STATES PRACTICES ON CORPORATE CRIMINAL LIABILITY: UK, AUSTRALIA, INDIA, MYANMAR

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Abstract

A corporation is a legal entity that the law treats as having its own legal personality. As a legal person, a corporation can engage in unlawful behavior and can be investigated by authorities, prosecuted and convicted of a criminal offence. Criminal liability needs to be imposed on a company for a crime its has committed. That is why most modern criminal law system foresee the possibility to hold the corporation criminally liable for the perpetration of criminal offences. Corporate criminal liability means the liability imposed upon the corporation for any criminal act done by an authorized person to act as the company or by its representative. Corporate criminal liability is not a universal feature of modern legal systems. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. These country are UK, Australia, India etc.. In Myanmar, there is no explicit provision relation to criminal liability of corporation in Penal Code or other statutory provisions like any other countries. To handle these problems, the specific law or provisions in relation to corporate criminal liabilities should be established in the relevant laws.

Key Words: corporate, criminal liability, Penal Code, statutory provision.

Introduction

A company is a type of corporation. In simple language, corporation means a group of individuals coming together to carry on a business .It is a creation of law, a business entity recognized by law. In fact, most corporations that are used to carry on business are referred to in some countries as companies, and in others as corporations.

A company or corporation is a legal person and that is why a company can hold property in its own name and enter into contracts in its own name. It can commence or defend legal proceeding in its own name.

But there is a problem in relation to it defending legal proceedings in its own name except in the case of civil proceedings .This is because a

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company being inanimate has no mind capable of entertaining criminal intent. Hence, it has no capacity to commit crime. Thus, the term "corporate crime" refers to a crime committed by a person authorized to act as the company or by its representative. Corporate criminal liability is liability imposed upon the company for any criminal act done by such natural person.

The theory of corporate criminal liability holds that liability is attributed to corporations for faults of individuals. But, a corporation has long been recognized as a legal personality that is distinct from its shareholders. This has created difficulties in how to hold these artificial legal personalities criminally liable. The major obstacle to holding companies liable is that the criminal law was developed to punish individuals. The application of human-based concepts, such as *actus res* and *mensrea*, to corporations was always going to prove problematic.

Corporate criminal liability is not a universal feature of modern legal systems. Some Countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognize any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. In this context, the legal system of India, the United Kingdom, Australia and Myanmar will be examined and discussed.

States Practices on Corporate Criminal Liability

Corporate criminal liability is not a universal feature of modern legal systems. Some Countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognize any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes hereby administrative penalties may be imposed on corporations for the criminal acts of certain employees. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability.

The following is an account of how the laws in common law countries, although generally similar, vary from each other in the context of corporate criminal liability.

Corporate Criminal Liability in India

Courts in India were hesitant to attribute criminal liability to a company for an offence that required a criminal intent and they were of the opinion that they could not prosecute companies for offences that entailed a mandatory sentence of imprisonment because the corporation could not be criminally prosecuted for offenses requiring *mensrea* as they could not possess the requisite *mensrea*.

The Supreme Court in *Asst: Commissioner v. Velliappa Textiles Ltd*,[1] held by a majority decision that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. The Supreme Court further held that where punishment provided is imprisonment and fine, the court cannot impose only fine.

In *A K Khosia v .S Venkatesan,*[2] two corporations were charged for committing fraud under the India Penal Code. The Magistrate issued orders against the corporations and the Court observed that in order to prosecute corporate bodies, there were two pre-requisites, the first being that of *mensrea* and the other being the ability to impose the mandatory sentence of imprisonment. A corporate body could not be said to have the necessary *mensrea*, nor can it be sentenced to imprisonment as it has no physical body.

In *Zee Tele films Ltd. v . Sahara India Co. Corp. Ltd*,[3] the Court dismissed a complaint which was filed against Zee Tele films under Section 500 of the IPC. In this case, it was alleged that Zee had telecasted a program which was based on falsehood. The court held that *mensrea* was one of the essential elements of the offence of criminal defamation and that a company could not have the requisite *mensrea*.

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1 (2003) 7SCC 405.
2 (1992) Cr.L.J. 1448.
3 (2001) 3 Recent Criminal Report 292.

In *Motorola Inc. v. Union of India*,[4] the Bombay High Court quashed a proceeding against a corporation for alleged cheating and the court concluded that it was impossible for a corporation to form the requisite *mesrea,* which was the essential ingredient of the offense. Thus the corporation could not be prosecuted for cheating under section 420 of the IPC.

In this case of the Assistant Commissioner, *Assessment-ll, Bangalore & Ors.v. Velliappa Textiles*,[5] a private company was prosecuted for violation of certain sections under the Income Tax Act. Sections 276-C and 277 of the income Tax Act provided for a sentence of imprisonment and a fine in the event of a violation. The Supreme Court held that the respondent company could not be prosecuted for offences under certain sections of the Income Tax Act because each of these sections required the imposition of a mandatory term of imprisonment coupled with a fine and the court could not only impose a fine on the corporation. After strict interpretation, the Court held that a corporation did not have a physical body to be imprisoned and therefore could not be sentenced to imprisonment.

The observations by the courts in the foregoing cases were that a corporation, unlike a person, could not have the *mensrea* required to be found guilty of a crime and neither could it be imprisoned as it was not a physical entity. Also, where a sentence called to a mandatory term of imprisonment plus a fine, only a fine without imprisonment could not be awarded, because in the Court's opinion such a sentence has to be imposed in full and not in part only. However, the opinion of the Court differed from this in the following case.

In *Oswal Vanaspati & Allied Industries v. State of U.P*,[6] the Full Bench of the Allahabad High Court held that a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. The question that requires determination is whether a sentence of fine alone can be imposed on it under Section 16 of the Act or whether such a sentence would be illegal and hence cannot be awarded to it. It is settled law that sentence or punishment must follow conviction and if only corporal

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4 2004 Cri L J 1576.
5 2004 1 Comp. L.J. 21.
6 1993 1 Comp LJ 172.

punishment is prescribed a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly then though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it.[7]

Thus, it cannot be held that in such a case the entire sentence prescribed cannot be awarded to a company as a part of the sentence, namely, that of fine can be awarded to it. Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal. Thus, the Indian courts were divided in their opinion as to whether a company could be held criminally liable or not.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in the 411st Report of Law Commission of India the Law Commission suggested an amendment to Section 62 of the India Penal Code by adding the following lines:

"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only".

"In every case in which the offence is punishable with imprisonment and any other punishment not being fine and the offender is a corporation, it shall be competent to the court to sentence such offender to fine."

In this section, "corporation" means an incorporated company or other body corporate, and includes a firm and other association of individuals.

But this bill prepared on the basis of the recommendations of the Law Commission lapsed and it did not become law. However, few of these recommendations were accepted by parliament and by suitable amendment some of the provisions in the taxation statutes were amended. The Law Commission has tried consistently to find a formula which would solve the

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[7] Corporate criminal liability – the issue revisited in the context of recent Supreme Court decision, V K AGGARWAL, www.icsi.edu>webmodules>programmes.

problem of fixing appropriate punishment for the Corporations which commit an offence, this has been done with a view to punish a corporation where mandatory minimum punishment is both punishment and fine. In such a case it needs to be fixed as to how the law courts would advance if this question comes up before them.[8]

But the view of the courts on corporate criminal liability was changed in the landmark case of *Standard Chartered Bank and Ors. V. Directorate of Enforcement*.[9] In this case, Standard Chartered Bank was prosecuted for the alleged violation of certain provisions of the Foreign Exchange Regulation Act, 1973 and the Supreme Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and held that the corporation could be prosecuted and punished with fines, regardless of the mandatory punishment required under the respective statute.

Finally, the Court decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company.[10]

After the decision of the Standard Chartered Bank case, the courts were generally of the view that the companies would not be exempted from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is a mandatory imprisonment.

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8 Analysis of Corporate Criminal Liability in India, The Lex-warrier in >Article, online law journal, ISSN 2319-8338, Sabani Panda, Research Associate.

9 ([2005] 4 SCC 530).

10 Angira Singhvi, Corporate Crime and Sentencing in India: Required Amendments in Law National Law University, Jodhpur, India, international journal of criminal justice sciences, Vol 1 Issue.2 July 2006.

In *Iridium India Telecom Ltd. v Motorala Incorporated and Ors*,[11] the Hon'ble Supreme Court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring *mensrea.* The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. In this case, it was also held that the corporations can no longer claim immunity from criminal prosecution on the grounds that they are incapable of possessing the necessary *mensrea* for the commission of criminal offences.

Thus, the criminal intent of the 'alter ego' of the company or corporate body, i.e. the person or group of people that guide the business of the company would be imputed to the corporation. It is now an established legal position in Indian that a corporation can be convicted of offences that require possession of a criminal intent, and that a corporation cannot escape liability for a criminal offence merely because the punishment prescribed is imprisonment and fine.

But it is always a controversial issue that Corporations cannot be sentenced to imprisonment and since, there is no explicit provision relating to it, the Supreme Court have held in various cases that it is better to impose fine upon the corporation even in the cases where there is a punishment for imprisonment. The imposition of fines may be made in four different ways as provided in the IPC. It is the sole punishment for certain offences and the limit of maximum fine has been laid down, in certain cases, it is an alternative punishment but the amount is limited in certain offences, it is imperative to impose fine in addition to some other punishment and in some it is obligatory to impose fine but no pecuniary limit is laid down. Section 357, Cr PC, empowers a Court imposing a punishment of fine or a sentence of which fine

[11] AIR 2011 SC 20.

forms a part to order payment of compensation out of the fine recovered to a person for any loss or injury caused to him by the offence.[12]

Environmental degradation arising out of industrial pollution in recent years has become a positive danger to social security. Thus, legal provisions have been incorporated in the Indian Code, to punish industrial and business organizations which pose a danger to public life by polluting water, and District Magistrates can initiate proceedings against the offender under Section 133 of the Code of Criminal Procedure, 1973.

Section 16 of Environment (Protection) Act, 1986 and Section 47(2) of the Water (Prevention and Control Pollution) Act, 1974 also explicitly lay down provisions for the offences by companies. It states companies can be prosecuted under certain circumstances and thus, reflects the concept of vicarious criminal liability.

The Black Money (Undisclosed Foreign Income and Assests) and Imposition of Tax Act, 2015(Black Money Act) has provided that if Indian residents do not disclose and declare tax on their assets and income from foreign sources, they are liable to be criminally prosecuted. Companies as well as individuals are subject to the Black Money Act. Section 56 of the Black Money Act provides for vicarious liability. An identical provision can be found in Prevention of Money Laundering Act, 2002.

Corporate liability may appear incompatible with the aim of deterrence because a corporation is a fictional legal entity and thus cannot itself be "deterred". In reality, the law aims to deter the unlawful acts or omissions of a corporation's agents. To defend corporate liability in deterrence terms, one must show that it deters corporate managers or employees better than does direct individual liability.

In India there was no prosecution of the corporations for offences requiring *mensrea* before 2005. But after the *Standard Chartered Bank &ors v Directorate of Enforcement &Ors*(2005) case it has been held, there was no immunity from prosecution for companies merely because the prosecution was in respect of offences for which the punishment prescribed was

[12] Sabani Panda, Analysis of Corporate Criminal Liability in India, The Lex-warrier in >Article, online law journal, ISSN 2319-8338, Research Associate .

mandatory imprisonment. Therefore, it is now an established legal position in India that a corporation can be convicted of offences that require possession of a criminal intent, and that company or corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is 'imprisonment and fine'.

Corporate Criminal Liability in UK

Corporate manslaughter is a criminal offence in English Law, being an act of homicide committed by a company or organization. In general, in English criminal law, a juristic person is in the same position as a natural person, and may be convicted for committing many offences. The Court of Appeal confirmed in one of the cases following the Herald of Free Enterprise disaster that a company can, in principle, commit manslaughter, although all defendants in that case were acquitted.[13]

The common law test to impose criminal responsibility on a company only arises where a person's gross negligence has led to another person's death and (under the "identification doctrine") that person is a "controlling mind", whose actions and intentions can be imputed to the company (that is, a person is in control of the company's affairs to a sufficient degree that the company can fairly be said to think and act through him).[14] This is tested by reference to the detailed work patterns of the manager, and the job title or description given to that person is irrelevant, but there is often no single person who acts as a "controlling mind", particularly in large companies, and many issues of health and safety are delegated to junior managers who are not "controlling minds".[15]

Corporate Criminal Liability for Manslaughter originated from the Herald of Free Enterprise disaster. On 6 March 1987, 193 people died when the Herald of Free Enterprise capsized. Although individual employees failed in their duties, the Sheen Report severely criticized the attitude to safety prevalent in P&O, stating: "All concerned in management…were at fault in that all must be regarded as sharing responsibility for the failure of

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[13] R. V. P & O Ferries (Dover) Ltd (1991) 93 Cr App Rep 72

[14] Section 1(3) of the Corporate Manslaughter & Corporate Homicide Act 2007.

[15] Tesco V. Nattrass [1972] AC 153.

management. From top to bottom the body corporate was infected with the disease of sloppiness.[16]

In English law, proving corporate manslaughter and securing a conviction of an individual where the corporation involved is a small concern are easier where it is easier to identify a "controlling mind" (in R v OLL Ltd, 1944, about the Lyme Bay canoeing tragedy, managing director Peter Kite was convicted), but efforts to convict people in large corporate entities tends to fail as the management structure is more difficult. Instead, the prosecution stands more chance of pursuing a case successfully if it prosecutes simply on the grounds of a safety breach under the Health and Safety at Work Act 1974.

The Corporate Manslaughter and Corporate Homicide Act 2007 is a landmark in law. For the first time, companies and organizations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care, since the Act states that, "a breach of a duty of care by an organization is a gross breach if the alleged conduct amounts to a breach of that duty that falls far below what can reasonably be expected of the organization in the circumstances".[17]

Under the new Act, Prosecutions would be of the corporate body and not individuals[18], but the liability of directors, board members or other individuals under health and safety law or general criminal law, would be unaffected. And the corporate body itself and individuals could still be prosecuted for separate health and safety offences.

This being so, Companies and organizations should keep their health and safety management systems under review, in particular, the way in which their activities are managed and organized by senior management. The Institute of Directors and HSE have published guidance for directors on their responsibilities for health and safety: 'Leading health and safety at work: leadership actions for directors and board members'.

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[16] Herald of Free Enterprise, Report of Court No 8074 (Sheen Report), London: HMSO.
[17] Section 1(4) (b) of the Corporate Manslaughter & Corporate Homicide Act 2007.
[18] Section 18 of Corporate Manslaughter & Corporate Homicide Act 2007.

The Organizations concerned with the Corporate Manslaughter Act are:

(a) The Corporation;

(b) A department or other body listed in schedule 1;

(c) a police force ;

(d) a partnership, or a trade union or employer's association, that is an employer

There are no new duties or obligations under the Act, nor is the new offence part of health and safety law. It is, however, specifically linked to existing health and safety requirements.

Under the Corporate Manslaughter Act, the offence is concerned with corporate liability and does not apply to directors or other individuals who have a senior role in the company or organization. However, existing health and safety offences and gross negligence manslaughter will continue to apply to individuals. Prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so.

In relation to Penalties, Penalties will include unlimited fines[19], remedial orders and publicity orders. A remedial order will require a company or organization to take steps to remedy any management failure that led to a death. The court can also impose an order requiring the company or organisation to publicise that it has been convicted of the offence, given the details, the amount of any fine imposed and the terms of any remedial order made. The publicity order provisions will not come into force until the Sentencing Guidelines Council has completed its work on the relevant guidance.[20]

The first corporation convicted under the CMCH Act was *Cotswold Geotechnical (Holdings) Ltd*.[21] The deceased was an engineer who entered trial pits to take soil samples without a second person present when the pit collapsed. The defendant was a small company run by a sole director. The defendant was fined £500,000 and the company soon went into liquidation.

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[19] Section 1(6) of the Corporate Manslaughter & Corporate Homicide Act 2007.

[20] www.hse.gov.uk>faqs, about corporate manslaughter.

[21] R v Cotswold Geotechnical (Holding) Ltd [2011] All ER (D) 100.

Cotswold Geotechnical Holdings appealed against the Judge's decision. However this was turned down in May 2011 with the Judge in the Court of Appeal holding the original fine.[22]

The second convicted corporation was *JMW Farms Ltd*, a small firm that pleaded guilty and was fined £187,500.[23] On 15th November 2010, a JMW Farms employee Robert Wilson, was tragically killed when he was struck by a metal bin which fell from the raised forks of a forklift truck and suffered fatal crush injuries. The joint investigation by the Health and Safety Executive Northern Ireland and the Police Service of Northern Ireland found that it was not possible to insert the lifting forks into the sleeves of the bin, as the forks were too large and incorrectly spaced causing the bin to fall. JMW Farms pleaded guilty to the offence under the Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act") and was fined £187,500 and ordered to pay £13,000 in costs. The total sum having to be paid within six months[24].

In *MNS Mining Ltd*, January 2013, The Crown Prosecution Service (CPS) was prosecuting both the manager and the company who operated the Gleision Colliery, the scene of a tragic accident in which four miners lost their fivesOn 19 June 2014 MNS Mining was found not guilty of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007, following a three month trial at Swansea Crown Court. The mine manager, Malcolm Fyfield, employed by MNS was found not guilty of gross negligence manslaughter. The company was on trial for four offences of corporate manslaughter and the mine manager with four offences of manslaughter.

In *Linley Developments*, September 2015, Hertfordshire building firm, Linley Developments has been sentenced for the corporate manslaughter of a worker who was crushed when a structurally unsound retaining wall collapsed. The company's managing director and project manager were both also given suspended prison sentences after pleading guilty to breaching CDM Regulations. It was heard in court how 28-year-old Gareth Jones died instantly

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[22] www.cqms-Ltd.co.uk>news>landmark, corporate manslaughter prosecutions.
[23] R v JMW Farm Limited [2012] NlCC 17.
[24] www.cqms-Ltd.co.uk>news>landmark, corporate manslaughter prosecutions.

on 30 January 2013 when a wall collapsed on him in on Mile House Lane in St Albans. Two days before the incident, managing director Trevor Hyatt visited the site to find that the foundations for the store room would leave the floor at a higher level than in the adjoining building. Project manager Alfred Baker suggested putting in a step but the client said he would prefer them at the same level. Two workers told Mr. Hyatt that, if they were to dig lower, they might need to underpin the footing of the existing wall. He told them to dig to a lower level regardless. Trevor Hyatt, 50, of Letty Green, Herford was given a six month prison sentence, suspended for two years, after pleading guilty to breaching Regulations 28 and 31 of the Construction (Design and Management) Regulations. He was also fined £25,000 with £7,500 in costs. Alfred Barker, 59, of Gazeley, Suffolk was given a six month prison sentence, suspended for two years, after pleading guilty to breaching Regulations 28 and 31 of the Construction (Design and Management) Regulations. He was ordered to pay costs of £5,000.

Linley Developments was fined £200,000 and ordered to pay costs of £25,000 after pleading guilty to corporate manslaughter on 7 September. It was allowed to pay the fine over six years. The judge also made a publicity order against the company.[25]

In the Corporate Manslaughter & Corporate Homicide Act 2007, the law has bound the courts to impose only a fine on companies as a form of punishment for the crime. Moreover, since other than fines, penalties also include remedial orders and publicity orders, the CMCH Act has how made it possible to impose criminal liability on corporations for the crime of corporate manslaughter resulting from senior management failure.

Corporate Criminal Liability in Australia

The Criminal Law in Australia focus on the notions of *mensrea* and *actusreus* as the components of a criminal offence. Accordingly, a corporation as an artificial entity cannot act nor can it possess a guilty mind excepts through its officers and agents. If corporations are to be made criminally

[25] www.cqms-Ltd.co.uk>news>landmark, corporate manslaughter prosecutions.

liable, then the law has to create a way though which criminal liability can be attributed to them. In response to this need, the criminal law in Australia has introduced and recognized the notion of vicarious liability. Borrowing from Civil Law principles, it is now well established that a corporation can be held vicarious liable for the act of its employees provided that they have acted within the scope of their employment. Under this doctrine of vicarious liability, corporations are made criminally liable as a principal offender not because of their own "direct action" but because of the "action of another person". It has been stated that there is no doubt that in Australia the vicar's criminal actions may be attributed to the employer in reliance upon the doctrine of vicarious liability.

But for this type of vicarious liability to be imposed various requirements need to be established. First, this liability can only be attached to the corporation when the relevant law intends to impose vicarious liability. Secondly, the employee, officer or agent must have committed the offence in question in the course of his or her employment or authority. Thirdly, the employee needs to have the relevant state of mind required in the definition of the offence committed under the Australian Criminal Law.

In Australia, Division (12) of the Criminal Code Act 1995, states that:

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as set out in this part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.[26]

If a physical element of an offence is committed by an employee, agent, or officer or body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.[27]

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[26] Division 12 (1, 2) of the Australian Criminal Code Act 1995

[27] Dr. Mouaid AL-Qudah, Corporate Criminal Liability under the Criminal Laws, Issue No.37-January 2009, Journal of Sharia & Law.

Section 12.2 imposes vicarious liability upon the corporation for the physical elements (though not the mental element) of the offence when committed by any employee, agent or officer within the actual or apparent scope of employment. This departs from the Tesco principle, where the physical elements of the offence must be attributable to a high-level officer. Under Section 12.3(1) of the Criminal Code, the requisite element of fault in an offence, characterized by, for example, intention, knowledge or recklessness, is established on the part of the body corporate itself, where the body corporate has "expressly, tacitly or impliedly authorized or permitted the commission of the offence".;[28]

Authorisation or permission for the commission of an offence may be established on, inter alia, the four bases set out in Section12.3 (2) of Corporate Manslaughter and Corporate Homicide Act, 2007.

Several non-exclusive means by which such authorization or permission can be established are set out in Section 12.3(2). The first two methods parallel the Tesco principle, through proof that the board of directors or a high managerial agent "intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence". In the case of the "high managerial agent", however, the corporation may escape the attribution of intention for the acts of a maverick within the organization, if the corporation can show it exercised due diligence to prevent the conduct.

Section 12.3(2)(a) and (b) (regarding the conduct of a corporation's board of directors or 'high managerial agents') essentially maintain the 'identification' approach (although the fact that the physical element of offences committed by any employee, agent or officer, rather than only a senior officer, is attributable to the corporation, is a departure from the identification approach as applied in the UK). Sections 12.3(2)(c) and (d), however, represent a new approach to corporate criminal liability, in that they

[28] Jennifer Hill, Corporate Criminal liability in Australia: An Evolving Corporate Governance Technique? , 2003.Journal of Business Law, p. 16.

are founded on the corporation's own wrongdoing, in the form of deficiencies in its 'corporate culture'.[29]

'Corporate culture' is 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.[30]

At first blush, the contours of the form of corporate liability established via "corporate culture" are very broad and very different from those under the Tesco principle. The concept of "corporate culture" focuses on blameworthiness at an organizational level, in the sense that the corporation's practices and procedures have contributed in some way to the commission of the offence. For liability to be attributed to the corporation by these means, there is no level in the corporate hierarchy beneath which attribution of liability to the corporation is impossible. Rather the key issue will be whether the organizational structure of the corporation was such that the relevant act of non-compliance could occur at any level.[31]

The Criminal Code itself sets out some relevant factors in determining whether a tainted corporate culture existed within the corporation.[32]

Section 12.4(3) of this Act, Provides that: negligence may be evidenced by the fact that the prohibited conduct was substantially attributed to:

(a) Inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) Failure to provide adequate system for conveying relevant information to relevant persons in the body corporate.

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[29] Allens Arthur Robinson, Corporate Culture' as a basis for the criminal liability of corporation, for the United Nation special representative of the Secretary-General on Human Rights and Business, Feb 2008, pp. 15-16.

[30] Ibid.

[31] Jennifer Hill, Criminal liability in Australia: An Evolving Corporate Governance Technique? 2003,Journal of Business Law P 17.

[32] Section 12.3(4) of Corporate Manslaughter and Corporate Homicide Act 2007

The approach adopted in the above provisions constitute a significant step in developing and clarifying standards of corporate criminal liability, it gives rise to new questions that may reveal the need for further reform.[33]

The extension of liability for all offences within the Criminal Codeto corporations was introduced primarily in response to the difficulties in determining the situations in which the requisite mental and conduct elements of a crime could be attributed to a corporation for the purposes of establishing criminal liability. Pursuant to the House of Lords decision in *Tesco Supermarkets Ltd v Nattrass*[34]*,* which has been followed by Australian Courts, attribution of the requisite mental and conduct elements to the corporation resulting in personal corporate liability will occur where those elements can be traced to the board of directors, managing director or persons to whom full management powers have been delegated (the Tesco principle). A recognition of the limitations of the Tesco principle in relation to large corporations resulted in the abandonment of the principle under federal legislatzion, in favour of broad vicarious liability for the actions of employees acting on the corporation's behalf. Thus, criminal liability of corporations at common law only exists at the state level. At the federal level, common examples of corporate crime involve breaches of the *Corporations Act 2001* (Cth) and *Trade Practices Act 1974* (Cth) (***TPA***) (particularly in relation to competition and consumer protection law).[35]

Thus, in Australia, a corporation may be found guilty of corporate criminal liability under the Criminal Code Act 1995 which provides that, "A body corporate may be found guilty of any offence, including one punishable by imprisonment".

The Act imposes vicarious liability on the corporation for the physical elements of the offence when committed by any employee, agent or officer within the scope of his employment. This differs from the identification

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[33] Dr. Mouaid AL-Qudah, Corporate Criminal Liability under the Criminal Laws, Issue No.37-January 2009, Journal of Sharia & Law.

[34] [1972] AC 153.

[35] Brief on corporations and human rights in the Asia-Pacific region, Allens Arthur Robinson, United Nations Special Representative of the Secretary General for Business and Human Rights, Aug-2006.

principle (as applied in the UK) where only the offence committed by a senior officer is attributable to the corporation.

If negligence is the fault element of the offence and it cannot be attributed to any individual employee, agent or officer, the fault may be attributed to the corporation if its conduct is found to be negligent when the aggregation theory is applied; that is by aggregating the conduct of any number of its employees, agents or officers.

Corporate Criminal liability in Myanmar

A corporation has long been recognised as a legal personality that is distinct from its shareholders. This has created difficulties in how to hold these artificial legal personalities criminally liable. The major obstacle to holding companies liable is that the criminal law was developed to punish individuals. The application of human-based concepts, such as *actusreus* and *mensrea*, to corporations was always going to prove problematic.

In the Myanmar Penal Code section 11 states that:

"The word "person" includes any company or association, or body of persons, whether incorporated or not". Therefore, this Code applies to any body corporate. But there is no other section in the code relating to the criminal liability of corporations.

Company is a legal person. As such, it has no physical existence and so cannot be imprisoned. Therefore, if the body corporate commits an offence punishable with imprisonment only, it obviously cannot be imprisoned. Therefore special provision should be made in order to hold a company accountable. Notwithstanding this point, however, there is no provision in the Penal Code that addresses the issue of what action can be taken against a company that commits an offence that is punishable with imprisonment. This deficiency is also present in other laws.

Corporations may also have criminal liability outside the terms of the *Penal Code* such as liability for environmental damage. Other acts expressly state that employees or directors can be held liable for the acts of a company, for instance, the Foreign Exchange Regulation Act, states that where a company commits an offence under the Act, every director, manager and

secretary will be punishable as if they committed the offence, unless they can prove that the offence was committed without their knowledge. The Act provides for imprisonment of up to three years and fines.[36]

With regard to money laundering, provisions can be found in Section 59 (a) of the Myanmar Anti Money Laundering Law, 2015 which state that no prosecution taking of action by criminal, civil, disciplinary or administrative means on reporting organizations or their directors, officers or staff who submit reports or provide information in good faith in accord with the provisions of this Law for the breach of the provisions of banking, professional secrecy and agreement.

In India companies as well as individuals are subject to Prevention of Money Laundering Act, 2002 and the Black Money Act.[37]

Therefore, Indian Black Money Act is more complete than Myanmar Anti Money Laundering Law 2015, in relation to corporate criminal liability.

The most common examples of corporate crime involve cases of environmental pollution and dangerous industrial practices, as well as other breaches of workplace safety. In particular, corporate breaches of legislation relating to fair trading, food production and handling, building and construction, as well as environment protection legislation and workplace health and safety laws should result in criminal sanctions against the company.

In this connection, a prominent event involving gross manslaughter and environmental pollution occurred in Hpakant, Kachine state. These areas, migrant small-scale miners earn a living by searching for jade in piles of waste soil on the mountainside.

On November 21, 2015, around 3 am, a landslide occurred next to the mountain of dump soil which was about 200ft high; by 300ft. 70 in which miners were sleeping were buried. Just 5 huts escaped the landslides. At the

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[36] Allens Arthur Robinson, Brief on Corporations and Human Rights in the Asia-Pacific Region, prepared for Professor John Ruggie, United Nations Special Representative of the Secretary General for Business and Human Rights, Aug-2006.

[37] Section 56 of Black Money Act 2015 and Section 70 of the Prevention of Money Laundering Act 2002.

time of Counting, the death toll had risen to 104. But many more people were still missing.[38]

This accident occurred at the mountain of dump soil, which had been dumped by a mining company. The mining company had been dumping waste soil day and night without following any regulations for safe dumping from a technical point of view.

In order to prevent disasters the cited case from happing, mining companies should dump waste soil systematically, and should be held criminally liable for death caused by their negligent dumping of waste soil. It is, therefore, necessary to include the criminal liability of company in relevant laws and regulation. For instance, provisions on corporate criminal liability should be included in the Myanmar Gemstone Law 1995.

On the other hand, there may be environmental damages because of negligent dumping of waste soil. Therefore, Environmental Conservation Law should be inserted Criminal Liability of Company for environmental damage of negligent dumping of waste soil.

A senior Technical and Policy Analyst of the Myanmar EITI, pointed out weaknesses in the technology used for dumping soil from mines, suggesting the adoption of a long term policy for dumping soil. The Ministry of Mines has adopted rules for the dumping of soil but has been weak in monitoring and enforcing these rules.

In reviewing this event, it may be seen that the company was at fault and should take responsibility for their negligent conduct in failing to obey the rules for the dumping of soil.

Incidentally, there are no provisions relating to criminal liability of corporations or responsible persons in the Myanmar Gems Stones Law, 1995 nor in the Environmental Conservation Law, 2015 or Penal Code under which such cases of mineral excavation and the use of polluting explosive can be tried.

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[38] Aye Min Soe, Huge Landslide Killed 30, The Global New Light of Myanmar, Vol. II, No.215, 22nd Nov,2015, p. 1.

On January 25, 2016, a landslide at a monastery in Mayangon Township caused the death of three people. The incident occurred around 9:45 am when six workers were digging around a 25 foot high earthen wall in preparation for the construction of a retaining wall.[39]

In this case A construction expert said that "the deadly tragedy happened because the workers have no experience in this kind of work, and there are few worksite safety measures in place".

A criminal case no 97/2016, State v Aye Min and 3, was brought in Mayangon township court with charges under section 174 of the criminal procedure code. This section deals with police to inquire and report on suicide.

The same event had occurred on at Future Mandalay Pullman hotel construction worksite. The scaffolding gave way on June 20 at the Mandalay Hotel construction site, killing two workers and injuring another 18 peoples.[40]

The case, *Win Bo v Nwae Oo Maung*, criminal case no 1226/2015, was brought in Chan Mya Tharzi township court.

In this case, "Nwae Oo Maung, the contractor of Nyan Family Construction, was sued under section 337, 338 and 304(a) of Penal Code. These charges relate to causing minor and grievous hurt by acts endangering the life or personal safety of others, as at least 18 workers were injured and two died.[41]

But, in fact, there was 22 workers were injured and two died.

In this case, there was the collapse of scaffolding. In relation to such a collapse a Mandalay based engineer speculated that it was likely caused by miscalculating about how much weight could be supported by the steel rods used to build the structure.

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[39] Zaw Gyi (panita),The Global New Light of Myanmar, Vol. II, No.279, 25th, Jan,2016, p. 2.

[40] Myat Nyein Aye, workplace safety in need of update, Myanmar Times,1st July 2015,www.mmtime.com.

[41] Zarni Mann, Pull Man Hotel contractor sued After deadly scaffold collapse,www.irrawady.com>News> Burma.

"There may have been a failure in the scaffolding because the pipes were too small to support the weight, and the base was too high off the ground," He said, explaining that other factors, could also have been present such as groundwork that was not sturdy enough to support the structure.

The case was eventually withdrawn by the aggrieved person. Cases of this kinds adversely affect the country's labour force but there are no remedies under law because of the lack of specific health and safety at workplace Law in Myanmar.

In these kinds of cases, generally police stations prosecute cases under section 304(a) of the Penal Code because there is no separate safety law.

In Myanmar, there was no separate Health and afety Law in workplaces. But, there are health and safety provisions in the Factories Act 1951 which however does not cover all workers in all work places. The draft of Health and Safety at Workplace Law was issued on 24 February 2017 which is applicable to the construction and engineering businesses.

Another case of the same type if the case of *State v Thant Zin Oo or Won Chaung*, opened as criminal case no 149/2016 in Mayangon Township Court. In this case, the defendant, Won Chaung was charged under section 174 of the Criminal Procedure Code which relates to suicide.

According to facts of this case, the incident occurred at Moe Htet Myint Consruction in Kone Myint Thar (10), Mayangon Township in Yangon. In this case, Won Chaung was not a construction worker but a worker who was to install a crane. Won Chaung had fallen down from the 8th floor on the way to installing crane because a piece of three-ply wood had broken. In this case, there was no legal remedy available because there was no Specific Safety Law. Therefore, in such kinds of cases there are no applicable laws to prosecute Construction Company that fail to protect the safety of workers.

Conclusion

Upon studying the corporate criminal liability systems of other countries, it is seen that in India there was prosecution of the corporations for offences requiring *mensrea* before 2005. But after the Standard Chartered Bank &ors v Directorate of Enforcement &Ors (2005) case it has been held, that there was no immunity from prosecution for companies merely because the prosecution was in respect of offences for which the punishment prescribed was mandatory imprisonment. Therefore, it is now an established legal position in India that a corporation can be convicted of offences that require possession of a criminal intent, and that a company or corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is 'imprisonment and fine'.

No amendments or additions have been made to the Indian Penal Code with regard to corporate criminal liability. Nevertheless, it has been noticed that provisions contained in some other laws permit the prosecution of companies for criminal liability. These other laws are the Black Money Act 2015, the Prevention of Money Laundering Act 2002, the Environment Protection Act 1986, the Water (Prevention and Control Pollution) Act 1974, etc.

In Australia, a corporation may be found guilty of corporate criminal liability under the Criminal Code Act 1995 which provides that, "A body corporate may be found guilty of any offence, including one punishable by imprisonment". In Australia under the Criminal Code Act, 1995, a corporate body may be found guilty of any offence, including one punishable by imprisonment. The corporation is held vicariously liable for the physical element of an offence committed in the scope of his employment, by any one of its employees (not just a senior officer). By this method, attribution of liability to the corporation is made possible for an offence committed by any employee, regardless of the employee's rank within the hierarchy of the corporation.

The Act imposes vicarious liability on the corporation for the physical elements of the offence when committed by any employee, agent or officer within the scope of his employment. This differs from the identification

principle (as applied in the UK) where only the offence committed by a senior officer is attributable to the corporation.

If negligence is the fault element of the offence and it cannot be attributed to any individual employee, agent or officer, the fault may be attributed to the corporation if its conduct is found to be negligent when the aggregation theory is applied; that is by aggregating the conduct of any number of its employees, agents or officers.

The Australian Criminal Code 1995 provides comprehensively for corporate criminal liability. In addition, corporate criminal liability is also addressed by other laws in Australia. For e.g the Proceeds of Crime Act, the Clean Water Act 1970, etc.

In the U.K., since the enactment of the Corporate Manslaughter and Corporate Homicide Act in 2007, companies can now be found guilty of corporate criminal liability. Punishment includes unlimited fines, remedial orders and publicity orders.

But in Myanmar there are no explicit provisions relating to the responsibility of a company in cases of criminal offences. Therefore, it is necessary to enact explicit provisions relating to the criminal liability of companies in the Penal Code, or in relevant laws or to provide a specific law for the criminal liability of companies like in the U.K or Australia.

In Myanmar, largely because of the recent emergence of public companies it essential to make appropriate provisions for the criminal liability of corporation. Further, the change required in the law to accommodate this development is of such dimensions that legislative action, rather than reliance on evolution of the common law is required.

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