

CORPORATE CRIMINAL LIABILITY: FINDING SETTLED SHORES?—A COMMENT ON *IRIDIUM INDIA TELECOM V. MOTOROLA INC.*

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ABSTRACT

Corporations today exist as important actors in almost every sphere of individual, social and political activity. This comment seeks to explore the criminal liability of corporations in India, especially concerning itself with the recent decision of the Supreme Court in *Iridium India Telecom v. Motorola Inc.* A study is also undertaken of the position of law on corporate criminal liability in India and the United Kingdom, so as to situate the comment in the context of the existing principles in this emerging area of legal study. The comment critically analyses the Court's decision at length, with a brief discussion on the aspects of the matter that were not adjudicated and the questions that remain to be answered by the court where the matter is finally adjudicated on merits.

INTRODUCTION

Across the globe, the position of law with respect to corporate criminal liability has been shrouded in speculation, inconsistency and controversy.¹ With the increasing role of large multinational corporations in the world economy today and the growing stature of India as a preferred global investment destination, the nature and extent of corporate criminal liability in India definitely assumes a unique significance.

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1 See e.g., Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (the 'corporate ethos' standard of liability as representing corporate *mens rea*); Hall, *Corporate Criminal Liability*, AM. CRIM. L. REV. 549 (1998) (analysing the elements of corporate criminal liability and discussing the use of corporate compliance programs to limit liability); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999) (discussing the various standards of *mens rea* and arguing for their replacement by a strict liability or negligence standard); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, II SYDNEY L. REV. 468 (1988) (proposing that courts impose criminal liability on a corporation that covers up criminal conduct); *Developments in Law -Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1978-1979) (discussing a liability standard based on corporate procedures that fail to prevent corporate criminal violations); Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3 (1984) (analysing the historical development of corporate criminal liability); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 HARV. L. REV. 1477 (1996) (comparing the costs and benefits of corporate criminal liability vis-à-vis other liability strategies).

Corporate criminal liability shot to significance in Indian legal circles after the Bhopal gas leak tragedy in 1984.² The need for effective laws to bring the perpetrators of the disaster to book dawned with realisation that the provisions of the century old Indian Penal Code³ were woefully inadequate to tackle the nature of crimes committed by large business corporations.

The past two decades have seen the Indian legal profession violently woken up to the fast emerging reality of globalisation, the impacts of which were simply too phenomenal to ignore. New areas of law, which were hitherto unknown or meted out with a proverbial step-motherly treatment have since acquired a special place in the profession. Antitrust law, Intellectual Property Rights Law and Alternative Dispute Resolution are the most obvious examples of the emergence of such new areas of interest. Corporate criminal liability too finds a place among these disciplines, with an increasing number of corporations finding themselves on the wrong side of the Indian criminal law. The present case, therefore, must be examined in the background these changes in the existing legal system.

The fundamental issue addressed in this paper is the legal position of corporations in the criminal law of our country, discussed in the background of the judgement in *Iridium India Telecom Ltd. v. Motorola Incorporated*.⁴ While Part I serves as a statement of the position of law as it existed prior to the decision; Part II discusses the background of the case and its holding and Part III critically analyses the legal and logical tenability of the decision. Part IV examines the various questions left unanswered by *Iridium*. The conclusion summarises the entire issue, briefly discussing the consequences of the decision and putting forth suggestions for the future of the concept of corporate criminal liability.

I. THE POSITION OF LAW PRIOR TO *IRIDIUM*

The Indian courts often turn to the depth of the common law to fill voids in new, developing or nascent fields, the law of contract, tort and taxation being just few examples of this trend. It is therefore not surprising that Justice Nijjar turned to the time tested formulations of English law in deciding the present matter. It would be most inappropriate, therefore, to proceed with the examination of a landmark case on the subject of corporate criminal liability without first undertaking a brief study of the development of common law in this area and the corresponding developments in Indian law.

2 See UPENDRA BAXI & AMITA DHANDA, VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE(1990).

3 No. 45 of 1860 [hereinafter the Code].

4 (2010) 160 CompCas 147 (SC) [hereinafter *Iridium*].

A. The Position of English Law

The present Indian law on the subject being greatly influenced by developments in English law, the historical development of the attribution of *mens rea* to corporations in English law makes for interesting analysis even to a person undertaking a study of the Indian corporate criminal liability regime alone.⁵

At first, a company was treated independently, distinct in its existence from its owners or shareholders,⁶ but with the passage of time and the increase in activities carried out by corporations, courts in most jurisdictions took to what is commonly referred to as ‘piercing the corporate veil’ theory.⁷

The first significant case on attribution of corporate responsibility was *DPP v. Kent and Sussex Contractors Ltd.*,⁸ in which it was held that a company identified with those officers who are its ‘directing mind and will’.⁹ Today referred to as the ‘identification principle’, this formulation received acceptance immediately,¹⁰ and was further crystallised by Lord Denning in *H.L. Bolton Co. Ltd. v. T.J. Graham & Sons*,¹¹ where he compared a company to a human body, likening the directors and managers to the ‘brain’ of the company and thereby allowing attribution. In *Tesco Supermarkets v. Natrass*,¹² the House of Lords further approved this approach.

Recently, this principle was further qualified in *Meridian Global Funds Management Asia Ltd. v. Securities Commission*¹³, where the Privy Council held that ‘...courts should be prepared to go beyond the people who represent the

5 ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 117 (5th ed., 2006) (1991) [hereinafter ASHWORTH, CRIMINAL LAW].

6 *Salomon v. A Salomon & Co Ltd.*, (1897) AC 22 (The owner of a company was allowed to claim sums due to him as a debenture holder before the outside creditors of the company were paid).

7 See generally, *Jones v. Lipman*, (1962) 1 WLR 832; *Booth v. Bunce*, 33 N.Y. 139 (1865); *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173, 179 (1839); *U.S. v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (C.C.E.D. Wisc. 1905); I.M. Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. (1912); J Dewey, *The Historic Background of Corporate Legal Personalit.*, 35 YALE L. J. (1926).

8 (1944) KB 146.

9 The case concerned two offences, making a statement known to be false and using a false document with intent to deceive. Viscount Caldecote CJ held the company liable on both counts, laying down what is today known as the ‘Identification Principle’.

10 The principle was adopted and used by the courts that very year in two cases: *ICR Haulage Ltd.*, (1944) KB 551; *Moore v. I Bresler Ltd.*, (1944) 2 All ER 515.

11 (1956) 3 All ER 624. A difficulty with this exposition was that companies could now escape sanctions on the ground that single human component of the company was responsible for forming the *mens rea* necessary to found a criminal prosecution.

12 (1972) AC 153 (In this case a company was convicted for selling goods at a higher price than indicated, in violation of the Trade Descriptions Act, 1968).

13 (1995) 2 AC 500 (In this case employees of a company acting within the scope of their authority, but unknown to the directors, used company funds to acquire some shares. The question was whether the company knew, or ought to have known that it had acquired those shares).

directing mind and will of a company.’ Lord Hoffman stated that the court should enquire as to whose act (or state of mind) was for this purpose intended to count as the act of the company, stating that such enquiry would depend from case-to-case on the ‘statutory context.’¹⁴

B. The Position of Indian Law

The position of law in India, however, has been far more nebulous and ambivalent. Most Indian statutes specifically include references to corporations in definitions of personality.¹⁵ The controversy surrounding the culpability of corporations in offences requiring mandatory imprisonment as a punishment was discussed by the Law Commission of India¹⁶ and it suggested an amendment to the Code to allow the prosecution of corporations for such offences. To that end, the Indian Penal Code (Amendment) Bill, 1972 was introduced, purporting to add Section 72(1)(a) and make imposition of fine the sole punishment for corporations in the aforementioned cases.¹⁷ However, the bill lapsed and was never re-introduced.

Indian courts today recognise corporate criminal liability, but with the twin reservation that: *first*, certain acts because of their nature cannot be committed by a corporation, such as rape, murder, etc. and *secondly*, corporal punishment cannot be imposed on the corporation but the corporation could be punished by imposition of fine.¹⁸ In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted in common law for statutory offences, including those requiring *mens rea*.¹⁹ However, Glanville Williams adds:

*A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings.*²⁰

14 Meridian Global Funds Management Asia Ltd. v. Securities Commission, (1995) 2 AC 500.

15 See § 11, The Code; § 3(42), General Clauses Act (No. 10 of 1897); § 2(31) (iii), Income Tax Act (No. 43 of 1961); § 2(4), Foreign Exchange Management Act (No. 42 of 1999); § 2(1), Competition Act, 2002 (No. 12 of 2003); § 2(s), Prevention of Money Laundering Act (No. 15 of 2003); § 2(49), Indian Electricity Act, (No. 36 of 2003).

16 LAW COMMISSION OF INDIA, 41ST REPORT, 1972.

17 The text of the proposed section reads as follows: “In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent for the court to sentence such offender to fine only.”

18 RATANLAL & DHIRAJLAL, THE INDIAN PENAL CODE 71 (31st ed. 2006).

19 Madras Port Trust v. A.M. Safiulla & Co., AIR 1965 Mad. 133.

20 GLANVILLE WILLIAMS, TEXT BOOK OF CRIMINAL LAW 970 (2nd ed. 1961).

The central issue of controversy is that a juristic person cannot easily be attributed with *mens rea*, required as an essential ingredient of most criminal offences.²¹ Furthermore, even once such state of mind is imputed to a corporation, in cases where punishment for the offence necessitates mandatory imprisonment, the stage of sentencing creates a fresh quandary for the courts.²² As the second of these two issues has been conclusively settled by the Supreme Court previously,²³ this comment seeks to address the first issue in the light of the recent decision in *Iridium*.

II. *IRIDIUM*: LEADING UP TO THE HOLDING

The factual matrix germane to the dispute was that Iridium India Ltd.²⁴, along with certain other public institutions²⁵, was induced into making investments to the tune of US \$70 million in Iridium Inc.²⁶, for their ambitious Iridium satellite communication project. Based on Iridium's representations put forth in their Private Placement Memorandums (PPMs) of 1992 and 1995, as well as on representations of Motorola Incorporated²⁷ in its personal capacity, several investors invested around Rs. 600 crore in Iridium.²⁸ Later, the project failed commercially and Iridium Inc. filed for bankruptcy in the USA. The Iridium system and its assets were eventually sold for 0.4% of their purchase value.²⁹

Since Motorola was the dominant personality behind the operations of Iridium,³⁰ and also conceived and executed the Iridium business model; given that Iridium was now bankrupt, the impugned complaint was directed towards Motorola. Also, interestingly, most systems for the project had been purchased from Motorola

21 State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722; W.O. RUSSELL, RUSSELL ON CRIME17 (12thed. 2001); P.S.A. PILLAI, CRIMINAL LAW27 (10thed. 2009).

22 Assistant Commissioner v. Velliappa Textiles Ltd., (2003) 11 SCC 405.

23 Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 SCC 405 [hereinafter *Standard Chartered*].

24 Hereinafter Iridium India.

25 These included inter alia, major public financial institutions like Industrial Development Bank of India (IDBI), State Bank of India (SBI), Export Import Bank of India (EXIMP Bank), Housing Development Finance Corporation Ltd. (HDFC) and Life Insurance Corporation of India (LIC).

26 Hereinafter Iridium. Iridium Inc. had an extremely complex ownership structure, but it would suffice to know that in 1996 it had merged into Iridium LLC. Iridium LLC, a corporation incorporated in Delaware, was in turn a wholly owned subsidiary of Motorola Incorporated.

27 Hereinafter Motorola.

28 *Iridium*, *supra* note 4, ¶ 25.

29 *Id.*, ¶ 16.

30 It was Motorola who had conceived, directed and controlled Iridium and was at all material times Iridium's dominant shareholder and at the time of the impugned transaction, Motorola continued to hold about 20% equity in Iridium. It was also further alleged that most of the persons on the board of Iridium were either former or current employees of Motorola who had been deputed or seconded to Iridium.

itself, for a fully paid consideration estimated to be worth around \$6.5 billion.³¹

The chief allegation in the criminal complaint was that Iridium India, along with certain financial institutions, had invested their funds on the strength of the representations in the PPMs, which had now emerged as ‘false, dishonest, fraudulent and deceitful’.³² It was alleged that the representations were false from the very beginning and the project had, to the knowledge of Motorola, been unviable from inception.³³ To substantiate this, reliance was placed on the fact that in the early 1990’s Motorola had themselves rejected a proposal to fund the project with their own funds.³⁴ Also, initial market research that Motorola had commissioned revealed that the system would not be of much use to the purported target group, business travelers.³⁵ Another research project had stated the project to be viable only for oil rigs or in the desert.³⁶

On 3 October 2001, a criminal complaint was filed by Iridium India against Motorola under Section 420 read with Section 120B of the Code.³⁷ On 6 November 2001, there was an issue of process by the Judicial Magistrate, Khadki, Pune. The accused appealed to the High Court under Article 227 of the Constitution and Section 482 of the Code of Criminal Procedure³⁸ and sought immediate quashing of the complaint. The High Court accepted their submissions and quashed the order issuing process in 2003.³⁹ The matter subsequently came up before the Supreme Court on appeal.

Iridium India argued, at first, that the power to quash a criminal complaint must be exercised ‘very sparingly and with abundant caution’, in accordance with the guidelines laid down in *State of Haryana v. Bhajan Lal*.⁴⁰ It was also argued, on the strength of various precedents, that the High Court could only consider the complaint as a whole and not delve into the merits of the matter.⁴¹

Motorola, on the other hand, remained defiant, arguing that the entire project was and is a technological success, citing its use in global aerospace programs and the

31 *Iridium*, *supra* note 4, ¶ 6.

32 *Id.*, ¶ 11.

33 *Id.*, ¶¶ 11-13.

34 *Id.*, ¶ 13.

35 *Iridium*, *supra* note 4, ¶ 14.

36 *Id.*

37 The offences made out therein are Cheating and dishonestly inducing delivery of property (420) and Criminal Conspiracy (120B).

38 No. 2 of 1974 [hereinafter CrPC].

39 *See* *Motorola Incorporated v. Union of India*, CriLJ 1576.

40 (1992) Supp. (1) SCC 335.

41 *Smt. Nagawwa v. Veeranna*, (1976) 3 SCC 736; *Municipal Corporation of Delhi v. Ram Kishan Rohtagi*, (1983) 1 SCC 1; *Dhanalakshmi v. R .Prasanna Kumar*, 1990 (Supp) SCC 686.

defence departments of different countries.⁴² It further argued that even if it was accepted that the project was not successful, this fact alone was grossly insufficient to establish that it had any dishonest or fraudulent intention. Lastly, it was contended that the 1992 PPM contained all the necessary information, including a list of risk factors.⁴³ Since estimates in the PPM were based on future assumptions, the mere non-realisation of these could not establish *mens rea*. Also, the investors were professional institutions advised by their own experts and it could not be presumed that their decision was based purely on PPM's advise.⁴⁴

Coming to the central issue of corporate criminal liability, it was argued that as cheating was an offence punishable with mandatory imprisonment,⁴⁵ it would be absurd to permit proceedings to go any further. Also, the alleged offence being one requiring the definite presence of *mens rea*, it could not be imputed to a company at all. In light of this, it was submitted that there could not be any criminal liability in such a case as the necessary ingredients of the offence of cheating were not and could not be made out in such a situation.⁴⁶

These arguments were refuted based on the decision of a Constitution Bench in *Standard Chartered Bank*,⁴⁷ which held, albeit by a narrow majority, that a corporation could be made liable for an offence punishable with mandatory imprisonment.⁴⁸ Several of the aforementioned foreign authorities were cited in support of the proposition that corporations are capable of possessing *mens rea*.⁴⁹

The Supreme Court duly considered the arguments on the powers of the High Court under Section 482 of the CrPC and only reiterated the well established rule that such power was to be exercised with great caution and only in exceptional circumstances.⁵⁰ It then briefly summarized the now established position regarding the liability of corporations in offences providing for a mandatory term of imprisonment before going on to discuss at length the issue of corporate criminal liability in offences involving *mens rea*.

42 *Iridium*, *supra* note 4, ¶ 29.

43 *Id.*

44 *Id.*

45 The punishment prescribed under Section 420 of the Indian Penal Code is "imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

46 *Iridium*, *supra* note 4, ¶ 29.

47 (2005) 4 SCC 50.

48 It is important to distinguish the present matter from the facts of *Standard Chartered* in so far as in that case, the offence in question was under Section 51 of the Foreign Exchange Regulation Act, 1973 imposes strict liability and therefore requires no enquiry into the *mens rea* of the corporation. In the present case however, Section 420 of the Indian Penal Code uses the terms 'dishonestly induces' and necessitates the presence of *mens rea*.

49 *See supra* notes 8-13.

50 *Iridium*, *supra* note 4, ¶ 44.

Regarding the issue of proceeding against a corporation in offences necessitating mandatory imprisonment, the Court dismissed the respondents' claims, taking note of its decision in *Standard Chartered*⁵¹ and concurring *in toto* with the majority judgment in that case.⁵² Notably, the Court refused to entertain arguments seeking to distinguish that decision and other similar judgments⁵³ on the ground that it pertained to special legislation, thereby extending the ratio laid down in *Standard Chartered* to all offences.

In considering the question as to whether a juridical person could be made liable for offences involving *mens rea*, the Court noted that the 'issues involved are of considerable importance to the parties in particular, and the world of trade and commerce in general'⁵⁴ and accordingly went on to analyse the position of law on the subject in several other countries.⁵⁵ On consideration of these authorities, the court arrived at the conclusion that the universally accepted position was that corporations could be liable for offences requiring *mens rea*.⁵⁶

While adding to its decision the caveat that the matter was to be considered on merits only by the appropriate lower court,⁵⁷ the Court nevertheless observed:

*From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons .*⁵⁸

In doing so, the court has effectively imported the 'identification principle', a product of the common law, into the Indian law on corporate criminal liability.

51 (2005) 4 SCC 405.

52 *Iridium*, *supra* note 4, ¶ 40.

53 Kalpnath Rai v. State, (1997) 8 SCC 732; Zee Ltd. v. Sahara India Co. Corporation Ltd., (2001) 1 CALLT 262.

54 *Iridium*, *supra* note 4, ¶ 44.

55 *Id.*, ¶44. The Court noted with approval the decisions in: New York Central & Hudson River Railroad Co. v. United States, (53 L Ed 613); DPP v. Kent and Sussex Contractors Ltd., (1944) 1 All ER 119; H.L.Bolton (Engg.) Co. Ltd. v. T.J. Graham & Sons, (1956) 3 All ER 624; Tesco Supermarkets Ltd. v. Nattrass (1971) All ER 127; The Director, Central Railway Company of Venezuela v. Joseph Kisch (1867) 15 WR 821; Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., () AC 705.

56 *Iridium*, *supra* note 4, ¶ 40.

57 *Id.*, ¶ 45.

58 *Id.*, ¶ 38.

Strictly speaking, these observations would constitute little more than *obiter*, it would be but natural for later decisions to pay heed to the Court's proclamation of the law on the subject, therefore making the identification principle almost certainly the established law on the subject.

In conclusion, the court specifically criticized the Bombay High Court's consideration of the matter *in extenso* on merits,⁵⁹ going on to allow the appeal and set aside the order of the Bombay High Court, thereby allowing further investigation and proceedings.

III. UNSETTLED ISSUES

The present decision is the first major decision in the field of corporate criminal liability after the *Standard Chartered* case. It has been welcomed by most as a much needed measure in ensuring the effective prosecution and conviction of corporations. However, as the matter was in the nature of a petition to quash the issue of process, it was not conclusively decided on merits, consequently leaving several extremely interesting questions of law open.

Motorola's central defence was that it had included a detailed chapter on 'risk factors' in its PPM, thereby protecting itself against claims of fraud at a later stage.⁶⁰ It had also claimed that since Iridium India was a large institutional investor, it had at its disposal its own analysts and experts, therefore precluding their claim of 'deceit and deception'.⁶¹ The determination as to where the courts draw the line between a mistaken business decision by one party and deception by the other would certainly involve complex issues of both corporate and criminal law.

Furthermore, the court declared in its decision that the Indian position is now 'almost the same' as the Canadian position.⁶² The exception to the rule of attribution in Canada is when the directing mind is himself defrauding the corporation, in which case liability cannot be attached to the corporation.⁶³ Whether or not this exception can be made applicable in India is a debatable proposition, since the court has not expressly discussed any such exception to the rule of attribution, it having no real bearing on the issue at hand.

Lastly, the true extent of the rule attribution is yet to be ascertained in Indian law. The current trend of simply aggregating the acts and omissions of two or more natural persons acting for the corporation could have absurd results, as seen in

59 *Id.*, ¶ 45.

60 *Id.*, ¶19.

61 *Id.*, ¶ 19.

62 *Id.*, ¶ 38.

63 *R. v. Canadian Dredge & Dock Co.*, (1985) 1 SCR 662; *Stephens v. Stone Rolls Ltd.* (2009) UKHL 39.

United States v. Bank of New England.⁶⁴ Also, it has been seen that very often, corporations acquire a momentum and dynamic of their own which temporarily transcends the actions of their officers.⁶⁵ In these cases, the simple aggregative rule of attribution would not suffice in attaching liability.

Corporate criminal liability is a new and emerging area of law in India and the proliferation of corporations at every level of economic activity in the country promises that the *Iridium* decision is far from the last word on the subject. It can only be hoped that a court that eventually does hear the matter on merits conclusively adjudicates the various questions that the Supreme Court has, in its wisdom, left open for determination.

IV. *IRIDIUM* AND THE EXPRESSIO UNIUS APPROACH

Those who have undertaken a study of a judicial decision will testify to the veracity of the proposition that in such analysis, what a Court leaves unstated is often just as important as what it states in its pronouncement. In that context, a notable omission on the part of the Supreme Court was the absence of the reference to the Privy Council's relatively recent decision in *Meridian Global Funds Management, Asia v. Securities Commission*.⁶⁶ That decision is widely recognised as the seminal judgment on the issue of attributing *mens rea* to corporations and is regarded as *locus classicus* in most common law jurisdictions. The judgment also failed to note the Kerala High Court's decision in *Reji Michael v. M/s. Vertex Securities Ltd.*⁶⁷ where it had been held that all juristic persons come within the definition of person for the purpose of Section 415 of the Code.

While concluding, the court stated that corporations could be convicted for offences requiring *mens rea*, irrespective of whether they were 'statutory or common law offences'.⁶⁸ Since in the Indian context crimes must be specified by legislation,⁶⁹ the question of 'common law crimes' does not arise and therefore, such a reference, while relevant in English law, could be misleading in the Indian context.

An issue of great importance that any court of law that adjudicates the matter on merits would have to deal with concerns the standard of proof that would be required to prove successfully the use of 'fraudulent' or 'dishonest' means by another party in a private business dealing. In transactions involving issue of securities that

64 821 F.2d 844 (1987) (In this case it was a statutory requirement for the bank to report fortnightly all transactions above \$10,000. A customer withdrew in excess of that amount by simultaneously presenting cheques of lesser amounts to a single bank teller. court held the bank liable, applying the rule of aggregation.).

65 ASHWORTH, CRIMINAL LAW, *supra* note 5, at 118.

66 (1995) 2 AC 500.

67 1999 CrLJ 3787 (Ker.).

68 *Iridium*, *supra* note 4, ¶ 38.

69 CONSTITUTION OF INDIA, art. 20.

are listed or proposed to be listed on a recognised stock exchange, the Securities and Exchange Board of India Act⁷⁰ lays down an express bar.⁷¹ However, the nature of the issue of securities in this case being a private placement, the determination of the standard of proof required to impeach a PPM as fraudulent would be a milestone as far as corporate criminal liability in India is concerned.

Furthermore, the ratio laid down in these recent cases firmly establishes the proposition that the punishment for crimes by a corporation must be by levy of fine alone. This pedantic approach to addressing the malaise of corporate crime has been severely criticised by scholars in the field.⁷² Ashworth points out the fallacy in this position, observing that:

*A company can hardly be imprisoned...moderate fines can be swallowed up as business overheads and swingeing fines may have such drastic side-effects on the employment and livelihood of innocent employees, so as to render them inappropriate .*⁷³

However, several scholars have proposed alternative methods of punishing corporations and ensuring justice for victims of corporate crime. These include ingenious solutions such as the reactive fault theory,⁷⁴ compulsory community service,⁷⁵ in what Sullivan terms as ‘expressing corporate guilt’⁷⁶, severe punitive damages⁷⁷ and corporate probation.⁷⁸

70 No. 15 of 1992.

71 In Chapter VA of the SEBI Act, inserted by the SEBI (Amendment) Act, 2002, there is in fact an express prohibition laid down; ‘Section 12A. No person shall directly or indirectly – (c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognized stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder...’

72 See Michael Jefferson, *Corporate Criminal Liability: The Problem of Sanctions*, 65 J. CRIM. L.235 (2001) (discussing inter alia, the merits and demerits of fines as the only sanction for corporate crime); John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982) (arguing that corporate criminal liability is inefficient from the perspective of deterrence); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 421 (4th ed. 1992).

73 ASHWORTH, *CRIMINAL LAW*, *supra* note 5, at 121.

74 FISSE & BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* 135 (1993). Often dismissed as a ‘post-hoc phenomenon’, this approach requires action to be taken by the corporation itself and then mandates a subsequent assessment by the courts, of the adequacy of measures taken by the company.

75 Fisse, *Community Service as a Sanction against Corporations*, WISC. L.R. 970 (1981).

76 GR Sullivan, *Expressing Corporate Guilt*, 15 OXFORD JLS 281 (1995).

77 Buries, *The Criminal Liability of Corporations*, 141 N.L.J. 609 (1991). However, it is submitted that in light of very high damages companies may be less willing to settle quickly than they otherwise would be and accordingly, the compensation process would be dragged on even longer than it now is.

78 Gruner, *Preventive Fault and Corporate Criminal Liability: Transforming Corporate Organizations into Private Policing Entities*, 16 A.J. CRIM. R.16 (1988); Gobert, *Corporate Criminality—Penal Sanctions and Beyond*, 2 WEB. J.C.L.1 (1998).

The issues in *Iridium* involve several aspects of corporate criminality and corporate personality which, though addressed by the court, are still far from settled. A truly final and binding decision of these issues shall be obtained only after the trial concludes and subsequent appeals lapse. It can only be hoped that all the various facets of the concerned issue are suitably addressed by the courts.

CONCLUSION

In 2002, when Donald Rumsfeld spoke of ‘known knowns’ and ‘known unknowns’, the context was indeed altogether different.⁷⁹ However, what can be gleaned from his statement and what is useful to us in the present context is the significance of an opportunity. That corporate criminal liability is a new area of law and that the Indian judiciary will soon have to create appropriate formulations as regards culpability, attribution and evidence in such cases are undeniable truths. What remains to be seen, however, is what the judiciary makes of such opportunity. It can only be hoped that a final decision on merits reduces the various issues raised here to ‘known knowns’ and clarifies the position of law on the subject conclusively.

While the basic position of law regarding corporate criminal liability seems to have been settled by the Supreme Court’s recent decisions, several questions about the validity and consequences of such a doctrine of corporate criminal liability persist nevertheless. For one, there are those who feel that the court has gone too far in reading down the mandatory imprisonment requirement from various statutes, opining that this was a task to be performed by the legislature.⁸⁰ However, as discussed above, a regime of corporate criminal liability that revolves around fines as a sole remedy has several adverse consequences.

The attribution of *mens rea* to corporations represents a new beginning as far as the jurisprudence of corporate criminality in India is concerned. The Supreme Court has ensured that corporations can no longer put up the flimsy defence of lack of personality to criminal charges involving *mens rea*, plugging the seemingly peculiar loophole in our criminal law. In the wake of the Bhopal gas tragedy, several proposals of new legislation tackling corporate criminality were proposed, none of which ever saw the light of day. It is therefore all the more commendable that the Supreme Court, painted as the villain of justice in the aftermath of the Bhopal tragedy, has put forth this progressive interpretation to the Code and consequently provided a strong deterrent to corporate crime.

79 The controversial statement, made at a press briefing on February 12, 2002, was in the context of the absence of evidence linking the government of Iraq with the supply of weapons of mass destruction to terrorist groups.

80 See *Standard Chartered*, *supra* note 23 (per B.N.SRIKRISHNA J., dissenting).