

NOTES

CRIMINAL LIABILITY OF CORPORATIONS: DOES THE OLD ORDER NEED TO CHANGE?

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The evolution of the concept of criminal liability of corporations is characterized by the judiciary's relentless struggle to overcome the problem of assigning criminal blame to fictional entities. This is particularly relevant in a legal system based on the moral accountability of individuals. This article outlines the broad range of principles governing the law related to corporate criminal liability and the essential elements required to incur such liability in a comparative perspective. A balance is sought to be achieved between the goals of criminal law and the socio-economic inefficiency resulting from indiscriminate application of criminal liability to corporations. The article also seeks to highlight the dilemma inherent in the contemporary attitude toward the so-called 'white-collar crimes'. A rise in corporate crimes signifies an apparent failure of corporate governance that in turn necessitates more effective law enforcement. The appropriate standard has been suggested to be achievable successful enforcement of behavioral norms within the corporate framework by a combination of internal governance structures and criminal prosecution.

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I. INTRODUCTION

“Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill”

– Hazlitt.¹

Of all the scholars engaged in similar lines of work, it is perhaps John Braithwaite who offers the simplest definition of corporate crime as the “*conduct of a corporation, or of employees acting on behalf of a corporation, which is proscribed and punishable by law.*”² There exist certain obvious differences between the archetypal notion of crime and the manner in which corporations can be subjected to the mechanisms of criminal justice.

As Celia Wells puts it rather succinctly, “*although when attention is turned to the corporation as perpetrator, economic crime is the most obvious example, what comes to the mind is rarely an offence of straightforward dishonesty but some complex tax or price-fixing violation.*”³ The reluctance to perceive corporate harm as a type of criminal violence and the lack of development of social vocabulary for corporate harms are other constraints one has to face, with restrictive terms such as “accident”⁴ reinforcing the legal impediments to prosecutions for manslaughter following negligent workplace deaths or others of its kind by corporate activity. What thus seems to be the call of the day is a perception sufficiently intuitive to acknowledge the ideological dimension separating corporate criminal responsibility from conventional crime. In this context, Part II of the article examines the reasons which render difficult the application of traditional criminal law principles to corporations. Part III studies the nuances of corporate criminal liability as it exists today in a comparative context, identifying the flaws and advantages of its application in each jurisdiction. Part IV explores the considerations which may be useful to determine the quantum of the punishment of fine and explains the need for alternative forms of punishment and outlines the alternatives. Part V is a note on the application of corporate governance in India, as a concept which is intricately involved in the detection and prevention of corporate crime. In the conclusion, the appropriate standard that should be applied to criminal liability of corporations is posited.

¹ CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 1 (2001)

² SALLY SIMPSON, CORPORATE CRIME, LAW AND SOCIAL RESPONSIBILITY 6 (2002)

³ *Id.*

⁴ The very usage of the term ‘accident’ for a death seeks to undermine its potentially unlawful homicidal character.

II. WHY CORPORATIONS FELL OUT OF THE PURVIEW OF THE CRIMINAL LAW

A. THE DIFFICULTIES, NOVELTIES AND ABSURDITIES

There was a time when the very notion of corporate criminal liability was a mere abstraction in the reality of the criminal justice system – something that did not have even the slenderest chance of a genuine existence. This was not without reasons. The legal fiction of the corporation, when faced with prosecution, presented certain difficulties. The necessity of personal physical appearance in the majority of criminal trials was one of them.⁵ Secondly, being a creature of law, a corporation could only perform such acts which it had been empowered to do; any criminal action was thus *ultra vires* by definition. However, whether the corporation can in reality perform or even condone such an action is another question to ponder upon.⁶ Thirdly, tracing *mens rea* or a guilty state of mind in an abstraction like the corporation posed a formidable challenge.⁷ Lastly, owing to the non-human form assumed by corporate bodies, it was outside the ambit of the obvious criminal sanction of imprisonment.⁸ Nonetheless, there are many criminal activities which a corporation can and unfortunately does get involved in, starting from workplace death and hurt to injury to the person and damage to the property of consumers and other members of the public.⁹ The lack of perception to associate the corporate image with such crimes has been, according to the authors, instrumental towards the abysmal rate of success in assigning liability for them and prosecuting there from. The evolution of the concept of criminal liability of corporations is thus characterized by the relentless struggle of the legislature and the judiciary to overcome the problem of assigning criminal blame to fictional entities in a legal system based on the moral accountability of individuals.

B. ACCOUNTABILITY: TO WHOM SHOULD LIABILITY BE ASSIGNED?

Criminal liability for crimes committed by a corporation can be apportioned in a multitude of ways - only the individuals committing the crime may be liable, only the company may be held liable or both the individual and the

⁵ Indian legislature has sought to address this problem, at least partially, by prescribing that personal attendance may be dispensed with only in a summons case, if allowed by the Magistrate under S. 205 of the Code of Criminal Procedure (Act 2 of 1974).

⁶ DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW 234 (2005)

⁷ *Id.*, at 235. *eg.*, a company cannot very well be a principal offender in rape even today as it requires a very *specific* and *subjective* state of mind which is perhaps impossible to attribute to a corporation.

⁸ *eg.*, a company cannot very well be a principal offender in rape, although whether a corporation could aid or abet a rape is a different point altogether lying beyond pertinence at this juncture.

⁹ WELLS, *supra* note 1, at 9.

company may be held liable. Hence, if an individual who is in the seat of a corporate vehicle uses that vehicle to commit a crime, he should definitely be held accountable, but the question is to what extent, if at all any, liability should be assigned to the corporate vehicle itself. Alternately, in a situation wherein identification is limited only to the vehicle itself, the question arises as to whether it is possible to hold only the vehicle liable, as a separate legal entity independent of its owner(s) or manager(s). Each of the aforementioned scenarios has advantages and shortcomings of its own. However, there exists an apparent unanimity on the point that if a crime has been committed using the corporate vehicle, criminal liability must attach on at least one of them.

III. LIABILITY STANDARD ADOPTED BY THE CURRENT LEGAL REGIME AND THE RESULTING FALL-OUT

A. ENGLAND: CORPORATE CRIMINAL LIABILITY IN AN INEXORABLY INDIVIDUALISTIC FORM

The U.K. legislature has striven to find a solution to the problem of personal appearance and has met with considerable success.¹⁰ The issue of corporate criminal action being *ultra vires* has seldom hindered the legal advance and has thus merited scant attention. However, the problems of assignment of guilty intention and the form of punishment ensuing from conviction have together played a pivotal role in moulding the pattern of corporate criminal liability to its present form. Historically, a corporation could be convicted for three kinds of offences. A corporation was first convicted in 1842 in the United Kingdom for failing to perform a statutory duty.¹¹ This represents one of those instances where a duty is imposed specifically on the corporation as a legal person, separate from its owners or managers, and is a form of vicarious criminal liability.¹² Second, a corporation could be prosecuted for offences including public nuisance, criminal libel and contempt of court, since these were offences where *mens rea* was not a prerequisite.¹³ Thirdly, by deduction from the above, a corporation could thus attract criminal sanction for other statutory strict liability offences as well.

¹⁰ See *R. v. Birmingham and Gloucester Rly Co.*, (1842) 3 QB 223. Initially, the Court of King's Bench would, by a writ of *certiorari*, allow the appearance of an attorney for the corporation. Presently, the § 33 of the Criminal Justice Act (UK), 1925 permits a representative to appear and plead on behalf of a corporation.

¹¹ *Birmingham and Gloucester Rly. Co.*, *supra* note 10.

¹² Although in general, the principle of vicarious liability does not apply in criminal law, exceptions can be made in case of statutory offences, criminal libel and public nuisance. See Law Commission (U.K.), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237 (1996), Part VIII, ¶ 6.9 [hereinafter UK LAW COMMISSION REPORT No.237].

¹³ Markus Wagner, *Corporate Criminal Liability: National and International Responses*, 25 COMMONWEALTH L. BULL. 600, 601 (1999).

However, prosecution of a corporation within the conventional framework of criminal law, requiring the performance of an *actus reus* and the presence of *mens rea* has been made possible only at the onset of the 20th century. Where *mens rea* was required, imposition of liability was subjected to the 'identification' of a corporate appendage to have committed the alleged offence. This simply meant that all the requisite elements of *mens rea* and *actus reus* must be *attributable* to that person, and he should fall within the category of those who may be called the "*directing minds*",¹⁴ or the "*brains*"¹⁵ or the *controlling officers*¹⁶ of the company. The scope of the liability was further restricted in *Tesco Supermarkets Ltd. v. Natrass*¹⁷, wherein the judiciary stated that a person did not qualify as a controlling officer merely by having the authority to exercise some level of managerial discretion. Based on this reasoning, it was held that even the manager of a supermarket could not be considered the so-called "*brains*" of a company which owned hundreds of supermarkets.¹⁸ Therefore, it can be concluded that liability may not always be assigned to the company, although the individual who is responsible for the act may be held criminally liable, if the act can be attributed to him and the requisites of the offence in question have been met with.

¹⁴ *Lennards Carrying Co Ltd. v. Asiatic Petroleum Co Ltd* (1915) AC 705, at 713, (Per Viscount Haldane, LC): ('[A] corporation is an abstraction. It has no mind of its own any more than it has a body; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the *directing mind* and will of the corporation, the very ego and centre of the personality of the corporation' (emphasis added))

¹⁵ *See* *HL Bolton Engineering Co Ltd v. T J Graham & Sons Ltd*, [1957] 1 QB 159 at 172 (Per Lord Denning) ('A company in many ways may be likened to a human body. 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. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such' (emphasis added))

¹⁶ *C.f.* *Tesco Supermarkets v. Natrass* [1972] AC 153, 171 (Lord Reid) (opining that the controlling officers are the board of directors, the managing director and other superior officers who act as the company) and (Lord Diplock), at 200 (opining that those people who, by the memorandum and articles of association, were entrusted with the exercise of the powers of the company are controlling officers) with (Viscount Dilhorne), at 187 (opining that a controlling officer was he who was not responsible to any senior in the company for the discharge of his functions).

¹⁷ [1972] AC 153 at 171, HL.

¹⁸ [1972] AC 153, 191-193. (Lord Pearson) ("...the company has some hundreds of retail shops, and it would be far from reasonable to say that every one of its shop managers is the same person as the company ... Supervision of the details of operations is not normally a function of higher management; it is normally carried out by employees..."). A branch manager was for this reason, likened to the 'hands' of a company, according to Lord Denning's aforementioned analogy.

The English form of imposing criminal liability unto corporations has often been termed individualistic,¹⁹ that is, to say that a company is liable ‘if and only if’ the offence can be attributed to a controlling officer,²⁰ and not otherwise.²¹ If it is so attributable, such officer as well as the company shall be liable for the stipulated punishment.²² Otherwise, neither the company, nor the officer shall be liable. This is the principle of attribution or identification. This suffers from two drawbacks. Firstly, where the identifiable *mens rea* is individually below the indictable level, but collectively or cumulatively satisfies the threshold of culpability, the company shall escape all liability under the existing legal provisions. This unpalatable realization is best driven home in the pronouncement of Devlin J, “*You cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind.*”²³ This test, however, does apply in England, but only under the law of tort,²⁴ and in cases where a duty is ‘specifically’ imposed on the corporation itself as in the case of regulatory offences as already explained.²⁵ As a result of this rigidity of approach, although the corporation may indeed have committed the offence in its distinct legal personality, neither the company nor the individual can be proceeded against. Secondly, if a scenario can be portrayed wherein an individual who is not the controlling officer may be attributed with the offence, the corporate liability shall almost inevitably be replaced by culpability assigned to the said individual only.²⁶

¹⁹ See Aurora Voiculescu, *Changing Paradigms of Corporate Criminal Responsibility: Lessons for Corporate Social Responsibility* in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 403 (Doreen Mc. Barnet et al. eds., 2007).

²⁰ See *Tesco Supermarkets v. Natrass* [1972] AC 153 at 171, HL. The requirement is more explicit in §733(2) of the Companies Act(UK), 1985 which states, “Where a body corporate is guilty of such an offence (as described in the previous clause of the section) *and* it is proved that the offence occurred with the consent or connivance or was attributable to any neglect on the part of any director, manager, secretary or similar officer...*he as well as the body corporate ...is liable to be proceeded against and punished accordingly...*” (emphasis added). See also Insolvency Act(UK), 1986, §432(2), Financial Services Act(UK), §202(1), Banking Act(UK), 1987, §96(1), Companies Act (UK), 1985, §733.

²¹ *But see Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 AC 500 (the Privy Council holding that from a statute, the intention of the legislature to impose criminal liability on the corporation for the act of someone other than the controlling officer may be inferred. The acts of a company’s investment manager were attributed to the company for the purposes of the New Zealand Securities Act, 1988)

²² *Id.*

²³ *Armstrong v. Strain* [1952] 1 All ER 139. The test is however applicable in England under the law of tort and in case of regulatory offences. See SALMOND ON TORTS (1996), 406-409. See also *Birmingham and Gloucester Rly Co.*, (1842) 3 QB 223 for the application in case of regulatory offences.

²⁴ See SALMOND ON TORTS (1996), 406-409.

²⁵ See *Birmingham and Gloucester Rly Co.*, (1842) 3 QB 223.

²⁶ This shall not, however be the case if an offence by statute can only be committed by a company.

Corporate Manslaughter: Whether A Sufficient Respite from the Individualistic Approach

In the United Kingdom, the charge of manslaughter had been defined, since the time of Coke, Hale and Blackstone, as the killing of a human being by another human being,²⁷ thereby implying that a corporation could never kill a human being. However, in 1990, Turner J. saw it fit to hold that an indictment for manslaughter could lie against a company.²⁸ Nevertheless, the argument for manslaughter was still set in the limited framework of the identification doctrine.²⁹ This limitation was taken into consideration by the UK Law Commission in 1996, when it suggested the creation of a new offence called ‘corporate killing’, whereby a corporation would be guilty of the same, if a management failure by the corporation is the cause (or one of the causes) of a person’s death and that failure constitutes conduct falling far below the level that can reasonably be expected of the corporation under the circumstances,³⁰ notwithstanding that the immediate cause is the act or omission of an individual.³¹ However, during the process of enactment in 2007,³² this notion of management failure was modified to include only those acts of individuals where activities organised by the senior managers constitutes a substantial element. The question still remains whether from the act or omission by an ordinary employee which has resulted in a person’s death, a management failure can be inferred. It should be noted that the offence of corporate manslaughter, even in the form suggested by the Law Commission, is not one of a conscious act but one of neglect or omission.³³ This is justified in terms of legal theory as it is comparatively easier to state that a corporation has failed to meet a particular standard of conduct than to say that it has done a positive act requiring the harbouring of a particular subjective state of mind.³⁴ At least, the company is liable *sans* the controlling officer if the latter’s *mens rea* is below the indictable level.

²⁷ STEPHEN, DIGEST OF THE CRIMINAL LAW (1877), Art.218, 140.

²⁸ P & O European Ferries (Dover) Ltd., (1991) 93 Cr App R 72 (Central Criminal Court). This was the case of the Zeebrugge disaster, where a passenger ferry capsized killing 193 passengers. The case, however, has not been considered at the appellate level. See UK Law Commission Report No. 237(1996), ¶ 6.43.

²⁹ See Attorney-General’s Reference (No.2 of 1999), [2000] 3 All ER 182, where the Court emphatically refused to recognise corporate criminal liability for manslaughter in the absence of mens rea of an identified human individual for the same crime.

³⁰ See generally UK LAW COMMISSION REPORT No.237, *supra* note 12.; Draft Bill, §4(1).

³¹ *Id.*

³² Ministry of Justice (UK), *Understanding the Corporate Manslaughter and Corporate Homicide Act 2007*, available at <http://www.justice.gov.uk/docs/manslaughterhomicideact07.pdf> (Last visited on Feb.5, 2008)

³³ See Corporate Manslaughter and Corporate Homicide Act (UK), §4A.

³⁴ See generally UK LAW COMMISSION REPORT No.237, *supra* note 12, at ¶ 7.4

B. UNITED STATES: TRANSPOSITION OF CIVIL LAW PRINCIPLES ONTO CRIMINAL LAW- WHETHER A FLAWLESS SOLUTION?

In the context of corporate criminality, prosecution in the United States labors under the *a priori* notion that corporation is a person, albeit an artificial one, and that the said entity is guilty if any person commits a crime to benefit the corporation while generally acting within the scope of his corporate duties. The authors, in an effort to examine the fall-out of actions based on such an assumption, arrive at the conclusion that the premise may not always hold true in the present scenario. Particularly in the case of large publicly traded corporations, the stigma and moral judgment that befall the corporate entity, conventionally meant as an agent of deterrence for the offender, are often transferred to thousands of innocent employees and shareholders. With large-scale multinational corporations being under the supervision of professional managers, the owners seldom play any meaningful role in the management of corporate affairs – holding them liable for the acts of employees may thus often lead to results defying rationality. It is this very concern that leads prosecutors to strike at the wrongdoing of individual employees instead of putting corporations on trial, despite the existence of legislations like the Sarbanes-Oxley Act of 2002 that exposes corporations to increased criminal liability.

The legal regime in U.S.A. assigns vicarious liability to a corporation for the acts of its employees if the individual: (i) acted within the scope and nature of his employment; (ii) acted, at least in part, to benefit the corporation; and (iii) the act and intent can be imputed to the corporation.³⁵ The first criterion is fulfilled if and only if the employee has actual or apparent authority to engage in the act in question, with the burden of proof to demonstrate the same lying with the prosecution. In several cases, federal courts have held the corporation accountable for an employee's act despite the former having implemented policies explicitly prohibiting such behaviour, although proof of such implementation may qualify as mitigating circumstances.³⁶ The U.S. Model Penal Code holds corporations liable for employee behaviour if liability is imposed by statute (either directly or tangentially through legislative intent) or if the commission of the offence has been authorized or tolerated by the directors or by a high-ranking agent acting on behalf of the corporation within the scope of his duties.³⁷ Regarding the second component, the employee's mere intention to bestow benefit to the corporation should suffice, with actions favourable to the corporate interest being viewed as

³⁵ See *United States v. One Parcel of Land*, 965 F.2d 311, 316 (7th Cir. 1992) and *Baena v. KPMG LLP*, 453 F.3d 1, 7 (1st Cir. 2006); See generally Han Hyewon and Nelson Wagner, *Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 337(2007).

³⁶ *United States v. Potter*, 463 F.3d 9, 26 (1st Cir. 2006). See also Hyewon and Wagner, *supra* note 35.

³⁷ Model Penal Code § 2.07(1)(a),(b) and (c) (1962)

manifestation of such intention.³⁸ However, if the action under consideration is expressly prejudicial to the corporate interest or constitutes a breach of fiduciary duty to the corporation, liability can no longer be assigned to the company.³⁹

A corporation may be held accountable for a conspiracy to commit a criminal act by its employees, whether among themselves or in conjunction with outsiders.⁴⁰ However, according to the Intra-Corporate Conspiracy Doctrine, it may not be convicted of conspiring with its own employees, although judicial reservations exist regarding applicability of the said doctrine in criminal cases.⁴¹ On rare occasions, corporations have been burdened with criminal liability for the prior wrongdoing of a target corporation after a merger or amalgamation, but such cases have been governed by the U.S. state corporation law related to successor liability, which is outside the purview of the present discussion. Offences like deliberate disregard of criminal activity or concealing and failing to report a felony may also attract corporate criminal liability. The *wilful blindness doctrine* is often applied in such cases, which requires proof of either actual knowledge or conscious avoidance.

Corporate white-collar crime mainly comprising actions deceptively similar to non-criminal activity, it becomes all the more difficult to establish that a crime has at all taken place, all the more so owing to the dearth of credible evidence. Even on those occasions where identification of criminal occurrence is achieved easily, the corporate practice of diffusing decision-making responsibility makes it well-nigh impossible to prove *mens rea*. Certain responses have been designed to tackle such problems, particularly the *collective knowledge doctrine*, imputing to a corporation the aggregate knowledge of all of its employees for the purpose of creating the necessary guilty corporate intent, bears watching. On the one hand, as has already been mentioned before, it prevents corporations from evading liability by compartmentalizing employee duties and has gained considerable prominence after the decision in *United States v. Bank of New England*,⁴² while on the other hand, there seems no dearth of logic in the argument of the corporation being innocent unless it is deliberately neglecting legal requirements. Moreover, the author would like to assert in this context that the aforesaid doctrine suffers from another limitation in that it fails to mention whether the corporation's intent, resulting from the aggregate knowledge or otherwise, should be taken into consideration. Some people believe that the effectiveness of the criminal sanction

³⁸ Cox v. Adm'r U.S. Steel and Carnegie, 17 F.3d 1386, 1404 (11th Cir. 1994)

³⁹ Standard Oil Co. v. United States, 307 F.2d 120, 129 (5th Cir. 1962)

⁴⁰ In *United States v. Holmes*, 406 F.3d 337, 351 (5th Cir. 2005), the judiciary defined conspiracy, as per 18 U.S.C. § 371 (2000), as conduct by two or more persons who agree to commit an offense, with one or more of them taking affirmative action to further the goals of the conspiracy.

⁴¹ *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974, 979 (9th Cir. 1994)

⁴² 821 F.2d at 856. In this case, the charge of willfully failing to file reports in relation to currency transactions was held to be proven because the bank's knowledge was held to be the totality of what all the employees knew within the scope of their authority.

as a deterrent has been reduced by these complexities to such an extent that the time has come to place greater reliance on corporate governance and possibly civil liability rather than criminal prosecution to control wrongdoing within business organizations. Again, diametrically opposite opinions also exist.

C. THE INDIAN SCENARIO

1. Grappling With Introductory Absurdities

The Indian Penal Code, 1860 which, although not exhaustive, is the general substantive criminal legislation of the land. It applies to all *persons* having a certain territorial connection with India. A company, association, or even an *unincorporated* body is expressly included within the definition of 'person'.⁴³ Logically, it may thus be concluded that the possibility of commission of the offences enumerated therein by companies was recognised as far back as 1860. However, the judiciary has not been amenable to such an expansive understanding of the law with respect to the liability of companies and corporate accountability was restricted to crimes in which two considerations were met, namely, where *mens rea* was not essential as an ingredient, and imprisonment was not mandatory as a punishment.⁴⁴ The restrictive interpretation was justified by implicitly assuming that every definition in the Indian Penal Code was subject to the qualifying clause, "*unless there is anything repugnant in the subject or context*", even in the absence of an express stipulation to that effect and therefore a corporation was to be excluded from liability for certain kinds of offences.⁴⁵

The requirement of the first consideration was dispensed with in 1964 when the possibility of a corporation committing a crime requiring *mens rea* was recognised by an Indian Court.⁴⁶ But the second consideration, that is, where imprisonment was not a mandatory sentence, was harder to dispense with, as it had strong legal arguments in its favour. The argument stated firstly, that there should be little or no judicial discretion in the interpretation of wording of the penal sections. Thus, where a provision contained the expression "*shall be punishable for imprisonment and also for fine*", the word 'shall' indicated that the Court is bound to award a punishment of imprisonment and cannot award a

⁴³ Indian Penal Code, No. 45 of 1860, §11.

⁴⁴ Sunil Chandra Banerji v. Krishna Chandra Nath, AIR 1949 Cal 689; Punjab National Bank v. A. R. Gonsalves, Bunder Inspector, Karachi Port Trust AIR 1951 Sind 142.

⁴⁵ Kartick Chandra v. Harsha Mukhi Dasi AIR 1943 Cal 345 (FB) and Darbari Lal v. Dnaram Wati, AIR 1957 All 541, relied on in State of Maharashtra v. Syndicate Transport, AIR 1965 Bom 195.

⁴⁶ See State of Maharashtra v. Syndicate Transport, AIR 1965 Bom 195 (not holding the company liable because the said act was committed by a "...mere shareholder who was only a stranger so far as the administration of the company was concerned").

sentence of fine ‘only’.⁴⁷ Secondly, evidence of legislative intention to exclude the liability of corporations in cases where imprisonment was mandatory was given by citing the inaction of the legislature to amend the law so as expressly denote corporate liability in such cases, despite the recommendations by the Law Commission⁴⁸ to that effect. This was in disregard of the fact that fine was still available as a possible punishment.⁴⁹ However, this argument suffered from the inherent flaw whereby a company could be convicted of less severe offences where imprisonment was not mandatory, but would be immune from prosecution for graver offences where imprisonment was mandatory. Thus, this legislative intention could also not be accepted, and the Court, in *Standard Chartered Bank v. Directorate of Enforcement*⁵⁰ held that fine could be imposed on the corporation even where the sentence stipulates mandatory imprisonment. The abovementioned result was achieved by interpreting the word ‘and’ in the expression ‘shall be punished with imprisonment for a period of...years (or months) and fine’ in penal provisions as ‘or’.

2. Do Economic Offences Show More Flexible Approaches in Apportioning Liability?

Under statutory provisions of the Indian law, the liability prescribed, at least for economic or strict liability offences committed by a company is threefold, as per the express provisions of the statutes.⁵¹ Firstly, the person who was in charge of and was responsible to the company for the conduct of its business is held liable, unless he can prove that the offence was committed without his knowledge or despite his exercising due diligence to prevent the offence. Secondly, if it is proved that an offence under such statutes has been committed “*with the consent or connivance of*”, or is “*attributable to*” neglect on the part of a director, manager, secretary or “*other officer*” of the company, such individual shall also be

⁴⁷ State of Maharashtra v. Jugminder Lal, AIR 1966 SC 940.

⁴⁸ See Law Commission of India, Report No. 41, ¶ 24.7 (suggesting an express amendment to the §62 of the Indian Penal Code to the effect that where an offence for which a sentence of mandatory imprisonment is committed by a corporation, the Court shall be competent to sentence such offender to fine only). See also Law Commission of India, Report No. 47, ¶8.3 (suggesting a recommendation in pari materia, but in respect of economic offences only).

⁴⁹ There is only one offence under the Indian Penal Code whereunder fine is not contemplated as a permissible sentence, imprisonment is the only offence, which is §.303, which has been ruled unconstitutional

⁵⁰ AIR 2005 SC 2622, ¶ 44. The comment was made in reference to §56 of the FERA whereby an offence involving an amount of one lakh rupees or less could be punished with fine, but that involving an amount of one lakh rupees or above was to be punishable with imprisonment ‘and’ fine. See also *Madhumilan Syntex v. Union of India*, AIR 2007 SC 1481, where a company was held to be capable of committing an offence under §276B of the Income Tax Act, which prescribes a sentence of imprisonment ‘and’ fine.

⁵¹ See, eg., one can refer to the Prevention of Food Adulteration Act, No.37 of 1954, §17, Foreign Exchange Regulation Act, No. 46 of 1973, §68, Income Tax Act, No. 43 of 1961, §278B.

held liable.⁵² Lastly, the company of course, is held liable, irrespective whether any individual is pinned with liability too. Liability for offences under the Indian Penal Code will be based on different considerations in the absence of express wording to that effect.

3. Nailing down the differences from English Law

Criminal liability for economic offences exhibits certain differences from its English counterpart by attribution. Firstly, if an offence is committed, the company is held liable despite the prosecution's inability to identify the specific individual whose act constitutes the offence. Thus, the rigidity of the English approach, holding either, the corporation and the controlling officer liable or exculpating both in one go is avoided. Secondly, the controlling officer, i.e. the person responsible to the company for the conduct of its affairs is automatically liable in case of an offence committed by a company, thereby lifting the burden off the prosecution to prove that the act was attributable to him, unless he proves that the offence was committed despite his due diligence.

4. Does the Indian flexibility apply even in relation to the conventional criminal law?

Criminal liability of corporations for an offence under the Indian Penal Code shall apply differently from its application in the context of economic laws, on account of the absence of an express provision apportioning liability on the corporation. Although the definition of a person includes a corporate body, the Bombay High Court has held that a crime cannot be committed by the corporate body alone and requires an indictable level of complicity by a controlling officer, thus accepting the English attribution doctrine completely.⁵³ Of course, if the individual is not a controlling officer but his conduct is indictable, he shall be liable, but the company will not be vicariously liable. Pronouncements of the Supreme Court have been in regard to economic offences only. This may reinforce the popular impression that the reference to corporate criminal liability is altogether in the context of special economic offences rather than the conventional offences of the general criminal law.

IV. CORPORATE SANCTIONS: THE TUSSLE BETWEEN LEGAL THEORY, ECONOMICS AND REALITY

The discussion hitherto has dwelt upon *whether* the corporation or an individual or both may be punished for criminal acts. The question now arises as

⁵² *Id.*

⁵³ State of Maharashtra v. Syndicate Transport, AIR 1965 Bom 195 (acknowledging the possibility of a commission of a crime under the Indian Penal Code by *controlling officers* and by using the corporate vehicle, but rejecting liability of the controlling officers, as the crime had been committed by a single shareholder)

to what *forms* of punishment are imposable on the corporation. Traditionally, fines are the only imposable sentences on corporations. In *R. v. Howe and Son (Engineers) Ltd.*⁵⁴, there was an observation that fines have to be large enough to have a deterrent effect on the corporation, and small enough so as not to imperil the earnings of employees. The authors are in agreement with the observation. Fines should, however, reflect the criteria of the gravity of offence and the capacity of the offender to pay them, so as to determine the appropriate amount for a deterrent effect.⁵⁵

A. THE NEED FOR ALTERNATIVE FORMS OF PUNISHMENT

However, fines suffer from several drawbacks. Fines up to a certain magnitude may not always produce the desired deterrent effect. On the other hand, if the magnitude of the fine is increased beyond a certain level to produce a deterrent effect, and the corporation refuses to pay up, it cannot very well be threatened as per the existing law of the land, which insulates shareholders on account of fundamental concepts like limited liability and prescribing imprisonment in default of fines, both of which act as cushions for the corporation. Of course, the impossibility of imprisonment can again be circumvented by a statutory provision to the effect that where a company has defaulted with regard to payment of fine, its director or other senior officer may be imprisoned, but espousing this line of reasoning seems more like a resigned and desperate attempt to apply conventional criminal law to unconventional situations, in spite of the resultant aberrations.

B. REVISITING UNDERLYING NOTIONS TO FIND THE ALTERNATIVES

In this regard, Garland's persuasive thesis that the social institution of punishment "*communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations and a host of other tangential matters*".⁵⁶ It may not be inappropriate therefore, to talk about *other kinds* of punishment, which, although not contemplated under criminal law, may be imposed on a corporation and be more in tune with its underlying theories than the conventional forms. It may be an observation of considerable importance towards gauging the popular attitude that when corporations are subjected to criminal enforcement, the term 'punishment' is habitually replaced by the altogether less poignant sanction.

⁵⁴ [1999] 2 All ER 249.

⁵⁵ See, Australian Commonwealth Crimes Act §4B (3). The provision stipulates that if a corporate body is convicted of an offence, the court may impose a pecuniary penalty equal to five times the amount which may be imposed on a natural person convicted of the same offence.

⁵⁶ WELLS, *supra* note 1, at 31.

C. THE ALTERNATIVES

In reality, many other options are there awaiting exploration, ranging from drastic measures like corporate dissolution through compulsory winding up to other actions like probation, adverse publicity, direct compensation orders etc. that are less severe, but effective nonetheless.⁵⁷ In the opinion of Fisse, “*These approaches are promising because they increase the variety of deterrent, retributive, and rehabilitative measures available against corporations and in doing so circumvent some of the major limitations of monetary sanctions...*”⁵⁸ Interestingly enough, the Indian legislature seems to have been acting in unknown consonance with its American counterpart in that both have approved the use of adverse publicity as a corporate sanction.⁵⁹ The sanction provides that while convicting a company, the court can direct the name and place of business of the same, along with the nature of offense and any other relevant detail to be published in newspaper at the expense of the company.⁶⁰ Nowadays, preventive sanctions like the appointment of independent directors for the purpose of scrutinizing corporate behavior are being increasingly favoured. The cumulative effect of these efforts is surely a progressive step forward.

D. IS DETERRENCE THE ONLY CRITERION?

It must be remembered that a criminal indictment can have devastating consequences for a corporation in terms of a market crash or drop in stock price which equivalent to a corporate death sentence. Also, it carries with itself the risk of causing harm to innocent parties, like the harmful spill-over effect of fines to innocent parties, such as in the form of reduction of employees’ wages. In extreme situations, they may result in the winding up of a company. Subjecting a company to exemplary penalty solely for retributive purposes will also lead to the same consequence. This can potentially be a general disincentive for corporate venture.

V. CRIMINAL LAW IN THE CONTEXT OF CORPORATE GOVERNANCE

Broadly speaking, corporate governance is the set of processes, laws, institutions affecting the way a corporation is administered and the relationships amongst stakeholders *inter se*. In the Indian context, few of over six lakh incorporated bodies ever bother to comply with existing legislations. The Indian Companies Act creates numerous offences, for all of which a company may be

⁵⁷ Although regulatory agencies can issue prohibitions and other notices, those do not belong to the category of judicially approved sanctions.

⁵⁸ Brent Fisse, *Sentencing Options Against Corporations*, 1 CRIM. L. FORUM 211 (1990).

⁵⁹ See, Essential Commodities Act, No. 10 of 1955, §.10(b); Drugs and Cosmetics Act, No. 23 of 1940, §.25.

⁶⁰ *Id.*

prosecuted in regular courts.⁶¹ The law is rigid in its scope in as much as there is absence of separation of procedural framework from substantive aspects of law and gradation of offences in accordance with gravity.⁶² In this regard, an expert group referred to as the Vaish Committee was constituted in the year 2005 to make suitable recommendations for the purpose of streamlining corporate prosecutions under the Companies Act.⁶³ Its primary achievement lies in the suggestion of gradation of the existing cases for remedial purposes, into compoundable cases and non-compoundable cases. In most categories of cases compoundable under the Companies Act, 1956 it has recommended withdrawal of the case in accordance with the existing company law provisions, or settlement of the case in accordance with the Company Law Simplified Settlement Scheme, 2005. Non-compoundable cases in which the Companies Act, 1956 prescribes the punishment of mandatory imprisonment have been left to continue.⁶⁴ The Committee has also expressed its approval of the recommendation for the need to create an *in-house structure* within the Ministry of Company Affairs in order to deal with cases not punishable with imprisonment.

Another example of such legislative activism appears to be the formal recognition of the so-called “*whistle-blower*”, an employee (or ex-employee) of an organization who discloses information about any illegal or unethical practice, which may be financial in nature, or dangerous to the public health or safety, and which is not otherwise apparent.⁶⁵ Such a person is accorded some protection by the law against any discrimination or harassment by the company against which he has helped in investigation. Sometimes, a company is even required to maintain channels through which employees can disclose unethical practices to the

⁶¹ See, Indian Companies Act, No.1 of 1956, §§.538-545, 621- 631 for the offences created under the Act. Falsification of accounts, wrongfully withholding property, not disclosing the entire quantum of company property to the liquidator are some of the offences enumerated thereunder.

⁶² C.L. Bansal, *Streamlining Corporate Prosecutions – Vaish Committee’s Proposals*, SEBI AND CORPORATE LAWS, Apr. 10–16, 2006, at 31, 32.

⁶³ *Id.*, at 33.

⁶⁴ *Id.*, at 34. See (Indian) Companies Act, 1956, §§.541(1), 630(2) for examples of offences entailing mandatory imprisonment.

⁶⁵ See, *eg.*, UK Public Interest Disclosure Act, 1998, the U.S. Whistle Blowers Protection Act, 1989, US Sarbanes-Oxley Act, S. 806 (*stating* that a company cannot dismiss, demote, suspend, threaten, harass or otherwise discriminate against an employee solely because the latter has been involved in a securities-related or fraud-related investigation against the company); See the Listing Agreement, Clause 49, Annexure 1D(7). Although this provision is hitherto non-mandatory in nature, the situation is likely to change, with the Securities and Exchange Board of India, the regulator for companies listed on the stock market monitoring Clause 49 pretty closely through the stock exchanges by way of requiring periodical reporting by the companies. See also R. Balakrishnan, *Whistle Blowing*, SEBI AND CORPORATE LAWS, Aug. 21 –27, 2006, at 111.

management.⁶⁶ However, lack of regulation of this phenomenon can nevertheless undermine and weaken mutual trust between the employer and employee, and leading to the eventual failure of the concept.

VI. CONCLUSION

Except in the case of regulatory offences where a duty is directly imposed on the corporation, the indiscriminate application of vicarious corporate criminal liability shall result in a corporation being held liable for agents irrespective of their position in the corporate chain of command and regardless of corporation's efforts to discourage such conduct. While determining the appropriate standard of punishment applicable to a company, the effects it could have on innocent parties have to be borne in mind. It must additionally be remembered that whereas an individual has complete control over his own acts, a company cannot physically have the same level of control for the acts of each and every employee. Additionally, this capability of exercising control over one's acts is an essential precondition for assigning liability under the criminal law as is evident from the acceptability of insanity as a complete or partial defence to the commission of an offence. The other extreme positing that a company can never be criminally liable is also unacceptable for reasons which are self-evident. The English stance veers towards this end on account of its relative inflexibility towards holding the corporation liable. The optimal standard of liability, according to the authors, is achieved by restricting the liability to those cases in which the corporation is proven to be guilty of *not taking all reasonable precaution* to prevent and detect crime by its employees. The goals of criminal law being to deter and punish unlawful conduct, if the corporation has already undertaken all reasonable measures to conform its employees' conduct to the law, then there no longer exists any rationale for corporate prosecution. The authors are in agreement with the view expressed in *R. v. Howe and Son (Engineers) Ltd.*⁶⁷ that while determining the sentence for a corporation certain aspects of causation which exacerbate the corporate offence such as causing death, failure to heed warnings and taking risks to maximize profits, and mitigating circumstances such as prompt admission of responsibility, timely guilty plea, evidence of having taken steps to remedy the deficiency and previous safety record should be identified. Lastly, the authors believe it to be necessary to incorporate different forms of punishment which shall induce voluntary self-compliance of legal processes and deter corporations generally from indulging in criminal conduct.

⁶⁶ *Id.*

⁶⁷ [1999] 2 All ER 249.