International Journal of Research in Social Sciences
Vol. 9 Issue 4, April 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gage as well as in Cabell's Directories of Publishing Opportunities, U.S.A

CRIMINAL LAW AS AN INSTRUMENT OF THE STATE

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Abstract: Law is often portrayed as an instrument of social change. It has been used as a tool of oppression as well as a tool for ensuring welfare of the people. Now there is an increasing trend of using criminal law in the name of welfare of the people. This paper analyses how criminal law is used as an instrument by the state and what are its possible implications

K**eywords:** criminal law, strict liability, human right, constitution,welfare

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.In 1933, Jerome Michael, a leading theorist of the criminal law, portrayed the criminal law as an instrument of the state like any other law having a political sanction. (Jerome Michael , Mortimer J Alder,1933) The criminal law acts as a fundamental agent in maintaining a just relation between citizen and the state. (Nourse,V. F. , 2003)George Fletcher endorses it while commenting that the criminal punishment is the basic and obvious expression of the sovereign power of the state. (George P. Fletcher, 1998)It is designed and administered for the welfare of the people in a political society. However, the concept of welfare differs from society to society. Every political society is governed by a morality set by its constitution. The concept of welfare is largely influenced by the constitutional morality in a state. It is a fact that different states have different constitutions and these constitutions determine welfare differently and therefore, the behaviour is considered to be desirable or undesirable with reference to the constitution of that particular political society. Thus, behaviour, which is contrary to the welfare in one state, may not be considered as contrary to welfare in another state. Therefore, the definition of crime varies from society to society.

However, history suggests that criminal law has also been used for contrary purposes. There are many opportunities to misuse this instrument according to the political will. A glance through history reveals that criminal law was used as an instrument of oppression and for the accomplishment of political purpose. (Thomas J.Gardner, Terry M.Anderson) Stalin used the criminal law not just for terror alone, but as “an instrument of rule” to imprison his enemies. (Peter.H. Solomon, Jr., 1996) Stalin constantly used criminal law beyond its normal scope and range of punishment to attain his political objectives. (Peter.H. Solomon, Jr., 1996)Hitler used the criminal justice system to help him achieve his political agenda by moulding the concept of treason. (Koch, H.W ,1989) Americans misused the criminal law to deny the democratic rights and to enslave African Americans in the post-Civil War era. These are the glaring examples of the misuse of criminal law for political purpose. However, one may realize that no democratic system may sustain itself if its people fear corruption or violence. The recent experiences in the Eastern- Europe and South Asian countries quite clearly demonstrate that no government that uses the criminal law to oppress its citizens can claim the title of a republic or can sustain for long. Therefore, wherever criminal law is used we have to monitor it with some element of

circumspection. More so since there is no law which is directly affecting the life and liberty of person.

As part of this way of thinking, we have a presumption against the use of the criminal sanction. It stems from the commitment to protect right to liberty that our constitutional jurisprudence contains. The use of the criminal sanction is justified only if the reason for infringement of liberty is sufficient to overcome the presumption against using such sanctions. This requirement of justification in turn suggests boundaries on the notion of an offence. The definition of an offence must be construed in a way that makes the infringement of liberty justified in light of the harm inflicted by the prohibited conduct. (Claire Finkelstein,2000)

The philosophy reflected in the defensive model and classical criminal law is that the most important task of the criminal law is to create a barrier between state and individual. They aim at protecting individuals against of state power, excessive repression in legal or illegal forms as well as against abuse of private, informal power. A central feature is that it aims at cooling down conflicts and emotions. Thus, an important purpose of criminal law is to prevent spontaneous social control and replace it with formalized social control. In doing so, legal certainty and justice are the key values to be preserved. They must not be subordinated to needs for crime prevention. (N. Jareborg, 1995)

Therefore, just as in constitutional law, in criminal law also structure and relation may work together to protect individuals. (Nourse,V. F. , 2003)All that criminal law aims at is protecting the interests using threats of punishment and by using execution of punishment to make the threat credible. It may be individual, collective, public or state interests. In doing so, it has to balance all these interests. The way, in which such balancing was

done by the criminal varied from time to time. The early history of humanity witnessed the primitive ways of criminal law administration. However, the development of civilisations changed the mode of criminal justice administration also. The early part of criminal justice administration was mostly influenced by the natural law theories. These theories always demanded some kind of blameworthiness or culpability to punish a person. The influence of the

church and religion was much evident in this period. In the medieval period, the alliance between church and state gradually weakened and Parliament began to gain independence from control of the King. During this time utilitarian ideas concerning punishment as a practice won widespread acceptance in criminal law jurisprudence.

1.2 Utilitarianism and Strict Liability Offences

Utilitarianism introduced a new trend in the definition of criminal behaviour. The special deterrence theory of utility resulted in development of separate theories. Criminal law became tool to accomplish social control and crime reduction. The notion, that the criminal law is unique because of its moral underpinnings, slowly deteriorated. The concept of criminal law as the body of law with blameworthy punishment diluted considerably. Theory of excuses based on the considerations of capacity, choice, will, obedience, power, voluntariness and conformity (A terminology characteristic of the special deterrence theory of utility) began to replace considerations of evil intent. (Gary Dubin,1966) The mid-nineteenth century witnessed some additional utilitarian trends in the definition of criminal behaviour. A distinct tendency to look upon criminal behaviour as merely the commission or omission of a harmful act irrespective of the state of mind of the accused emerged. (Gary V. Dubin, 1966) By this time, often courts were willing to ignore the learning of centuries that blameworthiness was relevant to criminal stigma and punishment. Instead, they applied clear utilitarianism to an area where moral concerns dominated (Manchester, 1977)

The leading example of this process is the growth of strict liability offences or public welfare offences. The phrase ‘public welfare offence’ is misleading because the justification of state intervention in any event is the public welfare. Sayre was obviously aware of this inappropriateness. (Richard G. Singer, 1989) However, Taft who argued that strict liability was necessary in the drug area, may not be. According to him, the general rule at common law was that the *scienter* as a necessary element in the charge and proof of every offence. This was followed in statutory offences even where the statutory definition did not include it. (*Rex v. Sleep*, 8 Cox, 472)Nevertheless, there was a deviation from this view in respect to prosecutions under some statutes where the purpose would be obstructed by such a requirement. (*United*

States v. Bahia,1922). However, the difficulty is that this explanation was applicable to real crimes like rape, homicide, theft, burglary etc also. (Manchester, 1977)

The industrial revolution added more impetus to this change. After the industrial revolution, Legislatures of many countries enacted strict liability laws to enforce economic and social regulations that were considered essential to industrial society. (F.B.Sayre, 1933) These new offences were initially restricted to violations of a minor nature. Nevertheless, they had a sort of infectious influence that spread into important areas of the criminal law. (Bishop, 1923) There was a tendency to disregard the mental element in offences where the state of mind of the accused was not an express part of the offence. Definitions of the requisite mental states began to be presumed. State of mind, although absent in fact, began to be implied in law (F.B.Sayre, 1932)

However, the existing use of strict liability is extremely ad hoc. It ranges from minor regulatory cases such as parking offences to very serious cases of wrongdoing such as importation of drugs and statutory rape. By definition, a strict liability offence involves an offence committed by conduct alone. Strict liability offence means no more than that the prosecution need not prove *mens rea*, as to some or all of the elements of the '*actus reus*'. Proof of the state of mind is not required. However, in some cases it could be considered for mitigation of sentence. In other words, prosecution can secure a conviction without proving that the accused acted intentionally, recklessly or even negligently in respect of some or all elements of the '*actus reus*'. The liability imposed under such law is 'strict' and not 'absolute'. Thus, the exclusion of *mens rea* may be total or partial. A good example of this is the case of *Prince*, in which the accused was convicted under the Offences against the Person Act, 1861. Section 55 made it a misdemeanour to take unlawfully any unmarried girl under the age of sixteen years, out of the possession against the will of her father or mother. The accused did the prohibited act. He was convicted despite the fact that he reasonably believed that the age of the girl was eighteen. In that respect, the prohibition was absolute. However, it is clear that the offence involved *mens rea* regarding other elements of the *actus reus*.

1.3 Formal and substantive strict liability

Strict liability may be either formal or substantive strict liability. According to this distinction, offences impose substantive strict liability when they contemplate the conviction of persons who are blameless for committing that offence. Substantive strict liability is a moral notion meaning liability without fault. By contrast, formal strict liability is a technical concept, depending on the practice of element analysis. (Kenneth W Simons,1997)This first divides the act element of an offence into constituent acts or omissions, circumstances and results. It then correlates each of these conduct, circumstance or result elements with a required culpable mental state, such as purpose or recklessness. Simons contrasts substantive strict liability with two kinds of formal strict liability. They are pure strict liability and impure strict liability. An offence is one of pure strict liability if it requires no culpable mental state with respect to any of its constituent elements constituting the prohibited act. An impure strict liability offence requires no culpability with respect to at least one of the elements. (Kenneth W Simons,1997) For the sake of clarity, we use strict liability simpliciter to the formal sense. An offence can be formally considered to impose strict liability if it contains at least one material element of the *actus reus* without a corresponding *mens rea* element. (A.P. Simester,2005) This definition admits the fact that most strict liability offences contain *mens rea* elements. They are strict because they lack *mens rea* requirement in respect of one or more elements of the *actus reus*. There is a possibility that substantive strict liability may sometimes be justified in the context of regulatory offences. There is also the possibility that formal strict liability does not always impose liability, which is substantively strict.

1.4 Regulatory Offences and Serious Crimes

A distinction can also be drawn between regulatory offences and serious crimes. (*Sweet v. Parsley,1970)* There are a large number of offences prohibiting acts, which are not criminal actually. They normally differ from the traditional crimes in its features. The general feature of the traditional criminal law is that the conviction operates as a condemnation of a person by the society. By labelling a person as a criminal, the conviction publicly asserts that he is a blameworthy wrongdoer. Hence, there is a disgrace of criminality. *(Warner* ,1969)Nevertheless, every offence does not involve the sort of public condemnation that is implicit in convictions for a serious crime. For example, a parking offence involves little or no stigma. The phrase

regulatory offences refer to crimes that do not bring in any significant element of stigma. However, they are prohibited in the public interest with a penalty.(*Sherras* ,1895)These acts are criminal in nature, as far as their commission may be followed by prosecutions and subject to rules of criminal evidence and procedure. However, in substance, it would be more accurate to describe such offences as quasi-criminal. They fall within the rubric and forms of the criminal law. However, they lack a key underlying feature that sets the criminal law separate from the civil law, i.e., the declaration of culpable wrongdoing that is implicit in the conviction and sentence. A classic example is the Trade Description Act, 1968 in England. According to Lord Scarman, the Trade Descriptions Act operated by prohibiting false descriptions under the pain of penalties enforced through the criminal courts. (*Wings Ltd,1985)* However, it is not a truly criminal statute. Its purpose is not the enforcement of the criminal law but the maintenance of trading standards. Trading standards and not criminal behaviour were its concern. (*Wings Ltd,1985*)Such offences are appropriately described as regulatory offences, as they are not truly criminal in spirit. (*London Borough,2000*)In practice, it is difficult to draw a boundary with sufficient clarity between these two varieties of criminal law. Nonetheless, the dichotomy is meaningful despite its blurred boundary.

1.5 Strict Liability Offences, Regulatory Offences

In this context, it is worth to discuss the meaning and the relation between strict liability and regulatory offences. It is to be noted that the regulatory offences need not be identical to public welfare offences, though there may be a considerable overlap. Still less one should have in mind the distinction between crimes *mala in se* and those *mala prohibita*. Some crimes *mala prohibita* carry a significant element of censure. Those crimes are not regulatory. In fact, the need for preventing the social and economic offences by way of effective prosecution and punishment made the legal system to go for such strict liability. In the context of stigmatic offences, intrinsic objections to strict liability outweigh this argument. However, it is taken seriously when creating regulatory offences. There are cases where the imposition of strict liability regarding some element of the *actus reus* need not lead to systematic conviction of the morally innocent. In these cases, the intrinsic objections to strict liability fall away. Sometimes its use may be justified even in stigmatic offences. For example, there can be an offence of causing death by dangerous driving, that requires no *mens rea* element to be proved in respect of the death. (Simester and

Sullivan,2003) Therefore, a key element of the *actus reus* of that offence involves strict liability. However, it seems that there is nothing wrong with convicting the accused of that offence. He is not only culpably guilty of dangerous driving but also culpably guilty of causing death by dangerous driving. It suggests the possibility of drafting offences that involve substantial strict liability elements without being objectionable in the straightforward manner.

1.6 Conclusion

The emergence of the strict liability offences is a classic example of the use of criminal law as an instrument of the state. The imposition of strict liability has been vehemently criticised by many academics and jurists. However, whatever be the reasons we have to accept that a category of offences called strict liability offences exist and will continue to exist. These offences by definition exclude the element of *mens rea* in total or some elements of it. Therefore, it is incumbent on us to see what the position of such offences is in a constitutional scheme and how far they can be justified in the light of emerging human rights jurisprudence. A balancing of the ill effects such extensive use of criminal law with the protection of constitutional right is essential for the survival of a society based on the principles of rule of law.

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