

Corporate criminal liability an analysis law company business partnership essay

[Law](#)



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INTRODUCTION

This concept of corporation cannot be said to have its evolvment around 15th century but it can be traced back to 12th century or perhaps the roman law where the juristic had been said to be recognized. Recognition of corporation as a person provided the premises for establishing corporate legal accountability. Subsequently with the development in law this determination od liability of corporation shifted to responsibility of courts[1]. The quoted statement of chief justice Halt, the corporation is not indictable, but the particulars of it are, is considered explaining the position of law at that point of time[2]. The latter judicial sentiments seemed to agree that if a corporations act looked like a crime it was a crime and whatever principles have allowed courts to establish liability of corporation for tort could be applied in establishing their criminal liability. New administrative structure was brought with improvement and development in the industry basically industrial revolution as corporation became more complex the position and function of individuals started becoming bleak. Master or servant

responsibility, municipal liability in public nuisance and the specific statutory origin of the early railways companies all played an early role in the development of liability, followed by particular judicial response to new form of judicial responsibility, dubbed public welfare offences[3]. The larger earlier indictments against corporation involved cases of public nuisance. We can say it is the judiciary not the legislature that has created the law with regard to the corporate behavior. Offence relating to corporate crime has an intersection. Only the expressed manner of corporate criminal liability is not an itself is a question to it. The main question is the inherent character of corporate body as far as its mention in criminal law is concerned. The problem is more intensified by process of globalization and the growth of interdependency in economic, social and environmental activities by the corporate entities requires greater international cooperation between countries. Earlier in criminal law there use to strict liability only men's rea. At the same time, corporate commit various crimes of these kinds to promote their interest. One can find that history of corporate criminal liability is full of problems and then solutions to it. The most important question that arises is Can Corporation may be made criminally liable along with the human beings associated with it? Extent to which corporation itself can be made liable for crime commission. Initially the problem was with imposing criminal liability at to corporations directly and indirectly but any way this problem came to end due to phenomenon of public nuisances. Then critics expressed doubts about the extension of vicarious corporate liability to crimes not requiring intent but they eventually agreed that such liability served a useful purpose. Then came the era in which critics contended that corporate criminal liability

for crimes of intent ran contrary to an aim of the criminal law because it relied upon vicarious guilt rather than personal fault. Then came the era in which when the culpable individual within the corporate hierarchy was or not easily identifiable so in order to maintain optimal deterrence need was felt for imposing liability on the corporation and same was done as well. However till now development of law in area of corporate criminal liability is generally based upon indirect holding of corporation for its criminal wrongs. So the need was felt so as hold the corporations directly for their criminal acts and 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. Hence this project is a noble attempt to enquire about the viability of applying the principles of traditional criminal law to corporations.

RESEARCH METHODOLOGY

Area: Corporate Crime. Topic: Corporate Criminal Liability: An Analysis.

Scope: The present paper only enquires about applicability of traditional principles of criminal law on corporations while determining their liability.

Moreover much more emphasis has been given on understanding the concept of corporate criminal liability in historical context and present day practice rather than by definitions. Research Question: In order achieve the goal as sated above following research questions have been formulated:

What are basic principle of Criminal Liability and Concept of Corporation?

Whether corporations can be termed as independent responsible actors.

Whether the doctrine of mens rea can be applied to it. Whether it can fulfill

the conditions of actus reus. Research Tools: The present term paper is

doctrinal in nature and based on the research done on West Law a virtual

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Library and other resources from word wide web as well some textbooks.

Footnoting: A uniform footnoting style has been adopted through the project, which is strictly according to guidelines provided by the University.

Chapterization: The whole will be chapterised in following manner:

Introduction
Research Methodology
Basis Of Criminal Liability & Concept

Corporations
Concept Corporate Criminal Liability
An Assessment Of

Applicability Of Concept Of Criminal Liability
Conclusion. Bibliography. BASIS

OF CRIMINAL LIABILITY & CONCEPT CORPORATIONS(I) Basis Of Criminal

Liability
The interpretation act of 1889, defined person to include a body of

persons corporate or incorporate, unless the contrary appears. Criminal

Liability is attached only those acts in which there is violation of Criminal Law

where there cannot be liability without a criminal law which prohibit certain

acts or omissions. The basic rule of criminal liability revolves around the

basic Latin Maxim *actus non facit reum, nisi mens sit rea*[4]. It means that to

make one liable it must be shown that act or omission has been done which

was forbidden by law and has been done with guilty mind. Hence every

crime has two elements one physical one known as *actus reus* and other

mental one known as *mens rea*. [5] The word *actus reus* connotes those result

of human conduct which is forbidden by law and hence constitutes of Human

action; result of conduct and act prohibited by law [6]. One other hand *mens*

rea is gene rally taken as blame worthy mental condition [7], which

constitutes of intention and knowledge. The fact that the offence requires

mens rea does not reveal a contrary intention for the state of mind of the

corporation's controlling officers as well as their acts may be attributed to

the corporation. Hence crime is said to be committed only when theses two

elements are there. This is the rule of criminal liability in technical sense but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behavior[8]. Although the general rule as stated above is applicable to all criminal cases but the criminal law jurisprudence has seen one exception to the above said concept in form of doctrine of strict liability in which one may be made liable in absence of any guilty state of mind.(II)

Concept Of CorporationsA corporation is nothing but an artificial person. It is creation of law i. e. in other words a legal fiction, which can own property.

Corporations are of two kind (i) Corporation Aggregate (ii) Corporation Sole[9]. Corporation Aggregate is an incorporated body having membership of several persons. It is formed by number of persons known as share holder who pool their resources to create a fund known as capital to start with and it works for common interest of all the share holder and prime being profit making[10]. The partnership must not be confused with corporations because although it also coming together of more than one persons together but is not an incorporated body. On other hand a corporate sole is series of successive person and have only one at a time. Salmond clearly states that corporation sole is found only when the successive holders of some public office are incorporated so as constitute a single, permanent, legal person[11]. The best example of corporation sole would be King. Hence leaving apart the concept of corporation sole what is important for Corporation Aggregate is incorporation and it is the nothing but a process of law through which this legal fiction is created. This means that phenomenon

of incorporation would have been very important that's why it has been so much of importance. The main effect of this legal phenomenon is that it gives the corporations a distinct legal personality having property of its own, limited liability (if the corporation is limited), perpetual succession, common seal etc. and main disadvantage would be that it imposes greater social responsibility and because these corporations are the outcome of legal fiction hence they cannot manage their own affairs and here the need of natural person arises which can manage the affairs of corporations and in fact the group of persons generally known as board of directors manage the affairs of corporations and this the point from where the whole doubt of applicability of liability principles of criminal law in strict sense to corporations is floating in the mind of jurist and intellectuals.

CONCEPT CORPORATE CRIMINAL LIABILITY

(I) Evolution of corporation:

It was Sutherland found that criminal behavior of these corporations was 'normal,' that is to say, they all engaged in illegal labor practices, falsified advertizing, stole patents and copyrights from each other, defrauded their customers, and conspired to control the making and the marketing of goods and services. He brought corporate crime into the discipline but he gave it a misleading label, white collar crime. While recognition of corporate crime was a big step forward for criminology, Sutherland did not differentiate between the crime done by white collar employees against the corporation on the one hand, and the crime done by the corporation as an acting individual company on the other hand. on Kramer of Western Michigan University at Kalamazoo has defined corporate crime as illegal and/or <https://assignbuster.com/corporate-criminal-liability-an-analysis-law-company-business-partnership-essay/>

socially harmful behaviors that result from deliberate decision making by corporate executives in accordance with the operative goals of their organizations and A second thing to Kramer's definition is that corporate crime is corporate crime because it achieves the goals of the corporation. Corporations have three generic goals: profit, growth, and control of their business environment. Corporate crime is structural crime because No one person plans it, No one person commits all of it, No one person is the victim of it, Social institutions are distorted by it. The separate identity of corporation as recognized in *solomon v. salomon*[12] that created occasion for the courts to consider the extension of liability on step by step process. The belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable[13] because those days due these four hindrances the jurist of that time cannot even think for criminal liability of Corporations:[14] There were procedural as well as substantive problems in determining the liability of corporation as categorised by glanville williams. As far as procedural difficulties are concerned the first one was that on trial on indictment at assizes or sessions, the party charged had to be originally present which is an impossibility for a juristic person. The other form of procedural hinderance was in respect of punishment, as a corporation could not be subjected to bodily punishment. Now in substantive part the first obstacle was that a corporation, being a person in fiction, could not act except through the human being whoever it's agents or servants. It could not act personally, it could only be a master or principle and nothing but that and therefore, its responsibility was vicarious. The second obstacle was the principle that a corporation no mind at all could not have a guilty

mind. So wherever an element of intention knowledge or deceit was must in crime, corporation could not commit. The third obstacle was the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters. The first target of imposing criminal liability started by Courts of England and the United States when they started imposing liability on quasi-public corporations, such as municipalities, that resulted in public nuisances and liability was in relation with acts or omission related with public convenience. By the early 1800s, saw the light of new jurisprudential change in the history of criminal law and company law and courts started holding commercial corporations criminally liable for the sorts of public nuisances that were previously inflicted by quasi-public corporations[15]and then started the era in which the criminal liability was extended by courts from public nuisances to all offenses that did not require criminal intent. Courts were slow to extend corporate criminal liability to crimes of intent. It was in 1909 that the Supreme Court of USA clearly hold a corporation liable for crimes of intent[16]under one enactment. The motivating factor for this result was that if corporations were immunized from criminal punishment, congress would lose its only effective method of controlling corporate misconduct and correcting abuses. During the early twentieth century courts began to hold corporations criminally liable in various areas in which enforcement would be obstructed without corporate liability. These historical developments facilitated the continued growth of corporate criminal liability in the twentieth century as well. First, federal courts in the United States disregarded European liability standards as well as the standards laid out in

the Model Penal Code, settling instead on respondent superior as the vehicle for corporate liability[17]. The resulting heightened awareness of corporate crime, especially in the 1960s and 1970s, made it clear to all nations that there is need to make the Corporations criminally liable.(II) Meaning:[18]Why these corporations requires special consideration in an inquiry into sentencing law, because a corporation is not a natural person and cannot be subject to one of the most important sentencing options, namely, imprisonment. Corporate criminal liability or Corporate Crime is very difficult to define because this phrase in present day scenario covers wide range of offences. However for understanding purpose it can be defined as illegal act of omission or commission, punishable by criminal sanction committed by individual or group of individual in course of their occupation[19]. It can be even defined as socially injurious acts committed in course of occupations by peoples who are managing the affairs of the company to further its business interest[20]. The target of their criminal act may be public at large, the environment or even the employees. The general act that fall within the present day concept of corporate crime are illegal restraint if trade in which due to conspiracy between two or more big corporations a small corporation is restraint from using particular geographical area and the techniques which used are artificially maintaining a particular price or creation of monopoly in the market. The second act which must attract criminal liability in growing effect of mass media on peoples is false claim and wrong advertisement. Although awareness about Pollution and other environment crime is of most resent origin but are the most affected area of corporate crime. III. Ways in which Corporations involves in crimes: throughout the development, the

corporation had been exempt from liability of committing strict personal crimes like murder, rape and perjury. But in *Andhra Pradesh v. State of Orissa* case [21] it was technically held that a company could be held liable for manslaughter even though on evidentiary lack the company was not held so in the said case.

Population: Government was asked to pay remaining \$325.5 million (15.03 billion rupees) due to Bhopal gas tragedy victims by the supreme court. The U. S. based Union Carbide Company, now owned by Dow Chemical Co., paid \$470 million in compensation to victims in 1989. In the year 1984 Union Carbide accident in Bhopal, India, which released a cloud of methyl isocyanate (MIC), hydrogen cyanide, and other toxins. Somewhere between 4000 and 8000 people died at the time, and victims' advocates estimate that in total over 20,000 have died as a result of this largest industrial accident ever, with 1,50,000 suffering continuing injuries and medical problems. It was by the gross negligence of corporate. The minimum safety measures were not taken by the company here as sufficient amount of MIC was unwisely stored and that too in city that was heavily populated. The temperature and other safety measures were not taken into account as was prescribed thereof and also the alarm for same was turned off.

Investors: There has been a tremendous fall in numbers of corporation reason being that one of two companies listed before stock exchange make crores of money from investors and disappears. Lakhs of crores of rupees have been invested by investors to the listed companies under stock exchange. There are various bodies like SEBI, RBI and ministry or department of corporate affairs at central level and also the special fraud investigation office under POCA (1988), to keep a check over these

transaction of stock exchange but hardly any of these would have bothered to find the companies those have been removed from stock exchange. Mostly the promoters and merchant bankers who are responsible for these are roaming scot-free. These regulating bodies under these market and stock exchange have failed to penalizing and get their returns back to them Target is Work Force: Corporations do not even leave their own workforce. Because of this globalization workers are being pushed against the wall and shrinking avenues for redressal. In public sector undertakings many irregularities has been seen. Factories were opened in some areas where the raw material was not available and where the location was correct, imported machinery was defective. On the Natural Resources: The government across the world have given a free hand to corporations to exploit the natural and community resources, while depriving the common people of their right on these resources. Inaccessible to clean and safe drinking water which is fundamental right of people was found to be a major problem in all these areas. The companies either pollute the water resources to an extent where it is no more portable or over exploit it till the water table goes down or dry up the wells. What happened at bottling plant in kerala for coco cola, the water level goes very low because of excess use by the company for their own use that lead the scarcity of water in village. We need to appreciate this that most of the damages caused to the environment is irreversible. IV. An Insight of concept and Nature of Corporate criminal liability in present scenario:

United Kingdom

Earlier there use to be three crimes under common law That did not require men's rea public nuisance, criminal libel and contempt of court. An category where mens rea was not required were regulatory offenses created by statutes, and which were held to be absolute liability offenses. Now there was need to shift focus on the corporate criminal liability. Despite of the fact that U. K. was one of the pioneers in inventing corporate criminal liability, till now the acts and state of mind of certain senior officers of the corporation, the directing minds, are deemed to be the acts and state of mind of the corporation[22]. That means that the directing minds are identified as the corporation, and thus the corporation is directly liable, rather than vicariously liable i. e now the doctrine of identification is followed.

United States

The courts in united states had followed English courts at the beginning in regard to the corporate liability but with the advancement they departed down and till now they follow either the concept of vicarious liability or Doctrine aggregation according to which for the purpose of calculating corporate criminal liability, the conduct, states of mind, and culpability of individual representatives of the corporation should be " aggregated." [23]

Canada

Equating it with England, Canada also selected to fall on doctrine of directing mind concept according to which corporations will be caught hold for acts of directing minds who have the capacity to exercise decision-making authority

on matters of corporate policy and this can be attributed to high level of management[24].

Australia

There was concept of vicarious liability till 1995, the legislature of country changed the criminal code to base corporate criminal liability on testing its " corporate culture." This term is defined as " an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place." [25] There were 4 ways adopted by Australia in order to prove the fault by its corporate culture. Among these are a " corporate culture which directed, encouraged, tolerated or led to a noncompliance with the relevant provision;" or that the corporation failed to created and maintain such a corporate culture. [26] In order to establish It was sufficient on the part of the board of directors " intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence," or that a " high managerial agent knowingly or recklessly engaged in relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence." [27] INDIACorporate crime has been defined as " the conduct of a corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law" [28] In this sense, " Corporate criminal Liability" refers to the imposition of criminal liability on either the corporation or its employees and agents. It is also referred to as white-collar crime. This liability in india is not just similar to that of English law but has been influenced by it an large extent. Earlier, ' corporations' easily evade of their liability. However, under Indian

penal structure, for an offence by the corporation, both corporation and its concerned officer can be made liable. The law on corporate criminal liability is however, has not been confined to the general criminal law in the penal code but it has, scattered over a bundles of statutes with specific provisions for the same. To have a proper law relating to corporate criminal liability in a legal system, like in the developing countries India was observed by the Supreme Court in the following terms:" In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and under-takings as well as by Transnational Corporations. Mostly all of these industries have been engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. There is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident."[29]The major law relating to Corporations in India is codified in the Company Act, of 1956 and the definition of " Corporation" as given in the Act under Section 2 (7) includes a company and it can also be said that general scheme of the of the penal code is laid out keeping the individual in mind, where it concerns defining an offence and prescribing the punishment for same. May be it is due to to this fact that legislature recognized the need to deal more specifically wit corporation in the hitherto elapsed 1972 amendment bill[30], clause 72(A) (1). Hence under Indian law the liability of the corporation is essentially liability of the company only. When a company is incorporated, all dealings are with the company and all persons behind the company are disregarded, however important they may be. Thus, a veil is

drawn between the company and its members. Normally, the principle of corporate personality of a company is respected in most of the cases. The individual responsible to fraudulent, dishonest or improper use is made of the legal entity, will not get shelter in the corporation. The court applies principle of " Lifting of the corporate veil" to look behind the corporate entity and take action as though no entity separate from the members existed. so the benefit of separate legal entity will not be available and the court will presume the absence of such separate existence. There are various provisions under the company law, which talks and authorizes the court to lift the corporate veil to reach the persons who are in fact responsible for the wrongful act. The corporate veil can be lifted in the following cases:!

- Where the doctrine disagrees with the Public policy,!!
- Where the use of corporate veil is for the fraud or improper conduct!!!
- Where the corporate is only an agency instrumentality!
- V In order to determine the real character of the company
- V When the veil has been used for tax evasionsV!
- for Quasi criminal casesV!!
- To investigate the ownership of the companyV!!!
- In order to investigate the affairs of the company[31],!
- X Where the company has been or is used as a medium to avoid various welfare and labour legislations, X
- In case of economic offencesX!
- Where the company has been used for illegal and unjustified purpose.

Below are the provisions under the companies act 1956, where the individual liability is attributed to alter ego of the company[32]:

- Where a company carries on business for more than six months after the number of its members has been reduced below seven in the case of a public company and two in the case of a private company.

Every person who was a member of the company during the time when it

carried on business after those six months and who was aware of this fact, shall be severally liable for all debts contracted after six months[33]The application money of those applicants to whom no shares has been allotted is not repaid within 130 days of the date of issue of the prospectus, then the Directors shall be jointly and severally liable to repay that money with the prescribed interest[34], An officer of the company or any other person acts on its behalf and enters into a contract or signs a negotiable instrument without fully writing the name of the company, then such officer or person shall be personally liable[35]The court refuses to treat the subsidiary company as a separate entity and instead treat it as only a branch of the holding company[36]In the course of winding up of the company, it appears that the business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, all those who were aware of such fraud shall be personally liable without any limitation of liability[37]There is also a provision under the said act that limits the liability of members. The concept of " limited liability" restricts the liability of a shareholder to the nominal value of the shares held by him. If he has paid the entire amount which is payable towards his shares, he is not held liable for the debts of the company, even if he holds almost the entire share capital of the company, provided if the court lifts the corporate veil and finds the shareholder responsible for the wrongful act[38]. In *Kapila Hingorani v State of Bihar*[39]the Apex Court analyzed the rights and liabilities of a company vis-à-vis the Fundamental rights and Human Rights of the individual. The Court observed:" A company incorporated under the Companies Act is a juristic person and has a distinct and separate entity

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

AN ASSESSMENT OF APPLICABILITY OF CONCEPT OF CRIMINAL LIABILITY

Criminal law basically aims at punishment. Earlier there use to be procedural difficulty as well. How the liability can be attributed to corporation, how a men's rea which is required can be attributed to a mindless person?

Corporation has no mind of its own similarly actus reus. For this criminal justice act was established to deal with procedural difficulties. So there was shift from the stage of no liability to strict liability to vicarious liability. With the development of doctrine of Alter ego the corporation were made liable in the cases where men's rea was required. Under this doctrine the corporation are recognized as alter ego of its stockholder's directors and its officers. This doctrine was first recognized in civil law in the case of Lennard; s carrying co. Ltd v. Asiatic petroleum Ltd[40], where lord viscount says' that . a corporation

is an abstraction. -It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. Regarding the criminal case where this doctrine was applied was R v I. C. R. Haulage Ltd[41]here a co. and its MD and few others were indicted for the offence of conspiracy to defraud. The question that raised here was whether corporation which has no mind of its own can be held liable for conspiring to defraud? MD of the company is in a way the center of attraction of co. and if the requirement of men's rea for the offence of conspiracy can be find in the mind of MD who is alter ego of company then criminal liability for that offence can be attributed to the company. Here the conviction was upheld. Question arises here that 2 other person were also held liable with MD. But the offence of conspiracy requires meeting of two mind and what if 2 other persons were not involved in it. So can they be(natural person) be alleged to conspire with juristic person so that both can be held liable for conspiracy. Although court of appeal didn't go into this question but we need to understand the corporation can't be held liable for offences like conspiracy atleast requires two minds not two person. Doctrine of Aggregation:- requirement for the offence is to be seen and see whether the aggregate of these requirement can be found in any other employee associated with the company apart from alter ego than that aggregate of requirement can be imputed to corporation. In all countries the corporation can be held liable even in offences requiring men's rea. In I. C. R. case court held that co. can be held liable like a natural person subjected to

two exceptions: Cases where upon its very nature the offence can't be committed by corporation for e. g. perjury, sexual offences. Cases where no effective order by way of sentence can be made against corporation for eg. Murder and other offences where only punishment is corporal punishment. Despite of the above said development in law still in most of the countries the foundation of corporate criminal liability is on doctrine of vicarious liability and identification doctrine which have been object of much criticism[42]and jurist still hesitate in applying basic principle underlying the criminal law to corporate criminal liability as they found that corporate criminal liability challenges the basics of criminal law or they can not be directly applied to corporations keeping in the view corporations being legal fiction managed by others.[43]So, the most important task of the paper starts from here because till now the history, concept and present situation has been discussed and from here the argument for application of principles of criminal law on corporations will start.(I) Corporations as Actor: One of the momentous differences between individual and corporate liability is that in the former the subject of responsibility is easily identified. Hence in order to bring the corporations under traditional Criminal liability one has to establish that the conditions under which human beings fulfill these requirements. There are two most common conceptions of the organization--holistic and atomistic--both based upon a human model.[44]The holistic approach--or personification--acknowledges the reality of collective entities and denies the possibility of their complete reduction into individuals and their interrelations[45]. However, the theory goes further by finding that as organizations share some of the characteristics of individuals, they must

therefore have all the characteristics relevant to the individual's moral and legal status[46]. It is on this assumption that the holistic theory deems a corporation fit for legal personhood. On contrast, the atomistic approach--or aggregation--sees collective entities as aggregates of individuals, and thus completely reducible into individuals and their interrelations. However the theory exaggerates this interrelation by equating an organization with a homogeneous group of individuals and dictating that the normative status of the collective entity must correspond to the normative status of the individuals that compose it[47]. The importance of recognizing the durable existence of organizational identity is very important in light dynamic change in its membership. The concept of a corporation has shifted from the notion of an enterprise headed by one entrepreneur, who both owns and runs the going concern, to that of an organization where stock ownership becomes separated from the control of the corporation's affairs, the latter being managed by a professional, hired and self-perpetuating bureaucracy also the individual shareholder's role has changed from part- owner to investor[48], and its importance has diminished in large corporations where the most significant shareholders are collective entities and the attachment of the shareholder to the corporation is becoming secondary and indirect, reflecting the fact that corporations serve a variety of interests besides those of shareholders, including those of their employees, customers and the community at large[49]. However, the more significant change for the purposes of the criminal law is the fact that the structure of many, especially large-scale, corporations is no longer based on a pyramid headed by a single, all-powerful individual[50]. The modern organization is " portrayed as

a coalition of groups of divergent claims and interests, engaged in a continuous process of bargaining with one another.[51]" A final change to be noted is the orientation of corporate goals as it is no longer accurate to describe them solely as a function of the self-interested and profit-seeking entrepreneur. The consequence of the above changes is that many corporations, particularly large ones, have developed to the state of being ownerless. The idea of a group of individual members has given way to that of a permanent, self-perpetuating bureaucratic machine in which members are only secondary and can no longer be realistically identified with the organization[52]. Hence in present day scenario all the giant corporations must be treated as independent actors.(II) Corporations as Responsible Actor: Before going in to phenomenon of corporation's capacity of forming mens rea, it is important to consider the meaning of a responsible actor or intentional agent which is one of the basis of imposing criminal liability. The nature of Corporations in present scenario as discussed above give rise to the question that whether an organization can be blameworthy in itself, or is it always a function of the blameworthiness of the individuals involved? The blame for wrongful acts of collective entities can and must be borne by the entity itself and not by its constituent members because the distinct personality of a collective entity, as discussed above subsumes the individual personalities composing it[53]and so it is unfair to hold individuals responsible for what is the fault of the entity itself. The viability of above said argument must be judged in light of present theory of legal personhood, which as matter of fact is unhelpful for the purposes of determining who is a responsible actor because recognition of a corporation as a legal person has

largely carried with its protections without the imposition of corresponding responsibilities or obligations because the separate legal personality of the corporation often serves as a shield for the directors and shareholders from their individual responsibility, and changing dimension of nature of corporations. Now coming to basics of criminal law where intentions are taken broadly as reasons for acting, then this requires the identification of a corporation's reasons for acting, over and above the reasons of the individuals[54]. In essence in order to make the corporation as liable actors one has to establish that corporate intention is something more than a means of referring to the collection of the intentions of the individuals comprising the corporation which has been partially established in above made discussion where an attempt was made to establish that at present corporations must be treated as independent actor. In order to find a solution to this problem one must treat a Corporation as a single and separate entity capable of committing a criminal offense but as a proviso to above said statement it must be noted that corporations may be likened to, or treated as, individuals for some purposes, but should not be regarded as individuals[55]. As far as rationale and foundation of this statement is concerned we need to go back to history particularly the history of Greek city state where collective criminal liability were imposed on a state in case of specific criminal offences and rationale for the practice was that a city had a single and continued existence over time in much the same way as a human being remains the same individual throughout life[56]. Just as the achievements of its citizens, past and present, became part of its heritage, certain criminal acts were also identified with the city itself. Responsibility for criminal acts

flowed as naturally to a Greek city as did glory for great achievement[57]. Hence it was the phenomenon of distinct identity only, which enabled the city to be considered responsible as a collectivity. Thus, once its responsibility was triggered, the city as a whole was punished, irrespective of whether the individual actor who committed the act was actually subjected to any punishment. It was punished on the basis of its own separate blameworthiness[58]. Thus the city, at least for the purposes of specific criminal offences, was considered to be a responsible actor, capable of being blamed and thus punished for wrongful acts. So by the arguments as given in above two paragraphs on conclusion that can easily drawn the corporations can be independent responsible actors.

(III) Corporations Capable of Forming Mens Rea: Till now it has been established that at present day corporations must be treated as responsible independent actors. In order to attribute the mens rea to the corporations we must look in to corporate internal decision structure[59]because corporate internal decision structure is the means by which the actions and intentions of individual human persons within the corporation are transformed into a corporate decision. Moreover, it is through the rules set out by corporate internal decision structure that it is possible to identify whether or not a given action or decision has been made " for corporate reasons" and two ways are: first, the corporate decision-making structure indicates the procedure that must be followed in order for a decision to become the corporation's; second, the decision must instantiate the basic policy of the corporation[60]. This approach of attributing the mental element on part of Corporations is excellent because reasons for corporate action are sought in procedural

rules and corporate policies[61]. The only feeble criticism of this approach is that corporate policy simply reflects the views of the current directors of a corporation but this is not the case with Big Giants Corporations where the policies framed are generally long term goal oriented and who are responsible for large amount of Corporate crime. So it is appropriate to use the ability of a corporation to make decisions for imposing corporate liability when and because a decision instantiates both an organizational policy and an organizational decision-making process chosen by the organization. The fairness of such a formulation is demonstrated by the fact that it avoids finding liability of the corporation where a decision is made by a rogue individual in defiance of corporate policy. However, this does not mean that the corporation cannot be held responsible for the actions of individuals where the intention of the individuals is other than to promote corporate goals and policies[62]. Theoretically the above said argument is sound enough but establishing intentionality through tacit corporate policy presents serious evidentiary difficulties because the Companies cannot have expressly illegal purposes, and culling out unofficial policies might be difficult without the cooperation of some of the agents of the corporation. So in these situation the most promising means of establishing intention or knowledge on the part of a corporation would be through the ratification of the illegal act of an agent, either by failure to discipline the agent, or because the actions in question are the effect of another corporate policy[63].(IV)

Corporate Actus Reus: For imposing liability under Criminal law as matter of convenience has divided the act requirements into four parts: the notion of an act, voluntaries, causation and justifications[64]. Among the above stated

requirements the most difficult question is the determination of positive corporate action and this become more problematic in the light of concept of corporations that corporations can only act through their agents. As a result, there is a tendency to reduce the acts of the corporation into the acts of its agents who physically and mentally participated in the act but theoretically this is not a serious problem if we recall as what has been discussed earlier that all those actions which embody corporate policy and are decided pursuant to corporate rules of procedure which are corporate acts and hence under this model of responsibility person who act in accordance with corporate policy for what ever reason it may be still act for the corporation. So a corporate act must always attract liability because it cannot occur without the existence of a rational decision to act on the part of the corporation. Moreover once this model is accepted one will find that the problem of voluntariness is taken care of by the existence of corporate action. The next important task after founding of existence of corporate act & its voluntariness principles of causation which is one the basic of criminal law according to which one is said to have cause actus reus of crime if that actus would have not occurred without one's participation[65]. Now at this instance it is to be noted that the traditional approach to causation must not be applied to corporations which seeks a human actor causally connected to the event because it limit the inquiry into the range of potentially blameworthy actors in a sense that corporate action is often an amalgamation of factors the traditional criminal law will tend to overlook this multiplicity of causes and concentrate on identifying human actors. In the corporate context, the causation principles must be applied taking in the

view notion of corporations in present day world as described above i. e. doctrine of causal connections must be based upon collective activities or multiple factors, without the need to identify the individual causal connections of each constituent element of the collective act. Moreover this view of applying causal connection will strengthen the above mentioned argument that a corporate actor has an existence which transcends that of its individual members and thus that events may be causally connected to it directly, as a separate entity and it also avoids the problematic attribution of blame for collective acts upon individuals who may constitute only a partial or indirect factual cause of the event[66]. Coming to the point of justification one will find that justifications are there only for thinking of society the citizen's conduct as right on that occasion[67]and allow a person to inflict harm to prevent a greater harm from materializing. It is clear that such considerations do not apply to corporations, as they cannot be subjected to such serious acts as loss of life or grievous bodily harm[68]. Hence in this way direct actus reus on the part of corporations can be established.

The Corporate Punishment – Whether only fine is Possible?

The punishments that can be imposed upon the convict and as per Sec. 53 of the code include death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine. In liability of corporation , the Courts in India have recognized that a corporation can have a guilty mind but still were reluctant to punish them since the criminal law in India does not allow this action[69]. This difficulty that arise out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code

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by adding the following lines:" In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only." With cotemporality under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of 'person' in the Indian Penal Code Includes 'company'. the Parliament has also considered this problem and proposed to amend code in this regard by including fine as an alternate to imprisonment where corporations are involved in 1972.

[70]Court has come with decision that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. This discretion must be read into the Section so far as the juristic person is concerned. Then the court would not be passing the sentence in accordance with law. As to the company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. The maxim 'judicis est just dicere, non dare' expounds the role of the court.[71]It means to interpret the law, not to make it. This when read with the Doctrine of Separation of Powers has bound the Court's hands in imposing various kinds of punishments and all that it is left with is to impose fines. In order to avoid compelling the Courts to go out of the statute and interpret and therefore define the law which is essentially the task of the legislature[72]it is advised that the legislature amends the various penal statutes in a way so as to bring in various forms of

punishments for the corporations as well, thereby maintaining the separation of powers regime and hence the rule of law.

Determining liability of corporation in cases of statutory offences:[73]

Section 11 of the penal code of India defined the word person thus-This word includes any company or association or body of person, whether incorporate or not. Courts find its controversy in situations when statute prescribes mandatory imprisonment with fine as a punishment for an offence. In *M. C. D. vs. J. B. Bolting Company Ltd.*[74], the court was faced a very interesting question: whether a company can be awarded a punishment of fine when the mandatory punishment is both imprisonment and fine. Here The company had been found guilty of committing an offence under Prevention of Food Adulteration Act, of 1954. The Court held the company guilty of the offence under the said act, declared that it could be punished with fine only.[75]later In 2003 Supreme Court in *Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd & Anr.*[76]Viewed that since an artificial person like a company could not be physically punished to a term of imprisonment, such a section, which makes it mandatory to impose minimum term of imprisonment, cannot apply to the case of artificial person. The majority was of the opinion that the legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty. Here in this case *j. B. N. Srikrishna and G. P. Mathur* held that a

company can be attributed with mens rea on the basis that those who work or are working for it have committed a crime and can be convicted in a criminal case, the judges also held that the corporations are liable even where the offence requires a criminal intent. Another question found in this case was, " whether a company is liable for punishment of fine if the provision of law contemplates punishment by way of imprisonment only or a minimum period of punishment by imprisonment plus fine whether fine alone can be imposed?", here J. Mathur was of the view that the courts would be avoiding their responsibility of imparting justice by holding that prosecution of a company is unsustainable merely on the ground that being a juristic person it cannot be sent to jail to undergo the sentence, few judges agree, in holding that corporate criminal liability cannot be imposed without making corresponding legislative changes. Which means to include the imposition of fines on corporate bodies, to bring such a fundamental change in criminal jurisprudence the legislative function would have to be applied and the parliament would have to step in However, Supreme Court in 2005 in Standard Chartered Bank v. Directorate Of Enforcement[77]in majority decision of 3: 2 expressly overruled the Velliappa Textiles case on this issue. K. J Balkrishanan J. in majority opinion held:" We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which punishment prescribed is mandatory imprisonment. We overrule the views expressed by the majority in Velliappa Textiles on this point. The question for consideration before court was: Whether a company or a corporation being a juristic person, can be prosecuted for an offence for which mandatory punishment prescribed is

imprisonment & fine. Prosecution is required for inflicting any punishment. This has to be accepted that when no punishment can be inflicted, no prosecution can be launched. Hence it is clear from Standard Chartered case that prosecution can be initiated and fine can be imposed even when imprisonment is given as mandatory punishment with fine, the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of the company, this can be construed as the true intention of the legislature. Apex court in this case referred to the decision of the United States Supreme Court, *United States v. Union Supply*[78] where, a corporation was prosecuted for willfully violating a statute that required the wholesale dealers in oleomargarine to keep certain books and make certain returns. Any concerned person who willfully violated this provision was liable to be punished with a fine of not less than fifty dollars and not exceeding five hundred dollars and imprisonment for not less than 30 days and not more than six months. The important thing noted here was that for the offense under Section 5 of the statute at issue, the Court had discretionary power to punish by either fine or imprisonment, whereas under Section 6 of the statute (section that was actually violated in *Union Supply*), both types of punishment were to be imposed in all cases. The corporation moved to quash the charge, and the District Court quashed it on the grounds that Section 6 of said statute was not applicable to the corporations. However the United States Supreme Court reversed the District Court's judgment. Where Justice Holmes held: It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare Section 5, the application of one of the penalties rather than of both is made to depend, not

on the character of the defendant, but on the discretion of the Judge; yet, there, corporations are mentioned in terms. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape. There is a maxim *lex non cogit ad impossibilia* which only tells that law does not contemplate something, which cannot be done. This maxim is used by majority and minority in *Standard chartered case*. The courts have followed this judgment and have denied any blind immunity to corporations from criminal liability.[79] This course is open only in the case where the company is found guilty but if a natural person is so found guilty, both sentence of imprisonment and fine are to be imposed on such person. As far as the liability of director is concerned in *Aneeta Hada vs M/S Godfather Travels & Tours*[80] and *avnish bajaj vs state & anr*[81], The main issue involved in this group of appeal is whether Directors of a Company alone can be prosecuted without making the Company as one of the accused. However, the Supreme Court in the case of *State of Madras v. C. V. Parekh & Anr* (1970) 3 SCC 491 has held that without suing the Company its Directors cannot be prosecuted. Conflicting judgments have been passed from time to time and the issue was once again raised in the present batch of appeals. After considering numerous judgments and making an elaborate analysis in this respect, the Supreme Court of India had restated the law on this aspect. That If the offence is by a Company, arraigning of a company as an accused is imperative, the company can have criminal liability and

further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the NI Act clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies liable. There is no immunity to companies from prosecution merely because the prosecution is in respect of offences for which punishment prescribed is mandatory imprisonment. In *Iridium India Telecom Ltd. v. Motorola Incorporated and Ors*[82] the apex court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs and relied on the ratio in *Standard Chartered Bank Case*[83]. In *Iridium*, the Supreme Court held: "The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons[84]. The apex court in this case held that corporations can no longer claim immunity from criminal prosecution on the grounds that they are incapable of possessing the necessary mens rea for the commission

of criminal offences. The notion that a corporation cannot be held liable for the commission of a crime had been rejected by adopting the doctrine of attribution and imputation[85]. Criminal lawThe general social norms codified under the criminal law has not been properly implemented which cause hue and cry. powers of police to investigate can be more effective, but the availability of relevant expertise may be limited. If successful, prosecution reinforces social values and shows the state's willingness to uphold those values in a trial likely to attract more publicity when previously respected business leaders are called to account. It accepts more severe penalties because it is necessary to overcome the higher burden of proof to establish criminal liability. The high burden means that it is more difficult to secure a judgment than in the civil courts, and many corporations are cash-rich and so can pay apparently immense fines without difficulty. Further, if the corporation knows that the fine is going to be severe, it may seek bankruptcy protection before sentencing. Civil lawAs it has lower burden of proof and better tools for management of case, civil liability is easier to prove than criminal liability, and offers more flexible remedies which can be preventative as well as punitive. But there is little moral condemnation and no real deterrent effect so the general management response may be to see civil actions as a routine cost of business which is tax deductible.

Comparison of using criminal liability over civil liability

Many states use criminal and civil systems in parallel, making the political judgment on how infrequently to use the criminal law to maximize the publicity of those cases that are prosecuted. Some states enact specific legislation covering health and safety, and product safety issues

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which lay down general protections for the public and for the employees. The difficulty of proving a mens rea is avoided in the less serious offences by imposing absolute, strict liability, or vicarious liability which does not require proof that the accused knew or could reasonably have known that its act was wrong, and which does not recognise any excuse of honest and reasonable mistake. But, most legislatures require some element of fault, either by way of an intention to commit the offence or recklessness resulting in the offence, or some knowledge of the relevant circumstances. Thus, companies are held liable when the acts and omissions, and the knowledge of the employees can be attributed to the corporation. This is usually filtered through identification, directing mind or alter ego test which proves that the employee has sufficient status to be considered the company when acting.

CONCLUSION & SUGGESTIONS

The above discussion has clearly given the view that it is possible to have a direct and separate notion of corporate blameworthiness and would constitute an invaluable addition to current theories of corporate criminal responsibility. The above said discussion has given a model with proper and sound argument that can be used for determining the mens rea and actus reus in the acts of corporations and that to with in ambit of traditional principle of criminal liability. The need for treating the corporations directly for its criminal acts is to ensure the liability in more concrete sense. The presented model corporate liability has greater advantage as compare to existing model of corporate liability as in sense its ability to capture a wider spectrum of corporate action within the structure of a criminal offence, thus rooting responsibility in a more complete understanding of corporate

blameworthiness. It can safely be concluded that laws relating to corporate criminal liability in India are vastly insufficient. What all is required That legislature should come forward and make some strong statutes which would check that the corporations must get punished and a better social order is established. There should be some few Provisions relating to procedural law to be incorporated and they should be modified so as to deal with the corporation. The legislature may table following suggestions: Economic Sanctions and Social Sanctions. Why I feel this to be there because these sanctions have the deterrent effect and it is for this affect only companies are made liable as we know that other accepted theories like reformation would not work here because corporate has juristic mind.