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**The Criminal Liability of Legal  
Persons: Reflections for Cambodia**

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## **Preface**

The harmful effects of acts by legal persons result in various responses by States. Cambodia is included amongst states providing legal provision on the criminal liability of legal persons. The actual implementation of provisions remains a problem and some clarifications on points of law need to be made.

Research on this issue requires the collection of a broad range of research materials, impossible to carry out in Cambodia due to lack of those materials. It is with much fortune and a great honor for me to have been granted a short stay as a research fellow at the Nagoya University Graduate School of Law, through the financial and administrative support of the Center for Asian Legal Exchange (CALE), where I could exploit rich research materials available both at the Law School and Central Libraries of the University. Without such resources and the strong support of Professor OBATA Kaoru, Director of CALE, and many other persons whose names do not appear in this page, the research and this working paper may not have materialised. Therefore, I would like to express my profound and heartfelt thanks to Professor OBATA Kaoru, the people of Japan, the Government of Japan, and staff of Nagoya University, who have provided me with financial, emotional and administrative support during my research and one-month stay in Japan.

This is a working paper; unintentional mistakes both in grammar and substance are my responsibility. I am open to constructive criticism.

Phnom Penh, 12 May 2016

## **Abstract**

Activities of legal persons may cause harmful consequences that require the legal framework to respond. This study helps to clarify some theoretical legal issues in Cambodian laws on the criminal liability of legal persons.

It argues that organs and representatives are not always high organs or high ranking officials of legal persons. They are assigned by legal persons; their work is performed in the course of assignment and not for private benefit.

This reveals that the criminal liability of legal persons in Cambodia is similar to the vicarious liability mode rooted in tort law. However, the application of vicarious liability to criminal liability of legal persons should take into consideration the different nature of civil and criminal liability.

## I . Introduction

For economic and social development, States adopt various measures and provide incentives to attract foreign and domestic investment. Companies and other types of corporations are established mainly to make profit. Some of them are wholly foreign owned or joint ventures with branches in several countries under a complex managerial structure.

Some legal persons are well organized, both making profit and helping to raise the well-being of people within the locations they are situated; some of them might be created to do harmful acts, affecting people, society and the environment.<sup>1</sup>

Scholars have theoretically pushed for the criminal liability of legal persons with a view to deterring legal persons from committing crimes.<sup>2</sup> Many States respond to the culpability of legal persons by adopting specific laws or inserting provisions on the criminal liability of legal persons into existing separate fields of laws.

The Kingdom of Cambodia provided more detailed provisions on the criminal liability of legal persons for the first time in the 2009 Criminal Code, much influenced by the French Criminal Code.

Reports of alleged harmful act caused by legal persons in Cambodia continue to exist; however, the extent to which existing provisions on legal person criminal liability are applied remains unclear. Given the trend to attribute more liability to legal persons, the application of provisions on criminal liability to legal persons in Cambodia will presumably increase.

The purpose of this research is to analyze the laws or jurisprudences of States, like France and Japan, identifying the scope and nature of criminal liability of legal persons in these States. Such an analysis will help to clarify provisions on criminal liability of legal persons in the Cambodian Criminal Code.

This discussion paper consists of four main parts: introduction; criminal liability of legal persons in general, focusing on types of offenses, legal persons and agents thereof covered by legal provisions, as well as models of attribution and conditions for imposing criminal liability. Part III will discuss criminal liability of legal persons in Cambodia, starting with an introduction on what already exists in laws or regulations before clarifying unsettled legal meanings. The final part

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<sup>1</sup> Council of Europe, Committee of Ministers, Recommendation No. R (88) 18, 1988, p. 1.

<sup>2</sup> Anca Iulia Pop, *Criminal Liability of Corporations-Comparative Jurisprudence*, 2006, p.39.



comprises the conclusion. The research will not cover procedural issues including sentencing for legal persons.

## II. Criminal Liability of Legal Persons in General

### a. Normative

#### i. Types of Legal Persons

The term “legal person” has various appellations; in some jurisdictions, the term “juridical person or legal entity” is used.<sup>3</sup> In this paper, the term “legal person” will be employed. It is defined narrowly or broadly according to laws of States. For instance, legal person may be defined as:

*“a company, foreign company and foreign company branch, public enterprise, public institution, domestic and foreign non-organizations, investment fund, other fund (except for the fund exercising solely public powers), sports organization, political party, as well as other association or organization which continuously or occasionally gains or acquires assets and disposes with them within the framework of their operations”.*<sup>4</sup>

The term “legal person” also includes organizations which are not incorporated or registered. French law divides legal persons into private and public ones; however, it excludes public legal persons, like State organs, from criminal liability.<sup>5</sup> United States law and jurisprudence show a limited form of criminal liability for State organs.<sup>6</sup> Generally, according to the laws of many States, all private legal persons are criminally liable.

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<sup>3</sup> The Law on the Liability of Legal Entities for Criminal Offenses, Official Gazette of the Republic of Serbia, No. 97/08 of 27 October 2008;

<sup>4</sup> Law on Criminal Liability of Legal Entities, Official Gazette of the Republic of Montenegro, Nos. 2/2007 and 13/2007, Article 3.

<sup>5</sup> French Criminal Code, Article 121-4, French Criminal Code, Legislationline, <http://www.legislationline.org/documents/section/criminal-codes/country/30>; see as well, the Council of Europe, *supra* note 1, p. 2.

<sup>6</sup> Charles Doyle, Corporate Criminal Liability: An Overview of Federal Law, 2013, p. 7.

## ii . Types of Legal Persons

Originally, only some offenses are covered for which legal persons are responsible for committing, such as tax evasion offenses.<sup>7</sup> Australian law renders legal persons responsible for types of offences that they committed.<sup>8</sup> Laws of some States hold criminal liability of legal person in the form of strict liability for offenses related to some specific fields, such as food and sanity or environment. Strict liability offenses do not need proof of mental element of crime (*mens rea*).<sup>9</sup>

## iii . Mode of Liability

Theoretically, in order to render legal persons responsible, except in the case of strict liability offenses, *actus reus* (action or omission) and subjective elements shall be proven to meet offense elements.<sup>10</sup> Actions may be committed directly, or offenders may aid in commission of offenses.<sup>11</sup> Unlike modes or forms of responsibility in the case of individual criminal liability<sup>12</sup>, liability of legal persons is divided into three modes: identification mode, vicarious liability and corporate culture.<sup>13</sup>

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<sup>7</sup> Markus Wagner, *Corporate Criminal Liability, National and International Responses*, 1999, p. 2.

<sup>8</sup> Cristina de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 3 (4), *Washington University Global Studies Law Review*, 551-552 (2005).

<sup>9</sup> LexMundi World Ready, *Criminal Liability of Companies, A Global Practice Guide* prepared by Lex Mundi Business Crimes and Compliance Practice Group, 2012, p. 45; see as well, Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed., 2005, p.67.

<sup>10</sup> Catherine Elliott, France in Kenvin Jon Heller and Markus D. Dubber, eds., *the Handbook of Comparative Criminal Law*, 2011, pp.215-216.

<sup>11</sup> Antonio Cassese, *International Criminal Law, Cases & Commentary*, 2011, pp. 381-382.

<sup>12</sup> They are: commission, planning, ordering, instigating, incitement, conspiracy, attempt, superior responsibility, aiding and abetting, *see generally*, Michael G. Karnavas, *Forms of Perpetration*, pp. 97-145, in Paul Behrens and Ralph Henham, ed., *Elements of Genocide*, 2013; Gideon Boas, James L. Bischoff and Natalie L. Reid, *Forms of Responsibility in International Criminal Law*, 2007.

<sup>13</sup> *Criminal Responsibility of Legal Persons in Common Law Jurisdiction*, Celia Wells Cardiff Law School, 2000, pp. 3-4.

The first mode is rooted in the legal system of the United Kingdom.<sup>14</sup> It is held that the act of directing minds is one of the legal persons; thus, the legal person shall be criminally liable. A landmark case indicated:

*[A] corporation is an abstraction...its active mind and directing will must consequently be sought in the person...who is really...the very ego and centre of the personality of corporation.*<sup>15</sup>

Who are directing minds are unclear, but for sure, they are not normal employees. They are directors or persons who bear decision-making power.<sup>16</sup> Currently, some legal persons have branch offices in many countries with hundreds of staff. Following this model, only persons in authority in companies in registered States may be held liable due to their acts, and legal persons will not be criminally liable for acts of rank and field staff. This might be because the parent legal person cannot control the acts of branch staff.

There might be cases where the acts of officials not falling within group of directors are dangerous, negative and seriously affect society or the environment. Exclusion of such an act from the scope of criminal liability of legal persons is socially unacceptable. Unless there is another redress available to victims to pursue compensation, they will not receive remedy. This may be this reason why Canada, whilst following this mode, broadens the definition of persons of authority for the purpose of attributing criminal liability to legal persons.<sup>17</sup>

Vicarious liability mode is rooted in the United States legal system and in civil liability form (tort).<sup>18</sup> Contrary to the identification mode, this mode allows the inclusion of wide categories of staff, including employees.<sup>19</sup> Theoretically, acts of any staff may trigger criminal liability of legal persons. The criminal code of the United States defines legal persons to include

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<sup>14</sup> Unlike UK, the Netherlands legal system does not adopt identification model, see B.F. Keulen & E. Gritter, *Corporate Criminal Liability in the Netherlands*, 14(3) *Electric Journal of Comparative Law*, 2010, p.5.

<sup>15</sup> *Lennards Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* [1915] AC 705, at 713.

<sup>16</sup> Allens Arthur Robinson, "Corporate Culture" as a Basis for the Criminal Liability of Corporations, 2008, p.11.

<sup>17</sup> Gerry Ferguson, *the Basis for Criminal Responsibility of Collective Entities in Canada*, p. 164 in Albin Eser, ed., *Criminal Responsibility of Legal and Collective Entities*, 1998; Celia Wells, *supra* note 9, pp. 130-131.

<sup>18</sup> Celia Wells, Cardiff Law School, *supra* note 13, 2000, p. 4.

<sup>19</sup> United Nations Office on Drugs and Crime, *Digest of Organized Crime Cases*, A compilation of cases with commentaries and lessons learned, 2012, p. 27.

“corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>20</sup>

The last mode is found in the criminal code of Australia. It is called “corporate culture” defined as:

“[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”<sup>21</sup>

Section 12.3(2) states, “A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance”; or....<sup>22</sup> As mentioned more below, unlike the identification and vicarious liability modes, this mode focuses on internal management, rules, implementation thereof by legal persons which may facilitate or encourage acts leading to breaching of laws by staff.<sup>23</sup> Internal structure or management leading to or ignoring tax evasion is an example of criminal liability through this mode.

The criteria attributing criminal liability to legal persons are generally loose. Although this mode helps prevent legal persons from violating laws or committing crimes, it is hard to apply it to developing countries where law enforcement is not effective and the system of monitoring operations or implementation of laws by legal persons is not well designed.

#### iv. Conditions for Imposing Liability

Conditions for imposing liability depend on the mode of liability. Vicarious liability and the identification model focus on the fault of natural person; thus, with the exception of strict liability offenses, fulfillment of elements of crimes needs to be satisfied.<sup>24</sup> In this connection, it is required that individual offenders shall be prosecuted and held responsible before imposing criminal liability on the legal person.<sup>25</sup> Therefore, an individual offender must be identified.<sup>26</sup>

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<sup>20</sup> 1 U.S.C.1; Charles Doyle, *supra* note 6, p. 2.

<sup>21</sup> Allen Arthur Robinson, *supra* note 16, pp. 15 -21.

<sup>22</sup> *Id.*, pp. 15 -21.

<sup>23</sup> *Id.*, p.49; Celia Wells, *supra* note 9, pp. 136-137.

<sup>24</sup> Celia Wells, Cardiff Law School, *supra* note 13, p. 5.

<sup>25</sup> LexMundi World Ready, *supra* note 9, Israel, 2012, p. 125.

<sup>26</sup> *Id.*,

Some jurisdictions impute criminal liability on legal person less stringently. There is no requirement of prior identification, prosecution,<sup>27</sup> or charging of the offender.<sup>28</sup>

Again, depending on the adopted mode of liability, for vicarious liability of the USA, it is in need of showing attribution of legal persons, officials or staff shall act for benefit of legal person or in the course of his or her employment.<sup>29</sup> There is no need to prove staff status; it might be *de facto* status.<sup>30</sup> Imputed acts of official to legal persons must be for entity benefit although employees acted contrary to rule of legal persons or *ultra vires*.<sup>31</sup> Whether the legal person gains any benefit from the acts of its staff at current time is irrelevant.<sup>32</sup> Legal persons are criminally liable even where they make only partial gains from crimes committed by staff.<sup>33</sup> Contrarily, acts by staff for personal benefit will not trigger criminal liability of the legal person.<sup>34</sup>

For the corporate culture model, it is not required that acts be committed on behalf of legal persons since the internal management culture of legal persons comprises the key element for imposing criminal liability.<sup>35</sup> The rationale for this mode is that the common knowledge of all staff of the legal person (collective knowledge doctrine), and structure of modern organizations prevents identification and proof of personal liability of an individual offender.<sup>36</sup>

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<sup>27</sup> LexMundi World Ready, *supra* note 9, France, 2012, p. 94; Thailand, p. 263; Malaysia, p. 175; Italy, p. 173; Council of Europe, *supra* note 1, p. 2.

<sup>28</sup> LexMundi World Ready, Canada, Oriento, 2012, p. 28.

<sup>29</sup> Allens Arthur Robinson, *supra* note 16, p. 29.

<sup>30</sup> *Id.*, pp. 35 and 73.

<sup>31</sup> Unites States v. Twentieth Century Fox Film Corp., 882 F. 2d 656, 660 (2d Cir. 1989); Mark A. Rush and Brian F. Saulnier, How Corporations Can Avoid or Minimize Federal Criminal Liability for the Illegal Acts of Employees, 1999, p. 4.

<sup>32</sup> Clifford Chance, Corporate Liability in Europe, 2012, France, p. 10; OECD Anti-Corruption Network for Eastern Europe and Central Asia, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, 2015, p. 25.

<sup>33</sup> Charles Doyle, *supra* note 6, p. 3.

<sup>34</sup> Allens Arthur Robinson, *supra* note 16, p. 78.

<sup>35</sup> Clifford Chance, *supra* note 32, 2012, France, p. 10; OECD Anti-Corruption Network for Eastern Europe and Central Asia, *supra* note 32, p. 24.

<sup>36</sup> Cristina de Maglie, *supra* note 8, p. 559; Allens Arthur Robinson, *supra* note 16, pp. 12-13.

### III. Criminal Liability of Legal Persons in Japan, France and Cambodia

#### A. France

Until 1994, France, like some countries, had long been reluctant to impose criminal liability upon legal persons. The 1994 Criminal Code, Article 121-2 is clear about this:

*“legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.”*<sup>37</sup>

According to this article, legal persons might be criminal liable for all types of offences.<sup>38</sup> This also includes the act of omission.<sup>39</sup> Articles 121-3, 121-4 and 121-7 of the same Code provide forms of criminal liability. Referring to articles 121-3, 121-4 and 121-7, it is asserted that legal persons will be liable if their organs are responsible through several forms of liability, such as commission, accomplice.<sup>40</sup>

Article 121-2 clearly mentions that only organs and representatives of private legal persons are covered. However, acts of public legal persons (territorial authorities) are criminally responsible for offences committed in the course of activities, which can be the subject of an agreement delegating a public service.<sup>41</sup>

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<sup>37</sup> French Criminal Code, *supra* note 5.

<sup>38</sup> Review of Implementation of the Convention and 1997 Recommendation, France, Phase 1, p.11, <http://www.oecd.org/daf/anti-bribery/france-oecd-nati-bribery-convention.htm>; Lex Mundi World Ready, *supra* note 9, France, p. 93; Clifford Chance, *supra* note 32, France, p. 10.

<sup>39</sup> French Criminal Code, *supra* note 5, Article 121-3.

<sup>40</sup> French Criminal Code, *supra* note 5.

<sup>41</sup> Katrin Deckert, Corporate Criminal Liability in France, pp. 153-154, in Mark Pieth and Radha Ivory eds., Corporate Criminal Liability, Emergence, Convergence, and Risk, 2011, p. 155; France, Review of Implementation of the Convention and 1997 Recommendation, *supra* note 38, p. 12.

What an organ or representative is remains unclear. Studies suggest the overlapping meanings of these terms.<sup>42</sup> The term “representative” is constructed broadly to include even normal employees who possess or have been granted authority to act on behalf of legal persons.<sup>43</sup> Lower level employees do not have the capacity to represent their employers and, therefore, their acts will not trigger the penal responsibility of the legal person, but can be held civilly liable if acting within the scope of their employment under article 1384 of the Civil Code.<sup>44</sup>

Organs cover all persons either individually or collectively invested with the power of direction; thus, an organ might comprise a board of directors, a management board or supervisory ones depending on types of legal persons.<sup>45</sup>

It is unclear which mode of liability France follows; however, the provision of article 121-4 seems to suggest that vicarious liability is adopted. This is correct if referring to the class of staff whose acts might lead to criminal liability of the legal person. Furthermore, it is clear from this article that the culture of the legal person does not comprise the criterion for considering the imposition of liability. However, it might be an element to be considered for imposing liability upon a legal person in addition to the requirement that the offence is committed by an organ or representative with the requisite mental state on behalf of the legal person. This is in the case that defective organisation of the legal person plays a role in the commission of the offence.<sup>46</sup>

It is not clear, besides meeting requirements of article 121-4, whether the prior identification of an individual wrongdoer is necessary? Traditionally, given the strict adherence to the principle of legality and individual criminality, prior identification of an individual, in addition to the satisfaction of criminal elements, might prove demanding; however, recent studies suggest the contrary, asserting that if legal infringement committed on behalf of the company by an organ or representatives is proved, there is no need to identify and/or convict natural persons in advance.<sup>47</sup>

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<sup>42</sup> Katrin Deckert, *supra* note 41, pp. 153-154; organs or representatives are such as the Board of Directors, the company legal representative, the CEO, a deputy CEO, a manager or a specially authorized agent, see Review of Implementation of the Convention and 1997 Recommendation, France, Phase 3, p. 20, <http://www.oecd.org/daf/anti-bribery/france-oecd-nati-briberyconvention.htm> (Accessed in December 2015)

<sup>43</sup> Katrin Deckert, *supra* note 41, pp. 158-161; Review of Implementation of the Convention and 1997 Recommendation, France, Phase 2, p. 48, <http://www.oecd.org/daf/anti-bribery/france-oecd-nati-briberyconvention.htm> (Accessed in December 2015).

<sup>44</sup> Lex Mundi World Ready, *supra* note 9, France, p. 93.

<sup>45</sup> Katrin Deckert, *supra* note 41, pp. 158-159.

<sup>46</sup> Katrin Deckert, *supra* note 41, p. 164; France, Review, *supra* note 41, p. 13.

<sup>47</sup> LexMundi World Ready, *supra* note 9, France, p. 94; France, Review, *supra* note 41, p. 13.

The legal person is exempted from liability if acts of representatives or organs are not for the benefit of the legal person, or if they are not organs or representatives of the legal person.<sup>48</sup> Where an employee acts outside the scope of his/her employment contract, or acts on his/her own initiative, the company is not liable for the acts. Under administrative law, providing for strict liability, no *mens rea* is necessary to prove the violation of an act. Therefore, a company can only plead not guilty in response to such alleged act.<sup>49</sup> Other cases, it is necessary to prove the intention of felony and misdemeanor if imputed...*mens rea* must be proven.<sup>50</sup>

## B. Japan

Japanese Criminal Code was adopted in 1880, influenced by French Criminal Code; however, the 1907 Criminal Code of Japan was influenced by German Criminal Code. After the Second World War, under the assistance of the United States of America, the Japanese Constitution was adopted. It contains several procedural rights, which comprise the basis for developing criminal procedure code, with many common law elements.<sup>51</sup>

Japanese Criminal Code uses the term “person”. Unlike the Criminal Code of Canada, the term “person” is not interpreted to include legal persons. Thus, the Penal Code of Japan does not impose criminal liability to legal persons.<sup>52</sup> Until 1932, several Acts containing provisions on

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<sup>48</sup> LexMundi World Ready, France, p. 96; Clifford Chance, *supra* note 32, France, p. 10; France, Review, *supra* note 41, p. 13.

<sup>49</sup> LexMundi World Ready, France, *supra* note 9, p. 96.

<sup>50</sup> *Id.*, pp. 93-94.

<sup>51</sup> Kanako Takayama, Criminal Law in Japan- Centering on corporation crimes, paper presented at 8th Cambodian Society for Comparative Laws, 21-22 February 2016, Cambodia, p.1; Interview conducted in May 2015 with Professor Kanako Takayama of Kyoto University on Criminal Liability of Corporations in Japan, at Nagoya; End of 2003, there are 570 acts in this respect, *see* Fafo, Survey regarding Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies of Private Sector Liability for Grave Breaches of International Law and Related Illicit Economic Activities, Japan, 2006, p.6; Cotty Vivant Marchisio & Lauzeral, Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Case of Japan, 2009, p. 7.

<sup>52</sup> Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p.6; Allens Arthur, *supra* note 16, p. 43; Japan, Review of Implementation of the convention and 1997 Recommendation, 2002, p. 2, at <http://www.oecd.org/japan/2387870.pdf> (accessed in December 2105)



double punishments (*Ryobatsu Kitei*)<sup>53</sup> were adopted, such as the *Act Preventing Escape of Capital to Foreign Countries*. As of 2015, there are more than 600 Acts that provide similar provisions on double punishment, which means that both corporations and their officers are liable.<sup>54</sup> Article 207 of the 2002 Securities and Exchange Act clearly provides that:

*“Where the representative person of a juridical person (including organizations without judicial personality for which the representative persons or administrators have been designated; hereinafter the same shall apply in this paragraph and the following paragraph) or an agent, employee, or other worker of a juridical person or individual has, with regard to the business or property of the juridical person or individual, violated any of the provisions set forth in the following items, not only shall the offender be punished but also said juridical person shall be punished by the fine prescribed in the respective items and said individual shall be punished by the fine prescribed in the provisions referred to in the respective items...”*<sup>55</sup>

The Acts do not define “legal person”; it is suggested that legal person means any form of enterprise<sup>56</sup> led by a natural person, such as an owner or legal entity. It depends on the field of law. According to the Unfair Competition Prevention Act (UCPA), an entity does not include an unincorporated one;<sup>57</sup> while article 2 of the Income Tax Act provides punishment for association without legal personality.<sup>58</sup> Double punishment does not apply to acts of State organs, but State owned companies, and their officers in person involved in the crime concerned.<sup>59</sup>

Legal entities are criminally liable for any types of crimes provided by the Acts<sup>60</sup> as committed by representatives, employees or workers. Their acts are in regard to services of, or in

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<sup>53</sup> N Kyoto, *Criminal Liability of Corporations-Japan*, 275 in Hans de Doelder and Klaus Tiedmann, *Criminal Liability of Corporations*, 1996.

<sup>54</sup> Article 164(1) of the Corporation Tax Act, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/cta.pdf>; (Accessed in December 2015) Article 22(1) of the Unfair Competition Prevention Act in 2005, available at <http://www.japaneselawtranslation.go.jp/law> (Accessed in December 2015).

<sup>55</sup> Financial Instruments and Exchange Act (Act No. 25 of 1948), available at <http://www.fsa.go.jp/common/law/fie01.pdf> (Accessed in December 2015).

<sup>56</sup> N Kyoto, *supra* note 53, p. 276.

<sup>57</sup> Article 14 of Unfair Competition Prevention Act, *supra* note 54.

<sup>58</sup> Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p. 7.

<sup>59</sup> Review of implementation, Japan, *supra* note 52, p. 7.

<sup>60</sup> N Kyoto, *supra* note 53, p.284; Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p.7.

connection with the business of the legal entity.<sup>61</sup> One employee killing another does not comprise an act in service. However, if the legal entity is negligent in the selection of employees or fails to prevent such a crime, it will be held criminally liable.<sup>62</sup> Unlike criminal liability in the United States of America, generally intent to benefit or an act by an employee to benefit the legal entity is not mandatory for imputing criminal liability to legal persons,<sup>63</sup> except in the case of bribery.<sup>64</sup>

As for the model of liability, one scholar asserts that the act of a representative comprises that of a legal person.<sup>65</sup> It is not clear if he means that Japanese practice follows the model of identification originated in the United Kingdom. If it does, like Canada's position, it may constitute a variant form since it treats even employees as directing minds whose acts are those of the legal entity. One scholar said that Japanese practice follows an element of the organisational model (corporate culture) adopted in the Australian Criminal Code. This applies to the case where legal persons do not exercise due care in the selection of employees or in the prevention of crimes by employees.<sup>66</sup> It is a partial element, not a corporate culture that leads to the commission of crimes by employees in the sense of the pure organisation model.

It is from the precedent of the Supreme Court that, in order to impute criminal liability to legal persons, the conduct of employees and subjective elements of offences committed shall be proven by the prosecution.<sup>67</sup> A minority of Japanese scholars have suggested that there is no need to first identify natural persons for the purpose of imputing the criminal liability of legal persons.<sup>68</sup> It is presumed that the legal entity has failed to prevent the commission of crimes by employees; thus, the burden of proof is placed on legal persons to prove that they have performed with due

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<sup>61</sup> Article 14 of Unfair Competition Prevention Act, *supra* note 54; Review of implementation, Japan, *supra* note 52, p. 8.

<sup>62</sup> This meaning of negligence is different from one applying to natural persons which requires that the natural person foresee risk but he/she decided to take such a risk.

<sup>63</sup> Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p. 8.

<sup>64</sup> Japan: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, 2005, para. 161, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_Eng.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_Eng.pdf) (Accessed in December 2015).

<sup>65</sup> N Kyoto, *supra* note 53, p.282; Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p. 9.

<sup>66</sup> Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p. 8.

<sup>67</sup> N Kyoto, *supra* note 53, p. 284.

<sup>68</sup> *Id.*, p. 284.

diligence in the supervision of employees. This leads to the allegation by scholars of a violation of the constitutional principle of presumption of innocence.<sup>69</sup>

As for proving *mens rea*, it will not be demanded if Japanese Criminal Code accepts strict liability offences, which requires proving only the conduct of the offender. There is no law clearly providing for strict liability, but it might implicitly be inferred that negligence of natural persons resulting in the death does not need intent.<sup>70</sup>

### C. Criminal Liability of Legal Persons in Cambodia

#### a. Normative

The Kingdom of Cambodia was a protectorate of France for approximately one hundred years.<sup>71</sup> The French legal system has exerted much influence upon the Cambodian legal system, with the Cambodian Criminal Code and Code of Criminal Procedure being partly copied from both French codes.<sup>72</sup> There are procedural rights prescribed in the Code of Criminal Procedure were as well influenced from international human rights norms of treaties to which Cambodia is party.<sup>73</sup>

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<sup>69</sup> Survey Questions and Responses, as Part of Commerce, Crimes, and Conflict, *supra* note 51, p. 9; Supreme Court Judgement 1965.3.26. Keishu 19.2.83 cited in Japan, Review of Implementation, *supra* note 52, p. 7.

<sup>70</sup> Product Liability Act, No. 85, 1994, Article 3, available at <http://www.consumer.go.jp/english/pla>; Act on Compensation for Nuclear Damage, Act No. 147 of 1961, available at <http://www.oecd-nea-org/law/legislation/japan-docs/Japan-Nuclear-Damage-Compensation-Act.pdf>; Eri Osaka, *Corporate Liability, Government Liability, and the Fukushima Nuclear Disaster*, 21 (3) Pacific Rim Law & Policy Journal, 435, 2012; see Younghee Jin Ottley, *Product Liability Law in Japan: An Introduction to A Developing Area of Law*, Ga. J. Int'l & Comp. L., 14:29 (1984), p. 56; Katsumi Kojima, *Product Liability and Medical Devices in Japan*, Association of Corporate Counsel, p.1, 2011.

<sup>71</sup> See generally French Protectorate of Cambodia, [https://en.wikipedia.org/French\\_Protectorate\\_of\\_Cambodia](https://en.wikipedia.org/French_Protectorate_of_Cambodia)

<sup>72</sup> United Nations Office of the High Commissioner, Cambodia, Annotated Cambodian Code of Criminal Procedure, 2<sup>nd</sup> Ed., 2015, p.101.

<sup>73</sup> For example, Article 149 on Right of Defense, Cambodian Code of Criminal Procedure, 2007.

It is a first time in the Criminal Code of Cambodia that details on the criminal liability of legal persons is provided. Besides, there are also laws imputing criminal liability on this type of entity.<sup>74</sup> Article 42 of the 2009 Criminal Code provides that:

*“Where expressly provided by law and statutory instruments, legal entities, with the exception of the State, may be held criminally responsible for offences committed on their behalf by their organs or representatives. The criminal responsibility of legal entities shall not preclude that of natural persons for the same acts”.*

The same code attaches provisions on the criminal liability of legal entities to specific offences contained therein.<sup>75</sup> For example, Article 87 states:

*Legal entities may be found criminally responsible under Article 42 (Criminal responsibility of legal entities) of this Code for the offences defined in Article 183 (Genocide) and Article 185 (Planning of Genocide) of this Code.*

The Code as well provides types of sentences applicable to legal persons (Articles 167-182). Article 167 stipulates *specific penalties incurred by legal entities: (1) fines as principal penalties; (2) Additional penalties under Article 168 (Additional penalties applicable to legal entities)*. According to Article 168, additional penalties are, such as dissolution or placement under judicial supervision; prohibition from undertaking one or more activities; disqualification from public tenders; prohibition from making a public offering; prohibition from issuing cheques other than cheques certified by a bank; prohibition from using payment cards; closure of the establishment which was used to plan or to commit the offence; prohibition from operating an establishment that is open to or used by the public; confiscation of the items or funds with which were the subject of the offence; confiscation of the proceeds or property arising out of the offence; confiscation of the utensils, materials and furnishing in the premises in which the offence was committed; publication of the sentencing decision in the print media or communicating the decision to the public by audio-visual communication. Other additional penalties might be imposed

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<sup>74</sup> Such as Law on Counter-Terrorism, 2007, Article 7.

<sup>75</sup> Criminal Code of Cambodia 2009: Article 198 (genocide, war crimes and crime against humanity); 207 and 209 (unintentional manslaughter); 226, 227 and 230 (toxic food deemed to be intentional acts of violence); 265 and 273 (refusal to supply goods or service), 269 (determination of employment) and 273; 274 and 277 (subjecting to working conditions incompatible with human dignity); 279 and 283 (giving bribes to employee); 284-294 and 296 (procuring); 330 and 336 (incitement to abandon a child), 331 (acting as an intermediary in case of adoption), 332 and 336; 404 and 409 (money laundering); 518 and 519 (bribery of judges); 548, 554, 556 and 559 (bribery of witness, interpreter and expert); 605, 606, 607 and 625 (preferring of bribery, active influence and intimidation); 638, 640 and 644 (bribery of authorized person and medical practitioners).

according to specific provisions of law.<sup>76</sup> In this connection, the court shall pronounce only the additional penalties attached with charged crimes.<sup>77</sup>

Finally, the general principles of title 1, 2, 3 of Book I of the Criminal Code are applicable to legal entities if they are not contrary to Chapter 7 (penalties incurred for legal persons). Title 1 provides for general principles of criminal law, including intent, the principle of legality, and jurisdiction. Title 2 provides for criminal responsibility, and Title 3 sets forth penalties.

The Code of Criminal Procedure 2007 contains one chapter dealing with procedure for legal persons, including jurisdiction related to legal entity; representation in court; the identity of representatives of legal persons; coercive measures against legal entities; placement under judicial supervision, and summons and writ of notification of decisions.<sup>78</sup>

An analysis of the contents of relevant laws and provisions on the criminal liability of legal persons finds that there is an abundance of detailed prescriptions as regards types of offences. Due to the extensive jurisdictional application of the criminal code, acts of foreign legal persons, or of Cambodian legal persons abroad that affect the Cambodian people are subject to prosecution in Cambodia.

The 2009 Criminal Code allows prosecution of crime with intent,<sup>79</sup> negligence<sup>80</sup> or omission.<sup>81</sup> Pursuant to Article 4, legal persons are held criminally liable for their own acts, or the omission or negligence of their organs or representatives. In this connection, doubts have to be cast on whether the conduct of organs or representatives is treated as that of the legal person according to the identification model. This is related to the model of attribution, an issue not yet clarified. Conditions for imposing criminal liability upon legal persons shall be clarified. The following will attempt to clarify these issues.

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<sup>76</sup> *Id.*, Article 168.

<sup>77</sup> *Id.*, Article 169.

<sup>78</sup> *Id.*, Articles 597-602.

<sup>79</sup> *Id.*, Article 4.

<sup>80</sup> *Id.*, Article 4.

<sup>81</sup> *Id.*, Article 529.

b. Issues for Clarification

i. Types of Legal Persons

Before addressing the meaning of “organs and representatives”, we need to clarify the meaning of the term “legal person”. Civil code partly helps in defining “legal persons” to have registered for such a status in order to have legal personality.<sup>82</sup> If this narrow meaning is adopted, unlike the United States,<sup>83</sup> only limited legal persons are covered by this article.

Cambodia has a general law on Statute of Public Enterprise.<sup>84</sup> There are at least three types of enterprises. The first one owned one hundred percent shares of State; second joined less than fifty percent by private, and the last one under the authority of State with financial and managerial autonomy. Questions may be raised regarding whether or not public legal persons, such as State companies, enterprises, public enterprises and shared enterprises, should be totally excluded from the scope of criminal liability.

Public legal person also comprises the State, which is an entity composed of territory, population, and governing body. The State has three main organs: judiciary, executive and legislative, and several institutions, such as ministries, to deliver services to the public. If we adopt a strict interpretation, State ministries shall not be held criminally liable. The State enjoys immunity, and has separation of powers. Holding public legal persons criminally liable means to put them under the scrutiny of courts, and thereby judiciary might possibly interfere with the work of the executive.<sup>85</sup>

Different views, based on some theories of law and adopted effective ways of interpretation of laws, assert that, at least territorial authority should be criminally liable. This is in order to end impunity and afford the individual a right to remedy (compensation). There are, in addition, norms of social responsibility that public legal persons should follow. It might be against the principle of non-discrimination if only private legal persons, and not public legal persons, are criminally liable. Criminal court intervention in the case of violations of law by public legal persons does not affect the separation of power since there is an existing mechanism of check and balance, and adjudication of administrative courts of decisions of public authority.

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<sup>82</sup> Glossary to Civil Code of Cambodia.

<sup>83</sup> The United States of America Code, Procedural and Administration, definition, 26 U.S.C. 7701(a)(1)-(3), *see* Charles Doyle, *supra* note 6, p. 7.

<sup>84</sup> Article 3, Cambodian Law on Statute of Public Enterprises, 1996.

<sup>85</sup> Katrin Deckert, Corporate Criminal Liability in France, *supra* note 42, pp. 153-154.

At least two of three types of enterprises mentioned above are not really State institutions in the strict sense of “State”, and they are created to deal with private institutions and for economic interests; thus, they should not be exempted from criminal liability. French, Japanese and Filipino courts have already asserted the criminal liability of some types of public legal persons, albeit under limited circumstances. Article 39 of the 1993 Constitution of Cambodia supports this, saying that *“Citizens of Cambodia shall have the right to denounce, or submit complaints to legally challenge or claim compensation for damages caused by any illegal act by State and public institutions or by officers of such institutions committed during the course of their duties. The settlement of complaints and claims shall reside under the competence of the courts”*.

## ii . Organs and Representatives

Like France, until 2009, Cambodian criminal law did not provide for criminal liability of the legal person. This type of criminality was provided in 2009 Criminal Code, and copied from the French criminal code. Due to the inaccessibility of the jurisprudence to the public, the meaning of the terms “organ” and “representative” are not revealed.

Civil code uses the term “representative”; however, it refers to legal representative, such as lawyers, or those appointed by the court to perform juristic acts (liquidators in the case of bankruptcy).<sup>86</sup> According to the same code, the term “representative” seems to be someone who was appointed or assigned by courts or authorities. Thus, it is not just a regular staff member of legal person, since set criteria must be met to be appointed as such. Therefore, the meaning of the term “representative” closely resembles the one adopted by French authorities and courts. There is no definition of “organ”, nor any jurisprudence clarifying this terminology, to the knowledge of this author.

## iii. Modes of Liability

As mentioned above, there are three modes of liability; each mode having different consequences. In order to consider or propose any mode to be followed by Cambodian courts, the legal nature and characteristics of Cambodia’s legal, social and political system must be taken into account.

Cambodia is still the least developed country and has adopted a free market economy. Cambodia has adopted policies to attract foreign direct investment and expand small and medium

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<sup>86</sup> Cambodian Civil Code, 2007, Article 79 (5).

enterprises by providing various incentives, especially with regard to taxes.<sup>87</sup> This fosters economic growth and the creation of employment.

The Cambodian political regime changed from a communist to democratic one. Accordingly, the legal system of Cambodia has changed much. It is still much influenced by the French one although there is a mix of Common law legal elements now. Therefore, courts adhering to the principle of legality and being quite reluctant to import something new into the legal sphere are still predominant.

There is no case, to the knowledge of the author, of courts treating acts of high hierarchical officials as those of legal persons so that the latter are criminally liable. Thus, the identification mode employed by the United Kingdom remains alien to the Cambodian legal system, and it is unwise to suggest this mode for Cambodia.

The “corporate culture” mode seems even more inappropriate at the current time, given characteristics of private legal persons in Cambodia and the lack of a fully effective law enforcement mechanism to supervise acts of legal persons. The author observes that the enforcement of law on private legal persons remains to be strengthened, implicitly caused by somewhat lack of full organized internal arrangement and management. Taking too much account of the corporate culture of legal persons as a key factor for determining criminal liability, would result in the exposure of many private legal persons liable; thus, it indirectly discourages business operation and investment. Consequently, economic growth might slow down. This is what that courts and policy and law makers should think over. For these reasons, the author advises that, for the time being, this mode of liability should not be adopted. However, as the case of France, internal management of legal persons might be factors to be considered when imposing criminal liability.

The new civil code of Cambodia was adopted in 2007 with technical assistance from Japan. One section provides for tort liability and liability of the employer:

*“Where a director or other legal representative of a juridical person intentionally or negligently causes harm to another in violation of law in the exercise of such a person’s duties, the juridical person is liable for the payment of damage”.*<sup>88</sup>

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<sup>87</sup> KPMG, Cutting through complexity, Investing in Cambodia, 2012, p. 35; Cambodia Pocket Tax Book, 2010, PricewaterhouseCoopers Ltd.,p.27.

<sup>88</sup> Civil Code of Cambodia, 2007, article 748.



Vicarious liability is rooted in tort liability.<sup>89</sup> Although both modes are used in criminal law and private law, respectively, *rationae personae*, the type of sanction is similar. Based on criminal code provisions on the criminal liability of legal persons, punishment only comprises a fine with other possible additional penalties, while the tort remedy is compensation. There is, furthermore, a difference between criminal court and tort procedures.

Criminal provisions use “organ or representative”, while “director or legal representative” is employed in Article 748. As mentioned earlier, meanings of “representative” in the civil code can help clarify terms employed in the criminal code.

While article 748’s criterion is “*violation of law in the exercise of such a person’s duties*”, Article 42 “*acted on behalf of*”, implies an act for the benefit of a legal person, thus rendering the legal person liable. It depends on whether Cambodian courts demand the act of the representative to be within her/his authority *in addition to accruing benefit to the legal person*. If the second element is not necessary, it makes vicarious liability in criminal law and civil law similar. It means that benefit is not a mandatory criterion. Lastly, Article 748 refers to violations of law broader than provisions on the criminal liability of legal persons, which only cover stipulated statutory offenses; thus, interpretation of the criminal liability of legal persons should be narrow, according to the criminal theory of interpretation.

Anyhow, among the three modes of liability, vicarious liability is close to what Cambodian civil code provides; thus, this mode should be followed, albeit with caution.<sup>90</sup>

#### iv. Conditions for Imposing Liability

Legal persons do not have a mind; thus, there is no criminal intent. It is by actions of natural persons that legal persons are criminally liable. As mentioned above, general principles of criminal law, such as form of responsibility - intention, negligence - apply to both natural and legal persons. Legal persons overlooking acts by organs or representatives which violate law, who do not take action to address those violations, may be held criminally liable for acting as accomplices or for negligence.

In order to make any individual criminally liable it is necessary to identify his/her involvement, and identification of the individual is a precondition. There is the exception of charging an

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<sup>89</sup> Celia Wells Cardiff Law School, *supra* note 13, p. 4.

<sup>90</sup> It is noted that, according to Japanese authorities, form of vicarious liability is adopted at least in case of bribery, *see* Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan, 2011, para. 39, available at <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanesephase3reportEng.pdf>. (Accessed in December 2015).

accomplice without identification of the principal, and being an unidentified offender is ground for extinction of a criminal charge/non-suit order. Cambodian criminal procedure code allows for trial *in absentia*.

#### **IV. Conclusion**

Cambodian laws prescribe for the criminal liability of legal persons in detail, but the reality of practice is far remote. Looking into laws and paperwork on this subject helped to clarify that the individual of legal persons, whose acts might lead to criminal liability, can be an official and not necessarily a high ranking one. He/she should be working on behalf of the legal person, and not for his private benefit. He/she is a representative in the sense that he/she was appointed or assigned to work for the legal person. It is suggested that that he/she should be working in her/his official capacity in order for the legal person to be criminally liable.

A legal person under the law of Cambodia is one who has registered to obtain a legal personality. This includes both public and private legal persons; however, law is unclear with regard to the liability of the former. Legal persons might be criminally liable for any offence provided in laws.

Identification and corporate culture models should not be recommended to Cambodian courts if balancing the promotion of the State's economic interest with the prosecution of legal persons liable through the acts of their officials. Accordingly, the vicarious liability model should be followed, a mix of identification of the individual as a pre-condition for holding legal persons criminally liable, since this issue falls within the sphere of criminal law. Legal persons are exempted from liability if it is proven that actors are not employees or representatives, or did not work on behalf of the legal person.

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