INTRODUCTION

Globalization has become the buzzword to encapsulate to some of our amazement and apprehension as we enter a new millennium and perceive the society around us changing at an alarming rate\(^2\). Human societies across the globe have established progressively closer contacts over many centuries, but recently the pace has dramatically increased\(^3\). Now we all can see that this current wave of globalization has been driven by policies that have opened economies domestically and internationally. In the years since the Second World War, and especially during the past two decades, many governments have adopted free-market economic systems, vastly increasing their own productive potential and creating myriad new opportunities for international trade and investment\(^4\). It has been observed that by this rapid phase of globalization various corporations have come into existence as it has been considered to be the most effective means to generate economy and help in the development. With this myriad of changes creeps in certain challenges in the society which gives rise to questioning the rule of law and also a threat towards universality of handling the complex situation.

In order to develop a civilized society it must be seen that there exists a perfect balance of equality and social justice in the society. The term “Social Justice” depicts the fairness and the mutual obligation in the society that should be primarily looked upon. John Rawls was the most influential thinker on “Social Justice” (1971). According to Rawls, he argues for a balance between social equality and individual freedom. However, social equality and individual

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1 Advocate, Calcutta High Court  
3 Available at www.globalpolicy.org/globalization/defining-globalization.html (Last viewed on 13th January, 2016, 20:18)  
4 Available at www.globalization101.org/what-is-globalization/ (Last viewed on 11th December, 2015, 19:45)
freedom are frequently seen as in tension, and debate continues as to how, and to what extent, they can be balanced\(^5\).

Now in this era of globalization body corporates plays a multi-facet role in the society, it is considered to be the most effective vehicle to regulate business enterprise in the modern times. Under legal norms company has got a separate status, which is “juristic personalities”. The term body corporate is used as synonyms for the term “corporation”. It has got wider scope than the term “company”. “Body Corporate” or “corporation” includes a company incorporated outside India, but does not include\(^6\):

- i. A co-operative society registered under any law relating to co-operative societies; and
- ii. Any other body corporate, which the Central Government may, by notification, specify in this behalf.

In Salomon v Salomon & Co.\(^7\) it was held that “like any juristic person, a company is legally an entity apart from its members, capable of rights and duties of its own, and endowed with the potential of perpetual succession”.

In the case of State Trading Corporation of India v Commercial Tax Officer\(^8\) the court held that unlike an unincorporated company, which has got no separate existence and which the law does not distinguishes from its members, an incorporated company has separate existence and the law recognizes it as a legal person separate and distinct from its members. When these corporations have got separate legal entity, it can own property, can sue and can be sued. Now the main question arises that whether these corporations can be guilty of committing a crime or not? And when they are held guilty can they be penalized for their criminal act and if yes then what would be the penalty that can be imposed upon them.

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\(^5\) Available at www.thersa.org/action-research-centre/learning.-cognition-and-creativity/education/social-justice/what-social-justice-means (Last viewed on 10th December, 2015, 08:55)

\(^6\) Sec. 2(11), TAXMANN’S COMPANY ACT, 2013

\(^7\) (1897) AC 22 H.L

\(^8\) (1963) 33 Comp Cas 1057 (SC)
“Corporate crime is the conduct of a corporation or of its employees acting on behalf of the corporation, which is prescribed and punished by law.”

-J. Braithwaite

When the term criminal liability comes to our mind the first thing we think of is: the occurrence of certain violation of criminal laws or certain omission of prohibited acts. The basic rule of criminal liability revolves around the Latin maxim “actus non facit reum nisi mens sit rea”. Thus to attract criminal liability the person has to be morally at fault. The whole concept revolves around the criminal concept which states that any act that is coupled with a guilty mind leads to the commission of a criminal activity. Each element of crime that a prosecutor needs to prove is the prime principle of CRIMINAL LIABILITY.

Equation:

\[ \text{ACTUS} + \text{MENS REA} = \text{CRIME} \]

It dates back to 1990s when both Europe and United States was facing challenging situations with regard to the criminal liability faced by corporations. The most prominent case which raised an alarm in the U.S.A was the Enron case. In case of an individual it is absolutely measureable to establish the requisite mens rea but it is not so when it comes to a “juristic person” or “artificial person” like that of the company. But it is often found that a company can be held liable for criminal acts and it becomes really difficult for the counsel to establish the requisite mens rea for the act of the company as it is not a natural person but a juristic person.

Criminal law has evolved principles of liability to tackle offences committed by individuals. With the growth of the corporate activities, corporations are susceptible to economic crimes. Corporate crime and fraud are not new issue that confronts the Indian corporate sector. In Indian business couple of fraud cases documented has been reported to increase. As a result ordinary

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11 Corporate law report, Conference Alert - Corporate Crimes & Organizational Integrity Management 2013, (19th July 2013)
criminal law, equipped with conceptual tools to attach responsibility on individuals is also used to regulate corporate behavior. Thus, criminal jurisprudence that based on individualism is being used to regulate the behavior of a collectivity\textsuperscript{12}.

Earlier as a general rule criminal liability on corporations were not imposed as per the common law. This is so because it was considered that the company lacked moral blameworthiness which is an essential element of crime. There was the belief on the existence of a common question that is “the company does not have a soul to damn, or a body to kick”. Eventually it was from the beginning of the 20\textsuperscript{th} century that the courts began to recognize corporate criminal liability of the corporations. Till then courts in India were hesitant in prosecuting companies for offences that entitled mandatory imprisonment of the crime committed.

In the United States for the past fifty years corporate scholars have opposed to the idea of corporate criminal liability by arguing that it should be strictly eliminated or at least strictly limited\textsuperscript{13}. In particular there has been a notable change in both English and Canadian law which aimed at making easier to prosecute corporations for homicide and workplace injuries. Accordingly, if the reform of corporate criminal liability is to be made a priority, there should be asking about not only the need for restrictions, but also whether there is a need to expand liability or enforce existing offenses more vigorously\textsuperscript{14}.

Since the year 2000 UNITED KINGDOM and CANADA had adopted legislation to make prosecution of corporations easier. The adoption of Corporate Manslaughter and Homicide Act, 2007 has circumscribed about the corporate criminal liability.

In the Australian federal system there also exists the jurisdiction of corporate criminal liability. The Australian Federal Code creates multiple bases for corporate criminal liability as per the Australian Criminal Code, 2002.

\textsuperscript{13} Sara Sun Beale, A Response To The Critics Of Corporate Criminal Liability, 46 American Criminal L.R, Pg 1481 (2009)
\textsuperscript{14} Ibid

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For instance in India the

- **Bhopal Gas Leak Case 1984**

Where in due to leakage of methyl isocyanate gas and other chemicals thousands of people lost their life and many got affected by temporary partial injuries and permanent disabling injuries.

- **Uphar Cinema Tragedy Case 1997**

In this case 59 people died due to suffocation which was caused due to fire break out in the cinema hall in DELHI.

From the aforesaid instances we can chalk out the ways in which the fault of the company leads to a mass disaster in the country and spoils several livelihoods without any remedy at all. The criminal law jurisprudence has seen this case of mass destructions through pollution, gross negligence of the company as the doctrine of “strict liability”. Hence, it is an established rule that in such cases the element of mens rea does not require. Crime is a general term, and the term offence is that crime which is made punishable by law. For commission of every offence the requisite thing is the actus reus coupled with mens rea, provided the statute expressly excludes it.\(^1\)

**VARIOUS THEORIES THAT GOVERN CORPORATE CRIMINAL LIABILITY**

**OPTIMAL PENALTY THEORY FOR CORPORATE CRIME**

The economic theory of optimal penalties has developed considerably since Becker’s insight that the penalty should equal the social harm divided by the probability of detection.\(^2\) Becker further stated that in the commission of a corporate crime there are different possible actors who play the role in committing and preventing a crime. Fines are preferred to incarceration since the latter is socially costly. This pure economic efficiency view states that the only time incarceration is required is when the offender is unable to pay the optimal fine.

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\(^1\) Available at http://goforthlaw.com/articles/fromlawstu/article12.doc, (Last viewed on 7\(^{TH}\) December, 2015, 15:36)

DEEP-POCKET HYPOTHESIS

It has been found under this theory that jurists treat corporate defendants less favorable than individual defendants. “Under the “deep pockets” theory favored by many jurists, big companies end up subsidizing customers and lawyers.” – Barbara Hackman Franklin, U.S Secretary of Commerce (1992)\(^1\)

“The only answer I wouldn’t believe is one that says they didn’t [take defendant wealth into account]. I can’t imagine that people wouldn’t think about that.” – G. Marc Whitehead, Director of the ABA Litigation Section, National Law Journal (1993)\(^2\)

THEORY OF VICARIOUS LIABILITY

Originally this doctrine developed in the context of tortious liability which was later imported into company liability. This particular doctrine states that a person is liable to answer for the acts of another. In the case of companies, the company may be held liable for the acts of its employees, agents, or any person for whom it is responsible. This was adopted in the case of Canadian Dredge & Dock Co. v. The Queen (1985) ISCR662

THE IDENTIFICATION THEORY

This theory specifically developed to hold corporations liable in case of offences which required the presence of \textit{mens rea}. This theory stipulates that the actions and the mental stage of the corporation found in the action stage of the employees or the directors are to be considered to be


\(^{18}\text{Ibid.} \)
the action and mental stage of the corporation itself. In the famous *Dredge & Dock Case (1985)* the Supreme Court of Canada had characterized the Theory of Identification19:

- A corporation may have several directing mind. Thus where corporate activities are widespread, it will be inevitable that there will be delegation and sub delegation of authority from the center and thus leading to several directing minds.
- The action and intent of the directing mind is merged with the intent of the corporate entity, thus there exists no defense for the company to claim.
- It is the Courts adopted rule the mental state of mind is equally same to that of the virtual body that is the corporate entity.
- As per the assessment of the Court if the agent’s directing mind and will assigned of the duties and responsibilities of the corporation then it shall be intended to be the act of the Company itself.
- The main essence of the test is to identify the existence of the meeting of the minds of the company with that of the agent.

Due to the rapid pace of globalization of business and evolution of transnational corporations, it has become very essential to determine the concept of corporate criminal liability. In *State of Maharastra v Syndicate Transport Co. Pvt. Ltd.*20 as quoted in *Rachana Flour Mills Pvt. Ltd. v Lalchand Bhanadiya*21 the Andhra Pradesh High Court observed that:

“Numerous corporate bodies have come into existence. These corporate bodies necessarily act through the human agency of their directors or officers and authorized agents. These seem to be no reason to exempt them from liability for crimes committed by their agents or servants while purporting to act for or on behalf of the corporate bodies. The ordinary citizen is now very much exposed to the activities of persons acting, in the name of corporate bodies.”

19 V K AGGARWAL, *Corporate Criminal Liability- The issue revisited in the context of recent Supreme Court decision*, Pg.3, http://www.icsi.edu/webmodules/Programmes (Last viewed on 23rd December, 2015, 23:40)
20 AIR 1964 Bom 195
21 (1987) 62 Comp Cas 15 AP
AN OVERVIEW OF CERTAIN JUDGMENTS GOVERNING CORPORATE CRIMINAL LIABILITY

*Tesco Supermarkets v Nattrars* [1972] AC 153

In this case TESCO a company was offering washing powder at a discounted rate in a store, and it had displayed in a poster. Once they ran out of stock the company withdrew the offer and replaced the price stock. The manager failed to inform and the customers were charged with higher price. Hence TESCO was charged under the Trade Description Act, 1968 for falsely advertising the price of washing powder. In its defense Tesco stated that the company had taken all reasonable precautions and all due diligence, and that the conduct of manager is not attached to the corporation.

**JUDGMENT**

The HOUSE OF LORDS gave the judgment that the manager was not the directing mind of the corporation and therefore he was not attributable to the act of the corporation. Lord Reid held that, in order for liability to attach to the actions of a person, it must be the case that "The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company".

*Oswal Vanaspati & Allied Industries V State Of Uttar Pradesh* (1993) 1 Comp. LJ 172

The appellant-company had sought to quash a criminal complaint, arguing that the company could not be prosecuted for the particular criminal offense in question, as the sentence of imprisonment provided under that section was mandatory.

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22 Available at http://en.wikipedia.org/wiki/Tesco_Supermarkets_Ltd_v_Nattrass (last viewed on 11th December, 2015. 11:15)

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JUDGMENT

It was held by the Allahabad High Court that “A company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. . . . It is settled law that sentence or punishment must follow conviction; and if only corporal punishment is prescribed, a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly, then, though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it. Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal; but a sentence which is less than the sentence prescribed may not in all cases be illegal.”

Zee Telefilms Ltd. V. Sahara India Co. Corp. Ltd (2001) 3 Recent Criminal Reports 292

In this case the complaint alleged that Zee had telecasted a program based on falsehood and had defamed Sahara India. Sahara had filed the complaint under Section 500 of IPC.

JUDGMENT

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

23 Available at www.lorandoslaw.com/Publications/Corporate-Criminal-Liability-India.shtml (Last viewed on 4th October, 2015, 21:15)
24 Available at www.supremecourtofindia.nic.in/ (Last viewed on 4th December, 2015, 21:55)
As under the aforesaid case it was found that it violated certain provisions of the INCOME TAX ACT. While the Sections 276-C and 277 provided for a mandatory term of imprisonment coupled with certain amount of fine.

**JUDGMENT**

Initially it left the Court startled because it could not impose only fine upon the company because it was a mandatory provision of the INCOME TAX ACT to impose both imprisonment and penalty. As per the penal provisions are concerned it was to be strictly interpreted. It was basically impossible to put the company behind the bars because it was impossible. The Court focused on two of the important maxims:

- "Lex non cogit ad impossibilia" which means “the law forces not to impossibilities”.
- "Impotentia excusat legem" which means “impossibilities excuses the law”.

Hence it was held that a company cannot be prosecuted for offences which required imposition of a mandatory term of imprisonment and fine. The SUPREME COURT stated that the legislative mandate of the Court is to prohibit the deviation from the minimum rate of punishment. The Court was further of the view that it is to favor the construction of a statute that exempts a penalty rather than to impose another penalty.

*Standard Chartered Bank & Ors. V Directorate Of Enforcement & Ors.*

The Standard Chartered Bank had violated certain provisions of the Foreign Exchange Regulation Act, 1973. In this case it was observed that as in the case of torts, the general rule prevails that the corporation may be criminally be liable for the act of an officer or agent and it

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25 (2005) 4 SCC 530
has been clearly stated in The General Clauses Act, 1897 that the term “PERSON” included “companies and corporations”. Thus the company was held liable.

The Standard Chartered Bank Case had overruled the VELLIAPPA CASE and had stated that the Court can only impose fine and excuse the part of the imprisonment.

**Iridium India Telecom Ltd. V Motorola Inc.**

In this case a criminal complaint was filed under Section 420 of the Indian Penal Code along with Section 120B against Motorola Inc. by Iridium India Telecom Ltd.

**JUDGMENT**

It was issued that cheating was an offence which is punishable with mandatory imprisonment; hence any further proceedings would be absurd. But the argument was refuted on the basis of the decision given by Standard Chartered Bank Case, and finally it was held that corporations can be made liable with mandatory punishment of imprisonment. The Court had imported the IDENTIFICATION PRINCIPLE in this case. On concluding the Court stated that corporations are capable of having *mens rea*.

**VARIOUS PROVISIONS WHICH ATTRACT CORPORATE CRIMINAL LIABILITY IN INDIA**

Section 141 of the Negotiable Instruments Act, 1881. It states that when any sort of offence committed under Section 138 of the Negotiable Instruments Act, then every person who ever have committed the offence shall be charged for the criminal act and conduct of the business of the company. If the person is the company itself even then the company shall be held to be guilty of the offence and shall be held liable to be proceeded against and will be punish accordingly.

Section 7 of the Essential Commodities Act, 1955. Section 7 states about penalties under the Act. It states that if any person contravenes any order made under Section 3 of the Act then he shall
be liable to imprisonment to a minimum of three months and maximum of seven years and will also be liable to pay a fine of a certain amount.

By this it can be seen that it is not a compoundable offence as it attracts both imprisonment as well as penalty provision. And the term “person” includes “individuals as well as corporations and companies” as per the GENERAL CLAUSES ACT, 1897.

Section 276-B of The Income Tax Act, 1961. The section states about the failure to pay tax deducted at source [TDS] In case of this section it attracts criminal liability if any sort of contravention occurs in the payment of TDS then it will lead to rigorous imprisonment which will be minimum of three months and maximum it may extend to seven years and also certain amount of fine will be levied.

EFFECT OF CORPORATE CRIMES IN THE SOCIETY

The series of activities undertaken by corporate bodies has got adverse effect on the life, property and liberty of the citizens. Various corporations commit large-scale financial irregularities. In this age of globalization the large-scale corporations form a defining force on the globe. This is so because the corporate vehicle now occupies a large portion of the industrial, commercial and sociological sector. Thus amenability of the corporation to a criminal law has become essential to have a peaceful society with stable economy. Corporate criminality “challenges or nags at our sense of reality”. It is the peculiar feature that makes corporate crime a tricky issue26. Corporations being non-human entities, their criminal behavior are also out of ordinary. Corporate crime has become a very sensitive issue in some of the countries.

The Law Reform Commission of New South Wales offers an explanation of corporate criminal activity27:

“Corporate crimes pose a significant threat to the welfare of the community. Given the pervasive presence of corporation in a wide range of activities in our society, and the impact of their actions on a much wider group of people than are affected by individual action, the potential for both economic and physical harm caused by a corporation is great.”

26 VIDYA VISHNU KAMBLLE, Corporate Criminal Liability: An overview, 2008, Pg. 71
27 Ibid
DENOUEMENT TO THE CONCEPT OF CORPORATE CRIMINAL LIABILITY IN INDIA VIZ A VIZ CONCLUSION

The Company is a separate legal entity when it comes to the existence of the company itself. It is in the eye of law a judicial person or an artificial person. This rule had priorly been established in the case of SOLOMON\textsuperscript{28}.

In the early 1700s, corporate criminal liability faced four obstacles:

- The first Juristic fiction: obstacle was attributing acts to a corporate personality.
- The second mens rea: obstacle was that legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent.
- The third ultra vires doctrine: under which courts could not hold corporations accountable for acts, such as crimes, that were not provided for in their charters.
- The fourth Courts liberal understanding of criminal procedure: for instance, judges required the accused to be brought physically before the court.

The traditional view has been that a corporation cannot be guilty of a crime, because criminal guilt requires intent and a corporation on not having a mind could not make any form of intent. In addition, a corporation has no body that could be imprisoned. Traditionally, one argument against corporate criminal liability was that the corporation was only a legal person and thus incapable of forming mens rea for the corporation has no will independent of its employees and shareholders. Today, however, most jurisdictions now attribute mens rea to a corporation via its employees, directors or shareholders. That means the answer for whether corporation can commit crime is that, it can certainly commit crime and may also be convicted in a criminal court for violations of the penal law of the jurisdiction in which it is tried. Courts are especially likely to impose criminal liability on a corporation when the criminal act is requested, authorized or performed by the Board of Directors, an Officer or any other person having responsibility for formulating company policy or high level administrator having supervisory responsibility over the subject matter of the offence and acting within the scope of his employment.

\textsuperscript{28} Solomon v Solomon & Co., (1897) A.C 22

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Many critics’ of corporate criminal liability who has argued that undue extension of the concept would ultimately result in deviation from the purpose and scope. The common law view is that the owner or manager is representative of the corporate mind in the current scenario of modern giant corporations with wide spread global operations. There are means to punish a guilty corporation: it can be placed in probation, it can be made to surrender the license that the law allows it to carry on its business, it can be forced into bankruptcy and most commonly it can be fined. It is very true that a corporation cannot be convicted for committing “murder” or “rape”. Hence it cannot be imprisoned. Criminal liabilities of legal bodies have been a legal agenda since the mid-nineteenth century, when the corporations began to play a role in social and economic life on the wake of Industrial Revolution and urbanization process. Now, in India certain Statutes like Indian Penal Code talks about various types of punishment that are defined under Section 53 of the Act. This Section quotes that punishment can be of various types: death or imprisonment which can be further sub-divide into rigorous imprisonment and simple imprisonment, forfeiture of property and fine. Section 420 of the Act states any person committing crime under this provision is bound to imprisonment and this punishment is also applicable for the Companies. We are all aware of the fact that the Penal statutes are only interpreted by means of Strict Interpretation. The growing trend of corporate criminality is at an alarming rate which makes the Court consider for the establishment of the fact of the presence of mens rea when it comes to the companies of India.

At the same time on the other hand there seems to creep the existence of the two famous maxims, they are as follows:

- “Lex non cogit ad impossilia” which means “the law forces not to impossibilities”.
- “Impotentia excusat legem” which means “impossibilities excuses the law”

As stated in the Velliappa Case. That the Company being a judicial and artificial person cannot be physically put behind the bars.

29 Celia Wells, ‘Corporation: Culture, Risk and Criminal Liability’ Cri LJ 1993, 551, 599
30 Available at www.financialexpress.com/old/efullstory.php Content id=62378 ( Last viewed on 5TH December, 2015, 12:25)
The difficulty that arose out of the conflicting situation between the Court and the Statutes seemed to be never ending. At that point of time the 41st Law Commission Report was established which suggested certain amendments to Section 62 of the Indian Penal Code. It stated as follows:

“In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the Court to sentence such offender to fine only.”

But later on in 2005 in the of Standard Chartered Bank Case, the decision of the Velliappa Case was overruled and it was established that the company can be held liable for the acts of the company and may also be send into imprisonment, without any sort of exemption. This decision was seconded by the famous Motorola Case.

Thus we case analyze from the above study that there is still no settled rule when it comes to Corporate Criminal Liability. It is an absolutely new area of law which the judiciary and the legislature have to work upon. In the year 2002, Donald Rumsfeld had spoken about “known knowns” though on a totally different context. Thus we can only hope that the final decision on the merits reduces the various issues to the “known knowns” and get the unsettled dispute sorted out on this context of law. It is also to be seen that the existing and potential investors losses their confidence and trust in the organization. This corporate criminal liability has got a rippling effect on the economy of the country also.

Thus the emergence of the large industrial corporations, both depersonalized and institutionalized has a major social phenomenon and its impact on the legal, economic and social structure of the society must be looked upon in order to settle the issue of criminal liability that are been carried out by the corporations in today’s society.

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32 Angira Singhvi, Corporate Crime and Sentencing in India Required Amendments in Law, VOL 1 ISSUE 2 INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCE 8 (July 2006)
33 Standard Chartered Bank & Ors. V Directorate of Enforcement & Ors. (2005) 4 SCC 530
34 Iridium India Telecom Ltd. V Motorola Inc. (2010) 160 CompCas 147 (SC)
35 Prateek Andharia, Corporate Criminal Liability- A Comment on Iridium India Telecom V Motorola Inc., NALSAR STUDENT LAW REVIEW, Pg 68