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# CORPORATE CRIMINAL LIABILTY - AN ANALYSIS

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***Abstract :***

Greater international collaboration between nations is necessary as a result of globalisation and the increase in corporate interconnectedness in terms of their economic, social, and environmental activities. At the same time, there has been a significant increase in both economic and white-collar crime. The dominance of national and international firms in economic transactions and their responsibility is one of the most urgent global challenges. This essay examines the fact that, compared to a few years ago, white-collar crimes are being committed on a larger and larger scale. Many legal systems have not yet taken this into consideration. The scope of crime has expanded internationally at the same time. This essay is an attempt to outline the issues with the notions of corporate criminal culpability, followed by an examination of the strategies used by various legal systems. The many sentencing strategies that have been used or suggested will be the main topic of the next section. It also seeks forth amendments in both- Indian Penal Code and Companies Act to keep tuned so as to meet justice in case of corporate frauds and need of new law to deal this problem in coming future. The researcher has tried to highlight the deficiencies in the existing legal framework which came to be highlighted and tested the deficiency in law or procedure in satyam case, which inspite of the fact being a case wherein the liabilities were accepted by Mr. Ramaligalm Raju has been languishing in courts ever since. The project report also tries to highlight the necessity of political and judicial will being visible in 2G investigation.

## I. INTRODUCTION

**Chapter I : INTRODUCTION AND JURISPRUDENCE OF CORPORATE CRIMINAL LIABILITY**

**1.1 INTRODUCTION**

A corporation is established through legislation or through registration due to which a corporation gets a separate legal entity. These corporations has their holding in one country as well as also in other countries meaning thereby the assets and liabilities of any corporation can be in home country and also in any other country in which it want to do business. These types of corporations are commonly known as multinational corporations(MNCs).[1]These MNCs plays a very important role in human life as well as in development of the nation. These corporations have been given many powers rights and duties by the respective nations. Therefore it is Important to keep an eye on these corporations to make control over them and to allow them to regulate within certain limits.[2]

[2]*Id*

Now if we say corporations are separate legal entities we mean to say that it is an artificial person.[3] Therefore the question arises that whether these corporations as an artificial person are capable to do any crime or can these corporations legally be held for any criminal liability for unlawful acts. The second questions which strikes inour mind is that whether the laws relating to crime such as IPC, The constitution of India etc. are applicable to such corporation or not. The answer to this question will be given in the text after doing the research.

The earlier view to determine the liability against the unlawful act of corporation is different as compared to the present scenario, because the element of intention which is required to make any person liable was not possible to determine and also the corporations as a person could not be imprisoned. For example if take section 11[4]under this person is defined as any company or association of persons whether incorporated or not. This shows that the provisions of INDIAN PENAL CODE, 1860 (IPC) are even applicable to corporations.[5] But the difficulty which arises is that how to determine the guilty mind of these corporations.

In India the concept of criminal liability was imported through the doctrine of respondeat superior which is to be used in tort law.[6] Indian criminal system faces various challenges in relation to corporate criminality. This is the serious problem which is faced by the prosecutor and court for determining liability of corporations and therefore there is a need for the growth of corporate criminal liability. In India corporate is held criminally liable for any unlawful acts done by its agent or employees on the basis of principle of vicarious liability. This vicarious liability principle is commonly used in criminal law in order to make artificial person liable in a limited manner and to certain limits such as in case of violation of statutory provisions of an employer or in cases where mens rea is not an essential requirement. But if we see other countries like European countries they were not willing to accept the concept of corporate criminal liability in their legal system.[7]

In present scenario it is important to determining the liability of the corporation or the criminal liability of the persons involved in such corporations such as directors, managers, officers and other employees of the corporation because these corporations not only affect the lives of the people in a positive manner but sometimes such corporations affect society in a negative manner which are disastrous in nature which comes under the head of crimes. For example uphar cinema tragedy, thousands crore scams and scandals especially the white collar and organized crimes may come within this category.[8]

## 1.2 CORPORATE CRIMINAL LIABILITY:

### DEFINITION

**Corporations**

The word corporation[9] is defined under the companies Act, 2013.

a. a corporation sole

b. any other legal entity that the Central Government may designate in this regard by means of a notification published in the official gazette, provided that said entity is not a corporation as defined by this Act.

Currently, the Act has no definitions for the term "Corporation Sole." Concisely speaking, however, a body corporate is any company that has a separate legal existence from the individuals that make up it, with the exception of those who are explicitly excluded. When compared to its members, it has an entirely distinct legal position. A body corporate is therefore defined as any of the following: a company, a foreign company, a corporation, a statutory company, a statutory body, an LLP, etc., and other similar bodies that have their own unique legal entity.

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[3] Salamon vs Salamon, 1897 AC 22

[4] INDIAN PENAL CODE, 1860

[5] *Id*

[6] Corporate Criminal Liability: National and International Response, Markus Wagner International Society for Criminal Law Reform A Comparative Perspective on Commercial and Financial Fraud at the 13th International Conference Malta, July 8–12, 1999

[7] *Id*

[8] Corporate Criminal Liability: An Analytical Study with Special Reference to Indian Penal Laws, by Abhinandan Bassi, published in 2006 by Rajiv Gandhi National University of Law in Punjab.

[9] Section 2(11) of The Companies Act of 2013,

**Criminal liability.**

The term "criminal liability" is not defined by the law, although instances of corporate criminal accountability can be found in sections (45, 63, 68, 70 (5), 203) where only the business's personnel are subject to punishment rather than the company itself. This concept is also mirrored in the Takeover Code. Actua non facit reum, nisi mens sit rea is a fundamental Latin principle that governs criminal culpability. It means that in order to hold someone accountable, it must be proven that they committed an unlawful conduct or omitted to commit an unlawful act while acting with malice aforethought. The main substantive criminal law of the country is found in the Indian Penal Code of 1860, while not being comprehensive.All individuals with a specific geographical tie to India are subject to it.

Company, or corporation, lives in a world apart from its owners and the people in charge of running it on a daily basis. Although the notion of a company's independent legal personality is well-established, it has long been unclear whether a company's misbehaviour might result in legal repercussions. While it is common knowledge that those in charge of a company could be held criminally accountable for wrongdoings committed by them, the trickier question is whether the company itself could be held criminally accountable for the wrongdoings of the managers (due to the company's separate legal status).

Gradually, however, the law began to recognize that legal persons such as companies could be liable under criminal law. The doctrine of strict liability is not defined in statute but there are some judicial decisions from which the courts have established the strict liability of corporations. A company may be held accountable for a criminal conduct committed by one of its workers under the current international legal concept if the individual did so while acting in the course of his job and with the intention, at least in part, to benefit the corporation. Similarly, in the case of **United States v. Park**[10], a corporate executive is subject to strict liability for a criminal act by one of her employees if the executive's position gave her the ability to prevent or promptly correct the act.[11]

Further in other cases also the courts established the strict liability of corporations such as **New York Central & Hudson River Railroad Co. v. U.S**[12]. In this case the corporation was held criminally liable for unlawful act of its agent in the payment of rebates to another company because it violated the Act[13]. This principle of strict liability recognized in India through the leading case of **MC Mehta v. Union of India**[14], where the strict liability was imposed on erring industries. It was held that if an enterprise is allowed to carry any activity which is "hazardous or inherently dangerous" for the profit. Moreover the court relied on the case **Rylands v. Fletcher**[15], in which the doctrine strict liability was evolved.

Rather if we see how corporation can be held liable, it is through section 447 of the Companies Act, 2013, provide the punishment for corporate fraud, Which says if any "person" who is found to be guilty of fraud is punishable and "person" is defined in Section 2(42) of the General Clauses Act, 1897 defines persons which include company also. It means corporation can be penalized but cannot be imprisonment. But the employees as well as the directors and other key holder can be imprisoned. Hence corporation can be held liable both in criminal case as well as in civil cases.

Similar to this, corporate vicariously liability has been established by legal rulings. For example, in the case of '**Mousell Bros. v. London and North Western Railway**', which was the first time a corporation was held vicariously liable for a mens rea offence outside of strict liability and nuisance, the corporation was held vicariously liable for the mens rea offence. However, it stood out as an exception among cases decided during that time when courts expressed their inability to impute criminal liability to corporations, despite the fact that this case was expected to serve as a basis for developing additional judicial dicta in the direction of imposing criminal liability on corporations.

Unlike in Act[16] in England, we do not have any statutory provisions mentioning the liability of the State in India. In rare extraordinary circumstances, the vicarious responsibility theory is also relevant in criminal trials, despite the fact that it is normally only applied in civil law. Since the State is not obligated by any laws after the Constitution enters into effect, it was

[10] 421 U.S. 658 (1975)
[11] *Id*
[12] 212 U.S. 481 (1909)
[13] The Elkins Act, 1903
[14] 1987 AIR 1086
[15] (1868) LR 3 HL 330
[16] The Crown Proceedings Act, 1947

determined by the Court in the judicial decision of Superintendent and Remembrance of Legal Affairs, West Bengal v. Corp. of Calcutta that this is not the case. State and citizen alike are now subject to civil and criminal statutes.

### 1.2.1 LAW & LEGALITY

As it has been discussed above that corporation is a legal entity and due to the legal personality such corporation has to face several punishment which are given in various Acts. Basically there are provisions available in companies Act, 2013 which makes corporation liable for any unlawful act. But apart from the provisions of Companies Act, 2013 there are also certain provisions in other Acts which provides for mandatory imprisonment of such corporation for example provision of IPC[17] and Income Tax Act[18]. Because a company has legal personality and cannot be imprisoned for its criminal activities but can only be fined, Indian courts find it challenging to apply the mandatory imprisonment provisions of a section to such cases where a corporation is accountable. The Supreme Court had to deal with this scenario in the case of '**M.V. Javali vs. Mahajan Borewell & Co**.' and Others since the corporation had been found guilty of violating section 276B R/W 278B of the Income Tax Act, which mandates a minimum 3-month sentence. On how to jail a company, the court took a stand, though. In this case Supreme Court finds a solution and said that though the corporations cannot be punished with imprisonment but it can be punish with greater amount of fine for such unlawful acts[19].

The theory of respondeat superior, commonly referred to as the principle of vicarious responsibility, is the foundation of the notion of corporate criminal culpability. In the case of vicarious responsibility, the master is held accountable for the wrongdoing of its employee.

It is necessary to point out that a corporate in India are peculiarly promoter driven rather than corporation in developed nation having developed laws wherein corporate are more large sized so as to be controlled by employees. In India usually corporate criminal liability is attracted upon the promoters like Hinduja Brothers in Bofors scam, but recently in the recent 2G scam a shift change was observed in which the CBI while exonerating Mr. Anil Ambani charged Mr. Gautam Doshi of Reliance in the 2G scam.

### 1.3 THE CONCEPT

Due to the fact that several Indian Companies Acts were modelled after the English Act, company law in India as a whole has its roots in English company law. The English Act served as the foundation for the 1850 legislation that first allowed for the registration of joint stock companies. Although the 1850 Act acknowledged businesses registered under the Act as independent legal entities, it did not include the notion of limited liability, which was subsequently included in the 1857 businesses Act in accordance with the English Companies Act of 1856. The limited liability provision did not apply to banking corporations until 1858, when it was made applicable to them. Three more times—in 1862, 1866, and 1882—the Indian Companies Act was passed. The English Companies Consolidation Act of 1908, which stayed in effect until 1956, was followed by the 1913 Act, which superseded the 1882 Act. As a result, Indian Law continued to be compatible with the ideas of English Companies Law. The 2013 Act has superseded the Companies Act of 1956, which has undergone many amendments.[20]

Criminal law talks about two elements which are compulsory for imposing a liability i.e. Physical Element and Mental Element. Criminal liability is related to those act or omissions which are violative of criminal law. Generally criminal liability is based on one maxim that is actus non facit reum, nisi mens sit rea,[21] which means that in order to make any person liable it is to be shown that there was some act or omission which was forbidden by law and which is done with guilty mind.

Even though this doctrine makes person criminally liable it has one exception which is known as doctrine of strict liability. Under this liability one can be made liable even if the defendant is not having guilty mind for example if there is a damage caused by any industry such as causing pollution, gross negligence the best example for this is Bhopal gas tragedy. Therefore in these types of

[17] *Section 420, Cheating and dishonestly inducing delivery of property.*
[18] Section 276B
[19] *Id*
[20] The Companies Act,2013
[21] Mayank Mehandru, *Mens Rea InCriminal Law*, Law Notes,(sptember.6,2007)

cases there is no need of imposing any criminal liability on corporations because no mens rea is required in these kinds of offences.[22]

**1.4 EMERGENCE OF PRINCIPLES OF CORPORATE CRIMINAL LIABILITY**

Te concept of corporate criminal liability is continuing concept. Generally it revolves around three questions, Firstly whether is it right to use criminal liability concept against entities such as corporation which was created for individuals. Secondly what is the value or amount should be imposed as compensation against the damage which they have caused. Thirdlywhether corporate criminal liability has any added value over and above individual criminal responsibility of corporate officers. Corporations can be held liable for the offenses based on employee's knowledge and intention. Again this rule talks about the intention and knowledge of employees when an employee is working within the course of employment. But this rule does not talk about those situations where collective actions or knowledge is involved such as decision taken in board meeting; in this situation the law is uncertain.

Neither there is any physical existence of corporations nor it act on its own; this function of thinking and act is done by the directors or members of the corporations and therefore these person must be punished. And also there is a need to take different view to impose liability, particularly in present scenario where a number of corporations are competing with each other and also plays an important role in society. In present scenario it is not easy to track down any individual wrongdoer in any large organization; the director or the wrongdoer can easily shift its responsibility on the other persons.

Sometimes it is very difficult to find out under what provision the director of corporations could be held liable such as commercial statutes, Corporations Law. In some of the cases provision are available for both civil and criminal actions in relation to the same conduct. Therefore if any director of a company misuses its power or acted dishonestly, generally a civil action is taken by the corporation against such director to recover damages. Corporation and their advisor always try to take such cases under provisions of civil law in order to avoid the mark of criminality which could have been arise on the name of corporations. Some of the jurist and advisors says that corporate crime is not serious crime.

Now, if we look at corporate criminal responsibility in the context of Indian Law, it reveals that criminal liability requires the existence of ingredients, namely mens rea (guilty thought) and actus reus (guilty act), which are the two factors required for a crime to be deemed to have occurred. Imprisonment of Natural persons is possible because they have mind and due to which we can make out the intention of any offender. But this is not the case with the corporations. The question arises that whether the company can be made liable for criminal offences. Courts in India had faced a lot of trouble and in the past few decades the Indian courts has done effort to create jurisprudence in order to find out the guilt of the corporations. Earlier for long duration the courts were of view that corporations cannot be prosecuted under criminal law for offences requiring mens rea and also think that corporation does not have mind to carry out the act. But this misconception was changed by the Supreme Court in the case of **Standard Chartered Bank v Directorate of Enforcement and Iridium India Telecom Ltd v Motorola Inc**.[23] In this case held that even corporations can be prosecuted for criminal acts.

## Chapter II HISTORICAL PERSPECTIVE

### 2.1 Corporate Liability in Ancient Era

The world has observed several forms of societal responses to the corporate wrongs. It is assumed that the existence of criminal liability to corporations is the result of contemporary world but it is not so. In ancient era the thumb rule was the criteria to know thecollective liability of any people or group of people. There are number of scriptures which support to the fact that during ancient era the groups were not considered as collection of individual but they were considered as group of people.

During that time thisdistinctiveness ended all the variations in framing of laws. Law was changed according to a system where small group which were independent existed for several function of society which were in the form of the people or unit.[24] The conduct of individual which were moral and ethical in nature was related and confused with the acts of group of which the individual is a Part. The ancient society was having a particular thinking about the Law i.e. the people of ancient era believe that if any offense is committed by society then its guilt will be larger than the sum total of the offenses committed by members.

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[22] *Id*

[23] CRIMINAL APPEAL NO.688 OF 2005

[24] A Comparative Perspective, 43 International and Comparative Law Quarterly 496& 497, (July 1994)

It was a sign that there is no more unity in the society if any offense is done. Therefore the group has the responsibility for the actions of its members. If any damage is caused by the group then it was considered to be caused by the group as a whole to which such member or person belong.

**2.2 Corporate Liability in Medieval Era**

In the medieval era the reason for the evolution and recognition of corporate institutions were independence and sovereignty of entities which were having certain obligations and sociopolitical rights.[25] Independent associations were supported and promoted by the government of Germany for the purpose of development. Under the Germanic law the land was shared only to families and not to the individuals. However the Romans were different from German in a way that German law considered both corporations as well as individuals as real subject of law.[26]

Under English law during medieval period the liability was not imposed on the individual who commits crime rather it was imposed on the group. Although the group was held to be responsible for the act or offenses done by its employees or members but the church always finds out the guilty person and hand it to the authorities because the general belief was that the criminal law should be applicable on human. But in France the situation was different due to the canon law; there they have the concept of making corporations liable even before the French revolution. Prior to French revolution it was accepted. Before the French Revolution, businesses were recognised in France as having criminal culpability as a result of canon law. Prior to the Revolution, it was widely recognised that a group or society existed in reality, that these societies or groups were capable of committing crimes, and that as a result, they should be punished regardless of the nature of the organisation.

In England the key conflict is between the guilt and interpretation of intention behind that guilt. There are some examples where church had punished several cities such as City of Toulouse, Bordeaux and Montpellier.Similarly there was a jurisprudence which rejected that the right to be a community means that it was not accepted as an independent group but a collective entity with collective obligations.[27]

In 1670 the regulations of French criminal law got the way and influenced by the policies of the church like under Roman law criminal liability of groups was accepted. One of its codified fundamentals was the acknowledgement of criminal liability of groups. Under the Roman law there was a provision[28] that cities, villages, bodies, and companies if commits any crime, offence or violence then they will be trial under criminal procedure.The code clearly stated that the terms "body" and "companies" referred to groups of attorneys, judges, and prosecutors, respectively, and that "body" also included schools, religious councils, and convents. Researchers like, Mestre[29]says that element of mens rea is important as this point of time because the action alone is not sufficient; the will of the group is essential in order to constitute crime.

**2.3 CORPORATE LIABILITY DURING THE MODERN ERA**

The societas delinquere non potest concept, which states that a legal entity cannot be held accountable, holds a significant place in the international legal system, particularly in nations like Italy and Germany. In these countries they came to know that the corporate cannot be held liable for any offence or sedition etc.[30]There is a case which has been cited by William Blackstone which tells that the judiciary does not accepted the extension of criminal liability to corporations this opinion of his was based on the Decision given by Holt CJ, hw states that “A corporation is not indictable but the particular members of it are”.[31]But the reasons behind the decision of LordHolts are not clear because case consists of only of this single sentence.

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[25]Anca Iulia Pop, *Criminal Liability of Corporates- Comparative Jurisprudence*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, 2006”

[26]*Id*

[27]“Richard Gruner, *Corporate Criminal Liability and Prevention*,2 Law Journal Press 2, (2005)”

[28]Matthew Goode, Corporate Criminal Liability, Australian Govt. Publications, http://www.aic.gov.au/media_library/publications/proceedings/ 26/goode.pdf

[29]In Fausto Martins de Sanctis' article "Responsibilidade Penal da Pessoa Juridica," published in 1999 by Saraiva in Sao Paulo, at page 26, he quotes Aquiles Mestre's essay "Les personnes morales et le problème de leur responsabilité penale."

[30]“John C. Coffee, Jr., *Corporate Criminal Responsibility*, Encyclopaedia of Crimeand Justice 253, Sanford H. Kadish ed. (1983)”

[31] (1701) 88 Eng Rep 1518 (KB)

In some circumstances, such as public nuisances that were previously imposed by quasi-public companies like the ancient universities or the collectives or the contemporary towns, courts began to establish the criminal culpability of corporations in the beginning of 1800. However, there were two requirements that needed to be met. The first was that no company employee could be held responsible for the corporation's actions or inactions; rather, the business was only required to carry out the specific act. Second, because only the corporation was required to carry out the precise conduct, there was no accusation of guilt made to the principle by the agent.Corporations have grown more well-liked and powerful in society up to the turn of the 19th century, which has increased their potential to seriously affect a number of different social groups.

The court in order to control the corporation started giving punishments to the corporation if they do not follow the duty to which they are bound or created public nuisance such as destroying the road,[32] decaying of bridges,[33] and rivers polluted by such corporations.[34]The need of public enforcement of punishment and penalties arose from the fact that a small number of members of society began pursuing these crimes in private courts, where the government would ultimately be found guilty of the crimes. Due to the sheer number of persons impacted by these wrongs or annoyances, these cases would shift from being privately contested to being public good focused.

Initially the corporate criminal liability was limited to crimes or acts which are prohibited by the law which are called as nonfeasance.[35] But in the middle of 19th century the courts extended this liability on the wrongful acts of the lawful authority i.e. companies which is called as misfeasance. Here the acts of the companies involved the non performance of any legal act or the non performance of provisions which are punishable by the courts.[36] The term misfeasance was usedbyLord Denman and held that, the corporations is liable for the misfeasance because it failed to build a bridge over a highway as per the statutory requirements[37] After this the courts began to identify that there is no difference between nonfeasance and misfeasance because the illegal act or omission can be illustrate as both nonfeasance and misfeasance because both are considered to be violative of law.[38]

The courts both in England as well as in United States began to impose corporate criminal liability instead of provision of civil liability, particularly in cases of nonfeasance or in non compliance of legal duty by quasi public corporations such as municipalities. The corporations came out of the control of church due to the political structure change of a state and because of this a new kind of joint ownership emerged.

A demand for money from creditors and investors arose as a result of these enterprises' need for investment. These autonomous joint stock corporations as a result grew in strength and influence among the business community. These companies don't legally resemble incorporated companies; instead, they resemble partnerships or groups. A few of these autonomous joint stock firms began engaging in wild stock scams later in the 18th century, such as the South Sea Company, which was founded in 1711 but finished up in bankruptcy in 1720 due to its involvement in insider trading and trade and financial speculations. Because of involvement of this company in such activities it managed to earn unethical gains. This company managed to raise the value of its shares which was 5 times more than the basevalue. This scam causes huge economic loss to the government of the nation and also took life of number of peoples.[39]

After this scam the company's share value decreases and it was the worst financial crashes in world history.[40] Further the government order to initiate an inquiry, which informed that the reason was the Bubble Act, 1720 which was enactment by the

[32]Commonwealth v. Hancock Free Bridge Corp., 1854, 68 Massachusetts 58

[33] Morris Canal and Banking Co. v. State (1850) 22 NJL 537

[34]*Albany Corporation v. People, II Wend 539 (NY Sup Ct 1834), at 543."*

[35] "79 ER 919 (KB 1635).

[36] Id

[37] "*The Queen* v. *Great North Of England Railway Co* [1846] EngR 803, at pp. 325-327"

[38] "*Commonwealth* v. *Proprietors of New Bedford Bridge* 68 Mass 339 (1854)""

[39]"12 JULIAN HOPPIT ,THE MYTHS OF THE SOUTH SEA BUBBLE 14,(Arthur Burnsed.,Cambridge UniversityPress, Cambridge 2002)."""

[40]Ron Harris, *The Bubble Act: Its Passage and Its Effects on Business Organization*, (1994) at 610

U.K. government.According to this Act if any corporation is to be established than it can be done only under this Act and such corporations were bound to act according to that legislation.[41]

The Bubble Act 1720 got repealed in 1825 which result in quick growth of businesses. Till the mid of 19th century the concept of corporate criminal liability was applicable to all types of offences which done by the corporations and this do not require element of intention.[42]For interpretation of wrongs, there was a shift from quasi judicial decision to the decision involving proof for element of fault like intention or recklessness, whichwas being recognized in the USA from 1909[43] and in Britain in 1917 onwards.

The new model that have developed over the common law jurisdiction are not similar in spite of these two countries share common tradition. Even in countries such as America also adopted the concept of applicability of principle of vicarious liability while determining criminal liability of corporations for the offences which also include element of intent.

The rule of respondeat superior, which is used in American courts, states that if an employee or agent of a corporation commits a tort while doing their duties with the aim to benefit the company, the business's owner is responsible for that tort. Although the most of the countries in the world recognizes the criminal liability of corporations but there are also several experts who do not support for criminal liability.[44]These experts which belong to the field of criminal law and corporate law thinks that the provisions of civil law are sufficient to handle such cases and therefore the criminal liability should not be imposed.[45]

Being a capitalist country The United States of America has a vast existence of large multinationals. These companies have several individuals associated with it and the experts thinks that when any corporate is being punished, then ultimately these whole set of individual get affected such as the stakeholders, the employees, the consumers etc., these are the persons who bear the effect of any punishment given against the crime. Therefore these experts insist on the argument that the concept of corporate criminal liability should be use very rarely and not in every case.[46] But when any corporation does any wrong there are several consequences which the society has to face.

## Chapter III – INDIAN POSITION OF CORPORATE CRIMINAL LIABLITY

### 3.1 Corporate Criminal Liabilities in India

The beginning of new trade law has made difficult path for commercial activities in regulating with the established international norms. Corporations both international as well as national are having become even more important in our economy. In recent times the Indian corporate sector is spotted for doing corporate misdoings.

In 1984 a huge industrial disaster took place in India. There was a company union carbids corporation registered in USA it had its Indian subsidiary under the name Union Carbid India Ltd. In December 1984 there was a leakage of methyl iscyanate (gas) from the plant of Union Carbid India Ltd. In this disaster around 3000 people were killed and uncountable people were seriously injured. After so many twist and confusions to jurisdiction the court imposed the civil liability of Union Carbid India Ltd. by a decree of compromise in which court order to compensate with the payment of $470 million. Earlier the liability of corporation was not laid down in any previous case. The liability principle was laid down in the case of **M.C. Mehta v. Union of India.**[47]

In this case one gas oleum leaked from the plant of the defendant company.[48]

Supreme Court further held that compensation should be proportionate to the size and ability of the enterprise because such compensation will have preventive outcome. It further said that as much as the larger and prosperous enterprise is, the greater

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[41] "WILLIAM LAUFER,CORPORATE BODIES AND GUILD MINDS: THE FAILURE OF CORPORATE CRIMINALLIABILITY 11, *(*1st ed, University of Chicago Press, Chicago 2008).

[42]Stessens Guy, *Corporate Criminal Liability: A Comparative Perspective,* 43 INTERNATIONAL COMPARATIVE LAW QUARTERLY 495-498, (1994)

[43]"*New York Central and Hudson River Railroad Co.* v. *United States* 212 US 481, 1909

[44]Beale Sara Sun, *Is Corporate Criminal Liability Unique,* 44 AMERICAN CRIMINAL LAWREVIEW 1503-1504, (2007)"

[45]""Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 NEW YORK UNIVERSITY LAW REVIEW 687–692, (1997)" by Jennifer Arlen and Reinier Kraakman

[46]"Alschuler Albert W, *Two Ways to Think About the Punishment of Corporations,*46 AMERICAN CRIMINAL LAW REVIEW 1366-1367, (2009)."

[47] AIR 1987 SC 1086

[48] Id

should be the amount of compensation for the damage caused by an accident in doing hazardous or essentially dangerous activity by the enterprise.[49]

First time the Supreme Court evolved the principle of absolute liability which was based on the principle strict liability of common law in order to examine the hazardous activities of such enterprises in today's world. Under the civil law principle of compensation for the harm done, there is also a component of prevention that provides for the payment of compensation up to the extent of the enterprise's ability. Therefore, even if it is presumed that responsibility is a component of civil law, it somehow helps the criminal aim. In various laws, like the National Green Tribunal Act of 2010 and the Civil responsibility for Nuclear Damage Act of 2010, where corporations can also be held accountable, the no fault principle of responsibility has also obtained legal support.[50]

Generally the provisions of Indian Penal Code, 1860 regulate the penal liabilities in India. The Court generally considers this statute in cases of criminal liability of corporation.[51]A corporation plays a critical part in practically everyone's everyday life as well as in the development and management of businesses. Because of this, the majority of contemporary criminal law systems allow for the potential of holding a company legally accountable for the commission of a crime.[52]

Numerous factories and plants have been built by businesses and undertakings in India as a result of the necessity for the industrial sector to flourish. Various industries amongst these are engaged in activities such as hazardous or dangerous which are harmful to the lives, health, and safety of an individual working in such industries or to any individual who is residing nearby that industry. There are various laws available to regulate the working of such industries but there is not specific or special legislation which deals with the provisions of compensation or any damages to an individual resides nearby that industry[53].

Since the several companies Acts have been based on English Acts therefore the origin of company Law in India can be find in English company law[54]. In 1850 the first legislature was passed regarding the registration of joint stock companies which was based on English Companies Act, 1844. The old Act identifies company as a separate legal entity but the concept of corporate criminal liability was not mentioned under the old companies Act, 1850. Later the concept of corporate criminal liability is mentioned under the companies Act, 1857, which was based on the lines of English Companies Act,1856. Earlier the concept of criminal liability clause does not include Banking companies but later it brought banking companies as well under the concept of corporate criminal liability in 1858. The companies Act has been replaced several times now the companies Act, 1956 has been replaced by Act of 2013.

### 3.2 Corporate Criminal Liability: Pre-Standard Chartered Bank Case Law

Till this case the courts were of observation that corporations cannot be held liable for offense which requires the element of mens rea because these corporations cannot possess mens rea. Mens rea is an essential element for offences which provide imprisonment or other penalties for its violation. Earlier in many decisions the Indian court had held that corporation cannot not be held liable for offences which necessarily provides for punishment of imprisonment because such corporations cannot be imprisoned.

In **A. K. Khosla v. S. Venkatesan**[55] , fraud was committed by two corporations under the IPC. The magistrate gives order for prosecution against these corporations. But the court does not allow this prosecution because it said in order to prosecute corporation there are two pre-requirement which has to be fulfilled .i.e mens rea and imprisonment.[56]Further the court said that it is not necessary that corporate have mens rea at the time of doing offences and it is not also possible to imprisoned it because it has no physical body.

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[49] Id

[50] sec 24

[51]"Indian Penal Code, 45 of 1860, Sec.11: The word "Person" includes any Company or Association or body of persons, whether incorporated or not."

[52]"Thiyagarajan& T. Sivanathan, Corporate Criminal-concept, http://www.manupatra.com/Articles.

[53] Singh.K.N.J, in Charan Lal Sahu v. Union of India, AIR 1990 SC 1480."

[54]*Supra* note 23, at 7

[55]"(1992) Cr.L.J. 1448

[56]*Id*

There is another case, **Zee Tele films Ltd. v. Sahara India Co. Corp. Ltd**.[57], the Supreme Court dismissed a complaint under section 500 and said that mens rea which is the important element to commit the crime of defamation and that company cannot have mens rea.In another decision, Motorola Inc. v. Union of India, Bombay High dismissed the proceedings under cheating against the companies and stated that it is impossible for a company to create the necessary mens rea, which is the crucial part of the offence. As a result, the corporation is exempt from liability under section 420 of the IPC.

**STANDARD CHARTERED BANK AND ORS. V. DIRECTORATE OF ENFORCEMENT**[58]

This is the landmark case where the bank faces the charges against the violations of certain sections[59] the Supreme Court overruled all the earlier decision and all the previous principles.The supreme court after observing the view of different high courts in various decisions and also after referring the old judgment **United States v. Union Supply**[60]came to the conclusion that the criminal liability is also recognized by the Supreme Court and said that there is no question that whether a company can be held liable and convicted for criminal offences or not. Earlier the establishment was that corporations cannot do crime because the corporations are incapable of doing crime which involves element of malicious intention, even though the agent of corporation has done criminal act.

**3.3 Corporate Criminal Liability: Post-Standard Chartered Bank Case.**

The fact that a company is being investigated for an offence for which a mandatory jail sentence is stipulated does not provide them immunity from prosecution. The Supreme Court considers the legislation that is in effect in America and England on the issue of whether a business may be prosecuted for criminal actions that entail mens rea in '**Iridium India Telecom Ltd. v. Motorola Incorporated'.**

The courts of England have categorically rejected the claim that a corporation cannot commit a crime requiring an element of intention that resulted from an act of will requiring state of mind, according to the court's examination. This point of view has been disproved, and the idea of attribution and imputation has taken its place. In other words, the firm will be attributed with the "alter ego" of the individual or group of people in charge of or running the business.

**'Bolton (HL) (Engg) Co. Ltd. v. T.J. Graham & Sons Ltd.'** and '**Tesco Supermarkets Ltd. v. Nattras'** were two additional cases from English courts that the Supreme Court also looked at, concluding that "it is clear from above judgements that a corporation is almost in a same position as any person and can be convicted under common law and also under penal laws that require the element of mens rea." Any corporation would be held criminally liable if an individual or group of individuals committed any crime while conducting business on behalf of that corporation.When this happens, it's critical to understand whether the amount of influence and control held by the person or group of people is sufficient for the company to be considered to think and act through them. Canada holds the same place. Using the 'alter ego' of the firm as a guideline, companies are accused of having mens rea.

Indian penal code, 1960 contains most of penal laws. Further section 27[61] provides that if any offence is committed by any company then every person who was in charge at the commissioning of crime will be responsible to the company for the act of business of the company and such company shall be held guilty of such offence and necessary proceeding will be conducted against that company and can also be punished.[62] But this provision will not apply in a case where any person is able proves that the committed offence was done without the knowledge of that person or else that person has taken all reasonable precautions to avoid the happening of offence.

In the case of **K.K. Ahuja v. V.K. Vohra**, the Supreme Court expressed the following opinion: "It is apparent that a person who can be deemed vicariously liable...is a person who is responsible to the company for the conduct of the company's business and in addition is also in charge of the business of the company. Many directors and secretaries might not be involved in the company's operations at all. A person may be an officer who may be in charge

[57] (2001) 3 Recent Criminal Reports 292
[58] (2005) 4 SCC 530"
[59]Foreign Exchange Regulation Act, 1973.
[60] 215 U.S. 50 (1909)
[61] Security Exchange Board of India Act, 1992 (SEBI)
[62]*Id*

of the business but may not be in overall charge of the business, or a director who belongs to the group of people making the policy followed by the company but may not be in charge of the business of the company.

In **Sunil Bharti Mittal v. CBI**[63]supreme court after relying on the above decision held that an individual who has executed the offence on behalf of the company will be the accused along with the company with a condition that there should be enough evidence that such individual has active role including criminal intention. Secondly an individual can be held liable in those cases where the provision itself specifically provides for vicarious liability of any individual.[64] But there are some cases in which the directors of the company cannot be vicariously liable even though the crime has committed by company in absence of specific provision.

With the view that the special court had improperly used the "Alter Ego" theory, the Supreme Court overturned the summonses sent to the directors. In these circumstances, the question of how the complaint against the companies may be upheld in the absence of the infraction being proven to have been committed by a person or group of people in charge of its activities, especially where the offence calls for mens rea, still persists.

**3.4 Corporate Sentencing Policy in India**

According to section 11 of the Indian Penal Code, 1860, any company, association, or group of people, whether or not they are incorporated, is considered a "person" for purposes of criminal responsibility in India. Also acknowledged as a separate entity by the judiciary is the criminality of companies. However, there is a lack of a specific corporate sentencing policy that is acceptable. When the criminal law solely calls for "imprisonment" or "imprisonment and fine," the courts have had a tough time imposing punishment on corporations. Is it permissible for the courts to disregard a legislatively mandated sentence of imprisonment? The following proposal was made by the Indian Law Commission in its 41st Report:

"Since a company cannot be put in jail, the closest thing to the only penalty that can be imposed on it for breaking the law is a fine. A problem will arise if the penal code under which a company is to be tried does not include a fine as a possible punishment. As a learned author put it so well: "Where the only punishment which the court may impose is death, penal servitude, imprisonment or whipping, or a punishment which is otherwise inappropriate to a body corporate, such as a declaration that the offender is a rogue and a vagabond, the court will not stultify itself by commencing a trial in which, if verdict of guilt is returned, no effective order by way of sentence can be made."

Again, the Law Commission of India in its 47th Report recommended as under:

Prison time is required under several of the Acts that deal with economic crimes. This clause becomes problematic when the guilty party is a company, hence it is important to include a clause stating the court should have the authority to impose a fine in such circumstances. However, it is likely to happen more frequently in the case of economic legislation. This issue can also emerge under the Penal Code.

A proposed Indian Penal Code (Amendment) Bill, 1972, was presented to the Parliament on the basis of the Law Commission of India's aforementioned suggestion. The following is how the Bill's provision 72(a)(1) was written:

(1) The court has the authority to impose a fine only in cases where the offender is a corporation and is subject to both a fine and an imprisonment penalty.

Given the aforementioned development, the Supreme Court ruled in the Velliappa Textiles case that the firm could not be physically punished or sentenced to a period of jail since it is an artificial person. According to the court, it is not an issue when the law only calls for a fine or an infraction to be punished by incarceration, but when both punishments are called for by the law, the court is not allowed to impose a fine instead of an infraction. The court made its decision, which was based largely on two arguments, that a prosecution against a business of this nature is not justifiable since the company, as a legal person, cannot be imprisoned. It will be equivalent to creating a casus omissus if the legitimacy of such a prosecution is upheld, and a criminal act must be strictly applied.

The Court decided without citing any case law or authorities that it is challenging to replace a fine for jail in the absence of a change in the legislation. The Court took note of the changes in law made by various foreign nations regarding the substitution of

[63] (2015) 4 SC 609 at p. 637 para 40.

[64] (2015) 4 SCC 609

a fine in lieu of imprisonment in cases of corporate criminal culpability. As a result, the court decided by a vote of two judges that a firm cannot be sued if a fine is required by law.

## Chapter IV- CORPORATE CRIMINAL LIABILITY INTERNATIONAL PERSPECTIVE

### 4.1 Corporate criminal liability in the United Kingdom.

The power of Roman law was stated to the world by its execution but it was rejected when the Roman law system was overtook by the common law system. The tribes chooses to make the law different from the Roman law when they come together to establish common legal system. These tribes focus to develop law on the basis of interpretation of courts and legislative enactment.In English legal system the concept of corporate criminal liability of corporation has been accepted and executed after the passing the long traditional path.[65]

In the beginning the concept of corporate criminal liability was not accepted by English law due to several reasons.[66] First the existence of corporation and businesses were too be considered only in the eyes of law and imaginary and Second the artificial person or corporations does not have the power to do act beyond the power given under their constitution.[67] The legal thinker believed that these corporations does not have physical existence because of which they do not posses guilty mind or the element of mens rea, which is necessary to punish and held such corporation liable.[68]

In 1864 Chief Justice Holt decided in a case that the corporations could not be held criminally liable, but their members could be.[69]Earlier these corporations and entities were very few in number and these corporations used to incorporate by order of the crown. These corporation were does not interfere in the lives of people and their work was mainly related with the crown.

It was only in the beginning of the 17th century that corporations started to involve machine instead of man labour and the existence of these corporations became more important and common. As the socio economics roles of these corporation increases in the form of buyer-seller-worker bonds, they started to develop connections with the lives of people. This creates the need for regulation and punishing the corporation for the misconduct and from here misconduct of corporations were recognized. During this period also the corporations were considered to be separate legal entity in eyes of law which held separate entity different from the member of the corporations.[70]

#### 4.1.1 Development as Vicarious Criminal Liability

In 1840 the first step was taken by the court regarding the growth of corporate criminal liability was that court began to impose criminal liability upon the companies under the strict liability principle.[71] Lord Bowen based on the opinion of Justice Holt introduced the concept of corporate criminal liability in English law to hold corporation liable for any misconduct.[72]He adapted this idea from the tort law theory of vicarious liability, under which corporations can be punished for the crime of public nuisance. This was a significant step by the courts, who imposed the rules of vicarious liability on the corporation in those situations where a natural person can be held vicariously liable.[73]

Another significant step was made in 1944 when the English court, in three precedent-setting decisions, defined that the presence of mens rea on the part of agents or employees would be a necessary condition for imposing direct corporate criminal culpability. Though these decisions of courts helps a lot in growth of concept of corporate criminal liability of corporations but the rules of punishment and implications were still unclear and not define because the element of mens rea and guilty mind were still not easily applicable to companies.

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[65]C. Harding, "Criminal Liability of Corporations-United Kingdom", La Criminalisation du Comportament Collect if: Criminal Liability of Corporations 369 at p. 382

[66] Id

[67] Id

[68] Anca Iulia Pop, Crimina Liability of Corporations-Comparative Jurisprudence (dissertation) Michigan State university College of Law, 2006

[69] Id

[70] James G. Stewart, "A Pragmatic Critique of Corporate Criminal Theory: Atrocity, Commerce and Accountability", A paper presented at the University of Toronto Workshop on Corporate Criminal Liability, 2012.

[71] Regina v. Birmingham & Gloucester R. R. Co., (1842) 3 Q. B. 223

[72] Regina v. Tyler, 173 Eng. Rep. 643

[73] Regina v. Stephens, (1866) L.R. 1 Q.B. 702

**4.1.2 Recognition of Alter Ego Doctrine**

In 1972[74] the above issues were clarified through various cases where court in order to make corporations criminally liable uses the doctrine of Alter Ego which is commonly established principle under the civil law. This theory of Alter ego was borrowed and developed in the shape of identification theory by various courts where shareholders were held Alter Ego of the company or in other words company can be identified through the actions of its share holders.[75]The comparison between a corporation and several other people, such as a human body, shows that there are multiple people that represent the different organs and functions of a legal person (for instance, the directors and managers stand in for the corporation's brain, intelligence, and will). Additionally, they said that the firm managers reflected the corporations' will. Later, this idea was rejected, and adjustments were made.[76]

**4.1.3 Doctrine of Identification**

In the 1940 in order to determine whether the companies were directly liable for offences done by its employee the court bring many cases under under statutory offence provisions from the then-current model of vicarious liability. In 1971 in **Tesco Supermarkets Ltd v. Nattrass (Tesco)**[77]the House of Lords decided and cleared that corporations can be made directly liable for the wrongful act done by the person who has enough power to frame the companies mind and will.

The Privy Council ruled in Meridian Global Funds Management Asia Ltd v. Security Commission that, in circumstances of statutory offences, the wording of the act should be used to identify the individual whose state of mind would serve as a proxy for the corporation's state of mind. Therefore, in order to identify these individuals, it is crucial to conduct a thorough investigation to determine if they are legally permitted to deem their actions to be those of the corporation.

**4.2 Corporate criminal liability in United States of America.**

The concept of corporate criminal liability was accepted and applied in many countries like United States of America and Canada along with England. These countries were the first one to face the industrial revolution and hence they were the first one to observe the threat of corporate wrong in terms of the injury they could cause.The English courts first punished businesses in somewhat various ways, but it was only at this point that they began to use the criminal law idea of culpability and began dismissing businesses that disobeyed the law.[78]

In the beginning the system of courts in determining the corporate criminal liability in the United States were similar to that of courts of England with regard to corporate criminal liability were parallel to that of the English courts. But after some time these courts diverted from the system of court of England. In the beginning in order to include element of mens rea in criminal offences, certain courts of Americabegan to enlarge the concept of corporate criminal liability, this thing was established by in case of **New York Central & Hudson River Railroad Company v. U.S.**[79]

After this case an Elkins Act was passed by congress, according to which if any act or omission is done by the employees within its course of employment then that act or omission will be considered to be of that corporation of which he is an employee, thus this Act give rise to the concept of vicarious liability.[80]Although the Supreme Court deals with the caseswhich are related to statutory offences, the lower courts quickly expanded the scope of criminal offences in common Law as well[81].

**4.2.1 Application of Principles of Corporate Criminal Liability by the Federal Courts**

Industrial revolution had played a very important role in developing the concept of corporate criminal liability. In federal law the concept of corporate criminal liability was based on respondeat superiorwhich had developed under the support of tort law. Corporate prosecution is generally controlled by the federal law and federal suits are greater in number and also important as compared to state prosecution. In the 20$^{th}$century this doctrine of corporate criminal liability was applied when the federal law was expanded by congress in the federal system; this was done because of existence of extraordinary centralized economic power in

[74] Tesco Supermarkets Ltd. v. Natrass [1972] A.C. 153

[75] Supra note 57

[76] Anca Luila Pop ,*Criminal Liability of Corporations- Comparative Jurisprudence*, MSU College of Law,(2006)

[77] [1972] 1 AC 153

[78] Coffee, No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. Rev. 386 (1981)

[79] New York Central & Hudson River Railroad Company v. U.S., 212 U.S. 481 (1909).

[80]Guy Stessens wrote Corporate Criminal Liability: A Comparative Perspective for the 43rd International and Comparative Law Quarterly, which was published in July 1994.

[81]*Id*

combinations and corporation of concerned business and also the harmful effect to public health and safety. A utilitarian and practical view of criminal law was there in the starting development of the doctrine and the use of its doctrine.[82]

Prior to the civil war there rate of federal crime was less in number and also these federal crimes does not conflict with the state criminal jurisdiction. A federal government was established by constitution of United States and the powers delegated to it were very limited and the matters granted to the central government were restricted to federal authority.[83]According to the constitution, the federal government was only given the authority to deal with four types of crimes: treason, forgery, crimes against international law, and crimes committed on the high seas, such as piracy. The constitution also granted the congress extra authority to enact legislation that are required to carry out the assigned functions. Because the federal government's programmes and operations were few in number and its powers were limited by a limited number of laws. General police authority, on the other hand, as well as the majority of the criminal code, were reserved for the States.[84]

As a result of the Civil War, the Congress broadened the scope of federal criminal law.[85]In beginning the federal statues were relatively narrow like transportation of explosive was made federal crime and cattle with contagious diseases in interstate commerce. In 19th century the congress by using its authority enacted legislation with the aim to control and handle activities which are anticompetitive which restrict the interstate commerce. This was a major step in identifying the malice from the operations of the companies.

In 1887 the congress passes the first federal law i.e. the Interstate Commerce Commission Act of 1887,[86] this was passed to regulate private industrial sector and also to regulate railway industry. This Act talks about the just and reasonable43 Rate and also talks about the prohibition of price discrimination against small markets and interstate Commerce Commission was also established. The Sharman Act was enacted to ban monopoly and conspiracies to restrict commerce.[87]

In the beginning of 1891, ICC made an appeal to congress to enact the law which creates criminal liability of individuals with corporate criminal liability. The Act of 1887 was failed because it does not provide punishment for corporations for criminal offences, this was the argument given by ICC and appealed for the immediate correction.

On the other side the claim of New York centrals was rejected by the majority in Supreme Court stating that it is unconstitutional to impose criminal liability because if it is done then innocent share holders will be punished without due process.[88] The court relied on the statement of Blackstone that a corporation cannot commit a crime and stated that corporate criminal liability was accepted by the modern authority.

Further the court stated that it is difficult to impose corporate criminal liability and rejected the claim that there was a barrier to this essential Enactment. Prior to 1900, it appeared that corporate criminal responsibility was the sole remaining option for addressing both the demand for public enforcement and the demand for corporate criminal accountability. Both the Elkins Act of 1887 and the Sherman Antitrust Act of 1890 were passed about the same time. The Sherman Antitrust Act was the first federal law to impose restrictions on cartels and monopolies.[89]

Though the congress of United State does not adopted it but various other state have executed it in a very confined form based on model penal code[90], along with certain exceptions and also the concept of respondeat superior was rejected by American Law Institute but kept the narrow role for corporate criminal liability.[91]

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[82] Sara Sun Beale, "The Development and Evolution of the U.S. Law of Corporate Criminal Liability," A version of this paper was presented at the German Conference on Comparative Law, Marburg Germany, September 2013, and a German version published in Zeitschrift für die gesamte Strafrechtswissenschaf,2014

[83] *Id*

[84] *Supra* note 86.

[85] Sara Sun Beale, "Federal Criminal Jurisdiction", Encyclopedia of Crime and Justice, Joshua Dressler et al. eds., 2d ed. (2002), pp. 695-696.

[86] The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379

[87] The Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, codified as 15 U.S.C. §§ 1-7 (2006)

[88] *Id*

[89] Id, § 8 (defining "person" to include U.S. corporations and associations).

[90] "Model Penal Code § 2.07 cmt. 2(a) nn.6 & 7 lists state laws that adopt various features of the proposed Code or are similar to the proposed code. The research reflected in the Commentary ended in 1979."

[91] "The Code permits the imposition of liability on the basis of respondeat superior if the offense is one outside the Model Code and "a legislative purpose to impose liability on corporations plainly appears." Model Penal" "Code § 2.07(1)(a). Liability may

**4.3 Corporate criminal liability in other countries**.

In the present scenario the corporations or entities cannot be governed by the old system. Therefore they need a complex structure of administration which includes governing bodies the boards, the trust, functioning and operation.At the world level the trade and commerce is enhanced by the liberalized economic policies and globalization. The corporation reached at the national as well as international level through mergers and acquisition to expand their size and competency. Till now large International Corporation has gained more power as compared to other nation states. Excessive power to corporation has given rise to practices which are unlawful and unethical in nature.

Till now it is the major challenge in criminal legal system those national and international corporations are getting involved in crimes and therefore it gives a rise to a major question .i.e liability of such corporations. The globalisation of crime in today's world makes it more important for countries to work together in judicial and administrative matters and to provide each other with mutual support. But there is a significant difference between the many legal systems that different nations throughout the world have created.

While some countries of the world does not follow this concept of corporate criminal liability but there are those countries also who still believe in statue and other regulatory provisions to determine the concept of corporate criminal liability. Countries which does not follow this concept thinks that criminal law cannot provide solutions to the problem that are created by corporations. These countries go by the concept that corporations are fictions and the theory of ultra virus and reject the fact that criminal wrong can be done by the corporation.

If we discuss corporate criminal culpability in other nations, we will find that each nation has its own conception of the issue. According to the societas delinquere non potest principle, which states that businesses cannot be held accountable for criminal wrongs, this idea is established in Germany. They cite the absence of the human element and the fact that actions like accepting bribes and handling finances are not to be regarded as acts of the firm as a whole as the justification for their argument.[92]

However, Germany has created a complex system of administrative penalties that includes clauses addressing corporate criminal culpability. Administrative bodies are in charge of issuing these alleged Ordnungswidrigkeiten.[93].

In Australian legislation concept of corporate criminal liability is adopted and they have the procedure of sanctioning criminal offences which is quite high[94] and director's criminal liability is also introduced under American legislation. In the beginning of 1970 countries all over Western Europe started accepting and expanding the concept of corporate criminal liability instead of contracting or abolishing it[95].

Before French revolution the concept of corporate criminal liability was not adopted by the France but this concept was adopted under New Code Penal of 1992 in which this concept was specifically mentioned in section 121(2)[96]. The dispute about not including corporate criminal liability under criminal code had increased over the years but the "Conseil Constitutional" in 1992 cleared that imposition of fine is not prohibited under French Constitution[97].

In Japan Corporate criminal liability is a fundamental part. They have more than 700 criminal provisions alone at the national level, under which they punish corporations rather than individuals and this figure will increase in future. Even though china got its first code in 1979.There are other international documents in which the existence of concept of corporate criminal liability can be seen. This topic has been discussed at several conferences since the conclusion of World War II.

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also be imposed whenever "offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law." § 2.07(1)(b)"

[92] "Konstantin Zens, Susan Watson, Enforcement instruments in transnational corporate bribery: an overview, International Company and Competition Law Review 271(2012) , www.westlaw.com."

[93] "Markus Wagner," Corporate Criminal Liability National and International Responses", Background Paper for the International Society for the Reform of Criminal Law 13th International Conference Commercial and Financial Fraud: A Comparative Perspective Malta, 8-12 July 1999,http://www.icclr.law.ubc.ca/publications /reports/corporatecriminal.pdf"

[94]*Supra* note 88 at 279

[95] Thomas Weigend , Soecietas delinquere no potest? A German Perspective, 6 J. INT'L CRIM. JUST. 927, 928 (2008) (noting quick spread of corporate criminal liability to the Netherlands, Switzerland, Austria, and Italy) available at http://www.law.yale.edu /documents/pdf/cbl/Beale_paper.pdf.

[96]*Supra* note 89 at p.5

[97] Stessens, Guy., Corporate Criminal Liability: A Comparative Perspective, 43International and Comparative Law Quarterly, July 1994, p.501

Various international papers also make note of the idea of corporate criminal culpability. Since the end of World War II, the same topics have been covered in a number of conferences.[98]

**4.3.1 Theories in corporate criminal liability**

**Agency Theory**

The agency theory was initially created in the context of tort law, and it was progressively applied to criminal proceedings. In accordance with this view, a company is responsible for the intentions and deeds of its personnel.

In the US, the concept of vicarious culpability, also known as respondeat superior, is widely used.

This approach is only loosely established in certain other jurisdictions in connection to some strict liability and hybrid offences that deal with things like pollution, food, drugs, health and safety at work, but not with offences involving mens rea.[99]

The basis of the agency hypothesis is that acts reus and mens rea are often required for a criminal offence. The only method to attribute intent to a corporation—which is thought of as being totally incorporeal—is to take into account the state of mind of its employees because corporations are not thought to possess any mental states. According to the notion, if a company does not have intention, then someone within the corporation must have it, and the intention of this person as a member of the corporation is the intention of the corporation itself. This technique is straightforward and logical, and it is used to assign blame to a corporate offender.

First, the employee needs to be acting legally and legitimately in the course of his work. Second, the employee must be operating, at least in part, in the corporation's best interests; nonetheless, it is irrelevant whether the firm really reaps the rewards or whether the conduct may have even been explicitly forbidden. Thirdly, the company must bear responsibility for the deed and its objective.[100]

**Identification Theory:**

The conventional means by which businesses are held accountable under the common law principles in the majority of nations is the notion of identity. A direct responsibility theory was developed in response to the agency theory's drawbacks. The identification theory, a model of main corporate criminal culpability for actions requiring mens rea, was developed by Viscount Haldane in Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd.

**In the light of Haldane's judgment:**

An abstraction would be a company. The latter, however, modifies these principles to take into account the realities of corporate wrongdoing, whereas the earlier theory just mimics tort principles. The identification theory also presents the corporate entity as a person. The assumption is that the individual employee is operating on behalf of the firm rather than for the company, in contrast to the agency hypothesis. The necessity of developing vicarious responsibility was downplayed by the idea. Currently, the agency theory is viewed as unfair and lacking a valid justification for the criminal justice system.

**Aggregation Theory:**

The corporate internal organisation has changed and grown during the last few decades. A definite, pyramid-like hierarchical structure of authority and power is no longer present in large modern organisations. It may be very difficult to identify the person who is accountable for an act whose goal might be attributed to the organisation as a whole when authority and influences are greatly diffused within the environment of a business.

The agency and identification concept, as well as the aggregation hypothesis, are all based on analogies to tort law. According to the aggregation theory, the company will calculate culpability based on the combined knowledge of all of its officials. The corporation totals up all the deeds and thought processes of the significant or pertinent individuals inside the organisation to determine whether they would constitute a crime taken as a whole if they had been done by a single individual. According to Celia

[98] ETS No. 172. Council of Europe. Convention on the Protection of the Environment through Criminal Law. 4 November 1998. available at http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm accessed on 19th Nov, 2012.

[99] Harvey L. Pitt, and Karl A Groskaufmanis., "Minimizing Corporate Civil and Criminal Liability: A second Look at Corporate Codes of Conduct (1990), 78 The Georgetown Law Journal 1560.

[100] United States v. One Parcel of Land, 965 F. 2d 311, 316 (7th Cir. 1992) (stating agent's knowledge of illegal act may be imputed to corporation if agent was "acting as authorized and motivated at least in part by an intent to benefit the corporation [citing Zero v. United States, 459 U.S. 991 (1982)].

Wells, the accumulation of employee knowledge implies that a company's culpability does not have to depend on every person meeting the necessary culpability requirements.[101]

The work of American Federal Courts led to the development of the aggregation theory. The most prominent case is United States v. Bank of New England, in which the bank was held guilty of failing to file CTRs (currency transactions reports) for cash withdrawals over $10,000. Between May 1983 and July 1984, the customer withdrew 31 times on different dates. Each time, he utilised multiple checks, none of which totaled $10,000 and each for a lesser amount than the needed total. On the Bank's settlement sheets, each cheque was recorded individually as a single item. After the checks were processed, the customer would get a single transfer from the teller that invariably included a lump quantity of cash worth more than $10,000. The money was taken from one account on each occasion that was charged. No CTRs were submitted by the Bank for any of these transactions. The teller received each bunch of checks at a separate time and from a different source.

In this instance, the question was whether the corporate entity had any knowledge or intent. The trial judge concluded that the communal knowledge model was completely suitable in such a situation and further emphasised as much, but you must consider the bank as an institution. As a result, its expertise is the culmination of the knowledge of all of its personnel. throughout other words, the bank's knowledge is the sum total of all that every employee understood throughout the course of their job.

Therefore, even if multiple checks are used, if it is determined that an employee knew that the reports had to be filed while acting in the course of his employment, the bank will be presumed to have known about it if each of the multiple employees knew a portion of the requirement and the total of what the various employees knew amounted to the knowledge that such a requirement existed. The proponents of collective knowledge argue that a corporation's compartmentalised structure shouldn't prevent the establishment of the knowledge of the organisation as a whole since it is difficult to demonstrate knowledge and willfulness there. These viewpoints argue that in order for collective knowledge to arise, it is not necessary for one element to be aware of the intentions and actions of another.[102]

## Chapter V -FRAUDS IN THE CORPORATE SECTOR

### 5.1 BCCI the rogue corporate.

The information technology revolution and the effects of globalisation have given criminals virtually nothing to worry about in terms of restrictions. The emergence and fall of the Bank of Credit and Commerce International (BCCI) serves as a very effective illustration of this. Agha Hasan Abedi, the organization's evil genius creator, moved to Pakistan following Partition despite being born in the Indian state of UP. He eventually established a commercial bank there called United Bank Ltd, which flourished until Zulfikar Ali Bhutto nationalised it in 1972. Abedi, though, resisted switching careers. Rather than the Pakistani national borders, he opted for an international platform. He came to understand that the offshore banking industry, which is not regulated by a central bank, offered him a vast array of prospects. His potential and the features of the banking industry were entirely uncontrolled. Any earlier expert on contemporary banking, from Walter Bagehot to RS Sayers, could not even have predicted the features of this wholly uncontrolled financial environment.

The BCCI was launched by Abedi with merely $2.5 million in initial funding from the Bank of America, despite the majority of its senior officials worked out of the organization's head office in London. The BCCI's two primary arms were incorporated in Luxembourg and the Cayman Islands. Within less than two decades, it had grown to be one of the biggest privately held financial institutions in the world, with assets of $ 20 billion and branches in as many as 72 countries. It developed without any setbacks and at breakneck speed. It had a core of 3,000 consumers throughout the world, the most of them were dishonest and shady, but there were also some thoughtless and honest people. Leaders in business and politics throughout the world were also among its clients.[103]

His desire for high profits helped him successfully invade the Soviet Union and China, where he established the first western-style bank to be authorised to conduct business on the Chinese mainland. Abedi presented himself as an advocate for the Islamic world in general and for Third World nations in particular. He travelled and interacted with various leaders, including those of Islamic nations and other developing nations in general. As he travelled and interacted with the leaders of the developing world, he made

[101] CELIA WELLS, CORPORATIONS and Criminal Responsibility 156, (2nd ed. Oxford: Oxford University Press, 2001)
[102] *Id*
[103] 65 Long, Robert Emmet, Banking scandals : the S&Ls and BCCI / edited by Robert Emmet Long 109 122(3ed.1993)s

an effort to persuade them of the need of assisting and bolstering the BCCI, which would then enable them to satisfy their demands for both cash and contemporary technology. By stealing billions for their wealthy and corrupt governing classes, the bank was thriving in its own right.[104]

Because the majority of the transactions and activities were carefully hidden, the BCCI's operations were not the subject of any suspicion until the early 1980s. Only after that were all morals and caution abandoned, and as a result, BCCI was plunged into crisis after crisis. Its greed drove it to get involved in the drug trade, money laundering, and brokering both legitimate and criminal arms deals.

The CIA was well aware of the bank's covert and open operations, but it chose to remain silent because it had amassed substantial funds at the bank's various branches and was using the bank's office in Pakistan as a conduit for millions of dollars in covert US aid to the Mujahedin, which was ostensibly supporting the Afghan government supported by the Soviet Union.[105]

The bank maintained connections with various despotic leaders from throughout the world, including the CIA, the ISI, and terrorists, arms dealers, drug traffickers, and drug runners. As a cover, it exploited Islam. Everyone was reportedly amazed by its effectiveness, from Khashoggi to Noriega to the CIA. Noriega suggested its services to a US drug cartel that was frantically trying to launder ill-gotten money and had placed at least $ 33 million there. Former Peruvian President Alan Garcia stole money from the country's coffers by using the country's panama branch. And the BCCI itself robbed little, unsuspecting depositors from Bangladesh to sub-Saharan Africa who were living in the Third World. Even the central banks of Nigeria and Zambia were persuaded to maintain their money with it, which caused them to incur significant losses when the bank failed.

**5.1.1 Iridium Indian Telecom Ltd. v. Motorola Incorporated & Ors (AIR 2011 SC 20, [2010] 160 Comp Case 147).**

In this case the question before the Supreme Court for the first time was whether corporation can be punished in criminal cases or not. The contentions wereraised by the plaintiff was of cheating and criminal conspiracy. The proceeding was started in by magistrate in Pune. Motorola moved to Bombay high court against this proceeding and high court passes the order to quash the proceeding by giving various reasons, one of which was that corporation was not capable of doing the offence of cheating because it does not have any mind. According to the High Court though corporation can be a sufferer of fraud or dishonesty, yet it cannot be the executor of fraud or dishonesty and also said that only human is capable of doing the crime of cheating because they have mind.

But when defendant aggrieved by the high court decision reached before the Apex court, the Supreme Court rejected the findings of High court and said that even corporations can be held liable for the offence of cheating and conspiracy under Indian Penal Code. The corporations are not limited to be made liable to certain Acts such as Income Tax Act, the Essential Commodities Act, and the Prevention of Food Adulteration Act. There are other various Acts also under which these corporations can also be made liable for prosecution, conviction and sentence.

The Supreme Court passes the order for continuation of proceeding before magistrate and also said that corporations cannot be exempted from criminal prosecution by taking the argument that corporation are not capable to possess the mens rea which is necessary for doing criminal offences.

In U.S and IN England the legal position has now changed .i.e there not any option of doubt left that corporation cannot not be liable for crimes which require mens rea. The Supreme Court further stated the legal position on two grounds which are as follows

The scope of High Court's jurisdiction under section 482[106]of criminal procedure code to quash the criminal proceedings and

The fact that corporations can be criminally prosecuted for offences which involve mens rea.

Supreme Court simply stated the principles which were laid down in the case of **Standard Chartered Bank v. Directorate of Enoforcement.**[107]

The Supreme court did not went on to discuss the other important points of the case which were related to the corporation's liability for wrong statement or non disclosure on an information memorandum which is published in relation with securities offering. This could be the subject matter of prosecution that continued and Supreme Court had given green signal.

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[104]Gurwin, Larry, False Profits: The Inside Story of BCCI, The World's Most Corrupt Financial Empire, Houghton Mifflin

[105] Id

[106] Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

[107] (2005) 4 SCC 530

The criminal complaint which was filed by plaintiff contains charges of cheating under section 420[108] R/W section 120B[109] under Indian Penal Code, 1860. The contention of the plaintiff was that Motorola which is the defendant in this case entered into a contract with the plaintiff .i.e. iridium system/project for raising funds or investment for the plaintiff company.

The project was represented as being the world's first commercial system designed to provide global digital hand held telephone data and it was intended to be a wireless communication system through a constellation of 66 satellites in low orbit to provide digital service to mobile phone and other subscriber equipment locally. Based on the information provided in PPMvarious financial institutions invested their money. But it was contended that the representations were wrong and that the project crooked out to be commercially unavailable therefore it results in a huge loss to investors

The facts of the case provide the basis for potentially interesting legal issues

Firstly, it is notable that complaint was filed under sections of Indian Penal Code and not under any other specific corporate or securities legislation. It can be maintainable because the PPM does not relate to public offering share and therefore the relevant sections were not attracted. The specific transaction appears to fall within private capabilities; as a result, it is controlled by contracts as opposed to rules governing public securities. Whether the broad charges of fraud and conspiracy to issue corporate securities would be advantageous to the plaintiff or respondent is still up in the air.

Secondly the defendant depends on the huge risk which in involved and refusal in PPM as a defense against criminal liability. Though the High Court was convinced by the language which exists in PPM. Further Supreme Court does not give significance to risk factor till the first stage of knowing whether to allow to continue this prosecution. The validity of rejections and risk factors in PPM should be tested.

Thirdly, it is vital to consider the issue of whether seasoned investors, such as financial institutions, would be held to a higher standard while examining the possibility of issuer corporate deception.

Final judgement on the facts about whether there was genuine fraud and inducement is made by the court.i.e., if the Issuer Company acted dishonestly or fraudulently, or if it was just a terrible business decision. Despite the fact that the distinction may be extremely severe from a legal standpoint, it could not always be obvious given the circumstances.

Enron scam

On August 14, 2001, Jeff Skilling announced his resignation as CEO, citing personal reasons. Kenneth Lay was reinstated as CEO.

On October 12, 2001, the legal counsel for Arthur Anderson instructed those responsible for the audit of Enron's financial records to shred all except the most essential records.

Enron announces a third quarter loss of $618 million on October 16, 2001.

24 Oct 2001: Andrew Fastow, the CFO who oversaw several of the contentious SPEs, is replaced.

8 November 2001: The Company restated its earnings for the previous four years, which was a very rare action. It acknowledged making accounting mistakes that since 1997 had caused the income to increase by $586 million. It practically conceded that it had exaggerated its earnings by hiding loans in the intricate partnership structures.

Enron filed for Chapter 11 bankruptcy protection on December 2, 2001, and the following day sued Dynegy Corp. for $10 billion in contract violations.

On December 12th, 2001, Jo Berardino, the CEO of Anderson, testified that his company may have found evidence of Enron's involvement in unlawful activity.

A criminal inquiry is opened by the US Justice Department on January 9, 2002.

As a result, in only three months, Enron went from having assets valued at approximately £62 billion to declaring bankruptcy. From roughly $95 to less than $1, its share price fell precipitously.

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[108] Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person de-ceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

[109] Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence

**Consequences**

The new practices of business such as overstating profits and hiding debt increases the stock value of company, therefore it allows the company to take more money in terms of loan and to get bigger. It also helps the senior executive to sell their stock and earn huge profit from this. These executive were prosecuted for money laundering fraud and conspiracy and also faces several civil suits filed together by former as well as pension fund employees. It was having one accounting firm named Arthur Andersen which discloses to have documents of shredded Enron after they came to know that investigation of the corporation is going to be done by Securities and Exchange Commission. This result in conviction of Arthur Andersen and it also lost its several customers and employees and went out of the business.

**Investigation**

In 2001 after collapse of Enron it led several investigations which involve charges of various criminal activities committed by top executive of companies. In 2002 in U.S one force was formed by the justice department .i.e. Enron task force bureau of Investigation, this include team of federal prosecutor and agents of federal bureau of investigation. Soon this scam developed into a case study of corporate frauds, poor management decision and also led to the early investigation of Enron fiasco which focused on financial reporting practices of the company. Although this company was following the generally Accepted Accounting Principle, yet these practices led to false impression in the minds of people that the company was earning more profit and more secure than actually is.

The revenues which were reported by the company were actually funds flowing through intermediary transaction with associated companies and it also concealed its debts and losses and did not mentioned in company's financial statement. Hence the company was found guilty of violation of justice in June 2002. After this for the first time criminal charges were framed and case was filed against Enron's Accounting Firm .i.e. Arthur Anderson. Further the department of justice framed charges against Arthur Anderson that it had shattered defective accounting practices and also several numbers of documents which include E-copies and other things related to every dealing of Enron. It was also convicted for manipulating certain messages and also misreporting the information related to Enron

The question which was raised by different analyst was whether the Arthur Andersen can survive after the conviction. If we see the role of this accounting firm then it can be said that this company give advice to Enron for number of years, therefore it raises the question of conflict of interest. Further the department of justice had not gone with criminal indictment with officials of Enron. Various analysts say that Enron was protected by the federal government under the presidency of George Bush. Various executive was examined by senate commerce committee but no charges were framed against them.

The first criminal charge was made against Michael copper who assisted chief financial officer Andew Fastow. Michael Copper accepted the allegations for money laundering and conspiracy to do fraud. Copper drag Fastow by making contention that fastow had done several transactions as told by Enron for the advantage of third party partnership owned by fastow. After this Fatow was called by the Securities and Exchange Commission but he invoked his privilege against self incrimination. He discloses all the accounting practices which he used to do in Enron, which include various ways of not showing certain funds in the books of Enron. According to various analysts the fastow was a fall person for Enron fiasco because there were chances that other members and executive of the board were aware of these practices.

Some banking institutions were also dragged into this scam and several criminal charges were framed. These banks were charged with wire fraud for their dealings with Enron. Later it came to know through Houston Chronicle that executives of internet department were likely to be charge for insider trading money laundering and fraud. Around 12 charges were framed which were related to Enron fiasco but only 7 charges were framed against company insiders.

**5.1.2World Com Scandal**

In 2002 the largest mobile company in U.S, World com had overstated the profits by showing $3.5 million in ordinary operating expense as capital expense. This result in extending the expense over many years, because of this it showed the people that it has the larger capacity in making profit and artificially increases the value of company to meet expected earnings of Wall Street. Earlier in 1999 the stock value of world com was $60 per share and it went down by 20 % per share in reaction to the news. Employment of around 17000 employees of world com was lost. The department of justice has protected accusation against

Richard breeden who was chief financial officer for securities fund, for bank fraud and also at time of filing wrong statement in SEC. There were some other senior executive who has pleaded guilty of offence related to fraud and also give consent for prosecution. A civil suit was filed by SEC against the company.

**OUTCOME**

The outcome of this scam was that public started came to know about the fraudulent accounting practices of Enron and World com and also the reports of other corporate accounting scandal came to know in the eyes of public. In February 2002 global Crossing was caught of overstating revenue and destroying the documents in which information of accounting exist. In May 2002 three former senior executive of Tycoon International Ltd were accused of taking loan from a company by fraudulent activity and without any permission and they also not return it to bank. He also gives bonus to himself as well as to the employees without the prior permission of board of director.

After the investigation it came to know that AOL Time warner had overstates sales figure. Afterfurther investigation the company admitted that it had showed inflated revenue by $49million. There were other companies on whom the eye of department of justice was there, such as Bristol-Myers Squibb, Kmart, Qwest Communications International, and Xerox. Further in addition to corporate scandal it was found that Meven Martha Stewart was charged with allegation of selling 3,928 shares in imclone system, accordingly it make about $227824 on the basis of insider trading information that has been received from company's founder Samuel Waksal.

**5.2 LEGISLATION INVOLVED.**

The frauds which are done by corporate in corporate world are because of mismanagement in any company which put adverse effect on the country's economy and as a result it required special treatment. And because of these frauds, legislature has made certain provisions to control these frauds such as section 397 & section 398 of the companies Act, 1956, these provisions says that any member can apply to NCLT in cases of mismanagement and oppression.

Section 397 talks about of filing an application before CLT to take relief in case of oppression in following cases:

1) If any member feels that any activity which is conducted is against the interest of public or oppressive to any member of the company then it may file an application before company law tribunal to pass an order under this section. But such member must possess the right to go before the tribunal by virtue of section 399.
2) According to this subsection if tribunal is satisfied with the complaint and is of opinion that the affairs of the company are being conducted in oppressive manner to members of the company then it is on the discretion of the tribunal to pass order which it may think fit in order to end the matter.
3) The word oppression has not been defined for the purpose of section 397 and it is on the discretion of courts to give meaning to this according to the facts and should see whether there is any oppression or not. It was held in the case of **Shanti Prasad Jain v. Kalinga Tubes Ltd.**[110]

Section398[111]:Specifically talks about the filing of application before CLT in cases of management:

1) if any member thinks that the company's affairs which are taking place in company are harmful to the interest of company or if any material change has been done in the company's management which is not in the interest of such as any creditors, debenture holders, or any class of shareholders then such member can apply to tribunal to pass an order which it may think fit to bring it to an end. But such member must have right to apply before tribunal by virtue of section 399[112]
2) According to this subsection if tribunal is satisfied with the complaint and is of opinion that the affairs of the company are being conducted in oppressive manner to members of the company then it is on the discretion of the tribunal to pass order which it may think fit in order to end the matter.

[110] AIR 1965 SC 1535).
[111] The companies Act,1956.
[112] *Id*

**5.2.1 Insider Trading and Corporate Criminal Liability**

Insider trading can be defined by different definitions and suggestions and it include both legal as well as illegal activity. In everyday life insider trading takes place when insiders of corporation such as directors or employees, officers sell or buy stock within their own company in given policy limit of the company and the regulations governing this trading.In other words insider trading would mean buying and selling of security by any key head of the corporation by possession of any material or non public information about the security.

United States was the first country to deal with the concept of insider trading successfully. The Securities and Exchange Commission is having authority under Insider trading Act, 1984 by which it can impose civil penalties apart from criminal proceedings. Several countries have proper legislation to deal with the issue of insider trading.

In India the issue of Insider trading company is regulate by SEBI (insider trading) Regulations 1992 drafted under section 11 of SEBI Act, 1992. In February 2002 certain amendment were done to these regulations and a new name was given to it as SEBI 9 Prohibition of Insider trading regulation, 1992. Later these regulations got amended in November 2002

**Reason behind Prohibition of Insider Trading**

The main reason behind the prohibition of insider trading is that the securities of market can be operated smoothly and will also help in healthy growth and development of corporation, which depends on huge expand on quality and market's integrity. Investor will get confidence to invest if they get this type of market. Insider trading will lead to reduction of confidence amongst investor in securities market because they will feel that market is equipped by the key executive and only those key executive will get huge profit by investment who is possessing material information or non public information. The "level playing field" is thus tainted by the insider trading practise. Thus, it is necessary to outlaw insider trading in order to preserve investors' faith in the fairness of the securities market.

**Samir C Arora Vs SEBI[113]**

The court in this instance found that the SEBI Act of 1992 and its implementing rules severely disapprove of acts like insider trading, fraudulent trade practises, and professional misconduct since they are wholly detrimental to the interests of regular investors.

**Meaning and definition of insider trading.**

**Insider**

According to the Regulations, someone is deemed to be a "insider" if they are, were, or are presumed to have been associated with the company and can be presumed to have knowledge of, access to, or a connection to unpublished price sensitive information pertaining to securities of a company; or if they have already received or had access to such unpublished price sensitive information;

As a result of the definition above, "connected person" is now a new word.

**5.2.2 Insider trading in America:**

The united state of America is the first country and also a leading country in the world to prohibit the practice of insider trading and to control it effectively. Therefore it is essential to talk about insider trading in American perspective.While it has been made mandatory by the congress to protect investor and also to keep market free from fraud.It is the judiciary, though at the advice of commission and the justice department of United State, who have wider role in determining the definition of insider trading.

In 1929 when market got crash due to expanded lack of confidence of investors in the securities market accompanied by great depression of U.S. economy, it result in framing of Securities Act1933 in which section 17[114] talks about the prohibition of fraudulent activity in case of sale of securities, which was strongly supported by another legislation .i.e. the securities exchange Act1934. Section 16 (b) directly talks about insider trading and section 10(b) talks about indirect insider trading. Further Section 16(b) talks about the prohibition of profits generated from sale and purchase within a period of six month which is made by directors, officers or if stockholder having more than 10% shares of any firm or in other words it prohibit short swing profit.

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[113] 83 /2004

[114] It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use
of the mails, directly or indirectly.

Whereas section 10 (b) specifically talks about the prohibition to fraud which are related to securities trading. There are some other Acts[115] which provides the provision for penalties for insider trading which is illegal and says that penalties will be as high as 3 times the profit earned or loss avoided from illegal insider trading. Apart from this judicial decision has given its support in developing the prohibition of insider trading.

If an insider has any inside knowledge, the federal court ruled in **Samir C. Arora v. SEBI** that he must either disclose it or refrain from trading with it. According to the Supreme Court of the United States, anyone who receives inside information may be held accountable if the court has reason to suspect that the insider violated their fiduciary duty by disclosing the confidential information and whether they received any benefit from doing so.

In this case the appellant dirks leaked the information in order to expose a fraud; instead of personal gain hence no one was liable for insider trading violations.In this case court went further to define the concept of constructive insider such as lawyers, investment bankers and any other person who got information from a company while giving services to such company. The court said that even the constructive insiders are also liable for violations of insider trading if company's hope is that the information is to remain secret, because both are under fiduciary duties to each other.[116]

Court took the help of earlier case[117]in which Supreme Court of U.S held one journalist (R. Foster) liable for getting information through mail rather than from the company itself. In this case court collectively held him liable under mail and fraud convictions[118]. Further the court said that it is commonly accepted proposition that if any person is getting information which is confidential or special knowledge by misusing its fiduciary relationship with another is under obligation not to disclose such confidential information or special knowledge for his personal advantage and he is under obligation to tell any profit which he earned from there .

In 1997 the misappropriation theory was adopted by Supreme Court in the case **United States v. O'Hagan**[119]in which there was a law firm and respondent was a partner of Dorsey & Whitney. This company was representing Grand Met regarding a tender offer of Pillsbury Co. the respondent uses the confidential information and purchases the stock of Pillsbury Company due to which respondent earned huge profit of above $4 million. Respondent contended that neither the law firm nor he is under fiduciary duty to Pillsbury and therefore he has not done any fraud by purchasing stock of Pillsbury Company.[120]

But this contention was rejected by Supreme Court and the conviction was upheld. Further the court said that misappropriation theory says that if any person has done any fraud in connection with securities transaction and violates section 10(b) and rule 10b-5, then it is said that such person has misappropriate confidential information for securities trading purposes.

Here it is recognized by the court that information of any corporation is its property. Confidential information of the company meets the criteria of property to which the company has a right to use it exclusively. The disclosing of information in violation of a fiduciary duty represents fraud which is like misappropriation.

In 2000 rule 10b5-1 was enacted by SEC which defines trading as, if any time a person trades at the same time he is in possession of material information or non public information, then no one will get the defense to say that she would have made the trade anyway. This rule also formed a positive defense for trades which are pre-planned.

Afterward, a measure was put out in May 2002 that would hold federal and congressional personnel accountable for any trades they make using information they learn while working for their respective governments. The legislation would also aim to control businesses that purport to provide "political intelligence" and collect data on government operations to sell to financial managers.[121]

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[115] The Trading Sanctions Act of 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988
[116] Id
[117] United States v. Carpenter (1986)
[118] Christopher Cox, U.S. Securities and Exchange Commission Speech by SEC Chairman:Remarks at the Annual Meeting of the Society of American Business Editors and Writers
[119] , 521 U.S. 642, 655 (1997)
[120] Id
[121] Id

**5.2.3 Insider trading in India**

In India Regulation 3 of the SEBI Regulations seeks to prohibit dealing, communication and counseling on matters relating to, insider trading.However, these restrictions are not applicable to any communication required ordinary, course of business or profession or employment or any law.

Further 3 A prohibits any company from dealing in the securities of another company or associate of that other company while in possession of any unpublished price sensitive information.

Insider Trading Regulations have been tightened by SEBI during February 2002. New rules cover 'temporary insiders' like lawyers, accountants, investment bankers etc.[122]

Directors and substantial shareholders have to disclose their holding to the company periodically. The New Regulations have added relatives of connected persons, as well as, the companies, firms, trust, etc. In which relatives of connected persons, bankers of the company and of persons deemed to be connected persons hold more than 10%. The definition of relative[123]under the New regulations is in line with that of the Companies Act, 1956, which ranges from parents and siblings to spouses of siblings and grandchildren. The term "connected person" is defined to mean either

I. a director or deemed to be a director,

II. occupies the position as an officer or an employee or having professional or business relationship whether temporary or permanent, with the company. Thus, there are two categories of insiders:

[124]The jurisprudential basis for the 'person-connected' approach seems to be founded in the equitable notions of fiduciary duty.

The secondary insider, who would have traded with an unfair informational advantage, may escape from being caught simply because there can be no trace of how he derived this information in the first place. Insider by reason of his connection with the company. In reality, much of the flow of the price-sensitive information often does not operate by way of such established networks of relational links between individuals.

Very often, such price-sensitive information is communicated and spread out through very loosely connected and informal networks of brokers, clients and even between friends and through electronic networks etc. or an elaborate nexus of company official, brokers, traders.These individuals are very often privy to strategic policy decisions or developments that may influence the valuation of a company's scrip on the bourses.

**5.3 Rajat gupta's insider trading conviction.**

In this case rajat gupta was the head of Mc Kinsey&co. which was the global consulting firm, he was found guilty of leaking secret information to his friend and Raj Rajaratnam who was the founder of Galleon hedge fund, about Global Sachs of which rajat gupta was the director. This information was given immediately after Goldman's board of directors meeting was over

After the broke out of this scam, U.S court held him liable and sentenced him for two years imprisonment and also the U.S. court did not allowed his request of new trial after uploading his conviction on insider trading charges. Further the court held that there is no merit for appeal in this case. When the matter reached before 3 judge bench of U.S courts of appeal, it said that after examining all the arguments of Rajat Gupta in this appeal which is found to be with no merit and held that order passed by judge jed Rakoff of U.S. district court is correct and there is no merit for appeal in this case and hence the order passed by the lower court was upheld.

It was shown during the prosecution by producing certain evidences that gupta had make call from the conference room where the meeting took place to direct line of Rajaratnam. They both talked approximately for 30 to 35 seconds on that line. Rajat gupta was send to jaiol for 2 years and his sentenced was followed by 1 year term of supervised release and court also imposed $5,00,000 as fine but later he got bail.

In February 2013 court imposes to pay $6.22 million as a restitution amount against Rajat Gupta. This order was subjected to separate appeal therefore it is pending.

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[122] academyofcg.org/marchissue.htm

[123] "On September 15, 2002 the SEBI Board decided to relax the meaning of the term `relative' in the Insider Trading Regulations."Only direct relatives of those who are deemed to have price-sensitive insider information on securities will now come under the ambit of the Securities and Exchange Board of India (Insider Trading) Regulations."

[124] Regulation 2(h) identifies seven broad categories of secondary insiders within which these are a few sub-categories

The court of appeal did not agree with the argument given by Rajat Gupta that the lower court was wrong in admitting the evidence that on October 24, 2008 wiretapped conversation between Sri Lanka-born Rajaratnam and David Lau, a Singapore-based portfolio manager at Galleon and a September 24 conversation with his trader Ian Horowitz.

Further the court of appeal said that the circumstantial evidence which was shown by the government was strong enough i.e. the secret information passed by Rajat Gupta to Rajaratnam on September 23 and October 23, 2008 - at the time of financial crisis.

The argument given by Rajat gupta that conversation between Horowitz and Lu was not admitted by the appellate court because this was hearsay evidence, court further said that there was no error in accepting the evidence by the trail court and therefore a new trail cannot be allowed to Rajat Gupta. The court concluded that the Rajaratnam evidence in communication with horowitz and Lau were admissible both as non hearsay evidence in backing of conspiracy of Rajaratnam and Rajat gupta and also under the exception for evidence against penal interest.

Further the judge said that charges does not allege only a conspiracy between Rajat Gupta and Rajaratnam rather it also allege that the conspiracy cover all other co- conspirator at Galleon. If only the statement of conspirator was in backing of conspiracy then there is no need that it have been in backing of the interest of the defendant himself or any specific co-conspirator

Rajat gupta also challenged that the court has not considered the statement of his eldest daughter which would have proven that Rajat was angry at Rajaratnam for cheating him in millions of dollars during a joint investment fund voyager. There was a conversation between Rajat Gupta and his daughter 3 days before when he tipped Rajaratnam by giving information about Goldman. Rajat Gupta's Daughter had confirmed that there was certain communication which her father had with her. But the court of appeal said that trial court was not wrong in not accepting the testimony of Rajat Gupta's Daughter during trial.

This is the case which restricts a wind of successful insider trading suits over the last few years, is a major success for the government, which has entered into some of Wall Street's most esteemed hedge funds and arrived into most prominent boardroom of corporate world in America.

## CHAPTER VI -CONCLUSION & SUGGESTIONS

### 6.1 CONCLUSION

The process of globalizations has been with it the rise of corporations which at the same time includes a process of consolidation and penchant for the corporate to rise further.A recent case study has explored that while two decades back 45 corporations owned most of the businesses in the world. Today presently corporations do so. With their raise the stakes of the customers, employees, investors, vendors, partners, government and society has also increased.To properly promote the interest of the stakeholders the corporation has to function independently, ethically and in the most disciplined manner. Else the corporation may flater, with frauds ensuing inside the corporation.

Recently world over the Corporations have been exposed to unethical in terms of Satyam Computers case involving one of the biggest accounting firms PWC being involved in cooking the accounts, further even funds owner around the world have been susceptible to floating trading account,further after takeover battle between the Barclays Bank & RBS on takeover of ABNAmro Bank.In 2008 it was found that the bank was hit by subprime crisis and was heavily indebted, most importantly these scams was caused a loss of money to people, due to the acts of few individuals "directing minds" of these corporations.

Corporate governance is concerned with commercial ethics. A person can choose between good and wrong and hence between several courses of conduct by using a set of values and principles known as an ethical code. Due to the fact that it fosters investor trust, which is so important for recruiting money, excellent corporate governance is beneficial for business. But all the trust that successful businesses establish and all the admirable things they accomplish over time may be entirely undone by a few shady businesspeople and fly-by-night entrepreneurs. Such exceptions call for the imposition of dissuasive penalties. Thought many Acts have seen created for the security of the people's money, there could be no positive outcome from the owner's side. Their main goal is to earn as much as possible money from the public through inviting them to invest, and building their personal empires. It is the easiest way to earn mass money at a single attempt. Sometimes it seems that the efforts to build the business empires are just to attract the common public to invest in their companies and make themselves at the enjoying position. In Indian, there is a common phenomenon in every citizen that their own money means hard-earned money any public or others money is the easily-earned money.

So, there shall be strict rules and punishments applied on the directors who gamble with the public money. Any relaxation towards the guilty will encourage the fraudsters to continue their fraudulent activities, affecting adversely not just the process or price formation on stock exchange, but also the very basis of the functioning of the corporate world. Though complete prevention is impossible, prevention of frauds would be a desirable outcome for corporate governance programs. Implementing better corporate governance measure by the corporates themselves and application of laws strictly by the regulatory bodies by awarding stronger punishment to the fraud makers can prevent these fraud practices. A better awareness is required among the public while investing in the corporates. Also, a corporate accountability should be developed in the corporates since the money invested by the public is to be gainfully utilized and serve the interests of public at large. Thus what is required is the good government based on effective representative democracy with a strong opposition drawing its substance form working people, which is well informed and does not confine itself only to rhetoric's. This will reduce the instance s of corporate frauds to a substantial extent. Thus white collar crimes can be avoided by the promotion of good corporate governance, with reasonable transparent processes within the corporation, to detect improper activities of its executives.

In the case of corporate criminal liability, the approach has changed over the years from there being no concept of a liability for criminal acts for corporations to liability based on the identification of some persons as the alter ego of the company.

Today, corporate criminal liability is a subject of concern for a wide range of groups campaigning on issues including human rights, environment, development and labour. Corporate crimes committed on all continents across a range of industrial activities in various sectors (e.g. chemicals, forestry, oil, mining, genetic engineering, nuclear, military, fishing, etc.) clearly point towards the need for greater control, monitoring and accountability of corporate activity in a globalised economy. Corporate criminal liability is complementary to individual liability.The present liability regime that makes both corporate and individual prosecutions available to regulatory authorities has underinable advantages over one that does not. Where crime arises from intra-organisational defects, the dismissal or discipline of a few individuals is clearly an inadequate response. Further, where individual liability is difficult to It is the view of the researched that with maturing economies of the world, it is necessitated by the acts of corporate which being in the change and shift in the legal framework to allow conceptualizing of the problems and regulating the same thereafter.

## 6.2 SUGGESTIONS

### A. Adoption of Fraud Prevention Policy

Generally many companies have an ethics policy, which set forth in detail, the expectations from the employees in the ethical climate of the company. Adoption of a written fraud policies another important element of overall fraud prevention programs of a company or organization. It specifically spells out about the person, who is responsible and handles varying fraud matters in the conflicting situations. A fraud prevention policy is the first step towards effective fraud prevention program.

The fraud prevention process has four main elements[125]:

a. Establishment of corporate governance
b. Implementation of transaction-level control processes often referred to as the system of Internal accounting controls.
c. Retrospective examination of governance and control processes through audit examinations.
d. Investigation and remediation of suspects or alleged problems.

**1.Establishment of corporate governance:**

It is about openness, integrity and accountability.[126] Corporate governance is about setting and monitoring objectives, policies, risk appetite, accountability and performance. An appropriate system of governance should be born with the company itself, and grow in complexity and reach as the company grows. It should predict any possible opportunity for fraud. It further communicates that compliance with slaws, ethical practices, accounting principles, and corporate policies is expected, and that any attempted or actual fraud is expected to be disclosed by those who know or suspect that fraud has occurred. Prevention,

[125] The Corporate Fraud Cycle: How to break the chain. Thomas W Golden, Steven L Skalak, Mona M Clayton
[126] Report of the Committee Appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla

therefore, offers a more realistic view. In short, corporate governance is an entire culture that sets an monitor behavioural expectations intended to find the fraudster. In order to execute effective governance, boards and management must effectively over see a number of key business processes, including the following:

- Strategy and operating planning
- Risk management
- Ethics and Compliance
- Performance measurement and monitoring
- Merges, acquisition, and other transformational transactions.
- Management evaluation, compensation, and succession planning.
- Comunication and reporting
- Governance Dynamics.

**2. Transaction-level control**

They are accounting and financial controls designed to ensure that only valid authorized and legitimate transactions occur and to safeguard corporate assets from losses due to theft or other fraudulent activity. These procedure are preventive because they may actively block or prevent a fraudulent transaction occurring. Such systems, however, are not fool proof, and fraudsters frequently take advantage of loopholes, inconsistencies, or vulnerable employees.

**3. Retrospective examination**

Retrospective procedures, such as those performed but auditors and forensic accounting investigators, do not prevent fraud in the same way that font-end transaction controls do, but they form a key link in communicating tolerance for fraud and discovering problems before they grew to a size that could threaten the welfare of the organization. Although auditing cannot truly prevent fraud before it happens, but helps in fraud prevention policy. Investigation and Remediation

An investigation should also form the basis for remediating control procedure. Investigations should lead to actions commensurate with the size and seriousness of the impropriety or fraud, no matter whether it is found to be a minor infraction of corporate policy or a major scheme to create fraudulent financial statements or misappropriate significant assets.

**B. Regulatory Role inFraud Prevention.**

From the last two decades Indian too has seen several corporate fraud experience involving thousands of Crores of public money. These frauds hit the Indian industry as well as country's financial system so severely that it has on other go except to bring changes in the policies of regulatory authorities like RBI, SEBI etc. To being the drastic changes in the corporate sector and to formulate the corporate governance policy, the Indian government initiated three high-level committees. The Naresh Chandra Committee was appointed by the Union government to look into the role of audit committees focusing primarily on independent directors. The Kumara Mangalam Birla Committee and Narayana Murthy Committee were appointed by SEBI to look into the various aspects of corporate governance.

These committees concluded:

**a)** Appointment of Independent Directors in the Audit committee of the companies.

**b)** Certification of CEO's and COO's on the Annual Audit Accounts.

**c)** Setting up of a corporate serious fraud office (CSFO) in the department of Company Affairs.

**d)** Inclusion of Clause 49 in the listing Agreement between the companies and SEBI by giving emphasis on the disclose practices and inclusion of independent directors on the board of a listed company, who would be responsible for upholding the corporate ethical culture.

**C. Clause 49 (Listing Agreement) – Sebi Guidelines**

The recommendations of the Narayan Murthy Committee have been accepted by SEBI and included in clause 49 of Listing Agreement of every Indian stock exchange. Clause 49 is all about the provision of listing agreement between companies and SEBI. It not only frames the code conduct to be followed by the companies, but also deal with many other aspects like

Committee composition, board practices and compensation policies – the core of corporate governance. The formulation of Audit Committee is mandated to oversee the financial reporting process which is the prime source of corporate frauds. The following are the provisions in relation to fraud prevention. Audit Committee.

Composition of Audit Committee: A quality and independent audit committee shall be formed with a minimum three directors as members, out of which two-thirds of members must be independent directors. All the member must be financial literates. An independent director must be the chairman of audit committee, who will answer the queries of shareholders. A Company Secretary will act as secretary to the committee.

Role of Audit Committee: The role of the Committee shall include the following:

- To look into any behaviour falling under its purview.
- To ask a worker for information.
- Getting expert guidance from outside sources, such as lawyers.
- If it deems it essential, to ensure the attendance of outsiders with pertinent knowledge.

I. Monitoring the organization's financial reporting procedure and the disclosure of its financial data to guarantee that the financial statement is accurate, complete, and reliable.

II. Financial Recommendations to the Board, the appointment, re-appointment, and, if necessary, there placement or removal of the statutory auditor, as well as the setting of audit fees.

III. Approval of payment to statutory auditors for any additional services they provide.

IV. Before submitting the yearly financial accounts for the board's approval, reviewing them with the management and paying particular attention to:

a. Items that, according to clause 2AA of S 217 of the Companies Act of 1956, must be included in the Director's Responsibility statement and in the board's report.
b. Modifications to the same's accounting policies and procedures
c. Significant accounting transactions containing estimates that reflect management's use of judgement.
d. Substantial financial statement changes made as a result of audit findings.
e. Adherence to listing requirements and other legal regulations pertaining to financial statements.
f. Disclosure of any transactions involving connected parties.
g. The qualifications in the draught audit report.

1. Examining the quarterly financial accounts with the management before they are approved by the board.
2. Examining the effectiveness of any internal audit function, taking into account its organisation, personnel, and seniority of the official in charge, as well as its scope and frequency.
3. A discussion of the key findings with internal auditors and subsequent action.
4. Reviewing the results of any internal investigations by internal auditors into situations where there is suspected fraud, irregularity, or a breakdown of internal control systems of a substantial character, and reporting the issue to the board.
5. Before the audit begins, there should be a discussion with the statutory auditors regarding the nature and scope of the audit as well as a follow-up conversation to identify any potential problem areas. to investigate the causes of significant payment failures to depositors, holders of debentures, shareholders, and creditors.
6. In the event that one exists, to examine how the whistleblower system operates.
7. Perform any additional duties outlined in the committee's terms of reference.

**D. "Report on Corporate Governance"**

A full compliance report on corporate governance must be included in a distinct section on corporate governance in the company's annual report. The amount to which the non-mandatory requirements of this clause have been accepted, the reasons for any non-compliance with the obligatory requirements of this clause, and the reasons for any non-compliance with the mandatory requirements of this clause should be clearly emphasised. The following information will be presented to the Board of Directors:

- Updates to the capital budgets.
- The company's quarterly financial results, as well as those of its operational divisions or business sectors.
- Records of the audit committee meetings and those of other Board committees.

- Details on the hiring and compensation of senior executives immediately under the board, such as the appointment or termination of the chief financial officer and the company secretary.
- Showcause, demand, prosecution and notices.
- Fatal or serious accidents, dangerous and penalty notices which are materially important to prove the charges against the company.
- Any material default in financial obligation to and by the company, or substantial problems.
- Any material effluent or pollution payment of goods sold by the company.

**E. REMEDY UNDER IPC**

**I. Towards New Reforms.**

Presently, all the sections include only fine as a form of punishment that can be imposed in a company.So is the case with judicial pronouncements on the aspect of sentencing. In addition to this, the Law Commission in its 41st Report also speaks of introducing only fine as an additional punishment to be imposed upon corporations in lieu of fines.[127] This reasoning in itself shows that the law lacks in a non holistic viewpoint in the concept of corporate criminal liability.The Courts have no doubt been efficient in evolving the concept of criminal liability of corporates and have imposed the same on the convicts but the only way of imposition that has been thought of is byway of fines. The legislature may take the following suggestions.

These other forms (including fine), can be classified into the following major heads:

- Economic Sanctions
- Social Sanctions.

These sanctions are all designed keeping in view that deterrence is the ultimate objective of penal law making companies labile since other accepted theories like reformation cannot be introduced where a juristic mind is concerned.

- **Economic Sanctions:** these sanctions would include various kinds of monetary and other forms which would cause huge losses to the company as a whole. Apart from fine, they can include the following:
- Corporate Death:

Corporate Death or order for winding up only in case of continuous criminal behaviour in criminal behaviour has been found continuously. For instance, the food department of a corporate can be directed to be shut if despite several warnings, poisonous or objectionable substances are adulterated. Such a sanction could have been imposed in the famous oil adulteration scam that came up around 7 years back causing loss of many lives.

It may also ordered at the first instance itself without giving any warning when due to the intentional activities of the corporate, people might lose their lives like manufacture of low quality engines for airplanes which would lead to their crashing thereby causing huge loss of lives."

- Temporary closure of the company:

Temporary closure of the company for a given period depending upon thegravity of the act till the time compliance with norms can be ensured.This can be an alternative to the above Course when the act is not that harmful to the society. For instance, aCorporate being closed for causing pollution till the times it does not arrange for a pollution free technology

- "Rehabilitation of victims of crime."

In such a form of punishment, the corporate would be ordered to rehabilitate the victims in a manner such as to erase any traces of the effect of the crime. For instance, cleansing of the riverbanks that have been polluted as a result of toxic disposal.Thought it would take some time but this would also assure that the crime has been undone. Such schemes are already operational in Germany. Compulsory welfare or reinstatement activities are to be undertaken in the affected areas over there. Its corporations are subject to administrative sanctions for public welfare or administrative offences.[128]

- Payments of high sum as compensation to the victims of crime

Payments of high sum as compensation to the victims of crime as were paid in the Bhopal gas tragedy. Compensation to a victim maybe made in three different ways. The State may be made responsible for the payment of compensation, or the offender can be

[127] Commissioner Of Sales Tax, vs Union Medical Agency 1981 AIR, 11981 SCR (1) 870

[128] "L. H. Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View

sentenced to pay a fine by way of punishment for the offence and, in addition, to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damaged one by the offence.[129]

In accordance with Section 357 of the Criminal Procedure Code, a court that imposes a fine or a punishment (including a death sentence) in which a fine is a component may, at its discretion, direct the payment of compensation to a person for any loss or harm brought on by the offence out of the amount that is recovered.

Section 357 (1) is subject to some limitations, it should be categorized as a separate form of punishment itself which is not dependent on the quantum of fine or constitutional provision.[130]

- **SOCIAL SANCTIONS**

Goodwill, for anybody corporate is its heart and soul. Once, that is lost, the entire strength comes to a standstill. The term 'reputation' carries with it more than one meaning.For individuals, reputation loss connotes both the individual's sense of shame and others increased reluctance to do business in the future with the indicidual or Corporations, however, reputation loss refers only to the reluctance of others, such as customers and workers, to deal with the corporation in the future.Of course, the managers of the corporation may feel shame about their corporation's conviction. As applied to corporations, reputation refers, for example, to the supra competitive price that a firm with a good reputation can charge customers for its products or the lower wages that a 'good' employer can pay while still attracting workers.

Once this is harmed, it would create a deep stigmatizing effect on the corporation since its business would come to a standstill with no customers. This can be done by asking the corporate to publish this crime widely compulsorily and fund the publication as well.This will act as a strong deterrence for not to commit crimes and the shareholders also would come in an active role in stopping the active organizational structure from authorizing committal of such crimes. However, in certain situations reputation sanctions are not effective against corporations.Because activities that harm third parties, such as environmental pollution, do not directly affect a firm's customer, the firm will be unlikely to suffer a reputation loss for engaging in those activities. Also, firms that lack reputations, such as 'fly-by-night' firms, cannot really suffer a reputation loss.This would also make the share value less attractive to be invested in thereby leading to huge financial losses also.[131]

Such sanctions should also be incorporated in Sec. 52 for the corporates apart from the traditional forms of punishment that are already there in the section.The other statues like Essential Commodities Act, Food Adulteration Act, Companies Act, etc., also require such sanctions to be imposed so as to adopt a just approach of punishment which is required for deterrence as fine cannot deter all corporates in all cases.

From the above analysis, it is proved that the criminal law jurisprudence relating to imposition of criminal liability on corporations is settled on the point that the corporationscan commit crimes and hence be made criminally liable. However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statues and judicial interpretations impose no other punishments except for fines. It is therefore recommended that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the stautes fit for strict interpretation by providing for infliction of criminal on the corporations as also providing for various kinds of sanctions apart from only fines.

Let's hope judiciary and law makers do their part. After all amendments are always a way out!

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