THE DEATH AND RESURRECTION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

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ABSTRACT

The term 'Corporate Criminal Liability' has always provoked multifarious deliberations and commentaries from legal academics in the United Kingdom. These reactions have gradually evolved from denying corporate criminal liability in the early 1800s to now acknowledging that the actions of corporations are as powerful as an individual's, if not more. This article analyses the gradual progression of corporate criminal liability in the United Kingdom through common law doctrines and legislation. It will argue from this analysis that, although the state of the law of corporate criminal liability is by no means as appalling as it has been in the past, there is definitely room for further improvement. This may be achieved by incorporating a corporate crime model similar to the model that is being used in America, that would envelope both criminal sanctions and deterrent-based initiatives to not only reduce corporate crime but also increase corporate accountability. In examining

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corporate criminal liability, this article will employ a method of using case law and statutory material together with an analysis of academic material.

I. INTRODUCTION

Under English law, a company today is identified as a juridical entity that has the same legal obligations as a natural entity does, despite its intangible physical presence. This was not always the case, however, and companies often would not be held liable in the past, especially criminally, on breaching their legal obligations. The legal system at that time is reflected in the view of academics such as Thurlow, who refused to accept corporate criminal liability, stating that 'corporations have neither bodies to be punished, nor souls to be condemned; they can therefore do as they like'.[1]

However, with the growing understanding of the systemic exploitation of communities by powerful organisations, in recent times there has been a measured progress to extirpate these antiquated views. It is acknowledged that the legislation in this area has changed the state of corporate criminal liability in the United Kingdom. However, this article explores additional measures that may be taken in order to further this progress, focusing on not only prosecuting corporate crime, but also deterring it in the United Kingdom.

This article will critically analyse these issues in four sections. The first section will trace the historical understanding of corporate criminal liability in the United Kingdom and analyse the shift, after the 20th century, in the changing beliefs surrounding corporate criminal liability through the development of various doctrines. The second section will then discuss the incorporation of these theories in the present legislative framework controlling corporate crime and also discuss the

[1] John Poynder, *Literary Extracts* (1844) vol 1, 268 (Poynder quoting Lord Chancellor Thurlow on the soulless nature of corporations)

need for greater accountability of powerful companies. Whilst doing so, it will demonstrate that, although there has been a significantly assertive attitude on the part of the government to incorporate powerful legislation[2], the reality is an exiguity in reducing corporate crime. The third section will emphasise this by conducting a broad comparative analysis of the corporate criminal liability framework in the United Kingdom and the United States. First, it will present the historical evolution of corporate crime legislation in America and its progress to the present framework of regulation. Second, it will highlight the differences in the two frameworks and focus on how corporate criminal liability would be revolutionised in the United Kingdom if a similar regulatory framework as in the United States was adopted. The final section will present a reform structure for corporate criminal liability in the United Kingdom, based on preceding conclusions. It will not only present modifications for the current corporate crime legislation, but also provide a set of general reforms targeted at effective deterrence.

Finally, whilst the aim of this article is to discuss and critically analyse corporate criminal liability, the sincere hope is to leave the reader pondering on a larger picture: one that depicts the growing power that companies possess in today's increasingly capitalistic society, and the risks that this power poses for the rights of, and justice for, individuals.

[2] Peter Aldreige, 'The UK Bribery Act: The caffeinated younger sibling of the FCPA' (2012) Ohio State Law Journal vol. 73 (5) 1181–1216

II. THE HISTORICAL EVOLUTION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

A. EVOLUTION OF THE CORPORATE SYSTEM

By the 18th century, many businesses had been set up in England, with the main purpose of growing the economy and improving trade relations with the rest of the world. A considerable number of these business went unregistered because there was no effective legal system in place for their registration. This flaw in the legal system caused significant financial chaos. To remedy this, the Joint Stock Companies Act 1844 was enacted: it introduced a convenient way to register businesses as companies and removed the concept of 'unregistered associations'.[3] The Act revolutionised company law because registered companies gained some legal dominion in the eyes of the law. However, it was only eleven years later that the real impact of the Act was felt through the introduction of the Limited Liability Act 1855. This Act stated that members of a registered company would no longer be held personally liable for any debts of the company.

With the 1844 Act and the 1855 Act, members of the company became assured that they would only be liable to the company itself and not to any of its creditors. The Acts confirmed that a registered company had its own legal personality, distinct from its shareholders. This was affirmed in 1896 in *Salomon v Salomon*, in which it was stated that a company is a legal entity in the eyes of law and is distinct and separate from its shareholders.[4] The affirmation of this principle of separate legal personality was an important step towards recognising that liability can be imposed on a company and, just like an individual, a company is accountable for its actions. Therefore, it is

[3] Amanda Pinto, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 10.
[4] Salomon v Salomon & Co Ltd [1896] UKHL 1 82.

clear that it was the first step in the history of the UK towards enforcing corporate liability on companies and curbing their potentially harmful corporate actions.

B. THE CASE FOR CORPORATE CRIMINAL LIABILITY PRIOR TO 1840

In spite of having identified that companies have their own legal identity, the government and courts were under the impression that giving corporations as much freedom as possible would strengthen the economy[5]. This perceptible inclination paved the way for underhanded actions of corporations. Although it had been made absolutely clear in *Salomon v Salomon* that a company 'was capable of owning and dealing with property, suing and being sued and contracting on its own behalf'[6], many within the legal coterie still maintained that a company could not, however, commit a criminal offence. This view was notably expressed by CJ Holt, who stated that 'while a corporation could not be indicted, its particular members could be'[7].

We can trace several reasons for the impetus behind denying corporate criminal liability. Essentially, it was argued that a corporation could not be held criminally liable because it possessed a juristic legal identity. This means that, unlike a natural person, it could not possess the *mens rea* needed in order to commit a criminal offence. This view was affirmed in cases such as *Sutton's Hospital Case*[8], in which the court held that 'a corporation is incapable of an act of understanding since it has no will to exercise'[9]. Another difficulty was that of procedural uncertainties surrounding the prosecution of a company. Specifically, the fact that a company could not actually be presented in court and accused of a crime, deterred many from imposing corporate

5 Celia Wells, *Corporations & Criminal Responsibility* (2nd edn, OUP 2001) 36.
6 Amanda Pinto, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 12.
7 ibid 6.
8 *Sutton's Hospital Case* (1612) 77 ER 960.
9 ibid.

criminal liability. Furthermore, a problem was presented by the 'ultra vires doctrine under contract law, which safeguards a corporation from being held liable for actions that fall outside the scope of activity for which it was formed': the doctrine '[ensured] that a company cannot be held criminally liable since conducting a criminal activity would clearly be stated to fall outside a corporation's scope of actions'.[10] It was clear that these reasons together with the general reluctance of courts ensured that no criminal liability was attached to corporations.

C. THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY POST-1850

Under English law, corporate criminal liability was first imposed in 1846 in *R v. Great North of England Railway* [11]. Courts began to consider corporate criminal liability for cases of civic nuisance[12]. It was then that courts, in a revolutionary move, decided to hold companies responsible in certain cases where 'there had been a failure to perform a public duty that had been imposed by the State'.[13] Soon after, courts extended corporate criminal liability to other contexts by employing different doctrines. The notable theories are discussed below.

(i) Theory of Vicarious Liability

The first doctrine that was established by courts to extend corporate criminal liability was the theory of Vicarious Liability. It essentially 'allowed for the imputation

[10] V.S. Khanna, '*Corporate criminal liability: what purpose does it serve?*' (1996) 109(7) Harvard Law Review 1480.

[11] *R v. Great North of England Railway* (1846) 115 Eng. Rep. 1294

[12] Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Wash. U. L. Q. 393, 405

[13] Khanna (n 10) 1481.

of an agent's conduct to the principal, when this conduct was within the scope of employment and had been done with some intent to benefit the principal'.[14] Whilst this theory had initially been applied only for civil cases, the wording of the principle in general terms allowed for it to be employed also in cases where courts sought to impose criminal liability on a company. The doctrine was first applied by the courts in *Mousell Bros Ltd v London and North-Western Railway*[15], in which the court held that 'if any law prohibits an act; the principle would apply to the company in the failure of compliance, even if the act is carried out by his servants'.[16] As we will see, the establishment of vicarious criminal liability for companies was influential in paving the way for courts to hold companies fully liable for any crimes that they would commit.

(ii) The Identification Doctrine

After extending the theory of vicarious liability, courts were soon able to extend corporate criminal liability for absolute liability offences beyond vicarious liability, through the Identification Doctrine. This doctrine was first established as the 'Alter Ego Doctrine' in a number of important cases such as *Kent and Sussex Contractors*,[17] *ICR Haulage*[18] and *Moore v L Breseler*.[19] Its development into the Identification Doctrine as presently understood, however, was only effected in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*.[20] The court held that, if a particular director of a company was working for the benefit of the company or was the 'company's directing

[14] ibid.
[15] Mousell Brothers v London and North Western Railway Company [1917] 2 KB 836.
[16] A Bassi, '*Principles and Theories of Corporate Liability*' (2016) 83 <http://shodhganga.inflibnet.ac.in/bitstream/10603/107447/10/10_chapter%203.pdf> Accessed 2 January 2018.
[17] *Kent and Sussex Contractors Limited* [1944] 1 KB 146.
[18] *Regina v ICR Haulage* [1944] 1 All ER 691.
[19] *Moore v L Breseler* [1944] 2 All ER 515.
[20] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

mind and will'[21], the company can be held fully liable because its actions would no longer be considered the director's actions but the actions of the company.

The Identification Doctrine laid the foundation for convicting companies of crimes of intent, and broadened the earlier Alter Ego Doctrine by allowing 'courts to hold a company liable for all *mens rea* offence cases, even cases where a natural person may not be held liable'[22]. A recent application of the Identification Doctrine is found in *Tesco Supermarkets Ltd v Nattrass*.[23] In this case, the court applied the doctrine and held that Tesco Supermarkets Ltd was responsible for the exploitation of the customer. Bassi criticised the judgment, however, arguing that it had actually narrowed the Identification Doctrine.[24] This concern was later rectified by the introduction of legislation on corporate crime, which is discussed below.

D. CESSATION

By the 1970s, several corporate criminal liability doctrines were in place, most notably the ones examined above. Nevertheless, it was still rare for courts to convict companies for criminal offences, especially for crimes with a mental element, such as corporate homicide. However, incidents such as the King's Cross Fire of 1987 and the Piper Alpha Oil Rig explosion became the 'drivers for corporate criminal legislation to hold companies liable for death and injury'.[25] The incident that created the most public uproar was the case of Herald of Free Enterprise[26], in which the prosecution charged P&O European Ferries with corporate manslaughter under the

[21] ibid.
[22] Bassi (n 16) 70.
[23] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.
[24] Bassi (n 16) 95.
[25] Iwona Sepiolo Jankowska, 'Corporate criminal liability in English law' (2016) Adam Mickiewicz University Law Review 6, 137.
[26] Department of Transport, *Herald of Free Enterprise: Formal Investigation* (1988) Report of Court No. 8074.

Identification Doctrine. Although P&O European Ferries was not convicted due to the narrow criteria provided for under the Identification Doctrine, this case triggered unprecedented deliberations concerning the development of legislation that would enable courts to impose corporate criminal liability for cases such as these. This resolutely closed any disinclination against corporate criminal liability in the UK.

III. THE PRESENT STATE OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

A. CORPORATE CRIME

In the previous section, we analysed various theories applied in cases, that acknowledged corporate criminal liability in the UK. With the understanding that the UK needed more in order to control corporate crime, the government decided to legislate on the issue. Before analysing the legislation on corporate criminal liability, it is important to broadly outline the different categories of corporate crimes that are recognised under English Law. A company can be held liable for two categories of crimes: economic crimes and offences of corporate killing. Economic crimes, which are fiscally dependent, usually involve crimes such as taking a bribe, accounting fraud, and money laundering. Corporate killing crimes may be committed where companies have been involved in the killing of an individual or several individuals, often, though not always, out of negligence. Examples of these cases are *Attorney General's Reference (No. 2 of 1999)*[27] and the Piper Alpha Oil Rig explosion.[28]

[27] *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182.

[28] National Aeronautics and Space Administration, 'The Case for Safety: The North Sea Piper Alpha Disaster' (2013) NASA Volume 7 (4) <https://sma.nasa.gov/docs/default-source/safety-messages/safetymessage-2013-05-06-piperalpha.pdf?sfvrsn=3daf1ef8_6> Accessed 3rd January 2018.

B. THE LAW ON CORPORATE CRIME

Although there are many pieces of legislation, this section will critically analyse the key pieces, namely the Bribery Act 2010, Corporate Manslaughter and Corporate Homicide Act 2007, Criminal Finances Act 2017, and Deferred Prosecution Agreements.

(i) Bribery Act 2010

The Bribery Act 2010 was enacted following the scandal involving the defence giant BAE Systems, in which the UK government was confronted with public outcry and severe criticism for constraining and intervening in a SFO investigation for so-called 'national security concerns'.[29] The Act is said to have been introduced in order to counter the international criticism that suggested that the UK was lenient on corruption.[30] The main feature of the Act is its introduction of criminal liability for a company where any member or associated person to the company bribed a third party with the intention of obtaining or retaining business for the company.[31] The offence is considered a strict liability offense.[32] The only defence available to the company is under s 7(2) of the Act, which operates if the company can prove that it did everything in its power to put adequate measures in place to prevent any member of the company from bribing a third party.[33]

[29] Gordan Belch, 'An Analysis of the Efficacy of the Bribery Act 2010' (2014) 5 (134) Aberdeen Student Law Review <https://www.abdn.ac.uk/law/documents/An_Analysis_of_the_Efficacy_of_the_Bribery_Act_2010.pdf> Accessed 7th January 2018.

[30] Caroline Binham, 'Companies face criminal liability for corporate fraud' Financial Times (12 May 2016) < https://www.ft.com/content/253554c4-185f-11e6-b197-a4af20d5575e> Accessed 8th January 2018.

[31] Bribery Act 2010, s 7(1)

[32] Mark Pieth and Radha Ivory, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (1st edn, Springer 2011) 28.

[33] Bribery Act 2010, s 7(2).

The first successful conviction under s 7(1) was in *R v Sweett Group Plc*,[34] where a UK-based construction service company, Sweett Group, was convicted by the SFO for making corrupt payments to a high-ranking official at a foreign company in order to secure a consultation contract.[35] The conviction had two main effects: First, it warned companies of the far-reaching grip of the Act and proved that the SFO would not hesitate to use its power to control illegal acts outside the UK jurisdiction. Second, it made clear that liability under the bribery offence is strict and that the defence under s 7(2) is not easily relied upon. It became apparent that companies would be held accountable if they did not have adequate procedures in place to prevent bribery.

S 7 of the Act has been termed the most 'overreaching' aspect of the Act.[36] Indeed, Aldreige refers to the Act as 'the caffeinated sibling of the Foreign Corrupt Practices Act (FCPA)'.[37] Aldreige is accurate, since the Act does take an overly strict approach when it comes to bribery and corruption even in comparison to United States standards, which has a legal system that is known for its tight control of corruption. The only other critique of the Act is the lack of clarity in the guidelines that has been provided by the Ministry of Justice, since the directions only pressurize companies to tackle internal issues of corruption and fail to provide any real guidance on how to do so.[38]

[34] *R v Sweett Group plc* (2016) (unreported).
[35] Judith Seddon, *Practitioner's Guide to Global Investigations* (2nd edn, David Samuels 2018).
[36] Bruce W. Bean and Emma H. MacGuidwin, 'Expansive Reach - Useless Guidance: An Introduction to the U.K. Bribery Act 2010' (2011) 18 ILSA J. Int'l & Comp. L. 323.
[37] Aldreige (n 2) 1181.
[38] Bribery Act 2010, s 9.

(ii) Corporate Manslaughter and Corporate Homicide Act 2007

As discussed in the previous section, *Tesco Supermarkets Ltd v Nattrass*[39] had unfortunately narrowed the criminal liability of companies. The failure to convict in crucial cases of corporate manslaughter and homicide, such as the Piper Alpha Oil Rig explosion and the King's Cross Fire, was blamed on the narrowness of the test laid down in *Tesco Supermarkets Ltd*.[40] It was not until the Law Commission's report in May 2000[41] that Parliament became aware of the need to address this issue of corporate liability for manslaughter and homicide through legislation. The report proposed a new offence of corporate killing that should be introduced into the legal framework. The Corporate Manslaughter and Corporate Homicide Act 2007 reflects many of the proposals made in this report. Perhaps the key achievement of the Act is the extension of the Identification Doctrine to allow 'for the first time in many years, for companies and partnerships to be easily prosecuted for corporate manslaughter'.[42]

S 1(1) of the Act allows for an organisation to be convicted of a corporate killing if any of the duties and activities managed by it: '(a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.[43] The Act coverage is not limited to only UK companies. According to the guidance provided by the Ministry of Justice, it also covers companies incorporated

[39] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.

[40] Bassi (n 16) 95.

[41] Home Office, '*Reforming the law on involuntary manslaughter: The government's proposals*' (May 2000) <http://www.corporateaccountability.org.uk/dl/manslaughter/reform/archive/homeofficedraft2000.pdf> Accessed 8th January 2018.

[42] Health and Safety Executive, '*Guidance on Corporate Manslaughter and Corporate Homicide Act' 2017* (Guidance Paper, 2008) <http://www.hse.gov.uk/corpmanslaughter/about.htm> Accessed 8th January 2018.

[43] Corporate Manslaughter and Corporate Homicide Act 2007, s 1(1).

overseas that operate in the UK.[44] The Act is based on the idea, linking to a clear principle under tort law, that a company has a duty of care towards its employees and clients. S 2(1) of the Act puts forward a list of duties that are covered by the Act.[45] With the extension of the tort law principal of 'duty of care' to companies, it is ensured that individuals can be protected from the often-grievous acts of companies, a guarantee that was not afforded before under the Identification Doctrine.

Although there are certain exemptions under ss 3–6[46], the Act conducts a comprehensive discussion of corporate criminal liability. The Act has been welcomed by academics: Shivam Goel, for example, welcomes it for covering the gaps in the law that had been introduced in *Tesco Supermarkets Ltd*.[47] Firstly, the Act applies to all organisations irrespective of their size and the amount of economic, financial and market power that they possess. Secondly, as stated above, the Act covers all companies regardless of whether they are incorporated in the UK or abroad; so long as the company has committed the crime in the UK, the Act allows for the prosecution of such a company. Thirdly, unlike *Tesco Supermarkets Ltd*,[48] the Act allows for the prosecution of a company not only for the actions of its high-level employees (such as directors and managers), but also for the actions of any party in the contracting chain, even third-party or sub-contractors; this results in a very wide reach over the corporation.

[44] Ministry of Justice, '*A guide to the Corporate Manslaughter and Corporate Homicide Act 2007*' (October 2007) <https://www.gkstill.com/Support/Links/Documents/2007-justice.pdf> Accessed 9th January 2018.

[45] Corporate Manslaughter and Corporate Homicide Act 2007, s 2 (1).

[46] Sections 3, 4, 5, 6, mention the duties of care which do not qualify as "relevant" duties of care for the purposes of constituting the offense.

[47] Shivam Goel, *Corporate Manslaughter and Corporate Homicide: Scope for a New Legislation in India* (1st edn, Partridge Publishing 2015).

[48] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.

Chris Warburton has questioned if the Act has had much practical impact on restricting corporate crime in the UK.[49] There may be some truth in these queries, considering that in the twelve years since the Act's implementation, there have only been approximately 25 convictions.[50] Most of these convictions have been of smaller companies, and the maximum fines that have been imposed have been no more than £1,200,000.[51] The lack of convictions can be blamed on two factors in the Act. First, the burden of proof, which lies on the prosecution, does not make convictions easier.[52] Many of the corporations have an extensive team of lawyers and large amounts of money at their disposal; this makes it difficult for the prosecution, which often work with fewer resources, to prosecute these cases successfully.[53] Second, the Act does not apply where British companies are responsible for committing an offense abroad.[54] Further, s 28 also makes it clear that the act is concerned with the territorial location of violation, not where the breach has occurred.[55] Hence, 'a company cannot be held liable for the death of a customer abroad even if there was an organisational or management failure at its offices in the UK and this played a substantial part in a breach of duty to the customer'.[56] The lack of accountability here

[49] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety at Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 15th January 2018.

[50] ibid.

[51] ibid.

[52] Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A 10 Year Review' (2018) The Journal of Criminal Law Vol 82 (1) 48.

[53] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety at Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 15th January 2018.

[54] Ministry of Justice, '*A guide to the Corporate Manslaughter and Corporate Homicide Act 2007*' (October 2007) <https://www.gkstill.com/Support/Links/Documents/2007-justice.pdf> Accessed 9th January 2018.

[55] Corporate Manslaughter and Corporate Homicide Act, s 28.

[56] Crown Prosecution Service, 'Legal guide to the Corporate Manslaughter and Corporate Homicide Act 2007' (July 2018) < https://www.cps.gov.uk/legal-guidance/corporate-manslaughter> Accessed 30 July 2018.

is controversial because many British companies could potentially set up factories abroad to forego the strict compliance maintained under UK standards.

(iii) Criminal Finances Act 2017

The Criminal Finances Act 2017 is one of the newest additions to the compendium of corporate criminal legislation in the UK. The Act effectively overhauled the Proceeds of Crime Act 2002, which previously governed confiscation procedures for money laundering in the UK. Amongst other reasons for the introduction of the Act, the primary motive was to ensure that corporations are held criminally liable for enabling tax evasion or failing to prevent an associated individual from enabling tax evasion. These were not covered in the 2002 Act.

The two main relevant sections of the Criminal Finances Act 2017 are ss 45 and 46. S 45 introduces criminal liability of an organisation that has failed, within its capacity, to prevent a person from committing a tax evasion offence in the UK. S 46 extends this liability in cases where an organisation has failed to prevent a person from committing the tax evasion offense abroad. Her Majesty's Revenue & Customs (HMRC) has issued a three-stage requirement process to identify if the offence actually falls under either of these sections, with 'stage one being a requirement for criminal tax evasion being carried out by a legal or individual taxpaying entity, stage two being the intended criminal facilitation of tax evasion by an associated person with the company; if stages one and two are completed then stage three would be to hold the relevant company criminally liable'.[57] The guidance provided by the HMRC also states that it is irrelevant to the prosecution if the organisation is incorporated in the UK or abroad: So long as the crime is committed in the UK, both sections would

[57] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018.

be applicable to the organisation.[58] As regards a defence to this strict liability offence, HMRC has taken an approach similar to s 7(2) of the Bribery Act 2010 (discussed above): 'where the Act provides for a defence if at the time of the offence the relevant body had put in force reasonable prevention procedures the organisation will not be held liable'.[59] The HMRC has also issued 'six guiding principles' that must be put in place by organisations to make sure that they can rely on the defence.[60] Whilst these guiding principles supplied by the HMRC are undoubtedly concise and detailed, they do rely heavily on risk assessments that need to be conducted by these companies on a regular basis, which could have a greater impact on the economy of the UK. This is especially relevant in relation to large multinational corporations, which might be hesitant to enter a jurisdiction such as the UK which insists on conducting risk assessments. Tuson elaborates on this, stating that "[a] large multi-national corporate which has a small branch office in the UK, may not want to continue in the UK because of the fact that its entire corporation might need to be risk assessed. The corporation might find a disproportionate legal risk of a criminal conviction being subjected on it because of its connection with the UK, which may not justify the risk of doing business in the UK'.[61]

There are other similarities with the Bribery Act 2010. For example, the Criminal Finances Act 2017 also extends to all third parties that may be associated with the organisation, including sub-contractors and other individuals in the

[58] ibid.

[59] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018.

[60] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018.

[61] Andrew Tuson, 'Criminal Finances Bill 2016: Corporate Offences of Failure to prevent facilitation of tax evasion' (Bryan Cave Leighton Paisner, October 2016) <http://www.blplaw.com/expert-legal-insights/articles/criminal-finances-bill-2016-corporate-offences-of-failure-to-prevent-facilitation-of-tax-evasion> Accessed 15th January 2018.

contractual chain.[62] It also includes not only companies, but also extends to government bodies, partnerships, and various other organisations.[63] Whilst the 2010 Act was an influential piece of legislation and provided as positive guidance for the 2017 Act, Tuson argues that the similarities between the two Acts could impede convictions under the 2017 Act. According to him, the lack of differentiation in between the two Acts regarding the categories of associated persons is problematic.[64] This is mainly because 'those who pose risks from a bribery perspective are generally entirely different from those who could facilitate the evasion of tax, since the process of seeking to identify how an associated person facilitates the evasion of tax is more challenging than identifying who may pay bribes'.[65]

What is certain for now is that since the Act has been introduced recently it will need to be given time before anyone can make a fair evaluation of its practical benefits.

(iv) Deferred Prosecution Agreements

Deferred Prosecution Agreements (hereinafter 'DPA') have been used for several years now in jurisdictions such as the United States. In 2014, the UK, in a historic move, decided to introduce the concept of DPAs in order to increase the conviction of companies. Their inception can be majorly attributed to the insistence of David Green, the Director of the SFO. HMRC defines a DPA as 'an agreement that is reached between a prosecutor and an organisation which could be prosecuted,

62 Criminal Finances Act 2017, s 44.
63 ibid.
64 Andrew Tuson, 'Criminal Finances Bill 2016: Corporate Offences of Failure to prevent facilitation of tax evasion' (Bryan Cave Leighton Paisner, October 2016) <http://www.blplaw.com/expert-legal-insights/articles/criminal-finances-bill-2016-corporate-offences-of-failure-to-prevent-facilitation-of-tax-evasion> Accessed 15th January 2018.
65 ibid.

under the supervision of a judge'.[66] The procedure and content of DPAs are enshrined in Schedule 17, s 1 of the Crime and Courts Act 2013. Ss 15–28 of the Act also provide a varied list of all the common law, statutory, and ancillary offences that can be covered by a DPA. A DPA can be compared to whistle-blower schemes which are employed in the United States, except that, instead of the company or a member of the company approaching the Crown, the SFO that approaches the company. After approaching a company that might be guilty, the SFO tries to discuss a deal with them that imposes financial sanctions and does not involve a criminal conviction. The scheme proves to be advantageous for both parties because they both save on expensive litigation costs. Moreover, the company misses a criminal conviction, saving its reputation, whilst still allowing the SFO to control companies that are guilty of misconduct.[67]

The SFO secured its first conviction with Standard Bank in late 2015.[68] Since then, it has used a DPA only two more times, most recently in the case of *Rolls Royce Plc*.[69] This case is known as the UK's largest conviction so far with the financial sanctions being for a 'total of approximately £497 million, relating to a number of charges of carefully planned bribery, corruption, false accounting, and conspiracy to corrupt, across several jurisdictions (Nigeria, Indonesia, Russia, Thailand, India, China and Malaysia) involving foreign public officials over an extended period (1989–2013), resulting in over £250 million of gross profit'.[70] Whilst the system of using

[66] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018

[67] Jonathan Grimes, Rebecca Niblock and Lorna Madden, 'Corporate criminal liability in the UK: the introduction of deferred prosecution agreements, proposals for further change, and the consequences for officers and senior managers' (Practical Law Multi-Jurisdictional Guide, 2014)

[68] Binham (n 30).

[69] *SFO v Rolls Royce Plc; Rolls- Royce Energy Systems Inc*. (2017) Southwark Crown Court, Case Number: U20170036.

[70] Daniel Smith, 'Corporate Criminal Liability: The UK is now talking the talk and walking the walk' Mondaq (29 March 2017)

DPAs has been successful so far, only time will tell if DPAs are truly beneficial towards the UK's legal system of corporate criminal liability.

C. CESSATION

The introduction of legislation such as the Bribery Act 2010, Corporate Manslaughter and Corporate Homicide Act 2007, and Criminal Finances Act 2017, together with the guidelines issued by the SFO and HMRC, have been greatly influential in prosecuting companies. Consonant with this, the UK employs theories of corporate criminal liability from case law to indict companies for corporate crimes. From this analysis, one can identify that the criminal model employed by the UK for corporate criminal liability takes a punishment-based approach. Whilst such an approach may be at least satisfactory, it fails to deter corporate crimes from occurring in the first place. To truly address the problem of corporate crime, it is helpful to examine the possibility of a 'mixed approach' which incorporates both punishment and preventative models. This would be desirable because it not only deals with the problem at its root, but also provides sanctions where a company does commit the crime. Employing preventative measures might also lead to a decrease in the number of companies that are comfortable with committing crimes since such a model would find a company liable if it failed to implement the mandated measures.[71] This mixed approach is employed by the United States, where there is greater emphasis on the corporate governance structure employed by the company[72]: for example, does the company and its rules make it subconsciously easier for its employees to commit the

<http://www.mondaq.com/uk/x/577986/Corporate+Crime/Corporate+Criminal+Liability+The+UK+Is+Now+Talking+The+Talk+And+Walking+The+Walk> Accessed 8th January 2018

[71] Bassi (n 16) 106

[72] ibid.

crime for the benefit of the company? If it does not, then when a corporate crime is committed, the company will be given an opportunity of a lesser sentence or a plea agreement. Such an approach encourages a systemic change by allowing companies to establish corporate structures that prevent corporate crime in the first place. This will be discussed in further detail in the final section.

IV. A COMPARATIVE STUDY OF CORPORATE CRIMINAL LIABILITY WITH THE AMERICAN LEGAL SYSTEM

A. HISTORICAL EVOLUTION OF CORPORATE CRIMINAL LIABILITY IN AMERICA

Much like the UK, the historical development of corporate criminal liability in America was almost negligible prior to the 1900's. Cases like the *Bank of U.S. v. Dandridge*[73] had vehemently refused to acknowledge the fact that criminal liability was attributable to a corporation. However, with the rising number of incidents that took place post the industrial revolution, courts found it necessary to establish some level of liability to curb the power of corporations. The US courts first ascribed criminal liability in cases of public welfare offenses where corporations had created nuisance accidents[74] much like the UK. *The People v. Corporation of Albany*[75] was one of the earliest cases that attributed criminal liability for corporations[76], where Justice Clifford stated that, 'A corporation's powers may be modified at any time to meet the criteria for public exigencies".[77] A similar verdict was given in *State v. Morris & Essex Railroad*[78] where the courts held that a company could be held liable for offenses of

[73] *Bank of the United States v. Dandridge* [1827] 25 U.S. 12 Wheat. 64.
[74] Brickey (n 12) 405.
[75] *The People v Corporation of Albany* [1834] N.Y. Sup. Ct.11 Wend. 539, 543.
[76] Brickey (n 12) 406.
[77] *Comm'rs of Laramie County v. Comm'rs of Albany County* [1875] 92 U.S. 307.
[78] *State v Morris & Essex Railroad* [1852] 23 NJ.L. 360.

corporate nonfeasance.[79] The reasoning of the courts behind this was that "if a corporation could be held civilly liable as a natural person for tortious acts of its agents, there was no reason for denying its capacity to be made accountable for the same actions in a criminal prosecution."[80]

However, the decision to establish full corporate criminal liability was seen in the Supreme Court decision of *New York Central & Hudson River Railway v. United States*,[81] a decision that was famously based the 'Respondeat Superior' theory, which had been previously used to prove tortious claims. Extending the Respondeat Superior Doctrine allowed courts to establish vicarious criminal liability for companies as long as it could be proven that the employee committed his actions for the benefit of the company and within the scope of his duty.[82]

New York Central attracted the attention of various high standing executives of the government, who began taking corporate criminal liability more seriously. This was seen through government mandated actions, for example, 'President Roosevelt showed a greater interest in the enforcement of the relevant laws, and Congress tried to appropriate special funds for enforcement and also provided for expedited appeal of similar cases to the Supreme Court'.[83] Dervan amongst many other scholars[84] also attributes *New York Central* as the main trigger for the revolutionary state of corporate criminal liability in America[85]since, corporations today can be liable for almost all

[79] Brickey (n 12) 405.
[80] ibid 406.
[81] *New York Central R. Co. v. United States* [1909] 212 U.S. 481.
[82] Lucian E. Dervan, 'Revaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability' (2011) 41 Stetson L. Rev. 7, 112.
[83] Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' (2014) 126 Zeitshrift Für Die Gesamte Strafrechtswissenschaft 3.
[84] Also see Anca Iulia Pop, "Criminal Liability of Corporations - Comparative Jurisprudence" (2006) Michigan State University College of Law (5) and Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' (2014) 126 Zeitshrift Für Die Gesamte Strafrechtswissenschaft 27–54.
[85] Dervan (n 82) 113.

mens rea offenses. Thus, making corporate criminal liability as expansive as individual criminal liability.[86]

B. THE CURRENT STATE OF CORPORATE CRIMINAL LIABILITY IN AMERICA

(i) Key Legislation

By the twentieth century, corporate criminal liability had been enforced fully in America through the efforts of Parliament and the work of judges. This could be seen through a few pieces of legislation that explicitly referred to the criminalisation of illegal activities conducted by companies such as the Elkins Act and the FCPA.[87] The main difference when it comes to legislation on corporate criminal liability between UK and America, is that the latter has chosen to extend all its criminal legislation to apply to and include 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals'[88] which makes it nearly impossible to not convict a company for a crime that a normal individual could be convicted for. Apart from this, several States have enacted the Model Penal Code to convict "a company for the reckless actions of the board of directors or a high managerial agent who was acting on behalf of the corporation within their scope of employment".[89] On the other hand, States which have chosen not to ratify this specific penal code, still have to abide by the verdicts provided under case law.[90]

[86] Anca Iulia Pop, "Criminal Liability of Corporations - Comparative Jurisprudence" (2006) Michigan State University College of Law (5) 38. <http://www.law.msu.edu/king/2006/2006_Pop.pdf.> Accessed 11 January 2018

[87] Sun Beale (n 83) 4.

[88] United States Code, Title 1 (1 U.S.C. § 1).

[89] Model Penal Code 1985, Title 2, Section 7 (Model Penal Code § 2.07).

[90] Mark Pieth and Radha Ivory, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (1st Edition, Springer 2011) 71.

(ii) Case Law

Although, courts still follow the judgment in *New York Central,* there has been an extension of the Respondeat Superior Doctrine in subsequent cases. The extension of vicarious liability in *United States v. Hilton Hotels Corp*[91] to include the actions of an employee who was acting under the policies that had been implemented by the same company[92] ensures that if the policies that are implemented by a company are not up to a certain standard they would be vicariously liable. This was decided on the basis that these policies encourage a subconscious behaviour that promotes corporate crime amongst employees. In *US v Ionia Management*,[93] it was established that a company could be held liable for the actions of not only it's high level managerial staff (as stated in the Model Penal Code[94]) but also of all its other employees irrespective of their position in the company.[95]

The courts also established the Aggregate Theory to help them extend corporate criminal liability. The theory was first established in the case of *US v Time-DC Inc*.[96], and was reaffirmed in United *States v Bank of New England*.[97] Here, the court held that a corporation could be held liable if it can be proven that its employees have a collective and aggregate knowledge of the said requirements,[98] i.e. if multiple employees were aware about different parts of the provisions, and if their collective knowledge adds up to the necessary requirement. The Aggregate Theory can be, perhaps, in some ways problematic because it can often be tough to prove what each employee knew and if all of it could actually add up to proving the company's wilful

[91] *United States v. Hilton Hotels Corp* [1973] 9th Circuit Court of Appeal 467 F.2D 1000.
[92] ibid.
[93] *United States of America v. Ionia Management S.A* [2009] 2nd Circuit Court of Appeal 467 F.2D 1000 07-5801-cr.
[94] Model Penal Code 1985, Title 2, Section 7 (Model Penal Code § 2.07).
[95] *Ionia Management S.A* (n 93).
[96] *United States v. TIME-DC, INC* [1974] W.D. Va 381 F. Supp. 730.
[97] *United States of America, Plaintiff v. Bank of New England* [1987] 1st Circuit Court of Appeal 821 F.2D 844.
[98] ibid.

ill-intent.[99] However, if proven correctly it would be difficult for a prosecutor to fail to indict a company because of such an exacting requirement, especially if the company is trying to hide 'behind the lines of multiple departments that may exist within it'.[100] Further, it is surprising that the theory continues to be rejected by UK courts for being austere,[101] because it has been stated to combine the best segments of the Respondeat Superior Doctrine and the UK's Identification Doctrine.[102] May reiterates this argument, stating that the Aggregate Theory is actually a good substitute for the Identification Doctrine used in the UK since unlike the latter it provides for a more rational and unfaultable theory of corporate criminal liability.[103]

(iii) Department of Justice Guidelines

While there is an extensive amount of legislation and case law under the American Legal system with relation to corporate criminal liability, it must be kept in mind that, "the decision to prosecute a corporation is vested in the Department of Justice (DoJ) and courts can only review the exercise of that discretion in instances where the constitutional rights of a defendant are challenged".[104] The guidelines which were first issued in 1991, are now comprised within Chapter 8 of the United States Sentencing Guidelines Manual,[105] which is additionally reviewed every few

[99] Khanna (n 9) 1484
[100] ibid 1515.
[101] *R v Australasian Films Ltd* [1921] 29 CLR 195.
[102] Bassi (n 16) 115.
[103] Richard Mays, 'Towards Corporate Criminal Fault as the Basis of Criminal Liability of Corporations' (1998) Mountbatten Journal of Legal Studies 54 <http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf> accessed 11 January 2018.
[104] Congressional Research Service, *Corporate Criminal Liability: An Overview of Federal Law* (October 2013, CRS Report R43293, 7-5700).
[105] United States Sentencing Commission, *Sentencing of Organisations* (2016, Chapter 8) < https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8> accessed 11 January 2018.

years by the United States Sentencing Commission.[106] The current guidelines integrate a mixed model approach of corporate crime, where there is a fair share of sanctioning measures and rehabilitative proposals. However, this was not always the case in the past, and the previous guidelines were found to be problematic and resulted in the criticism of the DoJ for allowing prosecutors to have too much power over the conviction of a corporation.[107] The criticism came following the infamous Enron and Arthur Anderson Scandal in 2001, where many felt that while Enron deserved the punishment it received, Arthur Anderson had received a rather harsh castigation.[108] The Enron scandal proved that, "Changing criminal laws and increasing penalties will not lead to an unconscious instinct to comply, and a punishment based approach only masked the need for a more comprehensive solution".[109] Based on this, the Attorney General's office passed the Thompson Memorandum, which advised prosecutors and courts to consider a more rehabilitative approach that takes into account the company's cooperation and previous criminal history when imposing financial penalties. However, the Thompson Memorandum's success was short lived since it was criticised for suppressing constitutional rights.[110] Since then, the Thompson Memorandum has been replaced by the McNulty Memorandum and the Filip Memorandum. The Filip Memorandum which is the current memorandum in place keeps in accordance with the same mixed model approach that has been incorporated in the sentencing guidelines. The memorandum introduces the concept of alternate sanctioning programmes like Deferred Prosecution Agreements, Non-Prosecution Agreements

[106] Sentencing Reform Act 1984.

[107] United States Sentencing Commission, *Variable Codebook for Individual Offenders* (1999) <https://www.ussc.gov/sites/default/files/pdf/researchandpublications/datafiles/Variable_Codebook_for_Individual_Offenders.pdf> accessed 11 January 2018.

[108] Geraldine Szott Moohr, 'An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime' (2003) 55 Fla. L. Rev. 937, 953.

[109] ibid 974.

[110] *United States v. Stein* [2006] WL 2556076.

(NPA's) and Corporate Compliance Programs, many of which should be incorporated under the legal structure of corporate criminal liability in the UK.[111] In addition to this, the US Attorney's Manual (USAM) 9-28.900 has also recently adopted various other corporate compliance programmes such as Plea Agreements and Voluntary Disclosures to allow for corporations to be prosecuted in an effective manner.

C. CESSATION

Unlike the UK corporate crime model, the model retained in America concerns itself with how a company may be prosecuted together with the rehabilitation and prevention of corporate crime.[112] This has been done by introducing agreements that provide for a lenient sentence in exchange for the company promising to focus on improving its corporate governance structure which in turn prevents future offenses from occurring.[113] While it can be argued that, there is nothing wrong with a purely punishment based approach, the inherent consequence of using such a methodology is undeniable since it "does not allow for focus on correcting the systemic physiognomies of corporate crime, such as corporate subcultures that encourage illegal conduct. Moreover, employing a purely punishment-based approach also allows for legislators to neglect initiatives that are more productive in preventing future fraud".[114] Hence, replicating a corporate crime model like the one in America

[111] United States Attorneys, *U.S Attorney's Manual: Principles of Federal Prosecution of Business Organizations* (2010, Title 9) < https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> accessed 11 January 2018.

[112] Markus Dubber, 'The American Model Penal Code: A Brief Overview' (2007) New Criminal Law Review Vol. 10, 327 <https://scholarship.law.upenn.edu/faculty_scholarship/131/> Accessed 11 January 2018.

[113] Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 17(1), 560 Washington University Global Studies Law Review <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1213&context=law_globalstudies > Accessed 11 January 2018.

[114] Szott Moohr (n 108) 974.

may not only lead to a reduction in corporate crime numbers but also should decrease the need for expensive prosecution. Furthermore, the adaptation of such an approach by the UK government may also encourage a "structural reform that encourages law-abiding behaviour by corporations, while conveying a consistent message that inspires a subconscious law-abiding conduct".[115]

V. POSTULATING A REFORM STRUCTURE FOR CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

Over the last three section, there has been an effort to undertake a methodical analysis of corporate criminal liability. Whilst conducting the said examination, there seemed to be certain recurring problems, and the solution for these issues will be encapsulated in this section.

A. LEGISLATIVE REFORMS

As seen earlier, there has been a significant amount of progress in corporate criminal liability in the UK. Today, it is clear that the UK government and the legal coterie has made a conscious political and legal decision to establish a rigorous judicial system that would regulate the contrived actions of corporations. Having said that, there are still some concerns regarding the effectiveness of some of these Acts.

(i) Reform: Bribery Act 2010

The Bribery Act 2010 was introduced as a subtle way to negotiate and defuse the political tensions that arose after the BAE scandal.[116] The introduction of the Act

[115] ibid 940.
[116] Belch (n 29).

was successful, save for the lack of clarity in the guidance issued by the Ministry of Justice.[117] This manifests in the unclear interpretation of technical terms such as who is a 'foreign official' or what defines 'corporate hospitality'.[118] Furthermore, the guidelines also introduce uncertainties specifically for Section 7 of the Act, which states that an 'associated' person acting on behalf of the company can result in the prosecution of the company for corporate crime.[119] Here, the problem centres on the guideline's lack of direction on who constitutes an 'associated' person.[120] Hence, if reforms are undertaken for the Bribery Act they would have to be heavily focused around elucidating the technical terms in the Act.

(ii) Reform: Corporate Manslaughter and Corporate Homicide Act 2007

The CMCHA was introduced as a way to extend the Identification Doctrine to efficiently prosecute a company that had committed a crime such as corporate manslaughter.[121] While the introduction of the Act was welcomed by scholars such as Goel,[122] the true effect of the Act on corporate crime was questioned by others.[123] A good example of the latter statement is provided by Tombs, who drew a comparison between the numbers of corporate deaths that have occurred every single year to the

[117] ibid 2.
[118] ibid.
[119] Bribery Act 2010, s7(1).
[120] Belch (n 29) 4.
[121] Health and Safety Executive, *Guidance on Corporate Manslaughter and Corporate Homicide Act 2017* (Guidance Paper, 2008) <http://www.hse.gov.uk/corpmanslaughter/about.htm> accessed 8th January 2018.
[122] Shivam Goel, *Corporate Manslaughter and Corporate Homicide: Scope for a New Legislation in India* (1st Edition, Partridge Publishing 2015), 225.
[123] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety At Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 15 January 2018.

number of prosecutions under the CMCHA.[124] Statistics showed that while there was an average of 13,000 deaths a year at the hand of corporations, there had only been 25 successful prosecutions under the CMCHA since its introduction.[125]

The reasons for this aberration can be attributed to two core issues with the Act. The first and prime issue was the burden of proof element that placed the onus on the prosecutor.[126] This was considered challenging mainly because of the power dynamics that went into play in such a situation — a powerful company with comparatively unlimited resources fighting a legal battle against prosecutors who often don't have the same amount of time or money to spend on a single trial. While this could clearly be fixed by a structural amendment in the legislation itself, some have argued otherwise. For example, Roper makes an interesting suggestion stating that instead of trying to rectify the problem through an amendment, a process that has proven time and again to be immensely long-drawn-out and tedious, the alternative should be to focus on prosecutor training.[127] Prosecution training could be conducted much like the training used by the European Union Commission, which has trained its prosecutors to combat the resources of multi-national companies with unique tactics and schemes during both the investigation and the legal trial.[128] Further, if the government increased funding for the SFO, it would help their department to combat the uneven power dynamics since corporations often have

[124] Steve Tombs, 'The UK's corporate killing law: Un/fit for purpose?' (2017) Criminology & Criminal Justice Vol 1 (18), 506 <http://oro.open.ac.uk/50458/3/50458.pdf> Accessed 25 January 2018.

[125] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety At Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 12 February 2018.

[126] ibid.

[127] Roper (n 52) 55.

[128] Directorate General, 'Training on corporate criminal liability for prosecutors and investigators in Belarus' (Council of Europe Portal, May 2016) < https://www.coe.int/en/web/human-rights-rule-of-law/-/training-on-corporate-criminal-liability-for-belarusian-prosecutors-and-investigators> Accessed 27 March 2018.

access to substantial funds that facilitate their ability to engage in prolonged legal battles using a barricade of legal experts.

The second problem was in relation to the 'senior management' requirement. The senior management provision proves difficult especially in the case of prosecuting a large corporation because many big organisations often delegate their work to 'mid-level' workers thus successfully shifting much of the onus off their directors.[129] The removal of this condition can therefore prove to be crucial when trying to increase the number of prosecutions for large multi-national organisations. A reform structure for this is to replace the 'senior management' wording with placing the whole burden on every worker, placing the burden on everyone in the company. However, Tingle states that this must be done with caution since doing so might make it problematic for the Act to address certain kinds of corporate failings.[130]

In addition to these two main issues that need to be reformed under the CMCHA, there are also issues relating to the sentencing and sanctioning guidelines in the Act itself.[131] However, since this is a common problem within all the Acts, it will be considered later on in the paper.

(iii) Reform: Criminal Finances Act 2017

The most recent addition to the stack of legislation revolving around corporate criminal liability is the Criminal Finances Act 2017 (CFA).[132] The introduction of this

[129] Roper (n 52) 56.
[130] Simon Tingle, 'New sentencing guidelines have shown up shortcomings in corporate manslaughter legislation, says expert' (2017) OutLaw Blog <https://www.out-law.com/en/articles/2017/september/new-sentencing-guidelines-have-shown-up-shortcomings-in-corporate-manslaughter-legislation-says-expert/> Accessed 20 March 2018
[131] Roper (n 52) 59.
[132] Criminal Finances Act 2017.

Act was allowed for an extension of the deep-rooted principle of "failure to prevent" that had been established in the Bribery Act to economic crimes.[133] While the Act is relatively new, Cronin and Coop have already raised doubts about the effectiveness of the 'failure to prevent' element in a financial context.[134] Cronin and Copp state that, while the introduction of the 'failure to prevent' element might be easily understood in the context of the 'giving and taking' of a bribe, it might not be as straightforward when applying it to economic crimes such as tax evasion.[135] Hence, one of the reforms would be to focus more on adopting a corporate crime theory such as the Aggregate Theory, that is used in the USA to approach economic crimes, instead of using more legislation.[136] Furthermore, the Act could also be adapted to hold economic crimes as crimes of strict liability, which not only erases the problematic 'failure to prevent' element but also may result in increased prosecution numbers.[137] However, all of these apprehensions are only hypothetical at this time and the effectiveness of the Act can only be tested with time.

(iv) Reform: Deferred Prosecution Agreements

The introduction of Deferred Prosecution Agreements (DPA's) by the SFO can be seen as a radical step in advancing the cause of corporate criminal liability. The employment of this new legal tool effectively cuts through the bureaucratic red tape that often occurs in the process of prosecuting multi-national companies. However, academics such as Grasso have debated the structure of the DPA that is being used

[133] Copp, S. and Cronin, A, 'New Models of Corporate Criminality: The Development and Relative Effectiveness of "Failure to Prevent" Offences' (2018) 39(4) *Company Lawyer*, 108.
[134] ibid 109.
[135] ibid.
[136] ibid 110.
[137] ibid.

by the UK to target corporate crime.[138] Grasso proposes that the DPA's issued in the UK should be similar to the sanctions in the US, where they not only place an emphasis on imposing financial penalties but also include the implementation of compulsory corporate governance solutions by the company so as to prevent the company from committing the crime again.[139] Grasso goes on to explain that the only way this can be done is "through a cultural shift in the understanding of the legal instrument".[140] This highlights specific issues that have already been mentioned earlier on, namely, the change that the UK must undergo from employing a purely punishment based corporate crime model to a deterrence based model so as to effectively target corporate crime. The importance of this, consistent with the reform structures that enable such a model are discussed below.

B. GENERAL REFORMS

Having discussed the legislative reforms that need to be undertaken to improve the current condition of corporate criminal liability, it's important to now analyse the general reforms that could be employed to advance the regulation of corporate crime in the UK. These corrective measures will include the consideration of reforming current sentencing and sanctioning standards together with contemplating a shift from the current purely punishment-based approach to a mixed corporate crime model that would incorporate sanctioning methods and deterrent mechanisms to curb corporate crime.

[138] C. Grasso, 'Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc.' (2016) 5 Journal of Business Law 388.
[139] ibid 408
[140] ibid.

(i) Reform: Sentencing Guidelines & Sanctioning Agreements

With reference to the reform of already established financial penalties, there has been great criticism of the sentencing parameters in both the CMCHA and the Bribery Act.[141] In both these Acts, there appears to not only be an inconsistency in the financial penalties that are being imposed across cases but also a need to increase the maximum financial penalty.[142] Firstly, it is vital to fix the rising incongruities in the case filings to ensure that there are no unnecessary appeals, especially considering the already high costs that prosecutors face when indicting a company. Secondly, the reason for increasing the maximum financial penalty is to ensure that large companies are strongly dissuaded from committing the crime again. Yet, the effects of increasing the financial penalty can have a greater impact on shareholders and often the dire consequences are not faced by the company. For this reason, there is a need to reflect on an alternate sentencing technique, i.e., the introduction of a death penalty for corporations.[143]

The consideration of introducing an alternate sentencing technique such as a 'death penalty' for corporations comes from the increasing 'repetitive patterns of criminal indulgences by companies that have exposed a new degree of crony capitalism in which the most economically and politically powerful (corporations) can commit financial crimes as long as they can afford to pay the financial penalty'.[144] The death penalty imposed on a company would have similar repercussions, to a life imprisonment sentence that is imposed on an individual. The easiest way to impose a death penalty on a company has been put forward by Grossman, where he states that such a company should be shut down and have its licensed revoked after three

[141] Tombs (n 124) 492.
[142] ibid 497.
[143] Drew Isler Grossman, "Would A Corporate 'Death Penalty' Be Cruel and Unusual Punishment?" (2016) 25 Cornell J. L. & Pub. Policy, 697.
[144] Mary Kreiner Ramirez and Steven A. Ramirez, *The Case for the Corporate Death Penalty Restoring Law and Order on Wall Street* (1st Edn, NYU Press 2017).

major violations.[145] The invocation of the death penalty should prevent the company from being able to operate its business or reopen a new business in any other areas.[146] During the process of shutting down the company, it would also have to pay off all its debts to its creditors and shareholders, thus ensuring that the only real impact is felt on the company and there is no collateral damage.[147]

With regards to the reform of sanctioning agreements, there should be a focus on introducing more self-reporting agreements such as whistle blower agreements and NPA's, all of which have shown great results in countries like America. Whilst the introduction of the DPA by the SFO has been seen as a helpful step, it has not provided the same results seen in America since it has only provided for financial penalties instead of including methods of deterrence to prevent companies from committing crimes in the future. Going ahead, there should not only be an emphasis on introducing different sanctioning agreements but also on including clauses in these agreements that impose corporate governance reforms to deter corporate crime, the importance of which is be analysed below.[148]

(ii) A Shift in the Corporate Crime Model

Corporate criminal liability in the UK has so far only been developed by penal legislation. While this in itself is prodigious, the model has failed to pay attention to the use of deterrent measures to prevent corporate crime. The use of a deterrence based corporate crime model alongside a punishment-based approach has proven to be very beneficial when used in countries like America as is endorsed in the earlier section.[149] This paper advocates that the incorporation of this latter model would

[145] Grossman (n 143) 697.
[146] ibid 698.
[147] ibid 698.
[148] Grasso (n 138) 405.
[149] Bassi (n 16) 112.

make a real difference in how corporate crime is being perceived today. In respect of establishing such a model, there have been considerations of incorporating corporate governance measures that would create a shift in the understanding of corporate crime. An example of a popular measure has been the changing of the discretional 'corporate commitments' to corporate obligations.[150] An illustration of how this would work in practice is by making the non-obligatory commitment of Corporate Social Responsibility (CSR) mandatory,[151] which has been proven to hold companies to a greater standard of accountability than a company that does not take on the commitment.[152]

Another change that could be made while incorporating a deterrence based model, is to encourage the development of corporate governance measures like 'Triple Bottom Line' reporting.[153] 'Triple Bottom Line' reporting is a concept that is used to judge the success of a company beyond just its monetary income.[154] The report bases its judgement on two additional factors: the social impact of the company and the environmental contributions it makes .[155] Incorporating this as a measure could prove to be very useful in preventing corporate crime, especially since it has been found that one of the key drivers for corporations to commit a crime is due to financial distress faced when trying to keep up with competitive economic conditions

[150] John Sullivan, 'The Moral Compass of Companies: Business Ethics and Corporate Governance as Anti-Corruption Tools' (2009) International Finance Corporation, Washington Volume 7, 17 <http://hdl.handle.net/10986/23980> Accessed 2 January 2018.

[151] Barbara Del Boscoa and Nicola Misani, 'Keeping the enemies close: The contribution of corporate social responsibility to reducing crime against the firm' (2014) Scandinavian Journal of Management 27, 89.

[152] ibid 90.

[153] Rick Sarre, 'Re-thinking Corporate Practice and Corporate Governance in light of Recent Corporate Collapses: Some evaluative questions and agenda items' (Australasian Evaluation Society International Conference, University of South Australia, 2002), 4 <https://www.aes.asn.au/images/stories/files/conferences/2002/papers/Sarre.pdf> Accessed 28 March 2018.

[154] ibid 5.

[155] ibid.

imposed by financial markets.[156] Changing this idea of 'success' by including factors such as social accountability and environmental consciousness would enable corporations to understand the responsibility that they owe to the community beyond just their own financial gain. Hence, the system of 'Triple Bottom Line' reporting if employed correctly can effectively reduce the number of crimes that are committed against the society and environment by companies.

C. CESSATION

The state of corporate criminal legislation in the UK is certainly not in the same alarming condition that it used to be in several decades ago. Having said that, the UK still has some measures that need to be undertaken in refining some of its legislation and also incorporating general reform measures that would be beneficial to prosecutors while prosecuting corporations. The introduction of some of the reforms discussed above are vital in making corporate criminal liability more transparent and efficient in the UK. Notwithstanding, the insistence of the SFO to use only conventional measures of punishment can be potentially pejorative. Hence, consonant with undertaking the reforms proposed herein, it's essential to moderate the approach that is undertaken by the SFO to reflect a criminal prosecution model that not only enforces corporate criminal liability but also deters and rehabilitates the apathetic attitudes that are emulated by some companies when it comes to corporate crimes.

[156] Nolan Naidoo, 'The role of corporate governance in addressing the factors contributing to commercial crime in large organisations in South Africa' (2016), 1 University of Pretoria, Gordan Institute of Business Science 15388795 <https://repository.up.ac.za/handle/2263/59734> Accessed 28 March 2018.

VI. CONCLUSION

Over the last four sections, there has been a critical analysis of corporate criminal liability in the United Kingdom. The paper started by presenting an account of the various reasons given by courts and legal academics for denying corporate criminal liability in the 19th century. Nonetheless, as observed, there has been a slow but definite progress in the understanding of corporate crime and corporate criminal liability post the 1900s. With the rising number of corporate crimes, there was finally an acceptance that corporations are juridical entities who have to be held liable for their actions, just like an individual would. This attitude was soon actualized by the government into a few pieces of legislation that strived to reduce corporate crime. The legislation on corporate crime compromised of powerful Acts such as the Corporate Manslaughter and Corporate Homicide Act 2007, Bribery Act 2010, and the most recent addition, the Criminal Finances Act 2017. The Serious Fraud Offices with the help of Parliament also enacted additional sanctions such as Deferred Prosecution Agreements to secure more prosecutions. Despite all these improvements, there still were growing concerns and awareness that more needs to be done to improve the state of corporate criminal liability in the United Kingdom as has been voiced by several academics.

Through a scrutiny of the status of corporate criminal liability in America, this paper concluded that there was a requirement for general reforms as well as a shift from the purely punishment-based crime model that is currently employed. It is considered that a well-adapted mixed model that focuses not only on punishing corporate criminal liability but also on more systemic changes that would deter companies from committing these corporate crimes in the first place would prove much more effective. With companies becoming more brazen every single day with regards to their criminal activities, corporate criminal liability has never mattered more. Denying any further progress from being made on corporate criminal liability would be analogous to reverting back to an archaic school of thought that denied

corporate criminal liability would be inimical. A focus on a mixed based crime model that incorporates both sentencing methods and deterring techniques might be the redemption needed for corporate criminal liability in the United Kingdom. When broadening the scope of penalty for corporate criminal liability, it is also crucial that sentencing guidelines extend beyond strong monetary punishments, and impose the death penalty for companies that are repeat offenders in order to prove that powerful organisations with money cannot just buy justice for their victims. Finally, importance has to be attributed towards changing the very concept of success in today's progressively capitalist society and to ensure that a company's success doesn't depend only on its financial prowess, but it unreservedly depends on its contribution to society and environment also. This may be effected by aligning the assignment of a higher credit rating as well as, possibly, awarding important government approvals to large companies for the inclusion of corporate governance measures such as 'Triple Bottom Line' reporting as mentioned earlier.

To conclude, two things must be kept in mind when navigating through today's raging neoliberalist and capitalist society. Firstly, to secure the rights of individuals means not only to protect them from each other but also against a greater force, which is the dynamism of powerful organisations that patiently wait for the legal system to falter. Secondly, the law must be used as a tool to achieve a meaningful existence in society for individuals, through a just and fair legal system, that not only protects those with money but also defends those without it.