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CRIMINAL LIABILITY OF CORPORATIONS

By

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INTRODUCTION

A cardinal principle of Criminal Law is embodied in the maxim "Actus non facit reum, nisi mens sit rea". This maxim states what must be proved to secure a conviction for all crimes. Two points are involved, First, by the outward conduct and secondly the state of mind of the accused. This is essential thing to consider the definition of every crime under two heads - the actus reus and the mensrea. The actus reus means the act, omission or other event indicated in the definition of the crime charged as being prescribed by criminal law.

The Mensrea means the mental state expressly or impliedly mentioned in the definition of the crime charged. The finding of a Mensrea in an individual is very easy. We can easily determine actus reus and the mensrea of a thief in a theft case. But it will not be so easy to determine the liability of a Corporation or Company. The object of this paper is to elucidate the present and past law with regard to the criminal liability of corporation. To begin with we must define a corporation, Salmond defines a corporation as follows:-

"A Corporation is a group or series of persons, which by a legal fiction is regarded and treated as itself a person". This definition emphasises on the point that a corporation exists only through its agents or representatives, for example the Directors, or the Managers.

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Grey has defined a corporation as under:-

"An organised body of men to which the State has given powers to protect its interests and the wills which put their powers in motion are the wills of certain men determined according the organisation of the Corporation"<sup>1</sup>.

Formerly the Corporations were kept out side the Criminal Law. If the crimes were committed by a Corporation's orders, Criminal proceedings, for having thus instigated the offences could only be taken against the individual members, in their personal capacity and not against the corporation as a guilty person. The reason for not prosecuting a Corporation for its wrong acts was that it was argued that a corporation has no will, and therefore cannot have a guilty will. The Corporation has no mind and is devoid of body. It is further argued that if the legal fiction which gives to a corporation an imaginary will, yet the only activities that could consistently be prescribed to the Fictitious will thus created, must be such as are connected with the purposes for which it was created to accomplish?<sup>2</sup>

In *Abrath V.N.E. Rly. -Co.*<sup>3</sup>, it was laid down that even in civil actions, doubts were entertained as to the possibility of holding a corporation liable for torts in which "Express malice" is necessary. During the days of Lord Holt, a Corporation was not indictable at all.<sup>4</sup>

But during the first half of the 19th Century we find a change in the attitude of the Courts, they started deciding that the offences committed by the Corporations need no mensrea. With the commercial development, which has been witnessed during past few years, the number of Corporations are increasing day by day. The number has become so numerous that the corporations could not be allowed to continue, to commit crimes and enjoy immunity.

There have been various theoretical difficulties and they have been settled and brushed aside. It is now settled law that corporations may, in an appropriate court, be indicted by the Corporate name and that fines may be consequently inflicted upon the corporate property? To

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1. Grey, Nature and Source of Law, p.51.
  2. Keny Outlines of Criminal Law, p.50.
  3. (1886) 11 Cas.247.
  4. anon, (1700) 12 Mad. 559.
  5. Keny, Outlines of Criminal Law p.50.

render a corporation liable for an offence, a distinction was laid down between offences of misfeasance and non-feasance. In the offences of misfeasance the servants or agents of the Company were also liable personally for the wrong act, where as in non-feasance the person or agent of the corporation was solely responsible for it. This concept of the corporate liability for the acts of the corporation was first considered by the English court in R.V. S. Birmingham and Gloucester Rly. Co.,<sup>6</sup> and was followed in R.V. the Great North of England Rly. Co.,<sup>7</sup> where a railway company was convicted of a public nuisance by obstructing a public way. This principle received a legislative approval in the year 1889. When in the Interpretation Act, it was provided that in the construction and interpretation of every statutory law relating to an offence, whether indictment or on summary conviction the expression "person" shall include a "body corporate" unless contrary is not provided. Thus in Mousell Brothers v. London and North Western Rly. Co.,<sup>8</sup> ATKIN, L.J. said "Once it is decided that this is one of those cases where a principal may be held liable criminally for the acts of his servants there is no difficulty in holding that a corporation may be the principal. No mensrea being necessary to make the principle liable a corporation is in exactly the same position as principal who is not a corporation".

Thus from the above decision it is clear that when there can be a "vicarious liability" for a crime in case of a natural person, there can be a criminal liability for the same crime for a corporation.

However, the extension of the criminal responsibility of corporations, effected by importing in to criminal law something of the notion of the vicarious liability of a master for the acts of his servant which was developed in the law of Tort was not found sufficient and the courts have moved in the direction of making the corporation directly responsible, by the fiction that the elements of the criminal liability present in the responsible agent of the corporation can be imputed to the corporation itself.<sup>9</sup>

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6. (1840) 2 Q.B. 47.

7. (1846) 9 Q.B. 315.

8. (1917) 2 K.B. 836.

9. Keny, Outlines of Criminal Law, p.51.

The theoretical basis of this extended corporate liability is that the acts and state of mind of its responsible servants may be treated as those of the cooperation itself.<sup>10</sup>

In Halsbury's Laws of England<sup>10a</sup> the "person" is defined and include a body corporate unless the contrary intention appears. A Corporation can only commit crimes through its agents, and it is a question of fact in each case whether the agent's state of mind, knowledge, intention or belief can be imputed to the Corporation. The similar view has been expressed in section 2 of the Interpretation Act, 1889, which defines, "person" to include a body corporate, unless a contrary intention appears. Despite these provisions and decisions, corporations were not ordinarily indicted for any serious offence or offences involving mensrea. They were only prosecuted for offences involving violation of by laws etc. Later on corporations were held liable vicariously. But the advancement of the Commercial world the idea of corporate work increased. Knowing that the law will not pursue a Corporate body for the criminal acts of its servants or directors unscrupulous persons began to prey upon individuals in the society of the Law towards the liability of corporate bodies. The modern tendency of the courts is to widened the scope of criminal liability of a corporation.

There is difference between the "Vicarious liability" and "Identification". Identification means to identify the work and responsibility of a person. A corporation is held only liable for the acts for which the agent was authorised. There are some officers of Company who may for some purposes be identified with it as being or having its directing mind and will, its centre and ego, its brains.<sup>11</sup>

In the same decision his Lordship Lord Reid said that its a question of Law in every case, once the facts have been ascertained a person in doing a particular thing is to be regarded as a company or merely as the servant or agent of that company. The Judge must direct the jury that if they find certain facts proved, than as a matter of Law they must find that the criminal acts

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10. 'Ennards' Carry Co. v. S.Asianic Petroleum Co.Ltd., (1915) A.C.705.

10a. Paragraph 52.p.281,10th Vol.

11. Tesco super markets v. Natrass (1971) 2 All E.R. 127.

of the officer or servant or agent, including his state of mind, intention, knowledge, etc. is the act of Company.

To hold a Corporation criminally liable, a difficulty was felt regarding the personal presence of the accused during the trial. Under English Law, in a Criminal trial an accused person is supposed to be present personally in the Court of Law. This difficulty was removed by Section 33(3) of Criminal Justice Act 1925. After passing of this act, in a Criminal trial a corporation can be represented by its representative. This enactment has again widened the scope of the liability of a Corporation in a criminal case.

The second difficulty for making a corporation criminally liable was that the punishment cannot be enforced against the Company. This difficulty was also removed after the decision in Lennards Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.,<sup>12</sup> after enunciating the organic theory of the Corporation, and after this the modern doctrine of alter ego was established. In this decision it was established that the natural persons are the representatives of corporation and its their mind which controls the intention and will of the corporation. Viscount Haldone has enunciated this organic theory in the following words and was followed in later decisions also:-

"A Corporation is an abstraction. It has no mind of its own and more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the Corporation — the board of the directors are the brains of the Company which is the body, and the company can and does act only through them.

EXCEPTIONS: But this general rule that a Corporation is criminally liable has two exceptions. The Corporation cannot be guilty of the offences which can be committed only by the natural persons such as Bigamy and perjury. The second exception is those cases where the only punishment is death or imprisonment. But there are cases where a doubt has arisen about the responsibility of

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12. (1915) A.C. 705,713.

corporation for the offence of perjury. Therefore it has been suggested that a corporation whose governing body authorised one of its members to swear a false affidavit could be convicted of prejury. But in the case of prejury in judicial proceedings the false statement must be made by person who had been lawfully sworn and corporation could hardly do so. Nevertheless if its governing body were authorised for making a false statement on oath in the court a corporation can be made liable for the offence.

The second exception to the corporate liability are those cases, where the only punishment which a court can award is corporal. The reason given for this exception is that in such cases the imprisonment cannot be enforced against a corporation. So its on the basis of this exception that Finaly J. in R. v. Cory Bros. and Co.,<sup>13</sup> held that an electric company cannot be held liable for killing some onc by touching some electric fence on the Company's property.<sup>14</sup> But this exception was questioned in I.C.R.Haulage Ltd.,<sup>14</sup> and is no more a law except in the case of Treason and Murder for which the only punishment is corporal onc. In a recent case a company has since been convicted of counselling and procuring the causing of death by dangerous driving<sup>15</sup>

Finally the liability of the corporation and the extent to which its members are liable can be ascertained by the following passage of the judgement of Denning, L.J., in H.L.Bolton (Engineering) Co.Ltd., Vs. T.J.Graham and Sons, Ltd.,<sup>16</sup>

"A Company may in many ways be linked to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and controls what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such".

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13. (1927) I KK.B.810.

14. (1944) K.B. 551.

15. Robert Miller (Contractors) Ltd., (1970) 1 All.E.R.

16. (1956) 3 All E.R. 624.

In another case<sup>17</sup> the court laid down that a company has no mind and no will and its acting through living persons, though not always one or the same person. The person, who is acting is not acting for the company but is acting as the company and his mind which directs his act is the mind of the Company.

What persons are to be taken as the Company has been discussed by Lord Diplock,<sup>18</sup> in a very interesting way by saying that those persons are to be treated in Law as being the Company for the purposes of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid Commission of Criminal offence, is to be found by identifying those natural persons who by memorandum and articles of association or by some other means are entrusted with the exercise of the powers of the Company. This principle is in confirmity with Lennard's case where, Mr. Lennard was the directing mind of the Company, and he was not the mere servant of the Company but some thing more as he was the registered managing owner of the Company.

In order to explain and understand the present position of the law in our country we will have to understand the true intent of Section 2 and Section 11 of the I.P.C. and give it true interpretation. Section 2 of the I.P.C. runs as follows:-

"Every person shall be liable to punishment under this code and not otherwise for every act or omissions contrary to the provisions thereof, of which he shall be guilty within India".

The person here means a natural person, although the definition of the word person in the Section 11 is slightly different. The section 11 of the I.P.C. defines person as under:-

"The word "person" includes any Company or association or body of person, whether incorporated or not". So according to this definition the meaning of the word "person" is so much extended as to include the Corporation or associations. In Law the word includes the juristic persons as well. By reading the section 2 and 11 jointly we can infer that the intention of the legislature was to

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17. Tesco Super Markets Ltd. v. Nathrass 9(1971) 2 All E.R. 127.

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widened the scope of the definition person and it was never intended to use it in a narrower sense.

The Mensrea is the true test of one's Criminal liability, so it is some times said that the word person in the section 2 I.P.C. is to be used in a narrow sense. But there are cases where the intention and knowledge of the agent or servant of the Company is imputed to the Company.<sup>19</sup> In this case the Court imputed the intention of the agent or servant to be the intention of the Company for violating the definite law.

In plain reading of the section 11 I.P.C. it can be inferred that the word person includes the Company incorporated. This view is also supported by the definition of the term "person" in the General Clauses Act 1897. The definition of the "person" in section 11 I.P.C. is similiar as in the English Interpretation Act, 1889.

Our Law relating to the liability of corporation is mainly based on English case law and we have not still made any clear and exhaustive law regarding this subject.

The question whether a corporation is liable criminally came before the Calcutta High Court in Anath Bandhu v. Corporation of Calcutta.<sup>20</sup> Here the main point of contention was that whether a limited Company is liable for the acts of its agents or not. In this case the application of sec. 11 I.P.C. to a limited Company was questioned as a limited company is not in a position to commit certain offences such as rape, etc., and limited company cannot be held liable as there is no mensrea. The notion that a limited Company cannot be held liable for Criminal acts is mainly based on an English judgement.<sup>21</sup> But their Lordship of Calcutta High Court has made a distinction between the Indian Law and English Law on the point, in the following words:-

" . . . . . the Company could not be committed for trial because the Interpretation Act of 1889 in England explained what was meant by the expression", committed for trial "used in relation to any person shall, unless the contrary intention appears, mean committed to prison with a view to being tried before a judge or jury. This expression committed for trial has not found place in the Indian Law".

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19. Emp. v. Dhanraj Mills Ltd., A.I.R. 1943, Bom.182.

20. A.I.R. 1952 Cal.759.

21. The King v. Daily Mirror News Papers Ltd., (1922) 2 K.B. 530.



There is nothing in the law, which preclude a trial where possible except in the cases where the death is the only punishment. There is nothing to prevent a court from inflicting a suitable fine. The sections 386 and 388 Cr.P.C. (1898 Code) lays down a suitable procedure for the recovery of this fine. The question again came up for discussion in State of Maharashtra v. Syndicate Transport Co.,<sup>22</sup> in this criminal reference the question was regarding the liability of a corporate body for indictment on a criminal charge which involved the question of mensrea. Again in this case the definition of section 2 and 11 of I.P.C. was considered. The brief facts of the case were that a share holder has advanced a loan of Rs.11000/-, from another company on some understanding, When the requisite conditions of the contract were not fulfilled. The complainant lodged a complaint against the company, its Managing Director, Directors and share holders. The Directors were discharged and the charges u/s 420 IPC were made against the company.

In support of the argument that the company was not liable for criminal acts of its servants, reliance was made on Punjab National Bank v. A.R.Gonsalyas Bunder,<sup>23</sup> Inspector Karachi Port Trust. This was a case where bye laws of Karachi Port Trust were infringed. It was held that the company is responsible for only a limited number of offences, and those are the offences where mensrea is not essential, and where a sentence of fine can be passed only. The same point was raised and up-held in Sunil Chander Banerjee v. Krishna Chandra Banerji,<sup>24</sup> where the court held that a Bank cannot be held liable for the offence of cheating as the mensrea is an essential ingredient for the offence of cheating the, Bank being a judicial person is not a natural person.

The present Indian position on the subject is similar as was laid down in the English case, Director Public Prosecutions v. Kent and Sussax Contractors Ltd.,<sup>25</sup> that a limited company could be convicted of offences under the Defence (General) Regulation 1939. If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to

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22. A.I.R. 1964 Bomb. 1995.

23. A.I.R. 1951 Sind 142.

24. A.I.R. 1949 Cal.689.

25. 1944 - 1 K.B. 146.

deceive. The same view was expressed in the famous case R. v. I.C.R. Haulage Ltd.,<sup>26</sup> and it was mentioned that the general rule is that a company is liable for the criminal act. The Indian Courts has also undergone a change so far as the liability of the Corporation in a Criminal act is concerned. They seem to be influenced by the various English decisions. Corporate bodies were initially liable for minor breaches of rules and by laws where the petty fines were awarded. But with the idea of developing the corporate bodies and incorporation of various private and public limited company's the attitude of the Courts have changed. These Corporate bodies act through the human agency of their directors and authorised servants and agents. The ordinary citizen is now very much exposed to the activities of persons acting, in the name of corporate bodies. Once these corporate bodies reap all the benefits from the acts of their directors and other office bearers, and there seems to be no reason why these corporations should not be held responsible for their criminal acts. Russial has rightly quoted:

"The point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of criminal law to persons, exposed to the action of the many powerful associations which surround them".

The view has been strengthened by the decision of Paratype J., in State of Maharashtra v. Syndicate Tpt. Co.,<sup>27</sup> where it was held, "The scope within which criminal proceedings can be brought against institutions which has become so prominent a feature of everyday affairs, ought to be widened so as to make corporate bodies indictable for offences flowing from the acts or omissions of their human agents. The Court further decided that for what acts and in what circumstances corporation is to be made liable. The court said:-

"A company cannot be indictable for offences like perjury, bigamy, rape etc., which can only be committed by a human individual or for offences punishable with imprisonment or corporal punishment. Barring these exceptions a corporate body ought to be indictable for criminal acts or omissions of its directors, or authorised agents or servants under authority of the corporate body or in-pursuance of the aims or objects of the corporate body".

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26. 1944 - 1 K.B. 551.

27. A.I.R. 1964 Bom. 195.

PUBLIC CORPORATIONS: With the advancement in the industrial field the concept of the public corporations has come up. These are the institutions which are created by some Act of the legislature and are operating under the Government control, having independent legal entity with its own funds.

In England the crown enjoyed the immunity for a long time for Civil and Criminal wrongs. But after the passing of crown proceedings Act 1947 the Crown is liable for Civil wrongs and there seems to be no difficulty in extending this liability in criminal cases.

The present day tendency is that these corporations should be held for the criminal acts of its servants, and if this will not be done these public corporations will create problem for the people as the private corporations have done in past.

CONCLUSION: After examining the law and discussing both English and Indian judgements one can infer that the law on this point is not settled. We need a comprehensive legislation on the subject to control the criminal activities of corporations. The common man is so much so exposed to the activities of such corporation that we could find hardly a simple field in life which is not concerned by the activities of the corporations. These should be made criminally liable provided the act committed is to secure the object for which the corporation was incorporated.

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