

# **Criminal Liability of Corporations: The Differing Features of their Provisions in the Common Law and Civil Law Countries**

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## **ABSTRACT:**

The rule of criminal liability of the individuals has been there in the system of criminal justice since its inception, but the rule of criminal liability of corporations in criminal law however is a rule of recent origin. Further, the rule has not been adopted by all countries of the world at one and the same time, and in one and the same form. While some countries have adopted the rule and taken the step of incorporating it in their legal systems, there are many others who have yet to recognize the rule and incorporate it in their positive law. Even among those who have adopted the rule, a good number of the features of the law on corporate liability have been at variance with others. The variation is mostly because of the traits of the Common Law and Civil Law systems.

This article has the object of highlighting the basic features of a 'corporate person' and pointing out the variations in the law on the system of corporate criminal liability in the Common Law and Civil Law countries.

The methodology adopted by me for my views in this contribution is to present the discussion in four sections.

**Section I** of the article discusses the basic features of a corporate personality with reference to the philosophical of the leading jurists on this subject. It also throws light on the recent developments in the United States of America, Europe and the Kingdom of Saudi Arabia.

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**Section II** of the article discusses first the basic features of a Common Law and the Civil Law principles with regard to the system of criminal justice and then highlights the differing features of law as they exist in the legal systems which follow, in the administration of justice, the principles of Common Law.

**Section III** of the article discusses the basic features of the Law on Corporate Criminal Liability in the Civil Law countries including Italy, Poland and Luxembourg.

**Section IV** of the article discusses the law on Corporate Crimes as it exists in certain GCC countries, and the Civil Law.

This article argues that there is no justification for the legal systems to adopt different approaches in the administration of justice; hence there is a need to bring about uniformity in the rules of corporate criminal liability.

### **Key Concepts:**

Corporate Personality, Common Law & Civil Law, Corporate Crimes, Corporate Criminal Liability

## I. INTRODUCTION:

This article is concerned with the concept Corporate Theory on the one hand, and the concept of Corporate Crimes and the liability, therefore, on the other hand.

The first component forms part of the mainstream of General Jurisprudence & Legal Theory and the second component forms part of the mainstream of Corporate Jurisprudence & the Law on Crime and Punishment.

With regard to the subject of Corporate Personality, I was inspired by the theory presented by prominent jurists on the subject of the legal personality of the natural persons and the views of the prominent jurists on the legal personality of a group of persons who, as abstract entities constituted the 'corporate personality'. Drawing material from the mainstream of Jurisprudence and Legal Theory, I have discussed the philosophical views of the leading jurists on the concept of 'corporate personality'.

The discussion in this article is with regard to the concept of Corporate Crimes and the system of the liability of corporations in the Common Law and the Civil Law countries.

The ideas on these two themes as found in the Western Jurisprudence are discussed. Keeping the broad framework in view, the article is presented in two sections. Section I is devoted to a discussion on 'Jurisprudence & Legal Theory of Corporations', and Section II is devoted to a discussion of the provisions of law in force in the selected four countries of the 'Common Law and Civil Law systems'.

In Section I the divergent views of the jurists on the concept of person in the western legal system are discussed. This section analyses the question of how the legal concept of 'person' is used with respect to natural persons and how the same concept is extended to non-natural persons or the legal and collective entities. The significance

of making a study of these factors is that the theory of criminal liability depends upon the status of a natural or legal entity as a person and their compliance with the conditions relating to corporate liability of the abstract and collective entities.

In Section II the differing features of the law on criminal liability first in the form of the Common Law and then in the form of Civil Law systems are discussed.

### **Section I: The Jurisprudence of Corporate Theory**

There are two major themes concerning the concept of corporate persons. The first one is about their status and the second one is about their liability. The first question of the status of persons is discussed under the subtitle of the concept of legal person.

#### **(i) Concept of 'Person':**

The term 'person' is derived from a Latin term which in the beginning signified the person who happened to act in the theatre and later the term 'Persona' was used in regard to the mask which the actor wears while acting in a play to hide his/her real identity. Afterwards, the term was used simply to indicate the role or character of the particular part.<sup>(1)</sup>

In Jurisprudence, the concept of person in general emphasizes the following two components:

First, the term person or personality is used to indicate that a thing is a unit capable of having a good or a unified interest. By ascribing personality or personal identity to something, it also denotes that the person holds some rights and imposes legal and moral duties on others.

Second, the terms person and personhood are used to refer to agents

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(1) P. W. Duff, 'Personality In Private Roman Law', pp. 3 - 6

and agency. When we describe something as a person, we point out not just that it has unified interests, but also that it is capable of having and critically appraising a will, truly capable, therefore, of authorising action and speech.<sup>(2)</sup>

Thus, the juristic idea of a 'person' denoting an individual is quite an old one; this idea as expounded by the Roman philosophers was well presented in the writings of ancient philosophers like Plato, Aristotle, Rousseau, Hegel, and Bradley.

Of course the concept of 'person' basically is a legal concept but there are several factors from other disciplines as well which the law has to take into account in deciding the status of a person. These other disciplines are non-legal disciplines, such as, history, politics, morals, philosophy, metaphysics and theology. Thus, Geldart in his famous treatise on 'real personality' says: "The question is at bottom not one on which law and legal conceptions have the only or the final voice: it is one which law shares with other sciences: political science, ethics, psychology and metaphysics".<sup>(3)</sup> Thus, the concept of 'legal personality' is a concept of multi-disciplinary nature. The explanation of the concept of 'person' here is confined to the discipline of law.

### **(ii) The Concept of 'Legal Person':**

In the view of law, persons are of two kinds, one, natural persons and the other, artificial or fictitious persons. A fundamental belief of the jurists is that human beings as natural persons or physical persons are the true 'legal persons'. The natural persons or physical persons are capable of holding rights and duties in relation to each other; therefore they are considered to be 'legal persons'.

The justification for such a view is that quite a good number of jurists believe that there is a relationship between people's desires and beliefs

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(2) Hans Kribbe, 'Corporate Personality: A Political Theory of Association.

(3) Geldart, Legal Personality, Law Quarterly Review 27 (1911) , 90

because of which human beings experience the need for a relationship. A common belief is that the sequence of thoughts culminates into experience among the natural persons and from the experiences of the natural persons the status of a 'person' stems. The crucial aspect of this phenomenon is that such a relationship among natural persons results in rights and interests.

But everything existing in nature cannot be claimed to have such a status. Animals, mountains and oceans, though they are natural beings, are not 'persons' because they have no instincts like the human beings to nurture their interests, right and duties.

Because the law does not recognize the rights and interests of animals as it does in the case of natural persons, the expression 'legal person' or 'legal personality' is not used in respect of animals but is used only in respect of persons who are capable of holding legal rights and obligations within a certain legal system. The rights and obligations covered by such a definition include the right to enter into contract, the right to have property, the right to hold, acquire or transfer property and the right to sue or be sued.

The determination of the personhood in any case will depend upon the provisions of law which are relevant to the person in question. For example, the status of a State in the context of constitutional law will depend on the question whether the organization has the power to make war and peace with another country, and whether it has the power to acquire, hold, or cede a territory. The status of a state in the context of International Law will depend on the question whether the state has the right to send and receive ambassadors, whether it has the right to enter into treaty relations with other countries and be a member of any international organization.

The determination of the question about the status of a legal person finally depends upon the relevant law and the situation in which the question of personhood has arisen.

### **(iii) Corporate Persons:**

Although natural persons are the true 'persons', there are others who are also analogous to the status of 'persons' and are recognized by the legal system as such. In this category are the group of persons who by dint of their wisdom and intellect set up a distinct body and are recognized by law as bearing the rights and duties for themselves like natural persons.

It would be proper at this stage to explain the concept of 'corporate person' with a statement of the great English jurist, F. W. Maitland, who has done so much to bring the question of the true nature of corporate legal personality to the attention of English readers. He says,

"The corporation is (forgive this compound adjective) a right-and-duty-bearing unit. Not all the legal propositions that are true of a man will be true of a corporation. For example, it can neither marry, nor be given in marriage; but in a vast number of cases, you can make a legal statement about x and y which will hold good whether these symbols stand for two members or two corporations or for a corporation and a man."<sup>(4)</sup> The term 'corporation' is a genus used in its broad sense for a number of institutions, a species of which is a commercial corporation.

The first justification for corporate personality focuses on the person as a legal right-and-duty-bearing unit. Legal persons are the subjects of rights and liabilities as defined by the legal system.<sup>(5)</sup>

The term person is used in a neutral sense, as signifying simply a right-and-duty-bearing unit. But actually the idea of a corporate personality depends upon an assumption that there are properties which any unit must antecedently and inherently have in order to be a right-and-duty-bearing unit. They may be summarised in the words of the great writer Gierke as the following:

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(4) Frederic William Maitland, 'The Collected Papers of Frederic Maitland, ed. HAL Fisher, (Cambridge University Press), (1911) p. 307.

(5) French Peter A., 'Responsibility Matters' (Kansas: University of Kansas Press, 1992),p. 134

“A ‘universitas’ (or corporate body) is a living organism and a real person, with a body and members and a will of its own. Itself can will, itself can act .... It is a group-person and its will is a group-will”

Apart from human beings who are treated as ‘persons’, there is the other category of persons who are not the natural persons but are treated by law as if they are natural persons and this category of persons in the view of Jurisprudence is what is known as ‘corporate persons or corporate personalities’.

Thus, the other category of persons in respect of whom the law has lent its recognition to treat them as persons is when a ‘group of individuals’ join together and pursue their aim of doing a thing in common interest are treated as persons. In human history such groups have been formed for various purposes such as religious purpose, educational, charitable, humanitarian or commercial purposes. According to their functions, these different groups are known as Trusts, colleges, hospitals, and business associations. Such groups of persons in the form of societies or associations are formed by the human beings for their own purpose.

Scrutton, in his learned treatise, sums up nicely what the corporation theory implies; he says,

“All of the following can be said to be true of corporations (whether clubs, churches or firms);

- They make decisions;
- They act freely and responsibly;
- They have moral rights and duties;
- They have legal rights and duties;
- They can make laws for themselves and their members, for the breach of which they are held responsible;
- They are objects of praise and blame; of loyalty, pride and affection; of anger, resentment and hate;
- They are historical beings, which flourish and decline according to the success of their undertakings;



They stand in personal relations and can adopt many of the roles adopted by human persons.<sup>(6)</sup>

Though corporate bodies may be for various purposes as outlined above, the one particular category of corporate bodies which is by far the most important is the corporate body of a commercial nature. It is with this kind of corporations that this article is concerned.

Since this article is focused on the corporate criminal liability, it may be pointed out at the outset that the problem of liability may arise with regard to its status or to functions which it is called upon to perform. In view of this the writer considers it necessary to throw light first on the basic features of a company as a corporate body and then discuss the theoretical framework of criminal liability

**(iv) Companies as Corporate Persons – The basic features of a company as a corporate body:**

(A) A company acquires a separate legal personality when it is registered under the law and all the formalities required for its registration have been complied with. On the company's registration, the Registrar of companies will issue a certificate of incorporation as evidence that the company has been incorporated. The company attains maturity on its birth; there is no period of minority; an interval of incapacity.<sup>(7)</sup>

Once the company has been registered the subscribers to the memorandum together with other persons who may from time to time become members of the company, become a corporate entity by the name set out in the certificate of incorporation. From the date of registration the company is capable of exercising all the functions of an incorporated company. The company begins a new life with a unique registration number set out in the certificate of incorporation. Where

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(6) R.. Scrutton, 'Corporate Persons', Proceedings of the Aristotelian Society, 63 (1989) pp. 23926- at p. 245

(7) Per Lord Macnaughten in Salomon v. Salomon & Co Ltd. (1897) AC 22

the company has a share capital, the subscribers to the memorandum of association become holders of the shares from the date of the company's registration.

- (B) Under the principles of Company Law the concept of a 'separate legal personality' or corporate personality signifies that a company is distinct from its shareholders. The company has the liability and not the shareholders. The company has a legal but not a physical existence. It is neither an agent nor a trustee for its shareholders. A company acquires certain attributes upon incorporation. It is treated as a person in its own rights.
- (C) Upon incorporation the company has a unique identity. It has a certificate of incorporation with its distinct registration number which distinguishes it from other corporate entities. The certificate signifies the birth of the company; a lifeless creature dependent upon the support of others for its functional and operational existence. It can be likened to a human being. In *HL Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.*<sup>(8)</sup> Denning J. stated: "A company may in many ways be likened to a human being. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre".
- (D) A company cannot act on its own and requires others for its functioning and operation. The nature of the corporation was considered in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*<sup>(9)</sup> where the House of Lords decided that liability could be imposed on corporations for the directors' acts as they were the controlling minds within the corporation. The legal fiction of the corporation was set out by Viscount Haldane when he stated:

"... a corporation is an abstraction. It has no mind of its own any

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(8) (1957) 1 QB 159 at p. 172

(9) *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, (1915) AC 705

more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of Section 502. ...”

(E) A company can only act through others to carry out its intentions. In *Tesco Supermarkets Ltd. v. Nattrass*(10) Lord Reid considered the nature of the personality which by a fiction the law attributed to a corporation. Lord Reid stated:

“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out the intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind, that guilt is the guilt of the company”.

Thus, a company has a ‘directing mind and will’ – the directors and gatekeepers of the company, who guard the best interests of the company at all times. They are at the nerve centre of the company, managing the day to day governance, operations and functions of the company, by protecting the company’s assets and striving towards profit maximisation as one of the major objectives of the company.

(F) (f) The company may have an artificial legal personality. In *Trustees*

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(10) *Tesco Supermarkets Ltd. v. Nattrass*, ( 1972) AC 153

of *Dartmouth College v. Woodward*(11) Chief Justice Marshall of the US Supreme Court stated:

“A company is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. Among the most important are immortality, and if the expression be allowed, individually, properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual” .

However, the corporation also has a ‘soul’. It has moral obligations in discharging its social obligations; it exercises a sense of social responsibility and purpose. This aspect of social responsibility awakens a sense of social consciousness within directors to address the company’s role in society by enhancing the company’s reputation as a good citizen in society with caring and sensitive persons.

(G) A company has real legal existence distinct from its shareholders. Lord Sumner in *Gas Lighting Improvement co. Ltd. v. Commissioners of Inland Revenue*(12) stated:

“Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed, and is not a sham (of which there is no suggestion here) the idea that it is mere machinery for effecting the purposes of the shareholders is a layman’s fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts”.

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(11) *Dartmouth College v. Woodward*, (1819) 17 US (4 Wheat) 516),

(12) *Gas Lighting Improvement Co . Ltd. v. Commissioner of Inland Revenue*, (1923) AC 723

**(v) Juristic Theories about Corporate Personality:**

While the law has been so considerate to bestow on various abstract entities the status of corporate persons, there have remained certain aspects of these bodies particularly their interior structure and their relations with the legal system which have been in need of regulations to answer certain fundamental questions.

In view of the fact that the corporate bodies have been concerned with social, economic, cultural and political issues, theories have developed in various disciplines apart from the discipline of law which are quite useful in understanding the nature of corporate bodies. The thrust of all these theories has been on the question of the status of companies and corporations and their relationship with other corporate entities. The significance of these theories is that they contribute to the existing mass of juristic philosophy about the corporations and enlighten us as to the justification for the law to move in to regulate the relationship of the corporate bodies with other entities.

The one great development to which a reference is immediately necessary as a prelude to the theories of corporate jurisprudence is the case of *Salomon v. A. Solomon*<sup>(13)</sup> which had a lasting influence on the principles of corporation law. It is this case which has credited the company law with the basic principles of corporate personality that:

- (i) it is a separate and legal entity;
- (ii) that the personality of the corporate body is distinct from its members, and
- (iii) that the members of the corporate body have a limited liability.

The case of *Solomon* was decided by the House of Lords in 1897 but the specific principles enunciated in this case were not new to the realm of jurisprudence. Roman Law since good old days had recognized the principle of ‘separate and distinct personality’ of the corporate bodies

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(13) 1897 AC 22.

apart from the individuals who had constituted it; this was recognized in the case of religious, charitable and educational institutions. The principle had been recognized since early days as far as the separate personality of the corporate body apart from the members composing it. The theory of corporate personality has to convey the message that a certain non-human entity is born which has the status of a legal entity. The jurists have explored the issue of corporate personality and a reference is made to the following theories of corporation as advocated by prominent jurists:

### **(a) The Fiction Theory:**

The fiction theory of corporation is said to be promulgated by Pope Innocent IV (1243-1254). This theory is supported by many famous jurists, particularly Savigny and Salmond. According to this theory the legal personality of entities other than human beings is the result of a fiction. Hence, not being a human being, a corporation cannot be a real person and cannot have any personality of its own except by a fiction.

According to the fiction theory, legal personality should be compared with the term 'persona' in the theatre. There it was initially used to refer to the mask worn by an actor in a play. Later, the term was used simply to indicate the role or character of a particular part. According to fiction theory, something similar could be said about legal personality, which is merely a mask or a role in a juristic play, enacted by agents and created by an author. Legal person, of course, must perform real actions and at some point we need real agency. However, groups need not be real agents themselves. They rely on individuals acting on their behalf. A group cannot literally sign a contract or transfer money itself. But the point is that these activities can be performed in its name. While its representatives act and decide, the consequences of their actions and decisions are assigned to the association.

**(b) The Concession Theory:**

This theory is basically concerned with the philosophy of the sovereign national states. It is said to be essentially a product of the rise of the national state at a time when there were rivals between religious congregations and organizations of feudal origin for the claim of national state to complete sovereignty. Under the concession theory the state is considered to be in the same level as the human being and as such it can confer on or withdraw legal personality from other groups and associations within its jurisdictions as an attribute of its sovereignty. Hence, a juristic person is merely a concession or creation of the state.

John Dewey in his learned article on ‘the Historic Background of Corporate Legal Personality’ says, “It is clear that there is nothing essentially in common between the fiction and concession theories, although they both aimed toward the same general consequence, as far as limitation of power of corporate bodies is concerned. The fiction theory is ultimately a philosophical theory that the corporate body is but a name, a thing of the intellect; the concession theory may be indifferent as to the question of the reality of a corporate body; what it must insist upon is that its legal power is derived. In some respects, the concession theory is the more favourable to expanded power of corporations; a charter of broad powers must be granted and the courts might construe its terms liberally. Its conceded assimilation to the singular person, even when a corporation is called ‘artificial’ might even enlarge its rights, privileges and immunities...”<sup>(14)</sup>

**(c) The Purpose Theory:**

Similar to the fiction and concession theory this theory declares that only human beings can be a person and have rights. Entities other than human beings are regarded as artificial persons and

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(14) The Yale Law Journal, Vol. 35, No. 6 (April 1926) 655

merely function as a legal device for protecting or giving effect to some real purpose. As corporations are not human, they can merely be regarded as juristic or artificial person. Under this theory, juristic person is no person at all but merely a 'subject less personality' properly destined for a particular purpose and that there is ownership but no owner. The juristic person is not constructed round a group of persons but based on the object and purpose.

### **(d) The Symbolist Theory or Bracket Theory:**

This theory was set up by Ihering. Basically, this theory is similar to the fiction theory in that it recognizes that only human beings have interests and rights of a legal person. According to Ihering, the conception of corporate personality is essentially an economic device by which it simplifies the task of coordinating legal relations.

The so-called fiction theory should not be confused with the 'bracket theory' or 'aggregate theory'. The fiction theory argues that while the legal rights of groups are in the end reducible to individual rights, corporate personality has a function as a technical device to diminish the complexity involved in such a reduction. The bracket theory is sometimes offered as a third justification of corporate personality, but it ultimately simply dismisses the idea.

### **(e) The Realist Theory:**

The founder of this theory was a German jurist, Johannes Althusius while its most prominent advocate was Otto von Gierke. According to this theory a legal person is a real personality in an extra juridical and pre-juridical sense of the word. It also assumes that the subjects of rights need not belong merely to human beings but to every being which possesses a will and life of its own. As such, being a juristic person and as alive as the human being, a corporation is also subjected to rights. Under the Realist Theory a corporation



exists as an objectively real entity and the law merely recognizes and gives effect to its existence. The realist jurist also contended that the law has no power to create an entity but merely having the right to recognize or not to recognize an entity.

**(VI) Statement of the problem:**

The above theories are good not only with regard to the status and functioning of the commercial entities as corporate bodies, but with regard to various other categories of institutions which come under the rubric of 'corporate bodies', such as trusts, universities, colleges, societies, associations etc. But one thing which is of the greatest concern to everybody in the field of law and the relevance of the principles and theories stated above is that owing to the paucity of literature on principles of criminal liability of companies and other corporate bodies a huge corpus of principles of criminal liability have developed at the national and international levels giving shape to a new body of principles of criminal justice. According to the views of the jurists on this subject the principles that have developed all along constitute the corpus of the modern Company Law or the body of 'Corporate Jurisprudence'.

Thus, overtime a huge body of law in different forms has developed, a large number of crimes by various names have come up and various forms of punishment or sanction have come up to punish the wrong doers and secure the implementation of the principle of criminal justice.

But an interesting aspect of Corporate Jurisprudence is that the law on criminal liability of corporations is not in the same form throughout the world, and does not have the same principles and procedures with regard to all kinds of wrongs of the corporate bodies. It is in respect of these matters that there is need for a detailed study.

One particular aspect of the system of criminal justice to which a reference is immediately necessary is that the earlier system of criminal justice had recognized since ancient days the rule of liability

of the natural persons for their wrongful acts. The rationale for such an approach was that the natural persons were considered to be capable of bearing the rights and duties, and were considered to be capable of suffering a punishment. But the same system of criminal justice did not recognize the wrongful acts of the non-natural persons like companies and corporations, educational institutions or welfare associations etc. The reason for this indifferent approach was that the law generally considered the abstract entities as incapable of bearing the rights and duties like human beings and incapable of suffering a punishment.

However, with the passage of time conditions underwent a change. Owing to the advent of social movements like the Enlightenment, the Renaissance, the Industrial Revolution etc. the thinking of the people changed and the authorities moulded their approach towards criminal liability of the corporate bodies too. In due course, a new body of law developed at the national and international levels urging upon the states to modify their legal systems.

### **The Concept of Corporate Crimes and the problem related to Corporate Criminal Liability**

The corporate bodies of the present days interact with several institutions and agencies of the society; the effect of the policies of corporate bodies and their actions is felt by the government, the community and the individuals. In a situation like this problem arises in almost every State on how to hold the corporate body responsible for its actions when the adverse effects of its policies and programmes affect the society and the individuals. The various kinds of wrongs which are noticed in the behaviour of the corporate bodies are the offences against health, safety and lives of individuals; the economic interest of the State is also affected. Problems like this raise the question of how the corporate body, which is an abstract entity, may be held criminally liable. The difficulty is that the corporate body does not have all the ingredients of an actor to bring him to book; it does not have a mind like an individual, nor a body like an individual.

But the corporations also do not act independently of the human beings; there are officers, agents, trustees and employees who perform the functions for which a corporate body is set up; question arises whether it is possible to consider the actions of the corporation at par with the actions of the individuals, whether it is possible to attribute the physical element or the mental element of the corporation and hold it responsible for all that has happened. In most systems of criminal justice there is the physical element as well as the mental element. The problem that arises is whether it is possible to impute the mental element to the corporation, when can a particular statement of mind of a human being be imputed to the corporation so that the corporation itself may be said to have a statement of mind. Difficulties like this have arisen with regard to the prosecution and punishment of corporate bodies. Societies which have lived under the old principles of criminal justice have to consider the question how far they can hold the corporations liable on the basis of the old principles and how far they are justified in modifying the old theories.

The principles of international law have not yet developed to the status of being applicable by all the states as in the case of International crimes. The institution of International Criminal Court has made a huge advance and States have surrendered to a great extent their power of punishing the criminals who are alleged to be guilty of international crimes, like international peace, war crimes and crimes against humanity. International Law is yet to make an advance in the sphere of corporate crimes as it has made in the case of international crimes. Of course, in certain matters the law has developed but it is not of the same magnitude as the rules of International Criminal Law.

The rules of International Law have of course made certain strides in developing the principles of liability for international crimes. For example, the UN Convention against Transnational Organized Crime provides that each State Party shall adopt such measures as may be necessary, consistent with its legal principles to establish the liability of

legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 8 and 23 of the Convention.<sup>(15)</sup> Similarly, the OECD Convention<sup>(16)</sup> on Combating Bribery of Foreign Public Officials in International Business Transactions requires States to establish the liability of legal persons. The Convention states: “Each Party shall take such measures as may be necessary in accordance with its legal principles to establish the liability of legal persons for the bribery of a foreign public official”.

The European Convention on the Crime of Corruption states that the EU member States are required to adopt measures to ensure that legal persons can be held liable for the relevant offences committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person...”

The kinds of corporate crimes noticed are the crimes affecting the economy, the environment, the health and the peace and order of the people of a given society; certain crimes have transnational effects particularly those relating to the environment, the health and the safety of the people. A study is needed with regard to the causes and effects of corporate crimes and the response of society to deal with the problem.

At the end of discussion, in this Section I wish to make a reference to some of the recent developments in the United States, the European countries and Saudi Arabia about the problem of corporate crimes and the system of sanctions to punish the rising trends of corporate criminality.

### **1. The problem of corporate crime in recent years:**

In recent years, many countries of the world have witnessed severe

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(15) Article 10 (1) of the UN convention against Transnational Organized crime.

(16) Article 2 (1) of the OECD Bribery Convention.

corporate crimes. A few of them may be described as follows :

**(a) The problem of corporate crimes in recent years in USA:**

1. In the year 2001 the Enron scandal led to its bankruptcy and fraud trials of its executives. Houston Natural Gas merged with InterNorth to form Enron in 1985.<sup>(17)</sup>
2. The WorldCom was a Telecommunication Company that had emerged in the 1990s. Its executives committed accounting fraud that led the company to the largest bankruptcy in the US and consequently it collapsed in 2002.<sup>(18)</sup>
3. In January 2017 the US authorities unveiled criminal charges against two men accused of helping operate a hedge fund as a Ponzi scheme and of swindling investors in a ticket reselling business for popular events, including the smash Broadway musical "Hamilton". Joseph Meli, who ran the ticket business and Steen Simmons, the head of an alternative investments at Sideris Capital Partners were arrested on Friday on securities fraud and wire fraud charges brought by Manhattan federal prosecutors. Meli and Mathew Harriton were separately accused by US securities and exchange commission of orchestrating an \$ 8.1 million Ponzi scheme by raising money from investors to buy and resell tickets for popular shows.
4. In the United States another interesting case of corporate criminality is the case of one Martin Shkreli known as 'Pharma Bro'. The selection of jurors is still going on and the trial may be held soon.<sup>(19)</sup> Martin Shkreli is the former Turing Pharmaceuticals executive who became known as 'Pharma Bro'. He became a

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(17) William W. Brato, 'Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?' *Enron and the Dark Side of Shareholder Value* (2002) 67 *Tulane Law Review* 1275,

(18) Kalev Keetaru, 'An Open Source Study of International media Coverage of the WorldCom Publish/Open\_Source\_Intelligence\_FBIS\_wORLDCOM.PDF.

(19) 'Newsweek' dated 27.6.2017

notorious figure; some called him, ‘the face of corporate greed’ and others labelled him ‘the most hated man in America’. Shkreli is charged with securities fraud and is on bail since 2015.

Essentially, Shkreli is accused of running a Ponzi scheme, using money from new investors in the drugs company he headed, Retrophin, to pay off mounting debts from his filed hedge fund. He is accused of cheating investors out of \$ 11 million.

5. In 2010 British Petroleum (BP’s) massive oil spill in the Gulf of Mexico involved the deaths of a number of employees on the deep sea oil rig and injuries to other rig employees as well as massive damage to the environment. These crimes resulted in the prosecution of the BP executives and of the company itself—for involuntary manslaughter.<sup>(20)</sup> The oil spill has triggered international public concern about corporate crime and its negative effects.
6. A very important development in the United States with regard to liability of Corporations under the Alien Torts Statute (ATS) was the case of *Kiobel v. Royal Dutch Petroleum*<sup>(21)</sup>. As of October 2011 there was a circuit split regarding whether corporations, as opposed to natural people, could be held liable under the ATS. In 2010 the Second Circuit Court of Appeals held in *Kiobel v. Royal Dutch Petroleum Co.* that “customary international law has steadfastly rejected the notion of corporate liability for international crimes” and thus that “in so far as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiff’s claims fall outside the limited jurisdiction provided by the ATS. However, in 2011, the Seventh Circuit Court of Appeals, the Ninth Circuit Court of Appeals, and the D. C. Circuit Court of Appeals all ruled that corporate liability is possible under the Statute. On October 17, 2011, the US Supreme Court announced that it would hear an appeal in *Kiobel* during its 2011-2012 term. Oral argument

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(20) David M. Uhlmann, ‘After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law’ (Working paper No. 227, Michigan Law Review (2011) 1,

(21) 621 F. 3d. 111 (2d Cir. 2010)

was held on February 28, 2012. On July 23, 2012 re-argument of the case was set for October 1, 2012. On April 17, 2013 the Court issued its decision affirming the Second Circuit Court of Appeals and holding that the ATS did not create jurisdiction for a claim regarding conduct occurring in the territory of a foreign sovereign.

**(b) The problem of Corporate Crimes in recent years in Europe:**

During the time of doctrinal disputes, the number and importance of corporations in the European society increased significantly. The laws became more flexible and the states' role in the process of incorporation diminished.

The example of the law adopted by France was followed by numerous other European countries. Thus, Belgium, through the Law of May 4, 199 modified art. 5 of the Belgian Penal Code and instituted the criminal liability of juristic persons.<sup>(22)</sup>

Netherlands adopted the concept of corporate criminal liability even earlier, in 1976.

Art. 51 of the Dutch Penal Code provides that natural persons as well as juristic persons can commit offences.

In 2002 Denmark modified its Penal Code and established that corporations may be liable for all offences within the general criminal code.

through the Decree Law No. 300 of September 29, 1999 and the Decree Law No. 231 of May 8, 2001.<sup>(23)</sup>

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(22) Sara Sun Beale & Adam Ci. Satwat, What Developments in Western Europe Tell us about American Critiques of Corporate Criminal Liability, 8 Buff. Crim. L.R. 89, 97 (2004)

(23) Gunter Heine, New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience or Vice Versa, 1998, St. Louis-Warsaw Transatlantic LJ 174 (1998)

### **(c) The problem of Corporate Crimes in Saudi Arabia:**

In the Kingdom of Saudi Arabia there have also been cases of corporate crimes. Owing to rapid industrial expansion of the Kingdom as a result of oil exploration as well as growth in the sectors of agriculture, tourism and urbanism there have been cases of corporate crimes. An illustration of such a phenomenon is the criminal judgment of the Board of Grievance (Diwan Al-Mazalim), in which the facts of the case were: the financial and administrative manager in a company had offered an amount of SAR 150,000 (approximately USD 40,000) to a public official in one of the Ministries. The objective was to induce him to issue an illegal permit to operate a business to the said company. The public official refused to accept this bribe and informed the authority concerned of the matter. The accused who appeared before the Board of Grievance, confessed that he had offered this amount to the public official in accordance with a verbal order from the manager of the said company. The Board of Grievance convicted him and passed its judgment based on sections 9, 15, and 19 of the Anti Bribery Law (ABL)'92.<sup>(24)</sup>

## **2. The System of Sanctions adopted to punish Corporate criminality:**

1. The criminal fines are the most common sanction. A pecuniary sanction has the advantages of directly affecting the corporation. It generates the capital necessary for compensation or restitution to the victims. It can be executed with minimum costs, and when appropriately individualized. It has a sufficiently strong impact to accomplish the scope of the punishment (especially the retributive and deterrent scopes). Whereas the greatest threat to an individual may be the loss of liberty, the greatest threat to a company is the loss of profitability. Because such a loss strikes at the essential purpose of the company, a fine holds the potential to be an effective deterrent. A corporation will balance the monetary

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(24) Judgment of the Third Criminal Circuit in Riyadh No. 12/D/G/14 of 1418 AH (1998)



gain from the offense with the loss from the potential criminal fine. Therefore, the fines must be sufficiently high to have an impact on the corporations. The amount of the fines should also take into account the financial resources of the corporation.

At the same time, fines have some disadvantages. A very high fine would have a negative effect on innocent third parties. Although a corporate manager usually commits the crime, he will be the last one to suffer the impact of his actions. However, the stockholders, other employees and creditor will be affected by the secondary consequences of the penalty. Other effects can be the increase of the price for the corporation's products and even the dissolution of the corporation. Despite all its drawbacks, the fine is the least expensive and most frequently applied sanction.

2. Another sanction often used is confiscation of the fruits of the crime. Deprivation of the proceeds of the crime is imposed by different systems as a punishment or as a security measure. However, in order to achieve the scope of the criminal punishment, the best solution would be if confiscation were a complementary sanction. If confiscation were the only punishment imposed, the corporations would be encouraged to take the chance, since the probability of getting caught is not 100%.
3. As a penalty, the activity of the corporation can be suspended for a limited period of time. This sanction has an important drawback because of the adverse effect on the employees who would lose wages. However, this sanction seems to be justified for serious violations of labour or environmental laws. Moreover, as a solution that would attenuate the ricochet effects, some authors suggested that employees should be paid their salaries for the time of suspension.
4. Dissolution represents the capital punishment for corporations.

Due to its drastic effects, some authors argued that the sanction of

dissolution should be applied only when the corporation committed very serious crimes, or when the corporation was created for illegal purposes. Others argue that such punishment should be completely eliminated for the category of corporate sanctions.

5. The publication of the decision or the adverse publicity orders (which consist in the publication at the company's expense of an advertisement emphasizing the crime committed and its consequences) are also sanctions for corporate criminal activity. Both sanctions can have an important deterrent effect because of the incidental loss of profits that negative publicity can cause. By its nature, this sanction can only be an auxiliary sanction accompanying another corporate penalty. This sanction also has a possible spill-over effect; the losses can cause the corporations to close plants or even go out of business, which in turn will negatively affect innocent employees, distributors and suppliers.
6. Other sanctions consist in restraining the corporation from the performance of some activities, denial, suspension or retraction of licences, loss of rights (such as benefiting from subventions or tax breaks), prohibition of advertising or selling on specific markets etc. Corporations can also be restructured, required to submit periodical reports, or put under the supervision or control of a consultant who can recommend or impose appropriate measures to prevention of future crimes. This 'corporate probation' has very strong rehabilitative effects. Its side effects on innocent third parties are also minimal. The goal, which is the rectification of the corporate policies and practices that gave rise to the criminal offence, is so crucial that a remedial rehabilitative probation condition should be virtually automatic unless the company could show that it had already taken adequate steps to prevent a reoccurrence of the offence.
7. Another attractive solution is the sanction of community service order which is not likely to result in job losses and it would be extremely beneficial to the community.

8. The French Penal Code lists all the sanctions that can be applied to corporations. The most common sanction is the fine which is applicable for all types of offences. In some cases, the fine can be replaced with the prohibition of issuing checks or confiscation. The amount of the fine is determined based on the limits applicable to individuals, the maximum amount of corporations cannot exceed five fines the maximum for individuals unless the corporation is a recidivist (when the amount can be ten times the maximum for such individuals). In addition to fines, the French Penal Code provides various other sanctions such as; dissolution, disqualification from performing specific economic or social activities, placement for no longer than five years, under judicial supervision, temporary or permanent closing down of lands used in the commission of the crime, temporary or permanent prohibition to contract with the government or other public institutions, temporary or permanent prohibition to issue stock or checks, confiscation of goods used or produced as a result of the crime, and publication of the judgment.

### **3. International Perspectives on Corporate Criminal Liability:**

The following discussion is concerned with an exposure of the developments at the international level where we have witnessed the emergence of conventions and protocols on the subject of corporate criminal liability.

#### **(i) Introduction:**

The methodology followed in presenting the discussion in this subsection in reference is made first to the developments at the international level which brought in the International Corporate Criminal Liability and then reference is made to the developments at the national level.

In the context of the system of corporate liability at the national level the discussion covers the principles on which the conventional system of criminal justice was based and the principles on which the modern

system of criminal justice is based. Reference is made to the Common Law and the Civil Law systems which had developed around particular theories and have been relevant to many aspects of criminal justice even at present.

Then reference is made to the modern system of criminal justice in which the concept of corporate crimes has been recognized as a distinct wrong. The discussion is focused specifically on matters relating to corporate crimes, such as the difference between corporate crimes and other crimes and the harmful effects of these crimes; the type of punishment which visits upon the perpetrators of corporate crimes and the method followed by the authorities for the enforcement of this particular law.

All the above features of corporate crimes are described making a reference to the provisions of law from the selected countries belonging to the Common Law and the Civil Law countries. Since it is not possible to cover all the Common Law and Civil Law countries in a limited work of this type, the study is confined to four countries of each of the Common Law and the Civil Law systems.

The beginning of this aspect is made with a description of events at the international level under the head of 'International Criminal Liability'.

### **(ii) International Corporate Criminal Liability:**

Since the advent of Industrial Revolution in the nineteenth century, a trend has developed of corporate globalization in which the business community of one country has been conducting its business with people of the other country abroad. In a situation like this questions arise about protection of the interests of the business community, the rights and interests of the people with whom the business community comes in contact. The workers engaged by the business entities also deserve protection of law. The relevant organization which has been seeking to take care of the labour at the international level is the International Labour Organization (ILO). This organization was formed

during the time of the League of Nations and has been working since then to evolve necessary standards to be observed by the business organizations in relation to the Labour. The ILO has emphasized the need of maintaining a certain standard with regard to occupational health and safety of the people with whom they come in contact.

The International Labour Organization is the institution which is concerned with the welfare of the workers and has followed meticulously the principle that workers should be protected from sickness, disease and injury arising from their employment.

The ILO standards on occupational safety and health provide essential tools for governments, employers, and workers to establish such practices and to provide for maximum safety at work. In 2003 the ILO adopted a global strategy to improve occupational safety and health which included the introduction of a preventive safety and health culture, the promotion and development of relevant instruments, and technical assistance. Such an approach in law-making has resulted in a body of new rules for regulating and prosecuting the corporations which indulge in different kinds of business and cause harm to the interests of the individuals. The concept of responsibility evolved by the ILO in this regard is what is known as the concept of International Corporate Criminal Liability, the message of this measure is that the international business organization should recognize the importance of ensuring that corporations understand the laws and standards with which they must comply and they must conduct their business by avoiding the process of criminal liability. A few examples of such measures are the ILO Convention on Health Safety and Occupational Safety.<sup>(25)</sup>

Apart from the Conventions formulated by the ILO on Occupational Safety and Health there are some more conventions adopted by other international organizations on subjects like transnational organized

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(25) ILO Convention of 1981 on Occupational Safety and Health, and the ILO Convention of 1985 on Occupational Health Services.

crimes, prevention of crime by state officials etc. A brief reference is made to such Conventions to show the development of law at the international level for the prevention and punishment of international crimes.

### **1. Convention against Transnational Organized Crime:**

The General Assembly of the United Nations adopted, in the year 2000, a Convention against Transnational Organized Crime and Protocols Thereto<sup>(26)</sup>. This is the main international instrument in the fight against transnational organized crime. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children; the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their parts and components and ammunition.

The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

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(26) General Assembly resolution 5525/ of 15th November, 2000

## **2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:**

A Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted by the Negotiating Conference of the Organization for Economic Cooperation and Development (OECD)<sup>(27)</sup> on 21st November 1997. The Parties to the Conference considered that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns. It undermines good governance and economic development, and distorts international competitive conditions.

Considering that all countries share a responsibility to combat bribery in international business transactions and having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development on 23rd May 1997,<sup>(28)</sup> which, inter alia, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that recommendation and with the jurisdictional and other basic legal principles of each country; welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union; adopted the following provisions of law in order to deal with the economic crimes and corporate wrongdoing:

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(27) OECD Convention of 2011

(28) C. (97) 123/FINAL

1. Article 1 The Offence of Bribery of Foreign Public Officials 1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.<sup>(29)</sup>
2. The Convention provided that each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.<sup>(30)</sup>

The Convention provided that each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

3. With regard to the system of sanctions to be introduced for dealing with these crimes the Convention provided that:
4. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
5. In the event that, under the legal system of a Party, criminal

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(29) Article 1 of the Convention of OECD 2011

(30) Article 2 of the Convention of OECD 2011



responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

6. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
7. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.<sup>(31)</sup>
8. With regard to the question of jurisdiction to punish for international crimes of this nature it was provided that each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
9. That each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
10. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
11. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials

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(31) Article 3 of the OECD Convention of 2011

and, if it is not, shall take remedial steps.<sup>(32)</sup>

### **3. Criminal Law Convention on corruption:**

The European Union adopted at Strasbourg a Convention on 27<sup>th</sup> January of 1999 called the Criminal Law Convention on Corruption which is an ambitious instrument aimed at preventing corrupt practices and complementary criminal law offences and corruption offences. The Convention is wide-ranging in scope and complements existing legal instruments as specific types of corruption, such as the following offences:

Active and passive bribery of domestic and foreign public officials; active and passive bribery of national and foreign parliamentarians, active and passive bribery of international civil servants;

Active and passive bribery of domestic, foreign and international judges; active and passive trading in influence;

Money laundering of proceeds from corruption offences; Accounting offences (invoices, accounting documents etc.)

### **4. Convention on Protecting the EU's financial interests - fight against fraud:**

The European Union adopted, in the year 1995, a convention which seeks to protect, under criminal law, the financial interests of the European Union and its taxpayers. Over the years, the Convention on the Protection of the European Communities' Financial Interests has been supplemented by a series of protocols.

The Convention and its protocols provide a harmonised legal definition of fraud require their signatories to adopt criminal penalties for fraud.

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(32) Article 4 of the OECD Convention of 2011

The Convention provides that the member states of the European Union must introduce effective, proportionate and dissuasive criminal penalties to deal with fraud affecting the EU's financial interests.

**(a) Genesis of the Common Law and Civil Law:**

The ancient Criminal Law of the Westerners had developed around the principles popular among the people of the time. One such principle was the principle of Natural Law which was the source of the Roman ideas of Right and Justice. Anything repugnant to the idea of Roman Law was not accepted by the operators of the system; therefore, they did not recognize the rule of criminal liability of abstract entities like the companies and corporations.

The main difference between the two systems of Common Law and Civil Law is that in the Common Law System, the Case Law — in the form of published judicial opinions — is of primary importance, whereas in the Civil Law System the codified statutes predominate as sources of law. Examples of the countries which follow the Common Law system are: the United Kingdom, the United States of America, Canada, Sri Lanka, India, Pakistan, etc. and the examples of countries which follow the Civil Law system are France, Spain, Japan, China, and a few African countries.

But the division between the Common Law and Civil Law is not as clear-cut as it might seem to be. In fact, many countries use a mix of features from common and civil law systems. An insight into the characteristics of these two systems therefore requires an understanding of the historical background of both the systems.

The original source of the common law system was the English monarchy, which used to issue formal orders called “writs” on the basis of which a legal action could be initiated in the Royal Courts. But because writs were not sufficient to cover all situations, the Courts of Equity were ultimately established to hear complaints and devise appropriate remedies based on equitable principles taken from many

sources of authority (such as Roman law and “natural” law). As these decisions were collected and published, it became possible for courts to look up precedential opinions and apply them to current cases. And thus the common law developed.

Civil law in other European nations, on the other hand, was generally traced to the code of laws compiled by the Roman Emperor Justinian around 600 BC. Authoritative legal codes with roots in these laws (or others) then developed over many centuries in various countries, leading to similar legal systems, each with their own set of laws.

In civil law countries, judges are often described as “investigators.” They generally take the lead in the proceedings by bringing charges, establishing facts through witness examination and applying remedies found in legal codes.

With regard to the approach of the two systems to the question of determining the liability of persons for crimes, there is some similarity in regard to some aspects but at the same time there is dissimilarity in certain matters. The important thing to note is the approach of the two systems with regard to liability of natural persons and the liability of artificial persons.

### **(iv) The Nature of Conventional System of Criminal Justice:**

As far as the Western legal system is concerned, the Roman Law of the ancient days had laid the foundation of the system of criminal justice recognizing the principle that there will be no wrong if there is no actus reus and no mens re. By actus reus was meant a wrongful act, and by mens rea was meant the state of guilty mind. This approach of the Roman jurists was characterised as ‘the guilty principle’ and was expressed in the Latin maxim, ‘Actus Non Facit Reum, Nisi Mens Sit Rea.’

The guilty principle advocated by Roman Law was considered as meeting the requirements of natural justice, therefore it was considered as an aspect of Natural Law theory; and was followed by the Courts of Civil Law.

Since the maxim *Actus Non Facit Reum, Nisi Mens Sit Rea* was found to be in consonance with the principles of Natural Justice it was followed by the Courts of Common Law too in determining the liability of persons for wrongful acts. But such an approach was adopted with regard to the question of determining the liability of natural persons only and not so much with regard to the liability of artificial persons. In the category of non-natural persons fell the institutions like companies, corporations, business organizations, charitable institutions, colleges, and universities.

The concept of individual liability in the traditional system of criminal justice had its origins from the theories of ancient law and had developed under the influence of the theories of right and justice, but the concept of Corporate Criminality has originated from 19<sup>th</sup> century onwards and has taken a recognizable shape in the twentieth century. The factors which have had their influence on the development of law on this particular subject have been the contemporary history, laws, economics and politics of different countries at different times. The conditions with regard to the economic, social and political matters being different in various countries.

Apart from the factors stated above, the concept of criminal liability of corporations has had a different evolution under the common law and civil law systems because of which we find variations in the rules of criminal liability in various countries, particularly the systems of Common Law and Civil Law. Reference is made herein to the particular countries which adhere to these systems.

### **Differing Features of the Law on Corporate Criminal Liability in the Common Law and Civil Law countries**

As part of the second theme of the article, namely, the differing features of the law on corporate crimes, I wish to take up now the status of law in the Common Law countries:-

### **Section II- The Rule of Corporate Criminal Liability in the Common Law countries:**

In this section the rule of corporate criminal liability is discussed with reference to select countries of the Common Law family such as the United Kingdom, the United States of America, Australia and Canada.

#### **(i) United Kingdom**

As explained above, due to historical circumstances, the evolution of common law systems has been different and did not embrace the Roman concepts. Unlike the Civil Law which has its sources in legislative acts, the sources of the common law are the judicial decisions and the legislative acts. The adoption of the concept of corporate criminal liability has followed a conservative course under the English law.

The Case of Sutton's Hospital<sup>(33)</sup> is an old common law case decided by Sir Edward Coke. It concerned the London Charterhouse, which was held to be a properly constituted corporation.

The facts of the case were that one Mr. Thomas Sutton was a coal mine owner and moneylender, as well as the Master of Ordnance for the North of England, a military position. He founded a school and hospital as a corporation at the London Charterhouse. When he died, he left a large part of his estate to the charity. Sutton's other heirs, wanting more, challenged the bequest by arguing that the charity was improperly constituted. Therefore, they argued, it lacked a legal personality to be the subject of a transfer of property.

In a full hearing of the Court of Exchequer Chamber, it was held that the incorporation was valid, as was the subsequent foundation of the charity and so the transfer of property to it, including the nomination of a master of the charity to receive the donation, was not void. The other heirs to Sutton's estate were therefore unable to retrieve any additional assets.

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(33) (1612) 77 Eng Rep 960

Sir Edward Coke wrote in the report in a unique style in the following words:

And it is great reason that an Hospital in expectancy or intendment, or nomination, shall be sufficient to support the name of an Incorporation, when the Corporation itself is onely in abstracto, and resteth onely in intendment and consideration of the Law; for a Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law; and therefore cannot have predecessor nor successor. They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by Attorney. A Corporation aggregate of many cannot do fealty, for an invisible body cannot be in person, nor can swear, it is not subject to imbecilities, or death of the natural, body, and divers other cases<sup>(34)</sup>.

He acknowledged it to be good law. He also noted that to modern eyes the language was so impenetrable that most lawyers simply took it on faith that the case stood for the principle for which it is cited. He summarised the ratio decidendi of the case thus:

That report, although largely incomprehensible in 1990, has been accepted as “express authority” that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything which a natural person could bind himself and to deal with its property as a natural person might deal with his own.

The case was also cited with approval (but distinguished) in another House of Lords case, *Ashbury Railway Carriage and Iron Co Ltd v Riche*<sup>(35)</sup>.

It was said at Common Law that ‘a corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may, in their distinct individual capacities.’<sup>(36)</sup>

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(34) LBC (1992) AC 1

(35) (1875) LR 7 HL 653

(36) Blackstone, Commentaries on the Laws of England 44 (1765).

The adoption of the concept of corporate criminal liability has followed a conservative course under the English law. Initially, England refused to accept the idea of corporate criminal liability for several reasons. Corporations were considered legal fictions, artificially entities that could do no more than 'legally empowered to do (ultra vires theory). Because corporations lacked souls, they could not have mens rea and could neither be blameworthy, nor punished. Chief Justice Holt decided that corporations could not be criminally liable, but their members could. In addition, corporations were very few in number, corporation being a privilege granted by the Crown. Therefore, the influence of corporations on the society was minimal.

During the 16<sup>th</sup> and 17<sup>th</sup> centuries, corporations became more common and their importance in the socio-economic life increased. A need for controlling corporate misconduct became more and more obvious. Corporations have been recognized as independent entities which owned property distinct from that of their members. The first step in the English development of corporate criminal liability was made in the 1840s when the courts imposed liability on corporations for strict liability offences. Lord Bowen decided that the most efficient way of coercing corporations was by introducing the concept of corporate criminal liability in the English law.

Soon after, by borrowing the theory of vicarious liability from the tort law the courts imposed vicarious criminal liability on corporations in those cases when natural persons could be vicariously liable as well. In 1944 the High Court of Justice decided in three landmark cases to impose direct criminal liability on corporations and established that the mens rea of certain employees was to be considered as that of the company itself. The motivation of the decisions was vague and confusing due to the lack of clear and organized criteria for attributing the mens rea element to corporations. This issue was clarified in 1972 in a case in which the civil law alter ego doctrine was used to impose the criminal liability on corporations, that is now known under the name of 'identification theory'.



The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person (e.g., the directors and managers represent the brain, intelligence, and will of the corporation). The willpower of the corporations' managers represented the willpower of the corporations. This theory was later criticized and slightly modified, but this decision still represents the landmark precedent in the English corporate criminal liability.

That perception changed overtime. First, it was agreed that a corporation might be held criminally liable for its failure to honour certain legal obligations (nonfeasance);<sup>(37)</sup> then for the inadequate manner in which it performed certain legal obligations malfeasance).

The United Kingdom has since 1940's dealt with corporate criminal liability on the basis of the doctrine of 'identification'. This doctrine had its origins in a civil case, *Lennard's Carrying Co. Ltd. V. Asiatic Petroleum Co. Ltd.*<sup>(38)</sup> in which Viscount Haldane said,:

"A corporation is an abstraction ... its active mind and directing will must consequently be sought in the person ... who is really ... the very ego and centre of the personality of the corporation."

In 1940's in a number of cases there was a shift in the scope of the class of persons considered sufficiently senior to constitute a corporation's 'directing mind and will'. By locating the directing mind and will the courts attributed liability to the Corporation. The courts moved from the current model of vicarious liability and adopted the principle of 'directing mind and will'.

In 1971, the decision of the House of Lords in *Tesco Supermarkets Ltd. v. Natrass (TESCO)*<sup>(39)</sup> clarified that corporations would be directly liable for wrongdoing committed by persons sufficiently senior to constitute the corporations 'directing mind and will', on the basis that the acts

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(37) Whareton, *Treatise on the Criminal Law of the United States* 58 (2d ed. 1852\_

(38) (1915) AC 705

(39) *Tesco Supermarkets v. Natrass (TESCO)* (1995) 2 AC 500

## Criminal Liability Of Corporations

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and culpable mindset of such individuals were the actions and mindset of the company itself.

In *Meridian Global Funds Management Asia Ltd. v. Security Commission*<sup>(40)</sup> the Privy Council held that in the case of statutory offences, the language of the provisions, their content and policy, served to indicate the persons whose state of mind would constitute the state of mind of the corporation.

Thus, the courts in UK followed seriously the Identification Doctrine and engaged in the inquiry as to the 'status and authority' of the person so that his acts could be regarded as acts of the corporation and liability imposed on the corporation.

In 1970's the legal system of UK took a different turn altogether and that was when the Parliament passed the Corporate Manslaughter & Corporate Homicide Act, 2007 which introduced the new principle of 'organizational liability' in the system of criminal justice.

Initiative for law reform was taken by the Law Commission of UK which in 194 had issued the proposals for reforming the law on involuntary manslaughter and in 1996 issued a report that recommended, inter alia, abolition of the existing offence of unlawful and manslaughter, its replacement by killing, and killing by gross carelessness, and the institution of a new offence of 'corporate killing.' In May 2000 the Government issued a consultation paper based on the Law Commission's recommendations. The Consultation Paper accepted the notion of failure in the management or organization of activities as a basis for liability, but inserted a requirement that these failures be referable to senior management. Finally, the legislation on this subject was enacted by the Parliament and the Corporate Manslaughter Act came into force on 6<sup>th</sup> April, 2008. The effect of this legislation is:

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(40) *Meridian Global Funds Management Asia Ltd. v. Security Commission* (1995) 2 AC 500

“An organization is guilty of the offence of ‘corporate manslaughter’ (corporate homicide in Scotland) where:

The way in which its activities are managed or organised: Causes the death of a person, and Amounts to a gross breach of a relevant duty of care owed to the deceased, and The way in which the organization’s activities are managed or organised by its ‘senior management’ is a ‘substantial element’ of the gross breach of the relevant duty of care.

There are exceptions to the regime under the Corporate Manslaughter Act that apply to certain acts or the decision of public authorities, or in the exercise of exclusively public functions<sup>(41)</sup>, military activities<sup>(42)</sup>; policing and law enforcement<sup>(43)</sup>, emergencies<sup>(44)</sup> and child protection and probation<sup>(45)</sup>.

## **(ii) The United States of America:**

In United States the Courts followed the old English principle in regard to non-natural persons, but later developed differently and more rapidly due to the important role of corporations in the American economy and society. The Courts had dealt with a good number of cases with regard to liability of corporations both in tort as well as crimes. In many of the cases the Supreme Court has expressed the view that Congress can impute to a corporation the commission of certain criminal offenses and subject it to criminal prosecution therefore. In actions for tort, a corporation may be held responsible for damages for the acts of its agent within the scope of his employment, , even if done wantonly, recklessly or against the express orders of the principal.<sup>(46)</sup> ... The Court has said that a corporation is responsible for acts not within its

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(41) Section 3 of the Act.

(42) Section 4 of the Act.

(43) Section 5 of the Act.

(44) Section 6 of the Act.

(45) Section 7 of the Act.

(46) *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U. S. 101

agent's powers, strictly construed, but assumed to be done by him when employing authorized powers, and in such a case no written authority under seal is necessary.<sup>(47)</sup>

With regard to liability in crimes, the Court has said, while corporations cannot commit some crimes, they can commit crimes which consist in purposely doing things prohibited by statute, and in such cases they can be charged with knowledge of acts of their agents who act within the authority conferred upon them. At the beginning of the 20<sup>th</sup> century, the corporate criminal liability concept was widely accepted.

In the famous case of *New York Central R. Co. v. United States*<sup>(48)</sup> the Supreme Court had occasion to review a legislation pertaining to the powers and functions of a Corporation under the federal law; the Court said, "Congress has power to so regulate inter-state commerce as to secure equal rights to all engaged therein, and the Act of February 19, 1903, known as the Elkins Act, is not unconstitutional because it imputes to the corporation, and makes it criminally responsible for, acts violative of the Inter-state Commerce act done by its agent.

### **(a) Types of Corporate Crimes for which there is vicarious liability:**

In United States, the law with regard to corporate liability earlier was almost the same as was the case with Common Law in the United Kingdom. But at the dawn of the 20<sup>th</sup> century, the Supreme Court expressed a more sweeping view.

It is true that there are some crimes which, in their nature, cannot be committed by corporations, but there is a large class of offences ... wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and

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(47) *Washington Gas Light Co. v. Lansden*, 172 U. S. 534.

(48) 212 US 481 (1909)

purposes of their agents, acting within the authority conferred upon them. If it were not so, many offences might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.”<sup>(49)</sup>

The Court spoke of ‘crimes which in their nature, cannot be committed by corporations’ but did not explain what specific crimes it had in mind. The Court however pointed out as to how the issue may be solved when it observed that the question turns on the nature of the crime and not the nature of the corporation.

**(b) Entities which are subject to Corporate Criminal Liability:**

In United States of America most federal criminal statutes spell out the categories of persons who would be subject to corporate criminal liability for example, the provision says, “whoever”, or ‘any person’ who violates their prohibitions. The difficulty which usually arises in such case is whether the words used in the Statute should be given a narrower meaning or a wider meaning. The Tax statutes are usually as terse as the example given above. Some statutes contain a detailed definition of the term person, for example, a Tax Statute says,

“When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

- (1) Person: The term person shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation;
- (2) Partnership and partner- The term ‘partnership’ includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on, and which is not,

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(49) New York Central & Hudson River Railroad Co. v. United States, 212 US 481, (1909)

within the meaning of this title, a trust or estate or a corporation, and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization;

- (3) Corporation- The term 'corporation includes associations, joint-stock companies, and insurance companies.'"(50)

### **(c) Criminal Procedure in regard to Corporate Crimes:**

During a criminal investigation and throughout the course of criminal proceedings, corporations enjoy many, but not all, of the constitutional rights implicated in the criminal investigation or prosecution of an individual. Corporations have no Fifth Amendment privilege against self-incrimination. On the other hand, the courts have recognized or have assumed that corporations have a First Amendment right to free speech, a Fourth Amendment protection against unreasonable searches and seizures, a Fifth Amendment right to due process and protection against double jeopardy; Sixth Amendment rights to counsel, jury trial, speedy trial and to confront accusers, and to subpoena witnesses, and Eighth Amendment protection against excessive fines.

### **(d) The system of Punishment:**

Corporations cannot be jailed. Otherwise, corporations and individuals face many of the same consequences following conviction. The federal Sentencing Guidelines influence the sentencing consequences of conviction in many instances. Corporations can be fined. They can be placed on probation. They can be ordered to pay restitution. Their property can be confiscated. They can be barred from engaging in various types of commercial activity. The Guidelines speak to all of these. For example, the Corporate fine Guidelines begin with the premise that a totally corrupt corporation should be fined out of existence, if the statutory maximum permits. A corporation operated for criminal purposes or by criminal means should be fined at a level

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(50) 26 U.S.C. 7701 (1) (a)

sufficient to strip it of all of its assets. In other cases, the Guidelines recommend fines and other sentencing features that reflect the nature and seriousness of the crime of conviction and the level of corporate culpability.

### **(3) The State of Canada:**

The State of Canada has a federal system of government in which there is distribution of powers between the federal government and the provincial governments, but Criminal Law is a federal subject. Canadian Criminal Code is a legislation enacted by the federal authority which is applicable throughout Canada. In this Code, 'Corporations' are included within the definition of 'persons' who may commit offences under the Canadian Criminal Code, but the actual attribution of liability to corporations occurs on the basis of the identification doctrine found in the U. K.

In Canada the law on this subject is in the form of the Criminal Code which has since been modernized to cover the criminal liability of corporations and the sentencing of corporations. The Criminal Code covers a wide range of crimes by all kinds of persons, the legislation employs complex and specific language in its provisions. The general features of the law may be described as the following:

The Criminal Code of Canada requires various elements to be proved before a person can be convicted of a crime. The commission of a prohibited act by the accused, such as, causing bodily harm, counselling a person to commit an offence, driving while impaired, or touching a person for a sexual purpose must first be proven.

The Crown must also prove that the accused had the requisite guilty state of mind in committing the offence. A person cannot be found guilty of a crime if the court concludes that the person was suffering from a mental disorder at the time the act was committed or did not know of certain facts that give the act its criminal quality.<sup>(51)</sup>

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(51) Section 1 'Current Canadian Law', Criminal Code of Canada.

## Criminal Liability Of Corporations

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The Criminal Code defines a person to include “every one, a body corporate, a society, a company, and includes ‘public bodies, bodies corporate, societies, companies, firms, partnerships, trade unions or an association of persons created for a common purpose.’”<sup>(52)</sup>

Under the law, officers and directors of a corporation cannot be convicted of a crime for acts of the corporation solely because of their status as directors or officers. If they are directing the corporation to commit crimes that will benefit the corporation, or are otherwise participating in criminal activities within the corporate context, they may be held criminally responsible. In such circumstances, the directors and officers would be charged with the offence jointly with the corporation.

A person is a party to an offence if the person actually commits the offence or aids or abets another person to commit it.<sup>(53)</sup> The Criminal Code makes a person who counsels another person to commit an offence also a party to the offence.

The Criminal Code also addresses the question of sentencing an organization. Since corporations cannot be imprisoned so the Criminal code provides for fines when corporations are convicted of crime.

Basically, a corporation is guilty of a crime if its ‘directing mind’ committed the prohibited act and had the necessary state of mind. To be a ‘directing mind’, a person must have so much authority in the corporation that the person can be considered the ‘alter ego’ or ‘soul’ of the corporation. Determining who is a directing mind depends on the facts of each case, but generally, the person must have authority to set policy rather than simply having authority to manage. The directing mind has as well to be intending, at least in part, to benefit the corporation by the crime.

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(52) Section 2 of the Criminal Code of Canada.

(53) Section 21 of the Criminal Code of Canada.



The Criminal Code of Canada in its improved form deals with an organization rather than a corporation. The definition of 'person' as given in the Code includes bodies in addition to corporations and the same rules for attributing criminal liability apply to all forms of joint enterprises carried out by individuals, regardless of their structure.

Under the law the Courts may place individual offenders on probation. The court imposes conditions on the offender, such as reporting to a probation officer, not drinking alcohol or taking drugs and performing community service, and in observing these conditions, the offender avoids going to jail. The Code contains a specific section dealing with probation orders for organizations. The list of conditions the Judge can impose includes:

Providing restitution to victims of the offence to emphasize that their losses should be uppermost in the sentencing judge's mind; Requiring the corporation to inform the public of the offence, the sentence imposed and the remedial measures being undertaken by the organization.<sup>(54)</sup>

The new provision also sets out conditions that may be imposed by the court to supervise the efforts of the organization to ensure it does not commit crimes in the future. A court can order an organization to:

Implement policies and procedures to reduce the likelihood of further criminal activity;

Communicate those policies and procedures to employees, Name a senior officer to oversee their implementation; and Report on progress.

#### **(4) The State of Australia:**

The Criminal Law in Australia is based on State legislation; all state offences are punishable under the Law enacted by the State legislature.

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(54) Section 732 (3.1) of the Criminal Code of Canada.

However, the federal legislature has the competence to enact a Law on inter-State offences. The legislation enacted by the federal law covers corporate offences. The newly introduced federal laws hold corporations liable for criminal offences where 'corporate culture' has encouraged or allowed the commission of offences.

For the purposes of the Australian Criminal Code Act, corporate culture means "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place. "

The Law Reform Commission of Australia has suggested that changes be made to the country's corporate sentencing model on the lines of the British Corporate Manslaughter and Corporate Homicide Act.<sup>(55)</sup> In order to establish this element of a corporate offence, one of the following scenarios must be proven to establish the requisite authorisation or permission:

- 1) The Board of Directors carried out or allowed the prohibited conduct;
- 2) Senior management engaged in or allowed the conduct;
- 3) The 'corporate culture' of the body corporate 'directed, encouraged or tolerated' the commission of the offence;
- 4) The body corporate did not create and maintain a 'corporate culture' that required compliance with the law.

### **A- few guidelines for evolving the sentencing policy the sentencing principles:**

From the close of nineteenth century, however, a trend has developed of corporate globalization in which the business community headquartered in one country conducts its business with people of the foreign countries. In order to safeguard the interests of the persons with whom the foreign companies come in contact the international

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(55) Welsbrot, D., Opeskin, B & McCrimmon, L. (2006)

community has emphasized the need of maintaining a certain standard with regard to occupational health and safety of the people of the countries wherever they are. Such an approach in law making has resulted in the emergence of new rules for regulating and prosecuting the corporations which indulge in different kinds of business and cause harm to the interests of the individuals. Such an approach has resulted in the concept of International Corporate Criminal Liability the message of which is that the international community should recognize the importance of ensuring that corporations understand the laws and standards with which they must comply if they wish to avoid criminal liability.

### **B - The Rule of Corporate Criminal Liability in the Civil Law countries:**

The Civil Law System is the earliest among the legal systems of the Western Jurisprudence. The Civil Law, as stated above, is based on the principles of Roman Law.

#### **(i) Rome:**

Roman Law of the ancient days had recognized the right of individuals to constitute trade, religious and charitable associations but the rule of their liability was lacking at that early stage of their evolution.

The different forms of the abstract entities including the territorial units of the State were known as *civitas* or *coloniae*. They were called *universitates personarum* (or *corpus / universitates*). They could be created by authorization and had their own identity; they owned property separate from that of their founders, and had independent rights and obligations. These entities were viewed as a fiction of the law.

In the medieval period the existence of independent entities with rights and obligations constituted the basis for the evolution of corporate institutions.

## **Criminal Liability Of Corporations**

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Pope Innocent IV created the basis for the maxim *societas delinquere non potest* by claiming that unlike individuals who have willpower and a soul, can receive the communion, and are the subjects of God's and emperor's punishments, *Universitas* are a fiction that lack a body and a soul, and therefore cannot be punished.

Later, in the 12<sup>th</sup> to 14<sup>th</sup> centuries the concept of corporate criminal liability evolved; the Roman Law clearly imposed criminal liability on the *universitates*, but only when its members were acting collectively. The emperors and popes used to frequently sanction the villages, provinces and corporations. The sanctions imposed could be fines, the loss of specific rights, dissolution, and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or excommunication.

In the 14<sup>th</sup> century the authorities recognized that corporations had their own willpower and therefore criminal liability could be sanctioned to them. With a few exceptions such as bigamy, rape etc. an entity could commit any crime which could be committed by an individual, regardless of the fact that the crime had no connection with the scope of the corporation.

In the 18<sup>th</sup> century it was believed that corporations should be liable, both civilly and criminally, for the acts committed by their members. Cities, villages, universities, trade and religious associations were required to pay fines for their crimes.

### **(ii) France:**

France had enacted a rule in the 16<sup>th</sup> century to the effect that there could be criminal liability of a corporation if the crime was committed by a collectivity's decision. Although the corporations were still considered legal fictions, the existence of corporate criminal liability sustained the conclusion that corporate criminal liability was not incompatible with the nature of the corporations.

Before the French Revolution a new rule was formulated through an Ordinance which established the criminal liability of corporations. In addition, the Ordinance provided for the simultaneous criminal liability of individuals for committing the same crimes as accomplices.

The French Revolution brought extreme changes in the French law; the corporations, including the provinces and non-profit hospitals were completely eliminated and all their goods confiscated. The notion of corporation was incompatible with the individualist aspirations of the revolutionary government. Moreover, the new government thought that, due to their economic and political influence corporations represented a potential threat for the new regime.

Under the influence of the ideals of French Revolution the majority of the continental Europe changed its view regarding corporate criminal liability. Corporations lost their power and importance and became undesirable entities under the antagonistic coalition of the monarchic absolutism and liberalism. This reality determined the creation of doctrinal theories that tried to find a basis for the lack of criminal liability of corporations. Malblanc and Savigny were the first authors sustaining the principle *societas delinquere non potest* in the 19<sup>th</sup> century. The main argument was that a corporation is a legal fiction which, lacking a body and soul was not capable of forming the criminal *mens rea* or to act in *propria persona*.

Writers like E. Bekker and A. Briz argued that. Corporations have a pure patrimonial character which is created for a particular commercial purpose and lacks juridical capacity. Therefore corporations cannot be the subject of criminal liability.

Critics of the fiction theory such as O. Gierke and E. Zitelman, argued that corporations are unities of bodies and souls and can act independently. The corporation's will power is the result of their members' will. F. von Liszt and A.

Maester were some of the principal authors who tried to substantiate the concept of corporate criminal liability in this period. They argued that the corporation's capacity to act under the criminal law is not fundamentally different from that under civil or administrative law; corporations are juristic persons that have willpower and can act independently from their members.

In the nineteenth century the number and importance of corporations in the European society increased significantly. The laws became more flexible and the states' role in the process of incorporation diminished. For the purpose of controlling the corporate misconduct, the Council of Europe recommended that "those member states whose criminal law had not yet provided for corporate criminal liability should consider the matter." France responded by making several revisions of its Penal Code for the purpose of modernizing its text. The revision of 1992 officially recognized the corporate criminal liability because, in the opinion of the French legislators it made judicial sense and because it lacked other effective ways of sanctioning criminal corporate misconduct. This process culminated with the Penal Code in 1994, which established for the first time in any civil law system, a comprehensive set of corporate criminal liability principles and sanctions providing in article 121-2 that, with the exception of the State, all the juristic persons are criminally liable for the offences committed on their behalf by their organs or representatives.

### **(iii) Germany:**

Due to doctrinal issues Germany resists the idea of incorporating corporate criminal liability in its legal system.

In Germany, corporate criminal liability is still governed by the maxim *societas delinquere non potest* and corporate misconduct is the subject of a very developed system of administrative-penal law.

Germany's administrative-penal system is the successor of a category of

petty offences. The reason for this growth of administrative procedures is of course to be found in the evolution of the Etat-Gendarme to the twentieth-century welfare state, resulting in an enormous expansion of the domain of the State resulting in an enormous expansion of the domain of the State.

The administrative fines are imposed by specialized administrative bodies which are part of the executive branch of the government. The sanctions can be imposed both as individuals and corporations. Under the administrative-penal law, punitive sanctions can be applied. However, the imposition of administrative sanctions does not imply moral stigma and this consideration seems to have been the most important for the German legislature in option for administrative sanctions rather than leaving the matter under the aegis of the criminal law.

The main arguments in defence of the lack of corporate criminal liability in Germany are: corporations do not have the capacity to act, corporations cannot be culpable, and the criminal sanctions are appropriate, by their nature, only for human beings.

**(iv) Italy:**

For a corporate entity to be held liable in Italy, under the Decretal Legislation No 231 of 2001 the offence must have been committed (at least in part, if not exclusively) in the interest or for the benefit of such corporate entity. Conversely, the corporate entity is not liable if the employee has acted exclusively in their or a third party's interest.

Under law 231 a corporate can be held liable only in relation to specific crime (the relevant offences) list under article 24 of the law, in addition responsibility may arise if the employee acts and abets the commission of such crimes. Finally, the corporate can be held liable—albeit exposed to lower penalties— even in the event that the relevant offence is merely attempted by the employee. The relevant offences include the following:

- Fraud for the purpose of receiving public funding or subsidies, fraud against the Italian government, municipalities or government agencies, computer fraud against the Italian Government or a Government entity.
- Cyber crimes and breach of data protection;
- Criminal conspiracy;
- Extortion and corruption
- Counterfeit of cash treasury bonds or stamp duties;
- Terrorism;
- Market abuse;
- Manslaughter and breaches of health and safety legislation;
- Slavery, exploitation of prostitution and pornography offences;
- Money laundering and self-money laundering;
- Copyright offences;
- Obstruction of justice offences;
- Environmental offences;
- Use of illegal immigrant workers and
- Private corruption.

### **(v) Luxembourg:**

The existence of corporate criminal liability is a relatively recent phenomenon in Luxembourg. Legislation was introduced on 3<sup>rd</sup> March 2010 on the criminal liability of legal persons the adoption of this law represents a significant change to the principles of the Luxembourg legal system; it was introduced both by international considerations such as reports from the Financial Action Task Force and by a deliberate effort of the Luxembourg legislator. The law applies to all corporate entities (including public legal entities with the exception of the State



and the local government entities.

Luxembourg has a three-tier system of offences which in descending order of gravity are called (a) crimes (ii) offences and (iii) contraventions. Corporate entities are not liable for the commission of contraventions which have been specifically omitted from the law.

There is no significance on the crimes and offences which a corporation entity is able to commit; indeed the law was drafted for adding corporate offences as potential perpetrators of the Criminal Code in order to render the Criminal Code applicable to them.

**(vi) Poland:**

Corporate Criminality in Poland is regulated by an Act on the Liabilities of Collective entities for acts prohibited under Penalty (the Liability Act) which came into force in 2003. It generally applies to all corporate entities, except the State Treasury, local government offences and associates thereof.

A corporate entity may be held liable for offences committed by:

- A person acting on behalf of his corporate entity or in the interest and within the scope of his/her powers of duty to represent it, ...
- A person given permission to act by a manager;
- A person acting on behalf of the corporate entity or in the interest with the consent or knowledge of a Manager or
- A person acting on behalf of the corporate entity or in the interest with the consent or knowledge of a Manager; or
- A person being “an entrepreneur (a sole trader) who is involved in a business relationship with the corporate entity;

The Liability Act lists the offences for which a corporate entity may face criminal liable. It refers to specific offences regulated in the Polish Criminal Code which are generally connected to individuals. The list is constantly being expanded and currently includes inter alia:

- Offences against economic turnover (for example money laundering);
- Offences against trading in money and securities (for example, currency counterfeiting or the counterfeiting of official security paper and the illegal assurance of corporate bonds);
- Offences against the protection of information (for example, the obtaining or removing information by an unauthorised person);
- Offences against the reliability of documents;
- Offences against property (for example, fraud, receipt of stolen property);
- Offences against the environment (for example, the pollution of water, air or soil);
- Bribery and contribution and certain fiscal offences;
- Offences of a terrorist nature, and
- Major offences against public order.;

### **(vii) China:**

Corporate Criminal Liability exists in China as a subset of what are called 'unit crimes. Unit includes corporations but also various entities.<sup>(56)</sup>

In China there was revision of the General art of the Chinese Criminal Code which allowed for unit crimes. A unit crime is subject to the

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(56) Corporate Culture as a Basis for the Criminal Liability of Corporations, Report prepared by Allens Arthur Robinson for the United Nations Secretary General on Human Rights and Business, Feb., 2008

provisions of the new Criminal Code thus:

“Companies, enterprises, institutions, state organs and social organizations when committing acts endangering the society shall assume criminal liability when prescribed by law.”<sup>(57)</sup> According to the author on Chinese Law, there are approximately 81 offences in the Criminal Code which are related to corporate criminal liability. But according to another writer, Liu Jiachen, there are 129 offences which come under the category of corporate criminal offences. According to Liu, a unit crime is committed as a result of a decision made by the unit collectively or by a person in a position of responsibility and reflects the will of a unit. The decision made by a unit collectively refers to the decision made by an agency which has the authority to act on behalf of a unit in accordance with the law or the constitution of that unit. E.g., decision made by staff and workers’ representative assembly, shareholder’s assembly, board of directors and special leader’s agency. “The decision made by a person in a position of responsibility refers to the decision made by an individual who has the authority of a unit in accordance with the law or the constitution of the unit, e.g., decision made by a factory director, chairman of the board of a corporation, general manager, or the persons who are responsible in organs and institutions.”<sup>(58)</sup> According to the same author an ordinary employee’s crimes will not amount to a unit crime. The majority of unit crimes can only be committed intentionally, although some can be committed by negligence.

The second part of the identifying test of a corporate crime in China is the test of the person being in a position of responsibility which is similar to the identification approach which is followed in many jurisdictions.

This element of crime appears to impose a benefit test. Lieu observes that a unit crime requires the unit to obtain an illicit benefit for the

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(57) Jianfu Chen, ‘Chinese Law: Towards and Understanding of Chinese Law, Its Nature and Development’ (1999)

(58) Lieu Jiachen, ‘The Legislation and Judicial Practice on Punishment of Unit Crimes in China, (1999).

unit. The requirement of benefit for the unit exclude private crimes committed by personnel for their own private benefit. More confusing is the requirement of illicit benefit. Lieu explains: "Here 'illicit benefit' refers to the benefit prohibited by national laws, administrative laws and regulations, local laws and regulations as well as other related stipulations. If a unit obtains an legitimate benefit by an act which violates the law, it will not have committed a unit crime."<sup>(59)</sup>

With regard to the system of punishment the Chinese Criminal Code provides, "When a unit commits a crime, it shall be fined. At the same time, the person in charge of this unit and other directly responsible persons shall be able to be punished by the criminal law unless otherwise provided."<sup>(60)</sup>

Commenting on this provision the author of Chinese Criminal Law Mr. Lieu observes: "If a unit, as an independent subject of a crime and of its own will, commits a crime, which seriously endangers society, the unit ought to receive criminal punishment. At the same time, the intention of committing the crime and the act of endangering society shall be deemed to be conscious actions by the person who is responsible within the unit. If no person is responsible, there is no crime committed by a unit."<sup>(61)</sup>

### **C– The Rule of Corporate Criminal Liability in GCC countries: 1. Saudi Arabia:**

The sources of Criminal Law in Saudi Arabia are the Shariah (Islamic Law) derived from the Holy Quran and the Sunna (words and deeds of Prophet Mohammed), as interpreted by influential scholars of Islamic jurisprudence.

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(59) Ibid, 74

(60) Article 31 of the Chinese Criminal Code.

(61) Lieu Jiachen, 'The Legislation and Judicial Practice on Punishment of Unit Crimes in China, (1999).

Page 76.

The sources of law are supplemented by Statutes, regulations, decree and circulars issued by the secular agencies of the Kingdom under the authority given to them for the purpose. These laws are in the form of Royal decrees, ministerial decisions, resolutions, departmental circulars and other pronouncements of authorized officials. While these sources constitute a valid source of law, there is in all matters the paramountcy of the Sharia law.

The Kingdom of Saudi Arabia does not have a Penal Code containing exhaustive provisions on various crimes but the rules and regulations in the form of the aforesaid sources, as stated above, constitute a valid source of law on various kinds of crimes including the corporate crimes.

Based on the principles embodied in the above sources of law, the type of corporate crimes, and the type of punishment for such crimes may be described as follows:

**(i) Types of crimes:**

- **Anti-Bribery Law:** The Law for Combating Bribery issued pursuant to a Royal Decree<sup>(62)</sup> lists a number of acts that, if committed by the corporate person, can lead to criminal liability. These acts include offering or providing a public official any promise or gift in order to:
  - Perform any of his or her duties;
  - Fail to perform any of his or her duties
  - Violate his or her official obligations.
- **Anti-money laundering Laws:** The Anti-money Laundering Law, issued pursuant to a Royal Decree<sup>(63)</sup> imposes criminal

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(62) Decree No. M/36 dated 29/12/1412- H corresponding to 11/992-6-

(63) Decree No. M/39 dated 25/12/1424/06/H (corresponding to 232003/08/G),

liability on any person (natural or juristic) that contravenes the anti-money laundering requirements. The Saudi Arabian Monetary Agency has issued further rules relating to money laundering for banks and insurance companies whilst the Capital Market Authority has issued rules for Authorised Persons (financial institutions licensed by the CMA to conduct securities business in the Kingdom).

- **Antitrust crimes:** The Competition Law issued pursuant to a Royal Decree<sup>(64)</sup> (the “Competition Law”) prescribes numerous sanctions for acts committed by corporate entities that breach the Competition Law, including entering into restrictive agreements, abuse of dominant position and economic concentration.
- **Trademark crimes:** These crimes are governed by the Trademark Law issued pursuant to a Royal Decree<sup>(65)</sup> (the “**Trademark Law**”). A person is deemed to be infringing a trademark if he or she or it:
  - Forges or fraudulently uses or imitates a registered trademark to deceive the public;
  - Places a mark owned by another person on goods with the intent to deceive; or
  - Knowingly sells or possesses, with the intention of selling products.
- **Environmental Crimes:** The Public Environmental Law, issued pursuant to a Royal Decree<sup>(66)</sup> (the “**Environmental Law**”), criminally sanctions any person (which includes corporate persons) for violating the law. Crimes include not abiding by the

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(64) Decree No. (M/25) dated 041425/05/H (corresponding to 222004/04/G)

(65) Decree No. M/21 dated 281423/05/H (corresponding to 082002/08/G)

(66) Decree No. M/34 dated 281422/07/H (corresponding to 152001/10/G)

relevant procedures and controls (as set by the Environmental Law) for the production, transportation, storage, recycling, treatment and final disposal of poisonous, hazardous or radioactive materials.

- **Cover-up Crimes:** The Anti-Cover Up Law, issued pursuant to a Royal Decree<sup>(67)</sup> prohibits any non-Saudi person from conducting a business in the Kingdom without a licence from the foreign investment authority (“**SAGIA**”). A person is considered to be engaged in a “cover-up” activity if he or she enables a non-Saudi to invest in or carry out any activity without the appropriate licence, whether by the use of his or her name, license, commercial registration or any other means.
- **Cyber Crimes:** The Anti-cyber Crime Law, issued pursuant to Royal Decree lists a number of acts that, if committed by the corporate person, can lead to criminal liability. These acts include:
  - Unauthorised spying, interception or reception of data through an information network or computer;
  - Illegal accessing of bank or credit data;
  - Production, preparation, transmission or storage of material impinging on public order, religious values, public morals and privacy through any information network or computer;
  - Construction or publicising of websites on information networks for terrorist organisations and/or facilitating communication between such organisations, etc.; and
  - Unlawfully obtaining data jeopardising the internal or external security of the Kingdom etc.;

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(67) Decree No. M/22 dated 04/1425/05/H. (222004/06/G),

- **Commercial fraud crimes:** The Anti-Commercial Fraud Law, issued pursuant to a Royal Decree<sup>(68)</sup> (the “**Commercial Fraud Law**”), lists the following acts (amongst others) as violations:
  - Deception or attempted deception by a person as to a product’s nature, type, kind, its origin, its quantity, weight, capacity etc.;
  - Display or sale of a fraudulent product;
  - Manufacturing, acquiring, displaying or selling products which do not conform to applicable standards specifications
  - Importing fraudulent products.
- **Securities and Stock Exchange-related crimes:** Under the Capital Market Law, issued pursuant to a Royal Decree<sup>(69)</sup> any person involved in market manipulation or insider trading, or purports to carry on securities business without the relevant licence from the CMA will be criminally liable.

### **(ii) Identification of companies and entities to which liability may apply:**

There is nothing in the laws mentioned above that would seem to exclude governmental agencies and their officers and departments. In fact, the Bribery Law and the Anti-Forgery Law specifically refer to acts of public officials. Therefore, at least theoretically, all types of corporate persons may be criminally liable.

### **(iii) Corporate liability for crimes committed abroad by its representatives or subsidiaries:**

There are no specific provisions in the relevant laws that govern the criminal liability of corporate entities when its representatives or

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(68) Decree No. M/19 231429/04/H (corresponding to 292008/04/G)

(69) Decree No. M/30 dated 021424/06/H (corresponding to 312003/07/G),



subsidiaries commit crimes abroad.

**(iv) Corporate liability in the case of transactions taking place after the commission of a crime (acquisitions, mergers, demergers, etc.)**

**Mergers:** The company resulting from the merger shall be liable for all the liabilities of the merged companies (legal memorandum of the Ministry of Commerce and Industry.<sup>(70)</sup> Transformation: The transformed company will continue to bear all the liability incurred prior to the transformation,<sup>(71)</sup> Acquisition: An acquisition of a company does not change the corporate liability of the company itself.

**(v) Type of sanctions applicable to the companies:**

Sanctions applicable to corporate entities include Fines, Confiscation, Cancellation of trade Licences, and Closure of establishments. For example, Article 20 of the Bribery Law provides that if a director or employee of a company or other business establishment is convicted of having violated the Bribery Regulations and it is determined that he or she did so in order to benefit the company, the company will be subject to a fine of up to 10 times the value of the bribe or a ban of at least five years on the company's being granted supply or public works contracts with Ministries or public establishments, or both. In addition, each government agency that has an ongoing contract with the relevant company is required to submit to the Council of Ministers a report suggesting the course of conduct to adopt regarding the project being performed by the company for the relevant government agency, notwithstanding that the particular agency may have no connection to the sanctioned infraction. In addition, the Government Tenders and Procurement Law and most standard governments provide for the withdrawal of work from, and possible blacklisting of, contractors who

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(70) Memorandum No. 197811/ dated 61988/10/G).

(71) (Article 211 of the Companies Law).

are found to have resorted to bribery to obtain the contract.

SOURCE:<https://globalcompliancencnews.com/white-collar-crime/corporate-liability-in-saudi-arabia/>

### **2. United Arab Emirates (UAE):**

The legal basis for corporate liability in UAE is: Article 65 of the Federal Penal Code provides that juridical persons, with the exception of governmental agencies, are responsible for any criminal act committed for their account or in their name by their representative, director or agent. Where the penalty for a criminal offence would be non-financial, the penalty that may be imposed against a convicted corporation is limited to a maximum fine of AED 50,000. However, this does not represent the maximum financial liability of a corporation that is found to have committed a crime. Article 22 of the Cr.P.L. allows the victim to make a claim against the company (and any other perpetrator) for civil compensation in respect of harm suffered as a result of the crime.

#### **ii) The types of crimes for which the corporate entities may be subject to:**

In theory, a corporate entity may be subject to any crime committed in the circumstances described by Article 65 of the Federal Penal Code. The following are a few of the crimes very frequently occurring in UAE for which the question of corporate criminal liability arises:

- Fraud and Breach of Trust
- Bribery & Corruption
- Embezzlement of public funds
- Money Laundering
- Forgery
- Dishonoured cheques

- Director & Officer liability for mismanagement or stating false information in company records
- Cyber Crimes
- Labour issues and violations of safety regulations which cause the death of one or more employees
- Criminal cases against employees for theft, breach of trust or disclosing confidential information.<sup>(72)</sup>

### 3. Jordan:

In Jordanian legal system, the principle of corporate criminal liability is not a disputable issue, as private legal entities have criminal liability. The criminal liability of legal entities is recognized under the Penal Code of Jordan.<sup>(73)</sup> Therefore, legal entities like natural persons are objects of the criminal law, and they can be criminally liable for illegal acts and criminal offenses committed by their organs, agents, representatives and employees.<sup>(74)</sup> The Penal Code determines the conditions for establishing the criminal liability and for imposing punishments on corporations that involved with unlawful actions and activities. Section 74 (2) of this Code clearly recognizes the principle of corporate criminal liability<sup>(75)</sup>.

The Jordanian Cassation Court applied this principle in early sixties of the last century, as the court ruled that the criminal liability can be established against the company as a legal entity<sup>(76)</sup>. Consequently, the Court also has ruled that criminal liability of the legal entity does not exclude the criminal responsibility of the natural persons that employed

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(72) Corporate Criminal Liability in UAE by Andrew Hudson & Omar Khodeir - a.hudson@tamimi.com / o.khodeir@tamimi.com

(73) (Al-Mahazneh, 'The Criminal Responsibility of the Legal Person', Comparative Study, Dirasat: Journal of Law and Shariat, University of Jordan, 2015: 42, 133146-.p. 137).

(74) Al Sharosh, The Criminal Liability of Legal Entities, Mutah University (In Arabic\_ 2006: p. 75).

(75) Latimer, P. Australian Business Law, 30th Edition (2011) Sydney, CCH Australia Ltd.

(76) Lazarus, A. A. Multinational Corporations, International Encyclopedia of the Social & Behavioral Sciences, (2001)

by a corporation, and whose crimes committed in the name or on behalf of the corporation<sup>(77)</sup>. The Court of Cassation held the corporate criminal liability for custom evasion in harmony with section 205 of the Custom Act and section 74 of the Penal Code, 1960. In several cases, the Cassation Court of Jordan has clarified that section 74 (1) of the Penal Code contains a general rule, which provides that the criminal liability of a person can be held when a crime proved that it was committed consciously and intentionally, and such person can be prosecuted, convicted and punished for such crime. The court explained the legislative attitude towards the concept of corporate liability out of interpretation of section 74 (2) by assuring that the legal entity has its own will and mind, and it can be prosecuted and convicted for its crimes. The same court has approved the conviction of the legal entity for the crime of issuing a check without balance in accordance with section 421 of the Jordanian Penal Code.

In addition, the recognition of corporate criminal liability under the Penal Code of Jordan does not exclude the personal criminal responsibility of the natural persons employed by the corporation. Therefore, the criminal liability of the corporation for illegal acts and criminal offenses of its agents, organs, representatives and employees dose not exempt those natural persons from their personal criminal responsibility for those offenses committed in the name or for the interest of the corporation. For instance, section 74 (1) of the Jordanian Penal Code, 1960 distinguishes between the corporate criminal liability and the personal criminal liability of natural persons, who can be separately liable for their crimes, even those committed within the scope of their employment in the corporation.

The Penal Code of Jordan obviously determines the conditions for corporate criminal liability. Section 73 of the Code clearly states

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(77) Lederman, E. Criminal Law, Perpetrator and Corporation: Rethinking a complex Triangle, *The Journal of Criminal Law and Criminology* (1985) 76.

that the private legal entities can be criminally held liable for crimes committed by their representatives or directors or agents in their name or on their behalf. The provisions of section 74 (1) are applied to both Jordanian and foreign legal entities, such as holding companies and their subsidiaries, limited companies as well joint stock companies, profit and non-profit legal entities, and all juridical persons, excluding governmental bodies.

Under Jordanian legal system, legal entities of the private law can be criminally held liable for illegal acts and criminal offenses committed in their names or on their behalf by their representatives or directors or agents. Hence, the provisions of section 74 (2) can be interpreted as to include all crimes that committed in the name or on behalf of a corporation by its managing body, authorized employees intentionally or lack of surveillance or control of corporation's representatives or directors or agents.

#### **4. Bahrain:**

Like the law in other GCC countries, in Bahrain also there is the concept of Corporate Criminal Liability recognized in relation to various crimes in which corporate bodies are involved. By way of illustration, reference may be made to the recent legislation on the crime of Money Laundering. The Decree promulgated by His Highness the King of Bahrain in 2001 contains the law known as Bahrain's Anti-Money Laundering Law,<sup>(78)</sup>.

Under this law 'criminal activity' means any activity which is a crime whether in the State of Bahrain or in any other State, and the offence of 'Money Laundering' is defined as: "Any person who commits any of the following acts for the purpose of showing that the source of the property is lawful shall have committed the offence of money laundering:

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(78) Decree Law No. (4) of 2001

- (a) Conducting a transaction with the proceeds of crime knowing or believing or having reason to know or believe, that such property is derived from criminal activity or from an act of participation in criminal activity;
- (b) The concealment or disguise of the nature, source, location, disposition, movement, rights with respect of, in or over or ownership of the proceeds of crime, knowing or believing, or having reason to know or believe that such proceeds of crime are derived from criminal activity or from an act or participation in criminal activity.
- (c) The acquisition or receipt or transfer of the proceeds of crime, knowing or believing, or having reason to know or believe, that the same was derived from criminal activity or from an act of participation in criminal activity;
- (d) The retention or possession or transfer of the proceeds of crime, knowing or believing or having reason to know or believe, that the same was derived from criminal activity or form an ac of participation in criminal activity....”<sup>(79)</sup>

The penal provisions relating to the offence of Money Laundering in the Kingdom of Bahrain are the following –

A person can be punished for the offence of money laundering under this law even if he is not convicted in the underlying criminal activity. In this context, “underlying money laundering activity” refers to criminal activity from which the property which is involved in a money laundering offence has been directly or indirectly derived.

A person can be separately charged and convicted of both a money laundering offence under the law and of an offence constituted by an

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(79) Article 2 of the Decree Law No. (4) of 2001

underlying criminal activity from which the property or the proceeds in respect of which he is charged with money laundering, were derived;

A person can be separately charged and convicted of both a money laundering Under this law and of an offence constituted by an underlying criminal activity from which the property or the proceeds in respect of which he is charged with money laundering, were derived....”<sup>(80)</sup>

## **CONCLUSION:**

After making a survey of the theoretical framework of corporate persons and the principles of law on the subject of corporate liability as they have developed in various legal systems the conclusions arrived at may be stated as follows:

- i) The concept of ‘legal persons’ developed with regard to the status and functioning of natural persons and the non-natural entities but the theories that developed in the sphere of company law are deficient in certain respects because of which there exists no clear cut idea to guide the people with regard to the liability of companies and corporations.
- ii) The objectives of the criminal law under the new theories are almost the same as those under the conventional system of criminal law which means the new system of criminal justice cannot take shelter under fake theories and avoid their responsibility on whimsical grounds;
- iii) The Common Law systems have taken a lead and freed their jurisprudence from the shackles of Mens Rea, yet certain legal systems still cling to the conventional theory of Mens Rea and avoid their responsibility to bear criminal liability;

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(80) Ibid, Article 2.2 to 2.3

- iv) If the objectives of the conventional and the modern systems of criminal justice are the same how can there be two different methods of punishment for the natural and the non-natural persons.
- v) The principle of sanctions which certain countries have introduced in their criminal justice system appears to be suffering from discriminatory practices.
- vi) It is necessary to harmonize the law on corporate criminal liability and punish the perpetrators of the corporate crimes in the same way as natural persons are punished under the conventional system of criminal justice.
- vii) Long ago in the 16<sup>th</sup> and 17<sup>th</sup> centuries the consensus of commentators agreed that corporations could not be held criminally liable. Lord Holt wrote simply and decisively in 1701 that a 'corporation is not indictable, but the particular members of it are. Eminent writers on criminal law had stated that there were at least four significant obstacles at that point to the recognition of corporate criminal liability:

It was difficult for courts to attribute acts by individuals to a juristic fiction, the corporation;

Corporations, being soulless, did not seem capable of moral blameworthiness to an age still dominated by religious convictions and morality;

The ultra vires doctrine seemingly denied corporations the power to commit crimes, because their powers were strictly limited by their charters; and

The corporation did not fit well within the then existing system of



criminal procedure, which depended on the defendant to plead before the courts (and usually confess).<sup>(81)</sup>

- viii) The principal barrier to the growth of corporate criminal liability was the sense of early courts and commentators that a corporation could not be held liable for a crime that required proof of intent. To most European courts, this remained an insurmountable barrier until only very recently. But in the United States, which had earlier lagged behind the United Kingdom, this barrier was crossed in 1909 in the US Supreme Court's decision in *New York Central & Hudson River Railroad Company v. United States*<sup>(82)</sup>
- ix) Such a realistic interpretation has changed the situation; it is advisable that the courts of other countries also follow suit and remove the barriers which are there in the proper implementation of the law and in attaining the objectives of criminal justice.
- x) The significance of a study relating to variations in the matter of corporate liability in various legal systems is that it may bring to light the true nature and character of the Law on criminal liability of corporations.

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(81) A fuller discussion of these problems is given in the treatise, 'Corporate Criminal Responsibility, by S. Kadish (ed.) Encyclopedia of Crime and Justice, vol.1, New York 1983 at 253.

(82) 12 US 481 (1909)

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## **Criminal Liability Of Corporations**

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## Table of Contents

Subject	Page
Section – I : The Jurisprudence of Corporate Theory	69
i) The Concept of ‘Person’	72
ii) The Concept of ‘Legal Person’	73
iii) Corporate Persons	75
iv) Companies as Corporate Persons – The Basic Features of a Company as a Corporate Body	77
v) Juristic Theories about Corporate Personality	81
a) Fiction Theory	82
b) The Concession Theory	83
c) The Purpose Theory	83
d) The Symbolist Theory or Bracket Theory	84
e) The Realist Theory	84
vi) Statement of the Problem	85
The Concept of corporate Crimes and the Problems related to Corporate Criminal Liability	86
1) The Problem of Corporate Crime in recent years	88
a) The Problem of Corporate Crimes in recent years in U S A	89
b) The Problem of Corporate Crimes in recent years in Europe	91
c) The Problem of Corporate Crimes in Saudi Arabia	92
2) The system of Sanctions adopted to punish Corporate Criminality	92
3) International Perspectives on Corporate Criminal Liability	95
i) Introduction	95
ii) International Corporate Criminal Liability	96

## Criminal Liability Of Corporations

---

1) Convention Against Transnational Organized Crime	98
2) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	99
3) Criminal Law Convention on Corruption	102
4) Convention on Protection the EU's Financial Interests – Fight Against Fraud	102
a) Genesis of the Common Law and Civil Law	103
5) The Nature of Conventional System of Criminal Justice	104
Differing Features of the Law on Corporate Criminal Liability in the Common Law and Civil Law	105
Section – II: The Rule of Corporate Criminal Liability in the Common Law Countries	106
1) United Kingdom	106
2) U S A	111
a) Types of Corporate Crimes for which there is vicarious liability	112
b) Entities which are subject to Corporate Criminal Liability	113
c) Criminal Procedure in regard to Corporate Crimes	114
d) The System of Punishment	114
3) The State of Canada	115
4) The State of Australia	117
A – Few Guidelines for Evolving the Sentencing Policy – the Sentencing Principles	118
B - The Rule of Corporate Criminal Liability in the Civil Law Countries	119
i) Rome	119
ii) France	120
iii) Germany	122
iv) Italy	123

v) Luxemburg	124
vi) Poland	125
vii) China	126
C – The Rule of Corporate Criminal Liability in GCC Countries	128
1) Saudi Arabia	128
i) Types of Crime Anti Bribery Anti Money Laundering Anti Trust Crimes Trademark Crimes Environmental Crimes Cyber Crimes Commercial Fraud Crimes	129
ii) Identification of Companies and entities to which liability may apply	132
iii) Corporate Liability for crimes committed abroad by its representatives or subsidiaries	132
iv) Corporate Liability in the case of transactions taking place after the commission of a crime (acquisitions, mergers, damages etc.)	133
v) Types of Sanctions applicable to the Companies	134
2) U A E	134
3) Jordan	135
4) Bahrain	137
Conclusion	139
Books	142
Journals	143
Case Law	143

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والدراسات القانونية والشرعية

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