THE PRINCIPLE OF ALTER EGO & THE EVOLUTION OF CORPORATE CRIMINAL LIABILITY IN INDIA

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ABSTRACT

The principle of alter ego lays down that criminal liability may be attributed to a company for the acts of the individuals in control of the affairs of the company. The doctrine endeavours to view both the directors/shareholders and the company as a single entity—thereby lifting the corporate veil. This article attempts to sketch the course of the development of the principle of alter ego in India by dissecting various landmark judgements passed by Indian courts. The Supreme Court's decisions in Iridium India Telecom Ltd. v. Motorola Inc. and subsequently in Sunil Bharti v. CBI paved the way for a more nuanced approach towards corporate criminal liability. This article draws from that context and discusses the rapidly changing position of law, leading up to the recent amendments to the Companies Act, 2013, which furthers the Indian government's goal to find a balance between making the legal framework conducive for businesses and ensuring that reasonable measures continue to be in place for wrongful acts or omissions by companies. Newer hurdles that could potentially prop up in the wake of the newly amended Companies Act have also been deliberated and the legal position on corporate criminal liability in the United States of America and the United Kingdom have been studied to place the current framework in the broader context of how other jurisdictions treat corporate criminal liability. Although the recent reforms are a welcome change for turning India into a more business-friendly nation, this article reinforces the imminent need to overcome hurdles that are likely to be encountered with the imposition of the revised framework.

Keywords: Corporate Criminal Liability, Principle of Alter Ego.

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I. INTRODUCTION

Legal systems have long grappled with the association of criminal liability to corporations. Until corporations gained their omnipresence in the eighteenth century, the prevailing view was that they could not be held criminally liable.[1] Corporations were originally only seen to entangle in criminal litigation when there were claims of public nuisance. The systems in England and the United States first associated public nuisance to corporations when quasi-public corporations were found to have caused public nuisance as a result of their nonfeasance.[2] This precedent eventually developed into the more general understanding that an individual working as a corporation's agent could not be held guilty for an omission of the corporation, since it was only the corporation that was duty-bound to perform the specific act.[3]

This principle then set the ground for courts to hold private commercial entities criminally liable for public nuisances which were earlier only attributed to quasi-public corporations.[4] Eventually, it was

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[1] Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. QUARTERLY. 393, 396 (1982).
[2] L.H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 16-18 (1969).
[3] JOHN C. COFFEE, JR., CORPORATE CRIMINAL RESPONSIBILITY, ENCYCLOPAEDIA OF CRIME AND JUSTICE 253-254 (Sanford H. Kadish ed., 1983).
[4] James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L. J. 73, 91-92 (1976).

held that corporations could also be held criminally liable for other positive acts and omissions. Once the precedent for holding corporations guilty of misfeasance for creating a nuisance was solidified, the courts were left free to apply the principle to other acts of misfeasance which did not require intent.[5]

This ambit was slower to encompass crimes that required intent,[6] until 1909 when the United States Supreme Court was the first to hold a corporation liable for a crime that required intent.[7] This move received great criticism at the time for being contrary to the objective of criminal law as a means to punish those who wronged morally, mainly because it relied on the vicarious guilt of corporations.

The apportionment of liability to corporations for crimes that require criminal intent has seen a rapid increase across the globe, ever since. In India, the Supreme Court on several instances restated that the legislative mandate for any criminal offence that prescribed a minimum punishment coupled with a fine prohibited the courts from only imposing the said fine in exclusion of the punishment.[8] The High Courts of several Indian states also went on to hold that companies could not be prosecuted for offences that necessarily required corporal punishment or imprisonment, given that companies could not possibly be sent to prison.[9] It was after the judgement of the Supreme Court in *A.K. Khosla v. T.S. Venkatesan*, that the judiciary began to tackle the other hurdle of not being able to associate *mens rea* to a company, which was a prerequisite unless specifically excluded by the statute.[10] The courts also began to acknowledge that

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[5] New York Central R. Co. v. United States, 212 U.S. 481 (1909).
[6] *Supra* note 4.
[7] New York Central R. Co. v. United States, 212 U.S. 481 (1909).
[8] Asst. Commr. v. Velliappa Textiles Ltd., (2003) 11 SCC 405 (Ind.); State of Maharashtra v. Jugmandar Lal, (1966) 3 SCR 1 (Ind.).
[9] State of Maharashtra v. Syndicate Transport Company Private Ltd., (1964) AIR Bom 195 (Ind.); Kusum Products Ltd. v. S.K. Sinha, I.T.O. Central Circle-X, Calcutta, (1980) 126 ITR 804 (Ind.).
[10] A.K. Khosla v. T.S. Venkatesan, (1992) Crl. L. J. 1448 (Ind.); Kalpanath Rai v. State, (1997) 8 SCC 732 (Ind.).

although a sentence exceeding what the statutes prescribed was always illegal, a sentence less than what was prescribed was not illegal in all cases.[11]

Ultimately, in *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.,*[12] the Supreme Court crystallized its stand on the matter, serving as a prominent precursor to the judgements and legislative changes that followed. The current legal regime in India culls out criminal liabilities for functionaries of companies, either generally through the Indian Penal Code, 1860 or more specifically through provisions like Section 27 of the Securities and Exchange Board of India Act, 1992 which lays down that an officer of the company would be found guilty of offences committed by companies if such an officer was in charge of and responsible for the business of the company, and Section 450 of the Companies Act, 2013—which prescribes a fine for the company and its responsible officers for any contravention for which no specific penalty/punishment has been laid down**.** Section 179 (1) of the Companies Act, 2013 authorizes the Board of Directors of a company to do the acts listed therein, and are hence liable for all the acts of the company.

However, this is not a concept that exists without a counterbalance, this article endeavours to dissect the concept of alter ego and the validity of its reverse application, by examining judgements leading up to recent statutory changes. It also examines the position in the United Kingdom and the United States as a contrast and seeks to place the current framework in the broader context of how other jurisdictions treat corporate criminal liability.

[11] Oswal Vanaspati & Allied Industries v. State of U.P., (1993) 1 Comp L. J. 172 (Ind.).
[12] Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 SCC 530 (Ind.).

II. ERSTWHILE POSITION OF LAW

The theory that criminal liability could be attributed to a company because of actions of its directors i.e., the principle of alter ego, was earlier endorsed by a single judge bench of the Supreme Court in *Assistant Commissioner, Assessment-II, Bangalore v. Messers Velliappa Textiles Ltd.*[13] where the predominant procedural hurdle of the inability to arrest companies for crimes had been raised. The sections of the Income Tax Act, 1961, which the private company was alleged to have violated, required imprisonment to be coupled with a fine. This led to the verdict that the corporation could not be imprisoned because it lacked a physical form, and since the fine had to be coupled with imprisonment, one could not be imposed to the exclusion of the other. This took a very literal approach to attributing criminality to the corporation and the age-old issue for not being able to impose criminal sanctions to corporations for their lack of a physical form was seen to persist. Merriam Webster defines alter ego to mean "a second self or a different version of oneself. In jurisprudence spanning across legal systems, the Alter Ego Principle culls out an exception to the otherwise default position that a company is an entity that is separate from its shareholders/directors. The Alter Ego Doctrine lifts the corporate veil by viewing the directors/shareholders of the company and the company itself as a single entity.

Later, in *Standard Chartered Bank v. Directorate of Enforcement,*[14] a three-judge bench of the Supreme Court overruled the erstwhile position of the Supreme Court and held that the legislature could not have intended to penalize the corporations for minor offences while completely excusing them of the graver crimes, simply because the statute prescribed that a fine be coupled with imprisonment. Although the bench of the Supreme Court did not proceed to crystallize whether companies were indeed capable of having *mens rea,* it did lay down that companies could be prosecuted for criminal offences and punished with fines. This holding

[13] Asst. Commr. v. Velliappa Textiles Ltd., (2003) 11 SCC 405 (Ind.).
[14] Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 SCC 530 (Ind.).

culminated in the Supreme Court's ruling in *Iridium India Telecom Ltd. v. Motorola Inc.*[15] and in *Sunil Bharti Mittal v. CBI,*[16] paving the way for a more nuanced approach to corporate criminal liability and holding companies more accountable for their actions, while finding ways to address procedural concerns inherent to criminal law. This was an implicit acknowledgement of the fact that criminal laws could not apply to corporations in the same way that it did to individuals and was therefore an essential milestone in paving the way for a more sophisticated approach to corporate criminal liability in India. Procedurally, it solved the conundrum of whether fines could be imposed on companies to the exclusion of any imprisonment when the offence specified that both were required.

The principle of alter ego gained more traction in the *Iridium* judgement where it was held that the acts of the individuals in control of the affairs of a company are attributed to the company and therefore the criminal accusations levelled against such individuals could be imputed onto the company too.[17] *Iridium* solidified the Supreme Court's stance on corporate criminal liability while addressing the issue of whether companies could be deemed to have criminal intention. For the apportionment of criminal liability, the Supreme Court had relied heavily on the doctrine of attribution to determine in whose hands the control of the company actually lay (to the extent that the company could be said to be acting through the person). In this manner, the *Iridium* judgement went a step ahead of the *Standard Chartered* judgement since in the former case, it was held that the person in-charge of the affairs of the company may be held liable for the wrongful actions of the company while in the latter, in extension of the Alter Ego Principle, it was observed that a person must be an authorized person acting in the course of his/her employment to be held liable for the actions of the company.

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[15] Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74 (Ind.).
[16] Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 (Ind.).
[17] Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74 (Ind.).

In the *Iridium* judgement, the Supreme Court also placed reliance on *Tesco Supermarket v. Nastrass,*[18] where it was held that the people who had the powers to steer the course of the company, derived from the Articles of Association, Memorandum of Association, approvals in meetings or specifically named by directors, would be liable for offences the company is deemed to have committed. The bench in *Iridium* went on to expand the scope of individuals that could be considered as instrumental to the functioning of the company to any natural person in charge of the company's affairs. However, this judgement left several questions unanswered: (a) what if no single officer was responsible for the affairs in question? (b) in a case where officers are held responsible, what would the liabilities of the company be? (c) what is the extent and nature of the liabilities that may be imposed on the company? And (d) how would the shareholders be recompensed for the erosion of their assets? Given the far-reaching nature of the questions left unanswered, the Iridium judgement set the foundation for the position of the judiciary on the issue of corporate criminal liability, and paved the way for the subsequent judgements and legislative changes that followed.

During the Supreme Court monitored CBI investigation relating to the grant of Unified Access Services Licenses (*hereinafter* referred to as "**UASL**"), the CBI had named the Deputy General Directors of three cellular companies. The main allegation was that the accused public servants entered into a criminal conspiracy with the accused beneficiary companies in taking a decision that caused an undue pecuniary advantage to them and a corresponding loss to the Exchequer.[19]

The learned Special Judge, apart from the accused persons in the charge-sheet, summoned the directors of M/s. Bharti Cellular Limited and M/s. Sterling Cellular Limited, Mr. Sunil Bharti and Mr. Raavi Ruia respectively. The reasoning provided for the same was that in their capacity as directors, these persons, *prima facie*, could be treated as

[18] Tesco Supermarket v. Nattrass, [1972] AC 153 (Ind.).
[19] Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 (Ind.).

controlling the affairs of the respective companies and represent the directing mind and will of each company. Thus, they were the "alter ego" of their respective companies and the acts of the companies could be attributed and imputed to them. Based on this premise, the Special Judge opined that there was enough material on record to proceed against the three directors as well.[20]

Subsequently, in *Sunil Bharti Mittal v. CBI,*[21] the bench of the Supreme Court dissected the principle of alter ego as laid down in *Iridium*, to look into other permutations that may invite its applicability; adding a few layers of complexity that, by then, had become central to the issue of corporate criminal liability. It dissected the impugned order and went on to give a detailed opinion of the issue that had been brought to the forefront: whether the liability of the companies could be attributed to the person(s) directing the affairs of the company by the invocation of the principle of alter ego.[22]

The appellants contended that the principle of alter ego had been applied in reverse—the liabilities of the company were being applied onto the individual(s) in control of its affairs. The respondents broadly rebutted this contention by claiming that the offences were necessarily required to be coupled with malicious intentions since they were not strict liability offences and since the companies would only act through their directors/officers, it was their *mens rea* that needed to be scrutinized.[23]

In analysing the aforesaid contentions, the Court placed heavy reliance on the precedent set by *Iridium* where it was laid down that where an offence requiring criminal intent is committed by the person(s) controlling the affairs of the company; the criminality that would be attributed to them would also go on to be imputed onto the company (since they were

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[20] *Id.*
[21] *Id.*
[22] Vishal Gera & Pierre Uppal, *Alter Ego: Judges and Punishes,* MONDAQ (Jan. 13, 2020) https://www.mondaq.com/india/shareholders/882646/alter-ego-judges-and-punishes.
[23] *Id.*

the "alter ego" of the company). In the present case, the *prima facie* reasons for summoning the directors were the control they exercised in the affairs of the companies and the likelihood that the will of the companies were represented through the directors owing to their controlling position.

The three-judge bench concluded that in instances where the company is the accused party, the directors may only be implicated in situations where ample incriminating evidence exists against the directors to adduce their role and criminal intention for the commission of the crime; or when the statute itself specifies the vicarious liability of directors for the acts of the company.

The bench further held that reliance had been placed erroneously on the principle of alter ego and set aside the order summoning the directors. In light of the criteria it solidified above, it found that in the impugned order, the Special Court had failed to record its satisfaction about the presence of material sufficient to incriminate the directors for the offences. The Supreme Court restated the crucial nature of the phrase "grounds for proceeding" in the statutes concerned and held that an order failing to delve into the reason(s) for the establishment of a *prima facie* case against the said controlling persons could be set aside. Although the Supreme Court made the position of law on this aspect clear, it restated the discretion of the Special Court to further dissect the material that had been placed on record to determine whether sufficient grounds were present to incriminate the Directors concerned.[24]

The court further restated the cardinal principle of criminal jurisprudence that vicarious liability necessarily needed to specifically arise out of the statute and that when a company was deemed an offender, vicarious liability could not be imputed automatically in the absence of any statutory provision stating so. The Court went on acknowledge that

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24 Satish Padhi et al., *Corporate Criminal Liability: Principles Of Attribution And Vicarious Liability Clarified,* MONDAQ (Feb. 05, 2015) https://www.mondaq.com/india/corporate-crime/372090/corporate-criminal-liability-principles-of-attribution-and-vicarious-liability-clarified.

although it was indeed true that *mens rea* could be attributed to a company by way of the principle of alter ego, a reverse application of that principle would require the fulfilment of either of the two conditions it listed above. Later, in *In Reference Amazan Capital Ltd*,[25] the Securities and Exchange Board of India held that unless directors could be held personally responsible for action criminal liability could not be imposed upon the erring directors

The transition from an era of absolute insulation to holding company criminally liable, as a result of the aforesaid judgements, took place without the courts going into the merits of corporate criminal liability. Questions such as whether this has resulted in any deterrence or retribution have not been deliberated upon. Further, the fact that criminal prosecution of a company leads to loss of assets and reputation of the company thereby, hampering the interests of stakeholders has not been considered; effectively leaving the questions left unanswered by the *Iridium* judgement untouched. Although the *Sunil Bharti Mittal* judgement did lay down that director could not vicariously be held liable for the criminal actions of the company, an in-depth analysis of why that was the case could have cleared some ambiguity in this regard. The legislative changes that followed, heralded mainly by the Report of the Committee to Review Offences under the Companies Act, 2013 did go on to address some of the said ambiguity.[26]

III. CHANGE IN LAW

The dissection of corporate criminal liability by the Indian courts has oscillated between finding new avenues and being met with hurdles similar to those in the eighteenth century. A future-proof solution to the issue of attributing liabilities to corporations, therefore, necessarily needed legislative backing. The Government of India (*hereinafter* referred to as

[25] In Re. Amazan Capital Ltd., (2017) SCCOnline SEBI 54 (Ind.).
[26] MINISTRY CORP. AFFAIRS, GOV'T OF IND., REPORT OF THE COMMITTEE TO REVIEW OFFENCES UNDER THE COMPANIES ACT, 2013 (2018), https://www.mca.gov.in/Ministry/pdf/ReportCommittee_28082018.pdf.

"**Government**") has long endeavoured to balance its two crucial priorities of making the legal environment conducive for businesses and of ensuring that reasonable penalties are in place for wrongful acts or omissions by companies. Moves towards striking such a balance have been made to ensure that India fosters a business-friendly environment and the inflow of foreign investment increases.

With the enactment of the Companies (Amendment) Act, 2019 (*hereinafter* referred to as "**CAA 2019**") the Government classified several criminal offences in the earlier Companies Act, 2013 as civil defaults. The Government also proceeded to table the Companies Amendment Bill, 2020 (*hereinafter* referred to as "**CAB 2020**") which aimed to decriminalize another set of compoundable offences under the erstwhile Act.

Even prior to the passage of the CAB 2020, the motive of the Government to uphold the spirit of the CAB 2020 was evident from initiatives like the Companies Fresh Start Scheme, 2020 which pardoned delayed filings with the Registrar of Companies for some categories of companies,[27] and provided immunity to those companies in cases where the Registrar had proceeded to institute criminal proceedings against them.[28]

The CAA 2019 also put in place an In-House Adjudication Framework,[29] which instituted an online platform under the administration of the Ministry of Corporate Affairs (*hereinafter* referred to as "**Ministry**") to deal with various compoundable offences under the Act, replacing the prevailing process of adjudication before the National Company Law Tribunal. The In-House Adjudication Framework entails the settlement of certain offences by the imposition of penalties by an

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[27] MINISTRY CORP. AFFAIRS, GOV'T OF IND., COMPANIES FRESH START SCHEME 2020, GENERAL CIRCULAR No. 12/2020 (Mar. 30, 2020), https://www.mca.gov.in/Ministry/pdf/Circular12_30032020.pdf.
[28] *Id.* at 6(vii).
[29] Companies Act, No. 18 of 2013, §454 (Ind.).

Adjudicating Officer[30] with the goal to clear the immense backlogs that most Indian courts are overwhelmed by and ensure the speedy redressal of matters. These orders may be appealed to the Regional Director of the Ministry. Deterrents put in place include the imposition of criminal sanctions for failure to comply with the orders and higher penalties for repeated offences.

The origin of most of the changes that the CAB 2020 encapsulates is a report published by the Company Law Committee in November 2019.[31] The issue of corporate criminal liability in the report was addressed to the extent of offences that were compoundable, leaving other, more grievous offences unaltered. The amendments in the Companies Amendment Act, 2020 (*hereinafter* referred to as "**CAA 2020**") steer the judicial attention away from wrongs that can objectively be determined and have no correlation with the public interest. The Report too paid specific attention to the fact that the said objective determination was only possible because the wrongful actions/omissions lacked the *mens rea* necessary for criminal prosecution and were thus best reclassified as civil offences which could be rectified upon the payment of penalties. This would also encourage the quick redressal of disputes since the threshold for civil liability i.e., 'preponderance of probability' would be relatively easier to establish.

The findings of the aforesaid report manifested in the CAA 2020, particularly with regard to the decriminalization of the offences in the earlier Act that were compoundable in their nature. In this domain, broadly, the CAA 2020 deleted criminal offences from the Act, excluded imprisonment for an array of compoundable offences and classified the fines as penalties, and decreased the amount of penalty for several other offences.

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[30] MINISTRY CORP. AFFAIRS, GOV'T OF IND., REPORT OF THE COMPANY LAW COMMITTEE, 102 (2019), https://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf.
[31] *Id.*

These changes in the new CAA 2020 indicate a more nuanced understanding of the attribution of liabilities to corporations and simultaneously stand to create a stable framework for ease of business, penalize grievous crimes and reduce the load on the judicial machinery. However, this new model comes associated with its new set of risks and loopholes—ones that could be filled by drawing from prominent legal systems around the world.

IV. FLAWS IN THE PROPOSED MODEL & THE ROAD AHEAD

Although the minimized criminal sanctions on companies for technical and inadvertent errors in the CAA 2020 could be considered a welcome change, the civil penalties associated with the acts that were earlier classified as offences could simply be deemed regular business expenses by companies, and defeat the objective of the legislation.[32] A fixed set of penalties applying to companies of various sizes and risk-appetites could simultaneously skew the likelihood of deterrence to certain, specific classes of companies and have other classes of companies remain unaffected.

Earlier, penal consequences also came associated with a loss of goodwill for companies and led them to take steps to reduce the likelihood of criminal prosecution. This was more excessive for some acts (like technical errors) and less for others. The reclassification of criminal offences which, despite being short of grievous, still require a deterring effect for companies to adequately comply with, might now be seen with an air of nonchalance. One of the shortcomings of this method of imposition of fines is that companies could deliberately violate the law as the loss incurred due to the imposition of penalties may be much lesser than the advantages gained through such violations.

[32] *Id.*

Further, the adjudication of penalties under the In-House Adjudication Framework has now been entrusted to a non-judicial body i.e., the Adjudicating Authority—which may be the Registrar of Companies or the Regional Director, both of whom are under the Central Government.

The relaxations in the CAA 2020 could potentially cause the executives of companies to act in a complacent manner, and remain shielded from liabilities for acts that would otherwise have been considered offences. A deeper understanding of the grapple to attribute criminal liability to corporations may be gained from an overview of what other jurisdictions have encountered.

The recent trajectory taken by the Indian government appears to be consistent with the criticism of the American scholars and the developments in the domain of attributing criminal liabilities to corporations and those who run them have been boosted by both the judiciary and the legislature.

Given that the imposition of criminal sanctions has substantial chances of reducing the likelihood of prosecution of companies,[33] the CAA 2019 and CAA 2020, along with the other allied schemes have been welcome changes for turning India more business-friendly. However, certain hurdles could likely still be met with, in the execution of these new changes. Although the reclassification of certain minor technical errors to civil wrongs would serve as an undisputed and welcome change, the reclassification of other graver offences could render them insufficient in acting as a deterrent for certain classes of companies. With this blueprint in place, these newer loopholes would be more subdued and could easily be rectified by creating different penalty brackets for different classes of companies. The inequity associated with penalizing all sorts of companies in a similar manner by identifying brackets for turnover, market

[33] John T. Byam, *The Economic Inefficiency of Corporate Criminal Liability*, 73(2) J. CRIM. L. & CRIMINOLOGY 582 (1982).

capitalization or whether the company is publicly traded or not would make way for a more layered approach to the apportionment of fines.

Practically, the disputes related to corporations could therefore be redressed sooner if the criminal offences in the Act continue to be classified as civil offences, given access to alternative recourses like mediation and arbitration, and the lower threshold for establishing liability in civil offences.

However, an array of offences that may be deemed to be committed by companies ought to still remain in place for malicious actions that cause damage to the public and the economy at large. The government would be required to adopt more sophisticated measures to conduct market studies and gain more clarity on the level of damage caused by such wrongful actions in order to devise approaches to abate the same and take a more sophisticated approach to apportion liabilities. The manner in which the company is constituted and its internal structure of governance should also be required to be scrutinized for instances where the guilt of the directors is being ascertained in line with the two principles laid down in *Sunil Bharti Mittal*: (a) ample incriminating evidence exists against the directors to adduce their role and criminal intention for the commission of the crime; or (b) when the statute itself specifies the vicarious liability of directors for the acts of the company.[34]

Further, the legislation would also be required to find newer ways to ensure larger companies, with decentralized powers, are not implicitly safeguarded from the likelihood of criminal penalties and that the controlling powers of the directors don't aid the shrewd dilution of their potential liabilities.

[34] *Supra* note 24.

V. POSITION IN THE UNITED KINGDOM AND THE UNITED STATES

A. CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

In the United Kingdom, a corporation may be prosecuted for crimes committed by the individuals acting on behalf of the company when (a) the Parliament has enacted specific legislation to identify criminal offences for corporates; (b) vicarious liability is attracted for regulatory offences not requiring any proof of mental fault; and (c) offences are committed by individuals who can be "said to be the directing mind and will" of the corporation.[35]

The third scenario is referred to as the identification theory in the United Kingdom, which is similar in principle to the Doctrine of Alter Ego. This theory limits the ambit of a company's vicarious liability to individuals whose acts/omissions may result in the attribution of liability to the company.[36] Finding that the state of mind of the company was that of the individuals who represent the directing mind and will of the company, Lord Denning, J. in the case of *H L Boulton (Engineering) Co. Ltd v. T J Graham and Sons Ltd.*[37] held as under:

"A company in many ways may be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

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[35] Ali Shalchi, *Corporate Criminal Liability*, HOUSE COMMONS LIBR. (May 5, 2021) https://researchbriefings.files.parliament.uk/documents/CBP-9027/CBP-9027.pdf.
[36] SMITH AND HOGAN, CRIMINAL LAW 178 (7th ed. 1992).
[37] H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd., [1957] 1 QB 159.

Further, in *Tesco Supermarket v. Nastrass,*[38] Lord Reid held that in order for liability to attach to the actions of a person, it must be the case that "*the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts, is the mind of the company. If it is a guilty mind, then that guilt is the guilt of the company."* The identification principles laid down by Lord Reid in this judgement were later reaffirmed in *St Regis Paper Co. Ltd. v. R.*.[39]

The identification doctrine, in the manner enunciated above, is applicable to all criminal offences which could be said to have been committed by someone acting within their authority[40]. While the "directing mind" of a company is identified, prosecutors in the UK consider the manner in which the company is constituted, the delegation of authority within it and its internal structure of governance,[41] as opposed to simply associating seniority to a position of authority. However, in *The Serious Fraud Office v Barclays PLC & Anr.,*[42] the judge advocated for keeping the scope of the identification doctrine narrow and restated that the Parliament continued to have the flexibility to take specific instances and classify them as new corporate criminal offences.[43] The narrative that the legislature alone could act to remedy the shortcomings of the identification theory had begun to gain traction back in 2010, with the passing of the Bribery Act 2010 until recently, with the passing of the Criminal Finances Act 2017, which imposed liabilities on corporations for failing to prevent the facilitation of tax evasion by individuals that were associated to them. The judgement in *Barclays* made way for further Parliamentary deliberations about how larger companies

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[38] Tesco Supermarkets Ltd. v. Nattrass, [1972] AC 153.
[39] St. Regis Paper Co. Ltd. v. R. [2011] EWCA Crim 2527.
[40] *Supra* note 35 at page 6.
[41] *Corporate Prosecutions*, CROWN PROSECUTION SERV. (Oct. 12, 2021) https://www.cps.gov.uk/legal-guidance/corporate-prosecutions.
[42] The Serious Fraud Office v. Barclays PLC & Anr. [2018] EWHC 3055 (QB).
[43] S. Cogman et al., *No "Directing Mind and Will" Found in SFO Prosecution of Barclays*, HERBERT SMITH FREEHILLS (May 5, 2020) https://hsfnotes.com/fsrandcorpcrime/2020/05/05/no-directing-mind-and-will-found-in-sfo-prosecution-of-barclays/.

with decentralized powers could have lower exposure to criminal liability and how reforms needed to have a more layered approach to classifying governance structures.[44]

B. CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES OF AMERICA

In the United States, as a general standard, federal criminal laws apply to corporations—some legislations refer to corporations specifically while others include corporations in their definitions.[45] In the landmark case of *New York Central R. Co. v. The United States,*[46] the US Supreme Court solidified its support for holding corporations liable for criminal acts and the *respondeat superior* test. The *respondeat superior* test holds an employer liable for the wrongful acts of its employee(s)—provided their actions are within the scope of their employment. This also applies to principal-agent relationships. When this doctrine is invoked, both the employer and the employee is likely to be held liable. This doctrine is applied to an employer irrespective of how closely it was supervising the conduct of its employee.[47]

On the federal level in the United States, it is also not uncommon for the collective action of many employees to result in liability for the corporation, even when no single employee has committed an offence.[48] The corporation is deemed to have knowledge of the commission of a certain act when *"one part of the corporation has half the information making up the item, and another part of the entity has the other half."*[49] In the *United States v.*

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[44] *Supra* note 41.
[45] *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES 107 (1st ed., 2002)
[46] New York Central R. Co. v. United States, 212 U.S. 481 (1909).
[47] *Respondent Superior*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/respondeat_superior (last visited Oct. 20, 2021)
[48] United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987), cert. denied 108 S. Ct. 328 (1987).
[49] In re WorldCom, Inc. Securities Litigation, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005).

Bank of New England,[50] the bank failed to report transactions of over $10,000 to the U.S. Treasury for a customer that made separate withdrawals totalling to over $10,000 by presenting cheques to different tellers. The court made note of the practice of compartmentalization of information by corporations and held that the aggregate of those components ought to be treated as the knowledge of the corporation and highlighted that the onus to create a structure where each employee had a holistic view of the transactions was on the corporation.

Although the Supreme Court, in the *New York Central* judgement did lay down that there were certain offences organizations could not commit, no federal decisions identifying such offences followed. To further the objectivity in the domain of corporate criminal liability, the American Law Institute's Model Penal Code (*hereinafter* referred to as "**MPC**") went on to be adopted by several states. The MPC had a limited approach to the apportionment of liability to corporations and rejected the *respondeat superior.*[51] The MPC limited the liability of corporations to instances where *"the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."*[52]

Several American scholars have argued that corporate criminal liability should be abandoned altogether, asserting that moral wrongs require the possession of certain capabilities like rationality, autonomy and emotionality,[53] and that holding corporations vicariously liable for criminal

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[50] United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987), cert. denied 108 S. Ct. 328 (1987).
[51] Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability*, 126 ZEITSHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 27 (2014).
[52] MODEL PENAL CODE §2.07(1)(c) (1962).
[53] MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 596–617 (1997).

acts circumvents the principle in criminal jurisprudence that requires persons to be responsible for their own intentions and actions.[54]

VI. CONCLUSION

The development of corporate criminal liability in India has seen a great sea change from the original framework of the Companies Act, 1956. The courts originally tackled the hurdles of whether fines could be levied for criminal offences in exclusion to imprisonment (when the statutes required both), and whether companies were indeed capable of having the necessary *mens rea* to commit crimes. This led to the ultimate question of how the "alter ego" of the company in such instances was to be treated.

The development of the principle of alter ego greatly began with the *Iridium* judgement, where the Supreme Court held that criminal accusations levelled against individuals who are solely responsible for the functioning of the company could be imputed onto the company too. In *Sunil Bharti Mittal*, the Supreme Court invalidated the reverse application of this principle and held that the offences committed by the companies could not be imputed onto the directors or those who represent the mind and will of the company. The Law Committee's Report delved deeper into the issue of criminal liability being associated with companies and suggested the reclassification of many criminal offences to civil wrongs, taking a considerate view of how much of a deterrent criminal prosecution actually serves as and the already overwhelmed Courts and Tribunals.[55]

This Report and extensive parliamentary deliberations led to the passage of the CAA 2019 and CAA 2020, which put a rest to the dilemma many courts in India were put through and filled the gaps in many individual judgements. However, there is still space for reform in certain

[54] John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 418 (1981).
[55] *Supra* note 30 at 14.

aspects like the detailing of the manner in which grave offences affecting the public at large would be identified (an aspect the Report of the Law Committee left unchanged) and the extent of that effect, the mechanism by way of which courts would dissect the internal governance structures of companies for the imposition of fines, and variation of fines based on the nature of the companies. While on one hand, India continues to follow the 'comply or else' approach—where there is no option but to follow the rules; on the other hand, it has also been recognized that there exists an over-criminalisation of corporate offences which has been toned down by decriminalising certain offences. Thus, somewhere we have accepted that the strict approach needs to be toned down. But still there is resistance towards adopting 'comply or explain' approach.