SECTION 32A OF THE IBC: SHREDDING THE INDEPENDENT CORPORATE PERSONALITY?

Arnav Maru [*]

Abstract

The Insolvency and Bankruptcy Code was introduced at a time when the non-performing asset crisis was at an unimaginable peak. Solving this crisis topped the priority list of a desperate government trying to rescue the banking sector as well as the debt market. The Insolvency and Bankruptcy Code was a game-changer. It has been largely successful in improving the recovery rates through its time-bound and creditor-in-control approach. The regime is still in its nascent stage and found itself amended for the fourth time in 2020. The amendment introduced Section 32A, which added another accelerant to the corporate insolvency resolution process. The Section, however, due to its sweeping reach and mandate, has raised some eyebrows. The Section alters established principles of corporate law that may have effects that cannot be comprehensively pictured-presently. The existing literature on the amendment and the Section has focused on the overriding clause, the interpretation and conflict with other laws,

[*] *Student at Maharashtra National Law University, Mumbai.*

and the benefits to resolution applicants. The discourse has failed to cover and question the theoretical foundations of what could be one of the biggest disruptions to the principle of independent corporate personality in recent times. This paper focuses on the evolution of the principle of independent corporate personality and its recognized exceptions and compares how they fit within the scope of the Section and its implications. It also addresses the concept of corporate criminal liability and its reduction to a mere exemplary status as a consequence of the provision. As a whole, the argument weighs economic efficiency against the body of common law and the need for stability therein to suggest that one must not necessarily overrule the other.

I. INTRODUCTION

The Bankruptcy Law Reforms Committee ("**BLRC**") was charged with revamping the insolvency and bankruptcy regime in India.[1] The first paragraph of the executive summary of the report submitted by the BLRC lucidly summarizes and defines the corporate structure in terms of debt and equity: "*The limited liability company is a contract between equity and debt*".[2] It reaffirms the complete control of equity owners over the corporate affairs, as long as no debt obligations remain outstanding, but envisages the transfer of control to creditors in case of

[1] Ministry of Finance, *The report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design* (4 November 2015).
[2] ibid ch 2.

a default.[3] Such a shift in control has been identified as a cornerstone of the insolvency process,[4] and its apparent lack has been blamed for India's abysmal insolvency landscape before the enactment of the Insolvency and Bankruptcy Code, 2016 ("**the Code**" or "**IBC**").[5]

The Code has largely brought about a positive shift in Indian insolvency law, and this shift has been well recognized.[6] The creditor-in-control approach has been a significant contributor in this progress and stakeholders have been quick to adapt to the alteration. However, this adaptation, and the Code's treatment of the corporate debtor undergoing insolvency, has raised pertinent questions as to the independent corporate personality of the corporate debtor. Still, there is scathingly little literature to reconcile the trivial looking, yet immensely significant inconsistencies between modern company law and the insolvency regime.

This paper firstly attempts to identify one such point of inconsistency, the infringement of the principle of independent corporate personality by Section 32A of the Act. The next section deals with the most recent amendment to the IBC. The third section discusses the abundantly discussed concept of the independent corporate personality, its *raison d'être,* and practical limits. The fourth section delves into how Section 32A of the Code disregards the established jurisprudence on disregarding the independent corporate personality. After establishing the irregularity in the law, the following section discusses its implications on the concept of corporate criminal liability. The penultimate section tries to define the bounds of choosing economic efficiency over established principles of law. The conclusion

[3] ibid.
[4] Stuart C Gilson and Michael R Vetsuypens, 'Creditor Control in Financially Distessed Firms: Empirical Evidence' (1994) 72 Wash U L Q 1005.
[5] Lalit Kumar, 'Our bankruptcy laws are a mess' (*The Hindu Business Line*, 10 March 2015) <https://www.thehindubusinessline.com/opinion/our-bankruptcy-laws-are-a-mess/article22512647.ece> accessed 17 June 2020.
[6] World Bank Group, Doing Business 2020, 'Ease of Doing Business Rankings'.

summarizes the discussion in the context of the development of common law while posing a crucial question.

II. SECTION 32A OF THE IBC

Under the new IBC regime, a corporate debtor undergoing a corporate insolvency resolution process ("**CIRP**") can have one of two fates. The Committee of Creditors ("**CoC**") can accept a resolution plan submitted by a resolution applicant within the stipulated timeline and manner.[7] The CoC can come up with plans to either restructure the loan, modify repayment, liquidate assets, sell the business of the debtor as a going concern, *et cetera*. Alternatively, if the CoC is unable to reach a consensus as to resolution within the stipulated deadline, the adjudicating authority will order the liquidation of the assets of the debtor.[8]

The National Company Law Appellate Tribunal ("**NCLAT**"), in the case of *Binani Industries Limited v. Bank of Baroda*,[9] noted that the first objective of the IBC is "*resolution*", second is "*maximization of value of assets*", and the third is "*promoting entrepreneurship, availability of credit and balancing the interests*", in that exact order. Reinforcing a similar view, the Supreme Court noted in *Swiss Ribbons*[10] that the preamble of the Code does not refer to liquidation in any manner, and that it should be a remedy of the last resort. It further states that only in cases where, either there is no resolution plan, or the ones submitted do not meet a minimum required standard, should liquidation be considered as an option. Regulations 32 and 32A of the IBBI (Liquidation Process) Regulations, 2016 also support such a

[7] Insolvency and Bankruptcy Code 2016, s 30(4) (India).
[8] Insolvency and Bankruptcy Code 2016, s 33 (India).
[9] 2018 SCC OnLine NCLAT 521.
[10] *Swiss Ribbons v. Union of India* 2019 SCC OnLine SC 73.

position. Regulation 32(e) envisages the sale of the corporate debtor as a going concern. Regulation 32A prioritizes such a sale above other methods. Regulation 32A was added vide the 2019 amendment,[11] endorsing the stance and object of the IBC, which is to maximize value by keeping the business of the debtor as a going concern, unless limited by feasibility.

The question then arises as to the permissible limits to which the legislation can be moulded to ensure the fulfilment of its object. Certainly, it cannot transgress the principles laid down in the Constitution. Similarly, it cannot also violate a principle of natural justice. What about principles of law, which have a solid foundation in common as well as statute law, but do not meet the higher threshold of the abovementioned principles? The principle of independent corporate personality, as will be detailed in the subsequent section, is an indisputable principle of modern company law, with solid grounding in Indian case laws, as well as the Companies Act, 2013. Courts have laid down stringent boundaries on disregarding the corporate personality to preserve the fundamental rights, and in some cases, liabilities that accrue on a company.

The Insolvency and Bankruptcy Code (Amendment) Act, 2020 added Section 32A to the Code. The Section talks about the liability of the corporate debtor for prior offenses. The Section has come under the judicial scanner most prominently in the case of *Bhushan Power Steel*,[12] where its applicability to a particular resolution applicant was tested. The Section's validity has not been challenged before any

[11] Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations 2019.
[12] *JSW Steel v. Mahender Kumar Khandelwal* Company Appeal (AT) (Insolvency) No 957 of 2019.

judicial body as of yet, but commentators have expressed doubts over its sweeping nature.[13]

The Section starts with a *non-obstante* clause granting it power over anything contained in the Code or any other law. This overriding provision is in addition to Section 238 of the Code, which provides that it will prevail over any other law in force. The Section goes on to lay down that the liability arising from any offense committed by the corporate debtor shall cease from the date the resolution plan is approved. A qualification is added to limit the corporate debtors claiming under the Section to those who see a change in management as a result of the resolution plan. Summarily put, if the person responsible for the operation of the company, or the persons involved in the commission of the offense through conspiracy or abetment, are no longer in control or management of the debtor, then the corporate debtor will be absolved of liability on approval of the resolution plan.

While, as mentioned, concerns have been raised as to the provisions of the Section, the discourse has not covered the shredding of the corporate veil. It is submitted that the Section lifts the corporate veil to overlook the liability of the corporate debtor, the permissibility of which has not been properly dissected. Not only does this go beyond the principles of established company law, it disregards corporate personality and liabilities without sufficient justification. It is understood that the IBC has been enacted to promote economic efficiency and expediency, but does the realization of that objective permit overruling the foundational principles of company law?

[13] Nausher Kohli, 'Section 32A of the IBC - An amendment with far reaching consequences' (*Bar and Bench*, 8 April 2020) <https://www.barandbench.com/columns/policy-columns/section-32a-of-the-ibc-an-amendment-with-far-reaching-consequences> accessed 10 June 2020; Sikha Bansal, 'Ablution by Resolution' (*Vinod Kothari Consultants*, 12 December 2019) <http://vinodkothari.com/2019/12/ablution-by-resolution/> accessed 10 June 2020.

However, since lifting the corporate veil is a prevalent concept, and was developed as an equitable remedy, why should objections be raised against Section 32A on this ground, since it promotes economic efficiency? The answer is twofold. First, that application of Section 32A dilutes the principle of corporate criminal liability, and consequently, it goes against the principles of independent corporate personality, by lifting the corporate veil for reasons not found in the theory of modern company law.

III. THE CONCEPT OF INDEPENDENT CORPORATE PERSONALITY

The origins of independent corporate personality could be traced to the case of *Salomon v. Salomon Co Ltd.*,[14] which rarely misses mention in a discussion about the independent personality of a corporation. It has not only formed the basis of modern English company law, but has also greatly influenced commercial law and its foundations globally.[15] The House of Lords, however, merely put into words what was already in practice since time immemorial.[16] The genesis can be found on the intersection of law and economics, where various theories have been forwarded to justify the existence of independent corporate personality.[17] The most prominent benefit and the leading theory stems from the fact that a separate corporate personality shields its stakeholder from unlimited liability, while still keeping doors open for

[14] *Salomon v Salomon & Co Ltd* [1897] AC 22.
[15] Christopher Stanley, 'Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law' (1988) 19 Cambrian Law Review 97, 97
[16] Robert W. Hillman, 'Limited Liability In Historical Perspective' (1997) 54 Wash. & Lee L. Rev. 615, 616.
[17] William W. Bratton and Joseph A. McCahery, 'An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition' (1997) Faculty Scholarship at Penn Law 904.

proportionate profits. The veil of incorporation further conferred on a company almost the same rights and powers as a human being,[18] and offered the added advantage of perpetual existence and succession.[19] The independent corporate form has been recognized in Indian jurisprudence,[20] and statute.[21]

IV. DILUTION OF THE INDEPENDENT CORPORATE PERSONALITY

As modern company law developed, and *Salomon* solidified the artifice of separate corporate personality, the need arose to find exceptions to the principle of the veil of incorporation to prevent its misuse by shareholders. As it stands now, courts possess the power to depart from the principle under certain conditions by 'piercing' or 'lifting' the corporate veil. Some conditions under which this concept may be applied are where the court finds incidences of fraud or illegality,[22] or when it is in public interest to lift the veil.[23] Lifting the veil does not render the corporate entity non-existent, but implies that the corporate personality would not be given full effect.[24] This usually leads to liability being imposed on the perpetrator responsible, along with the corporate vehicle.[25] This person is found liable by lifting the metaphorical veil and gleaming behind the corporate façade. The

[18] Ross Grantham and Charles Rickett, *Corporate Personality in the 20th Century* (Hart Publishing, Oxford 1998) 18.
[19] Denis Keenan and Sarah Richer, *Business Law* (Longman Publications, London 1987) 52.
[20] *Life Insurance Corporation of India v Escorts Ltd. & Ors*. (1986) 1 SCC 264.
[21] Companies Act 2013, s 9 (India).
[22] *Delhi Development Authority v. Skipper Construction*, (2000) 10 SCC 130
[23] *Kapila Hingorani v. State of Bihar* (2003) III LLJ 31.
[24] Cheng-Han Tan, Jiangyu Wang, and Christian Hofmann, 'Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives' (2019) 16 Berkeley Bus. L.J. 140, 140.
[25] ibid.

concept is widely recognized in Indian jurisprudence.[26] The Companies Act 2013 itself stipulates the liability of directors and managerial personnel under certain conditions, which is an example of a statutory disregard of corporate personality.[27]

The recent case of *Balwant Rai Saluja v. Air India* clarified the Indian legal position of piercing the corporate veil and relied on the English case of *Prest v. Petrodel*[28] while doing so. The case took an abundantly clear stance on the piercing of the veil, stating that the principle should be applied in a restrictive manner, and only in scenarios where it is established that the corporate form was a mere sham created to avoid liability.[29] The judgement further quoted the English case of *Ben Hashem v. Ali Shayif,*[30] while referring to the six key principles that govern the piercing of the veil. The principles extensively referred to the presence of improprieties linked to the corporate structure and concealing liability, the control of the corporate in the hands of the wrongdoers, and the company being a façade for fraudulent activity.

The abovementioned principles make it clear that corporate personality may be overlooked only under a limited set of conditions. It may be noted that the process cannot be undertaken merely to fulfil "*the interests of justice*" if certain other conditions are not met. This places the process of overlooking the corporate personality at a seemingly high pedestal. Examples of lifting the veil include, but are not limited to, prevention of fraud or misconduct,[31] prevention of tax evasion,[32]

---

[26] *Life Insurance Corporation of India v Escorts Ltd. &Ors*. (1986) 1 SCC 264*; State of U.P v Renusagar Power Co.* 1988 AIR 1737*; Delhi Development Authority v. Skipper Constructions Co. (P) Ltd.* (1996) 4 SCC 622.
[27] Companies Act 2013, ss. 34, 35, 39, 339 (India).
[28] [2013] 2 AC 415.
[29] *Balwant Rai Saluja v. Air India Ltd*. (2014) 9 SCC 407, 441.
[30] 2008 EWHC 2380 (Fam).
[31] *Gilford Motor Company v Horne* [1933] T CH 935.
[32] *Sir Dinshaw Maneckjee Petite, Re* AIR 1927 Bom 37 Khe*; CIT v. Sri Meenakshi Mills Ltd* AIR 1967 SC 819.

prevention of bypassing welfare legislation,[33] use of company for illegal purposes,[34] or, as discussed above, in cases where the corporate form is a mere sham.[35] It would not be improper to conclude that the corporate veil is lifted so that the real wrongdoer can be properly subject to the punishment prescribed by law, and does not evade punishment by hiding behind a corporate facade.

At the risk of generalization, it can be stated that the corporate form came into being to shield and protect the shareholders from excessive liability, and that lifting this veil, in certain *exceptional* conditions, is necessary to prevent the abuse of the independent corporate form.

Focusing the discussion back on Section 32A of the IBC, a few points of departure may be noted. The Section is clear in terms of the liability it seeks to absolve. The liability must rest on the corporate debtor. The liability of the debtor being discharged contingent on the change in management leads to the implication that the management is being held responsible, although not in real terms. This process lifts the corporate veil to look beyond the corporate personality and pins responsibility on to the persons on control. The intended consequence of disregarding the corporate personality is to absolve the debtor that is undergoing the overhaul in control and management from liability.[36] The rationale accorded to the process is that the new management must not suffer for the wrongs of the previous.[37] It can be stated, without arousing major concerns, that the corporate veil has indeed been lifted.

---

[33] *Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd,* [1986]59 Comp. Cas. 1341.
[34] *PNB Finance Limited v. Shital Prasad Jain* (1990) 19 DRJ 10.
[35] *Delhi Development Authority v. Skipper Construction Company* (1996) 4 SCC 622.
[36] Arjun Gupta, Abhinav Harlalka & Simone Reis, 'Ghosts of the Past: Another Shot in the Arm for Acquisition under IBC' (*Nishith Desai Associates,* 8 May 2020) <http://www.nishithdesai.com/information/news-storage/news-details/article/ghosts-of-the-past-another-shot-in-the-arm-for-acquisition-under-ibc.html> accessed on 29 November 2020.
[37] ibid.

The jurisprudence behind lifting the corporate veil is concentrated around the factor of wrongdoing by personnel in control, hiding behind the veil. As summarized above, the theory provides an equitable remedy against a person who was using the fact of incorporation as a mere façade to carry out wrongful acts. Section 32A seeks to do something entirely different. By separating the management and the corporate debtor, it seeks to absolve the debtor of any culpability. The corporate veil is lifted and the wrongdoer is punished *instead* of the company, to protect the company and its shareholders from the misdeeds of a responsible few. In the present case, the corporate debtor itself must be found guilty of some wrongdoing before being absolved by the passage of a resolution plan. The evolution of the principle took place in a completely different context and served a wholly different purpose.

The argument can be summed up by following a short trail of logical inferences. The corporate veil has traditionally been lifted in instances where the corporate personality was a mere façade. While this diluted the strength of the corporate personality, it was seen as a necessary remedy to prevent inequity. When this rule of equity with narrow boundaries is stretched to meet economic ends, it dilutes the factum of a legal personality to a mere artifice, to be moulded according to policy needs of the moment. Moreover, as the next Section will detail, rights are correlated with duties, and stand at the very root of our legal system. Since a criminal offense is a violation of a duty to another, making criminal liability disappear into thin air raises questions on the rights accorded to a corporation in the first place.

V. THE EFFECTS ON CORPORATE CRIMINAL LIABILITY

Possessing similar rights as human beings also brings the other, inseparable side, which is, bearing the same liabilities as well. Corporations even attract criminal liability, even though a common-

sense approach to establishing *mens rea* necessary to commit a crime, would dictate that an artificial person is not capable of possessing the same.[38] The concept is not new,[39] and courts have battled with inculpating artificial persons with criminal liability since the sixteenth century.[40] While the common law beginnings of the imposition of such liability are obscure and bereft of conscious direction,[41] the law has now solidified itself in the form of precedent as well as a statutory mandate. Agents acting on behalf of corporates may violate regulatory statutes, commit criminal offenses as well as strict liability offenses for which a corporation may be found guilty.[42]

The Companies Act, 2013 provides for corporate criminal liability as well as individual liability for directors. The Supreme Court has affirmed the same on various instances.[43] While the debate rages on the efficiency, desirability, and the necessity of corporate criminal liability,[44] discussing the same falls out of the scope of this paper. This paper takes a positivist stance towards the existence of corporate criminal liability and does not comment on its efficacy. Since, the theory is time tested, has a nearly global recognition, and has found a place in Indian statute books, the argument builds upon the premise that

---

[38] V.S. Khanna, 'Corporate Mens Rea: A Legal Construct in Search for a Rationale' (1996) Discussion Paper No. 200 Harvard Law School.
[39] Cynthia E Carrasco and Michael K Dupee, 'Corporate Criminal Liability' (1999) 36 Am Crim L Rev 445.
[40] *Androscoggin Water Power Co. v. Bethel Steam Mill Co.* 64 Me. 441 (1875); *State v. Great Works Milling & Mfg. Co.* 20 Me. 41 (1841).
[41] Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3.
[42] Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary' (1975) 29 Sw LJ 908; State v. Lehigh Valley R.R. 90 N.J.L. 372, 103 A. 685 (Sup. Ct. 1917); See also, Ananthi Bharadwaj, 'Corporate Manslaughter and Corporate Homicide Act, 2007' (2009) 21 (1) NLSI Rev 201.
[43] *Standard Chartered Bank and Ors. etc. v. Directorate of Enforcement,* AIR 2005 SC 2622.
[44] John T. Byam, 'The Economic Inefficiency of Corporate Criminal Liability' (1982) 73 J. Crim. L. & Criminology 582; Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary' (1975) 29 Sw L.J. 908.

imposition of such a liability on corporations serves a deterrent and penal purpose.[45]

Most recently, the cases of *Iridium India Telecom Ltd. v. Motorola Incorporated*[46] and *Standard Chartered v. Directorate of Enforcement*[47] blurred the distinction between corporate criminal liability and criminal liability otherwise, by affirming that corporates can be prosecuted for crimes that mandate imprisonment as a punishment. The judgments have added weight to the concept of corporate criminal liability and promoted the use of criminal sanctions to regulate corporate behaviour.[48] Further, as Indian company law distinguishes between individual liability of directors and, in some cases, shareholders, from the liability of a corporation as an independent person, it will be assumed that they serve separate and independent purposes, and that one is not dispensable even if the survival of the other is ensured. Section 32A of the Code destroys the efficacy and purpose of imputing corporates with criminal liability. It does so by exculpating the body corporate based on the mere factum of change in control while undergoing the insolvency process. Furthermore, by doing so, it hits at the foundation of an independent corporate personality by reducing a criminal conviction to a mere exemplary role. The following paragraphs elaborate on the reasons underlying this position.

The imposition of criminal liability on corporates is relevant from a jurisprudential perspective. Corporates are recipients of numerous

[45] Henry Edgerton, 'Corporate Criminal Responsibility' (1927) 36 Yale LJ827, 833; VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harvard Law Review, 1477, 1484; Harold J. Laski, 'The Basis of Vicarious Liability' (1916) 26 Yale L.J. IO5, 111; LH Leigh, *The Criminal Liability of Corporations in English Law* (1969) 1, 12.
[46] (2011) 1 SCC 74.
[47] (2005) 4 SCC 530.
[48] V Umakanth and Mihir Naniwadekar, 'Corporate Criminal Liability and Securities Offerings: Rationalising the Iridium-Motorola Case' (2013) NLSIR (Spl. Issue) 144, 167.

rights.[49] The Supreme Court, in the case of *State of Rajasthan v. Union of India*,[50] stated that "*legal rights are correlatives of legal duties and are defined as interests which the law protects by imposing corresponding duties on others*". Lord William Blackstone defines a crime as a "*violation of the public rights and duties due to the whole community, considered as a community*".[51] When a corporation is accorded a set of rights, it is bound by the accompanying and corresponding duties. Criminal acts, which are a subset of the violation of some such duties, invite punishment from the society and state. As discussed, the punishment serves a deterrent purpose. Absolving the company of a violation of its duties, but continuing conferring it with rights goes against the fundamentals of the theory of rights on which our legal system rests. Recognizing a body corporate capable of committing a crime, and then blurring the distinction between the corporate and its constitutive elements will have the unintended consequence of blurring the independent corporate form as well.

The argument garners further strength if the rationale of Section 32A is stretched to a hypothetical. A company X is convicted of an offense requiring it to pay a fine of Rs. 10 lakhs. Between the date of the commission of the offense and the conviction order by the competent court, X completely overhauls its management and control. Can it then petition a competent court to set aside its conviction on the account that the control and management of the company has changed entirely since

[49] Article 14, Article 20, Article 21, Article 22, Article 25, Article 27, and Article 28 of Part III of the Constitution of India grant these rights to 'persons' as against 'citizens'. Companies are excluded from being citizens by the virtue of Part II of the Constitution and the Citizenship Act, 1954, but are considered to be legal persons; *See, Chitranjit Lal Chowdhari v. The Union Of India* 1951 AIR 41; *State of Bombay vs. R.M.D. Chamarbaugwalla* 1957 AIR 699; The Law Commission of India, *Hundred and First Law Report on Freedom of Speech and Expression under Article 19 of the Constitution: Recommendation to extend it to Indian Corporations* <www.lawcommissionofindia.nic.in/101169/Report101.pdf> accessed 1 June 2020.

[50] AIR (1977) SC 1361.

[51] Sir William Blackstone, *Commentaries on the Laws of England*, vol 4 (17th edn, 1830) 5.

the commission of the offense? X then files for insolvency and moratorium is ordered before the fine was payable. The resolution plan is approved with a new management, and X stands exonerated from the offense and liability for the payment of the fine owing to Section 32A. This misuse of the corporate façade now has the backing of the letter of law. Such fraud, which earlier demanded the piercing of the corporate veil and punishment of the wrongdoers in control, now has the authority to overlook the corporate personality for the perpetration of the fraud itself.

Section 32A talks about a change in control and management, while the Code does not specifically define the phrase. The recent case of *Arcelor Mittal*[52] defined the two words individually with respect to their use in the IBC. The term management would include the *de jure* management of the company and would include the Board of Directors, 'managers', and 'officers', as per the Companies Act, 2013.[53] 'Control' as per the Companies Act has been defined as "*the right to appoint majority of the directors or to control the management or policy decisions*".[54] Section 32A creates a disjunctive condition and a change in either control *or* management, and not both. A strict reading of the Section would lead to the interpretation that even a change in the Board of Directors of the Company post the approval of resolution plan would render the company eligible to take shelter under Section 32A. The disjunctive requirement creates an easy way out for a controlling shareholder to merely change the management of the company after the insolvency process is initiated. Furthermore, shareholders own the company and are the ultimate beneficiaries of any financial gains it makes. An application of this Section might mean that the company may be exculpated of a crime even if the shareholding pattern remains exactly as it was at the time of the commission of the offense. The

[52] *Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta* (2019) 2 SCC 1.
[53] ibid, ¶48.
[54] The Companies Act 2013, s 2(27) (India).

various contours of the misuse of the provision also involve myriad questions of the reality of the corporate structure. What separates the corporate from merely being an artifice made up of a group of people is the fact of its independent personality, rights and liabilities. The imprecise definition of control and management, and their many valid interpretations as highlighted above, may lead to manoeuvres that cost the legal corporate structure its very essence.

Besides diluting the principle and efficacy of corporate criminal liability, the provision has also received criticism due to its application in the recent case of Bhushan Power & Steel Limited ("**BPSL**"), the case that has been theorized to be the *raison d'etre* of the provision in the first place.[55] JSW Steel Ltd. submitted a resolution application in the CIRP of BPSL. The adjudicating authority approved the resolution plan on September 5, 2019, and the Directorate of Enforcement ("**ED**") attached the assets of BPSL under the provisions of the anti-money laundering law on October 10, 2019. Section 32A was applied to the facts of the case to reject the ED's arguments to attach the property of BPSL. The matter is currently sub-judice before the Supreme Court.[56] The Court herein will have the opportunity to clarify the application of Section 32A and decide on the scope of its application. The current NCLAT judgement in the matter implies that Section 32A has wide-reaching powers, to the extent that it overrides the provisions of the Prevention of Money Laundering Act, 2002. The finding is *prima facie* perverse to previously established law.[57] One of the implications of this ruling is that illegal acts, such as concealing proceeds of crime, aiding in tax evasion, *et cetera*, can be perpetrated using the corporate structure and a legitimate way out can be found out of liability since the Code and Section 32A have been ornamented with *non-obstante*

[55] Kohli (n 13).
[56] Civil Appeal No(s). 1808/2020.
[57] *Directorate of Enforcement v. Axis Bank* 2019 SCC OnLine Del 7854; *Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj* 2018 SCC OnLine NCLAT 415.

clauses having power over any criminal legislation that precedes the passing of the Amendment Act.

VI. A QUESTION OF MORALITY OF LAW?

The legislation may, in due course, raise questions of equality under Article 14 of the Constitution. Both the old test,[58] as well as the new test,[59] under Article 14 may be used to ground such contentions against section 32A. Both unreasonable classifications, under the old test, as well as arbitrariness, under the new test, can be used to attack the legislation. However, this section analyses the infrequently inked challenge based on the morality of law. The 1981 case of *R.K. Garg v. Union of India*[60] discussed the questions arising out of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 ("**Bearer Bonds Act**") and its moral bearings. There are many parallels between the aforementioned legislation and the present section in discussion. The Bearer Bonds Act brought the discussion of economic necessity and moral boundaries of law to the forefront. The legislation sought to bring the 'black money' back into the economy by incentivizing tax evaders to invest the black money into the bearer bonds. Such an investment would grant the evaders immunity from prosecution for evasion and bar any inquiry into the source of the money. It was seen as putting a "*premium on dishonesty*" and rewarding tax-evasion at a cost to the honest taxpayer.[61] The majority judgement in the case upheld the validity of the legislation. While the petitioner contested that morality is the foundation of laws,[62] the Supreme Court categorized it

[58] *Anwar Ali Sarkar v. State of West Bengal* AIR 1952 Cal 150.
[59] *E.P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3.
[60] *R.K. Garg v. Union of India* AIR 1981 SC 2138.
[61] Lira Goswami, 'Law and Morality: Reflections on the Bearer Bonds Case' (1985) 27 Journal of the Indian Law Institute 3, 496.
[62] ibid.

as only a passing element of Article 14. In doing so, it affirmed that if a law is "*reeking with immorality*", it can be held arbitrary and thus violative of Article 14 and thereby unconstitutional.[63] A legislation not crossing that threshold would invite no valid challenge on the grounds of immorality.

Gupta J, in his dissenting opinion held the law to be invalid. He also quoted Friedmann, "*There cannot be — and there never has been — a complete separation of law and morality*",[64] while holding that reasonableness does not exclude notions of morality and ethics. Gupta J believed that economic efficiency, if not pushed to the limit of necessity, did not trump the moral foundations of our laws. He reasoned that the act puts a "*premium on dishonesty without even a justification of necessity*".[65]

Section 32A of the Act has not been introduced as a necessity but rather as a method to lure potential investors. The corporate debtor also gets a premium on dishonesty as well as a criminal conviction and liability merely by declaring insolvency. These grounds can validly be raised to make a dent on the reasonableness of the enactment as the NPA crises has well passed its peak, inviting no need for increased economic efficiency of the IBC.

VII. THE END GOAL?

The amended provision has come to the rescue of many bidders who were earlier scared off by prior criminal liabilities of the corporate debtor.[66] It is likely that the amendment may also make strides in

[63] *R.K. Garg v. Union of India* AIR 1981 SC 2138, at 2155-56.
[64] *R.K. Garg v. Union of India* AIR 1981 SC 2138, at ¶30 (per Gupta J.).
[65] *R.K. Garg v. Union of India* AIR 1981 SC 2138, at ¶29 (per Gupta J.).
[66] Pallav Gupta and Devarshi Mohan, 'IBC (Amendment) Ordinance, 2019: Providing a much-needed relief to the Prospective Investors' (*Bar and Bench*, 13

improving the ease of doing business in India, taking it further up on the World Bank Ease of Doing Business rankings. However, the focus needs to be drawn on the limits that can and cannot be traversed to reach economic efficiency. The Code was amended to include Section 32A in the backdrop of the CIRP of BPSL. The insolvency of BPSL is one of the biggest yet with claims amounting to a total of Rs. 47,158 crores.[67] The policy incentive on the part of the government is well understandable. However, instead of rushing such a behemoth provision into the statute, the singular case of BPSL may have been dealt with through an executive order. The Central Government, under Section 237 of the Companies Act, has the power to amalgamate two companies in public interest. The provision could have been utilised to deal with one-off situations involving convicted corporates.

The government has also mulled decriminalizing corporate crimes in a recent report.[68] Corporate criminal liability as a deterrent vanishing from the statute books, compounded by the effects of Section 32A, further endangers the principle of independent corporate personality. While corporate crimes have been decriminalized, there has been no discourse or move towards diluting the principles of lifting the corporate veil. The process is, thus, made easier for persons engaging in white-collar crimes, as the deterrence of a financial penalty on their holding in the company has considerably fallen.

While ease of doing business is an extremely relevant factor in a developing economy such as ours, we must not lose sight of traditionally sound principles of law. Corporate law was initially developed to shield shareholders from unlimited liability and

January 2020) <https://www.barandbench.com/apprentice-lawyer/ibc-amendment-ordinance-2019-providing-a-much-needed-relief-to-the-prospective-investors> accessed 17 June 2020.

[67] Insolvency and Bankruptcy Board of India, *Insolvency and Bankruptcy News* (January to March 2020, Vol. 14) 20.

[68] Ministry of Corporate Affairs, *Report of Company Law Committee* (14 November 2019).

disproportionate risk. An entire body of law regulating corporate behaviour has since developed around the traditional principles. This development has been slow and has allowed for stakeholders and participants to adjust to changes in a reasonable manner. Customs and customary principles have also solidified into the practice of corporate exchanges.[69]

To bring in such a radical change not only disrupts the traditional and customary understanding of what a company stands for, but also does not allow for practice to build around it organically, trampling the legitimate expectations of stakeholders. As it happened in the case of BPSL, the ED had to oppose the application of the Section to the case, as the anti-money laundering law does not allow for abrupt absolutions of criminal liability. The fact of 'proceeds of crime' somehow being dissolved into the assets of the corporate debtor runs contrary to settled notions of justice and equity. Similarly, it would not come as a surprise if the Section results in litigation due to inconsistencies with the company law or other sets of legislation operating in different fields.

VIII. CONCLUSION

While talking about the common law and its evolution, Oliver Wendell Holmes, Jr. stated "*The life of the law has not been logic: it has been experience*".[70] Accounting for all the fundamentals that make common law what it is, he ended the line of thought with the following: "*The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form*

[69] 'Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law' (1955) 55 Colum. L. Rev. 1192.
[70] Edmund Fuller, 'Oliver Wendell Holmes, Jr.' (*Encyclopaedia Britannica*, 20 April 2020) <https://www.britannica.com/biography/Oliver-Wendell-Holmes-Jr> accessed 19 June 2020.

and machinery, and the degree to which it is able to work out desired results, depend very much upon its past".[71]

This article has tried to build on the argument that the latest Amendment to the IBC has the potential to shake the fundamentals of company law. The corporate structure and personality have slowly and gradually developed into its present form. Similarly, exceptions and limits to those exceptions, in the form of safeguards, have calculatedly evolved to prevent inequity and fraud. The limited exceptions to an independent corporate personality enable the courts to look behind the veil of incorporation to the actual perpetrators using the corporate façade.

Section 32A uses the principle of disregard of corporate personality to safeguard the interests of successful resolution applicants by absolving an insolvent corporate debtor of prior liability. The fruits of this Section are available to a debtor who will undergo an overhaul in its control and management. The principle of corporate criminal liability thus loses its ground to economic considerations, and a wrongdoing corporate escapes criminal liability.

The government, while making policy decisions that affect the very root of established legal principles must bear in mind the ripple effect that a small tweak in a regime may have. The effect on the gigantic body developed to regulate corporate behaviour is yet to react and adapt to the change. Justice Holmes's words could not be more appropriately reflected than at the end of this discussion. While the introduction of Section 32A may seem like the logical step to promote the ease of doing business in India, the success or failure of the provision, and the insolvency regime, will depend on the history of corporate and commercial law, and the meandering course that it has taken to reach its present form. This article was written with the intention to spark a debate on an often-marginalized topic about the validity of provisions

[71] ibid.

that, while not crossing the threshold of unconstitutionality, do transgress existing principles of established law. The fate of Section 32A is yet to be determined by the Supreme Court, and it remains to be seen which takes the upper hand between the sanctity of the corporate personality and the lure of economic gain.