

TRANSPOSING OF PECUNIARY PENALTIES IN PLACE OF CORPORAL PUNISHMENTS FOR JURISTIC PERSONS

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ABSTRACT

This paper revolves around the study of trends in sentencing that are followed by courts, in situations where mandatory imprisonment has been prescribed by the statute, but the person who is found guilty of the offence is a juristic person and is thus incapable of corporal sanction. Vide this paper the author advocates that for truly imposing sentences and penalties which would have a deterrent effect and thus lead to crime prevention, it is necessary that the aspect of suffering in the punitive spirit be directed towards the pecuniary interests of the juristic person itself, rather than corporal suffering of its employees/human representatives. The paper begins with a brief discussion regarding the theoretical basis of criminality and liability of juristic persons, at par with natural persons and goes on to discuss the justification of replacing imprisonment with fine, in the exercise of judicial discretion. The nature and scope of discretion enjoyed by the court has also been debated upon. It is traced that since the establishment of the Identification Doctrine in 1971, the courts in majority of the countries adopted the Individualistic Approach. However, this was seen to be countered by the Realistic Approach which saw no real equivalence being achieved in terms of the treatment of juristic person before the law. It is then demonstrated how the judicial fraternity in India have adopted a similar approach through the action of granting discretion to the courts themselves. Finally, practices followed in other countries such as USA and Australia have been compared with the Indian Scenario, to give suggestions that can be incorporated in the Indian situation. Finally, the researcher ends with suggesting that certain provisions of original the Indian Penal Code (Amendment) Bill as drafted in 1972 need to be passed.

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1. INTRODUCTION:

The present paper deals with the study of trends in sentencing that are followed by courts, in situations where mandatory imprisonment has been prescribed by the statute, but the person who is found guilty of the offence is a juristic person and is thus incapable of corporal sanction. Through this paper the researcher has sought to make a case for the transposition of pecuniary penalties in place of corporal punishments for such juristic persons. The primary objective of doing so is rooted in the widely recognisable fact that - while juristic persons may be dispensing of their functions through the people who constitute the hands and legs, the main purpose for existence, interests and perpetuation of juristic persons is pecuniary benefit. This leads to a situation where even the people who are dispensing the actions on behalf of the juristic person become removed from the impact and consequences borne by the juristic person. It is thus the opinion of the researcher that in order to truly impose sentences and penalties which would have a deterrent effect and thus lead to crime prevention, it is necessary that the aspect of suffering in the punitive spirit be directed towards the pecuniary interests of the juristic person itself, rather than corporal suffering of its employees/human representatives. Vide this paper the author seeks to justify this as a change from the individualistic approach of penology to the realist approach and a re-thinking of the penal system in this respect.

2. THEORETICAL BASIS FOR CRIMINALITY OF JURISTIC PERSONS:

Traditionally, the precept on which criminal law functioned was that merely the performance of any outlawed act does not make the person liable for the offence. The requirement of mens rea was also a sine qua non for any prosecution and liability.¹ This principle had been arrived at after

looking at the consequences that faced the world after the ancient practices of trial had been adopted, and the mode of punishment was through absolute/strict liability. It gave way to the framing of the essential features of a crime or *Corpus Delecti*ⁱⁱ, as:

- Culpable act / Actus reus
- Intention/ Mens rea
- Concurrence of Actus reus and Mens reaⁱⁱⁱ

This led to the Latin maxim *actus non facit reum, nisi mens sit rea* - to make one liable it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind. Besides laying out the substantive provision, the requirement of mens rea gave a boost to a lot of criminological theories that took the psychological approach. It led to a long debate on how the mind of a human being works, and how his experiences get him predisposed to criminality. This was referred to as the Social Learning Theory which said that the mental outlook of a person is influenced by the company that he keeps.^{iv} Depending on the moral quotient and the tendency for delinquency, it was believed that different people succumb differently in similar situations. This was referred to as the Differential Association Theory as given by Edwin Sutherland.^v

The differential association theory is born out a situation in which the individual in question is engaged in interaction with his surroundings and other individuals. In this manner, the researcher now attempts to show how a juristic person, even though it is a fiction of law, still manifests itself through activities that affect others. Such manifestation makes it get engaged in “interaction” with other persons in society – whether natural or juristic. As a corollary of Sutherland’s theory, a juristic person would also be treated at par with a human if the manner of interaction is similar.

An extension of such equal consideration would be that if a juristic person is capable of any kind of behaviour, then it would also have to be treated at par if the behaviour becomes criminal. This forms the basis for a criminological inquiry with regard to the manner in which such criminal behaviour is to be dealt with by the state. The universally accepted position in this regard, is to treat them as falling under the broad definition of ‘person’; and all ‘persons’ are made liable under

criminal statutes.^{vi} For example, under the Indian Penal Code, ‘person’ is defined as saying “The word “person” includes any Company or Association or body of persons, whether incorporated or not.”^{vii}

Out of all other forms of juristic persons, the one that is the most significant – both in society and hence for law makers, is the Body Corporate or Company. There are other juristic persons such as Idols and Temples, but the occurrence is extremely limited in number. Consequently, the maximum legislations in relation to juristic persons is found to be in relation to corporations.

One point to be noted here is that legislations do not consider these legal personalities to be “equal” to humans, but only equivalent. There do exist limitations on their recognition^{viii} - Legal entities cannot marry, they usually cannot vote or hold public office, and in most jurisdictions there are certain positions which they cannot occupy. Certain countries prohibit a legal entity from holding human rights; other countries permit artificial persons to enjoy certain protections from the state that are traditionally described as human rights.

In the present paper, the researcher shall now use the terms ‘juristic person’, ‘corporation’, ‘company’ and ‘body corporate’ interchangeably. The paper, in the following chapters, shall only restrict itself to analysing the manner in which liability is seen to be fixed on the *persona ficta*.

3. JUDICIAL TREND: CORPORATE LIABILITY:

Once the criminality has been deliberated on, and a settled position has been reached to say that corporations must be treated equivalent to natural persons, now begins the painstaking task of laying down a method in which laws must be made equally enforceable on them, not just in word, but also in practice.

Corporate Criminal Liability has thus been found to be a young and constantly evolving field because the lawmakers have, time and again, needed to legislate on new methods of applying the

old law to these entities. If it is decided to accept criminal liability of juristic persons everyone must deal with consequences of such decision, which means that equally artificial instruments will have to be formed to provide just and fair application of the law.^{ix} Understandably, most of the law that exists on the subject is judge-made law. This is because the constant challenges that crop up in the practical implementation of law, reach the table of judges and lawyers in the first instance. And they must take action because the law will have to clarify under what conditions and under which grounds it will be possible to attain an equitable solution.

The first step in fixing liability is to clarify what the liability will be. The different models for the criminal liability of juristic persons reveal a tension between individualist and realistic approaches. For individualists a corporation is the product of a union of individuals. This means that a juristic person can only be held criminally responsible if the conduct and fault of an individual involved in the entity are attributed to the juristic person. For realists a corporate entity has an existence independent of its individual members. The juristic person is blameworthy because its corporate identity or corporate ethos encouraged the criminal conduct^x.

Thus the 2 approaches are:

- a) Affixing unlimited responsibility in which juristic person will be equalised to the natural person.
- b) Affixing the responsibility within the corporation itself. This means that one should locate the responsible natural persons within the company. This would have to be done by either to looking into the law, statute or articles of association of the company or more likely by finding who is in “control” of the action.^{xi}

Keeping these possibilities in mind, the courts across the world have adopted varying trends, and have developed several theories and doctrines to resolve the issue. This can be easily explained by tracing the long line of cases on the subject.

- 1852:

The earliest view was that corporations could not be made criminally liable. This can be witnessed in a quote by Edward, First Baron Thurlow where he said: *"Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"*^{xii} In **State v. Morris & Essex RR** it was held that it cannot have "actual wicked intent and cannot, therefore, be guilty of crimes requiring "malus animus"^{xiii}

- **1854:**

The courts began to identify situations in which corporations could not be held liable such as - Treason, felony, perjury, and violent crimes against the person were thought to be committed only by natural persons in **Commonwealth v. Proprietors of New Bedford Bridge**^{xiv}.

- **1860:**

The Indian Penal Code was enacted to say that companies would be read under the definition of 'person'. So, companies would have to be made liable for all offences committed by a 'person' under section 11.

Now, the courts were forced to recognise it, but they were not able to reconcile the exact manner by which this would be implemented. The courts tended to take the approach from the old case of **Regina v. Great North of England**^{xv} which said corporate employees could be held personally accountable for crimes committed on behalf of a corporation and this was a point on which there was "no doubt."

- **1908**

This approach was extended in those cases where the corporations were thought incapable of fulfilling the requirement of mens rea. But, this was later overruled when the corporations began to even be prosecuted for offences of mens rea, as seen in the case of **New York Central and Hudson River Rail Road Co. v. U.S**^{xvi} and was upheld in landmark judgments such as Lord Haldene's pronouncement in **Lennard's Carrying**

Company Ltd v. Asiatic Petroleum Co. Ltd^{xvii} where the court identified the employees as Directing mind and Will of the corporation to affix liability.

- **1956**

This was a turning point in the jurisprudence on the subject and Lord Denning in the case of **H.S. Bolton (Engg.) co. ltd v. T.J Graham**^{xviii} laid it out in no uncertain words that: *“A company may in many ways be likened to a human body. They have a brain and a nerve centre, which controls what they do. They also have hands, which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is state of mind of company and it treated by law as such. So you will find that in case where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of company.”*

- **1971**

Thus, the Identification Doctrine was developed and further clarified by **Tesco Supermarkets v. Natrass**^{xix} to behold all those persons within the company, who fulfil the test of **Identification, Attribution and Imputation**, to be made punishable. The test was to look at:

- a) Whether the person was in a position of substantial authority
- b) Whether the person was in control of the operations and management in the corporation.

The situation at this point was settled in terms of the Individualistic approach. However, this was met with heated criticism under several Realist theories because the end result of the Identification, Attribution and Imputation was that the liability of the corporations was being imputed upon natural persons within the corporations itself.

This was found to be problematic because there was no real equivalence achieved in terms of the treatment of juristic persons and corporations before the law. The criminal behaviour of the corporations was not being tackled.

Moreover, the Individualistic approach was failing in situations where the guilt was delocalised within the organisations. Thus, other theories such as the Organisational Fault theory^{xx} and Aggregation theory were developed by criminologists. But there was no judicial mechanism to prosecute such guilt.

This problematic aspect was explained by Fisse when he said that the attribution of criminal liability to corporations is one of the blackest holes in criminal law. The common law principle developed in *Tesco Supermarkets Ltd v Natrass* has been criticised. It is unsatisfactory mainly because it restricts liability to the conduct or fault of high-level managers alone. This restriction makes it difficult to establish liability against large companies. Offences committed on behalf of large organisations often occur at the level of middle or lower-tier management, yet the Tesco principle requires proof of fault on the part of the top-tier manager or a delegate in the very restricted sense to being given full discretion to act independently of instruction. On the contrary, the Tesco principle works best in the context of small companies, where fault on the part of a top manager is usually much easier to prove and where there is relatively little need to improve corporate criminal liability.^{xxi}

4. EXERCISE OF JUDICIAL DISCRETION:

The justification that was being provided by the courts, for adhering to the Individualistic Approach was on the basis of their incapacity to impose any real criminal sanctions on the corporate bodies. The complaint was that there was no corpus to punish. In India, there are basically 3 forms of sanctions that have been prescribed under the criminal statutes:

- Pecuniary or Monetary Compensation or Fine
- Fine OR Imprisonment

- Fine AND Mandatory Imprisonment.

The judges iterate that their powers are extremely limited, and the discretion that is allowed to them under the criminal statutes is only with regard to sentencing, and nothing more. Even within that limited discretion, the judges must function within the range and limits laid out by the Parliament. Discretion is referred as the power of the judiciary which enables them to make legal decisions at their own discretion. Throughout the criminal process discretion is evident, from the police to the regulatory agencies to the courts. However, the essence of monarchy, the rule of law, is limitation of the discretion of officials, and providing a process by which errors or abuse of discretion can be corrected.

In analysing these 3 forms of punishment, the courts have said that:

- ***Fine =***
No real problem in implementing and sentencing because a body corporate is a business entity and is fully capable of paying monetary sanctions.
- ***Fine OR Imprisonment =***
The judges were of the opinion that since a company does not have any corpus, corporal sanctions could not possible be attached to such persona ficta. But, since the statute gave them the discretion of imposing monetary penalties, they were not completely powerless and thus could go ahead and prosecute the company, affix guilt, and impose sanction.
- ***Fine AND Mandatory Imprisonment =***
This was the crunching factor in relation to the court's view of letting off the corporations. In such a situation, the judges held that the statute does not provide them any discretion at all. The statutory guidelines for interpretation of the word "AND" result in excluding any judicial discretion.

Hence, this is where the dilemma originates from. Within the boundaries set by the legislature, the courts must exercise a judicial discretion in order to determine an appropriate sentence, based on a balancing of all the different factors present in the particular case. This discretion is coupled with a well-established system of appeal against sentences imposed in all the trial courts, as well as judicial review of sentences imposed in the lowest courts. No trial court is likely to impose a sentence in the full knowledge that that sentence is likely to be quashed on appeal, with the result that the appellate system influences the outcome.^{xxii}

This has been witnessed in a series of case laws such as:

- One of the first cases on the issue, was **Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd & Anr.**^{xxiii} the courts gave a liberal view to say that the sentence must be imposed wherever possible, if such imposition is impossible, then no punishment would be imposed – It was further held that where punishment provided is imprisonment and fine, the court cannot impose only a fine. The majority opinion in this case relied on the maxim of *Lex Non Cogit Impossibilia* to insist that the intent of the legislature must be examined. The case laid out also that it is forced to give a harmonious construction – “legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty”.
- **State of Maharashtra v. Syndicate Transport**^{xxiv} it was held that the company cannot be prosecuted for offences which necessarily entail corporal punishment no effective order by way of sentence can be made. The judges here relied on the maxim “*impotentia excusat legum*” that means powerlessness dispenses with law. They said that even after the entire tedious process of prosecution and evidence examination, if the corporation is found to be guilty, the courts are powerless to sentence them to any sanctions because, in the absence

of judicial discretion, and presence of impossibility, they would have to dispense with the law.

- **Kusum Products Limited v. S.K. Sinha, ITO, Central Circle-X, Calcutta^{xxv}** - Company being a juristic person cannot possibly be sent to prison and it is not open to court to impose a sentence of fine or allow awarding any punishment if the court finds the company guilty, and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function.

This shows that the courts were adopting a hands-off approach. However, this could not be allowed to continue because it was resulting in injustice as the corporations were being acquitted even though guilt could be proved beyond reasonable doubt.

There had been previous attempts by the legislature to remedy the situation. This can be seen from some of the recommendations of the law commission. In its 41st Report, where the Law Commission suggested amendment to the S.62 of Indian Penal Code by adding the following line:

“...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.”^{xxvi}

This recommendation got no response from the Parliament and again in its 47th Report, the Law Commission in paragraph 8(3) made the following recommendation -

In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in the case of economic laws.

It is therefore recommended that the following provision should be inserted in the Penal Code as, say, Section 62:

- In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, 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.

This led to the drafting of the IPC (Amendment) Bill, 1972. But the Bill lapsed, and it did not become law. However, few of these recommendations were accepted by the Parliament and by suitable amendment some of the provisions in the taxation statutes were amended.

This thus resulted in the Indian Law being silent on this subject, and it later led to injustice, as witnessed in the trends adopted by the courts. Parallely, this concern was also recognised by several courts and then the courts themselves went on to find a solution that could be transposed into the situation. This is seen from the cases of **M. V. Jawali v. Mahajan Borewell**^{xxvii}, and **Kalpanath Rai Case**^{xxviii} where the Judges began to read in the discretion in the statute in those cases where the question of impossibility arose. It was considered that such impossibility does away with the bar on discretion because courts are approached for a just remedy. They had recognized that the Hands off approach resulted in injustice.

A similar approach was taken by the Allahbad High Court in 1993, in case of **Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh**.^{xxix}

However, after the 2005 judgment of Apex Court, in the case of **Standard Chartered Bank and Ors v. Directorate of Enforcement and Ors**^{xxx}, the law has taken a settled position and it is basically much more logical. It was expressly stated in this case that *the company is liable to be*

*prosecuted even if the offence is punishable both with a term of imprisonment and fine. In case the company is found guilty, the sentence of imprisonment cannot be imposed on the company and then the sentence of fine is to be imposed **and the court has got the judicial discretion to do so.***

This recourse is open only in the case where the company is found guilty but if a natural person is so found guilty, both sentence of imprisonment and fine are to be imposed on such person. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

So, in this case, it is seen that the **JUDGES GRANTED DISCRETION TO THEMSELVES.** They justified it in corollary terms of the impossibility maxim to say that If a corporate body is found guilty of the offence committed, the court, though bound to impose the sentence prescribed under law, has the discretion to impose the sentence of imprisonment or fine as in the case of a company or corporate body the sentence of imprisonment cannot be imposed on it and as the law never compels to do anything which is impossible, the court has to follow the alternative and impose the sentence of fine. This discretion could be exercised only in respect of juristic persons and not in respect of natural persons. There is no blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable.

5. INTERNATIONAL TREND:

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The issue at hand is one which has been recognised by lawmakers, the world over. Most of them have not wasted anytime in incorporating provisions such as the proposed S62 amendment. This can be seen below:

a) Germany:

It has developed an elaborate structure of administrative sanctions, which includes provisions on corporate criminal liability. These so-called *Ordnungswidrigkeiten* are handed down by administrative bodies. The key provision for sanctioning the corporation is Section 30 *Ordnungswidrigkeitengesetz*, which calls for the imposition of fines on corporate entities.^{xxx1}

b) Australia:

The criminal code of Australia has also incorporated the provision which reads the same as the proposed IPC amendment. The key phrase in such a provision is the one saying, “it shall be competent for the courts to grant fine”. This shows that judicial discretion in sentencing is specifically being granted in cases where the statutes have barred it originally.^{xxxii}

c) France:

France had also not recognized corporate criminal liability since the French Revolution, the new Code Pénal of 1992 makes specific mention of this concept in section 121(2)61. The resistance to not including corporate criminal liability in the criminal code had increased over the years, and in 1982 the “*Conseil Constitutionnel*” had made it clear that the French Constitution did not prohibit the imposition of fines on a corporation

d) United States:

Way back in 1909, in **New York Central and Hudson River Rail Road Co v. United States**, Supreme Court in the US had held that a corporation is liable for crimes of intent and stated: "We see no good reason why corporations may not be held responsible for and

charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. Recognizing that the rights of corporations should be respected, as are the rights of natural persons, the Court nonetheless stated that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands. Moreover, US Sentencing Commission established several sentencing guidelines that promulgate an appropriate punitive fine range for convicted organisations.

6. CONCLUSION: NEED FOR LEGISLATION:

Hence there is need for the amendment bill to be brought back into force because the courts cannot be allowed to grant discretion to themselves. They must be given statutory mandate. The reason is given under the precedent that **Bachan Singh v. State of Punjab** xxxiii, observed - "a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single offence category ceases to be Judicial. It tends to sacrifice justice at the altar of blind uniformity." While judge-made law can be said to be valid law, the judges cannot be allowed to pronounce on a situation where the law they make in about themselves. This results in a serious conflict of interest and is hit by the Federal principle of the constitution.

There must be a system of checks and balances that the legislature must maintain on the power of the judiciary, and vice versa. Therefore, it is submitted by the researcher, that the suggestions proposed under the original text of the IPC Amendment Bill, 1972 (as opposed to the bill eventually passed in 1978) must be taken up by the parliament again, so that the legislature can once and for all validate/invalidate the discretion that the courts have granted unto themselves. Another pertinent aspect which needs to be deliberated again is the provision under the Amendment Bill which had stated that fine and imposition of pecuniary penalties should considerably be enhanced, and it should, as far as possible, be substituted for short-term imprisonment. This is especially important in the prevalent situation when the amounts of fine prescribed long ago have lost their

relevance and impact in the present day and this has gravely diluted the necessary element of deterrence which would help in prevention of such crimes.

This becomes indispensable in a country like India, where the sentencing process is hit with a huge amount of disparity and non-uniformity. In the absence of any guidelines as to how the discretion being claimed by the courts is to be exercised, it will lead to a situation of arbitrariness, and this is one more reason such discretion would become unconstitutional. Lessons must be learnt from the systematic and scientific way the US Sentencing guidelines have dealt with the subject to provide a range of fine that the courts have the power to impose, based on the nature and seriousness of the crime.

ENDNOTES

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