CHAPTER 6

PUNISHING THE CORPORATE
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1. INTRODUCTION

The present day criminal law provides precise definitions of crime, along with appropriate punishment for that crime. Till the times the world witnessed the traditional set of wrongdoings, the principles of criminal law were enough to deal with criminal activities of the wrong doer in the society. The new acts of crime and the new roles which are redefining crimes in the modern world have forced us to rethink and review principles, dealing with crime and punishment, both with respect to new form of criminal activities and the new profile of the criminals, which also include the legal entities.

The legal systems world over have recognized that corporations as such can be held liable for crime and the legal system are redefining the concepts and theories with respect to crime and criminality of the corporations. Still the penological principles are lagging behind to adequately respond to the need for appropriate sanctions for corporate guilt's.

Initially the civil regulatory system and other administrative controls were enough to handle the wrongs that were committed by the companies. Fine and other sanctions were provided for the regulatory lapses on the part of corporations. But now, these sanctions are not enough to curtail the kind of criminal activities of the corporations, which affect the every sphere of society on large scale. Because, if after finding the guilt the penalties are not appropriate, the whole
purpose of criminal justice system would get defected. The debate comes down to the same short-coming that a corporation cannot be physically brought down to the court and more importantly, whom would you imprison? The company wriggles out of many a situations because there is no boundary strong enough to hold it down. The criminal law today needs to strengthen these very boundaries and hold captive the guilty corporates. The shift has to be made because since long the directors or the agents have been prosecuted for the misconduct of the companies but this system has failed to create a deterrence for the multi-national corporations who operate in million boundaries and through million hands. All hands cannot possibly be handcuffed but they can be threatened and deterred and the guilty can be reformed through effective criminal justice system.

Scholars of Criminal law have long been stressing upon the need to revise our practice of criminal justice system and the jurisprudence on which it is based upon. One of their main concern is the overpowering affluence of attention that the informal social norms play in governing the societal behavior and how to judicially control the behaviour that now includes the behaviour of a juristic person as well. New paradigms of committing a crime have emerged, along with new players. There needs to be a whole new strategy to counter these crimes and to punish the wrongdoer.

Looking at penal provision in law, "a crime is made up of two parts, forbidden conduct and a prescribed penalty."¹ Even if a criminal statute did not provide for a fine, probation, confinement, restitution, community service, or such, and instead stated that "the sole punishment for this crime is the stigma of conviction alone, as the moral obloquy and the social disgrace incident to criminal

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convictions are whips which lend effective power to the administration of criminal law. Then this minimal punishment would only be a legitimate one if the "stigma" was justified by condemnation retribution or general or specific deterrence. If not, there would be no legitimate punishment and, by definition, no legitimate crime.

It cannot be denied that, none of the traditional goals of the criminal law or its basic concern for individual determinations of guilt supports the application of agency principles of vicarious liability where a corporation has taken all reasonable measures to conform its employees’ conduct to the law. Criminal law, after all, is reserved for conduct that we find so repugnant as to warrant the severest sanction. The goals of the criminal law are to deter and punish such conduct.

As a matter of course the criminal law is not concerned till the corporates stuck to their usual business within the regulatory boundaries. In the even of violations, the regulations and prescribed penalties are enough to take care of situations. Perhaps it has taken a long time to comprehend that corporates can be guilty of crime in the strict sense and need to be punished to protect the larger interest of the society and the State. Further what manner or mode is required to determine the punishments which could be appropriate and justified as per existing penological principles. Even there could be need to develop new principles and policies for corporate punishment.

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This chapter is an attempt to study the penological aspects of the corporate crime and the need to evolve effective measures to deal with present day corporate criminality.

2. **DILEMMA OF PUNISHING A CORPORATE**

There are lot of dilemmas and contradictions when we talk about punishing a company. There have been various Acts and provisions which have been incorporated in relation to the separate existence of the company. Majority of the countries consider that the company has a separate legal entity from its members and employees and should be treated separately from them too. There is no denial in the fact that majority of the sanctions and regulations to control the conduct of these companies have redefined policies to handle this separate existence of the body corporates as well. The conflict is regarding the nature and kind of punishments for the wrongs that the company commits. The main issues which exist in relation to the concept of punishing a corporate are identified as under:

1. The company is taken to be a separate entity from the employees and employers of that company. The biggest *lacuna* is that the company itself cannot have *mens rea* to commit a crime. The crime is said to contain two elements- guilty mind and guilty act. Even though the guilty act can be attributed to the company buy the element of guilty intent or guilty mind can never be figuratively attributed to the company. Even in case of natural persons the guilt or intent is inferred from the circumstances keeping in view their act and conduct. It has also been established by the honourable Apex Court through various case laws that where public safety and public welfare is concerned then *mens rea* may not be required as a constituent element for a crime. In *Gujarat Travancore Agency*
v. Commissioner of Income-Tax Kerala\textsuperscript{5} the Supreme Court observed that unless there is something in the language of the statute indicating the need to establish the element of \textit{mens rea}, it is generally sufficient to prove that a default in complying with the statute has occurred. However in the earlier decision in \textit{State of Maharashtra} v. \textit{Mayer Hans George}\textsuperscript{6} the court held that It is a well settled principle of common law that \textit{mens rea} is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded \textit{mens rea}.

Therefore, it is a matter of construction of statute keeping view the legislature intent and objective to deal with the situations and circumstances. \textit{Mens rea} is undoubtedly the main component of the crime but if the statute does not infers it or requires it then the act may be punished even if \textit{mens rea} is not proved. Statutory offences should also be allowed to prosecute the guilty for criminal liabilities of their acts as well. In cases where liability of a corporation is to be fixed hostistic view is required to be taken to meet the ends of justice perhaps by taking a departure from the traditional rules.

2. The companies cannot be physically punished. This idea has long been promulgated by the legal scholars. It was in early 18\textsuperscript{th} century that Lord Edward, the Chancellor of England, commented that ‘did you ever expect the corporation to have a

\textsuperscript{5} AIR 1989 1671
\textsuperscript{6} AIR 1965 722
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conscience, when it has no soul to be damned and no body to kick? This observation has troubled the legal framers from a long time. Even though the company is treated as a person by the statutes; be it the commercial statutes or the penal statutes, yet there is no law which refers to the imprisonment of a company. There has been views that since company is an artificial person, it cannot be physically punished to a term of imprisonment. At the same time it is understood that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring mens rea. Even though it is not possible to imprison a company but many other punishments like fine, economic sanctions, rehabilitation of victims, loss of goodwill etc. can be awarded to the company. The main motive of the punishment is to deter a person from doing wrong. Even though there is no body to kick yet the economic sanctions, the fine and other penalties will serve the same purpose as imprisonment corporates can be hit by adopting different forms of sanctions. There can even be a punishment in shape of death penalty for the corporate indulged in committing heinous crimes that can be in the shape of a shut down or dissolution of the company.

3. Then the main dilemma is who should be punished? Should it be the company or should it be the shareholder, the director or the agents who actually committed the crime. The theory of corporate veil tells us that the company is a separate entity but the theory of vicarious liability at the same time lays down that one can be punished for the act of another if the act was done in consonance of the orders during the course of employment. There is a strong opinion of scholars who say that when a
company is punished then it’s the shareholders who are punished and not the company itself. When it is required to find the real hands who have done the wrong within a company the courts also face a challenge when they deal with criminal liability cases. It gets a very difficult to find the real culprit in a complex hierarchical structure of a multinational or other companies having complex organizational structure. Thus the further question which remains to be answered is whether the liability of corporation and management is to be dealt distinctly and independently. Emerging trend is to keep the Directors’ liability distinct and independent.7

3. RATIONALE FOR PUNISHING A CORPORATE

Criminal law based on certain factors which recognize that there are certain conducts which need to be treated as crime because of hurting public sentiments, concern of the State to maintain law and order or otherwise violating the penal policy. By prescribing such acts or conduct law sets norms for human behavior. Similar prescriptions are also required to regulate the corporate conduct which should be supported by socio-economic and legal concerns to provide healthy corporate culture. Significance of developing such culture is discussed as under:

3.1 Social Norms

Social norms is the idea of influence, which describes the well-known phenomenon that our choices are influenced by what other people choose and approve of. We conform our behavior to that of others in all sorts of ways, from fashion and speech customs to choosing

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7 See Sunil Bharti Mittal v. C.B.I. (2015) 4 SCC 609 (when a company is accused its Directors can be roped only if (a) there is sufficient incriminatory evidence against them coupled with criminal intent or (b) statutory regime attracts the doctrine of vicarious liability.)
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11 Ibid.
13 Supra note 9.

Legal goals of crime prevention or dispute resolution are more likely to be successful if the law can work in conjunction with social norms. The law can foster compatible social norms—norms that encourage the same conduct that the law wants to encourage—and can diminish the strength of norms that conflict with legal goals, like reduction of harmful wrongdoing. It can work to shape the social influences that lead people to law-breaking or law-abiding. For instance, if the law can reduce the perception that crime and disorder are widespread in a neighborhood, crime rates are likely to decline; this is a key premise of order maintenance or community policing. It also supports government efforts to ensure that large firms have formal "compliance plans" in place to discourage law-breaking by employees; those plans signal the unacceptability of rule-breaking in a corporate setting. Moreover, the law may be ineffective if it does not do so. Social norms and influence likely affect crime rates more than the law's deterrent of increased punishment.

3.2 Legitimacy of Law

Social norms and the localized cultures they help define interact with another factor that impacts how effectively legal regimes work. Public perceptions of the law’s legitimacy or moral credibility can either sustain or undermine substantive law. Legitimacy increases both voluntary compliance and cooperation with enforcement. People largely obey the law not because of the fear of punishment, but because they agree with its substantive content and see it as morally credible, a belief that is reinforced by society. Compliance to law can be obtained if it is seen that the rules and their administration as fair and justified.\(^\text{14}\)

There is a wide scope of the regulatory administrative controls and criminal laws that governs wrongdoing in marketable settings. It is believed that the failure to regulate the market and control free environment may lead to irresponsible conduct. Without conscienous compliance of societal and ethical obligation law alone may not yield desired results.

Insurance and Health care frauds, tax evasions, human trafficking, hoarding and black marketing are few of the examples of crimes which exist in the society despite the strict regulatory controls existing today all over the world. Administrative guidelines, tax and revenue policies, environmental safeguards, labour safety standards etc. are all in proper operational places in form of codes and statutes, which the industry adheres to but not fully. What is needed is a strict obedience of the regulations of law. This may be achieved through sanctions or through punitive damages being rendered against the corporate alongwith developing an overall compliance

culture. For this is required if the nomadic and legitimate moral conduct of the company within the society has to be established because still today morality rules the roots of law all over the world especially in countries like India, where morality form the base of criminal jurisprudence too.

3.3 Social Investment

Comparable concerns are keeping the debate over the misconducts of the corporates alive. The generation of adversarial cultures of resistance to regulation describes one way that the social investment necessary to minimize wrongdoing is decreased. This social investment is needed in any visible form today; be it the regulations or policies which will reinforce the social obligations and reciprocity that the companies owe towards the society. Efforts to rejuvenate regulation in a more cooperative and collaborative form by displacing command-and-control regulation aim to increase the social infrastructure-the attitudes within firms and industries and the relations between firms and enforcement officials-thereby decreasing wrongdoing without resorting to the deterrence of disciplinary sanctions.15 While criminal law scholars and policy makers in recent years have given some attention to such cooperative strategies, regulatory scholarship and agency practice have a much longer and more extensive record of attention to this issue.16

The criminal wrong doings by the corporate giants, not only hurt the social investment when the tax payer’s money is invested to stop the effects of the criminal acts or omissions undertaken by the units but also when the infrastructure of the police and public prosecutors is

used to control and punish their misdeeds. This cost could very well be used for the benefit of the society. Ironically, the damage is twofold here. On one hand the future and present sustainable development of the society gets affected when the considerable amount of state funds are used to control crime and on the other hand the society suffers loss of capital in the form of unemployment and devastation that it faces when the crime shakes the foundations of the society.

3.4 Public Outrage

Corporations in these days get involved in more serious offences than what is done by individuals various surveys and studies have been undertaken to get public response to serious crimes like fraud by the companies. There are views that heavier penalties should be imposed on white collar crimes than theft, larceny, burglary, aggravated assault and robbery. The other important cross-cultural study is Graeme Newman’s Comparative Deviance finds that in countries like India, Indonesia, Iran, Italy, and Yugoslavia people demanded longer prison terms for corporate fraud than for robbery. The corporate needs to be punished for its wrongs so that the public anger and outrage towards such incidents can be

17 Australian Law Reform Commission, “Sentencing of Federal Offenders”: Interim Report No. 15, 28 (1980). Two Australian public opinion surveys both found respondents to react more punitively to items on fraud by company directors than to most other offenses in the surveys
18 Scott & Al-Thakeb, “The Public’s Perceptions of Crime: A Comparative Analysis of Scandinavia, Western Europe, the Mile East and the United States, in Contemporary Corrections” 78, C. Huff ed. (1977). Scott and Al-Thakeb have provided the most wide-ranging international survey of attitudes towards the seriousness of white-collar crimes; interviews were conducted in the United States, Great Britain, Finland, Sweden, Norway, Denmark, the Netherlands, and Kuwait. They compared the level of penalty which would be administered for various white-collar crimes with the penalty regarded as appropriate for the seven FBI index crimes.
20 Id., at p. 230
controlled and averted. The mental strains which arise due to devastation along with the pain and loss suffered by the citizens can lead to an irrational and angry mob capable of another destruction in itself. Punishing the company for its wrong will manage this anger and reinforce people's faith in the law.

Therefore as a final analysis it is said that to maintain social norms and to uphold the legitimacy of law and keep the social costs under wrap, it becomes mandatory to create a deterrence in form of a punishment for the body corporate as a single act of misconduct and malice undertaken by the corporate of today can take the society back by generations in terms of progress and stability. Chernobyl Nuclear disasters and the Bhopal gas tragedy are examples enough.

4. THEORIES OF PUNISHMENT

The theories of punishment have developed with focus on human nature of the criminal as well as the community at large and the victims of crime. In the present day corporate culture and the nature of harm resulting from corporate crime is different from those caused by individuals. Therefore there is need to have a relook at the traditional theories of punishment in the context of corporate criminality.

4.1 Retribution

In the past decade the scholars of criminal law and legislative policy makers have focused on the effects and implications of the retributivist theory of punishment. Retribution stands for, in words of Markel, 'Vengeful rehabilitation "urges punishing an offender in a way that mirrors the harm or suffering he has caused, typically
identified as *lex talionis*: the principle or law of retaliation that a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer*.21*

Retribution, is not a single concept. Rather, throughout the literature there exist a number of philosophical theories variously articulating both the meaning and role for retribution as a rationalization for punishment. In its most original meaning, retribution is vengeance an eye for an eye. The rule interpreted by the researchers lays down that if someone has harmed us, or our friends or family, or those people who are close to us through an injury or any other form of hurt then our first instinct is to hurt the offender with full force and make them suffer the same loss and pain that we have felt. In penal law society offers a ritualized form of punishment to redirect our innate, primitive reactions, thereby controlling and removing the socially destructive possibility of vengeful self-help, blood feuds, and the like.24

For many jurists in the western countries, unlike the Middle Eastern countries who believe in raw vengeance, express views about retribution, do not advocate, but rather what is called "just deserts." Retribution in this sense is an ethical, moral limitation on who can be punished. We've chosen you for punishment because you

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deserve it, not merely because your punishment would benefit society (which in theory the punishment of an innocent could achieve). The last decade has seen a resurgence of "just deserts" as the rationale for punishing criminals. They should be punished because they deserve to be punished. The quantum of their suffering should be in proportion to the seriousness of their crime, not according to any assessment of whether they are rehabilitated or when they no longer pose a threat to the community.

More recently, a theory of retribution based on the notion of "mutual political obligation" has emerged. Through the criminal law we mutually agree not to engage in certain behaviors, though sometimes it might be to my individual advantage to engage in such conduct. I defer to the law, knowing that you will also do so in instances when violating the law would be to your advantage. In this system, therefore, we cannot tolerate those who take advantage through violating the law while the rest defer taking such advantage. Punishment returns this system of mutual obligation to "equilibrium," thereby both assuring the rest of us that we have not been suckers for following the law, and avoiding a loss of confidence in the community's willingness to enforce its criminal prohibitions.

The strictness of this theory is apt to control the deviant behaviour of the companies and its officers. The retributive punishment of dissolution of the firm or the company which has committed the wrong, the punishment accorded to the guilty officers of the company, the lock out or total shut down of the premises till the loss

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is taken care off by the executives are few examples how this theory can be used for according punishment to the company. It may seem harsh but in case of environmental destruction and other heinous crimes which leave a devastating impact on the society at large, this strict interpretation is appropriate. It would also satisfy the instinct of public outrage and vengeance in the even of grave suffering or loss is caused to the victims of grave corporate crime.

4.2 Deterrence

Traditional deterrence theory focuses on formal legal sanctions as the important influence on potential offender conduct; if we increase either the certainty of conviction or severity of punishments, rational offenders should reduce their misconduct\(^{31}\). This premise presumably underlies the dramatic increase in incarceration rates in the last quarter-century. Social norms describe the informal, non-legal rules that shape behavior, including decisions to violate the law. Norms arise among all sorts of social groups; they are the informal rules that describe conduct that groups either encourage through rewards or discourage through informal sanctions.\(^ {32}\)

Deterrence traditionally is broken down into two components, specific and general. Specific deterrence refers generally to incapacitating the criminal to prevent or dissuade future conduct in that individual. For a real person, that incapacitation comes usually in the form of imprisonment. It can also include restrictions on one’s liberty and even employment during a period of supervised release. Prison of course is not an option for a corporation. Specific deterrence of a company could, however, take the form of causing the dissolution of the company (the equivalent of a corporate death

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penalty), barring the company either permanently or for a period of time from engaging in certain businesses, or subjecting the corporation, like an individual, to a probationary period during which its conduct is restricted and monitored by a court.\textsuperscript{33}

General deterrence refers to the effect punishment of a specific defendant will have on other members of society who might be tempted to engage in similar conduct. Such deterrence is thought to work particularly well in connection with white-collar offenses and less well to deter crimes of passion, in which a criminal is thought likely to engage without much forethought to the punishment meted out to similarly-situated individuals. General deterrence is particularly apt with respect to corporate criminal conduct, which tends to be the antithesis of crimes of passion. Corporations through boards, inside and outside counsel, and formal deliberative processes generally pay particular attention to precedent in determining the risks and rewards of contemplated action.\textsuperscript{34}

Upon contemplation that what would deter the body corporate from committing criminal wrongs, the main answer found in the statutes and policies is fine. This is because sanctions like imprisonment individuals cannot be imposed on corporations and the dissolution of the offending corporation may not be viable solution. Perhaps the rationale for imposing fine is deterrence i.e. if a corporation is earning profit through unlawful activities it could be deterred by imposing fine making the activity unprofitable. Here comes in the phenomenon known as "deterrence trap".\textsuperscript{35} It means that when heavy fine is imposed on a corporation to deter i.e. more than its capacity to pay. This is precisely explained as under:

\textsuperscript{33} 18 U.S.C. § 3551(c) (2000).
\textsuperscript{34} \textit{United States v. Park}, 421 U.S. 658, 673 (1975).
The crux of the dilemma arises from the fact that the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a $5 million fine than by a $500,000 fine if both are beyond its ability to pay. In the case of an individual offender, this wealth ceiling on the deterrent threat of fines causes no serious problem because we can still deter by threat of incarceration. But for the corporation, which has no body to incarcerate, this wealth boundary seems an absolute limit on the reach of deterrent threats directed at it. If the "expected punishment cost" necessary to deter a crime crosses this threshold, adequate deterrence cannot be achieved... In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources.36

Keeping in view the countries like US and UK have evolved corporate sentencing policing which have been discussed in the later part of this work. In India the Supreme Court has evolved the principle of absolute liability.

In M.C Mehta v. Union of India and Ors37 crippling deges can be awarded. The rule said that in the event of a disaster out of inherently dangerous and hazardous activity the quantum of compensation could be to the capacity of the enterprise. This is required in extreme cases where a big enterprise should not escape liability simply by paying certain amount of money. In such circumstances the principle would serve the deterrent objective and the corporation will have to take all measures to avoid such dissectors. As such deterrence value of heavy damages has been envisaged.

36 Ibid.
37 1987 SCR (1) 819
4.3 Preventive Theory

If the deterrent theory tries to put an end to the crime by causing fear of the punishment in the mind of the person who is about to commit the crime, then, the preventive theory aims at preventing crime by disabling the criminal. The theory is different in ways from the deterrent theory for example, a criminal may be portrayed a sense of deterrence by inflicting the death penalty on the criminal, or by confining him in prison, or by any other action that can prevent him from committing any crime. Here for that criminal, the extreme penalty or the sentence ensures that, once and for all, the offender will be prevented from repeating the wrongful act. Traditionally too, many moral sanctions and punishments have been inflicted by the society on the wrong doer to prevent him from committing a bigger crime.

In the case of individual specially guilty of serious offences or otherwise hardened criminal the long term imprisonment is imposed whereby they are taken away from the society and disabled from committing further crime. Similarly death sentence also eliminates the criminals who are otherwise dangerous for the society. In the corporate context there are consideration that corporates whose activities are hazardous for life or environment do deserve shut up or their activities should be stopped.

Decision regarding corporate punishment is different from individuals. In the case of corporations the crime prevention can be achieved by making the other adopt compliance mechanism. The law and policy may can improve regulatory mechanism that a corporation have system of internal monitoring, reporting and preventing the violations. This aspect is dealt in sentencing policies adopted in US and UK.
4.4 Reformative Theory

According to the reformative theory, the society contributes in the creation of a convict. It lays down that a crime is committed as a result of the conflict between the character and the motive of the criminal. The deterrent theory, by showing that crime never pays, seeks to act on the motive of the person, while the reformative theory aims at strengthening the character of the man, so that he may not become an easy victim to his own temptation. The reformative theory on the other hand, considers that the punishment should cure the criminal and not kill him. According to this theory, crime is like a disease and the scholars advocating this theory maintain that, you cannot cure by killing.

The proponents of the reformative theory believe that a wrong-doers reform should be the base for the stay in prison should be aimed at re-educating him and to re-shape his personality in a new mold. They believe that though punishment may be severe, it should never be degrading. This theory propagates, execution, solitary confinement and maiming and other traditional punishments are ineffective and rather harmful. Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society. The reformists argue that if criminals are to be sent to prison in order to be transformed into law-abiding citizens, prisons must be turned into comfortable, dwelling houses.

The corporate organizational structure is diverse, where there is involvement of individuals at different levels. Still the concept of good corporate citizenship is coming up where corporates as a whole are required to adopt practices and policies which should avoid corporate wrong doings and develop a corporate culture that may
ensure due compliance of law. The policy may provide means to rehabilitate corporates who have engaged in criminal conduct by requiring them as a term of probation to institute and maintain effective compliance programs.\(^\text{38}\) The emerging trend in corporate punishment has been taken up in the following discussion as corporate sentencing policy.

5. CORPORATE SENTENCING POLICY

Punishments are required to be determined keeping in view the various factors. It is an established principle of penology that when the courts are to determine sentences they are required to keep in mind both the circumstances of crime and criminal.\(^\text{39}\) The law prescribes the punishment for offences leaving discretion to the courts to tailor the punishment taking into account the circumstances of the individual cases. The same analogy, if applied to corporate crime the punishments need to be prescribed providing discretion to the courts to do justice keeping in view all the circumstances in which a corporation commits crime as well as the corporate culture. The nature and activities of the corporation are diverse from large corporations to non-profit organisations and government entities. They may be manufacturing, trading or having investment venture etc.

In view of the fact that corporations do not have a physical body there is a need to find out alternatives which should be equally effective and should also suit the nature and gravity of the culpability. There are alternatives in the form of fine, publicity of conviction, forfeiture of ill-gotten profits and also order for probation.

\(^{38}\) See United States Sentencing Guidelines 1991, Chapter 8.

As discussed in Chapter V of this work generally the corporations commit crimes like fraud, adulteration of food, manufacture of superior drugs environment degradation, tax evasion and the like. When it comes to punishing the corporations there is a limited option to impose fine on the corporation. Perhaps fine has been accepted as an alternative for punishing the corporations. However fine has also not been accepted as appropriate punishment of a company. The imposition of find may also preclude a corporation from remedying the harm at caused aspect from its impact on innocent shareholders or investors. Criminal law has only extended the penal policies being applied to the individuals with a little effort to develop a legal system which could be more appropriate keeping view the peculiar nature and functioning of the corporations.

5.1 Corporate Sentencing Policy in United States

In United States the Federal Probation Act\(^\text{40}\) though did not specifically dealt with corporation but the courts found sentencing alternatives for corporations.\(^\text{41}\) In the Sentencing Reform Act, 1984 probation was provided as sentence alongwith fine. The various factors required to be considered under the Sentencing Act, 1984 re:

(i) Nature and Circumstances of the Offence,
(ii) History and Characteristics of the Offender,
(iii) Purpose of Sentencing (Just Punishment, Deterrence, Incapacitation and Rehabilitation).\(^\text{42}\)

It is opined that:

Fines alone do not address the complexities of the corporate criminal behavior. Although monetary penalty is a useful sanction in sentencing a criminal corporation it is not adequate as a sole remedy to control corporate criminal

\(^{40}\) The Probation System Act, 1925, amended 1982 and replaced by the Sentencing Reforms Act, 1984 (US).


\(^{42}\) *Id.*, pp. 787-88.
activity. In response to this inadequacy new sanctions must be developed and employed in sentencing criminal corporations. Probation is one such sanction.\(^{43}\)

Probation here is referred as a form of sentence rather than a suspension of sentence.\(^{44}\) Under the US Sentencing Act, 1984 probation, unless is expressly excluded for grave offences, prescribes terms of probation from one year to five year. In the case of corporate crime both the needs of corporate offender and needs of the society are looked into. The Sentencing Act created a United States Sentencing Commission which provides sentencing guidelines and policy statements. The Sentencing Commission is part of judicial branch. Otherwise the sentencing guidelines do not take away judicial discretion rather guide to determine appropriate sentence. It is commented that the US "Sentencing Act is based on the realization that all criminal corporations are not alike; some need to be sentenced with fine while others do not. Because each corporate offender is unique, judges need flexibility to tailor a sentence to the particular circumstances of the offence. The discretion provided by the Sentencing Act provides that flexibility within the flexibility of judicial discretion, however, guidelines are necessary to achieve a just and equitable application of probation to criminal corporations."\(^{45}\)

Curran has suggested these guidelines for corporate probation with reference to judicial decisions. There should be 'reasonable relation' that it should serve the sentencing objective and should also not be disproportional to offence. In *United States v. Allied Chemical*\(^{46}\) the guilty corporation was sentenced to $13.24 million for water pollution caused by escape of pesticides. Trial Court reduced the

\(^{43}\) Id., pp. 792.
\(^{45}\) Supra note 41.
sentence to $5 million to establish Environment Endowment, a non-profit corporation to fund scientific research projects and other programs to alleviate the problem and improve environment. These conditions were said to be reasonably related to several purposes of the sentence. Second it should 'work within the corporation', i.e. with the people responsible for the offence. This would internalize the punishment within the structure of the corporation whereas the fine has externalized effect by passing out penalty to shareholders or consumers. In United States v. Danilow Pastry Co.\textsuperscript{47} six whole sale bakers were convicted of price fixing. Probation condition required guilty corporations to perform community service by providing their product free of charge to needy members of the community. Court noted there would be specific deterrence and rehabilitation against future price fixing, by participation of executives and workers in satisfying the conditions of probation. This would guard against future violations. Third, that conditions of probation should be tailored to the needs of the offending corporation and the community as well. In United States v. Mitsubishi International Corp.\textsuperscript{48} substantial fine could have been imposed for violation of a statute. The court thought large corporation could easily pay the fine and walk away. Therefore it ordered the corporation to loan an executive for one year to the National Alliance for Business in development of its Community Alliance Programme for Ex-Offenders. This specially 'unique and creative' condition was said to be a meaningful sentence serving sentencing objectives.\textsuperscript{49}

5.2 US 'Just Punishment' and 'Deterrent' Models

The United States Sentencing Commission after years of deliberations adopted the organizational guidelines in 1991 with

\textsuperscript{47} 563 F. Supp. 1159 (S.D.N.Y. 1983).
\textsuperscript{48} 677 F. 2d 785 (5th Civ 1982).
\textsuperscript{49} Supra note 41.
respect to policy on sentencing corporations. The guidelines aim to provide 'just punishment' with an element of 'deterrent'. Under the 'just punishment' model the punishment should correspond to the degree of guilt of offender and under 'deterrent' model incentive is offered to organisations to detect and prevent crime. The organizational guidelines have provisions to mitigate the potential fine even to the extent of 95% in some cases, if an organization can demonstrate that it had put in place an effective compliance programme. The mitigating credit is subject to prompt reporting to the authorities and non-involvement of high level personnel in the actual commission of offence. The purpose of punishment of corporates is different from individuals. US 1991 organisational guidelines focus on providing restitution and an appropriate fine range for the offender organization through probation provisions. The guidelines aim towards deterrence and provide sentencing benefits for organisations that have an effective programme to prevent and detect violation of law. As such organisations are required to establish an 'effective compliance programme.' These include:

- Oversight by high-level personnel
- Due Care in delegating substantial discretionary authority
- Effective Communication to all levels of employees
- Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
- Consistent enforcement of compliance standards including disciplinary mechanisms
- Reasonable steps to respond to and prevent further similar offences upon detention of a violation.

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It is noted that punishment is not the ultimate purpose of the organizational guidelines. If imposition of fine would preclude an organization from making restitution or otherwise remedying harm it caused, the fine is to be waived. The purpose of guidelines is the promotion of good corporate citizenship through encouraging implementation of effective compliance programs with the objective of preventing crime. These guidelines apply to varied and charging circumstances.51

Therefore, the adoption of effective compliance program may both defer the prosecution and also mitigate the criminal penalty imposed upon an organization. Due compliance adds to the reputation of the organization whereas serious criminal misconduct may make them unsuitable for contract with government for goods or services.

5.3 General Principles Relating to Sentencing of Organisations

The Chapter Eight of the US Sentencing Guidelines Manual provides for fine calculation for organisations for crimes by taking into account the offence, history and characteristic of the organization. Broadly the principles are as under:

(i) The court must whenever practicable order the organization to remedy any harm caused by the offence. It may be through restitution order, a remedial order, an order of probation requiring restitution or community service or an order of notice to the victims.

(ii) If the organization operated primarily for a criminal purpose or primarily by criminal means the sentencing court should set the fine sufficiently high to divest the organization of all the assets. Example of an organization that operates primarily by criminal means include a hazardous waste disposal business that has no legitimate means of disposal of hazardous waste.

51 Ibid.
(iii) For all other organisations the sentencing court should base the fine range on the seriousness of the offence and the culpability of the organisation.

The US Guidelines provide for criminal fines based upon (1) misconduct in question and (2) the defendant’s culpability. Each offence subject to the US Guidelines is assigned a base offence level,’ which corresponds to Dollar Amount.  

Crucially, either this amount or the amount of gain to or loss caused by the defendant as a result of its offence serves the base fine whichever is greatest. The base fine is then multiplied by the defendant’s 'culpability score' to establish a fine range. All defendants start with a score of five; points are then added or subtracted based on the presence of various factors, like previous history, presence of an effective compliance and ethics programme, self reporting/cooperation and acceptance of responsibility. The resulting culpability score corresponds to a maximum or minimum multiplier applied to the base fine.

(iv) The court may order probation for an organization at fault when it is needed to ensure that another sanction will be fully implemented or ensure that steps will be taken within the organization to reduce the likelihood of further criminal conduct.

The guidelines offer incentives to organisations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self police its own conduct through an effective compliance and ethics programs. This will help the organisation in encouraging ethical conduct and complying fully with all applicable laws.

5.4 Corporate Sentencing Policy in UK

A framework for sentencing corporate offenders was adopted in 1st October 2014, in UK, where sentencing councils Definitive Guidelines for offences of Fraud, Bribery and Money Laundering

52 USSG Ss. 8 C.2.4
53 Id., Ss. 8 C.2.5 (b) – (g)
54 Id., Ss. 8 C.2.6
55 U&SG Chapter 8.
have been provided. The guidelines have been created as a part of a package to support the introduction in the UK of Deferred Prosecution Agreements (DPAs). It contains ten-steps process to be followed by the criminal courts when sentencing corporations for fraud, bribery and money laundering offences. It is said that UK Guideline may also open the way for a greater degree of parity with corporate sentences in United States, where authorities are perceived to be better equipped to punish to corporate offending than in UK.56

The UK Guidelines provide ten steps which require the court to consider the following:

1. Whether compensation order is appropriate keeping in view personal injury, loss or damage resulting from offence and also means adopted by the offender;
2. Whether confiscation is appropriate confiscation;
3. The offence category with reference to the offender's culpability and the harm caused;
4. The starting point and the category range;
5. The overall effect of the orders and whether the fine should be adjusted;
6. Any factor which would indicate a reduction in the fine such as assistance to the prosecution;
7. Applying any reduction for guilty plea;
8. Whether to make any ancillary orders;
9. If the sentencing is for more than one offence, whether sentence is just and appropriate; and
10. Reasons and to explain the effect of the sentence.

Punishment is to be determined keeping in view culpability and level of harm caused by the offence by assessing the role of the organization and motivation in carrying out the offence. It is to be


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decided whether the offence was committed with high (Level 'A'), medium (Level 'B') or lower culpability (Level 'C').

Harm is represented by a financial figure which represents the gross amount the corporate obtained, intended to obtain or the loss avoided or intended to be avoided from the offence. The UK Guidelines set out suggested methods for calculating the harm figure as under:

1. For fraud offences, the harm will normally be the actual or intended gross gain to the offender;

2. For Bribery Act offences, the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences of failing to prevent bribery may be likely cost avoided by failing to put in place appropriate measures to prevent bribery; and

3. For money laundering offences, the appropriate figure will normally be the amount laundered or alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher.

A multiplier which is derived from the culpability level and the harm figure. This is called a "starting point". The court then takes into account aggravating and mitigating factors to decide whether a sentence should be adjusted upwards or downwards.

Aggravating factors include amongst others:

1. Previous relevant convictions or previous relevant civil or regulatory enforcement action;

2. A company or subsidiary being set up to commit the fraud;

3. Endemic fraudulent activity within the organization;

4. Attempts made to conceal the misconduct; and

5. The offence being committed across various jurisdictions.
Mitigating factors include amongst others:

1. The corporate co-operating with the investigation, making early admissions and/or voluntarily reporting the offending behavior; and
2. The offending conduct having been committed by previous directors/managers.

The court must consider whether the fine calculated meets the objectives of punishment, deterrence and the removal of gain in a fair manner. The court must consider whether any adjustments should be made to the fine to ensure that it is proportionate, having regard to the size and the financial position of the offending organization and the seriousness of the offence. The UK Guidelines set out that any fine must be substantial enough to have a real economic impact so that both management and shareholders understand the need to operate within the law. The UK Guidelines recognize that a fine may have the consequence of putting an offender out of business.

Having arrived at a provisional sentence, the court then considers whether:

1. The offender has given any assistance to the prosecutor or to investigators;
2. The offender has entered into a guilty plea;
3. It should make any ancillary orders; and
4. The total sentence is just and proportionate to the offending behavior where an offender is sentenced for more than one offence.\(^\text{57}\)

The UK Sentencing Guidelines are based on US Sentencing Guidelines for organisations introduced in 1991. Like US Sentencing Guidelines, UK Sentencing Guidelines also prescribe a series of steps in order to arrive at an appropriate penalty for corporate criminal

\(^\text{57}\) "New UK Sentencing Guidelines - what does this mean for corporate". Dechert, www.sitesedischat.com
conduct. However US guidelines are said to provide greater certainty and predictability in federal criminal charges.58

Both UK and USA Sentencing Guidelines create incentives for organisations to institute 'effective compliance and ethics programmes', which in turn reduce the organisation's culpability score. The seven key factors in this respect are as under:

1. Established standards and procedures to prevent and detect criminal conduct;
2. Oversight by high-level personnel;
3. Reasonable efforts to exclude individuals who have engaged in misconduct from exercising substantial authority;
4. Effective communication to and training for all levels of employees;
5. Reasonable steps to achieve compliance, including systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal;
6. Consistent enforcement of compliance standards including disciplinary mechanisms; and
7. Reasonable steps to respond to and prevent further offences upon detection of a violation.

If an organization has an effective compliance and ethics programme in place and self-reports criminal conduct, the presumptive fines under the US Sentencing Guidelines can be substantially reduced. The compliance factors can be considered from before bringing criminal charges against a business organization. It is opined that the UK Guidelines will narrow the gap between financial penalties imposed in the UK and the US.

5.5 Corporate Sentencing Policy in some other Countries

In Canada the Federal Criminal Code was amended in 1909 whereby a fine could be substituted for a sentence of imprisonment and made it possible to punish corporations.

58 Ibid.
Now the criminal code of 2004 provides for fines when corporations are convicted of crime. In the case of a summary conviction offence (less serious offences that are punishable for individuals by up to six months in jail and/or a $2,000 fine), the Code provides for a fine of up to $25,000 for corporations. The maximum fine on an organization for a summary conviction offence is to $100,000. For the more serious, indictable offences, the Code provides no limit on the fine that can be imposed on an organization.

**Germany** practices a sort of administrative sanction to deviant corporations and does not recognize criminal liability of corporations as such. Germany implemented a comprehensive administrative-penal system that regulates corporate criminal wrongdoing. In Germany administrative liability of corporations meets the goals of deterrence, predictability, clarity, and general fairness, and is also less costly to implement than corporate criminal liability. Germany finds that the administrative-penal system is sufficient.\(^{59}\) The German system underemphasizes the role of the moral stigma that accompanies any criminal sanction; therefore, it is not characterized by the retribution of the criminal punishment.

At the same time, German corporations have been extremely well regulated by the very advanced German system of administrative law.\(^{60}\) A regulatory fine (Geldbuße) of up EUR 1 million can be imposed on a corporate entity if the prosecution authorities and courts find that a senior executive or an employee of the entity committed a criminal or regulatory offence and thereby either

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\(^{60}\) Fines are the standard punishment and can reach into the millions of Euros. Corporations can also face asset forfeiture and forced repayment of illegally obtained gains.
enriched or violated specific legal obligations of such entity. The fine can be increased if the alleged offence led to economic benefit of more than EUR 1 million. Alternatively, a court can make a forfeiture order (Verfallsanordnung) against a corporate entity if the court finds that the entity was enriched by a criminal or regulatory offence committed by an individual (most likely by an officer or employee of the entity). Such forfeiture orders siphon off the gross proceeds (Brutto-Erlangtes) of the criminal or regulatory offence (without deducting any related expenses incurred) and can therefore result in significant amounts.⁶¹

In France the Penal Code of 1994 introduced the concept of corporate criminal liability. Initially applicable to a limited number of offences, the principle has been extended to all offences as from 31 December 2005 (Law No 2004-204 of 9 March 2004).⁶²

A company may be prosecuted for most of the same offences as an individual offender. The differences in the punishment of an individual company is reflected as under:

- Sanctions for the legal persons are five times greater than the fines that are applicable to natural persons, to make up for the fact that they cannot be imprisoned.

- Fines are an efficient sanction in terms of deterrence and follow the principle of proportionality of the offence committed and the scale of the damage caused.

- The other sanctions applicable are dissolution, forfeiture, prohibition from exercising social or professional activity, closure of the establishment, disqualification from public tenders, prohibition from drawing checks, and posting public notice.


⁶² Ibid.
Where it is expressly provided by law, the following additional penalties may be imposed:

- dissolution, where the corporate entity was created to commit a felony; or, where the felony or misdemeanor carries a sentence of imprisonment of three years or more, where the corporate entity was diverted from its objectives in order to commit the crime; prohibition to exercise, directly or indirectly, one or more social or professional activities, either permanently or for a maximum period of five years;

- placement under judicial supervision for a maximum period of five years;

- permanent closure or closure for up to five years of one or more of the premises of the company that were used to commit the offences in question;

- disqualification from public tenders, either permanently or for a maximum period of five years;

- prohibition on making a public appeal for funds, either permanently or for a maximum period of five years;

- prohibition on drawing cheques, except those allowing for the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition on using payment cards, for a maximum period of five years;

- confiscation of the object which was used or intended to be used for the commission of the offence, or of the assets which are the product of it; and

- publication of the judgment.

In Australia a corporate may be found guilty of any offence including one punishable with imprisonment. The Commonwealth Criminal Code Act, 1995 part 2.5 read with Section 4-B (3) of the Crimes Act, 1914 provided that where a body corporate is convicted of an offence against a law of the commonwealth the court may if contrary intention does not appear and the court thinks it fit, improve a pecuniary penalty not exceeding an amount equal to five times the
amount of the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence.

From the foregoing discussion it is clear that world over there is trend to adopt specific penal policies for corporate offences.

### 5.6 Corporate Sentencing Policy in India

In India criminal liability of corporation has been legislatively recognized as the definition of 'person' under section 11 of the Indian Penal Code, 1860 include in the word 'Person' any Company or Association or body of persons whether incorporated or not. Judiciary has also recognized the criminality of the corporations as a distinct entity. However, appropriate sentencing policy distinctly for corporations is lacking. The courts have encountered difficulty in awarding punishment to corporation where the penal provision provides for only 'imprisonment' or 'imprisonment and fine'. The question was whether the courts can ignore mandatory provision for imprisonment provided by the legislature. The Law Commission of India in its 41st Report made the recommendation 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. If the penal law under which a corporation is to be prosecuted does not provide for a sentence of fine, there will be a difficulty. As aptly put by a learned writer:

Where the only punishment which the court can impose is death, penal servitude, imprisonment or whipping, or a punishment which is otherwise inappropriate to a body corporate, such as a declaration that the offender is a rogue and a vagabond, the court will not stultify itself by embarking on a trial in which, if the verdict of guilt is returned no effective order by way of sentence can be made.

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63 The 41st Report of Law Commission of India para 24.7.
In order to get over this difficulty Law Commission of India recommend that a provision should be made in the Indian Penal Code 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 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 vide paragraph 8.3 recommended as under:

"8.3. 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:

'(1) 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.

(2) 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.

(3) In this section, "corporation" means an incorporated company or other body corporate, and includes a firm and other association of individuals."

On the basis of above recommendation of Law Commission of India a proposed Indian Penal Code (Amendment) Bill, 1972, was put up before the Parliament. The clause 72 (a) (1) of the Bill read as under:

"(1) In every case in which the offender is punishable with imprisonment and fine, and the offender is a company, it shall
be competent for the court to sentence such offender to fine only.

(2) In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the court to sentence such offender to fine only.

*Explanation.* – For the purpose of this section, ‘company’ means anybody corporate and includes a firm or other association of individuals”. The aforesaid Bill was however just lapsed.

In *Velliappa Textiles case*64, the Supreme Court taking into account the aforesaid development held that since company is an artificial person, it cannot be physically punished to a term of imprisonment. The court opined that where the statute provides for imprisonment or fine, it is not a problem, but where the statute provides for imprisonment and fine, the court is not given the discretion to impose fine in lieu of imprisonment. The court was of the view that such a prosecution against a company is not sustainable because the company being a juristic person cannot be imprisoned was reached primarily on two grounds. Firstly to uphold the validity of such a prosecution will amount to filling up a *casus omissus* and secondly a penal statute has to be strictly construed. The Court in para 57 principally noticed the changes in law made by several foreign countries regarding substitution of fine in lieu of imprisonment in case of corporate criminal liability and held without any discussion of law or authority that without changes in law it is difficult to substitute fine for imprisonment. Therefore, the court in majority decision of two judges held that a company cannot be prosecuted where there is mandatory provision for fine.

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64 Assistant Commissioner, Assessment-II, Bangalore and others –Vs- Velliappa Textiles Ltd. and another (2003) 11 SCC 405.
However, the Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement*\(^65\) overruled the Velliappa ruling and held that in such situations the court can award the only sentence of fine. Though the law is settled with the decision of the apex court that company can be prosecuted and convicted for offences attracting imprisonment and fine but still in India we lack the appropriate sentencing policy. Keeping in view the emergence of corporate crime there is a need to adopt the sentencing policy on the lines provided in United States and United Kingdom.

In India the Malimath Committee constituted by the Ministry of Home Affairs Worked on Reforms of Criminal Justice System and submitted its report in 2003. The committee in its report *inter-alia* emphasized on the need to introduce sentencing guidelines. There is a suggestion to establish a Statutory Committee to lay down sentencing guidelines Again in 2008 the Madhva Menon Committee on Draft National Policy on Criminal Justice stressed on the need for statutory sentencing guidelines. The matter remained under consideration of the government as the Law Minister of India in October 2010 stated that Government is looking into establishing a uniform sentencing policy in line with United States and the United Kingdom.\(^66\) Therefore in view of developments all over the world regarding evolving of appropriate corporate sentencing policy there is an urgent need that in India a proper sentencing policy is formulated on the similar lines in US and UK.

**Conclusion**

There is a significant increase in the corporate activities in the recent past. The corporations have increased in size and reach with the

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\(^65\) (2005) 4 SCC 530.  
\(^66\) Govt. for a Uniform Policy by Courts, Zee News 7 October 2010.
globalsiation and liberalized economic policies. The present day structure of the corporations is complex with diverse organisational hierarchy. The overall corporate culture makes a major departure from the activities of an individual. At the same time, the remedial measures applied in the case of the corporations also need to be different from those applicable on individuals.

Since corporate criminal liability is an accepted norm and is being followed by almost all the countries, under different theories and principles, but the penological aspects of corporate liability are still at the nascent stage.

Imprisonment as a punishment is totally excluded for corporate criminal liability, whereas most part of penal statutes prescribe punishment of imprisonment of various durations keeping in view the gravity of the offence. Only alternative punishment for corporations remain corporate fine. However, without proper sentencing policy the fine as such could be counter productive i.e. the heavy fine may have a crippling effect and in other cases the big corporation may not mind to pay, certain amount of fine to buy immunity. This also may be harsh on the shareholders or investors.

Good developments have taken place in countries like USA and UK where they have adopted the organizational sentencing policy. The main thrust is on developing internal mechanism to detect, prevent and deter corporation by providing incentives to emerge as good corporate citizens. As a rehabilitative measure the court may provide probation on certain remedial conditions. However, in the grave cases where continuity of corporate is not desirable the heavy fine could be imposed, which may result in shutting down of the corporation. In India, we are lacking behind in developing corporate sentencing policy. It is only the judicial interpretation where courts
have the power to levy fine in lieu of prescribed punishment of imprisonment. Therefore, the corporate sentencing policy is required to be framed in India.