CHAPTER-III

CONCEPTUAL FRAME WORK
OF CORPORATE CRIMINAL LIABILITY
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CONCEPTUAL FRAME WORK OF CORPORATE CRIME

3.1 Introduction

As part of the industrial growth and opening of economic reforms in corporate era, corporate criminality is inherent in contemporary society. However, theoretically, corporate crime is still an obscure territory. Corporate criminality is a complex phenomenon that has started to be discussed and analyzed quite recently in comparison to traditional crimes. Criminal law and criminology have been almost exclusively focused on individual misconduct, especially in India. Corporate crime is a relatively new topic for criminologists and it is still a controversial subject for legal theorists.

More qualitative and quantitative analyses of corporate crime are needed. Since the subject was brought to public attention over 20 years ago, scholars have not agreed on a proper concept for corporate crime, nor have official data on the harm and cost caused by corporate crime been gathered. It is not the purpose of this chapter to focus on these issues or to claim an ultimate and refined examination of corporate criminal liability. Still, it is important to provide a

1. See generally 'Crime in India 2010' and 'Crime in India 2011', Compendiums, National Crime Record Bureau, Ministry of Home Affairs, Govt. of India, New Delhi. There is no specific offence of Corporate Crime is included in the list mentioned by NCRB, except traditional company frauds, stock market manipulations and economics offences viz., Criminal Breach of Trust, Cheating and Counterfeiting.
general account of corporate crime and its consequences in order to further elaborate on corporate criminal liability. What follows is rather a superficial attempt to glance at corporate crime, its seriousness and costs, as a preliminary validation of further claim for the use of strong controlling mechanism of corporate criminality in India.

Criminal liability of corporations has been the subject of vigorous debates for the last century. International congresses, studies, articles, and notes have addressed this issue and have been the ground for doctrinal confrontations among the partisans and adversaries of this concept. Every element of corporate criminal liability has been discussed, attacked, or defended. Most of the arguments were built on the principle societas delinquere non potest and on the belief that alternative forms of liability (like civil or administrative liability of corporations or criminal liability of individuals acting for the corporation) are superior to corporate criminal liability. In the following sections of this chapter it shows how different crimes of body corporate can be held criminally liable and learns, by what kind of act, and with what state of mind, can induce the criminal liability of corporate bodies. Finally, I will make a concise presentation of pros and cons available for corporate crimes and violence and the alternatives to corporate criminal liability.

3.2. Definition of Corporate Criminality

An exact definition of corporate criminal liability is hard to find. Even those who have written and studied the subject have not attempted to make one.
Consequently, the exact meaning of the same is merely assumed and is left to individual perceptions and conceptions. Explanatory, though it is, yet may be justified say that it is the purpose of the law, that it is of prime necessity, in certain cases "to determine the extent of criminal responsibility and the applicability of criminal statutes thereto".

The criminal responsibility of corporations has been a subject of judicial uncertainty. Early text writers have themselves disagreed if not to some fundamental aspect of the law governing corporate criminal responsibility, at least, to the extent of application of the same. Lord Holt, for example, has always been of the opinion that "a corporation is not indictable although the particular members of it are". Others, as Blackstone, maintain that a "corporation cannot commit treason, felony or other crimes in its corporate capacity" for the reason that a corporation by its inherent nature cannot commit a crime, it being incapable of entertaining a specific evil intent.

These early concepts have gradually developed, following the gradual change and importance of corporation as an entity in the commercial world, until finally the doctrine laid down by modern authorities found place in criminal jurisprudence enunciating that an indictment will lie against a corporation aggregate although not for every species of crime or misdemeanor.


3. Ibid, p.263.
Notwithstanding this recent development in the law there are still at a loss to find in the jurisprudence, rules and precedents tending to adopt this new doctrine, but on the contrary it can find in limited field of study, decisions which hold, though not the opposite view, that law is wanting in remedies to enforce the same. Thus, there is here presented a problem which prompted to investigate and critically study some of the leading authorities on the subject in order to give some additional thought on such a vague and rather untouched topic to work for the adjustment of the same to modern standards which confirms to be in accord with the present state of affairs.

The term, "corporate crime," has two meanings, and to which meaning courts and commentators refer is not always clear. "Corporate crime" may refer to the criminal liability of the corporate entity. The term may also refer to the criminal conduct and liability of an agent of the firm. Although the two meanings are related, it is important to distinguish misconduct at the corporation from misconduct by the corporation. Indeed, the firm is not always a perpetrator. A business firm may be a victim of an agent's misconduct, and in some cases, may be both a victim and a perpetrator.

The concept of corporate crime as committed by the entity does not occupy a comfortable berth in corporate governance law. Nor does it occupy a natural place in criminal law, reflecting as it does an inherent tension in criminal law

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theory. Criminal theory teaches that punishment is justified only when one has chosen to disobey the law. Despite exceptions like conspiracy, the general rule is that individuals are responsible only for their own actions. Criminal liability is a function of immorality of conduct and culpability of the actor, which includes an individual's decision to flaunt community norms and disobey the law.

In contrast to a human being, a corporation—an unnatural, artificial person can act only through others. To paraphrase, there is no person there. Thus, the justification for punishing a corporation does not rest on personal choice. Instead, corporate criminal liability rests squarely on the concept of vicarious liability. Indeed, the U.S. Supreme Court decision that established corporate criminal liability was based on a beneficial consequence of punishing the corporation—enhancing the government's ability to control and regulate corporations. The Court noted that punishing individuals was often ineffective in securing compliance with the law, and reasoned that absolving corporations of guilt "would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at". Although the court's reasoning is less than persuasive in the age of regulatory enforcement, for better

5. Ibid., p.27

6. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 495 (1909) (stating that the law "could not be effectually enforced so long as individuals only were subject to punishment" for violations). Although corporate crimes were prosecuted prior to this decision, this case was unique because the prosecution was focused on a crime that required a mens rea element rather than just strict liability offences.

7. Ibid, at p.496
or worse the federal standard for corporate criminal liability is the familiar *respondeat superior* of tort law.

The pragmatic basis for assigning guilt to a corporate entity is reflected in the standard for determining when a business may be guilty of a crime. In the federal system, a corporation bears responsibility for the crime of an agent when the agent acted within the scope of his or her real or apparent authority, intending to benefit the firm. The prospect of criminal liability gives firms an incentive to prevent criminal conduct in the first place, and that incentive is quite strong because corporate criminal responsibility in the federal system derives almost automatically from an agent's conduct. The standards for determining when agents acted within the scope of their authority and in the interest of the firm are not difficult to establish.

In sum, a finding of corporate guilt derives from the crime of a natural person. Corporate crime is a function of individual misconduct, and the ultimate target of deterrence is the individual with the means and power to injure the public. It is thus appropriate to consider the prospects for deterring agents who commit corporate crimes.

3.3. *Why Prosecute the Corporation?*

Corporate activity is best regulated by an enforcement regime comprising both criminal and civil sanctions does not answer the question of who should be prosecuted, the corporation or its constituents (officers, employees and agents).
In some cases the prosecution of culpable individuals within an organisation can be a very effective way of punishing and deterring corporate crime. From the perspective of these individuals, the prospect of a criminal conviction, especially one that leads to imprisonment, may have a greater deterrent effect than a sanction imposed on the company. There are cases where it is only possible to prosecute the individuals, for example where the company has become insolvent. However, there are a number of reasons why, in general, it is desirable that criminal liability be imposed on corporations in addition to, or instead of, individuals within those organisations.

3.4. The Corporation as a Source of Crime

Corporate crime may result from an individual's personal motivations, stem from improper corporate values and practices, or a combination of both. The reason that corporate crime occurs varies, and in most instances, no single agent will be solely responsible for the misconduct. Prosecution of the corporation is appropriate where the unlawful conduct results from corporate organisational processes and policies rather than the actions of an individual; and where both the corporation and certain individuals are to blame for the infringement.

8. For example, employee selection and retention policies; the setting of unrealistic performance goals; division of labour so that individual employees inadvertently contribute to the committing of an offence; and the non-existence of crime prevention measures.
For example, many cases of environmental pollution or dangerous work practices, including failure to provide safe workplaces, arise from defective systems rather than the wrongful conduct of a single individual or group of individuals. In this situation, the imposition of liability on individuals alone may not correct the institutional factors that caused or contributed to the offence, and may actually lead to managerial encouragement of criminal behaviour in order to profit from the prohibited acts without incurring liability. In such instances, prosecution of the corporation in addition to, or instead of individuals, will likely be the more effective way of correcting systemic faults.

3.5. The Justification of Corporate Criminal Liability

The general desirability of regulating corporations through the mechanism of the criminal law is implicit from the above discussion. This section examines the validity of this assumption, which raises two fundamental and related questions, whose resolution will affect the model or models of corporate liability that should, appropriately, be adopted. The questions are:

- Is it appropriate to impose criminal liability on body corporate at all? and,

- Who should be prosecuted for corporate crime, the corporation or its constituents' viz., officers, employees and agents?

3.6. Is Criminal Liability to corporate body appropriate?

Criminal liability is only one means of regulating corporations. Regulation is also possible through the civil law and through the persuasive techniques of self-regulation. Criminal sanctions typically include imprisonment, fines and community service orders. Since a corporation cannot be imprisoned, the criminal sanction most frequently imposed in the corporate context is the fine. Civil sanctions commonly take the form of a declaration, injunction, community service order, compensation order or a pecuniary penalty. Administrative penalties form part of the civil sanctioning regime and are enforceable by the relevant regulatory agency. Administrative sanctions may include the issuing of infringement notices, negotiated or other monetary penalties, publicity orders, the restriction of rights and withholding of licences. Most commonly however, administrative remedies entail the resolution of disputes by alternative means, such as negotiation, arbitration, authorisation and conciliation10.

The circumstances in which it is appropriate to regulate through the imposition of criminal as opposed to civil liability can only be determined by appreciating the strengths and weaknesses of each form of regulation. By way of generalisation, however, it is worth noting that regulatory theorists generally warn against over-reliance on criminal law as a regulatory mechanism.

3.7. Classification of Corporate Crime

Under present system, there are very few crimes of which a corporation cannot be convicted. Corporations cannot commit the crime of bigamy; however there is little reason why they cannot be convicted of an offence such as manslaughter.

According to Sec. 11 of the Indian Penal Code provides the word ‘person’ includes any company or association or body of persons whether incorporated or not. Thus, it would appear at first blush that the Indian Penal Code makes companies liable with respect to every crime found in the Code. However, certain offences under the code provide for punishment by way of mandatory imprisonment or death, as in the case of culpable homicide, the punishment provided is death or life imprisonment\textsuperscript{11}. Now as it is an impossibility to imprison a company, it is but obvious that the company cannot be convicted for such offences. Thus the word ‘person’ is used frequently in the Code in a sense in which it is clear from the context that corporate bodies are not included\textsuperscript{12}.

\textsuperscript{11} See: Indian Penal Code, 1860, sec. 302.

\textsuperscript{12} See sections 73, 84-87, 100, 105, 114, 137, 139, 141, 149-151, 153, 157, 159, 170, 191, 216, 220-225, 278, 282, 295, 297, 298, 491, 497 and Chapter XVI. See also: RATANLAL & DHIRAJLAL, LAW OF CRIMES 54 (Vol 1, 25th edn, Bharat Law House)
There is another category of offences which provide for punishment by way of imprisonment or by levying a fine. In such cases, if also supported by the context, since a company can be fined, these provisions would be apply to corporate bodies.

There is some difficulty when it comes to offences that provide for mandatory imprisonment along with mandatory fine as punishment. The Law Commission of India in its 41st report recommended as under:

As it is impossible to imprison a corporation practically the only punishment which can be imposed on it for committing an offence is fine. In order to get over this difficulty we recommend that a provision should be made in the Indian Penal Code e.g. as Section 62 in Chapter III relating to punishments, on the following lines:"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an

13. See for instance Offences Relating to Elections (Chapter IXA), Contempt of he Lawful Authority of Public Servants (Chapter X), Offences Relating to Weights and Measure (Chapter XIII), Offences Affecting the Public Health, Safety, Convenience, Decency and Morals (Chapter XIV), Theft (sec. 379), Criminal Breach of Trust (Sec. 406), Cheating (sec. 417), Forgery (sec. 465) etc.

14. See for instance sec. 170 of the Penal Code which makes it an offence to impersonate a public servant and this offence can be punished by fine alone also; Again the offence of adultery under sec. 497 of the Code also can be punished by fine alone, but such an offence simply cannot be committed by the company.


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association of individuals, it shall be competent to the Court to sentence such offender to fine only.

Again, the Law Commission of India in its 47th report recommended as under:\textsuperscript{16}:

\begin{quote}
In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in the case of economic laws. We, therefore, recommend that the following provision should be inserted in the Penal Code as, say, Section 62:—
\begin{enumerate}
\item In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.
\item In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.
\item In this section, ‘corporation’ means an incorporated company or other body corporate, and includes a firm and other association of individuals.
\end{enumerate}
\end{quote}

However, the Indian legislature is yet to implement these recommendations of the Law Commission.

Basing on the above, corporate crime can be divided into two broad categories:

\textsuperscript{16} The 47th Report of the Law Commission of India at para 83
(a) Personal Crimes (Crimes which affect people physically and their physical environment); and

(b) Economic crimes.

3.7.1. Personal Crimes (Crimes which affect people physically and their physical environment)

The first category, "personal crimes", includes pollution, the distribution of unsafe food and drugs, manufacturing defects in products, and occupational and industrial hazards. The results of such crime, which can affect millions, include cancer, birth defects, injuries, sickness, disease, and death.

A chemical plant operated by an Indian subsidiary of Union Carbide released 40 tons of toxic gas and caused the deaths of thousands of people in Bhopal, India. National and international criminal law must be restructured with an eye toward multinational corporate criminals17.

Each year millions of pounds of hazardous pesticides are sprayed on grapes grown in the United States. For consumers, grapes doused in pesticides can be dangerous, but for the farmworkers who harvest the grapes, these

17. The Bhopal Disaster took place in the early hours of the morning of December 3, 1984, in the heart of the city of Bhopal in the Indian state of Madhya Pradesh. A Union Carbide subsidiary pesticide plant released 40 tonnes of methyl isocyanate (MIC) gas, immediately killing nearly 3,000 people and ultimately causing at least 15,000 to 22,000 total deaths. Bhopal is frequently cited as one of the world's worst industrial disasters and the Hiroshima of the Chemical Industry.
pesticides can be deadly. One study in 1984 conducted by the World Resources Institute, found that as many as 313,000 farm workers in the United States are poisoned by pesticides annually, with symptoms ranging from dizziness, vomiting and dilated pupils to severe skin rashes\textsuperscript{18}.

Reckless disregard of the risks posed by multinational industry demands swift criminal prosecution. In the United States, local and state prosecutors have begun bringing criminal homicide prosecutions against smaller corporations in connection with work and product-related deaths. The obstacles confronting prosecutors contemplating criminal charges against large corporations and multinationals, however, are formidable. Few are in a position to take the political risks involved in bringing such prosecutions. In one notable case, a Republican prosecutor in Indiana decided in 1980 to bring reckless homicide charges against the Ford Motor Company in connection with the fiery deaths of three teenage girls who died when their Ford Pinto exploded after it was hit from behind. Ford, one of the world's largest multinationals, brought significant resources to bear against the local prosecutor, who relied on law students for research\textsuperscript{19}.


\textsuperscript{19} Ibid.
3.7.2. Economic crimes

Economic crimes include price fixing, bid-rigging, misleading advertising, tax evasion, fraud, commercial kickbacks, bribery, crimes related to securities, deceptive financial reporting, falsification of records and other similar offences.

Economic offences which affect the marketplace can be divided into those which directly manipulate the marketplace, for example, price fixing and misleading advertising, and those which seek to manipulate government intervention in the marketplace through political contributions and bribery. The economic payoff of the latter can be immense. Government regulation of restrictive trade practices, tariffs, patents, guaranteed loans, tax expenditures, licences, reduction in safety or pollution standards and government contracts can all affect substantially the profits of a company.

There are few aspects of life which corporate crime, in theory at least, cannot penetrate. The cost to society in terms of lives and safety and property damage can be immense. Economic crimes can lead to redistribution of income and a waste of real resources. However, little is known about the actual prevalence of corporate crime.

3.8. Cost of Corporate Crime

"Corporate crime costs run into billions of dollars," the Justice Department's study concluded. "These costs involve not only large financial losses but also injuries and health hazards to workers and consumers. They also
include the incalculable costs of the damages done to the physical environment and the great social costs of the erosion of the moral base of our society"20.

As the Bhopal tragedy and other industrial disasters have shown, corporations can inflict irreparable damage on large segments of society. Only through tough criminal penalties and meaningful economic sanctions will corporations be forced to enter the economic, environmental and human costs of their actions on their corporate balance sheets. Only by holding corporate executives accountable for the actions of their companies can society begin to force the corporation to obey the law. Corporations, their executives and their shareholders should bear responsibility for corporate crime.

There are no official data on corporate crime in common law jurisdictions; governmental agencies do not bother to collect statistics on such issues. This is not different in India. The lack of information on corporate criminality would be understandable in developing countries where commonly any data are very difficult to obtain and where, in most of the cases, corporations cannot be criminally liable; however, this is also a reality in developed nations. Unofficial research has shown that corporate crimes are not only more harmful than street crimes but also more costly. The economic cost of corporate crime is vastly greater than street crime. The costs of corporate crime cannot be quantified.

1. In 1984, 2000 to 5000 persons were killed and 2,00,000 injured, 30,000 to 40,000 of them seriously, after a Union Carbide affiliate's factory in Bhopal, India, released a deadly gas over the town.

2. One million infants worldwide died in every year because they were bottle-fed instead of breast-fed\textsuperscript{21}.

3. 1,00,000 miners have been killed and 2,65,000 disabled due to coal dust (black lung) disease.

4. An estimated 85,000 cotton textile workers suffer breathing impairments due to cotton dust (brown lung) disease.

5. The Dalkon Shield intrauterine device seriously injured tens of thousands of women who used it in U.S\textsuperscript{22}.

6. Over the next 30 years, 2,40,000 people — 8,000 per year, one every hour — will die from asbestos related cancer.

7. Almost 800 die every day from cigarette induced diseases.

\textsuperscript{21} Infant formula companies also hire "milk nurses" to visit patients in the maternity wards of hospitals to promote bottlefeeding. The business of these "so-called nurses is to sell milk, not look after the health of the children," said Dr. Cicely D. Williams, a British doctor who worked in hospitals throughout the Third World.

\textsuperscript{22} Between 1971 and 1975, A.H. Robins Company of Richmond, Virginia, USA, distributed an estimated 4.5 million Dalkon Shields in at least 80 countries. The Shield injured thousands of women, most suffering from pelvic inflammatory disease (PID) which can impair or destroy a woman's ability to bear children. Shield induced PID killed at least 18 women in the United States. Of the estimated 110,000 women who became pregnant while wearing the Shield, 66,000 miscarried — most as a result of miscarriages known as spontaneous abortions. Others suffered infected miscarriages known as septic spontaneous abortions. And hundreds of women gave birth prematurely to stillborn children or to children with birth defects including blindness, cerebral palsy, and mental retardation.
8. One hundred and thirty die every day in automobile crashes. Many of these deaths are either caused by vehicle defects or preventable by available vehicle crashworthiness designs.

9. In Minamata, a small fishing village in Japan, Chisso Corporation, a chemical company, deposited mercury wastes in Minamata Bay that killed and injured thousands.

10. Thalidomide, marketed primarily in West Germany, England, and Japan as a sedative, created 8,000 severely deformed babies, some born with shortened or no limbs.

According Crimes in India there were approximately 30000 victims of street murder and manslaughter in 2010 and 2011. Think of the above deaths. Is it comparable with street murders? And Think of the following, it will be more than all the burglaries in one year. Is it comparable with routine burglaries?

1. About 8.3 lakh WorldCom investors will get back $6.1 billion from investment banks, auditing firms and former WorldCom directors in settlements.

2. Cendant Corp, the US travel and real estate service provider, paid $2.83 billion in investor settlement for unspecified accounting irregularities. Ernst & Young, the former auditor of CUC International, Inc., also agreed to settle allegations for $335 million.

3. Time Warner will pay $2.4 billion and reserve another $600 million to settle investor claims in the failed merger with Internet firm America Online.

4. Morgan Stanley will pay $188.9 million to Parmalat Finanziaria SpA. It spent $140 million on legal matters in a year, mostly on settlement negotiations.

5. Bank of America Corp. and FleetBoston Financial Corp. reached a record $675 million settlement with the Securities and Exchange Commission and New York Attorney General Eliot Spitzer over illegal mutual fund trading.

Each of these cases have their own set of disturbing facts, but taken together, they raise an issue of fundamental importance: Are the corporate bodies are responsible for such massive devastation.

Even with no official data, it is not very complicated to reach the conclusion that corporate crime is more costly and causes more damage than individual. It is a simple matter of proportion. Corporations have more power, have fewer limits, and the results of their actions are larger, both negatively and positively. It is also clear that the more we know about corporate crime and how to control it, the less likely crimes would occur. Nonetheless, it does not seem

that corporate crime will become an official issue, at least not until corporations are challenged by effective policies and sanctions.

The Green Peace International report compiles 48 cases from various industrial sectors, including chemical, forest, mining, genetic engineering, nuclear energy and oil industries in different parts of the world. They illustrate the urgent need for governments to force corporations to uphold the law and become more accountable to the public.

These cases show that irresponsible corporate behaviour continues to severely affect both the environment, people’s health and that the companies who are responsible fail to respond in an adequate manner. It shows how companies routinely fail to compensate and/or assist impacted communities, how they evade obligations to clean up or remediate damaged environments, and, by and large, how they violate human and community rights by failing to monitor, report and provide essential information concerning their products and processes. Such behaviour is no less than criminal, and it is becoming increasingly difficult - sometimes impossible- to seek justice, and to hold these companies accountable and liable for their crimes.25

The cases below provide information on the relevant companies, the type of incident, the effect on people and the environment, the outcome of legal

procedures, the amount of damage and the conclusion regarding the (ir)responsibility of the company. The cases are divided into industry sectors. The report starts with a cluster of cases on Dow Chemicals due to its intolerable lack of action to help the Bhopal victims. Not surprisingly, this corporation is also involved in several other cases of corporate crime around the world.

An important aspect in many of the cases is the apparent difference in behaviour of a company in a rich “western” country which has relatively strict rules protecting people and the environment, and the disappointing behaviour of the same company in “poor” countries where the laws are lax and hardly enforced. The cases show that the global markets make it possible for corporations to practice double standards, misusing lax standards in poorer countries to save on costs and to maximise profits. For example, asbestos can be handled more cheaply in industrialising countries in Asia without the stringent rules protecting workers that exist in the USA or Europe.26

It is not only global companies that act in an irresponsible manner. National, state-owned or even employee-owned companies can also fail to act in an acceptable way. In countries such as the Czech Republic, Russia or India where the state occupies a very strong position in the companies concerned, the situation can be even worse. A global international instrument is also needed to address these particular circumstances.

26. Ibid,
The cases listed here are not exhaustive or final. The intention was neither to cover all categories of industry nor to present only the most important cases. These cases should simply be seen as a preliminary register of corporate crimes with huge and very long lasting impacts on people and the environment—positive proof of the need for urgent international action.

List of Companies involved in Corporate Violence

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<th>Name of the Company</th>
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<th>Category</th>
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<td>Dow</td>
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<td><strong>Chemical cases</strong></td>
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<td>Bayer S.A.</td>
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<td>Ebara Corporation</td>
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**Shipping industry cases**

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### 3.9. Civil Liability Vs. Criminal Liability

The main debate is whether solutions should be sought from criminal law or civil law or both. One school of thought suggests that corporate criminal liability concerns criminal behaviour which demands the application of criminal law even if it is applied to a legal person. The other school of thought is of the view that civil sanctions are the best tool to deal with the conduct of corporations which are not natural persons. Criminal and civil corporate liability have two things in common, namely the imposition of liability on the corporation and the aim of deterrence.

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29. Ibid, 1492.
3.9.1. Civil Liability

Some critics of corporate criminal liability maintain that corporate criminal liability serves no purpose because there are civil enforcement strategies that can be used\textsuperscript{30}.

The criminal route stigmatises the company being prosecuted, and has the effect that customers and employees of the company might refuse to deal with the company in the future. The stigma results in damage to the reputation of the corporation, and could result in over deterrence.

Khaana argues that\textsuperscript{31} there is no reason why corporate criminal liability should be regarded as the best way to influence corporate behaviour because corporations cannot be imprisoned. Fischel and Sykes\textsuperscript{32} support this view and argue that civil remedies are more appropriate. Khaana argues that one must compare the net benefit of imposing alternative liability strategies such as the civil liability forum\textsuperscript{33}. The public enforcement goal can be efficiently accomplished through civil liability regimes\textsuperscript{34}. Civil proceedings may allow for information-gathering powers similar to criminal proceedings, and would lessen

\textsuperscript{30} Ibid, 1534.

\textsuperscript{31} Ibid, 1477.


\textsuperscript{33} Khanna.V.S., \textit{Corporate Criminal Liability : What Purpose Does it Serve?}, supra 1492.

\textsuperscript{34} Khanna.V.S., \textit{Corporate Criminal Liability : What Purpose Does it Serve?}, supra 1521.
the effect of the corporate criminal liability.

Corporate criminal liability discourages the corporation from creating effective incentives in order to engage in social optimal behaviour. Corporations do not spend enough money to ensure that the internal corporate monitoring prevents misconduct. Economic analyses indicate that civil liability in the corporate context may be a more efficient deterrent than criminal liability.

The imposition of criminal sanction on a corporation, an artificial entity which can possess no state of mind, is questionable in the absence of some theory which ascribes fault to the corporation itself, rather than to its officers, directors and employees. To prosecute the directors and servants of the corporate body is not fair and effective, because the convictions of the corporation’s officers and employees will not change the policy of the corporation and the way it functions.

Criminal corporate liability is not as efficient as civil liability, because the sanctions used to control unlawful corporate conduct, such as fines, probation, debarment, loss of licence and related penalties exist in corporate civil liability. Imposing a fine is cheaper to administer than any other sanction because there are administrative fines which can be imposed without taking the corporate body to

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court. Debarment would prevent the corporations conducting business with government from contracting with government departments for a period specified by the court in the debarment order. Corporate probation occurs when the corporate body is compelled by a court to change those policies and procedures that were amenable to the commission of the offence.

3.9.2. Criminal Liability

Corporate crime is a contravention of regulations intended to control corporations' conduct and is a commission of an offence such as any other offence applicable to individuals. The offences committed in breach of those regulations are intended to protect the public and employees on issues of health, safety at the work place, and in general. Corporations can also be convicted of public welfare offences.

The majority view appears to be that the doctrine is ill considered, but this may be due to the fact that critics are more likely to voice their opinions than those who are satisfied with the status quo. Another argument is that the corporation should be criminally liable because it has corporate influence on employees, who are likely to engage in actions that they otherwise would not have engaged in, but for

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There is an incipient consensus developing throughout the world that normalisation of corporate crime is a requirement for satisfactory control of organizational law violation. The state as the custodian of the rights of its citizens has a legitimate interest in prosecuting those who breach regulations and commit crime.

Corporate criminal activity needs to be regulated because a corporation can kill, maim and poison. Just like the case with individuals there is occasional deviance by corporations. Corporations can create hazardous situations, which are risky to humankind. Civil remedies alone cannot control such conduct.

Any conduct which is a threat to public safety invites the application of public law, which includes criminal law. The purpose of criminal law is to lay down acceptable behavioural standards in the societies, communities and nations. Criminal law is one of the methods used to ensure social control, but it is different in that it carries punishment.

There are also transnational corporate crimes, which are the result of the organized conduct of corporate bodies that do business in two or more nations. The prevention of organized crime is a priority of most nations. By charging

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individuals who work for a business involved with a crime and related activities conducted on behalf of business interests, society is directly recognizing that the business is not always an anonymous body devoid of individual actors. Coercive powers of the state should be used where there is harm directed at the public.

Corporate bodies cannot be imprisoned, and they are sentenced to pay fines. Paying fines is an integral characteristic of criminal law. In *New York Central & Hudson River Railroad Company v United States* the court held that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting. Corporations are major role-players in the corporate world and to exonerate corporations from criminal liability, based on the view that corporations lack capacity to commit crimes, would eliminate the reason for controlling corporate conduct.

It is submitted that corporate criminal liability has better procedural protection measures than corporate civil liability because it has stronger enforcement mechanisms, more severe and, arguably, unique sanctions (such as stigma) and is a better deterrent.

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45. 212 U.S. 481 1909

3.9.3. Effect of imposing both Criminal and Civil Liability

It is common for certain actions to have both civil and criminal consequences. Criminal and civil remedies supplement each other. Using both remedies has been followed for centuries all over the world. Asset forfeiture, commonly used in some countries, including South Africa, in order to fight the profiting in crime, is applied in criminal courts, although having civil law procedure and consequences. The state confiscates money, goods and property bought with money which was unlawfully obtained. This system applies to individuals and corporations. Asset forfeiture is a supplementary measure against the corporation which is essential because it deprives the corporate body the fruits of crime. It addresses both criminal and civil law objectives in that it is justified by the principle of restoration.

Simpson researched whether criminal penalties against corporations and/or their culpable employees are effective strategies and concluded that, at best, results of the rare studies are open to doubt. She found only a few oddments in her research to support either viewpoint and came to the conclusion that such

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studies are not conclusive\textsuperscript{48}.

It is wise to implement any advantageous programme such as a compliance programme whether under civil or criminal law. A compliance programme is any programme that seeks to ensure that the corporate body complies with the law. For corporations, just like individuals, it is possible to use both criminal and civil corporate criminal liability.

3.10. Advantages of Regulation by Criminal Law

3.10.1 Express Public Censure

The capacity to express public disapproval of the convicted party is often said to be unique to criminal liability\textsuperscript{49}, as “only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates”. That condemnation may result in a loss of corporate reputation, which may in turn translate into financial harm, and which is, arguably, the most powerful sanction that can be imposed on a corporation\textsuperscript{50}. Many corporate executives care deeply about avoiding adverse publicity because they view both their personal reputation and that of the corporation as priceless assets.


\textsuperscript{50} Ibid, p.1492.
3.10.2. Severe Penalties

Criminal penalties tend to be more severe than civil penalties. As criminal liability may lead to reputational losses for the corporation and deprivation of liberty for corporate management, criminal sentences are widely perceived as harsher than civil penalties. Fines imposed for criminal conduct are typically higher than those in the civil regime. The heightened procedural safeguards for defendants in criminal cases, such as more stringent rules of evidence and a higher standard of proof show the importance of ensuring that defendants are afforded procedural fairness in light of the potential severity of the penalty.

3.10.3. Reinforcement of Societal Values

One function of the criminal law is to shape standards of appropriate behaviour and reaffirm fundamental community values. The public prosecution of violations of the criminal law is a visible demonstration of the State's will to protect certain values and an affirmation that the community continues to adhere to those values51.

3.10.4. Enhanced Potential for Publicity

The stigma that attaches to criminal liability, as well as the possibility that high level managers (who are possibly also well-respected members of the community) may be incarcerated, means that criminal proceedings generally

receive intense media coverage. It is arguable however, that corporate criminal liability receives more public attention simply because of the nature and extent of the penalty awarded, or perhaps, the public prominence of the corporation, rather than from any cause derived from the criminal process itself.

3.11. Disadvantages of Regulation by Criminal Law

3.11.1. Ineffective in the corporate context

Some commentators have suggested that criminal sanctions are inappropriate in the corporate context given that corporations are immune to traditional criminal penalties; corporations cannot be imprisoned and their formidable wealth often renders the imposition of a fine inconsequential. Moreover, where the defendant corporation is bankrupt or no longer trading at the time of sentencing, the fine as a sanction is ineffectual. It has also been said that, as corporate criminal liability derives from the culpability of individuals within the corporation, the moral condemnation that attaches to criminal liability has little rehabilitative impact on the organisation itself, as the corporation is an inanimate entity, incapable of feeling shame, guilt or remorse. Commentators favouring corporate criminal liability dismiss these concerns, arguing that, as many corporations appear to possess distinct public personae,


53. Khanna.V.S., p.1485, supra note
they are capable of “expressive potential” and as such, are rightly subject to criminal liability for misconduct.54.

3.11.2. Disincentive to Self-Regulation

A regulatory framework with its focus on punishment rather than cooperation, promotes disharmony by putting the relationship between the relevant enforcement agency and businesses that it seeks to regulate on an adversarial footing. Criminal investigations and prosecutions may antagonise businesses, prompting the emergence of a sub-culture of disobedience.

3.11.3. Difficult to secure convictions

The heightened procedural safeguards that attend criminal proceedings mean that there is a lower likelihood of proving criminal, as opposed to civil, liability.

3.12. Advantages of Regulation by Civil Liability

3.12.1. Widely available

Civil remedies are more accessible than criminal penalties as they do not rely solely, or even primarily, on public enforcement. Civil liability is arguably

54. Friedman observes that “corporate exemption from criminal liability would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct – and, ultimately ... diminish the moral authority of the criminal law as a guide to rational behavior”: Friedman Lawrence, In Defense of Corporate Criminal Liability, Harvard Journal of Law & Public Policy, Vol.23, No.3, 2000, pp.833-855.
easier to prove than criminal liability as a lower standard of proof and more inclusive practices regarding the admissibility of evidence apply.

3.12.2. Flexible

In civil proceedings the parties may narrow the issues in dispute by the use of interlocutory procedures such as discovery and interrogatories. This enables the court to avoid wasting time and money hearing evidence on matters where, in effect, there is general agreement between the parties. The court is also afforded greater flexibility in fashioning orders that are appropriate in the particular circumstances, and as such, is more able to ensure that the remedy fits the wrong.

3.12.3. Preventive rather than merely punitive

In particularly urgent and appropriate cases, the enforcer can seek injunctive relief. Accordingly, civil remedies are capable of preventing misconduct from occurring in the first place, as the complainant need not wait for injury to occur before instituting proceedings.

3.13. Disadvantages of Regulation by Civil Liability

3.13.1. Little denunciatory capability

Civil sanctions lack the moral condemning force, and therefore possibly the deterrent effect of criminal penalties. As one commentator has remarked, civil liability merely identifies "a failure to live up to an ideal standard of conduct"

which may be beyond the knowledge or capacity of the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes. As such, the imposition of a civil penalty may simply be viewed by corporate management as a necessary, and recoupable, cost of business.

It sees no reason why the two regimes of criminal and civil liability should not exist side by side to regulate the conduct of corporations. While the civil law may provide more predictable, accessible and efficient remedies than the criminal law, the criminal law's unique ability to express the community's condemnation of morally unacceptable behaviour is equally valuable. The criminal law identifies conduct wholly lacking in social utility and seeks to instill an environment of deterrence.

It recognises, however, that public censure is a limited resource. Reform of the current regulatory framework should, therefore, avoid the over-criminalisation of corporate behaviour. It agrees with the view that criminal liability should attend morally blameworthy behaviour. Moreover, while acceptance that the civil liability is generally appropriate for regulatory offences that, while not immoral, offend against statute, it should be reject the


suggestion that the criminal law should have absolutely no role in the regulation of these types of offences.

It accords with modern regulatory theory, which recognises that the adoption of a regulatory strategy based totally on persuasion, or alternatively, based solely on punishment, is inappropriate. The ideal regulatory approach through the tool of an "enforcement pyramid", in which the majority of enforcement action occurs at the base of the pyramid without resort to civil or criminal enforcement processes at all. Here preliminary mechanisms, consisting of administrative responses such as written warnings and negotiation meetings, aim to coax compliance through gentle persuasion. Where such measures fail, the regulator may choose to escalate its enforcement response by perhaps issuing a formal notice or making an application for the imposition of a civil penalty. Where non-compliance continues, further ascension up the pyramid becomes necessary. This may include the use of the criminal law; and, in extreme cases, "corporate capital punishment", where the company is incapacitated by the revocation of its licence or a dissolution order. The obvious advantage of this approach is that regulators are always able to keep the more stringent sanctions in reserve while attempting to encourage compliance. In practice, legislation reflecting this approach may provide for sequential or parallel proceedings, as is presently the case in federal law.

3.14. Compliance in Exchange for Legal Privileges
Corporate criminal liability may be predicated on an implied duty on the part of a corporation to comply with the law. The State confers on a corporation the capacity to perform transactions with legal effect and affords it other privileges, such as protection from anti-competitive conduct. In return for these legal benefits, the State should expect corporations to abide by its laws. It is said that corporate criminal liability is part of a public policy bargain, whereby the corporation is afforded privileges in exchange for the imposition of a legal and moral duty to remain within the bounds of the law and thereby prevent harm to outsiders59.

3.15. Criminal Liability is an Effective Deterrent in the Corporate Context

It is commonly said that corporations are rational actors given that, as incorporeal entities, it is impossible for them to be driven by emotion. Accordingly, corporate crimes are not typically crimes of passion, but rather, result from corporate policies and practices deliberately implemented by management on a cost-analysis gamble60. In theory then, it should be possible to use the economics of corporate crime to deter the majority of would-be corporate criminals. Where preventive measures fail the imposition of criminal liability and


an adequate penalty on an offending corporation sends an important signal to others in the industry that their kind of commercial activities are being actively regulated, perhaps resulting in general deterrence throughout the industry.

3.16. Self-Regulation and Reform

Prosecution of the corporation may compel corporate management (by way of shareholder or public pressure), to discover the individuals responsible for the offence and punish them accordingly. The threat of corporate criminal liability may also prompt management to implement preventive programs and foster an environment of compliance. Additionally, where the enforcement regime provides certain incentives for compliance (such as the exercise of due care and diligence as well as the reporting of regulatory infringements), there is a greater likelihood that management will cooperate with authorities by providing information and carrying out internal investigations to locate responsibility.

This rationale is particularly appealing as it pays due regard to the fact that some corporations, large and complex ones in particular, might be better suited than the government to allocate blame and impose punishment on culpable officers and employees61. While self-regulation has its own problems and should not be seen as the panacea for corporate misconduct, it does provide a good means of addressing the causes of corporate offending without unnecessary

A sentencing policy that encourages internal discipline is important in an environment where regulatory agencies do not always have sufficient resources to discharge their enforcement functions exhaustively.

3.17. Prosecution – The barriers

Another reason why governments may choose to prosecute a corporation rather than its officers or employees is that it may be less burdensome to investigate, prosecute and convict the company than to prove individual guilt. It is often difficult and costly for the prosecuting authority to determine which individuals within a corporation are actually responsible for the unlawful conduct. At times, the company’s organisational structure may obscure the culpable person(s) or perhaps no single person may be responsible for the breach. Alternatively, the action of each individual may not be sufficient to convict him or her. Factors of loyalty, secrecy, or selective memory loss within the organisation may also hamper the investigation and prosecution. Further, in the event that culpable corporate officers are identified, their co-operation may


64. Ibid, p.427.

be more important to the overall investigation than their individual prosecution and conviction\textsuperscript{66}.

It may also be harder to secure the conviction of culpable individuals. It has been argued that jurors are more reluctant to convict corporate officers, who are seen as real people with families and responsibilities, than faceless corporations. More to the point, where individuals are concerned, the prosecution must prove that the accused committed the offence with the requisite \textit{mens rea}. On the other hand, when the government charges a corporation, it may not, depending on the elements of the offence, have to demonstrate precisely who committed the offence, or the mental state of individual actors in the organisation. For example, there are laws that require corporations to secure a licence from the relevant licensing authority before they can conduct a particular business or engage in some activity, under pain of penal sanction. If a corporation contravenes this requirement, the prosecuting authorities need not show which individual officer or employee was responsible for the omission: they need only prove that the corporation engaged in the relevant business or activity without a licence. A similar example involves laws that require corporations to keep records and provide penal sanctions for mere failure to do so.

\textbf{3.18. Equitable Distribution of Penalty}

Even when the barriers to prosecuting individuals are overcome and a conviction is obtained, there may still be problems imposing a just penalty. Low-level employees of the corporation may not have adequate funds to pay a heavy fine or to compensate victims\(^{67}\). On the other hand, when senior managers are convicted and punished with a monetary penalty that they are able to pay, the penalty's sting may be reduced if corporations reimburse their executives for fines and legal fees. In these instances, corporate criminal liability provides a useful middle ground for prosecuting authorities.

3.19. Heightened Capacity to Cause Harm to the Community

The economic and non-economic harm\(^{68}\) caused by corporate crime potentially exceeds that arising from crimes carried out by individuals\(^{69}\). Given

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67. "Of course, in some cases, an organization could also have trouble paying substantial restitution and heavy fines. Even so, including an organization in a criminal prosecution ordinarily will increase the likelihood that fines and restitution will be recovered": Saltzburg, S A, *The Control of Criminal Conduct in Organizations*, Boston University Law Review, Vol.71, 1991, p.429.

68. Non-economic harm includes personal injury and death, environmental pollution, even social disharmony and therefore creates distrust, and this lowers social morale and produces social disorganization.

69. In Bhopal Disaster approximately half a million people were exposed to the gas and 20,000 have died to date as a result of their exposure. More than 120,000 people continue to suffer from severe health ailments related to the accident and the contamination that Union Carbide left behind. In 1989, Union Carbide India Ltd (UCIL) paid US$ 470 million in compensation for gas-related injuries and deaths to the victims of the Bhopal disaster.

The Exxon had paid an estimated US$2 billion in cleanup costs and agreed to pay another US$1 billion dollars as part of its settlement of criminal charges following the infamous 1989 oil spill. Civil claims against the corporation totalling over US$50 billion were still pending.
the immense scale of damage that corporations are able to cause in the current age of international trade and technology, the argument that the full artillery of the law should be made available to deter corporate crime is persuasive.

Corporate criminal liability is complementary to individual liability. The present liability regime that makes both corporate and individual prosecutions available to regulatory authorities has undeniable advantages over individual than that of body corporate. Where crime arises from intra-organisational defects, the dismissal or discipline of a few individuals is clearly an inadequate response. Further, where individual liability is difficult to determine, prosecution of the corporation is an attractive alternative. There are many other situations where the prosecution of the corporation may be the only way to allocate responsibility for corporate crime. Where both a body corporate and its officers can be prosecuted, the prosecution of one over the other, or both, is a matter that is largely left to the discretion of the prosecuting and regulatory authority. The prosecution’s choice should be aimed at achieving the effective regulation of corporate activities, as well as the general objectives of sentencing. It is important to give regulators a multi-pronged strategy to allow them to tailor their enforcement response to the specific circumstances of each case. In the Commission’s view, such a strategy, operating in conjunction with a penalty regime comprising both criminal and civil sanctions, provides a flexible regulatory framework that has optimum potential for corporate crime prevention.

Additionally, an estimated 250,000 seabirds, 2,800 sea otters, 300 harbour seals and 22 killer whales died as a result of the spill.
3.20. Conclusion

In view of the foregoing investigation it has been found as a fact that both the procedural and substantive laws do not countenance corporate criminal liability, but that there is a great probability for a change should the matter be brought to the consideration of the legislature. There is a distinctive form of culpability which is specifically corporate and which need not be tied down to the culpability of any one or more persons associated with the company. Having established that there is something like "corporate" corporate liability, it is evident then that it is conceptually inconsistent to continue with the nominalist form of liability strategy.