

ECONOMIC OFFENSES UNDER THE PENAL CODE IN COMMONWEALTH COUNTRIES WITH SPECIAL REFERENCE TO CORPORATE DIRECTORS: A CASE STUDY OF INDIA, SINGAPORE AND MALAYSIA

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INTRODUCTION

Reports of corporate crimes have recently filled newspaper headlines around the world. Such crimes are a species of white-collar crime prevalent in almost every country. E.H. Sutherland, an American criminologist, coined the phrase "white-collar crime," defining it as "a crime committed by a person of respectability and high social status in the course of his occupation."¹ Sutherland also commented that white-collar crimes are violations of law by persons in the upper socioeconomic class. Sutherland's definition, however, does not account for the use of crime as a business, such as a planned bankruptcy, or an old fashioned "con game," operated in a business milieu, although he did consider and discuss these activities. An improved definition of white-collar crime, adopted by the United States Congress in 1979 in the Justice System Administration Improvement Act,² is as follows: "an illegal act or series of

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1. E.H. SUTHERLAND, *WHITE-COLLAR CRIME* 9 (1949); see also E. SUTHERLAND & D.R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 40 (1974). There is abundant literature on the subject. See generally H.E. BARNES & N.K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* (1959); R.G. CALDWELL, *CRIMINOLOGY* (1965); W. CHAMBLISS, *CRIMINAL LAW IN ACTION* (1975); M.B. CLINARD, *THE BLACK MARKET* (1962); M. CLINARD & R. QUINNEY, *CRIMINAL BEHAVIOR SYSTEMS* (1973); M. CLINARD & P. YERGER, *CORPORATE CRIME* (1980); *ECONOMIC CRIMES IN EUROPE* (L.H. Leigh ed. 1980); K. MANN, *DEFENDING WHITE-COLLAR CRIME* (1985); Sutherland, *Criminal White-Collar*, in *DICTIONARY OF SOCIOLOGY* (Fairchild ed. 1968); D.R. TAFT & R.W. ENGLAND, *CRIMINOLOGY* (1964); Hartung, *White-Collar Crime and its Significance in Theory and Practice*, 17 *FED. PROBATION* 31 (1953); Nagel & Hagan, *The Sentencing of White-Collar Criminal in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 *MICH. L. REV.* 1427 (1982); Sutherland, *Is 'White-Collar Crime' Crime?* 10 *AM. SOC. REV.* 132 (1945); Sutherland, *Crime and Business*, 27 *ANNALS AM. ACAD. POL. & SOC. SCI.* 112 (Sept. 1941); Sutherland, *White-Collar Criminality*, 217 *AM. SOC. REV.* 1 (1940); Wheeler & Rothman, *The Organization as Weapon in White-Collar Crime*, 80 *MICH. L. REV.* 1403 (1982).

2. 42 U.S.C. §§ 3701-3797 (1982). See S.T. REID, *CRIME AND CRIMINOLOGY* 232

illegal acts committed by non-physical means and by concealment or guile to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage.” This definition encompasses corporate crime, which is defined as white-collar crime that involves “managerial direction, participation, or acquiescence in illegal business acts.”³

Recent years have seen heightened consciousness of corporate crime. The losses created by corporate crimes are recognized to be much greater than those resulting from traditional crimes such as murder, rape, and robbery, because sometimes these corporate crimes create social, economic and political instability. Justice Lai Kew Chai expresses concern over corporate crime in a recent Singapore case, *Public Prosecutor v. Tan Koon Swan*:⁴

[P]ublic interest plainly requires that the accused should receive a punishment which will not only fit his crime but which will also act as a deterrent to other persons who may be similarly disposed. Our commercial marketplace must be protected from and purged of the likes of the accused.

In order to respond effectively to concerns similar to Justice Chai’s, the Commercial Affairs Investigation Department of Singapore (CAID) came up with the novel idea that offenders convicted for economic crimes would have to pay the costs incurred by the prosecution, in addition to the jail sentence and fine imposed by the court for the original crime. Failure to pay such costs could result in a six-month prison term. Because economic crimes are committed for the purpose of financial gain, the idea is to strike at the source and deprive the offenders of any possible benefit resulting from the crime. The CAID also declared that it would institute proceedings under its seizure powers to prevent illegally obtained

(1982); see also H. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME* 3 (1970).

3. See *Hearings on H.R. 4973 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980); see also Conyers, Jr., *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287 n.1 (1980).

4. 1 MALAYAN L.J. 18, 22 (Singapore 1987). Justice Tan Sri Haji Mohamed Azmi notes that: “By and large, dishonesty in the public sector is straight-forward in its modus operandi, and therefore easy to detect. But dishonesty in the private sector, which is committed behind the corporate veil, is more complex in nature and disastrous in effect to the national economy.” *The Star* (Penang, Malaysia), Jan. 13, 1987, at 14; see also *White-Collar Crime on the Rise Worldwide*, *The Star* (Penang, Malaysia), Jan. 13, 1987, at 14 (news report of a seminar in which Barry Rider, Chief Fraud Officer of the Commonwealth Commercial Unit, Roger Olsen, Assistant Attorney-General of the U.S. Justice Department and others expressed concern for worldwide rise in white-collar crimes).

funds from being sent out of the country or to trace the funds and obtain court orders requiring forfeiture of them to prevent unjust gains. In fact, the CAID secured such a court order for the first time in a case in which a former director of a collapsed company had to pay costs of about U.S. \$75,000 in addition to his eight-year jail term.⁵

In India, the Santhanam Committee attached great importance to the emergence of white-collar crime as far back as 1963. The Committee found, in a special report:

The advance of technological and scientific development is contributing to the emergence of "mass society" with a large rank and file and a small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanism [T]he emergence and growth of white-collar and economic crimes, renders enforcement of the laws, themselves not sufficiently deterrent, more difficult. This type of crime is more dangerous, not only because the financial stakes are higher but also because they cause irreparable damage to public morals. Tax evasion and avoidance, share-pushing, malpractices in the share market and administration of companies, monopolistic control, usury, under-invoicing or over-invoicing, hoarding, profiteering, substandard performance of contracts of construction and supply, evasion of economic laws, bribery and corruption, election offenses and malpractices are some examples of white-collar crime.⁶

Most corporate crime stems from personal greed and abuse of corporate power by those who control and manage the affairs of corporations. In the age of impersonal corporations with diffused

5. See *New Straits Times* (Kuala Lumpur), Dec. 13, 1986, at 13.

6. GOVERNMENT OF INDIA, *SANTHANAM COMMITTEE REPORT* 11 (1963). Some of the offenses mentioned by the Committee were already punishable by special statutes. These statutes generally dealt with either acts regarded as harmful, or were concerned with problems confined to a particular trade or industry. See, e.g., *Foreign Exchange Regulation Act*, *Essential Commodities Act*, *Prevention of Food Adulteration Act* and *Companies Act*. The Committee therefore recommended the addition of a new chapter to the Penal Code "bringing together all the offenses in such special enactments and supplementing them with new provisions so that all social offenses will find a prominent place in the general criminal law of the country." *SANTHANAM COMMITTEE REPORT*, *supra* at 54.

The government, however, decided to refer the Santhanam Committee's proposal to the Law Commission for consideration and recommendation. The Law Commission doubted such offenses could properly be incorporated into the Indian Penal Code and therefore recommended the strengthening of the special statutes. See *LAW COMMISSION OF INDIA, TWENTY-NINTH REPORT ON THE PROPOSAL TO INCLUDE CERTAIN SOCIAL AND ECONOMIC OFFENSES IN THE INDIAN PENAL CODE* 49 (1966); see also *LAW COMMISSION OF INDIA, FORTY-SEVENTH REPORT ON THE TRIAL AND PUNISHMENT OF SOCIAL AND ECONOMIC OFFENSES* (1972) (considering the causes of defective enforcement of social and economic legislation).

ownership of assets, corporate executives are involved in “ripping off” business. Berle and Means, in their study of United States corporations, found that ownership of shares in a corporation gave no direct control over the assets of the corporation to the shareholders.⁷ A few individuals with minority blocks of shares frequently obtain de facto control of the corporation and shareholder ownership degenerates into nothing more than the right to dividends. Control rests with those who own blocks of shares that enable them to appoint directors and management.⁸ The challenge confronting modern corporations and law enforcers is, therefore, to ensure that those comparatively few individuals who control vast properties of others do not abuse that power.

The question of criminal liability of directors has acquired new dimensions, given the current concern for corporate crime. A director’s liability for an offense may arise under a special statute, or general criminal law, i.e., the Penal Code. In most countries special statutes have been enacted prohibiting newly defined economic crimes, in order to create new responsibilities for conduct in the marketplace, but the role of the general criminal law has not diminished. Prosecution is generally launched under both the Penal Code and the special statute.

This Article examines criminal liability of directors in those countries of the Commonwealth where the general criminal law is codified in the form of the Penal Code. The emphasis will be on India, Singapore and Malaysia. The purpose is to examine the extent to which the Penal Code effectively deals with economic offenses. The Article also aims to stimulate interest in the experience and legal approach to corporate crime of the Commonwealth nations. There is a greater need now than ever before to enhance sharing, harmonization and unity among the countries that inherited the common law. This can be achieved by encouraging these countries to receive, adopt, and adapt the principles, precedents and legal solutions of their fellow countries within the Commonwealth.⁹

7. See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

8. *Id.*

9. See Hiller, *The Law-Creative Role of Appellate Courts in the Commonwealth*, 27 INT’L & COMP. L.Q. 85 (1978).

Commonwealth judges and the lawyers who assist them in meeting their creative responsibilities must be far more outward-looking and ready to borrow than ever before. In an effort to preserve a workable uniformity of the common law across political boundaries and through time, but also to solve new problems as they arise, all of the participants in the decision-making process must become more familiar

I. THE PENAL CODE

The Penal Code was drafted during the British rule in India by the First Indian Law Commission, which drew not only from English and Indian laws, but also from Livingstone's Louisiana Code and the Napoleonic Code.¹⁰ It was also influenced by the Scottish law of crime.¹¹ The Code was first introduced in India in 1862. It was then adopted in many other territories and countries of the British Empire. The Code serves as the main repository of substantive criminal law in many Commonwealth countries including India, Singapore, Malaysia, Pakistan, Bangladesh, Sri Lanka and Brunei.

At the beginning of the twentieth century, the Code was extended to the protectorates of Uganda and East Africa (now Kenya), Zanzibar and Tanganyika (both of which now form Tanzania), Sudan,¹² Fiji,¹³ Burma, Somaliland and other territories.¹⁴ The Indian Penal Code was replaced in Uganda, Kenya and Tanganyika in 1930, and in 1934 in Zanzibar by another Penal Code.¹⁵

Except for punishment, the substantive provisions in the Penal Code in all countries where it is still in force are the same. In all these countries companies are generally governed by the Companies Act, which contains comprehensive penal provisions to deal with corporate crimes.¹⁶ These crimes are also subject to the provisions

with the growth of the law in other parts of the world but especially within the Commonwealth. Less now than ever before can lawyers afford to be ignorant of the large and growing body of precedent and principal within the Commonwealth, available as input in the decision process.

Id. at 117-18.

10. See generally M.P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* 441 (1981); Ilbert, *Indian Codification*, 5 L.Q.R. 369 (1889); Patra, *An Historical Introduction to the Indian Penal Code*, 3 J. INDIAN L. INST. 351 (1961); see also Gledhill, *The Republic of India*, in 6 THE BRITISH COMMONWEALTH: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 224-29 (G.W. Keeton ed. 1964) [hereinafter BRITISH COMMONWEALTH]; Gledhill, *Pakistan*, in 8 BRITISH COMMONWEALTH 264-72; Calvert, *Criminal Law and Procedure*, in MALAYA AND SINGAPORE, THE BORNEO TERRITORIES 191-207 (L.A. Sheridan ed. 1961).

11. See T.O. ELIAS, *BRITISH COLONIAL LAW* 147 (1962).

12. See Guttman, *The Reception of Common Law in the Sudan*, 6 INT'L & COMP. L.Q. 401, 405 (1957); A.N. ALLOT, *ESSAYS IN AFRICAN LAW* 10 (1960).

13. See T.O. ELIAS, *supra* note 11, at 147.

14. See regulations under 33 & 34 Vict. ch. 3; RATANLAL AND DHIRAJLAL, *THE LAW OF CRIMES* 3 (1966).

15. See Read, *Kenya, Tanzania and Uganda*, in AFRICAN PENAL SYSTEM 94 (A. Milner ed. 1969); Morris & Read, *Uganda*, in 13 BRITISH COMMONWEALTH, *supra* note 10, at 293; Cole & Denison, *Tanganyika*, in 12 BRITISH COMMONWEALTH, *supra* note 10, at 238.

16. See, e.g., INDIAN COMPANIES ACT, 1956 (Act 1 of 1956); SINGAPORE COMPANIES ACT (Cap 185 of the revised edition); MALAYSIAN COMPANIES ACT, 1965 (Act 125); see generally P.B. MUKHERJEE, J., H.K. SAHARAY & P. MUKHERJEE, *INDIAN COMPANY LAW*

of the Penal Code. This Article will discuss only those provisions of the Penal Code which are relevant to offenses committed by company directors. These provisions, however, are applicable to offenses by other entities as well. In the context of corporate crimes they are applicable to corporations themselves,¹⁷ directors, officers, auditors, trustees, liquidators, and other persons connected with corporations. They apply to directors of companies registered under the Companies Act as well as statutory corporations. They also apply to directors of cooperative societies.¹⁸

II. OFFENSES UNDER THE PENAL CODE

The criminal liability of a director may arise in three broad situations. First, liability can occur when there is a failure on the part of a director to fulfill certain technical requirements of law, e.g., failure to submit annual returns to the Registrar of Companies under the Companies Act. Second, liability can arise when a director commits an act or omission to benefit himself or any other person at the expense of the company, e.g., embezzlement or breach of trust. Finally, liability may arise when the director's act or omission is for the benefit of the company regardless of any individual advantage for himself, e.g., issuing a false prospectus. Acts or omissions within each of these categories fall within the mischief proscribed by the Penal Code.

The Penal Code contains no offense created specifically for company directors. As a general rule of criminal law, a director, like

(1979); S.M. SHAH & R.M. KANTAWALA, J., LECTURES ON COMPANY LAW (1981); P.N. PILLAI, SOURCE BOOK OF SINGAPORE AND MALAYSIAN COMPANY LAW (1986); A. SINGH, COMPANY LAW OF SINGAPORE AND MALAYSIA (1976) (volume 1 contains a checklist of offenses at 203-14); T.Y. HOCK, THE MALAYSIAN COMPANY DIRECTOR (1985) (containing a check-list of offenses at 148-77); A. SINGH, TARLING'S CASE DIRECTORS LIABILITIES (1981); DUTIES AND RESPONSIBILITIES OF COMPANY DIRECTORS IN MALAYSIA AND SINGAPORE (CCH Australia Ltd. ed. 1974); Soe, *Directors Liabilities and the Criminal Law*, 1 MALAYAN L.J. at cxli (1986); Vyas, *Company Directors and Offences Under the Companies Act in Malaysia and Singapore*, 1 C.L.J. — (1989).

17. For a discussion of the general principles of criminal liability of corporations see Vyas, *Criminal Liability of Corporation in Malaysia*, 1 CURRENT L.J. 225 (Malaysia 1982); see also Vyas, *Prosecution of Corporation: Procedure in Malaysia and Singapore*, 2 MALAYAN L.J. at xcii (Singapore 1984).

18. Cooperative societies are invested by statute with legal personality and are corporations. See *Daman Singh v. State*, 1986 Reports of Company Cases [Comp. Cas.] 1 (India S.C.). They are, however, not governed by the Companies Act but by separate statutes.

Recently, in Malaysia, as a result of investigations by the Bank Negara (Central Bank), directors of a number of cooperative societies were charged under the provisions of the Penal Code for various economic offenses. See *New Straits Times* (Kuala Lumpur), Nov. 13, 1986, at 1-2; see also *The Star* (Penang, Malaysia), Jan. 13, 1987, at 14. Therefore, the scope of the Penal Code is much wider than the penal provisions of the Companies Act.

any other person, is liable for any offense which he has committed or in that he was involved. There are, however, some offenses that are economic in nature and relevant in the context of corporate crimes. These include criminal misappropriation, criminal breach of trust, cheating, fraud, forgery, falsification of accounts, false information, and omission to give information and assistance to a public servant. An examination of cases from Malaysia, Singapore and India will illustrate how the provisions in the Penal Code are applied in practice.¹⁹ The following discussion will also provide an overview of the ways in which corporate crimes are committed.

A. Criminal Misappropriation

The law treats directors harshly where the company's funds or property are concerned. Directors are regarded as trustees of those funds and property.²⁰ Where a director dishonestly misappropriates or converts money or movable property belonging to the company for his own use, he may be found guilty of criminal misappropriation, which is set out in Section 403 of the Penal Code.²¹

There are three elements that must be proved before an offense under Section 403 can be established. First, it must be shown that the property in question is movable property. Second, the property must have been misappropriated or converted to the use of the accused. Finally, this must have been accomplished dishonestly. Movable property includes "corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth."²² Misappropriation is

19. For the provisions of the Penal Code *see generally* INDIA PEN. CODE 1860 (Act XLV of 1860); SINGAPORE PEN. CODE (Cap. 103); MALAYSIA PEN. CODE (F.M.S. Cap. 45); RATANLAL AND DHIRAJLAL, *supra* note 14; H.S. GOUR, THE PENAL LAW OF INDIA (1984); V.V. RAGHAVAN, LAW OF CRIMES (1984); V.B. RAJU, COMMENTARIES ON THE INDIAN PENAL CODE (1982); R.A. NELSON, THE INDIAN PENAL CODE (S.S. Sastry & S.D. Singh eds. 1966); R.A. NELSON, THE PAKISTAN PENAL CODE (S.A. Halim ed. 1975); K.K. LIAN, M. SOE & M. CHEANG, THE PENAL CODES OF SINGAPORE AND MALAYSIA: CASES, MATERIALS AND COMMENTS (1976) [hereinafter K.K. LIAN]; P.L. PEIRIS, OFFENSES UNDER THE PENAL CODE OF CEYLON (1982).

20. *See* Indra Narain v. State, 1963 All India Reporter [A.I.R.] (Cal.) 61, 68; R.K. Dalmia v. Delhi Admin., 1962 A.I.R. (S.C.) 1821, 1837.

21. MALAYSIA PEN. CODE § 403. "Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both."

Sections of the Penal Code reproduced in this Article are from the Penal Code of Malaysia, and will be cited simply as PEN. CODE. Sections of the Penal Codes in Singapore and India are, with the exception of the punishment provisions, in *pari materia* with sections in Malaysia. The numbers of the sections are also the same.

22. PEN. CODE § 22.

“to set apart for or assign to the wrong person or wrong use and this act must be done dishonestly,”²³ whereas “converts” means “appropriation and dealing with property of another without right as if it is one’s own property.”²⁴ The term “dishonestly” is defined as follows: “Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.”²⁵

The term “dishonestly” is used in the Penal Code in a technical sense. It has nothing to do with probity or honesty. Wrongful gain is “gain by unlawful means of property to which the person gaining is not legally entitled,” and wrongful loss is the “loss by unlawful means of property to which the person losing it is legally entitled.”²⁶ Under Section 403 a “person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.”²⁷

B. Criminal Breach Of Trust

The more serious offense of criminal breach of trust is created by Section 405. This offense deals with cases where a company entrusts its property in confidence to a director for custody and management, and the director dishonestly misappropriates or disposes of that property. Section 405 states:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ‘criminal breach of trust.’

The punishment provided for criminal breach of trust is three years imprisonment or a fine, or both.²⁸ However, the law takes a most serious view of cases in which the duties of the person who is in breach of trust are of a highly confidential character, involving

23. *Sohan Lal v. Emperor*, 31 Indian Cases [I.C.] 651, 653 (1915) (Piggott, J.).

24. *Durrugappa v. Emperor*, 57 Cr. L.J. 630, 631 (1956) (Padmanbhia, J.).

25. PEN. CODE § 24.

26. PEN. CODE § 23.

27. *Id.*

28. PEN. CODE § 406.

great control over the property entrusted to him. A breach of trust by such a person may often induce serious public and private calamity. Therefore, Penal Code section 409 provides for aggravated punishment when there is a breach of trust by a banker, merchant, agent, and others in a highly confidential position.²⁹

To be guilty under Section 409 a person must:

- (1) be within the category of persons described in the statute;³⁰
- (2) be entrusted with property or have dominion over the property in such a capacity;³¹ and
- (3) (a) dishonestly misappropriate or convert the property to his own use;³² or (b) dishonestly use or dispose of the property or willfully cause any other person to do so in violation of (i) a direction of law prescribing the manner in which such trust should be discharged;³³ or (ii) a legal contract which he had made regarding the discharge of such trust.³⁴

1. *Criminal Breach of Trust by Agents of the Company*

In *Tay Choo Wah v. Public Prosecutor*,³⁵ one of the questions before the High Court of Singapore was whether a director is an agent of the company within the meaning of Section 409. The appellant was entrusted in his capacity as director of a company with 3,000 shares held by that company in another company. The appellant sold the shares at par value to members of his family when the shares were worth substantially more than par value.

The prosecution argued that the appellant had dishonestly disposed of those shares and thereby committed the offense of criminal breach of trust under Section 409. The appellant contended that the word "agent" in Section 409 refers to a professional agent, i.e., a person who carries on the profession of agency, and that the accused was not in that profession. The court held that the appellant was at all material times a director and agent of the company; and

29. Section 409 states:

Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

30. See *infra* notes 35-36 and accompanying text.

31. See *infra* note 37 and accompanying text.

32. See *infra* notes 35-36 and accompanying text.

33. See *infra* notes 47-48 and 106-107 and accompanying text.

34. See *infra* note 47-48 and accompanying text.

35. 2 MALAYAN L.J. 75 (Singapore 1976).

that he received the shares and arranged for their disposal in his capacity as agent. The court upheld the conviction of the appellant by the district court because he had dishonestly disposed of the shares.

The court in *Tay Choo Wah* relied on an Indian case, *R.K. Dalmia v. Delhi Administration*.³⁶ In *Dalmia* the appellants *D* and *C* were convicted under Section 409 of the Penal Code for misappropriation of the funds of the Bharat Insurance Company (BIC). *D* was the chairman of the board of directors and *C* was an appointed agent of BIC. *C* bought and sold securities on behalf of BIC at the instructions of *D*, but without any authority from BIC.

The misappropriation arose in the following way: *C* purchased securities for BIC from a broker; the broker in turn purchased the securities from the Bhagwati Trading Company (BTC), which was owned by *V*, a nephew of *C*. BTC's entire business was actually conducted by *C*. The delivery of the securities was executed from BTC to *C*. But in fact, no delivery of securities was ever made to BIC. *C*, however, issued checks drawn on BIC's account in payment for the securities purchased from BTC. Sale transactions followed the same pattern. Securities held or supposed to be held by BIC were sold to a broker and the income obtained from the sale was utilized to purchase more securities which were never received by BIC. The funds BIC ostensibly spent on the purchase of securities ultimately reached another company, Bharat Union Agency, which was in actuality owned by *D*.

The Supreme Court held that both *D* and *C*, as agents of the company, had control over the securities and the funds of the company. It was their legal duty to look to the interest of the company. They failed to do this and therefore they were rightly convicted under Section 409 of the Penal Code.

In *Chang Lee Swee v. Public Prosecutor*,³⁷ the appellant was charged under Section 409, for the offense of criminal breach of trust by an agent. The appellant was the executive director of finance of Trengganu Development and Management Berhad (TDMB), and in such capacity he was entrusted with the funds of the company. The prosecution alleged that the appellant was an agent of TDMB, and committed breach of trust by transferring the

36. 1962 A.I.R. (S.C.) 1821; see also *Shivnarayan v. State*, 1980 A.I.R. (S.C.) 439; *Peoples Bank v. Harikishanlal*, 1936 A.I.R. (Lah.) 408. But see *Cooray v. The Queen*, 1953 A.C. 407, (P.C.).

37. 1 MALAYAN L.J. 75 (Malaysia 1985).

funds (amounting to \$390,000.00) to another company without the approval of the board of directors of TDMB. The appellant was convicted and sentenced to imprisonment for three years by the sessions court at Kuala Lumpur.

The High Court was confronted, *inter alia*, with two questions. The first was whether there was an entrustment of funds to the accused. The court, after considering a resolution by the directors, together with the articles of association and other evidence, found that the board of TDMB had delegated and entrusted to the managing director all of its powers, including the power to manage the funds of the company, except the power to borrow and make calls. Therefore, it held that the accused, even after he was appointed an executive director in charge of financial affairs, was not in a position to manage the funds of TDMB without the overall control of the managing director. Therefore, under the circumstances of the case, the appellant was not entrusted with or in complete dominion over the funds of the company.

The second question before the court was whether the accused dishonestly misappropriated the funds of TDMB by authorizing the payments in question. The court held that there was no dishonest misappropriation since the transfers of funds were properly accounted for and recorded in the account books of both companies. Furthermore, there was no dishonest intent on the part of the accused to cause wrongful loss to TDMB or wrongful gain to the other company.

2. *The Nature of "Misappropriation"*

It is immaterial for criminal liability whether dishonest misappropriation is permanent or only of a temporary nature. A deprivation of property even for a short period is within the meaning of the expression "misappropriation."

In a Malaysian case, *Tan Sri Tan Hian Tsin v. Public Prosecutor*,³⁸ the appellant was convicted on a charge of criminal breach of trust involving \$200,000 belonging to Folex Industries Bhd. of which he was the chairman and managing director. On June 24, 1974, a check was issued and signed by the accused and by *H* on behalf of Folex which at that time was in financial straits. The printed words "or bearer" were cancelled and the check was

38. 1 MALAYAN L.J. 73 (Malaysia 1979); see also *Mangal Sen v. Emperor*, 1930 A.I.R. (Lah.) 57; see also *infra* text accompanying note 39.

crossed with a stamped impression reading "A/C Payee only." Then by another impression the crossing was cancelled. The check became for all practical purposes a bearer check. The check was paid into the account of Kwong Hing Trading Co. on the day it was issued and cleared. On the same day, Kwong Hing Trading Co. issued a check for a similar amount in favor of Li Seng Min Co. (M) Sdn. Bhd., of which the appellant and his wife were the only shareholders. The check was credited to the account of Li Seng Min in another bank where Li Seng Min's account was overdrawn and the effect of the deposit was to change the indebtedness to a credit. The payment was alleged to be in payment of the Folex debt to Hwa Chiang Engineering Co. Ltd. in Taiwan. But the amount was never transferred out of Li Seng Min's account.

The prosecution sought to establish that there was either no such entity as Hwa Chiang or, if there was, that there was either no debt due to it or no payment made to it in reduction of such debt. The defense, however, produced a letter allegedly written on July 24, 1974 by one Z, as a director of Hwa Chiang, acknowledging the receipt of \$200,000. The federal court doubted that Folex was indebted to Hwa Chiang but did not think it necessary to disturb the findings of the trial judge. It held that even on the strength of the letter the appellant was guilty of criminal breach of trust since he had used the money from June 24 to July 24, 1974. Addressing the argument that no criminal breach of trust is committed if the money is used to reduce the company's indebtedness to one of its creditors, the court stated: "[T]his statement of law is predicated on the assumption that at no time before the use of money to reduce the indebtedness, the person who effected the payment, had converted the money to his own use, for however short a period of time. If he does so, then he is guilty of the offense."³⁹

3. *Misappropriation for the Benefit of Others*

A director may be criminally liable even if he is not motivated by self interest but acts from a misguided appreciation of what is good for the company. In *Jaswantrai Akhaney v. State*,⁴⁰ the managing director of the Exchange Bank was charged and convicted under Section 409. The Cooperative Bank, under a written agreement,

39. 1 MALAYAN L.J. 78 (Malaysia 1979).

40. 1956 A.I.R. (S.C.) 575; see also *Ram Chand Gurwala v. Emperor*, 1926 A.I.R. (Lah.) 385.

pledged securities of a certain amount with the Exchange Bank for the express purpose of covering its overdraft account. The accused, in violation of the terms of this agreement, repledged the securities to a third party in order to obtain a loan for the Exchange Bank to ease its financial problems.

The Indian Supreme Court held that it was of no avail to the accused on the charge of criminal breach of trust that he had repledged the securities only temporarily, that he had no motive of personal gain,⁴¹ and that he acted as he did only in the interest of his own bank. It was sufficient to prove that he pledged the securities intentionally and with full knowledge that he was thereby causing a wrongful loss to the Cooperative Bank and wrongful gain to the Exchange Bank.

While in the above case the manager's act was to benefit the company, in *Shailendra Nath Mitter v. Emperor*,⁴² the manager's offense was for the benefit of a third party. In that case, *T*, a third party, pledged to the bank certain government promissory notes for overdrafts granted to *T*. The manager returned the promissory notes to *T* before the overdrafts were satisfied, however in the bank's books they were still shown as deposited in the bank. *T* then repledged the promissory notes with other banks. The Calcutta High Court held that the manager committed criminal breach of trust.

Return of capital disguised as dividends threatens creditors' interests, and thus a director who authorizes wrongful payment of dividends may be guilty of criminal breach of trust. This is because the share capital represents the ultimate fund to which creditors look for repayment in the event of the company's dissolution. In an Indian case, *Queen Empress v. Moss*,⁴³ the directors, manager and accountant of a bank were charged, *inter alia*, for criminal breach of trust. The prosecution alleged that acting in concert, the defendants put forward a balance sheet and directors' reports which falsely stated that the bank had earned a divisible balance of profits, which was available for payment of a ten percent dividend. They thereby fraudulently and dishonestly induced the shareholders to confirm an illegal ad interim payment of that dividend, which was made not

41. See also *R.K. Dalmia v. Delhi Admin.*, 1962 A.I.R. (S.C.) 1821, discussed *supra* in text accompanying note 36 (Indian Supreme Court rejecting accused's plea for reduction of sentence on ground that he made no profit for himself out of impugned transaction).

42. 1 Indian Law Reports [Indian L.R.] (Cal.) 493 (1943).

43. 16 Indian L.R. (All.) 88 (1983); see also *infra* text accompanying notes 68 & 73.

out of profits, but out of deposits.

The court held that the directors were guilty of criminal breach of trust as bankers under Section 409, because they caused wrongful loss to depositors and wrongful gain to themselves and others. It also held that the manager, officiating manager and accountant were not persons who were entrusted with or had dominion over the property of the bank. Therefore they were not guilty of criminal breach of trust, but of abetment under Section 109, read together with Section 409 of the Penal Code.⁴⁴

4. *Misappropriation by Director-Managers*

If a director is also a full time executive employed by the company, his position is similar to that of other employees. In the case of criminal breach of trust by such a director, Section 408 of the Penal Code may apply. However, there is no bar to charge under Section 409 since such a director may fall within the category of an agent also. Section 408 creates another type of aggravated form of criminal breach of trust—breach by a clerk or servant. It provides:

Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Directors are not permitted to make use of their position to obtain profits for themselves. A Singapore case, *P.G. Ralph v. Public Prosecutor*,⁴⁵ dealt with a secret profit made by a former manager of a company. The manager knowingly deceived his principal, whereby the principal was led to believe that 201,250 rights to shares to which it was entitled had been sold to C at twenty-five cents per right, when they in fact had been sold to others at a profit kept by the manager. The manager collected \$102,784.96 for himself. The district court convicted him for criminal breach of trust under Section 408.

On appeal, the High Court upheld the conviction on the ground that having sold the rights in the open market, albeit without authority and by devious means, it was the appellant's duty to hold

44. For a discussion of the offense of abetment *see infra* text accompanying notes 98-107.

45. 1 MALAYAN L.J. 81 (Singapore 1973).

the profits in trust for his principal. By not doing so, he had committed criminal breach of trust.

The Companies Act prohibits the ranking of loans to directors.⁴⁶ Thus, a director may not authorize a loan to another director, or a director of a related company, or anyone related to the director. If such a loan is authorized, the director may be found to have dishonestly disposed of the company's property in violation of the Companies Act, and therefore be guilty of criminal breach of trust.

In criminal breach of trust cases, the fact that the company suffers no loss is irrelevant if the director's act causes wrongful gain to himself or any other person. Such an act is dishonest within the meaning of Section 24 of the Penal Code. *Public Prosecutor v. Yeoh Teck Chye*⁴⁷ is a case on point. The prosecution alleged that *M*, the manager of a bank, honored checks written by *L* in excess of the overdraft facilities given to *L*. *M* had no authority to authorize such overdraft facilities. *M* was charged under Section 408 for criminal breach of trust and *L* was charged with abetment. There was no dispute as to the entrustment to *M* of the property of the bank. *M*'s duty was to ensure that no money was paid out without authority or in excess of the authorized limit unless security had been furnished. *M* was convicted by the trial judge for acts in violation of the direction of the law prescribing the mode in which entrustment of property to him should be discharged.

The Malaysian Federal Court upheld the conviction. However, the court based its decision on a contract between *M* and the bank regarding the discharge of the trust, rather than on the direction of a law prescribing the discharge of such trust. The court was of the view that there was an implied legal contract governing the manner in which *M* was authorized to dispose of the funds of the bank. The court stated: "[T]hat there had been wrongful loss to the bank may be a matter of some doubt but . . . there had been wrongful gain to [*L*] in that he had obtained easy loans for his business and share buying ventures."⁴⁸

46. MALAYSIA COMPANIES ACT § 133; SINGAPORE COMPANIES ACT § 162; INDIA COMPANIES ACT § 295.

47. 2 MALAYAN L.J. 176 (Malaysia 1981).

48. *Id.* at 180. Similar observations were made in a recent Malaysian case. See *Public Prosecutor v. Mohammad Abdullah Ang*, *New Straits Times* (Kuala Lumpur), Dec. 16, 1986, at 2.

C. Cheating

Sections 415 through 420 of the Penal Code deal with the offense of cheating. Cheating is defined in Section 415.⁴⁹ Under this section, there must be an act of deception by the offender. Also, the person deceived must be fraudulently or dishonestly induced to deliver property, or consent to the retainment of property, or to do or omit to do something he would not ordinarily do. Lastly, the delivery of the property or the act or omission must cause or be likely to cause the damage or harm to the person deceived in body, mind, reputation or property.

Under the Penal Code a "person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."⁵⁰ This obviously is not a very helpful definition. The word "fraudulently" is equivalent to "intent to defraud," which implies conduct coupled with an intent to deceive and thereby to injure. It means something more than deceit. Intent to defraud is established only when the deception has some advantage to the person practicing deceit or some injury or possibility of injury to another.⁵¹

In the case of criminal breach of trust, a trustee obtains possession of property by free consent. However, there can be no consent by a person who is cheated. In cheating the offender tricks another into delivering property.

For simple cheating the punishment is imprisonment up to one year, or a fine, or both.⁵² The Penal Code also provides for an aggravated case of cheating when there is a trust relationship whereby the cheater is obligated to protect the cheated party.⁵³

49. Section 415 states:

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to 'cheat.'

Explanation 1—A dishonest concealment of facts is a deception within the meaning of this section.

50. PEN. CODE § 25.

51. See *Dr. Vimla v. Delhi*, 1963 A.I.R. (S.C.) 1572; *Surendra Nath Ghose v. Emperor*, 38 Indian L.R. (Cal.) 75 (1910); *Ram Chand Gurwala v. Emperor*, 1926 A.I.R. (Lah.) 385 (for a discussion of this case, see *infra* text accompanying note 72); *Seet Soon Guan v. Public Prosecutor*, MALAYAN L.J. 223 (Singapore 1955).

52. PEN. CODE § 417.

53. PEN. CODE § 418.

Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

The element of aggravation in this offense is an abuse of trust by the cheater coupled with cheating. The abuse of trust on the part of the cheater makes the offense more aggravating because it is probably committed with comparative facility. This section requires a legal obligation, whether created by law or contract, by which the deceiver is bound to protect the interest of the deceived. Such a relationship necessarily exists between a company and its directors, the directors of an incorporated company and its shareholders, a principal and an agent, a banker and a depositor, etc.⁵⁴

Section 420 provides for another aggravated form of cheating.⁵⁵ This section applies when there is delivery of any property, or alteration or destruction of any valuable security, resulting from the act of the deceiver. The offense is complete at the moment the cheater obtains delivery of property as a result of his imposition. The fact that he afterwards returned the property under pressure does not exonerate or exculpate him. If no property is transferred, the offense is punishable under Section 417 only,⁵⁶ but where the property is delivered, the offense is punishable under Section 420.⁵⁷

A director of a company may commit the offense of cheating by deceiving the company, or by means of a fraudulent prospectus, or by issuing false balance sheets and directors' reports.

1. *Cheating the Company*

A director may deceive the company itself by any of the ways described in Section 415. He may fraudulently induce the company to deliver property to himself or any other person, or cause the company to do or omit to do anything that the company ordinarily would not do or omit to do. If the director dishonestly or fraudulently causes the company to make advances to individuals or companies, or allows such advances already made to continue, without an adequate security or guarantee, or without proper provision for the payment of interest, he may be committing the offense of both cheating and criminal breach of trust.

54. See H.S. GOUR, *supra* note 19, at 3683-84.

55. Section 420 states:

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

56. See PEN. CODE § 417.

57. See RATANLAL & DHIRAJLAL, *supra* note 14, at 1152.

2. *Fraudulent Prospectus*

A director may deceive the public or investors by means of a fraudulent prospectus, so as to induce them to invest money in the company.⁵⁸ A prospectus is fraudulent when it either makes false representations to the public, or dishonestly conceals facts.

In an Indian case, *Srinivasan v. Emperor*,⁵⁹ the defendants entered into an agreement with Travancore Sugars Ltd., a state controlled company. The defendants were granted a lease to operate the company as a contractor for an agreed period. Under the terms of the agreement the defendants were prohibited from subletting or assigning their interest without the consent of the company, and the company was at liberty to cancel the contract at any time. The defendants did not confine their activities to Travancore Sugars, but were involved with three other enterprises. None of the four enterprises were financially stable, and all sustained losses. A new company was incorporated to acquire the rights and interests of the defendants in these four enterprises. It was the prospectus for the new company for which the accused were prosecuted. The prosecution alleged that there were material omissions in the prospectus which rendered it completely false.

The Madras High Court held that the defendants were guilty of the offense of conspiracy to cheat under Section 120B of the Penal Code.⁶⁰ The court pointed out that the defendants did not disclose that their interest in the agreement was not assignable; that they were in arrears with payments, which subjected the agreements to cancellation; and that when the prospectus was issued, they were in a desperate financial condition. None of the enterprises that they operated were profitable. A reference in the prospectus to the assignment limitation was, on its face, a half-truth intended to deceive, and thus no better than a downright falsehood. The court also said that "to make a company prospectus fraudulent it is not necessary that there should be a false representation in it; even if every word is true the suppression of material fact may render it fraudulent. To judge its effect, it should be read as a whole."⁶¹

An Indian case, *Radha Ballav Pal v. Emperor*,⁶² involved an in-

58. See also *infra* text accompanying notes 100-01.

59. Madras Weekly Notes [Mad. W.N.] 312 (India 1944).

60. For a discussion of the offense of conspiracy see *infra* text accompanying notes 107-113.

61. Madras Weekly Notes [Mad. W.N.] 317 (India 1944).

62. 40 Cr. L.J. 600 (1939); see also *Durgadas v. Emperor*, 1934 A.I.R. (Bom.) 48; *Jatindra Nath Sircar v. Emperor*, 1936 A.I.R. (Cal.) 440.

insurance scheme launched by a society. It advertised the new scheme which promised that monetary benefits would accrue to the policy holders in the amount of twelve times their original contributions. The court held that there was no cheating under Section 420 or conspiracy to cheat under Section 120B. The court stated that upon a fair reading of the prospectus, it might appear too absurd for such schemes to work with success, but it could not be said that it contained any fraudulent or deceitful representations. However, if the promoters never intended to start such a business, or to make such lucrative payments, they would have been guilty of cheating under Section 415 of the Penal Code.⁶³

3. *False Balance Sheets and Directors' Reports*

A director may deceive creditors or investors or other persons by means of false accounts, balance sheets, directors' reports or other documents so as to induce them to give credit or invest money in the company.⁶⁴ Fabricating an incorrect balance sheet or a false directors' report or other document may, in certain circumstances, amount to criminal breach of trust, cheating, or falsification of accounts. A director may be guilty of one or more of these offenses if he causes or permits any document to be prepared in such a way so as to conceal the true nature of the company's financial position.

There must be some positive evidence of guilty knowledge. The nature of the false statements, the degree of difficulty with which their truth or falsity can be ascertained, the course of business of the company, and the position and experience of the individual director, are some of the circumstances that should be considered in determining criminal liability.⁶⁵ It is necessary to provide evidence of dishonesty, or that the director intended to profit at the expense of the company, or that he intended to defraud the creditors or investors.⁶⁶

In *Giles Seddon v. S.J. Loane*,⁶⁷ the Indian High Court of Madras held that the failure to separately classify or identify debts which are doubtful or bad in a report required by a statute cannot, in the absence of positive evidence of guilty knowledge, create a presumption of cheating on the part of the directors of a limited

63. See *Hari Das Barat v. Emperor*, 2 Indian L.R. (Cal.) 81 (1939).

64. See also *infra* text accompanying notes 100-01.

65. See *Giles Seddon v. S.J. Loane*, 11 Cr. L.J. 624 (1910).

66. See *In re Baron von Dincklage*, 2 MADRAS L.J. [MAD. L.J.] 748 (India 1941).

67. 11 Cr. L.J. 624 (1910); see also *infra* text accompanying notes 79-80.

company. Nor does the omission by the directors to show their personal debts to the company as a separate item create a presumption of guilt on their part.

In *Queen Empress v. Moss*,⁶⁸ the court held that the directors, manager and accountant of a bank were guilty of aggravated cheating because they had, by means of a false balance sheet and directors' report, induced the shareholders to declare dividends when there were no profits. They also induced certain persons to make or renew deposits in the bank, which those persons would not have done if the balance sheet and directors' reports had not deceived them into supposing that the bank was in a solvent and prosperous condition. The court also held that, because the accused persons acted together to put forward a false balance sheet, they were guilty of abetment⁶⁹ by conspiracy under Sections 109 and 418 of the Penal Code.⁷⁰

D. Falsification Of Accounts

A frequent offense in the corporate sector is falsification of accounts. Directors are occasionally involved in the commission of this offense. A company's balance sheet, profit and loss account and similar documents often influence investment decisions. Shareholders or third parties may suffer losses due to falsification of such documents. Section 477A of the Penal Code makes falsification of books and accounts punishable.⁷¹

Section 477A pertains to: (a) falsification of accounts; (b) making or abetting the making of a false accounting entry; or (c) omitting or altering, or abetting the omission or alteration of, an entry. The falsification may be effected by destruction, alteration, mutila-

68. 16 Indian L.R. (All.) 88 (1983). The facts of the case are recounted *supra* text accompanying note 37; see also *infra* text accompanying note 73.

69. For a discussion of the offense of abetment see *infra* text accompanying notes 98-107.

70. See also *G.S. Clifford v. Emperor*, 15 Cr. L.J. 580 (1914) (Lower Burma Chief Court holding on similar facts that directors and manager were guilty of cheating under Penal Code section 420).

71. Section 477A states:

Whoever, being a clerk, officer, or servant, or employed or acting in the capacity of a clerk, officer, or servant, wilfully and with intent to defraud destroys, alters, mutilates, or falsifies any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employers, or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud, makes or abets the making of any false entry in, or omits or alters, or abets the omission or alteration of any material particular from or in any such book, paper, writing, valuable security, or account, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

tion or falsification of any book, paper, writing, valuable security, or account. An entry may be falsified by the addition of a new entry, the alteration of an existing entry, or by the omission of an entry which ought to have been made. The expression "falsify" applies to preparation of an entirely new document containing false information. Such entries might be either manipulated by the director himself or abetted by him. The offense is complete when a person wilfully and with intent to defraud, destroys, alters, mutilates or falsifies any document.

This section applies only to clerks, officers or servants. It does not require any misappropriation of any specified sum on any particular occasion. The act of falsifying an account or making a false entry with intent to defraud is enough for prosecution under Section 477A.

In *Ramchand Gurwala v. Emperor*,⁷² the appellants issued a false statutory report under the Companies Act for a bank of which they were directors. The figures in the report were inflated and misleading and gave the members an entirely false idea of the bank's progress. The working capital of the bank was shown as 600,000 rupees, though in fact it was half that amount. The number of shares actually sold was exaggerated and the amount of deposits was falsely inflated. Also, a number of bogus deposit entries were made in the books. The appellants were convicted and sentenced to imprisonment by the lower court under Section 477A. The Lahore High Court of undivided India (now in Pakistan) upheld the conviction and held that the acts of the appellants were with intent to defraud. It was not necessary for the prosecution to prove that any person was actually deceived by the false statement. It was quite sufficient in the opinion of the court that the documents were designed to deceive the public.

In *Daulat Rai v. Emperor*,⁷³ the managing director of a bank induced his son to present a promissory note for a certain amount to the bank. This amount was treated as a pro tanto addition to the profits for the year by reducing on paper to that extent the managing director's remuneration which he had actually drawn. He did this in order to maintain the confidence of the shareholders and the public by presenting a more favorable financial report than was actually warranted. He deceived the shareholders at their general meeting as to real profits and induced them to declare a dividend of

72. 1926 A.I.R. (Lah.) 385.

73. 1915 A.I.R. (Lah.) 471.

six percent, instead of some three percent which would otherwise have been available. Later the accounts were readjusted and matters returned to the status quo ante.

The Lahore High Court of undivided India held that both the managing director and the manager of the head office were guilty under Section 477A for falsifying the balance sheet and the books by showing "profits" which were not truly profits. Although the account was restored to its original state, the falsification was nonetheless complete. The managing director was also found guilty of criminal breach of trust under Section 409, for dishonestly disposing of the bank's property by causing shareholders to declare a dividend larger than the profits warranted.⁷⁴

E. Other Offenses

The criminal liability of directors is not confined to the preceding offenses. There are other more general crimes which have a bearing on corporate crime.

1. Fraudulent Disposition of Property

Sections 421 through 424 deal with the criminal aspects of fraudulent disposition of property in order to defraud creditors. These provisions, although crucial, have seldom been used to prosecute corporate crime. Fraud may be perpetuated when there is dishonest or fraudulent: (a) removal, concealment, delivery or transfer of any property without adequate consideration to prevent distribution among creditors;⁷⁵ (b) prevention of any debt due to any person from being made available for payment;⁷⁶ (c) execution of any instrument that purports to transfer, or charge any property or interest, where such instrument contains a false statement relating to the consideration or relating to the person to be benefited by it;⁷⁷ (d) concealment or removal of any property, or assistance in removal, or concealment of any property; or release of any demand or claim.⁷⁸ The property fraudulently disposed of may be of any kind and it may be owned by the offender himself or any other person. These offenses thus apply in cases where directors dispose of the company's property in order to defraud creditors.

74. See also *supra* text accompanying notes 43 & 68.

75. PEN. CODE § 421.

76. PEN. CODE § 422.

77. PEN. CODE § 423.

78. PEN. CODE § 424.

In an Indian case, *Indra Narayan v. State*,⁷⁹ the chairman of the board of directors of a bank wrote off a debt of 1.7 million rupees. This amount represented a debt owed to the bank by a company of which the appellant was the manager. It was alleged that, pursuant to a conspiracy with the appellant, the chairman dishonestly discharged the debt and thereby committed the offense of criminal breach of trust. The appellant was convicted by the lower court for abetment to criminal breach of trust.

On appeal, the conviction was set aside by the Calcutta High Court. The court held that if the chairman of the board exercised effective control over the funds of the bank and if he dealt with the funds in a manner beyond his power, he would be guilty of criminal breach of trust. However, with respect to the debts owed to the bank, the director was not in a position of trust and if he wrongfully discharged a debt, causing loss to the bank, he might be guilty of another offense, but not criminal breach of trust. In the court's opinion, to constitute a criminal breach of trust the property in the hands of the director or under his control must be tangible property. Thus, the wrongful discharge of the debts due to a company cannot be the subject matter of criminal breach of trust.⁸⁰ This means that if a director wrongfully writes off the debts due to a company, he may be liable for fraud under Section 422 of the Penal Code for preventing the debts from being available to the company.

The decision of the court with regard to criminal breach of trust is open to criticism, for debt is property⁸¹ and hence there can be a criminal breach of trust involving such property. This view is supported by the holding of the Supreme Court of India in several cases that the word "property" is wide enough to include a chosen action. In *R.K. Dalmia v. Delhi Administrations*,⁸² the Court cited with approval its decision in *Delhi Cloth & General Mills Co. v. Harnam Singh*,⁸³ holding that a debt is property. In a more recent

79. 1963 A.I.R. (Cal.) 61; see also *supra* text accompanying note 67.

80. See also *Rex v. Kavena Ismail Sahib*, MALAYAN L.J. 242, 244 (Singapore 1937) (Singapore Court of Criminal Appeal holding that "property" for purpose of Penal Code section 405 must be something tangible, and mere incorporeal right does not fall within purview of section).

81. See K.K. LIAN, *supra* note 19, at 390. The authors point out that the "word 'property' is wide enough to cover incorporeal property. . . . [A] person may be entrusted with dominion over incorporeal property such as a book debt."

82. 1962 A.I.R. (S.C.) 1821.

83. 1950 A.I.R. (S.C.) 590.

case, *Shivnarayan v. State*,⁸⁴ the Indian Supreme Court again held that a managing director was capable of dishonestly misappropriating or converting an actionable claim of the company.

2. *Forgery*

Chapter XVII of the Penal Code contains provisions relating to forgery and false documents. The offense of forgery is defined as the making of a false document with intent to either: (a) cause damage or injury to the public or any person; (b) support any claim or title; (c) cause any person to part with property; (d) enter into any express or implied contract; or (e) commit fraud or cause fraud to be committed.⁸⁵

A false document may be created by specifically enumerated processes. A person makes a false document if he dishonestly or fraudulently: (a) makes, signs, seals or executes a document; or (b) cancels or alters a document in a material part; or (c) causes any person to sign, seal, execute or alter a document knowing that such person could not by reason of some incapacity, or deception know the contents of the document or the nature of the alteration.⁸⁶ The forger may be punished by imprisonment of up to two years, or fined, or both.⁸⁷

Usually forgery is a means to an end and is committed in furtherance of some other criminal design. The Penal Code provides for an aggravated form of forgery when forgery is for the purpose of cheating.⁸⁸ The punishment provided is up to seven years imprisonment and a fine. Since cheating is an offense against property, it follows that the offense of forgery to cheat applies when the forger has intent to dishonestly acquire or retain the property. However, it is not necessary that the forged document actually be used for cheating, or that cheating even occur.

3. *Omission to Furnish Information, Documents and Assistance*

The intentional nonproduction of a document by a person legally bound to produce it is an offense.⁸⁹ Also, a person who is legally bound to give notice or furnish certain information to a public ser-

84. 1980 A.I.R. (S.C.) 439.

85. PEN. CODE § 463.

86. PEN. CODE § 464.

87. PEN. CODE § 465.

88. PEN. CODE § 468.

89. PEN. CODE § 175

vant and intentionally omits to do so commits an offense.⁹⁰ It is an offense if a person legally bound to render assistance to a public servant intentionally omits to give such assistance.⁹¹ A person who knowingly furnishes false information to a public servant when he is legally bound to furnish the information also commits an offense.⁹²

Under all of these provisions, no offense is committed unless there is a legal obligation imposed by law. The Penal Code states that "a person is said to be 'legally bound to do' whatever it is illegal for him to omit."⁹³ Also, to be convicted under the Code, the defendant must be required to provide information, documents or assistance to a public servant.⁹⁴ A director or officer of a company who intentionally omits to furnish information to a public servant may be charged with one of these offenses.

III. ATTEMPT, ABETMENT, AND CONSPIRACY

Attempt, abetment, and conspiracy to commit the crimes discussed above are also offenses under the Penal Code. Generally, a defendant may be charged with both the primary offense and the attempt to commit it. If he acted as part of a group, he may be charged with the primary offense and abetment or conspiracy.

A. Attempt

In every crime there are various stages: first—intention, second—preparation, and third—attempt to commit. If the attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but nonetheless the law punishes the person attempting it.

An attempt to commit, or cause to be committed, an offense punishable by the Penal Code, or any other written law⁹⁵ is an offense under Section 511 of the Penal Code, if there is otherwise no express provision for the punishment of attempt under the Code or law. "Attempt" is not defined in the Penal Code. However, it is broadly defined as "an intentional act which a person does towards

90. PEN. CODE § 176.

91. PEN. CODE § 187.

92. PEN. CODE § 177.

93. PEN. CODE § 43. Section 43 defines the word "illegal" as including everything that is an offense or that is prohibited by law or that furnishes a ground for a civil action.

94. See Penal Code § 21 for a broad definition of "public servant."

95. In India, however, only an attempt to commit an offense punishable by the Penal Code qualifies as attempt under Section 511.

the commission of an offense but which fails in its object through circumstances independent of the volition of that person."⁹⁶

The Indian Supreme Court in *Abhayanand Mishra v. State*,⁹⁷ held that a person commits the offense of attempt when he intends to commit an offense, prepares to commit it, and does an act towards its commission. The act need not be the penultimate act towards the commission of the offense, but must be an act during the course of committing the offense.

It is significant to note that in Malaysia and Singapore, any attempt to commit an offense under any written law that contains no express provision regarding attempt is an offense under Section 511 of the Penal Code. This means that an attempt to commit an offense under the Companies Act, or any other statute, may be punishable under Section 511. On the other hand, in India only an attempt to commit an offense under the Penal Code is an offense under Section 511. Further, the offense attempted must be punishable by imprisonment. In Malaysia and Singapore, it does not matter whether the attempted offense is punishable by imprisonment or fine or both.

B. Abetment

Crimes in the corporate sector generally involve the activity of several persons. Not all of them take part in the actual commission of the crime. Some may only instigate, conspire or aid in the commission of an offense. Such persons may not be guilty of the principal offense, but may be guilty of abetment. Abetment is charged as a separate and distinct offense provided the thing abetted is an offense.⁹⁸

In order to be guilty of abetment, the accused abet by instigating, conspiring or intentionally aiding the primary offense. In *Public Prosecutor v. Datuk Haji Harun Haji Idris*, Justice Abdool-

96. *State v. Ram Charan*, 1962 A.I.R. (All.) 359, 362 (J.B. Sharma, J.). Sir Lawrence Jenkins, C.J., defined "attempt" in *Queen Empress v. Luxman Narayan Joshi*, as "an intentional preparatory action which fails in its object . . . through circumstances independent of the person who seeks its accomplishment." 2 Bom. L.R. 286, 296 (1899). Sir Jenkins' definition was approved in a Malaysian case, *Munah Binti Ali v. Public Prosecutor*, MALAYAN L.J. 159, 166 (1958) (Good, J.).

97. 1961 A.I.R. (S.C.) 1698.

98. Section 107 defines abetment as follows:

A person abets the doing of a thing who-First-Instigates any person to do that thing; or Secondly-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly-Intentionally aids, by any act or illegal omission, the doing of that thing.

cadet of the Malaysian High Court observed:

Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offense. Advice can also become instigation if that advice is meant to actively suggest or stimulate the commission of the offense. . . . Abetment by conspiracy consists of the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference deducted from certain criminal acts of the accused done in pursuance of an apparent criminal purpose in common between them. . . . Abetment by aiding takes place when a person by the commission of an act intends to facilitate and does in fact facilitate the commission of an offense. . . . Where there is shown a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting the offense, the abettor is guilty of abetment by aiding.⁹⁹

A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.¹⁰⁰ By virtue of this explanation, any wilful misrepresentation or concealment in a prospectus, account, directors' report or any other document may be punishable as abetment by instigation.¹⁰¹

The offense of abetment is complete when the alleged abettor instigates another or engages with another in a conspiracy to commit the offense. It is not necessary that the act abetted be committed. If a person abets an offense by intentionally aiding another to commit that offense, and the person alleged to have committed the offense is acquitted, then the charge of abetment will fail.¹⁰²

A person may be punished in accordance with the provisions in Section 109 if the act abetted is committed in consequence of the abetment.¹⁰³ It is important to mention that Section 109 punishes

99. 1 MALAYAN L.J. 180 (Malaysia 1977).

100. See PEN. CODE § 107, explanation 1.

101. The offense is punishable under Penal Code § 109. See also *supra* text accompanying notes 58 & 64.

102. *Jamuna Singh v. State*, 1967 A.I.R. (S.C.) 533.

103. Section 109 reads:

Whoever abets any offense shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offense.

See also *supra* text accompanying notes 58-63 & 64-70. The Code also provides for punishment when the offense abetted is not committed in consequence of the abetment. PEN. CODE

anyone who abets any offense under the Penal Code or any other law.¹⁰⁴ The abettor in such cases shall be punished with the punishment provided for the offense abetted.¹⁰⁵

A recent Singapore case, *Public Prosecutor v. Tan Koon Swan*,¹⁰⁶ concerned the abetment of a criminal breach of trust. *T*, a substantial shareholder of Pan Electric Industries Ltd. (Pan El) and Growth Industrial Holdings Ltd. (GIH), which were publicly listed companies, agreed with the accused, a substantial shareholder in a company called Grand United Holdings Bhd. (GUH), to buy thirty-four million GUH shares from the accused at a price substantially higher than the market price. If *T* had entered into the transaction on his own account, he would have suffered a colossal loss of around \$13.9 million. *T* had no such funds. Neither did he intend to lose such a large amount of money. *T*, therefore, decided to make use of the resources of Pan El and GIH. In keeping with the arrangement, he purchased GUH shares using the group's name. These purchases were transacted through Associated Asian Securities Ltd. (AAS) of which *T* was the managing director and major shareholder. As the sum involved was large, *T* arranged to fund the purchases by use of a roll-over mechanism. Arrangements were made with an agent of a stockbroker who would purchase the same shares from the Pan El and GIH groups. Simultaneously, the groups contracted to repurchase the same shares at the same time but delivery and payment was to take place six months later. Since the market price of GUH shares was lower than the agreed price, *T* artificially raised the price of GUH shares. He did so by using a wholly owned subsidiary of GIH, which bought 2.8 million GUH shares from the open market. The potential loss to Pan El and GIH was in the region of \$20 million.

Just before the remaining 27.775 million shares were due for delivery, *K*, a director of Pan El, became concerned about how to effect payment. By this time the price of GUH shares had fallen again. Orange Grove, another Pan El group company, was instructed to buy the shares and a roll-over mechanism was again

§§ 115-16.

104. This occurs by reading Section 109 together with Section 40 of the Penal Code. Section 40 enlarges the scope of the Penal Code. By virtue of clause 2 of Section 40 the word "offense" in Section 109 denotes a thing punishable under the Code or under any other law. (This definition is also applicable to other sections of the Penal Code.) Thus, abetment of any offense under the Penal Code or any other statute (including the Companies Act) is punishable under Section 109 if no express provision is otherwise made for punishment.

105. PEN. CODE § 109.

106. 1 MALAYAN L.J. 18 (Singapore 1987).

arranged. By this mechanism *K* went into the market and purchased 9.8 million GUH shares, which the Pan El group did not need, to artificially create a price which would facilitate the roll-over. Out of the 9.8 million shares purchased, three million were purchased by Orchard Hotel, a subsidiary of Pan El, through *L*, a stockbroking company. Subsequently *K* conspired with the accused and instructed Pan El to pay \$144,852 representing interest charges to *L*, the stockbroking company. Pan El subsequently liquidated.

The accused was charged with abetment by conspiracy to dishonestly dispose of the sum of \$144,852, which was the property of Pan El and over which *K* had dominion. The property was dishonestly disposed of in violation of Section 157 (1) of the Singapore Companies Act, a direction of law that prescribes that *K* was to dispose of such property honestly. The accused was sentenced to two years imprisonment and fined \$500,000 for abetment of criminal breach of trust under Section 109 read with Section 406 of the Penal Code. The sentence was upheld by the Criminal Court of Appeal.¹⁰⁷

C. Conspiracy

Criminal conspiracy as defined in Section 120A of the Penal Code is a substantive offense, and covers acts that do not amount to abetment by conspiracy.¹⁰⁸ Under Section 120A, a criminal conspiracy is an agreement between two or more persons to do or cause another to do an illegal¹⁰⁹ act, or to do a legal act by illegal

107. See *New Straits Times* (Kuala Lumpur), Oct. 17, 1986, at 1.

108. Penal Code section 120A states:

When two or more persons agree to do, or cause to be done-

(a) an illegal act, or

(b) an act, which is not illegal, by illegal means,

such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offense shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

The distinction between abetment by conspiracy under Section 107, *see supra* note 98, and conspiracy under Section 120A is that in the former case a mere combination of persons is not enough. An act must take place in pursuance of the conspiracy. In the latter the mere agreement is enough if the agreement is to commit an offense.

However, unlike abetment, a conspiracy to commit an offense under any other written law (including the Companies Act), is not an offense under the Penal Code in Malaysia and Singapore. This is because Sections 120A and 120B are not included in the definition of offense in clause 2 or 3 of Section 40 of the Penal Code. *See supra* note 104. In India, on the other hand, a conspiracy to commit an offense under any special or local law is an offense under the Indian Penal Code by virtue of Section 40 of the Penal Code.

109. For the definition of "illegal" *see supra* note 93.

means.¹¹⁰

When there is an agreement to commit an offense, the agreement itself is a criminal conspiracy. When, however, the agreement does not concern committing an offense, then an act in furtherance of the agreement is necessary for culpability. It is not necessary that each member of a conspiracy know all the details of the conspiracy in order to be convicted.

The offense of conspiracy was at issue in *Mulki Suryanarayana Rao v. G.G. Kamble*.¹¹¹ In the reasonable belief that certain companies were evading payment of excise duty, excise officials raided the factory and branch offices of the companies and residences of some of the directors. As a result of the search, several incriminating documents were found showing undervaluation of the products manufactured by the companies. The price lists recovered showed that the cost structure was deliberately worked out to evade excise duty. It was alleged that the companies evaded duty amounting to more than fifty million rupees. The companies and thirty-five other persons were charged.¹¹²

It was shown conclusively that the conspiracy continued for about two years, and during that period some of the defendants retired. The conspirators then changed their techniques and resorted to methods such as entering into warranty agreements, giving trade discounts, and recollecting the discounts, in addition to continuing their earlier modus operandi. The defendants filed petitions praying that the proceedings be quashed as they were frivolous and vexatious.

The Bombay High Court rejected the petitions and held that evasion of excise duty could not have occurred without the knowledge and active acquiescence of the directors in the perpetuation of the fraud. The court's position was that in cases where tax evasion takes place in consequence of a conspiracy, the prosecution should have an opportunity to present complete evidence, and the case could not be shut out by granting the type of relief requested in the petitions. The court further observed that if, on proper evidence, the court is satisfied that certain persons did conspire to commit the offense of tax evasion, and but for such conspiracy no tax evasion

110. Penal Code Section 120B provides for the punishment of criminal conspiracy. See *supra* text accompanying notes 59-60.

111. Chartered Secretary 471 (June 1987).

112. They were charged with offenses under Section 9 of the Central Excise and Salt Act, 1944 read with Section 120B of the Penal Code.

could take place, then all those who entered into the unlawful agreement would be liable.

Even a participant who enters the scene after the offense is nearly complete can be guilty of conspiracy. In *Shivnarayan v. State*,¹¹³ false cash credit and debit entries were made to conceal the misappropriation of the property of a bank. A number of persons, including the managing director of the bank, were convicted by the High Court for conspiracy, criminal breach of trust and falsification of accounts. Their appeals were rejected by the Indian Supreme Court. One of the appellants became general manager of the bank after the misappropriation and falsification of accounts had already taken place. Within a few months he learned of the offenses, yet allowed the concealment of the shortage of the bank's fund to continue throughout his regime as general manager. The Court held that he was a party to the conspiracy and had participated therein by helping the other conspirators carry out the object of the conspiracy. The Court took the view that an accused could be one of the principal members of a conspiracy, even though he is not one of the original conspirators.

IV. LIMITS ON LIABILITY

A. *Ratification by the Company*

The question of whether a director can plead the defense of subsequent ratification by the company of his unlawful acts or omissions has arisen in a number of cases. In a Malaysian case, *Public Prosecutor v. Yeoh Teck Chye*,¹¹⁴ the manager of a bank approved payment of a check exceeding an overdraft facility, in violation of a contract. This act was ratified by the board of directors of the bank. The federal court held that the act of ratification was of no assistance to the defense. The court observed: "[R]atification would not exonerate a criminal offense and no authority we are aware of or which has been brought to our notice says otherwise."¹¹⁵

113. 1980 A.I.R. (S.C.) 439.

114. 2 MALAYAN L.J. 176 (Malaysia 1981). The facts are discussed *supra* text accompanying note 47; see also *Yeow Fook Yuen v. Regina*, 2 MALAYAN L.J. 80 (Singapore 1965).

115. 2 MALAYAN L.J. 176, 180 (Malaysia 1981). The question also arose in *P.G. Ralph v. Public Prosecutor*, 1 MALAYAN L.J. 81 (Singapore 1973). See *supra* text accompanying note 45. In the court's view the fact that the board subsequently approved the manager's deception of his client to obtain secret profits for himself did not excuse the manager.

B. *Knowledge of One of the Directors*

A director who commits an offense against a company cannot plead in his defense that another director had knowledge of his acts. In a Singapore case, *R. v. Tay Thye Joo*,¹¹⁶ the court held that when a person is charged with criminal breach of trust respecting the property of a limited company, he cannot exonerate himself by showing that one of the directors had knowledge of the facts or had been a party to the fraud. The knowledge of the director is not the knowledge of the company even in a case where the other directors remained ignorant through their own negligence.

C. *Indemnity Against Liability*

The Companies Act¹¹⁷ expressly provides that no provision in a company's articles or in a director's contract of employment or otherwise, may exempt him from or indemnify him against liability for negligence, default, breach of duty or breach of trust in relation to the company. Such exemption or indemnity is void.

A company, however, may indemnify a director for the costs incurred in successfully defending civil or criminal proceedings in which the judgment is in his favor, or he is acquitted, or a relief¹¹⁸ is granted to him by the court in connection with any application under the provisions of the Companies Act.¹¹⁹

The indemnity provisions are of a general nature and apply equally to proceedings under the Penal Code. A company, therefore, is prohibited from exempting or indemnifying a director for liability incurred in criminal proceedings in which he was found guilty. Indemnification is possible where a director successfully defends against criminal charges.

D. *Relief by the Court*

The Companies Act specifically empowers the court to relieve a director, either in whole or in part, of liability for negligence, default, breach of duty or breach of trust.¹²⁰ To get relief the director

116. MALAYAN L.J. 33 (Singapore 1933).

117. MALAYSIA COMPANIES ACT § 140(1); SINGAPORE COMPANIES ACT § 172(1); INDIA COMPANIES ACT § 201. For references on the Companies Act *see supra* note 16.

118. For a discussion of relief provisions *see infra* text accompanying notes 120-24.

119. See MALAYSIA COMPANIES ACT § 140(2); SINGAPORE COMPANIES ACT § 170(2); INDIA COMPANIES ACT § 201(2).

120. Section 354(1) of the Malaysian Companies Act provides:

If in any proceeding for negligence, default, breach of duty or breach of trust

must show that he acted reasonably and honestly and that fairness requires he be excused. A director who is about to be sued may also apply to the court for the relief without waiting for proceedings to commence.¹²¹

The scope of similar provisions in the United Kingdom Companies Act, 1948¹²² was explained by Lord Justice Stepheson in *Customs & Excise Commissioners v. Hedon Alpha Ltd.*:

The language of section 448 was apt to describe the area in which a company director might be in breach of his duties to the company and the ambit and concern, the context or matrix, of the section was company law and the relation of the officer (or auditor) of a company to the company and not to third persons. The proceedings which qualified for the statutory relief were claims made by companies, or on their behalf or for their benefit by, e.g., liquidators, the Board of Trade, private prosecutors, including penal proceedings for the enforcement of the Companies Act, but not proceedings for the recovery of debts or the enforcement of civil liability to strangers.¹²³

This means that, in spite of their broad language, relief provisions do not extend to criminal proceedings other than those under the Companies Act. Thus the courts are not empowered to grant relief from liability under the Penal Code. The Indian courts, on the other hand, take a contrary view. In *In re Beejay Engineering Pvt.*,¹²⁴ the Delhi High Court held that the expression "any proceeding" in the Companies Act is of wide amplitude and is comprehensive enough to include all kinds of proceedings, civil as well as criminal. In addition, there is nothing in the language or the context of the section which limits, restricts or confines its operation to

against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

SINGAPORE COMPANIES ACT § 391(A); INDIA COMPANIES ACT § 633(1). The provisions in the Singapore and Indian Companies Acts are similar in effect to the Malaysian section.

121. MALAYSIA COMPANIES ACT § 354(2); SINGAPORE COMPANIES ACT § 391(2); INDIA COMPANIES ACT § 633(2).

122. U.K. COMPANIES ACT, 1948, § 448, amended by U.K. COMPANIES ACT, 1985, § 727. This section is in *pari materia* with MALAYSIA COMPANIES ACT § 354; SINGAPORE COMPANIES ACT § 391; INDIA COMPANIES ACT § 633.

123. 2 All. E.R. 697, 701 (1981).

124. 53 Comp. Cas. 918 (1983); see also *In re S.P. Chopra & Co.* (Muksar Elec. Supply Co.), 36 Comp. Cas. 144 (Pun.) (1966) (granting relief under a similar provision in Companies Act, 1913 against apprehended commencement of criminal proceedings against liquidator under Penal Code section 409).

liability arising under the Companies Act alone. In the opinion of the court, protection under this section is available to a company officer as long as the alleged act related to the affairs and functioning of the company.

E. Disqualification

Legal policy prevents a person convicted of certain offenses from becoming a director or taking part in the management of a company.¹²⁵ The simple reason for the policy is that a convicted person is not a suitable candidate to be involved in company affairs.¹²⁶ The Companies Act specifically disqualifies a person who has been convicted of certain offenses from managing companies for five years.¹²⁷

This applies equally to convictions under the Penal Code for offenses described of the disqualification provisions in the Companies Act. Any person who is disqualified from becoming a director is guilty of an offense if he takes part in the management of a company within the prohibited period. However, a convicted person may manage a company with the leave of the High Court. To obtain such leave, the onus is on the applicant to convince the court that the general intention of the Act should be waived in his particular case.

125. See generally Tay Swee Kian, *Disqualification of Directors Under the Companies (Amendment) Act, 1984*, 2 MALAYAN L.J. at xxxvii (1985); Hicks, *Taking Part in Management—The Disqualified Director's Dilemma*, 1 MALAYAN L.J. at xxiv (1987).

126. See *In re Magna Alloys & Research Pty.*, C.L.C. § 40-227 (1976) (Bowen, C.J.). The Chief Justice said that the disqualification section is "designed to protect the public and to prevent the corporate structure from being used to the financial detriment of investors, shareholders, creditors and persons dealing with the company. In its operation it is calculated to act as a safeguard against the corporate structure being used by individuals in a manner which is contrary to proper commercial standards."

127. Section 130(1) of the Malaysian Companies Act states:

Where a person is convicted whether within or without Malaysia—

(a) of any offense in connection with the promotion formation or management of a corporation;

(b) of any offense involving fraud or dishonesty punishable on conviction with imprisonment for three months or more; . . .

and that person, within a period of five years after his conviction or, if he is sentenced to imprisonment, after his release from prison, without the leave of the Court is a director or promoter of or is in any way whether directly or indirectly concerned or takes part in the management in Malaysia of a corporation he shall be guilty of an offense against this Act.

SINGAPORE COMPANIES ACT § 154(1); INDIA COMPANIES ACT §§ 274 & 203. The Singapore section is similar to the Malaysian section. The Indian sections are slightly different. In India, for a person convicted of an offense involving moral turpitude and sentenced to six months imprisonment, disqualification is for five years and the court, it seems, has no power of waiver. INDIA COMPANIES ACT § 274. For other offenses, however, the court convicting a person may by order disqualify him for up to five years. *Id.* at § 203.

CONCLUSION

Corporate crime is complex, ranging from violation of ordinary requirements of law, to business fraud, environmental pollution, sale of adulterated food or defective products, and tax-evasion. It would be an overstatement to say that the provisions of the Penal Code are comprehensive enough to cover every type of corporate crime. Yet the Penal Code can effectively be used to deal with most of the commonly occurring crimes in the corporate sector.

Directors are perhaps the most important persons in the hierarchy of a company, in a position where they have the opportunity and temptation to manipulate the corporate structure to their own interest. They are expected to strictly adhere to a high standard of ethical behavior. If they deviate from honest dealings, the law must deal harshly with them. Unfortunately, the provisions of the Penal Code are sparingly used to deal with corporate crimes, particularly crimes by directors. The cases of investigation and prosecution have been few and far between. A change of attitude is required because the objective in dealing with corporate crime is not to prohibit isolated acts of wickedness, but to promote higher standards in business, trade and industry.

Recently, due to the disclosure of corporate scandals and unethical financial maneuvers, authorities in Malaysia and Singapore initiated a number of cases under the provisions of the Penal Code and the Companies Act involving directors and other corporate personnel.¹²⁸ It is too early to say that this trend is likely to continue, but it is a positive step toward protecting the commercial marketplace from being used by individuals in a manner that is prejudicial to the economic well-being of the society.

The problem of policing corporate crime is much wider than the form and content of the Penal Code. It is not only a legal problem, but a social, economic and political problem as well. This needs to be recognized before prosecution of corporate crime will become more effective and widespread.

128. See, e.g., *Public Prosecutor v. Peter Tham*, *New Straits Times* (Kuala Lumpur), Dec. 29, 1986, at 15 (Singapore); *Public Prosecutor v. Mohammad Abdullah Ang*, *New Straits Times* (Kuala Lumpur), Dec. 16, 1986, at 1-2 (Malaysia); see also *1986 A Horror Year for Some Corporate Bosses*, *New Straits Times* (Kuala Lumpur), Dec. 29, 1986, at 15; *Public Prosecutor v. Datuk Khoo, Peattie & Soo.*, *New Straits Times* (Kuala Lumpur), Nov. 26, 1986, at 10 (Brunei).

