Chapter-4

Comparative study of Corporate Criminal Liability

4.1. Introduction

Late 20th and beginning of 21st century is the era of globalization. International trade and business growth are phenomenal. Emergences of powerful national and Multi-national companies have re-defined the economy of number of nations. The role of State is no more confined to police functions but extended to welfares. Obviously each state is interested in boosting their economy by giving red-carpet welcome to Multi-national companies. Moreover, the power now wielded by corporations is both enormous and unprecedented in human history. Corporations like, Microsoft, AIG, GE, Pepsi, Coke-Cola and retail giant Wall-Mart have presence in more number of Countries.

The wealth of the top Fortune 500 corporations is one measure of corporate power. In 2008, annual revenue from the top ten corporations in the US was more than 2.1 trillion Dollar which was equal-lent to economy of African and Latin American Countries.\(^1\) Now Interaction of Multi-National Companies and national companies with human beings has become part and parcel of their day-today life. Besides governments and governmental agency, it is the corporations that are more and more effective agents of action in our society. But corporations, as it is understand today, have not been the same in the past. The multitude of roles the corporations play in present days human life have been necessitated by the demands of the society, as it kept on developing. The development of the society, at various

points of time, has had a direct influence on the structure and functions of the corporations.

The growth of interdependence in economic, social and environmental activities by corporate entities requires greater cooperation between countries. Modern corporations not only wield virtually unprecedented power, but they do so in a fashion that often causes serious harm to both individual and society as whole. More number of individuals, national companies, semi-government, and governments are investing money in multi-national companies. Enron was the seventh-most valuable company in the US, until the revelation of its use of deceptive accounting devices which had duped more than 100 billion Dollar investor money. But the Enron was not alone in the use of fraudulent accounting practice. Some Corporations including Dynergy, Adelphia Communications, WorldCom, Global Crossing, Health South, Parmalat (in Italy), and Royal Ahold (in Netherlands) falsified their financial disclosures.

Even in India, Sathyam Computer Scandal has duped millions of investors money due to fraudulent accounting system practiced by Ramlinga Raju Chairman of Company with convince of other top officials. Simens the Germans engineering giant, paid more than $1.4 billion in bribes to governments in Asia, Africa, Europe, the Middle East, and Latin America. Recently Ran Baxy of India fined to the extent of 500 million for selling adulterated drugs in USA. Because of their size, complexity, and control of vast recourses, corporations have the ability to engage in misconduct

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2 *Id.*


4 For a detailed list of the top 100 corporate criminals see Russell Mokhiber, Top 100 Corporate Criminals of the Decade, at [http://www.corporatepredators.org/top100.html](http://www.corporatepredators.org/top100.html). Accessed on May 5 2012.

that dwarfs that which could be accomplished by individuals. In the Universe, different nations have different legal systems. Moreover in the modern legal system, complex provisions regulate the structure of corporations defining the nature and role of governing bodies. Depending upon the size and nature of the corporation, its structure may be complicated, multi-layered, centralized or decentralized. The complexity of the corporate structure and different provisions of different nations peruses the matter to be studied comparatively. Germany and Italy still follows the principles of *societus delinquere non potest* (a corporation can not commit a criminal offence). In those states that do recognize the concept of corporate criminal liability, approaches to its implementation can vary significantly. It was argued that different approaches to corporate criminal liability across states would pose a problem in the light of global economy and trade. Therefore study of corporate criminal liability is incomplete without comparative study.

**4.2. Diverse Philosophy of Corporate Criminal Liability in different Countries**

The potential for corporate criminal liability for the illegal conduct of employees is on rise. Foremost among reasons proffered for this upward spiral is the desire to deter corporate misconduct and fashion more responsible corporate behavior, i.e., increased monitoring, by imputing employees’ illegal acts to the corporation. The reaction to this corporate criminal phenomenon has been the creation of juridical regimes that could deter and punish corporate wrongdoing. Corporate misconduct has

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104
been addressed by civil, administrative and criminal laws. All countries have unanimously agreed that corporations can be sanctioned under civil and administrative laws. However, the criminal liability of corporation has been more controversial. Several jurisdictional have accepted and applied the concept of criminal liability under various models. American model includes a large variety of criminal sanctions for corporations (such as fines, corporation probation, order of negative publicity, etc.) in attempt to effectively punish corporations when any employee commits a crime while acting within the scope of his or her employment and on behalf of the corporation.  

The English and French models requires that individuals acting on behalf of the corporation hold a high position or play a key function within the corporation’s decision structure. Indian legal system which is legacy of Common law system followed the English model that corporate is criminally liable when its officer who holds higher position commits crime while acting on behalf of company. 

Germany and Italy still refuses to accept the criminal liability of corporation and remains loyal to the old maxim *societas delinquere non potest* which is based on the doctrine of corporation’s lack of capacity to act, lack of culpability, and inappropriateness of criminal sanctions. Proponents of German philosophy begin from the premises that corporations are fictitious entities, which have no existence apart from the various individuals who act on behalf of the fictitious entity. Malblanic and Savigny are the first authors to sustaining the principle of *societas delinquere non*

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10 Id.  
11 *Iridium India Telecom Limited v. Motorola Incorporated And Others*, (2011) 1 SCC 74 at 97.  
protest in the 19th century.\textsuperscript{13} The main argument was that a corporation is a legal fiction which lacking a body and soul, was not capable of forming the criminal \textit{mens rea} or to act in \textit{propria} person. Moreover, corporate criminal liability would violate the principle of individual criminal punishment.\textsuperscript{14} German author Bekkar and Briz argued that corporations have a pure patrimonial character which is created for particular purpose and lacks juridical capacity. Therefore, corporations cannot be the subjects of criminal liability.\textsuperscript{15} They feel that there is social need to punish entities that have “no soul to be damned, and nobody to be kicked.”\textsuperscript{16} Put it differently it defies all the logic of criminal law. This premise can lead quickly to the conclusion that corporate criminal liability is unjust because it punishes innocent third parties (Share holder, employees, and so forth) for the acts of individuals who commit offenses while in the employ of these fictitious.\textsuperscript{17}

On the other hand, opponents suggest that corporations are real but not fictions. Critics of “fiction theory” such as Gierke and Zitelman argued that corporations are units of bodies and souls and can act independently. The corporation’s willpower is the result of their members’ will they have the independent legal existence apart from the members of the corporations.\textsuperscript{18} Law acknowledges that corporations can buy and sell property on its own name.\textsuperscript{19} Corporations can enter into contracts with others, it can sue others and be sued by others,\textsuperscript{20} and it can commit

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\item Florin Streteanu & Chirita, Raspunderea Penala A Presonel Juridice, Rosetti, (Ed.), (Muncih: Maxwell Publication Ltd. 2002).p22.
\item Id.
\item \textit{Salomon v Salomon & Company Ltd}, (1897) AC 22.
\item See the various provisions of sale of property, mortgage, lease, and exchange of property under \textit{Transfer of Property Act}, 1882.
\item Section 11 of the \textit{Indian Contract Act} 1872 authorizes every person who is above the age of 18 years and sounded person to enter into contract. However the word “person” is not defined. Therefore, the
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torts. Indeed the Supreme Court of America held that corporations have many constitutional rights under the U.S. Constitutions. Moreover the power now wielded by corporation is both enormous and unprecedented in human history. It misses a lot to compare corporations like Exxon Mobil, Microsoft, or AIG to horse or cart that was treated as a deodand under ancient English law. The wealth of top ten Fortune companies in 2008, were more than $2.1 trillion and profits were more than 176 billion. Modern corporations not only wield virtually unprecedented power, but they do so in fashion that often causes serious harm to both individuals and society as whole. The revelations of misconduct of WorldCom, Dyenergy, Adelphia communications, and Global Crossings led to massive losses. American Authorities imposed highest fine of 500 million $ for a worldwide scheme to fix the price of vitamins and fine from the nine most serious anti-trust cases of the decade totaled $ 1.2 billion. US investigation authorities found the Siemens company is guilty of criminal offence of bribery and fined. Indian companies also not lagging behind in this matter, Ramlinga Raju manipulation of Satyam Computers accounts, massive loss of investor’s money in UTI’s Unit-64 because of concealment of truth by top officials of company, unfair means of lending by the top authorities of company led to liquidation of Global Trust Bank, and stockbroker Harshad Mehta and Ketan Parikh exploitation of the system of share market. Therefore the German and Italy

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22 Although corporations do not possess the Fifth Amendments privilege against self-incrimination, the Supreme Court has recognized that they do have rights under the First Amendments, the Fourth Amendments, the Equal Protection Clause, and the Double Jeopardy clause of Fifth Amendment, See, Peter Hennings, The Coundrun of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions, 63 TENN. L. Rev. (1996),p.793.
23 Supra note 4.
24 Supra note 5 at 91.
philosophy that corporation is mere fiction and cannot be punished is also fiction and distortion of real facts. Indeed the corporations are very much real and part and parcel of society.

4.3. Different Theory of Corporate Criminal Liability in Different Countries

How to find the corporation liable for criminal offences involving *mens rea* as an essential element, has posed one of the most difficult problem for the judiciary, law makers and our society. In England, in the United States and in Canada corporate criminal liability had been almost exclusively achieved by the development and extension of common law principles. Unheard of until the middle of the 19\textsuperscript{th} century began to be imposed in strict liability offences and only much latter to full *mens rea* offences, while three principles means of finding liability had emerged: in Canada and England, identification theory for *mens rea* offences, vicarious liability applied in the United States, a corporate culture or holistic approach notably in Australia and blend of identification and vicarious theory in India.

4.3.1. England

During the 16\textsuperscript{th} and 17\textsuperscript{th} centuries, corporations became more common and their importance in the socio-economic life increased. A need for controlling corporate misconduct became more and more obvious. The first step in the English development of corporate criminal liability was made in the 1840s when the courts imposed liability on corporations for strict liability offences.\textsuperscript{25} Lord Bowen decided that the most efficient way of coercing corporations was by introducing the concept of corporate criminal liability in the English law.\textsuperscript{26} Soon after, by borrowing the theory of vicarious liability from the tort, the courts imposed vicarious criminal liability on

\textsuperscript{25} *Regina v. Brimingham & Gloucester R.R. Co.*, (1842) 3 Q.B. 223 (breach of statutory duty; strict liability for omissions-nonfeasons).

corporation in those cases when natural persons could be vicariously liable as well. Lord Denning laid down the foundation for doctrine of “alter ego” theory in *H.L.Bolton (Engerring) Co,Ltd. v. T.J.Graham & Sons Ltd.*\(^{27}\) His Lordship held that the corporation is liable even where the board of director may not have been aware of the specific acts making up the crime and hence the “directing mind” of the actor whose acts and intent attributed to the company. It is worth to quote their Lordship,

“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also had hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are more servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represents the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”\(^{28}\)

In *Tesco Super Market Ltd, v. Nattrass*\(^{29}\), the House of Lords examined the reasoning of Lord Devlin in respect of corporate criminal liability. In that case, the company was charged under the Trade Descriptions Act.\(^{30}\)Facts of the case that Miss Rogers, whose duty it was to stock the supermarket shelves with goods, including the laundry detergent advertised as being on sale, had been unable to find those special packs and instead put out the normal packs. She failed to tell her manager Mr Clement, who in turn reported in his daily return “all special offers okay”. A customer who failed to purchase those things complained to authorities. Court held that

\(^{27}\) *H.L.Bolton (Engerring) Co,Ltd. v. T.J.Graham & Sons Ltd*, (1957) 1 Q.B. 159.

\(^{28}\) *Id.*

\(^{29}\) [1972] AC 153 (HL).

\(^{30}\) Sections 20(1) of *Trade Descriptions Act*, 1968 provided that “where an offence under this which has been committed by a body corporate is proved to have been committed with the consent and convince of . . . any director, manager, secretary, or other similar officer of the body corporate . . . he as well as the body corporate shall be guilty of that offence.”
Clement was neither a director nor managing director of the board but merely a subordinate manager. Court used civil law doctrine “alter ago” to impose the criminal liability on corporations which is known under the name of “identification theory.”

The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person (e.g. the director and managers represent the brain, intelligence and willpower of the corporation). The willpower of the corporations’ managers represented the willpower of the corporation. The word “brain” restricts the criminal liability of corporation. It is officers who make policy and executes the policy are called the brain of company. The corporate criminal liability is very restricted to the acts of officers who are holding high position like director, managing director or managers and who execute the same are called the brain of company.

4.3.2. United States of America.

The United States initially followed the English example, but latter developed differently and most rapidly due to the important role of corporations in American economy and society. Unlike the English courts, the American courts were much faster in holding corporation criminally liable. Initially, the American Courts promoted similar arguments against corporate criminal liability. The courts started by imposing criminal corporate in cases of regulatory or public welfare offences not requiring proof of mens rea nuisance, malfeasance, non-feasance and vicarious

33 Id at 63.
34 Hardings. C. op. cit., p. 368.
liability. At the beginning of 20th century the corporate criminal liability concept was widely accepted in the American society and was expanded to mens rea.35

Finally Supreme Court of America in New York Central & Hudson River R.R. v. U.S.36 held that defendant corporation can be responsible for and charged with the knowledge and purposes of its agent, acting within the authority conferred upon them. Mr Justice Day for the Court held:

“We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agent to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, whose knowledge and purposes may well be attributed to the corporation for the agent act. While the law should regard to rights of all, and to those of corporation no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abused aimed at.”37

The corporate criminal liability in America founded on vicarious liability principle which must satisfy two conditions.38 First, the illegal act was committed while the employee was acting within scope of employment. Second, the employees’

36 212 U.S. 481 (1909), (sustaining the constitutionality of the Elkins Act which provides that the acts and omissions of an officer acting within the scope of his employment were considered to be those of the corporation).
37 212 U.S. 481 (1909) at 485.
conduct was undertaken, at least in part for the benefit of the corporation. Federal Courts have broadly interpreted the words “within the scope of employment”. For the purpose of determining corporate criminal liability an employee acts within the scope of employment if the employee acts within either actual or apparent authority. Moreover, if the two elements listed above are present, a corporation can be held liable even where the employee’s conduct contravened corporate policy or violated express instructions.39

Some of the courts have been willing to go even further, extending liability to situations when an employee acted beyond the scope of either actual or apparent authority and such actions went unchecked by officers or directors, giving the appearance of official approval.40 Such an expensive interpretation of an element designed to limit corporate liability for the illegal act of employees has prompted at least one commentator to label limitation as “almost meaningless.” 41 The government also must show that the employees’ illegal conduct furthered the corporation’s business.

However courts have held that the corporation need not actually benefit to satisfy this requirement. Rather, the employee must have only intended to benefit the corporation, although, criminal liability may attach to the corporation even where an employee’s illegal conduct is motivated primarily by it self-benefit, when the employee intends, “at least in part,” to confer a benefit on the corporation.42 At the present, corporate criminal liability is virtually as broad as individual criminal liability, corporations being prosecuted even for manslaughter.43

39 United States v. Twentieth Century Fox Film Corp., 882 F 2d. 656, 660 (2nd Cir. 1989).
41 Id at 107.
42 United States v. Gold, 743 F.2d 800, 803 (11th Cir. 1984).
43 Supra note 39 at 87.
4.3.3. Canada

Canada has followed the Common law doctrine of “identification” laid down in Tesco in respect of corporate criminal liability. Supreme Court of Canada in *R v. Canadian Dredge and Dock Co.* it was held that the identification theory establishes the “identity” between the directing mind of the company and the company. Justice Estey J, for the Court observed,

“The identity doctrine merges the board of directors, the managing directors, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.”

By this reasoning a company may have more than one directing mind and further not only is delegation probable but even sub-delegation also. Lordship noted the doctrine will only operate where the action undertaken by the “directing mind” and action,

a. was within the field of operation assigned to the directing mind,

b. was not totally in fraud of the corporation,

c. was design or result partly for the benefit of the company.

The doctrine was further clarified in *Rahone (The) v. Peter A.B.Wider (The)*, in which Lordship Iacobucci J, for the Supreme Court of Canada stressed the label of directing mind must be confined to only those cases where,

“[T]he impugned individual had been delegated the “governing executive authority” of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the

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45 Id at 693.
discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.” 47

Phases such ability to “design and supervise the implementation of corporate policy” and “full discretion to act without guidance” and the ability to “exercise decision-making authority on matters of corporate policy” clarified the policy versus implementation role as being the bright line which had to be crossed to find a “directing mind”. The Canadian Supreme Court instead of using word “brain” used phase “the power to design and supervise the implementation of corporate policy”. The officer must have the power to design the policy and the discretionary power to execute the same without any restrictions. Such acts of the officer may be imputed to the criminal liability of corporation. Acts of senior officer which are merely executing the policy does not attract the criminal liability of corporations. The Court of Appeal of Ontario held that even though the employee may have extensive responsibilities and discretion, unless this is accompanied with “power to design and supervise the implementation of corporate policy” or “governing executive authority”. 48

4.3.4. India

The development of the law relating to corporate criminal liability in India is not only similar to that in English law but also greatly influenced by the English law. At one point of time ‘corporations’ were viewed as a convenient shield to evade

47 Id.
criminal liability. However the present legal position has now crystallized to leave no matter of doubt that corporations would be liable for crimes of intent.  

Indian legal system has not exclusively relied on the doctrine of “identification” theory but accommodated even the vicarious theory also. Unlike American and English courts, the response of Indian judiciary was lukewarm in respect of the criminal liability of corporation.

The Constitutional Bench of Supreme Court in Standard Chartered Bank v. Directorate of Enforcement, by 3to 2 majorities held that corporation is criminally liable. Justice K.G. Balakrishnan speaking through court said as following words,

“It cannot be said that, there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company under takes series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such large portion of the industrial, commercial, and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.”

However the court was silent on which theory the criminal liability of corporation is tested. Nevertheless, the Supreme Court filled that vacuum in Iridium India Telcom Ltd v. Motorola Inc, Justice Nijjar S.S. speaking through Supreme Court of India held,

49 New York Central & Hudson River Railroad Co v. United States, 53 L Ed 613:212 US 481 (1908),
Director of Public Prosecutions v. Kent and Sussex Contractors Ltd, 1944 KB 146:(1944).
51 Id at 2638.
52 Iridium India Telcom Ltd v. Motorola Inc, (2011) 1 SCC 74.
“The legal position in England and United States has now crystallized to leave no manner of doubt that corporation would be liable for crimes of intent. The courts in England have emphatically rejected the notions that body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular a state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. The criminal intent of the “alter ago” of the company/body corporate i.e. the persons or group of persons that guide the business of the company, would be imputed to the corporation.”

Indian legal system adopted the “alter ago” theory which is known as identification theory now. On the other hand certain legislations have accommodated the vicarious theory of liability for imputing criminal labiality to corporations for the acts of its servants. Nevertheless the theory has been not implemented to the extent which has been adopted in American legal system. Vicarious theory is restricted to only the acts of the person who is head or responsible for company conducts. Therefore the vicarious theory is to some extent blend of principle of ‘alter ago’ doctrine.

In nutshell the American theory of vicarious liability has very wide scope imputing act of every agent or servant of company committing within the scope of employment for corporate criminal liability. England, Canada, and Indian legal system adopted the identification theory which scope is very limited, where acts of only higher officer who is in charge of running company would be attributed to the corporate for criminal liability.

53 Id at 99.
4.4. What entities come under the scope of corporate criminal liability?

The first step in determining the applicability of corporate criminal liability is delineating the types of entities that it applies. There is no unanimity view among the different legal system in this respect. Similar to individuals, corporations have an identifiable person and the capacity to express moral judgment. Corporations have an identifiable persona in the sense that they have a unique presence in the community, different from that of their owners or managers, they have ‘ethos’ that makes them unique and different from the individuals controlling or working for the corporations.55 The ethos can be derived from the corporation’s dynamic, structure, monitoring system, aims, policies, promotions of compliance with the laws, and discipline of the employees.56

The United States Supreme Court has decided that corporations have the capacity to express independent point of view and moral judgments, and their freedom of speech should not be abridged without a compelling state interest.57

Moreover, corporations are recognized as passive legal subjects in criminal law: a corporation has a cause of action against an individual who harmed it. It would be at least bizarre to accept that a corporation is reality when it is harmed by others, but not when it violates the right of other persons.

Once it had been decided that corporations can be subject of criminal law, it has been subsequently debated whether all corporations should be held criminally liable. Some authors have argued that the creation of exception would produce an inequitable discrimination. This point of view cannot be sustained because the

56 Id at 1099.
criminal law also has exceptions regarding the individuals who can be subjects of criminal liability.\(^{58}\) Thus, if a government employee acting in his or her ministerial function is immune from criminal liability,\(^ {59}\) there is no reason why the governmental institution would not benefit from the same exception. Some very limited and clearly delineated exceptions that promote higher interests should be admissible.\(^ {60}\) At the same time, in order to avoid confusion, entities with no legal status, or entities in process of dissolution or merger should be held liable when the entities held liable are clearly individualized.

The majority legal systems have agreed that private entities are subject to criminal liability. The French legislator have raised issue of freedom of association when deciding whether entities without a lucrative or profit oriented scope should be held liable. The non-commercial character of the association cannot justify their impunity when committing a crime, therefore the exception from criminal liability must be absolute necessary. Under the Article 121-2 of *French Penal Code* juristic persons includes both commercial and non-commercial entities that are criminally liable for the crime they committed. Under Indian legal system also person includes both commercial and non-commercial entities for the purpose of commission of crime.\(^ {61}\) Therefore, associations, foundations, and syndicates/unions are criminally liable because they often own property that could be used for illicit purpose or they could use information obtained from their members for illegal purpose.\(^ {62}\)

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\(^{61}\) Section 11 of the *Indian Penal Code* defines person it includes any company or Association or body of persons, whether incorporated or not.

The criminal liability of syndicates in England has special treatment. In 1901, the English Court decided that syndicates could be held criminally liable. However, following strong protest from the syndicate, the English Parliament adopted in 1906 a law conferring immunity from the criminal liability to syndicates. At present, the English syndicates are the only private entities that are not held criminally liable. Unlike, England, the United States decided in 1922 that trade unions can be held liable. The Supreme Court of America held in *United Mine Workers v. Coronado Coal Co* that trade unions could violate the criminal law provisions and they should not escape its applications. Because unions manage enormous sums of money and their memberships exceed hundreds of thousands of people, they should be held criminally liable. Moreover, the victims of union’s misconduct cannot realistically sue such large number of members individually in order to recover the damages caused.

In India the trade unions are not absolutely exempted from the criminal liability. Registered Trade Unions can claim partial immunity from criminal liability in respect of committing the offence of conspiracy in the furtherance of trade dispute. The purpose of protection is to make them strong and healthy to fight for their cause.

The major legal systems have granted the State government an exception from criminal liability. Article 121-2 of the *French Penal Code* provides that the juristic persons, with the exception of the State, are criminally liable. In common law systems, the rule was that the King can do no wrong. In England, the state, government, and minister are not criminally liable for the common law crimes.

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66 Section 17 of the *Trade Unions Act* 1926.
However the laws can provide that the Crown can be held liable for other crimes. In the United States, the Model Penal Code expressly states that entities organized by a governmental agency for the purpose of implementing a governmental activity are not criminally liable. However the courts have not denied the possibility those governmental institutions is held criminally liable. In the Indian legal system the government would be covered under the definition of person. Indian Constitution does no where make any exemption provision in respect of governmental criminal liability. However the Supreme Court of India, in State of West Bengal v. Corporation of Calcutta, held that state is bound by statute unless excluded expressly or by necessary implication. State cannot be imprisoned; therefore state is not liable for those offences which are punishable by imprisonment. In case of fine, the fine amount is to go State Exchequer, the prosecution and the punishment of the State shall also be deemed to be excluded by the necessary implication because to realize the fine amount from such a person who would realize himself is nothing but an absurdity. However things would make substantial difference where the victim of crime is likely to get the substantial amount as relief from the fine amount.

The issue of whether entities without a legal status can be held liable criminally liable has been resolved differently. Some opinions argued that criminal liability of such entities should not be allowed to order to maintain the coherence, consistency, and predictability of the criminal law. Other argue that the act of registration or incorporation should not bear so much importance when the entity is already an autonomous subject, the predictability of the criminal law can be assured if

the law clearly individualizes the entities that can be assimilated to the juristic person. Article 121-2 of the *French Penal Code* does not acknowledge that non-legal-entities can have the capacity to commit crime. The majority of the French doctrine has negatively criticized this attempt based on theoretical concepts. The doctrine argued that such a jurisprudential extension of the concept of juristic person would create insecurity.\(^{71}\) In Common Law System, the unregistered or unincorporated entities are criminally liable under the same conditions as the registered or incorporated entities. Thus, in England, under the Interpretation Act of 1978, the concept of juristic person includes associations.\(^ {72}\) In U.S., the traditional view was that, in the absence of a law passed by Congress that provides otherwise, partnership or joint ventures cannot be held criminally liable because they do not have a separate identity from that of their members.\(^ {73}\)

However, under the federal law, the concept of “person” includes the partnerships and other similar entities.\(^ {74}\) The U.S. Federal Sentencing Guidelines defines and lists the organizations which are subject to regulation. “Organization” means a “person other than an individual.”\(^ {75}\) The term includes “corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions theory, and nonprofit organizations.”\(^ {76}\) In India, unlike company, partnership firm does not enjoy the existence of independent personality different from the members. Nevertheless the

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\(^{71}\) Leigh, L.H., *op. cit.*, p. 1510.

\(^{72}\) *Interpretation Act* of 1978, Ch.30, Sec.1. (Eng.).


\(^{75}\) 18 U.S.C. 18.

Indian legal system has included the partnership firm in the definition of person. Therefore partnership can be criminally liable for the acts its officers.

On the other hand, corporations and partnerships going through the process of dissolution, transformation, or merger are liable for the crimes committed in most of the countries. Thus, under Article 133-1 of the French Penal Code, the fines can be executed before the end of the liquidation of the corporations.

In America, when a corporation merges with another, the former continues to exist as part of the latter, and is responsible for its crimes. The Courts have held that corporations in the process of dissolution can be held criminally liable because corporations continue to exist for the purpose of “paying, satisfying and discharging any existing debts and obligations …. In India also the company is still in existence until the all the formality of liquidation is completed. Any criminal offence committed by company officials during the period of liquidation, the company is held responsible for that. In case of merger and acquisition the new entity inherit the all the liability of the extinguished companies.

4.5. What are the crimes that can be imputed to corporations?

There are three system of determining for which the corporations can be held liable. Under the first system-general liability or plenary liability the juristic person’s liability is similar to that of individuals, corporations being virtually capable

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77 Supra note 69.
78 U.S.v.Alamo Bank of Texas, 886 f.2d. 828, 830 (5th Cir.1989).
80 Section 309 of the Companies Act 2013 states that “In case of a voluntary winding up, the company shall from the commencement of the winding up cease to carry on its business except as far as possible required for the beneficial winding up of its business, provided that the corporate state and corporate powers of the company shall continue until is dissolved.”
81 See section 336 (4) of the Companies Act 2013.
of committing any crime. The second system requires that the legislators mention for each crime whether corporate criminal liability is possible.\textsuperscript{83} The third system consists of listing all the crimes for which collective entities can be held liable.\textsuperscript{84}

The first system has been adopted by England, Netherlands, Canada, and Australia.\textsuperscript{85} By taking into consideration section 11 of IPC which defines ‘person’ that includes corporation for all kinds offences mentioned in IPC suggests that Indian legal system also adopted the first system of English system. In England, the corporations are liable for almost any type of crime. Although general liability is the rule, there are some limits based on the principle \textit{lex non cogt ad impossibilia}.\textsuperscript{86} Thus, juristic persons are not liable for crimes punished only by imprisonment. Under the same principles, corporations are not liable for crimes expressly excluded by the legislator or crimes that, due to their nature, cannot be committed by corporations. Hence corporations can not commit bigamy, incest, perjury, or rape.\textsuperscript{87} Nevertheless some authors argue that such crime could be committed by corporations as instigators.\textsuperscript{88} The English\textsuperscript{89} and Indian\textsuperscript{90} courts have held that company could be made liable for manslaughter due to negligence of their officers.

The second system has been implemented in France. Thus, under Article 121-2 of the French Penal Code, the juristic persons are criminally liable only when the law or regulations expressly provides for such liability. In India, there is no such general provision in IPC. However, apart from the general criminal liability of

\textsuperscript{83} See, section of the \textit{Money Laundering Act} 2002, section of the \textit{Essential Commodities Act} 1955.
\textsuperscript{84} Cristina Magile, \textit{loc. cit.}
\textsuperscript{85} Id at p.558.
\textsuperscript{86} \textit{R v. I.C.R. Haulage, Ltd.}, K.B.551 (Crim. App.).
\textsuperscript{87} Id.
\textsuperscript{89} \textit{R v. P&O European Ferries (Dover) Ltd.}, 93 Cr App Rep 72 (1990 UK).
\textsuperscript{90} Section 304A of IPC states that whoever causes the death of any person by doing any rash or negligent act not amounting culpable homicide shall be punished.
corporation under IPC, corporations could be held criminally liable where specific legislations specifically mention the liability of corporations otherwise not. Therefore Indian legal system in respect of corporate criminal liability is concerned is blend of first and second system which is more flexible. The French system has its rationale in the science of criminology; corporations are sanctioned for specific crimes based on the frequency of the corporation’s involvement in such crimes. However, this system is not comprehensive. By trying to exclude the crimes that cannot be committed by corporations, the French Legislators inadvertently omitted some labor and economic crimes, and also neglected the fact that even the crimes that cannot be committed by corporations as authors can probably be committed by corporations as instigators or accomplices. The third model is reflected by the American Law. The U.S. Sentencing Guidelines includes a detailed list of the offences that can be committed by corporations. Corporate criminal liability virtually extends to all the crimes that can be committed by individuals. Thus, a corporation can be convicted for theft, forgery, bribery and manslaughter or negligent homicide. Also in People v. O'Neil, even though the corporation has not been found guilty, the court has not denied the possibility that corporations can be held criminally liable for murder.

The American model has the advantage of avoiding confusion and long searches in various statutes. Thus, the American system meets the requirements of clarity, predictability, efficiency, and consistency with general principles of criminal

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93 Supra note 76.
law. Unless it is certain that there is no other possible crime that a corporation could be held liable for, the list of crimes should not be exhaustive. In this respect, The English and Indian legal system are good examples because they do not limit the list of crimes for which corporations can be held criminally liable but they provide for liability similar to that of individuals. The French system, in attempt to be clear and predictable, turned out to be less efficient due to the amount of time necessary to do the searches in various statutes and to the omissions of several crimes. Moreover, similarly to the English system, the French system omits the possibility that some crimes that could not be committed by corporations as principles could probably be committed by corporations as accomplices or instigators.

4.6. When and which natural persons can cause corporate criminal liability?

Now the issue is how wide the pool of individuals who can draw the corporate criminal liability should be, by what acts, and with what mental state. Although the corporations are the subject of the law, the actions or in actions of a human being is necessary to engage the corporation’s criminal liability. Initially, the persons who could engage the corporation’s liability were limited to the corporate organs. The organs represented the soul of the corporation, their actions were the corporation’s actions, and therefore, the crimes committed by the organs were those of the corporations.\(^{97}\) Now a day, in some legal system, there is a tendency of expanding the categories of persons who can cause corporate criminal liability.

4.6.1. France

Under Article 121-2 of the French Penal Code, corporations are criminally liable for the crimes committed on their behalf by their organs and representatives. When the organs or representatives have required *mens rea* and *actus reus* of the crime, the corporation is automatically liable. The organs are individuals exercising an administrative or other important function conferred by law or the charter of the corporations. The notions of “representative” is wider than that of “organ,” and includes other persons such as the temporary, administrators, liquidators, and special agents. Therefore, the acts of other members or subordinate employees cannot engage the criminal liability of corporations even the acts are committed in the benefit of the corporations. Due to this requirement, the French system is the most restrictive model of the jurisdictions presented. The organs and representative must act on behalf of the corporation. The notion of crime committed on behalf of the corporation varies based on the type of crime committed because the commission of a crime presupposes the existence of a subjective element-*mens era*- and an objective element-the profit.

Hence, crimes committed solely in the personal interest of organ or representative would not engage the criminal liability of the corporations. Nevertheless, when the individual acts partially in his benefit and partially in the benefit of the corporation, the corporation would be held criminally liable. In France, the organ or representative of the corporation can commit both intentional and

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98 *Id.*
100 *Id* at 120.
101 C.PEN, Art 121-2 (Fr.).
102 Lord Denning in *H.L.Bolton (Engineering) Co Ltd v. P J Graham& Sons Ltd.* (1957) 1.Q.B.159 at 172
unintentional crimes on behalf of the corporation.\textsuperscript{104} When the \textit{mens rea} and the \textit{actus reus} elements are established with reference to the organ or representative, the corporations is automatically liable as long as the cause and effect relationship (but not the culpability) between the commission of the crime and activity done on behalf of the organized is proved.

4.6.2. England

The identification theory (also called alter ago theory) was developed by the English law importing the concept from the civil law of tort.\textsuperscript{105} Under this anthropomorphic theory, a sufficiently high ranking corporate member acts not agent of the corporation, but as the corporation itself.\textsuperscript{106} In \textit{Tesco Supermarkets Ltd v. Nattras}\textsuperscript{107}, the court compared corporations to human bodies; the high ranking managers represent the nervous systems that control what the corporations do. Therefore, the \textit{mens rea} and \textit{actus reus} of the high ranking managers automatically those of corporation and no other method of proof is necessary.\textsuperscript{108} Whether an officer controls the corporations as the brains control the human body is a question of law; the determining factor of this test is whether the officer could act independently.

The identification theory has been largely criticized. This theory can function properly only for small corporations where only the high-ranking managers are involved in the decisions process.\textsuperscript{109} Today’s corporations are very complex and many other persons are involved in the decision making process. Corporate agents other than the top managers do not engage the criminal liability. Moreover, corporations

\textsuperscript{104} C.PEN. Art 131-39 (Fr.).
\textsuperscript{106} Id at 495.
\textsuperscript{107} [1972] AC 153 (HL).
\textsuperscript{108} Cristina Magile, \textit{op. cit.}, p.560.
\textsuperscript{109} Supra note 102 at 138.
can evade liability by structuring themselves in a way that few decisions could be taken by controlling officers.\textsuperscript{110} The identification of the person is also necessary and this creates a serious bar to prosecution of a highly complex corporation characterized by diffusion of responsibility. Therefore crimes that rely on defective organization are not included. Another disadvantage is that it is impossible to cumulate the acts or \textit{mens rea} of multiple controlling officers.\textsuperscript{111}

In English law, the essential conditions of corporate criminal liability vary based on the nature of the crime. The corporations are liable under the respondent superior theory for strict liability offences and crimes for which the law expressly or impliedly provides for indirect liability.\textsuperscript{112} For the crimes which require \textit{mens rea}, corporations are liable under the identification theory. The natural persons who can make the corporations criminally liable are those who can identify themselves with corporations; this category includes the members of the board of directors, managing directors, other persons responsible for the general management of the corporation, and delegates responsible with management functions who can act independently.\textsuperscript{113} The crimes must be committed within the person’s scope of employment.\textsuperscript{114} However, due to strict limitations of the identifications theory, company can be held liable for few offences of few people’s acts of corporations. The English law has started to change slowly; the courts decided that corporations can be convicted for negligently omitting to take some preventive measures even though no person within the company had this specific duty.\textsuperscript{115}

\textsuperscript{112} Allen v.Whitehead, (1930) 1 K.B. 211. RaduChirita,Raspundera Penala, op. cit., p.147.
\textsuperscript{113} Tesco Supermarkets Ltd. v. Natrass, (1972) A.C.153 at 178.
\textsuperscript{114} Director of Public Prosecutions v. Kent & Sussex Contractors, Ltd., (1944) K.B. 146.
\textsuperscript{115} Seaboard Offshore, Ltd. v. Secretary of State for Transp., (1942) 2 All E.R. 99, 104 (H.L.).
4.6.3. America

The United States has adopted the respondent superior model from civil law. “The principle of respondent superior represents the implementations of the principles governing vicarious liability: the actus reus and mens rea of the individuals who act on behalf of corporations are automatically attributed to the corporations. The corporation is liable if the employee commits the crime while acting within the scope of his employment and on behalf of the corporations. Under federal law, a corporation may be held criminally liable for the acts of any employee, not only for the acts of managers or directors.\textsuperscript{116} The majority of U.S. jurisdictions’ agrees with the federal law and attributes the crime of all the employees to the corporations. In addition, the employees must have been acting within scope of their employment. The acts “directly related to the performance of the type of duties the employee has general authority to perform”\textsuperscript{117} fall within the scope of employment. It is also sufficient that the employees act with apparent authority.\textsuperscript{118} It does not matter “that the act was ultra vires or unauthorized or contrary to corporate policy or to specific instruction given to the agent.

Unlike English law, under American law it is not necessary to identify the specific individuals who committed the crime; it is sufficient to prove that one or more agents of the corporation must have committed it. The American law went a step further and decided to impose liability based on the act of one employee and the culpability of another who realized the significance of the act.\textsuperscript{119} This is known under the name of aggregation theory. The employee must act on behalf of the corporation.

\textsuperscript{116} U.S. v. Gold, 734 F.2d 800 (5\textsuperscript{th} Cir, 1984), U.S. v. Automatic Medical Laboratories Inc., 770 F.2d 339 (4\textsuperscript{th} Cir. 1995).
\textsuperscript{117} U.S. v. American Radiator & Standard Sanitary Corp., 433 F.2d. 174 (3\textsuperscript{rd} Cir 1970).
\textsuperscript{118} U.S. v. Bank of New England N.A., 821 F. 2d. 844 (1\textsuperscript{st} Cir. 1987).
\textsuperscript{119} Wise, E., op. cit., p. 391.
This means that employee must act with intent to benefit the corporation, but the
corporation does not have to actually derive a benefit from the employee’s act. If the
employee intended to benefit only him or a third party, the corporation is not liable except strict liability offences. if the employee intended to benefit both himself and the corporation, the corporation is held criminally liable.

The Model Penal Code, adopted by American Legal System has proposed a different model which contains three systems of corporate criminal liability. The first system is similar to the English alter ego criminal liability. Corporate are liable for the ordinary or true crimes, such as theft or manslaughter, committed by managers or high corporate officers whose acts of the acts of corporations. Under the second system, corporations are liable for price-fixing, securities fraud, or other crimes for which there is an apparent legislative intent to impose liability on corporations, committed by any employee acting within the scope of his employment on the corporation’s behalf. However, corporations can defend themselves by showing that their managers used due diligence when attempting to prevent the crime. Finally, under the third system, corporations are generally liable for “violations” or regulatory offences for which the law imposes strict liability. The offences can be committed by any employee within the scope of his employment. The “due diligence” defense is not available.

4.6.4. India

India also adopted three model system of corporate criminal liability. Under first system the corporate is liable on the theory of alter ego or identification for the

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120 Id.
121 Id at 398.
122 Id.
123 Id at 399.
ordinary crimes, such as fraud. This is the direct criminal liability of corporations. The Supreme Court of India held that,

“[I]t is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offences, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents acting within their authority conferred upon them. If it were not so, many offences might go unpunished.”

A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporations by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain the degree and control of the persons or body of persons is intense that a corporation may be said to think and act through the person or the body of persons.

In State of Maharashtra v. Syndicate Transport Company, the question was wheather a corporation could be prosecuted under section 420 of IPC. The court held that under section 11 of IPC “person” includes a company and under section 2 “every person” shall be liable to punishment under the Indian Penal Code. A corporate body therefore, ought to be indicate for criminal acts or omissions of its director or authorized agents provided they have acted or purported to act under authority of the

127 Id.
corroborate body or in pursuance of the aims or objects of the corporate body. However, the corporation cannot be liable for offences which can be committed only by human being such as bigamy, rape murder etc. In India, the corporation is held liable for only those acts of employee who have control over the corporation and who could act independently. As far as a traditional crime is concerned the corporate criminal liability is restricted to acts of few officers and not to the acts of every employee of the corporation. Further the employee must have been acting for the benefit corporation even though it is not necessary that corporation might have benefited actually.

In the second system the corporation is liable for all the offences which are of strict nature. As regards corporate criminal liability, there is no doubt that a corporation or company could be prosecuted under for any offence punishable under law, whether it is coming under strict liability or absolute. Where the statute has created the strict offence the company becomes liable for the same because the Act does not require the presence and proof of mens rea. The vicarious liability is applied and the corporation is liable for acts of its servants who have committed offences during the course of their employment. The Supreme Court in Sarjoo Prasad v. State of Uttar Pradesh, has held that any person whether employer or employee contravening the provisions of Section 7 of the Prevention of Food Adulteration Act, 1954, is liable to punishment under section 16, and it is not necessary for the prosecution to establish that the person concerned had any guilty knowledge or

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129 Id.
intention that he knew that the article was adulterated.\textsuperscript{132} In \textit{Indo China Stream Navigation Co, v. Jasjit Singh},\textsuperscript{133} Sections 52A and 167 (12A) of the \textit{Customs Act}, 1878 which imposes a prohibition as to the entry within the limits of any port in India of a vessel constructed, adapted, altered or fitted for the purpose of concealing goods and which in the event of breach of this prohibition provide that a vessel shall be liable for confiscation and the master shall be liable to a fine, have been construed by the Supreme Court as imposing absolute prohibition irrespective of any guilt intent of the owner of the vessel. This result was reached on the view that a construction consistent with the presence of the guilty intent as an essential ingredient of the crime will make the prohibition a dead letter because of the difficulty of proving the existence of \textit{mens rea} against the owners or master of vessel.\textsuperscript{134}

In third system the legislation which expressly makes the corporation is liable for the acts of its employee would be held liable. Parliamentarians of India have enacted so many socio-economic legislations which expressly provide criminal liability of corporations.\textsuperscript{135} Section 140 (1) of The Custom Act, 1962 makes company criminally liable for the acts of its servant. Further it says that the person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company is also guilty of offence along with the company. However, that person can absolve from criminal liability by proving that offence was committed without his knowledge or that he exercised all the due diligence to prevent the commission of such offence.\textsuperscript{136}

\textsuperscript{134} Id at 1149.
\textsuperscript{136} Section 140(1) of \textit{The Customs Act} 1962.
been committed by company and it is proved that the offence has been committed with consent or convince, or negligence of any director, managers, secretary, or other officer of the company shall be deemed to be guilty of offences.\textsuperscript{137} The section explains ‘company’ means a body corporate and includes a firm or other association of individuals and ‘director’ in relation to a firm, means a partner in the firm.\textsuperscript{138} These provisions widen the scope of criminal liability not only to the person who actually committed the offence and company but to those persons who are in charge of the company at the time of committing offences. Therefore it can be said that legislation intended to be more severe deterrent on those who is at the helm of the company affairs at the time of committing offence. In order to fasten liability on a person other than the company it is essential for the prosecution to show that such a person was in charge of and was responsible to the company.\textsuperscript{139}

Generally, there are two models of corporate criminal liability: a restrictive direct liability model, followed by France, England and India, and wide vicarious liability model followed by the United States. The wider model seems to be more effective in combating corporate crime. The French, English, and India models are not in line with the real development of corporate structure. The reluctance of these models to adopt the aggregate responsibility model is likely to hamper the accomplishment of justice and accountability for significant types of corporate misconduct. The fragmentation and specialization of corporate department can create an ideal way of escaping liability under the restrictive models: one’s apparently innocent action coupled with another’s will often times form crimes. The requirement that the crimes be committed by high ranking officers or managers is also a great

\textsuperscript{137} Section 140(2) of \textit{The Customs Act} 1962. \textit{D.K. Jain, v State} AIR 1965 All 525.
\textsuperscript{138} See explanation attached to section 140 of \textit{The Customs Act} 1962.
impediment in combating corporate crime because corporations will avoid liability by empowering lower level employees to make decisions.

The English and Indian system presents another disadvantage when requiring the identification of the individual who committed the act. The identification of the individual who committed the crime is often times impossible. Although they have the advantage of being clear, predictable, and consistent with the general principles of criminal law, these systems do not meet the requirements of general fairness and efficiency. Moreover, due to the difficulty of prosecuting corporations, the English, French and Indian systems are less deterring. On the other hand, the American model establishes a wide system of corporate criminal liability that promotes general fairness and deterrence. The adoption of the aggregation theory and the fact that any employee can engage the criminal liability of corporations under certain circumstances represents great advantages; the American model comprehensively covers the wide variety of loopholes existent under other systems. This system is clear, predictable and efficient in preventing corporate crimes. At the same times, the wide possibility of convicting corporations for acts of any employees increases the number of lawsuits against corporations; this causes high costs for the courts and the corporations, and the loss of jobs and profits for innocent employees and share holders.

4.7. Sanctions

The issue of what sanctions are appropriate for corporate criminal activities has been the constant subject of the doctrinal debates, and even often times, has been the argument for rejecting corporate criminal liability. The first issue raised in this debate was the individual character of criminal responsibility. The critics argue that by sanctioning the corporate entity, all its members are sanctioned regardless of
whether they had any participation in the criminal offense. Thus, sanctioning a
corporation to pay a criminal fine would have the indirect effect of diminishing the
income of the stakeholders, or the corporation would be forced to reduce the number
of innocent employees who would lose their income.140 This would amount in the
critics’ view to a criminal liability for another’s crimes, which would be unacceptable.
However, the majority of the doctrine sustains that corporate criminal liability does
not conflict with the individual character of criminal liability. The only person
suffering the direct effects of a criminal sanction is the corporation. Moreover, the
indirect effect of corporate criminal liability suffered by the corporation’s members is
similar to the indirect effects that family members of an individual’s criminal
offenders suffer.

Corporations cannot be physically retained in prisons (one of the most
effective sanctions known) is hardly debatable. The criminal fine penalty has been
successfully applied to corporations in the majority of countries and has deterrent
effect when its quantum was properly individualized. The criminal fines are the most
common sanctions for corporate criminal liability.

4.7.1. France

The French Penal Code lists all the sanctions that can be applied to
corporations.141 The most common sanction is the fine which is applicable for all
types to offences.142 In some cases, the fine can be replaced with the prohibition of
issuing checks, or confiscations.143 The amount of the fine is determined based on the
limits applicable to individuals; the maximum amount for corporations cannot exceed

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141 RaduChirita,Raspundera Penala A Personei juridice, op. cit., p.140.
142 Id.
143 C.Pen. Art 131-139 (Fr.).
five times the maximum for individuals unless the corporation is a recidivist (when the amount can be ten times the maximum for individuals). In additions to fines, the French Penal Codes provides for various other sanctions such as: dissolutions, disqualification from performing specific economic or social activities, placement for no longer than five years under judicial supervision, temporary or permanent closing down of plants used in the commission of the crime, temporary or permanent prohibition to contract with the government or other public institutions, temporary or permanent prohibition to issue stocks or checks, confiscations of goods used or produced as a result of the crime and publication of the judgment.

4.7.2. England

In England, the standard sanction is the fine. However, because the fines are often to low in relation to the corporations’ financial means and damages caused by the offence, corporate probation, confiscation of the proceeds of the crime, and withdrawals of lenience have also been scarcely accepted. Some authors argue that English law should reassess both the nature of the sanctions applicable to corporate offenders and the principles of attribution of criminal liability to corporations. Therefore, the English sanctioning system lacks imagination and effectiveness.

4.7.3. America

The United States Sentencing Guidelines impose an innovative sanctioning system. The main goals of the American system are to “provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanism

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145 C.Pen. Art 131-139 (Fr.).
146 Hardings. C. op. cit., p. 382.
147 Id.
for preventing, detecting, and reporting criminal conduct.” Under federal law, the main sanctions are the fines, restitution, remedial orders, and community services and probation. Under some state laws, corporations can be sanctioned with dissolution, and ordered to refrain from engaging in certain kinds of business activities. The U.S. system insists on retribution and deterrence; the punishment must be just and fit. Therefore, the courts must calculate the amount of the fines following several steps:

In the first, the court will calculate a base fine that reflects the seriousness of the offence committed. Seriousness is measured by the greater of the pecuniary gain to the offenders: the pecuniary loss to the victim and the intrinsic wrongfulness of the offence as established by a statutory table. Next, the court will multiply the base fine by a numerical factor that reflects the culpability of the offenders. This will yield a recommended fine range. Finally, the court will select an appropriate fine form within the recommended range, unless it can justify a departure from that range.

In addition to paying high fines, corporation must also adopt complex internal mechanism to prevent and detect crime. “This new approach to deterrence is called the carrot-stick model. The stick consists of the application of fines, which are much higher than in the past. The carrot consists of reduction in fines if the corporation has adopted an effective compliance and ethics program. The American system also ensures the goal of rehabilitation. The probation sanction allows an invasive and intense reconstruction. Courts imposing the sanction of probation may require corporations to, Submits to the court an effective compliance and ethics program: . . .

148 New York Central and Hudson River Railroad Company v. United States, 212 U.S. 481 (1909)...
151 Id, s8C2.4(a).
152 Id s8C2.7.
153 Id , s8C2.8.
154 Cristina Magile, op. cit., p.565.
to make periodic reports to the courts or probation officer . . . regarding the organization’s progress in implementing the program . . . . In order to monitor whether the organization is following the program . . . the organization shall submit to . . . reasonable number of regular or unannounced examination of its books and records. The sanction of probation is imposed when the corporation has prior criminal history or it does not have an effective program to prevent and detect violations.

4.7.4. India

Indian legal system in respect of corporate criminal liability primarily focused more on the concept of fine. Unlike America and France it does not have variety of punishment against corporate criminal liability because it does not have comprehensive legislation covering the criminal liability of corporation. Even though Indian Penal Code prescribes different kind of punishments like death sentences, life imprisonment, simple or rigors imprisonment cannot be imposed on corporation because of its legal characteristic personality. Therefore judiciary left with no option but relay on traditional concept of fine. Moreover the IPC does not prescribe the quantum of fine. Obviously the amount of fine would be meager amount which in fact dose not exhibit characteristics of deterrence.

Indian Parliamentarians started to show their maturity in respect of corporate menace of criminal activity by enacting different kind of regulatory legislations and prescribing higher standard of quantum of fine for corporate criminal liability. The Securities and Exchange Board of India Act 1992156 (SEBI), imposes fine to the extent of twenty-five cores or three times the amount profits made by corporations

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which is higher in case of insider trading offence. Further, the SEBI has laid down certain guidelines for determining the quantum of fine which has to be imposed on corporation. Like SEBI, even Foreign Exchange Management Act (FEMA) 2000 has provided that in case of contravention of the Act where the amount is quantifiable the penalty may be up to thrice the amount.

SEBI has provided variety of punishment which includes prohibiting the company to issue prospectus, debentures, and securities. Even Board has the power to confiscate and attach the Bank accounts of the corporation. The Foreign Exchange Management Act, 1999 also made provision in respect of confiscation of property, security and money of the corporation which violated the FEMA. Companies Act 1956 has provided another unique way of punishing company in the form of winding of company by the order of court where it is involved in any kind of fraudulent or unlawful purposes, and guilty of fraud, misfeasance or other misconduct towards company or members.

The sanctions applicable to corporate offenders vary from country to country. As shown above, France has a wide variety of sanctions and U.S has very innovative and effective system which offers corporations strong incentives to prevent and detect

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157 Section 15G of The Securities and Exchange Board of India Act, 1992, section 15H also prescribes same kind of punishment in case of non-disclosure of acquisition of shares and takeovers. Further section 15HB provides that where no separate penalty is provided for any offence, shall be liable to a penalty which may extended to one cores rupees.
158 Section 15J says while adjudging quantum of fine three matters has to be considered. First, the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of default. Second, the amount of loss caused to an investor or group of investor. Third, repetitive nature of the default.
159 Act NO. 42 OF 1999.
160 Section 13(1) of The Foreign Exchange Management Act, 1999.
161 Section 15J of The Securities and Exchange Board of India Act, 1992,
162 Section 11A of The Securities and Exchange Board of India Act, 1992,
163 Section 11(4) (e), Id.
164 Section 13(2) of the Foreign Exchange Management Act, 1999.
165 See, section 237 (b) (i) (ii) of the Companies Act 1956.
corporate crimes, while the English and India system lacks many of the sanctions presented.

The French system has the advantage of being clear, but the system seems to be less deterring because the calculation of fines is reported to the fines applicable to individuals. In India the corporate criminal liability for traditional crime is less deterrence because IPC has used words only fine but it is not quantified by the law. Therefore naturally the mount would be meager amount. However the legislations like The Securities and Exchange Board of India Act 1992, and The Foreign Exchange Management Act, 1999 have made progress in respect of deterrence of punishment by prescribing high standard of punishment.

Indian, French and English system is non-rehabilitative because it lacks the corporate probation sanction. The American system is not only achieves the goals of deterrence, retribution, and rehabilitation, but also offers incentives for self-policing and avoidance of costly trials. In America it is in society interest to transform cultures that might previously have encouraged or implicitly tolerated illegality to cultures that take seriously their legal obligations.

The fines are not comparable to the maximum applicable to individuals so the courts can impose fines with deterrent effects on corporations. However, this may have some significant spill-over effects on innocent employees and share holders. Unlike India, and English system, the American system of corporate criminal liability is more innovative in respect of sanction of probation which has the advantage of fulfilling all the scope of the criminal punishment while leaving insignificant spill-over effects.
4.8. Conclusion

Several countries were and some still are refusing to accept the concept of corporate criminal liability due to doctrinal, political, and historical reasons. Out of those formerly refusing to accept this concept, some started to change their views slowly. The realities of our times have been changing so much that legislators have realized that doctrinal issues are less important than the prevention and appropriate punishment of large-scale white-color crimes, money-laundering, illegal arms sales, environment harm, product liability, and many others. Some of the countries that have newly introduced the corporate criminal liability in their legal system provide for restrictive systems of engaging liability and punishing criminal activities of corporations. That might be because of they are apprehensive of rapid and extreme changes in short period of time or maybe the realities of their so cities are not sufficiently pressuring: the historical, social, economical, and political realities differ from country to country, and these differences have strong influences on the legal system.

Although the system developed in United States is presently considered the most advanced in the word, the American model has a few drawbacks that could probably be eliminating by using from other models. The American system’s most important disadvantage are the significant spill-over effects on innocent employees and share holders, the possible over-detering effect, and high cost of implementing corporate criminal liability. However, its advantage outweighs its disadvantages. The American model seems to be better reflected the actual developments of corporate structure and thus, it is better suited to punish corporate crime. The retributive and rehabilitative effects or criminal punishment are almost perfectly reflected by the American model. Moreover, this system is clear, predictable, consistent with
principles of modern criminal law and fair. The French, English and Indian systems also clear, predictable, and consistent with principles of criminal law. Moreover, they do not have significant side effects on innocent individuals or share holders and are not over-deterring. However these systems are less deterring. The prosecution of corporation is very difficult due to the significant restrictions of these models. Thus, retributive goal of the criminal law cannot be effectively achieved. Nevertheless, these systems would probably have the effect of attracting potential corporate criminals seeking to avoid liability.

Corporations are independent juristic persons that can cause harm. Therefore, corporations should bear the responsibility of their actions. Although corporations have been initially conceived as a method of avoiding personal liability, and although its members will feel the side effects of sanctioning corporations, members do not lose more than what they were willing to risk from the beginning (at incorporation). The corporate criminal liability models so far show that the only way to effectively punish and battle corporate crime is to criminally punish corporations. Prosecutions of individuals only is unjust not only to them, but to society at large because convictions of individuals will rarely affect the way corporations will conduct their business in the future. Moreover, civil and administrative liability of corporations are not sufficient. Victims do not always have the financial resources to pursue a civil action. Criminal law punishes justly; its irreplaceable retributive, deterrent, and rehabilitative characteristics satisfy the public demand of vengeance. Criminal punishment of corporations sends a symbolic message: no crime goes unpunished and crime never pays.