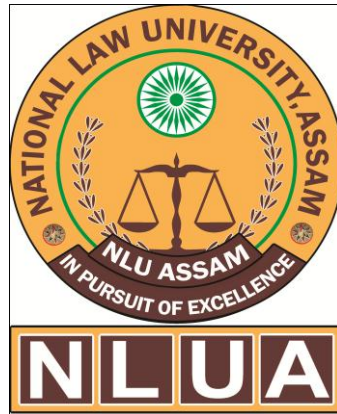


**CORPORATE CRIMINAL LIABILITY IN INDIA:
AN ANALYTICAL STUDY**



Dissertation submitted to National Law University, Assam
in partial fulfilment for award of the degree of
MASTER OF LAWS

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DECLARATION

I, **HIMASHRI BAISHYA**, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled **CORPORATE CRIMINAL LIABILITY IN INDIA: AN ANALYTICAL STUDY** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

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2017-18

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PREFACE

A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings. This research has thrown light on whether the very existence of the word “person” makes it liable for an offence under Indian Penal Code, 1860.

There have been stages of evolution of criminal liability of Corporations. The doctrines of Strict Liability & Vicarious Liability derived from law of torts are methods to obviate criminal liability of a corporation. The application of strict liability eliminating the requirement of mens rea, respondent superior dispenses with *actus reus* working together leads to imposing of corporations liability. The corporation cannot think of its own due to absence of mind create difficulties in establishment of *mens rea* in such crimes. There is a concept of “*alter ego*” doctrine that the management was the corporations “brain”. Similarly, no bodily punishment can be inflicted into it leading it to incapable of usual punishments. It does not have a soul to be condemned or a body to be hanged.

In the contemporary legal world, corporate criminal liability has been a subject of great relevance. It is also a highly polemical issue. In this research work, an attempt has been made to trace the growth and development of the concept of corporate criminal liability in India. Special, reference has been made to the evolution of the concept in the common law jurisdiction. The theoretical and practical controversy over this subject has also been discussed in detail.

This research work has tried to capture the recently evolved law of corporate criminal liability in India with special reference to UK and US law on corporate criminal liability. The legal framework on corporate criminal liability, prevailing in India, has been discussed by explaining Judicial Pronouncements and by showing the change in the courts approach at different prospects of the activities. The research has also deals with some prevailing obstacles in attaching criminal liability to corporations. In the last chapter the researcher tries to points out some recommendations and deduction of the study.

This researcher hopes that India will take necessary insights from its dynamic past and the present, so as to move towards a future that will be bright a shining.

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LL.M One Year Degree Programme

2017-18

TABLE OF CASES

1. *Ananth Bandu v Corporation of Calcutta*
2. *Aneeta Hada v Godfather Travels and Tours Pvt. Ltd*
3. *Assistant Commissioner, v. Velliappa Textiles Ltd*
4. *Avnish Bajaj v. State*
5. *Bolton (H.L.) (Engg) Co. Ltd v T.J. Graham & Sons Ltd*
6. *Commonwealth v. Proprietors of New Bedford Bridge*
7. *Daimler Company Ltd v. Continental Tyre & Rubber Co. (Great Britain)*
8. *Dilip Kumar Jaiswal v. Dabapriya Banerjee*
9. *ducts Ltd v S.K. Singh*
10. *Food Inspector Cuttack Municipality v BP Oil Mills Ltd*
11. *Giridhar Lal Gupta v. D.H. Mehta and Another*
12. *Iridium India Telecom (P) Ltd. v Motorola Inc & another*
13. *Iridium India Telecom Ltd. vs. Motorola Inc*
14. *K.K. Ahujav V.K. Vora*
15. *Kalpanath Rai v State*
16. *Kalpanath Rai v. The State*
17. *Keki Hormusshi Gharda & Ors v Mehervan Rustom Irani & Ors*
18. *Knight v. Birmingham Corp*
19. *Kusum Products Ltd. S. K. Singh*
20. *Lennard Carrying Co. Ltd. v Asiatic Petroliam Co. Ltd*
21. *Ltd.Gilford Motor Company v. Horne.*
22. *M.C. Mehta v. Union of India*
23. *M.V. Javali v Mahajan Borwells & Co*
24. *Maksued Saiyad v State of Gujarat*
25. *Meridian Global Funds Asia Ltd. v. Securities Commission*
26. *Mobarak Ali Ahmed v The State of Bombay'*
27. *Moore v I. Breseler Ltd*
28. *Motipur Zamindari Co. Ltd. V State of Bihar*
29. *New Hampshire v. Zeta Chi Fraternity*
30. *New York Central & Hudson River Railroad v. United States*
31. *Oswal Vanaspati & Allied Industries v. State of U.P*

32. *PNB Finance Ltd. Shital Prasad Jain.*
33. *R K Dalmia v Delhi Administration*
34. *R v Canadian Dredge & Dock Co*
35. *Radhey Shyam Khemka v. State of Bihar*
36. *Re, Bedrock Ltd.*
37. *Ryland's v. Fletcher*
38. *S K Alagh v State of UP*
39. *Salomon v Salomon & company Ltd*
40. *Santanu Ray v. Union of India.*
41. *Sical Cwt Distriparks Ltd.v Besser Concrete System Ltd*
42. *Sri Dinshaw Maneckjee Petit. Birmingham Corp.*
43. *Standard Chartered Bank & Ors. V Directorate Of Enforcement & Ors*
44. *Standard Chartered Bank and Ors. Etc., vs. Directorate of enforcement and Ors.
Etc*
45. *State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd and others*
46. *State of U.P. v. Renusagar Power Co.*
47. *Sunil Bharti Mittal v CBI*
48. *Tesco Supermarkets v. Natrass*
49. *The Queen v. Great North of England Railway*
50. *U.P. Pollution Board v. Modi Distillery*
51. *United States v. A & P Trucking Co*
52. *United States v. Alaska Packers' Ass'n, I Alaska*
53. *United States v. Investment Enter, Inc*
54. *United States v. Milwaukee Refrigerator Transit Company*
55. *Zee Telefilms Ltd. V Sahara India*

TABLE OF STATUTES

Acts

1720 - The Bubble Act

1810 - French penal Code

1844 - Joint Stock Companies Act

1850 - The Joint Stock Companies Act

1856 - Companies Act

1860 - The Indian Penal Code

1872 - The Indian Evidence Act

1881 - The negotiable instrument Act

1882 - Companies Act

1899 - Bengal General Clause Act

1903 - Elkins Act

1913 - Companies Act

1923 - Calcutta Municipal Act

1923 - Employees' Compensation Act

1934 - The Securities Act of

1938 - The Food, Drug, and Cosmetic Act

1947 - Foreign Exchange Regulation Act

1948 - Factories Act

1950 - The Constitution of India

1954 - Prevention of Food Adulteration Act

1955 - Essential Commodities Act

1956 - Companies Act

1956 - The Companies Act

1961- Income Tax Act

1973 - Foreign Exchange Regulation Act

1973 - The Code of Criminal Procedure of India

1974 - Water (Prevention and Control of Pollution) Act

1985 - The Narcotic Drugs and Psychotropic Substance Act

1987 - Terrorist and Disruptive Activities Act

1988 - Prevention of Corruption Act

1988 - The Prevention of Corruption Act

1992 - SEBI Act.

2000 - Information Technology Act

2002 - The Money Laundering Act

2007 - Corporate Manslaughter and Corporate Homicide Act

2010 - Bribery Act

2013 - Companies Act

2013 - Crime and Courts Act

2015 - Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act

2015- Companies (Amendment) Act

2017 - Companies (Amendment) Act

Bills

1972- Indian Penal Code (Amendment) Bill

2013- Prevention of Corruption (Amendment) Bill

Conventions

1997 - OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Anti-Bribery Convention).

2000 - United Nations Convention against Transnational Organized Crime (UNTOC).

Law Commission Reports

1969- 41st Law Commission of India Report

1972- 47th Law Commission of India Report

2015- 254th Law Commission of India Report

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1.	AIR	All India Reporter
2.	AOA	Articles of Association
3.	Art.	Article
4.	Bom.	Bombay
5.	CBI	Central Bureau of Investigation
6.	CEO	chief executive officer
7.	CJ	Chief Justice
8.	CLC	Company Law Cases
9.	Co.	Company
10.	Corp.	Corporation
11.	CPC	Civil procedure Code
12.	CPC	Civil Procedure Code
13.	CrPC	Criminal Procedure Code
14.	Del.	Delhi
15.	DOJ	Department of Justice
16.	DPAs	deferred prosecution agreements
17.	ED	Enforcement Directorate
18.	Ed.	Edition
19.	Eds.	Editors
20.	EU	European Union
21.	FIR	First Information Report
22.	Ibid	Ibidem (In the same case)
23.	IC	Indian Cases
24.	ICC	International Criminal Court
25.	ICTR	International Criminal Tribunal for Rwanda
26.	ICTY	International Criminal Tribunal for the former Yugoslavia
27.	IDBI	Industrial Development Bank of India.
28.	Inc.	Incorporation
29.	Infra	Something mention bellow

30.	IPC	Indian Penal Code
31.	IT	Information Technology
32.	Jour.	Journal
33.	KFA	Kingfisher Airlines
34.	KMP	Key Managerial Person
35.	LOU	Letters of Undertakings
36.	MOA	Memorandum of Association
37.	NFRA	National Finance Reporting Authority
38.	No.	Number
39.	NY	New York
40.	OECD	Organization for Economic Cooperation and
41.	p.	Page
42.	PIL	Public Interest Litigation
43.	PNB	Punjab National Bank
44.	Pvt.	Private
45.	SBI	State Bank of India
46.	SC	Supreme Court
47.	SCC	Supreme Court Cases
48.	SCL	Supplementary Cause List
49.	SCLR	Supreme Court Law Review
50.	SCR	Supreme Court Reporter
51.	SEBI	Securities Exchange Board of India
52.	Sec.	Section
53.	SIT	Special Investigation Team
54.	Supra	Something mention bellow
55.	TADA	Terrorist and Disruptive Activities
56.	UK	United Kingdom
57.	UN	United Nation
58.	UNTOC	United Nations Convention against Transnational Organized Crime
59.	UP	Uttar Pradesh
60	USA	United States Of America

61.	USAM	United States Attorneys' Manual
62.	V.	Versus
63.	Vol.	Volume
64.	WGB	Working Group on Bribery

TABLE OF CONTENTS

	Page No
Certificate	
Declaration	
Acknowledgement	i
Preface	ii-iii
Table of Cases	iv- v
Table of Statutes	vi-viii
Table of Abbreviation	ix- xi
CHAPTER 1- INTRODUCTION	
1.1 Introduction	1-6
1.2 Statement Of Problem	6- 7
1.3 Research Aim	7
1.4 Research Objectives	7-8
1.5 Research Scope And Limitation	8
1.6 Literature Review	8-15
1.7 Research Question	15
1.8 Research Hypothesis	15
1.9 Research Methodology	15-16
1.10 Research Design	16-17

**CHAPTER 2 ESTABLISHMENT OF CORPORATIONS AND CRIMINAL
LIABILITY: HISTORY AND DEVELOPMENT**

2.1	Evolution Of The Concept Of Corporate Criminal Liability under Different Legal System	18-19
2.1.1	Liability Of Corporations Under Roman Law	19-20
2.1.2	Liability Of Corporations Under German Law	20- 21
2.1.3	Liability Of Corporations Under French Law	21- 23
2.1.4	Liability Of Corporations Under English Law	23-25
2.1.5	Liability Of Corporations Under American Law	25-27
2.1.6	Liability Of Corporations Under Indian Law	27-30
2.2	Theories of Corporate Criminal Liability	
2.2.1	Theory Of Vicarious Liability	30
2.2.2	Identification Theory	30-32
2.2.3	Attribution Theory	32-33
2.2.4	Aggregation Theory	33
2.3	Strict Liability Principle For Corporate Crime	34
2.4	Corporate Criminal Liability : A Conceptual Study	
2.4.1	Concept Of Corporation	35-36
2.4.2	Characteristic Feature Of Corporation	
2.4.2.1	Artificial Person	36
2.4.2.3	Limited Liability	36-37
2.4.2.4	Common Seal	37
2.4.2.5	Separate Legal Entity Or Corporate Veil	37-38
2.4.2.6	Lifting Of Corporate Veil	38-40
2.4.3	Crime And Criminal Liability	
2.4.3.1	Definition Of Crime	40-42
2.4.3.2	Crimes And Civil Wrongs	42
2.4.3.3	Principles Of Criminal Liability	43
2.4.4	Crime And Corporate Criminal Liability	
2.4.4.1	Criminal Liability Of Corporations	43-44

2.4.4.2 Basic Conditions Of Corporate Criminal Liability	45- 46
2.4.4.3 Approaches In Determining Corporate Criminal Liability	46-47
2.4.4.4 Punishments for Corporate Criminal Liability	47
CHAPTER 3 - LEGAL FRAMEWORK ON CORPORATE CRIMINAL LIABILITY IN INDIA: AN ANALYSIS	
3.1 Pillars Of Indian Criminal Justice System : An Overview	48
3.2 Liability Under Indian Penal Code (IPC) 1860 In Relation To Corporation	
3.2.1 Corporate Criminal Liability In General	48-49
3.2.2 Criminal Liability Of Directors	50-51
3.2.3 Forty First Law Commission Of India Report	51
3.2.4 Forty Seventh Law Commission Of India Report	51-52
3.2.5 Consequences Of Law Commission Report And Indian Penal Code (Amendment) Bill 1972	52-53
3.3 Corporate Criminal Liability Under Companies Act, 1956	53-54
3.3.1 Directors' Liability Under Companies Act, 1956	54- 55
3.4 Corporate Prosecution Under The Code Of Criminal Procedure, 1973	55-56
3.5 Corporate Criminal Liability Under The Companies Act, 2013	56-57
3.5.1 Officer In Default	57-58
3.5.2 Offences And liabilities Of corporation	58-63
3.5.3 Class Action Suit	63
3.6 Corporate Criminal Liability Under Other Indian Statutes	63- 65
3.7 Models Of Vicarious liability In The Corporate Sector In India	65-68
CHAPTER 4 : PUNISHMENT OF CORPORATION: A CHALLENGE BEFORE THE INDIAN JUDICIARY	
4.1 Judicial Pronouncements from 1950 to 1970.	69
4.1.1 Crimes Not Requiring Criminal Intent : <i>Ananth Bandu Case</i>	69-70
4.1.2 Crimes Of Intent : <i>Messrs Syndicate Transport Case</i>	70-71
4.2 Judicial Pronouncements Post 1970 Period	71
4.2.1 Interpretation Of The Word "In Charge" : " <i>Giridhar Lal Gupta Case</i> "	71
4.2.2 Establishment Of Doctrine Of Attribution :	

<i>A D Jyaveerapandia Nadar Case</i>	71-72
4.2.3 Parliamentary Intention Can Be Deduced From The Language Of The Statutes Books : <i>Kusum Products Case</i>	72
4.3 Judicial Pronouncements Post 1990s Period	72-73
4.3.1 Prosecution Under Companies Act, 1956 Doesn't Bar A Parties Right To Claim Relief Under IPC : <i>Radhey Shyam Khemka Case</i>	73
4.3.2 Court Can Award Part Of Prescribed Sentence : <i>Oswal Vanaspati Case</i>	73-74
4.3.3 Harmonies Construction Of Penal Provision To Punish A Corporation : <i>M.V. Javali Case</i>	74
4.3.4 Incapability Of Company To Form <i>mens rea</i> : <i>Kalpanath Rai Case</i>	75
4.4 Judicial Response; Post 2000 Period	75
4.4.1 Impossibility To Prosecute Corporation For Defamation : <i>Zee Telefilms Case</i>	76
4.4.2 Impossibility To Prosecute Corporation For Mandatory Punishment : <i>Assistant Commissioner Case</i>	76-77
4.4.3 Relaxation Of imprisonment : <i>Standard Chartered Bank Case</i>	77-78
4.5 Judicial Response; Post 2010 Period	
4.5.1 Establishment Of <i>mens rea</i> On Corporation : <i>Iridium India Telecom Case</i>	78-80
4.5.2 Special Vicarious Liability : <i>Sunil Bharti Mittal Case</i>	80-82
4.7 Judicial Trend : Post 2015	82-83

CHAPTER 5 : CHANGING FACE OF CORPORATE CRIMINAL LIABILITY

5.1 New Dimension Of Corporate Criminal Liability Under The Prevention Of Corruption (Amendment) Bill, 2013	84
5.1.1 Liability Of Bribe Givers	84
5.1.2 Liability Of Commercial Organization	85
5.1.3 Vicarious Liability Of Officer In Charge	85
5.1.4 Law commission Of India Report On Amendment Bill, 2013	85-86
5.2 Recent Developments Under Companies (Amendment) Act, 2017	
5.2.1 Key Managerial Person	87
5.2.2 Constitution Of NEFA	87

5.2.3	Section 447 Of Companies (Amendment) Act, 2017	88
5.3	Recent Development Under UK Law	88-89
5.3.1	Liability For Gross Negligence Under Corporate Manslaughter And Corporate Homicide Act 2007	89
5.3.2	Liability For Failure To Prevent Bribery Under Bribery Act, 2010	89-90
5.3.3	UK Deferred Prosecution Agreement (DPA)	90-91
5.4	Recent development under US Law	91
5.4.1	The United States Attorneys' Manual	92-93
5.4.2	The United States Sentencing Guidelines For Organizations	93-94
5.4.3	Deferred Prosecution Agreement Under US Attorneys Manual	94-95
5.5	OECD Anti-Bribery Convention Liability Of Legal Persons For Foreign Bilbray	95-96
5.6	Corporate Criminal Liability Under International Criminal Law	96
5.6.1	Nuremberg Tradition On Corporate Criminal liability	96-97
5.6.2	ICC Tradition On Corporate Criminal Liability	97-98
5.6.3	Liability Of Legal Persons Under UNTOC	98-99

CHAPTER 6 : ISSUES AND CHALLENGES CONCERNING PREVAILING INDIAN LAWS FOR CORPORATE CRIMINAL LIABILITY

6.1	Corporate Civil Or Criminal Liability : A Juristic Controversy	100
6.1.1	Juristic View In Favors Of Corporate Criminal Liability	100-101
6.1.2	Juristic View In Favor Of Corporate Civil Liability	101-102
6.2	Lacunae In Various Judicial Pronouncements	102-103
6.3	Shifting Of Corporate Criminal Liability	103-104
6.4	Shareholders Or Consumers Bear The Cost Of Corporate Criminal Liability	104- 105
6.5	Position Based Liability For Corporate Crimes	105-106
6.6	Guidelines Regarding Fine Or Imprisonment Yet To Be Developed	106-107
6.7	Absence Of Sentencing Policy Before The Courts Of India	107
6.8	Cyber Fraud In Corporations:	108
6.8.1	Cloud Computing Fraud	108
6.8.2	Social Media Fraud	108
6.8.3	Crypto Currency Fraud	108-109

6.9 Corruption And Bribery In Indian Corporate Sector	
6.9.1 Satyam Scandal	109
6.9.2 Vijai Mallya Loan Default Case	109-110
6.9.3 Nirav Modi Scam	110-111

CHAPTER 7 CONCLUSION AND SUGGESTION

7.1 Key Findings Of The Research	112- 115
7.2 Summing Up	115-117
7.3 Suggestion	117-118

BIBLIOGRAPHY	xvii-xxviii
---------------------	-------------

CHAPTER 1

INTRODUCTION

1.1 Introduction

A company is an artificial person; a juristic person having perpetual succession and common seal; lexically speaking, it is an association of persons having its own rights, duties and liabilities as distinct from the individuals forming it.¹ A company can own property in its name and can dispose of the same. As a legal person the liabilities of the company are of its own and not of its directors, members or shareholders. From the jurisprudential point of view, though, company is not a living individual having flesh and blood; but never the less, it works through individuals having ‘head and brain’.²

Glanville Williams, in his book titled “Text Book of Criminal Law” have rightly observed that:

A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings.³

In the 21st century, the notion of corporate criminal liability is one of the most debated and burning topic of the corporate jurisprudence. The concern for corporate criminal liability came to the limelight with the emerging impact of the corporations in the society. It is seen that sometimes corporations become notorious by solely aiming on the economic gain and ignores the social responsibility. It is also evident that large corporations have increasingly started indulging in criminal activities from the past two centuries. With the increase of industrial frauds and financial crimes, the need for criminal liability of corporations was felt under various jurisdictions of the world. However, not being a natural human being, corporation’s activities, criminal or

¹ Dr G.K. Kapoor and Sanjay Dhamija, COMPANY LAW AND PRACTICE: A COMPREHENSIVE TEXT BOOK ON COMPANIES ACT, 2013, 20th ed. 2015, p. 5.

² *Ibid.*

³ Glanville Williams, TEXT BOOK OF CRIMINAL LAW, 2nd ed. 1961, p. 970.

otherwise, are not ordinary and are difficult to attribute the criminal liability of the corporations by applying the general principle of liability.⁴

The doctrine of corporate criminal liability may be imported from the doctrine of respondent superior which has been a tort law principle. This doctrine states that a corporation can be criminally liable and convicted for the unlawful acts of its agents, provided those agents were acting within the scope of their actual or apparent authority. So, in simple terms, corporate criminal liability meant that, if a crime is committed in the name of a corporation, then the corporation has to bear the liability for that crime.

In this context, **Salmond's**⁵ view can be attributed. He said,

He who commits a wrong is said to be liable or responsible for it. Liability exists to remedy the wrong.⁶

So, when a corporation bears the criminal liability for the acts of its members, it has to bear the punishment for it, generally in the forms of fine or imprisonment or with both. Practically, a company cannot commit a crime by itself. As the company acts only through its directors, managers and other employees, for any criminal acts of those members, which is committed during the course of their business, the corporation will be liable and be punished accordingly.⁷

When the question is about civil liability, it does not create much problem, because, civil wrong can be easily remedied by imposing fine. But when the question is about criminal liability and the prescribed punishment includes mandatory imprisonment, then problem arises in imposing the punishment. It's becomes complex when the respondent superior doctrine applies in the context of corporate liability, because unlike the master-servant relation or principal-agent relation in the tort or criminal law, where master or principal is a natural person, corporation, which act as a master

⁴ The general principle of liability is that "In order to make one liable, it must be shown that an act or omission has been done which was forbidden by law with a guilty mind."

⁵ Sir John Salmond (3 December 1862 – 19 September 1924) was a lawyer, university lecturer, solicitor general and judge of the Supreme Court of New Zealand. He is considered as an inaugural or founding father of modern concept of law.

⁶ John C. Ball, "Deterrence Concept in Criminology and Law", 46 JCLC (1955), P. 348.

⁷ A corporation is an artificial person in law having a fictional entity, with perpetual succession and is known by a name with which it has been incorporated. It is a collection of persons, enjoying the rights and duties of its own.

or principal is not a natural person but the combination of persons having separate personality from the persons composing it.

Vicarious liability

<ol style="list-style-type: none"> 1. Master (natural person) 2. Servant(natural person) 3. Master can be held personally liable for servant's wrong 4. Master can be personally imprisoned 	<ol style="list-style-type: none"> 1. Corporation(artificial person) 2. Members (natural person) 3. Corporation cannot be held personally liable for member's wrong 4. Corporation cannot be personally imprisoned
--	--

The legal issue, in the context of corporate criminal liability is that, being an artificial person whether a corporation is capable of committing crime, if not, then what will happen to the criminal acts which are committed in the very name of the corporation or, if yes, then how a corporation's guilty mind can be proved or can be sent it to jail. The traditional view is that "a corporation could not be held guilty of a crime, because guilt requires guilty mind and a corporation not having a mind could not form intent. But this view is not an accepted view today. The majority opinion throughout the world is that corporations can be made criminal liable to pay fines; and *mens rea* can be proved against a corporation. With this attitude, the law on corporate criminal liability is started growing in varies jurisdiction across the world. But, countries' attitudes are still different in accepting the very notion of corporate criminal liability in the same line.

The theoretical debate on criminal liability on corporations mainly centers round the two juristic views. According to one view, corporate criminal liability serves no real purpose as the society is no way a gainer by its existence, corporations exists only in legal fiction and can act only through human agency.⁸ So, supporter of this view argues that is it better to deal with the guilty individual for whatever wrong is done by him, in the name of the corporate body.⁹ Supporter of this view come to the

⁸ Pradip Ghosh, "CRIMINAL LIABILITY OF CORPORATE ENTITIES" 1st ed. 2017, pp. 21- 40.

⁹ *Ibid.*

conclusion that corporate liability is unjust because it punishes innocent people (directors, employees, shareholders and so on) for the criminal acts of other individuals who acts under the corporate veil.¹⁰

On the other hand, the opponents viewed that, in the contemporary world corporations hold an enormous potential position, which, when applied to crimes and the breach of the law, assumes massive injuries and harm to the society. Therefore the socio – economic realities require the corporation punished for the crime committed by it.¹¹

Earlier literature on the subject of corporate criminal liability mainly focused the common law countries, such as England, America and Canada, who made the first attempts to impose corporate criminal liability.¹² The Industrial revolution in this three countries provide a great contribution to the economy which also later on emphasized the brutal effects of criminal activities of the corporations. It is also evident that, evolution of American corporate criminal liability has its origin in the English common law.¹³ “Historically, the recognition of corporate criminal liability commenced under the English law towards the end of the nineteenth century, mostly with regard to the statutory offences relating to welfare and regulatory laws, which usually did not require *mens rea*.¹⁴ In the nineteenth century, by applying the vicarious liability doctrine the English court began to hold corporations liable for the actions of their agents, for wrongful act and omissions.¹⁵ But in the twentieth century this vicarious liability doctrine was replaced by identification theory, under which, corporation were punished for crimes of intent.¹⁶ However in 2007 there was a significant move in UK when they enacted The Corporate Manslaughter and Corporate Homicide Act, 2007, which is a rare piece of legislation on corporate crime as initiated by the UK Parliament.

In the United States, the federal courts instead of holding the corporation indirectly liable for criminal acts have started to apply the doctrine of vicarious liability to hold

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Anca Iulia Pop, “Criminal Liability of Corporations : Comparative Jurisprudence” , http://www.law.msu.edu/king/2006/2006_Pop.pdf (April 2, 2017).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Detail discussed in Chapter 2 - “ESTABLISHMENT OF CORPORTIONS AND CRIMINAL LIABILITY: HISTORY AND DEVELOPMENT”.

the corporations directly liable for the acts of its employees as well as agents. Later on, United States has adopted the aggregation theory, according to which, corporations are made liable based on the act and culpability of one or more of the employees whose aggregate activities met the criteria of “*actus reus*” and “*mens rea*”.¹⁷ This meant that a radical departure had taken place from the English court.

All the countries of the world have at least recognized one of the various trends in criminalizing the corporations for their criminal act, as several jurisdictions accepted and applied it, while other rejected it. Countries like France, Belgium, Italy and many other countries of the world, have now incorporated the provisions, dealing with corporate criminal liability, in their laws. But the countries like Brazil, Luxembourg, and Slovak Republic do not recognize the criminal liability of corporations in their laws at all.¹⁸ On the other hand there are countries like Mexico, Hungary and some Arab countries such Algeria, Egypt, Libya and Kuwait assumes only corporate administrative and civil liability and not corporate criminal liability.¹⁹

It is significant to note that in the common law jurisdiction as well as in India, the law of corporate criminal liability has been mainly, judge made law. The legislative initiative is quite a few or somewhat controversial. Specially the developing countries like India which are most vulnerable to corporate crime, punishment of corporations for their criminal is very difficult in the absent of strict laws on corporate crime . In India the laws pertaining to corporate criminal liability emerged primarily in 20th century, particularly it was strengthened after **Bhopal Gas leak tragedy**.²⁰ However it is still in an emerging stage. The courts in India continued to hold the traditional view that a corporation, being an artificial person having no mind of its own , could not be guilty of offence requiring *mens rea* and can only be punished with fine. Even the Indian statutes are not in pace with the developments as in UK and USA as the corporations are not made criminally liable and even if they do so courts and statutes impose no other punishments excepts fines. This is evident from the landmark judgment in 2005 in the case of ‘*Standard Chartered Bank and Ors. Etc., vs.*

¹⁷ *Supra* note 12.

¹⁸ *Ibid.*

¹⁹ Raed S. A. Faqir, “The Criminal Liability of Parent Corporations for Acts of Its Subsidiaries under Criminal Law in Jordan: A Comparative Study”, 7 B.L.J (2016) , pp. 212-237.

²⁰ Detail discussed in Chapter 2- “ESTABLISHMENT OF CORPORATIONS AND CRIMINAL LIABILITY: HISTORY AND DEVELOPMENT”.

Directorate of enforcement and Ors. Etc.,’ where the Apex court rejected the previous views on Corporate criminal liability and held that when both imprisonment and prescribed punishment, the court can impose fine alone which could be enforced against the company. Thereafter the court felt an urgent need for law reforms to criminalize the corporations, as a result of which a radical shift in the law has been carried out in the year 2011 with the judgment of the case ‘*Iridium India Telecom Ltd. vs. Motorola Inc.*’.²¹ The court in the case held that company can be indicated for *mens rea* offences as the corporations performs their functions through the directors and other agents whose belief, actions or intent can be attributed to the company.²²

Meanwhile, the debate over the scope and extent of corporate criminal liability has been going on among the scholars opposite views, but the courts of the varies countries are taking an active role in punishing the guilty corporations and their responsible officers, as corporations are increasingly taking control of most of the important aspects of our day to day life.

It is appreciable that Indian courts have no doubt been efficient in evolving the concept of corporate criminal liability and have always tried to impose the same on the convicts. It is not only the duty of the court but also a responsibility of the legislature to improve the notion of what is corporate crime and up to what extent the criminal liability can be imposed on the corporations.

1.2 Statement Of Problem

By fiction of law, a corporation is a distinct entity, yet in reality, it is an association of persons who are in fact the beneficiaries of the corporate property. Juristic personality of the corporations is the main cause of issue in the context of their criminal liability, as not being the natural person; corporations cannot be liable for the criminality. It happens that corporate personality of the company is used to commit frauds or improper acts. Since an artificial person is not capable of doing anything illegal or fraudulent, in such situations the court lifts the veil of the corporation and identify the person who are really guilty. However, there are no classes of cases where lifting of veil is permissible. That must necessarily depend on relevant or other provisions.

²¹ AIR 2011 SC 20.

²² *Ibid.*

Though various doctrines and theories are there in the context of criminality of corporations, none of the theories are however clear about who will actually be punished when a corporation as a whole is liable for criminality. Various thinkers argue that if fine is the only possible mode punishment against a corporation, then corporate civil liability can obtain the desirable features of corporate criminal liability(e.g., criminal liability's powerful enforcement) while largely avoiding its undesirable features (e.g., criminal procedural protections).²³

The problem lies in the fact that there is no uniform model on the principles of criminal liability of corporations, where countries like UK and USA are following different justification in criminalizing the corporations and there is still a lacuna in the laws prevailing in India. In view of this, the problem undertaken for study is confined to the logical and legal analysis of the concept of corporate criminal liability.

1.3 Research Aim

This work aims at providing a legal aspect on the long continuing debate of criminal liability of the corporations. Along with analyzing the legal framework on corporate criminal liability in India and in selected jurisdictions; the researcher has also made an attempt to study about the judicial precedent as laid down by the judiciary in determining the criminal liability of corporations.

1.4 Research Objectives

- To study the nature, scope and characteristics of criminal liability of corporations.
- To examine the types and modes of punishments that is imposed for corporate criminal liability.
- To understand the legal framework available for corporate criminal liability in India.
- To examine the current issues, challenges and problems that arises in the enforcement of corporate criminal liability.
- To analyze the legal development, via legislations and judicial decisions, that occurs in the enforcement of corporate criminal liability in India.

²³ *Supra* note 8.

- To enlist some suggestions and measures that the authorities may take into consideration to improve the statues on the subject of corporate criminal liability.

1.5 Research Scope And Limitation

The scope of the research work is confined to the general understanding of the concept of criminality and liability of corporation, its natures and the emerging trends. This study has also highlighted the legal developments on the extent of criminality of the corporations; those have taken place in different parts of the world, with special reference to India, UK and USA. It further extends to analyzing the legal theories and legislative frameworks on criminality of corporations and the judicial approach towards compensating the directors, managers, officers and other employees of the corporations for the wrong committed by the corporations. In the light of the objectives and purpose of the this study the researcher has tried to figure out the underlying problems and shortcoming which are still facing in handling the corporate criminal liability and laid some possible solutions as to what amendments are needed in the penal laws so as to restrict the company's activities which promote criminal actions through their policies, procedures and actions. Due to certain limitations as to time and money the researcher has made the best efforts to utilize the available recourses to find out the relevant information by using doctrinal method so that the necessary information and the real problem regarding criminal liability of corporations in India may be identified.

1.6 Literature Review

Books

Pradip Ghosh (2017), CRIMINAL LIABILITY OF CORPORATE ENTITIES: WITH SPECIAL REFERENCE TO THE LAW IN INDIA

In this book the author deals with his deep understanding of the concept corporate criminal liability. The author has expressed in words not merely the foundational ideas and the edifice of corporate criminal law but also its gradual evolution and development of corporate criminal liability in the global scenario with special reference to the Law in India. The book has also projected the present mammoth jurisprudential field of corporate criminal law.

Dr. G. K. Kapoor and Sanjay Dhamija (2015), COMPANY LAW AND PRACTICE

This Book represent an impressive and judicious blending of the provision of the Companies Act, 2013, judicial decisions, clarification issued by the Department of Company Affairs and the guidelines and clarification issued by the SEBI. The book is interspersed with interpretations, explanations and illustrations wherever felt necessary to assimilate the provisions in a better way.

Another important feature of this book is that the authors have tried to present the provisions of the law in a simple and lucid style, backed by most up-to-date decisions. A number of specimen notices, minutes and resolutions have been given at relevant places.

K.D.Gaur (2009), CRIMINAL LAW: CASES AND MATERIALS

In this book the author stated that, a Corporation is a legal entity incorporated by law for preserving certain rights in perpetual succession. In other words a corporation is a group of human beings, authorized by law to act as a legal unit, endowed with a legal personality and has a seal of its own. In this book the author has made it clear that corporation is different from its members and it can exercise its rights. Further he says that there should be difference between natural person and legal person while fixing criminal liability.

Avtar Singh (2015), COMPANY LAW

In this book the author discusses that, a Company being a body corporate, can sue and be sued in its own name. Criminal complaint can be filed by a company but it must be represented by a natural person. It is necessary that the complaint is liable to be dismissed because of the absence of the representative in the same way in which an individual complaint is liable to be dismissed for absence of the complainant. In reality, however, the business of the legal person is always carried on by, and for the benefit of, some individuals. In the ultimate analysis, some human beings are the real beneficiaries of the corporate advantages.

The author in this book has rightly pointed out that, though the beneficiaries of the business of the company are the natural persons as a group, the company is distinct from its members as it has a right to file a suit against others and others can also file a suit against the company.

Celia Wells (2001), CORPORATIONS AND CRIMINAL RESPONSIBILITY

In this book the author argued about the appropriate basis for corporate criminal liability, where two distinct strands emerge. One line seeks to equate the corporate entity with the individual, to tease out those characteristics of corporations which can be correlated with the essence of individual responsibility. The other exploits the dissimilarities between individuals and the group entity. Corporations are different from human beings, their activities are not merely on a gladder scale, their whole existence, function and formation marks them apart. The contours of their culpability should reflect those differences. Although either route can lead to corporate liability, the second has more potential. Any argument which seeks to equate corporate with individual liability has to confront the group difference at some point: effort to bring out corporate intentionality from corporate policy need to face the complexities of group structures with their lines of authority and internal power distributions. The author of the book in his argument has stressed the different identity of the corporation with that of the individuals. And the liability would be fixed on the basis of the authority and power given to the individual.

K.R.S Sampath (2006), LAW OF CORPORATE GOVERNANCE

In this book the author focused on vicarious liability under environmental laws. Under the environment laws, if a company performs the illegal act, it is held liable for that work. Imposing liability on corporation is very important as the majority of environment crimes are committed by companies: merely prosecuting the corporate officers for such offences would not sufficiently deter the company. By application of the principle of respondent superior the company is held vicariously liable for the actions of its employees in the course of employment and for the benefit of the company. Such liability would be especially useful when it is difficult to pin liability on one particular official, as the environmental violations are the result of the actions of several different officers. Along similar lines of argument, holding companies may also be held liable for the criminal acts of their subsidiaries. The case of union carbide chemicals is an example. The author in this book has elaborately discussed the liability of directors of the company and company itself. He has discussed the vicarious liability principle on which company can be held liable for the acts of its agents.

Shivam Goel (2015), CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE

In this book the author pointed out the issues relating to corporate criminal behavior, in particular 'corporate homicide' and 'corporate manslaughter'. The author discussed in detail the provisions of Corporate Manslaughter and Corporate Homicide Act, 2007(UK) and necessitated the need of such legislation in India. The author rightly pointed out that, in the absence of such a legislation, the Bhopal Gas Tragedy and the Uphaar Cinema Tragedy, is no less a pity for India. He opined that absolute liability theory (coupled with deep- pocket theory), though an improvisation over the strict liability theory but has failed to ensure corporate criminal deterrence.

Articles

Andrew Weissmann, "A New Approach to Corporate Criminal Liability", 2007

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

Khanna, V.S., "Corporate Criminal Liability: What Purpose Does it Serve?" 1996

In this article the author has discussed in detail the rapid growth of corporate criminal liability in the past two decades. He observes that there has to be an element of corporate liability related to crime and of crime and criminal acts of a company in the statutes so that the government can differentiate between the companies that take total precautions in following the rules and the who do not. He advocates that this approach will narrow down the scope of corporate criminal liability which is the real requirement today as it creates a problem for civil corporate vicarious liability to be fully applied by the courts. He further analysis that corporate criminal liability takes into account the goodness of civil liability but keeps the undesired policies like

stigma, punishment, sanctions etc. away which rather should be the strength of a powerfully enforced criminal liability. He proposes that the civil liability should be strengthened rather than stressing the need of corporate criminal liability as it would be rather tough to punish the corporate and it is still not clear if corporate criminal liability can inference and correct the corporate behaviour.

Khanna, V.S., “Corporate Crime Legislation: A Political Economy Analysis”

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

Weissmann, A., “Rethinking Criminal Corporate Liability”, 2007

This article is an attempt of the author to apply the logic behind the cases where there is a criminal content on behalf of the corporate; there the rethinking of this doctrine is required. He lay down that, however small the company may be, it is still corporate of committing a crime when that crime is committed by an employer during the course of employment for the benefit of the company. The author advocates through this article that the government can and should device such strategies which inspire the board to make decisions, which keep them away from breaching the rules.

Balakrishnan “Corporate Criminal Liability: Evolution of the Concept”, 1998

In this article, the author pointed out how serious is the problem arising from corporate criminal liability and what has been the attitude of the courts towards tackling this problem. He says, “Corporate criminality challenges or nags at our sense of reality.” It is this characteristic that makes corporate crime a tricky issue. The development of corporate criminal liability has become a problem which a growing

number of prosecutors and courts have to deal with at the present time. 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. 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 only 150 years ago, to white-collar crimes on an ever increasing scale has not yet been taken into account in many legal systems. At the same time, crime has also become increasingly difficult to tackle.” The view expressed by Balakrishna justifies the approach adopted by the researcher for undertaking the work as a viable venture.”

Saran Sun Beale, “A response to the critics of corporate criminal liability”, 2009

The author has analyzed the rationale for the problem of corporate criminality, with regard to which there is a sharp difference of opinion as to the justification for conventional type of punishment and there is also a fundamental question debated among jurists as to whether a company should be subjected to criminal punishment or it should be subjected only to a civil liability. Analyzing the approach of the American authorities Dr. Saran says, “For more than 50 years, most criminal law and corporate scholars in the United States have been opposed to corporate criminal liability, arguing that it should be eliminated or at least strictly limited. Many law and economics scholars have argued that corporate liability is inefficient and should be scrapped in favor of civil liability for the entity and/or criminal liability for individual corporate officers and agents.

Abhishek Anand, “Holding Corporations Directly Responsible for Their Criminal acts: an Argument”, 2004

The author of this article opined that development of law in areas of corporate criminal liability is generally based upon indirectly holding a Corporation liable for its criminal wrongs. So it is come necessary to hold the corporations directly liable for their criminal acts. As a consequence, debate started regarding direct liability of corporations in the era of neo realism in which economy the prime might and giant MNC’s are the main players. Author in his article has argued that the corporation should be made directly liable for its act.

Praveen Dalal, “Corporate Entity in Existing Legal system; its rights and Liabilities under the Constitution and other enactments”, 2004

The author in this article opined that when a company is incorporated all dealings are with the company and all persons behind the company are disregarded, however important they may be. Thus a veil is drawn between the company and its members. Normally the principle of corporate personality of a company is respected in most cases. The separate personality of the company is however a statutory privilege. It must be used for legal and legitimate business purposes only. Where a fraudulent, dishonest or improper use of corporate personality is proved, the concerned individual is not allowed to take shelter behind the corporate personality.

Kumar Askand Pandey, “Corporate Criminal Liability in India some reflections”, 2008

In this article the author has suggested that, the Indian parliament must be aware of the controversies surrounding the corporate criminal liability however even the modern legislations concerning economic offences do not contain specific provisions to facilitate the inflicting of penal liability on corporations and need immediate attention. There is no doubt that the concept of corporate criminal liability is how very well established in India, but even after the judgment of supreme court in *Standard Chartered Bank* case, the debate on legislative function and judicial function seems to be far from over. So it is suggested that suitable amendments in the code of criminal procedure should be brought in this regard. The author suggests amending the penal provisions to avoid the judicial interference in the legislative aspects. Mere amendment of provision of punishment in respect of corporate liability is not viable. Therefore, enactment of separate comprehensive corporate criminal legislation is solution that is more appropriate.

Angira Singhvi, “Corporate crime and sentencing in India: Required amendments in law”, 2006

Imposition of criminal liability on corporation is settled on the point that the corporations can commit crimes. But the statutes in India are not in pace with these developments and the judiciary will impose only fine. So amendments should be carried out by the legislature as soon as possible. The author opines that judiciary

should not impose fine in lieu of punishment as it has no discretion and hence amendment by legislature is necessary in this regard.

1.7 Research question

- Whether a corporation, not having a mind of its own, and being only a juristic entity created by fiction of law, can incur criminal liability? If so, then, what are the nature, scope and extent of a corporation's criminal liabilities?
- What are the major legal developments in determining the criminal liability of corporations with special reference to India, UK and USA?
- Whether Indian criminal justice system is adequately equipped with to try and treat the corporate crime and criminality?
- What is the legislative trend on criminal liability of corporation in India? How far these legal developments are effective to control and combat crime related activities of corporation?
- What is the role of Indian judiciary in determining the criminal liability of corporations? What is extent of effectiveness of judicial process in the area of corporate criminal liability in India?

1.8 Research Hypothesis

In the light the development relating to corporate criminal liability the hypothesis formulated for the study is:

‘Legal provisions relating to corporate criminal liability in India are in fluid stage. There is a lot of scope for further legislative improvements which are needed to be implemented in the near future.’

1.9 Research Methodology

The methodology adopted by the researcher in this research “**Corporate Criminal Liability in India: An Analytical Study**” is analytical in nature as it analysis the laws relating to criminal liability of corporations under the Indian statute. The researcher has adopted the doctrinal method on the basis of the data available on the present study. But wherever any recent examples and current instances relevant to the study are found, they are taken into consideration. The researcher has referred standard text books, newspaper, journals and articles in this work.

The researcher has adopted the primary and secondary sources as provided by the National Law University, Assam Library. The researcher has also tried to maintain a uniform mode of citation for footnote and bibliography throughout the research work.

1.10 Research Design

Chapter 1: Introduction

This Chapter deals with the introductory part of the dissertation. 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 chapters 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.

Chapter 2: Establishment of Corporations and Criminal Liability: History and Development

This chapter discusses Origin and Development of Corporate Criminal Liability in different reigns of the world and the historical background behind the current laws. It discusses from the Roman era of formation of corporation including to the modern era of prevalence of principles of common law and civil law countries, where the principles of liability of the corporate were established by the courts of countries. This chapter also expounds the two key terms ‘Corporation’ and ‘Corporate Criminal Liability’ by making a reference to the juristic theories and the theories of criminal law on the subject of corporate crimes.

Chapter 3: Legal Framework on Corporate Criminal Liability In India: An Analysis

In this chapter an analysis of Indian legislative framework on corporate criminal liability is made. This chapter deals with adoption of different theories of corporate criminal liability under legal framework of India. It also covers crimes that can be imputed to corporate body, which brought under for the punishment of the crime. The chapter also analyzed the forms of sanctions adopted in India for offence under the corporate criminal liability on individuals and corporate

Chapter 4: Punishment of Corporation: A Challenge Before the Indian Judiciary

In this chapter the researcher has dealt with the judicial response to corporate criminal liability in India. From 1950 to recent years our courts have been dealing with cases relating to corporate criminal liability in various angles. The attitude of the judiciary has changed over a period of time, and the same has been discussed elaborately in this chapter.

Chapter 5: Changing Face of Corporate Criminal Liability

This chapter deals with the recent development of adoption of different corporate criminal liability in India, UK and USA. This chapter also covers new forms of corporate crimes that can be imputed to corporate body, which brought under for the punishment of the crime. It discusses the forms of sanctions adopted in UK and USA for offence under the corporate criminal liability on individuals and corporate. The same is compared with the law that is existing in India.

Chapter 6: Issues and Challenges Concerning Prevailing Indian Laws for Corporate Criminal Liability

This chapter deals with the exiting problems of corporate criminal liability in India and makes a study of the corporations which faced turmoil owing to corporate crimes. This chapter also tries to highlight the problems in sanctioning the corporation in India in the absence of standard guidelines before the Indian courts and the legislature.

Chapter 7: Conclusion and Suggestion

This chapter deals with conclusions that have been arrived after dealing with various topics in above chapters. In this chapter the overall observation of laws relating to corporate criminal liability and judicial response on the topic is made. The researcher has recorded the broad observations and given humble suggestions to modify the existing laws and to enact new legislation relating to corporate criminal liability

CHAPTER 2

ESTABLISHMENT OF CORPORATIONS AND CRIMINAL LIABILITY: HISTORY AND DEVELOPMENT

2.1 Evolution Of The Concept Of Corporate Criminal Liability Under Different Legal System

The Growth of commerce in Ancient era has demanded the formation of corporation. Commercial transaction initially took place at domestic level, within a society or a local area. The concept of international trade has come up when the countries have started trade related activities with other countries of the world. Even in historical times i.e. starting from the time of four major ancient civilizations²⁴, commercial transactions have existed at the international level.²⁵ However, during that time, the commercial transaction at international level took place by limited effort of traders through sea route.²⁶ Traders form association to trade in different dimensions. This was the time when earliest recorded ‘associations of persons’ for commercial venture finds a mention in the history of corporation.

Corporation as exists today was not the same in the past. The roles played by the corporations in the present day human life have been necessitated by the demand of society. The dynamic nature of the society, at various points of time, has been playing a direct influence nature, scope and functions of society. This development has placed a demand for the law to recognize the corporate behaviour, accordingly.

However, the original concept of corporation was not associated with commercial activities, but was heavily connected with public bodies which perform the function of religious, charitable and social character. Through the centuries, this concept of public services by the corporations has been replaced by business activities. Though, Corporations today, deal with various non-for-profit activities, their main focus remains in commercial or business oriented activities.

²⁴ Mesopotamia (Tigris and Euphrates), Harappa and Mohenjo-Daro (Indus), Egyptian (Nile) and Chinese (Hwang Ho).

²⁵ Radhakumud Mookerji, “Trade and Commerce in Ancient India”, <https://ithihas.wordpress.com/2014/05/17/trade-and-commerce-in-ancient-india/> (April 2, 2018)

²⁶ The only possibility of co-operation of efforts between traders appears to have been to travel together to places where the distance was too much for any individual trader to traverse alone.

Though the history of corporate criminal liability can be traced back to the ancient era, it became the center of discussion at the end of the 19th century. The different history, politics, economics of each country of the world have influenced the adoption and development of the concept of corporate criminal liability in their own way, as a results of which different models of corporate criminal liability have evolved. For example, civil law and common law countries have adopted different evolution of the concept of corporate criminal liability, due to the different socio-economic history of their own.

2.1.1 Liability Of Corporations Under Roman Law

The origin of corporation can be traced back to the old Roman law, where juristic persons have been said to be recognized.²⁷ However, some scholars have traced its origin to the Greek city state, which bears some resembles with the modern corporations. But the legal creativeness of the Romans leads many scholars to believe that Romans made more important contribution to the legal character of corporations.²⁸ The right of individuals to constitute trade, religious, and charitable associations has been recognized early in the development of the Roman law.²⁹ The Roman entities were called *universitates personarum or corpus*³⁰ and *univesritates rerum*³¹. The entities had their own identity, separate property from that of their owners and had separate rights and duties of its own. At that time, though, roman organizations were regulated by the emperors, who encouraged or restricted them according to their own interest, moreover organizations were democratic in nature and members used to discuss the affairs of the company.³² Thus the recognition of independent entities with separate rights and obligation constituted the basis of Independent Corporation in Roman history.

With the passes of time, when this corporation became an important social actor by adopting various business and administrative roles, it was then that the roman thinkers

²⁷ *Supra* note 12.

²⁸ Sir William Blackstone's Commentaries on the Laws of England (1765-1769) stands as the first great effort to reduce the English common law to a unified and rational system. Blackstone demonstrated that the English law as a system of justice was comparable to Roman law and the civil law of the Continent.

²⁹ *Supra* note 12.

³⁰ *universitates personarum or corpus* included the Roman state and other entities with religious, administrative, financial, or economic scopes.

³¹ *univesritates rerum* included entities with charitable scopes.

³² Richard Gruner, "Corporate Criminal Liability and Prevention", 2 LJP (2005), p. 2-7

started adopting the concept of juristic personality of corporations. The jurist holds the idea that corporations were mere fictions and were incapable of making a disposition; they were not supposed to have an intention and accordingly could not commit crimes. The recognition of corporation as a legal person traced the establishment of corporate legal accountability.

It was in 12th- 14th century, the concept of corporate criminal liability evolved, when crime is committed by members of entities collectively. The Roman law started to consider the possibility of attributing criminal liability to a collective entity such as the city state. In 1245, **‘Innocent IV’ introduces the principal that corporate bodies were a fiction only and not a natural person, who was considered as the father of the dogma of the purely fictitious and intellectual character of juridical person.**³³ This theory thus expressed the view that the corporate body is not in reality a person, but is made a person by fiction of the law.³⁴ Accordingly, Roman laws were made to recognize the juristic personality of corporations and their capacity of being sanctioned for their crimes. The emperors and Popes used to frequently sanction the villages, provinces, and corporations and the sanctions imposed could be fines, the loss of specific rights, dissolution, and spiritual sanctions upon the members of the corporations.³⁵

In the 14th century, the concept of criminal liability of corporations was strengthened by adopting the view that corporations had their own willpower and therefore, their criminal liability was a given. It was viewed that with a few exception like (rape, bigamy etc.) a corporation could commit any crime which could be committed by an individual. Thus corporation were made liable, both civilly and criminally, for the act committed by their members. This conception, however dominated the continental Europe doctrine of corporate criminal liability until the end of the 18th century.³⁶

2.1.2 Liability Of Corporations Under German law

German law has also contributed to the development of corporation. Initially, families were also considered as corporation. Both corporations and individuals were

³³ J. Dewey, “The Historic Background of Corporate Legal Personality” 35 Yale LJ (1926), p. 655 - 665.

³⁴ W.M. Geldart, “Legal Personality” 27 TLQR (1911), pp. 90- 92.

³⁵ Andrew Weissman, “Rethinking Criminal Corporate Liability”, 82 Ind. L.J. 411 (2007), p. 417.

³⁶ *Ibid.*

considered as real subject of law and can be sanctioned. They used to form some territorial units which were made liable for crimes committed within their territory. On the basis of guilt, Territorial entities were sanctioned which was viewed more as compensation than punishment.

Non existence of criminal liability of corporations remains as one of the features of the corporate law of Germans. Instead of criminalizing the corporation, Germany implemented a comprehensive administrative-penal system that regulates corporate criminal wrongdoing.³⁷ German legislators used to argue that administrative liability of corporations fulfills the goals of deterrence, predictability, clarity, and general fairness, and is also less costly to implement than corporate criminal liability.³⁸ . The administrative fines, called *Geldbussen*, are imposed by specialized administrative bodies which are part of the executive branch of the government.³⁹ But many critics have found a close similarity between German administrative-penal law and criminal law because, under the administrative-penal law, punitive sanctions can be applied.⁴⁰ Later on non existence of corporation's criminal liability under the German law has also been criticized by scholars on the ground that such liberal law has emphasized the growth of corporate crime in German.

The main arguments of Germaine's in defense of the lack of corporate criminal liability are: corporations do not have the capacity to act, corporations cannot be culpable, and the criminal sanctions are appropriate, by their nature, only for human beings.⁴¹

2.1.3 Liability Of Corporations Under French Law

In France, before the France revolution, '*Ordinance de Blois of 1579*' and '*French Grande Ordinance Criminal of 1670*' imposed the criminal liability of corporations only on the condition that crime committed must be the result of collective action.⁴² But France revolution brought a huge change to the France law. The corporations including the hospitals, non-profitable institutions and trusts have been completely eliminated and their goods were confiscated. The new government thought that, due

³⁷ *Supra* note 12.

³⁸ James N. Carlo, Corporate Criminal Liability, 7 Buff. L. Rev. 453 (1958), p. 455

³⁹ Nigel Foster and Satish Sule, GERMAN LEGAL SYSTEM AND LAWS, 4th ed. 2010, pp. 283- 308.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

to their economic and political influence, corporations represented a potential threat for the new regime.⁴³ The finance were mainly owned by the corporations and upon the heavy needs of fund, the new revolutionary government founded the easiest way to confiscate these funds from the corporation after the elimination.⁴⁴ As Corporations disappeared from the French law, liability of corporations became futile. Therefore the French penal Code 1810 eliminates the mentioning of corporate criminal liability under the domain of French penal law.

Under the influence of the ideals of French Revolution, many continental Europe countries started to change their views regarding corporate criminal liability. Monarchy system got the prominence and with the flow of liberalism, corporations started to lost their importance. This reality, thus, stressed the creation of theories in favor of lack of corporate criminal liability.

Later on, the adoption of ‘Fiction theory of corporations’⁴⁵, as emphasized by the German jurist, influenced the French penal system.⁴⁶ As a result of which, it was feared that individual criminal liability will be violated by the adoption of corporate criminal liability principals. But the critics of the ‘fiction theory’ used to argue that corporations are unities of bodies and souls and can act independently; the corporations’ willpower is the result of their members will.

With these historical consequences, France has made several revision of its penal statute and finally the revision of 1992 officially recognized the corporate criminal liability.⁴⁷ Under Article 121-2 of French New Penal Code, a comprehensive set of corporate criminal liability principles and sanctions was established by stating that with the exception of the State, all the juristic persons are criminally liable for the offenses committed on their behalf by their organs or representatives.⁴⁸ This revolutionary establishment of corporate criminal liability attracted the critics of

⁴³ Guy Stessens, “Corporate Criminal Liability: A Comparative Perspective”, 43 Int’l & Comp. L.Q. 493, 494 (1994) p. 350.

⁴⁴ *Ibid.*

⁴⁵ *Supra* note 34.

⁴⁶“Malblanc and Savigny are the first authors sustaining the principle *societas delinquere non potest* in the 19th century.” They argued that “a corporation is a legal fiction which, lack a body and soul, was not capable of forming the criminal *mens rea* or to act in *propria persona*.”

⁴⁷ Leonard Orland & Charles Cachera, “Essay and Translation: Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code”, 11 Conn. J. Int’l L. (1995). P. 111-114.

⁴⁸ *Ibid.*

corporate liability, which later on, led to the growth and development of corporation and corporate liability in the European societies.

2.1.4 Liability Of Corporations Under English Law

In England, the earliest corporations, in the medieval period, were ecclesiastical bodies whose principal function was management of church property. The English corporation, in an organized form, started to be formed from the Fourteen century, by a grant from the crown or by an act of parliament.⁴⁹ The British crown emphasized the idea that incorporation was a privilege, and it encouraged organizations to become legally authorized entities over which it would hold control.⁵⁰

During the sixteenth and seventeenth centuries the importance of corporations grew as hospitals, universities, and other similar associations adapted to the corporate form. During the end of the seventeenth century the concept of Joint Stock Company came up. **The British East-India Company was formed as the first joint stock company.** It was granted as an English Royal Charter, by Queen Elizabeth on 30th December 1600, as it was a necessity for incorporation.⁵¹ However, when East India Company was first incorporated, it was quite unlike a modern corporation. Initially, the individual members of the company continued to trade on their own account.⁵² It was only after 1692, individual members were prohibited from trading on their own account and the company became a true joint commercial enterprise.⁵³

The Bubble Act, 1720 was the first statute passed by the British Parliament which contains provisions regulating corporations. This Act contained provision which reflected the fact of having separate legal existence of incorporated company. But later on it becomes an unsuccessful legislation due to its structural error and made it difficult for the joint stock societies to adopt a corporate form. Till nineteenth century, criminal prosecution of brokers was reported under the Act.

In the middle of the nineteenth century, company law developed haphazardly, as a result of which the first modern company law statute the Joint Stock Companies Act

⁴⁹ Kathleen F. Brickey, "Corporate Criminal Accountability: A Brief History and an Observation", 60 Wash. U. L. Q. (1982) p.393.

⁵⁰ *Ibid.*

⁵¹ Dr. Rega Surya Rao, LECTURES ON HISTORY OF COURTS, LEGISLATURES AND LEGAL PROFESSION IN INDIA, 1st ed. 2013, pp. 6-24.

⁵² *Ibid.*

⁵³ *Ibid.*

of 1844 was enacted. The Act for the first time provided for “Restricted incorporation by registration.” Hereafter, a registered company started to have the legal status of corporation.

Corporate liability-

With the incorporation of corporation, various corporate personality principles were evolved. Some were arguing in favour of corporate personality as distinct from its members, whether others are arguing against it on the ground that it is only the corporation’s property that is distinct from the member’s property and not otherwise.

Till seventeenth century the concept of corporate civil liability prevails where a corporation was held liable on a presentment for nonfeasance. It was only in the eighteenth and nineteenth century, the inhabitants of a governmental unit were charged in a criminal proceeding for failure to repair a public convenience.⁵⁴ By mid-nineteenth century, it was fairly well established that a corporation was liable for a breach of duty consisting of inaction, though not for crimes involving personal violence.⁵⁵

In “*Queen v. Great North of England Railway*”⁵⁶, the railway company was instructed to cutting through an existing highway which was habitually used by the entire *liege subject*⁵⁷ on foot and with their horses and carriages. When the employees of the company cut the highway, the company was convicted for the same. But, Lord Denman C.J, delivering the judgment of the court exempted the corporation from criminal liability on the ground that acts of immorality were beyond the capacity of body corporate.⁵⁸

Following this landmark decision, the pattern of corporate criminal prosecution remained one of targeting regulatory offenses that required no culpable mental state.

⁵⁴ Though such prosecutions were not uncommon, they were perceived not as true criminal prosecutions but rather as a means to enforce the performance of a public duty. Even so, the only sanction that could be imposed upon conviction was a fine.

⁵⁵ *The Queen v. Birmingham & Gloucester Ry.*, 114 Eng. Rep. 492 (Q.B. 1842)

⁵⁶ 115 Eng. Rep. 1294 (Q.B. 1846).

⁵⁷ A vassal bound to feudal service and allegiance.

⁵⁸ The court further observed that it was "as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.

This theory, however dominated the cases not requiring *mens rea.*, and later on, lost its relevance when the theory of corporate *mens rea* started to be recognized.

2.1.5 Liability Of Corporations Under American Law

Till the nineteenth century, the American judiciary followed a skeptical view about enforcing criminal liability of corporation like the courts of England.⁵⁹ But, later on, due to the rapid development of corporation in the American economy and society, new concept arose.⁶⁰

During the American colonial period, corporate charter was the foundation of most forms of political organization.⁶¹ When the colonies became states, the power to create corporations was then reposed in the legislatures, which perpetuated the corporate form of governance. Corporation was mainly quasi- public in nature, which was established to improve services of public transportation. Initially, like the English courts, American courts used to argue against corporate criminal liability. Then, the courts of America started to impose criminal liability on corporation only in the cases of regulatory or public welfare offences, not requiring *mens rea*, such as nuisance, malfeasance, non-faience and vicarious liability cases.

Though criminal liability of corporations was accepted, its extension to crime of intent was not accepted. In “*Commonwealth v. Proprietors of New Bedford Bridge*,”⁶² the court settled the distinction between nonfeasance/ misfeasance distinction and concluded that corporations could not be held criminal for crimes requiring guilty mind.⁶³ Thus, felony, perjury and violent crimes which were punishable by death or dismemberment, for which sanction quite impossible to impose on corporate entity in, could be committed only by natural person.⁶⁴ The two arguments against the corporate criminal liability were that, on the one hand corporation has no soul and it cannot have actual wicked intent, and on the other hand some acts are so far beyond

⁵⁹ Andrew Weissman; Andrew Weissman, Rethinking Criminal Corporate Liability, 82 Ind. L.J. 411 (2007) p. 418.

⁶⁰ *Ibid* at 419.

⁶¹ *Ibid* at 420.

⁶² 68 Mass, 339,345, (1854)

⁶³ *Ibid.*

⁶⁴ *Ibid.*

the purposes of the corporation and the powers granted by its charter that the corporate entity is incapable of committing them.⁶⁵

In the beginning of the 20th century, the American court developed the concept of corporate criminal liability by including *mens rea* offences and by making irrelevant the status of the agent within the corporate hierarchy.⁶⁶ Courts also started to assuming criminal liability of corporations by holding the acts and defaults of every senior managers, directors and officers. The theory of “*alter ago*”⁶⁷ or “*brain*” of the corporation, which was originally developed in English courts, started to get the prominence in American courts.

This principle of “*alter ago*” was expressly approved by the United State Supreme Court in “*New York Central & Hudson River Railroad v. United States*”⁶⁸. In that case Manager and Assistant Traffic Manager of New Central agreed to an illegal rebate of 55% of the published price to ship a large quantity of sugar. This was to avoid the sugar being sent by boat and the lower price helped the shipper to respond to severe competition with other shipper and dealers. The Supreme Court in its judgment made the managers liable who acted wrongly and held that:

Since a corporation acts by its officers and agent, there purpose, motives, and intent are just as much those of the corporation as are the things done. It is true that, some crimes cannot be committed by corporations, by its nature.⁶⁹ But, a large class of offences is committed with purposely for doing things prohibited by statutes.⁷⁰ For that class of crime there is no reason why a corporation may not be charged for the knowledge and purposes of their agents, acting with the authority conferred upon them. If it were not so, many

⁶⁵ In *United States v. Alaska Packers' Ass'n, I Alaska* 217, 221 (1901) it was held that a corporation, especially as viewed from the standpoint of the criminal law, is an artificial creation of the law, consisting of one or several persons endowed with a part of the duties and capabilities of an unincorporated man.. Hence a corporation cannot, in its corporate capacity, commit a crime by an act in the fullest sense *ultra virus* and contrary to its nature.

⁶⁶ Joe Albano and Alexander Sanyshyn, *Corporate Criminal Liability*, 53 *Am. Crim. L. Rev* (2016) p. 1028.

⁶⁷ According to this theory “ when top officials, managers, directors or employees acts on behalf of the corporation, their motives and intentions, as well as the acts themselves, are imputable to the corporation.”

⁶⁸ 212 US 481 (1909) : 212 US 481 (1908) : 531 Ed 613.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

offences might go unpunished and the acts be committed in violation of the law.⁷¹

In *New York Central* case, court upheld the constitutionality of the Elkins Act, 1903, a federal statute regulating fines on railroads, that offers rebates and upon the shippers that accepted these rebates and imposed criminal liability on corporations that violated the statute's mandates.⁷² This case makes a turning point to US corporate criminal liability doctrine by rejecting the "old and exploded doctrine that a corporation cannot commit crime. The opinion in the new central was assumed to be based on the tort law concept of respondent superior"⁷³.

After this case, the US Congress adopted many legislative insensitive for the expansion of entity liability. Congress started to enact statutes creating new or additional criminal liability for corporations.⁷⁴ The Securities Act of 1934, the Food, Drug, and Cosmetic Act 1938, are some of the well known statues, containing provision for corporate criminal liability, passed in the last century.⁷⁵ In the beginning of the 21st century also, various legislative and judicial approaches has been adopted by the US government which get to the birth of various new concept and theories of corporate criminal liability.

2.1.6 Liability Of Corporations Under Indian Law

In India, company law and criminal liability is based on statutory provisions, enacted by the legislature. The Indian history of company law can be traced back to the enactment of Joint stock companies Act 1850, which was based on the English Companies Act 1844. The Joint Stock Companies Act, 1850 recognized companies registered under the Act as distinct legal entity but did not introduce the concept of Limited Liability, which was later provided in the Companies Act, 1857 on the lines of English Companies Act, 1856.⁷⁶ The companies Act, 1856 was amended various

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Under the tort law the principal may be held responsible for the acts of the agent in the course of his employment when the act is done, wholly or in part for the benefit of the corporation.

⁷⁴ Sara Sun Beale, "The Development and Evolution of the U.S. Law of Corporate Criminal Liability", [http://www.stetson.edu/law/lawreview/media/2017%203%20-%20Beale\[1\].pdf](http://www.stetson.edu/law/lawreview/media/2017%203%20-%20Beale[1].pdf), (April 21, 2018)

⁷⁵ Edward B. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure", Yale L J (2008), p. 138.

⁷⁶ Abhimanyu Kumar, Corporate Criminal Liability, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446669 (April 15, 2018)

times; after that, the Companies Act, 1913 was enacted which remained in force till 1956.⁷⁷

After Independence, The Companies Act 1956 was enacted, which, for the first time, introduced the Concept of Modern Company. The Companies Act, 1956 has been amended from time to time and has now been replaced by Companies Act, 2013.

The development of law relating to corporate criminal liability in India is similar to that of the English law and is remarkably influenced by the English law.⁷⁸ There was a time in India when corporate crime was considered as just an insignificant part of legal consideration. The reason was that the number of corporations was too less than today and there prosecution was rather difficult. So, the Indian traditional perspective towards crime never included criminality of corporation.⁷⁹

But, the multidimensional aspect of corporate crime has given a number of corporate crimes emerging everyday and threatening the overall economy and welfare of the country. Authorities are felling the necessity to have clear and strict norms, which could deter the corporation from committing, such crime. Specifically, in India, the phenomenon of corporate criminality emerged in 20th century and is being strengthened after the Bhopal Gas league tragedy. Since the concept of corporate criminal liability has been emerging in India, its understanding has been evolving till now.

Bhopal Gas leak disasters : a concern before the Indian Judiciary

In India, the concept of corporate criminal liability was got the prominence in the Bhopal Gas leak incident in 1984, which was on the worst industrial disaster in the world. This disaster is a landmark in the context that “it raised various issues regarding liability of multinational corporations both civil and criminal, when such corporations are engaged in inherently hazardous activities.” As a consequence of this disaster, PIL was filed in the Supreme Court of India where the court in “*M.C. Mehta v. Union of India*”⁸⁰, adopts the common law principle of strict liability in

⁷⁷ *Ibid.*

⁷⁸ Shouvik Kr. Guhu and Abhyudaya Agarwal, “Criminal Liability of Corporations : Does the Old Order Need to Change?”, 1 NUJS L. Rev. (2008), pp. 329- 340.

⁷⁹ *Ibid.*

⁸⁰ 187 SCR (1) 819.

“*Ryland’s v. Fletcher*”⁸¹ and laid down the principle of **absolute liability**⁸² of corporation engaged in such hazardous activity.

The Legislative growth on corporate criminal liability

The Indian Penal code, 1860 was enacted as the ‘general penal code for India’⁸³ dealing with major offences. Initially, there was no provision under the IPC with possible culpability of corporate body. As, during 1860s, there was no scope for any such provision as corporate bodies were quite few in those days. It was only through various amendments to the IPC that provisions relating to corporate crime have been introduced, but no direct provision has been added with regard to corporate penal liability till date. Courts have started adopting punishment for criminal activities of corporation and extended the scope of the traditional limit.

The concept of corporate criminal liability spared beyond IPC, 1860 and different statutes. There are various other acts in India i.e., ‘the Prevention of Corruption Act, 1988’⁸⁴, ‘The Money Laundering Act, 2002’⁸⁵, ‘The Negotiable Instrument Act, 1881’⁸⁶, ‘Essential Commodities Act, 1955’⁸⁷, ‘Income Tax Act, 1961’⁸⁸ etc which deals with penal provisions for corporations.

The 41st and 47th Law commission of India reports⁸⁹ is significant in the context of corporate criminal liability in India. These commission reports have recommended various suggestions to the Indian legislature and Courts to punish the corporations for their criminal activity. Recommendations which carried out a detail sentencing policy for corporate crime, unfortunately, the Indian legislature failed to adopt this recommendation.

⁸¹ (1868) L.R. 3 H.L. 330

⁸² The rule laid down in *Ryland v Fletcher* was termed as absolute liability which is subject to certain exception. The exceptions are detail discussed in *foot* note no 105.

⁸³ The Indian Penal Code (IPC) is the main criminal code of India. It is a comprehensive code intended to cover all substantive aspects of criminal law. The code was drafted in 1860 on the recommendations of first law commission of India established in 1834 under the Charter Act of 1833 under the Chairmanship of Thomas Babington Macaulay. It came into force in British India during the early British Raj period in 1862.

⁸⁴ Section 13 of Prevention of Corruption Act, 1988

⁸⁵ Section 3 of The Money Laundering Act, 2002.

⁸⁶ Section 141 of The Negotiable Instrument Act, 1881.

⁸⁷ Section 7 of Essential Commodities Act, 1955.

⁸⁸ Section 278 B of Income Tax Act, 1961.

⁸⁹ Detail discussed in chapter 3 – “LEGAL FRAMEWORK ON CORPORATE CRIMINAL LIABILITY IN INDIA: AN ANALYSIS.”

2.2 Theories Of Corporate Criminal Liability

2.2.1 Theory Of Vicarious Liability-

The theory of vicarious liability has its origin under the tort law.⁹⁰ According to this theory, a person is held liable for the acts of another. The traditional theory of vicarious liability applies to the master servant relationship where masters are held liable for the acts of the servant.⁹¹ Similarly in the case of corporations, the company will be held liable for the acts of its employees working within the scope of the corporation.

The courts of England are considered to be the pioneers of vicarious liability doctrine. The American courts later on developed this theory as the theory of *respondent superior*.⁹² In *New York Central*⁹³ case, the United States Supreme court applied the principle of respondent superior as a standard of imposing criminal liability on the body corporate. Later on the US court in “*United States v. A & P Trucking Co.*,”⁹⁴ laid down some criteria for imposing this doctrine as-

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.

Thus, under the American context, a corporation may be criminally liable for the acts of its officers, agents or servants who are acting within the scope of their employment and for the Benefit of the corporation.

2.2.2 Identification Theory-

This theory recognize that the acts and state of mind of certain senior officers in a corporation are the directing minds of the corporation and thus deemed to be the acts and state of mind of the corporation itself.⁹⁵

The origin of the doctrine can be traced back to 1915 when in “*Lennard Carrying Co. Ltd. v Asiatic Petroliam Co. Ltd*”⁹⁶, the court hold a company liable on the ground that

⁹⁰ Amanda Pinto Q. C. and Martin Evans, CORPORATE CRIMINAL LIABILITY, 2nd ed. 2008, p. 20.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Supra* note 68.

⁹⁴ 358 U.S. 121, 124-27 (1958)

⁹⁵ *Supra* note 81 at 39.

when the agent in question is such that he is the brain and will of the company then the company can be very well identified with him.⁹⁷

However, in the landmark case “*Tesco Supermarkets v. Natrass*”⁹⁸, the House of Lords rejected the corporate criminal liability on the basis of respondent superior and held that people who actually have control and who are not answerable to anybody else within the company must be considered the company as they are performing the same.⁹⁹ The court implies for imputation of agent’s criminal intent to the corporation if the agent is alter ego of the corporation and defies alter ego to mean an agent high up in the corporate hierarchy.¹⁰⁰

As *Lord Reid* in *Tesco* case rightly said that :

‘A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through a living person, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his act is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company’s servant or agent.¹⁰¹ In that case the liability of the company can only be a statutory or vicarious liability.’¹⁰²

In this context Professor Celia wells¹⁰³ explained-

‘Employees of the company can be divided into those who acts as the hands and who acts as the brains of the company. The identification principle essentially meant that a company would be liable for a serious criminal

⁹⁶ [1915] A.C. 705

⁹⁷ *Ibid.*

⁹⁸ [1972] A.C. 153 (H.L.)

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Professor of Criminal Law, University of Bristol.

offence (only) where one of its most senior officers had acted with the requisite fault.¹⁰⁴

In that context, the main point of difference between European and American doctrine of corporate criminal liability is that of application of different theories. In Europe, criminal liability is attaches to the corporation by applying identification theory, when top level management is involved in corporate misconduct and in America, liability is attached by applying the respondent superior doctrine, when any agent commits a wrongful act, but courts impose significant penalties only when substantial authority personnel are involved.¹⁰⁵

2.2.3 Attribution Theory-

In “*Meridian Global Funds Asia Ltd. v. Securities Commission*”¹⁰⁶, **Lord Hoffman** said that “there exists certain rule which determine whose acts and states of minds will be attributed to the company.”¹⁰⁷ The rules laid down by **Lord Hoffman** are called as “rules of attribution”. While delivering judgment **Lord Hoffman** noticed that the primary rules of attribution are those as mentioned in the company constitution and company law, generally; the board of directors or the unanimous members, whose name is there in the MOA¹⁰⁸ or AOA¹⁰⁹ of the company, are the enable organs of a company and can be attributed to the company.¹¹⁰

Under the attribution approach, it is not necessary to consider who the directing mind is. Corporate structure is examined in more detail and seeks to ascertain those area of relevant individual responsibility in which offences takes place and attribute the responsibility accordingly. The rule of attribution, thus, depends upon the “relevant substantive rule of law” in each country.

¹⁰⁴ C. Wells, “Corporate Criminal Liability: A Ten Year Review”, *Crim. L.R.*(2014), pp. 849-878

¹⁰⁵ Anthony O. Nwafor, *Corporate Criminal Responsibility: A Comparative Analysis*, 57 *J. Afr. L.* (2013), p. 94.

¹⁰⁶ [1995] 2 A.C. 500.

¹⁰⁷ *Ibid.*

¹⁰⁸ Memorandum of Association (MOA) is the most important document of a company. It states the objects for which the company is formed. It contains the rights, privileges and powers of the company. It is also called a charter of the company.

¹⁰⁹ A company’s Articles of Association (AOA) is a primary declaration of the company’s nature, purpose and ends which, along with the Memorandum of Association, forms together the company’s constitution.

¹¹⁰ *Ibid.*

But this theory is criticized on the ground that the identification approach is a 'potentially powerful tool' for holding companies liable. It is also argued that “the greater flexibility of the *Meridian* approach has brought with it greater uncertainty regarding who will be deemed the relevant person within the corporate hierarchy in any particular case.”¹¹¹

Though this theory of corporate liability got prominence in the courts of England, later the Corporate Manslaughter & Corporate Homicide Act 2007 expressed the view that common law crimes are still governed by *Tesco* case and are not affected by *Meridian*.

2.2.4 Aggregation Theory-

The theories of corporate criminal liability as discussed above results in not satisfactory covering all the circumstances. Cases occur where a corporate crime results from the guilty state of mind of many persons. In 1987, the first circuit court of United States of America, propagated the theory of Aggregate collective knowledge or the Aggregate Theory where by establishing that a corporation can be held criminally liable even though no 'one' employee could be held holding the full knowledge and information about the act.¹¹²

Under the aggregation theory, the corporation aggregates the composite knowledge of different officers in order to determine liability. It is said that this theory combines the elements of vicarious liability principle and identification theory by portraying the knowledge of agent and identifying it with that of the owner. Under this mechanism, it's become difficult for the corporation to escape from the liability of a crime which may be committed at different levels or multiple departments that exist within the companies.

This theory is criticized on the ground that even though courts can deduce the aggregate of criminal minds through fragmented knowledge of employees, it cannot yet proof guilty mind of the corporation. But, many a times this theory provides more appropriate strategy to understand the corporate structure and its liabilities.

¹¹¹ *Ibid.*

¹¹² United States v. Bank of New England, 1987 821 F. 2nd 844 (1st Cir).

Strict Liability Principle For Corporate Crime

The rule laid down in the “*Ryland v Flether*”¹¹³ is generally known as the rule of strict liability. For the application of this rule, the following three essentials should be there

- Firstly, some dangerous thing must have been brought by a person on his land;
- Secondly, the thing brought or kept by a person on his land must escape;
- Thirdly, there must be non-natural use of land.¹¹⁴

If the above conditions are fulfilled, then, the person or the owner of the land will be prima facie answerable for all the damage which is the natural consequence of its escape, and no *mens rea* is needed to be proved on the part of the owner of the land or property.

However some exceptions are there for the application of the doctrine, such as-

- Plaintiff the wrongdoer;
- Act of God;
- Consent of the plaintiff;
- Statutory authority;
- Act of third part.¹¹⁵

Though this principle is considered as a tort law principle,¹¹⁶ recently, there is a trend of adoption of the this doctrine for the corporate criminal liability. Under this doctrine, a corporation is made liable for failure to prevent crime by taking appropriate measure to combat corporate crime. Generally strict liability offences are those where the commission of the act or omission is by itself sufficient to incur criminal liability, regardless of the actor's state of mind.¹¹⁷ Under this doctrine, it does not matter that top management had no knowledge of the crime committed by the corporation. This strict liability may lead up to a more effective compliance system by avoiding the complexities and difficulties posed by the directing mind and will test.

¹¹³ (1868) L.R. 3 H.L 330

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ The underlying principle of the law of tort is that every person has certain interests which are protected by law. Any act of omission or commission which causes damage to the legally protected interest of an individual shall be considered to be a tort, the remedy for which is an action for unliquidated damages. Tort is generally a breach of duty.

¹¹⁷ This strict liability doctrine is adopted in the UK Bribery Act, 2010, section 7 of which creates an offence of failure to prevent bribery.

2.4 Corporate Criminal Liability : A Conceptual Study

2.4.1 Concept Of Corporation

In the ancient society, laws were made in a system where small independent groups like clans of families existed for various function of the society. Such groups acquired collective responsibility towards society. According to *Sir Henry Maine* there are ample scriptures present which are witness to the fact that in ancient society, collectives were not conceived as a collection of individuals but rather as an aggregation of families.¹¹⁸ This uniqueness of corporation prevails in ancient and medieval India.

A corporation has been described as a denomination, having perpetual succession under an artificial form, and vested by the policy of law, with the capacity of acting, in several respect, as an individual.¹¹⁹ A corporation has no soul to damn and no body to kick. Though different jurisdiction provides for different condition of forming a corporation, under their statute, incorporation is the universally accepted legal condition to form a corporation. Incorporation is the legal process, by which an artificial person created with its legal personality,¹²⁰

The word company has no strict technical or legal meaning. The Indian Companies Act, 2013, does not define a company in terms of its features. Section 2(20) of the Companies Act, 2013 defines a company to mean “a company incorporated under this Act or under any previous company law.”¹²¹ This definition does not clearly point out the meaning of a company.

According to **Chief Justice Marshall-**

A corporation is an artificial being , invisible, intangible, existing only in contemplation of law. Being a mere creation of law, it possesses only

¹¹⁸ K. BALAKRISHNAN, Corporate Criminal Liability : Evolution of The Concept, <http://dspace.cusat.ac.in/jspui/bitstream/123456789/10911/1/Corporate%20criminal%20liability%20-.PDF> (April 6, 2018)

¹¹⁹ *Supra* note 8 at 3.

¹²⁰ The act or process of forming or creating a corporation; the formation of a legal or political body, with the quality of perpetual existence and succession, unless limited by the act of incorporation. Through incorporation, corporate entity got all the benefit given to it the law.

¹²¹ *Supra* note 1 at 6.

properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.”¹²²

The above definition clearly points out that a company to which the Companies Act applies comes into existence only when it is registered under the Act. On registration, a company becomes a body corporate, i.e. it acquires a legal personality of its own, separate distinct from its members. A registered company is, therefore created by law and law alone can regulate, modify or dissolve it.¹²³

2.4.2 Characteristic Feature Of Corporation

2.4.2.1 Artificial Person

Though the company is a juristic person, it does not possess the body of a natural being. It exists only in a contemplation of law. Being an artificial person, it has to depend upon natural person, namely the directors, officers, shareholders, etc. for getting its various works done. However, these individuals only represent the company and accordingly whatever they do within the scope of the authority conferred upon them and in the name and on behalf of the company, they bind the company and not themselves.

2.4.2.2 Limited Liability

One of the principal advantages of trading through the medium of a limited company is that the members of the company are only liable to contribute towards payment of its debt to a limited extent.

As per the relevant provision of the Companies Act, 2013, limited liability is explained as-

Nature of company	Extent of liability of members
Company limited by shares	Amount unpaid on the shares held by every member
Company limited by guarantee	Amount guaranteed by every member
Company limited by guarantee and	Aggregate of amount unpaid on the

¹²² *Ibid.*

¹²³ *Ibid.*

having share capital	shares held by a member and the amount guaranteed by him
Unlimited company	Liable to contribute to the assets of the company until all the debatses of the company are paid in full.

2.4.2.3 Common Seal

The common seal is the seal used by a corporation as the symbol of its incorporation. In “*Sical Cwt Distriparks Ltd.v Besser Concrete System Ltd*”¹²⁴, it was held that it is not necessary that agreement executed on behalf of company should bear seal of company but question whether agreement is valid or not would depend upon facts of each case.

As per Section 22, of the Companies (Amendment) Act, 2015, a company may, under its common seal, if any, through general or special power of attorney empower any person to execute deeds on its behalf in any place either in or outside India.¹²⁵ It further provides that a deed signed by such an attorney on behalf of the company and under his seal where sealing is required, shall bind the company. However, under certain circumstances, a company can work without seal when such work is authorized by company secretary or directors, as provided by the Companies Act.

2.4.2.4 Separate Legal Entity Or Corporate Veil -

A corporation is a separate legal person in law having a fictional entity, with perpetual succession and is known by a name with which it has been incorporated. Corporation has the fictional personality which is different from the personality of the members forming it. Unlike an unincorporated body such as partnership firm which is not an entity distinguishable from its members, corporations’ stands apart in every aspect from its individual members.¹²⁶

¹²⁴ [2003] 46 SCL 196 (Mad.),

¹²⁵ *Supra* note 1 at 12.

¹²⁶ Shivam Goel, CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE, 1st ed. 2015, p. 20

The evolution of separate legal entity concept can be traced back to the landmark case “*Salomon v Salomon & company Ltd*”.¹²⁷ The legal principle derived from this case has been the legal basis of subsequent application of separate legal entity concept of corporation, which established the principle that a company is a separate legal entity on its own distinct from its members, recognized by law. The House of Lords said that “the company is not in law the agent of the subscribers or trustees for them; nor are the subscribers’ members liable, in any shape or form, except to the extent and manner provided by the Act. This is known as the veil of incorporation.

2.4.2.5 Lifting Of Corporate Veil-

‘The company is at law a different person altogether from the subscribers to the Memorandum and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or the trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.’¹²⁸ -

*Lord McNaughten in Soloman v. Soloman and Co.*¹²⁹

The concept of separate personality confers the ultimate advantage on the members of the corporation of not being responsible, by statute or by corporation’s constitution, for the acts or omission of the corporation. But there are certain situations in which the court may disregard the corporate veil or ‘lift the corporate veil’.

As Grower¹³⁰ puts it when corporate personality is being blatantly used as cloak for fraud or improper conduct, the court has the discretion to lift the corporate veil. “It refers to the situation where, despite the rule of limited liability and separate personality, a member or employee of a company is held liable for its corporation’s act or omission.”

¹²⁷ [1897] AC 22

¹²⁸Nikhil Singal and Aditya Bhattacharya, “Doctrine of Lifting of Corporate Veil”, https://www.lakshmisri.com/Uploads/MediaTypes/Documents/TOP_DISCUSSION_TAX_Direct%20Tax_Corporate_veil_nikhil.pdf (March 15, 2018).

¹²⁹ (1897) A.C 22 (H.L)

¹³⁰ Grower, “PRINCIPLES OF MODERN COMPNY LAW”, 4th ed. 1979, p. 10.

In “*United States v. Milwaukee Refrigerator Transit Company*”¹³¹ the US Supreme Court held that where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons.¹³²

Lifting Of Corporate Veil In India

The circumstances under which the courts may lift the corporate veil in India may broadly be grouped under the following heads:

- A. Under statutory provisions.
- B. Under judicial interpretation.

A. Under statutory provision

The Companies Act, 2013 itself provides for certain cases in which the directors or members of the company may be held personally liable. The classes of cases, under which both company and officer in default are held liable, are as follows:

- Misstatement in prospectus under section 34 and 35;
- Failure return application money under section 39;
- Misdescription of name of the company under section 12;
- Punishment for contravention of section 73 and 76 ;
- For facilitating the task of an inspector appointed under section 210 or 212 or 213 to investigate the affairs of the company under section 219;
- For investigation of affairs of the company under section 216;
- Fraudulent conduct under section 339;
- Liability for ultra vires act;
- Liability under other statutes (for e.g. section 278B of Income Tax Act, section 138 of Negotiable Instrument Act, 1881).¹³³

¹³¹ 142 F. 247 (1905)

¹³² Jennifer Payne, Lifting the Corporate Veil: A Restatement of the Fraud Exception, The Cambridge Law Journal Vol. 56, No. 2 (Jul., 1997), pp. 284-290

¹³³ Detail discussed in chapter 3 - LEGAL FRAMEWORK ON CORPORATE CRIMINAL LIABILITY IN INDIA: AN ANALYSIS

B. Under judicial interpretation

Some of the cases under which the court lifted the corporate veil by judicial decision are as follows-

- For protection of review – In *Sri Dinshaw Maneckjee Petit*.¹³⁴
- For prevention of fraud or improper act – In *Gilford Motor Company v. Horne*.¹³⁵
- Determination of enemy character of a company – In *Daimler Company Ltd v. Continental Tyre & Rubber Co. (Great Britain) Ltd*.¹³⁶
- Formation of subsidiaries to act as an agent – In *State of U.P. v. Renusagar Power Co.*¹³⁷
- Where a company act as an agent for its shareholders –In *Knight v. Birmingham Corp.*¹³⁸
- In case of economic case – In *Santanu Ray v. Union of India*.¹³⁹
- Where company is used for some illegal or improper purpose – In *PNB Finance Ltd. Shital Prasad Jain*.¹⁴⁰
- Fraudulent scheme of arrangement or companies – In *re, Bedrock Ltd.*¹⁴¹

2.4.3 Crime and Criminal Liability

2.4.3.1 Definition of crime

The word *crime* is derived from the Latin root *cerno*, meaning ‘I decide, I give judgment’ Originally the Latin word *crimen* meant ‘charge’ or ‘cry of distress’.¹⁴² The Ancient Greek word *krima*, from which the Latin cognate derives, typically referred to an intellectual mistake or an offense against the community, rather than a private or moral wrong.¹⁴³

¹³⁴ Air 1927 Bom. 372F.

¹³⁵ [1933] 1 CH 935.

¹³⁶ [1916] 2 AC 307.

¹³⁷ [1991] 70 Comp. Cas. 127.

¹³⁸ [1939] 4 All ER 116 (KB).

¹³⁹ [1989] 65 Comp Cas. (Delhi)

¹⁴⁰ [1983] 54 Comp. Cas. 66 (Delhi).

¹⁴¹ [1998] 17 SCL 385 (Bom.).

¹⁴² Ernst Freund, “Classification and Definition of Crimes”, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1338&context=jclc>, (May 3, 2018)

¹⁴³ *Ibid.*

A precise definition of 'crime' is by no means an easy task. Generally speaking, almost all society have certain norms, beliefs, customs and traditions which are implicitly accepted by its members as conducive to their well-being and healthy development. Infringement of these norms and customs is condemned as anti-social behaviour, thus many writers have defined, 'crime' as anti-social immoral behaviour.

Every crime has specified elements, prescribed by the law. For example, in India the Indian Penal Code contains the statutory definitions of the offences dealt with by the code.¹⁴⁴

There are, generally, two constituent elements in a crime

- *Actus Reus*'
- *Mens rea*"

Actus Reus

The word '*actus reus*' is referred to as such result of human conduct as the law seeks to prevent.¹⁴⁵ Blameworthy act or conduct committed or omitted in the circumstances as specified by law, leading to a particular result constitute what is called '*actus reus*' or offensive act.

Mens rea

The word "*mens rea*" means guilty mind. In the context of crime, it means that "there must be a mind at fault to constitute a crime."¹⁴⁶ In the common language, "intention means purpose or desire to bring about a contemplated result or foresight that certain consequences will follow from the conduct of the person."¹⁴⁷

'*Nulla poena sine lege*' doctrine says that no person shall be punished except in pursuance of a statute which fixes a penalty for criminal conduct.¹⁴⁸ Another important principle of criminal law is '*Et actus non facit reum nisi mens sit rea*,' which signifies that there can be no crime without an act or omission forbidden by law and a guilty

¹⁴⁴ Detail discussed in chapter 3.

¹⁴⁵ Gour. K.D., "PRINCIPLES OF CRIMINAL LAW", 1992, p.32.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

mind.¹⁴⁹ Thus, a crime is said to be committed when a person has committed a voluntary act prohibited by law, together with particular state of mind.

2.4.3.2 Crimes And Civil Wrongs

The distinction between crime and civil wrong is roughly that crimes are public wrong while civil wrongs are private wrongs.

Crime is illegal activity that is prohibited by the law. A crime is often called an 'offence'. According to **Blackstone**, 'a crime is an act committed or omitted in violation of a public law either forbidden or commanding it'.¹⁵⁰ Those who commit crime are proceeded against by the State, in order that, if convicted, they may be punished. Civil wrong such as breach of contract or trespass to land deemed only to infringe the rights of individual wronged and not to injure the society in general. Consequently the law leaves it to the victim to sue for compensation in court.¹⁵¹

In India, the evidentiary requirements of a civil case and a criminal trial are different. In civil matters a factual matters is decided on the basis of balancing the preponderance of probability.¹⁵² On the other hand, in criminal trial, the proof has to be beyond reasonable doubt and the accused person is presumed to be innocent until proved to be guilty.¹⁵³

There are many offences, which may also be civil wrong. Whether a civil wrong will also amount to an offence or not will depend on a number of variables. Most of the property related offences, like cheating, breach of trust, negligence, defamation etc. which are offences, are punishable under criminal law as well as civil law.¹⁵⁴ It is the presence or absence of the dishonest mental element of guilt that is the distinguish feature between a criminal offence and a civil wrong.

¹⁴⁹ *Ibid.*

¹⁵⁰ Jonathan Herring, CRIMINAL LAW: TEXT, CASES AND MATERIALS, 6th ed. 2014, p. 2

¹⁵¹ *Ibid* at 15.

¹⁵² R. N. Saxena, INDIAN PENAL CODE, 9th ed. 2012, p. 13.

¹⁵³ *Ibid.*

¹⁵⁴ Andrew Ashworth, PRINCIPLES OF CORMINAL LAW, 6th ed. 2009,p. 185.

2.4.3.3 Principles Of Criminal Liability

In criminal law, corporate liability determines the extent to which a corporation as a legal person can be liable for the acts and omissions of the natural persons it employs. It is considered that each element of crime that the prosecutor needs to prove beyond reasonable doubt is a principle of criminal liability-

- Criminal liability occurs when there is a violation of criminal law which means that there cannot be liability without a criminal law which prohibits certain acts or omissions.
- Criminal liability is the liability to be punished, that a person incurs under the penal law of the land for acts of commission or omission, which the law had made punishable.
- Penal law creates the offences by defining the ingredients of each offence and prescribes punishment as the punitive consequence for committing the offences so defined.
- Criminal liability primary entails punishment imposed by law which is administer by criminal courts.

Although these general principles are applied to all criminal cases, exceptions are there in the criminal law jurisprudence. There are the cases of strict liability where *mens rea* need not to be specifically proved and one may be made liable in the absence of guilty state of mind. These happen in cases of mass destruction to the environment by gross negligence of the company resulting in widespread damages like environmental crime or corporate crime.

2.4.4 Crime And Corporate Criminal Liability

2.4.4.1 Criminal Liability Of Corporations

The distinction between individual and corporate criminal liability has become the need of the day. Studies shows that there are many ways to categories corporate criminal liability

- Liability of those individuals committing the crime within the scope of company;

- Company alone is to be held liable;
- Liability rests with both the individuals as well as the company.¹⁵⁵

There are merits and demerits with respect to each of the categories, under which, corporate criminal liability lies. The only point of consensus is that under what circumstances which entity, whether individual or company alone or with both, will be held liable. Though liability in corporate crime will be varied by facts and circumstances of each case, legislations are enforced by combining both corporate and individual liability on companies indulging in wrongful activities.¹⁵⁶

There are different approaches adopted by different countries all over the world to hold corporation liable by finding the intent behind it. For example, the civil law and common law countries all have different means to handle the criminal intent of a body corporate. But the principle is that the criminal intent and the crime of the corporation in no case are overlooked. In this context, the views regarding guilt on the part of corporation as expressed by **Chief Justice Holt** can be mentioned when he said that ‘a corporation is not indictable, but the particular members of it are’.¹⁵⁷

Private or public corporation: both can be made criminally liable

A corporation can raise an action against the person who caused harm to it. In the debate of corporate criminal liability, it is generally argued by the scholars that “the private entities should be brought under the ambit of criminal liability,¹⁵⁸ just because there is non-marketable behaviour among the associations it does not mean that they will be exempted from criminal liability.¹⁵⁹ Therefore any association, union, foundation, registered society, which qualifies the condition of incorporation¹⁶⁰ and is recognized under the law as the incorporated company, can be held criminally liable because the property or the assets they own could be used for illegal purposes as well.

¹⁵⁵ Arti Aneja, “Multidimensional aspect of Corporate Criminal Liability: An Indian Perspective”, JIJ, 2016, p. 34.

¹⁵⁶ *Ibid.*

¹⁵⁷ Michael E. Tiga, “It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law”,

https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=5865&context=faculty_scholarship (May 23, 2018)

¹⁵⁸ Luca Enriques, “Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms” 38 W F L R (2003), p.911.

¹⁵⁹ *Ibid.*

¹⁶⁰ The process of legally declaring a corporate entity as a separate legal entity distinct from its members is known as incorporation of a company.

2.4.4.2 Basic Conditions Of Corporate Criminal Liability

A corporation may be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment.¹⁶¹ In determining the criminal liability of corporations, courts used to relook the guilty act and guilty indentation of the employees of the corporation. In order to make a corporation liable for the acts of its employees, courts generally consider certain conditions, upon the fulfilling of which a corporation can be held liable for criminal.

A. Incorporation of entities: only incorporated entities under the law can be held liable for corporate crime.

A corporation can raise an action against the person who caused harm to it. In the debate of corporate criminal liability, it is generally argued by the scholars that “the private entities should be brought under the ambit of criminal liability,¹⁶² just because there is non-marketable behaviour among the associations it does not mean that they will be exempted from criminal liability.¹⁶³” Nature and working behaviour of a company or an association is immaterial in the context of criminal liability of corporation. The requirement is that, any association, union, foundation, registered society, which qualifies the condition of incorporation¹⁶⁴ and is recognized under the law as the incorporated company, can be held criminally liable; because, the property or the assets they own could be used for illegal purposes as well.

B. Corporations are Only Liable for the Acts of Employees if the Employees are Acting Within the Scope and Nature of Their Employment-

For a corporation to be liable for the act or omission of its employees, the employee must be acting within the scope of his employment. This requirement is met if the employee has actual or apparent authority to engage in the act in question.¹⁶⁵ An

161 Shaun P. Martin, “Intra-corporate Conspiracies”, 50 STAN. L. R. (1998), pp. 399 -406 .

162 Joan McPhee, “The Survival Dilemma”, <http://www.ropesgray.com/files/Publication>>, (May27, 2018).

163 Luca Enriques, “Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms” 38 W F LR (2003), p. 911.

164 The process of legally declaring a corporate entity as a separate legal entity distinct from its members is known as incorporation of a company.

165 *United States v. Investment Enter, Inc.*, 10 F.3d 263, 266 (5th Cir. 1998) (corporation is criminally liable for the unlawful acts) of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent."");

employee is said to be acting with apparent authority if a third person reasonably believes that the agent has the authority to perform the act in question.¹⁶⁶

Apart from this general framework, the question of ‘whether an employee acted in the scope of his or her authority’ depends on the various models and principles adopted by different jurisdiction.

C. Corporation Will Not be Liable for the Acts of its Employees Unless Those Actions are Designed to Benefit the Corporation

The second condition of corporate criminal liability requires that employee should act to benefit the company. To fulfill this requirement the corporations not required to actually receive a benefit, the employee’s mere intention is enough to benefit the corporation. The court may find this intuition by seeing whenever the employee's actions are favorable to the interests of the corporation or not. However, when an agent or employee violates a company policy or such action constitute a breach of fiduciary duty, the corporation may avoid its liability and can punish such employee or agent for the same. It is not a subject of corporate criminal liability, but a subject of individual criminal liability of concerned employees when acts are committed by those employees that are expressly contrary to the interests of the corporation and for which the corporation derives no benefit.

2.4.4.3 Approaches In Determining Corporate Criminal Liability-

There are different approaches adopted by different countries all over the world to hold corporation liable by finding the intent behind it. For example, “The civil law and common law countries have different means to handle the criminal intent of a body corporate.” But the established principle is that the criminal intent and the crime of the corporation in no case are overlooked. Bases on the models, adopted by different countries in criminalizing the corporation, some basic principles can be attached to the concept of corporate criminal liability-

1. The first principle talks about the general or plenary liability which implies that the juristic person's liability is same as that of an individual as

¹⁶⁶ *New Hampshire v. Zeta Chi Fraternity*, 696 A.2d 530, 535 (N.H. 1997) (stating actual authority exists when "the principle explicitly manifests its authorization for the agent to act")

corporations being practically capable of committing crime.¹⁶⁷ (this principle has been taken up by England)

2. The second principle necessitates that the legislator discuss upon every crime, examining whether corporate criminal liability is possible or not.¹⁶⁸ (this principle has been taken up by France)
3. The third principle said that, on the basis of principles, adopted by countries, it will decide what crimes can be committed by corporations.¹⁶⁹ (This principle has been taken up by America under US punishing guidelines.

2.4.4.4 Punishments For Corporate Criminal Liability

In the corporate context, both statute and judge exercise the power to inflict many sanctions in the corporate criminal proceedings including cash fines, probation¹⁷⁰, debarment¹⁷¹, loss of license and other related penalties. Cash fines are considered as most preferable for corporate crime and non pecuniary penalty, such as, imprisonment generally not preferable when the wrong doer is the corporation itself as corporation cannot be imprisoned.

Under some jurisdiction, If the defendant corporation cannot pay the entire amount as imposed by the court of law, the fine imposed will not be enough to conceive optimal deterrence and in such case, the court may impose further sanctions like cancellation of license, prohibition on advertising or selling on specific markets and so on;¹⁷² this combined penalty will have a stronger deterrent impact.¹⁷³

Though fine is the most accepted sanction, in the context of corporate crime, critics argued that cash fines have an indirect effect on the stockholders of the corporation and also on a number of guiltless employees who are working for the corporation who would lose their income.

¹⁶⁷ Arpita Sharma and Puja Kumar ‘Understanding Corporate Criminal Liability from a Global Perspective: Whose Liability Is It, after All’, 2 Kathmandu Sch. L. Rev. 98 (2013), p. 103

¹⁶⁸ *Ibid* at 104

¹⁶⁹ *Ibid* at 105

¹⁷⁰ Probation in criminal law is a period of supervision over an offender, ordered by the court instead of serving time in prison.

¹⁷¹ Debarment is the state of being excluded from enjoying certain possessions, rights, privileges, or practices and the act of prevention by legal means.

¹⁷² Jonathan R. Macey, “Agency Theory and the Criminal Liability of Organizations” (1991) 71 *Batson UNV L R* (1991), p. 315.

¹⁷³ *Ibid*.

CHAPTER 3

LEGAL FRAMEWORK ON CORPORATE CRIMINAL LIABILITY IN INDIA: AN ANALYSIS

3.1 Pillars Of Indian Criminal Justice System: An Overview

Historically, from the colonial period, Indian derived its criminal justice system from British. India adopted the separation of power theory, under which Indian Government made a clear demarcation of role, function and power of legislature, Executive and Judiciary. The various judgments of Supreme Court of India now cleared the view that the penal philosophy in India has accepted the concept of prevention of crime and treatment and rehabilitation of criminals.

The Indian criminal justice system is governed by overall by four statutes:

1. The Constitution of India, 1950;
2. The Indian Penal Code, 1860;
3. The Code of Criminal Procedure of India, 1973;
4. The Indian Evidence Act, 1872.

The legislative power is vested with the union parliament and state legislatures and the law functions are divided into the union list state list and concurrent list in the Indian constitution. At the national level these two major criminal codes, The Indian Penal Code 1860 and the Code of Criminal procedure 1973 deal with all substantive crime and their punishment. These two criminal laws are applicable through India and take precedence over any state legislation. All major offences are defined in the Indian penal code and these apply to resident, and citizens of India. Beside the Indian penal code, many special laws have also been enacted to tackle new crime.

3.2 Liability Under Indian Penal Code 1860 (IPC) In Relation To Corporation-

3.2.1 Corporate Criminal Liability In General

IPC defines “offences” and prescribe the punishment for the same. The preamble of IPC indicates that the Code is intended to deal with all unlawful acts omissions defined to be offences and committed within India and to provide for the punishment thereof of the person or persons found guilty thereof.

Sec 2 of IPC reads-

Every person shall be liable to punishment under this code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.¹⁷⁴

In “*Mobarak Ali Ahmed v The State of Bombay*”¹⁷⁵ it is observed that the use of the phrase ‘every person’ in Sec 2 IPC contrasted with the use of the phrase ‘any person’ in Sec 3 as well as Section 4(2) which indicates that the extent of the guilt for an offence committed within India can be attributed to a person, and every such person without exception is liable for punishment under this code.¹⁷⁶

Sec11 of IPC reads-

The word person includes any company or Association or body of person, whether incorporated or not.¹⁷⁷

The scope and ambit of this provision came up for consideration in “*Motipur Zamindari Co. Ltd. V State of Bihar*”¹⁷⁸. The five judges’ bench of Supreme Court repealed the submission of the counsel that Section 41 of the Bihar Act which was a penal provision could not be applied as against a company and that would definitely indicate that the Act would not apply to a company.¹⁷⁹

But, the surprising fact is that, though as early as in 1953, the Supreme Court have adopted this developments in the English Law with respect to the criminal liability of body corporate. It took half a century since then for the courts in India, to apply those principles of English law to hold that a corporation may be indictable in respect of offences involving *mens rea*.¹⁸⁰

¹⁷⁴ Prof. S. N. Mishra, INDIAN PENAL CODE, 19th ed. 2013,p. 74

¹⁷⁵ AIR 1957 SC 857 : 1958 Scr 328 : 1957 Cri LJ 1346.

¹⁷⁶ *Supra* note 8 at 128

¹⁷⁷ *Supra* note 164 at 86.

¹⁷⁸ AIR 1953 SC 320 : 1953 4 SCR 7.

¹⁷⁹ *Supra* note 8 at 129.

¹⁸⁰ *Ibid* at 130.

3.2.2 Criminal Liability Of Directors

Directors are, in eye of law, agents of the company for which they act, and the general principles of the principal and agent relationship applies to the relationship between company and its directors.¹⁸¹

As it is already mentioned that the director's criminal liability under the corporate structure may be of two kinds i.e. personal liability and vicarious liability. Personal liability, generally, arises because of the independent acts and conduct of the director himself in relation to the affairs of the company.

In "*R K Dalmia v Delhi Administration*"¹⁸² the question was whether the directors could be convicted in respect of offences including offence under section 409 of IPC which relates to criminal breach of trust by public servant, or by banker, merchant, attorney or agent entailing the maximum punishment of life imprisonment?¹⁸³ The court held that director of a company is not only an agent but also a trustee of the assets of the company which come into his hands. Thus having dominion and control over property he would come within the scope of section 409 IPC, if he misappropriates that property or convert the same to his own use. On the same principle, a director of a company may guilty of offences under the penal code in relation to his dealings with the company or with regard to the properties or assets of the company.

IPC does not provide for any vicarious liability of a director in respect of any offences committed by the Company.

"*Maksued Saiyad v State of Gujarat*"¹⁸⁴ is one of the initial case where it was held that "in the absence of any specific provision creating such vicarious liability, a director or employee of a company cannot be held to be vicariously liable for any offences committed by a company. Vicarious liability of the managing director and director would arise only when provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liability. For that purpose it

¹⁸¹ Palmer's, COMPANY LAW, 24th Ed, 1987, p. 56.

¹⁸² AIR 1962 SC 1872 : (1963) 1 SCR 253.

¹⁸³ *Ibid.*

¹⁸⁴ (2008) 5 SCC 668 : JT 2007 (11) 276 (SC) : (2008) 2 SCC 692(Cri).

is obligatory on the part of the complainant to make requisite allegations which attract the provisions constituting vicarious liability.”¹⁸⁵

Thus, when a penal provision in a Statute provides for liability of the corporations along with other officials or directors of the company, for any specific offence, it will depend on the prosecution party, whether the company or responsible directors or against both, they want to indicate proceedings.

The same view was expressed in several cases like “*S K Alagh v State of UP*”¹⁸⁶, “*Keki Hormusshi Ghada & Ors v Mehervan Rustom Irani & Ors*”¹⁸⁷ that vicarious liability is unknown to IPC, unless specifically backed by the statutes.¹⁸⁸

3.2.3 Forty First Law Commission Of India Report

The Law Commission of India 41st report is significant in the context of corporate criminal liability in India. The commission viewed that 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 IPC 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.’¹⁸⁹

3.2.4 Forty Seventh Law Commission Of India Report

When the 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

¹⁸⁵ *Ibid.*

¹⁸⁶ (2008) 5 SCC 662 : 2008 CrLJ 2256 : (2008) 2 SCC 686.

¹⁸⁷ (2009) 6 SCC 475 : 2009 Cri.L.J 3733 : AIR 2009 SC 2594.

¹⁸⁸ *Supra* note 8.

¹⁸⁹ 41st Law Commission of India Report, The Code of Criminal Procedure Code, 9 (9169), <http://lawcommissionofindia.nic.in/1-50/Report41.pdf>, (February 15, 2018).

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 IPC also but it is likely to arise more frequently in the case of economic laws. Therefore the commission recommends that the following provision should be inserted in the Indian Penal Code as says 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.¹⁹⁰

Through these recommendations, Law Commission of India focuses on the gaps left by the legislature which renders it impossible for a court to convict a corporation where the statutes mandate 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 the conflicting view on the part of legislatures, the bill prepared on the basis of the recommendation did not fructify into law and lapsed.

3.2.5 Consequences Of Law Commission Report And Indian Penal Code (Amendment) Bill 1972-

This amendment bill of IPC was the result of the concern of law makers in India through the law commission report that proposes various changes to the tradition punishment mechanism prevailing in India. Clause 72(a) of the Bill reads as under-

¹⁹⁰ Parliament of India Rajya Sabha, "Forty Seventh Report on The Judicial Standards and Accountability Bill", 2010
<http://www.prsindia.org/uploads/media/Judicial%20Standard/SCR%20Judicial%20Standards%20&%20Accountability%20Bill.pdf> (February 9, 2018)

- (1) “In every case in which the offences are punishable with imprisonment and fine, and the offender is a company, it shall be competent for the court to sentence such offender to fine only.”¹⁹¹
- (2) In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the court to sentence such offender to fine only.”¹⁹²

However, the Bill was not passed and was allowed to lapse; and after that no attempt has been made in the Indian legislature to reintroduce the lapsed Bill.

3.3 Corporate Criminal Liability Under Companies Act, 1956

Companies Act 1956¹⁹³ was the sole statute exclusively dealing with condition of corporations in India. The Act imposed criminal liability on corporation as well as on the directors and other officers of the company. While certain section exclusively imposes criminal liability on corporation and certain section on directors or officers of company.

Section 117(c)(5) provides that if default is made in complying with the order of the company, Law Board under sub-section (4) of sec 117-C (directing the company to redeem the debentures forth with by the payment of principal and interest due thereon), every officer of the company who is in default, shall be punishable with imprisonment which may be extended to three years and shall also be liable to a fine of not less than five hundred rupees for every day during which such default continues.¹⁹⁴

Section 272 deals with criminal liability of company’s director under certain circumstances. According to this section if after the expiry of the period of two months, any person acts as a director of a company when he does not hold the qualification referred to in section 270, he shall be punishable with fine as directed under this section.¹⁹⁵

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Act No. 1 of 1956 [18 January 1956].

¹⁹⁴ Ministry of Corporate Affairs Government of India, “Companies Act, 1956”, http://www.mca.gov.in/Ministry/actsbills/pdf/Companies_Act_1956_Part_1.pdf.

(February 27, 2018)

¹⁹⁵ *Ibid.*

Section 420 provides that if any officer of a company who, knowingly, contravenes, or authorizes or permits the contravention of, the provision of section 417, 418 or 419 shall be punishable with imprisonment for a term which may be extended to six months, or with fine which may be extended to ten thousand rupees.¹⁹⁶

Section 541 of the Act deals with criminal liability of officers of a company where proper accounts of books not kept at the time of winding up of the company.¹⁹⁷ According to this section every officer of company who is in default for such act shall be punishable with imprisonment for a term which may be extend to one year.

Section 630 provides that if any officer or employee of a company wrongfully obtains possession of any property of a company, then he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may be extended to ten thousand rupees.¹⁹⁸

Thus the Companies Act 1956 imposes criminal liability on corporations as well as its officers and directors depending on the situation and circumstances.

3.3.1 Directors Liability Under Companies Act, 1956

The Companies Act 1956 provided for the prosecution of director for breach of statutory duties and other offences under the Act.

Section 2(13) of Companies Act 1956 defines directors as directors includes any person occupying the position of directors by whatever name called.” This definition is inclusive in nature and includes any person as director with respect to his function and duties whether or not designated as director.¹⁹⁹ Regarding the actual position of directions in the companies, the Companies Act 1956 is critical as directors acts in various capacities i.e. trustees, agent, of the company. But, it is settled position that director has power on behalf of a company to the extent to which any power or powers of the board have been delegated to him by the Board, within the limit as prescribed by the Companies Act.²⁰⁰

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

As per Section 5 of the Companies Act 1956, the director who is in default to comply with specific responsibility assigned to them, shall be treated as officer in default.²⁰¹

Regarding the criminal liability of directors, the Ministry of corporate affairs has issued circular no 08/2011 relating to prosecution of Director on March 25, 2011. According to this circular independent director, director appointed under section 408 by central government, nominee director on PSU appoint by government shall be held liable for any act of omission or commission by the company or by any officers of the company which constitute a breach or violation of any provision of the Companies Act, 1956 and which occurred with his knowledge attributable through Board process and with his consent or connivance or where he has acted diligently in the Board process. This circular also stated that if the directors are unable to comply with the specific responsibility assigned to them under section 209(5), 209(6), 211 and 212 of Companies Act 1956, then they shall be liable accordingly.²⁰²

3.4 Corporate Prosecution Under The Code Of Criminal Procedure, 1973

There are certain procedural provisions for the prosecution of a body corporate in India. Since the corporation is juristic person it cannot appear in any court as an accused. Section 305 of Code of Criminal Procedure, 1973 (CrPC) provides that when a corporation is an accused person or one of the accused person in any inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial who would represent the corporation during the trial.²⁰³ However, such appointment need not be under the seal of the corporation.

The provision under section 305 was incorporated in the CrPC of 1973 on the recommendation of Law Commission of India.²⁰⁴ There was no such provision in the original Code. However, under the new provision, although, the representative appears on behalf of the corporation, he is not regarded as anything more than a representative for appearance in court. His appointment is only confined to that of representing the corporation at the inquiry or trial. He is neither to suffer any

²⁰¹ Kiran Mukadam, Director;s liability under the Companies Act 1956, <https://taxguru.in/company-law/directors-liability-companies-act-1956.html> (May 12, 2018).

²⁰² *Ibid.*

²⁰³ S.N. Mishra, THE CODE OF CRIMINAL PROCEDURE, 1973, 19th ed. 2015, p. 448.

²⁰⁴ *Ibid.*

punishment as the representative of the corporation nor any liability should be imposed upon him.

In “*Food Inspector Cuttack Municipality v BP Oil Mills Ltd*”²⁰⁵ a company was prosecuted under the Prevention of Food Adulteration Act, 1954. The company nominated a person to be its representative under section 305 of CrPC. This appointment is challenge on the ground that the person so nominated shall be liable for punishment in terms of section 17 of the Prevention of Food Adulteration Act, 1954. But, the Court held that these two provisions under these two sections operate in different fields. Section 305 CrPC relates to representation of the company during the inquiry or trial and section 17 of the Prevention of Food Adulteration Act, 1954 relates to liability for punishment in case the corporation found guilty. Where there is no nomination by the corporation under section 305 CrPC, the person who is responsible for the conduct of the business of the company may be liable for punishment on the basis of vicarious liability.

Another issue is the service of summons on the corporation in the criminal proceedings. Section 63 CrPC deals with the condition of service of summons on corporation and societies by serving letter on the secretary, local manager or other principal officer of the corporation.

3.5 Corporate Criminal Liability Under The Companies Act, 2013-

The companies Act, 2013²⁰⁶ is one step further in understanding the concept of corporate criminal liability in India context. The new Act 2013 have introduced two new types of ordinary directors i.e. nominee directors and independent directors.²⁰⁷ This Act has contained clear provisions to control and deter corporate crimes like fraud, cheating etc. For example, to control fraud and to bring deterrence affect, independent directors, auditors are made more accountable and responsible, by making them company’s watchdog to ensure company’s compliance to the Companies Act, 2013. This Present Act is considered as comprehensive, which contains strict penalties for corporate fraud and is able to achieve huge appreciation and recognition from the legal fraternity.

²⁰⁵ 1995 CrLJ 3043.

²⁰⁶ The companies Act, 2013 received the assent of the President of India on 29th August, 2013.

²⁰⁷ The common types of directors under both old and new Companies Act are additional directors, directors appointed in casual vacancy and alternate director.

The corporate regime under the Companies Act, 2013 is considered as a development over the Companies Act 1956. For instance, penalties under the 1956 Act were seen ineffective which have been significantly amplified under the Companies Act, 2013.²⁰⁸ The approach in the new Act 2013 has been seen to impose more stringent and increased penalties for corporate crime as compared to the 1956 Act. Apart from monetary penalties, penalty of imprisonment is also provided for certain offences. While most of the offences leading to imprisonment under the new Act 2013 are non-cognizable, there are certain offences which are cognizable in nature; this kind of offences is mainly connected to fraud or intent to defraud.

Under the Companies Act, 2013, the issue of vicarious criminal liability for the directors and other key personnel of companies are approached in a few fashions as compared to the Companies Act 1956. Along with penalizing various economic crimes, this Act criminalizes various kinds of activities in the daily course of the company's activity. More specifically, the Companies Act, 2013 tries to impose, for all the fraudulent activities committed by the employees under the scope of the company, special vicarious liability on officers of the company who are 'in default'.

3.5.1 Officer In Default-

One of the key concepts under the Companies Act, 2013 is the meaning and definition of the word "officer in default". The phrase is referred to at various sections of the Act also are statutorily recognized as responsible for compliance of law and who will be convicted for conviction or non-compliance with such provision. The definition of this term has been seen in the new Act to include a wide set of officers. This definition as follows-

Section 2(60) of the Act 2013- officer who is in default for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine, or otherwise, means any of the following officers of a company, namely-

- (i) Hole-time director;
- (ii) Key managerial personal;
- (iii) Such director or directors as specified by Board in this behalf;

²⁰⁸Ravi Puliani and Mahesh Puliani, COMPANIES ACT WITH RULES, 25th ed. 2015 pp. 5-33.

- (iv) Any person under the immediate authority of the Board or any key managerial personal in this behalf;
- (v) Any person under the advice and instruction of directors or the Board in this behalf;
- (vi) Every director who is aware of contravention of any of the provision of this Act;
- (vii) Share transfer agent, in respect of the issue or transfer of any share of a company.²⁰⁹

It is evident from this definition that the term ‘officer in default’ now seeks to implicate every director (including nominee director) who is aware of the contravention of the Companies Act, 2013.

3.5.2 Offences And Liabilities Of Corporation

Corporate criminal liability concerns only those crimes and offences that makes the corporations liable towards any person, whether natural or juristic person. However, the liabilities of the corporation is different from the liabilities of directors, managers, auditors or other employees, which may be their personal liabilities against the corporation or against any third person. Personal criminal liabilities of the individual members of the corporation have nothing to do with the criminal liabilities of the corporations.

The Companies Act, 2013 has come up within strict punishment and penalties for violation or non compliance of various provisions of and rules under the Act. The companies and other responsible person or persons must look the same for ascertaining the implications of the actions done or to be done by them so that the requisite compliance, as prescribed by the Act, is in place. The various categories of offences and liabilities are dissuaded bellow-

Fraud Under The Companies Act, 2013-

Section 447 of Companies Act, 2013 is the most debated and controversial Section. This Section has a very wide coverage. It applies to all people, includes omission of

²⁰⁹ A. Ramaiya, GUIDE TO THE COMPANIES ACT, 18th ed. 2015, pp. 207-239.

duties are not typically in the nature of fraud, and contains no materialistic thresholds.²¹⁰

Section 447 states that Fraud in relation to affairs of a company or a body corporate, includes any act, omission or abuse of any position by any person or any other person, with intent to deceive, to gain undue advantage from, or to injure the interest of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.²¹¹

Section 447 also said that the person who is guilty of fraud shall be punishable with imprisonment for a term not less than 6 months and up to 10 years and fine which shall not be less than the amount involved in the fraud and may extent to three times of the fraud amount.²¹²

The companies Act, 2013 under Section 447 cover only those frauds which have been committed in relation to the affairs of the company or in relation to affairs of a body corporate. The fraud need not to be on the company but with respect to something concerning the company like its shares and other securities, its public offer, its business, its director, officers , advisors etc. This section indicates that fraud may be committed not only by any person but also a company, partnership firm, body corporate, association of persons, joint venture.

‘Section 211 of the Companies Act, 2013’ provided for the Establishment of Serious Fraud Investigation Office, who should have special knowledge of banking, corporate affairs, taxation, forensic audit, capital market, information technology and law.²¹³

A reference of other criminal offences, liabilities and penalties by the corporation is mentioned bellow-

²¹⁰C. R. Dutta, COMPANY LAW, 7th ed. 2017, p. 3.2386.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Avtar Singh, COMPANY LAW, 16th ed. 2015 p. 514.

Sections	Criminal Offences	Liabile person	Punishments
Section 15	Default in alteration of memorandum or articles to be noted in every copy.	Officer in default.	Penalty of one thousand rupees for every copy of the memorandum or articles issued without such alteration.
Section 35	Criminal liability for mis-statements in prospectus.	Every person who authorizes the issue of such misleading prospectus.	Liabile for fraud under section447.
Section 38	Abatement or inducement for acquisition, etc., of securities of the company.	Any person.	Liabile for fraud under section447.
Section 53	Prohibition on issue of shares at discount.	Company and officer in default.	Company- fine which shall not be less than one lakh rupees but which may extend upto five lakh rupees. Officer in default -imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.
Section 68(11)	Default by company in purchasing its own securities.	Company and officer in default.	Company- fine which shall not be less than one lakh rupees but which may extend to three lakh rupees. Officer in default- imprisonment for a term which may extend to three years or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.
Section 71(11)	Default in debentures.	Officer in default.	Maximum imprisonment of 3 years or Fine- Not less than Rs. 2 lakh and may extend to Rs. 5 lakh or with both.
Section 92(5)	Company fails to file its	Company and officer in	Company-Fine- Not less than Rs.

	annual return.	default.	50,000 and may extend to Rs. 5 lakh. Officer in default- Maximum imprisonment of six months or Fine- Not less than Rs. 50,000 Thousand and may extend to Rs. 5 lakh or with both.
Section 118(12)	Tempering with Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot.	Any person found guilty of tampering with the minutes.	“Maximum imprisonment for 2 years and Fine- Not less than Rs. 25,000 but which may extend to Rs. 1 lakh
Section 128(6)-	Books of account, etc., to be kept by Company.	Officer in default.	Maximum imprisonment of 1 year or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakh or with both.
Section 129(7)-	Default in Financial statement.	Officer in default.	Maximum imprisonment of 1 year or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakh or with both.
Section 134	Financial statement, Board’s report, etc.	Company and officer in default.	Company-Fine- Not less than Rs. 50,000 and may extend to Rs.25 lakh. Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakh or with both.
Section 185(2)-	Loan to directors, etc.	Company and officer in default.	Company-Fine- Not less than Rs. 5 lakhs and may extend to Rs.25 lakh. Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 5 lakh and may extend to Rs. 25 lakh or with both.
Section 186(13)	Loan and investment by Company.	Company and Officer in default.	Company-Fine- Not less than Rs.25,000 which may extend to Rs. 5 lakh. Officer in default- Maximum imprisonment of 2 years may extend to Rs. 1 lakh or with both.

Section 59(5)	Rectification of register of members.	Company and officer in default.	Company-Fine- Not less than Rs.1 lakh and may extend to Rs.5 lakh. Officer in default- Maximum imprisonment of 1 years or Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakh or with both.
Section 137(3)	Copy of financial statement to be filed with Registrar.	Company and officer in default.	Company- Fine- Not less than Rs.1000 for every day in default but not more than 10 lakh. Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakh or with both.
section 182(4)-	Prohibitions and restrictions regarding political contributions.	Company and officer in default.	Company- Fine- 5 times of the amount of contribution in contravention. Officer in default- Maximum imprisonment of 6 months and Fine- 5 times of the amount of contribution in contravention.
Section 187(4)	Default in investments of Company to be held in its own name.	Company and officer in default.	Company- Fine- Not less than Rs.25,000 and may extend to Rs.25 lakh. Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both.
Section 147	Contravention of any of the provisions of sections 139 to 146 (both inclusive).	Company and officer in default.	Company - fine - not be less than twenty five thousand rupees but which may extend to five lakh rupees. Officer in default - imprisonment for a term which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees, or with both.
Section 172	Contravention of any of the provisions of Chapter XI, for which no specific punishment is provided.	Company	Company and Officer in default – fine- not be less than fifty thousand rupees but which may extend to five lakh rupees.

Section 229	Furnishing false statement, mutilation, destruction of documents.	Any responsible person.	Punishable in the manner as provided in section 447.
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3.5.3 Class Action Suit

Under Section 245 of Companies Act, 2013, a group of shareholders²¹⁴ can bring an action on behalf of all affected parties, against the company and or its directors, for any fraudulent or wrongful act or omission of conduct on its or their behalf.²¹⁵

In addition to that, Companies Act, 2013 also provide for punishment for fraud of directors, key managerial personal, auditors and other officers and management of companies in different section of the Act such as Under Section 7(5), 7(6), 8(11), 34, 36, 38(1), 46(5), 56(7), 66(10), 75,140(5), 206(4) 213, 229, 251(1), 266(1), 339(3), 448 etc. and these are cognizable offences and a person accused of any such offence under these sections shall not be released on bail or bond, unless subject to the exception provided under section 212(6) of the Act.²¹⁶

3.6 Corporate Criminal Liability Under Other Indian Statutes

Directors may also face liability under other Indian Statute. Such liability may arise , for instance

dishonor of checks under Negotiable Instruments Act, 1881(Section 141)

In “*Dilip Kumar Jaiswal v. Dabapriya Banerjee*”²¹⁷ when a check issued by company is dishonored so as to constitute an offence under section 138 of the Negotiable Instrument Act, 1881 then the director signing the check as well as the company can be prosecuted under section 141 of the Negotiable Instrument Act, 1881 and no separate notice would be necessary to prosecute the director in question.²¹⁸

²¹⁴ Constituting a minimum of 100 shareholders or such minimum perchantage of total shareholders as may be prescribed.

²¹⁵P. K. Mittal , “Class Action”, <https://www.icsi.edu/portals/70/316102013.pdf>, (February 25, 2018).

²¹⁶Tax Guru, “Companies Act, 2013 : Fraud and Fraud Reporting”, [http:// taxguru.in/company- law/ companies-act-2013-fraud-fraud-reporting.html](http://taxguru.in/company-law/companies-act-2013-fraud-fraud-reporting.html). (February 25, 2018).

²¹⁷ (1992) 73 Comp case4 434, p.440 : 96 CWN 90 (cal)

²¹⁸ L V V Iyer, GUIDE TO COMPANY DIRECTORS, 4th ed. 2015, p 1055.

Liability under Pollution and Other Laws

In *U.P. Pollution Board v. Modi Distillery*²¹⁹ The managing director and the members of the Board of Directors can be prosecuted under the Water (Prevention and Control of Pollution) Act, 1974 and it is not necessary that the company should also be prosecuted along with them.²²⁰

Special vicarious liability under the Prevention of Corruption Bill, 2013(POCA Bill) (Section 10)

Under the POCA Bill, 2013, if a company is held guilty of an offence (because a person associated with the company bribed a public official), then, every person in charge of and responsible to the company for the conduct of the business of the company would also be criminally liable for the same offence.²²¹

Section 7 of Essential Commodities Act, 1955

Section 7 states that if any person contravenes any order made under Section 3 of the Act then he shall be liable to imprisonment to a minimum of three month and maximum of seven years and will also be liable to pay fine of certain amount.²²²

The main contention here is that “it is not a compoundable offence as it attracts both imprisonment and fine, and the term *person* includes individuals as well as corporations and companies as per the General Clauses Act, 1897.”²²³

Section 278-B of Income Tax Act

Section 278-B states that if a company fails to pay tax as prescribed by the Acts then every responsible person of the company for the same shall be deemed to be guilty of offence and it will lead up to rigorous imprisonment which will be minimum of three months and maximum it may extend to seven years and also certain amount of fine will be levied.²²⁴

²¹⁹ (1987) 2 Comp LJ 298 (SC)

²²⁰ *Supra* note 1054.

²²¹ Section 10 of POCA Bill, 2013

²²² Indiacode, “The Essential Commodities Act, 1955”,
<https://indiacode.nic.in/bitstream/123456789/1579/1/195510.pdf> (April 2, 2018).

²²³ *Ibid.*

²²⁴ Taxmann’s, INCOME TAX ACT, 60th ed. 2016, p 1.1136.

Section 85 of Information Technology Act, 2000(IT Act)

Section 85 of the IT Act makes the directors of a company liable for offences committed by companies, which provides that where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made there under is a Company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.²²⁵

In the landmark case of “*Avnish Bajaj v. State*”²²⁶, the Court while upholding the prosecution of the Director, recognized the principle of *deemed criminal liability* of the directors of the accused company, which meant that it is not necessary for the company itself to be a party to the case in order to proceed against its directors.²²⁷

3.7 Models Of Vicarious liability In The Corporate Sector In India

Apart from IPC, there are large number of other statutes which seek to enact prohibitory or regulatory provisions relating to different areas of human conduct, business dealings, social issues and other issues. Each of such statutes creates statutory offences for violation of the regulation by the individual as well as by the corporations. There are again revenue related laws which also creates offences for violation of statutory provisions relating to revenue.²²⁸

Most of these offences are strict liability offences, which generally operates irrespective of *mens rea*. However, certain offences may involve willful violation, in which *mens rea* of accused person has to be established.

With respect to the nature and characteristics of the liability of a natural person such as an individual director or officer, in respect of offences committed by corporation, the Indian Legislature has adopted three different models of vicarious liability for corporate crime.²²⁹ These are as follows-

²²⁵ Vakul Sharma, INFORMATION TECHNOLOGY LAW AND PRACTICE, 3rd ed. 2011, p. 301.

²²⁶ (2005) 3 CompLJ 364.

²²⁷ *Ibid.*

²²⁸ Income Tax Act, 1961.

²²⁹ *Supra* note 8 at 162.

	First model (vicarious liability)	Second model(special vicarious liability)	Third model
Concept	The most common form is to provide for the prosecution of the company as well as a person who is in charge of and responsible to the company for carrying of its day to day activity. Such a provision is accompanied by a further provision proving that if it is proved that the offence was committed with the consent of or in connivance with a director or manager or officer, then such person would also be liable to be prosecuted. However, if the accused proves that the offence was committed either without his knowledge or in spite of his efforts to prevent commission of the same, in that case, the said person shall not be convicted. (this model is also termed as special vicarious liability)	The second model is one, in which, the statute itself specifies an individual officer or functionary who would be liable to be prosecuted.	Under the third model, the statutes provides for the nomination of a particular director or officer who would be deemed to be liable for prosecution, in the event of the commission of an offence by the company.
Respective provisions	Section 141 of the Negotiable Instrument Act, 1881; ²³⁰ Section 278B of Income Tax Act, 1961 (ITA) ;	Section 18(a) of Employees' Compensation Act, 1923; ²³¹	Section 17 of the Prevention of Food Adulteration

²³⁰ This provision was enacted by way of Negotiable Instrument (Amendment) Act, 1988 with effect from 1 Jan, 1989.

²³¹ This provision was enacted by Employees' Compensation (Amendment) Act 1933, by Act 15 of 1933.

	Section 56 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015; Section 27 of SEBI Act provides for the same.	position of occupier under the Factories Act, 1948	Act 1954.
Analysis	<p>Question have raised as to who can be brought within the ambit of the expression was in charge of and responsible to the company for the conduct of business of the company.</p> <p>In <i>K.K. Ahujav V.K. Vora</i>²³² Court held that “somebody as director of a company, does not <i>ipso facto</i> make the person in charge of and responsible to the company for the conduct of its business. What is required is that the person should be, at the material time when the offence was committed, factually in charge of and responsible to the company.</p>	<p>Under this statute, there is no provision to, of making the company or a body corporate liable in respect of the company.</p> <p>In “<i>Aneeta Hada v Godfather Travels and Tours Pvt. Ltd</i>”²³³ court held that when statue specifically make a director liable for the offence committed by company, it is imperative to arraign the company.</p>	<p>The great merit of this kind of nomination is that “once a nomination has been made, against a person to be in charge of and responsible to the company for the conduct of the business of the company, it is only the nominated person who may be prosecuted and not any other director or officer.</p>

²³² (2009) 10 SCC 48 ; (2009) 4 MLJ (CrI) 1330.

²³³ AIR 2012 SC 2795.

Among the three models as discussed above, it is seen that the third model has limited scope in India, while the first two models have wide amplitude in India. The first model is the traditional application of the vicarious liability doctrine, which find place both under the Indian Statutes and Indian Courts.

The second model of vicarious liability as termed as special vicarious liability is complicated in its application. Without legislative provision providing for special vicarious liability, Indian Courts refused to hold the directing minds of companies vicariously liable for the crimes committed by their companies.²³⁴

²³⁴ Nigam Nuggehalli, “Vicarious Criminal Liability for Corporate Officers in India: Problems and Prospects”, <http://azimpremjiuniversity.edu.in/SitePages/pdf/Vicarious-Corporate-Criminal-Liability%20.pdf>, (February 22, 2018)

CHAPTER 4

PUNISHMENT OF CORPORATION: A CHALLENGE BEFORE THE INDIAN JUDICIARY

4.1 Judicial Pronouncement From 1950 To 1970.

It is significant to note that in common law jurisdiction as well as in India, the law of corporate criminal liability has been mainly judge made law. The role of the Indian Judiciary in the evolution and development of the doctrine corporate criminal liability is more significant than the legislative initiative.

The Indian courts continued to hold the conservative view that “company being artificial person, unlike natural person cannot be held liable for criminal offences.” Company does not possess body or soul hence cannot be punished like natural person. Therefore the jurisdiction of criminal jurisprudence was not extended to the corporate crime. Even in 1997, when the courts of the common law jurisdiction had already gone a long way to appropriately convict and punish corporate bodies on criminal charges including offences involving *mens rea*, the courts of India continues to hold that company is not a natural person , so does not have *mens rea* of its own.²³⁵

4.1.1 Crimes Not Requiring Criminal Intent : *Ananth Bandu Case*

In “*Ananth Bandu v Corporation of Calcutta*, ”²³⁶ Messrs Samanta Industries Ltd was charged for the adulteration of Mustard oil under Section 407 of Calcutta Municipal Act, 1923 read with Section 408. Section 3(32) of the Bengal General Clause Act, 1899 stated that ‘person’ shall include any company or association or body of individual whether incorporated or not.

After the trial, the honorable high Court has laid down the following principles of criminal liability of corporation²³⁷ -

- i. A limited company cannot be generally tried when *mens rea* is essential.
- ii. Company cannot be tried where the only punishment for the offence is imprisonment because it is not possible to send limited company to prison.

²³⁵ *Kalpanath Rai v. The State* (1997) 8 SCC 732.

²³⁶ AIR 1952 Cal 759.

²³⁷ *Ibid* at 780.

- iii. Where there is other sentences than imprisonment or transportation or death is provided, there is nothing prevents the Court from inflicting a suitable fine and a sentence of fine need not carry with it any direction of imprisonment in default.

The judgment of the Court is important in the context that the court accepted the view that company is not outside the view of criminal jurisprudence and can be made criminally liable for offences where *mens rea* is not require.

The court also viewed that it is well established cardinal principles of criminal law, that trial of accused should be conducted in the presence of accused. As company being a legal person it could not secure its presence during the trial, hence company could not be tried.

4.1.2 Crimes Of Intent : *Messrs Syndicate Transport Case*

In “*State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd and others*”²³⁸ a complaint was filed against a director of a transport corporation under “Section 420, 406 and 403 of the Indian Penal Code. The contention under this case was that section 2 of IPC says that every person shall be liable to punish under this code; and section 11 says that *person* also include any company or association or body of persons whether incorporated or not.

The court did not accept the argument and held that there are several offences which could be committed only by human being, for instances, murder, treason, bigamy, rape, perjury etc.²³⁹ therefore, company being juristic person incapable of forming the *mens rea*, and hence company cannot be held liable for crime. The court adopted the theory of identification while **Justice Paranjpi** observed that ordinarily a corporate body like a company acts through its managing director or board of directors or authorized agents or servants and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the act or omissions including state of mind, intention, knowledge or belief of the company.

²³⁸ AIR 1964 Bom 195.

²³⁹ *Ibid* at 196.

However the judgment of the Bombay High Court remained an exception and was not followed by most of the other High Courts, and not even by the Supreme court in the subsequent cases.

4.2 Judicial Pronouncement: Post 1970 Period

During 1920, the corporate sectors was in the initial stage of its expansion , therefore, there were not much cases for criminal liability of corporations. Though penal provisions were interpreted so as to include corporate crime, but Indian Courts have still held the conservative view in penalizing corporations.

4.2.1 Interpretation Of The Word “In Charge” : “Giridhar Lal Gupta Case”

In “*Giridhar Lal Gupta v. D.H. Mehta and Another*”²⁴⁰, Supreme Court of India faced the important question of interpretation of word *in charge* under the section 23-C of the Foreign Exchange Regulation Act 1947.

The Court held that in the context a company, *a person in-charge* must mean that the person should be in over all control of the day to day business of the company or firm. Today’s structures of the company are very complicated. Under such circumstances identifying the person who is over-all in-charge of company is a hilarious task and some time the officers of the company can escape from the liability by taking advantage of this ground. Therefore, the interpretation of the term *in-charge* must mean that he should be in over-all control of the day to day business of the company or firm.

4.2.2 Establishment Of Doctrine Of Attribution : A D Jyaveerapandia Nadar Case

Under “*A D Jyaveerapandia Nadar & Co. and Ors*”²⁴¹ a significant decision was rendered by Madras High Court. It was a case under section 227 of Income Tax Act, 1961 relating to the offence of making false verification under the said Act against a partnership firm and individual partner of the said firm. They were accused of offences under Section 227 of the Income Tax Act, 1961 read with section 34 IPC and there was charge of conspiracy under section 120B IPC.

²⁴⁰ AIR 1971 SC 2162.

²⁴¹ (1975) 101 ITR 390 : 419- 20 (Mad).

The Madras High Court took note of the fact that in prosecutions for the offences committed by its agents the liability of the company had come in question in a number of cases, both English and Indian. The court referred the decision held in “*Moore v I. Breseler Ltd*”²⁴² and expressed the view that “in support of the proposition that in appropriate cases depending on evidence, it is possible to attribute to the company, the guilty acts and conduct of directors or general manager of a company, who are not only the agents of the company, but *something more*.”²⁴³

4.2.3 Parliamentary Intention Can Be Deduced From The Language Of The Statutes Books: *Kusum Products Case*

In “*Kusum Products Ltd v S.K. Singh*”²⁴⁴, a company was prosecuted under section 277 of Income Tax Act, 1961. It was held by the court that “although the definition of a person is wide enough to include a company or a juristic person that meaning is wide enough and could not have been used in Section 227 of the said Act.” It was further held that “though the punishment for the offence of “false statement in verification” under Section 277 of the Income Tax Act, 1961 is compulsory imprisonment, the intention of the parliament is clear enough in that context, that, only a natural person could commit such offence. A juristic person cannot possibly sent to prison and it is not open to a court to impose a sentence of fine and not to award the punishment of imprisonment if the court finds the company guilty under the said section, as such a company cannot be indicated for the same offence.

4.3 Judicial Response; Post 1990s Period

In 1990s, as the result of the Law Commission 41st and 47th Report, it is observed that in case of company the Court has discretionary power to impose fine. It is the general view that in the light of these developments in the law, Supreme Court of India should have held that corporation could be prosecuted for criminal offences even though such offences require *mens rea* on the basis of either vicarious liability or identification theory.

²⁴² (1944) 2 All ER 515.

²⁴³ *Supra* note 133.

²⁴⁴ (1980) 2 CHN 326 : 1980 124 ITR 804

Supreme Court of India, that too in 1990 decade without looking into all these issues and holding that company cannot be criminally liable simply on the basis of old and outdated theory that company is juristic person and incapable of forming *mens rea*.

4.3.1 Prosecution Under Companies Act, 1956 Doesn't Bar A Parties Right To Claim Relief Under IPC: *Radhey Shyam Khemka Case*

The Supreme Court of India in “*Radhey Shyam Khemka v. State of Bihar*”²⁴⁵ faced a unique question that any irregularities and misappropriation of amounts in issue of share by the officials of the company has to be dealt under the Companies Act, 1956 rather than IPC.

The Court by refusing to quash the cognizance taken by the Magistrate against the Managing director and other directors for the offence committed under section 405 and 409 of IPC held that, even the relief under the Companies Act, 1956, against alleged act of directors, does not bar the prosecution under the IPC provisions.

Supreme Court speaking through **Justice N.P. Singh** held that if there is sufficient evidence to prove their guilt then appellants are liable to be prosecuted under IPC penal provision. Hon'ble Court made emphatically clear that, the persons managing the affairs of the company could not use the juristic entity and corporate personality of the company to evade from prosecution for offence under the Indian Penal Code. It means that act of person is likely to be actionable under the Companies Act, 1956 as well as IPC, and then both actions can be maintainable at the same time. The court also held that the concerned individual officer of the company may be punished in the form of imprisonment and company can be punished in the form of fine that is just appropriate interpretation.

4.3.2 Court Can Award Part Of Prescribes Sentence : *Oswal Vanaspati Case*

In “*Oswal Vanaspati & Allied Industries v. State of U.P.*”²⁴⁶ The question before the court was that “whether a sentence of fine alone can be imposed where punishment of imprisonment is also the prescribed punishment or whether such a sentence would be illegal and hence cannot be awarded to it.”

²⁴⁵ (1993) 3 SCC 54.

²⁴⁶ 1993 1 Comp LJ 172.

The court held that where the entire prescribed sentence cannot be awarded, a part of the sentence can be awarded, namely, that of fine can be awarded to it; The court also viewed that a sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal.

4.3.3 Harmonies Construction Of Penal Provision To Punish A Corporation : *M.V. Javali Case*

In “*M.V. Javali v Mahajan Borwells & Co*”²⁴⁷, the court was dealing with an offence under section 276-B²⁴⁸ of the Income Tax Act, 1961 which provided that any person guilty of an offence shall be punished with rigorous imprisonment. Section 278-B of the said Act further provides that if an offence under the Act has been committed by a company every responsible person of the company, at the time of the commission of the crime, as well as the company shall be deemed to be guilty of such offence and be punished according. Thus an anomalous situation arose because of the two conflicting requirements under these two Sections.

In order to resolve the anomaly and to make the provision of the Act workable, the Supreme court expressed the view that A statute is neither a literary text nor a divine revelation. If there is any anomaly in the application of law the court could shape the law to remove the anomaly. Under emergency, the court can go to the extent of modification of language used in the statute book.

The Court thus held that in the case of an offence involving mandatory imprisonment, where the wrong doer is a body corporate, the court may impose the sentence of fine, instead of letting it off on the ground of impossibility of imposing the sentence of imprisonment.

²⁴⁷ 1997) 8 SCC 72 at 75.

²⁴⁸ Section 276-B of Income Tax Act states that “if person fails to pay the credit of the Central Government which he has deducted the income tax at source, then such person shall be punished with rigorous imprisonment for term which shall not be less than three months but which may extended to seven years and with fine.”

4.3.4 Incapability Of Company To Form *mens rea* : *Kalpanath Rai* Case

In “*Kalpanath Rai v State (Through CBI)*”²⁴⁹ Twelve accused were charged for various offences before the Designated Court in New Delhi under the “Terrorist and Disruptive Activities Act, 1987”²⁵⁰ (TADA 87). All of them except the company were sentenced to imprisonment and the company was sentenced to fine. The company was convicted under section 3(4) of the TADA 87.²⁵¹

The court while deciding the case held that TADA 87 is penal statute which prescribes heavy punishment with mandatory minimum punishment; therefore it should be construed strictly. Section 3(1) of TADA 87 being principal offences which constitute terrorist act unless done with *mens rea*, therefore section 3(4) which depends upon section 3(1) should also be read with implied requirement of *mens rea*. The company is being juristic person incapable of forming the *mens rea*. Hence company is acquitted from the offence of harboring the offenders under the said provision.

4.4 Judicial Response; Post 2000 Period

Beginning of the 21st century is the boom period for the Indian companies. Indian economy showed the growth rate at around 9 percentage of GDP.²⁵² Indian Companies were introduced in the Global market and began to make their profit increased numerously. The Government of India liberalized its industry, tax and export and import policy to encourage the development of private companies. As a result of this poly, foreign industries show their interest in it and started to invest in the India Market. With this development, the criminal act by the companies, to meet their selfish end, is also increased. With this context, the role of the Indian judiciary becomes very vital to see that guilty company should not go unpunished and harm the nation and people.

²⁴⁹ (1997) 8 SCC 732.

²⁵⁰ Act 28 of 1987.

²⁵¹Section 3(1) of TADA defines terrorist acts which start with words whoever with intent to over the Government, therefore offence punishable under section 3(1) requires the ingredients of *mens rea*. However, section 3(4) does not mandates the presence of *mens rea*, the wordings of that section is as follows, Whoever harbors or conceals, any terrorist shall be punishable with imprisonment for term which shall not be less than five years but which may be extend to imprisonment for life and shall also be liable to fine.

²⁵² India’s growth rate of Gross Domestic Product for the year 2009 is 8.5/, for 2010 year is 10.5/ and for 2011 year is 6.3.

4.4.1 Impossibility To Prosecute Corporation For Defamation: *Zee Telefilms Case*

In *Zee Telefilms Ltd. V Sahara India*²⁵³ case the allegation by the complainant was that Zee had telecast a program based on falsehood and had defamed Sahara India. Sahara had filed the complaint under section 500 of IPC.²⁵⁴

The Court held that to commit a crime under defamation it was required to find out the presence of the requisite *mens rea* which is one of the most essential elements of the offence of criminal defamation and in this case the company could not have the requisite *mens rea*. Therefore the court decided that the company will not be held liable for the criminal acts.

4.4.2 Impossibility To Prosecute Corporation For Mandatory Punishment: *Assistant Commissioner Case*

In *Assistant Commissioner, v. Velliappa Textiles Ltd*²⁵⁵, one of the question before the three judges' Bench of the Supreme Court was "whether the *mens rea* of the person-in-charge could be attributed to the company and whether a company was liable for punishment of fine alone if the law contemplated punishment by imprisonment only or by imprisonment and fine."²⁵⁶ The offence complained of in this case was the one under Section 279 of the Income Tax Act, 1961. The two issues arose in this case:

- Whether a company can be attributed with *mens rea* for committing crime, and can be convicted in a criminal case?
- Whether company is liable for punishment of fine if law contemplates punishment by way of imprisonment, only or a minimum period of punishment by imprisonment plus fine, whether fine alone can be imposed?

While deciding the case the court focused on two important maxims-

- *Lex non cogit ad impossibilia* which means the law forces not to impossibilities.

²⁵³ (2000) 2 Cal LJ 580.

²⁵⁴ *Ibid.*

²⁵⁵ (2003) 11 SCC 405.

²⁵⁶ *Ibid.*

- *Impotentia excusat legem* which means impossibilities excuses the law.

Two of the judges (Mathur J and Srikrishnan, J) agreed on the first issue and answered the question in the affirmative, but expressed different view in the second issue . The learned judges referred to the observations of the Law Commission of India in 41st²⁵⁷ and 47th²⁵⁸ report, which provides for the imposition of fine in spite of imprisonment, where the offender is a company.

Rajendra Babu J referred to the proposed Indian Penal Code (Amendment) Bill, 1972, but the bill was not passed and was lapsed. Finally, with the majority view, the court observed that to bring such a fundamental change in the criminal jurisprudence is a legislative function, which only Parliament can do it. It is difficult to impose fine in lieu of imprisonment though the definition of person in Indian Penal Code includes company. The court, finally, held that a company cannot be prosecuted for offences which required imposition of a mandatory term of imprisonment and fine.

4.4.3 Relaxation Of Imprisonment: *Standard Chartered Bank Case*

In “*Standard Chartered Bank & Ors. V Directorate Of Enforcement & Ors*”²⁵⁹ case the question to be considered was that “The Standard Chartered Bank had violated certain provisions of the Foreign Exchange Regulation Act, 1973, So, Whether a company could be prosecuted for an offence for which mandatory sentence of imprisonment is provided or whether the court had the discretion to impose the sentence of fine alone.

Learned Judge Balakrishna, J expressed the view of the court that “there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment.”

Regarding the requirements of *mens rea*, **Balakrishna, J** observed as:

‘We are not concerned with the question of requirements of *mens rea* to prove guilty in these proceedings; we do not express any opinion on that issue.’

²⁵⁷ *Supra* note 166.

²⁵⁸ *Supra* note 167.

²⁵⁹ (2005) 4 SCC 530.

The court, thus, overruled the view expressed in *Veliappa Textiles* case and held that it is possible for the court to impose the sentence of fine only and excuse the part of imprisonment in respect of a body corporate since imprisonment is legally impossible. The court also held that “Court would permit prosecution of corporate entities in those offences which prescribe imprisonment and fine and not permit prosecution in which the only prescribed punishment by law is mandatory imprisonment and no other.

4.5 Judicial Response; Post 2010 Period

4.5.1 Establishment Of *mens rea* On Corporation : *Iridium India Telecom* Case

In “*Iridium India Telecom (P) Ltd. v Motorola Inc & another*”,²⁶⁰ the Supreme Court was called upon to directly address the issue of corporate criminal liability under IPC. This was a case involving offence of cheating as defined under Section 415 IPC along with other penal provisions.

Before the Supreme Court of India, there were two issues to determine

- i. Whether non-disclosures of information amounts to deception;
- ii. Whether company could be prosecuted for criminal offences which require *mens rea*.²⁶¹

The Supreme Court speaking through its two judge’s bench held that even the deliberate non-disclosure of material fact amounts to deception. Even , misleading statement which withhold vital facts for intentionally inducing a person to do or omit to do something, would amount to deception. Regarding the first issue, the Court concluded that Respondent 1(Motorola Inc) had concealed certain vital information from disclosing to the Indian Investors. Thus, such misleading statement had fraudulently caused wrongful damage to the deceived Indian Investor that amounted to cheating.

The Supreme Court expressed the view that virtually in all jurisdictions across the world governed by rule of law, the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mens rea* for the commission of criminal offences. The

²⁶⁰ AIR 2011 SC 20.

²⁶¹ *Ibid.*

Court held that the legal position in England and US has now crystallized to leave no manner of doubt that a corporation would be liable for crimes of intent.

The court considered the decision of the US Supreme Court in *New York Central* case

While the law should have regard the rights of all, and those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce, is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling the subject matter and correcting the abuses aimed at.

The Supreme Court also referred to the observation of **Lord Denning** in the *Bolton (H.L.) (Engg) Co. Ltd v T.J. Graham & Sons Ltd*²⁶² and relied on the famous statement that a company may in many ways be linked to a human body.

The Supreme Court then referred to the “*Tesco Supermarkets*” case and observed that:

When a person, within the scope of his employment under a company acts, he is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company; There is no question of the company being vicariously liable; He is not acting as servant, representative, agent or delegate; He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of company; If it is guilty mind then that guilt is the guilt of the company.²⁶³

The court ruled that the person who is in direct control and in-charge of the affairs of the company and the degree of the control is so intense and rigorous that the company is said to act through the person, is instrumental in attributing criminal liability to the company. The court gave its ruling upon the two points:

- Firstly, a company is capable of possessing the requisite *mens rea*;

²⁶² (1957) 1 QB 159 : (1956) 3 WLR 804 : (1956) 3 All ER 624 (CA).

²⁶³ *Ibid.*

- Secondly, the rigid test of identification of the directing mind of the company has to be followed in determining the requisite mental element.

Significance of the case

- Iridium India Telecom case is the first case in India the authoritatively laid down the foundation of the principle of corporate criminal liability in respect of *mens rea* offences.
- Apex Court refused to rely upon the theory of “vicarious liability” of USA legal system to make corporation criminally liable but it thought that common law doctrine of “identification” or “alter ego” would be more appropriate to the Indian legal system because Indian legal system is the legacy of common law.
- Corporations are capable of having *mens rea* and can be made liable with mandatory punishment of imprisonment.

4.5.2 Special Vicarious Liability : *Sunil Bharti Mittal Case*

Under “*Sunil Bharti Mittal v CBI*”²⁶⁴ case, prosecution was launched by CBI against a few government officers and three companies namely M/s Bharti Cellular Limited, M/s Hutchison Max Telecom (P) Limited and M/s Sterling Cellular Limited alleging offences under section 3(2) read with 3(1) (d) of the Prevention of Corruption Act, 1988 and conspiracy under section 120B IPC.

The Special Court, before which the charge sheet has been filed by CBI, satisfied to the fact that there were enough incrimination materials on record to proceed against the named accused person. At the same time, the learned judge also founded that individual directors or chairman cum managing director of the companies named as accused were also to be summoned.

The special thus held that in light of the capacity in which these directors acted, they can be considered as the persons controlling the affairs of the company and the directing mind and will of the respective companies. These persons can be considered to be the alter ego of their respective companies and the acts of the companies are to be attributed and imputed to them.

²⁶⁴ AIR 2015 SC 923.

This order passed by Special court was challenged before Supreme Court on the ground that-

1. Whether the principle of attribution/alter ego can be applied to make the directors of the company liable for an offence committed by the company?²⁶⁵
2. When can a director/person in charge of the affairs of the company be prosecuted for an offence committed by the company?²⁶⁶

Regarding the first issue the Court relied on its decision in *Iridium India Telecom* case and held that criminal intent of the *alter ego* of the company/body corporate i.e. the persons or group of persons in control of the affairs of the company or who guide the business of the company would be imputed to the corporation.²⁶⁷

Regarding the second issue the court held that there is no vicarious liability unless the statutes specifically provides for it, therefore when the company is the accused, its directors cannot be implicated automatically; and can be made liable only in two situations :-

1. If there is sufficient incriminating evidence against them as to their specific role, coupled with criminal intent on their part; or
2. The statute provides for specific vicarious liability of directors for the acts by the company.²⁶⁸

The court finally concluded that the principle of *alter ego* can only be applied to make the company liable for an act committed by a person or group of persons who control the affairs of the company as they represent the *alter ego* of the company; however it cannot be applied in reverse direction to make the directors of the company liable for an offence committed by the company.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ Many acts such as Negotiable Instruments Act, Prevention of Money Laundering Act etc have such provisions where the liability of the Director/Managing Directors is deemed and the onus is on them to rebut the same by proving : either due diligence on their part to prevent the offence, or lack of involvement in the case.

A critical analysis of the ruling of this case shows that, Supreme Court in the case *Sunil Bharti Mittal v CBI* laid down a specific condition for the application of the doctrine of alter ego, as laid down in the Iridium India Telecom Case.

The legal proposition laid down in the judgment of the Iridium Case is that if the person or group of person who directs the business of the company commits an offence with a criminal intent, they will be liable on behalf of the company, since they are the alter ego of the company. Conversely, in *Sunil Bharti Mittal* Case the Supreme Court held that directors or any one representing the alter ego of the company can only be prosecuted on the account of criminal acts of the company, when it is specifically provided by statute. Without legislative provision, directors or other officer of the company cannot be made automatically liable for offence committed by the company.

Judicial Trend : post 2015

The literature Available till date shows that, as of now, principle laid in Iridium case is the law in India, as to the fact that *mens rea* can be attributed to the corporate entities and they cannot claim immunity on the ground of absence of legal personality. But this development is still at a nascent theoretical stage, as yet the courts of India did not have occasion to deal with the practical applicability of this doctrine.

While deciding the Iridium Case, the court accepted the view that, wherein it was laid down that the people who are specifically entrusted with the powers and duties towards the company and are mentioned in the MOA²⁶⁹ and AOA²⁷⁰, named by the directors or approved of such powers in the general meetings of the company will be held liable and their acts will be instrumental in attributing criminal liability of the company. Though, this is the prevailing law in India, in actual practice, it is very hard to implement those laws. In the recent ten to fifteen years

According to **EY's 14th Global Fraud Survey 2016**, titled "Corporate Misconduct – Individual Consequences, Reinforced the Sentiment", highlighting that bribery and

²⁶⁹ As per Section 2(56) of the Companies Act, 2013 "memorandum" means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.

²⁷⁰ As per Section 2(5) of the Companies Act, 2013 "articles" means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

corruption in India are ongoing challenges. While, in 2016, globally this view was shared by 39% of the respondents, in India the percentage stood significant higher at 58%.²⁷¹

However, due to the very complex nature of corporate crimes, courts generally delayed in their proceedings. The last couple of years have seen a push from the Government through revisions, amendments and regulations focused on combating white-collar crime in India. The Indian Judiciary is also seen active in combating those crimes. Presently, there are various cases of corporate crimes that are lying before the Supreme Court of India.²⁷²

²⁷¹ Fraud Investigation and Dispute Services, “EY – The Changing Dynamics of White Collar Crime in India”, [https://www.ey.com/Publication/vwLUAssets/ey-the-changing-dynamics-of-white-collar-crime-in-india-new/\\$FILE/ey-the-changing-dynamics-of-white-collar-crime-in-india.pdf](https://www.ey.com/Publication/vwLUAssets/ey-the-changing-dynamics-of-white-collar-crime-in-india-new/$FILE/ey-the-changing-dynamics-of-white-collar-crime-in-india.pdf)

²⁷² Discussed in detail under Chapter 6 – “ISSUES AND CHALLENGES CONCERNING PREVAILING INDIAN LAWS FOR CORPORATE CRIMINAL LIABILITY”.

CHAPTER 5

CHANGING FACE OF CORPORATE CRIMINAL LIABILITY

5.1 New Dimension Of Corporate Criminal Liability Under The Prevention Of Corruption (Amendment) Bill, 2013

In the wake of numerous scams being happening in India over the past decade, the enforcement agencies have been proactive in terms of monitoring compliance under relevant anti-corruption and bribery laws and taking action against violations thereof.

The Prevention of Corruption Act 1988²⁷³ is the principal anti-corruption law in India.” This Act does not contain provision for vicarious criminal liability as it mainly focuses on the personal liability of public officials for acts of corruption. It penalizes offences committed by public servants in relation to the acceptance or attempted acceptance of any form of illegal gratification (ie, anything of value other than a legal entitlement).²⁷⁴ But this view has been changed under the Prevention of Corruption (Amendment) Bill 2013²⁷⁵. However, the Bill has not passed yet.

5.1.1 Liability Of Bribe Givers

Where, The original Act, 1988, which has been used to punish bribe takers and not bribe givers, the current Government through the Prevention of Corruption (Amendment) Bill 2013, which is pending parliamentary approval, seeks to punish bribe givers by:

- Setting out specific provisions for the prosecution of bribe givers;
- Explicitly bringing commercial organizations within the ambit of the definition of ‘bribe giver’; and
- Prescribing a specific time limit for completing trials.”

²⁷³ The Prevention of Corruption Act, 1988 (No. 49 of 1988) is an Act of the India enacted to combat corruption in government agencies and public sector businesses in India.

²⁷⁴ *Ibid.*

²⁷⁵ PRS Legislative Research, “Prevention of Corruption (Amendment) Bill, 2013” <http://www.prsindia.org/uploads/media/Corruption/PCA%20SC%20Bill%20July%202017.pdf> (February 23, 2018).

5.1.2 Liability Of Commercial Organization

Under section 8 of the Prevention of Corruption (Amendment) Bill, 2013, a commercial organization²⁷⁶ will be liable for bribing a public servant. Where Section 8 of the Prevention of Corruption Act, 1988 states that if any public servant accept or aggress to accept any gratification, then he shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. Section 8 of the amendment Bill states that when the offence under this section has been committed by a commercial organization, such commercial organizations shall be punishable with fine.²⁷⁷

Section 9 of the 2013 Bill, on the other hand, holds a commercial organization liable for failure to prevent persons associated with it from bribing a public servant to obtain or retain business or an advantage in the conduct of business for such commercial organization.²⁷⁸

5.1.3 Vicarious Liability Of Officer-In -Charge

Section 10 of Prevention of Corruption (Amendment) Bill, 2013 states that in cases where the commercial organization has been guilty of an offence under section 9, every person in charge of and responsible to it shall be deemed guilty, unless he or she can prove that the offence was committed without their knowledge or that they had exercised all due diligence.²⁷⁹ This Section makes an officer-in-charge of the commercial organization vicariously liable if it is proved that offence was committed with the consent or connivance of such an officer-in-charge.²⁸⁰

5.1.4 Law commission Of India Report On Amendment Bill, 2013

While the draft Bill Prevention of Corruption Act, is sent for the recommendation of Law commission of India, the commission headed by former **Delhi High Court Chief Justice AP Shah** viewed that The effect (of the provision) is that if an employee (P) of a company (C), sitting in Bangalore bribes a local official (R) to get

²⁷⁶ A commercial organization has been defined under Section 9(3) (a) of the Prevention of Corruption (Amendment) Bill 2013, which includes companies and partnership firm (India and Foreign)

²⁷⁷ *Supra* note 247.

²⁷⁸ *Ibid.*

²⁷⁹ Parliament of India Rajya Sabha, , “Prevention of Corruption (Amendment) Bill, 2013” https://rajyasabha.nic.in/rsnew/committees/prevention_corruption.pdf (May 11, 2018)

²⁸⁰ *Ibid.*

its clearance on time, then the combined effect of the Bill is that all will be liable unless C can prove it has in place adequate procedures designed to prevent such conduct.²⁸¹ However, the provision will operate to deem every single person in charge of, and responsible to C – thus, every director on the board of directors, who may be sitting in Delhi more than 2000 kms away – guilty, and the burden on proof will shift on each of these directors to prove they had no knowledge or had exercised due diligence.²⁸²

The 254th Law Commission of India proposed a new draft Bill stating that only that official must be held liable whose consent or connivance is proved.²⁸³ The Law Commission report also says that “ the Centre cannot enforce the new law unless it first publishes guidelines, along the lines of the UK Bribery Act and the Foreign Corrupt Practices Act in the US describing procedures that corporate can in place so that there are "adequate systems" to prevent their employees from bribing a public servant; these guidelines must emerge through a consultation process initiated by the Centre in which the views of all the interested stakeholders are obtained through public notice .²⁸⁴

The Commission viewed that In both countries thus, there are extensive guidelines on procedures, which commercial organizations may use on a voluntary basis to conform their conduct to the law and relevant govern policy.²⁸⁵

The Prevention of Corruption Act, 1988 extends to the whole of India (other than the state of Jammu and Kashmir) and to all Indian citizens, irrespective of their geographical location. Thus, by implication it may also apply to foreign companies doing business in the Indian territory, but the Act does not cover extraterritorial activity (i.e., instances of illegal gratification and payments made to foreign officials or persons employed by public international organizations).²⁸⁶

²⁸¹ *Ibid.*

²⁸² 254th Law Commission of India Report, Amendment to The Prevention of Corruption (Amendment) Bill, 2013, 2 (2015), http://lawcommissionofindia.nic.in/reports/report_no.254_prevention_of_corruption (May 10, 2018). (May 11, 2018)

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

5.2 Recent Developments Under Companies (Amendment) Act, 2017

5.2.1 Key Managerial Person

Section 2(51) of the Companies Act defined the term key managerial person(KMP) , I relation to accompany, as the chief executive officer (CEO), managing director or manager, company secretary, whole-time director, chief financial officer(and such other officer as may be specified.

A plain reading of the above definition suggests that there is limit on officer who can be designated as KMP. The companies Law committee was of the view that flexibility should be given to companies for designing its whole time officers as KMP of companies.

The 2017 Amendment Act, thus amended this Section 2(51), which now reads as the board of directors of a company will have the power to designate the officer, not more than one level below the directors who are in whole-time employment, as KMP of the company.²⁸⁷

5.2.2 Constitution Of NEFA

Section 132 of the 2013 Act empowers the central Government to constitute the NFRA (National Finance Reporting Authority). The NFRA will be quasi judicial body and will have the responsibility to ensure overall quality of financial reporting. The authority will make recommendation to central government on auditing policies.

But the Government has not constituted the NFRA due to various criticisms upon its criticism. The Companies Law Committee 2016 is of the view that “there is a need of an independent body to oversee the transparency and adequacy of profession.” The Companies (Amendment) Act 2017 demanded the quick establishment of NEFA.²⁸⁸

²⁸⁷Ministry of Law and Justice, “Companies (Amendment) Act, 2017”, <http://www.nfcg.in/UserFiles/THE-COMPANIES-AMENDMENT-ACT-2017.pdf> (march 23, 2018)

²⁸⁸ *Ibid.*

5.2.3 Section 447 Of Companies (Amendment) Act, 2017

Section 447 of the Companies Act, 2013 Act deals with the punishment for Fraud.²⁸⁹ However this Section does not define the term “Fraud”. The report of the Companies Law Committee in 2016 received suggestion that the ambit of section 447 was too broad and would result in minor infractions being punished with several penalties, which are non- compoundable. The committee also observes that the provision has a potential of being misused and may also have a negative impact on attracting professional in the post of directors etc.²⁹⁰

The 2017 Amendment Act thus amend this provision stating that instead of any fraud, only frauds involving an amount of at least INR 10 lakh or 1% of the turnover of the company, whichever is lower, will carry higher punishment.²⁹¹

The Amendment Act also contains a new condition that where a fraud involving an amount less than Rs1 million or 1% of the company turnover (whichever is lower) and which does not involve public interest, such person will be punishable with a maximum five-year prison term, a fine of up to Rs 2.5 million or both. For other instances of fraud, the penalty remains the same (ie, six months to 10 years’ imprisonment and a fine of up to three times the amount involved in the offence).

5.3 Recent Development Under UK Law

In UK, the principle underlying corporate criminal liability is Identification doctrine.²⁹² However in the recent years, the UK government decided that identification principle was outdated and need reforms.

Under the Identification doctrine, it is only the most senior personnel in a company (generally understood to be those at the main board level or equivalent) who bear the liability for the crime committed by corporation. Attempts have been made by the UK Government to redress this situation, with the introduction of new statutory corporate criminal offences, most notably in section 7 of the Bribery Act 2010 (ie, failing to prevent bribery) and the Corporate Manslaughter and Corporate Homicide Act 2007,

²⁸⁹ *Supra* note 186.

²⁹⁰ Ministry of Corporate Affairs (Government of India) , Report of the companies Law committee. Report submitted to honorable finance minister on 1st February, 2016.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

together with new investigative tools such as the introduction of deferred prosecution agreements (DPAs) into UK law on the 24 February 2014 by the Crime and Courts Act, 2013.²⁹³

5.3.1 Liability For Gross Negligence Under Corporate Manslaughter And Corporate Homicide Act, 2007

The Corporate Manslaughter and Corporate Homicide Act, 2007²⁹⁴ has created a new statutory offence called “corporate manslaughter by negligence.” This new law has changed the common law doctrine of identification so that the liability of new offence depends on findings of gross negligence in the way in which the activities of organization are run. This Act was meant to remedy the problems of identification doctrine of corporate criminal liability.

Section 1 of Corporate Manslaughter and Corporate Homicide Act, 2007 provides that an organization will be guilty of an offence if the way in which its activities are managed or organized by its senior management, causes a person’s death or amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.²⁹⁵

A significant feature of this new Act of UK is that under section 18 of the Act when there is corporate liability for causing death by negligence under this Act, there will no individual liability for aiding, abetting, counseling or procuring the commission of the offence of corporate manslaughter and as such no individual will be guilty of such collateral liability.²⁹⁶

5.3.2 Liability For Failure To Prevent Bribery Under Bribery Act, 2010

The Bribery Act, 2010²⁹⁷ which was enacted specifically to combat economic crimes signifies the erosion of the identification principle. In particular Section 7 of the Act deals with a new corporate offence of failure of commercial organization to prevent

²⁹³ Business Crimes Defence, “Trends in Corporate Criminal Liability in the UK”, <http://whoswholegal.com/news/features/article/31747/trends-corporate-criminal-liability-uk> (May 10, 2018)

²⁹⁴ The Corporate Manslaughter and Corporate Homicide Act 2007 was enacted by the British Parliament in 2007 and it received the royal assent on 26th July, 2007. It came into force on 6th April 2008.

²⁹⁵ Section 1(3) of Corporate Manslaughter and Corporate Homicide Act 2007

²⁹⁶ U. K. Government Legislation, “Corporate Manslaughter and Corporate Homicide Act 2007”, <https://www.legislation.gov.uk/ukpga/2007/19/section/18>. (May 11, 2018)

²⁹⁷ The Bribery Act 2010 (c.23) is an Act of the Parliament of the United Kingdom that covers the criminal law relating to bribery.

bribery, which states that “a corporation will be liable for giving bribe, if any person associated with the corporate (such as an employee, no matter how junior, or an agent) paid a bribe to attract or retain business on behalf of the corporation.”²⁹⁸ The only defense for corporation is that it has adopted adequate anti-bribery procedures in place.

Beyond by the success of the Bribery Act, the UK government brought a new “failure to prevent” offence onto the statute book in 2017, relating to the criminal facilitation of the evasion of UK a foreign taxes.

5.3.3 UK Deferred Prosecution Agreement (DPA)

Schedule 17 part 1 of Crime and Courts Act 2013²⁹⁹ defines DPA as “ DPA is an agreement reached between a prosecutor and an organization which could be prosecuted, under the supervision of a judge.³⁰⁰ The agreement allows a prosecution to be suspended for a defined period provided the organization meets certain specified conditions.³⁰¹ DPAs can be used for fraud, bribery and other economic crime and are applied to organizations, but never individuals.³⁰²

The key features of DPAs are:

- A deferred prosecution agreement (DPA) is a power given to the court under the Crime and Courts to approve a financial penalty and compensatory payments which have been agreed between the company and the prosecutor.
- The agreement allows a company to continue to trade without being prosecuted over a set period when they have been investigated for financial crime or bribery and have paid a fine and made other financial recompense.
- They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or

²⁹⁸ Section 7 of Bribery Act, 2010- A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending— (a)to obtain or retain business for C, or (b)to obtain or retain an advantage in the conduct of business for C

²⁹⁹ DPAs were introduced on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013.

³⁰⁰ U. K. Government Legislation, “Crime and Courts Act 2013”

<http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted> (May 11, 2018)

³⁰¹ *Ibid.*

³⁰² *Ibid.*

reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).

- They are concluded under the supervision of a judge, who must be convinced that the DPA is ‘in the interests of justice’ and that the terms are ‘fair, reasonable and proportionate’.
- They are means for alternative disposal of criminal offences by companies and avoid lengthy and costly trials.
- They are transparent, public events.³⁰³

Literature on the recent development also shows that “UK government has recently consulted on proposals to introduce further corporate offences of failing to prevent fraud and other economic crimes. The EU General Data Protection Regulation and accompanying UK legislation will also introduce (from June 2018) new criminal offences for corporate that do not rely on the identification principle.³⁰⁴ Prosecutions in this area are likely to be pursued in instances of cybercrime and manipulation or misuse of personal data. Many of these new laws are having extraterritorial reach will strengthens the prosecutor’s hand.

5.4 Recent Development Under US Law

Over the past three decades The United States Department of Justice (DOJ) and Sentencing Commission has been working on reshaping the corporate criminal liability structure in the federal system. Corporate liability in the US is based on the principle of respondent superior and this principle renders a company liable for the wrongful acts of its employees committed during the course of their employment. As there is no requirement for the culpable employee to be of certain seniority, it is relatively easy for the prosecution to discharge its burden of proof regarding the company’s liability. By responding to the criticism of respondent superior model, the US government has adopted various new policies and guidelines determining what section to impose on corporation.

³⁰³ Serious Fraud Office, “Deferred Prosecution Agreement”
<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>
 (May 12, 2018)

³⁰⁴ *Ibid.*

5.4.1 The United States Attorneys' Manual

The principles of federal prosecution as laid down in The United States Attorneys' Manual (USAM) provides both general standards for the exercise of federal prosecutions to all cases, and specific provisions governing the prosecution of corporations and other business entities.³⁰⁵ The Principles of Federal Prosecution of Business Organizations (Principles of Prosecution)³⁰⁶ makes it clear that federal prosecutors should not bring criminal charges merely because a case can be made on the basis of respondent superior.³⁰⁷ Rather the prosecutor must consider some general aspect to identify corporate blameworthiness, before initiation of any federal prosecution against any person.

The principles of Federal Prosecution emphasizes that in conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The corporation's culpability in connection with the offense;
5. The corporation's history with respect to criminal activity;
6. The existence and effectiveness of the corporation's pre-existing compliance program;
7. The corporation's timely and voluntary disclosure of wrongdoing;
8. The adequacy of remedies such as civil or regulatory enforcement actions;
9. Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
10. The person's willingness to cooperate in the investigation or prosecution of others; and
11. The probable sentence or other consequences if the person is convicted.³⁰⁸

³⁰⁵ Compare U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL at 9- 27.220 to 9- 27.230 (stating general standards), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9- 27.220 (June10, 2018)

³⁰⁶ *Ibid* at 9- 28.300.

³⁰⁷ *Ibid* at 9- 28.300(A), 9- 28.1300(A).

³⁰⁸ *Ibid* at 9-27,23.

The USAM expressly states that it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondent superior theory for the single isolated act of a rogue employee, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged.³⁰⁹

USAM also recommend that every corporation should adopt adequate compliance program and it is the duty of every prosecutor to consider whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.³¹⁰

Generally it's become difficult for the outside investigators to determine which particular employee or employees commit the crime on behalf of the corporation and to find the relevant evidence, so with this view USAM gives weight to the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.³¹¹

5.4.2 The United States Sentencing Guidelines For Organizations

Chapter 8 of the United States Sentencing Guidelines 2016 mandates deals with the sentencing guidelines when the convicted defendant is a corporation.³¹² The Guidelines mandates the view that organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents; at the same time, individual agents are responsible for their own criminal conduct; Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants.³¹³ Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements.³¹⁴

The principles behind the Guidelines are:

³⁰⁹ *Ibid.* at 9- 28.500(A)

³¹⁰ USAM at 9- 28.800

³¹¹ *Ibid.* at 9- 28.700.

³¹² United States Sentencing Commission, "2016 Guidelines Manual"

<https://www.usc.gov/guidelines/2016-guidelines-manual/2016-chapter-8> (May12, 2018).

³¹³ *Ibid.*

³¹⁴ *Ibid.*

- First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused;
- Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets;
- Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization;
- Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.³¹⁵

It is also provides in the book of sentencing guidelines that these guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.”³¹⁶

5.4.3 Deferred Prosecution Agreement Under US Attorneys Manual

The US Attorneys’ Manual 1997 also provides for another option in criminal cases, by deferred prosecution agreement signed between prosecutor and defendant (defendant including corporate defendant).³¹⁷ Under this agreement the prosecutor may agree to grant amnesty to the defendant be in exchange for the defendant agrees to fulfill certain requirements of the prosecutor. By such agreement the defendant agrees to pay fines, implement corporate reforms and fully cooperate with

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ U. S. Depart of Justice, “U. S. Attorney’s Manual”, <https://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11> (June 16, 2018)

investigation. Fulfillment of specific requirements will then result in dismissal of the charges.³¹⁸

5.5 OECD Anti-Bribery Convention : Liability Of Legal Persons For Foreign Bilbray

One of the most important international anti-corruption framework agreements is the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Anti-Bribery Convention), which requires signatory countries to criminalize the bribery of foreign public officials.³¹⁹ India was not a signatory to this convention.

OECD³²⁰ has 34 members' countries including UK and US. India being one of the non member economies of OECD has been working with it since 1995.

Articles 2 and 3 of the Convention, which obligate the 41 Parties to establish Legal person's liability in accordance with their legal principles and to ensure that legal persons are subject to effective, proportionate and dissuasive criminal penalties or (if criminal responsibility is not applicable to legal persons under a Party's legal system) equivalent "non-criminal sanctions, including monetary sanctions for foreign bribery."³²¹ Article 2 of the OECD Anti-Bribery Convention provides that each state parties shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.³²²

The OECD Working Group on Bribery (WGB) in International Business Transactions has recommended that "member countries' systems for the liability of legal persons for bribery of foreign public officials in international business transactions should either be triggered by:

³¹⁸ *Ibid.*

³¹⁹ OECD, "The OECD Convention on Bribery: A Commentary", <https://www.oecd.org/daf/anti-bribery/39200754.pdf> (June 15, 2018).

³²⁰ The Organization for Economic Co-operation and Development (OECD) is a group of 34 member countries that discuss and develop economic and social policy.

³²¹ OECD, "The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report" <https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> (June 15, 2018)

³²² *Ibid.*

- Any level of employee whose bribery conduct reflects the wide variety of decision-making systems in legal persons; or
- The highest level of managerial authority, whether the conduct involves actively giving a bribe to a foreign public official or failure to prevent bribery within the organization.³²³

The convention and the WGB monitoring is significant in the context that it strengthens and provides a model for legal person's liability system both for foreign Bilbray and for offences beyond the scope of the convention, to its 41 member parties. Though, the convention recommends only to the member parties, such recommendation are free to be adopted by non member countries.

5.6 Corporate Criminal Liability Under International Criminal Law

The legal framework for holding corporations and their individual agents criminally responsible at the international level is poorly developed and, even more so, poorly enforced. Some scholars suggest that international law cannot impose obligations on corporations because corporations do not possess international legal personality.³²⁴ Whether and to what extent corporations are to enjoy rights and duties under international law appears to be solely a matter of political will.³²⁵ Some commentators have argued that the mere fact that corporations are key “participants” in the international legal system ipso facto implies that they have international legal personality.³²⁶

5.6.1 Nuremberg Tradition On Corporate Criminal liability:

The Nuremberg trial of German war criminals after the Second World War marked the beginning of increased focus on individual criminal responsibility, which was a departure from the view that only the state was responsible when gross human rights violations had been committed.

³²³ *Ibid.*

³²⁴ Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1(2003), pp. 48-49.

³²⁵ Ole Kristian Fauchald and Jo Stigen, “Corporate Responsibility Before International Institutions”, 40 *Geo. Wash. Int'l L. Rev.* (2009), p. 1028.

³²⁶ The U.N. special representative of the secretary-general has noted that corporations have become “participants” in the international legal system, and thus, by implication, have the capacity to bear some rights and duties under international law.

The Nuremberg tradition to focus on individual criminal responsibility, as opposed to corporate criminal responsibility, was upheld when the Security Council created the two ad hoc tribunals for the former Yugoslavia and Rwanda.³²⁷

In his report to the Security Council regarding the establishment of the ICTY, the U.N. secretary-general noted the following:

The question arises, whether a juridical person, such as an association or organization may be considered criminal as such and thus its members, for that reason alone, is made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.³²⁸

The respective statutes of these two tribunals authorize the tribunals to prosecute individuals but not legal entities.³²⁹

5.6.2 ICC Tradition On Corporate Criminal Liability:

As for the newly established International Criminal Court (ICC), the Rome Statute only authorizes the ICC to prosecute natural persons.³³⁰ Under the ICC jurisdiction only corporate officers, not the corporations are responsible for their company's criminal conduct. The ICC entertain individual criminal responsibility³³¹ or superior responsibility³³² for corporate officers when their actions are part of an overall situation of atrocity crimes that either has been referred³³³ to the Prosecutor by a State Party or the Security Council, or the Prosecutor has initiated an

³²⁷ *Ibid.*

³²⁸ The Special Representative of the Secretary-General, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, delivered to the Human Rights Council, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) <https://www.business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> (May 29, 2018).

³²⁹ Article 6 of the Statute of the ICTY provides: "The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute;" Article 5 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) provides: "The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."

³³⁰ Article 25 of Rome statutes provides: "The Court shall have jurisdiction over natural persons pursuant to this Statute."

³³¹ Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90.

³³² *Ibid.* at Article. 28.

³³³ *Ibid.* at Article. 13.

investigation,³³⁴ approved by the Pre-Trial Chamber, of essentially a situation of atrocity crimes.³³⁵

Initially, the option for holding corporations liable for criminal acts was rejected during the UN talks leading to the Rome Statute in July 1998.³³⁶ Jurist opined that the reasons for the exclusion of criminal liability for juridical persons from the Rome Statute was that, at that time, there were an insufficient number of national jurisdictions that held corporations liable under criminal law, as opposed to civil tort liability, which has long been universal.³³⁷ It was also feared that the potential economic cost of a finding of corporate criminal liability, or even the possibility of an ICC investigation in the future, could have devastating impacts on a nation's economy.³³⁸

Tough requirements of personal, territorial, temporal, and subject-matter jurisdiction requirements must still be met, particularly in the context of individual corporate officers who could be investigated and prosecuted, and the situation must also meet the threshold required to qualify for the ICC's attention. It is certainly possible that in the future, an atrocity crime of relatively limited magnitude, perhaps caused by corporate criminal conduct, may be a situation the merits ICC investigation.

5.6.3 Liability Of Legal Persons Under UNTOC

The United Nations Convention against Transnational Organized Crime (UNTOC), adopted by General Assembly in 2000, is considered as an important international instrument in the fight against transnational organized crime.³³⁹

Article 10 of the convention deals with liability of legal persons, which reads as under :

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for

³³⁴ *Ibid.* at Article. 15.

³³⁵ David Scheffer, "Corporate Liability under the Rome Statute", 57 Harvard ILJ (2016), p. 36.

³³⁶ Benjamin B. Ferencz, "The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results".

https://www.researchgate.net/publication/284532159_The_International_Criminal_Court_The_Making_of_the_Rome_Statute-Issues_Negotiations_Results, (May 29, 2018).

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ U.N. General Assembly, Official Records, Sess. 55, U. N. Document A/RES/55/25 , (January 8, 2001) , <http://www.refworld.org/docid/3b00f55b0.html> (May 29, 2018).

participation in serious crimes involving an organized criminal group and for the offences established in accordance with this Convention;

2. The liability of legal persons may be criminal, civil or administrative;

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences;

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.³⁴⁰

The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems.

³⁴⁰ *Ibid.*

CHAPTER 6

ISSUES AND CHALLENGES WITH RESPECT TO THE PREVAILING INDIAN LAWS OF CORPORATE CRIMINAL LIABILITY

6.1 Corporate Civil Or Criminal Liability: A Juristic Controversy

The juristic controversy, regarding the concept of corporate criminal liability, gives to the birth of two schools of thoughts. While one school is opposing the very concept of corporate criminal liability, the other school not only strongly advocates the need for recognizing the concept of corporate criminal liability, but also wants it to be implemented in practice by the legislature and the judiciary.

6.1.1 Juristic View In Favors Of Corporate Criminal Liability

The jurists, who are in favor of the idea of the idea of criminal liability of corporations, generally prefer to focus on the social realities of the contemporary world. Though, in law, a corporation has a fictional personality, but in the modern world they are very much real. They hold that the modern corporations are quite capable of committing crime just as natural person; rather they commit massive crimes than the individual offender. The question as to who actually acted on behalf of the body corporate as its head and hands would be just as a matter enquiry. But merely because the corporation acted through its agent or employees who are natural persons, the corporation should not be allowed to escape from the liability.

One of the grounds of objection of criminal liability of corporation is the impossibility to punish the corporations, as they cannot be sent to jail. The imposition of fine and other monetary penalty on the corporation is unlikely to make any deterrent effect on the guilty people behind the veil of the corporation who would remain untouched by such imposition. This has been contended by the jurist, who is in favor of corporate criminal liability, that there may be alternative mode of punishing corporations, such as fine, confiscation of assets, and suspension of license. They also contended that it is better to punish the individual operators who commit the offences, by lifting the corporate veil.

Celia Wells³⁴¹, a great supporter of corporate criminal liability, in her pioneering study of corporate criminal liability contended that there are four principles under which liability for fault is imposed on person for their behaviour :

- Accountability ;
- Fair opportunity;
- Ability; and
- Justification or excuse.³⁴²

Celia Wells contended that if a corporation is unpunished for crime committed by its individual operators, then on these parameters corporations will be lined up with animals, infants, and insane, as non-accountable person.³⁴³

6.1.2 Juristic View In Favor Of Corporate Civil Liability

There are jurists, who opposed to the very idea of holding an artificial person liable for any offence whether involving *mens rea* or not, whether punishable with fine or imprisonment. Supporter of this view holds that since there cannot be any moral turpitude on the part of an artificial entity, and on principle, criminal sanction should not be invoked in the absence of moral turpitude of the person to be indicated; therefore corporation should not be charged with criminal offence.³⁴⁴

V S Khanna³⁴⁵, in his study entitled “Corporate Criminal Liability: What Purpose Does it Serve?” compared the cost and benefit of corporate criminal liability with the cost and benefit of other possible liability strategies, including various forms of corporate civil liability, managers’ personal liability, third party liability, and administrative sanction, in an effort to determine the best strategy or mix strategies to deal with the problem. His paper argues that corporate civil liability can be able to obtain the required features of corporate criminal liability (e.g. criminal liability’s powerful enforcement and information gathering dimensions) while largely avoiding its undesirable features (e.g., criminal procedural protection and criminal sanction’s

³⁴¹ Celia Wells, corporations and criminal responsibility, <http://www.oupcanada.com/catalog/9780199246199.html> (May 22, 2018)

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Supra* note 297.

³⁴⁵ V.S. Khanna, Corporate Criminal Liability: What purpose Does it serve?” 109 Har L R (2005) , p. 1477.

stigma effects).³⁴⁶ The paper concludes that “a modified form of corporate civil liability could make corporate criminal liability outmoded by taking the advantages of corporate criminal liability while avoiding or mitigating its disadvantages.”³⁴⁷ This argument revolves around the American legal system, wherein the concept is well developed, discussed and debated.

It is viewed that, under the Indian legal system, adoption of corporate civil liability in the place of corporate criminal liability would not be satisfactory because of the reason that:

- In India, the civil enforcement mechanism is not as efficient and powerful as the criminal enforcement system. It is preferable that powerful entities like corporation should as much as possible remain within the hard hands of criminal sphere; and
- There is hardly any development of law in India over this issue. We are at a stage where there is no clear jurisprudential understanding of the concept within our system. At this stage it would be inappropriate to consider such arguments.”³⁴⁸

6.2 Lacunae In Various judicial Pronouncements

Though, the Supreme Court of India has laid down numbers of principles for holding a corporation liable for the criminal act done by its officials, through the series of case laws. But, various questions and issues are still debatable. In *Iridium India Telecom v Motorola Inc*³⁴⁹, the court specifically held that “a corporation can be made liable for offence requiring *mens rea* and can be punished accordingly through the alter ego(directing mind) of the corporation.”³⁵⁰ Though, the principles laid down in the *Iridium Case* is the prevailing law in India, there are many question that may arise in the actual application of the Iridium principles, such as-

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ AIR 2011 SC 20.

³⁵⁰ *Ibid.*

- The Iridium case does not address the issue as to whose act or omission behind the corporate structure would be attributable to the corporate entity in a given case.
- While deciding the iridium, the Court referred to both English decision and American decisions without clearly deciding whether the courts in India should follow the identification theory of England or the aggregation theory of the US Law.
- This case in general fails to talk about the vicarious liability aspect when it is not clubbed with strict liability offences.
- The Iridium rule cannot be read as an ultimate rule for all the subsequent cases of corporate criminal liability, as this case was decided in the context of the requirements of the IPC under certain specific facts and circumstances.
- The Supreme Court has left open issues of when a directing mind's acts will not be attributed to the company.³⁵¹ The court could not possibly have dealt with this situation, as this issue was not at all before the court.
- Situation may arise “where a directing mind is playing a fraud on the company itself and third parties are incidentally affected by such a fraud. In such a case, it appears unfair to nonetheless hold the company criminally liable.”³⁵² The Canadian Supreme Court's decision in “*R v Canadian Dredge & Dock Co.*”³⁵³ Provide a jurisprudential rational in this context by showing that when company is victim of fraud by its so-called directing mind, that so-called directing mind is not really the directing mind of the company.

6.3 Shifting Of Corporate Criminal Liability

Jurist argue that, providing punishments and other penal sanctions against the corporate is of no value as it is not the corporate who commit the crime, it is the individuals in the company who commits the crime.³⁵⁴

³⁵¹ V. Umakanth and Mihir Naniwadekar, “Corporate Criminal Liability and Securities Offences : Rationing the Iridium – Motorola Case”, http://kailash.pairservers.com/kailash/wordpress/wp-content/uploads/2016/07/Corporate-Criminal-Liability-and-Securities-Offerings_Rationalizing-the-Iridium-Motorola-Case_V-Umakanth_Mihir-Naniwadekar.pdf (Jun 12, 2018).

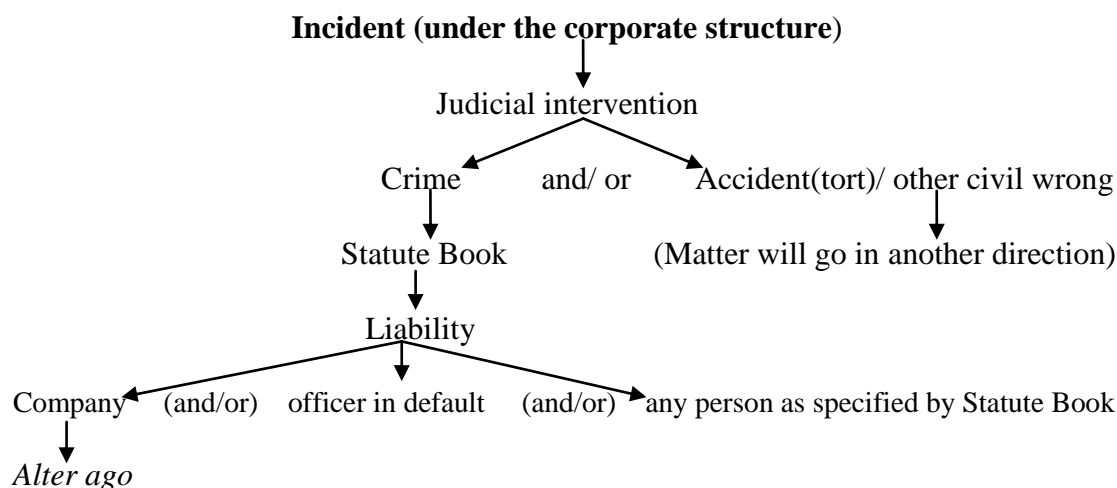
³⁵² *Ibid.*

³⁵³ [1985] 1 S.C.R. 662 (Supreme Court of Canada).

³⁵⁴ K.Balakrishnan, "Corporate Criminal Liability: A Comparative View", C.U.L.R. (1998),p. 436.

Hence, in the practical situation, it is not the corporation but the individuals (within the corporate structure) who commit crime, the burden to bear criminal liability also shifted from the corporation to the individuals. For Instance, the shifting of burden from a corporation to the individuals flows through a detail procedure.

The Stages before the court for determining criminal liability of corporations are as mentioned bellow:



This diagram tries to explain the stages and the procedure when an incident of corporate criminal liability comes before a court. Firstly, when a case is laid before a court, the court initially find out whether it is a case of criminal liability or other civil or tort liability. If the court finds it as a case or tort or civil liability, then the court will proceed accordingly. But, if court find is as a case of criminal liability, then the court will see the statutory provisions regarding this particular type of crime. Then, the question will come as who will have to bear the liability on behalf of the corporation. As seen the above mention diagram, the liability is divided into various categories of persons i.e. (officer in default or any person as specified by statute book). The point here is that, even, when the corporation itself is the liable person, the liability is shifted to alter ago (directing mind) of the corporation. The burden to bear the liability is thus divided or shifted within the corporate structure to its individuals working with it.

6.4 Shareholders Or Consumers Bear The Cost Of Corporate Criminal Liability

The critics of corporate criminal liability observed that the cost of corporate criminal fines and sanctions imposed on corporation is borne by innocent shareholders and

consumers, who do not deserve punishment, because they are not culpable.³⁵⁵ For instance, what is practically happening is that, for the fault of its employees or officials, corporations (which offers public shares) have to loss its market position by paying a huge amount of fine to the prosecutor; resulting in falling share of the corporation in the financial market.

It is feared that the fines imposed, which is incidentally the only punishment ever possible against a corporation, will deprecate the pecuniary interest of the stockholders in the corporate assets.³⁵⁶

6.5 Position Based Liability For Corporate Crimes

The Indian Courts have strictly interpreted the vicarious liability doctrine in the context of corporate criminal liability. For instance, under section 278-B of the Income Tax Act, 1961, when any officer of the company is formally responsible to the conduct of the business of the company, the prosecution has to prove that the officer was in charge of, and responsible to, the company for the conduct of the business (Overall business and not merely part of business). This section makes liable both the responsible officers of the company as well as the company, for criminal acts by the company. Seminal provision is also contained under Section 447 of the Companies Act, 2013, where vicarious criminal liability is imposed on certain officer identified by the Act as “officer in default”.

These provisions are criticized on the ground that, this kind of sentencing policy would cover only the top officials of the company such as managing director or whole time director without any requirement to prove that these officers were actually in charge of the affairs of the company. Most of the Indian legislation on corporate law imposes criminal sanction primarily based on the positions occupied by persons employed by company. Possibilities are there in that context that “such position based liabilities might result in innocent directors being held liable for the misdeeds or wrongful act of other inferior employees.

The Report of the Companies Law Committee in 2016 suggested that the ambit of section 447 was too broad and would result in minor infractions being punished with

³⁵⁵ K. Balakrishnan, "Corporate Criminal Liability: Evolution of the concept ", C.U.L.R. (1998), p. 277.

³⁵⁶ Fredaic P. Lee, "Corporate Criminal Liability", 28 Colum. L. Rev. (1987) p. 2.

several penalties, which are non- compoundable.³⁵⁷ The committee also observes that the provision has a potential of being misused and may also have a negative impact on attracting professional in the post of directors etc.”³⁵⁸

6.6 Guidelines Regarding Fine Or Imprisonment Yet To Be Developed

In every part of the world, fine is the most common punishment. In imposing fine it is necessary to have regard to the character and magnitude of the offence and also to the pecuniary circumstances of the offender. It is argued that fine can be an effective punishment in case of civil cases, but where the offence is grave and severe it is questionable whether fine can achieve the object of punishment. It is also argued that rich corporation can easily get away from criminal liability by paying huge fine which may not have any deterrent effect in the society.

The Indian Penal Code under Section 53 deals with various kinds of punishment that can be imposed upon the convict which include “death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine.” Problem may arise when the prescribed punishment is the mandatory punishment like in the case of Section 420 “as to how to apply those sections upon the companies since a criminal statute needs to be strictly interpreted wherein there is no scope for corporations to be imprisoned.” Though Law commission of India in its 41st as well as 47th report makes recommendation in this regard, and amendment was proposed to IPC, but it did not come into effect. The present Indian law in this regard is of the view that it is difficult to impose fine in lieu of imprisonment as the definition of ‘person’ in the Indian Penal Code Includes company. So the Indian position is not clear as to whether fine or imprisonment, a court can prefer, for corporate crime.

In the context of criminal sanctions it is seen that out of all the countries, America has developed an extensive system of corporate criminal liability till now while American model comprises a vast variety of criminal sanctions for corporations which strictly include fines, corporate probation, order of negative publicity, etc. in an effort to effectively punish and charge corporations when any employee or worker commits an

³⁵⁷ Ministry of Corporate Affairs Government of India, “Report of the Companies Law Committee 2016”, http://www.mca.gov.in/Ministry/pdf/Report_Companies_Law_Committee_01022016.pdf, (May 22, 2018)

³⁵⁸ *Ibid.*

offense while acting within the capacity of his or her service and on behalf of the corporation.³⁵⁹

6.7 Absence Of Sentencing Policy Before The Courts Of India

Criminal sentencing” has long been a debated issue in India. The Supreme Court of India has self-consciously incorporated political and social justifications to shape the Indian Constitution into a living moment for the people. When the former activist Judge of Supreme Court of India, Justice Chinnappa Reddy,³⁶⁰ while discussing the approaches taken by the Apex Court of India in determining appropriate sentence in criminal cases, expressed the view that “In most of the criminal’s appeals, the supreme Court of India confines itself to statutory interpretation or to issue of fact determination. Hence, criminal law and sentencing have become static in India.³⁶¹ He also discussed the purpose and principles of criminal sentencing and expressed the view that:

In cases culminating in conviction of accused, a judge has to work out his sentencing policy. Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the Judge. But, in Indian there is no legislative or judicial policy in this context. Giving punishment to the wrongdoer is at the heart of the system. Sentencing is a neglected field in India. If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella’s illegitimate baby.³⁶²

So, when a case of sentencing comes before the court, the sentence has to be determined according to the facts and circumstances of each case. It is not possible for the court to prescribe a straitjacket formula for sentencing, so, in most to the time sentencing becomes a “judge- centric” decision.

³⁵⁹ Brent Fisse and John Braithwaite, “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability”, (1988) 11 Sydney L R (1988) , p. 468.

³⁶⁰ Chinnappa Reddy was a judge at the Supreme Court of India. He is known for his pro-active judgments which changed the judicial history of India.

³⁶¹ Rajeev Kadambi and O. Chinnappa Reddy, “The Court and the Constitution of India: Summits and Shallows”, SSRN: <https://ssrn.com/abstract=1886507> (Jun 9, 2018)

³⁶² *Ibid.*

6.8 Cyber Fraud In Corporations:

Several new kinds of frauds and crimes are emerging each day which needs protection under the present legislative framework.³⁶³ The main contention here is that, as long as no liability is prescribed for such new dimension of corporate crimes, it's become difficult for the court to punish corporations or their official for the same. According to **Deloitte Indian Fraud Survey**³⁶⁴, India has faced some new corporate frauds due to emerging trend of using high technology digital media in regular business models.

Presently e-commerce involves in every business and numerous transaction through internet or online media. The E-commerce industry is growing at a high pace in India with increasing number of computer literate who gives significant scope for on line scammer.³⁶⁵

6.8.1 Cloud Computing Fraud :

Presently with the use of cloud technology companies can share and edit data and application from different location. The uses of cloud based computing are so many that it has become target of online scammer (who may a corporate official) risking the data shared on cloud technology of being stolen or misused.³⁶⁶

6.8.2 Social Media Fraud :

Whereas social media is widely used by customers of all ages, risks regarding customer's data loss by the host companies of social media make its risky for corporate crime. Although such host companies maintain strategy for customer relationship, we are still in the process of understanding how it works.

6.8.3 Crypto Currency Fraud :

“Crypto currency is a digital currency that uses cryptography for security.”³⁶⁷ The crypto currency transaction involves online transfer and several other trading or exchanges for goods or services. “Unlike the regulation of physical money regulation,

³⁶³ *Ibid.*

³⁶⁴Deloitte Forensic, “Deloitte Indian Fraud Survey” <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-finance-annual-fraud-survey-noexp.pdf>. (Jun 9, 2018).

³⁶⁵ Arti Aneja, “Multidimensional Aspect of Corporate Criminal Liability : An Indian Perspective”, MANUPATRA, JLJ (2016), P. 37.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid*

generation of crypto currency is less regulated in India and can be manipulated easily.”³⁶⁸

6.9 Corruption And Bribery In Indian Corporate Sector

6.9.1 Satyam Scandal

The Satyam Computer Services scandal was a corporate scandal that occurred in India in 2009. This was - a case for insider trading which was initially handled by SEBI. The Indian corporate community was shocked and scandalized when the chairman of Satyam, Ramalinga Raju resigned on 7 January 2009 and confessed that he had manipulated the accounts by US\$1.47 Billion.³⁶⁹

Satyam Computer Services Ltd. was the 4th largest IT Company in India having about 3 lakh shareholders promoted by Shri Ramalinga Raju and more than 53,000 employees.³⁷⁰

According to the media report, during confession, Mr Raju admitted that he had manipulated the financial statements of Satyam Computer Services Ltd. with a view of misleading the shareholders, which accounts as serious fraud that runs into hundreds of crores of rupees.³⁷¹

On 10 April, a special court sentenced Ramalinga Raju, and nine others to seven years of rigorous imprisonment after convicting them. All 10 have challenged the verdict. The trial that began in 2010 is still going on before the Supreme Court of India. The main contention here is that, such industrial accidents have not only caused damaged to individuals but have also caused harm to the interests of the investors. Because of such incidents the investors had to suffer a lot.

6.9.2 Vijai Mallya Loan Default Case

Vijay Mallya was the chairman and managing director of the Kingfisher Airlines (KFA). Since 2010, this company has become unable to make profit and loosed its

³⁶⁸ *Ibid.*

³⁶⁹ Arpit Khurana, “Corporate Governance- A Case Study of Satyam Computers Services Ltd”, 3 SRJIS (2016), p. 3596.

³⁷⁰ Dr. Madan Bhasin, “Corporate Accounting Scandal at Satyam: A Case Study of India’s Enron”, <http://ejbss.com/data/sites/1/marchissue2013vol12/ejbss-1208-13-corporateaccountingscandalatsatyam.pdf>, (June 15, 2018)

³⁷¹ *Ibid.*

reputation in the share market. In 2015, the Kingfisher Company recorded over Rs 9,000 crore unpaid loans that it owed to IDBI Bank and 16 other banks. In July 2015, CBI registers a case in the loan default fraud based on a complaint by IDBI Bank.³⁷²

According to the newspaper report, the CBI charged against Vijay Mallya with fraud and criminal conspiracy and sought judicial custody for former bankers and Kingfisher Airlines (KFA) officials arrested for the unpaid loan.³⁷³

According to the charge sheet, the bankers and KFA executives accused were arrested under the Prevention of Corruption and Criminal Conspiracy Act, 1988 under Sections 13 (1), 13 (2) and 420 of IPC.³⁷⁴ According to CBI, the bank officials entered into criminal conspiracy with the KFA executives for “misutilisation, misappropriation and diversion of funds.”³⁷⁵

After this scandal, Mr. Vijai Mallya fled to London. Currently, he is tried under London Court on the basis of “Extradition Treaty” between India and UK.³⁷⁶ In India, the ED (Enforcement Directorate) and CBI are dealing with this loan default case.

6.9.3 Nirav Modi Scam

The biggest news story in India over the last few months has centered around a billionaire jeweler, Nirav Modi, who has allegedly defrauded one of India's largest banks of more than a billion dollars.³⁷⁷

Nirav Modi was the founder of the global diamond jewelry house “Nirav Modi”. In February 2018, he was accused of \$40 million fraud by Punjab National Bank (PNB). The Bank has alleged in the complaint that a fraudulent issuance of “Letters of

³⁷² Express Web Desk, “IDBI money laundering case: ED files first charge sheet against Vijay Mallya, others”, <https://indianexpress.com/article/business/companies/vijay-mallya-enforcement-directorate-money-laundering-case-idbi-bank-4703575/>, (June 15, 2018)

³⁷³ *Ibid.*

³⁷⁴ Khushboo Narayan, “Mallya Diverted Loan Funds, Didn’t Reveal Full assets :ED”, THE INDIAN EXPRESS, Kolkata, Tuesday, June 19, 2018, p. 2.

³⁷⁵ *Ibid.*

³⁷⁶ Aditi Khanna, “Mallya Loses Assets Case To IndiaBanks in UK Court”, THE INDIAN EXPRESS, Kolkata, Wednesday, May 9, 2018, p. 2.

³⁷⁷ *Ibid.*

Undertakings (LOU)³⁷⁸ took place on January 16, 2018 on behalf of the accused Company “Nirav Modi Group of Companies”.

According to the newspaper report PNB has suspended more than 10 officials over the Rs.11,400 crore scam and referred the matter to CBI for investigation.³⁷⁹ Nirav Modi left the country on January, 1 week before the CBI received complaint from PNB on January 29.

CBI has registered Charge Sheet on the basis of FIR alleging various offences like criminal conspiracy under section 120A, cheating under section 415, criminal breach of trust by a public servant, merchant, banker or agent under sec 409 of IPC and also under the Prevention of Corruption Act, 1988 and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 against Nirav Modi and his alleged partners.³⁸⁰ Currently, the Central Bureau of Investigation (CBI) is investigating the case.³⁸¹

Under the Charge Sheet PNB has accused three companies - Solar Exports, Stellar Diamonds and Diamond R US - that belongs to Nirav Modi, who runs his eponymous Nirav Modi stores that spread from New York to Hong Kong.³⁸² This case is still going on before the court. According to the media report, recently, the Supreme Court dismissed a public interest litigation (PIL) seeking a special investigation team (SIT) probe into the PNB scam.³⁸³

³⁷⁸ Letters of Undertaking is an assurance note offered by a bank to a party to facilitate overseas import payments.

³⁷⁹ Navmi Krishna, “All you need to know about Nirav Modi and the \$1.77-billion PNB fraud”, THE HINDU, Kolkata, Saturday, February 17, 2018, P. 2.

³⁸⁰ Rajesh Ahuja, “Nirav Modi’s firm faked foreign buyers, misused loans: CBI charge sheet”, HINDUSTAN TIME, New Delhi, Tuesday, May 22, 2018, p. 1.

³⁸¹ *Ibid.*

³⁸² The Business Today, “Nirav Modi case: How PNB was defrauded of Rs 11,400 crore”, <https://www.businesstoday.in/sectors/banks/nirav-modi-case-pnb-fraud-11400-crore-scam-ed-cbi-raid/story/270708.html> (June 16, 2018).

³⁸³ *Ibid.*

CHAPTER 7

CONCLUSION AND SUGGESTION

7.1 Findings Of The Research

After the analysis of present legal framework on corporate criminal liability, the researcher has tried to lay down some findings, as mentioned below:

Findings from the legislative regime of corporate criminal liability-

- It is still a debated issue that whether or not it is feasible to hold an artificial entity like corporation responsible for crime. A corporate body has no physical existence of its own except the buildings, where it works and cannot think for itself. It is only the directors and the employees, through which it can act. Within the complex organizational structure, it becomes difficult to track down the individual offender. In most of the cases it is seen that the higher rank officer can very easily shift the whole blame or responsibility on another worker of inferior rank.
- Under India's present penal regime, for a criminal offence, both the corporation as well as its officers can be held liable and accountable. Where individual liability is difficult to determine for lack of evidence, prosecution of the corporation will be the only alternative. However, where both a corporation and its officers can be prosecuted, the prosecution of one over the other, or both, is a matter of discretions of the prosecuting party. There are, also, various other provisions in different legislations where the prosecution of corporation is the only way to allocate criminal liability on the corporation.
- The law in regard to corporate criminal liability in India is not restricted to just Indian Penal Code, 1860, Criminal Procedure Code of 1973 or Companies Act, 2013, but is scattered over a number of statutes with specific provision for the same. However over the period, need has been felt for a comprise piece of rules and regulations that focus solely on the principle of corporate criminal liability in India.
- Corporations may escape from criminal liability by establishing certain defense. Unless the offense is one, for which, absolute liability has been

imposed, the corporation may be able to establish a defense by proving a preponderance of evidence that the high managerial agent, having supervisory responsibility over the subject matter of the offense, employed due diligence to prevent its commission.

- Most of the Indian penal provision contains the condition that, if any person, who is liable to punishment for a specific corporate crime, proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, he will not be liable for the said offence. The practical consequences of such provisions are that, by taking the advantage of such condition, a corporate official can very easily collect evidence that, he was not in charge of the affairs of the company at that relevant time when crime was committed or he applied his best to prevent the commission of crime or may even take the resort that crime was committed without his knowledge and can easily escape from his criminal liability.

Findings from the Indian judicial approach for corporate criminal liability

Indian Judiciary confronted the issue of corporate criminal liability only after the Bhopal Gas Tragedy in 1980s, with the rise in awareness in regards to the corporate killings in India. Since then, corporate criminal liability as a jurisprudential issue gained the momentum in the courts of India. The judicial response and periodical development of the concept of corporate criminal liability in India can be explained as follows:

- 1952- In *Ananth Bandhu* case the court viewed that corporations commit only those crimes where criminal intent is not required.³⁸⁴
- 1964- In *Messers Syndicate Transport Co.* case the court viewed that corporations can commit crimes, requiring the intention of the wrong doer.³⁸⁵
- 1971- In *Giridhar Lal Gupta* case the court interpreted the term person in charge of a company to mean a person who is in overall control of the day to day business of the company.³⁸⁶

³⁸⁴ *Supra* at

³⁸⁵ *Supra* at

³⁸⁶ *Supra* at

- 1975- In *A D Jyaveerapandia Nadar* case the court established the doctrine of attribution to know the directing mind of the company.³⁸⁷
- 1980- In *Kusum Products* case the court viewed that the Parliamentary intention can be deduced from the language of the Statutes books, that, a corporation cannot commit all kinds of crime.³⁸⁸
- 1993- In *Radhey Shyam Khemka* case the court viewed that Prosecution under Companies Act, 1956 does not bar a party's right to claim relief, at the same time, under IPC.³⁸⁹
- 1993- In *Oswal Vanaspati* case the court expressed the view that where the entire prescribed sentence cannot be awarded, Court can award part of prescribed sentence.³⁹⁰
- 1997- In *Kalpanath Rai* case the court held that a company is incapable to form *mens rea* .³⁹¹
- 2000- In *Zee Telefilms* case the court held that it is impossible to prosecute a corporation for the offence of defamation, as a corporation cannot form mental element.³⁹²
- 2003- In *Assistant Commissioner* case the court held that a corporation cannot be prosecuted where the prescribed punishment is the mandatory imprisonment and fine.³⁹³
- 2005- In *Standard Chartered Bank* case the court held that it is possible for the court to impose the sentence of fine only and excuse the part of imprisonment, where the wrong doer is a body corporate.³⁹⁴
- 2011- In *Iridium India Telecom* case the court, for the first time, laid down the law that, a company is capable of possessing mental element and the test of identification of the directing mind of the company has to be followed in determining the mental element of the corporation.³⁹⁵

³⁸⁷ *Supra* note

³⁸⁸ *Supra* note

³⁸⁹ *Supra* note

³⁹⁰ *Supra* note

³⁹¹ *Supra* note

³⁹² *Supra* note

³⁹³ *Supra* note

³⁹⁴ *Supra* note

³⁹⁵ *Supra* note

- 2015- In *Sunil Bharti Mittal* case the court held that there is no vicarious liability unless the statutes specifically provides for it.³⁹⁶

It is evident, from the various case laws that, the courts of India are quite active enough to address the issue of corporate criminal liability. But, it is also evident from the rulings of the courts that “Indian case law lacks any confirmation to a single model of corporate criminal liability.” The only change of the judicial trend is that, till 2011, the Indian courts hold the view that corporations can commit only those crimes which do not require mental element and where, mandatory imprisonment is prescribed for such a crime committed by corporation, it shall be the discretion of the court to provide the punishment of fine only. It is seen that while deciding a case of corporate crime, the Indian courts ascribe to a combination of vicarious liability and identification doctrine without drawing the necessary distinction between the two models. These rulings of the courts cannot be considered as set of jurisprudence, as these are only ad hoc decisions depending more on facts and circumstances of each case.

7.2 Summing Up

Corporate criminal liability is an evolving subject all over the world. The question as to whether a corporation should at all suffer a criminal liability has been a controversial jurisprudential issues since the latter half of the nineteenth century. Prior to that, the question of criminal liability of corporations does not arise as that a corporations “have no soul to damn” and “no body to kick” was the prevailing principle of corporate liability.

However, law has evolved quite substantially since nineteenth century and there has been a general acceptance of the proposition that corporation may be indictable to certain situation. In the twentieth century the common law and the civil law countries accepted the view that a corporation cannot seek immunity from criminal liability and recognized that legal person such companies could be liable under criminal law. Firstly the English courts started to hold the corporations liable for criminal acts done by the top officials of the corporation on the basis of identification doctrine. The American courts developed the concept of corporate criminal liability on the basis of

³⁹⁶ *Supra* note

vicarious liability, which is termed as respondent superior doctrine. The scope this legal development spread across the world and countries starting to adopt this judicial development in their respective legal framework.

The Indian jurisprudence on corporate criminal liability is limited to a few cases. In India, it was only after the turn of this century, when the Supreme Court of India in *Iridium India Telecom* case, in the year 2011, laid down the law that a company may be indicted even in respect of *mens rea* offences. In that case the court followed both identification doctrine of English law and respondent superior doctrine as developed by American courts.

The law laid down in the Iridium case is considered as the ruling law of the land, which is the present position of corporate criminal liability in India. The court laid down the law that, every corporation is managed by a group of individual that form the head and brain of the body corporate and when a corporation commits a crime, the required *mens rea* requirement needs to be fulfilled by attributing the guilty mind with the knowledge and intention of the individual that manage the affairs of the body corporate.

Meanwhile, the world wide debate over the scope and limits of corporate criminal liability has been going on among the jurist taking opposite stands, but the Indian courts are increasingly leaning towards punishing the guilty corporations as also their management as corporations are increasingly taking strategic control of most vital areas of our everyday life. The on-going debates, on this subject, by numerous jurists have contributed a lot more the exiting literature of the corporate criminal liability in India.

It can be concluded that a lot more have happened in the recent past and will happen in the near future. The various case laws before the Indian Judiciary show that the courts of India become active to address new issues of corporate criminal liability. Though Indian Legislature is not dealing these issues in detail, it is also possible that legislature will take a more proactive role in this area.

With the increasing tendency to carry on business through corporate entities and enormous economic growth, corporate criminal liability will be a live issue in modern

India and the judges and the lawmakers will have to make creative contributions to meet the challenges of the situation in near future.

7.3 Suggestions

Effective compliance programme

There is no limitation on the nature and scope of illegal conduct of the employee that will be imputed to a corporation. Furthermore, a corporation may be held criminally liable for the illegal conduct of wide verity of “officers in default” or “officer in charge” of the company. Due to such technicalities and complex conditions, when a case of corporate criminal liability comes before a court, the court finds it difficult to find out the actual culprit or culprits. However, the implementation of an effective compliance program “that specifically targeted at detecting and helping prevent criminal conduct by employees of the corporation” may be beneficial in this context. For instance, the compliance programme must have some characteristics, such as-

- High level independent and impartial personal must be assigned to oversee the compliance programme;
- Compliance programme must be communicated to all employees, agent and officials of the corporation;
- The corporation must adopt disciplinary mechanism for the enforcement of compliance programme;
- The compliance programme must be so constructed that it creates a deterrence effect among the employees, to commit a crime.
- When an offence has been detected it must be the duty of the corporation to take necessary steps to respond appropriately to that offence.

Sentencing guidelines

As of now, India does not have any sentencing guidelines for corporate prosecution. The UK and US sentencing policy for organizations can be adopted as a model for India, in this context. Most of the other developed countries have already started to work in this line. The sentencing policy must have some basic characteristics, such as-

- Sentencing guidelines independent or impartial in the sense that is must be adopted by a commission or committee consisting of judicial or corporate experts which may provide guidelines to judiciary or criminal justice system in India.
- An effective and efficient corporate sentencing guideline based on the past and the present corporate culture of India.
- Sentencing guidelines must address the issues which are faced by Indian courts and Legislature, while sentencing a corporation.

Alternative forms of punishment

Fines and imprisonment suffers from several drawbacks as a mode of punishment for corporate criminal liability. Fines for criminal liability may not always produce desired deterrent effect on to society. However, impossibility of bringing corporation to jail is another issue.

In this regard, various other forms of punishment can be imposed on corporation, ranging from drastic measures like compulsory dissolution of corporation through winding up to other forms of punishment like probation, adverse publicity of corporation, direct compensation orders etc. Such kind of punishments may be less severe, but may be effective depending on the facts or circumstances of each case. Such alternative mood of punishment have been started to find place in the sentencing policies of the advance countries. The 'US Sentencing Guidelines for Corporation (2016)' provides for alternative mood of punishment for corporate crime.

Punishment in accordance with gravity of the offences

Punishment must be based on the seriousness of offense and the culpability of the organization as well as the directing mind of the corporation which form the alter ego of the corporation. When the court provides for punishment for corporate crime, it must be given in such a way that it reduces the likelihood of future criminal conduct within the corporation.

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