



ROLE OF CONSENT IN CIVIL & CRIMINAL LIABILITIES: A COMPARISON

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ABSTRACT Kelson's "Pure theory of law" was based on 'grand norm' which is supreme, unique, irrevocable and perpetual. Thus "law" which is presented in legislative written format is the supreme virtue of legal system. All civilians have to obey the law as it is and it decide & declare the ration of liabilities of civilians as legal duties/obligation/penalties. As an exception "Consent" has a significant existence in both of civil laws and criminal laws. It is an important element who can change the complete legal scenario of any civil & criminals liability. Sometime an innocent person can be saved from undue liabilities and a mischievous person or offender can be punished who is not involved in the offense directly. The consent is an impression & reflection that the mirror of liabilities was hold by whom. Consent can expose each & every fact of the circumstances in which it was given consent is an theoretical perspective of "res Ipsa loquitor".

KEYWORDS: Obligation, Agreement, Liabilities, Consent, Meeting Of Mind, Commitment, Exemption, Free & Fairness, Defenses, Offense.

Human race is governed by the theory of action & reaction in each & every aspect whether it is social, Financial psychological or communal. We are habitual of this natural phenomenon of natural law of nature, even our body reacts in most appropriate & prudent way in every specific circumstance whether our brain didn't have any command to our body. But it applies only in an invisible manner with the results beyond prediction. Sometime action has no reaction & a reaction has no ground of genuine action. Society is full of such persons who never involve in critical incidents & some who never wait for desired reaction. It is concern with 'Should be' and 'should not be'. But in legal scenario law is govern by 'is' not by 'ought to'.

Kelson's "Pure theory of law" was based on 'grand norm' which is supreme, unique, irrevocable and perpetual. Thus "law" which is presented in legislative written format is the supreme virtue of legal system. All civilians have to obey the law as it is and it decide & declare the ration of liabilities of civilians as legal duties/obligation/penalties. As an exception "Consent" has a significant existence in both of civil laws and criminal laws. It is an important element who can change the complete legal scenario of any civil & criminals liability. Sometime an innocent person can be saved from undue liabilities and a mischievous person or offender can be punished who is not involved in the offense directly. The consent is an impression & reflection that the mirror of liabilities was hold by whom. Consent can expose each & every fact of the circumstances in which it was given consent is a theoretical perspective of "res Ipsa loquitor".

CONCEPT OF CONSENT :-

According to legislative formation consent defined under sec 13 of Indian contract act 1872 which says "two or more persons are said to consent when they agree upon the same thing in the same sense". Thus it is an appropriate definition in the Contractual perspective which is emerging from an agreement. The sense of similar object of an agreement is depend on proposal & acceptance their circumstance & nature.

As per English law - a real consent is "consensus ad idem" which is the base of a contract as well as every civil liability it is an essential element for valid contract in fact it is a main factor who can define & declare a criminal liability under criminal laws. "Consensus ad idem" is similar to meeting of mind and if two or more person have same mentality & Plan of action. It can reveal the hidden 'mens Rea'. Some time a person has a plan of action but he doesn't have any partner to execute it. Thus an offensive thought couldn't have the opportunity to create itself but when other person has same mental status they follow their consensus ad idem for committing an offense.

ROLE OF CONSENT IN LIABILITIES :-

Generally consent is measured as an content of valid contract but it has a very vast criteria to decide liabilities in civil laws as well as criminals laws.

ACCORDING TO CIVIL LAWS :-

if a person is giving his consent for anything he will be bound from his

own words. A verbal statement of consent is as powerful as written document. Consent is an assurance of part performance by an individual. Whether it is an agreement of commercial purpose property transaction, valid forms of general & specific contract or personal affairs.

Consent creates an obligation on the consent giver. to fulfill his commitment regarding consent every contract has a reciprocal liability in which both parties have to perform as per the contract & all the transaction related to moveable & immoveable property are also governed by the contract act. Thus consent is capturing the modus operand of each party of contract.

The Indian partnership act says that creation of partnership is based on consent of parties, where termination of partnership is allowed by giving consent of dissolution the mutual consent create a partnership & terminate. The sale of goods act, hire & purchase act. Contract for agency, bailment, indemnity & surety & pledge are related to moveable property where the **Transfer of property Act 1882** is covering all the transactions of immoveable property, in which sale, exchange, lease, mortgage, gift & negotiable instruments are included the right of license is arising merely by a consent which is covered by Indian easement act 1882.

As per **Personal laws** marriage divorce, maintenance, adoption, guardianship, succession, will, partition, religious, endowment and conversion. All the aspects can be justified and legally executed only by consent of parties. Any familiar relationship is accepted by the concerned person through a declaration in the name of consent. Nobody can impose a familiar liability on a person who is not ready to welcome such kind of relationship. If a person is not accepting any responsibility personally then how can be a liability imposed on him?

Mediation & Arbitrary body can be formed through a mutual consent otherwise there is no scope of legal counseling in any civil dispute. The alternative dispute resolution system is based upon the concept of concept. The Lok Adalat & PLA are working successfully where parties are mutually agreed to adapt the ADR. In many contractual dealing where both parties are in different status like legal & living persons than contract are followed through "standard form" in which living parties have to follow the written Terms & conditions by signing contractual draft. Today insurance policies, mutual funds, saving policies, investment policies, service facilities, rental agreement are the regular institutions where 'standard forms of contract' are applicable. Once a person signed it is implied that has given his consent & ready to bear concern liabilities. Thus consent has many faces in which it can be identified whether it is written or verbal declared or unrevealed, direct or implied. It can be measured by circumstances.

As per the Judgment of Raffles V wichelhaus - Exchaquer 1864, H&C-906, **Consent** is the confirmation of notice & acknowledgement, which are the reflector of civil liability, because every breach of liability, imposes a duty on the defaulter who has given his consent that means he knows about the facts & his consent was acceptance towards

the liability. A consent maker cannot take a 'U-Turn' of non responsibility. Consent is like a fencing which is created & developed by him & he cannot escape beyond it without serving the liabilities completely.

CRIMINAL LIABILITY:

as per the severity of liable ratio or the consequences of a consent civil law has a progressive and positive approach where in criminal law, consent has two faces defensive and offensive as well as positive & negative. In criminal law, consent make a ground of exemption from criminal liability if a person has a valid consent from an authorized source and on another side he will be punished as an offender if has not taken an authorized consent for specific act, or he has manipulated & fabricated the consent in an offensive way. "Consensus ad idem" is the basic requisite for joint liability. All the offences that are committed in the joint venture, meeting of mind or agreement for same thing & same sense is essential. Every 'actus reus' is performed by 'mens rea' of joint offenders or individual.

Joint liability as a principal of common intention sec. 34-IPC 1860 as a concept of abatement U/s 107, or the criminal conspiracy U/s 120-A, these are the main example who executed through 'consensus ad idem'. Prior meeting of mind, agreement on same thing/offense in similar sense are the basics of criminal liability where an agreement on offense is sufficient to punish each partner of agreement whether offense doesn't committed, because it is must for decreasing offensive agreement. The mutual consent is evaluated by the physical presence involvement, direct indirect help & co-operation in committing an offence motive, intention, object & desired outcomes are the revealing element of consent or presence of consent.

In the defensive manner an offender can save himself from a criminal liability or can change the ratio of liability in following provisions of Indian penal code 1860,

Sec - 87 : Act not intended and not known to be likely to cause death or grievous hurt done by consent.

Sec - 88 : Act not intended to cause death done by consent in good faith For person's benefit.

Sec - 89 : Act done in good faith for benefit of child or insane person, by or by consent of guardian.

Sec. -92 : Even an Act done in good faith for benefit of a person without consent is not an offence under four limitation Intended to death, hurt/grievous Hurt, or abatement.

Sec. - 300 : (When) culpable homicide is not murder, when the persons whose death is caused, being above the age of 18 yrs. suffers death or take the risks of death with his own consent.

Although this provision is not an absolute defense of the criminal liability, but in this proviso, consent can change the gravity & severity of liability and makes the punished quite liberal.

CONSENT & MISCARRIAGE:

Miscarriage is an offense against motherhood where an unborn child & his Mother's faces life threaten danger. According to **section 91**- some specific acts which are offences independently of any harm which they may cause or be intended to cause or be known to be likely to cause to the person giving the consent or on whose behalf the consent is given. The illustration of this section declare it that miscarriage is an independent offense which is explained under **section 313-313** & 314 in detail, 312 says miscarriage is an offense and **313, 314** says miscarriage without the consent of woman and death caused by act done with intention to cause miscarriage without the consent of women is an offense punishable from the life Imprisonment. It shows sometimes consent can be a defense but sometime consent has no significance in crime & lake of consent can convert an act in an offence and disobeying of consent can increase the punishment of such offensive act.

Sec. 361 :

Kidnapping from lawful guardianship will be declared an offense if an offender takes or entices any minor, or unsound mind person from the guardianship of an authentic & lawful guardian without his consent. In this offense consent of guardian has an important status in current scenario in custodial disputes of child. Parents file litigations against of

each other ...spouse/father/mother. If court provide the custody to the mother/father, the deprived persons cannot take away the child anywhere without the consent of legal guardian otherwise he/she/ will be treated as a kidnapper, whether he/she is the biological father/mother of child.

Sec. 375 - Rape

The most heinous offence against privacy of women, which destroyed her Dignity as well as her Psycho-Physical-strength. Will & consent both are two basic elements that can make liability of this offense or can defend from criminal Liability. Any woman who has denied or not gave her consent regarding sexual intercourse is a rape. A forcible physical relationship under six descriptions of the section 375 will be an offense and an offender has to bear criminal liability along with strict punishment, but if there were presence of will or the consent all the sexual relationship converts in to mutual pleasure. The concept of will without declared consent was treated with the circumstantial scenario as well as previous intimacy of both parties, but now "No" mean it's not about all intimate relationship. Now it is measured by sole testimony of victim's statement that she has given consent or not. No one can escape from the punishment if he didn't consider the consent of a woman.

Sec -497 :

Whether this section has been modified by Hon'ble supreme court by amendment & declare it unconstitutional but this section which is related to adultery is deeply rooted in our society where, adultery is not only a legal offense but also a social demoralization of women as well as status of a marriage. According to legal definition adultery is sexual intercourse with a married women whose husband didn't gave consent or connivance for such adultery. It means a person can get sexual pleasure from another married women with the proper consent of her husband. It was really unethical criteria of such criminal liability, there were no scope of the consent of the married women. It was a one sided, man oriented legislation, in which only an evidence of consent can make it an ordinary Act where no criminal liability arises. But for social preservice of morality & trust worthy matrimonial bonding, this offence should be exists in a new Avtar with the perspective of gender equality.

CONCEPT OF FAIR CONCENT IN CIVIL & CRIMINAL LAWS.

Where **sec.14**. Of Indian contract Act, 1872, declare free consent free from coercion, undue influence, fraud misrepresentation and mistake. **Sec. 90**, Indian penal code, 1860 define consent's status which is given without fear of injury and misconception of facts. **Sec. 415** of IPC. Clarify cheating in reference of consent, where consent is acquired by deceiving any person fraudulently or dishonestly inducement. Thus a free consent should be free from all psychological pollutant who can affect the decisioning of an individual or pressurized him to take a decision against his will and such forcible consent will not be consider as a fair consent.

Consent given in violation of natural and legislative law has a weaker status that's why it can be revoked at the appropriate segment/ stage of fulfillment of liability. A liability can be declared an under responsibility which will not be protected by law neither civil nor criminal because, both have different jurisdiction but impact of consent on the ration of liability is similar civil liabilities have remedies of damages, specific performances, compensations and part performance but criminal liability has only punishment thus it has sensitive aspect about consent about consent which is a double edge sword in criminal law.

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