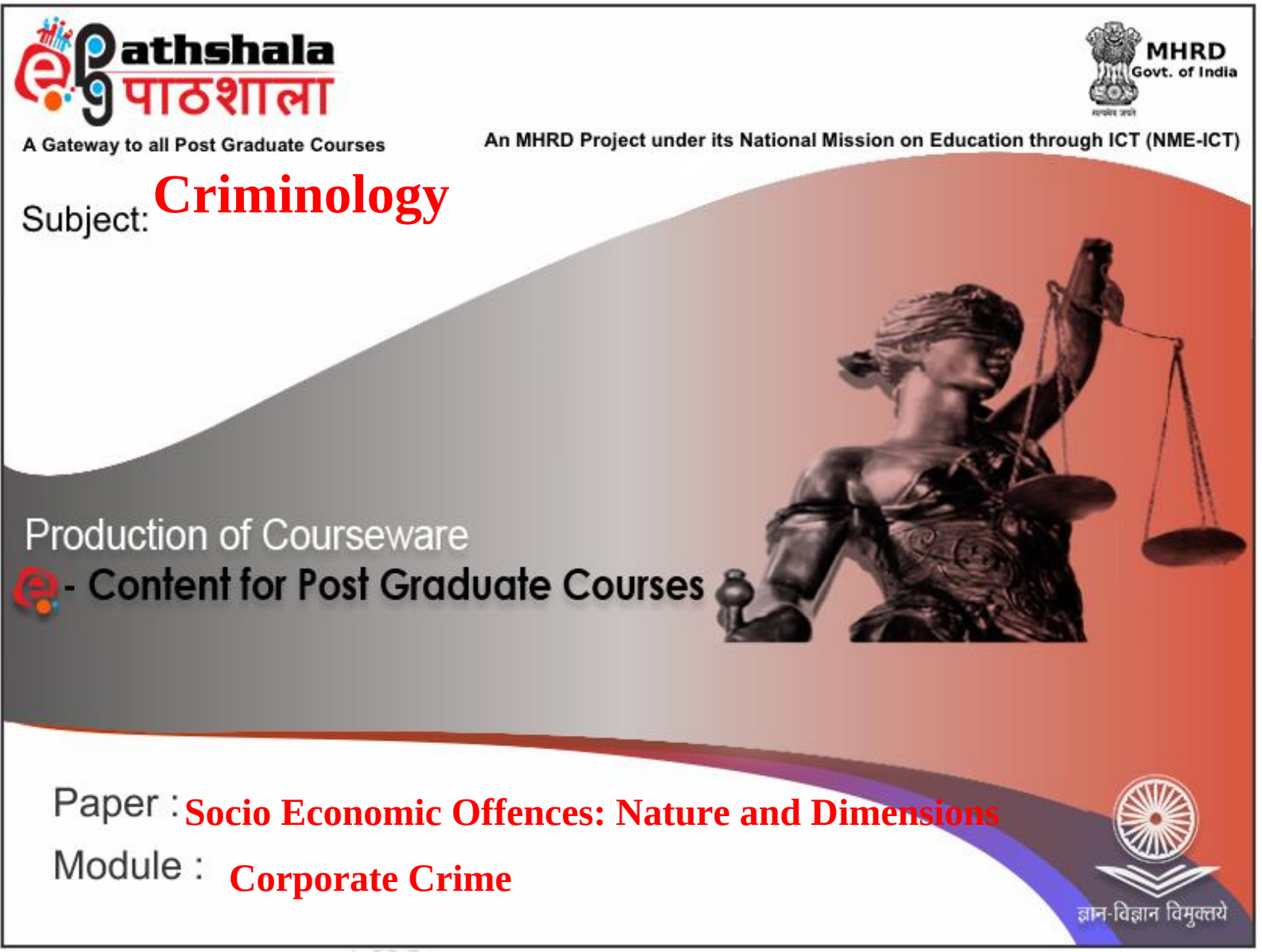

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DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Criminology
Paper Name	Socio Economic Offences: Nature and Dimensions
Module Name/Title	Corporate Crime
Module Id	
Objectives	The objective of this module is: • To inculcate within the readers in-depth knowledge of corporate crimes. • To answer the hurdles regarding imposition of Corporate criminal liability. • To discuss various laws and legal doctrines to combat and prevent corporate crime.

Module Title: Corporate Crimes

Synopsis:

- Introduction
- Legal Concept of "Person"
- Corporate Crime:
- Model Penal Code (MPC):
- Defence of Due Diligence:
- Doctrines of Corporate Criminal Liability
- Indian Legal Regime:
- Summary

INTRODUCTION

"Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill." [1]

The Australian criminologist John Braithwaite defined corporate crime as "the conduct of a corporation or employees acting on behalf of a corporation, which is proscribed and punishable by law.[2] A corporation is a group or series of persons which by legal fiction is regarded and treated as itself a person. [3] Basically, it is a group of human beings authorized by law to act as a legal unit, endowed with legal personality, and has a seal of its own for preserving certain rights in perpetual succession. It is often asserted that companies themselves cannot commit crimes; they cannot think nor have intentions, they can do it only through the help of human agency. [4] Therefore, only the people within a company can commit a crime. From the juristic point of view, a company is a legal person distinct from its members.[5] This principle may be referred to as "the veil of incorporation". [6] The human ingenuity, however, started using this veil of corporate personality blatantly as a cloak for fraud or improper conduct. Thus, it became necessary for the courts to break through and lift the corporate veil to crack the shell of corporate personality and look at the persons behind the company who are the real beneficiaries of the corporate fiction. [7] However, the most fundamental hurdle for courts to overcome, is the idea of holding fictional entities culpable in a legal system based on individual moral accountability. As the number of corporations has grown and the involvement they have in diverse aspects of daily life has expanded, the pressure for the imposition of criminal liability for their wrongdoing has increased. The debate has been brought into an acute focus by various disasters each with large loss of life. [8]

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[1] Hazlitt (1821) 1901:359 as cited in Celia Wells, Corporations and Criminal Responsibility, 2nd Edition, Oxford University Press, 2000 at Pg. 1.

[2] See, John Braithwaite, Regulatory Capitalism: How it Works, Idea For Making It Work Better, Edward Elgar Publishing (2008). See also, http://shodhganga.inflibnet.ac.in/bitstream/10603/107447/12/12_chapter%205.pdf last visited 30/04/2017.

[3] According to Salmond, as cited by Srivastava O.P., Principles of Criminal law, 5th Edition, Eastern Book Company, Lucknow, 2010 at Pg. 12.

[4] However, once one accepts that the entire notion of corporate personality is a fiction there seems no reason why the law should not develop a concomitant corporate mens rea fiction.

[5] *Salomon v. Salomon & Co. Ltd.*, (1897) A.C. 22

[6] The effect of this principle is that there is a fictional veil between the company and its members, *i.e.*, the company have a corporate personality which is distinct from its members.

[7] Kapoor N.D., Elements of Company Law, 27th Edition, Sultan Chand & Sons, Delhi, 2003, at Pg. 7.

[8] In particular, the *Herald of Free Enterprise ferry disaster* and various rail crashes (Southall, Ladbrooke Grove, Paddington, Hatfield), etc. See also, David Ormerod, *Smith & Hogan* Criminal Law, 11th Edition, Oxford University

It is a widely held view that the law's present approach to criminal punishment of corporations is unsatisfactory at a fundamental level since the law has not sought to create a specific model of criminalization to reflect accurately the reality of the modern day corporation. Corporate liability is particularly important because most defective products are put onto the market by, most pollution is caused by, most crashes occur in transport run by, and most accidents at work take place at sites occupied by companies. Historically, it was thought that a corporation could not be indicted for a crime at all. Personal appearance was necessary at court and the corporation, having no physical person, could not appear. Further objections which have been raised to imposing criminal liability are that, since a corporation is a creature of law, it can only do such acts as it is legally empowered to do, so that any crime is necessarily ultra vires; and that the corporation, having neither body nor mind, cannot perform the acts or form the intents which are a prerequisite of criminal liability.[9] From a situation in which corporations were considered capable of committing no or almost no crimes, there has developed the situation in which corporations are considered capable of committing all or almost all crimes. The emergence of the common law principle that masters had 'Vicarious Liability' for their servants facilitated the development both of civil and criminal liability of corporations. A central problem in this area is the question of how a corporation, which is only a "person" by an act of legal fiction, can be said to possess a "unitary, discrete, and demonstrable state of mind. Courts resolved this issue slowly, beginning with the civil law-based doctrine of respondeat superior[10] and gradually injecting aspects of the criminal law, into the abstract nature of the corporation. [11] It is important to note that in the common law world, following standing principles in tort law, courts started sentencing corporations for statutory offenses. Corporate criminal liability was primarily the result of judicial interpretation of common law and existing statutory laws, rather than the result of any deliberate

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Press, 2005 at Pg. 234. In Indian context, Bhopal Gas leak disaster is one of the best example of corporate wrongdoing.

[9] The *ultra vires* doctrine, however, seems to have been ignored in both the law of tort and crime and to apply only in the law of contract and property.

[10] The doctrine of respondeat superior has been the most traditionally accepted method of imputing criminal liability to a corporation, which provides that a corporation can be held criminally liable for the acts of any of its agents who commit a crime within the scope of their employment with the intent to benefit the corporation.

[11] It is important to note that in the common law world, following standing principles in tort law, courts started sentencing corporations for statutory offenses. On the other hand, a large number of European continental law countries have not incorporated the concept of corporal criminal liability into their legal systems.

legislative action. However, it is interesting to note that Civil law countries, lacking the tradition of judicial interpretation, have never developed the concept of corporate criminality. [12]

Learning Outcome:

After going through this module the readers will have a comprehensive knowledge of the concept of corporate crime, laws relating to corporate crime, imposition of liability for mens rea offences, corporate social responsibility, and national and international legal regime dealing with corporate crime.

Twenty first century has witnessed a tremendous explosion in the number and size of corporations, to the point that virtually all economic and much social and political activity is greatly influenced by corporate behavior. [13] Generally, Courts use a three-prong inquiry to determine whether a corporation will be held vicariously liable for the acts of its employees:

1. **Must be acting within the scope and nature of employment**
2. **Employee act to benefit the corporation**. [14]
3. **Employee's act and intent must be imputed to the corporation**

The cardinal principle of criminal law is contained in the Latin maxim "Actus non facit reum nisi mens sit rea." which means there can be no crime without a guilty mind. Thus, the two components of a crime are the physical act or actus reus, and the guilty mind or mens rea.

From the viewpoint of mens rea, wrongs may be classified in following three categories:

1. Intentional Wrongs: Where mens rea is equated with intention, or purpose.
2. Wrongs caused by negligence: In such case culpa constitutes mens rea.

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[12]Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, available at:

http://heinonline.org/HOL/PDF?handle=hein.journals/crim22&collection=journals&section=0&id=5&print=16&sectioncount=1&ext=.pdf last visited 03/06/10.

[13]http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals/hlr92&div=67&start_page=1227&collection=journals&set_as_cursor=23&men_tab=srchresults last visited 30/04/2017.

[14] In addition, it is not necessary that the employee be primarily concerned with benefiting the corporation, because courts recognize that many employees act primarily for their own personal gain.

3. Wrongs of Strict Liability: Where mens rea is not necessary.

It is often asserted that companies themselves cannot commit crimes; they cannot think or have intentions. Only the people within a company can commit a crime. However, once one accepts that the entire notion of corporate personality is a fiction - but a well-established and highly useful one - there seems no reason why the law should not develop a concomitant corporate mens rea fiction. In criminal law **"each person is responsible for his own act."** A person to be criminally liable, should not only have committed an act but must also have a guilty mind.

In today's world, we urgently need a legal mechanism to prosecute as well as to punish corporate entities for their criminal activities. Unfortunately, because of legal lacunae corporate bodies are successfully convicted in only a limited number of cases even after violating the norms of criminal law.

Legal Concept of "Person":

The word 'Person' generally used in English to denote a human being, [15] but the word is also used in a technical legal sense, to denote a subject of legal rights and duties. So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition. [16] Coke says; "Persons are of two sorts, persons natural created by God,…and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, viz., either sole, or aggregate of many".[17]

Corporate Crime:

[15] The 'human being' is, of course, the most obvious entity to which legal rights and duties may be ascribed. The law, as we shall see presently, does treat other, non-human entities as 'legal persons'. See, Harris, An Introduction to Law, 7th Edition, Cambridge University Press, 2007, at Pg. 102.
[16] Fitzgerald P.J., Salmond on Jurisprudence, Twelfth Edition, N.M.Tripathi Private Limited, Bombay, 1966, at Pg. 299.
[17]A corporation aggregate is an incorporated group of co-existing persons, and a corporation sole is an incorporated series of successive persons. The former is that which has several members at a time, while the latter is that which has only one member at a time. See also, Fitzgerald P.J., Salmond on Jurisprudence, Twelfth Edition, N.M.Tripathi Private Limited, Bombay, 1966, at Pg. 308.

Does it make any sense to prosecute a company for criminal offences, which is, after all, an inanimate, fictional entity?

The term "crime" denotes a legal category. It refers to particular kinds of conduct that our legal institutions recognize as "criminal." Such conduct must be defined in a particular manner, employing certain characteristic concepts such as actus reus and mens rea; it must have a certain "public" character in the sense that a wrong is committed against the public as a whole and charges are brought in the name of the government or the people; the question whether a crime has been committed must be adjudicated in a particular manner, with various actors playing distinctive roles, employing distinctive procedures and burdens of proof, and recognizing distinctive procedural rights; and it must entail certain characteristic forms of punishment.

Crime can be divided into three main types:

1. Conventional or ordinary Crime: It includes crimes of violence, such as assault, rape, murder etc. and it also consists of property related crimes such as theft, robbery etc.
2. Occupational Crime: It involves the violation of law in the course of activity in a legitimate occupation. It is often referred to as **"White – Collar Crime"** [18] because the

[18] The term white-collar crime only dates back to 1939. Professor Edwin Hardin Sutherland was the first to coin the term, and hypothesize white-collar criminals attributed different characteristics and motives than typical street criminals. Mr. Sutherland originally presented his theory in an address to the American Sociological Society in attempt to study two fields, crime and high society, which had no previous empirical correlation. He defined his idea as "crime committed by a person of respectability and high social status in the course of his occupation". To refer to a crime as "white collar" is to draw attention to the characteristics of the person (or entity) that committed it. Indeed, it was the qualities of the offender, rather than those of the offense, that were the main focus of Sutherland's critique. lower classes and emphasized poverty as its principal cause. He argued that because there is a significant category of crimes that are committed by persons of wealth, "respectability," and social status, poverty cannot be viewed as the sole, or main, cause of crime. And, in fact, recent cases involving the likes of super-wealthy alleged white collar criminals such as Martha Stewart, Kenneth Lay, Bernard Ebbers, Richard Scrushy, and Dennis Kozlowski seem to demonstrate the truth of such an assertion.

In 1970, U.S. Department of Justice official Herbert Edlehertz described white collar crime as "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, or to obtain business advantage." Nineteen years later, the FBI defined white collar crime as those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage. See, U.S. Department of Justice, Federal Bureau of Investigation, White Collar Crime: A Report to the Public 3 (1989). See also, Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, BCLR,Vol. 8:1, available at: http://wings.buffalo.edu/law/bclc/bclrarticles/8/1/green.pdf last visited 02/06/10.

crimes are committed by individual businesspersons, politicians, government employees, doctors etc.

3. Organizational Crime: It is committed by large corporations, an industry, labour unions, and even a church hierarchy.

Big companies that are criminally prosecuted represent only the tip of a very large iceberg of corporate wrongdoing. Generally, corporate criminals fell into following categories of crime: Environmental, Antitrust, Fraud, Food and drug, Financial crimes, False statements, Illegal exports, Worker death, Bribery, Obstruction of justice, Public corruption, Tax evasion etc. Corporation being non-human entities, their criminal behaviour is also not of the ordinary nature. Corporate criminality "challenges or nags at our sense of reality." It is this characteristic that makes corporate crime a tricky issue. In Lennard's Carrying Co. Ltd. [19] case it was held that;

"A corporation is an abstraction. It has no mind of its own, any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation the very ego and centre of the corporation." A company, being a legal institution, cannot operate without human intervention. It cannot take action nor have a state of mind. A company not being a natural person has no mind but others state of mind may be attributed to it. A living person has a mind which can have knowledge or intention or be negligent and has hands to carry out his intention. A corporation has none of these; it must act through living persons. Then the person who acts is not speaking or acting for the company. He is acting as the company. He is not acting as a servant, representative, agent or delegate. If his mind is a guilty mind, then that guilt is the guilt of the company. [20] **In UK** from 1944 onwards, a company could be held criminally liable on the basis that the acts of certain employees were regarded as being the acts of the company itself. This is direct, personal liability and not vicarious liability. This principle was established in trio of cases:

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[19] [1915] AC 705
[20] *Tesco Supermarkets Ltd. v. Natrass*, [1972] AC 153, *per* Lord Reid.

- The first of the trio of cases was DPP v. Kent & Sussex Contractors Ltd. [21] This case heralded the first appearance of the "doctrine of identification" in the criminal law. It was held that the knowledge and intention of a company's servants were to be imputed to the body corporate.
- The second case is R. v. ICR Haulage Co. Ltd. [22] The company was charged, together with its MD, with a common law offence of conspiracy to defraud – requiring proof of a criminal state of mind. The principal defendants were all convicted. On appeal, it was argued for the company that it could not be indicted for conspiracy or indeed any offence involving mens rea as an essential ingredient. It was necessary for the court to consider the relevant position of the officer or agent to determine whether his act was the act of the company, and it was held that acts were plainly the acts of the company.
- The last of the trio is Moore v. I Bresler Ltd.[23] in this case it was held that, The officers acts, were the acts of the company." It was approved by the Privy Council in Meridian Global Funds Management Asia Ltd. v. Securities Commission case. [24]

Recently, Corporate Manslaughter and Corporate Homicide Act, 2007 has been enacted in UK to address corporate killing.

Model Penal Code (MPC):

The MPC is formulated by American Law Institute (ALI). It is another approach to assess corporate criminal liability. A stricter standard can be found in the Model Penal Code. MPC may be an effective response to respondeat superior's overinclusiveness.[25]

Defence of Due Diligence:

Due diligence is the antithesis of fault. If a company can show that it had taken appropriate and reasonable steps to avoid the harm that had occurred, it should be able to escape criminal

[21] [1944] 1 KB 146
[22] [1944] KB 551
[23] [1944] 2 KB 515
[24] [1995] 2 A.C. 500 PC
[25] The doctrine of respondeat superior does not distinguish between "offenses committed with the participation, pressures, or encouragement of upper management," and those that are "committed by the proverbial 'black sheep' employee whose act violated company policy and could not have been prevented by monitoring and corporate compliance programs."

sanction. An obligation to exercise due diligence is indistinguishable from an obligation to exercise reasonable care. [26] It is for the accused to prove on the balance of probabilities that it has exercised due diligence. A corporation can not rely on this defence if it has delegated its responsibilities to another who has failed to act with due diligence. The failure of the delegate is the failure of the principal, which, in case involving corporations, will be the company. [27] Due diligence is a good ground of defence where the company has made a good faith, reasonable effort to identify and concrete and specific steps to prevent the occurrence of the crime in question.

In India, there is plethora of legislations which addresses offences by companies. [28] For instance

- I.T.Act, 1961;
- Securities and Exchange Board of India Act, 1992;
- Section 17 of The Prevention of Food Adulteration Act, 1954;
- The Essential Commodities Act, 1955;
- The Negotiable Instruments Act, 1881;
- The Environment (Protection) Act, 1986; etc

However, one thing is common in almost all these provisions, i.e., they all talk about the defence of due diligence.

Some important Doctrines dealing with Corporate crime are :

1. **Vicarious Liability[29] or Respondeat Superior doctrine:**

[26] *Riverstone Meat Co. v. Lancashire Shipping Co. Ltd.*, (1960) 1 All ER 193
[27] *R. v. Mersey Docks and Harbour Company*, (1995)15 Cr. App.R. (S.) 806
[28]

- Section 278B of The I.T.Act, 1961;
- Section 27 of The Securities and Exchange Board of India Act, 1992;
- Section 21 of Depositories Act, 1996;
- Section 35-H Wealth Tax Act;
- Section 24 of The Securities contracts (Regulation) Act, 1956;
- Section 14-A Employees Provident Funds and Miscellaneous Provisions Act;
- Section 17 of The Prevention of Food Adulteration Act, 1954;
- Section 38 of Narcotic Drugs and Psychotropic Substances Act;
- Section 10 of The Essential Commodities Act, 1955;
- Section 6 of Indian Merchandise Act;
- Section 141 of The Negotiable Instruments Act, 1881;
- Section 16 of The Environment (Protection) Act, 1986; etc.

[29] Mc Barnet, Voiculescu & Campbell, "The new Corporate Accountability", 1st published, Cambridge University Press, 2007, Pg. 404.

Under this doctrine if a corporate agent, acting within the scope of his or her employment[30] and with intention to benefit the corporation, commits a crime, liability can be imputed to the company. It is irrelevant whether the company actually receives the benefit or whether the activity might even have been expressly prohibited by the company. Attention was focused on whether the wrong was done within the scope of the servant's employment. So far as criminal law is concerned the maxims *"Respondeat Superior"* and *"qui facit per alium facit per se"* finds no place. It is a point not to be disputed but that in a criminal case the principal is not answerable for the act of his deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour.[31] However, vicarious liability was at that time restricted to civil wrongs.[32]

2. Doctrine of Identification:

A Company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools that act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hand to do the work and can not be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of

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[30] It seems that an employee will not necessarily exceed the scope of his authority simply because he acts in a way contrary to instructions given. In *Coppen v. Moore*, [1898] 2 QB 306, an assistant sold hams as "stock hams", despite the employer's express instructions that they were only to be sold as "breakfast hams", the sale nonetheless was made by the employer and constituted an offence by the latter.

[31] *Huggins* (1730) 2 Ld. Ray. 1574; (1730) 2 Str. 883, 885; 92 E.R. 518, *Per* Raymond C.J. In this case the warden of the Fleet (H) was charged with the murder of a prisoner whose death had been caused by the servant of H's deputy. Lord Raymond C.J. ruled that;

"He only is punishable, who immediately does the act or permits it to be done". The crime of the servant could not make H guilty without "the command of the superior"; as the murder was committed without his knowledge or command, H could not be guilty.

By the beginning of the next century, the courts had rejected the "command theory" of vicarious liability, accepting instead that liability depended upon the nature of the relationship between the employer and his employee. See also, Amanda Pinto Q.C. & Martin Evans, Corporate Criminal Liability, 2nd Edition, Sweet & Maxwell, 2008, at Pg. 20.

[32] *Lloyd v. Grace Smith & Co.*,[1912] A.C. 716 HL. In this case the respondent was a firm of solicitors in Liverpool who employed a conveyancing manager who deceived one of the firm's clients into signing her properties to him. There was no suggestion of impropriety on the part of the firm. Mr. Smith, the principal, was civilly liable to the firm's client. The fraudulent employee was no doubt guilty various criminal offences in his own right, but, in the absence of any encouragement or complicity, neither then nor today would Mr. Smith also be criminally liable for the wrongdoing of his clerk. Lord Macnaghten made it clear that an employer is civilly liable for fraud committed by an employee in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

There can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for a private employer, the person for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. See also, *Ranger v. Gt Western Ry Co.* (1854) 86-87, *per* Lord Cottenham L.C.

these managers is the state of mind of the company and is treated by the law as such.[33]The Doctrine of Identification essentially means that a company can be held liable for a serious criminal offence if one of the most senior officers had acted with the requisite fault. This doctrine has marked the recognition of corporations as capable of committing offences that required proof of a mental element, *i.e. mens rea*. The origin of the doctrine of identification can be traced definitively to *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[34] The leading case where the doctrine of identification was expounded was the case of *Tesco Supermarkets v. Nattrass*,[35] which limited the relevant personnel for the attribution of fault to those at the centre of corporate power.

3. Aggregation Doctrine or collective knowledge doctrine:

In order to overcome some of the problems associated with the identification doctrine, an alternative basis for the construction of criminal liability would be the "***aggregation doctrine"***, known in the United States as the ***"Collective Knowledge Doctrine"***[36]. Under this approach one aggregates all the acts and mental elements of the various relevant persons within the company to ascertain whether in toto they would amount to a crime if they had all been committed by one person. For example, if the actions or inactions of A, B, C and D cumulatively led to the harmful result and if their aggregated mental elements or negligence would amount to the mens rea of the crime, the company can be held liable.

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[33] *H.L.Bolton (Engineering) Co. Ltd. v. T.J.Grahams and sons Ltd., [1957]1 Q.B. 159.*

[34] [1915] A.C. 705 HL. See also, Amanda Pinto Q.C. & Martin Evans, Corporate Criminal Liability, 2nd Edition, Sweet & Maxwell, 2008, Pg. 44.

[35] [1972] AC 153 (HL). In this case, the appellants own a large number of supermarkets in which they sell a wide variety of goods. The goods are put out for sale on selves or stands, each article being marked with the price at which it is offered for sale. The customer selects the articles he wants, takes them to the cashier, and pays the price.

From time to time the appellants, apparently by way of advertisement, sell 'flash packs' at prices lower than the normal price. In September 1969 they were selling Radiant washing powder in this way. The normal price was 3s IId but these packs were marked and sold at 2s IId. Posters were displayed in the shops drawing attention to this reduction in price. Mr. Coane, saw this and went to but a pack. He could only find packs marked 3s IId. He took one to the cashier who told him that there were none in stock for sale at 2s IId. Mr. Coane paid 3s IId and complained to an inspector of weights and measures. This resulted in a prosecution under the Trade Descriptions Act, 1968 and the appellants were fined.

[36] Federal courts have found corporations liable even when there was no single employee at fault through the so-called "collective knowledge" doctrine, which imputes to a corporation the sum knowledge of all or some of its employees. The apparent rationale behind this doctrine is a desire to prevent corporations from evading liability by compartmentalizing and dividing duties such that the corporation could plead ignorance in the face of any criminal prosecution.

In other words, we can say that aggregation doctrine means the cumulative effect of a number of different negligent acts by different persons, so as to amount, in total, to gross negligence.

This doctrine has the advantage of recognising that in many cases it is not possible to isolate a single individual who has committed the crime with *mens rea*. This doctrine can deter companies from burying responsibility deep within the corporate structure. The First Circuit pioneered this ground – breaking theory in *United States v. Bank of New England, N.A.*[37]

4. **Doctrine of Corporate Culture:**

"**Corporate Culture"** means; "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place."[38] It has to be proved that the corporate culture directed, promoted, tolerated or caused legal transgressions. This approach may be preferable to the standards currently used in the US for imposing corporate liability because rather than simply imputing the acts of employees to the corporation, it more accurately demonstrates why the corporation itself deserves punishment.[39]

All these doctrines have some benefits and some drawbacks. No doctrine is full proof to tackle the problem of corporate crime. In different jurisdictions different doctrines are applicable. In India, doctrine of Identification applies to deal with corporate crime.

Indian Legal Regime:

The concept of corporate criminal liability was addressed for the first time in **State of Maharashtra vs. Syndicate Transport Company Ltd.[40],** wherein the possibility of incorporation of such liability through the Alter-ego or the Identification theory was observed by the Bombay High Court which observed that:

"….did not see any reason for exempting a corporate body from liability for crimes committed by its directors, agents or servants while acting for or on behalf of the Corporation."

[37] Court of Appeals, First Federal Circuit, 821 F. 2nd 844, 1987
[38] Criminal Code Act, 1995, § 12.3(6) (Austl).
[39] Australia follows this doctrine. See also, Ashley S. Kircher, *Corporate Criminal Liability versus Corporate Securities Fraud Liability: Analyzing the Divergence in Standards of Culpability*, 46 Am.Crim.L.Rev.157.

[40] 1963 Bom. L.R. 197

The issue of corporate criminal liability and its incorporation within the Indian scenario was formally taken up by the Supreme Court in **Velliappa Textiles**[41]. case. In this case, two aspects of corporate criminal liability were up for determination before a three-Judge Bench[42]

- **Firstly,** Whether a company can be attributed with mens rea on the basis that those who work or are working for it have committed a crime and can be convicted in a criminal case?
- **Secondly,** Whether a company is liable for punishment of fine if the provision of law contemplates punishment by way of imprisonment only or a minimum period of punishment by imprisonment plus fine?

The case decided in favour of the adoption of the Identification theory and held that the mens rea of the company can be identified with the concerned employees of the company. However, the later question was decided in negative.

The 47th Law Commission Report was referred which recommended that 'the law as it exists renders it impossible for a court of law to convict a Corporation where the statute mandates a minimum term of imprisonment plus fine. It would not be open to the court of law to hold that a Corporation would be found guilty and sentenced only to a fine for that would be re-writing the statute and exercising a discretion not vested in the court by the statute. It is precisely for this reason that the Law Commission recommended that where the offence is punishable with imprisonment, or with imprisonment and fine, and the offender is a corporation, the Court should be empowered to sentence such an offender to fine only.' [43]

Thereby, concurrent to the Law Commission's recommendation, the status of law was left unchanged. Following the **Velliappa case**[44]**,** the corporate criminal liability regime formally came into existence. However, some hurdles in punishing corporations are stated as follows:

- Corporation could not be convicted for offences which by nature could be committed by human beings alone and not by a Corporation like sexual offences, bigamy, etc.
- Corporation could not be held criminally liable for committing offences that were punishable by mandatory corporal punishment or capital punishment alone.
- Court could not impose criminal liability on the Corporation, if penal provisions provided for imprisonment only or a minimum term of imprisonment plus fine.

[41] AIR 2004 SC 86
[42] S. Rajendra Babu, B.N. Srikrishna and G.P. Mathur, JJ.
[43] Para 20
[44] AIR 2004 SC 86

Though, in the **Velliappa case,** the judges realized the necessity for imposing corporal punishment while holding a company and its employees liable, it held that the same is the work of the Legislature and beyond the purview of the duty and power vested in Courts. The question again came in 2005 before the Supreme Court's Constitutional Bench[45] in **Standard Chartered Bank vs. Directorate of Enforcement**[46]. The Majority judgment[47] in the present case delved into the interpretation of statutes and relied on case laws against immunity to offenders on technical grounds. It cited with approval **Balram Kumawat vs. Union of India**[48], wherein it was held that 'in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Furthermore, in light of the **Balram case,** the Court applied the dictum in **M.V. Jawali vs. Mahajan Borewell & Co. and Ors.**, [49] which dealt with similar circumstances as that in the present case and had held that fine can be imposed even in cases where mandatory punishment is prescribed.

Thereby, the Court in the case arrived at the decision that in spite of prescription of mandatory imprisonment or imprisonment plus fine, a sum of fine alone, can be imposed on the concerned personnel of the delinquent company. This position was re-affirmed by the Court in 2 **Standard Chartered Bank case**[50] wherein the Court held that imposition of fine on a Corporation when the penal provisions provide for mandatory imprisonment or imprisonment plus fine does not violate Art.14 and 21 of the Constitution or for that matter, any provisions of the Constitution and is constitutionally valid. Recently, the judgment of the Supreme Court in **Iridium India Telecom Ltd. v. Motorola case**[51] merely reiterated the principles laid down previously in the Standard Chartered Bank case. Thus, the Corporate Criminal Liability within the Indian scenario has received its blessing from the Supreme Court and is formally established, with a few limitations. Corporate criminal liability under environmental, antitrust, securities, and other laws has grown rapidly over the last few decades. It is time to take a new look at the standard for

[45] Judges N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar and B.N. Srikrishna
[46] AIR 2005 SC 2622
[47] Majority decision given by Judges K.G. Balakrishnan, Arun Kumar, D.M. Dharmadhikari
[48] (2003) 7 SCC 628
[49] (1977) 8 SCC 72
[50] AIR 2006 SC 1301
[51] (2011) 1 SCC 74

corporate criminal liability. It is undisputed that a corporation, being merely a person in law only, and not a real one, can act only through its employees for whom it should be held responsible. Although, Corporations are primarily business organizations run for the benefit of shareholders, they have a wide ranging set of responsibilities –

- To their own employees;
- To customers and suppliers;
- To the communities in which they are located; and
- To the society at large.

Corporations also have an economic responsibility to produce goods and services and to provide jobs and good wages to the work force while earning a profit. In addition business firms have certain legal responsibilities. One of these is to act as a fiduciary, managing the assets of a corporation in the interests of shareholders. The corporations also have numerous legal responsibilities towards its employees, customers, suppliers and other parties.

It is significant to note that, Corporations carry out some of the most horrific human rights abuses of modern times, but it is increasingly difficult to hold them to account. Economic globalization and the rise of transnational corporate power have created a favorable climate for corporate human rights abusers, which are governed principally by the codes of supply and demand and show genuine loyalty only to their stockholders. .

Corporate criminality "challenges or nags at our sense of reality." It is this characteristic that makes corporate crime a tricky issue. In the common law world, following standing principles in tort law, English courts began sentencing corporations for statutory offenses. [52] On the other hand, a large number of European continental law countries have not been able to or not been willing to incorporate the concept of corporate criminal liability into their legal systems. The concept of corporate criminal liability did not develop at all in civil-law countries, where all criminal liability is laid individuals, and none to the corporation itself.

Corporate Social Responsibility (CSR):

[52] Courts in both England and the United States first imposed corporate criminal liability in cases involving nonfeasances of quasi-public corporations, such as municipalities,that resulted in public nuisances.

Corporate Social Responsibility (CSR) represents nothing less than an attempt to define the future of our society. [53] Central to the concept of CSR is deciding where companies fit within the social fabric. By addressing business ethics, corporate governance, environmental concerns, and other issues, society creates a dynamic context in which firms operate. Businesses are largely responsible for creating wealth and driving progress within society; however, they do not act alone. Businesses produce much of what is good in our society. At the same time, businesses can also cause great harm, as pollution, layoffs, industrial accidents, and other consequences as well. Between the great good and terrible harm businesses produce lies concern about the proper role of corporations in society, particularly as globalization, technological innovation, and other changes expand their reach and potential. Moreover, this concern has gained renewed attention after the high-level accounting and other scandals that emerged in the early years of the new century. [54]

It relate to the business contribution to our sustainable development goals. Essentially it is about how business takes account of its economic, social and environmental impacts in the way it operates – maximizing the benefits and minimizing the downsides. Specifically we see CSR as the voluntary actions that business can take, over and above compliance with minimum legal requirements, to address both its own competitive interests and the interests of the society.[55]

At its most basic level, the concept of CSR aims both to examine the role of business in society, and to maximize the positive societal outcomes of business activity. It is about viewing business as part of society, not somehow separate from it. But the question arises "What is business for?" Among the most famous answers is that attributed to Milton Friedman; namely that **"The business of business is business".*[56]*** Normally, the purpose of a limited liability company is to make a profit for shareholders, or to contribute to overall societal welfare by making a profit for

[53] Werther & Chandler, Strategic Corporate Social Responsibility, SAGE Publications, 2006, at pg. xvii.

[54] Three events illustrate a conscious determination to reassert the importance of socially responsible behaviour and ethics in business:

- The passage of Sarbanes – Oxley (2002), which has added stringent and costly requirements to final reporting by publicly traded firms;
- Requirements by the Securities and Exchange Commission (2003) that companies disclose whether or not they have implemented a code of ethics; and
- Revised federal sentencing guidelines in the United States (2004), which "require companies to make stronger commitments to ethical standards and prove they are living up to those commitments.

[55] Zerk, Multinationals and Corporate Social Responsibility, Cambridge University Press, 2006, at Pg. 30.

[56] Nina Boeger et. al., Perspectives on Corporate Social Responsibility, Corporations, Globalization and the Law, 2008, at Pg. 9.

shareholders. The extent to which a business fulfils its societal obligations must be both a function of what it is legally required to do, and what it chooses to do. CSR and law are undeniably linked with each other.

SUMMARY

Why is it that despite the high number of victims, when people think of crime, they think of burglary before they think of monopoly (if they think of antitrust violations at all), of assault before they think of pharmaceuticals, of street crime before they think of corporate crime?

It's true that recognition of corporate crime is increasing, but corporate law violations are, on the whole, except for very large ones such as Bhopal Gas Leak case, the WorldCom and Enron cases not highly publicized and rarely come to the attention of the public. The perception is that corporate law violations are generally not anywhere as serious or as numerous as conventional crimes[57] which gets nearly all the publicity. Again, it is interesting to note that the word 'punishment' is replaced when corporations are the object of criminal enforcement by the altogether less emotive 'sanction'. The words are sometimes used interchangeably, but while lawyers talk of civil sanctions, they never speak of civil punishment.

The 21st Century has witnessed the rapid growth of giant MNCs, simultaneously, corporations has evolved an equally great potential for significant social harm. Much of our lives and daily routines are affected by corporate activities. To a large extent, companies provide the food we eat, the water we drink, the necessities and luxuries of everyday living.

Criminal sanction is the law's ultimate threat, although not the only weapon of punishment in our social arsenal, the unique combination of stigma and loss of liberty which the criminal sanction promises distinguishes, it from other punishment devices. One of the main objects of corporate criminal liability is to ensure that companies improve their work practices. If no individual who has committed a crime can be identified and no mechanism for corporate prosecution were to

[57] There are three types of Crime:
1. Conventional Crime;
2. Occupational Crime; and
3. Organizational Crime.

Conventional crime includes crimes of violence, such as, assault, rape and murder, but mainly consists of property crimes, such as, theft, robbery etc.

exist, the harmful practices would continue unabated. However, it's true that tracking white-collar crime, and especially corporate crime, is generally much more complicated than tracking other crimes. In today's world, we urgently need a legal mechanism to prosecute as well as to punish corporate entities for their criminal activities. Criminal law is an ineffective and inefficient deterrent for the corporate criminals. Some argue that criminal Law is not well suited for use against the corporate offenders, whereas others suggest that the problem is one of implementation, that is, the threat of criminal processing will not produce deterrent effects until criminal sanctions are more certain and severe. Another position, however, rejects the deterrence framework as theoretically and empirically unsound. Unfortunately, because of legal lacunae corporate bodies are successfully convicted in only a limited number of cases even after violating the norms of criminal law. The best method of assessing whether a company possesses the requisite degree of blameworthiness is through adoption of the corporate mens rea doctrine. While this inevitably will raise problems of how to assess policies and procedures to ascertain whether they reflect the requisite culpability, such a task is not impossible. The answers might not be easy, but at least this approach involves asking the right questions. After all, the ultimate object of the laws, procedures and the super structure of criminal justice are to help create an order wherein the society is protected from depredation of crime. [58]

[58] Jyotsna H. Shah, *The Crime Complex: Dilemma of Punishment,* Indian Journal of Criminology, Vol. 4. No. 2, July 1976 at Pg. 87.