Corporate Criminal Liability

Time for Sweden to look beyond individual criminal responsibility?

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Preface

First of all, I would like to thank my supervisor Inger Österdahl. She was also my teacher during my in-depth studies in international law and has been a great source of inspiration during my studies. I know she has a lot of work to do so I am very grateful she agreed to advise me.

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Thank you!
1. Introduction
   1.1 Aim, research questions and approach
   1.2 Terminology
   1.3 Disposition
   1.4 Method and delimitations
2. Corporation and crime
   2.1 The Corporation
   2.2 The scope of corporate criminality
   2.3 Definitions of corporate crimes
3. The Swedish model for corporate liability
   3.1 Development towards individual criminal liability
   3.2 Vicarious Liability for Corporate Executives
   3.3 Corporate fines
   3.4 Critique against the Swedish system
4. Corporate Criminal Liability
   4.1 Introduction to Corporate Criminal Liability
   4.2 History of corporate criminal liability
   4.3 Different forms of Corporate Criminal Liability
   4.3.1 Vicarious liability (respondeat superior)
   4.3.2 Identification doctrine
   4.3.3 The Aggregation model
   4.3.4 The Self-identity Doctrine (corporate culture)
   4.4 Corporate Criminal Liability in International Law
5. Corporate Criminal Liability and the fundamental principles of Criminal Law
   5.1 Introduction
5.2 Mens rea 42
5.3 The Contextualisation of Criminal Law 43
5.4 Ultima ratio and the functionalization of criminal law 44
5.5 The purpose of criminal law 45
5.6 Organisational fault or corporate mens rea 48

6. Discussion 52

7. Conclusion 57

8. References 59
1. Introduction

“The last two decades have created a new socio-political-economic reality, characterized by a thriving common market in Europe, changes in the political regimes of Eastern Europe, intensive privatization processes in many countries that shifted many areas of activity to the non-governmental sector, and the creation of mega-multinational-corporations that are the result of acquisitions, mergers and takeovers. In a process that peaked in the second half of this century, legal bodies have actually assumed control of all forms of commerce and industry, to the extent that no economic endeavor is deemed possible without their involvement.”

When you think about criminals you rarely think about corporate officials. When for instance politicians say they are getting tough on crime you immediately think about street crime such as murder, drugs, rape, assault and so on. The idea of crime as a lower-class problem is strongly historically rooted and one that is hard to change as well. In reality, the cost of corporate crime is likely way beyond that of street crime. The World Bank estimates that every year only bribery cost society at least a thousand billion euro. That is equivalent to the total annual revenue of Great Britain, notably number six on the list of world's greatest economies.

Meanwhile, legislators and legal thinkers have a hard time coming up with a unified and comprehensive solution to corporate criminality. The history of corporate crime paints a picture of trial and error characterized by low number of fruitful convictions and often the financial stakes at hand far exceeds the risks of criminal liability. In a recent case for example, the Swedish telecom giant

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3 See chapter 2.2.
Teliasønera has admitted to the payment of bribes to a sum of 750 million euro. Meanwhile, according to the present system in Swedish criminal law, corporate fines up to a maximum of only 1 million euro can be imposed. In another recent case involving the same company the charges had to be dropped because of the difficulties with establishing mens rea (criminal intent, knowledge, recklessness etc.) in cases involving corporate actors under Swedish criminal law. These cases are only the tip of the iceberg and with the tools prosecutors and law enforcement have at their disposal today, many times they face unsurpassable difficulties with proving a crime has been committed and when possible, they have no way to prove intent on the part of any corporate officials. The legal uncertainties within the field of corporate crime are immense and international consensus on the subject is desirable.

For some reason, dealing with corporate crime is particularly tricky. Street crimes fit the predominant individual criminal responsibility doctrine within criminal law very well while corporate crime does not. The individual criminal responsibility doctrine demands mens rea to be established in natural persons (only natural persons can have intent and hence only natural persons can commit crime) and in cases with corporate crime it is often difficult to find the actual perpetrator within the organization. Most OECD countries have now introduced criminal liability for corporations, something that would have been unthinkable just a few decades ago. These recent developments suggest we now need to move beyond the individual criminal responsibility in order to effectively deal with this new modern form of criminality. However, for an argument such as the aforementioned to be given legitimacy in any legal order depends first and foremost on the legitimacy of the solution itself.

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7 See chapter 3.4.
8 See chapter 3.4.
10 Ibid.
Corporate criminal liability was introduced in international law in the Nuremberg charter following the atrocities of the Second World War. Even though criminal prosecution of a corporation as a legal entity was new to international law it had been a part of the American legal system since the late 1800’s. In the trial that followed however, only corporate executives were prosecuted and punished for their involvement. The corporation itself was not prosecuted or punished *per se* even though the court had the jurisdiction over legal entities. Both in Sweden and in international law the criminal system is built upon the idea of individual liability. However, in Great Britain, since the Corporate Manslaughter Act 2007, a company as a legal person can be prosecuted as a natural person. The UK Bribery Act 2010 is another example which moves beyond individual guilt and holds corporations strictly liable for failure to prevent bribery. To avoid criminal sanctions the company must prove that the company has adequate procedures in place designed to prevent bribery. In Australia they have gone even further with the Australian Criminal Code Act 1995 which sees the corporation as an entity beyond the individuals it employs, focusing on corporate culture as a means of finding genuine corporate fault (as opposed to derivative fault). These are not isolated cases but follow a trend brought on by developments in international law to extend criminal punishment to the corporation as a legal entity.

Sweden is one of the few countries who still lack a real corporate criminal liability regime. The vicarious liability regime used in Swedish criminal law can only attribute the acts and omission of a corporation's agents to a manager, not to the corporation per se. The corporation as a legal entity can only be ‘punished’ through corporate fines indirectly after establishing culpability in a natural person. In 1997, after several changes in EU law relating to financial crimes and benefit fraud, the Swedish government launched an investigation into the possibilities of introducing criminal punishment for corporations as legal entities.\(^\text{11}\) The following

\(^{11}\) SOU 1997:127.
report lead only to minor changes in the already existing system. In another report from 2016 the advantages of widening the application to include cases where mens rea could be established separately from natural persons was highlighted but was dismissed on the grounds that no mandate was given to consider changes in the individual criminal responsibility doctrine.¹²

1.1 Aim, research questions and approach

The aim of this paper is to look at if there are any grounds for Sweden to consider adopting a corporate criminal liability regime in order to more effectively deal with corporate crime.

What different corporate criminal liability regimes are there and what can they contribute with?

How does corporate criminal liability work with the fundamental principles of criminal law?

1.2 Terminology

Anyone who has looked at this field of study know that there is a lack of common terminology. For instance, the different models of corporate criminal liability used are given different names within different legal orders. They are also divided up differently in different doctrines and so forth. This of course complicates the research but as I have left none of the corporate criminal liability doctrines out (to the authors knowledge at least) this will not affect the reader's experience. However, this information might be useful if pursuing further research of your own. Corporate criminal liability also encompasses different fields of law such as civil

¹² SOU 2016:82, p. 263.
law, criminal law and international law which all use different terminology. However, this paper is trying to put the Swedish criminal law system in the international context. Therefore, translated terminology from Swedish criminal law using the glossary from the Swedish National Courts Administration together with the terminology from the predominant international law doctrine on this subject has been used. Some clarifications should however be made from the beginning.

**Corporate criminal liability** refers to what extent a corporation as a legal person can be held criminally liable for the actions of the natural person it employs. Vicarious liability is a form of corporate criminal liability, however this should presumably not cover the Swedish system as the corporation can never be held criminally liable or be subject to criminal sanctions. This standpoint is shared by for instance the OECD.  

**Individual criminal responsibility** refers to the current overarching doctrine within criminal law, both in national jurisdiction and within international law, that only natural persons can commit crime. It stems from the idea that all people are free and rational beings with rights and obligations. We are in control over our actions and have an inner moral continuity which also allows our actions to have a degree of moral blameworthiness and guilt. These are humanly attributes and hence, according to this doctrine, a corporation can not commit crime.

**Mens rea** refers to the guilty mind, intent or recklessness, of the individual perpetrator that has to be established for a conviction. In Swedish criminal law a corporation is a legal fiction and cannot have intent, thus not fulfilling the mens rea

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15 Ibid.
requirement. Therefore, imposing corporate fines according to Swedish criminal law can only be done indirectly as a consequence of the conviction of an individual within the company. Corporate mens rea is not dependent on one individual in the company but instead derives corporate culpability by looking at for instance corporate culture and policies.16

A realist model of corporate criminal liability seeks genuine corporate culpability, as oppose to derivative models who attributes culpability to the corporation through natural persons.

1.3 Disposition

The outline is as follows: I start in chapter 2 by giving a brief context to the issue, an overview on the corporation’s role in today's society, the extent of corporate criminality and the different definitions of corporate crime. Thereafter in chapter 3 looking at the situation in Sweden, the historical move towards individual criminal responsibility and the current system of vicarious liability and corporate fines. After that in chapter 4, I will present corporate criminal liability, first from an historical perspective and after that the different forms of corporate criminal liability we see today. I will in the same chapter go on to look at the general development in this field of law from an international law perspective. After that, in chapter 5, I will look into how corporate criminal liability works with the fundamental principles of criminal law. In chapter 6 I will try and compare some of the arguments presented in this thesis while also giving some my own opinions on the subject while in the last chapter, chapter 7, give a few concluding remarks.

16 More about corporate mens rea in chapter 5.6.
1.4 Method and delimitations

The method used is mainly literature studies based upon the legal dogmatic method underlining the critical legal dogmatic. The law is a continuation of politics and must be treated as such. To understand both what law is (de lege lata) and how it should be (de lege ferenda), the two perspectives which are both present in this thesis, the historical perspective is imperative why legislative and legal history has been a big focus. Other material is the basic sources of law: doctrine, documents from international organizations, legislation and treaties. Non-legal material has been kept to a minimum.

Corporate criminal liability is most advanced in the field of corruption and anti-bribery why many arguments and examples are found within that field. Corporate criminality however ranges from financial crime to violent crime and I hope and believe the arguments and ideas presented in this thesis can largely be applied to all fields of corporate criminality, be it corruption, corporate complicity in gross human rights violations or work-health issues. The arguments presented against corporate criminal liability largely assert that corporate criminal liability is not coherent with the fundamental principles of criminal law, hence the authors focus on these principles.

Corporate criminal punishment is mostly confined to corporate fines. A broader perspective as to the relevant toolbox for criminal punishment on corporations would be desirable and also in line with the aim of this thesis. The gravity of the punishment must correspond with the gravity of the crime. Punishment for gross human rights abuses could e.g. include the liquidation of the company. The underlining principles of criminal punishment in relation to corporate crime should also be further analyzed. For instance, regarding gross human rights abuses, the need for reparations is underlined by the UN while, traditionally, criminal law is not meant to be reparatory.

Further case study of the corporate culture approach would be desirable but is also restricted due to its limited use in criminal law. To answer my thesis and to
present this rather new concept within criminal law to the reader I also want to paint a rather broad picture. My aim is to tell a story of why we are where we are today and to make the reader see that there are choices to make and that either choice will have consequences.
2. Corporation and crime

2.1 The Corporation

As the corporate form slowly took over the world during the course of the last three decades one might argue that the basic plot of law, state vs. individual, has largely been rewritten. For instance, the power dynamics on the global arena have changed dramatically and in 2015, 69 of the world’s 100 biggest economies were corporations.\textsuperscript{17} An impressive increase from when the list was first presented in 2002 when the number was 51.\textsuperscript{18} Of the 200 biggest economies, 150 are corporations.\textsuperscript{19} The revenue of the 10 biggest corporations surpass that of 180 of the poorest countries in the world.\textsuperscript{20} Corporations are now involved in all facets of human life. From the food we buy to the roof we put over our heads. This constitutes a clear and remarkable shift in the traditional view on state supremacy on the international arena (at least from an economic standpoint) dating back to the peace of Westphalia and the birth of international law. Accidentally at about the same time as the formation of the first modern joint-stock company, The British East India Corporation.\textsuperscript{21}

The role of the corporation has changed during the years, however, the interdependent relationship with the state has always been there. During the time of British colonization all trading companies were created by the state through royal charters and had quasi-governmental duties.\textsuperscript{22} In 1719 all uncharted trading companies were even banned.\textsuperscript{23} Incidentally, TeliaSonera was also previously completely owned by the Swedish government while today they own about 40 percent of the shares.\textsuperscript{24} The continued interdependence between state and

\textsuperscript{17} Global Justice Now (2015).
\textsuperscript{18} Global Justice Now (2015).
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} Baars, Spicer (2017), p. 4f.
\textsuperscript{22} Baars, Spicer (2017), p. 9.
\textsuperscript{23} Ibid.
\textsuperscript{24} Telia Company AB, Shares owned per 31 mars 2018.
corporation can also be seen in the increase of privatization of governmental duties over time, with the most remarkable development of privatization of even military services in recent history. Increasing privatization means that corporations are taking over what used to be, or was at least traditionally viewed as, the state’s responsibilities towards its citizens. As the criminal justice system is the ultimate expression for states power over the subjects within its jurisdiction there must be a degree of tension in this relationship and towards the punishment of the corporation as legal entities when it's so heavily reliant on them. This dynamic becomes extra visible in the context of state reluctance to deal with corporate complicity in extra-territorial offence. This interconnectedness is also highlighted in the commentaries to The UN Guiding Principles on Business and Human Rights article 8 which states that: “There is no inevitable tension between States’ human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda.”

2.2 The scope of corporate criminality

The full extent of corporate crime is hard to grasp, as is with all forms of criminality. Finding statistics in regards to corporate crime seems particularly hard, according to the author’s view. However, in regards to the cost of corporate crime, estimations are that they are probably several times greater than with traditional street crime. It is estimated that in the United States, only financial crime costs around $300 to $600 billion dollars per year. In recent years one out of every four household has

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26 See for instance May, Hoskins (2014).
27 UN Guiding Principles, Guiding Principle 8, Commentary.
been subjected to some form of white-collar criminality while the chances for an individual to be subject to traditional property or violent crime is one in a hundred.30

When it comes to business involvement in human rights violations there have been numerous accounts of both recent and past violations and very few of these lead to criminal charges.31 Of 277 lawsuits profiled by The Corporate Legal Accountability Annual Briefing, published by Business & Human Rights Resource Centre, only 37 have included criminal charges and only 13 have resulted in verdicts against corporations, their managers or agents even though many of the cases involve gross human rights violations.32 Only in the last two years at least 450 attacks on advocates working towards corporate accountability have been tracked including threats, beatings and even killings.33 Another example of corporate involvement in human rights violations is the issue of forced labour. The International Labour Organization (ILO) estimates that about 25 million people are stuck in forced labour of which 16 million of them are in the private sector, within such economic activities as manufacturing, construction and agriculture, while state-imposed forced labour on the other hand amounts to 4.1 million people.34

In “Corporate liability for gross human rights abuses”, a report prepared for the Office of the UN High Commissioner for Human Rights, it’s acknowledged that even though there are situations where corporations have been accused of being primary perpetrators most cases concern “corporate complicity” in human rights violations perpetrated by governments and state authorities.35 The report subsequently states that “Theories of corporate complicity in the wrongs of others therefore assume central importance in domestic legal responses to corporate involvement in gross human rights abuses.”36 Especially high risk for corporate

30 ibid.
31 Business and Human Rights Resources Center (2017), p. 5.
32 Ibid.
33 Ibid.
36 Ibid.
complicity, in regards to gross human rights violations, are conflict areas.\textsuperscript{37} The report highlights one of the most problematic aspects of corporations involvement in human rights abuses namely that they are more often than not the primary perpetrator which more often than not complicates criminal proceedings. To determine abetment, you first have to establish the initial crime and then to find direct causal link between the abettor and the perpetrator, proving that the abettor: “...knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.”\textsuperscript{38} This is another aggravating factor you have to consider when dealing with corporate crime.

### 2.3 Definitions of corporate crimes

There is no one definition of corporate crimes why this research field is somewhat more complicated and why it is said to be hard to give an entirely lucid overview.\textsuperscript{39} The problem is to define in certain terms what crimes can be attributed to, and differences in criminalized behavior between jurisdictions within, the sphere of corporate activities. Sutherland, who is perhaps the first and most influential researcher in this field, introduced the term “White-collar Crime” in The United States in the 1940’s.\textsuperscript{40} Even though his studies focused on the unlawful actions of corporations his definition of white-collar criminality came to involve any “offense committed by a person of respectability and high social status in the course of his occupation.”\textsuperscript{41} This definition focus on the characteristics of the offender. This broad definition meant the scrutiny of not just corporate misconduct per se but also that of politicians and of professionals in general.\textsuperscript{42} However criticism with Sutherland’s definition was that it encompasses actions that were not defined as

\textsuperscript{37} UN Guiding Principles on Buisness and Human Rights, Guiding Principle 7 and 23, commentary.
\textsuperscript{38} The definition of abettor is taken from the UN Guiding Principles, Guiding Principle 17, Commentary
\textsuperscript{39} See for instance: Cullen, Cavender, Maakestad, Benson (2006), p. 6ff.
\textsuperscript{40} Sutherland (1940), pp. 1-12.
\textsuperscript{41} Sutherland (1961), p. 9.
\textsuperscript{42} Cullen, Cavender, Maakestad, Benson (2006), p. 7
criminal. However, as we will come back to later, historically we have not been inclined to impose criminal sanctions on corporations.

The Swedish definition for crimes committed within the scope of the business enterprise, which is prerequisite for the awarding of corporate fines according to chapter 36 article 4 of the “Swedish penal code”, could serve as another benchmark. A definition of this concept is given in prop. 2005/06:59 which states that:

“A crime must therefore be regarded as committed within the scope of the business if it is part of the agent’s business. There should typically be a clear connection to the activity being conducted by the perpetrator, either in his capacity as an agent or representative for or as employed by the company. Corporate crime is not considered to be committed by anyone other than an agent, deputy, employees or contractors of a company”.

This definition is highly contingent on the individualistic mindset within the traditional philosophy of criminal law. In Swedish doctrine the term “Modern Criminality” has been used to refer to all crimes within the economical-industrial sphere. This description focuses on the context of the crime and applies to “already criminalized acts, that which through descriptions of the events that surround them, are attributed to society’s economic-industrial sphere”. That means conversely to what can be called traditional criminality that refers to crimes attributed to the individual or private sphere.

Corporate crime, although organizational by nature and not individualistic, have to be committed by one or many individuals within that company as is: “... a corporation cannot do anything but through the acts of its agents”. However, which will be demonstrated below, according to some corporate criminal liability

43 Ibid.
44 Prop. 2005/06:59, p. 20 (Authors translation).
46 Ibid.
doctrines no natural person have to be identified per se as long as the criminal act can be established.

In future reference to corporate crime I am talking about an individual act or the actions of several individuals within the scope of the business enterprise, albeit the identity of the perpetrators may never be known. An important distinction however, is that the crime must be perpetrated for the benefit of the company (although personal gain might be the result such as benefits, higher salary or a promotion) not against it like for instance insider trading.\textsuperscript{48}

\textsuperscript{48} Ibid p. 9.
3. The Swedish model for corporate liability

3.1 Development towards individual criminal liability

The system with individual criminal responsibility was not established in Sweden until around a hundred and fifty years ago.49 Before that, society was arranged around the collective entity of the family. The collective, not the individual, was in point of fact the main focus for the criminal law system. Any wrongdoing to a member of a family was viewed as an attack on the entirety of that collective. The main legal subject in medieval Sweden was the collective which meant that the punishment or retribution had the same collective character. Without a strong central power, conflict resolution was left in the hands of the families themselves often leading to feuds raging over long periods of time.50 In sixteenth century Sweden, like in many other countries, it was a patriarchal system where the man was head of the household. As head of the household the “master” was held criminally liable for any act committed by anyone in the household.51 The master-servant relationship is also where the vicarious liability doctrine used in Swedish criminal law as corporate criminal liability stems from.52 Over time as the central power grew, focus started to shift towards individual liability, focusing on the perpetrators guilt and penance for the victim instead of the collective. Still, however, effect-oriented conflict resolution was the main objective. More similar to the civil law system than the criminal. This changed when the peace and order became a national concern. Not only the victim could claim penance but that right was said to also behoove the public; the crown, the municipal or the city.53 The penance was to be divided between the public and the victim. Hence the focus came to shift from the injury towards the level of disobedience shown and of course the

50 Ibid.
51 Ibid p. 98.
52 See further in chapter 4.1.
individual guilt of the perpetrator.\textsuperscript{54} As the criminal justice system developed towards individual liability, civil liability remained open to claims towards judicial persons and is still today.

3.2 Vicarious Liability for Corporate Executives.

Sweden use vicarious liability for corporate executives (företagaransvar) as the only means for corporate liability, together with corporate fines. The doctrine of vicarious liability is not written law but instead follows from common practice and doctrine and was first introduced in 1948.\textsuperscript{55} Basically, it stands on the idea that whatever a manager does through an agent, he is deemed to have done himself.\textsuperscript{56} Much like the same way the master is responsible for the torts of his servants or members of his household. On the issue of knowledge, the same viewpoint is advised, the knowledge of the agent is the knowledge of the principal or manager. This doctrine comes from tort law where the judicial person is said to have certain responsibilities, often related to supervision of the business operations. Even when the criminal action or negligence can be tied to a specific person, the question of managerial responsibility often arises.\textsuperscript{57} Even though an agent of a company commits an offense, that person might only be operating under strict orders. The CEO and chairman of the board is assumed to have this far-reaching supervising responsibility within a company. The only way that the responsibility would fall on someone other than them, in Swedish criminal law, is if the responsibility would have been sufficiently delegated.\textsuperscript{58} Vicarious liability for corporate officers can

\textsuperscript{54} Ibid p. 97.
\textsuperscript{55} Jönsson, (2004), p. 94.
\textsuperscript{56} Lederman (2000), p. 652f.
\textsuperscript{57} Dahlqvist, Holmquist (2017), p. 83.
\textsuperscript{58} Dahlqvist, Holmquist (2017), p. 83.
only be applied if pre-conditions of normal criminal liability for the manager has been exhausted.\textsuperscript{59}

### 3.3 Corporate fines

In the Swedish criminal system, a corporation cannot commit a crime and hence not either be punished for a crime. In lieu that criminal liability is placed on certain key positions within the corporation. Except for the aforementioned the only punitive sanction against the legal entity up until 1986 was forfeiture of profit. Corporate criminal liability had largely been dismissed simply on the grounds that it did not correlate with the Swedish model of crime and punishment.\textsuperscript{60} On the subject of corporate liability Hans Thornstedt in 1948 comments as follows: “Any need for liability to collective entities can hardly be assumed in Swedish law, in any case not strongly enough that it could justify an attempt to overcome the technical difficulties the integration of such responsibility into the current criminal system would cause”.\textsuperscript{61} However, the need for more punitive measures on legal entities was revived as economic crime came in to focus during the 70’s. This prompted another governmental investigation in 1975 and this time Hans Thornstedt, as appointed to head the investigation of the Department of Justice, concludes that the need to regulate economic activity has changed due to the fact that corporations are now considerably larger in size.\textsuperscript{62} The indirect advantages of corporate crime were not covered sufficiently by the tools available for the prosecution. The proportions between the level of sanctions and the economic benefits involved were too great in comparison why Sweden in 1986 introduced corporate fines (företagsbot).\textsuperscript{63}

\textsuperscript{60} See further chapter 3.4.
\textsuperscript{61} Thornstedt (1948), p. 112f. Authors translation.
\textsuperscript{62} Ds Ju 1975:23 p. 8.
\textsuperscript{63} Ibid.
Corporate fines shall be imposed on corporations in the case of crimes committed within the business activities, if the crime has caused a serious breach of the special obligations associated with the business or otherwise are of a serious nature and the corporation has not done what was reasonable required to prevent that crime or the crime has been carried out by someone in a managerial position. The fines were constructed not as a punishment for crime but as an alternative punishment, hence not disrupting the individual criminal responsibility doctrine. Corporate fines can only be imposed if a natural person fulfills all the necessary prerequisites of a penal provision though the identity of the individual must not be established.

3.4 Critique against the Swedish system

Why corporate fines were introduced into Swedish criminal law was that the existing system was not sufficient to deter from corporate criminality. The latest revision has been regarding the limited application of the legislation and the size of the fines. The maximum fines that can be awarded is only 1 million euro which is comparatively low and according to the financial stakes at hand are not in line with Swedish commitments in international law. In 1997 the government launched an inquiry with the mission to see if the system in place should be replaced with criminal liability for legal persons. The inquiry concluded that the present system, because of its limitation to relatively serious crimes, the general scope of the regulation and its practically facultative configuration, caused the system to be ineffective. This lead to a proposal to replace the current system

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64 The Swedish Penal Code chapter 36 section 7.
66 SOU 2016:82, p. 71
69 SOU 2016:82, p. 16f. See also OECD 2014, p. 5.
70 SOU 1997:127, p. 95.
with criminal liability for legal persons.\textsuperscript{71} The proposal was motivated based on that corporate fines were treated as subordinate in relation to the individual liability and therefore was regarded as “odd” to the rest of the criminal law system.\textsuperscript{72} An advantage of introducing a corporate criminal liability regime was that the label of criminal punishment demarcates the repressive nature of the sanction that includes condemnation and has a stigmatizing effect.\textsuperscript{73} The current system was not applied to the extent intended by the legislator and the relabeling to criminal punishment was also deemed to motivate the criminal justice system to more effective implementation.\textsuperscript{74} The proposal did not lead to any legislative alterations on the basis that since criminal law is built upon individual liability and hence linguistic differences could be desirable.\textsuperscript{75}

A revised bill on corporate fines, mainly including an increase of maximum penalty from 1 million euro to 10 million euro, is however under revision.\textsuperscript{76} In the work leading up to that bill, SOU 2016:82 “Overview of the Corporate Fines legislation”, the advantages of criminal liability for legal persons was highlighted. This was due to critique from OECD on the issue of applying criminal sanctions to legal persons for \textit{mens rea} offenses.\textsuperscript{77} Even though no conviction of a natural person is necessary under Swedish criminal law the \textit{mens rea} must be established in a natural person within the company and even if proving negligence on the part of an unknown manager might be possible, proving intent of an unknown perpetrator on the other hand appears problematic.\textsuperscript{78} Sweden has not yet fined a corporation for a \textit{mens rea} offence without the prior prosecution of a natural person.\textsuperscript{79} The OECD in its 2012 report consequently states that “The focus of Swedish authorities on the individual rather than the corporate entity is concerning because

\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid p. 238.
\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid.
\textsuperscript{75} Ds 2001:69 p. 29f.
\textsuperscript{76} SOU 2016:82.
\textsuperscript{77} OECD (2012), p. 17ff.
\textsuperscript{78} Ibid.
\textsuperscript{79} OECD (2016), p. 77.
it had led to terminations of several investigations”.\textsuperscript{80} In SOU 2016:82 the investigator states that a new legislation permitting criminal prosecution without finding \textit{mens rea} in a natural person could make the rules more effective but was dismissed on the grounds that there was no mandate to consider changes in the individual criminal liability doctrine.\textsuperscript{81} Sweden has so far been unsuccessful to impose corporate fines on corporations for bribery, foreign or domestic.\textsuperscript{82} Even more alarming considering Sweden rarely utilize the possibility of forfeiture of profits towards legal entities.\textsuperscript{83}

In 2017, three former executives from the Swedish telecom company TeliaSonera where prosecuted in a case regarding foreign bribery, involving TeliaSonera and the Uzbek company Takilant Ltd.\textsuperscript{84} The case was brought up after Swedish public television (SVT) launched an undercover investigation that was presented on national tv in 2012. In 2013 the prosecution office issued a subpoena against SVT for the original documents from the negotiations between TeliaSonera and Takilant Ltd, which were obtained by SVT during the investigation.\textsuperscript{85} The original documents were important to the investigation inter alia for fingerprint analysis.\textsuperscript{86} TeliaSonera had however admitted to the payment of bribes and already reached a settlement with American and Dutch authorities to pay a sum of 750 million euro\textsuperscript{87} while the company according to the present system in Swedish criminal law can face corporate fines of a maximum up to 1 million euro. Meanwhile the ongoing investigation against the former executives of TeliaSonera, another case involving TeliaSonera and the Nepalese company Ncell was dropped by the prosecution office because of the difficulties with establishing \textit{mens rea} in cases involving corporate actors under Swedish criminal law.\textsuperscript{88} Gunnar Stettler

\textsuperscript{80} Ibid p. 18.
\textsuperscript{81} SOU 2016:82, p. 263.
\textsuperscript{82} OECD (2012), p. 17ff
\textsuperscript{83} SOU 2016:82, p. 175.
\textsuperscript{84} Gerdfeldter (2017).
\textsuperscript{85} Stockholms Tingsrätt, föreläggande AM-150915-12 i mål B 14304-12, 2013-05-29.
\textsuperscript{86} Gerdfeldter (2017).
\textsuperscript{87} Ibid.
\textsuperscript{88} Reuters, (2016).
from the prosecutions office told Reuters that with the tools they have at their disposal they could not prove bribery and he also added that even if bribery had been proven, it would not have been possible to prove intent on the part of any Telia officials.\textsuperscript{89} The prosecutor’s situation appear dire and recent budget proposals towards the prosecutor’s office for coming years does not mirror this situation, rather it could mean that at least a hundred prosecutors could lose their job in the following years as well as IT-investments that could be put on halt.\textsuperscript{90}

Another critique against the Swedish system has to do with vicarious liability doctrine and conceptual blurring.\textsuperscript{91} Susanne Wennberg talks about this in her contribution to the 2008 homage volume for Lars Heuman, “Are corporate executives strictly liable?”.\textsuperscript{92} The blurring is in part due to the fact that the vicarious liability doctrine comes from tort law to describe a strict liability, which is unknown to Swedish criminal law.\textsuperscript{93} However, certain cases seems to point to that the vicarious liability doctrine is used in a way that effectively makes the responsibility strict. Often, in court, the focus is primarily on only two things, the accused executives’ position within the company and whether or not he or she had any reason for suspicion.\textsuperscript{94}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} Ibid.
\item \textsuperscript{90} Wetterqvist (2018).
\item \textsuperscript{91} More about conceptual blurring in chapter 4.3.2.
\item \textsuperscript{92} Authors translation.
\item \textsuperscript{93} Wennberg (2008), p. 564.
\item \textsuperscript{94} Ibid.
\end{itemize}
\end{footnotesize}
4. Corporate Criminal Liability

4.1 Introduction to Corporate Criminal Liability

Corporate Criminal Liability refers to what extent a corporation as a legal person can be held criminally liable for the actions of the natural person it employs. Its development comes mainly from the legal development in common law countries while today most countries have adopted some form of corporate criminal liability regime. According to a survey done by the law firm Clifford Chance done in 2016, most of the countries in the survey have criminal liability for corporations, meaning that the acts and omissions of employees can be attributed to the corporation as a legal entity.\(^{95}\) The United States, Australia, China, France, Spain, Japan, India, United Arab Emirates and Great Britain are only some of the countries that does have Criminal Liability for corporations.\(^{96}\) The only countries in the survey that does not hold corporations as legal entities criminally liable, like Sweden, are Russia and Germany.\(^{97}\) The study conclude that “… there is also a general trend in most countries towards prosecuting corporate entities for the criminal misconduct of their officers and employees and towards the imposition of higher penalties.”\(^{98}\)

4.2 History of corporate criminal liability

Up until early sixteenth and seventeenth century it was generally unthinkable that a corporation could be held criminally liable. However, it was the idea of vicarious liability (master-servant) in ancient times together with the emergence of the church as a legal person in the twelfth century that made way for what we today know as corporate criminal liability. With the general development of business in

\(^{95}\) Clifford Chance (2016), p. 5.
\(^{96}\) Ibid p. 5.
\(^{97}\) Ibid p. 5.
\(^{98}\) Ibid p. 4.
17th century and specifically that of the first modern corporation, the East India Company, they were also soon to be recognized as legal persons. One might think that legal persons were to be treated as natural persons before the law, however that was not to be the case. A judge from an early case in eighteenth century England stated that “A corporation is not indictable but the particular members of it are”.

Similar to most other developments within law, the church played a big part in the development of corporate criminal liability. In twelfth century England, as the power of the landowner was diminished, the question of who actually owned the church was raised. As it was not deemed fit for the church to be owned either by the clergy or its patron saint, church property was to be owned by “the church” - that is the whole congregation treated as one single person for legal purposes. The church used this system to inherit land to such a degree that in 1279, King Edward I of issued a statute that limited the amount of land that could be passed on to what was then termed a corporate person. Today the notion of juristic or legal persons is well established in most legal systems. Without this abstract concept, the idea of corporate criminal liability would be inconceivable.

Both civil and criminal liability for corporations derives from the idea of vicarious liability. In ancient times masters where held criminally liable for everything his servants did. In Roman law the master, as paterfamilias, criminally liable for any tort committed by anyone under his power. In England a similar law existed concerning the master of the household. This vicarious liability was in England later analogized onto corporations. As put by Bernard “The earliest corporations were not thought capable of committing civil or criminal offenses themselves, but it was only a short step from the idea of a master as human

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101 Ibid p. 4.  
102 Baars, Spicer (2017), p. 3.  
105 Ibid.
person to the master as a corporate person”. Here the development within corporate liability differs from Swedish criminal law as no attribution of acts or omissions are done to the corporate person in Sweden, only between natural persons within the corporation. The development between civil law and common law countries differs on this point in general and a possible explanation is that the idea of the legalistic person was not as well established in civil law countries, merely seeing the legalistic person as a collection of individuals rather than an a separate entity. This has been used to explain why England could behead their monarchs while still keeping the monarchy whilst the French got rid of both at the same time. Another possible explanation is that France had a centralized government while both Great Britain and The United States had highly decentralized governmental structures why it was important for the central government to be able to prosecute local authorities for public nuisance offenses. An explanation that would be line with the development in Swedish criminal law as well. However, the most fundamental difference lies in the basic structure of the two legal tradition. Civil law is highly codified and the result of the legislative process the judges and courts are not supposed to make interpretations over time. This lies in deep contrast to the more responsive common law system where judges are supposed to make substantial interpretations and advancements over time.

Criminal intent was first attributed to a corporation in the early 20th century in both The United States and Great Britain, while the debate of corporate criminal liability really took off late 20th century as the issue of corporate crime was brought to the agenda after several big corporate scandals like the Ford Pinto

107 See chapter 3.2.
109 Ibid.
110 Ibid.
111 See chapter 3.1.
113 Ibid p. 9.
Case during the 1970’s in the United States or the 1987 Herald of Free Enterprise ferry disaster in Great Britain where almost 200 people lost their life after a ferry went to sea with its bow doors open and capsized. The official inquiry pointed out that even though mistakes had been made by personnel on duty that night, the entire company was so badly run that responsibility had to be shared due to organizational flaws and managerial failure. In the following court case against the corporation operating the ferry it was established that corporation could be charged with gross negligence manslaughter. However, to successfully prosecute the corporation the prosecution had to convince the court that the acts or omissions of the culpable agent can be attributed to the corporation using the “identification doctrine”, as if that individual is the realization of the corporation itself. In practice that meant proving gross negligence manslaughter of a high ranking officer and therefore applying the identification doctrine to large corporations would later be deemed almost impossible. Of the 34 cases of work-related manslaughter brought between 1992 and 2005, only 7 were successful and all of them were against small companies or sole traders. In 2007 the UK parliament passed The Corporate Manslaughter Act which applies only to corporations. Section 1(1) of the Act lays out the elements of the offense: “An organization to which this section applies is guilty of an offense if the way in which its activities are managed or organized (a) causes a person’s death, and (b) amounts to a gross breach of a relevant duty of care owed by the organization to the

114 More about the Ford Pinto case in chapter 5.6.
115 Wilkinson (2003), chapter IV, para. 5.
116 Ibid.
118 More about the identification doctrine in chapter 4.3.1.
121 Ibid.
deceased”. Up until September 2017 there had been 25 convictions whereof one conviction of a major company. 122

4.3 Different forms of Corporate Criminal Liability

To the authors knowledge there are four main types of corporate criminal liability, ‘vicarious liability’, ‘identification doctrine’, ‘aggregation model’ and the ‘Self-identity Doctrine’. Three derives corporate culpability from natural persons within the corporation while the third goes one step further and focus on corporate mens rea.

4.3.1 Vicarious liability (respondeat superior)

Vicarious liability is one of the most common forms of corporate criminal liability, also called the respondeat superior. 123 Unlike the Swedish variant, vicarious liability as a basis for corporate criminal liability means attributing individuals acts and omissions to the corporation per se. The corporation can not possess any form om mens rea of its own but is merely seen as a collection of its individuals. 124 The actus reus and mens rea of individuals who act on the corporation's behalf however is attributed to the corporation. 125 The corporation is liable if: a) an agent of the corporation commits a crime, b) while acting within the scope of employment, c) with the intent to benefit the corporation. 126 The concept of agent can mean any individual who acts on behalf of the corporation and can also apply only to managers, depending on which legal system and usually the severity of the

124 Ibid.
125 De Maglie (2005), p. 553.
126 Ibid.
offense. What acts that can be attributed were traditionally limited to acts: “expressly, tacitly or impliedly authorized by the board of directors” but have been expanded and can include all acts: “...corresponding to the general patterns of employee behavior as agents”. As described in chapter 2.3 the act has to benefit the company for it to be liable however also mixed intentions, intent to only partly benefit the corporation, is enough to satisfy this requirement.

4.3.2 Identification doctrine

The identification theory admits an independent criminal liability for legal persons. In order to find criminal liability for the corporation itself, this model first needs to identify a natural person within the company. When the guilty act (actus reus) and the guilty mind (mens rea) is established only then can the corporation per se be held liable. Some of the criminal law systems that use this form of liability focus only on individuals on the managerial level as the ‘directing mind’ of the company whose acts can be directly transferred to the legal entity, which is the case in for instance British criminal law. The agents are then acting as the company, as opposed to for the company like in the doctrine of vicarious liability. However, without a material test, who is actually the directing mind cannot be justly established. Same basic problem exists with the other forms of vicarious liability doctrines where it can be said that guilt is established prior to a material investigation in the specific case. The limited number of people whose acts and omissions can be attributed to the corporation will also consequently limit the application of the doctrine.

127 Ibid.
128 Ibid.
129 Ibid.
130 Jönsson (2004), p. 147
131 Ibid
132 Ibid p. 148
133 OECD (2016), p. 5.
In some criminal law systems, criminal liability for the corporation can also be transferred from lower level employees as long as the offense has been authorized or directed by someone with managerial authority, which is the case in United States.\textsuperscript{135} Already in the 1909 case, New York Central & Hudson River Railroad Co. v. United States, the Supreme Court held that a corporation could be liable for crimes of intent.\textsuperscript{136} The case was based upon the principle of respondeat superior which comes from tort law.\textsuperscript{137} Using tort law in a criminal law case was criticized as the two fields of law was said to have different purposes.\textsuperscript{138}

The doctrine also has a weakness as it can create clear incentives for representatives on a management level to try and evade liability by decentralizing decision-making or limiting access to information that could be incriminating.\textsuperscript{139} At the same time, where a firm has numerous branches, it is unrealistic to expect that a handful of executives at central headquarters would be able to keep a tab on what is happening in all the branches. Thus creating a classic ‘catch 22’ situation where often the corporations can evade criminal liability.\textsuperscript{140}

4.3.3 The Aggregation model

This model is the result of the more complex and decentralized structure or characteristics of the modern corporation.\textsuperscript{141} It moves beyond the previous two models to include events that were previously impossible to prosecute. It is still dependent on the idea of vicarious liability. The knowledge in possession of each of the various agents is attributed to the corporation separately which are then aggregated into one criminal whole.\textsuperscript{142} The aggregation model was used in \textit{United

\textsuperscript{135} Ibid p. 150
\textsuperscript{136} \textit{New York Central R. Co. v. United States, 212 U.S. 481 (1909), 2nd paragraph.}
\textsuperscript{137} Muhwezi (2016), p. 2.
\textsuperscript{138} Ibid.
\textsuperscript{139} OECD (2016), p.5
\textsuperscript{140} Ibid p 9.
\textsuperscript{141} Lederman (2000), p. 661.
\textsuperscript{142} ibid p. 661f.
States v. Bank of New England. According the Currency Transaction Reporting Act a bank is forced to report customer transactions above ten thousand dollars and intentional negligence not to do so is criminalized. By using different tellers a customer was able to withdraw sums far exceeding the allowed ten thousand dollars. As none of the tellers had sufficient knowledge of the amount withdrawn however, the court could not have amounted to intent using the other forms of vicarious liability. The court said that “corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation”. 143

However, it is important to stress that collective knowledge is not the same as collective intent. The extent of this doctrine has been debated in case law. 144 It is easier to accumulate knowledge from employees and the corporate books for instance but harder to accumulate intent as it is emotional. 145 Lederman says that emotions are an unique attribute to humans. 146 Hope, aspiration or indifference are by definitions one whole and can therefore not be dismantled like knowledge. 147 To sum up, when using the aggregation model we can assume that if one agent knows one thing and another agent know another thing, then the corporation knows both of these things. However, if one agent wants something and another agent wants something different, the company cannot be said to want both of those things simultaneously. A restricted model of this doctrine envisages that, yes knowledge can be accumulated from several agents but that at least one agent also has to fulfill: “...the emotional element of desire or indifference that is required to fulfill the mens rea”. 148 Lederman comments on the critique on both of this models as follows:

145 Ibid.
146 Ibid p. 668
147 Ibid
148 Ibid p. 669
“On the one hand, the model tries to remain loyal to the traditional conceptual framework of penal law and resorts to a known and defined term such as knowledge, which implies an understanding of all the objective elements of the offense. On the other hand, however, the model grants this concept a totally different meaning from the one customarily accepted in the human context, seeking to incorporate the idea of collective knowledge. An inevitable consequence, in these circumstances, is conceptual blurring. The doctrine that adopts the restricted view of the aggregation model seeks to contend with this difficulty. By demanding that an emotional element be present in the agent who also possesses part of the knowledge, this approach brings the conceptual terminology of the aggregation model closer to the traditional concept of culpability. However, even this demand cannot altogether preclude conceptual blurring, since the restricted approach also allows the application of the aggregation model, using it to envision a mental state that does not include all the elements of knowledge as if it were actual knowledge.”

However, the aggregation model is used to form corporate *mens rea* under the Australian Criminal Code Act 1995 but only applies to the fault element *negligence*. More about the Australian model of corporate criminal liability will follow in the adjacent chapter.

### 4.3.4 The Self-identity Doctrine (corporate culture)

The criminal guilt in this model is completely independent from any natural person within the company. This doctrine is furthest from the principle of *societas delinquere non potest* (that a company cannot be held criminally liable) and the culpability of the corporation is purely on a structural level. The corporation as a legal entity is autonomous in relation to and beyond the natural persons it

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149 Lederman (2000), p. 676
employs.\textsuperscript{150} In the previous three models, the corporation is merely seen as a collective of individuals whereas here the corporation can commit crime on its own. The liability of the legal person is derived by directly examining its functional mechanisms and by “...analyzing the link between the performance of corporate systems and the propriety of its processes on the one hand, and the commission of the offense in question on the other”.\textsuperscript{151} Findings in the course of this inquiry might of course result in findings that could very well serve as basis for individual liability of corporate agents as well.\textsuperscript{152}

Part 2.5 of the “Australian Criminal Code Act 1995” is based on the self-identity model and views the company as a unique entity having an existence independent of its employees. It allows for an examination of a company’s corporate policy and culture and its organizational structure in order to find genuine (as opposed to derivative) corporate fault. The actus reus and mens rea is replaced by ‘physical elements’\textsuperscript{153} and ‘fault elements’\textsuperscript{154}. The code is in fact a mix of different forms of corporate criminal liability. It applies vicarious liability doctrine in order to establish the physical element - agents acting within the scope of their employment.\textsuperscript{155} The fault element is divided between actions that only require negligence on the part of the perpetrator and those who require higher levels of mens rea like recklessness or intent. For actions that only require negligence, that negligence can be aggregated by the conduct form any number of agents or employees. The Australian Criminal Code §12.4(2)(b) states that if “no individual employee, agent or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole” (emphasis added). With action requiring e.g. intent or recklessness, the corporation can be held liable using

\footnotesize{\textsuperscript{150} Ibid. \\
\textsuperscript{151} Lederman (2000), p. 681 \\
\textsuperscript{152} Ibid. \\
\textsuperscript{153} Australian Criminal Code § 12.2. \\
\textsuperscript{154} Australian Criminal Code § 12.3 and 12.4. \\
\textsuperscript{155} Australian Criminal Code § 12.2.}
both the identification doctrine deriving culpability from board of directors or from a ‘high managerial agent’\textsuperscript{156}, or by establishing organizational fault by looking at corporate culture\textsuperscript{157}. Corporate culture is defined as meaning: “… 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.”\textsuperscript{158}

This model tries to combine human factors and organizational-structural mechanisms to establish a form of corporate personality.\textsuperscript{159} Supporters for this theory argues that, in contrast to the other forms of corporate criminal liability which are derivative in nature and therefore to some extent artificial to the context of corporate crime, this model focus on the reality of the modern corporation and works independently to other forms of liability in criminal law.\textsuperscript{160} However, even though the theoretical basis for corporate culture might be theoretically solid (see further chapter 5), there are still many practical and conceptual issues regarding the corporate culture approach that, just like the derivative models, limit the scope and applicability of the provision. The evidential burden is still many times too high for the prosecution and the uncertainties many regarding how to identify and prove the corporate culture in relation the physical act.\textsuperscript{161} The corporate culture approach to corporate criminal liability have been said to display: “…more academic purity than practical utility”.\textsuperscript{162}
4.4 Corporate Criminal Liability in International Law

“The corporate responsibility to respect exists independently of States’ duties. Therefore, there is no need for the slippery distinction between ‘primary’ State and ‘secondary’ corporate obligations—which in any event would invite endless strategic gaming on the ground about who is responsible for what. Furthermore, because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. Finally, ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps—for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.”

There are no mechanisms in international law to hold corporations as legal persons criminally liable for their actions. During the drafting of the Rome Statute, jurisdiction over legal entities was discussed but dismissed during the preparatory work due to limited time and lack of consensus. The Rome Statute specifically states that it only has jurisdiction over natural persons. However, the idea of international legal personality has opened up for interpretations of corporations as subjects under international law. This opens up for interpretations as to the idea of ‘persons’ under several international treaties, limiting their jurisdiction to ‘persons’ but not ‘natural persons’, such as the Genocide Convention as Article 4 does not distinguish natural persons from judicial persons. However, the idea of international legal personality as a basis for being duty-bearers under international law is contested by several legal thinkers as the concept is built upon doctrine and hence can be dismantled by doctrine.

The shift towards the idea of corporations as duty-bearers in international law is affirmed in the ongoing process within the UN under resolution 26/9 and

Ref:
163 Ruggie (2008), para. 55.
165 Ibid.
166 Ibid p. 61.
the drafting of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.\textsuperscript{169} However, the resolution point to a certain divide between developing and western countries where the support for a binding document is mostly coming from developing countries.\textsuperscript{170} The chair of the OEIWG on transnational corporations and other business enterprises with respect to human rights established by the resolution just released guiding questions for the third open consultation where the need to find a common approach among different jurisdictions on the issue of legal liability of business enterprises was also emphasized.\textsuperscript{171}

A significant factor promoting corporate criminal liability has been the increase in international instruments requiring such provisions. For instance the UN Convention against Transnational Organized Crime article 10(1) of which states 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, 6, 8 and 23 of this Convention”.\textsuperscript{172} OECD is by far the most outspoken actor within international law actively promoting liability for corporations as legal entities. Article 2 of the OECD Anti-bribery Convention from 1997 states 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”.\textsuperscript{173} Article 3 of the same convention also states that punishment should be “effective, proportionate and dissuasive”\textsuperscript{174}, something the Swedish system has been criticized not to be.\textsuperscript{175} In the “OECD Public Consultation On Liability Of Legal

\textsuperscript{169} General Assembly resolution 26/9, 2014.
\textsuperscript{170} ibid p. 3. \textit{Voting in favor e.g.:} Congo, Côte d’Ivoire, Cuba, Ethiopia, India, Indonesia, Kenya, Morocco, South Africa, Venezuela. \textit{Voting against:} France, Germany, Ireland, Italy, Japan, United Kingdom of Great Britain and Northern Ireland, United States of America.
\textsuperscript{171} OEIWG (2018).
\textsuperscript{172} United Nations, Convention against Transnational Organized Crime, 2000, art. 10(1).
\textsuperscript{173} OECD, Anti-Bribery Convention, 1997, art. 2.
\textsuperscript{174} Ibid art. 3.
\textsuperscript{175} OECD (2012), p. 5.
Persons”, a report done by U4 Anti-Corruption Resource Centre, the case for moving beyond individual criminal responsibility is underlined.\textsuperscript{176} The presumption of knowledge provided for in the UK Bribery Act facilitates for integrated risk management when today the CEO’s are only present at risk management 34\% of the time.\textsuperscript{177} The report goes on to state that: “By recognizing the norms of a corporate culture in corporate liability regimes, governments can create the necessary external pressure to drive change. The models that focus on monetary sanctions and compliance checklists is a weak driver for addressing issues related to corporate culture and norms”.\textsuperscript{178} However, it also emphasizes that the best way to deter from corporate crime is a balanced regime between individual and corporate fault: “Corporate liability regimes should ultimately be geared towards balancing corporate with individual fault, emphasizing the strong behavioral influence of corporate management through its many carrots and sticks, while also ensuring general deterrence at individual level where it has the greatest effect on achieving corporate compliance.”\textsuperscript{179}

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\begin{itemize}
\item\textsuperscript{176} Eriksson, Kirya, Stridsman (2016), p. 20.
\item\textsuperscript{177} Ibid
\item\textsuperscript{178} Ibid p. 21.
\item\textsuperscript{179} Ibid p. 22..
\end{itemize}
\end{flushleft}
5. Corporate Criminal Liability and the fundamental principles of Criminal Law

5.1 Introduction

“Any development of law that deviates away from its principles and theories will push its legal implementation away from its true direction and in the end of the day it will depart far away from the essence of legal development.”

As aforementioned the area of criminal law is particularly sensitive area of law. It deals with the worst of human behavior such as murder, rape and crimes against humanity. Because it deals with the worst in us it also incorporates the biggest opportunity for state restrictions on basic human rights. If a person commits murder the state is given the authority to imprison that person hence restricting basic human rights. To criminalize an act is more often than not a restriction by itself because the state is delimiting individual’s freedom of choice in that the state imposes a threat of punishment. Its therefore important that all changes made in criminal law can be explained with and derived from basic principles of criminalization and criminal punishment. In the coming chapters some of the arguments for and against corporate criminal liability with respect to the fundamental principles and purposes of criminal law will be presented.

5.2 Mens rea

In both civil and common law tradition, individual liability has been of fundamental aspect to form intent, to have a ‘guilty mind’ or mens rea. There are

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180 Prostopo, Ruslan, Sofyan (2015), p. 120.
different variations of mens rea in different criminal law systems but usually the concept refers to intent as the most violent or malice, knowledge somewhere in the middle and recklessness and negligence as the most lenient forms of mens rea. The demand for mens rea corresponds with one of the fundamental principles in criminal law namely that criminal law generally punishes morally blameworthy behavior. Another concern regarding punishment and corporations is the possible spillover effect on non-culpable shareholders. Jönsson says that mens rea rests on 1) the notion of individual moral agency, meaning that what one person does has a moral value to another person, and 2) that our actions is the result from free and individual choices. This means that people should be judged on basis of their action and not there social status or the situation that person find themselves in. The criminal act should be kept separate from cultural, economic and sociological factors. What motivates a crime is not a subject for law. A theft is a theft, whether motivated by greed or starvation. However, Jönsson also says that there just as well can be said that the opposite is true, that there is a big moral gap between us and that we are not free people who make rational decisions. Jönsson also states that there is no problem with constructing criminal liability for legal persons, the only question is if and why it should be used.

5.3 The Contextualization of Criminal Law

On the subject of if and why Jönsson pushes on the problem of contextualization of criminality. The context is the industrial-economic sphere and corporate
criminal liability is a response to an experience of lack of control in that context.\(^\text{190}\) The vicarious forms of liability are constructed in this way. By constructing vicarious liability for corporate managers, the industrial-economic sphere is treated as an exception in criminal law.\(^\text{191}\) Criminal acts within that context cannot be motivated by the degree of moral blameworthiness in the specific case. Jönsson says that if the legislator saw the specific crime as morally blameworthy then there can be no transfer of guilt, that bill had to contain a demand for personal guilt - *nulla poena sine culpa* (no punishment without fault).\(^\text{192}\) Criminal law loses its moralizing function and becomes neutral. Without the stigma, legitimizing prosecution in one specific context or case becomes harder to do.\(^\text{193}\) By decontextualizing the individual criminal act the law also seeks to remove cultural and social prejudice from legal practice.\(^\text{194}\) However, to depart from the moralizing effect of criminal law and that it can be damaging to the effectiveness of the system is however debated since it can be said to be an empirical question.\(^\text{195}\) To punish someone other than the perpetrator rather becomes an ethical question weighing effectiveness against arguments of justice.\(^\text{196}\)

### 5.4 Ultima ratio and the functionalization of criminal law

To impose criminal liability on corporations as legal persons, according to some legal thinkers, follows a trend within criminal law, an unfortunate one as well. This trend is described as the functionalization of criminal law.\(^\text{197}\) Often characterized by the mixing of different fields of law, such as for instance administrative law and

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\(^{190}\) Ibid.

\(^{191}\) Ibid p. 144.

\(^{192}\) Ibid p. 145f.

\(^{193}\) Ibid p. 146.

\(^{194}\) Ibid.


\(^{196}\) Ibid.

\(^{197}\) See for instance Jönsson (2004), p. 36.
criminal law.\textsuperscript{198} Jönsson, when citing Nuotio, means that this functionalization is due to that criminal law is moving towards trying to manage the limits of what should be permitted risks within the industrial-economic sphere.\textsuperscript{199} These risks are described as unwanted side effects in pursuit of societal material welfare; industrial production.\textsuperscript{200} This way criminal law becomes a tool for political reform as any other which violates the principle of ultima ratio - criminalization should only be used as a last resort. As criminal law is the most violent expression of state power, using it in this way again threatens to undermine its moralizing effect.\textsuperscript{201}

Nuotio uses the field of environmental law as an example where he suggests that as criminal law fails to decrease the overall effects of pollution, punishing individual perpetrators leads to a dissolution of blameworthiness in the specific case.\textsuperscript{202} When the overall goal of the criminalization is functional, then the public expects the results to be functional as well. When the effects are not shown, this leads to criminal law becoming symbolic and in the end can lead to a legitimacy deficiency within the system.\textsuperscript{203}

5.5 The purpose of criminal law

Swedish criminal law doctrine is built on three separate but interrelated purposes for punishment; 1) general deterrence, 2) specific deterrence and 3) retribution.\textsuperscript{204} General deterrence is focused on deterring others from committing crime in the future while specific is focused on the offender. General deterrence hence does not focus on the level of individual blame but the need for: “...the consequentialist

\begin{itemize}
\item \textsuperscript{198} Prostopo, Ruslan, Sofyan (2015) p. 116.
\item \textsuperscript{199} Jönsson (2004), p. 36.
\item \textsuperscript{200} Ibid.
\item \textsuperscript{201} Ibid p. 36ff.
\item \textsuperscript{202} Criminal law should only punish morally blameworthy behavior, see chapter 4.7.
\item \textsuperscript{203} Ibid p. 37f.
\item \textsuperscript{204} Ibid p. 31.
\end{itemize}
effect of punishment in reducing recidivism”. 205 Although retribution still is a part of the system, it more serves as justification for the punishment rather than as an overall purpose. 206 General deterrence and retribution are also the two main rationales for punishment in international criminal law. 207 In international criminal law retribution should not be to interrelated with the idea of vengeance but rather seen as a way for the international community to express outrage. 208 Systems of criminal law that focus more on retribution might not be as keen on adopting the models of corporate criminal liability focusing on corporate culture but rather focusing on personal guilt and fault. However, the public’s idea of retribution might still be more in line with the corporate culture model. The idea that the corporation represents something beyond the individual's it employs is evident for those who promote the realist approach. Even for the corporations themselves looking at the great length corporations will go to safeguard its reputations. 209 The public's reaction to the 1987 Herald of Free Enterprise ferry disaster also points towards a general understanding of the idea of corporate fault. Celia Wells reports that the relatives of the deceased “were keen to see the company properly punished but not the particular individuals whose misfortune it was to be operating the ferry that... night”. 210 Surely a testament to the public’s perception of attributing fault and the consequent retribution to abstract entities.

One area of law which has focused greatly on Corporate Criminal Liability is that of corruption and specifically cross-border corruption. The harmful effects of corruption have been highlighted in recent years and lead to intense international cooperation. The globalized market works to stop trade restrictions which corruption effectively constitutes and The World Bank estimates that bribes at

206 Ibid.
208 Ibid.
209 See for instance McDonald’s v Steel Queens Bench Division No 1990- M- No 5724.
210 Wells (2003), chapter V para. 6.
about one thousand billion euro are being handed out each year.\textsuperscript{211} Corruption also means that a lot of foreign investment ends up in the pockets of public officials as opposed to benefiting the people.\textsuperscript{212} Consequently eroding the belief in democracy and undermining faith in public officials, investment and trade.\textsuperscript{213} In 2011 Great Britain introduced strict liability for Corporations for failure to prevent corruption.\textsuperscript{214} This legislation was the result of many years of pressure from OECD to punish legal persons, \textsuperscript{215} which is seen as elementary in the fight against corruption\textsuperscript{216}. Spain and Switzerland are two other countries that have also introduced Corporate Criminal Liability as a result from the developments within OECD and in anti-bribery.\textsuperscript{217} To avoid criminal sanctions according to The Bribery Act 2010 the company most prove that the company has adequate procedures in place designed to prevent bribery.\textsuperscript{218} A legislation that goes way beyond the traditional legalistic approach of individual liability. Instead, by effectively introducing a strict liability offence for failing to prevent bribery, the focus is moved the company is organized as a collective. The concept of blame is transferred from the individual intent or knowledge towards corporate culture and how the company is effectively run hence creating clear organizational incentives to prevent crime, which is aligned with the fundamental principle of general deterrence.

One of the main arguments for introducing CCL in Swedish criminal law has been the stigmatizing effect of criminal punishment.\textsuperscript{219} It is easier for a company to blame misconduct on a few ‘bad apples’ then to clear their name in.

\textsuperscript{211} Drewert (2012), p. 179.
\textsuperscript{212} Ibid.
\textsuperscript{213} Ibid.
\textsuperscript{214} Bribery Act 2010.
\textsuperscript{215} Drewert (2012), p. 178.
\textsuperscript{216} “The liability of legal persons for foreign bribery and related economic offences is a key feature of the emerging legal infrastructure for the global economy. Without it, governments face a losing battle in the fight against the bribery of foreign public officials and other complex economic crimes.” - OECD (2016), p. 3.
\textsuperscript{217} Ibid.
\textsuperscript{218} Yeoh (2010), p. 142.
\textsuperscript{219} Drewert (2012), p. 182.
the light of criminal punishment. The effect of using the current system of corporate fines as alternative punishment might not be as effective from the perspective of general deterrence. Some countries use compliance programs to preclude liability or as mitigating factors when imposing sanctions. Although controversial, these programs can be “potentially important tools for promoting effective compliance with the law within legal persons”. The use of compliance programs is also discussed and encouraged in the previously mentioned publication from OECD, “Public Consultation on Liability of Legal Persons”.

5.6 Organizational fault or corporate mens rea

“Organizational fault inheres when a company has organized its business in such a way that person and property are exposed to criminal victimization or the unreasonable risk of harm, when the company has failed to devise and put into place systems for avoiding criminological risk, when its monitoring and supervision of those whom it has put in a position to commit an offence or cause harm is inadequate, and when the corporate ethos or culture is such as to tolerate or encourage offences.”

The Shorter Oxford English Dictionary defines a corporation as “a body of persons combined or incorporated for some common object” and in the same way as the body consists of different parts, the corporation is as well and can therefore be considered as one unit. The word ‘corporation’ comes from the Latin word ‘corpus’ which means ‘body’ or ‘body of persons’. A corporation, like a body, is also organized and in a way therefore predictable to a certain extent. Just as different organs have different responsibilities within the body, a corporations

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220 Ibid.
221 OECD (2016), p. 66.
222 Ibid p. 21.
223 Ibid p. 66.
consist of people or branches with different responsibilities. This organizational attribute is vital to form any form of corporate criminal liability but especially in the self-identity model. In this aspect, the corporation is not just any group of people. Stephen Tully exemplifies this difference in that both ‘external outcomes’ and ‘internal outcomes’ will differ between organized and unorganized groups.\textsuperscript{227}

If I had a construction firm with access to finance, some expertise in construction and say ten employees and I would ask those ten people to build a house by the end of the year, that house will probably be built. If I were to ask a group of ten people on the bus to build a house by the end of the year those people would just look at me funny and that house would definitely not be built. This according to Tully is a significant distinction between organized and unorganized groups regarding outcomes external to the group. Internal outcomes refer to the behavior within the group. My construction firm would exhibit significantly higher levels of behavioral coherency and consistency than the group of people on the bus.\textsuperscript{228}

The complex structure of the corporation is also one of the underlying reasons that the idea of corporate criminal liability, and especially the self-identity doctrine, has emerged in recent years.\textsuperscript{229} The corporation is no longer the traditional hierarchy-pyramid it once was, or at least thought to have been. It is highly compartmentalized, complexly arranged in corporate groups, subsidiaries and spread out geographically across national borders. To find and successfully prosecuting natural persons within that complex structure is almost impossible.\textsuperscript{230} This is one reason why the individual responsibility doctrine and the derivative models of corporate criminal liability, by themselves, have been argued not to be sufficient in the fight against corporate crime. Realist models of corporate criminal liability (as opposed to the derivative models), such as the self-identity doctrine,

\textsuperscript{227} ibid p. 4.
\textsuperscript{228} Ibid p. 4f.
seek to reflect the corporation as an individual entity with its own distinctive goals and attributes. Theories of organizational behavior points to a variety of reasons why organizational fault needs to be reflected in criminal law, for instance corporate goals that can be unrealistic and therefore promote unlawful behavior. What are the incentives - is safety or risk rewarded? Does the company make reasonable efforts to educate employees of the legal requirements? These are some of the aspects of corporate culture that are unique to every corporation and can reflect fault on the organization. An example used to demonstrate the culpability of corporations is the State v. Ford Motor Co, the first ever prosecution for reckless homicide brought against a corporation following the death of three girls after their Ford Pinto had burst into flames during an accident. The Ford Pinto model had a faulty gas tank placed directly behind the rear bumper causing the car to burst into flames from a rear end collision. During the trial the court dismissed numerous documents that showed that Ford knew of the defect. Ford had pursued an internal cost-benefit analysis and concluded that the $11 safety improvement that would make the Pinto less likely to burn would cost more than the benefit derived. It is estimated that at least 500 burn deaths had occurred because of Pinto gas tank ruptures. Accounts on the corporate culture of Ford at this time said that safety was not the focus, instead bringing up safety issues was thwarted. Ford was nonetheless acquitted by a jury on all charges however the case is viewed as a critical step in the work towards corporate criminal liability and organizational responsibility.
When it comes to extraordinary international crimes, crimes against humanity, these crimes are never done by one individual. These crimes are done in a collective manner and by people who most often than not conform to a group or an authoritative figure.\textsuperscript{240} Also most often the people involved are more characterized by their normality than there abnormality and for instance a psychiatrist dispatched during the Nuremberg trials did not find evidence of psychiatric disturbance among the defendants.\textsuperscript{241} Those who resist group assimilation are in fact the deviants - “Extraordinary international crime often flows from organic groupthink in the times and places where it is committed, making individual participation therein less deviant and, in fact, more a matter of conforming to a social norm”.\textsuperscript{242} These factors are not isolated to gross human rights violations but are in some capacity transferable to other crimes such as corruption where for instance, an organization that rewards winning contracts, regardless of the method, signals to employees that the end justifies the means, although never explicitly expressed.\textsuperscript{243} Professor Mark A. Drumbl says in his critically acclaimed book about how individuals who perpetrate genocide and crimes against humanity should be punished, that “.. there is an unequivocal need for criminological and penological research that recognizes the influence of the group as a social agent and the structural nature of criminogenic conditions”.\textsuperscript{244}

\textsuperscript{241} Ibid.
\textsuperscript{242} Ibid p. 32.
\textsuperscript{243} Ibid.
\textsuperscript{244} Ibid.
6. Discussion

“A philosopher produces ideas, a poet poems, a clergyman sermons, a professor compendia and so on. A criminal produces crimes. If we take a closer look at the connection between this latter branch of production and society as a whole, we shall rid ourselves of many prejudices. The criminal produces not only crime but also criminal law. The criminal moreover produces the whole of the police and of criminal justice, constables, judges, hangmen, juries, etc; and all these different lines of business, which form just as many categories of the social division of labour, develop different capacities of the human mind, create new needs and new ways of satisfying them… Crime, through its constantly new methods of attack on property, constantly calls into being new methods of defence, and so is as productive as strikes for the invention of machines.”

Today legislators are struggling to effectively deal with corporate offense in both finding a concept of corporate criminal liability that would decrease the incentives for such crimes while at the same time fitting that concept into the very conservative framework of criminal law. The socio-economic benefits from holding corporations accountable are obvious. However, how that accountability should be constructed is of course a different question. Looking at the arguments presented against and for corporate criminal liability I am however hopeful criminal law have an important part to play, especially since the arguments against corporate criminal liability are so largely based on only formal doctrinal theory oppose to for instance policy analysis. The Criminal law system is the ultimate exhibition of the power the state can exercise against its subjects and must therefore be used according to the rule of law and should be in line with the basic principles of criminal law. However, the corporation did not even exist in the Roman empire why one could argue that it is problematic basing arguments against corporate

criminal liability on roman logic such as *Actus non facit reum nisi mens sit rea* – ‘an act does not make a person guilty unless mind is also guilty’. The principle of *societas delinquere non potest*, the long withstanding principle that says corporations cannot be prosecuted, furthermore translates to ‘society cannot be wrong” which can be said to mean anything really and is dubious at best.\(^{247}\) That is my own most sharp criticism to the critique against corporate criminal liability, the dubious nature of its fabric. The moral continuity and the consequential blameworthiness of a human beings’ actions is built on the premise that human beings are more than the sum of its parts. If so, the same can be said about groups of people and corporations. Some of the arguments against corporate criminal liability that have been discussed in this thesis are:

- Weakened moralizing effect of criminal law.
- Conceptual blurring.
- The spillover effect on non-culpable shareholders.

That a deviation from the concept of individual criminal responsibility would be morally diminishing to criminal law in general I find hard to believe and to me, according to some of the arguments for group behavior and organizational fault, many times it is more just to blame the corporation itself. The possible demoralizing effect and the proposed legitimacy issues of corporate criminal liability also has to be put in a wider perspective. Drewert talks about the issue of legitimacy crisis in many developing countries due to corruption. If the economic growth does not benefit the general public the legitimacy crisis will be apparent throughout society, effectively undermining faith in public officials, investment and trade and in the end democracy itself. Corporations have to be liable one way or another. However, how this should be done correctly and justly will take time to figure out. The individual criminal responsibility doctrine was established in

\(^{247}\) No in-depth interpretation to the underlying meaning behind the concept has been found.
Sweden 150 years ago, before which the collective was in fact the responsible entity not the individual.

The contextualization of the corporate sphere or the industrial-economic sphere is an inevitability. To decontextualize would mean getting rid of both vicarious liability and the appurtenant corporate fines all together. This could very well be the way to go. The amount of resources that would have to be invested in the whole legal apparatus however, would be enormous. For a prosecutor, with the tools they have at their disposal today, to prosecute individuals of a multinational corporation that is highly compartmentalized and with massive financial and legal resources is complex to say the least. Without any contextualization of the law that job would not be made easier. It is like finding a needle in a haystack. However, by adopting a realist model corporate criminal liability regime, like the Australian model, conceptual blurring can be kept to a minimum by finding genuine organizational fault instead of deriving that fault from a natural person.

Spillover effect from punishment is an inevitability regardless of which system you use. There will always be innocent people being subject to indirect consequences. This is apparent in the individual criminal responsibility doctrine as well when you for instance think about the family and relatives of those who are incarcerated. The current system in Swedish criminal law means the shareholders are punished due to the culpability of one manager. Finding genuine corporate fault seems more just to the shareholders. It also creates incentives for shareholders, both to be more involved in the business they have invested in and to do proper due diligence. Hence hopefully also creating a need for greater transparency.

There is a development within law to further punish corporations for corporate crime which can be seen in the growing number of legislations focusing on corporate criminal liability. However, there are still those who are concerned about a trend towards even greater corporate impunity.\textsuperscript{248} As corporations grow

\textsuperscript{248} Business and Human Rights Resources Center, (2017).
larger and larger, it is hard to imagine their impact on society will be reduced. On the contrary, states that are financially weaker will continue to be dependent on foreign investment and these countries are vulnerable targets for e.g. foreign bribery. Sweden ranks 14th among all countries when it comes to outward foreign direct investment why the need for a comprehensive corporate criminal liability regime and international cooperation is dire. The same goes for human rights violations as the recent case with the Swedish oil consortium Lundin Oil suggests where managers of the corporation is under investigation for alleged war crimes. UN Resolution 26/9 also mirror both the need for a more effective corporate liability regime and greater cooperation. Focus from law enforcement must also mirror the cost of corporate crime. More resources for prosecutors are perhaps some of the uncomfortable political solutions that opponents to corporate criminal liability are talking about and that must be put in place. However, more prosecutors will not fix the problem of corporate impunity, prosecutors need more tools in their toolbox. Here are some advantages of introducing corporate criminal liability beyond individual criminal responsibility that is missing in the current Swedish criminal law system:

- Clear organizational incentives to prevent crimes.
- Criminal liability not dependent on finding natural persons to prosecute within the complex structure of modern day corporations (does not exclude the possibility of individual prosecution).
- Facilitates greater international cooperation, which is fully needed.
- Minimize conceptual blurring.
- Higher probability for a more effective and more deterrent system.
- The stigmatizing effect of criminal punishment.

For more information on Lundin Oils involvement see the report ‘Unpaid Debt’ by ECOS (2010).
In cases of corporate involvement in gross human rights violations, it is clear that companies are often involved as aiders or abettors. It also shows that most violations occur in conflict zones. Many times it is easier for companies to get access than say other states or international organizations or non-governmental organizations. This does not only enhance the importance for corporations to respect human rights, but also demonstrates an opportunity for western countries to prosecute perpetrators for gross human rights violations since many of the companies that are involved are domiciled there. To commit gross human rights violations you need resources why corporations are often involved since economic endeavors almost always demands corporate involvement. Greater international cooperation is also needed, to create common terminology, access to remedy and so on.


7. Conclusion

I think that there are clear indications that most individuals today move within three fundamental, distinct and separate contexts: the private, the public and the corporative. Therefore, I believe that further contextualization of the corporate sphere is inevitable. The changing power dynamics and the increasing privatization of public duties also suggest that the responsibility of corporations to respect human rights must reflect this development. If we can conclude that a nation state has failed to uphold human rights for its citizens, we can claim that corporations are responsible for violations within the scope of their business activities. The individual criminal responsibility doctrine stresses the importance of individual guilt and personal fault which effectively makes it an ineffective tool towards corporate crime.

The derivative models of corporate criminal liability that are still tied up to the traditional concept of individual guilt that does not take the practical realities of the modern corporation into account. Neither does it reflect the realities of human interactions within the complex corporate dynamics. The Swedish system of vicarious liability for corporate officers is resource consuming and ineffective which is clear in the case of Teliasonera. The identification doctrine and the aggregation model are also derivative and will inevitably lead to conceptual blurring without realist regime on corporate criminal liability. To effectively deal with corporate criminality there has to be a corporate criminal liability regime that takes the actual realities of the modern corporation into account. The possible negative effects of deviating from the individual criminal responsibility doctrine are hard to survey. If you look at the development in international law however, especially in the context of foreign bribery, the trend is clear and there seems to be clear advantages. There also seems to be no turning back on this issue.

The Australian model is probably not the definitive model for corporate criminal liability but it is the most modern and most comprehensive solution to
date. It is a step in the right direction. It utilizes components from all corporate
criminal liability models into one holistic regime. It does not derive fault from a
natural person instead finds genuine corporate fault. It builds upon the concepts
within the individual criminal responsibility doctrine like the *actus reus* and *mens
rea* while at the same time avoiding conceptual blurring by replacing them with a
physical element and a fault element. It also creates organizational incentives to
prevent crimes through corporate policy and culture.

The practical uncertainties of corporate criminal liability cannot be
overlooked but should not either be overstated due the practical uncertainties of the
system currently in place. Any development in law takes time. The theoretical basis
for corporate criminal liability is sound, based in both traditional concepts of guilt
and theories of organizational fault. Hence my conclusion is you can argue that
corporate criminal liability works with the fundamental principles within criminal
law. With the possible advantages that a holistic corporate criminal liability regime
could contribute with I believe there are grounds for Sweden to adopt corporate
criminal liability why I strongly urge that future inquiries on corporate liability will
debate this subject from a wider perspective and that they have the mandate to
consider changes in the individual criminal responsibility doctrine.
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