CORPORATE CRIMINAL LIABILITY:
AN ANALYTICAL STUDY WITH SPECIAL REFERENCE TO PENAL LAWS IN INDIA

A
SUMMARY
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Summary

1. INTRODUCTION TO THE TOPIC

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

The first initial attempts to impose the corporate criminal liability were taken by common law countries, such as England, the United States and Canada, who had seen a large contribution and a very important role in the economy due to the earlier beginning of the industrial revolution in these countries. Despite an earlier reluctance to punish corporations,\(^1\) the recognition of corporate criminal liability by the English courts started in 1842, when a corporation was fined for failing to fulfill a statutory duty.\(^2\) There were a number of reasons for this reluctance. One, the corporation was deemed to be a legal

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2 Re-Birmingham & Gloucester Railway Co. (1842) 3 Q.B. 223.
fiction, and under the rule of *ultra vires* could only carry out acts which were specifically mentioned in the corporation’s charter. Secondly, how could the corporate be physically brought in the court and punished? These factors hold true even today. The law has seen a lot of growth in many areas but yet the global acceptance of criminal liability is not established in its zenith.

The contenders of rejection of corporate liability have raised many objections including the lack of the necessary *mens rea*, and recognition of its separate legal entity. Finally, the difficult situation of punishing the corporation for want of adequate sanctions those could be applied to corporations. Over time, the English courts followed the doctrine of *respondeat superior*, or vicarious liability, in which the acts of an employees are attributed to the corporation.\(^3\) However, vicarious liability was only used for a small number of offences, and later on replaced with the identification theory. In the United States, the approach was different. Instead of holding the corporation indirectly liable, the federal courts applied the concept of vicarious liability\(^4\). While the courts initially made use of this doctrine solely in cases where *mens rea* was not required, later decisions also included this category of offences. This meant a radical departure from the stance English courts had taken. The continental European systems’ penal codes are based on the finding of individual guilt, and therefore, the incorporation of corporate criminal liability into their criminal codes has met a wide range of criticism in these jurisdictions.\(^5\)

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3. Supra note 1
4. The details have been discussed in the subsequent parts of this thesis.
As a general principle, Criminal Liability is attached to those acts in which there is violation of Penal Law i.e. to say there cannot be liability for those acts or omissions unless there is some Penal law that prohibits them. The basic rule of criminal liability revolves around the Latin Maxim *Actus non facit reum, nisi mens sit rea*. It means that to make one liable it must be shown that act or omission which was forbidden by law has been done with guilty state of mind.

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

2. **STATEMENT OF THE PROBLEM**

Today, every morning when a common man wakes up and looks at the world through the eyes of a newspaper, he sees a new wave of crime. A crime, that is not committed by a man but is being undertaken by a bricked wall or at times by a building. We are witnessing a new era where the world is overtaken by the bricked walls of the corporate giants. These giant commercial entities have an entirely different face from their conventional versions. Now, along with controlling the economic circles of a country, they can easily devastate it too.

The very objective of the criminal law is to protect the individual and societal interests by maintaining peace and order. This task was much easier in the traditional society where identity of the person

involved in a criminal activity was not at all difficult to be concealed from the society. The principles of criminal law have been developed regarding the concepts of liability of the crime and it’s punishment by keeping in mind individuals with fixed identities, an abode and having movements in proximate location of the commission of crime or near it.

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

Committing a crime becomes quite manageable for these corporate bodies as they have challenged the principles of portraying the liability of a criminal act. The heads of these corporations are the main decision makers and they operate at the national or global levels with a veiled existence to camouflage their deeds and many a times go scot free because of this protection of the corporate veil.

So far emphasis remained on prescribing regulations for smooth conduct of corporations. But lately a need is felt to develop and recognize principles of liability to keep a check on corporate criminality. Further task is the development of means and methods to deal with such criminality. The traditional methods of punishment do not fit in the requirements and circumstances in which corporations operate. The criminal justice system needs to adopt itself to the changing scenario while dealing with corporations as such and also the persons who are responsible for their operations.
Thus, it is time for revising our criminal law, so as to make it equipped to rope in the malefic corporate activities in the greater interest of the society, the nation and the international community as a whole. There is an imminent need to study the principles of corporate criminal liability and their different penal aspects thereof. This research has been undertaken as a humble effort in this direction.

3. **SCOPE OF STUDY**

The Scope of the study is very relevant and vast as corporate criminality challenges are testing our sense of reality. The various elements of offences committed in the grab of the corporate veil and name, makes the corporate crime a tricky issue to handle. The unknown identity of the wrongdoer and his power to damage the communal peace needs to be tackled with due diligence.

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

On the other hand, a large number of European continental law countries have not been able to or not been willing to incorporate the concept of corporate criminal liability into their legal systems for various different reasons. Few believe that the corporate can never be wrong and others believe that the administrative law should deal with such offences and not criminal law. The fact that crime has shifted from individual perpetrators only 150 years ago, to white-
collar crime organised at international levels on an ever increasing scale has not yet been taken into account in many legal systems.

Criminal Liability is what forms the basis of the logical structure of the Criminal Law. Each element of a crime that the prosecutor needs to prove after articulation of facts, is a principle of criminal liability. The question of imposing criminal liability to a corporation for the criminal offences committed by directors, managers, officers and other employees of the corporation while conducting their day to day corporate affairs has gained a lot of importance in the jurisprudence of criminal law over the past few decades. And, the very basis for the possibility of imposing criminal liability to a corporation is its independent legal personality, who may not be possessing a soul but for sure has enough hands which can be hand-cuffed.

This study focused on the emerging trends in different countries with respect to criminality and liability of the corporations. The required study of the developments those have taken place in different parts of the world. Recognition of different principles and their justifications. And also the shortcoming which we are still facing in handling the corporate criminal liability. Therefore, this research is an attempt to analyse the Penal laws which exist in different countries about the criminal liability of a corporate and to study what amendments are needed to be incorporated in place in every legal system to regulate the growing menace of the multinational companies so as to restrict their actions and policies which promote criminal activities through their policies, procedures and actions.

4. RESEARCH METHODOLOGY

The present study is a diagnostic and analytical study. The study material for the study has been collected from various Primary as
well as secondary sources which include the relevant statutes, commentaries, text, books, Law Journals, Periodicals, Newspapers magazine, web sources etc.

The major Part of this research is analytical in nature and includes the application of pure and applied research to understand the concepts and the underlying problems in determining the criminal liability of corporations. The researcher has studied and analysed principles of criminal law by exploring the origin and development of corporate liability. The study also includes comparative analysis of developments in other countries on the same subject. The review of case laws and case study have been an essential part of this research work. Various international documents linking the theme and study of the topic to the legal documents adopted at the national and international levels, have been reviewed to chalk out the necessary amendments to the existing legal framework of India for developing the principles to identify corporate criminal liability and the means and methods to handle the problem.

RESEARCH QUESTIONS

1. Whether the corporations are capable of committing crime? If so, what is the nature of such crimes?
2. What are the developments in determining the criminal liability of corporations in different jurisdictions?
3. What principles of fault attribution are to be applied to determine corporate criminal liability?
4. Whether there is need to define corporate crimes separately?
5. Whether there is need to lay down separate penal sanctions for the corporations?
6. Whether the criminal justice system is adequately equipped to trace, try and treat the corporate crime and criminality?
7. Do the corporations get involved in organised crimes at the national and international levels? If so, whether criminal justice system is capable to control and combat such activities?

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

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

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

6. HYPOTHESIS

Commission of a crime can be undertaken by a corporate body. The motive may be money or power, depending upon the situation. From years together the law is facing a conflict if the company without a soul or a body should be held accountable for crime or not. In the present day scenario the corporates may indulge in variety of crime ranging from financial irregularities to violent ones with varied magnitude. Accepting the complicity of corporations in crime, principles of liability have been evolved in various jurisdiction by attribution of *actus reus* and *mens rea* to the corporations. Still there is need to define corporate criminality and prescribe penal sanctions keeping in view corporations as wrong doers. The criminal justice system as at present need to cope up with the emerging situations where corporates are more and more influencing the individuals and society as a whole through malefic activities. Rather corporations do have role in organised crimes which are putting a further challenge to the criminal justice system. Presently, the criminal justice system is not fully equipped to deal with such situations. The increasing presence of multi-national corporations call for putting in place the effective measures at the international level. The industrial
disastrous and environmental degradation due to unscrupulous activities amounting to crime are a direct challenge to human existence and preservation of environment. Relook at the criminal justice system is required specifically taking into account the criminological and penological aspect keeping in view the corporate activities in the present time. Distinct and specific policies are required to be developed to deal with corporate criminal acts and activities.

7. PLAN OF STUDY

7.1 Introductory

Corporate criminality challenges or nags our criminal justice system. It is this characteristic that makes corporate crime a tricky issue. The development of corporate criminal liability has become a serious problem for the prosecutors and courts that have to determine the criminal liability. In the common law world, established principles in tort law, the English courts recognised corporate criminal liability in the middle of the last century for statutory offences where mens rea was not required.

In India, the principles of vicarious liability have also been extended to criminal law in a limited manner to certain circumstances like breach of statutory obligations of an employer or other regulatory offences where mens rea is not essential element of crime or where there is liability as an occupier of land as stated in Section 154 of the Indian Penal Code, 1860.

On the other hand, a large number of European Continental Law Countries have not been able to or not been willing to incorporate the concept of corporate criminal liability into their legal systems. The fact that crime has shifted from almost solely individual perpetrators
few years ago to corporate entities made us to explore possibility of expansion of criminal law principles. The new manifestation of crime and the transnational character of criminal activities are other areas where the criminal justice system needs review. This aspect is more challenging when we need to deal with artificial entities. At the same time, crime has also become increasingly transnational with global impact with more and more involvement of the corporate sector.\textsuperscript{7}

The question of imposing criminal liability to a corporation for criminal offences committed by directors, managers, officers and other employees of the corporation while conducting corporate affairs has gained a lot of importance in the criminal law jurisprudence. The very basis for the possibility of imposing criminal liability to a corporation is its independent legal personality. In the modern day world, the impact of activities of corporations is tremendous on the society. In their day to day activities, not only do they affect the lives of people positively but also many a times in a disastrous manner which come in the category of crimes. For instance, the Uphar Cinema tragedy or thousands crore scams and scandals especially the white collar and organized crimes may come within this category that require immediate concern, a case which has very recently been settled by the apex court after so many years of contemplation.

Despite so many disasters, the law was innocuous to impose criminal liability upon corporations for a long time, as the question is whether a corporation as an artificial person is capable of committing a crime and is criminally liable under the law or not.\textsuperscript{8} 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

\textsuperscript{7} Balakrishnan. K; “Corporate Criminal Liability - Evolution of the Concept” (1998)
\textsuperscript{8} Abhishek Anand, Holding Corporations Directly Responsible For Their Criminal Acts: An Argument.
could form no intent. In addition, a corporation had no body that could be imprisoned. These two obstacles were faced by the judicial system in the late 20th century and very early 21st century.

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 encountered at least four obstacles. The first obstacle was attributing acts to a juristic person, the corporation. 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. The second obstacle was that legal thinkers did not believe corporations could possess the mental blameworthiness necessary to commit crimes of intent. The third obstacle was the doctrine of ultra vires, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in objects of their charters. Finally, the fourth obstacle was courts’ literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court. Further when the penal provisions enacted with reference to human beings lay over emphasis on imprisonment as primary punishment. The alternative, if any, in the form of fine are only prescribed for minor offences.

7.2 **History and Development of Corporate Criminal Liability**

Corporate criminal liability has its origins in ancient law, and became the focus of the doctrinal discussions at the end of the 19th century. The history, laws, economics, and politics unique to each country have had a remarkable influence on the adoption and development of the concept of corporate criminal liability. This influence resulted in different models of corporate criminal liability.
The concept of criminal liability of corporations has had a different evolution under civil law systems as compared to its development under common law systems. At the same time, under the civil law or common law systems, corporate criminal liability has developed differently to reflect the historical and socio-economic realities of different countries.

The historical evolution of corporate criminal liability shows that corporate criminal liability is consistent with the principles of criminal law and the nature of corporations. Furthermore, the development of theories of corporate criminal liability reveals that criminal liability of corporations is part of an important “public policy bargain. The bargain balances privileges granted upon the legal recognition of a corporation, such as limited liability of corporate shareholders and the capability of a group of investors to act through a single corporate form, with law compliance and crime prevention pressures on the managers of the resulting corporate entity.”

The path of origin, development and application of the theories of corporate criminal liability can be traced from the Roman Era where even though the concept of criminal liability of the corporate was not acceptable.

Then in the medieval times, the acknowledgement of the existence of independent entities with rights and obligations constituted the basis for the evolution of corporate institutions in the medieval. The Germanic law has also promoted the development of associations. The land was shared among families, and not among individuals. However, unlike the Roman universities, which were fictitious creations of the law, the Germanic law considered that both the corporations and the individuals were real subjects of law.

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Under original common law, a company could not be convicted for any criminal offence. The common criminal law also took the position that, in general, there could be no vicarious criminal responsibility; that is, a person could not be deemed to be guilty of a criminal offence committed by another. But in the nineteenth century, general statutory exceptions to the vicarious responsibility principle led also to statutory exceptions to the principle against the criminal responsibility of corporations, and to common law exceptions where the corporation had failed to carry out a statutory duty creating a common law nuisance. For a variety of reasons, not least confusion about the principles governing primary corporate criminal liability, the principles of the common criminal law have never truly shaken free from these foundations.  

Under both criminal and civil law, a firm is directly and vicariously liable for wrongs committed by its agents (managers and other employees) within the scope of their employment. A firm’s liability under this principle is far reaching. For example, it extends to crimes committed by the firm’s subordinate agents (including salesmen, clerical workers and truck drivers), even when these agents violate corporate policy or express instructions. Moreover, although culpable agents must generally intend to benefit the firm before it is liable, this requirement is easily met if there is any possibility that wrongdoing might increase corporate profits—even if its net effect is to injure the firm, once expected corporate sanctions are considered.

The general rule is that a corporation will be criminally liable for the illegal acts of its employees if the employees are acting within the

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13 See United States v. Carter, 311 F.2d 934, 943 (6th Cir. 1963).
A corporation may be held criminally responsible for the illegal conduct of its employees if: (1) the illegal act was committed while the employee was acting within the scope of employment, and (2) the employee’s conduct was undertaken, at least in part, for the benefit of the corporation.\textsuperscript{15}

In the criminal law, corporate liability determines the extent to which a corporation as a fictitious person can be liable for the acts and omissions of the natural persons it employs. It is sometimes regarded as an aspect of criminal vicarious liability, as distinct from the situation in which the wording of a statutory offence specifically attaches liability to the corporation as the principal or joint principal with a human agent\textsuperscript{16}.

In the eyes of the law, a corporation has many of the same rights and responsibilities as a person. It may buy, sell, and own property; enter into leases and contracts; and bring lawsuits. It pays taxes. It can be prosecuted and punished (often with fines) if it violates the law. The chief advantages are that it can exist indefinitely, beyond the lifetime of any one member or founder, and that it offers its owners the protection of limited personal liability.

The Latin maxim \textit{actus non facit reum, nisi mens sit rea}. The (“guilty mind” or criminal intent) refers to the accompanying mental state, criminal offence, requires that the prosecution prove that an intentional state lay behind a person’s illegal conduct.\textsuperscript{17} This principle of criminal liability poses difficulty in fixing the criminal

\begin{itemize}
  \item \textsuperscript{14} United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 42 (1st Cir. 1991).
  \item \textsuperscript{15} United States v. Sun-Diamond Growers of Cal., 138 F. 3d 961, 970-71 (D.C. Cir. 1998).
  \item \textsuperscript{17} William A. Simpson, Corporate Criminal Intent, Metropolitan State College of Denver Publication, 2009
\end{itemize}
liability of corporations without involving the human element. Now we are in the process of developing various theories as to overcome to this difficulty which is discussed in a separate chapter.

7.3 Emergence of Principles of Corporate Criminal Liability

Corporate criminal liability is a controversial beast. To a large extent, the controversies surround three core questions: first, whether there is a basic conceptual justification for using a system of criminal justice constructed for individuals against inanimate entities like corporations; second, what value corporate criminal liability could have given coexistent possibilities of civil redress against them; and third, whether corporate criminal liability has any added value over and above individual criminal responsibility of corporate officers.18

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 involves a principle of criminal liability. There are some crimes that only involve a subset of the principles of liability, but these are rare and 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. Along with other principles, the mens rea takes into account the principle of strict liability. Here the liability without fault arises for example in cases of corporate with respect to environmental crimes. In certain acts of strict liability, the absence of mens rea would not absolve the liability.

As a general rule, “ Corporations may be held liable for the specific intent offenses based on the ‘knowledge and intent’ of their

employees.” Again, the rule extends only to those instances when the employee or agent acted, or acquired knowledge, within the scope of his or her employment, seeking, at least in part, to benefit the corporation. The law is somewhat more uncertain when a corporation’s liability turns not upon the knowledge or the intent of a single employee but upon cumulative actions or knowledge of several.

It is sometimes debated whether or not it is desirable to punish an entity such as a corporate body which is not, like a natural person, capable of thinking for itself or of forming any intention of its own. It is sometimes said that the idea of blameworthiness inherent in the concept of culpability presupposes personal responsibility - something which an abstract entity such as a corporate body lacks.

The corporate body has no physical existence and does not think for itself or act on its own; its thinking and acting are done for it by its directors or servants, and it is argued that it is these persons of flesh and blood who ought to be punished. On the other hand, there is in practice a great need for this form of liability, especially today when there are so many corporate bodies playing such an important role in society. It is very difficult to track down the individual offender within a large organization; an official can easily shift blame or responsibility onto somebody else.

Sometimes the dividing line between criminal and civil provisions may not be very clear or precise. For example, in some commercial statutes, such as the Corporations Law, provision is made for both civil and criminal actions to be undertaken in relation to the same conduct. Consequently, where a director of a company has misused

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19 United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118 (D.C.Cir. 2009).
20 United States v. LaGrou Distribution Systems, 466 F.3d at 591.
his or her position as a director or acted dishonestly, a civil action can be brought by the company (or in the name of the company) to recover damages or compensation for the loss suffered. Indeed, corporations and their advisers often seek to blur this distinction by seeking to have matters dealt with under civil law provisions, so avoiding the stigma of criminality which might otherwise arise. Some even argue that what is called corporate crime is not serious crime.21

The history of corporate criminal liability is pragmatic. In the United States, the seminal decision authorizing the curious practice of holding corporations criminally responsible explicitly reasoned that disallowing the practice “would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”22 Corporate criminal liability was, in effect, a practical necessity given the absence of other viable forms of redress. The rapid uptake of corporate criminal liability in Europe several decades later was inspired by similar thinking.

In the principal authority case of Tesco Supermarkets Ltd v. Nattrass23, Tesco had been prosecuted under the Trade Descriptions Act, 1968 for displaying a notice that goods were being offered at a price less than that at which they were actually being offered. In DPP v. Kent & Sussex Contractors Ltd,24 Macnaghten J said if a responsible agent of the company puts forward on its behalf a document which he knows to be false and by which he intends to deceive, his intention and belief must be imputed to the company. Therefore under the identification theory the State of mind and acts of the individual doing the act are attributed to the company.

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23 [1972] AC 153
24 [1944] KB 146
Lord Hoffmann, in the Privy Council in a civil case *Meridian Global Funds Asia Ltd v Securities Commission*\(^{25}\) advised that whether a company was liable for a statutory offence depended on the terms of the enactment, its content and its policy. The issue was whether a company was liable for the acts of its senior investment managers done without its knowledge. The Judicial Committee decided that it was, after investigating the policy of the statute, which was to compel disclosure of the identity of persons who had acquired substantial security. In a company those persons were those who had the company’s authority to acquire the security. Therefore, the company was liable.

Both of the American standards for holding organizations criminally liable employ the "identification" approach pioneered in England. This approach imposes vicarious liability on an organization for the acts committed by agents of the organization. *Respondeat superior* is the broader of the two standards. It is a common law rule developed primarily in the American federal courts and adopted by some American state courts. Derived from agency principles in tort law, it provides that a corporation "may be held criminally liable for the acts of any of its agents [who] (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation."\(^{26}\) This standard is quite broad, permitting organizational liability for the act of any agent, even the lowest level employee.\(^{27}\)

It took, until the beginning of this century, however, for the principle to emerge that organizations are responsible for crimes that require a

\(^{25}\) [1995] 2 AC 500
general or specific intent. In *New York Central & Hudson River Railroad Co. v United States*, the Supreme Court of the United States, in an opinion written by Justice Day for a unanimous Court, expressly abandoned what it termed the "old and exploded doctrine" of corporate immunity from criminal prosecution; the Court emphasized its concern that many offenses might otherwise go unpunished."

The four principles under which fault are ascribed to persons are accountability, fair opportunity, answerability, and justification or excuse. There help to explain why ascription of fault to corporations has been problematic. The principles underlie the doctrine of *mens rea*, which Ashworth describes as follows: "criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have, [such] that they can fairly be said to have chosen the behaviour and its consequences." The notion of individual choice, therefore, animates the understanding of when it is appropriate to ascribe fault for behaviour. The impact of this concern for preserving individual liberty has been a focus of subjective fault, in other words, the fault of the individual offender. Only where a defendant has intended or knowingly risked the consequences can responsibility be ascribed.

In the context of Indian Law, Criminal liability presupposes the existence of *mens rea* (guilty mind) and *actus reus* (guilty act) - the two essential ingredients of an offence under the Indian Penal Code

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29 212 U.S. 481 (1909)
30 *Id* at 495-96
32 *Ibid*, "There is indeed a fundamental principle underlying the mens rea concept: in criminal law there should normally be no responsibility without personal fault. ... Criminal responsibility without personal fault removes the choice of lawful behaviour";
33 *Id* at p. 129
Natural persons can be convicted of an offence as they possess mind. However, when an offence has been committed by a company - a legal person - the question arises as to whether the company can be convicted of a criminal offence. The issue has troubled Indian courts and in the past few decades where by the courts have struggled to formulate a jurisprudence to base the guilt of the corporations. For a long time, they were of the view that companies could not be criminally prosecuted for offences requiring mens rea, as they could not possess the requisite mind to carry out the act and nor the body to physically prosecute.

The Supreme Court's decisions in *Standard Chartered Bank v Directorate of Enforcement* and *Iridium India Telecom Ltd v Motorola Inc* have settled the controversy, holding that corporate bodies can be prosecuted for criminal offences. Earlier to these cases, the law was unwilling to impose criminal liability on corporate bodies because corporations cannot have the mens rea to commit an offence; and corporations cannot be imprisoned.

In *Iridium India Telecom Ltd v. Motorola Incorporated and Others in October 2010*, 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 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.

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34 Under Section II of Indian Penal Code, a person includes a natural person.
36 (2005) 4 SCC 530
37 AIR SC 2010
7.4 International Perspective of Corporate Criminal Liability

There may be different models of organization and different chains of command or control. The complexity of the corporate structure raises difficult issues over the allocation of responsibility for the consequences of unlawful behaviour by individuals acting on the corporation’s behalf. This is particularly true when the corporation and its shareholders materially benefit from the criminal conduct. In the criminal law context, all modern systems share the basic assumption that criminal responsibility should be placed on the individuals who commit a crime in the corporation’s interest. To what extent, and in what ways, should the corporation as a legal entity also be held legally responsible for criminal acts committed to further corporate objectives?

Corporate criminal liability is not a universal feature of modern legal systems. Some countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognise any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees.

The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. The most common models could be characterized as involving ‘derivative’ liability, in which the corporation is liable for the acts of individual offenders. One common variant of this is vicarious liability, or respondeat superior, the model found in US federal criminal law and in South Africa. Under this model, the offences of individual employees or agents are imputed to the corporation where
the offence was committed in the course of their duties, and intended at least in part to benefit the corporation. Another variant is the 'identification' model found in the United Kingdom and other British Commonwealth nations. Under this model, the offences of individual senior officers and employees are imputed to the corporation on the basis that the state of mind of these senior officers and employees (and their knowledge, intention, recklessness or other culpable mindset) is that of the corporation.

In addition to 'identification' approach, there is what could be described as the 'expanded identification' approach. Found primarily in continental Europe, this approach retains the focus on the actions of high level officers and employees, but also incorporates a duty of supervision, although whether that duty is owed by the corporation or its officers individually varies from country to country. Recently, there has been increased focus on an alternative model of liability, focused on the acts or omissions of the corporation itself. Under this model, rather than the corporation being liable for the acts of individual offenders, a corporation is liable because it's 'culture', policies, practices, management or other characteristics encouraged or permitted the commission of the offence. Australia is a prime example of this organisational liability model.

7.5 Corporate Crimes: Nature and Types

Corporate criminality is required to be understood in different perspectives of criminological theories than those which are applicable to the natural persons. This is because of the different causes and different environment for and in which corporate crimes are committed. The corporate crimes are committed by the

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38 Corporate culture is defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.'
individual for the benefit of corporations. These are also referred as sub-category of which collar crimes. There are other manifestations of crime like occupational crimes, state corporate crimes etc. Criminological aspects of these crimes are based on theories like learning theory and theory of Anomy apart from other factors under which conduct of perpetrators of such crimes happen in various situations and circumstances like some socio-economic developments, nature of organisational structure and the criminological market. Corporate crimes are attributed to the corporations under various theories discussed separately in this work. At the same time the persons responsible for conducting the affairs of the corporation are also vicariously liable. But as the apex court of our country rules such person can only be liable, if the corporation itself is prosecuted.

Now the corporates are capable of committing variety of crimes which include crimes resulting in physical harm-like industrial disasters, occupational hazards, manufacturing unsafe products, causing industrial pollution and also human rights violations. In the economic front the impact is devastating when various means and opportunities are available in the corporate environment and culture. This begins from deception of accounts and financial manipulations to inside trading, manipulation of security market, stealing trade secrets, projecting investment trends, corporate corruption and bribery and can also lead to corporate negligence and manslaughters. The new Companies Act in India has introduced certain provisions to put check on corporate misdeeds and also imposed upon them corporate social responsibility.

Some of the offences committed by the corporations are mentioned as under:
In the recent past many industrial disasters have happened world over like - The Bhopal Gas Tragedy, 1984, Chansala Mining Disaster, 1975, Jaipur Oil Depot Fire, 2009, The Windscale Fire, Great Britain, 1957, The Banqiao Dam Failure, China, 1975, Korba Chimney Collapse, 2009, Mayapuri Radiological Incident, 2010, Bombay Docks Explosion, 1944, Ojhri Camp, Pakistan, 1988, Texas City Refinery Explosion, 2005. The Industrial Disasters are a threat to people and life support system that arise from the demand – supply – production of goods and services. Many of these incidents leave long term health effects and severe contamination of the surroundings.

Corporate sector is responsible for major financial scams, scams in the business world. In the categories of financial frauds or irregularity the corporations are blamed for various offences like Corruption, Tax Evasion Hoarding, Black Marketing. There have been Share Market Scams, Hawala Transactions, Ponzi Schemes, Fake Currency and Cheque Forgery etc. Further we can find use of Fictitious Government Securities, Siphoning of Investors Money and Fraud off Shore Investment Where there is involvement of corporations.

There are like organized crimes is a new form of criminality in which along with organized groups the corporation are also found to be indulged. Money Laundering, Cyber Crimes, Terrorist Funding, Drug Trafficking, Human Trafficking.

The workers in hazardous industries do suffer death and injuries at workplaces and may also develop long term effects of occupational diseases. Corporate executives are responsible for the vast majority of deaths because they have violated occupational health and safety standards or have chosen not to create adequate standards.
Therefore the corporations may be liable for neglect for adopting safety measures to workers.

The unsafe products also injure or harm consumers. Consumers may also be victims of corporate violence include those injured or harmed due to defect in products or services.

The general public also experiences violence in the form of pollution and other green crimes. There are many different green crimes but they are all committed for the sake of profit and they all harm the environment. Other examples of corporate violence against the environment include the toxic waste dumped by the nuclear weapons industry, asthma and other respiratory illnesses caused by air pollution, and the environmental and human damage caused by the chemical. In recent years, some multinational corporations have moved production plants to countries that do not have many laws regulating pollution, and the environmental damage has been significant.

Corporates also get involved in various regulating offences. Other regulatory offences depending upon the activities undertaken by the corporate there are other categories of regulatory offences committed by them. These offences may be committed during the usual operation of their working or by non-compliance. In addition the Companies Act has provisions to ensure the compliance with regulatory from work.

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7.6 Punishing the Corporation

Once the guilt of the corporation is established the next onerous task is to determine nature and type of punishment to be imposed. Though conviction itself is a stigma that affects the business prospects of a corporation yet ends of criminal justice could only be met by providing appropriate sanctions. Here the foremost question is why the corporations should be punished? It can be said that objective of criminal justice would require that there should be condemnation of the guilty even when it is a corporation. Once the corporations are taken as separate from individuals within itself and they are acting as a whole in a different way than its executives, there is a requirement they should be punished distinctly even if physical imprisonment is not possible.

Under criminal law the theories of punishment are based of Retribution, Deterrence, Prevention and Reformation. How far these theories can be applied to find the rational corporate punishment?

The researcher has tried to analyse the various theories of Punishment and the need to formulate appropriate corporate sentencing policy.

7.6.1 Theories of Corporate Punishment

The main objective is the prevention of crime by laying down norms whereby criminal activities can be discouraged. There is a need for developing a culture whereby there could be voluntary compliance of law and cooperation will law enforcement. When there is failure to regulate and control the wrongful acts this leads to development of an environment of irresponsible conduct. Failure to control the corporate misdeeds may lead to retarded development and also loss of capital in many ways. In view of the magnitude of harm caused by
the corporate wrongs society looks for adequate legal mechanism to deal with it.

In the case of individual penological jurisprudence has developed keeping in view the conduct of individuals in the society. Broadly different theories of punishment viz., Retribution, Deterrence, Prevention and Reformation take care of different circumstances of the crime as well as criminals.

Retribution is a natural instinct to hit back the wrongdoer in the same way, but is it appropriate toward a fictitious entity without any mind of its own.

Freedman nevertheless contends that expressive retributivism justifies corporate punishment. The expressive retributivist's commitment is to assert moral truth in face of its denial.41

The objective of deterrence theory that punishment should be sufficiently sever to deter the convict and the prospective criminals from committing future crimes. Since the corporate form of punishment is not possible in the case of corporation the alternative forms of deterrence can be adopted in the case of corporations. In these cases deterrence modal of punishment are based on cost benefit concerns and are built on the promise of rationality.42 That is to make the criminal activity non beneficial. Mostly the corporations are operating for benefits or profits therefore deterrence of excessive cost of non-compliance of law could be more deterrent for them though the same is not generally true in the case of individual criminal behavior. It is also believed that deterrent fine imposed

upon the corporate would also affect many innocent shareholders, creditors, employees or the public too. But at the same time they should not profit from a crime committed on this behalf.

In the Supreme Court in *M.C. Mehta v. Union of India*\(^43\) the Supreme Court recognizing the absolute liability of an enterprise carrying on inherently dangerous and hazardous activities held that quantum of damages in such cases should be deterrent in event of any disaster. Such quantum of damages can be to the capacity of the enterprise i.e. crippling damages can be awarded to such enterprises. Only then multinational corporations which run their hazardous activities at the social cost could be deterred and made to take no risks of incurring any mishaps that may result in widespread rampage.

The preventive theory of punishment is applied to incapacitate the offender so as he may not be able to commit further crimes. In the cases of human offenders the courts may determine the kind or quantum of punishment to meet the ends of preventive theory of punishment by awarding death sentence or long term imprisonment by keeping in mind the various factors and circumstances of crime and criminal. The question for present discussion is how far preventive theory is appropriate for corporations and if so in what circumstances? It is believed that prevention or incapacitation is more workable with corporate criminals because their kind of criminal activity is dependent on being able to maintain legitimacy in formalised roles in the economy.\(^44\) There are formal ways to debar or restrict the activities of corporations which is not otherwise available in the individual cases. The erring corporation can also be permanently incapacitated by order of wounding up which is equal to

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\(^43\) AIR 1987 SC 1086

capital punishment in the individual cases. Corporation can also be restrained from continuing some activities which could violate the law.

It is observed that many corporate crimes arise from defective control system, insufficient checks and balances to ensure that the law is complied with, poor communication, inadequate standard operating procedure which fail to incorporate safeguards as against reckless behaviour. These organisational defects may be because of negligence or some conscious decision. However these wrongful acts can be controlled by regulatory agencies, which may regulate the corporate policies and practices. Therefore, rehabilitation is more workable strategy with corporate crime than traditional crime because defective organisational structure can be more easily regulated than the criminal behaviour of the individuals.

In a way, other formal mechanism can be applied for rehabilitation of which consent decree negotiated with regulatory agencies, probation order of putting the corporation under supervision of the auditor, environmental expert or other authority who would make sure, the order of restructure was complied with. There can also be suspended sentences for compliance with the necessary regulations.

### 7.6.2 Kinds of Corporate Punishment:

Because of inherent distinction the kinds of punishment for corporations cannot be the same as are prescribed for the natural persons. The death sentences, life imprisonment, imprisonment or any other corporate punishment are not feasible for the corporations in the strict sense. The penal statutes prescribing the punishments for the different sentences generally have not made any distinctions

\[\text{Id.}, \text{p. 809.}\]
for the offences which could otherwise be the same for both human beings and the corporations. The matter regarding corporate punishment also came under the judicial scrutiny when the Apex Court in the Assistant Velliappa Textile Ltd. & others.\textsuperscript{46} Where the court observed that the criminal liability cannot be imposed upon corporations where the punishment for the offence also prescribes imprisonment. In this context the Law Commission of India had also recommended that in cases where imprisonment is a part of prescribed sentence along with fine the court in the case of corporations should be competent to sentences the comparators with fine.\textsuperscript{47} A bill in this regard was also introduced in the parliament in 1972 had lapsed. However the Apex Court in a later decision in Standard Charted Bank and others v. Directorate of Enforcement & others\textsuperscript{48} ruled that when the prescribed sentences is imprisonment and fine then a company can be punished with fine though imprisonment as such is not possible.

In spite of the aforesaid relaxations still there is need to develop penological jurisprudence for corporate punishment keeping in mind the present day activities of the corporations. The viable punishment for corporations are fine quantum of which should not be less than the gain obtained by the corporation. Keeping in view the theories of punishment applicable to corporations the kinds of punishment must have hearing on the requirement of deterrence, prevention and of reformatory aspect can also be taken care of fine could serve the purpose of deterrence and also restitution of the victims. Preventive sanctions or probation sentences requiring offender’s reforms can also be imposed. In addition censure and adverse publicity do serve

\begin{itemize}
\item \textsuperscript{46} AIR 2004 SC 86
\item \textsuperscript{47} 41st Report of Law Commission of India, 1969
\item \textsuperscript{48} AIR 2005 SC 2622
\end{itemize}
penological purposes. Closure or Winding up could be effective in extreme cases which is equivalent to death.

Presently the corporate activities are impacting every human activity. Consequently, the wrong doing in corporate actions or omissions have serious consequences that may sometimes range from grave offences to irregularities calling for penal sanctions. It is also concluded that the corporate criminality is a cause of concern and need to be identified and determined. The corporate criminal liability has developed in the course of history from vicarious liability to present day independent corporate fault. In this research work, the developments in addressing the problem of corporate criminality has been discussed along with the emergence of various theories of corporate criminal liability in the present times.

The developments which have taken place in different countries, envisages the need to reorganise standard principles for corporate criminality in the present scenario. Particularly in India, the independent corporate fault has so far not been specifically laid down legislatively or judiciously. There is no disagreement on the issue that the corporation need to be punished for their criminal activity independently of its managers.

The other agitating issue is to identify the underlying principle for corporate punishment. The researcher finds that the deterrent preventive and reformatory theories are as much relevant for the corporation through in different perspectives than in Individual. The research further observed that retribution theory as such cannot be justified against the artificial person through it cannot be denied that public sentiment do arouse where grave harm is caused due to corporate disastrous acts. The study also finds penal sanctions for corporate crimes need to be specifically tailored. Keeping in mind the
interest of aggrieved victims, employees, customers, suppliers, traders, investors, also of general public and of course the Government itself.

The Penological approach for corporate crime should also taken into account the remedial and preventive measures in addition to fines. Innovative probation practices are also being considered in various countries. There is a need to develop corporate sentencing policy by promoting compliance of law through internal mechanism of the corporation.

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

The common belief established through various doctrines endures that corporate criminal liability stands in conflict with the individual character of criminal responsibility. There are times when the stakeholders of the corporate suffer and the rest of the times the direct effects of a criminal sanction are faced by the corporation alone in shape of fines. There were few instances when the courts began to award punishments in form of strict sanctions or fines to
the companies which had begun to create public nuisances and harm. A step forward was the decision of Solomon v. Solomon & co.\textsuperscript{49} which laid down that Corporate is a separate personality and this legal personality’s property is separate from the property of its members who assumed the risk of losing their contribution to the corporate patrimony after incorporation of the company. Members form corporations in order to avoid personal liability. Through various case laws which followed this decision established that even though the corporations’ veils separates and protects its members yet, the members, through their corporations, cannot avoid any legal penalties that would result from their actions as members.

There are certain laws followed by various countries to handle the punishments in case of corporate criminal liability. New models of criminal liability, such as the aggregation or self-identity theories, have been developed and observed by the courts. The American system of corporate criminal liability has been the most developed and extensive system of corporate criminal liability created so far. The American model includes a large variety of criminal sanctions for corporations such as fines, corporate probation, order of negative publicity, etc. in attempt to effectively punish corporations when any employee commits a crime while acting within the scope of his or her employment and on behalf of the corporation. The most appreciable fact in relation to the American model of corporate criminal liability is the adoption of the aggregation theory by courts.

There has been a gradual and structural shift in stance taken by Indian courts related to the conceptual application of corporate criminal liability. Indian courts have now started recognizing the criminal liability of a corporate. A company has a distinct legal

\textsuperscript{49} [1896] UKHL 1
personality under commercial laws as well as the penal laws in India. It can sue or be sued, can own and sell assets, or commit an offence that is of civil or criminal in nature and is taken as a respectable legal person. The old school in India too believed that the company is not a real person and that there is no physical punishment that can be awarded to it. The influence of the common legal countries is clearly visible in India when we see the interpretation of liability be dealt with vicarious liability theories and identification theories by the Indian Courts. Unlike Australia which uses the components of corporate fault theory to find the guilty minds and hands within in the company, we have not even started thinking on those lines yet. There is a dire need to incorporate sanctions and punishments under Criminal Laws in India like fines, economic sanctions, death penalty for a company, etc. so that the guilty acts of the companies can be addressed and punished in the right manner. The suggestions include; Need to recognize Corporate Fault as Distinct Principle of Liability; Need for Uniform Principles of Corporate Criminal Liability at the International Level; Need to Define Corporate Crime; Need to Develop Corporate Sentencing Policy; Pragmatic Approach is required towards Nature and Types of Corporate Punishment and Independent Liability of Person Responsible for Corporations Affairs.

CHAPTERIZATION

The thesis has been divided into the following chapters which discuss in detail the process and principles of corporate criminal liability.

**Chapter One**, entitled **Introduction** deals with the introductory part of the thesis. A brief mention has been made about the background of the study. The object and purpose of study, scope, significance, database, research methodology, research questions and chapter
have also been discussed in the introductory chapter. The chapter discusses the need of study of this topic so that the required changes can be initiated in our legal system through an amendment in the penal laws so that the dire need of holding the corporations accountable and liable for the criminal acts can be addressed by them.

Chapter Two, which is titled as **History and Nature of Corporate Criminal Liability** discusses the Origin and Development of Corporate Criminal Liability in different reigns of the world and the historical background behind the current laws that these reigns have to tackle criminal liability of the corporates. It discusses from the traditional era of prevalence of principles of common law, where the principles of liability of the corporates were established by the courts countries and how a company became an all-powerful giant from a traditional clan owed entity. The chapter traces this journey and how these entities have been treated and controlled by various jurisdictions.

Chapter Three, **Principles and Theories of Corporate Criminal Liability** contains the in depth analysis of the Principles of Corporate Criminal Liability *respondeat superior* which was strict and liability for statutory branches. In view of the increasing impact of corporation in every sphere aggregation, identification and corporate fault principles have been evolved from the beginning of vicarious liability to the depths of strict liability to the latest approach of absolute liability including the varied approaches adopted by countries like America, England, and Australia etc. to hold the guilty companies accountable for their criminal misconduct.
Chapter Four, entitled International Perspective of Corporate Criminal Liability

In this chapter, the researcher has tried to give a detailed outline of the International and the Indian Perspective of the corporate criminal liability. The perspectives and laws of both; civil as well as common law countries is discussed. The twin approach of law in these countries has been analysed where one sect has implemented strict provisions of criminal liability of corporate crimes and the other believes in dealing with the criminal wrongs of a company through administrative policies. The chapter highlights the issue that the principles to handle the doctrine of corporate criminal liability may vary from one country to the other but no jurisdiction is in a state to ignore its need and presence.

Chapter Five, Corporate Crimes: Nature and Types and its Impact on the Society deals with nature and types of corporate offences and their impact on society. In lieu of the spectrum of activities and reach at national and international level corporate criminality is posing serious threat. The chapter discusses various theories of corporate criminality and type of corporate crimes.

Chapter Six, Punishing the Corporate deals with theories corporate punishments as distinct from those applicable in the individual cases. New penological principles are emerging to deal with corporate criminality. Distinct policy for corporate sentencing adopted in different countries is discussed in this chapter along with the need to adopt and enact sentencing policies to punish the companies in India.

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