Chapter-3

Historical Development of Corporate Criminal Liability

3.1 Introduction

A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity, nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nation. Large-scale corporation are the defining force on the globe, they are everywhere, in almost every aspect of our lives. Parallel to this subtle and sometimes not so subtle dominance, corporations have become dangerous criminals as well. As a general rule only human beings can commit offence the exception is that corporate bodies also can be for corporate crime, crimes elsepite absence of unlawful conduct and men’s rea. A corporate body is a legal person, with, constitutional rights just like natural persons. It is a separate person distinct from its members.

Now the question is whether a corporation as an artificial person is capable of committing a crime and is criminally liable by the law or not. The traditional view was that a corporation could not be guilty of a crime, because criminal guilt required intent and a corporation not having a mind could form no intent, addition, a corporation had no body that could be imprisoned. Courts are especially likely to impose criminal liability on a corporation when the criminal act is requested, authorized, or performed by the board of directors, an officer or person having responsibility for formulating company policy or high administrator having supervisory over the subject matter of the offence and acting within the scope of his employment.
3.2. Object of Criminal Law

“Whatsoever views one holds about the penal laws, no one will question its importance to society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. Nowhere in the entire legal field is more at stake for the community or the individual”

Criminal law is absolutely essential in a society for maintaining law and order. Criminal law has to be strong enough both in its contents as well as in its implementation, without being oppressive. This quality is needed in all branches of law but too crucial in criminal law since the stakes involved exceptionally high in terms of social injuries of various kinds. When the rule of law collapses, it is replaced by Matsyanyaya which means the law of jungle. Matsyanyaya means a state of affairs where the big fish devours the smaller one.

The primary purpose or function of the criminal law is to maintain security and stability. Bentham defines security, the paramount end of law, is terms of expectation. “Without law, there is no security” and without security the values of substances abundance and equality cannot be perused through law. The criminal law however, differs from other branches of law in that a conviction involves censures and it employs stigmatic punishment against those who violates its commands. It attempts

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to reflect those fundamental social values expressing the way we live and then uses this “big stick” of punishment as a means of reinforcing those values and securing compliance therewith. In this way it seeks to protect not only the individual, but also the very structure and fabric of society. Existence and function of society ultimately rest on the efficacy of criminal norm.

The purpose of criminal law is to express a formal social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it. On these premises the following functions of criminal law is deduced-

1. The criminal law must identify which conduct should be brought within its ambit. On what basis this decision is to be made.

2. Criminal law must on the basis of seriousness of offences with fair reasons classify and grade the offences.

3. A critical function of criminal law is to reduce crimes which ultimately based on the degree of actual enforcement of the criminal law; a law that was never enforced would soon become dead letter. Efficiency of criminal law is most vital to the society.

4. The final function of Criminal law is that of determining with what proportion punishment is appropriate. In this regard there are conflicting theories of punishment.

### 3.2.1 Essential Features of Crime

*Nulla poena sine lege* doctrine says that “no person shall be punished except in pursuance of a statue which fixes a penalty for criminal conduct.” This doctrine is

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further qualified by another common law doctrine that “*Et actus non facit reum nisi mens sit rea.*”\(^7\) It signifies that there can be no crime without a guilty mind. That is to say, in order to make a person criminally accountable for an act, it must be proved that certain event or state of affairs, which is forbidden by law, has been caused by his conduct, and that was accompanied by a legality blameworthy attitude of mind.\(^8\)

3.2.1.1 *Actus Reus.*

The word ‘*actus*’ connotes a ‘deed’, a physical result of human conduct. The word ‘*reus*’ means ‘forbidden by law’. The word ‘*actus reus*’ may, therefore be defined as “such result of human conduct as the law seeks to prevent”. An act is defined as “an event subject to the control of the will”. In other words, an act means something voluntarily done by a human being. Broadly speaking, human action includes acts of commission as well as acts of omission.\(^9\)

3.2.1.2. *Mens Rea.*

*Mens rea* is a technical term, generally taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion negativeres the contention of crimes. It means there must be a mind at fault to constitute a crime. In the common parlance, intention means purpose or desire to bring about a contemplated result or foresight that certain consequences will follow from the conduct of the person.

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\(^7\) Kenny’s, *Outline of Criminal Law*, J.W. Cecil Turner, (Ed.), (19th Ed.), (Bombay: Cambridge University Press, 1966), p.13. In this famous phrase there is a clear distinction between a man’s ‘*deed*’ (actus) and his mental process (mens) at the time when he was engaged in the activity which resulted in the deed.


\(^9\) *Id* at .33.
3.2.2. Theories of Punishments

Different authors have offered various theories of punishment but those can be broadly classified as utilitarian, non-utilitarian, and mixed theories that contain utilitarian, and non-utilitarian, elements. What distinguishes these theories is their focus and goals: utilitarian, theories are forward looking concerned with the future consequence of punishment; non-utilitarian theories are backward looking, interested in the past acts and mental status; and mixed theories are both forward and backward looking. Punishment awarded to reduce the crime and used as means to an end is the claim of utility theory. George Hegel and Immanuel Kant criticized and rejected the utility theory, presented the contrast retributive theory of punishment, which is of non-Consequentiality on the premises that punishment, is not means but end in it. This tug of war between the George Hegel and Immanuel Kant on one side and Jeremy Bentham on the other side is carried even by 20\textsuperscript{th} century scholars. In 1949, Lord Denning appearing before the Royal commission on ‘Capital punishment’ expressed the following view:\footnote{Friedman, W., Law in a Changing Society, (2\textsuperscript{nd} Ed), (Delhi; Universal Law Publishing Co. Pvt. Ltd, 2008), p.506.}

“The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizen for them. It is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else … The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all namely the death penalty.”

Well known contemporary author in criminal law Professor Glanville Williams of Cambridge University, applauds the utilitarian opinion that punishment is preventive or deterrent, disapproves the retributive theory punishment.\textsuperscript{12} Both agree punishment is essential but disagree in respect of its purpose. Utility doctrine has further classified punishment as Preventive (Restraint), satisfactory (compensatory), reformative (Therapeutic or corrective), and deterrent.\textsuperscript{13}

3.3. Concept of Corporate Criminal Liability

Criminal liability is attached to only these acts in which there is violation of criminal Law basic rule of criminal liability revolves around the basic Latin maxim “\textit{acts non facet ream, nisi men sit rea.}” Corporate crime refers criminal practices by individuals that have the legal authority to speak for a corporation or company these can include Presidents, Managers, Directors, and Chairman, Sales people, Agents or any on within a company that has authority to act on behalf of the firm corporations can be held criminally responsible for a wide variety of crimes like-

1) Contempt in disobeying decrees and other court orders.

2) Conspiracy

3) Maintaining public nuisance

4) Violation of consumer protection Laws.

5) Selling, exhibiting obscene matter.

6) Frauds

7) Extortions,

8) Antitrust violations, etc.

\textsuperscript{12} Jeremy Bentham, \textit{op. cit.}, p. 122
\textsuperscript{13} \textit{Id.}
Most of these crimes are economically motivated where the offence is commercial and motivated by a desire to enhance profits.

**3.3.1. Corporate Criminal Liability under Roman Law Principles**

Under Roman law the whole community was sometimes held liable for the wrong actions of one of its members, even though they were innocent regarding the commissions of the unlawful act. The primitive family was a corporation represented by the paterfamilias in Roman law. He held processions of the members in trust for the family, He was able to sue or be sued. It is not clear whether Roman law up to the time of Justinian conceived the corporation as juristic person as we know it today. The Institute by Gaius divided the law into law of persons, things and actions. Gaius only refers to res universities, i.e. corporate property in his digests he uses the word corporations and nit legal persons. Romans invented the idea a corporations, where two or more persons combined their resources in order to achieve desired result they developed the concept of a separate legal entity, when acknowledging the existence of public and private corporations. The corporation could sue or be sued with no liability attaching to its Members.

**3.3.2. Corporate Criminal Liability under Common Law Principles**

The common law accepted that the corporate body, just like a natural person is criminally responsible for a contravention of law committed by its agent or servant while acting within the scope of his agency or course of employment. This was not applicable where the *actus reus* could not be performed by a legal person, where the legislature restricted the commission of an offence only to natural persons and where penalty provided could be impersonal. It is fictitious in nature and cannot be incarcerated. Where knowledge is an element of the offence the knowledge of agent
was imputed to the master or the employer even where he neither willfully permitted the act nor authorized it. Initially vicarious liability in criminal law was based on the contravention of a statutory provision.

The common law recognized the corporation as an artificial person with legal personality the wider meaning of the word ‘person’ is recognized by Indian penal code. Section 11 of Indian Penal Code define person as “The word person includes any company or Association or body of persons, whether Incorporated or not.” Although our corporate criminal liability was similar to vicarious liability there were certain exceptions where-

i. The conduct demands that a natural person should act—e.g. rape and bigamy and offence which can only be committed with a human body.

ii. The legislature or statute provided that only natural persons’ can commit the offence.

iii. The penal provisions for the offence committed cannot be applied to a juristic person, i.e. imprisonment or death penalty. Where it is not prosecute the corporate body for the offence, the individual who committed the offence must be charged

In addition to the instance above where the corporate body could not be liable, certain offence could not be committed by the corporate body, e.g. offence committed with a wicked intention, treason, murder, assault, similar offence. Under the common law a juristic person could not be held liable for an offence requiring mens rea, because the corporation has no mind of its own.

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14 See Section 11 of Indian Penal Code 1860
3.4. Theories of Corporate Criminal Liability

The endorsement of crimes of corporations has largely been a 20th century judicial development, influenced by the sweeping expansion15 of common law principles. The majority of theories of corporate criminal liability are typical of common law development; they have been constructed on a case-by-case basis. Despite their importance, these theories have proved to be infective, for their lack of strong theoretical basis and their individualistic roots.

Three main theories of corporate blameworthiness derive from the human actus reus and mens rea. Namely;

1) Agency theory or vicarious liability.
2) Identification theory.
3) Aggregation theory.

These three theories seek to equate the corporate body’s culpability with that of an individual. They are derivative forms of liability.

3.4.1. Agency Theory or Vicarious Liability

In legal theory, vicarious liability is really distinguishable from personal liability. In the first place, the idea that a person is, generally speaking, liable only for acts or omissions—for things which he has actually done or omitted to do.16 Vicarious liability is accurately described by its name; that is, in other words a form of liability imposed on one party for the tortuous conduct of another.17 The expression “vicarious liability” signifies the liability which A may incur to C for damage caused

17 Id at .6.
to C by the negligence or other tort of B. it is not necessary that A shall have participated in any way in the commission of the tort not that a duty owed in law by A to C shall have broken.\textsuperscript{18} What is required is that A should stand in particular relationship and that B’s tort should be referable in certain manner to that relationship. Vicarious liability in the law of tort may be defined as liability imposed by the law upon person as a result of (1) a tortious act or omission by another, (2) some relationship between the actual tort-feasor and the defendant whom it is sought to make liable, and (3) some connection between tortious act or omission and that relationship.\textsuperscript{19} In the modern law there are three and only three relationships which satisfy the second requirement of vicarious liability, namely that of master and servant, that of principal and agent, and that of employer and independent contractor.\textsuperscript{20} The master’s tort theory really originated in \textit{Twine v. Bean’s Express Ltd}\textsuperscript{21} and further it was supported in \textit{Brown v Morgan}\textsuperscript{22} in common law. The vicarious theory is justified on different grounds.\textsuperscript{23} The more important are being the master has control over the activities of its servant; master has obtained the benefit from the savant’s work and therefore should also bear the burden caused by his servant’s torts.\textsuperscript{24} The English common law vicarious liability was the law of tort, and

\textsuperscript{19} \textit{Latil Sarajmal Kanodia v. Office Tiger Data Base Systems India (P) Ltd}, (2006) 129 Comp Cas, 192, Mad.
\textsuperscript{20} Id.
\textsuperscript{21} \textit{Twine v Bean’s Express Ltd}, [1946] 1 All E.R. 202, CA, in this case, the plaintiff had been given a lift in a van driven by the defendant’s servant. The driver was forbidden to give lifts, and the plaintiff was aware of this fact. It was argued for the defendants that they were not liable because they themselves (as opposed to their driver) owed no duty of care to the plaintiff.
\textsuperscript{22} \textit{Brown v Morgan}, [1953] 1 Q.B 597, C.A. In this case, the defendant was held liable to the plaintiff for the negligence of her own husband who was the defendant’s servant. Since the wife could not herself have sued the husband at the time, the decision could be taken as support for the view that a master could be vicariously liable even where his servant has not committed any tort.
\textsuperscript{23} Baty analyzed nine different grounds which had, at the one time or another, been put forward in justification of vicarious liability. Nine grounds are control, benefit from servant’s work, revenge, care and choice, identification, evidence indulgence, danger, and satisfaction. See, Atiyah.P.S., \textit{Vicarious Liability in the Law of Torts},( Butterworth &Co Publication Ltd, 1967),p.15.
\textsuperscript{24} Atiyah.P.S., \textit{op. cit.}, pp,.15-16.
not applicable in criminal law.\textsuperscript{25} The two exceptions existed, namely common law cases of public nuisance and criminal libel where the employer could be held criminally liable for the acts of his employee.\textsuperscript{26} The employer was liable even if he was not aware of the actions of the latter.

This theory is gradually extended to corporation’s activity in criminal law. In America the federal courts corporate criminal liability is founded chiefly on a vicarious liability approach. The landmark decision respecting the American theoretical basis for corporate criminal liability is \textit{New York Central and Hudson River Railroad Company v. United States} a 1909 decision of the United States Supreme Court.\textsuperscript{27} Mr. Justice Day for the court held:

\textit{“We see no objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates or transportation, and whose knowledge and purposes may be well be attributed to the corporation for which the agents act. While the law should regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut it eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and to give them immunity from all punishments because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”}

\textsuperscript{26} Id at 172.
\textsuperscript{27} \textit{New York Central and Hudson River Railroad Company v. United States}, 212 U.S. 481 (1909).
New York Central & Hudson River case was the watershed for imputing criminal liability to the corporation. What remained to be achieved, however, was the precise application of the theory. This theory encompasses a simple and logical method of attribution liability to a corporate offender, if corporation do not have intention, someone within the corporations must have it and the intention of this individual as part of the corporation is the intention of the corporation itself. Courts in the United States, where the theory is widely used, have developed a three part test to determine whether a corporation will be held vicariously liable for the acts of its employees.

3.4.1.1. Scope of Employment

Liability will only be found for corporation however if firstly the employee is acting within the scope and nature of their employment, and secondly the acts are designed to benefit the company, and the court must impute the intent of the individuals to the company.\(^{28}\) What is the scope and nature of employment will vary, for the purpose of determining corporate criminal liability an employee acts within the scope of employment if the employee acts with either actual or apparent authority.\(^{29}\) Moreover, if the above said two elements are present, a corporation can be held liable even where the employee’s conduct contravened corporate policy or violated express instructions.\(^{30}\) Some courts have been willing to go even further, extending liability to situations when an employee acted beyond the scope of either actual or apparent authority and such actions went unchecked by officers or directors, giving the


\(^{29}\) Kathleen Brickley, ‘Corporate Criminal Liability’, (2nd Ed.), (New York: Oxford University Press, 1991),p.277. (basing this rationale on the theory that a corporation can only acts through its agent, thus, the corporation should not be able to befit while disclaiming any responsibility).

\(^{30}\) United States v. Twentieth Century Fox Film Corp., 882 F. 2d 656, (2nd Cir. 1989). Further also see, United States v Beusch, 596 F. 2d 871.
appearance of official approval. The practical result is that the government needs only to prove that an employee’s illegal conduct occurred while performing work-related activities to attach criminal liability to the corporation. It was also held that there is no requirement a person be a ‘central figure’ in the company if the court has sufficient basis for finding the individual has some relationship to the company which allowing for obtaining the requisite knowledge.

3.4.1.2. Benefiting the Corporation:

The second element of corporate criminal liability according to the theory of vicarious liability is that the act benefits the company. The benefit need not be real, yet potential. As Hall points out, “for this requirement, the corporation need not actually receive a benefit; the employee’s mere intention to bestow a benefit suffices. The prosecution must also show that the employee’s illegal conduct furthered the corporation’s business, i.e., benefited the corporation, in order to equate the employee’s action with that of corporation. Courts have held that the corporation need not actually benefit to satisfy this requirement. Rather, the employee must have only intended to benefit the corporation, although, criminal liability may attach to the corporation even where an employee’s illegal conduct is motivated primarily by self-benefit, when the employee intends, “at least in part,” to confer a benefit on the corporation. Ultimately, a corporation will likely only be insulated “from criminal liability for actions of its agents which (are) iminical to the interest of the corporations

31 Continental Banking Co v United States 281 F. 2d 137 (6th Cir. 1960).
32 United States v. Jocelyn, 206 F. 3d 144, 159 (1st Cir. 2000).
34 Stabbard Oil Co of Tex v. United States, 307 F 2d 120, 128 (5th Cir. 1962).
35 Id.
36 United States v. Gold, 743 F. 2d 800 823 (11th Cir. 1984).
or which may have been undertaken solely to advance the interest of that agent or of a party other than the corporation.  

3.4.1.3. The act imputed to the Corporation:-

It is not necessary that the employee be primarily concerned with benefiting the corporation since many employees act primarily for their own personal gain. Although the corporation did not actually gain from the action or the agent violated a company policy, liability may still be imputed to a corporation.

3.4.1.4. Limitations on Vicarious Liability

Vicarious liability can be limited in three ways, where the offence is not committed in furthering or endeavoring to further the interest of the body corporate, where the employees acts amount to aiding and abetting and where there was an attempt to commit the offence. Where limitation apply, the employer cannot be vicariously liable for the agent’s action, because of imputed knowledge. For example, a licensee was charge for abetting customers in consuming liquor in his licensed premises after hours. It appeared that all proper steps were taken except for her waiter’s omission to collect liquor from customers. The court held she could aid and abet where she knew that customers were committing the offence. The court was not prepared to hold the licensee liable by imputing her waiter’s knowledge to her as the aider or abettor where she was not charged as principal offender. That would have been tantamount to creation of a new principle in criminal law. The license holder was found not guilty and discharged for supplying liquor outside the permitted hours because the sale was concluded by a messenger boy who had no authority to sell. An

38 Coppen v. More, No2 1898 2QB 306.
39 Gardiner v. Akeroyed, 19552 2QB 743.
40 Ferguson v. weaving, [1951] 1KB 814.
41 Adams v. Canfoni, [1929] 1KB 95 DC.
attempt to commit an offence is founded in common law, and there is no vicarious liability for the principle where the agent attempted to commit an offence even if the offence so attempted would create vicarious liability.

3.4.1.5. Criticisms against Vicarious Liability

According to Read and Seago vicarious liability can be both too broad and too narrow. It is too narrow or under-inclusive it can be committed through the unlawful act of natural person.\textsuperscript{42} Where the body corporate is the wrong doer the courts are concerned fault of a natural person and not the corporate fault even where the later fault is clear. On the other hand, it is too broad, because once the individual liability is established, the body corporate is liable whether it has fault or not.\textsuperscript{43}

The result of the board terms of vicarious liability are the body corporate can be liable even if the employee acted against the clear instructions and policies of the body corporate. It occurs frequently where liability of the body corporate is extended to all employees. It is submitted that the corporate body should rather be provided with a defense based on due diligence.\textsuperscript{44}

This means that where the company uses all available reasonable means to avoid crime, it should be exonerated because of its diligence. Vicarious liability treats corporate bodies differently the fault enquiry is not required for corporate bodies while it is required for natural persons In terms of Indian Constitution legal persons have the same rights as natural persons.\textsuperscript{45}

\textsuperscript{42} Mousell Bros Ltd London and North – Western Rly. Co., [1917] 2KB 836.
\textsuperscript{44} Arlen “The potentially perverse effects of corporate criminal law” vol23 (June 1994) Journal of Legal studies 883-896.
\textsuperscript{45} See, Article 300A of the Indian Constitution.
It is argued that imposing vicarious liability on corporate bodies is unfair, because it stigmatizes a company when it is charged with a criminal offence. Vicarious liability also damages the reputation of the body corporate and punishes its shareholders.\textsuperscript{46}

Although in theory, vicarious criminal liability often requires that, the agent internal to benefit the corporation, this rule doesn’t effectively limit the scope of vicarious liability in any significant way. e.g. Corporation, do not commit corporate crime, but their agents commit crimes in order to benefit themselves.

The agent may commit a crime, that incidentally benefits the corporation, but the benefit to corporation is not the agents primary motivation, but purely incidental. The agent commits crime for his or her personal needs within the scope of his employment. A company can be criminally liable even if it was defrauded by its controlling officer if the offence was committed within the scope of his office.\textsuperscript{47}

3.4.2. Identification Theory

The doctrine of identification is the traditional method by which companies are held liable under the principles of the common law. This principle is followed in most countries. The limitations of the agency theory led to the construction of a direct liability theory. This theory was developed as an attempt to overcome the problems of imposing primary, as opposed to vicarious, corporate criminal liability for offences that insisted on proof of criminal fault. Viscount Haldane fashioned a model of primary corporate criminal liability for offences that require \textit{mens rea} that would later be known as the identification theory.\textsuperscript{48}

\begin{itemize}
  \item \textsuperscript{46} Smith and Brian Hogan, \textit{op. cit.}, p. 186.
  \item \textsuperscript{47} Moore \textit{v.} Bressler \textit{Ltd} 1944 2All ER 515 D.C
  \item \textsuperscript{48} Lenard Carrying Co \textit{Ltd.} \textit{v.} Asiatic Petroleum \textit{Ltd.} (1915) AC 705.
\end{itemize}
In the light of Haldane’s judgment; “A corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody, who for some purpose may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation.” The theory of identification is often referred to as the *alter ego* doctrine. This theory recognizes certain higher officer as being the company itself, and the acts of these individuals are regarded as that of the company. In *HL Bolton Co Ltd v. PJ Graham and Sons Ltd*,\(^49\) Lord Denning explained this theory as follows:

“A company may in ways be linked to a human body. It has a brain and nerve centre which controls what it does. It also has hands, which holds the tools and act in accordance with directions from the nerve centre. Some people in the company are mere servants and agents who are nothing more than hands to do work and cannot be said to represent the mind or will of the company. Others are directors and managers who represent the directing mind and 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 law as such.”\(^50\)

From above quoted passage, it follows that those who directing the mind and will of the corporation are the company.\(^51\) These people include directors’ managers and those who have powers that were delegated to them, having full discretion to act independently of the instructions from the management.\(^52\) The application of the identification theory is very similar to vicarious liability. The company’s blameworthiness is deduced from the human state of mind and conduct.

\(^49\) *HL Bolton Co Ltd v. PJ Graham and Sons Ltd*, 1957 1 QB 159.
\(^50\) Lord Denning in *H.L.Bolton (Engineering) Co Ltd v. P J Graham & Sons Ltd*. (1957) 1.Q.B.159 at 172.
\(^51\) Supra note 27.
\(^52\) *Id.*
As the agency theory, and the identification theory relies on an individual to attribute liability to a corporation. However, while the farmer doctrine simply imitates tort principles; the latter adjusts these principles to the reality of corporate misconduct. Further, the identification theory introduced the personification of the corporate body. According to this theory, the solution for the problem of attributing fault to a corporation for offences that require intention was to merge the individual within the corporation itself. Unlike the agency theory, the individual employee is assumed to be acting as the company and not for the company. The theory de-emphasized the need for the development of vicarious liability. The agency theory has now been considered as unjust and lacking in defensible penal rationale.

3.4.2.1. Guilty Mind

The main underlying principle of the identification theory is the detection of the guilt mind, the recognition of the individual who will be identified as the company itself, who will be the company’s very ego, vital organ, or mind. *Tesco Supermarket Ltd. v. Nattrass* is the leading authority in this area.53 Tesco Supermarket was a large chain store which was charged with an offence against the *Trade Descriptions Act 1968*54 by selling goods to consumers at a price different than had been announced. The prosecution concerned the advertisement of soap powder at a reduced price. A shop assistant had mistakenly placed normally priced soap powder on the shelf. The manager had failed to ensure that the powder was available at the advertised price. There was a defense of due diligence could be attributed to the company.55 The

54 Section 20(1) of the *Trade Descriptions Act* 1968 says that where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, any director manager, secretary or other similar officer of the body corporate shall be guilty of that offence.
55 See, Section 24(1) of *Trade Descriptions Act* 1968.
question was whether the manager of the store could be identified with the company via the common law doctrine.

The House of Lords held that the manager was not a person of sufficiently important stature within the corporate structure to be identified as the company for this purpose, and since there had been due diligence at the level of top management, the company could use the defense. The metaphor used by Lord Denning in an earlier case was a reference in this decision. The manager of the store was not considered as the mind of the store. Instead he was regarded as a servant, the hands of the store. In order to give some guidance for the problem of who is to be considered as the corporation itself for the purpose of imputing liability, some standards were articulated in *Tesco Supermarket v. Nattrass*, Lord Reid stated that, normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Viscount Dilhorne explained that in his view “a person who is in actual control of the operations of a company or of part of then and who is not responsible to another person in the company. Lord person underscored this reasoning adding that the constitution of the company concerned should be taken into account in order to indicate if the person is in a position of being identifiable with the company.

Tesco’s criterion is still the most frequently used for determining whose corporate agent can be identified as the embodiment who’s corporation itself. According to these established pattern, the guilty mind the ‘ego’ or ‘brain’ of the company must be a ‘vital’ organ of the company, an individual who is sufficiently senior within the corporate structure to represent, metaphorically, the mind of the company. Generally, the guilty mind can be identified with the board of directors, the

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56 *HL Bolton Co Ltd v. PJ Graham and Sons Ltd*, 1957 1 QB 159.
top officers of the corporation, these who are delegated responsibility and those that have duties of such responsibility that their conduct may fairly be assumed to represent the policy of the corporation.

The array of personnel whose acts can be imputed to the company varies from Jurisdiction to Jurisdiction. Australian courts have shown a marked tendency to apply Tesco principles. Some American states and the American Model Penal Code also accept this approach. In England where the principles were molded the Tosco standard is strictly followed, yet it can be shaped differently in every situation. Canadian courts adopted a broader view of the Tesco principles and stretched the set of personal that can be identified with the company itself. The wider Canadian position can be contrasted with the restricted English application of the doctrine of identification, established in Tesco. In Canadian Dredge & Dock case the distinctive posture is clearly defended in a comparative ground “The application of identification rule in Tesco Supermarket may not accord with the realities of life in our country”: then it is said that the simple size of Canada means that corporations may be widespread, and consequently may have a decentralized control, which implies that the directing minds and will can be found in different geographic location.

Bill c-45, of Canada enacted on November 7, 2003 extends the concept of directing mind; it uses the expression “senior officers” to include everyone who has an important role in setting policy or managing an important part of the organizations.

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57 Section 2.07 (4) American Model Penal Code (Proposed Official Draft 1962) states that the corporation agent is a “Senior Managerial Agent”.
58 Lord Hoffman stated that in each case the court had to fashion a special rule of attribution for the particular substantive rule in, Meridian Global Fund Management Asia Ltd v. Securities Commissions, [1995] 2 AC 500 PC.
60 Id.
activities. For crimes of negligence, the bill proposes a departure from the concept of
directing mind when it states that mental element of the offence will be attributable to
corporations and other organizations through the aggregate fault of the organizations
“senior officers”.

3.4.2.2. Limitation of “Identification” or Alter Ego” Theory

The English model of identification theory proved to be restrictive mainly due
to their requirement that individuals acting on behalf of the corporation hold a high
position or play a key function within the corporation’s decisional structures. Moreover, this theory refused to adopt the aggregation theory. Due to
contemporaneous tendency of corporation to fragment and delegate the power to
decide and act, the prosecution of a significant number of crimes is prevented. This
theory seems to be under-deterring, less retributive and overall less efficient. The
identification theory can function properly only for small corporations where only the
high-ranking managers are involved in the decision process. Presently existed
corporations are very complex and many other persons are involved in the decision
making process. Corporate agents other than the top managers do not engage the
criminal liability of corporations. Moreover, corporations can evade liability by
structuring themselves in a way that few decisions could be taken by controlling
officers. The identification of the person is also necessary and this creates a serious
bar to prosecution of highly Complex Corporation characterized by diffusion of
responsibility. Therefore, crimes that rely on defective organization are not included.
Another disadvantage is that it is impossible to cumulate the acts or mens rea of
multiple controlling officers. The fragmentation and specialization of corporate
departments can create an ideal way of escaping liability under alter ego theory

because one’s apparently innocent action coupled with another’s will often times form a crime. The requirement that the crimes be committed by high ranking officers or managers is also a great impediment in combating corporate crime because corporations will avoid liability by empowering lower level employees to make decisions. The identification theory presents another disadvantage when requiring the identification of the individual who committed the act. The identification of the individual who committed the crime is often times impossible.

### 3.4.3. Aggregation Theory

Although corporate criminal liability initially started by imitating the criminal liability of human beings, new models of criminal liability, such as the aggregation or self-identity theories have been developed to better fit the corporate and operation. The American system of corporate criminal liability has been the most developed and extensive system of corporate criminal liability created so far. The most distinguishing and bold element of the American model of corporate criminal liability is the adoption of the aggregation theory. This theory provides that corporations can be held criminally liable based on the act of the one employee and on the culpability of one or more other employees who cumulatively, but not individually, met the requirement of *actus reus* and *mens rea* of the crime.\(^\text{63}\) The aggregation theory is grounded in an analogy to tort law in the same way as the agency and identification doctrine. Under the aggregation theory corporation aggregates the composite knowledge. Unlike English system, under American law it is not necessary to identify the specific individuals who have committed the crime; it is sufficient to prove that one or more agents of the corporation must have committed it. This theory also provides that while, no single employee had sufficient information necessary to have

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\(^{63}\) State v. Morris and East Sussex Railway 23 NLJ 360 (1850).
the required *mens rea* of the offense, if multiple individuals within the corporation possessed the elements of such knowledge collectively, their aggregate knowledge can be attributed to the corporation.\(^{64}\) As a result, in some situation corporation will be liable when no employee is individually responsible.\(^{65}\) The adoption of the aggregation theory by the America comprehensively covers the wide variety of loopholes existent under the other system. This system is clear, predictable and efficient in preventing corporate crimes. The company aggregates all the acts and Mental elements of the important persons within the company to establish whether in Toto would amount to a crime if they had all been committed by one person, according to Celia Wills, “aggregation of employees knowledge means that corporate culpability does not have to be contingent on one individual employees satisfying the relevant capability criterion.”\(^{66}\) The theory of aggregation is a result of the work of American Federal courts. The leading case is *United States v. Bank of New England*,\(^{67}\) where the Bank was found quality of having failed currency transactions under the Currency Transactions Reports Act (CTRS) for cash withdrawals more than $10,000. The client made thirty one withdrawals on separate occasions between May 1983 and July 1984. Each time he used several checks, each for a sum lower than the required total, none of which amounted to $10,000. Each check was reported separately as a singular item on the Banks settlement sheets. Once the checks were processed the client would receive in a single transfer from the teller, one lump sum of cash which always amounted to over $10,000 on each of the charged occasions, the cash was


\(^{65}\) *Id.*


\(^{67}\) (1987) 821F.2d 844 (1stCir), 484 US 943.
withdrawn from one account. The Bank did not file CTRS on any of these transactions. Each group of checks was presented to a different teller at different times.

In this case, the question was if any knowledge and will could be attributed to the corporate entirely. The trial Judge found that the collective knowledge model was entirely appropriate in such context, and stated as much in addition, however you have to look at the Bank as an institution. As such its knowledge is the sum of all the knowledge of all its employees. That is, the Bank’s knowledge is the totality of what all of the employees knew within the scope of their employment. So if employee ‘A’ knows another facet of it, and ‘C’ a third facet of it, the Bank knows them all. So if you find that an employee within the scope of his employment knew that the reports had to be failed, even if multiple checks are used, the bank is deemed to know it if each of the several employees knew a part of the requirement and the sum of what the separate employees knew amounted to the knowledge that such a requirement existed.

The partisans of collective knowledge explain that the difficulty of proving knowledge and willfulness in a compartmentalized structure such as a corporation should not be an impediment to the formation of the corporation’s knowledge as whole. According to these positions, it is not essential that one part be aware of the intention and not act of the other part for the formation of aggregation knowledge.

In United State V. Bank of New England 68 explained that “corporations compartmentalize knowledge, subdividing the elements of specific duties and operation into smaller component. The aggregation of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether

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68 (1987) 821F.2d 844 (1stCir), 484 US 943.
employees administering one component of an operation know the specific activities of employees administering another aspect of the operation”.

The corporation may accept the blame worthiness of these associated with it. It is not the fault of one person, which determines the liability, but the collective fault of all the employees together. The theory of aggregations closely related to the newly proposed form of liability called corporate guilt which is based on corporate culture and polices of the corporation. In terms of the corporate guilt it is the corporate body on its own which is liable by failing to cultivate a certain culture and polices laid for its employees.

3.4.3.1. Criticism of Aggregation Theory

Aggregation theory has significant spillover effects on innocent share holders and employees and some argue that, due to the adoption of the aggregation theory in particular, it lacks consistency with the traditional principles of criminal law. The wide possibility of convicting corporations for acts any employee increases the number of lawsuits against corporations: thus causes high costs for the courts and the corporations, and the loss of jobs and profits for innocent employees and share holders.

The aggregation theory is applied where negligence is an element of the offence and not in offence that requires intention. Its use in cases where intention is the element of the offence amounts to artificial manufacturing of faults. This theory has the disadvantage that it does not lift the corporate veil.

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69 Smith and Brian Hogan, op. cit., p.186.
71 Supra note 21.
Instead of looking for one single individual whose liability can be attributed to the corporate body one focuses on several persons. The doctrine ignores the reality that the corporation has the duty to put measures in place to ensures that not only must individuals be prevented from committing offences but it must put policies in place in order to prevent the commission of crime by a group of persons.

Applying the aggregation theory can result in stigma to persons charged when they in fact committed no offence at all. People representing the corporate body are at times subjected to criticisms in courts and linked to the guilty verdict of the body corporate, with possible adverse consequence.

3.5. Corporate Criminal Liability in India

Nulla poena sine lege means no person shall be punished except in pursuance of a statute, which fixes a penalty for criminal conduct. The Origin of nulla poena sine lege can be found in 39th clause of Magna Cart which latter developed the concept of “Due Process”. Et actus non facit reum nisi mens sit rea means the intent and the act must both concur to constitute the crime. This is maxim which has been accepted by courts for centuries, recognizes that there are two necessary elements in crime, a physical element and mental element. Actus non facit reum nisi mens sit rea is principle of natural law and common law which is cardinal doctrine of criminal law. There can be no crime without a guilty mind. In order to make a person criminally accountable for an act, it must be proved that his act is done with guilty mind. Thus, there are two components of every crime namely, a physical element and mental element usually called “actus reus” and “mens rea”. The world ‘actus’

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72 Jerome Hall, op. cit., p.20
73 Id at 22.
connotes a ‘deed’, a physical result of human conduct. The world ‘reus’ means ‘forbidden by law’.

The world ‘actus reus’ may be defined as ‘such result of human conduct as the law seeks to prevent.’\textsuperscript{76} Mens rea is a technical term, generally taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasions negatives the contention of crime. Mens rea meant the intentional doing of wrong act but its meaning has changed considerably with the development of various ideas and principles like insanity, necessity, coercion, mistake, accident, negligence etc. Thus, essential meaning of mens rea is intentional or reckless doing of a morally wrong act.\textsuperscript{77}

Although the general rule as stated above is applicable to all criminal cases but the criminal law Jurisprudence has seen one exception to the above said concept in from of the doctrine of strict liability in which one may be made liable in absence of any guilty state of mind. The legislator may, however create an offence of Strict or Absolute liability where mens rea is not necessary. Strict liability implies legal responsibility despite the lack of mens rea.

Strict liability has expanded so considerably in recent years and in such various forms that it is impossible to generalize regarding it. Quite apart from the diverse major crimes that have been brought within this sphere. Strict liability is the product of modern legislative policy and not of traditional morality. In other words, it is matter of malum prohibitum rather than malum in se. Malum in se means it is universally recognized that these are wrongs of ethics.\textsuperscript{78} Malum prohibita are

\textsuperscript{76} Supra note 24 at 17.
\textsuperscript{77} Supra note 28.
\textsuperscript{78} Id at 296.
sometime called “quasi-criminal offences,” offences that are regarded as “not criminal in any real sense, but acts which in the public interest are prohibited under penalty.” It is some time argued strict liability offences are instances of petty offences and are not immoral. They are merely convention wrongs because prohibited by the positive law. This encouraged legal theory that mens rea is not material element of these offences hence that strict liability is therefore justified. Another justification for strict liability it increases care and efficiency, even by those who are already careful and efficient. Human beings knowing about strict liability, they will take precautionary measures beyond what they would otherwise employ. Strict liability is the gadfly which stimulates the greater effort; this redounds to the public good. The objective is unassailable, the sanctions are not too harsh in many wrongs, and there is no actual occasion for concern even though the innocent persons are occasionally convicted, hence criticisms of strict liability from the view point of the fundamental principles of penal law is merely academic. It is ironic that when the base of justification of strict liability is the lightness of liability, the same is being used to justify heavy punishments, which are in turn expected to assist in the implementation and enforcement of the law while at the same time facilitating administration efficiency. This happens in case of mass destructions through pollution, gross negligence of the company resulting in wide spread damages

3.5.1. Necessity of Corporate Criminal Liability

For more than fifty years, most criminal law and corporate scholars in the United States have been opposed to corporate criminal liability, arguing that it should

79 Glanville Williams, op. cit., p.936.
80 Supra note 28 at 300.
be eliminated. Many law and economic scholars have argued that corporate criminal liability is inefficient and should be scrapped in favor of civil liability for the entity and criminal liability for individual’s corporate officers and agents. A good deal of scholars begins from the premises that corporations are fictional entities, which have no existence apart from the various individuals who act on behalf of the factious entity. These premises can lead quickly to the conclusion that corporate liability is unjust because it effectively punishes innocent third parties (share holder, employees and others) for the acts of individuals who commit offences while in the employ of these fictional entities. What this account misses is the reality that corporations are not fictions. Rather, they are enormously powerful and very real, actors whose conduct often causes very significant harm both to individuals and to society as a whole. Moreover, the power now wielded by corporation is both enormous and unprecedented in human history. It misses a lot to compare corporations like Exxon Mobil, Microsoft, or AIG to horse or a cart that was treated as deodand under ancient English law.

In the modern day world, the strong effect of activities of corporation is incredible on the society. In the day to day activities, not only do the corporations affect the lives of the people as a blessing but also many a times proves disastrous which then falls under the category of crimes. For instance, the Uphar Cinema tragedy or thousands of scandals especially the white collar and organized crimes can come within the category that requires immediate concern. Prof Sutherland highlighted the serious repercussions of white-collar crimes in1940 decade. Since socio-economic offences are constantly on the rise. 1990s and 2000s decades are the decades of high profile scandals. Corruption in Telecom 2G license, Delhi Common Wealth Games of

83 Id.
2011, and Pune’s Hasan Ali tax evasion runs into cores of money by politicians. Top Business professional are also not lagging behind in this area’s Promoter Ramalinga Reddy manipulation of Satyam Computers accounts, UTI’s Unit-64, Liquidation of Global Trust Bank, stockbroker Harshad Mehta and Ketan Parikh exploitation of the system of share market. Fodder scam of Bihar, Mines Mafia in Bellary etc have proved that menace of White collar crimes by companies are more serious threat to the existence of society than Blue-collar crimes.

Despite so many disasters, the law was unwilling to impose criminal liability upon corporations for a long time. This was for two reasons,\(^8^4\)

- that corporations cannot have the *mens rea* or the guilty mind to commit an offence
- that corporation cannot be imprisoned

These two obstacles were managed to survive till late 20\(^{th}\) and early 21\(^{st}\) century. The general belief in the early 16\(^{th}\) & 17\(^{th}\) centuries was that corporation could not be held criminally liable. In this period corporate criminal liability faced at least four obstacles,\(^8^5\) i.e.

1. Attributing acts to a juristic fiction, the corporation. 18\(^{th}\) 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 20\(^{th}\) century.

2. The legal thinkers did not believe corporation could posses the moral blame worthiness necessary to commit crimes of intent

\(^{8^4}\) *Zee Telefilms Ltd v.Sahara India Corporation Ltd.* 2001 (3) Cri LJ 292.

3. The ultra virus doctrine, under which courts would not hold corporation accountable for acts, such as crimes, that were not provided for in their charters

4. The courts literal understanding of criminal procedure, e.g. judges required the accused to be brought physically before the court.

3.5.2. Statutory Inadequacy

This developed jurisprudence does not find a place in the Indian statutes as they still make only the officials responsible for the act criminally liable and not the corporate itself. Instances of this are, SS.45.63.68.70(s), 203 etc of the Indian Companies Act 1956 where in only the officials of the company are held liable and not the company itself, it is also reflected through the Takeover code the various sections of the IPC that direct compulsory imprisonment does not take a corporate into account since such a section cannot work against the corporation. These are the Major statutes in their respective field that are devoid of necessary legal aspects. On the other hand law has also developed to an extent with regard to certain other statutes and their respective penal provisions wherein fine has been imposed on the corporation when they are found to be guilty. Some of the examples are, Section 141of the Negotiable Instruments Act 1881, Section 7 of the Essential Commodities Act 1955 and Section 276-B of the Income Tax Act 1961.

3.5.3. Deficiency in the Punishment of Corporations.

In India, certain statutes like the Indian Penal Code (IPC) talks about kinds of punishment that can-be imposed upon the convict and as per section 53 of IPC punishment includes death, life imprisonment, rigorous and simple imprisonment, for forfeiture of property and fine. In certain cases the sections speak only of
imprisonment as a punishment like in case of offence under section 420 of IPC. Thus the problem arises as to how to apply those sections which are having only imprisonment as punishment on the companies since a criminal statute needs to be strictly interpreted and in such statues there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminally, the courts in India have finally recognized that a corporation can have a guilty mind but still were reluctant to punish them since the Criminal Law in India does not allow this kind of action.

3.5.4. Judicial Response to Corporate Criminal Liability in India

As early as 1984, in the case of *Kusum products Ltd v. S.K. Sinha*,\(^86\) 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 awarding 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 usurping the legislative function.”

But with the passage of time the court started taking a positive approach towards this issue. In the case of *Standard chartered Bank and Org v, Directorate of Enforcement and others*,\(^87\) 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 there by imposing fine on the corporate. The court looked into the interpretation rule that all penal statutes are to be strictly construed in the sense that they 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

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\(^{86}\) (1984)149 ITR 250(Cal).

\(^{87}\) (2005) 4 Comp LJ 464 (SC).
have included if thought of. Simultaneously it also considered the legislative intent and held that all penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. It was of the view that here the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted.

In the case of the Asst. Commissioner, Assessment II, Bangalore v. Velliappa Textiles Ltd, the court held that corporate criminal liability cannot be imposed without making corresponding legislative changes. The court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, where as in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as custodial sentence cannot be imposed on it.

It was expressly stated in this case that the company is liable to be prosecuted even if the offence is punishable both with a term of imprisonment and fine. In case the company is found guilty, the sentence of imprisonment cannot be imposed on the company, then the sentence of fine is to be imposed and the court has got the judicial discretion to do so. This course is open only in the case where the company is found guilty, both sentence of imprisonment and fine are to be imposed on such person. There is no dispute that a company is liable to be prosecuted and punished for criminal offences.

3.5.5. Law Commission of India’s Recommendations (Forty first Reports)

The Law Commission of India in order to clear the controversy observed in its 41\textsuperscript{st} report that as it is impossible to imprison a corporation practically the only punishment which can be imposed on it for committing an offence is fine. If the penal law under which a corporation is to be prosecuted does not provide for a sentence of fine there will be difficulty. In order to get over this difficulty the Commission recommends that a provision should be added to the Section 62 of the \textit{India Penal Code} on the following lines,

"In every case in which the offence is only punishable with imprisonment & the offender is the company or other body corporate or an association of individuals, it should be competent to the court to sentence such offender to fine only"

3.5.6. Law Commission of India’s Forty Seventh Reports

When Law Commissions of India has realized that Parliament has not acted upon their earlier recommendations it went on to make another recommendation in its forty seventh reports and observed that, “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 \textit{Indian 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 \textit{Indian Penal Code} as say Section 62.

a) 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.
b) 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.

c) In this section, “corporation” means an incorporated company or other body corporate, and includes a firm and other association of individuals. The recommendations of the law commission focus on the gaps left by the legislature which renders it impossible for a court to convict a corporation where the statutes mandates a minimum term of imprisonment and fine. The recommendation seeks to empower the court with the discretion to sentence an offender to fine only, where the offence is punishable with imprisonment, or with imprisonment and fine. However due to inaction on the part of legislatures, the bill prepared on the basis of the recommendation did not fructify into law and lapsed.

3.6. Rights and Liabilities of Companies under the Indian Constitution

Although a company is a legal person, it is not a citizen either under the Constitution of India or the Citizenship Act, 1955. Thus a company has a nationality but no citizenship. This difference of status is important because certain fundamental rights are available to citizens only. In State Trading Corporation of India v. CTO, 89 the Supreme Court of India held that a corporation cannot claim the status of a citizen under the Constitution of India. Thus, under the Constitution, a corporation has no fundamental rights which are expressly available to citizens only. It can, however, claim the protection of these fundamental rights which are available to all ‘persons’, whether citizen or not. 90 Besides certain fundamental rights which are available to all

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89 AIR 1963 SC 1811.
90 Right to equality under Article 14 of the Indian Constitution.
‘persons’, including a corporate entity, a company also enjoys the protection of various constitutional rights as provided under the Constitution. For instance, a company has a constitutional right to hold and enjoy its property. Article 300A of the Constitution confers a right on all persons to hold and enjoy properties. Thus a company cannot be deprived of its property save by authority of law. Any violation of this right of the company can be challenged in a court of law. In view of the interpretation given to the word ‘law’ by the Supreme Court in *Maneka Gandhi v. Union of India*, a law depriving a company of its property must be fair, reasonable and just. An arbitrary and unreasonable law is vulnerable to attack under article 14 of the Constitution and is liable to be struck down. In, *Bhavnagar University v Palitana Sugar Mills (P) Ltd.* the Supreme Court held that an owner of a property, subject to reasonable restrictions, which may be imposed by the Legislature, is entitled to enjoy the property in any manner he likes. A right to use a property in a particular manner or in other words a restriction imposed on user thereof except in the mode or manner laid down under the statute would not be presumed.

In, *Dharam Dutt v. Union of India*, the Supreme Court held that the protection of Article 300A is available to any person, including a legal or juristic person and is not confined only to a citizen. However, the same cannot be sought to be enforced by a petition under Article 32 of the Constitution, since it is not a fundamental right but merely a constitutional right.

Similarly, Article 301 of the Constitution confers on a company a right to have a free trade, commerce and intercourse throughout the territory of India. This right, however, is subject to the provisions of Article 302 to 305 of the Constitution. Thus,

91 AIR 1978 SC 597.
92 AIR 2003 SC 511.
so long a company is carrying on its business in accordance with the law, its business activities cannot be interfered with. A right without restrictions or/and limitations cannot be visualized. Thus, by its very nature a right is non-absolute in nature and is subject to various well-defined parameters. In a civilized society one cannot imagine a situation where rights are conferred without limitations. This is so because law has to perform various social functions also which are directed towards the welfare of human beings at large. Thus, conferment of rights without limitations may create chaos within the legal system and may disrupt the normal functioning of the society.

A company possessing various fundamental rights enjoys the same subject to their restrictions and limitations. Similarly the constitutional rights of a company are also subject to the express or/and implied restrictions contained therein. Thus, a company enjoys various rights subject to their restrictions and limitations. It must be noted that the corporations 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 law as the government itself, though in the eyes of law they would be distinct and independent legal entities.

3.7. Conclusion.

Crimes are existed in the society since the existence of civilization. Crime free society is almost impossible to be achieved. Therefore, society has to live with crime but only thing is that it has to be strictly regulated through law. Traditional view is that it is only human being is the subject matter of criminal law because crime has to be committed with ingredients of mens rea and actus reus. Company being legal person does not have physical existence and rational mind like human being. Hence company cannot be bought under the coverage of criminal law because it is incapable
of forming the mens rea. Gradually the companies started interacting with people and society in numerous ways, playing significant diversified role in the development of society and became powerful institution in respect of political, social and legally. Equally on the other hand it has causing harm to people and society more than what human being is causing. Therefore the theory of corporate criminal liability was invented and now company is held liable on the basis of different theories. Theory of vicarious liability of corporate is invented in America, where as common law has followed the theory of identification. India has followed theory of common law. The theory of aggregation has been applied in US. Different theory has its own merits and demerits but vicarious theory has wider application and seems to be reformatory, deterrent and effective. Another problem of corporate criminal liability is what kind of punishment is appropriate for companies. Most of the countries found that only fine is appropriate punishment except US. Indian judiciary like other countries, initially refused to apply criminal law to company but gradually changed its perspective and held that company is also liable for criminal liability subjected punishment of fine. Indian Law Commission noticed the inadequacy in the IPC to impose punishment on company. Therefore it suggested the law makers to amend the IPC to the effect that wherever IPC provision carries only imprisonment as punishment, there the word “or fine” should be added. This enables the courts to impose the punishment on companies. The tragedy is that Parliamentarian yet to act upon such important suggestion and the deficiencies in the corporeal punishment persistent to exist.