

# Corporate Criminal Liability: Some Reflections for Malaysia

Usharani Balasingam<sup>a</sup>

**Abstract:** *Corporate criminal liability is a very important concept given the growth of commercial entities in reach, scope, and impact. A comparative legal doctrinal approach with the United Kingdom is adopted as the method of research. The paper recommends the need to demarcate between regulatory offences (involving standards of conduct in a specialised activity) and non-regulatory conduct (involving deception and fraud). The latter is to be treated with the full measure of the weight of the law to penalise, condemn and act as a deterrent, aside from ensuring that the offender does not reap benefits from the crime. It should not be compoundable and needs to attract the full rigour of criminal censure, as the behaviour is treated as morally repugnant deserving of full public censure and condemnation. The criminal processes, including any plea bargain, should be guided by transparent guidelines subject to court scrutiny. The ability to hold the corporation liable as distinct from the controllers is also discussed. Further recommendations are that the sanctions against corporations need to be diversified under a principle-based approach, as it does not suffer imprisonment or whipping, and can even pass on cost of fines to its customers. The penal provisions should recognise the distinct nature of corporations in the meting out of punishments.*

**Keywords:** Corporate criminal liability; Doctrine of identification; Strict liability; Regulatory offences; Civil and administrative agencies; Statutory reform.

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<sup>a</sup> Faculty of Law, University of Malaya, Lembah Pantai, 50603 Kuala Lumpur, Malaysia. *Email:* [usha@um.edu.my](mailto:usha@um.edu.my), ORCID: <https://orcid.org/0000-0003-2358-358X>

## 1. Introduction

Corporate liability may be civil or criminal. In terms of criminal liability, regulation is increasingly needed, particularly in light of the massive scale of economic crimes, financial and accounting scandals, breach of fiduciary duties and trust, corruption, illegal activities, environmental degradation and human rights violations today. The impact of misconduct may likely be colossal on individuals and the wider society.

The primary purpose of imposing corporate criminal liability is to support and entrench the fundamental values of our society by punishing breaches. Another reason is to deter undesirable activity (Muhwezi, 2016). There is a further distinction between criminal offences that are regulatory in nature, and that of serious non-regulatory corporate crimes, that would arguably include also economic crimes. Crime is an area of law where *mens rea* and *actus rea* are required to be proven beyond reasonable doubt for the commission of a crime as a general rule. Under *mens rea*, there may be ranges of intent like recklessness, knowledge, and dishonesty. It has also been stated that “unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every offence” (*B v. DPP*, 2000).

Crimes are no longer always committed in a physical context by natural entities as they were 150 years ago. The types and nature of criminal offences, as well as perpetrators, have also evolved with the changing environment and modern-day advancements. It was said in common law that “a corporation cannot commit treason, or felony, or other crime in its corporate capacity: though its members may, in their distinct individual capacities” (Blackstone, 1765). However, having a legal personality and identity enables corporations to be vehicles for the commission of crimes. Hence, there is a need to make corporations liable for crime to be able to trace or to recover the proceeds of a crime, or then to make her controllers liable by deeming statutory provisions or alternative modes, or by the piercing of the corporate veil under common law (which is not expanded upon in this paper).

The method adopted in this paper is a limited comparative legal doctrinal approach and analysis. It covers primary case law, statutes, and secondary literature resources. The common law’s early position on a corporation as a *persona ficta* (legal fiction) is seen in the famous maxim

by Edward Coke (1613, Case of Sutton's Hospital): "They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by Attorney..."

The journey to impose corporate criminal liability originated in cases of regulatory or public welfare offences not requiring proof of *mens rea*—nuisance, malfeasance and non-feasance cases (Anca, 2016; Courtney, 1902; Burrows, 1948). This is the principle of strict liability somewhat extended to regulatory-type offences.

## 2. Limitations of Criminal Law on Corporations

In case of criminal liability, the case is not as simple when dealing with corporations that are juristic and nonphysical entities. It cannot be committed to prison, for its existence being fictional, no man can apprehend or arrest it (Blackstone, 1765). A corporation does not suffer mortality of death. Even if the punishment is by way of a fine, it can be passed on to the hapless consumer in the bigger picture. According to Williams (1983) that businessman will just regard the fines as overhead cost. It does not serve to deter the incentives to commit crimes. This causes an indifferent attitude if the penalty is only linked to capped fines, which defeats the aim of deterrence or punishment (Macrory, 2006).

The use of fine as the sanction (especially one that is capped) is a weak response to regulate corporate crime. Hence, the need for alternative diversification sanctions. To guide the exercise of discretion by the public prosecutor for a principled approach in the exercise of the treatment of regulatory offence and sanctions, it is suggested that a principle-based approach and guidelines mooted in the Macrory report and the resultant umbrella statute in the United Kingdom (UK) may be further studied. Likewise, a similar principled approach could be considered for plea bargains in criminal prosecution for serious non-regulatory offences.

The limitation to a juristic entity like a corporation is based on the principle of *lex non cogit ad impossibilia* (the law cannot foresee the impossible). Thus, juristic, or artificial persons are not liable for crimes punished by imprisonment or death (R v. ICR Haulage Ltd, 1944). However, the same stance has been revised by the UK Sentencing Code, as will be detailed later, in validation of the penal provision of imprisonment, which is not possible for corporations and where a fine can be substituted.

### 3. Regulatory and Non-Regulatory Offences: Pathway and Sanctions

The nature of regulatory offences is not considered ‘truly criminal’ in that it seeks to regulate standards of behaviour. The concept of regulatory context is described in which a “Government department or agency has (by law) been given the task of developing and enforcing a standard of conduct in a specialised area of activity” (Law Commission, 2010).

In *Gammon (Hong Kong) Ltd. and Others v. Attorney-General (AG) of Hong Kong* (1985), the Judicial Committee of the Privy Council held that the presumption that an offence requires *mens rea* is particularly strong where the offence is “truly criminal” in character. “Truly criminal” was distinguished from “quasi-criminal” in *Sweet v. Parsley* (1970). Such offences typically carry moral stigma and are of general application to the conduct of ordinary citizens in the course of their everyday life, contrasted with “regulation of a particular activity involving particular danger to public health, safety or morals in which citizens have a choice as to whether they participate.”

In Law Commission (2010), it is recognised that the criminal pathway should be reserved for the most serious cases on non-regulatory breaches, and more serious offences which involve principally deliberate, knowing reckless or dishonest wrongdoing. For minor cases of regulatory non-compliance, it is suggested that two-step measures could be adopted, which is an indirect criminalisation. The UK Consumer Protection Act 1987 is cited, where it is possible to craft enforcement measures like prohibition notices, warning, and suspension notices with entitlement of representations to be made by the defaulter, which is imposed as a matter of civil law. The second step involves the possibility of criminal prosecution in breach of the civil order.

The globalised world presents an international playing field for globalised corporations. Slawotsky (2013) explains that in today’s global economy, states are private market actors in the private realm, while private corporations engage in public actor functions driving the need for corporations to be regulated under international law. Slawotsky adds that global corporations are drawn to nations that have weak accountability for criminal corporate misconduct to engage in misconduct that can cause severe harm in those nations.

It is the argument of this paper that regulators should be vigilant of the blurring of lines between an offence that breaches standards of regulatory conduct, and one that is truly criminal, or non-regulatory offences (Lee,

2022). It is suggested that regulators should regulate both components should they arise within the scope of the statute, with relevant principles and guidelines. It is open for consideration if the same could be under a common umbrella with set principles, guidance, and sanctions, whether under a common statute or otherwise.

Reference is made to Section 200 of the Capital Market Services Act 2007 which allows for civil regulation *inter alia* for deceptive or fraudulent practices within certain areas and a broader context of penalties and restorative justice. There are other Malaysian laws that deserve mention to consider the framework, sanctions and scope of conduct, whether it is to be treated as regulatory and compoundable, or for more serious breaches, non-regulatory and pursued along a criminal pathway. The laws include the Financial Services Act 2013, Islamic Financial Services Act 2013, Capital Market Services Act 2007, Competition Act 2010, Environmental Quality Act 1974, Local Government Act 1971, Income Tax Act 1967, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, Occupational Health and Safety Act 1994 and the Penal Code.

The framework and development of the said laws are in different levels of progression and comprehensiveness to also address the very important question of legal empowerment to deal with detection, investigation, prosecution, sanctions, and enforcement against corporate crimes. Section 200, for example, has taken a more proactive approach in seeking to regulate conduct of market operators that engage in deception and fraud, in terms of false trading and market rigging (Section 175), stock market manipulation (Section 176), false or misleading statements (Section 177), and use of manipulative and deceptive devices (Section 179). The Securities Commission can recover up to three times the gross amount of pecuniary gain or loss avoided, and a civil liability of not more than RM1 million to defray costs of investigation and compensation for victims (Lim & Singh, 2022).

There are two considerations as to how to make the corporation itself liable on elements of intent and action, and how to make the controllers liable. An example of the latter is Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (MACC) that imposes deemed liability on natural persons designated with statutory defences when corporations are convicted with offences. It is a form of secondary liability that does not come to pass if the first step of the liability of the corporation is not met (Balasingam & Rukumani, 2020).

The court will infer from statute the legislative intent if the offence is meant to be strict liability, or akin to it and regulatory. This is usually when the offences are created without mental elements. The areas of such offences are within areas of local government, environmental pollution, food, product and workplace safety, or even obligation to pay contributions under Section 46 of the Employees Provident Fund Act 1991 or under Section 108A of the Social Security Organisation Act 1969. In the case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Azimuddin Ab Ghani & Others* (2012), the argument that Section 46 of the Employees Provident Fund Act was unconstitutional was rejected.

More serious criminal offences that have corrosive socio-economic impacts have been referred to as ‘economic crimes’ (Ministry of Justice, 2017). The UK government uses the term ‘economic crime’ to refer to a “broad category of activity involving money, finance or assets, the purpose of which is to unlawfully obtain a profit or advantage for the perpetrator or cause loss to others.” This definition is broader than terms such as ‘financial crime’ or ‘white-collar crime’ and includes fraud, terrorist financing, sanctions contravention, market abuse, corruption and bribery, and money laundering (HM Treasury and Home Office, 2019).

#### **4. Some Relevant Law and Enforcement Bodies**

Article 145(3) of the Federal Constitution provides that the AG has discretionary power to commence, conduct or discontinue proceedings for any offence. Section 376(1) of the Criminal Procedure Code (CPC) designates the AG as the public prosecutor to control and direct all proceedings under the CPC. The enforcement authorities include the Commercial Crime Investigation Department (CCID) under the Royal Malaysian Police (PDRM), MACC, Companies Commission of Malaysia (SSM), Securities Commission (SC), Bank Negara Malaysia (BNM), the Malaysian Competition Commission (MCC) and the Penal Code. The applicable statutes are referred to above.

## 5. Section 406 of the Penal Code and Section 187 of the Companies Act 2016

Section 187 of the Companies Act 2016 relates to monies to be held in trust until allotment and the Penal Code is referred to for criminal breach of trust. In this regard, arguably Section 405 of the Penal Code for criminal breach of trust would be applicable to a breach of Section 187, where monies which have been allotted for shares or debentures in certain circumstances are said to be paid trust for that purpose.

However, Section 406 of the Penal Code only envisages a natural person committing the offence as the punishment is imprisonment, fine and whipping (not in the alternative). This is notwithstanding that corporations are also capable of being trustees. Here again, one recognises the person or controller is the one to be held accountable. The Singapore Law Reform Act 2019 has repealed and reacted the law on criminal breach of trust. Section 409 covers, for example, criminal breach of trust of a director in his capacity as a director of a corporation.

Section 38A of the Companies Commission of Malaysia Act 2001 allows for the registrar with the written consent of the public prosecutor to compound the offence to a fine of up to half of the maximum. This mode, however, has no bearing to the fruits gained in the commission of the crime.

Section 187(1) of the Companies Act 2016 provides for the monies paid for allotment by an applicant to be held in trust by the company and proposed director named in prospectus and the promoter.

Section 187(3) reads (emphasis mine):

A company *and every officer* who, or a proposed company and every person named on the prospectus as a proposed director and every promoter who knowingly and wilfully authorises or permit the default commits an offence and shall on conviction be liable—  
(a) *In the case of company or a proposed company to a fine not exceeding five million ringgit and*

(b) In the case of the person named in the prospectus as a proposed director or the promoter, to imprisonment for a term not exceeding five years or to a fine not exceeding one million ringgit or to both.

It is noted that there are separate penalties for natural and artificial beings in the current Companies Act 2016 legislation in recognition of the nature of the offenders. However, the movement away from a ‘just a fine’ approach is not evident within the legislation. As said earlier and which deserves emphasis, it does not consider the fruits gained by the commission of the offence by the corporation or other relevant factors.

The minor point on discrepancy in the provision of the Section 187 above is that the penalty does not apply to the “officer” of the company, though the officer is said to have committed the offence under Section 187(3). For subsidiary legislation under the Companies Act 2016, there is Section 613(2), which stipulates a fine not exceeding RM500,000 or imprisonment for a term not exceeding three years, or both, without distinction of the separate penalties adopted with relation of the nature of the natural or artificial offender as in the parent act.

Penalties here, as seen in the selected statutes (generally) in Table 1 below, focus on fines or imprisonment or both, without consideration of any other diversified sanctions or recovery of the fruits of the crime; nor discrimination between type of offences, whether regulatory or non-regulatory, in terms of compoundability, with the ultimate discretion in the hands of the public prosecutor.

## **6. Sections 52A and 52B of the Penal Code (Act 574)**

Sections 52A and 52B of the Malaysian Penal Code define a non-serious and serious offence respectively as:

52A. The word ‘non-serious offence’ denotes an offence punishable with imprisonment for a term not more than ten years.

52B. The word ‘serious offence’ denotes an offence punishable with imprisonment for a term of ten years or more.

Given the above, it is seemingly open to argument that a corporation will be excluded from serious or non-serious offences, as it is not able to be subjected to imprisonment. This is notwithstanding that the word “person” under Section 11 of the Penal Code covers any company or association or body of persons, whether incorporated or not.

In this regard, there is a need to review these definitions, as it seemingly



excludes corporations from the sphere of crime, whether serious or not. This ambiguity requires consideration as to what types of offences would be designated as serious crimes from the perspective of a corporation. The current yardstick for fines – whether aligned to alternative imprisonment penalties or not – may not be the best. This would arguably also require a demarcation of regulatory and non-regulatory offences within the corporate context, for which fixed principles, guidelines, processes, pathways, and diversified sanctions may be drawn up to decide how a compound regime would be administered.

The danger of making all offences (regulatory or non-regulatory) potentially compoundable within the statute for a capped fine is the disincentivisation of criminal prosecution. It may also result in compromises – compounds and plea bargains – that allow the offender to benefit from a crime. The consideration of sufficiency of existing laws across all sectors may need a review, so as to empower prosecutors and regulators to collaborate on securing convictions for criminal charges and recover the proceeds of crime.

## **7. Section 17A of the Malaysian Anti- Corruption Commission Act 2009**

Section 17A (2) of the Malaysian Anti-Corruption Commission Act 2009 also regrettably ties the penalty of a corporation to imprisonment. It also has a limited vision on sanctions, which is narrowed to fines (Balasingam and Rukumani, 2020). It reads:

(2) Any commercial organisation who commits an offence under this section shall on conviction be liable to a fine of not less than ten times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of pecuniary nature, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding twenty years or to both.

It is to be noted in passing that the statutory provision for imprisonment and/or fine when it relates to a corporation has been challenged in India as ineffective and void (see *Standard Chartered & Others v. Directorate of*

Enforcement & Others, undated).

In the UK, Sections 119 and 120 of the Sentencing Code allow for a fine to be imposed for any offence, even if the legislation only imposes imprisonment, save for mandatory life sentences (Law Commission 2021). This seemingly saves the penal legislation from being contested as not applicable to a corporation as an artificial entity.

## **8. Exercise of Discretionary Powers**

Under the UK system, only a corporation can enter into deferred prosecution agreement (DFA) with the prosecutor. The same needs to be approved by the courts. It is a mechanism where prosecution against the corporation is suspended pending payment of a penalty and/or remedial actions upon fulfilment of which the action is discontinued. The DFA came into force on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013. It can be resorted to by the Crown Prosecution Service (CPS) and the Serious Fraud Office (SFO). There is a Code of Practice for Prosecutors, which was published jointly by the SFO and CPS on 14 February 2014 after public consultation. In Singapore, the Criminal Justice Reform Act 2018 has introduced this among other amendments, but Malaysia has yet to consider the scope function and procedures of the same.

Section 172C of the Malaysian Criminal Procedure Code allows for plea-bargaining. This should also be followed with reflection as to whether it is advisable to have guidelines governing the government's ability to plea bargain for an independent, principle-based, and bias-free exercise of discretion. The prosecution also has the prerogative in a criminal case to withdraw a case based on a discharge not amounting to an acquittal (Malaysian Bar, 2020), where the offender may be open to be charged again, unlike a discharge amounting to an acquittal where the offender is freed from further charges on the same matter. Whether this prerogative need some fixed principles and guidance subject to court scrutiny is open for consideration. Even internal guidelines within the AG office seemingly may need stringent self-regulatory controls to be monitored to adhere to set principles. Hence, check mechanisms and audit of an independent oversight nature is a consideration.

Voluntary disclosure of criminal conduct in Malaysia does not provide an entitlement to leniency, save for the provision under Section 41 of the

Competition Act 2010. Likewise, in the spirit of a proper and transparent exercise of discretionary powers, guidelines for the same would be advisable, if so extended.

## 9. United Kingdom Law Commission

The Law Commission in the UK has studied and is studying the area quite extensively. The difficulty lies in the fact that the company is *persona ficta*, as well as that *mens rea* and *actus rea* need to be evident for non-regulatory crimes. This is aside from the rules of evidence and burden of proof that must be satisfied in a criminal case. There is a need not to overclassify too many offences into the realm of criminal law so as not to overwhelm the system – to classify serious offences under the umbrella of criminal law, and to use civil administrative alternative to deal with minor regulatory compliance offences.

Under criminal law, *mens rea* and *actus rea* are required before liability can be imposed as a general rule. The alternative for minor compliance and regulatory offences is a strict liability approach, where intent need not be proven. The move towards decriminalisation and having a more responsive regulatory theory was considered in the Macrory Report (2006). It is premised on the idea that the burdens on the criminal justice system can be lifted by creating a different pathway for regulatory offences to be dealt with. It is to be on a proportionate mode, with a broad range of sanctions to improve outcomes for society, raise standards of compliance across industry, and create a level playing field for all compliant businesses. In the Macrory Report, the idea that in addition to a fixed fine, the profit order would reflect the direct or indirect financial benefits gained from non-compliance (e.g., cost saved from non-payment of tax). The right to trace and recover proceeds could be also codified. The fine would be reflective of the seriousness of the breach. The profit order is to capture the financial benefit gained from the breach.

A corporate rehabilitation order aims to change the behaviour of the offender. This is to ensure that the corporation addresses the flaw within and prevent future breaches. Corporations can plan remedial actions, e.g., a community project, and failure to comply will attract breaches for which the corporation may be sentenced.

A publicity order is yet another mode by which corporations that value their reputations will be incentivised into proper behaviour. This would

empower the courts to order a notice to be included in newspapers, trade publications, or in the company annual report or website within a set time frame. The notice could include the offence, the steps taken to remedy or prevent future occurrence, and/or any compensatory or restorative measure taken by the corporation.

Among the recommendations in the Macrory Report is that the government reviews the formulation of criminal offences that relate to regulatory non-compliance. Six principles and seven characteristics were suggested for designing sanctions for regulatory non-compliance offences.

For regulatory cases in courts, a sentencing guideline was recommended. This is to be heard at the lower courts and with appropriate training to prosecutors, including informing the courts of how the wrongdoer benefits from non-compliance. Enforcers can consider monetary administrative penalties in fixed and variable schemes in line with the suggested principles and characteristics. Appeals therefrom are to be heard by a regulatory tribunal rather than the courts. The fines should be set out and particularised with limitations or scope.

Another recommendation is that a statutory notice be used to secure compliance, in default of which regulators should have access to administrative financial penalties as an option to criminal prosecution. The report also suggests the introduction of enforceable undertakings and undertakings plus (a combination of an enforceable undertaking with an administrative financial penalty) as an alternative to a criminal prosecution, as well as the introduction of pilot schemes involving restorative justice as a pre-court diversion, an alternative to a monetary administrative penalty. If it is within the criminal justice system, alternative sentencing options like a profit order (when profits made from non-compliance is clear) can be introduced to require repayment of profit in addition to fine. Corporate rehabilitation orders and publicity orders can also be taken into account for sentencing.

The other recommendations deal with improved transparency and accountability to ensure standard practices, sharing of best practices, development of outcomes, reporting mechanism and accountability, which is included in performance measurement. A list of completed actions and against whom can be published on a regular basis in the media that is readily sighted.

The Regulatory Enforcement and Sanctions Act 2008 (RESA) was enacted based on the recommendation of the Macrory Report. The RESA scope relates to local authority exercising the function under Section 4 (which demarcates it from a serious criminal offence *inter alia* involving fraud or deceit or economic crime) as:

- (a) a function under a relevant enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity, or
- (b) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of a relevant enactment relate to any activity.

Under RESA, such categories are transformed into civil actions (as opposed to criminal actions) by defined regulatory authorities. There are procedures provided for notices, processes, grounds for appeal, and appeals to a tribunal. The pathways allow for the differentiation of offences – those placed under fixed monetary penalties, discretionary monetary penalties (which in addition to a variable fine, includes the option to cease the offence or to reinstate or restore the position), stop notices, and enforcement undertakings. It is also possible to have a combination sentence. This extends to subordinate legislation for specified enactments. The schedules under RESA *inter alia* list the enactments that come within its purview and identify designated regulators. In short, it transforms the criminal pathway of an administrative regulatory offence into a centralised civil pathway under a common umbrella. It lifts regulatory offences out of the criminal pathway with provision of alternative remedies and penalties – not just a basic fine with no regard as to the gravity or the need of purposive response to the offence. It can be envisaged that perhaps more options of restorative penalties could be embedded, like a public apology on a website, community service, or corporate responsibility services by the offending corporation (see also Van Genugten, 2019).

In this regard, it is worth mentioning that the UK has other statutes that deal with crimes, including the Serious Crime Act 2007, Proceeds of Crime Act 2002, and the Fraud Act 2006. The rationale and logic of these statutes, especially for regulatory compliance of minor offences, makes

sense, especially where there may be numerous statute and subsidiary regulation offences that are required to be dealt with which would likely to paralyse the system. The criminal route would entail a cumbersome and overwhelming process, including the rules of evidence procedure and burden of proof. The time, effort, and cost incurred in the exercise is very likely to be counterproductive and inefficient. The move adopts the approach of other civil jurisdictions in Europe like Germany of administrative and civil sanctions for regulatory non-compliance offences (Paraschiv, 2013; Esakov, 2010).

The Law Commission paper builds upon this regulatory compliance approach, moving away from reliance on criminal prosecution to secure compliance, towards an alternative administrative mode. It is seeking consultation and the progress is ongoing at the policy development stage. Other relevant papers that are currently ongoing are Ministry of Justice (2020) Corporate Liability for Economic Crime: Call for Evidence, which is at government response stage, and Law Commission Consultation (2021) Corporate Criminal Liability, which is at the consultation stage. A dated Commission Report (1944) on Codification of Criminal Law is also mentioned here for reference of principles of criminal liability.

## **10. Selected Malaysian Statutes**

Table 1 is a compilation of selected statutes to see how breaches are treated within statutes. It is noted that there is a general compound pathway with no discrimination of regulatory (non-serious) or non-regulatory (serious) crimes. Malaysia has taken this approach of decriminalisation, by seemingly making available the power to compound offences indiscriminately for the most part.

**Table 1:** Selected Extracted Malaysian Acts on Compoundable Offences

Act	Content	Penalty
Section 45, Environmental Quality Act 1974.	All offences compoundable under Environmental Quality	Rule 2: Sum collected not exceeding RM2,000.
Environmental Quality (Compounding of Offences) Rules 1978 (PU(A) 73/2010)	(Control of Pollution from Solid Waste Transfer Station and Landfill) Regulations 2009 (PU(A) 433/2009); Environmental Quality (Industrial Effluent) Regulations 2009 (PU(A) 434/2009); Environmental Quality (Sewage) Regulations 2009 (PU(A) 432/2009).	Section 47, Environmental Quality Act 1974, allows for recovery costs and expenses to remove or mitigate pollution (incidental to the issue of penalty for the offence)
Companies Commission of Malaysia Act 2001	Section 38 A (1) allows the registrar, with the public prosecutor's written consent, to offer a compound for offences committed under the Companies Commission of Malaysia Act 2001, Companies Act 2016, Trust Companies Act 1949, Kootu Funds (Prohibition) Act 1971, Registration of Businesses Act 1956, Limited Liability Partnerships Act 2012 (Act 743) and Interest Schemes Act 2016 (Act 778).	By a written offer to offender of compound of an amount of money not exceeding 50% of the maximum fine for that offence.
Solid Waste Management and Public Cleansing Management Act 2007	Section 94(1)	Director may, with written consent from the public prosecutor, compound for an amount of money not exceeding 50% of the maximum fine for that offence.
(Note: There is a provision to set up a tribunal with limited jurisdiction)		

Act	Content	Penalty
Local Government Act 1971 (Act 171) Section 102 (T)	Power to compound Section 102 (T) and Section 104 on penalties.	(T) To provide for the offences under the act and any by-laws which may be compounded by the local authority, the persons who may compound.  Section 104 allows for a fine not exceeding RM2,000, or a term of imprisonment not exceeding one year, or both, and in the case of a continuing offence, a sum not exceeding RM200 for each day during which such offence is continued after conviction.
Financial Services Act 2013 (Act 758)	Section 253, power to compound	Section 253(1) allows for the governor, with the written consent of the public prosecutor, to compound any offence punishable under the act or any regulations made under the act, such sum of money not exceeding the amount of the maximum fine.
Islamic Financial Services Act (Act 759)	Section 264, power to compound	Section 264 (1) allows for the governor, with the written consent of the public prosecutor, to offer in writing to compound any offence punishable under the act or any regulations made under the act, such sum of money not exceeding the amount of the maximum fine.
Capital Market and Services Act (Act 671)	Section 373, compounding of offences	Section 373 (1) allows for the chairman of the commission, with the written consent of the public prosecutor, to compound any offence committed by any person under Part II, III, VI, VII, X or XII or any regulations made thereunder, not exceeding the maximum fine (including the daily fine in the case of a continuing offence, if any) for that offence.
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001	Section 92, power to compound	By competent authority with consent of the public prosecutor, compound (not exceeding 50% of maximum fine) any offence under the act or any regulations made under the act.

Source: Author's own.



## 11. Models from United Kingdom

There are three common law models namely, identification doctrine, vicarious liability, and delegation. These models are further elaborated upon in the Table 2 below.

**Table 2:** Models Applied for Corporate Liability in United Kingdom

Models	Elements	UK Examples
Strict liability offences that may be also construed as criminal vicarious liability	Imposed by statute. Intent of company is not required. Act of agent or employee of corporation in the commission of the offence will attract criminal liability to the corporation as the principal. The agent or employee also may be held liable ( <i>Griffith v. Studebaker</i> , 1924)	Section 26 of the Companies Act 2006: Registrar to be sent copy of amended article. Failure will result in an offence by the company and every officer who is in default. Upon summary conviction to a fine not more than level 3 on standard scale, and a daily default fine not more than one-tenth of level 3 on the standard scale.
Identification model	Seek to identify people whose mind and action are deemed to be that of the company. Intent needs to be found in the minds of highest levels of senior management (board or directors or expressed delegate) as having the directing mind and will (DMW) of the company followed by the criminal act. The effect is to make it quite difficult to hold large corporations liable criminally, as intent is difficult to be established in such cases.	Common law doctrine: <i>Tesco v. Natrass</i> (1972) held that a store manager did not have the status or authority to make the company criminally liable. More recently, in <i>Serious Fraud Office v. Barclays</i> (2020), the person who can be the DMW is even more restrictive. This has led the call for reform and statutory intervention for corporate criminal liability, as common law is seen as insufficient to deal with the same.
Civil vicarious liability for criminal action	Common law civil liability for financial compensation. Intent and act are that of another (like an employee or agent) who is in a special relationship with the company. The company is secondarily liable for the tortious act (may be a crime too) committed during course of work.	<i>Lister v. Hesley Hall</i> (2001): The employer was liable for by a warden against children as the acts “inextricably interwoven with the carrying out ... of his duties” even though it could never be described as a “mode” of carrying out his duties to care for the children. In <i>Mahmoud v. WM Morrison Supermarkets</i> (2016), likewise, the action of an attendant committing racial abuse and assault on a customer was found to be closely connected with his duties and for employer interest.

Models	Elements	UK Examples
Delegation	Limited application where a specific person is imposed a duty and the breach of which is a criminal offence. The specific person cannot escape liability by delegation as the delegate is imputed with the intent of the delegator.	Example: Knowingly permitting disorderly conduct under Section 44, Metropolitan Police Act 1839.
Failure to prevent	Corporation may be guilty of the separate offence of failure to prevent bribery if a person associated with it bribes another person, or intends to obtain or retain business or an advantage for the corporation.	Section 7, Bribery Act 2010

Source: Law Commission reports.

The identification model seeks to identify the mind of the company as resided in certain levels of natural person(s) in the company, to decide on the requisite *mens rea*. This has been the bane of the doctrine, as will be seen later. But the major criticism is that the scope of application is quite limited, as indicated in the case of Tesco. The English theory focuses on senior management, whereas criminal offences are also committed at lower levels. Hence the bigger the corporation, the more likely it is to evade arrest.

The vicarious liability model as it exists rests on an employer being secondarily liable to a civil remedy for a tortious act of a person in employment, akin to employment, or in course of employment. The company may be liable for the criminal conduct of an employee, as was decided in the case of *Various Claimants v. Catholic Child Welfare Society* (2012) and *Cox v. Minister of Justice* (2016), but only on a secondary basis, when the employee is criminally liable. There is no issue of criminal intent on part of the employer. Vicarious liability, however, has been accepted in relation to criminal offences of strict liability, where no particular mental state is required and the elements for vicarious liability are satisfied.

The delegation model applies to certain limited type of legislation where duty is imposed on X (the delegator) and breach of the duty is a criminal offence. But it is not strict liability, as there is requirement of some *mens rea*, e.g., knowingly permitting disorderly conduct. The doctrine is to allow the *mens rea* of delegate (Y), who was delegated the premises to be imputed to the delegator (X), so that the delegator on whom the duty is imposed cannot

escape liability by delegation. This relationship does not fall under the realm of vicarious liability, as it is with the primary liability of the delegator that this doctrine is concerned.

## **12. Imputing Liability to Controllers of the Corporations and to Corporations in Malaysia**

In the Malaysian context, in terms of imputing liability to the person in control of the corporation, there is relevant legislation, such as Section 130T of the Penal Code Section for offences committed by a body corporate under Sections 130N, 130O, 130P and 130Q (which relates to terrorist-linked offences) for liability to be imposed on designated persons. These designated persons – any person responsible for the management and control of the body corporate, which includes a director, manager, secretary, or other similar officer acting in such capacity – are deemed to be liable for the corporation's breaches.

The statutory defence is that the corporation's offence was carried out without the consent or connivance of the designated person, and that the said person exercised due diligence within his or her capacity to prevent the commission of the offence. Similarly, this approach has been adopted under Section 87 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, Section 367 (1) of the Capital Market Services Act 2007, Section 17A (3) of the Malaysian Anti-Corruption Commission Act 2009, and Section 38B (1) of the Companies Commission of Malaysia Act 2001. The latter allows for the natural person to be charged jointly and severally with the corporation, with a deemed liability provision in event of conviction of the corporation, subject to the statutory defences stated above.

It is to be noted that Section 52 of the Occupational and Health and Safety Act 1994, which allows for a designated person to be charged jointly and severally with the corporation, has a provision to hold the designated person liable with the body corporate without any statutory defence. It is also to be noted that in Malaysia, individual primary liability on a joint and several basis with the corporation has been imposed directly on directors or designated persons by way of or akin to strict liability offences (Section 46 of the Employees Provident Fund Act 1991, Section 108A of the Employees Social Security Act 1969. Section 101B of the Employment Act 1955).

There are statutory provisions that regulate imputations of liability on natural persons and shifting of onus of proof to prove statutory defences. Section 38B (1) of the Companies Commission of Malaysia Act 2001 provides that the company must commit and be convicted of the offence before the liability of the designated persons are imputed. This is subject to statutory defences. Section 38B (2) envisages imposition of criminal liability on a person by the use of doctrine of vicarious liability. It remains for the court to decide if this section is applied to impute liability to a corporation. Section 87 of the Malaysian Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 imputes liability on persons with certain designations to be liable for an offence (with statutory defences) where an offence is committed by a body corporate. Section 87(2) allows for prosecution against the individual, notwithstanding the body corporate is not convicted. It is open to debate and future court decision if prosecution will result in conviction. Section 87(4) allows for a person to be liable vicariously *inter alia* for acts of employees or agents with statutory defences. If a company is to be held vicariously liable under this provision, then arguably, intent or consent is required to be established. Section 88 requires a person to be liable before vicarious liability is imposed for acts of designated others. However, the approach of imputation of intent to a company by the actions of natural persons is seemingly adopted under Section 17A (1) of the Malaysian Anti-Corruption Commission Act 2009.

### **13. Identification Model**

The doctrine of identification rests on ascribing a person or persons within the company as being the company's will and mind, or the alter ego of the company. Recent developments have made it more difficult to ascribe who is the mind of the company, which is likely to result in difficulty of securing convictions for corporate crime in England and Wales. But the doctrine is set out nonetheless. The origin is traceable to the dicta of Viscount Haldene in the well-known case of *Lennard Carrying Company v. Asiatic Petroleum Ltd* (1915):

My lords, 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

the same purposes may be called an agent; but who is really the directing mind and will of the corporation, the very ego and centre of personality of the corporation.

In *Tesco Supermarkets Ltd v. Natrass* (1971), Lord Reid said:

...the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company.

In the case of *Tesco*, the court held that the store manager did not represent the mind and will of the company for the company to be liable under Section 11(2) of the Trade Descriptions Act 1968, when the advertised reduced sale price of washing powder was not made available. The court held the offence was not one of strict liability as there was a due defence clause. The store manager in the case was not considered senior enough to be the directing mind or will (DMW) of the company to intent the crime.

It is summarised from the Law Lord speeches that those who can represent the directing mind and will are limited. In sum, it could include the board of directors collectively, the managing director, a senior manager to whom there has been delegation – although whether it needs to be formal or *de facto* delegation is not clear. Some suggest that a reference to a “director, manager or secretary” in a consent or connivance provision to make the individual liable would make a senior manager the mind of the corporation.

The problem is that for large corporations especially, it would be difficult to satisfy the criminal intent where the conduct is carried out by subordinates at lower levels, and where the chain of management and information is widely dispersed.

There was an attempt to resolve the issue in the Privy Council, in the case of *Meridian Global Funds Management Asia v. Securities Commission* (1995), by extending the scope of the “mind of the company.” It was the case that concerned the failure of two employees to disclose that the company had become a substantial shareholder in another. The knowledge of the employees was held to be knowledge of the company for purposes of non-compliance of statutory disclosure by the company.

Lord Hoffmann, giving the leading judgment, proposed that the rule

of attribution for an offence should be found through normal rules of interpretation applied specifically to the offence in question, meaning that the corporation would be identified with different people for different offences, depending on the purpose of the offence. This development was welcomed by the Law Commission (2010) as a movement away from the strict identification doctrine. It was the view that the courts had the discretion to interpret statutes, impose it on different bases to decide what would be best to fulfil the statutory purpose, and even identify employees not identified as senior management in certain cases to attach liability to companies. This could be an option to be adopted by the courts in Malaysia under common law.

However, the *Meridian* case was later interpreted by A-G Reference (1999) as merely a restatement, not an abandonment of existing principles. This seems to be the approach taken recently. In the recent case of *Serious Fraud Office v. Barclays* (2020), the court used a strict application of the identification principle as a default, and only looked to the “special rule” of attribution if the statutory purpose is defeated. It is not just a reversion to the *Tesco* concept, but even stricter. It may be understandable to argue that a store manager does not have the authority to be the mind of the company, but it was envisaged that a managing director would be – not so in this case. It did not address the question as to who would be considered the company mind, without considering if they had been its alter ego through an act of delegation.

The mechanics of how to make the drivers or the corporation itself accountable are ripe for further consideration. This would also require consideration that the corporation’s rights as a person are not constitutionally violated. Some points for consideration would be a fault (conduct) as opposed to an intent-based focus for corporations, the reversal of onus of proof upon establishment of facts, lifting the corporate veil on certain bases, statutory imputation of criminal vicarious intent from employees to corporations within given limits, statutory provisions – like a deeming provision – that makes the person implicit in making the corporation criminally liable also liable, failure to prevent or a consent or connivance provision.

This case, *Serious Fraud Office v. Barclays* (2020), has led to criticism that the judgement had the effect of removing companies with widely cascaded levels of management and functioning board and subcommittees

from being prosecuted. It goes back to a strict interpretation as to who can be the directing mind and will at the highest levels. Further, that the operating levels need to be delegated in writing full responsibilities, and not be responsible or accountable to anyone else. It would seem a *de facto* authority of delegation would not be enough to make corporation liable (Rappo & Bullock, 2020).

The retrogression has caused the Law Commission to seek views for reform. The reform will seek to develop the law on how companies may be liable in criminal context. But it is hoped that since companies are artificial, and the real wrongdoers in certain offences like corruption, breach of trust, and money laundering are human, the need to be penalise the wrongdoer for a deterrent effect will be envisaged. There are steps and position papers undertaken in this regard and direction, which includes the Law Commission Consultation (2021).

#### **14. Conclusion and Recommendation**

The area of corporate liability and regulation is vast and one that would require further research and study. This paper is a humble initial attempt with the following recommendations. To consider if the distinction of corporate crimes can or should be demarcated into regulatory and non-regulatory offences, and the diversified sanctions considered (due to the nature of corporations) therein would be beneficial to address corporate crimes. This should attract the necessary oversight proportionate to the seriousness of the offence with a transparent, principle-based approach – as opposed to one that is discretionary-based – with compounds reserved for non-serious regulatory offences. Plea-bargaining processes should also be on principle-based criteria and subject to court oversight. This would require consideration of structural and legal reforms.

To review existing Malaysian laws, with comparative jurisdictions in view, for modern-day advancements are needed to address the elements required for corporate crime; evolution of nature of the offender; types of offences and penalties; need to capitalise on the use of a digital platform; and shared resources and arrangements between agencies (and external/cross-border parties), for the detection, investigation, evidence gathering, prosecution, conviction, sanctions and recovery of proceeds of crime.

Further research can be conducted on how the corporation will be held

liable for fraud or deception based on criminal law on the issue of intent (or fault if an alternative is preferred), given that the doctrine of identification has undergone a setback under common law in the UK. This is important, given that the commonly adopted mode of secondary liability with statutory defences of designated natural persons deemed to be in control of the corporation will only occur upon the finding of primary liability of the corporation. The intent of the corporation is still, arguably, requisite under some statutes and the general law.

## References

- Attorney General's Reference No 2 of 1999 (2000). England and Wales Court of Appeal (Criminal Division). <https://www.casemine.com/judgement/uk/5a8ff8cd60d03e7f57ecd9ec>
- Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) Malaysia. <https://lom.agc.gov.my/>
- B v. DPP (2000). *The Weekly Law Reports* 2(452).
- Balasingam, U., & Rukumani V. (2020). Section 17A of the Malaysian Anti-Corruption Act 2009: Corporate liability and beyond. *Malayan Law Journal* 4, cxli.
- Blackstone, W. (ed.) (1765). *Blackstone's Commentaries on the Laws of England*. Chicago: University of Chicago Press.
- Burrows, R. (1948). The responsibility of corporations under criminal law. *Journal of Criminal Science* 1,1-19.
- Case of Sutton's Hospital (1612). *English Report* 77(960).
- Capital Market and Services Act (Act 671) Malaysia. <https://lom.agc.gov.my/>
- Companies Act 2016 (Act 777) Malaysia. <https://lom.agc.gov.my/>
- Companies Commission Act 2001 (Act 614) Malaysia. <https://lom.agc.gov.my/>
- Cox v. Minister of Justice (2016) *Appeal Cases* 660.
- Employees Provident Fund Act 1991 (Act 452) Malaysia. <https://lom.agc.gov.my/>
- Employees Social Security Act 1969 (Act 4). <https://lom.agc.gov.my/>
- Employment Act 1955 (Act 265) Malaysia. <https://lom.agc.gov.my/>
- Environmental Quality Act 1974 (Act 127) Malaysia. from <https://lom.agc.gov.my/>



- Esakov, G.A. (2010). Corporate criminal liability: A comparative review. *City University of Hong Kong Law Review* 2, 173-192.
- Fraud Act 2006 c 35 United Kingdom Public General Act. <https://www.legislation.gov.uk/ukpga/2006/35/contents>.
- Financial Services Act 2013 (Act 758) Malaysia. <https://lom.agc.gov.my/>
- Gammon (Hong Kong) Ltd and Others v Attorney-General of Hong Kong (1985) *Appeal Cases* 14.
- HM Treasury and Home Office (2019). *Economic crime action plan, 2019-22*. <https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022/economic-crime-plan-2019-to-2022-accessible-version>
- Income Tax Act 1967 (Act 53) Malaysia. <https://lom.agc.gov.my/>
- Interpretation Acts 1948 and 1967 (Act 388) Malaysia. <https://lom.agc.gov.my/>
- Islamic Financial Services Act 2013 (Act 579) Malaysia. <https://lom.agc.gov.my/>
- Kenny, C.S. (1902). *Kenny's Outlines of Criminal Law*. Cambridge: Cambridge University Press.
- Law Commission (1972). Codification of the criminal law/ General principles criminal liability of corporations. Working paper 44. <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxsou24uy7q/uploads/2016/08/No.044-Codification-of-the-Criminal-Law-General-Principles-Criminal-Liability-of-Corporations.pdf>
- Law Commission (2010). *Criminal liability in a regulatory context*. [https://www.lawcom.gov.uk/app/uploads/2015/06/cp195\\_Criminal\\_Liability\\_consultation.pdf](https://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf)
- Law Commission (2021). Law Commission seek views on corporate criminal liability. <https://www.lawcom.gov.uk/law-commission-seek-views-on-corporate-criminal-liability/>
- Lee, S. (2022). 'Sabah Watergate' suspect to pay RM30mil compound. *The Star*, 19 February. <https://www.thestar.com.my/news/nation/2022/02/19/sabah-watergate-suspect-to-pay-rm30mil-compound>
- Lembaga Kumpulan Wang Simpanan Pekerja v. Azimuddin Ab Ghani & Ors (2012). *Current Law Journal* 522.
- Lennard Carrying Company v. Asiatic Petroleum Ltd (1915). *Appeal Cases* 705.
- Lim Koon Wan and Manshan Singh (2021). IGCL business crime laws and regulation Malaysian chapter. *ICLG*. <https://iclg.com/practice-areas/>

- business-crime-laws-and-regulations/malaysia.
- Lister v. Hesley Hall (2002). *Appeal Cases* 215.
- Local Government Act 1976 (Act 171) Malaysia. <https://lom.agc.gov.my/>
- Mahmoud v. WM Morrison Supermarkets (2016). *Appeal Cases* 677.
- Macrory, R. (2006) *Regulatory justice: Making sanctions effective* (Better Regulation Executive) [https://www.regulation.org.uk/library/2006\\_macrory\\_report.pdf](https://www.regulation.org.uk/library/2006_macrory_report.pdf).
- Malaysian Bar (2020). Legal issues on the granting of a discharge not amounting to acquittal of Riza Aziz. <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-legal-issues-on-the-granting-of-a-discharge-not-amounting-to-acquittal-of-riza-aziz>.
- Malaysian Anti-Corruption Commission (Amendment) Act 2018 (Act A1567) Malaysia. <https://lom.agc.gov.my/>
- Meridian Global Funds Management Asia v Securities Commission (1995). *Appeal Cases* 500.
- Ministry of Justice (2017). Corporate liability for economic crime: Call for evidence. <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/#:~:text=The%20call%20for%20evidence%20is,in%20the%20name%20of%20companies>.
- Muhwezi, M. (2016). The case for corporate criminal liability. <https://www.researchgate.net/publication/309041784>.
- Occupational Health and Safety Act 1994 (Act 514) Malaysia. <https://lom.agc.gov.my/>
- Paraschiv, D.Ş. (2013). Corporate criminal liability in comparative law. *Contemporary Readings in Law and Social Justice*, (1), 100-105.
- Penal Code (Act 574) Malaysia. <https://lom.agc.gov.my/>
- Pop, A.I. (2006). Criminal liability of corporations—Comparative jurisprudence. Student scholarship, Michigan State University College of Law. <http://digitalcommons.law.msu.edu/king/81>.
- Proceeds of Crime Act 2002 c 29 United Kingdom Public General Act <https://www.legislation.gov.uk/ukpga/2002/29/contents>
- R. v. I.C.R. Haulage Ltd (1944) *King's Bench* 551.
- Rappo, P., & Bullock, L. (2020, March 12). Barclays SFO trial: Is corporate criminal liability dead? *Thomson Reuters Regulatory Intelligence*.
- Regulatory Enforcement and Sanctions Act 2008 c 13 United Kingdom Public General Act <https://www.legislation.gov.uk/ukpga/2008/13/contents>

- Serious Fraud Office (2013). Deferred prosecution agreements. <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/>
- SFO v. Barclays (2018) *England and Wales High Court* 3055.
- Singapore Criminal Reform Act 2019. <https://sso.agc.gov.sg/Act/CLRA2019>.
- Singularis Holdings Ltd v. Daiwa Capital Markets Europe Ltd (2020) *Appeal Case 1189*.
- Solid Waste Management and Public Cleansing Management Act 2007 (Act 672) Malaysia. <https://lom.agc.gov.my/>
- Suman, S. (n.d.), Corporate criminal liability: An analysis of constitutional lawyers in India. <https://www.legalserviceindia.com/article/1101-Corporate-Criminal-Liability-An-Analysis.html>
- Slawotsky, J. (2014). Corporate liability for violating international law under the Alien Tort Statute: The corporation through the lens of globalization and privatization. *International Review of Law*, 2013(2), 6.
- Standard Chartered Bank & Others v. Directorate of Enforcement & Others (2006). *Supreme Court of India* 107.
- Serious Crime Act 2007 C 27 United Kingdom Public General Act <https://www.legislation.gov.uk/primary+secondary/2007?title=Serious%20Crime%20Act%20>
- Sweet v. Parsley (1970) *Appeal Cases* 132.
- Tesco Supermarkets Ltd v. Nattrass (1972) *Appeal Cases* 153.
- Van Genugten, J. (2019). Opening the door to court-ordered restitution for corporate criminal liability: A cautionary tale. *The Review of Litigation* 39. <https://www.shearman.com/-/media/files/perspectives/2020/06/39-rev-litig-191-2020.pdf>
- Various Claimants v. Catholic Child Welfare Society (2013). *UK Supreme Court* 56.
- Williams, G.A. (ed.) (1983). *A Textbook of Criminal Law*. London: Stevens & Sons.