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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO:44

SECOND PROGRAMME, ITEM XVIII

CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

CRIMINAL LIABILITY OF CORPORATIONS

30 June 1972

The Law Commission will will be grateful for comments before 31 March 1973. All correspondenc should be addressed to:-

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WORKING PAPER NO. 44

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LAW COMMISSION INTRODUCTION

1. This Paper is the third in a series prepared by the Working Party[1] assisting the Law Commission in the examination of the general principles of the criminal law which is designed as a basis upon which to seek the views of those concerned with the criminal law. It is being issued for consultation simultaneously with Working Paper No. 43.[2]

2. As the introduction to Working Paper No. 43 explains, extended consideration of the liability of corporations outside the context of criminal liability for another's acts was thought necessary because of particular problems in the field of the criminal law to which corporations give rise. Those problems also dictated the form which the present Paper takes. Unlike the two previous Papers in this series, it contains, not a series of propositions with illustrations and commentary, but in the first place an exposition of the present state of the law and its development together with a survey of the current position abroad and, secondly, an examination of the various possible bases of corporate liability followed by a discussion of the social and policy factors which may favour the choice of one or other of these bases for the future.

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1. For membership, see p. (3).
2. "Parties, complicity and liability for the acts of another".

3. The Law Commission agrees with the views expressed by the Working Party that the subject of corporate criminal liability requires treatment separate from that accorded to the subject of complicity in general and that such treatment may best take the form of an exposition of the problems such as the present Paper adopts. The Commission therefore welcomes the Paper for purposes of consultation and, in accordance with its usual policy, is publishing it with an invitation to comment upon its general approach and conclusions. Criticisms and comment should be addressed to -

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and it would assist the Commission if they were received by 31 March 1973.

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CRIMINAL LIABILITY OF CORPORATIONS

I. Introduction

1. The liability of corporations is Subject 14 of the Law Commission's Working Paper No. 17 (The Field of Enquiry)[1]; Subject 12 is Complicity and Subject 13, Vicarious Liability. These three subjects are closely linked and, for this reason, the Working Party assisting the Commission in the examination of the General Principles of the Criminal Law decided to advise the Commission to issue Working Papers on them simultaneously.[2]

2. Until quite recently a corporation could only be criminally liable as an employer in the circumstances in which an individual employer could be vicariously liable for the offences of another person. This was the position until shortly before the last war. The law has, however, since developed and a corporation may now be itself liable for offences quite apart from any vicarious liability. These developments, to which we refer hereafter[3], were accompanied by some confusion between the two bases of liability. This confusion, as well as other problems, such as whether a corporation can commit certain offences, for example perjury and homicide, make it important that the subject of corporate liability as a whole should be clarified at a relatively early stage in the examination of general principles.

3. The first Working Paper which resulted from the work of the Working Party was No. 31, "The Mental Element in Crime", and that Paper and Working Paper No. 43, "Parties, complicity and liability for the acts of another" have taken the form of

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1. Working Paper No. 17 "Codification of the Criminal Law, General Principles", the Working Party's Preliminary Paper, "The Field of Enquiry".
2. Vicarious liability is treated in Working Paper No. 43 "Parties, complicity and liability for the acts of another".
3. See para. 12 below.

a series of propositions embodying in short form the proposals for revision and restatement of the law, in each case followed by examples illustrating the operation in practice of the principles contained in the propositions, and a commentary. It was thought, however, that the subject of corporate liability was not susceptible of the same treatment. A restatement of the law could be founded upon any one of a number of possible theoretical bases, each of which has its justifications. It was, therefore, considered important that all these bases should be explored and the arguments for and against each of them fully set out. Consequently, the greater part of this Paper is devoted to a treatment of these matters. The main points arising in these parts are summarised at the end of the Paper in an endeavour to clarify the issues for the purpose of eliciting comments from the Paper's recipients. The opening parts of the Paper in the first place state the law as it is at present and briefly trace how that position has been reached; and, secondly, indicate how corporate liability is treated under other systems of law.

II. The present position

4. It is important to emphasise at the outset the distinction between the liability of the corporation as a person and its liability as an employer for its servants and agents, that is, its vicarious liability. Largely as a result of the courts' interpretation of statute law, the latter now arises in two situations. In the first place, where an individual delegates to another the performance of duties cast on him by statute, the individual may be held liable for the acts of that other. Secondly, an employer may be liable for acts done physically by his employee because those acts are held, in law, to be his, the employer's, acts. A corporation may be vicariously liable in both these situations in the same way as a natural person[4].

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4. See further Working Paper No. 43, proposition 4, and paras. 28-31 below.

But the personal criminal liability of corporations is far wider than the narrow limits governing vicarious liability, and it is now accepted that a corporation may be liable for a wide variety of offences, notwithstanding the presence of a mental element in most serious offences and the fictional nature of a corporation as a personality. That personal liability can be attached to it only by attributing to it certain of the activities of individuals identified with the corporation. The nature of the personality so attributed and the clear distinction which then emerges between corporate liability and the corporation's liability as an employer is exhibited in the following passage from Lord Reid's speech in Tesco Supermarkets Ltd. v. Nattrass[5] -

> "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company, or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that [i.e. the latter] case any liability of the company can only be a statutory or vicarious liability."

5. Identification of the individuals whose acts and state of mind are to be considered the corporation's own is a problem to which recent cases have afforded some guidance, but, although the general class of individuals is now reasonably clear, it cannot be said that the exact boundaries of that class have been

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5. [1971] 2 W.L.R. 1166, 1176. See also R. v. Andrews-Weatherfoil Ltd. [1972] 1 W.L.R. 118.

delimited to render the matter free from doubt in particular cases. The most widely quoted and approved[6] dictum on the subject seems to be that of Denning L.J. in the context of a landlord and tenant case -

> "A company may in many ways be likened 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 control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."[7]

On another view, however, identification must be pursued strictly by "identifying those natural persons who by the Memorandum and Articles of Association or as a result of action taken by the directors, or by the company in general meeting pursuant to the Articles, are entrusted with the exercise of the powers of the company".[8] Whether or not these tests in fact represent a difference of approach in substance, the same result is likely to be achieved whichever is employed, provided that those identified "constitute the directing mind and will" of the company.[9] The corporation may, on these criteria, be identified with a manager to whom the directors have entrusted full power in the running of its affairs,[10] but

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6. In e.g. John Henshall (Quarries) Ltd. v. Harvey [1965] 2 Q.B. 233; Tesco's case [1971] 2 W.L.R. 1166, 1177, per Lord Reid, and 1192 per Lord Dilhorne.

7. H.L. Bolton (Engineering) Co. Ltd. v. P.J. Graham & Sons Ltd. [1957] 1 Q.B. 159, 172; and see Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480.

8. Tesco's case, [1971] 2 W.L.R. 1166, 1204, per Lord Diplock.

9. Tesco's case, ibid, 1192, per Lord Dilhorne.

10. Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705.

not with a branch manager of a company with a large number of branches who is required to obey the general directions of the board of directors,[11] nor with a depot engineer.[12] But the tests so far adopted by the courts do not provide a ready-made solution to all cases. It cannot be maintained with certainty that a manager with full powers over a limited aspect of a corporation's activities or the head of a major branch of a corporation would be treated by the courts in the same way as the manager in Tesco's case. The results of such cases would probably depend upon the degree of devolution and the extent of the powers delegated in the particular case. Whether it is possible or desirable to formulate a more exact means of identification is examined below.[13]

6. So long as an individual in committing an offence is acting "as the company"[14] there should, in theory, be no limit upon the type of crime, whether statutory or common law, which a corporation can commit. There are, however, certain practical limitations, and some judicial dicta suggest that there are, in addition, particular offences for which a corporation cannot be convicted.

7. In the first place, it is accepted that a corporation cannot be convicted of those offences, such as murder,[15] in which the penalty, in this case imprisonment, can be inflicted only upon an individual in his personal capacity. Moreover, since it requires the agreement of two separate and real (and not merely fictional) minds, a company cannot commit a conspiracy where the one alleged conspirator is a company of the

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11. Tesco's case, [1971] 2 W.L.R. 1166.
12. Magna Plant Ltd. v. Mitchell [1966] Crim. L.R. 394.
13. See para. 39 below.
14. See para. 5 above, and Lord Reid in Tesco's case, [1971] 2 W.L.R. 1166, 1177.
15. R. v. I.C.R. Haulage Ltd. [1944] K.B. 551, 554.

"one-man" type and the other is that same man in his individual capacity.[16]

8. In recent years bigamy and perjury have been mentioned as offences in the commission of which corporations cannot act as principals. The former is said to be an offence which only a natural person can commit.[17] The position with regard to the latter is more disputable, but the prevailing view at present seems to be that a corporation cannot be called upon to give evidence and cannot, therefore, commit perjury.[18] Apart from these offences there now appear to be no specific limitations upon the offences which a corporation may commit. It was, for example, formerly believed that a company could not be indicted for manslaughter,[19] but that view probably does not now represent the law.[20]

9. Finally, it must be mentioned that the person identified with the corporation renders the corporation liable only so long as he acts or purports to act in its name. This does not, however, mean that activities contrary to the corporation's interests will exclude its liability. A company may be convicted, according to the law as it stands, even though it is itself defrauded, provided that the offence is committed by the officers of the company acting as such within the scope of their authority.[21]

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16. R. v. McDonnell [1966] 1 Q.B. 233.

17. R. v. I.C.R. Haulage Ltd. [1944] K.B. 551, 554.

18. See R. v. I.C.R.Haulage Ltd. ibid, 554, Penn-Texas Corpn. v. Murat-Anstalt [1964] 1 Q.B. 40, and idem (No. 2) [1964] 2 Q.B. 647. See further para. 38 below.

19. R. v. Cory Bros. & Co. Ltd. [1927] 1 K.B. 810.

20. See R. v. I.C.R. Haulage Co. Ltd. [1944] K.B. 551, 556, and R. v. Northern Star Mining Construction Co. Ltd., Glamorgan Assizes 1 Jan. 1965 in which a corporation was tried for manslaughter but acquitted on the merits.

21. Moore v. I. Bresler Ltd. [1944] 2 All E.R. 515.

III. Development of corporate liability

10. Detailed studies of the history of corporate liability are available elsewhere.[22] In the present context it is necessary to trace this subject only because the position which obtains today as a result of relatively recent developments in the law appears in retrospect to have been unplanned and an examination of the law at an earlier stage in its development may suggest a basis upon which it may be rationalised for the future.

11. Prior to the Interpretation Act 1889, corporate liability seems to have been accepted in the case only of three offences or types of offences, namely, public nuisance,[23] criminal libel[24] and statutory offences of non-feasance[25] or misfeasance.[26] Section 2(1) of the 1889 Act provided that references to a "person" in all statutory criminal offences should "unless the contrary intention appears, include a body corporate". As the provisions of this section only repeated what had previously been enacted in the Criminal Law Act 1827 section 14 it is clear that they were not intended to alter the existing position. There is, however, some evidence to suggest that the appearance of the provision in an interpretation statute made it more readily accessible and that courts were, in consequence, more apt to cite its provisions in support of their conclusions.[27] The period following its enactment saw a rapid growth in the

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22. See e.g. Leigh, The Criminal Liability of Corporations in English Law, Ch. 2-4; Welsh, "The Criminal Liability of Corporations" (1946) 62 L.Q.R. 345.

23. See dictum of Lord Blackburn in Pharmaceutical Society v. London and Provincial Supply Association Ltd. (1880) 5 App. Cas. 857, 870.

24. See Lord Blackburn's dictum, ibid.

25. R. v. Birmingham and Gloucester Ry. (1842) 3 Q.B. 223.

26. R. v. Great North of England Ry. (1846) 9 Q.B. 315.

27. See e.g. Darling J. in Pearks, Gunston and Tee Ltd. v. Ward [1902] 2 K.B. 1, 9.

number of convictions of companies for breach of statutory offences of a public welfare character upon the principle of vicarious liability both in respect of offences without a mental element[28] and in respect of offences where the responsible servant possessed that element.[29] This basis of liability was most clearly defined in Mousell Bros. Ltd v. London and North-Western Ry. Co.,[30] which, while it called in aid section 2 (1) of the 1889 Act[31] to establish the liability of the company for a statutory offence of fraudulently avoiding the payment of freight charges, is most notable for Atkin J.'s test for establishing the existence of vicarious liability under statute: "Regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom in ordinary circumstances it would be performed, and the person upon whom the penalty is imposed".[32] By means of this test the courts can conclude as a matter of interpretation that Parliament has imposed absolute liability on a principal for the act of a servant, rendering a principal liable even though unaware of his servant's act or his guilty mind.

12. The position at least until shortly before the last war was, therefore, that personal liability of the corporation as such did not exist. That liability was, as has been indicated, rejected in the case of a charge of manslaughter,[33] although the decision was not based upon the distinction between offences in respect of which vicarious liability is or is not attracted.

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28. E.g. Pearks, Gunston and Tea Ltd v. Ward, ibid.
29. Chuter v. Freeth and Pocock Ltd. [1911] 2 K.B. 832.
30. [1917] 2 K.B. 836.
31. See Lord Reading C.J. at 842 et seq.
32. Ibid, 845.
33. R. v. Cory Bros. & Co. Ltd. [1927] 1 K.B. 810.

This distinction was also, it seems, blurred and misunderstood in D.P.P. v. Kent and Sussex Contractors Ltd,[34] the first of the trio of cases in 1944 which went far to establish the present law. There a company was held liable for making use with intent to deceive of a document signed by its transport manager which he knew to contain false information, contrary to statutory regulations. Mousell's case[35] was treated as applicable to the decision, yet the court was clearly of opinion that a state of mind could be attributed to the company.[36] The decision was treated as authority for that proposition in the next case, R. v. I.C.R. Haulage Co. Ltd[37] although here Mousell's case was correctly distinguished as concerning vicarious liability. The company here was held correctly convicted of common law conspiracy to defraud and the judgment of the Court of Criminal Appeal established decisively that, in certain circumstances, the state of mind and acts of an agent may be the state of mind and acts of the company. It is worth noting, however, that Lord Reid in Tesco's case[38] has criticised the criterion there put forward for such imputation. According to the Court of Appeal[39] this "must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case". The nature of the charge is, according to Lord Reid, irrelevant, for "if the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act

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34. [1944] K.B. 146. A few cases prior to this had accepted the personal liability of corporations without discussion: see Triplex Safety Glass Co. Ltd. v. Lancegay Safety Glass (1934) Ltd. [1939] 2 K.B. 395 and Stevens and Steeds Ltd. v. King [1943] 1 All E.R. 314.

35. [1917] 2 K.B. 836.

36. See [1944] K.B. 146, 158-9.

37. [1944] K.B. 551.

38. [1971] 2 W.L.R. 1166, 1179.

39. [1944] K.B. 551, 559.

of the company". The third of the trio of cases decided in 1944 has already been referred to.[40]

13. There is evidence that the legislature has now accepted this new development in the law. The standard form of director's liability provision included in some legislation, which renders a director personally liable for an offence committed by the corporation in cases where he consents to or connives in the offence, specifically applies, for example, in the Theft Act 1968,[41] to offences requiring a full mental element. But cases subsequent to the 1944 decisions have made little attempt to define the nature and purpose of the liability which they established. Rather, as has been shown in Part II, they have attempted in some degree to clarify the problem of identification. Thus, the necessity for the broad basis of liability which now exists has never been questioned by the courts, nor, apart from specifying a few offences to which reference has already been made,[42] has any limitation upon liability been attempted. Before discussing possible bases of liability it may, therefore, be of assistance to examine briefly how the subject has been treated under other systems of law.

IV. Corporate liability in other legal systems

1. Common law systems

Other Commonwealth Countries

14. Common law systems all, it seems, admit the personal liability of corporations, although the manner of doing so varies. Some, such as New Zealand,[43] follow very closely recent

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40. Moore v. I. Bresler Ltd. [1944] 2 All E.R. 515; see para. 9 above.

41. See s. 18.

42. See para. 8 above.

43. Adams (ed.) Criminal Law and Practice in New Zealand (1964) p. 13 and supp.

developments in English law. Others have adopted different methods. In Australia,[44] it seems that the actions of an employee are attributed to the corporation if they may reasonably be regarded as within the scope of his employment, and this applies whether the employee occupies a senior or junior position provided he has any requisite mental element. On this basis corporations have been tried, for example, for offences of corruption, fraud, knowingly and unlawfully possessing and making false statements. In India it appears that corporate bodies are now indictable, in general, for the criminal acts or omission of their directors, authorised servants or agents, whether they involve mens rea or not, provided they have acted or purported to act under the authority of the corporate body or in pursuance of its aims or objects.[45]

U.S.A.

15. In the Federal Courts no distinction seems to have been drawn between vicarious liability and personal liability. The object of these courts has been to ensure compliance with regulatory legislation (such as anti-trust laws) much of which affects the operation of large loosely-organized corporations engaged in inter-state commerce. Liability has been imposed in respect of the conduct of those below directorial level, such as area and branch managers, regardless of whether the offence reflects the corporate policy approved by the directors, and sometimes regardless of whether the directors themselves could be found liable for complicity. The general rule applied is that liability will be imposed whenever an officer or agent, in doing the acts complained of, was engaged in exercising corporate powers and acting within the course and scope of his employment, provided that he intended thereby to benefit the corporation.[46] The formulation adopted by the Model Penal Code

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44. See Howard Australian Criminal Law, 2nd ed., 1970. p.382

45. Ranchhoddas and Thakore The Law of Crimes, 21st ed., 1966, p. 7.

46. Leigh The Criminal Liability of Corporations in English Law, pp. 114 et seq.

is set out in the Appendix to this Paper. This formulation, wide though it is, has been described as restrictive in terms of existing American law.[47]

Scotland

16. The Scottish common law system is, of course, very different from the English and subjection of corporations to liability under the criminal law has not proceeded as far as it has in England. Corporations may be liable for public welfare offences but a leading writer[48] has commented that "there is little or no authority in Scotland on the responsibility of corporations for criminal offences involving mens rea and no reported example of a prosecution of a corporation for a common law crime". The same writer maintains that since a company can be guilty in Scottish law of an offence of permitting a statutory contravention by reason of wilful blindness "it is difficult to see any ground for holding that a company cannot be guilty of a statutory offence requiring actual knowledge or intention, and if a company can commit a statutory offence requiring mens rea it should be capable of committing a common law offence ...". The commentary examines the present position in England and the author makes it clear that he considers that the Scottish courts should, in the main, follow the English decisions as to mens rea liability if the question should ever be in issue.

2. Civil law systems

France

17. The leading commentary upon the criminal law of France[49] affirms that French law has up to now refused to admit the criminal responsibility of "personnes morales". There

47. Leigh op. cit. p. 123.

48. Gordon The Criminal Law of Scotland,(1967) p. 283.

49. Traité de Droit Pénal et de Criminologie (Dalloz): see Vol. 1, p. 226.

are, however, two qualifications to be made to this principle, discussed in the following paragraphs.

18. In the first place, the commentary makes clear that the subject of corporate liability has been a matter for discussion amongst French writers, in which the arguments rehearsed both for and against it have been in many respects similar to those canvassed in common law countries. Thus, the existence and capacity of "personnes morales" extends no further than is necessary for the accomplishment of their purpose. They have no mind of their own and, as there can be no fault without a mind, they cannot incur criminal responsibility. Nor are the punishments of the Code, such as decapitation or imprisonment, applicable to them. As against this, it has been more frequently and insistently maintained in recent years that there does exist a corporate will separate from that of the members of the body, that many punishments in recent legislation may be applicable to corporate bodies, as may the publicity attending conviction, and that there are today practical reasons for rendering "personnes morales" criminally liable when so many misdeeds are the work of "sociétés" and "syndicats".

19. Practical necessities have also led to a growing number of exceptions established either by case law or by legislation to the principle of non-responsibility. Thus, among the first type of exception, in a few cases certain fiscal penalties which are part penal and part civil reparation in character have been imposed; certain punishments, such as closure of the business establishment, have been applied to "personnes morales" as well as individuals; and the Cour de cassation now frequently finds occasion to penalise both "personnes morales" and individuals where the law in question imposes obligations on employers or landlords. Amongst legislative exceptions imposing liability on "personnes morales" are certain fiscal measures which provide for imposition of penalties part penal and part civil in character, and certain immediate post-war measures relating to exchange control offences, breaches of economic legislation

and war-time collaboration with the enemy on the part of the press.

Germany

20. The discussion of corporate liability in a leading commentary on German penal law[50] shows that the German position does not differ greatly from that of the French. In dealing with specific crimes, the commentary states that, as a general principle, only natural persons have the capacity to act and consequently only they can be liable for criminal acts. There are, however, several exceptions to this, in particular in the field of tax laws; certain associations committing a tax offence within the field of the criminal law can be fined and costs recovered from them even though the fault required of a natural person is not established. Fines can also be levied against a legal person in the case of breach of certain price regulations. The commentary's discussion of principle makes it clear that an ability to impose wider penalties on legal bodies has been under continuous and increasing discussion over a long period, and considerable attention has been given to the position in Anglo-American law.

Italy

21. In Italy, the constitutional principle is that criminal guilt is strictly personal and permits no imputation of responsibility based on a person's position within a corporate enterprise independent of his involvement in an illegal act. Thus, if a company is involved in criminal activities, those subject to prosecution are individuals who personally act in violation of the law. The leading commentary[51] again, however, indicates that the question whether the penal law applies to "persone giuridiche" and in particular "persone morali" is a matter of debate, the general conclusion being that they are

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50. Schönke-Schröder, Strafgesetzbuch, Kommentar, 14th ed., 1969, p. 329.

51. Manzini Trattato di diritto penale italiano (1961) Vol. 1, pp. 535-547.

not so subject. Apparent exceptions to the general principle do not in fact have the character of penal sanctions but rather of administrative penalties.

Scandinavia

22. In Norwegian law, criminal liability can in most cases be imposed only on one who is personally guilty and not upon the corporate body. Even in cases of breach of duties imposed on the corporation, criminal liability lies with the individuals responsible for the commission. Measures without penal character may, however, be used, in particular forfeiture of the profits obtained as a result of the offence. The position in Denmark is very similar. In both countries, however, considerable discussion has taken place in recent years as to the desirability and justification of imposing fines on corporations on the lines of Anglo-American law,[52] and some legislation now makes provision for this. Thus, in Norwegian law, under certain economic regulatory statutes, the corporation itself may be fined in the event of a violation, if committed to further its interests or if it must be presumed to have benefited from it. It must be shown that the requirements for punishment of an individual person do exist and "the law has not gone so far as to burden the organisation with criminal liability on the basis of a purely objective breach, where the actor was irresponsible or did not have the subjective guilt or mens rea. But the organisation may be punished even if the actor himself is not prosecuted"[53]

V. Possible alternatives to the present law

23. Our survey of foreign law suggests that it would be feasible to adopt a basis of liability different from the present one; for example, the complete exclusion of liability which appears to be the position in Italy; limitation of liability

52. Danish and Norwegian Law - a general survey, (1963) p. 212. edited by the Danish Committee on Comparative Law.

53. Andenaes, The General Part of the Criminal Law of Norway. p. 246.

to exceptional and specified offences as in other civil law systems; or the limitation by reference to the presence of a particular fault element, which appears at present to obtain in Scotland. Our examination of the development of English law further suggests that a liability parallel to the vicarious liability of natural persons is another possible solution. We, therefore, proceed to examine in more detail the feasibility of some alternatives and, in Part VI, set out the factors which may suggest the choice of one or other of them.

(a) Absence of liability

24. The complete absence of any criminal corporate liability was the law of England until early in the nineteenth century and is still the law in some civil law systems. Moreover, large scale organisations exist, in the form of partnerships, which have no criminal liability and it might, therefore, be thought anomalous that such liability should be extended to corporations. But absence of liability would mean that no offence, whether requiring a mental element or not, could be the subject of a prosecution unless the person actually responsible for its commission (or those in complicity with him within the company) was charged. We do not think that this solution is acceptable. As it would exclude even vicarious liability, the only person who could be made liable for many offences would be of very low rank in the organisation. No one of senior rank could be made liable unless he had aided or abetted its commission. Indeed, in many cases of breach of regulatory offences of strict liability it might not be possible to prosecute any one. For example, section 1(1) of the Clean Air Act 1956 provides that, subject to certain defences, "dark smoke shall not be emitted from a chimney of any building and if ... dark smoke is so emitted, the occupier of the building shall be guilty". Here, liability is placed on the occupier, merely by virtue of something occurring. In many instances, for example in the case of a company's factory, no single

natural person can be identified as the occupier, nor would it be just or practicable to prosecute all persons within the building as the occupier. Thus, to avoid stultifying the operation of the provision, prosecution of corporations in appropriate cases is a practical necessity.

(b) Liability confined to offences of strict liability

25. This basis would confine corporate liability to offences which have no mental element and no defences involving the lack of a fault element - that is, defences of due diligence or 'no negligence'. This would make corporations liable for a number of offences of a regulatory character for which on grounds of policy it may be thought desirable they should be liable. It also has what seems initially to be a further advantage in eliminating the problem of identifying the "thinking" members of a corporation whose acts render a company liable in the case of offences having a mental element or due diligence defence. In all such cases those who committed the offence or who aided and abetted its commission would be personally liable.

26. Despite the apparent advantage offered by elimination of identification there are disadvantages to this alternative which we, provisionally, think rule it out. If it is accepted that a need exists for corporate liability in the sphere of regulatory legislation, that need exists whether the offences in question require a mental element or not. Indeed, few regulatory offences are now created which provide no form of due diligence defence and, for such offences, we think it clear that, if it can be criminally liable at all, a corporation should be liable. But all such defences require the identification of individuals whose acts and minds are to be considered as the acts and mind of the corporation,[54] so that

54. See comments of Lord Reid on R.C. Hammett Ltd. v. Crabb (1931) 75 J.P. 180 and R.C. Hammett Ltd. v. L.C.C. (1933) 97 J.P. 105; Tesco Supermarkets Ltd. v. Nattrass [1971] 2 W.L.R. 1166, 1178; see also Lord Morris at 1187, Lord Dilhorne at 1190, Lord Pearson at 1198 and Lord Diplock at 1206-7.

the advantage of eleminating the problem of identifying the "thinking" members vanishes. Further, on a practical level, corporations have been held vicariously liable now for a period of sixty years for regulatory offences requiring a mental element and the number of such offences which have a mental element has increased during that period.

27. A further consideration to be taken into account is the effect which a limitation to offences of strict liability might have upon the attitude adopted by government departments to future legislation. Were corporate liability to be restricted to offences of strict liability there would be a real danger that in some instances departments would be tempted to include in future bills offences of strict liability in order to permit company prosecutions where normally such offences might be expected to have a mental element. Any such practice would run contrary to the general policy regarding criminal offences put forward in our Working Paper, "The Mental Element in Crime"[55]. Since the decision of the House of Lords in Sweet v. Parsley[56] it is, perhaps, permissible to assume that Parliament will not in general create serious offences which require no mental element, but even were this to be a presumption of law, it is one which could be expressly negatived where other policy factors required it.

(c) Liability arising out of vicarious liability

28. It is a feasible solution to make the liability of a corporation co-extensive with that of natural persons for the acts of others. We have described the situations in which such liability is at present imposed in Working Paper No. 43[57] and refer to them briefly in paragraph 4 of this Paper, where we indicate that, in addition to instances of delegation (in

55. Working Paper No. 31.

56. [1970] A.C. 132: see especially Lord Reid at 148-150.

57. See proposition 4 and commentary thereon.

particular, under the provisions of the Licensing Act 1964) the courts have interpreted words used in certain offences,[58] in the light of the relationship between employer and employee, as applying to the employer when the employee is the person who physically performs the act. In this respect, a company's liability is the same in extent as that of a natural person[59]. A company can otherwise be made liable only through identification with the acts and state of mind of particular individuals within it. The two aspects of company liability, vicarious and personal, have, as already indicated,[60] sometimes been confused.

29. Working Paper No. 43 proposes that, for the future, liability for acts of another shall be confined to instances where a person is expressly made so liable or, as at present, where the legislation describes the act in terms which in the context apply to that person, although the physical act may be performed by another.[61] In accordance with the proposals in the Working Paper upon "The Mental Element in Crime", under the latter class of cases a person made liable for another's acts will normally only be so liable if he himself had the fault element required by the offence. In practice, these proposals, if implemented, will have the effect of excluding an employer's vicarious liability where a fault element is required, unless the employer possesses that fault element. In such cases, a corporation as employer would be held responsible only if an individual whose mind is identified as the mind of the corporation possessed that fault element.

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58. E.g. "sell": Coppen v. Moore (No. 2) [1898] 2 Q.B. 306; "keep": Strutt v. Clift [1911] 1 K.B. 1; "use": Green v. Burnett [1955] 1 Q.B. 78; and "possess": Melias Ltd v. Preston [1957] 2 Q.B. 380.

59. James and Son Ltd. v. Smee [1955] 1 K.B. 78, 92 per Parker J.

60. See para. 12 above.

61. See note 58 above.

30. It is clear that limitation of corporate liability to the liability of natural persons for the acts of others would leave corporations liable for a wide range of regulatory offences. In effect it would exclude the extended ambit of liability which has become accepted since the developments to which the 1944 cases gave rise, and, since liability for most offences with a mental element would no longer exist, this would eliminate the doubt as to whether corporations can be criminally liable for such offences as perjury. Although the test of identification would be necessary in some cases, this difficulty presents itself in any event if any more extended basis than that of liability for strict liability offences is chosen.

31. This restriction on the criminal liability of corporations would, however, exclude liability for a number of offences in the regulatory area for which companies would undoubtedly be held criminally liable at present. One example already quoted[62] is section 1(1) of the Clean Air Act 1956. Liability under this provision could hardly be justified in terms of the proposed test for the imposition of liability for another's acts[63] and in cases of doubt such as this specific provision for corporate liability would seem to be necessary if the vicarious test is to be adopted.

(d) Liability for strict liability offences with or without a defence of 'no negligence'

32. A further method of restricting liability would be to make corporations liable only for offences of strict liability and for those providing a defence of due diligence or 'no negligence'. Such defences are now very common in a wide range of regulatory legislation[64] and mitigate the rigour of offences

62. See para. 25.

63. See para. 29.

64. See e.g. Trade Descriptions Act 1968, s. 24(1)(b); Food and Drugs Act 1955, s. 113; Weights and Measures Act 1963, s. 26 (1)(b).

which are otherwise of strict liability. Liability on this basis would be to some extent co-extensive with the present area of vicarious liability, although it would exclude liability for regulatory offences having an affirmative mental element necessarily involving a thinking part of the company in cases where vicarious liability exists at present. But it would not eliminate the necessity of identifying the company with an officer or employee because, where a defence of 'no negligence' is provided, although it would be possible to place the onus upon the company of showing that it was not negligent by indicating who it was who in fact failed to exercise proper care, it would still be necessary to go further and show that the acts and mind of that person were not identifiable as those of the company.

(e) Limitation of liability by reference to penalty

33. Unlike most criminal codes, English law has no satisfactory classification of offences. We have the procedural classification into indictable and summary and the division between arrestable and other offences but we have no classification which points what some think to be a real distinction between "real" crimes and mere "violations", "contraventions", or "infringements". Other codes make such a distinction usually by reference to the maximum punishment which an offence can attract. A very large number of regulatory and public welfare offences are subject to relatively minor penalties and would, in other codes, not be called "crimes". This fact suggests that limitation of liability by reference to a particular maximum penalty might provide a satisfactory way of clearly separating those offences for which only an individual should be prosecuted. Limitation of corporate liability to offences punishable in an individual by not more than three months' imprisonment and a fine would exclude liability for most offences where the necessity for corporate liability is arguable, whereas a wide range of offences in the regulatory field would be included.

34. There are, however, some offences in the regulatory field, such as the offences under the Trade Descriptions Act 1968, for which a company can now be prosecuted and where for policy reasons this position should probably be retained. An adoption of this basis of liability would require a careful examination of the whole field of regulatory legislation to ensure that proper exceptions were made to the general rule in such cases. If, however, it is assumed that the presence of a director's liability provision in an Act is adequate indication that corporate liability is intended in respect of the offences in that Act, it may be that there will not be an unacceptably large number of cases requiring special consideration. But there remains an additional disadvantage in limiting liability by reference to penalty in that it would make it possible to render a corporation guilty of offences having a mental element which are in no sense regulatory, such as section 23 of the Theft Act 1968[65] which relates to advertising rewards with "no questions asked" for return of stolen goods. This basis of liability is not, therefore, an efficient way of limiting corporate liability to regulatory offences.

(f) The status quo

35. We have already, in Part II, summarised the law as it is. Acceptance of the present law as the basis of liability would, nevertheless, entail examination of two aspects of it with a view to clarification: they are -

(i) possible exceptions to the general liability of corporations; and

(ii) the process of identification.

With these and other matters requiring consideration in this context we now deal.

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65. But is seems that such offences are very few in number. Other examples may be found in the Vagrancy Act 1838 s. 2 and the Indecent Advertisements Act 1889 s. 4.

(i) Possible exceptions to criminal liability

36. Part II of this paper noted that there has not, as yet, been any authoritative statement of the precise limits which the law today places upon corporate criminal liability. In any system which imposes general criminal liability upon a corporation it may be thought logically difficult to justify any exception, even the exclusion of liability for offences punishable only by imprisonment; for if, as Lord Reid states,[66] the person identified with the company is an embodiment of it, and his guilty mind is the guilty mind of the company, it ought to follow that imprisonment of that individual is imprisonment of the company with which he is identified. But, however logical, this seems to be absurd and cannot be regarded as an acceptable result in practice. Probably the most satisfactory way of dealing with the problem is to regard the process of identification as referable only to the activities and guilty mind of the relevant individual and not to the possible punishment for those activities. Imprisonment and capital punishment are punishments referable only to natural persons and, as a corporation cannot be subject to them, it cannot be held liable for offences only so punishable.

37. It may also be asserted with some confidence that there are certain offences which, by their very nature, a company will never commit as principal, such as bigamy, rape or self-administration of a noxious drug to procure an abortion. Here the individaul who participates in the offence as principal, however closely he may be identified with the company, always acts in a personal capacity. He is never, in Lord Reid's words, "acting as the company" nor "an embodiment of the company". Yet clearly circumstances may exist which would make it appropriate for a corporation to be charged with being an accessory to these offences, for example if an incorporated marriage bureau were to procure a bigamous marriage, or a director of an incorporated nursing home were to procure an illegal abortion; and

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66. See para. 4 above.

there is nothing in their nature to prevent a charge as accessory in these offences being brought against a company.[67] Furthermore, there are many offences, such as theft or burglary, where the liability of a corporation as a principal is likely to remain theoretical because the prosecution will invariably prefer to charge the individual involved as principal and the company with which he is identified as an accessory. We would not, however, consider it necessary for this reason to place any restrictions upon the general liability of corporations other than those already indicated.

38. Perjury in judicial proceedings is more complex. Whilst there seems to be little doubt that a company is capable of aiding, abetting, procuring or suborning perjury or of the other offences akin to perjury in the Perjury Act 1911, different considerations are sometimes thought to apply to perjury itself. On the one hand it is argued that,[68] although a corporation cannot be called to give evidence generally, it can be called upon to produce documents and can be described as a witness who can be required (through the proper officer) to give evidence as to their possession or custody. On the other hand it is argued[69] that a corporation can be called upon to produce documents as a party but not as a witness; that, while an officer of the company may be identified with it, as a witness he is sworn as an individual; he speaks of his own knowledge and cannot speak of facts known to other officers of the company but not himself; and, however important his position is within the company, he cannot bind it since his evidence can always be put in issue by calling other witness. These considerations are, doubtless, finely balanced. Our preliminary view is that, however closely the acts and mind of an individual are identified as those of the company concerned, when sworn he is sworn

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67. See further Winn (1929) 3 C.L.J. at p. 415.

68. See Denning M.R. in Penn-Texas Corpn. v. Murat-Anstalt (No. 2) [1964] 2 Q.B. 647, 662 et seq.

69. See Willmer L.J. in Penn-Texas Corpn. v. Murat-Anstalt [1964] 1 Q.B. 40, 53 et. seq.

as an individual; and, whatever measure of authority he may have been given by the company as to the testimony he gives, that testimony is, similarly, delivered by him as an individual. Hence it follows that only he can commit perjury as principal. This causes no injustice for, if it is proved that the company is accessory to the perjury, it may be convicted accordingly and the penalties imposed may reflect the relative seriousness of the offences committed by each party.

(ii) The test of identification

39. The test of identification described in Part II of this Paper showed that, while it is satisfactory for many purposes, there are cases in which the results of its application would be uncertain. It is, perhaps, not possible to provide a formula satisfactory for every case, since each must depend to some extent upon its own facts. There are, however, factors which it is believed would provide a greater measure of certainty -

a. Tesco's case indicated[70] that, although the board, managing directors and perhaps some other superior officers act as the company, the board may delegate some part of their functions of management giving their delegate full discretion to act independently of instructions. In order to identify him with the company it is our provisional view that the functions of management delegated should be substantial. What will be substantial will depend upon the significance of what is delegated in relation to the corporation's activities as a whole. It may include, for example, even control of a branch of a chain of shops if, unlike the manager in

70. See e.g. Lord Reid at [1971] 2 W.L.R. 1166, 1177.

Tesco's case, sufficient powers of control have been delegated to the branch manager.[71]

b. A delegate can, of course, act for the company only within the scope of his delegation; and the delegation of functions referred to in sub-paragraph a. must, therefore, in our view be not only substantial but also of a relevant part of the corporation's activities. This qualification makes it clear that the corporation cannot have attributed to it the fault of an officer whose delegated powers of control are unconnected with the activity for which it is sought to hold the corporation responsible. We would not, of course, wish to change what we believe to be the present position whereby the person identified with the corporation renders it liable only so long as he acts or purports to act in its name. The entirely personal activities of its officers can never be attributed to the corporation.

c. The identification of the company with an individual can only be made if the activity to be penalised is done within the scope of the authority conferred upon the individual concerned. It may be argued that, in the normal course of affairs, no authority is conferred to commit criminal acts, but that it is sufficient if the individual is acting in pursuance of the authority actually or ostensibly conferred. Our provisional view, however, is that when the person by his action intends to harm the company he cannot be identified with it. The principle

71. But, for the view that Tesco's case may go far to nullify the protection given to the consumer by the Trade Descriptions Act, see (1971) 34 M.L.R. 676.

established by Moore v. Bresler[72] is clearly inequitable since it penalises a corporation and its shareholders for something done in fraud of the corporation and to the detriment of the shareholders.

d. There have been no reported criminal cases in which consideration has been given to the possibility of piecing together several minds among the controlling officers of a company to render the company liable. For example, would a company be liable if one director makes a statement for the purpose of obtaining property not knowing the statement to be false, while another knows the true facts but does not know the statement is being made? This is thought to be undesirable and contrary to the principles adopted in regard to the mental element.[73] Our provisional view is that a corporation should not be taken as having any required mental element unless at least one of its controlling officers has the whole mental element required for the offence.

40. Finally, in the context of identification, it is relevant to mention the position of controlling officers who, while acting as such with the consent of those concerned within the company, have some defect in the manner of their appointment. We believe that, in seeking to identify the mind and activities of these individuals with the company, it should be regarded as irrelevant that they may not have been validly appointed.[74]

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72. [1944] 2 All E.R. 515: see para. 9 above.

73. In Working Paper No. 31, "The Mental Element in Crime". It has also been rejected in relation to civil liability: see Armstrong v. Strain [1952] 1 K.B. 232.

74. Compare the position in regard to civil actions: see Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 48.

We are, of course, aware that director's liability provisions in recent statutes refer to "any person purporting to act" as a director, manager, secretary or other similar officer[75], but these provisions are concerned, not with identification, but with rendering liable directors etc. where a liability has already been shown to rest on the company. As Part II of this Paper indicates, the criterion for identification depends more upon the fact of control than the formal status occupied by the person in question. Moreover, on a literal construction, anyone, even a minor employee, may "purport" to act as a controlling officer without necessarily having any authority to do so. We do not, therefore, consider the language of the director's liability provisions to be appropriate to describe the position where a defect exists in the manner of appointment of those whom it is sought to identify with the company.

Summary of suggested alternatives

41. We are anxious in no way to confine the comments of recipients of this Paper but it is our provisional view that the foregoing examination of the possible bases of liability suggests that the only ones which are both feasible and perhaps acceptable are -

(i) the status quo with some clarification;

(ii) vicarious liability only; or

(iii) limitation by reference to penalty.

In the next part of the Paper we examine the social and policy considerations which may indicate whether a general or limited basis of liability is the more desirable.

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75. Overruling Dean v. Hiesler [1942] 2 All E.R. 340.

VI. Factors in the choice of a wide or limited basis of liability

Factors favouring a limited liability

42. (i) The main argument against a system which imposes corporate liability for serious offences is that, as a matter of principle, where such an offence has been committed only he who committed it should be liable, not only because punishment of such offenders provides the best deterrent to others similarly placed but also because conviction of the company results only in loss to its shareholders (or in some instances to its creditors) who may be innocent. This loss may not only be the pecuniary loss of the fine but also the intangible loss suffered by reason of the damage to the company's reputation.

(ii) It is further argued that it offends against common sense that a company should be found guilty of serious offences having no regulatory content. A basis of liability which permits a company to be charged with conspiring to commit or committing (even if only as an accessory) such crimes as rape, murder or manslaughter is one not readily understood by a jury.

(iii) It is also said that the extension of liability outside the ambit of vicarious liability is a relatively recent and unnecessary development

Factors favouring a general liability

43. (i) It is sometimes argued in favour of a wide liability that evidential requirements may be less strict in the case of company prosecutions, so enabling a company to be convicted where the individual responsible would escape.

(ii) The publicity given to a company on conviction even for a serious offence is said to constitute a strong deterrent.

(iii) The fine imposed upon a company, it is argued, provides a means of depriving it of unjust enrichment.

(iv) It may sometimes be of importance to proceed against a company for aiding and abetting the commission of offences. Aiding and abetting requires the presence of a mental element. Thus, companies could only be made liable for aiding and abetting if the basis of liability permitted prosecution of companies for offences with a mental element.

(v) Where many individuals within a corporation are known to be involved in a particular offence, prosecution of the company may be more convenient.

Consideration of the factors

1. The historical argument

44. The development of corporate liability outlined in Part III showed that the expansion of corporate liability taking place in 1944 was probably due to a misunderstanding of the law as to vicarious liability as it applied to companies. It may be maintained, therefore, that, since this development in the law is of such recent date, it would not be difficult to restore the law to the position which obtained prior to 1944. This would, however, overlook developments both judicial and legislative since that date. The extended liability has, to judge merely by the number of reported cases on the subject, proved a useful device and the reference in, for example, section 18 of the Theft Act to corporate liability for offences which require a mental element is indicative of the degree to which this liability has been accepted without question. Legislation since 1944 in the public welfare area has included many provisions

for which corporate liability has been held, or probably would be held, to exist irrespective of whether the liability is vicarious,[76] a strict liability,[77] or a mens rea liability[78]. Clearly, therefore, any change in the basis of corporate liability should look to grounds of principle and policy other than the merely historical for justification.

2. Identification and personal liability

45. Prior to 1944 prosecution of offences requiring a mental element and outside the sphere of public welfare legislation, such as fraud, were invariably instituted against individuals where those offences were committed in the course of a company's business. It is relevant to ask, therefore, why prosecution of the company itself is now sometimes thought desirable. One reason advanced is that there is considerable difficulty, in the case of large corporations at least, in identifying the persons actually responsible for the commission of an offence. Where an act is committed by a person or persons within a large organisation, it may be impossible to learn where the fault lies; at most, the subordinate who has performed the penalised act itself is located while real guilt lies higher in the leadership of the organisation. Even though the head of the organisation is reached, the real power may lie in interests even beyond him. By making the company itself liable, the law ensures that the offence will not go unpenalised. Considered by itself, this argument may well be thought a cogent one. But if the aim of prosecutions conducted on this basis is to secure the admission of evidence against the company as a whole where such evidence would not be admissible against an individual within it, we believe them to be objectionable in principle. Moreover, we doubt whether such prosecutions do

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76. E.g. the offences in Pt. IV of the Weights and Measures Act 1963, especially s. 22(1) and (2).

77. E.g. offences under the Offices, Shops and Railway Premises Act 1963 and the Clean Air Act 1956, s. 1.: see para. 25 above, and see Alphacell Ltd v. Woodward [1972] 2 All E.R. 475.

78. E.g. Trade Descriptions Act 1968, s. 14.

achieve this aim; it is, at least, difficult to conceive of an example in practice which would do so. The idea behind such prosecutions may be that the knowledge or activities of various members of the company, while insufficient individually to found a prosecution, may, when pieced together, suffice to prove the full mens rea; but we have already suggested that this, too, is objectionable in principle.[79]

3. Loss to shareholders

46. Many regulatory offences, including those in respect of which vicarious liability is imposed, carry relatively light penalties; the most frequent maximum is three months' imprisonment and a fine of a few hundred pounds. The more serious offences for which a company may at present itself be held liable usually carry fines limited only by reference to the present policy of the law that fines should not generally be unreasonable in relation to the capacity to pay of those upon whom they are imposed. Where a company is concerned, theoretically this may be very high indeed. Such fines can only be met from company assets and must, therefore, adversely affect the shareholders. Thus, it may be argued that any rationale for the extension of company liability to serious offences must require that the shareholder should exercise a large degree of control over the company in order to prevent recurrence of these offences.[80] If this is not the case, then the imposition of drastic penalties which ultimately can only affect the shareholders can have no deterrent effect at all. It is probable that shareholders at a general meeting have little personal knowledge of the candidates for directorial office who present themselves. In any case individual shareholders in large companies have little control over their operations unless they are institutional shareholders with a large holding. Their rights can only be exercised at a general

79. See para. 39 d.

80. See Leigh, Criminal Liability of Corporations in English Law, pp. 150 et seq.

meeting and, in contrast to those in controlling positions within the company, with their ability to control the proxy vote, they probably have no detailed knowledge of the routine of the company nor the opportunity of acquiring it. In any case it may be considered doubtful whether a duty of supervision so close as is implied by the argument as to shareholder control ought to be imposed upon them.

47. It is, however, important, when considering the loss borne by shareholders, to bear in mind their general position within the company. The company itself is a fiction, in law a special type of person consisting of shareholders and run by its members. By taking shares in the company, the shareholders deliberately subject themselves to the fluctuating fortunes of the company and it may be argued, therefore, that they must accept any losses arising out of a company's conviction for an offence as one of the risks incidental upon being shareholders. Such losses, it may be said, should not properly be regarded as penalties unfairly imposed on the shareholders but merely as an inevitable consequence of the risks referred to. But these arguments are more effective in relation to fines imposed for regulatory offences than to fines imposed for serious crime. The risk of "violations" in the field of its trading activities may be one with which a shareholder can properly be saddled but the same considerations may not be thought to apply to the risk of the controlling directors indulging in serious crime.

4. Publicity

48. The main objective of the criminal law is the prevention of crime and it is argued that the publicity attendant upon the prosecution of companies has a strong deterrent effect. The prosecution of a company for the commission of an offence symbolises the failure of control by the company and it is socially desirable to have the company's name before the public. We think that it is probably true that the publicity given to a corporation (even a nationalised one) is valuable in the

field of regulatory offences the purpose of which is often to ensure adherence to proper standards, for example in respect of food-stuffs, drugs and other articles of consumption. This publicity achieves its effect in the main through reports in the local press, so having a maximum impact upon consumers, and where there is a danger that the company's name may achieve publicity through a successful prosecution a strong joint sense of responsibility operates among the company's directors and staff aimed at minimising the damage the publicity may cause.

49. In the field of serious crime, however, it may be doubtful whether the fear of publicity being given to the company is a deterrent factor. If the directors of a company consider embarking upon a serious criminal enterprise it is more likely to be their fear of personal discovery leading to punishment and disgrace which deters them.[81]

50. It is our provisional view that the publicity given to a company following conviction is a very strong argument against any exclusion of corporate criminal liability in the regulatory field but that, in the field of serious crime, the balance is perhaps the other way. The damage done to a company's reputation by a conviction for a serious crime may well prove harmful to the innocent although the threat of such a conviction may not deter the guilty.

5. Unjust enrichment

51. The present policy of the law is that the level of fines imposed on conviction should not be excessive, and this of necessity involves an assessment of the defendant's ability to pay without undue hardship. In many cases, therefore, the

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81. In particular, if certain offences are committed in connection with the management of a company, the court may debar a person from being a director or taking part in the management of the company for up to 5 years: see Companies Act 1948 s. 188(1).

size of a fine which might be imposed upon an individual official of a company would be less than would be imposed on the company itself were if found guilty of a serious offence. If only individuals could be prosecuted and if the appropriate fine had in each case to be determined in relation to the circumstances of an individual official it would frequently be impossible to impose a penalty sufficient to deter the company for whom the individual was acting.[82] In addition the courts would not be able to look at another important aspect relevant to the determination of sentence, namely the advantage that the company derived from the breach of the law.

52. It is our provisional view that the ability heavily to fine a company in appropriate circumstances so that it shall not profit by criminal activity is a strong argument in favour of retaining a broad basis of corporate criminal liability. Heavy fines are clearly not unfair to the shareholders in so far as they merely deprive the company of illegal gains. We are not, however, sure to what extent this is a practical consideration which ought to be taken into account, and, upon this, we would welcome guidance from those whom we consult. If fines of this kind upon companies are, as we believe, rarely imposed for offences outside the regulatory field, then the support they afford to the argument in favour of a broad basis of corporate criminal liability is weakened. If, however, they were a common feature in the administration of the criminal law, they would raise questions of policy which require further consideration.

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82. See, in this context, s. 25(7) of the Nuclear Installations Act 1965 which provides for unlimited fines on corporations for offences which carry determinate fines when committed by individuals.

53. Whilst fines imposed on companies for various offences may be heavier than those imposed on individual directors or officers, the basis of their assessment is no different in principle from the assessment of fines upon individuals. The seriousness of the offences and the deterrent effect of the fines are the main factors. In determining the deterrent effect of the fine both the ability to pay and the advantage illegally obtained are taken into account. A fine which would be likely to lead to extreme financial difficulties is not usually imposed even though such a fine might be warranted if assessed on the basis of illegal gain alone.

54. It is for consideration whether the courts should be encouraged to give greater emphasis to the factor of illegal gain in assessing the fines to be imposed on corporations and, if so, how this could be best achieved. A possible solution is to provide that corporations should be deprived of all, or a portion, of any profits flowing from a breach of the criminal law in addition to, or in place of, a fine. We seek views on whether such a solution should be adopted and whether a procedure should be devised for enabling the prosecution in a proper case, after notice to the defendant company, to have power to investigate the affairs of the company to determine the profit resulting from the criminal conduct charged.

6. Inchoate offences; aiding and abetting

55. Inchoate offences are at present under review by the Working Party which is assisting the Law Commission. The crimes of incitement, conspiracy and attempt are at present common law mens rea offences with unlimited penalties which would be excluded by either of the bases of limited liability which we are here considering. Thus a company could be convicted of an offence of vicarious liability not requiring a mental element but not for an attempt to commit any such offence. Whilst this is apparently illogical, it does not, on closer examination, seem to be of great importance. The vast majority of offences of vicarious liability are non-indictable whereas inchoate

offences are indictable. Although incitement and conspiracy may be charged in respect of non-indictable offences, it is a question for consideration whether they will continue to be so in future.[83] Attempts, in any event, can probably not be charged in respect of non-indictable offences and an inability to bring such a charge in regard to corporate offences would, therefore, introduce no difficulty. Moreover, since the individuals concerned in attempts and incitements must be identified, the possibility of proceeding against them personally remains open. In one area at least, that of trade descriptions, the problem is surmounted by special provisions relating to "supply" and "offer to supply".[84] Were the narrow basis of liability to be chosen no doubt similar provisions enabling prosecution of an inchoate offence to be instituted could be made in other very exceptional cases where it was thought necessary.

56. Similar considerations apply where a company is a secondary party to an offence. If a limited basis of liability is assumed, the company may be convicted of the offence but, because of the mental element required, not of aiding or abetting it.[85] Here again, however, the possibility remains of proceeding against the individuals concerned.

7. Convenience

57. Prosecution of a company itself, especially in the case of large companies with many controlling officers, has certain obvious procedural advantages. Service on the company is easily effected at its registered office; where a large number of controlling officers are concerned a multiplicity of actions

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83. This is under review by the Working Party.

84. The Trade Descriptions Act 1968 s. 6 provides that "A person exposing goods for supply or having goods in his possession for supply shall be deemed to offer to supply them"; and s. 1(1) is drafted in terms of supply or offer to supply.

85. See Working Paper No. 43, proposition No. 7.

are avoided, and fines can easily be collected. These advantages are present whatever degree of seriousness the offence may possess and, bearing in mind that the individual responsible for serious offences must be identified to render his company liable, our provisional view is that there is nothing which is unfair or contrary to principle in taking advantage in appropriate cases of the procedural advantages here outlined.

The bases of restricted liability compared

58. It seems to us that these are the principal factors which have to be taken into account in deciding between a broadly based liability and one restricted in either of the two ways which we have so far been considering. We now turn to a brief consideration of the comparative merits of the two bases of restricted liability, namely, a restriction to offences of vicarious liability and a restriction by reference to penalty.

59. A restriction of corporate liability to one co-extensive with the vicarious liability of natural persons creates no theoretical difficulties and accords with the historical position of corporations. As a general proposition, however, it suffers from the defect already alluded to, in that there are offences in the regulatory field, particularly where an occupier is made criminally liable, which would seem to be excluded by a limitation to vicarious liability only. A limitation by reference to penalty presents conceptual difficulties[86] in that the line would be drawn without reference to the mental element required for the commission of an offence. Many regulatory offences require for their commission a full mental element. Further, the underlying criterion upon which this suggestion is based is that corporate criminal liability should be confined to the regulatory field. But this would require a number of exceptions to its generality in respect of what might be called serious regulatory offences, such as those under the Trade Descriptions Act, Exchange Control Act, and

86. It is, however, a starting point taken by the Model Penal Code. See Appendix.

sanction breaking offences.

VII. Summary

60. We are led by our consideration of the problems to the conclusion that it is necessary for there to be corporate criminal liability in some form. The alternative - a total absence of such liability - is, as we earlier indicated, believed not to be practicable at the present time, and the Paper has, therefore, eschewed extensive theoretical discussion of the nature of corporations and the social purpose of their creation and existence. It has instead concentrated upon an examination of possible bases of liability and the factors which offer guidance in the choice of a relatively narrow or an extended basis.

61. Part V of the Paper indicated that, in our opinion, there are only three bases of liability which are practicable - the status quo, vicarious liability and liability limited by reference to penalty - although none of these would produce exactly the results desired by their proponents as they stand. The status quo would require clarification both in regard to those offences for which a company ought not, by its nature, to be held liable, offences contrary to its own interests for which it ought also not to be held liable and in regard to certain aspects of the doctrine of identification. Vicarious liability would require specific exceptions to enable corporations to be prosecuted, where necessary, for certain strict liability offences and offences of omission in respect of which there is no vicarious liability. Liability limited by reference to penalty, the object of which is to restrict liability to the regulatory field, would require extension to cover offences in that field carrying a higher penalty than that by which liability is limited.

62. We have tried to set out the arguments in relation to these possible bases of liability as guides. It would greatly assist the Law Commission if recipients will consider these arguments, comment upon their validity and in the light of their

comments give their views as to which of the bases of liability considered is the most appropriate. If none is thought satisfactory, we hope that other bases not considered by us will be suggested.

A P P E N D I X

Model Penal Code: proposed official draft of 30 July 1962

Section 2.07. Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf.

1. A coproration may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such limitations shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorised, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

2. When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

3. [Unincorporated association]

4. As used in this Section:

(a) "corporation" does not include an entity organised as or by a governmental agency for the execution of a governmental program;

(b) 'agent' means any director, officer, servant, employee or other person authorised to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) 'high managerial agent' means an officer of a corporation or an unincorporated association or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

5. In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection 1(a) or Subsection 3(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is inconsistent with the legislative purpose in defining the particular offense.

6. (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorised by law when a natural person is convicted of an offense of the grade and the degree involved.