one victim but instead harm another

5.3.3. The Principle of Concurrence: Issues

1) attendant circumstances — some crimes have additional elements that must accompany the criminal act and the criminal mind; e.g., rape, but not with your wife

2) enterprise liability — in corporate law, this is the idea that both the act and the agency (mens rea) for it can be imputed to the corporation; e.g., product safety

3) year-and-a-day rule — common law rule that the final result of an act must occur no later than a year and a day after the criminal state of mind. For example, if you struck someone on the head with intent to kill, but they didn’t die until a year and two days later, you could not be prosecuted for murder. Many states have abolished this rule or extended the time limit. In California, it’s three years.
4) vicarious liability — sometimes, under some rules, the guilty party would not be the person who committed the act but the person who intended the act; e.g., supervisors of employees

5.3.4 The Principle of Causation: Issues

1) actual cause — a necessary but not sufficient condition to prove causation beyond a reasonable doubt; prosecutor must also prove proximate cause

2) but for or sine qua non causation — setting in motion a chain of events that sooner or later lead to the harmful result; but for the actor’s conduct, the result would not have occurred

3) intervening cause — unforeseen events that still hold the defendant accountable

4) legal causation — a prosecutor’s logic of both actual and proximate cause

5) proximate cause — the fairness of how far back the prosecutor goes in the chain of events to hold a particular defendant accountable; literally means the next or closest cause

6) superceding cause — unforeseen events that exculpate a defendant

Responsibility For Crime Presumptions are court-ordered assumptions that the jury must take as true unless rebutted by evidence. Their purpose is to simplify and expedite the trial process. The judge, for example at some point in testimony, may remind the jury that it is OK to assume that all people form some kind of intent before or during their behavior. It is wrong, however, for the judge to order the jury to assume intent or a specific kind of intent in a case. Presumptions are not a substitute for evidence. Presumptions are supposed to be friendly reminders about safe, scientific assumptions about human nature or human behavior in general. The most common presumptions are: reminders that the accused is considered innocent until proven guilty
reminders that the accused is to be considered sane, normal, and competent

It is important to understand that presumptions are not inferences. Presumptions must be accepted as true by the jury. Inferences may be accepted as true by the jury, but the trick is to get the jury to believe they thought of it first. Lawyers are not allowed to engage in the practice of “stacking of inferences”, or basing an inference solely upon another inference. Lawyers are also prohibited by logic from making certain “impermissible inferences”

5.4 Concept of Corporations

The common man definition of corporation is a group of individuals coming together to carry on a business. Corporation is a creation of law, a business entity recognised by law. Though, English law establishes the origin of Modern Corporation in the 14th century or so, yet some authors are of the view that the origin of corporation could be sought in the twelfth century or perhaps in the Roman law where, juristic person was said to have been recognized. Sir Henry Maine suggested that a sort of corporate (as opposed to the individual) responsibility was at the very heart of the primitive legal system. Society was not what it is assumed to be at present, a collection of individuals but in view of others it is an aggregation of families. The law recognized this system of small independent corporations. Corporations are of two kinds:

(a) Corporation Aggregate, and

(b) Corporation Sole.

Corporate Aggregate

Corporation Aggregate is an incorporated body having membership of several persons. It is formed by number of persons known as share holder who pool their resources to create a fund known as capital to start with and it works for common interest of all the share holder and prime being profit making. It was the industrial revolution of the 17th century and improvement in the
transportation system thereby, which brought about the previously unanticipated changes not only in the size and structure of the corporations but also in the role and functions corporations play in the society.

Over the past century, the concept of a corporation has shifted from the notion of an enterprise headed by one entrepreneur, who both owns and runs the going concern, to that of an organisation where stock ownership becomes separated from the control of the corporation’s affairs, the latter being managed by a professional, hired and self-perpetuating bureaucracy. Further, the individual shareholder’s role has changed from part-owner to investor, and its importance has diminished in large corporations where the most significant shareholders are collective entities. The attachment of the shareholder to the corporation is becoming secondary and indirect, reflecting the fact that corporations serve a variety of interests besides those of shareholders, including those of their employees, customers and the community at large. And hence, it has been observed that “the corporation can no longer be identified with a single homogeneous group of individuals. Its decisions and activities are the resultant of and are responsive to a complicated set of interests and conflicting claims” This is the more significant change for the purposes of the criminal law and for imputing corporate criminal liability on the corporations.

In today’s economic and social structure, a corporation possesses functional structures, it is permanent, large, formal, complex and goal-oriented, and has decision-making structures.

Although not all corporations share the characteristic of being large-scale operations involving many individual participants, it should be noted that small corporations do not generally raise the same problems for prosecutors as large ones. Moreover, the social importance of an organization’s policies and decisions increase with the magnitude of its resources, reflecting the greater potential of large organizations to cause substantial harm. It has also been observed that the large corporations tend to breed the conditions for disaster. The larger the corporation, the greater the diffusion of responsibility, and the greater the possibility for disaster, and for disaster of greater reach.
Corporation Sole

Under the English law, a corporation sole is a legal entity consisting of a single (‘sole’) incorporated office, occupied by a single (‘sole’) man or woman. This allows a corporation usually a religious corporation to pass vertically in time from one office holder to the next successor-in-office, giving the position legal continuity with each subsequent office holder having identical powers to his predecessor.

The concept of corporation sole originated as a means to the orderly transfer of church or religious society property, serving to keep title within the church or religious society. In order to keep the religious property from being treated as the estate of the vicar of the church, the property was titled to the office of the corporation sole. In the case of the Roman Catholic Church, the property is usually titled to the diocesan bishop, who serves in the office of the corporation sole. The Roman Catholic Church continues to use the corporation sole for holding title for property, and as recently as 2002, split a Californian diocese into many, smaller corporations sole, with each parish priest becoming his own corporation sole, thus limiting the liability of the diocese. However, this is not an accurate statement of the worldwide position which will vary from country to country.

5.4.1 Difference between Corporate Aggregate and Corporate Sole

A corporation aggregate consists of two or more persons, typically run by a board of directors while in contrast to this a corporation sole is a legal entity consisting of a single incorporated office. Another difference is that corporations aggregate may have owners or stockholders, neither of which are a feature of a corporation sole.

5.5 Concept of Corporate Criminal Liability

Large multinational corporations have come to dominate the national and global economic scene. The scale of their operations is enormous. The largest have grown into enterprises of astonishing magnitude that in their economic
dimensions are fully comparable to nation states. Imposing adequate controls over multinational conduct and achieving accountability by multinationals for their conduct both at home and abroad should be a major objective of every industrialized power.

Corporate criminal liability has been an important issue on a legal agenda for a long time. Corporations play a significant role not only in creating and managing business but also in common lives of most people. That is why most modern criminal law systems foresee the possibility to hold the corporation criminally liable for the perpetration of a criminal offence.

The term ‘Corporate criminal liability’ means the liability imposed upon a corporation for any criminal act done by any natural person. Liability is imposed so as to regulate the acts of a corporation. The principle of corporate criminal liability is based on the doctrine of respondent superior which is commonly known as the theory of vicarious liability, where the master is made liable for the acts of his servant.

Any corporation can be made liable for act of its agent or servant if she/he:
· commits a crime;
· acts within the scope of employment;
· with the intent to benefit the corporation.

This doctrine grew out of the common law doctrine that masters were criminally liable if their servants created a public nuisance or caused harm to persons’ or property. The doctrine further developed through judicial interpretation of common law and also the existing statutory law but it faced a lot of difficulty before it was actually considered as a law.

5.5.1 Problems faced before becoming a Statutory Law

It is undeniable that every corporation has its own legal entity, which is separate from its directors and shareholders and officers. A corporation can sue and be sued, can hold property on its name and enter into contracts. The owners enjoy the benefit of limited liability i.e. they are personally not liable for the
debts or obligations of the corporation. And the corporation is perpetual in the sense its existence is not altered by death or retirement of the existing members. Thereby the central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a *culpable a mental state or mens rea* – the required element of most criminal offences – to non human & artificial entities.

### 5.5.2 Growth of the Doctrine of Corporate Criminal Liability

The doctrine of corporate criminal liability has turned from it’s infancy to almost a prevailing statutory law. But, because a corporation is not a natural person and cannot be subject to one of the most important sentencing options, namely, imprisonment, it requires special consideration in an inquiry into sentencing law. Punishing a corporation undermines the theoretical foundations of criminal law, which presupposes that crimes involve an act and a culpable mental state. Corporate criminal liability or corporate crime is very difficult to define because this phrase in present day scenario covers wide range of offences. However for understanding purpose it can be defined as *illegal act of omission or commission, punishable by criminal sanction* committed by individual or group of individual in course of their occupation. It can be even defined as socially injurious acts committed in course of occupations by peoples who are managing the affairs of the company to further its business interest. Corporate criminality also represents a kind of instrumentalities through which the trust of the people continues to be betrayed by persons in positions of responsibility, authority and power in the business sector. Corporate crime has been defined as “the conduct of a corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law”. In this sense, “Corporate criminal Liability” refers to the imposition of criminal liability on either the corporation or its employees and agents. The latter is also referred to as white-collar crime.
5.5.3 Organic life Of The Company And Capacity To Commit Crime

Lord Denning in *Botton Engineering Company Ltd.* v. *Grahm and Sons* (1957, 1 QB 15) 9 CA) observed that ‘a company, in many cases is linked to a human body. It has a brain and a nerve center, which controls what it does. It has also hands, which hold the tools and act in accordance with directions from the Cenozoic. 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 said to represent the mind or will. Others are directors and managers who represent the directing mind or will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. In *Trustees of Dartmouth College* v. *Wood Ward* (1819) 17 US (4 wheat) 518, Chief Justice Marshal observed, that a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of creation confers on it. This observation of Justice Marshal led to the concept that a corporation is an entity distinct from its members and officers, and with rights and liabilities of its own.

It was said that the corporate body could not: have criminal intent; be indicted by criminal procedure; be punished corporally; or be capable of certain criminal acts which were either void as *ultra vires* or by their very nature were inherently human. In most instances these barriers to liability have been overcome by judicial decisions and legislative enactments. The impossibility of harboring criminal intent, is a vestige of tradition stemming from the theory that a corporate body, without a mind and a will cannot harbor any intent in its ordinary capacity. However, most courts have now come to the settled position that a corporation may be capable of *mens rea*.

As most corporate crimes stem from economic objectives, it is entirely possible that a corporation might readily subject itself to the fine. But incalculable effect of conviction on the public attitude towards the corporation is probably the most forceful deterrent. There are corporate acts which are *ultra*
vires and of no legal effect. The outlook sometimes prevails that a corporation can not be guilty of a particular crime, for that is ultra vires in itself, but it is not impossible to tear off logic to reason that no such crime exists. The considered range of these ultra vires acts has been so narrowed by the modern extension of corporate liability that the paths of this trend become a prime concern.

5.6 Doctrine of Corporate Criminal Liability Under Different Countries

Historically, the criminal law has been the vehicle for deterrence. Corporations are increasingly significant actors in our economy and, to the extent their actions can victimize society, they too should be deterred.

Two major issues which were of dominance, during the phase of evolution of the doctrine of Corporate Criminal Liability were:

One is the failure to identify or prove corporate intent. Traditionally, the criminal law has been reserved for intentional violations of the law. Yet, our prosecutions of corporations have been marked by floundering efforts to identify the intent of intangible, fictional entities.

A second issue is regarding sanctions. In addition to proof of intent, a major distinguishing characteristic of the criminal law has been the threat of imprisonment. It was said that a corporation cannot be imprisoned; the criminal law is not an appropriate vehicle for controlling corporate behavior.

Corporate criminal liability under environmental, antitrust, securities and other laws has grown rapidly over the last two decades. The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable. In the early 1700s, corporate criminal liability faced at least four obstacles.

1) The first obstacle was attributing acts to a juristic fiction, the corporation. Eighteenth-century courts and legal thinkers approached corporate liability
with an obsessive focus on theories of corporate personality; a more practical approach was not developed until the twentieth century.

2) The second obstacle was that legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent.

3) The third obstacle was the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters.

4) Finally, the fourth obstacle was courts’ literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court.

Resistance prior to the twentieth century to extension of the doctrine of corporate criminal liability was tied to the widely-held juridical belief that a corporation lacked the requisite mens rea essential to sustain a criminal conviction. It was widely prevalent and followed that: A Corporate has ‘no soul to damn, and no body to kick.’

The corporation is invisible, incorporeal, and immortal; it cannot be assaulted, beaten, or imprisoned; it cannot commit treason . . .

So, one can find that history of Doctrine of Corporate Criminal Liability is full of problems and then solutions to it. At present, different nations have diverse notions regarding the applicability and extension of the Doctrine of Corporate Criminal Liability.

**5.6.1. Corporate Criminal Liability in America: A Jurisprudential Approach.**

Although some earlier cases took the position that a Corporation is not indictable, but the particular members of it are liable, the rule is now well established that a corporation may be held criminally liable. It is immaterial that the act constituting the offence was ultra virus. The Corporation may be held responsible, even though its employees or agents acted contrary to express
instructions when they violated the law, so long as they were acting for the benefit of the corporation and within the scope of their actual or apparent authority. A corporation is accountable for its employee’s conduct if it motivated, at least in part, by desire to serve the Corporation but this need not be the sole motivation. And even if, the employees were acting in their own interests when they committed a crime, the corporation may still be criminally liable for the failure of its supervisors to detect and stop the wrongdoing, either in intentional disregard of the law or in plain indifference to its requirements

5.6.1.1 Model Penal Code provisions:

The Model Penal Code provides that a corporation may be convicted of an offence if:

1. the offence is a violation or defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment.

2. the offence consists of an omission to discharge a specific duty of affirmative performance imposed on a corporation by law, or

3. the commission of the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

A corporation duly dissolved under the laws of the state of its incorporation may thereafter be subjected to criminal prosecution under a dissolution provision of the state authorizing any action, suit or proceeding against the corporation within a specified period after the dissolution and the words action and proceeding as used in a statute continuing corporate existence include criminal proceedings.
Corporations can be held criminally responsible for a wide variety of crimes:
1. Contempt in disobeying decrees and other court orders, directed to it. (a.) Conspiracy.
2. Bribery or conspiracy to bribe public officials.
3. The illegal practice of medicine.
5. Violations of licensing and regulatory statutes.
7. Antitrust law violations.
8. Liquor law violations.
9. Larceny, if corporate officers authorized or acquiesced in criminal act.
10. Extortion, assuming that it was authorized, requested or commanded by a managerial agent having supervisory responsibility.
11. Obtaining money by false pretenses.
12. Selling or exhibiting obscene matter.
13. Statutory federal crimes and such as violations of the Occupational Safety and Health Act.

Most of the above crimes are economically motivated and it has been noted that corporate liability for criminal offences is often found where the offence is commercial and motivated by a desire to enhance profits. A corporation may not receive direct economic benefits from a crime against the person, it may still receive a direct economic benefit obtained by not taking expensive safety precautions, and if a corporation takes such risks, the corporation becomes a proper criminal defendant.

5.6.1.2 Punishments.

A corporation may be punished by fine, indeed the only punishment that can be inflicted on a corporation for a criminal offence, is a fine or seizure of its property which can be levied by an execution issued by the court. A corporation cannot be imprisoned and is not amenable to prosecution for a
criminal offence which is only punishable by death or imprisonment. However, the fact that the penalty provided for the violation of a statute is a fine or imprisonment, or both in the discretion of the court, does not render it inapplicable to a corporation, and the same rule applies where the statute creating the offence provides for imprisonment if the fine imposed not paid. Sometimes, a statute providing that the penalty for a particular crime is imprisonment may be read in conjunction with a general statute allowing the imposition of a fine, and the fine may be imposed on the corporation in lieu of imprisonment.

5.6.2. Corporate Criminal Liability in Europe.

While the preceding philosophical and policy debate has been occurring in the United States, a debate of a different kind has been occurring in Western European countries. Western European legal systems fundamentally resisted the imposition of criminal liability on legal entities throughout most of the last century. This opposition was expressed in the principle societies delinquere non potest, which means, ‘a legal entity cannot be blameworthy’.

The modern trend in Western Europe of imposing criminal responsibility on corporations began in 1970 and continues to the present time.

5.6.3. The Netherlands

In 1976, the Netherlands became one of the first Western European countries to adopt legislation enacting comprehensive corporate criminal liability. The legislation made corporations liable for all offenses, expanding on criminal liability that had previously been limited to economic crimes. The 1976 legislation also dispensed with the requirement that liability be predicated on the actions of natural persons acting on the corporation’s behalf, which was a requirement of the previous 1951 law. Liability may be predicated on deficient decision-making structures within the corporation or on the aggregate knowledge of multiple individuals.
5.6.4. Denmark

In 1926, with the passage of the Butter Act, Denmark introduced corporate criminal liability for some offenses. By the end of the century, Denmark had greatly expanded the list of enterprise offenses.

5.6.5. Switzerland

In late 2003, Switzerland imposed criminal liability on corporations, having previously rejected such liability for doctrinal reasons. Swiss criminal liability is based on the concept of ‘subsidiary liability’: a corporation can be held liable for offenses committed on its behalf only if fault cannot be attributed to a specific individual ‘because of a lack of organization within the enterprise.’ The offense must be ‘in furtherance of a business activity consistent with the purpose of the enterprise,’ a requirement which undoubtedly will need to be defined by the courts. Criminal fines can range up to 5 million Swiss francs. Such liability is predicated on management’s failure to properly organize and manage the corporation’s affairs.

5.6.6. France

The basis for corporate criminal liability in French law is codified in Article 121-2 of the new French penal code, which states: Juridical persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives . . . in the cases provided for by statute or regulations. Article 121-2 further provides the “criminal liability of legal persons does not exclude that of the natural persons who are perpetrators or accomplices to the same act.”

There are three basic requirements for liability to be imposed under Article 121-2.0 First, the French legislature must have enacted a substantive criminal offense which the corporation contravened. Second, actual criminal responsibility for the offense must lie in the conduct of a corporation’s representatives or its organs.
Third, the acts on which criminal liability is predicated must have been committed for the benefit of the corporation.

An important feature of the new French law is that it provides an expansive list of statutory criminal penalties. In most cases, these will be monetary penalties five times the rate for natural persons committing the same offense, with greater monetary penalties for recidivist conduct.

5.7 Evolution of Corporate Criminal Liability in India

In Oswal Vanaspati & Allied Industries v. State of U.P. 1993 1 Comp LJ 172, the Full Bench of the Allahabad High Court held that a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. The question that requires determination is whether a sentence of fine alone can be imposed on it under Section 16 of the Act or whether such a sentence would be illegal and hence cannot be awarded to it. It is settled law that sentence or punishment must follow conviction and if only corporal punishment is prescribed a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly then though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it. Thus, it cannot be held that in such a case the entire sentence prescribed cannot be awarded to a company as a part of the sentence, namely, that of fine can be awarded to it. Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal. Recently, The Supreme Court in Standard Chartered Bank & Others v. Directorate of Enforcement & Others (2005) 4 SCC 530, considered the issue as to whether a company, or a corporation, being a juristic person, could be prosecuted for an offence for which mandatory sentence of imprisonment and fine is provided; and when found guilty, whether the court has the discretion to impose a sentence of fine only. The Supreme Court held that there is no dispute that a company is liable to be prosecuted and punished
for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern 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.

In the Standard Chartered Bank case the Supreme Court observed that as in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorised powers, and without proof that his act was expressly authorised or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any “person” who commits the prohibited act, and in many statutes the term “person” is defined. Even if the person is not specifically defined, it necessarily includes a corporation. It is usually construed to include a corporation so as to bring it within the prohibition of the statute and subject it to punishment.

5.7.1 Corporate Criminal Liability under Indian Law

The development of the law relating to corporate criminal liability in India is not only similar to that in English law, but also greatly influenced by the English Law. At one point of time, ‘corporations’ were viewed as a convenient shield to evade liability. However, under our present penal structure, for an offence by the corporation, both the corporation and its officer can be made liable. The law on corporate criminal liability is however, not confined to the general criminal law in the penal code but it is, in fact, scattered over a plethora of statutes with specific provisions for the same. The need for proper law relating to corporate criminal liability in a legal system, specially in the developing countries like India was observed by the Supreme Court in the following terms:

“In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and under-takings as well as by Transnational Corporations. Many of these industries are engaged
in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a 614 number of laws of our country, there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident.”

Hence under Indian law the liability of the corporation is essentially liability of the company only. Further, under Indian law as well as under the English law, a Company is a creation of the law. It is not a human being but is an artificial person. On incorporation, the company acquires a separate legal entity distinct from and independent of its members. When a company is incorporated, all dealings are with the company and all persons behind the company are disregarded, however important they may be. Thus, a veil is drawn between the company and its members. Normally, the principle of corporate personality of a company is respected in most of the cases. The separate personality of the company is, however, a statutory privilege; it must be used for legal and legitimate business purposes only. Where a fraudulent, dishonest or improper use is made of the legal entity, the concerned individual will not be allowed to take shelter behind the corporate personality. The court will break through the corporate shell and apply the principle of “Lifting of the corporate veil”. The court will look behind the corporate entity and take action as though no entity separate from the members existed. In other words, the benefit of separate legal entity will not be available and the court will presume the absence of such separate existence. The Companies Act, 1956 contains certain provisions, which empower the courts to lift the veil to reach the persons who are in fact responsible for the culpable or wrongful act. The corporate veil can be lifted in the following cases:

(1) Where the doctrine conflicts with the Public policy,
(2) Where corporate veil has been used for fraud or improper conduct,
(3) Where the corporate facade is only an agency instrumentality,
(4) For determining the real character of the company,
(5) Where the veil has been used for evasion of taxes,
(6) In quasi-criminal cases,
(7) For investigating the ownership of the company,
(8) For investigating the affairs of the company,
(9) Where the company is used as a medium to avoid various welfare and labour legislations,
(10) In case of economic offences,
(11) Where the company is used for some illegal and improper purpose, etc.

The following provisions of the Companies Act, 1956 provide that the Members or the Directors/officer(s) of a company will be personally liable if:

a) A company carries on business for more than six months after the number of its members has been reduced below seven in the case of a public company and two in the case of a private company. Every person who was a member of the company during the time when it carried on business after those six months and who was aware of this fact, shall be severally liable for all debts contracted after six months,

b) The application money of those applicants to whom no shares has been allotted is not repaid within 130 days of the date of issue of the prospectus, then the Directors shall be jointly and severally liable to repay that money with the prescribed interest,

c) an officer of the company or any other person acts on its behalf and enters into a contract or signs a negotiable instrument without fully writing the name of the company, then such officer or person shall be personally liable,
d) The court refuses to treat the subsidiary company as a separate entity and instead treat it as only a branch of the holding company,

e) In the course of winding up of the company, it appears that the business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, all those who were aware of such fraud shall be personally liable without any limitation of liability.

Thus, the protection of separate legal entity cannot be claimed in these cases and the limited liability of the shareholder becomes unlimited if he is engaged in these activities. The concept of "limited liability" restricts the liability of a shareholder to the nominal value of the shares held by him. If he has paid the entire amount which is payable towards his shares, he cannot be held liable for the debts of the company, even if he holds almost the entire share capital of the company. This rule, however, does not apply if the court lifts the corporate veil and finds the shareholder responsible for the wrongful act. Not less recently, in the landmark judgment of Kapila Hingorani v State of Bihar, the Apex Court analysed the rights and liabilities of a company vis-à-vis the Fundamental rights and Human Rights of the individuals. The Court observed:

“A company incorporated under the Companies Act is a juristic person and has a distinct and separate entity vis-à-vis its shareholders. The corporate veil, however, can in certain situations be pierced or lifted. Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof. The veil can indisputably be lifted when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest”. It has also been observed that a corporation deemed to be “State” within the meaning of Article 12 of the Constitution and acting as agency of the government, would be subject to the same limitations in the field of Constitutional or administrative law as the
government itself, though in the eyes of law they would be distinct and independent legal entities.

5.7.2 Corporate Criminal Liability in India: Judicial Approach

Criminal Liability is attached only to those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions. The basic rule of criminal liability revolves around the basic *Latin Maxim ‘actus non facit reum, nisi mens sit reat’*. It means that ‘to make one liable, it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind’.

The major law relating to Corporations in India is codified in The Company Act, 1956 and the definition of “Corporation” as given in the Act under Section 2 (7) includes a company.

As far as the current status of the Doctrine of Corporal Legal Liability in India, is concerned, the recent landmark judgment of Apex Court in Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors. had made the scenario crystal clear. It overruled the previous views regarding the Corporate Criminal Liability and had given a new touch to the said doctrine.

*The question that arises for consideration was whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment*

In Velliappa Textiles case, by a majority decision it was held that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where punishment provided is imprisonment and fine, the court cannot impose only a fine. The majority was of the view that the legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty. -
Further in the case of State of Maharasthra v. Syndicate Transport it was held that the company cannot be prosecuted for offences which necessarily entail consequences of a corporal punishment or imprisonment and prosecuting a company for such offences would only result in the court stultifying itself by embarking on a trial in which the verdict of guilty is returned and no effective order by way of sentence can be made. A similar view was taken by Calcutta High Court in Kusum Products Limited v. S.K. Sinha, ITO, Central Circle-X, Calcutta were it was clearly stated that:

“….a company being a juristic person cannot possibly be sent to prison and it is not open to court to impose a sentence of fine or allow to award any punishment if the court finds the company guilty, and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function.”

The legal difficulty arising out of the above situation was noticed by the Law Commission in its 41st Report, where the Law Commission suggested amendment to the S.62 of Indian Penal Code by adding the following line“…..in every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only.”

This recommendation got no response from the Parliament and again in its 47th Report, the Law Commission in paragraph 8(3) made the following recommendation:

In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in the case of economic laws.
We, therefore, recommend that the following provision should be inserted in the Penal Code as, say, Section 62:

- In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

- In every case in which the offence is punishable with imprisonment and any other punishment not being fine and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

- In this section, corporation means an incorporated company or other body corporate, and includes a firm and other association of individuals.

But the Bill prepared on the basis of the recommendations of the Law Commission lapsed and it did not become law. However few of these recommendations were accepted by the Parliament and by suitable amendment some of the provisions in the taxation statutes were amended.

A similar approach was taken by the Allahbad High Court in 1993, in case of Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh where an entirely distinctive observation was given by the judges.

If a corporate body is found guilty of the offence committed, the court, though bound to impose the sentence prescribed under law, has the discretion to impose the sentence of imprisonment or fine as in the case of a company or corporate body the sentence of imprisonment cannot be imposed on it and as the law never compels to do anything which is impossible, the court has to follow the alternative and impose the sentence of fine. This discretion could be exercised only in respect of juristic persons and not in respect of natural persons. There is no blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations.
The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable.

5.7.3 The Present status of India on Corporate Criminal Liability

The present status of India on Corporate Criminal Liability and how judicial decision is inconsistent with the legal provisions. Current Supreme Court’s decision have made the stand apparently clear in India that the Corporation can be prosecuted as a separate legal entity even in the offences where the punishment is imprisonment. The present status of India on Corporate Criminal Liability and how judicial decision is inconsistent with the legal provisions. It further provides the current situation about the corporate criminal liability in the International scenario. The apex court’s decision under various matters reflects the gravity of the concerned problem i.e being faced by the aggrieved parties. The Concept of “No soul to kick” has become obsolete and applicability of lifting the corporate veil has unveiled the sheath. The current research on this subject have been included and it is substantiated with the effect of recent Supreme Court’s judgement and also focused on the dilemmatic situation of the Court’s decision.

A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstance, as well as the human beings.

All the Penal liabilities are generally regulated under the Indian Penal Code 1860 in India. It is this statute which needs to be pondered upon in case of criminal liability of corporation\textsuperscript{12}. Corporations play a significant role not only in creating and managing business but also in common lives of most

\textsuperscript{12} Indian Penal Code, 45 of 1860, Sec.11: The word “Person” includes any Company or Association or body of persons, whether incorporated or not.
people. That is why most modern criminal law systems foresee the possibility to hold the corporation criminally liable for the perpetration of a criminal offence. The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule\textsuperscript{13}

In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and under-takings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a 614 number of laws of our country, there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident\textsuperscript{14}

5.7.3.1. Corporate Criminal Liability: Pre-Standard Chartered Bank Case

Until recently, Indian courts were of the opinion that corporations could not be criminally prosecuted for offenses requiring mens rea as they could not possess the requisite mens rea. Mens rea is an essential element for majority, if not all, of offenses that would entail imprisonment or other penalty for its violation. Adopting an overly generalized rationale, pre Standard Chartered decision, Indian courts held that corporations could not be prosecuted for offenses requiring a mandatory punishment of imprisonment, as they could not be imprisoned.

In \textit{A. K. Khosla v. S. Venkatesan}\textsuperscript{15}, two corporations were charged with having committed fraud under the IPC. The Magistrate issued process against the corporations. The Court in this case pointed out that there were two pre-requisites for the prosecution of corporate bodies, the first being that of mens rea and the other being the ability to impose the mandatory sentence of imprisonment.


\textsuperscript{15} A. K. Khosla v. S. Venkatesan (1992) Cr.L.J. 1448
A corporate body could not be said to have the necessary mens rea, nor can it be sentenced to imprisonment as it has no physical body.

In Kalpanath Rai v State (Through CBI)\textsuperscript{16}, a company accused and arraigned under the Terrorists and Disruptive Activities Prevention (TADA) Act, was alleged to have harbored terrorists. The trial court convicted the company of the offense punishable under section 3(4) of the TADA Act. On appeal, the Indian Supreme Court referred to the definition of the word “harbor” as provided in Section 52A of the IPC and pointed out that there was nothing in TADA, either express or implied, to indicate that the mens rea element had been excluded from the offense under Section 3(4) of TADA Act. The Indian Supreme Court referred to its earlier decisions in State of Maharashtra v. Mayer Hans George\textsuperscript{17} and Nathulal v. State of M.P\textsuperscript{18} and observed that there was a plethora of decisions by Indian courts which had settled the legal proposition that unless the statute clearly excludes mens rea in the commission of an offense, the same must be treated as an essential ingredient of the act in order for the act to be punishable with imprisonment and/or fine. There is uncertainty over whether a company can be convicted for an offence where the punishment prescribed by the statute is imprisonment and fine. This controversy was first addressed in MV Javali v. Mahajan Borewell & Co and Ors\textsuperscript{19}.

where the Supreme Court held that mandatory sentence of imprisonment and fine is to be imposed where it can be imposed, but where it cannot be imposed, namely on a company then fine will be the only punishment.

In Zee Tele films Ltd. v. Sahara India Co. Corp. Ltd.,\textsuperscript{20} the court dismissed a complaint filed against Zee under Section 500 of the IPC. The complaint alleged

\textsuperscript{16} Kalpanath Rai v State (Through CBI), (1997) 8 SCC 732

\textsuperscript{17} State of Maharashtra v. Mayer Hans George, A.I.R. 1965 S.C. 722

\textsuperscript{18} Nathulal v. State of M.P., A.I.R. 1966 S.C. 43

\textsuperscript{19} MV Javali v. Mahajan Borewell & Co and Ors.,AIR 1997 SC 3964

\textsuperscript{20} Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd., (2001) 3 Recent Criminal Reports 292
that Zee had telecasted a program based on falsehood and thereby defamed Sahara India. The court held that mens rea was one of the essential elements of the offense of criminal defamation and that a company could not have the requisite mens rea. In another case, Motorola Inc. v. Union of India\textsuperscript{21}, the Bombay High Court quashed a proceeding against a corporation for alleged cheating, as it came to the conclusion that it was impossible for a corporation to form the requisite mens rea, which was the essential ingredient of the offense. Thus, the corporation could not be prosecuted under section 420 of the IPC.

It is clear from the above stated cases that Indian court never felt about inclusion of company on certain criminal liability. But what if a corporation is accused of violating a statute that mandates imprisonment for its violation \textit{In The Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles}\textsuperscript{22}, a private company was prosecuted for violation of certain sections under the Income Tax Act ("ITA"). Sections 276-C and 277 of the ITA provided for a sentence of imprisonment \textit{and} a fine in the event of a violation. The Indian Supreme Court held that the respondent company could not be prosecuted for offenses under certain sections of the Income Tax Act because each of these sections required the imposition of a \textit{mandatory} term of imprisonment coupled with a fine. The sections in question left the court unable to impose only a fine. Indulging in a strict and literal analysis, the Court held that a corporation did not have a physical body to imprison and therefore could not be sentenced to imprisonment. The Court also noted that when interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction that exempts an accused from penalty rather than the one that imposes the penalty.

\textsuperscript{21} Motorola Inc. v. Union of India, (2004) Cri.L.J. 1576

\textsuperscript{22} The Assistant Commissioner, Assessment-II, Bangalore & Ors. \textit{v. Velliappa Textiles}, (2004) 1 Comp. L.J. 21
5.7.3.2. Standard Chartered Bank and Ors. v. Directorate of Enforcement (2005) 4 SCC 530

This is the landmark case in which the apex court overruled the all other laid down principles. In this case, Standard Chartered Bank was being prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act, 1973. Ultimately, the Supreme Court held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment required under the respective statute.

The Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate. The Court looked into the interpretation rule that that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of23

5.7.3.3. Corporate Criminal Liability: Post-Standard Chartered Bank Case

There is no immunity to companies from prosecution merely because the prosecution is in respect of offences for which punishment prescribed is mandatory imprisonment. In Iridium India Telecom Ltd. v. Motorola Incorporated and Ors24, the apex court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business


24 Iridium India Telecom Ltd. v. Motorola Incorporated and Ors, AIR 2011 SC 20
of the corporation by a person or body of persons in control of its affairs and relied on the ratio in Standard Chartered Bank Case. In Iridium, the Supreme Court held:

“The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.”

The apex court in this case held that corporations can no longer claim immunity from criminal prosecution on the grounds that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The notion that a corporation cannot be held liable for the commission of a crime had been rejected by adopting the doctrine of attribution and imputation.

In another judgment in July 2011 of CBI v. M/s Blue-Sky Tie-up Ltd and Ors., the apex court reiterated the position of law held that companies are liable to be prosecuted for criminal offences and fines may be imposed on the companies.

This case appeal arose from criminal applications quashed by the Calcutta High Court. The Appellant filed criminal applications against the Respondents for committing criminal offences under the provisions of the Indian Penal Code and under Section 13(2) read with 13(1)(c) and (d) of the Prevention of Corruption Act, 1988. Pursuant to that, the Respondents filed applications under

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25 Standard Chartered Bank and Ors. v. Directorate of Enforcement (2005) 4 SCC 530

26 Iridium India Telecom Ltd. v. Motorola Incorporated and Ors, AIR 2011 SC 20 at 38


28 CBI v. M/s Blue-Sky Tie-up Ltd and Ors, Crl. Appeal No(s). 950 of 2004
Section 482 of the Criminal Procedure Code for quashing of the said proceedings.

The Calcutta HC quashed the proceedings against the Respondent No. 1 on the false premise that the company being a body corporate cannot be prosecuted. The Supreme Court relying on the Standard Chartered Bank Case has held that offences committed by the Respondent No. 1 being grave in nature, fines may be imposed upon them and set aside the quashing of the proceedings.

5.7.3.4. Can Criminal Liability of Corporation be determined through Imprisonment

It is always a debatable issue and almost agreeable that Corporation cannot be sentenced for imprisonment. Imprisonment, transportation, banishment, solitude, compelled labour are not equally disagreeable to all person under the penal code. It totally depends upon the circumstances of the person for the imposition of punishment. But, in case of corporation, Imprisonment cannot be recognised even for serious offences mentioned under the IPC. Since, there is no explicit provision relating to it, Hence the apex court in various cases have held that it is better to impose fine upon the corporation even in the cases where there is a punishment for imprisonment. The imposition of fines may be made in four different ways as provided in the IPC. It is the sole punishment for certain offences and the limit of maximum fine has been laid down; in certain cases it is an alternative punishment but the amount is limited; in certain offences it is imperative to impose fine in addition to some other punishment and in some it is obligatory to impose fine but no pecuniary limit is laid down29

However, Section 357, CrPC, empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part,

in its discretion, inter alia, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence\textsuperscript{30}

The argument that a corporation has no soul to damn and no body to imprison\textsuperscript{31} cuts both ways. Critics use it to argue that there is no reason to prosecute a corporation. Supporters of corporate criminal liability might turn the argument around and ask what’s the big deal, since the corporation can’t go to jail\textsuperscript{32} Corporate liability may appear incompatible with the aim of deterrence because a corporation is a fictional legal entity and thus cannot itself be “deterred.” In reality, the law aims to deter the unlawful acts or omissions of a corporation’s agents. To defend corporate liability in deterrence terms, one

\textsuperscript{30} Sub-section (1) of the section reads: When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied

a. in defraying the expenses properly incurred in the prosecution;

b. in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

c. when any person is convicted of any offence for having caused death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death; when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.


(183)
must show that it deters corporate managers or employees better than does direct individual liability\textsuperscript{33}\n\nThe legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41\textsuperscript{st} Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines:

\textit{“In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only.”}

As per the jurisprudence evolved till then, under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of ‘person’ in the Indian Penal Code includes ‘company’. It is also worthwhile to mention that our Parliament has also understood this problem and proposed to amend the IPC in this regard by including fine as an alternate to imprisonment where corporations are involved in 1972\textsuperscript{34}. However, the Bill was not passed but lapsed. Such a fundamental change in the criminal jurisprudence is a legislative function and hence the Parliament should perform it as soon as possible by also considering the following arguments.

\begin{footnotesize}
\textsuperscript{34} The proposed Indian Penal Code (Amendment) Bill, 1972, Clause 72(a) reads as hereunder:

“Clause 72(a)(1) – In every case in which the offences is punishable with imprisonment and fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. (2) – In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. Explanation: – For the purpose of this section, ‘company’ means any body corporate and includes a firm or other association of individuals.”
\end{footnotesize}
Till now, the Courts in India have been able to impose only fine as a form of punishment because of statutory inadequacy and lack of new forms of punishments which could be imposed upon corporates. But the recent judgments in India make it clear that corporations are liable to be prosecuted for offences under Indian Penal Code. With this, India is now in the same platform with other jurisdictions such as the US and the UK when it comes to law in relation to criminal liability on corporation.

5.8 Finding

It must be stated that environmental degradation resulting from industrial pollution in recent years has become a positive danger to social security. Legal provisions are therefore incorporated in the Indian Penal Code\textsuperscript{35}, to punish industrial and business organizations which create danger to public life by polluting water\textsuperscript{36}, and District Magistrate can initiate proceedings against them under Section 133 of the code of Criminal Procedure, 1973.

Section 16 of Environment (Protection) Act, 1986 and Clause 2 of Section 47 of Water (Prevention and Control Pollution) Act, 1974 also explicitly lays down provision for the offences by companies. It states companies can be prosecuted under certain circumstances and thus, reflect the concept of vicarious criminal liability.

Although considerable debate surrounds society’s increasing reliance on criminal liability to regulate corporate conduct, few have questioned in depth

\textsuperscript{35} Indian Penal Code, 1860 §277. Fouling water of public spring or reservoir: Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

\textsuperscript{36} Water Pollution (Amendment) Act, 1978
the fundamental basis for imposing criminal liability on corporations. Accordingly, Courts is based on the maxim *lex non cogit ad impossibilia*, which tells us that law does not contemplate something which cannot be done. The statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines.

It is apparent from the current action that some serious measures must be taken in relation to the criminal liability of corporation of India so that it could be stopped from the multiple dimensions of the court’s decision.

Corporate corruption scandals, which have brought into sharp focus the role of India’s corporate sector in the problem of corruption in India. In this context, to fix liability for corruption and bribery offences, it becomes relevant to examine criminal liability, not just of individual directors or agents of a corporation, but also of the company itself.

Recently, the Supreme Court of India, through a landmark judgment (*Iridium India Telecom Ltd v Motorola Incorporated & ors [2010]*) has added a new dimension to the jurisprudence relating to corporate criminal liability in India with respect to offences requiring *mens rea* or criminal intent, holding that despite being a legal fiction, a company can be said to possess *mens rea* required to commit a crime.

5.9 Development of Law Relating To Corporate Criminal liability In India

As a general rule, common law did not impose criminal liability on corporations. This was based on the belief that a corporation lacked moral blameworthiness or the requisite *mens rea*, which is an essential element of a

crime. Further, the thought that was prevalent was that a corporate has ‘no soul to damn, and no body to kick’. Exceptions were restricted to holding a company liable to provide compensation to third parties for wrongful acts of its employees, but did not extend to liability for crimes. It was from the early 20th century onwards that courts began to recognise the criminal liability of corporations.

Until recently, courts in India were hesitant to attribute criminal liability to a company for an offence that required a criminal intent. Further, courts were of the opinion that they could not prosecute companies for offences that entailed a mandatory sentence of imprisonment.

The Supreme Court of India, in Standard Chartered Bank & ors v Directorate of Enforcement & ors [2005], decided the question of whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment. It had previously been held (by the assistant commissioner in Bangalore & ors v Velliappa Textiles Ltd [2004]) that when the punishment to be imposed under a statute is ‘imprisonment and fine’, the statute would become unworkable in the case of a juristic, since the court is bound to award a sentence of imprisonment, as well as a fine, and that there is no discretion on the part of the court to impose only a fine. Overruling this view, it was held that as far as a juristic person was concerned, a discretion could be read into the section relating to punishment and a sentence of fine could always be imposed, while the sentence of imprisonment could be ignored as it is impossible to be carried out in respect of a company. The court reasoned that, if the contrary view is accepted, no company or corporate body could be prosecuted for the graver offences, whereas they could be prosecuted for minor offences as the sentence prescribed therein is a custodial sentence or fine. Thus the legal position emerged that there was no immunity to the companies from prosecution merely because the prosecution was in respect of offences for which the punishment prescribed is mandatory imprisonment.
The challenging question of whether a corporation could be attributed with requisite *mens rea* to prove guilt was decided more recently by the Supreme Court of India in *Iridium*. In *Iridium* a company was charged with offences of cheating and criminal conspiracy on the basis of alleged false representations made by the company. Rejecting the argument that a company cannot possess the requisite *mens rea* to commit a crime, the court held that a corporation is virtually in the same position as any individual and may be convicted of common law, as well as statutory offences, including those requiring *mens rea*.

The court observed that the criminal intent of the ‘alter ego’ of the company or corporate body, i.e. the person or group of people that guide the business of the company, would be imputed to the corporation. Therefore, it is now an established legal position in India that a corporation can be convicted of offences that require possession of a criminal intent, as that company or corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is ‘imprisonment and fine’.

### 5.9.1 Liability Of Company Under The Indian Prevention Of Corruption Act (POCA)1988

A company may be held liable for corruption offences in India under POCA 1988, which primarily addresses corruption in the public sector, but also brings within its ambit, private citizens who abet the corrupt actions or omissions of public servants in respect of an official act.

Under POCA 1988, an anti-bribery offence includes the following acts, committed directly or indirectly:

1. an act of a public servant of taking illegal gratification in respect of an official act;
2. an act of any individual taking illegal gratification to influence a public servant in respect of an official act; and
3. an act of abetment of any of the above acts, which may include the act of giving a bribe to a public servant.
The provisions of POCA 1988 apply not only to all citizens living in India, but also to all Indian citizens living outside India.\(^1\) While POCA 1988 does not specifically create a corporate offence relating to bribery, a company being a ‘person’ could be held liable under the provisions of POCA 1988.\(^2\) Courts may prosecute a company along with its directors or agents for offering bribe to a public servant under the offence of criminal conspiracy under the Indian Penal Code 1890.\(^3\) In respect of these offences, a company would be liable for a fine, the maximum limit for which has not been prescribed.

Serious Fraud Investigation Office (SFIO)

In addition to the machinery existing under POCA 1988, the Indian government has set up the SFIO under the Department of Company Affairs, Ministry of Finance to professionally investigate white-collar crimes.\(^4\) The SFIO was set up in the backdrop of stock market scams, failure of non-financial banking companies, phenomena of vanishing companies and plantation companies. This organisation takes up investigation of the cases of alleged frauds referred to it by the central government under s235 and s237 of the Companies Act 1956.

The criteria for referring the cases to the SFIO by the central government are:

complexity and having inter-departmental and multidisciplinary ramifications;

substantial involvement of public interest to be judged by size, either in terms of monetary misappropriation or in terms of persons affected; and

the possibility of investigation leading to or contributing towards a clear improvement in systems, laws or procedures.

On the receipt of a report after the investigation, the government can, in appropriate cases, bring a petition to wind up the company. The government may also bring civil proceedings in the name of the company for recovery of damages against delinquent directors, as well as for recovery of property that
has been misapplied or wrongfully retained. Criminal proceedings may be instituted against the officers of the company.

Theoretically, under Indian law a company that is found to have committed offences relating to corruption and bribery could face potentially unlimited fines and may even be wound up in circumstances where the court holds that it is just and equitable to do so.

5.9.2 Liability Of An Indian Company Under Foreign Anti-Corruption Laws

As Indian companies set to expand globally, with increasing cross-border transactions and foreign investments, there is a need for them to be aware of the extraterritorial reach of foreign anti-corruption legislations, and to implement adequate compliance measures. The UK’s Bribery Act 2010 (the 2010 Act), which is due to be brought into force this year, is being hailed as one of the ‘toughest anti-corruption laws’ in the world. In the US the Foreign Corrupt Practices Act (FCPA) 1977 (as amended in 1988) deals with anti-corruption. Both legislations have a broad reach extending to companies and persons outside of the territorial jurisdictions of their respective countries, and have significant implications for Indian companies.

The 2010 Act penalises bribery of private persons, public officials of the UK, as well as of foreign officials. All individuals who are nationals of the UK or are ordinarily resident in UK are liable to be penalised under the 2010 Act for anti-bribery offences. Further, the 2010 Act also applies to organisations that are resident in the UK or conduct some part of their business in UK. This would extend the application of the 2010 Act to any company that has a subsidiary or affiliate in the UK. Therefore, for example, if an agent of an Indian company, with a subsidiary in the UK, engages in bribery in any part of the world, it would render the company liable to prosecution in the UK.
Under the 2010 Act, a new corporate offence is created and strict liability is imposed for failure to prevent bribery by corporate entity. Under this offence companies will be liable if anyone acting under its authority commits an offence of bribery. Such persons can include employees, consultants, agents, subsidiaries and joint venture partners. The only defence available to a company would be that it has put ‘adequate procedures’ in place to prevent offences of bribery and failure to demonstrate such compliance could expose them to potentially unlimited fines, as well as imprisonment of their directors. Further, a person’s acts or omissions done or made outside the UK would form part of such an offence if done or made in the UK and the person has a ‘close connection’ with the UK (s12 of the 2010 Act).

FCPA 1977 prohibits corrupt payments made to a ‘foreign official’, a foreign political party or party official, or any candidate for a foreign political office. The purpose of the bribe should be to influence or induce the official, so as to assist the person in obtaining, retaining business or directing business to any person.

Under FCPA 1977 the following persons or entities can be penalised for an offence of bribery:

1. **Issuers**: includes US or foreign corporations that have a class of securities registered, or that are required to file reports with the Securities and Exchange Commission.

2. **Domestic concerns**: includes US citizens, nationals and residents, and companies and organisations managed by US laws or having a place of business in the US.

3. **Any natural person carrying out an offence of bribery while in the US.**

Therefore, an Indian company that is listed on the New York Stock Exchange could be held liable for violation of FCPA 1977 committed in another country.
Further, a foreign company or person is subject to FCPA 1977 if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the US (whether or not they make use of US mail or other means or instrumentalities of interstate commerce). Even a minor action, such as sending an e-mail to a person in the US, will suffice to bring a person under the ambit of FCPA 1977.

Penalties under the 2010 Act extend to up to ten years’ imprisonment and/or fine for individuals and potentially unlimited fines for corporates. Penalties under FCPA 1977 extend up to:
- $2m for firms;
- fines of up to $100,000 and imprisonment of up to five years for officers, directors and stockholders; and fines of up to $100,000 for employees and agents.

5.9.3 Liability under the Prevention of Food Adulteration Act,

The object and purpose of the POFAA (Act) are to eliminate the danger to human life from the sale of unwholesome articles of food. It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief— an evil that attempts to poison, for monetary gains, the very sources of sustenance of life and the well being of the community. The evil of adulteration of food and its effects on the health of the community are assuming alarming proportions. The offence of adulteration is a socio-economic offence. The construction appropriate to social defence legislation is, therefore, one, which would suppress the mischief aimed at by the legislation and advance the remedy. The offences under the Act are really acts prohibited by the police powers of the State in the interests of public health and well-being. The prohibition is backed by the sanction of a penalty. Intention or mental state is irrelevant.
In State of Orissa v K.R. Rao the Supreme Court defined the scope of the prohibition against selling of adulterated food. The court observed:

“In the absence of any provision, express or necessarily implied from the context, the courts would not be justified in holding that the prohibition was only to apply to the owner of the shop and not to the agent of the owner who sells adulterated food. The Act is a welfare legislation to prevent health hazards by consuming adulterated food. The mens rea is not an essential ingredient. It is a social evil and the Act prohibits commission of the offence under the Act. The essential ingredient is sold to the purchaser by the vendor. It is not material to establish the capacity of the person vis-à-vis the owner of the shop to prove his authority to sell the adulterated food exposed for sale in the shop. It is enough for the prosecution to establish that the person who sold the adulterated article of food has sold it to the purchaser”.

In Delhi Administration v Manohar Lal the Supreme Court held that the High Court, in exercise of its revisional jurisdiction, has no power to itself decide to commute the sentence imposed under sections 16/7 of the Act and direct the convict to deposit in trial court a specified sum as fine and inform the government of such deposit for formalizing the matter by passing appropriate order u/s 433(d) of Cr.P.C.

In State of H.P v Narendra Kumar the Supreme Court observed: “The occurrence of adulteration took place nearly two decades back, and the courts below acquitted the accused, though erroneously. Therefore, keeping in view the nature of violation and the peculiar facts and circumstances of the case while sentencing the accused to undergo 6 months RI and fine of Rs 1000, we make it clear that if the accused moves the appropriate government to commute the sentence of imprisonment the same may be considered subject to such conditions or terms as the government may choose to impose. For a period of 3 months the accused need not surrender to undergo sentence. During this period it shall be open to him to move the appropriate government for commutation. The fate
of the order of commutation, if any, shall be operative. If no order in the matter of commutation is passed by the appropriate government, the accused shall surrender to serve the remainder of the sentence”.

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