Vicarious Criminal Liability for Corporate Officers in India: Problems and Prospects

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1. Introduction

This paper is concerned with legal and policy approaches at the intersection of three issues. The first issue is the problem of regulating white collar crime, so called because it has more to do with fraudulent or evasive financial transactions rather than the traditional crimes of physical harm. While the idea of a white collar crime carries an impression of modernity, the problem itself and the responses to it hark back to the period immediately after the Second World War. The second vector in the debate is the role of corporations in economic crime. Rarely does an individual commit an economic crime by himself; the involvement of corporations in economic crime brings with it various complexities chief among these being the problem of holding a corporation as a whole responsible for the acts of its agents and officers. The third issue in this domain involves questions that reverse the inquiry identified above: the problem of holding key officers of a company responsible for the offences committed in the name of the company. However, if the directors and managers of a company are held criminally responsible for actions committed by other agents of the company, difficult problems of vicarious liability arise. This essay christens the third problem as special vicarious liability. The problems associated with the application of special vicarious liability are the primary focus of this paper.

This essay begins, in section 2, with an analysis of a corporation’s vicarious liability for the criminal offences of its employees and agents. Section 3 discusses one mode of imposing liability on corporate management for offences committed by the corporation, which is to treat the management as the alter ego of the company. Section 4 analyses a different mode of criminal liability, namely the special vicarious liability of corporate management, and discusses the issues that arise in the application of this legal standard. Section 5 discusses special vicarious liability in the context of the Companies Act, 2013 and identifies the somewhat harsher rules of liability imposed under this enactment. Section 6 discusses special vicarious liability under the Prevention of Corruption Bill, 2013 in order to bring out the concerns of the Indian Law Commission about the unfair consequences of special vicarious liability. Section 7 will consider briefly the UK law on vicarious criminal liability in order to see if presents a version of vicarious criminal liability that is less onerous in its impact on corporate management. The essay will conclude with the observation that Indian law needs to pay heed to the problems arising out of special vicarious liability, as has been identified by the Law Commission.

2. Criminal vicarious liability for Indian companies

Vicarious liability as a concept of law has been with us since the development of the traditional doctrine of tort law relating to the liability of employers. An employer is liable for the torts committed by his employee within the course of his employment. Likewise, a principal is liable for the torts committed by his agent within the scope of the agency.

It did not take long for the principle of vicariously liability to be extended beyond its natural habitat. Increasingly, criminal law became an important site for the imposition of vicarious liability, and in India, the domain of vicarious criminal liability consists mainly of white collar crime. The debate on vicarious liability in India has been dominated by the debate on whether a company can be held criminally liable for the actions of its employees where the law creating the relevant offence is silent on this question.
Recently, the Supreme Court in *Iridium India Telecom Ltd. v Motorola* Inc.\(^1\) considered the issue of a company being criminally responsible for the actions of its employees. In *Iridium, Motorola* sold a technology product to *Iridium* that was accompanied by assertions and promises by Motorola that allegedly turned out to be false. *Iridium* brought a case of cheating against Motorola. The case was brought not against Motorola's employees but against Motorola itself. Under the provisions of the Indian Penal Code, cheating requires an intention to deceive. Motorola argued that a corporate body, being an artificial person, is not capable of a mental state and therefore cannot be held criminally liable for offences such as cheating. Motorola's arguments were rejected by the Supreme Court after it considered the modern approach to the problem of corporate criminal liability in the English courts.

Of particular relevance to the discussion in this essay is the Supreme Court's reference to the House of Lords decision in *Tesco Supermarkets Ltd. v Nattrass*\(^2\) where it was held that, in the absence of a specific statutory or common law exception, the principle of corporate criminal liability was not based on the vicarious liability of an employer for the acts of its agents and employees. Instead it was based on the concept of attribution. A company cannot think and act on its own as it is a juristic personality. It thinks and acts through certain of its employees. In other words, the mental states and actions of its employees are attributed to the company.

This is a legal fiction but a necessary legal fiction in order for the separate legal personality of the company to sustain itself over a period of time. Otherwise, the company would not be able to sign contracts, acquire property, negotiate with business partners, sue and be sued and make public disclosures and statements. It follows from *Tesco Supermarkets* that corporate criminal liability is not a species of vicarious liability but is a species of attribution of natural actions and states of minds to artificial entities.

3. **Liability of corporate officers on the basis of attribution**

The actions and mental states of a company's directors are attributed to the company such that the actions and the mental states of the companies' directors are deemed to be the actions and the mental states of the companies. Can the reverse be true? Suppose a company (through its employees) commits actions that have criminal consequences. Can the directors of the company be attributed these actions such that they can be held responsible for the criminal consequences?

This aspect of vicarious criminal liability was in issue in the recent Supreme Court decision in *Sunil Bharti Mittal v Central Bureau of Investigation.*\(^3\) The government issued telecommunication licences to a number of companies. The license process came under scrutiny for certain irregularities (related to bribery of public officials) as a result of which a criminal investigation was launched into the actions of various companies. One of these companies was *Bharti Cellular Ltd.* (BCL). The special court investigating the licensing irregularities decided to attribute the actions of Bharti Cellular Ltd. to Sunil Bharti Mittal, its Chairman cum Managing Director, and made him an accused in the proceedings.

The special court's directions to make the director of BCL the accused was challenged in the Supreme Court as a mistake of law. The Supreme Court held that without statutory backing, the persons in charge of a company cannot be held criminally liable for the actions of a company. The court was firm in applying the proposition that there is no special vicariously liability in criminal law without a statutory exceptions in this regard.

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\(^1\) (2010) 14 (ADDL) SCR 591.
\(^2\) 1971 1 ALL ER 127.
\(^3\) Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl) No. 3161 of 2013)
One might quibble with Bharti Cellular's refusal to attribute the company's actions to the directing minds of the company as the Supreme Court had no such compunctions, when, in Iridium, the court extended the actions of the directing minds of a company to the company itself, and held that the company can be held criminally liable by attribution. One might argue that instead of the post Iridium one way attribution, Indian jurisprudence needs a two way attribution between the company and persons in charge of the company to fully guarantee the reach of the criminal law.

However, there are some significant problems with a two way attribution of liability. The juristic basis for the attribution of the actions and mental states of the directing minds to their company is that the company cannot act otherwise. The legal fiction of a corporate person has necessitated another legal fiction of attribution for otherwise the first legal fiction would be meaningless. No such necessity arises in the case of the actions of the company being attributed to its directing minds. The directing minds are capable of thinking and acting on their own and do not need attribution as a matter of necessity. The best justification of the Indian Supreme Court’s decision is that attribution is not the appropriate mechanism of imposition of liability in order to hold the directing minds responsible for the actions of their company.

In the United States, the courts have taken a much more stringent line towards persons in charge of companies that commit offences. In United States v Park, ⁴ the United States Supreme Court considered the case of Acme Markets Inc. (Acme). Acme was a food chain that operated throughout the United States. With an employee population of thirty thousand and several hundred stores, its business operations were large and complex. Acme’s President, Mr. Park, coordinated the business of the company through several senior delegates. The US federal government detected a rodent infestation in some of Acme’s warehouses and warned Mr. Park of potential legal liability arising out of the unhygienic conditions in which Acme stored its food. Mr. Park conferred with his legal team and referred the warehouse hygiene problem to his delegates. When the rodent infestation problem continued, the federal government sued both Acme and Mr. Park under a federal legislation that made liable any person who trades in adulterated food.

The U.S. Supreme Court stated that a person who has a responsible relationship to a corporate activity that leads to criminal liability is also liable under the relevant legislation. The liability of the responsible corporate officer is not vicarious liability: it is a species of primary liability. The liability arises out of a voluntary assumption of responsibility coupled with a failure to discharge the liability and resultant harm. In this respect, the liability of the responsible corporate officer is akin to criminal negligence. It is interesting that a statutory offence has been converted, through prosecutorial zeal and judicial interpretation, into an offence similar to criminal negligence.

However, in practice, one could read Park as laying down a standard that begins and ends with the question: did the corporate officer hold a position of responsibility in the corporation? Has a de jure criminal negligence test become in practice a de facto responsible position test? Some remarks of the majority opinion lends credence to this proposition. The Supreme Court remarked that while a corporate officer in a position of responsibility for a certain state of affairs (for example, warehouse storage) would normally be liable for any offences committed in furtherance of such a state of affairs (rodent infestation in the warehouse), he can escape liability if he proves that it was impossible for him to have prevented the offence. One way to demonstrate the impossibility is to, as the Supreme Court itself stated, affirmatively prove to the court that the responsible officer was powerless to prevent the commission of the crime. That a person had to prove an impossibility in order to escape from liability demonstrates how the Park doctrine in practice is a responsible position test.

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⁴ 421 U.S 658 (1975)
4. Vicarious criminal liability for the directing minds

Vicarious liability (referred to in this essay as special vicarious liability) is another legal option to hold the directing minds responsible for the actions of their company. Special vicarious liability does not require attribution; what it requires is a prescribed connection between the acts (with or without a relevant mental state) of a person or an entity (the employees of a company or the company itself) and the directing minds of the company. The prescribed connection must be a legal requirement emanating from common law or statutory law.

The most prominent example in the Indian context is the Income Tax Act, 1961 (ITA), and expresses the model that is followed in a plethora of Indian legislation concerning the prosecution of economic offences. The ITA prescribes criminal consequences for various kinds of tax offences committed by persons. A person has been defined in the ITA as including a company. Therefore, companies have been statutorily recognised as entities capable of committee criminal offences.

The manner in which such companies would be recognised as committing these offences have not been specified in the ITA. However, as the court decisions analysed above have shown, a statutory regime for attributing natural actions to companies is needed. The common law, both in England and in India, attributes the minds and acts of the people in charge of the company's affairs (such as its managing director and whole time directors) to the company itself.

The ITA, in addition to making a company criminally liable for offences, has provisions imposing vicarious criminal liability on the key management personnel of the company. These provisions follow a pattern of first imposing vicarious liability under prescribed conditions, followed by creating a safe harbour that denies the incidence of vicarious liability if the key management personnel prove the existence of prescribed circumstances and finally, imposing direct (not vicarious liability) on the employees of companies for certain offences committed under the company's authority.

The ITA imposes special vicarious liability on the key management personnel of company under section 278B of the ITA which states that if a company commits an offence, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company shall be deemed to be guilty of the offence. However, a person deemed guilty under section 287B can escape liability if he can prove that the relevant offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence.\(^5\)

Notwithstanding the imposition of vicarious liability referred to above, section 278B also imposes criminal liability directly on the key management personnel of companies. If the company's offence was committed with the consent or connivance of a director, manager, secretary or other officer of the company, these persons shall be deemed to be guilty of the same offence. It is not even necessary that the enumerated personnel must have consented to or connived with the commission of the offence. It is sufficient if these personnel were negligent and the commission of the offence (by some other employee of the company) is attributable to their negligence.

A number of Indian statutes concerned with economic crime have provisions that are identical or nearly identical to section 278B of the ITA. The Securities and Exchange Board of India Act, 1992 (SEBI Act) prohibits manipulative and deceptive practices (including insider trading) relating to the securities markets.\(^6\) Section 27 of the SEBI Act provides for vicarious liability of the key management personnel of companies and is identical in language to section 278B of the ITA. The Black Money

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\(^5\) Proviso to section 278B.

\(^6\) See, for example, section 12A of the SEBI Act.
(Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (the Black Money Act) has provided that if Indian residents do not disclose and declare tax on their assets and income from foreign sources, they are liable to be criminally prosecuted. Companies as well as individuals are subject to the Black Money Act. Section 56 of the Black Money Act provides for vicarious liability in the same manner noticed in the earlier two enactments. Identical provisions can be found in the Prevention of Money Laundering Act, 2002 (PMLA).\(^7\)

The special vicarious liability provisions were in play in *K.K. Ahuja v V.K. Vora*, a Supreme Court decision. A company issued cheques that, to use the commercial parlance, bounced i.e. the cheques were dishonoured because the company's bank balance was not adequate. The legislation on negotiable instruments criminalises the issuance of cheques that are found to be dishonoured. The dishonour of an issued cheque can result in criminal prosecution for the company that issued the cheque as well as the officers under terms that are identical to section 278B of the ITA. Mr. Ahuja, the Deputy General Manager of the company, was prosecuted under the SVL provisions of the negotiable instruments legislation because he was said to be 'in charge of, and responsible to the company for the conduct of the business of the company.'

The Supreme Court went through the two prongs-*in charge of* and *responsible to-*of the corporate officer special vicarious liability. It acknowledged that there was very little guidance in the legislation on negotiable instruments (or indeed, in the other statutes with similar language of vicarious liability) on what made a corporate officer satisfy the *in charge* and *responsibility* test referred to above. In the context of the lack of any legislative guidance, the Supreme Court provided for certain parameters crucial to which is the idea that the special vicarious liability provisions lay down a factual test and a legal test both of which have to be satisfied by the prosecution. The *in charge* prong presents a factual test and the *responsible to* prong presents a legal test.

Regarding the legal prong of the test, The Supreme Court took recourse to the Companies Act, 1956\(^9\) to explain this part of the test. Under this enactment, the corporate officers considered as responsible to the company for the conduct of the business of the company are its managing director, whole time directors, manager and secretary.\(^10\) Regarding the factual prong of the test, the Supreme Court stated that a person would be in charge of the business of the company if the person is in *overall control* of the day to day business of the company. There might be a director, for example, an independent director or a non-executive director, who might not be in charge of the business of the company. There might be a manager who is in charge of the business of the company but may not be in charge of the overall business of the company. There might be an officer who may be in charge of only a discreet part of the business of the company.

The Supreme Court made it clear that a case of vicarious criminal liability cannot succeed unless the prosecution proves both the prongs of vicarious liability discussed above. In *KK Ahuja*, the accused was a deputy general manager of the company. The Supreme Court declared that since the accused

\(^7\) Section 70, PMLA.

\(^8\) MANU/SC/1111/2009.

\(^9\) The Companies Act, 1956 has been replaced by the Companies Act, 2013.

\(^10\) Besides these four designations, the Companies Act, 1956 identifies four other categories of people who are considered as responsible to the company for the conduct of the business of the company. The first category refers to persons in accordance with whose directions or instructions the Board of directors of the company is accustomed to act. The second category comprises people charged by the Board with the responsibility of complying with that provision *(that was violated)* and who have given their consent in that behalf to the Board. The third category applies in the event that the company has not designated anyone as managing directors, whole time directors or managers; in that event, the responsible directors are those who have been specifically identified as being responsible to the company for the conduct of the business of the company. The fourth category comprises all the directors of the company in the event there are no managing directors, whole time directors or managers, and the Board of Directors has not identified any person as responsible to the company for the conduct of the business of the company.
did not come into any of the categories of responsibly mentioned in the Companies Act, 1956, the prosecution was prima facie invalid. There was no further need to look into the question whether the accused was in charge of the business of the company.

5. Vicarious criminal liability under the Companies Act, 2013

The issue of vicarious criminal liability for the directors and other key personnel of companies takes a somewhat alarming turn when it comes to the provisions of the Companies Act, 2013 (The Companies Act). The Companies Act approaches the issue of criminal liability in an all-embracing fashion when compared to the statutes noticed above. Much like the other legislation concerned with economic crime, the Companies Act also criminalises various kinds of activities in the course of the economic life of the company, chief among them being fraudulent activities committed by the company (through its employees). For all offences committed by the company, the Companies Act imposes special vicarious liability on officers (of the company) who are 'in default'.

Section 2(60) of the Companies Act specified the persons who would be considered as officers who are 'in default'. The specifications closely follow the descriptions of the personnel considered in the predecessor legislation (Companies Act, 1956) as persons responsible to the company for the conduct of the business of the company. Four categories of personnel come within the ambit of officer 'in default'. The first category encompasses what the Companies Act helpfully terms as 'key managerial personnel' (KMP). KMP includes the managing director, whole time directors, Chief Executive Officers (CEO), Chief Financial Officers (CFO) and Company Secretaries (CS). The second category comprises those personnel who, while reporting to the KMP, are responsible for maintaining, filing or distributing accounts and records, and actively participate in, knowingly permit or knowingly fail to take active steps to prevent any default. The third category is extraordinarily wide in its amplitude. It covers anyone who is responsible for 'maintaining accounts and records'. It certainly looks like the compliance officers of banks would be covered, for example.

Provisions regarding the third category can be contrasted with comparable provisions in section 5(f) of the predecessor legislation, the Companies Act, 1956, which made officers of the company liable under similar circumstances provided two conditions were fulfilled. The Board ought to have given the officer the relevant responsibility, for example, the responsibility of filing certain records for regulatory purposes. Further, the officer in question must have consented to taking on such a responsibility. On the face of it, the predecessor legislation looks slightly less onerous as it includes the consent requirement. However, in practice such a consent would probably be obtained from the officers in question. In one sense the predecessor legislative provisions were more onerous as they did not require, at least on the face of it, any particular mental state or affirmative action by the responsible officer. On the other hand, the current version requires the responsible director to authorise, actively participate, knowingly permit or knowingly fail with respect to his duties.

The fourth category is concerned with directors who were aware of the contraventions (that led to or constitute the offence committed by the company) either because they participated (without objecting) in the board proceedings that led to such contraventions or they were in receipt of such board proceedings, even if it is the case that they were not present during these board proceedings. Since whole time directors are already covered under the first category, this category, on the face of it, might be construed as applying to independent directors. The potential liability involved here appears to be disproportional to the duties and functions of independent directors. However, the Companies Act mitigates the potential liability of independent directors by providing that two circumstances need to combine for an independent director to be held liable for offences committed

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11 Section 2(51), Companies Act.
by his company. First, he must have knowledge of the offence attributable through board proceedings. Second, (note this is an additional requirement) the offence must have been committed either with his consent or because of his lack of diligence.\(^12\)

Given that the managing director and whole time directors are covered under the first category and independent directors have a different liability regime because of an express provision in the Companies Act, who exactly is the fourth category intended to cover? Some guidance on this matter can be found in section 149(6) of the Companies Act, which defines an independent director. An independent director is any director other than the managing director, whole time director or a nominee director of the company. It follows from this definition that a nominee director is not an independent director. Therefore nominee directors are the kind of directors that are liable to be included in the fourth category.

The fifth category consists of people who don't run the company on a day to day basis but are instead associated with the issue or the transfer of a company's shares. Section 2(60) states that with regard to any offences associated with the issue or transfer of the shares of the company, the officers in default would be deemed to be the share transfer agents, registrars and the merchant bankers to the issue or transfer of the shares.

A criminal prosecution might result in significant and punitive financial damages for the officers of a company. The predecessor legislation restricted the ability of companies to indemnify their officers against the deleterious financial consequences of a criminal prosecution. Section 201 of the Companies Act 1956 voided any attempt by a company (either in its articles or through a separate agreement with the concerned officer) to indemnify its officers for any legal liability arising out of criminal proceedings. However there was a limited exception provided for by the same section under which a company could indemnity an officer for the legal expenses incurred by him in defending criminal proceedings provided he was successful in his defence. There is no provision comparable to section 201 in the current Companies Act giving rise to the speculation that directors and officers under the current corporate regime can avail indemnification for any pecuniary liability arising out of criminal proceedings.


The most recent legislative measure with respect to which the issue of vicarious criminal liability has arisen concerns the flagship measure for tackling economic corruption in India: The Prevention of Corruption Act, 1988 (POCA). Currently the POCA does not contain provisions for vicarious criminal liability because its focus has been on the personal liability of public officials for acts of corruption. The POCA has been used to punish bribe takers and not bribe givers. The current government has introduced, through the Prevention of Corruption Bill, 2013 (POCA Bill), certain amendments to POCA in order to make bribe givers including corporates punishable under POCA\(^13\). A 'commercial organisation'\(^14\) is guilty of an offence under the POCA Bill if a person 'associated'\(^15\) with the commercial organisation bribes a public official.\(^16\)

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\(^{12}\) Section 149(12), Companies Act.

\(^{13}\) Section 9, POCA Bill.

\(^{14}\) A commercial organisation has been defined widely in section 9 (3)(a) of the POCA Bill to include companies (Indian and foreign), partnerships (Indian and foreign)

\(^{15}\) According to Section 9(3)(c) of the POCA Bill, a person is associated with a commercial organisation if the person performs services for an on behalf of the commercial organisation. This is a very wide definition and would cover persons who would be employees of the commercial organisation. Explanation 3 to section 9 states that if a person is an employee of the commercial organisation, it would be presumed that he provides services on behalf of the commercial organisation, unless he proves to the contrary.

\(^{16}\) Section 9, POCA Bill. Technically, the bribe receivers have to be 'public servants'.
The inclusion of corporate corruption meant that the issue of vicarious criminal liability of the company and the special vicarious liability of the officers of the company had to be addressed. This issue has been addressed in a manner identical to the corresponding sections in other economic offence legislation, such as SEBI and the ITA, i.e. under the POCA Bill, if a company is held guilty of an offence (because a person associated with the company bribed a public official), every person in charge of and responsible to the company for the conduct of the business of the company would also be criminally liable for the same offence.\(^{17}\)

The POCA Bill was referred to the Indian Law Commission for their comments. The law commission expressed some reservations regarding the wide amplitude of the vicarious liability provisions. The commission was particularly concerned about the impact of section 10 of the POCA Bill that imposed special vicarious criminal liability on the persons in charge of and responsible to the company. Here's what the commission had to say about this provision:

The effect of section 10 is that if an employee (P) of a company (C), sitting in Bangalore, bribes a local official (R) to get its clearance on time, then the combined effect of the 2013 Bill is that P will be liable under section 8\(^{18}\), R under section 7\(^{19}\), and C under section 9, unless it can prove it has adequate procedures in place designed to prevent such conduct. However, section 10 will operate to deem every single person in charge of, or responsible to, C, thus every Director on the Board of Directors, who may be sitting in Delhi more than 2000 kms away-guilty, and the burden of proof would shift on each of these directors to prove they had no knowledge or had exercised due diligence. The situation could be even worse if for instance, P had the high level clearance of one of the sitting directors to bribe R, because of which every other director would be faced with the difficult task of discharging their high burden of proof.

There are two interesting aspects to the Commissions' concerns about the absurdity of vicarious criminal liability provisions. First, the Commission laid great stress on the POCA Bill's provisions ability to make innocent directors liable for the crimes of guilty directors. However, after the Satyam scandal, the issue of collective responsibility of directors has gained prominence. One of the reasons for the Satyam scandal was that the directors on the Satyam board failed to voice their concerns when some of their fellow directors were in the process of committing a major accounting fraud. The POCA Bill can be plausibly defended on the point that directors have a responsibility to each other in taking positive steps towards avoiding corporate misfeasance. However, in order to fix this responsibility, there is no need to rely on the special vicarious liability provisions. The provisions that make corporate officers liable if they consent or connive in the commission of corporate offences or are negligent in performing their duties are sufficient to address the corporate governance concerns arising out of the Satyam scam.

Second, the Commission, in making its remarks on the deleterious features of special vicarious liability, appears to have ignored the long history of identical provisions in a host of other statutes mentioned above. The example quoted above applies mutatis mutandis to the provisions in many other statutes that regulate economic offences. If the criminal vicarious liability provisions have passed muster before, one wonders why the proposed provisions in the POCA Bill are particularly onerous for the corporate directors in India. After all, the same officers of the company identified are faced with similar risks in respect of most of the other legislation dealing with economic offences. The real problem here is the unfair and onerous burden inherent in the special vicarious liability provisions. The Commission, in rejecting these provisions in the POCA Bill, has opened the doors to a more urgent debate on whether such provisions ought to be repealed in other statutes as well.

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\(^{17}\) Section 10, POCA Bill.

\(^{18}\) Section 8 would impose a liability on a person bribing a public official. This liability is in addition to the liability imposed under section 9 on the company with which this person is associated.

\(^{19}\) R would be criminally liable under section 7 because he would have accepted a bribe in his capacity as a public official.
7. Is there a milder version of vicarious criminal liability?

The United Kingdom follows what, at least on the face of it, might be considered as a more liberal version of vicarious criminal liability. A recent example of this version is the Bribery Act, 2010. 20 Under the Bribery Act, a corporate officer is liable for the same offence as that committed by his company if he or she is a senior officer of the company and the offence committed by the company has been committed with the consent or connivance of the senior officer. 21 A person is a senior officer of the company if he or she is the director, manager, secretary or other similar officer of the company. 22

The test of consent or connivance has been discussed in the House of Lords decision in R v Chargot Ltd. 23 This case involved the unfortunate death of an employee while he was operating a truck on a the farm owned by the defendant company. The company and its director were subject to criminal prosecution for the violation of legislation relating to health and safety at work. The relevant legislation contained the vicarious liability provisions relating to ‘consent or connivance’ mentioned above. The House of Lords held that the application of these provisions would depend very much on the particular circumstances in which the corporate offence was committed. Where the legislation defined an offence by virtue of a failure to achieve or prevent a result (a person must not do X), it could be inferred, from the fact that a corporate officer had a supervisory function over the state of affairs that led to the offence, that the corporate officer had consented to or connived in the commission of the offence.

Most of the economic offences considered in this essay are described in terms of a failure to achieve a prescribed state of affairs, whether it relates to furnishing of tax returns or securities information or prevention of fraud. Therefore it follows from Chargot that whenever a corporate offence is proven, the inference that the corporate offence was done with the consent or connivance of its directors would be, in practice, a foregone conclusion. This makes the English test as harsh as its American and Indian counterparts.

8. Conclusion

Vicarious criminal liability in Indian law arises at two levels. Companies are made criminally liable for the offences committed by its employees within the scope of their employment. Further, certain key employees of the company are also made criminally liable for the offences of the company. The first kind of vicarious criminal liability has not created much controversy in India. Indian courts have upheld the notion that companies can be held vicariously liable for the offences committed by their employees, and it is no defence to argue that the relevant statute imposes only a custodial sentence on the offenders.

The situation regarding the second kind of vicarious criminal liability, what has been termed as special vicarious liability in this essay, is more complicated. Where there is no legislation providing for special vicarious liability, Indian courts have refused to hold the directing minds of companies vicariously liable for the crimes committed by their companies. The cautious attitude of the Indian courts in this respect can be contrasted with the U.S. Supreme Court cases following the so called Park doctrine that makes corporate officers in a responsible relationship to the activities leading up

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20 Language identical in relevant respects can be found in section 12 of the Fraud Act 2006, and In section 18 of the Theft Act 1968.
21 Section 14 (2), Bribery Act, 2010.
22 Section 14(4), Bribery Act, 2010.
23 [2008] UKHL 73.
to the crime committed by a company vicariously liable for the same. However the Park doctrine, if interpreted as a negligence standard of criminal liability, is not strictly a case of vicarious liability.

Indian statutes have a long history of imposing special vicarious liability for a number of offences relating to tax evasion, money laundering, securities related offices and corporate fraud. Corporate officers are statutorily liable for their company's offences if they are in charge of and responsible to the company for the conduct of the business of the company. This is a case of strict vicarious liability because no particular wrong doing is required of the corporate officers. Their liability is based on the powers and responsibilities assigned to their positions in the company.

The strict vicarious liability described above can be contrasted with another kind of liability imposed statutorily on corporate officers that requires the corporate officers to have contributed to the crime committed by the company through various means: by consenting to the crime, by conniving with the commission of the crime, or being negligent in allowing the crime to happen. Unlike the strict vicarious liability provisions, this kind of liability requires some wrong doing on the part of the corporate officer, although the wrong doing required has a low threshold (for example, consent is sufficient).

Indian courts have interpreted the special vicarious liability provisions quite strictly and have pointed out that even if the corporate officer is formally responsible to the company for the conduct of the business of the company, the prosecution has to prove that in fact the corporate officer was in charge of the overall (not merely one part of the business) day to day business of the company. This is likely to be a high threshold and would, in all probability, cover only the top management of the company such as the managing director and the whole time directors. Very recently the Companies Act, 2013 has brought in harsher provisions regarding the vicarious criminal liability of corporate officers. Under this legislation, for a variety of offences identified under the legislation, certain corporate officers identified by the legislation as officers in default are vicariously liable without any requirement to prove that these officers were actually in charge of the affairs of the company.

When the Indian position on vicarious liability is compared with the UK position, one notices that the major economic offences statutes in the United Kingdom do not have a special vicarious liability position. Instead these statutes impose liability on the corporate officers for the offences committed by the company only if they have consented to or connived in the commission of the offences or their negligent behaviour has led to the commission of the offences. However, UK Courts have interpreted this provision in such a way that the position of a corporate officer would in most instances be the single most important factor in determining his vicarious liability.

Special vicarious liability for corporate management continues to raise questions about the reach of criminal law. None of the three approaches identified in this essay are satisfactory. The first approach, pioneered by the U.S. Supreme Court, imposes vicarious criminal liability as a judge made doctrine, which is too precarious a foundation to rest the onerous consequences that would ensue for the corporate officers if they are held liable for the offences committed by their companies. The second approach, enunciated in the most recent Indian legislation on corporate law, imposes criminal sanctions primarily based on the positions occupied by persons employed by companies. Such position based liabilities might result in innocent directors being held liable for the misdeeds of rogue employees. The third position adopted by UK legislation is to move away from position responsibility and focus on the wrong doing of directors but the UK Courts have interpreted the legislation in such a way that the test of wrong doing would be inevitably fulfilled if a corporate officer occupied a responsible position in the company. Ultimately, special vicarious liability suffers from an irredeemable violation of natural justice: corporate officers are potentially subject to criminal liability for offences with which they would at most have only a remote connection based essentially on the fact that the perpetrator and the corporate officer happened to have a common employer. The law
commission's recommendations that the special vicarious liability provisions in the POCA bill be deleted as they impose unfair legal consequences on corporate officers are steps in the right direction. The government must consider doing away with similar or identical provisions in other statutes as well.