CHAPTER 5

COMPARATIVE APPROACH TO CORPORATE LIABILITY UNDER INTERNATIONAL CRIMINAL LAW

OBJECTIVE:

Comparative study is useful both in municipal law as well as international law. In so far as municipal law is concerned, comparative approach of two systems helps in weeding out inefficient statutory provisions and replacing them with more productive rules which experience in other systems has so revealed. In the context of international law, comparative approach is relevant because it helps in bringing out general principles of law as recognised by civilised nations which is a source of international law. For the purpose of present research, comparative study assumes more significance since corporate culpability is not yet recognised by many developed civil law nations although the concept of corporate criminality has made steady inroad in civil law systems. Lack of recognition of corporate criminality by many civil law nations (mainly European) has been an obstacle in the development of corporate criminality as a general accepted principle of law by civilised nations. Nevertheless, many countries, most notably US, India, Australia, UK, Canada and a few European countries also have specific legislations or legal provisions dealing with corporate culpability.

By undertaking a comparative study, the research seeks to emphasise the emergence of corporate criminality as an accepted principle of law in municipal law such that the same is capable of being engrafted in international criminal law. International criminal law relies heavily on
municipal law in so far as principles of individual liability are concerned in as much the whole thrust of ICL has been on individual criminal liability. Comparative approach would also help in revealing any common grounds in two different systems.

5.1 CORPORATE CRIMINAL LIABILITY IN INDIA:

The basic philosophy of Indian criminal law has always been to acknowledge the principle of corporate culpability. A major reason for this has been the influence of English common law which also recognises corporate criminality. A number of statutes take into account the possibility of a criminal act being committed by a legal person e.g. Essential Commodities Act, Indian Penal Code, Prevention of Food Adulteration Act, Negotiable Instruments Act, Companies Act 1956 (which has now been repealed) to name a few. What is relevant is the approach of India courts towards prosecuting legal person where the prescribed punishment is mandatory imprisonment with or without fine and not fine as an alternative punishment. This approach of Indian courts (not of law) towards corporate criminality can be divided into two phases. The pre Standard Chartered Bank case approach and post Standard Chartered Bank case approach.

5.1.1 Pre-Standard Chartered Bank Case approach

Pre Standard Chartered Bank decision, Indian courts held that corporations could not be prosecuted for offenses requiring a mandatory punishment of imprisonment, as they could not be imprisoned. Indian courts were also of the opinion that corporations could not be criminally prosecuted for offenses requiring mens rea as they could not possibly possess the same.
In *A.K. Khosla V. T.S. Venkatesan*\(^{255}\), two corporations were charged with having committed fraud under the IPC. The Magistrate issued process against the corporations. In the Calcutta High Court, the counsel for the defendants argued, *inter alia*, that the corporations, as juristic persons, could not be prosecuted for offenses under the IPC for which *mens rea* is an essential ingredient. The court agreed. The court pointed out that there were two prerequisites for the prosecution of corporate bodies, the first being that of *mens rea* and the other being the ability to impose the mandatory sentence of imprisonment. Each of these prerequisites rendered the prosecution of the defendant corporations futile. In *Kalpanath Rai V. State*\(^{256}\) a company, accused under the Terrorists and Disruptive Activities Prevention ("TADA") Act, was alleged to have harbored terrorists. The trial court convicted the company of the offense punishable under section 3(4) of the TADA. On appeal, the Indian Supreme Court referred to the definition of the word "harbor" ["harbour"] as provided in Section 52A of the IPC and pointed out that there was nothing in TADA, either express or implied, to indicate that the *mens rea* element had been excluded from the offense under Section 3(4) of TADA. The Indian Supreme Court referred to its earlier decisions in *State of Maharashtra V. Mayer Hans George*\(^{257}\) and *Nathulal V. State of M.P.*\(^{258}\) and observed that there was a plethora of decisions by Indian courts which had settled the legal proposition that unless the statute clearly excludes *mens rea* in the commission of an offense, the same must be treated as an essential ingredient of the act. Taking this reasoning a step further, the Indian Supreme Court held that an accused corporation could not possess

\(^{255}\) (1992) Cr. LJ 1448  
\(^{256}\) (1997) 8 SCC 732  
\(^{257}\) 1965 (1) Cr LJ 641  
\(^{258}\) AIR 1966 SC 43
the requisite *mens rea*, even if any terrorist had been allowed to occupy the rooms in its hotel.

In *Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd.*\(^{259}\), the complaint alleged that Zee had telecasted a program based on falsehood and thereby defamed Sahara India. The court held that *mens rea* was one of the essential elements of the offense of criminal defamation and that a company could not have the requisite *mens rea*. Similarly, in *Motorola Inc. v. UOI*\(^{260}\), the Bombay High Court quashed a proceeding against a corporation for alleged cheating, as it came to the conclusion that it was impossible for a corporation to form the requisite *mens rea*, which was the essential ingredient of the offense.

In *Velliappa Textiles*\(^{261}\), a private company was prosecuted for violation of certain sections under the Income Tax Act ("ITA"). Sections 276-C and 277 of the ITA provided for a sentence of imprisonment and a fine in the event of a violation. The Indian Supreme Court held that the respondent company could not be prosecuted for offenses under certain sections of the ITA because each of these sections required the imposition of a *mandatory* term of imprisonment coupled with a fine. The court was unable to impose a fine alone. Indulging in a strict and literal analysis, the Court held that a corporation did not have a physical body to imprison and therefore could not be sentenced to imprisonment.

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\(^{259}\) (2001) 1 CALLT 262 HC
\(^{260}\) 2004 Cr. LJ 1576
\(^{261}\) Appeal (Crl.) 142 of 1994, DOJ 16/09/2003 (SC)
5.1.2 Post Standard Chartered Bank (Standard Chartered Bank and Ors v. Directorate of Enforcement) case approach:

In *Standard Chartered Bank and Ors v. Directorate of Enforcement*\(^{262}\), Standard Chartered Bank was being prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act of 1973 ("FERA"). Indian Supreme Court held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment of imprisonment required under the respective statute. The Court also referred to the recommendations made by the Law Commission\(^ {263}\).

Standard Chartered Bank argued that the Indian Parliament enacted laws knowing fully well that a corporation cannot be subjected to custodial sentence, and, therefore, the legislative intention was *not* to prosecute the companies or corporate bodies. Thrust of the argument was on the futility of engaging in a prosecution which cannot be taken to its logical end by actually punishing the entity itself i.e. accused. However, the argument on the face of it was devoid of any merit in as much as a legal person is a person within the meaning of a penal statute i.e. as per Indian laws. If the legislative intent had been to leave out entities or groups/associations of persons, legislature would have specified that person means a natural person, as has been done in the Rome Statute.

\(^{262}\) (2005) 4 SCC 530

\(^{263}\) The Law Commission recommended the following provision to be inserted in the Penal Code:

(1) In every case in which the offense 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 offense 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.
The Supreme Court in *Standard Chartered Bank* highlighted the divergent views of various high courts in regard to entity liability. For example, in *State of Maharashtra v. Syndicate Transport*[^264^], the Bombay High Court had held that the company could not be prosecuted for offenses which necessarily entailed corporal punishment or imprisonment. However, in *Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh*[^265^], the appellant-company had sought to quash a criminal complaint, arguing that the company could not be prosecuted for the particular criminal offense in question, as the sentence of imprisonment provided under that section was mandatory. The Full Bench of the Allahabad High Court had disagreed[^266^].

Supreme Court also referred to an old decision of the United States Supreme Court in *United States v. Union Supply*[^267^]. In that case, a corporation was indicted for willfully violating a statute that required the wholesale dealers in *oleomargarine* to keep certain books and make certain returns. Any person who willfully violated this provision was liable to be punished with a fine of not less than fifty dollars and not exceeding five hundred dollars and imprisonment for not less than 30 days and not more than six months. It is interesting to note that for the offense under Section 5 of the statute at issue, the Court had discretionary power to punish by either fine or imprisonment, whereas under Section 6 of the statute (the section that was actually violated

[^264^]: (1963) Bom. LR 197
[^265^]: 1992 (75) CC 770
[^266^]: A company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. . . . If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly, then, though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it. . . . A sentence which is in excess of the sentence prescribed is always illegal; but a sentence which is less than the sentence prescribed may not in all cases be illegal.
[^267^]: 215 US 50 (1909)
in *Union Supply*), both types of punishment were to be imposed in all cases. The corporation moved to quash the indictment, and the District Court quashed it on the grounds that Section 6 was not applicable to the corporations. The United States Supreme Court reversed the District Court's judgment²⁶⁸.

It is obvious that the legislative intent to prosecute corporations for the offenses committed by them was clear and explicit. To follow the decision rendered in *Velliappa Textiles* would be to presume that the legislature intended to punish the corporate bodies for minor offenses while giving immunity from prosecution for major crimes. As an illustration, the court pointed out that in the case of cheating and dishonestly inducing delivery of property covered under Section 420 of the IPC, the punishment prescribed is imprisonment, which may extend to seven years and fine. However, for the offense under Section 417, that is, simple cheating, the punishment prescribed is imprisonment for a term which may extend to one year, a fine, or both. If Standard Chartered Bank's argument were accepted, it would mean that for the offense under Section 417 of the IPC, which is a minor offense, a company could be prosecuted and punished with a fine, whereas for the offense under Section 420, which is an aggravated form of cheating, the company could not be prosecuted as there is a mandatory sentence of imprisonment. The Supreme Court also pointed out that, as to criminal liability, the FERA statute does

²⁶⁸ Justice Holmes held:
It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare Section 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the Judge; yet, there, corporations are mentioned in terms. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape.
not make any distinction between a natural person and corporations. Further, the Indian Criminal Procedure Code, dealing with trial of offenses, contains no provision for the exemption of corporations from prosecution when it is difficult to sentence them according to a statute. The Standard Chartered Bank decision overruled prior decisions to the contrary and holds that corporations are liable for criminal offenses and can be prosecuted and punished, at least with fines.

The principle of corporate culpability was taken to higher level as a result of the recent decision of the Supreme Court of India delivered in Anita Hada vs. M/s Godfather Travels Pvt. Ltd.\textsuperscript{269}. The legal issue involved was the liability of a Director to face criminal prosecution when the offence in question is alleged to have been committed by a ‘Company’. In this case, it is the Directors who were being prosecuted instead of the ‘Company’ itself even though the allegation was against the ‘Company’. The Court quashed the prosecution holding that where the offence is allegedly committed by a ‘Company’, it is the ‘Company’ which has to be first made an accused and only after that can the Directors be arrayed as accused and prosecuted along with the Company. In the absence of the main accused which is the ‘Company’, the liability of Directors would not arise. The significance of this decision lies in the recognition by Indian courts that not only is a company capable of committing a crime but is also the principal accused when the allegation is specifically against it for an offence. In other words, the natural persons i.e. directors, officers and employees of the accused ‘company’ derive their culpable behaviour from the

\textsuperscript{269} Criminal appeal no. 838 of 2008 decided on 27 April 2012 (SC)
‘company’ instead of the other way round. This decision has in a way taken the alter ego theory of Lord Denning to a different level.

The shifting approach of Indian courts is an indication that strict liability principal is being invoked against corporate culpability. Once the law recognises a legal person as capable of committing a crime, no obstacle should come in the way of its prosecution. Of course, the general defences which are available to a natural person will be available to the legal person also but lack of mens rea and impossibility of imprisonment are no longer good enough grounds to stall the prosecution. Mens rea can be gathered from the intent of decision makers as well as executors of decision within the corporate hierarchy. In so far as imprisonment is concerned, there are viable alternatives to physical imprisonment of a juristic person/accused which will bring about the same desired effect which a jail term brings about in the case of a natural person.

5.2 CORPORATE CRIMINAL LIABILITY IN USA:

US legal system has been the pioneer in attaching criminal liability to ‘Legal Persons’. Attaching criminal liability refers to making the juristic person or the corporate body liable for the acts of its officers – whether Directors or any officer vested with handling the affairs of the Corporation or even an employee who may not high up in the decision making hierarchy. In the United States, corporations—as entities—can be criminally tried and convicted for crimes committed by individual directors, managers, and even low-level employees. US approach of dealing with Corporate misbehaviour is a result of their historic philosophy of protecting the freedom of market economy, which is
reflected in practically all laws dealing with corporate malfeasance. Until the eighteenth century, the concept of convicting a corporation of a crime had generally been rejected out of hand. In the United States, those attitudes began to soften during the course of the nineteenth century when corporations in American society first began to blossom and their potential to do harm first became significant. By the turn of the twentieth century, as the Industrial Revolution fundamentally altered the role of large corporations in American life, the need for some mechanism of regulating and punishing corporate malfeasance became all the more clear. Most histories of American corporate criminal liability start there—the Industrial Revolution, the rise of the regulatory state, and the Supreme Court’s landmark 1909 decision in *New York Central & Hudson River Railroad v. United States*\(^{270}\). In *New York Central*, the Court upheld the constitutionality of the Elkins Act, a federal statute regulating railway rates that imposed criminal liability on corporations that violated the statute’s mandates. By confirming that a corporation could constitutionally be prosecuted for a crime under a theory of *respondeat superior*\(^{271}\), the Court validated a practice\(^{272}\) that had been pursued with increasing frequency by prosecutors for more than fifty years. Recognizing that

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\(^{270}\) The Court rejected the corporation’s contention that, as an entity, it could not commit a crime, finding Congress had expansive power to regulate interstate commerce that included the authority to impose criminal sanctions. The Court was untroubled by the legal fiction that an entity could neither take criminal action nor possess criminal intent. Instead, the Court adopted the civil law doctrine of *respondeat superior*, holding that a corporation could constitutionally be convicted of a crime when one of its agents had committed a criminal act (1) *within the scope of his or her employment*, and (2) *for the benefit of the corporation*. That standard remains good law to this day.

\(^{271}\) Corporations are equally liable regardless of whether the “agent” in question is a top-level manager or a low-level secretary. *Riss & Co. V. United States*, 262 F.2d 245, 250 (8th Cir. 1958)

\(^{272}\) refer to fn no. 205
all federal criminal laws apply to “any person” who violates them and that Congress had defined the term “person” to include “corporations” for purposes of the U.S. Code\(^2^7^3\) more generally, federal prosecutors began applying the criminal code to corporate conduct. In the years immediately following *New York Central*\(^2^7^4\), federal prosecutors charged corporations with individual crimes such as knowingly mailing obscene materials, conspiring to transport liquor onto Indian territory, violating the Espionage Act, and manslaughter. In addition, as has been discussed in preceding chapters, the common law\(^2^7^5\)

\(^{273}\) *See* 1 U.S.C. § 1 (2000) (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

\(^{274}\) Acknowledging the law’s historical aversion to corporate criminal liability, the Court argued that rejecting such practice was now permissible because the law “cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through [corporate] bodies, and particularly that interstate commerce is almost entirely in their hands.” *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481, 495 (1909).

\(^{275}\) It must be understood that it was easier for corporate criminal liability to develop in a common law country rather than a civil law country. In a Common law system, the extension of application of a recognised legal principle is easier since the same is based on equity and logic. As opposed to this, in a civil law country, the statute must mandate the application of a legal principle which basically means that if in an act, certain categories are exempted, the law needs to be amended before a legal principle can be extended. This of course is time consuming as compared to the common law system where it is the argumentative genius and innovativeness/ingenuity of a lawyer is enough to extend the applicability of a legal principle to areas which are yet untouched.

Indeed, as early as the 1850s, prosecutors in states like New Jersey and Pennsylvania aggressively pursued criminal charges against corporations by applying common law criminal doctrines—most commonly, the crime of nuisance—to corporations as entities, despite the facts that the common law did not recognize the concept of entity liability and state laws made no explicit mention of entity liability. Corporations often challenged these prosecutions with little success on the very grounds that, as entities, they could not be charged with or convicted of crimes. For the most part, state supreme courts affirmed the validity of such convictions, finding, for example, that a criminal “indictment and an information are the only remedies to which the public can resort for a redress of their grievances.” As courts repeatedly upheld such convictions, prosecutors became emboldened, indicting corporations not just for common law crimes but also for statutory offenses, even when the statute made no specific mention of entity liability. Prosecutors in Alaska, for example, indicted a corporation whose employees
system of US played a significant role in recognition of the principle of corporate culpability in which the lawyers as well as the judges played an equal role in expanding the scope of offences. The significance of specific study of US criminal law in regard to corporate culpability lies in the way prosecution (not courts) deals with the accused ‘corporation’ or ‘company’. The risk of indictment alone is overwhelming: a criminal indictment promises a swift market response, the ouster of leadership, millions of dollars in legal fees, and, of course, the possibility of conviction. Such a conviction would lead not only to any criminal penalties imposed, but also to what others have termed “collateral consequences” — financial and reputational repercussions that can, and do, force companies out of business. In addition to criminal laws, the United States also regulate corporate behaviour largely through administrative. What makes American laws so unique is that it imposes significant criminal liability in addition to those administrative and civil regulations. The pre-emptive approach adopted by the US government by ensuring that corporate governance plays an important part in preventing corporate crimes is also worth highlighting. Above mentioned both facets of the approach US law i.e. Deferred Prosecution Agreements, and The Sarbanes–Oxley Act of 2002 are being discussed hereinafter.

5.2.1 Deferred Prosecution Agreements (DPA)

DPA’s are a unique American legal response to corporate criminality. Deferred Prosecution Agreements are also known as “non-prosecution” agreement or “pre-trial diversion. Pre-trial diversion or deferred

had violated a statute prohibiting salmon fishing, concluding that for purposes of the statute, the employees’ conduct and mental state could be imputed to the corporation.
prosecution began in the early 1900’s as a way to handle juveniles without stigmatizing them for life as criminals. It was mostly associated with individuals and not applied to companies until the early 1990’s. However, before trying to understand how the DPA system works, it is important to understand why in the US, the DPA’s are a significant tool for the prosecutors in forcing the corporations to plead guilty and cooperate with criminal investigation?

In the United States, criminal defendants enjoy significant procedural protections. The US Constitution affords all criminal defendants a pack of protective rights that make it more difficult for prosecutors to interrogate a defendant or uncover evidence. In the context of white-collar crime in particular, the protection of greatest significance is the corporate attorney-client privilege, a privilege that has been read expansively by American courts to shield virtually any conversation between in-house counsel and employees related to their work. Moreover, American defendants are guaranteed the assistance of a defense counsel, who in turn is given significant tools to slow an investigation, block the admissibility of evidence, and combat a conviction at every stage of the proceeding. These difficulties, are only exacerbated in the context of white-collar criminal proceedings, in which the underlying facts are likely to be particularly complex. But, in return, the American system gives prosecutors significant powers: American prosecutors have the power to determine whether to bring charges, and if so, what charges to bring. Moreover, those prosecutors can negotiate plea bargains and demand that defendants cooperate with an investigation in return. It is by exercising those powers that corporate criminal liability comes into play in the

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276 In India charges are framed by the Courts, the prosecutor and defence counsel having an equal right to advance arguments for and against a particular charge proposed by the prosecution or revealed by the investigation.
American system: by threatening corporations with the prospect of criminal prosecution, prosecutors force them to plead guilty and then to cooperate in attempts to prosecute and convict individual corporate directors and employees. Under the guise of “cooperation,” federal prosecutors have compelled corporations to waive the attorney-client privilege, to complete thorough internal investigations and turn over any results to prosecutors, and perhaps most controversially, to cut off the advancement of attorneys’ fees to individual employees under investigation.

A corporate deferred prosecution agreement is basically a way of imposing a term of probation before a conviction. The government files charges but then agrees to hold them in abeyance pending the company’s successful completion of certain terms in the agreement for a period of time. If the conditions set forth in the agreement are met to the government’s satisfaction—and to its satisfaction alone because there is no judicial supervision—the charges get dismissed.

Advantages - Prosecutors get a choice for disposing of a corporate case other than declining or indicting. They can still make sure wayward companies will be fined, chastised, restructured, and reformed. From the company side, deferred prosecution helps it avoid the distraction, risk, and often devastating consequences of indictment, trial, and conviction. The board of directors cleans the house (i.e. removing all the tainted aspects of corporate governance which either facilitated the wrongdoing/crime or were a result of the crime), pays money (as a fine), and the company stays in business. In other words, DPA recognises the overriding factor of human control in case of entity liability and keeping in mind this factor, gives the organisation or entity a chance to redeem itself by removing all tainted officers from its governance, hand over all information which will
enable the prosecutor to deal with de facto wrongdoers i.e. natural persons – directors, officers and employees, and give consent for future supervised conduct i.e. as per the terms set by the Government or the Prosecutor. A DPA requires a defendant to meet certain conditions in return for a prosecutor’s promise to defer any prosecution—and ultimately to drop charges—provided the conditions are met. Because the authority to bring charges or to offer a deal rests exclusively with the prosecutor, he has virtually complete control over negotiating the terms of a DPA. And in the context of DPAs offered to corporations, the terms imposed by prosecutors are very telling: to “cooperate,” corporations are generally required to take a series of steps aimed primarily at facilitating the investigation of those individual employees accused of misconduct.

There are no set standards regarding the terms which can be imposed upon the Company e.g. a hospital was asked to give to the public millions of dollars of free health care; a company was asked to endow a chair in business ethics at a US University; a Company was required to create 1,600 new jobs in the state over 10 years. It really is in the discretion of the Prosecutor who has vast powers under US law to deal with criminals, whether natural or juristic. However, certain terms have become almost a standard feature e.g. a heavy fine usually running into millions of dollars as in the case of KPMG; cooperation with the government’s ongoing investigation (which often obligates the company to make its employees available and includes privilege

277 The accounting firm KPMG when informed that it was under investigation for tax fraud, took significant steps in an effort to obtain a deferred prosecution agreement. KPMG thus agreed to waive the corporate privilege, to turn over the contents of its own internal investigation, and most controversially, to cut off the advancement of attorneys’ fees to the individual partners under investigation. As a result, KPMG was given a DPA and, to date, has never been charged with a crime.
waivers—even *Lawyer–client* privilege\(^{278}\)); the adoption of compliance programs and other reform measures such as changes in corporate governance. Under US laws, a company/corporation has to indemnify its employees by agreeing to pay his lawyer fee in case of any prosecution. But in the case of DPA’s, in exchange for immunity from prosecution, the corporation has to waive even this contractual privilege for its employees. This factor leaves the employees extremely vulnerable as it is almost impossible for an ordinary employee to hire a good lawyer to defend him i.e. in the absence of financial support from the corporation. This makes the delinquent officers and employees of the corporations’ easy pickings for the prosecution which then charges them with various offences and sends them up for trial. In the face of company indemnification, the prosecutors would find it very difficult to prosecute even the de facto wrongdoers i.e. officers and employees. In a market driven economy and globalised commerce, it is not safe to prosecute corporations for every offense. Although it is not morally correct to let off the corporations with strict fines and

\(^{278}\) The corporate attorney-client privilege was first recognized by the Supreme Court in *United States V. Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915). A judicially developed doctrine, the corporate attorney-client privilege covers virtually anything discussed between in-house corporate counsel and any company employee, provided that the communication pertains to the employee’s official responsibilities and can be characterized as related to the attorney’s representation of the company. The corporate privilege, thus, can shield as protected anything from legal advice given to senior management to general statements of legal advice or policy distributed widely throughout the corporation. The corporate attorney-client privilege also protects attorney work product—including any internal investigations or inquiries into the underlying conduct made by corporate counsel. The privilege is held by the company, not any individual employee, which means that the corporation has the authority to invoke it or to waive it. Once invoked, it can and does block American prosecutors from obtaining all sorts of internal company records and correspondence. The in-house lawyer is also said to *represent* all such employees. Thus, when a corporation comes under investigation, it can and will claim that all of its employees are represented by counsel, thereby making it impossible for law enforcement officers or prosecutors to contact any individual employees without first going through the corporation’s counsel. As a result, cultivating sources within a company and finding whistleblowers becomes much more difficult.
supervised restructuring but it is logical. By resorting to large scale corporate prosecutions, market vitality will be shattered leading to loss of confidence and interest in security markets of the investor whose primary goal is to find a safe return on its investment. The importance of DPA is to be viewed in this background. Nevertheless, DPA has been roundly criticised as providing an escape route to erring corporations even where the allegations are grave e.g. violations of human rights, international money laundering associated with terrorist financing.

Criticism—DPA’s are often characterised as ‘all of the punishment, none of the guilt’. In other words, even without their guilt being proved, the accused corporations have to submit to the punishment which is in the discretion of the prosecutor, not the Courts. Some commentators criticize the practice precisely because it allows “corporate criminals” to opt out of the criminal justice system and avoid conviction. Even after the DPA is offered and accepted, Prosecutors retain the sole discretion to determine whether a company has materially breached an agreement. Courts have no role to play at all. Companies have to admit their guilt and undertake not to make any contradictory statement - this has the effect of affecting their basic right of fair trial. Given the sensitivity of market dynamics, DPA is more in the nature of an arm twisting tool. Infact, DPA’s are being offered irrespective of the gravity of the offence which the corporation is charged with. The reality is that DPA has become an easy handle for the US prosecutors (department of Justice) to bring the corporation to its feet in minutes and dictate its terms without having to actually go through the tough process of a full scale trial and indictment. DPA is as much an escape route for the prosecutor as it is for the accused corporation. In case of

279 In case of breach of the terms of a DPA, the Prosecutor retains the right to again press for criminal charges against the corporation.
criminal charges against the corporation, it is very difficult to prove *mens rea* which can be done only when the entire gamut of corporate documents are made available to the prosecution. US discovery procedures are complex and defence lawyers can stall discovery procedures citing technical objections. However, the very threat of criminal trial is enough for the corporations to go into submission since initiation of a criminal trial inevitably leads to crashing of share prices at the stock market. So the prosecutor's use DPA as a carrot for the corporation to clean up its governance, hand over all the documentary evidence and waive all employee privileges so that the natural persons i.e. actual delinquents can be charged with specific offences (instead of the corporation). This mutually beneficial process enables the corporation to legitimately continue with its business and at the same time remain under the supervision of the government for a specified period as per the DPA terms. Thus technically, the accused corporation is proceeded against under criminal law but in reality it does not have to face the consequences of a criminal trial. In addition, the huge fines that the corporations are asked to pay as penalty adds to the government revenues. DPA cannot be a panacea for all corporate wrongdoings. Just as death sentence is recognised as a necessity in many criminal law systems of the world, in much the same manner, keeping in mind the gravity and short/long term effects of the alleged crime, the corporations, might have to be either wound up or broken up into smaller entities or compulsorily nationalised irrespective of the outcome of such a penalty on securities market and commerce in general. However, the DPA's have a significant positive role to play when the accused is a corporation having the potential of affecting market economy in case of severe criminal indictment. It does seek to strike a balance between the need to protect a juristic person, take corrective and preventive measures and the need to
punish those who actually commit the crime by hiding behind the corporate veil. As a brief reference, 2 Deferred Prosecution Agreements are being discussed below.

**Biomet to pay $17.28 million criminal penalty** - Biomet Inc. entered into a deferred prosecution agreement with the Department of Justice to resolve improper payments by the company and its subsidiaries in violation of the Foreign Corrupt Practices Act (FCPA). The matter is part of an investigation into bribery by medical device companies of health care providers and administrators employed by government institutions. According to the criminal information filed in U.S. District Court in the District of Columbia in connection with the agreement, Biomet, its subsidiaries, employees and agents made various improper payments from approximately 2000 to 2008 to publicly-employed health care providers in Argentina, Brazil and China to secure lucrative business with hospitals. During this time, more than $1.5 million in direct and indirect corrupt payments were made. In addition, at the end of each fiscal year, Biomet, its executives, employees and agents falsely recorded the payments on its books and records as "commissions," "royalties," "consulting fees" and "scientific incentives" to conceal the true nature of the payments. As part of the agreement, Biomet will pay a $17.28 million criminal penalty and is required to implement rigorous internal controls, cooperate fully with the department and retain a compliance monitor for 18 months. In addition, Biomet received a reduction in its penalty as a result of its cooperation in the ongoing investigation of other companies and individuals.

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281  Previously, Johnson & Johnson and Smith & Nephew Inc. have agreed to pay criminal penalties and entered into deferred prosecution agreements related to the ongoing investigation.
*Royal Bank of Scotland Group PLC* - RBS settled in May 2010 with the Justice Department, agreeing to forfeit $500 million while admitting that *ABN Amro*, a Dutch bank it acquired in 2007, illegally helped clients from countries like Iran, Cuba, Libya and Sudan move hundreds of millions of dollars through the U.S. financial system. More than $3.2 billion involving shell companies and high-risk transactions with foreign financial institutions flowed through the bank’s New York branch, according to court documents filed at the time. In addition, the branch willfully didn’t implement an anti-money laundering compliance program from 1998 through 2005. Between 1995 and 2005, the bank stripped names and references from payment messages that would have automatically triggered a red flag on transactions with sanctioned countries, the court documents said. It entered into a one-year deferred-prosecution agreement as a part of the settlement, and the agreement was extended by a federal court to Dec. 31 to allow RBS more time to comply with the obligations.

Apart from Deferred Prosecution Agreement, which is a basically a facet of the punitive aspect of US law dealing with corporate wrongdoing, American legal system responded to the financial scandals that rocked the US economy starting from that of Enron by enacting *Sarbanes-Oxley Act 2002* (more popularly known as SOX 2002). Most of the financial scandals were a result of the greed of the directors who looted the corporate finances with impunity for personal gains which was eventually at the cost of the shareholder’s money. The importance of this Act lies in the value attached to corporate governance under the Act. Though the Act deals heavily with accounting procedures to ensure that there is no possibility of manipulating corporate balance sheets, in essence it underscores the significance of good corporate governance.
5.2.2 The Sarbanes–Oxley Act of 2002

The bill was enacted as a reaction to a number of major corporate and accounting scandals including those affecting Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom. These scandals, which cost investors billions of dollars when the share prices of affected companies collapsed, shook public confidence in the nation’s securities markets. On June 25, 2002, WorldCom revealed it had overstated its earnings by more than $3.8 billion during the past five quarters (15 months), primarily by improperly accounting for its operating costs. By the end of 2003, it was estimated that the company's total assets had been inflated by around $11 billion. Enron was "America’s Most Innovative Company" for six consecutive years. At the end of 2001, it was revealed that it’s reported financial condition was sustained substantially by institutionalized, systematic, and creatively planned accounting fraud. Enron has since become a popular symbol of willful corporate fraud and corruption. The scandal also brought into question the accounting practices and activities of many corporations throughout the United States and was a factor in the creation of the Sarbanes–Oxley Act of 2002. The scandal also affected the wider business world by causing the dissolution of the Arthur Andersen accounting firm. The Enron scandal and dissolution of Arthur Anderson (reported to be world’s largest accounting Firm) are the most widely known corporate financial scandals. In addition to appreciate the gravity of the situation in which the SOX Act was enacted, it will be worthwhile to have a brief look at the other financial scandals as well.

Tyco International has operations in over 100 countries and claims to be the world’s largest maker and servicer of electrical and electronic

components; the largest designer and maker of undersea telecommunications systems; the larger maker of fire protection systems and electronic security services; the largest maker of specialty valves; and a major player in the disposable medical products, plastics, and adhesives markets. Tyco’s former CEO Dennis Koslowski, former CFO Mark Swartz, and former General Counsel Mark Belnick were accused of giving themselves interest-free or very low interest loans (sometimes disguised as bonuses) that were never approved by the Tyco board or repaid. They were also accused of selling their company stock without telling investors, which is a requirement under SEC rules. Koslowski, Swartz, and Belnick stole $600 million dollars from Tyco International through their unapproved bonuses, loans, and extravagant "company" spending. As many as 40 Tyco executives took loans that were later "forgiven" as part of Tyco’s loan-forgiveness program, although it was said that many did not know they were doing anything wrong. Essentially, they concealed their illegal actions by keeping them out of the accounting books and away from the eyes of shareholders and board members. In 1999 the SEC began an investigation after an analyst reported questionable accounting practices. This investigation took place from 1999 to 2000 and centred on accounting practices for the company’s many acquisitions, including a practice known as "spring-loading." The investigation ended with the SEC deciding to take no action. In January 2002, the accuracy of Tyco’s bookkeeping and accounting again came under question after a tip drew attention to a $20 million payment made to Tyco director Frank Walsh, Jr. That payment was later explained as a finder’s fee for the Tyco acquisition of CIT. In June 2002, Kozlowski was being investigated for tax evasion because he

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283 In “spring-loading,” the pre-acquisition earnings of an acquired company are underreported, giving the merged company the appearance of an earnings boost afterwards.

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failed to pay sales tax on $13 million in artwork that he had purchased in New York with company funds. At the same time, Kozlowski resigned from Tyco "for personal reasons" and was replaced by John Fort. By September of 2002, all three (Kozlowski, Swartz, and Belnick[284]) were gone and charges were filed against them for failure to disclose information on their multimillion dollar loans to shareholders. The SEC asked Kozlowski, Swartz, and Belnick to restore the funds that they took from Tyco in the form of undisclosed loans and compensations.

Adelphia filed suit[285] seeking more than $1 billion against the entire Rigas family, including John's wife, Doris, and his daughter Ellen and son-in-law, Peter Venetis. The suit accuses the family of a violation of the Racketeer Influenced and Corrupt Organizations Act, breaching its fiduciary duties, wasting corporate assets, abusing control, breaching its contracts and other violations. The suit alleges that the Rigases "regularly conducted their business activities with the sole purpose of benefiting themselves at the expense of Adelphia" and borrowed company funds that "either directly or indirectly, unjustly enriched the Rigas family directors and other Rigas family members." The criminal complaint, filed in federal court in New York, offers the clearest view yet of one of the biggest cases of alleged insider dealing ever. The Rigases engaged in a mass cover up that included fictitious receipts, falsified financial reports and lavish personal spending at the expense of shareholders, according to the 68-page complaint that

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284 Kozlowski and Swartz were found guilty in 2005 of taking bonuses worth more than $120 million without the approval of Tyco's directors, abusing an employee loan program, and misrepresenting the company's financial condition to investors to boost the stock price, while selling $575 million in stock. Both are serving 8 1/3-to-25-year prison sentences. Belnick paid a $100,000 civil penalty for his role.

charges them with securities fraud, wire fraud and bank fraud. The Rigases borrowed billions of dollars for their closely held companies and used $252 million of company funds to meet margin calls on their private stock, the complaint alleged. After John J. Rigas racked up a personal debt of more than $66 million by early 2001, he was withdrawing so much money from the company for personal use that his son Timothy had to limit him to $1 million a month even as public filings listed his annual compensation at less than $1.9 million, the complaint said. The Rigases also spent $12.8 million of company funds to start construction of a golf course.

The scandal came to light in March, when the Rigases disclosed that Adelphia was responsible for more than $2 billion in loans to family-owned entities. As investors and ratings agencies demanded the company reduce its debt, the Rigases embarked on a series of escalating financial frauds to conceal the borrowings and inflate earnings - even as the family withdrew increasingly vast sums for personal use, according to the complaint. Between 1999 and the end of 2001, the amount of debt that was omitted from Adelphia’s public statements ballooned to $1.8 billion from $250 million, the complaint said. In 2001 and 2002, the Rigases told public shareholders they were buying company stock to help ease the debt pressures. What they didn’t disclose, the complaint said, was that the money-more than $400 million-was borrowed from Adelphia. To give the appearance that the family used private funds for the stock, Timothy Rigas and Mr. Mulcahey directed Adelphia employees to create false receipts showing payment by the family for the stock, according to the complaint.
Peregrine Systems, Inc., a publicly traded San Diego-based software inflated Peregrine's revenue and stock price\textsuperscript{286}. To achieve its unlawful purpose, Peregrine filed materially incorrect financial statements with the Commission for 11 consecutive quarters between April 1, 1999, and December 31, 2001. The fraud was uncovered in April 2002, and in February 2003, Peregrine restated its financial results for its fiscal years 2000 and 2001, and for the first three quarters of fiscal 2002. Peregrine reduced previously reported revenue of $1.34 billion by $509 million, of which at least $259 million was reversed because the underlying transactions lacked substance. Through the actions of certain of its officers and employees, Peregrine engaged in deceptive practices to artificially inflate its revenue. The heart of the fraud was the recording of hundreds of millions of dollars of revenue despite non-binding arrangements with customers, in violation of Generally Accepted Accounting Principles (GAAP). Peregrine then took fraudulent action to conceal the revenue fraud through the actions of certain of its officers and employees.

It is in this backdrop of a string of corporate financial scandals that The Sarbanes-Oxley Act was signed into law on July 30, 2002. Sarbanes-Oxley has been called by many the most far-reaching U.S. securities legislation in years\textsuperscript{287}. Now, all companies required to file periodic reports with the Securities and Exchange Commission (SEC) have new duties for reporting and corporate obligation. Non-compliance comes with significant penalties. The act covers following main areas:

\textsuperscript{286} http://www.sec.gov/litigation/complaints/comp18205.htm accessed on 16.8.2013
**Public Company Accounting Oversight Board (PCAOB):** This board sets standards and rules for audit reports. All accounting firms that audit public companies must register with the Oversight Board. It also inspects, investigates, and enforces compliance from these registered firms. This board as set up to provide independent oversight of public accounting firms providing audit services ("auditors")\textsuperscript{288}

**Corporate Responsibility** section mandates that senior executives take individual responsibility for the accuracy and completeness of corporate financial reports;

**Attorneys’ Responsibilities:** There are now minimum standards of professional conduct for attorneys representing public companies before the SEC. These include a rule requiring an attorney to report securities violations to the CEO.

**Corporate and Criminal Fraud Accountability:** Also referred to as the "Corporate and Criminal Fraud Accountability Act of 2002". It describes specific criminal penalties for manipulation, destruction or alteration of financial records. Altering, destroying, concealing or falsifying records or documents with the intent to influence a federal investigation or bankruptcy case is subject to fines and up to 20 years

\textsuperscript{288} Existence of such a supervisory Board is relevant in every country which has a free market economy. Indian experience by way of Satyam scandal, where PWC auditors, who were external auditors, were charged with conniving with Management in fudging financial records, has also shown the need to have a supervising authority over external auditors. In a free market economy, public money i.e. money invested by small investors is at a much greater risk than in a socialistic economy. Most of the businesses raise money either through public offerings or through banks and in both cases it is the small investor which is the major contributor. When the national economy encourages private enterprise, the threat of financial scandals is inherent. Thus the need to ensure that those corporations/companies who either borrow from public sector or raise money through public offerings must comply with strict accounts reporting standards to prevent cheating of the investors. This includes the need to ensure that the external auditors also don’t connive with the management.
imprisonment. New audit work-papers must be retained for five years. Any person who knowingly defrauds shareholders of publicly traded companies is subject to fines or imprisonment;

*White Collar Crime Penalty Enhancement:* Also called the "White Collar Crime Penalty Enhancement Act of 2002." This section increases the criminal penalties associated with white-collar crimes and conspiracies. It specifically adds failure to certify corporate financial reports as a criminal offense;

*Auditor Independence:* Auditors now have a list of non-audit services they can't perform during an audit. The Act also imposes a one-year waiting period for audit firm employees who leave an accounting firm to become an executive for a former client. In addition, the former firm must wait one year before performing any audit services for the new employer;

*Greater Financial Disclosures:* Transactions and relationships that are off-balance sheet but that may affect financial status now must be disclosed. Personal loans from a corporation to its executives are now largely prohibited. Annual reports must include a report stating the management is responsible for the internal control structure and procedures for financial reporting;

*Conflict of Interest Disclosures for Analysts:* Conflict of interest disclosures now need to be made by research analysts who make public appearances or offer research reports. These disclosures need to contain certain information about the company that is the subject of the appearance or report. The analyst has to report whether he or she holds any securities in the company or received corporate compensation. Brokers and dealers have to disclose if the public company is a client.
5.2.3 What Level Of Employee Conduct Can Trigger Corporate Culpability?

In addition to the above aspects of US law dealing with corporate wrongdoing, it will also be worthwhile to have a brief look at the principles applied by US courts to hold a corporation guilty for the conduct of its employees. Courts in US hold corporations guilty for the acts of its employees irrespective of whether the act in question was authorised by or had the approval of the management of the corporation or was a result of the corporate policies being followed. In other words, irrespective of the link between the wrongful act of the employee (done in the course of employment) and its connection with the corporate decision making, the corporation can nevertheless be held criminally liable. In *U.S. v. Ionia Management* 289 a federal court in New York held a company criminally liable for the acts of its employees for a conduct which was directly contrary to the company’s compliance policies. In *Ionia*, the crew of an oil tanker, managed by the defendant corporation, discharged oily waste water on the high seas via a "magic hose." The hose bypassed the ship's oil filtration equipment contrary to Ionia’s corporate compliance policies. The crew then falsified the ship's oil record book to hide the illicit discharges. When the U.S. Coast Guard later inspected the ship, the crew attempted to hide the falsified oil record book and the "magic hose." Subsequently, the government charged Ionia with criminal conspiracy, violations of the Act to Prevent Pollution on Ships (APPS), falsification of records in a federal investigation, and obstruction of justice.

The United States Court of Appeals for the Second Circuit's decision applied the theory that companies are vicariously responsible for their

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employees' actions even though the laws under which Ionia was charged were silent on such *respondeat superior* liability. The court also held that the existence of an effective corporate compliance program was not a basis for an additional element or affirmative defense to Ionia's charged crimes. The Second Circuit cited *U.S. V. George F. Fish, Inc.* and *U.S. V. Twentieth Century Fox* for the general proposition that corporations may be held liable for the actions of its employees in the scope of their employment. Therefore, Ionia was criminally liable for the crew's actions because they acted in the scope of their employment in dumping the waste water. As to the second question, the court acknowledged Ionia's compliance program, but decided that it only was relevant in determining whether or not the employees acted in the scope of their employment. Citing *Twentieth Century Fox*, the Court rejected the argument that Ionia should be able to use the program as an additional element or affirmative defense to the charges. This approach of the US courts has been criticised because it gives no incentive to the corporations to set up a compliance program so as to prevent commission of crimes or offences.

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290 It is a Latin term meaning 'let the master answer'. It's a common law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope of employment. This doctrine was established in 17th century England and adopted by the US. The legal relationship between an employer and an employee is called agency. The theory behind *respondeat superior* is that the principal controls the agent's behaviour and must then assume some responsibility for the agent's actions. An employee is not necessarily acting outside the scope of employment merely because he does something that he should not do. A forbidden act is also within the scope of employment for the purpose of vicariously charging the employer if the said act is necessary to accomplish an assigned task.

291 Inc., 154 F. 2d (2d Cir 1946)
292 71 USLW 4415
Martin Kwedar\textsuperscript{293} has criticised the decision in \textit{Ionia} by observing that the court misapplied the principle of the U.S. Supreme Court’s in \textit{New York Central \& Hudson River Railroad V. U.S.} In \textit{New York Central} case, the appellant railroad company was convicted of violating the \textit{Elkins Act}, a law which prohibits common carriers, via its agents or employees, from reducing shipping prices below the published rate. There was no factual dispute that the railroad company’s employees orchestrated a deal to give a customer a rebate of 5 cents for every 100 pounds of sugar shipped, resulting in a price below the published rate. Thus, the only question was whether the Elkins Act’s \textit{respondeat superior} provisions were constitutional.\textsuperscript{2} The Court held that the Act was constitutional because Congress “may” pass legislation providing for vicarious corporate criminal liability pursuant to its Commerce Clause powers.

\textit{Martin} opined that adopting an alternative approach will encourage corporate compliance. The current broad application of \textit{respondeat superior} in criminal law is punitive and archaic. Criminal law is designed to punish morally culpable behavior and deter crime. If an employee flouts his company’s rigorous compliance program and breaks the law, it is nonsensical to say the company is morally culpable. Such prosecutions merely punish innocent employees and shareholders with sometimes devastating results.

While criticising the \textit{Ionia} judgment, \textit{Martin} cited three civil harassment cases brought under Title VII of the Civil Rights Act of 1964\textsuperscript{294}, however, to provide guidance for an alternative approach. In

\begin{itemize}
\item \textsuperscript{293} Martin Kwedar, “Vicarious Corporate Liability: Courts Can Lend Reason To Archaic Criminal Law Principle”; Washington Legal Foundation January 15, 2010 (Vol. 25 No. 3) at www.wlf.org
\item \textsuperscript{294} Title VII of the Civil Rights Act 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, colour, national origin and religion. It generally applies to employers with 15 or more
\end{itemize}
the Title VII cases - *Faragher v. City of Boca Raton, Burlington Industries, Inc. v. Ellerth*, and *Kolstad v. Am. Dental Ass’n* - the Court restricted vicarious corporate criminal liability to the acts of supervisors, holding that broad *respondeat superior* rules do not serve the goals of punishment or deterrence. Furthermore, the Court decided that reasonable corporate compliance policies should be a defense to vicarious liability in quasi-criminal settings. *Martin* concluded that Courts can narrowly apply *respondeat superior* in criminal cases and allow the defense of using effective corporate compliance

5.3 CORPORATE CRIMINAL LIABILITY IN GERMANY

In Germany the principle of *societas delinquere non potest*—“a legal entity cannot be blameworthy”—long prevented imposition of entity criminal liability at all. Germany has held fast in refusing to punish criminally corporations for the acts of their individual directors or employees. Germany regulates corporate behavior largely through administrative and civil laws. In Germany, corporations face no prospect of criminal liability. But they also have no power to thwart the investigation and prosecution of individual employees. There is no corporate attorney-client privilege, for example, or any general practice of aiding individual employees under investigation through indemnification. Embracing the principle of *societas delinquere non potest*, the German system instead punishes individual corporate officers and punishes them harshly. This is not to say the Germans have turned a blind eye to the need to regulate corporate behaviour

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employees including federal, state and local governments. Title VII also applies to private and public colleges and universities, employment agencies and labour organizations

and punish corporate malfeasance. But it is to say that they have done so in a different manner: Germany extends its criminal law to individual corporate directors and agents and punishes them for many of the same crimes American directors could be accused of, including all forms of theft and fraud. Germany then relies on administrative and civil law remedies to regulate and punish the corporation itself.

German prosecutors lack the type of far-reaching and virtually unbridled authority that American prosecutors possess and have used to expand entity liability. Germany controls and punishes the corporation itself through a system of administrative regulations that come with the prospect of civil liability. The German administrative system is technically overseen by criminal courts, and the penalties imposed can seem quasi-criminal in nature. Fines are the standard punishment and can reach into the millions of Euros. The administrative fine called *Geldbussen*, are imposed by specialised administrative bodies which are part of the executive branch of the government. Corporations can also face asset forfeiture and forced repayment of illegally obtained gains. Despite the undeniably punitive aspect of those fines, however, corporations in the German system are never accused, let alone convicted, of “crimes.” Instead, they may commit “order violations.” And while the punishment imposed is arguably the same—the corporation pays a monetary fine—the broader “collateral consequences” that attach to a criminal conviction are not present. Indeed, many of the reputational costs associated with a corporate criminal conviction in the United States simply do not exist in Germany. Corporations that commit order violations face no further government sanction, and in a society in which civil fines are relatively common and accepted methods of social control, the market response is generally mild.
Germany, adhering to the aforementioned principle of *societas delinquere non potest*, simply does not think a corporation, as an entity, is capable of committing a crime. Germany, like virtually every country, is willing to adopt the fiction of a corporation as a separate “person” for purposes of corporate law, bankruptcy law, and even administrative law. In fact, in some respects, Germany carries the fiction further than American law. For example, Germans speak of corporations as having “privacy” rights\(^\text{296}\), which can prevent the type of civil discovery that is so prevalent in American litigation.

**5.4 CORPORATE LIABILITY IN FRANCE** \(^\text{297}\)

In 1579, in France, Ordonnance de Blois of 1579 enacted the criminal liability of corporation which laid down that the crime must have been committed as a result of collective decision. Then in 1670, French Grande Ordonnance Criminelle of 1670 established criminal liability of corporations on similar basis. However, the French Revolution confiscated all private property and consequently Corporations were eliminated. Accordingly, French Penal Code of 1810 stopped mentioning the criminal liability of corporations, not because the concept was incompatible but because corporations itself disappeared from the French system of law. Under the French Revolution ideals, majority of the continental Europe changed its view regarding corporate criminal liability. Malban and Savigny are the first authors sustaining the principle *societas delinquere non potest* in the 19th century. However, as number of corporations grew and heir misconduct became more pronounced, the Council of Europe

\(^{296}\) Germany, as a member of the European Union, is required to impose stringent “data protection laws” that prohibit corporations from revealing any private information collected from customers, employees, or other individuals with which it engages.

\(^{297}\) Clifford Chance, “Corporate Liability in Europe”; January 2012 at www.cliffordchance.com
recommended that those member states whose criminal law had yet not provided for corporate criminal liability to reconsider the matter. France responded by making several revisions of its penal code. The revision of 1992 officially recognised the corporate criminal liability. The process culminated with the Nouveau code penale in 1994²⁹⁸.

French law provides for the prosecution of companies as legal entities in a similar way as an individual offender. Under article 121-2 of the Penal Code, ‘legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives’. Companies may be held liable through imputation for acts caused by a natural person, so long as the natural person is acting as its organ or representative. A company may be prosecuted for most of the same offences as an individual offender.

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 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 a social or professional activity, closure of the establishment, disqualification from public tenders, prohibition from drawing checks, and posting public notice.

Along with the penal sanctions, administrative authorities, independent public authorities, or certain administrative agencies, can also impose administrative sanctions on companies. Such a dual burden (non bis in idem) on the company will be allowed if the

²⁹⁸ Anca Iulia Pop, Criminal Liability of Corporations – Comparative Jurisprudence; Submitted in partial fulfillment of the requirements of the King Scholar Program, Michigan State University College of Law 2006 accessed at www.law.msu.edu/king/.../2006-Pop.pdf
elements of the penal and administrative sanctions are of different nature.

The types of sanctions that can be imposed on a company for a felony or misdemeanor\(^{299}\) are outlined under article 131-37 and article 131-38 of the Penal Code. Both provisions provide that a fine may be imposed with the maximum amount applicable to legal persons being five times that which is applicable to natural persons by the law sanctioning the offence. In addition to this, where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000.

Article 131-39 of the Penal Code enumerates additional sanctions depending on the offence committed e.g. Dissolution applies where the legal person was created to commit a felony, or, where the felony or misdemeanor is one which carries a sentence of imprisonment of three years or more. Other sanctions include prohibition from exercising directly or indirectly one or more social or professional activity 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 or closure of one or more of the establishments of the enterprise that was used to commit the offences in question, disqualification from public tenders either permanently or for a maximum period of five years, prohibition, either permanently or for a maximum period of five years from making a public appeal for funds, confiscation of the thing which was used or intended for the commission of the offence or of the thing which is the product of it, and posting a public notice of the decision. Article 131-33 of the Penal Code allows for mandatory closure of an establishment and for

\(^{299}\) The sanctions that can be imposed on a company, as a legal person, for petty offences, are outlined under article 131-40 and 131-42 of the Penal Code.
prohibition from exercising on such premises the activity that occasioned the commission of the offence. Article 131-45 of the Penal Code orders the dissolution of a legal person. This entails a referral to the competent court for its liquidation.

Since the 1.1.2006, the criminal liability of legal entities has been largely extended and applies to all the offences outlined in the French Penal Code. Corporations can be liable for any crime, offence and infringement therein except for claims related to freedom of speech for the press and related audio-visual claims. Upper level managers have the legal capacity to represent their employer and thus invoke the company's penal responsibility. In contrast, lower level employees do not have the capacity to represent their employer and therefore cannot invoke its penal responsibility.300

Under French law, if the law simply states ‘acte’, it can imply either positive or negative acts (omissions). For example, involuntary manslaughter and involuntary injuries require positive act, while negligence does not necessarily require a positive act. Under article 121-3 of the Penal Code ‘there is no felony or misdemeanor in the absence of an intent to commit it’. The criminal liability of the legal entity is therefore imputed. With regard to establishing mens rea of the company, the offence in question has to be performed on the company’s behalf by an executive organ or a representative of the company. Natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen i.e. in cases of recklessness, negligence, or failure to observe an obligation of due

300 All employees (directors, managers and lower level employees) through their illegal acts can impute civil liability on themselves (under article 1382 of the Civil Code) and their employer, if they are acting in the scope of their employment under article 1384 of the Civil Code.
care or precaution imposed by any statute or regulation are criminally liable where it is shown that they have deliberately broken such a duty of care or precaution, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.

Articles 122-1 to 122-8 of the Penal Code outline the grounds for absence or attenuation of criminal liability. Possible defences include, duress, mistake of law, command of lawful authority, self defence, and incapacity. A company can also argue that an employee was not acting within the scope of his employment or that he was not a legal representative of the company. A company has a duty of care to respect statutes and regulations. It will be criminally liable for any breach thereof (under article 121-3 of the Penal Code). To avoid conviction, a company can base its defence as mentioned above. Article 121-2 of the Penal Code provides that the criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act which implies that both the individual offender and the company can be convicted for the same offence.

Subsidiaries and parent companies are autonomous legal entities. However, the principle of judicial autonomy will not apply if the parent company has interfered with the subsidiary’s own affairs. French law distinguishes between the ‘société mère’ (parent) and the «filiale» (subsidiary) while the group encompasses both the parent and the subsidiary. When an offence is committed within a subsidiary, the subsidiary is the natural perpetrator of the offence. The parent may be considered as the subsidiary’s accomplice and may be prosecuted as an ‘organ’ under article 121-2 of the Penal Code.
In the French procedural system, civil and criminal claims are pursued in the same trial. Therefore, a company can also face a civil damages claim from the victim of an illegal act at the same time it faces criminal penalties. In addition to the above, a company may face administrative sanctions from the applicable governmental bodies. The most common type of sanction for both civil and administrative proceedings is the imposition of fines. In order for civil damages to be imposed, a third party must claim that it is the victim of the company's illegal act. Administrative agencies have the power to impose sanctions on the companies relevant to the industries that they govern.

According to Articles 40 and 41 of the Penal Procedure Code, the prosecutor has the right to commence an investigation regarding a company without restriction. The prosecutor has the right to pursue investigations and criminal claims against a company on his own volition. There is no prerequisite complaint, judicial order, or police investigation necessary. Further, this discretionary right may not be questioned by either the parties involved in the investigation or by the jurisdictional court. However, there may be certain cases in which prosecution is required by law. Under French law, investigations can take three different forms. The first is a simple inquiry. During this preliminary investigation, one must have assent of the party under investigation in order to require production of documents, access to a company site, testimony, etc. There is a second form of investigation, called the ‘ enquête de flagrance’ used in circumstances in which notification of investigation would impede the discovery of important evidence. During this type of investigation, a company does not have the right to refuse to produce such evidence. In a judicial investigation (information judiciaire), the investigating judge has specific powers which are broader than those in the preliminary investigation and
during the ‘enquête de flagrance’. As a fundamental principle, every investigated party has the right to avoid self-incrimination. In respect of this principle, the Law of June 15, 2000 creates the right to remain silent and requires that a warning be given to questioned parties that have such a right.

The criminal liability of legal entities does not exclude individuals acting on behalf of the company from being prosecuted as perpetrators or accomplices. Thus, the criminal liability of legal entities may be combined with the personal criminal liability of individuals (article 121-3). Under article 121-1 of the Penal Code, one can be responsible for only his own acts. However, it is possible to hold a director or manager criminally liable as an accomplice or co-actor to offences committed by other individual directors, managers or employees. In order for liability to be imputed from one employee to another, it must qualify as an accomplice or co-conspirator. A representative who has not personally participated in the commission of the offence can be exonerated from criminal liability if he can provide evidence that he had delegated his powers to a person who had the competence, authority, and the necessary means to accomplish the task.

5.5 CORPORATE LIABILITY IN ITALY

In Italy the criminal liability of companies is regulated by Legislative Decree No. 231 of June 8th, 2001 (the “Decree”), which introduced in the Italian legal system the concept of administrative liability of corporations for crimes committed by their management and/or representatives, on the assumption that the relevant criminal conducts are committed in the company’s interest. No, no other type

301 Supra Note 297
of sanction can be imposed on companies under criminal law. However, there are other kinds of sanctions (of administrative nature) that can be imposed directly on companies\textsuperscript{302}. The following list gives a number of examples:

(i) Articles 15 and 19 of Law 287/1990 imposes fines in case of infringement of the rules on competition provided by the mentioned Law No. 287\textsuperscript{303}; (ii) Article 2 paragraph 20 of Law No. 481/1995\textsuperscript{304} imposes fines on the companies and -in case of reiteration of the violations- also the suspension of the activity and the suspension or loss of the authorization; (iii) with respect to management companies in the financial sector, Article 75 of Legislative Decree No. 58/1998\textsuperscript{305} provides for the revocation of the market’s authorization if the irregularities are exceptionally serious; (iv) with respect to auditing companies, Article 163 of the Decree No. 58 provides for several sanctions to be imposed directly on the entity: pecuniary administrative sanctions between ten thousand and five hundred thousand Euros; prohibition to employ, for a period of not more than five years, the person responsible for the audit who committed the irregularities; revocation of the audit engagements; prohibition to accept new auditing engagements for a period not longer than three years; deletion of the company from the register; (v) Article 6 paragraph 5 of Legislative Decree No. 374/1999\textsuperscript{306} imposes pecuniary sanctions in case of infringement of its provisions; Article 33

\begin{itemize}
\item \textsuperscript{302} The general rule with respect to administrative sanctions consists in the joint liability of the Company and the actual author of the offence which states that companies and entities are jointly and severally liable with the offenders for the payment of the sanction and can exercise the right of recourse against those responsible for the offences.
\item \textsuperscript{303} concerning agreements and concerted practices between undertakings, abuse of a dominant position, concentrations between undertakings
\item \textsuperscript{304} concerning regulations for the public utilities sector
\item \textsuperscript{305} consolidated Law on Financial Intermediation, the “Decree No. 58”
\item \textsuperscript{306} concerning money laundering and financial activities especially liable to be used at money laundering purposes
\end{itemize}
paragraph 4 of Law No. 223/1990 provides that, as a consequence of the infringement of the rules provided by Article 15 and concerning the abuse of dominant position, the company may incur the following sanctions: disconnection of the plants; forced divestment of the company or capital shares, unbundling or forced sale of activities.

Regarding sanctions under criminal liability of companies, the following sanctions may be imposed on the company, in case of violations of its provisions:

- a pecuniary fine, the measure of which is established by the judge, on the basis of the relevance of the violation, the level of responsibility of the company, and the activities carried out in order to avoid the violation;

- the mandatory seizure (“confisca”) of the price or profit deriving from the violation;

- the interdiction of the company’s activities (for a period ranging from three months to two years or permanently in case of significant and repetitive violation);

- the suspension or revocation of the administrative authorisations or licenses, functionally linked to the violation;

- the prohibition to enter into agreement with the public administration (with the exception of public services);

- the exclusions from public contributions or financial aid, and possible revocation of such contributions and aids;

- the prohibition to advertise goods or services;

The criminal conducts falling within the scope of application of the Decree include: fraud against the State or other public entities aimed at receiving public contributions; unlawful perception of 307 concerning regulations for the radio and television system
contributions; extortion and corruption; corporate crimes; counterfeiting of money, credit cards or stamps; crimes of terrorism or crimes directed towards the subversion of the democratic system; market manipulation; money laundering; crimes against the person (including pornography); computer fraud; crimes committed in different countries (cross-borders crimes). Article 5 of the Decree contains a list of the persons whose conducts trigger the application of the Decree, namely managers, directors, directors of units provided with financial and functional independence, persons carrying out de facto management or control activities; persons acting under the supervision or direction of the above top officers and managers. Acts or omissions of individuals are attributed to the company if executed in the company’s interest. The company is not considered responsible if the author of the offence has operated exclusively in his own interests or in the interests of a third party.

Mens rea of the company is established on the basis of the mens rea of the top officer and managers committing the relevant crimes which will be attributed to the company. It is not necessary to convict the individual offender in order to prosecute the company. Pursuant to the Decree the company can be prosecuted even in the event of non-identification/conviction of the individual offender. Pursuant to Article 6 of the Decree, the company’s liability can be excluded in the event the relevant company proves that:

(i) before the relevant violations were committed, organisational and management models aimed at preventing such violations (the “compliance programs”) were adopted;

(ii) together with the above measure, a specific supervisory body – provided with independent powers of “initiative and control” – was appointed for the purpose of verifying the effective functioning of the compliance programs;
(iii) the violations were committed by the relevant persons with the fraudulent intention to elude and avoid the compliance programs;

(iv) the supervisory body did not omit to exercise a “sufficient” level of control.

The management body entrusted with the implementation of the organisation aimed at preventing violations is deemed to be the board of directors. Thus, the board of directors is, first of all, in charge of the appointment of the supervisory body and approval of the compliance programs. The supervisory body as per point (ii) above should be composed of third independent parties with wide power of inspection and access to information (also vis-à-vis directors). According to Article 6 of the Decree, the relevant entrepreneurs’ associations (“associazioni di categoria”) are given the power to prepare and approve - with the supervision of the Ministry of Justice and other competent ministries – models and guidelines on the basis of which companies may adopt their compliance programs. Pursuant to article 7 of the Decree, in the event of a violation committed by persons acting under the supervision or direction of the top officers and managers, the company is responsible if the violation took place as a consequence of the lack of direction or supervision. In any event, such lack of supervision is excluded if, prior to the commission of the crime, the company adopted and effectively implemented its compliance programs. Both the individual offender and the company can be convicted for the same offence. In addition, a parent/group

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308 “effective implementation”, meaning:
(a) the carrying out of periodical revisions of the compliance programs and the introduction of amendments to the same in the event significant violations to such programs are found or changes in the organisation or business of the company have occurred;
(b) the introduction of a system of sanctions applicable in case of violation of the compliance programs.
company can be prosecuted for offences being committed within a subsidiary.

Under Italian criminal law, the principle of compulsory exercise of investigations by the public prosecutor upon notice of crime applies. However, the public prosecutor may weigh, under its own discretion, the persuasiveness and sufficiency of evidence before filing the criminal action against a corporation. A company will have the status of a suspect as soon as its name is introduced in the registry of persons under investigations. Specifically, the Italian Criminal Code states that: (i) the investigation is a phase of the criminal action preceding the trial, during which the public prosecutor is granted the time to carry out the investigation (ii) this phase is covered by public secret; (iii) the suspect has the right to be informed on the investigation and to entrust an attorney. The company has the rights to (i) remain silent and (ii) refuse to answers questions. However, the company does not have the rights to (iii) refuse production of documents, (iv) deny access to company site without search warrant, (v) refuse testimony. The person entitled to exert these rights is the legal representative of the company.

There will be a joint proceeding\textsuperscript{309} against the company and the individual offender. However, directors or managers cannot be criminally held liable for offences committed by other individual directors, managers or employees, by virtue of the principle that “the criminal liability is personal”. The only way to exclude or minimize criminal liability risks is the adoption of the compliance programs by the company.

\textsuperscript{309} Pursuant article 38 of the Decree the proceedings shall be brought jointly.
Summing up:
In the United States, corporations face the threat of criminal prosecution but rarely, if ever, do those corporations actually go to trial. Instead, in return for agreements to waive the privilege, to deny indemnification to employees, and to cease any support provided to those individuals under investigations, corporations are given deals—generally deferred prosecution agreements. American prosecutors and corporations thereby leverage their unique powers, bargaining for an outcome that looks remarkably similar to the German system: corporations forfeit any protections and avoid criminal liability, and individual wrongdoers are aggressively pursued and prosecuted. For the corporation to be convicted, the New York Central test still applies: prosecutors need only establish that a corporate agent committed an illegal act while acting within the scope of his employment and intending to benefit the corporation. Moreover, the term “agent” and the “intent to benefit” test have been read quite expansively by lower courts. Courts have routinely found that a low-level employee is acting “within the scope of his employment” with an “intent to benefit” the corporation when he is acting in a manner expressly forbidden by the company’s own internal policies. Corporations can be held criminally liable whether or not management was aware of the conduct in question, and they may receive no leniency for having a compliance or oversight system in place.

In England, courts imposed criminal liability in 1840’s for strict liability offenses. Lord Boween decided that the most efficient way of coercing corporations was by introducing the concept of corporate criminal liability in the English law. Soon after, borrowing the theory of vicarious liability from the tort law, the courts imposed vicarious
criminal liability on corporations in those cases when the natural persons could be vicariously liable as well. In 1944, the high Court of Justice decided in 3 landmark cases \(^{310}\) to impose direct criminal liability on corporations and established that mens-rea of certain employees was to be considered as that of Company itself. In 1972\(^{311}\), civil law doctrine of alter ego was used to impose the criminal liability on corporations which is now known as the 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 directors and manager represent the brain, intelligence and will of the corporation.

The rise of corporations as controlling cultural entities took place considerably later in many European countries than it did in the United States, and the corresponding fear of the harm those corporations could do to society is similarly a more recent phenomenon. This argument might further explain why some European countries have recently begun to expand their administrative regulation or even experiment with corporate criminal liability. In the recent past three years, two of the largest corporations in Europe have announced internal scandals that easily rival Enron in both significance and scope. In 2004, the Italian giant *Parmalat* disclosed that some $8.5 billion in assets had simply “vanished”\(^ {312}\). The company changed leadership, and many of the outgoing directors and the company itself now face criminal charges. Italy, has more

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\(^{310}\) DPP vs. Kent an Sussex Contractors Ltd. [1944] All E.R. 119 (THE Director used a false document); Moore vs. Bresler [1944] 2 All E.R 515 (tax evasion); R vs. ICR Haulage Ltd. [1944] KB 551 (common law conspiracy)

\(^{311}\) Tescos Supermarkets Ltd. Vs. Natrass [1972] AC 153

\(^{312}\) *See* Eric Sylvers, *Indictments Are Sought in the Collapse of Parmalat*, N.Y. TIMES, Mar. 19, 2004, at W1
recently expanded entity liability, and therefore *Parmalat* was eligible to be charged and tried for criminal offenses in addition to its corporate directors. In 2006, German-based Siemens disclosed that it was under investigation in more than a dozen countries, including Germany and the United States, for allegedly bribing government officials to win government contracts, bid rigging, and a variety of other illegal and anticompetitive practices.

The most distinguishing and bold element of the American model of corporate criminal liability is the adoption of the aggregation theory. The theory provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, met the requirements of actus reus and mens rea of the crime. English and French models proved to be more restrictive mainly due to their requirement that the individuals acting on behalf of the corporation hold a high position or play a key function within the corporation’s decisional structure. Identification theory followed in UK is criticised for two reasons. Firstly, in the complex corporate hierarchy, it is very difficult to say with certainty as to who took the decision. Secondly, the identification theory lets the acts of lower level employees pass through the net of corporate criminality even though it might have caused the same damage to a third party as in the case of a decision of a high level officer \(^\text{313}\).

\(^{313}\) *Supra* Note 289