THE EFFECTIVENESS OF A FINE AS A PUNITIVE MEASURE IN RESPECT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

by

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1. INTRODUCTION

> "*Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises*"[1]

Corporate criminal liability in South Africa is currently regulated by section 332 of the Criminal Procedure Act[2] (the CPA). In terms of section 332 of the CPA, a company or corporate body may be held criminally liable for any intentional or negligent act[3] performed by a director or a servant of such company or corporate body, in the performance of his/her duties as a director or servant or in furthering the interests of the company or corporate body. Section 332 of the CPA permits the judiciary to impute the actions of the director or servant as if they have been committed by the company and hold the body corporate liable for such actions, and further regulates the prosecution procedure for corporate bodies.

As a form of punishment for a corporate crime, section 332(2)(c) of the CPA only prescribes the imposition of a fine, with the resultant effect that no other punitive measure applies to a corporate body in the event of it being found guilty of a criminal act. It is the intention of the author to prove that the provisions of section 332(2)(c) of the CPA has raised various concerns as to whether the current punitive measures that can be imposed on corporate bodies are effective in enforcing corporate criminal liability, given the fact that, depending on the resources of the company, the fine imposed may not serve as a deterrent to the prosecuted company.

The purpose of this minor dissertation is to undertake an analysis of the current penalty regime applicable to corporate criminal liability in South Africa, to determine whether the punitive measures are effective in deterring criminal activity by corporate bodies. Based on the above findings, this minor dissertation also seeks to propose how the penalty regime applicable to corporate criminal liability may be bolstered to deter criminal activity by corporate bodies impactfully.

The above aims will be achieved by first assessing corporate criminal liability in South African law and the applicable punitive measures. This assessment will entail considering the historical background of corporate criminal liability, the underlying theory of vicarious liability, the regulatory framework applicable to corporate criminal liability, and in conclusion provide a critical analysis of the effectiveness thereof.

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1 *New York Central & Hudson River Railroad Co. v. United States* 212 US 509 (1909) 1.

2 Criminal Procedure Act 51 of 1977.

3 An act in terms of section 332 of the CPA includes both a commission or omission by a director or servant of the body corporate.

The second chapter will be a comparative analysis of the application of corporate criminal liability in (i) the United Kingdom, with specific focus on the Corporate Homicide and Corporate Homicide Act, 2007 and the Identification theory, (ii) Canada, concerning the Identification theory, and (iii) the United States of America, in terms of the Model Penal Code and the *Respondeat Superior* theory. The analysis conducted in this chapter will be based on the review of the formative theories for corporate criminal liability in each of the above jurisdictions, regarding how they regulate corporate crimes and while considering the publicity orders, community service and corporate probation orders. The chapter will conclude with a critical evaluation of each considered jurisdiction in order to assess the effectiveness of their punitive measures for corporate criminal liability.

The third chapter will consider the current enforcement of corporate criminal liability in South Africa, compared to the other considered jurisdictions. The underlying purpose of this comparative analysis would be to assess whether there is a need to further develop the manner in which punitive measures for corporate crimes are enforced in South Africa, beyond the imposition of fines as prescribed by section 332(2)(c) of the CPA.

The final chapter will summarise all the legal principles considered in the chapters and to provide concluding remarks on the future of corporate criminal liability in South Africa.

CHAPTER 1

2. THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

2.1. The development of the doctrine of corporate criminal liability in South Africa

The development of corporate criminal liability in South Africa has been gradual and this is primarily because the codification of criminal law in terms of the South African common law has always been focused on the regulation and punishment of natural persons,[4] with minimal consideration for juristic persons. This was mainly because it was problematic to prove certain elements of a crime, such as culpability, which are required in order to hold a person criminally liable. According to Farisani,[5] the lack of culpability on the part of a corporation was addressed by attributing the *mens rea* of the directors to the company, through the principle of vicarious liability. Burchell[6]defines the principle of vicarious liability as follows:

"*A master is liable for a delict (act) committed by his servant if the delict was committed in the course and scope of his servant*"[7]

From a legislative perspective, the principle of corporate criminal liability was formulated in terms of section 117 of the Companies Amendment Act 23 of 1939 read with the provisions of section 384(1) Criminal Procedure and Evidence Act 31 of 1917, which extended liability for criminal offences to corporate bodies. In terms of both Acts, a corporate body may be held liable for any criminal activities committed by a director or servant of the company in the exercise of their duties or in furthering the company's interests.

Through the development of the common law and the application of the theory of vicarious liability,[8] it became possible to hold a corporation criminally liable for offences committed by its employees, in their scope of work and in the furtherance of the business interest of the

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4 According to Snyman CR, *Criminal Law* 6th Edition, LexisNexis (2014) 31, the definitional elements of a crime include an Act or Omission, Unlawfulness and Culpability (which can either be intention or negligence).

5 Farisani *A comparative Study of Corporate Criminal Liability - Advancing an argument for the reform of corporate criminal liability in South Africa, by introducing a new offence of corporate homicide.* (2014 LLD*)* [Unpublished] UKZN, 43. Retrieved from: https://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/13913/Farisani_Dorothy_Mmakgwale_2014.pdf?sequence=1&isAllowed=y. (Date accessed: 07 March 2018).

6 Burchell *et al*, *South African Criminal Law and Procedure Vol.1 General Principles of Criminal Law* 4th ed Juta (2011).

7 Although the theory of vicarious liability is derived from delict, Jordaan argues that section 332(1) of the CPA created a broader liability than traditional liability of a master in civil law because a corporate body may also be liable for *ultra vires* acts of its servants, as long as they were performed in the interest of the corporate body. Jordaan *"New Perspectives on the criminal liability of corporate bodies"* (2003) SA e-Publications.

8 Borg-Jorgensen and Van der Linde indicate that vicarious liability lays a corporate body open to liability for crimes committed by individuals in the course of their duties, or in the scope of their employment for and with the intent to further the interest of the corporation. Borg-Jorgensen and Van der Linde "*Corporate criminal liability in South Africa" time for change? (part 1)"* (2011) TSAR 2.

company.[9] According to Snyman[10] corporate criminal liability encourages the employer to ensure that its employees and representatives comply with legislative provisions, as the actions taken by its employees may be imputed to it.

Although the liability of a corporation was extended by the theory of vicarious liability, the courts were careful not to impose liability in relation to crimes that could not be committed by a juristic person, as illustrated in *R v RSI (Pty) Ltd,*[11] where the respondents contravened the provisions of section 135(3) of the Insolvency Act,[12] but could not be held criminally liable as the court was of the view that in terms of the Insolvency Act, a limited liability company was not considered a debtor.[13] As such it could not, in law, be guilty of committing such a crime. Even if the respondents could have been found guilty in terms of section 135(3) of the Insolvency Act, the court would not have been able to impose punishment as the prescribed method of punishment for the contravention of section 135(3) of the Insolvency Act, is imprisonment.[14] This principle was further substantiated in *S v Sutherland*,[15] where the court held that since the Liquor Act[16] provided that a hotel liquor license could not be held by a company, the hotel in question could not be convicted of selling liquor in contravention of its hotel licence.

The limitation imposed by the common law principle of vicarious liability permitted corporations to avoid criminal liability even when it had been found guilty of a crime, with the resultant effect of defeating the underlying purpose of criminal law, being to punish the offender. Alternatively, the court imposed liability only on the directors of the corporation, in instances where the company and directors were jointly charged for the crime.

2.2. **The regulatory development of corporate criminal liability in South Africa**.

2.2.1. Criminal Procedure and Evidence Act 31 of 1917

The codification of the principle of corporate criminal liability into South African law was formalised by the enactment of the Criminal Procedure and Evidence Act.[17] In terms of section 384(1) of the Criminal Procedure and Evidence Act, any company undergoing criminal proceedings in terms of statutory or common law may be charged alongside the director or secretary of the company and be jointly liable for the crime, unless such director or secretary could prove he was not a party to the commission of the crime.

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9 Farisani (n5) ibid.

10 Snyman (n4) ibid.

11 *R v R.S.I (Pty) Ltd and Another* 1959 (1) SA 414 (E) at 416E.

12 Insolvency Act 24 of 1936.

13 The definition of a debtor is terms of the Insolvency Act is restricted to a person or partnership of persons or the estate of such person or partnership.

14 s135(3) of the Criminal Procedure Act.

15 *S v Sutherland* 1972 (3) SA 385 (N) 387D-E.

16 Liquor Act 30 of 1928.

17 Criminal Procedure and Evidence Act 31 of 1917. As discussed above, the Criminal Procedure and Evidence Act, read with the Companies Amendment Act 23 of 1939 was the first legislation to formalise the principle of corporate criminal liability.

In as much as this was the regulatory recognition of corporate criminal liability in South Africa, the provisions of section 384(1) of the Criminal Procedure and Evidence Act were criticised by the court in *R v Bennett & Co (Pty) Ltd.*[18] The court held that the section was a procedural provision which simply reflected the common law position of vicarious liability in its original form[19]. Kahn also criticised the section as flawed legal draftsmanship since it dealt with procedural law and not with the substantive law on the liability of the body corporate.[20] In addition to the provision being procedural in nature,[21] section 384(1) [22] also placed a reverse onus on the directors of the company to prove their innocence, which is contrary to the principle of criminal law that places the *onus of proof* on the prosecution.

It is also argued by the author that another shortcoming presented by section 384 of the Criminal Procedure and Evidence Act was that it did not provide a penalty regime for corporate criminal liability, leaving the courts to rely exclusively on its own discretion for purposes of implementing punishment. Therefore, due to how the statutory provision was drafted, the judiciary was not provided with much opportunity to interpret the provision in a manner which could have led to the development of corporate criminal liability.

Section 384(1) of the Criminal Procedure and Evidence Act was amended through the enactment of section 117 of Companies Amendment Act,[23] which extended the liability of a corporate body to common law or statutory crimes committed by directors or servants of the corporate body in the furthering or endeavouring to further the interests of that corporate body. The purpose of section 384(1) of the Criminal Procedure and Evidence Act, as amended, was to formally regulate the criminal conduct of companies as undertaken though its representatives, as well as to grant the courts authority to further develop the common law by holding corporations liable for crimes which may require the element of *mens rea.*[24] However, section 117 still placed a reverse onus on the directors or servants of the corporate body to prove their non-involvement in the commission of the crime in order to escape joint criminal liability.[25]

18 *R v Bennett & Co (Pty) Ltd* 1941 TPD 194.

19 (n18) paragraph 198.

20 Kahn "*Can a corporation be found guilty of murder? The criminal liability of a corporation*" Businessman's Law (1990) 145-146.

21 As discussed above, section 384(1) of the Criminal Procedure and Evidence Act merely stated that in criminal proceedings against a company, a representative of such a company may also be held liable.

22 The principle of reverse onus on company directors or representatives in relation to criminal proceedings was repealed by the Constitutional Court in *S v Coetzee 1997 (3) SA 527 (CC)* on the basis that it is inconsistent with an accused's right to be presumed innocent until proven guilty, as it relieves the prosecution of the burden of proving all the elements of the offence with which the accused was charged, This principle was applied by the Constitutional Court pursuant to the decision by the same court in *S v Zuma and Others 1995 (2) SA 642 (CC).* However, there are certain instances where the court may still apply the reverse onus, such as in cases where there is an allegation of Common Purpose on the co-accused, *such as in S v Thebus and Another 2003 (2) SACR 319 (CC).*

23 Companies Amendment Act 23 of 1939.

24 In *R v Durban Baking Co* 1941 TPD 194, the court held that in terms of s384(1), a corporate body may be held liable for offences requiring *mens rea* as the corporate body used its functionaries to formulate the required intent.

25 However as noted in (n21) ibid, the principle of "reverse onus" on the directors or representatives of the company has been repealed.

2.3. The current regulation of corporate criminal liability: section 332 of the Criminal Procedure Act[26]

As a further advancement of corporate criminal liability, the legislature enacted the CPA,[27] currently regulates corporate criminal liability in terms of section 332(1), which provides that:

"*For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law:*

(a) any act performed, with or without a particular intent, by or on instruction or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any), by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of the corporate body".[28]

Section 332 of the CPA provides the regulatory framework currently applicable to corporate criminal liability, and regulates the criminal prosecution of companies for common law and statutory crimes. Borg-Jorgensen and Van der Linde[29] argue that the ambit of section 332 of the CPA extends beyond vicarious liability as the fault of the individual is imputed to the company even where the director acted beyond the scope of his employment. The argument advanced by Borg-Jorgensen and Van der Linde is also supported by Jordaan[30] who further states that, whether the corporation or its members had knowledge of the exact criminal acts or omissions, is also not a relevant consideration in determining criminal liability.[31]

It is contended that the above authors interpretation of section 332 is not entirely correct in that, section 332(1)(a) of the CPA expressly states that criminal liability will be imposed on the corporate body in respect of any act or omission performed by the corporate body through any of its representatives, *on instructions or permission given by the director of such a corporate body* [*own emphasis*]. This provision, in the view of the author indicates that for purposes of holding a company criminally liable, there must be, to an extent, a

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26 Act 51 of 1977.

27 This Act replaced both the Criminal Procedure Act of 1955 and the Criminal Procedure and Evidence Act of 1917.

28 (n25) s322(1).

29 (n8) ibid.

30 (n7) ibid.

31 In *S v Joseph Mtshumayeli (Pty) Ltd* (1971) (1) SA 33 SA, the appellate division also held a company liable for culpable homicide for an act committed by a third party, on instructions of a representative of the company. The court held that the act of the third party was committed while "endeavouring to further the interests of the company, and as such was deemed to have been performed by the company".

delegation of authority by the directors of a company. Therefore, any act undertaken by the director or a representative of a company which falls outside the delegated authority, even if it was undertaken to further the interest of the corporate body, cannot be imputed to the corporation, unless the corporation consents to be bound thereby.

With regard to the punishment of a corporate body, section 332(2)(c) of the Criminal Procedure Act provides that should the corporate body be found guilty of a corporate crime, *the court shall not* [*own emphasis*] impose any other punishment, whether direct *or as an alternative [own emphasis*], other than a fine, even if the law infringed does not make provision in respect of the offence in question. The provisions of section 332(2)(c) of the Criminal Procedure Act are, in the views of the author, on the premise that it is practically imposible to imprison a corporate entity. According to Farisani,[32] the underlying purpose of a fine is to act as a deterrent and to punish the corporate body by reducing its financial ability as it is dependent on its financial ability in order to ensure continued existence. In *S v Seola*[33] the court rejected the notion that a fine may act as a deterrent against the commission of a crime. However, it is the view of the author that the decision in *S v Seola* may be distinguished in cases where the fine imposed on the corporate body is excessive to the extent that it has a direct impact on the shareholders of the corporate body.

The CPA does not provide minimum thresholds that must be considered by courts when imposing a fine as a criminal sanction, and no provision was made in respect of sentencing guidelines for corporate crimes, when the legislature enacted the Criminal Law Amendment Act[34]. However, Terblanche[35] indicates that the maximum amount to which a fine may be imposed for common law crimes in the Magistrates Court is limited by the jurisdiction of the court,[36] whilst the High Court is permitted to exercise its own discretion when imposing a sanction, unless restricted by a statutory provision in terms of the amount of the fine.

In relation to statutory crimes, legislation normally prescribes the maximum amount that can be imposed by the court in relation to the crime thereto. An example being the Prevention and Combating of Corrupt Activities Act.[37] In terms of section 26 of the Prevention and Combating of Corrupt Activities Act, any person found guilty of an offence in relation to corrupt activities in relation to contracts or tenders,[38] may be held liable for a fine of R250 000,00 or to imprisonment for a period not exceeding a period of three years.

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32 Farisani (n5) ibid 79.

33 *S v Seola* 1996 (2) SACR 616 (0) at page 622.

34 Criminal Law Amendment Act 15 of 1997. The Act made provision for minimum sentences in relation to serious offences such as murder and rape – committed by natural persons.

35 Terblanche "*The Guide to Sentencing in South Africa*" 3rd edition 2016. https://0-www-mylexisnexis-co-za.ujlink.uj.ac.za/Index.aspx (Accessed: 25 August 2018).

36 The maximum amount that can be applied by a district court is R120 000 and the maximum amount for a district court is R600 000.

37 Prevention and Combating of Corrupt Activities Act 12 of 2004.

38 In terms of the Act, this is in relation to any person who, directly or indirectly-
(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person

In addition to the R250 000,00 fine, the court may impose another fine equal to five times the value of the gratification involved.[39]

A noteworthy provision in the Prevention and Combating of Corrupt Activities Act is section 28(1)(b) and 28(1)(c), which, in addition to a fine that may be imposed by the court, authorises the court to issue an order which sets out the nature of the offence, the name of the company which committed the offence, directors involved in or ought to reasonably have known about the commitment of the offence and the fine imposed by the court. The court order in terms of section 28 of the Prevention and Combating of Corrupt Activities Act may be endorsed on the Register of Tender Defaulters in terms of chapter 6 of the Act,[40] which is accessible to the public. This statutory provision introduces another type of punitive measure in South African corporate criminal liability in a form of a publicity order, a type of order that is prescribed in other jurisdictions.[41]

Section 332(2)(c) of the CPA further indicates that in the event that the statutory provision permits for an alternative form of punishment besides a fine, the court may only impose a fine in relation to a corporate body. The primary concern with section 332(2)(c) is that it has placed a restriction on the types of punitive measures that can be imposed by courts in enforcing corporate criminal liability, which hampers the development of corporate criminal liability in South Africa. Farisani[42] makes a valid point that in as much as a fine can serve as a just punishment for corporate criminals as it may have a direct impact on its financial status, this may not necessarily always be the case in the instance of large corporations that may have budget allocations dedicated to corporate crimes. The contrary may be argued for small corporations that may lack the financial means to pay the fine.

It is therefore submitted that the South African legislature has to review the current punitive measure applicable to corporate crimes in terms of the CPA. In developing the principles applicable to corporate criminal liability, the legislature may consider incorporating statutory provisions similar to section 28 of the Prevention and Combating of Corrupt Activities Act as, in recent years, it has become more evident that corporations are concerned about protecting their reputation, perhaps even more so than the payment of fines. A citable example is the consulting firm KPMG South Africa Proprietary Limited which suffered a severe reputation damage in 2017, resulting in a loss of business opportunities after the firm was implicated in an irregular audit process in relation to business transactions concluded between the South African government and various companies owned by the Gupta family.[43]Thus, the legislature may have to consider additional measure, such as adverse publicity orders, concerning to corporate offenders.

39 Section 36(3).

40 Prevention and Combating of Corrupt Activities Act 12 of 2004.

41 The principle of publicity orders in other jurisdictions will be further discussed in Chapter 2, below.

42 Farisani (n5) 131.

43 https://www.fin24.com/Companies/Financial-Services/kpmg-boss-opens-up-about-gupta-red-flags-20171013 (Accessed 17 October 2018).

2.4. **Concluding Remarks**

The common law principle of vicarious liability laid the ground for corporate criminal liability in South African law and was entrenched through various legislation into a legal principle governing corporate crimes. However, these principles have been scantily developed and the legislature has to reconsider the further development of corporate criminal liability in a manner that will ensure that more corporations are held criminally liable and appropriately punished for the crimes committed. Although fines may, to a certain extent, serve as a deterrent, there are other punitive measures, such as community service, corporate rehabilitation orders and adverse publicity orders, which may be considered by the legislature in further developing the principles on corporate criminal liability.

CHAPTER 2

3. COMPARATIVE ANALYSIS OF THE APPLICATION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM, CANADA AND THE UNITED STATES OF AMERICA

3.1. England

South Africa was once a British colony and the first company law that was applied in South Africa was the Joint Stock Companies Act.[44] This was an Act that was applicable in England. As South African company and criminal law developed, it still derived some of its principles from English law, and as such a comparative study of the punitive measures applied in English law in relation to corporate criminal liability may contribute to the development of the concept in South Africa.

3.1.1. The development of corporate criminal liability in England and the identification doctrine

The concept of a corporation and its recognition as a separate legal entity in English law can be traced back to as early as the 13th century,[45] and legislatively since 1844 with the enactment of the Joint Stock Companies Act. It was however, only in the case of *Salomon v Salomon*[46] where the English judiciary in the House of Lords formally acknowledged that as a separate legal entity, a corporation has the capacity to have its own rights and obligations. As such it must be treated like any other independent person with rights and liability apportioned to it. Therefore, as result of this separate legal personality from its shareholders, it then became possible in English law to hold a corporation liable for its actions.

However, just as with South African law, English law was not developed to include the prosecution of corporations for criminal activities. Therefore, the prosecution of corporations was hindered by various factors such as the inability of a corporation to attend court proceedings, the lack of a juristic person to have the element of *mens rea* and the fact that certain punishments (e.g. crimes punishable by death) could not be imposed on a corporation.[47] Nevertheless, the English courts in *R v Birmingham & Gloucester Railway Co*[48] entrenched the concept of corporate criminal liability, when the courts held that the

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44 Joint Stock Companies Act of 1844.

45 According to Williston, the origin of the corporation can be traced to peace guilds, which were groups of brotherhoods formed by neighbours, formed with the intention of protecting one another and acquiring property. Williston *"History of Business Corporations Before 1800 (1888) 2 (3)"* Harvard Law Review 107 – 108.

46 *Salomon v Salomon* [1896] UKHL 1, [1897] AC 22 at page 30.

47 In *Cloggs v Bernard* [1558 – 1774] All ER 1, the court held that as a company does not have a soul and cannot appear in person therefore it cannot commit treason, nor be outlawed or punished by death.

48 *R v Birmingham & Gloucester Railway Co* (1842) 3 Q.B. 223.

liability of corporations was to be equated, so far as possible, with that of natural persons.[49] Thus, the decision in in *R v Birmingham & Gloucester Railway Co* became a judicial basis for the recognition of corporate criminal liability in England.

The formal recognition of corporate criminal liability in English law still presented the courts with the dilemma that, in relation to certain crimes, it was impossible to impute the element of *mens rea* on a juristic person. As such, the English courts in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [50] established the identification theory in order to hold the corporation liable for crimes committed by a person under the direction of the shareholders or directors of the company. In finding against *Lennard's Carrying Co Ltd* in the matter, the court held that:

> "*a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent but who is really the directing mind and will of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, in some companies it is so, that that person has also an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company and can only be removed by the general meeting of the company.*"[51]

Therefore, the liability of a corporation in terms of the identification theory is limited to agents who occupy high positions within the organisation as they are regarded as the directing mind of the company and agents who, in terms of the constitutional documents of the corporation, are authorised to act on behalf the corporation. The identification theory has been criticised by some authors who argue that it fails to recognise that in large corporations, the people who occupy high positions normally delegate tasks to junior personnel and who, normally, are the ones committing the crimes.[52]

3.1.2. The current regulation of corporate criminal liability in England

After the decision in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd,*[53] the English courts proceeded to apply the identification doctrine in a number of criminal proceedings against corporations[54] and as such entrenched the identification doctrine in English Law. However, prior to the court judgement in *Lennard's Carrying Co Ltd v Asiatic Petroleum*

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49 (n48) ibid.

50 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713.

51 It is important to note that the *Lennard's Carrying Co Ltd* case was of a civil nature, however, it was the first judicially noted matter where the identification theory was applied, prior to the courts applying the principle in criminal matters.

52 Radhi *"The Standard Liability for Corporate Crime: What can Other Jurisdictions Learn from Canada"* 2017 Asper Review of International Business and Trade Law 5.

53 (n50) ibid.

54 The disputes in *DPP v Kent and Sussex Contractors* [1944] K.B 146, *Moore v Bresler* [1944] 2 All E.R 515 and *R v ICR Haulage Ltd* [1944] K.B 551, all dealt with holding a corporation liable for crime which require *mens rea* and wherein the courts applied the identification doctrine in order to hold them liable.

Co Ltd , the enforcement of corporate criminal liability was not regulated by legislation, until the recent enactment of the Corporate Manslaughter and Corporate Homicide Act[55], which came into force in April 2008.

In terms of the Corporate Manslaughter and Corporate Homicide Act, a corporation is guilty of an offence if the manner in which it undertakes its activities cause the death of a person and amounts to a gross breach of relevant duty of care owed by the corporation to the deceased.[56] The Act further states that the corporation will be guilty only if the way in which its activities are managed by its senior management results in a breach.[57] In reading the provisions of section 1 of the Act, it appears to the author that the legislature indirectly codified the doctrine of identification into law, as the liability of a corporation in terms of the Act is still dependent on the existence of an act (by omission) of senior management, who are considered the directing mind of the corporation.

With regard to the punishment of corporations found guilty in terms of the Corporate Manslaughter and Corporate Homicide Act, the Act makes provision for three kinds of penalties, namely, a fine,[58] a remedial order[59] or a publicity order.[60] In relation to a fine, the Act does not provide any thresholds or external factors that must be considered by the court when imposing a fine. It implies that the court has a discretion on the amount it may enforce as a form of punishment. In addition to a fine and taking into consideration the nature of the breach, the court may also require the corporation to remedy the breach committed. Bharadwaj[61] criticises this option on the basis it may result in the unintended "spill-over" effect to consumers as the corporation may increase its prices in relation to the product or service offered. The author agrees with this argument.

The Corporate Manslaughter and Corporate Homicide Act introduced another punitive measure that may be considered by courts in enforcing corporate criminal liability, i.e. the publication of conviction orders or publicity orders. In terms of section 10, the court may require a convicted corporation to publicise that it has been convicted of an offence in terms of the Act, specify the particulars of the offence, state the amount of any fine imposed and the terms of any remedial order that was made by the court. Bharadwaj [62] argues that due to the reputational risk associated with publicity orders, this method of punishment may have a long-term effect in deterring corporate crimes as corporations would not want to risk the potential loss of investors customers and insurers. Reputational risk is more important for large corporations with global footprints as any crime committed by the company may have

55 Corporate Manslaughter and Corporate Homicide Act of 2007.
56 s.1(1) of the Corporate Manslaughter and Corporate Homicide Act of 2007.
57 s1(3) (n54).
58 s1(6) (n54).
59 s9 (n54).
60 s10 (n54)
61 Bharadwaj *"Corporate Manslaughter and Corporate Homicide Act, 2007: Note and Comments"* 2009 National Law School of India Review 201 209.
62 (n60) ibid 210.

an adverse effect not only in the jurisdiction in which the crime was committed but on other countries where the company may have jurisdiction.[63]

3.2. **Canada**

3.2.1. The development of corporate criminal liability in Canada and the extension of the identification doctrine

The concept of a corporation and its recognition as a legal personality in Canadian law is derived from English law, as discussed in *Salomon v Salomon,*[64] and English law has significantly influenced Canadian company law. This includes the principles of corporate criminal liability, through legislation such as the Joint Stock Companies Act, which was also applicable in Canada.

The recognition of corporate criminal liability in Canada dates back to the late 1800s with the incorporation of the Canadian Companies Act[65] and the Criminal Code of Canada,[66] more in particular section 2 of the Criminal Code, which defined the word "person" to include corporate bodies and the imposition of a fine instead of imprisonment in the event of a corporation being found guilty of a crime.

However, as with many other jurisdictions, corporations could only be found guilty for regulatory crimes and not crimes which require *mens rea*, as regulatory crimes only require absolute liability without the need to prove fault on the part of the corporation. The inability to hold a corporation liable for crimes which require *mens rea* was considered in *R v Fane Robinson*[67] where the court had to deliberate on a matter against a company found guilty of conspiracy to defraud and for obtaining money through false pretences. In finding the corporation guilty, the court held that:

> "*In my opinion George Robinson and Emile Fielhaber were the acting and directing will of Fane Robinson Ltd. Generally and in particular in respect of the subject-matter of the offences with which it is charged, that their culpable intention (mens rea) and their illegal act (actus reus) were the intention and the act of the company and that conspiracy to defraud and obtain money by false pretences are offences which a corporation is capable of committing…the gradual process of placing those artificial entities known as corporations in the same position as a natural person as regards amenability to the criminal law has, by reason of the provisions of the Criminal Code, R.S.C., 1927 ch. 36, reached that stage where it can be said that, if the act complained of can be treated as that of the company, the corporation is criminally responsible for all such acts as it is capable of committing and for which the prescribed punishment is one it can be made to endure.* "

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63 A citable example is the Steinhoff Group of companies, which has dual listing in the Johannesburg Stock Exchange and the Frankfurt Stock Exchange, and was charged with accounting irregularities in 2017 in relation to its African operations. The impact of the allegations adversely affected the Steinhoff share prices on both Johannesburg Stock Exchange and the Frankfurt Stock Exchange.

64 (n45) Ibid.

65 Canadian Companies Act of 1850.

66 Criminal Code of Canada of 1892.

67 [1941] 3 D.L.R. 409 (D.A.C.S Alta).

Therefore, the court decision in *R v Fane Robinson* laid the foundation for the introduction of the identification doctrine as a theory for corporate criminal liability in Canada, as derived from English law. In applying the identification theory, the Canadian courts have always followed a similar approach as the one developed by the English courts, in that the corporation can only be held liable only if the crime was committed by a person who is the directing mind of the company, occupies a senior position in the said company and the act occurred with the intention to benefit the corporation.[68]

However, in *Canadian Dredge & Co. v R,*[69] the Supreme Court of Canada extended the application of the identification theory beyond the concept of the "will and directing mind of the company" and beyond the board of directors and senior managers of the company, to include personnel who have been delegated the authority to act on behalf of the company by senior management, and also noted that a company may have multiple directing minds and not just a single one. According to the court:

> "*The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation…A corporation may have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and sub-delegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by decentralizing and delegating the guiding forces in the corporate undertaking*".

Further to the above, the Supreme Court stated that in the event that, in committing the crime, the directing mind of the corporation also acted with the intention to defraud the company, then the company cannot be held liable[70]. Therefore, in terms of the extended identification theory, it is the view of the author that a corporation can only be held liable if and when the act was committed by a directing mind of a corporation, acting within the scope of employment, not with the intention to defraud the company but to benefit the company.

3.2.2. The current regulation of corporate criminal liability in Canada in terms of Bill C-45 and the Criminal Code of Canada

The enforcement of corporate criminal liability in Canada is currently regulated by Bill C-45 which was enacted in March 2004 to amend to the Criminal Code of Canada and further extended the application of corporate criminal liability to an organisation[71], which includes a corporate body. In terms of paragraph 22.2 of Bill C-45:

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[68] *R v St Lawrence Corp Ltd* [1969] 3 C.C.C. 263., *R v Waterloo Mercury Sales Ltd* (1974).

[69] [1985] 1 S.C.R. 662 (Can).

[70] (n69) at paragraph 47.

[71] section 2 of Bill C-45 defines an organisation as a public body, body corporate, society, company, firm, partnership, trade union or municipality or an association of persons that:
(i) is created for a common purpose,
(ii) has an operational structure, and

"*22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organisation is a party to the offence if, with the intent at least in part to benefit the organisation, one of its senior officers*

(a) acting within the scope of their authority, is a party to the offence;
(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or
(c) knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence. "

A development that was introduced by paragraph 22.2(b) of Bill C-45 is the recognition that corporate bodies normally operate on a system of delegation, and that under normal circumstances, it is the junior personnel of a corporation that commit corporate crimes, on the instructions of the directing mind. Therefore, this provision in legislation has made it far more difficult for corporations to escape liability on the basis that the act was not committed by a "directing mind" of the company. However, paragraph 22.2 has retained some of the elementary principles of the identification theory in that a senior officer of the corporation must be part of the act, the act must have been committed within their scope of authority and with the intention to benefit the corporation. Archibald, Jull and Roach[72] argue that one of the implications of paragraph 22.2 of Bill C-45 is that the fault of a senior officer who had no intention to benefit the organisation will not be attributed to the organisation even though the actions of the senior officer may have benefited the organisation. The authors suggest that this provides a corporation with a degree of protection in the event of a senior personnel acting in a mischievous manner and without any intention of benefiting the company.

In relation to the punishment of corporations, Canadian law still enforces fines against corporations as a punitive measure, as provided by section 19 of Bill C-45, which permits the court to grant an award of up to $100 000 in relation to a summary conviction offence. However, section 718.21 of the Criminal Code provides mandatory mitigating and aggravating factors that must be considered by a court when imposing a fine on a corporation, which are as follows:

"*a. any advantage realised by the organisation as a result of the offence;*

b. the degree of planning involved in carrying out the offence and the duration and the complexity of the offence;

c. whether the organisation has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

d. the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;

(iii) holds itself out to the public as an association of persons.

72 Archibald, Jull and Roach *"The Changed Face of Corporate Criminal Liability"* 2004 48 Crim. L.Q 367 379.

e. the cost to public authorities of the investigation and prosecution of the offence;

f. any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;

g. whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

h. any penalty imposed by the organisation on a representative for their role in the commission of the offence;

i. any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and

j. any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence."[73]

The underlying purpose of section 718.21 of the Criminal Code is to provide the court with sentencing guidelines that must be considered when applying its discretion on the appropriate fine to be imposed on a corporation, which will strike a balance between deterrence and fairness. Although an argument that may be advanced against 718.21 of the Criminal Code is that it interferes with the discretionary powers of the judiciary, the benefit of restricting the discretion of the court is that it ensures that each case is considered on its own merits against objective principles. It also warrants against the imposition of a fine by a court which may not be suitable for the crime committed or the corporation itself.

The enforcement of corporate criminal liability in Canada has evolved from the adoption of the identification doctrine from English law and has been further developed to cater for the modern concept of a corporation wherein there are multiple directing minds in a corporation. The enactment of Bill C-45 further developed the principle of corporate criminal liability in that the legislature recognised that conduct that often result in corporate crimes is not always directly undertaken by the directing minds of such entities. Such a corporation should be capable of being held liable in the event of a delegation of authority to junior members of the company.

In addition to the above, Archibald, Jull and Roach[74] state that section 732.1(31) of the Criminal Code permits the court to order probation orders that aim to change the organisational behaviour and ultimately act as a deterrence against the commitment of similar offences in future. Alternatively, the court may order the organisation to issue a publicity order informing the public about the conviction, sentence and the procedures adopted to prevent the re-occurrence of the offence.[75]

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73 s 718.21 of the Criminal Code.

74 (n70) ibid 379 389.

75 Section 32.1(31) (f) of the Criminal Code.

Furthermore, the sentencing guidelines provided by section 718.21 of the Criminal Code guarantees that the court, when applying its discretion, will take into consideration appropriate factors when ordering a fine against the corporation, in order to ensure the effectiveness thereof. However, as indicated by section 732.1(3.1) of the Criminal Code, it appears that Canadian law is open to alternative punitive measures which may serve as better deterrence against corporate crimes, in addition to a fine, such as probation and publicity orders. The fact that other punitive measures are available under Canadian law may be considered as an implied admission that a fine alone may no longer serve as an effective punitive measure against corporate criminal liability.

3.3. **United States of America**

3.3.1. The development of corporate criminal liability in the United States of America and the *Respondeat Superior* theory

In contrast to the identification theory applied in English and Canadian law, the principle of corporate criminal liability in the United States of America (the USA) is based on the *Respondeat Superior* (let the master answer) theory. It states that a principal can be held liable for the wrongful action of its agent if the actions were completed for the benefit of the principal and were within the express or apparent scope of the agent's duties.[76]

In the USA, the concept of criminal liability was firstly recognised under the US federal law in the case of *New York Central & Hudson Railroad Company v United States*[77] where a company and two of its employees were held to be in violation of the Elkins Act.[78] In terms of the Elkins Act:

> "*(a) anything done or omitted to be done by a corporation common carrier, which, if done or omitted to be done by any director or officer thereto, would constitute a misdemeanour under said act and such act shall also be held to be a misdemeanour committed by such corporation; and*
> *(b)in construing and enforcing the provisions of this section, the act, omission or failure of any officer or agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission or failure of such carrier, as well as that of the person."*

On the basis of the Elkins Act, the court found that corporations can be found liable in respect of acts that are in violation of the Act and that agents have the authority to perform tasks that are within their employment for the benefit of the principal, without the principal having participated in the act.[79]

From the onset, the principal distinction between the identification theory and the R*espondeat Superior* theory is that, the liability of a corporation is based on the principal having granted the agent the necessary authority to act within the scope of employment and

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76 (n1) ibid.
77 *New York Central R Co. v United States* 212 U.S 481 (New York 1909) [New York Central].
78 Elkins Act 32 Stat. at L 847, 708, US. Comp. Stat. Supp.1907.
79 (n75) ibid.

for the benefit of the principal, and is not based on the position of the agent within the corporation. This results in the fact that the scope of liability for a corporation in terms of the *Respondeat Superior* is wider than in terms of the identification theory, which narrows the liability of a corporation to conduct committed by senior personnel (directing mind) of the company. In the case of Canadian law, it also recognises conduct committed by junior personnel with the permission of senior personnel.

Kamensky[80] argues that corporate criminal liability is implemented in terms of a two-staged approach, wherein the corporation is held liable when (a) the actions of the employer's agent were within the scope of his professional duties and (b) were intended to benefit the corporation. In relation to the second leg of the two-staged approach, Khanna[81] is of the view that the agent need not act with the exclusive purpose of benefiting the corporation and the corporation need not actually receive the benefit. The view advanced by Khanna may place a corporation in a disadvantage as it may find itself held liable for crimes committed by employees operating with self-serving intentions but under the pretence of corporate benefit.

3.3.2. The current enforcement of corporate criminal liability in the USA

Corporate criminal liability in the USA is still governed by the doctrine of R*espondeat Superior* as developed in *New York Central & Hudson Railroad Company v United States*, and in terms of the Model Penal Code.[82] In terms of the Model Penal Code, a corporation will be held liable if the corporation's official involvement in the crime can be attributed to the corporation, and if the employee was authorised, requested or commanded to act, or the act was negligently or recklessly tolerated by the board of directors or a senior manager acting on behalf of the corporation and within the scope of his employment.[83]
Contrary to *Respondeat Superior* doctrine, which does not restrict the liability of a corporation on the basis of the person who committed the crime, the Model Penal Code has adopted an approach similar to the identification theory. It requires a senior official of the corporation to be involved in, had prior knowledge of or tolerated the crime, in order for the corporation to be held liable.

With regard to the punitive measures that are enforceable against corporations in the USA, the imposition of a fine is also regarded as an easy punishment that can be imposed against a corporation. However, Miester[84] argues that fines are not always efficient as a form of a punitive measure, in particular against large corporations. Further, the 8th amendment to the American Constitution prohibits the court from imposing excessive fines and unusual punishment. As an alternative to cash fines, Coffee[85] proposes that as a punitive measure,

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80 Kamensky *"Introducing Corporate Criminal Liability in Ukraine: Terra Incognita"* 2016 Stetson Law Review 3.

81 Khanna *"Corporate Criminal Liability: What Purpose does it serve?"*1996 Harvard Law Review 5.

82 Sepinwall *"Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime"* 2012 Hastings Law Journal 411 415.

83 Model Penal Code, section 2.07(1) (c) 1985.

84 Miester Jr. *"Criminal liability for corporations that kill"* 1990 Tulane Law Review 919 927.

85 J Coffee *"Criminal Sentences for Corporations: Alternative Funding Mechanisms"*, 198573 CALIF.433.

guilty corporations should be compelled to issue stock equal to the cash fine necessary to deter the illegal activity. In support of his proposition, Coffee states that the main advantage of an equity fine is that it averts the problem caused by cash fines of having liquid assets readily available to pay the fine, with the resultant effect of the corporation raising its product costs in order to pay the fine.

Under the Sentencing Reform Act[86] the court is granted the right to impose a probation on a corporate body for criminal behaviour. Miester[87] argues that there are two types of corporation probations that may be considered by the court, namely, invasive and non-invasive probations. Invasive techniques require the court to order the corporation to change its policies and procedures that may have resulted in the commission of the crime, and may appoint a trustee to oversee the operating procedures of a company. However, Miester states that a critique that has been raised against the invasive probation technique is that it results in the court assuming a role of a corporate watchdog, a role which may affect the autonomy of a corporation. The non-invasive probation technique normally forces corporations to donate either time or money to charitable causes or community services. However, Miester also raises a short-coming of the non-invasive probation, stating that it can be abused by the corporation to create positive publicity for itself and not necessarily serve as a punitive measure against the corporation.

Miester also proposes the concept of "putting the corporation to jail".[88] This would be done not in a literal form but by means of a quarantine, where the corporation could be prohibited from participating in a particular trade or from trading in a specific geographical area. However, the potential disadvantage of the corporate quarantine is that it may have a direct impact on employment.

3.4. **Concluding remarks**

The comparative analysis of the United Kingdom, Canada and the United States of America indicates that there has been significant development in the prosecution of corporate criminal liability through case law and legislation. In all three jurisdictions there is a growing inclination of acknowledging that a fine alone is no longer effective as a punitive measure against corporations, and as such legislation and academic writers have recommended that various other punitive measures, such as publicity orders and sanctions be considered by courts when punishing corporate criminal liability. Fines have always been a preferred punitive measure by courts as they impose less of an administrative burden. However, in order for a fine to serve as an effective punitive measure against a corporation, the courts must consider all present factors in a particular case, in accordance to its own merits and without excessive reliance on judicial precedents.

86 Sentencing Reform Act, 18 U.S.C (1982 & SUPP. III (1985).
87 (n82) ibid 938.
88 (n82) ibid 919 944.

CHAPTER 3

4. CURRENT PROSECUTION OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA AND THE PROPOSED DEVELOPMENT THEREOF

4.1. The imposition of a fine as a punitive measure in South African law

As indicated in Chapter 2, the current punitive measure applicable to corporate crimes in South African law is the imposition of a fine in terms of section 332(2)(c) of the CPA,[89] and according to the provisions of this section, a fine is the only punitive measure that may be imposed in relation to corporate offenders.[90] In this regard, subsection 332(2)(c) further provides that in the instance that the relevant law infringed by the corporate body provides for other methods of punishment but for a fine, such punishment may not be imposed on a corporate offender. The court has to impose a fine, in terms of section 288 of the CPA.[91] This position was initially laid down by the court in *R v Hammersma*[92] where the magistrate had imposed a sentence of imprisonment on a corporate body represented by its agent, and it was held to be incorrect as no other punishment may be imposed to a corporate offender other than a fine.[93] The decision in *R v Hammersma* was affirmed by the court in *R v Connock,*[94] where the court held that:

> "*in so far, however, as the magistrate imposed a term of imprisonment as an alternative, the sentence was not a competent one, in view of the provisions of section 384(2)(d) of Act 31 of 1917, as amended".*[95]

The regulatory framework governing the imposition of fines as punishment for corporate crimes has been criticised by South African scholars[96] on the basis that, although it may serve as a deterrent[97] in some instances, it is also not always sufficient and there is a call to consider other factors in the punishment of corporate offenders.[98] Farisani also contends that punishing a corporation by means of a fine is not an effective method in reducing or preventing corporate crimes, as in some instances, corporations that have ample resources

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89 (n2) ibid.

90 Mahala (2012) *Corporate Criminal Liability for Economic Crimes*. LLM (Commercial Law) [Unpublished]: University of Johannesburg 25. Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Repository?exact=sm_title:%22Corporate+criminal+liability+for+economic+crimes%22 (Accessed: 29 August 2019).

91 Section 288 of the Criminal Procedure Act regulates the procedure that has to be followed by an offender when the court passes the payment of a fine as a sentence.

92 *R v Hammersma and Another* 1941 OPD 39.

93 Fischer JP In *R v Hammersma supra*.

94 *R v Connock* 1949 (2) SA 295 (E).

95 Section 384 of the Criminal Procedure and Evidence Act was the legislative basis which formulated the regulation of corporate criminal liability in South African law.

96 Du Toit *Sentencing the corporate offender in South Africa: A comparative approach* 2012 South African Journal of Criminal Justice 235 236.

97 In *S v Selebi* Joffe J cited case law which confirms that deterrence has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment. (Judgement on sentence) 25/2009 [2010] ZAGP JHC 58 3 August 2010 Retrieved from: http://saflii.org/za/cases/ZAGPJHC/2010/58.html (Accessed 05 September 2019).

98 Rycroft *Corporate Homicide* South African Journal of Criminal Justice (2004) 141.

often do not feel the punishment.[99] In his critique of section 332 of the CPA, Du Toit[100] states that the purpose of corporate punishment should be to prevent the offender from re-offending and to discourage other corporations from offending or re-offending.[101] Therefore, the purpose of the punishment should reflect the nature of the crime committed, in order to avert the possibility of re-offending.

Section 8(4) of the Constitution of the Republic of South Africa[102] grants a corporate body rights and responsibilities, to the extent applicable as natural persons and as result,[103] the sentencing principles applicable to natural persons should also be applied to corporations,[104] as far as reasonably possible. In *Director of Public Prosecutions, Kwazulu-Natal v P*[105], the general principles were restated by the Supreme Court of Appeal, as follows:

"The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the 'triad consisting of the crime, the offender and the interest of society'[106]*. In the assessment of an appropriate sentence, the court is required to have regard to the main purpose of punishment, namely, the deterrent, preventive, reformative and the retributive aspects thereof. To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender."*[107]

As the triad sentencing principle is well established in our law for the purposes of imposing sentences on offenders, it is proposed that the same principle be utilised in relation to corporate offenders.[108]

The first consideration in the triad principle is the nature of the crime committed and in *S v Engelbrecht*, the Supreme Court of Appeal stated that as each court has the authority to exercise discretion when passing a sentence, it is entitled to take into account the fact that a crime was carefully planned and executed.[109] According to Du Toit, a further consideration is the foreseeability of the crime and its consequences.[110] Thus, if the corporate offender through its directing minds could have foreseen the commission of the crime and its possible consequence, but proceeds to commit the crime or allow the crime to be committed, this may render the crime serious as there is an element of intention.

99 Farisani *Corporate homicide: what can South Africa learn from recent developments in English law?* 2009 XLII CILSA 210 218.

100 (n94) ibid.

101 (n94) ibid 241.

102 Constitution of the Republic of South Africa, 1996

103 Section 8 - **Application**

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

104 (n94) ibid.

105 *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (1) SACR 243 (SCA).

106 The triad principle was initially laid down by the Appellate Division in *S v Zinn* 1969 (2) SA 537 (A).

107 *R v Swanepoel* 1945 AD 444.

108 (n94) ibid 242.

109 *S v Engelbrecht* 2011 (2) SACR 540 (SCA).

110 (n94) ibid 244.

Another consideration in the triad principle is the offender. A constraint in having a corporation as an offender is that it has *'no soul to be damned and no body to be kicked,*[111] and hence it is imperative for the court to contemplate relevant factors in relation to the corporate offender as such, the financial circumstances of the offender and its character have to be considered.[112]

In deciding on an appropriate fine to be imposed on the corporate offenders, the court in *S v Shaik,*[113] considered it to be insensible to impose a fine that could not be recovered from the offender, and as such a punishment of a fine must be imposed on a corporation that could afford to pay, while striking a balance between societal interests and the circumstance of the corporate offender.[114] What has been affirmed as an imperative when imposing the sentence of a fine is that the fine should not be less than the fruits of the crime committed, as was held by the trial court and the appellate division in *S v Deal Enterprises (Pty) Ltd*.[115]

The last consideration in the triad principle is the interest of the community and the impact of the crime to it. It has been argued that the failure to hold corporations liable may frustrate society's effort to condemn corporate crimes.[116] Du Toit also states that the effect of the sentence on the community must be considered by the court, more in relation to the economic viability of the organisation and the continued employment of its employees.[117]

4.2. Critique against the imposition of fines against corporate offenders as a punitive measure

The debate on whether fines are an effective punitive measure against corporate offenders has been popular amongst legal scholars. Khanna[118] states that deterrence is the aim of corporate criminal liability and cash fines are considered as optimal sanctions by most legal jurisdictions as they are much cheaper to administer in comparison to other sanctions, hence the reason they rank higher in relation to punitive measures against corporate offenders.

In imposing a fine, just as with other methods of punishment, the principle of proportionality governs the sentencing court in that the gravity of the fine to be imposed should be proportionate to the crime committed. Thus, the effectiveness of a fine against a corporate offender may also be determined by the financial capacity of the offender as some companies may lack the financial capacity to pay it, and imposing a large fine may have an

111 Coffee *No soul to damn: No body to kick: An unscandalised inquiry into the problem of corporate punishment* 1981 Columbia Law School 386.

112 (n94) ibid 244.

113 *S v Shaik* 2007 SACR 142 (D).

114 In *S v Shaik,* the court passed imposed a suspended fine sentence on the corporate offenders who did not have the financial means to make payment of the fine, on condition that they were not found guilty of corruption.

115 *S v Deal Enterprises (Pty) Ltd* 1981 (4) SA 29 (A).

116 Diamantis *Clockwork Corporations: A character theory of corporate punishment* 2008 Iowa Law Review 507 509.

117 (n94) ibid 250.

118 (n79) ibid 14.

unintended consequence of rendering the corporation insolvent.[119] Notwithstanding the possibility of imposing disproportionate sentences, Clough[120] still argues that in the case of corporate offenders, the financial capacity of the offender should be taken into account even where this has the effect of increasing the amount of the fine.

In his comparison of the advantages and disadvantages of fines, Jefferson states that another advantage of a fine is that it places the corporate offender at a risk of losing profits which ultimately defeats the sole purpose of its existence.[121] Jefferson further argues that the imposition of a fine may also compel a corporate offender to take disciplinary measures against those who were responsible for placing the corporation in legal jeopardy.

In as much as fines are used as a form of sanction against corporate offenders, there is wide criticism against the effectiveness of fines as a form of deterrence in relation to corporate crimes due to the infrequent prosecution of such crimes, and in the event of prosecutions, the fines imposed are sometimes either too modest or too excessive, resulting in the lack of deterrence.[122] In the event of a fine being too excessive, Jefferson argues that the fine may be such an "overkill" that it results in the dissolution of the company, whether voluntarily or compulsory, and this would not assist in dealing with the facts that led to the fine.[123]

Another disadvantage of imposing fine against corporate offenders that has been cited by scholars[124] is the inevitable consequence of "overspill" or "spill over". According to Jefferson and Clough, the danger with imposing fines to corporate offenders as a punitive measure is that it is usually not the company that ultimately pays the fine but innocent victims who did not participate in the commission of the crime, such as shareholders (in the form of reduced shareholder dividends), employees (in the form of possible retrenchment or salary cuts), consumers (as a result of increased product costs) and creditors (as a result of the reduced capital of the company which increases credit risk).[125]

A further apprehension raised by Jefferson in relation to corporate fines is that normally such penalties are absorbed by the corporate offender as a cost of doing business,[126] which results in little, if any, deterrence against the corporate offender. Imposing a fine on a corporate offender provides no certainty that a corporate offender will implement necessary corrective measures to deter it from being a repeat offender.[127]

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119 Clough *Will the punishment fit the crime? Corporate Manslaughter and the problem of sanctions* 2005 Flinders Journal of Law Reform 113 122.

120 (n117) above 122.

121 Jefferson *Corporate Criminal Liability: The Problems of Sanctions* 2001 The Journal of Criminal Law 235 238.

122 Thomas *The Ability and Responsibility of Corporate Law to Improve Criminal Fines* 2017 Ohio State Law Journal 601 610.

123 (n119) ibid 242.

124 Clough (n117) ibid 122, Jefferson (119) ibid 238, Miester D Jr (n82) ibid 6.

125 (n119) above 242.

126 (n119) above 242.

127 Fisse *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions* 1983 Southern California Law Review 1141 1241.

In South African law, a most recent citable example which further intensifies the argument against only imposing fines against corporate offenders is the matter between the *Financial Sector Conduct Authority* v *Steinhoff International Holdings NV*[128]. In this case *Steinhoff* was charged and found guilty of contravening the provisions of section 81 of the Financial Markets Act,[129] which prohibits the publication of false, misleading or deceptive statements by a company listed in a regulated market. In sentencing *Steinhoff*, the Financial Sector Conduct Authority fined the corporate offender an administrative penalty of R1, 5 billion (inclusive of costs), which was substantially reduced to R53 million. As reasons for the reduction of the administrative penalty, the Financial Sector Conduct Authority indicated that it took into consideration that the disclosed misstatements had a catastrophic effect on the share price of Steinhoff and its financial positions and the Authority wanted to avoid penalising innocent shareholders as the offence was committed by former officers of the corporation.

It is the submission of the author that the decision by the Financial Sector Conduct Authority in the *Steinhoff* matter indicates a great disparity between the offences committed by the corporate offender and the consequences thereof, in comparison to the punishment imposed. Taking into consideration the *ratio decidendi* of the Financial Sector Conduct Authority, it, on face value, appears that the sentencing authority emphasised the interest of *Steinhoff,* while to a large extent, neglecting the severity of the crime as entrenched in our judicial system by the *Director of Public Prosecutions, Kwazulu-Natal v P.*[130].

Therefore, in the view of the author, the imposition of fines as the only punitive measure in South African corporate criminal liability does not satisfy the requirements of justice being primarily deterrence in the form of punishment.[131] As such a review and the possible addition of other forms of sanctions may be required. Rycroft has recommended other punitive measures that may be considered within the context of South African law, such as (a) community service orders, (b) adverse publicity orders, (c) restraint orientated sanctions and (d) rehabilitation and remedial orders.[132] Another suggested form of deterrence is the development of the corporate culture that ensures internal compliance with corporate governance principles, such as the King Code of Corporate Governance Principles. [133]

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128 Financial Sector Conduct Authority v Steinhoff International Holdings N.V, FSCA Case no: 10/2019 https://www.fsca.co.za/Enforcement-Matters/Documents/Order%20(Signed_Steinhoff_2019_09-12.pdf (Accessed: 19 October 2019).

129 Financial Markets Act, 19 of 2012.

130 (n103) above.

131 Gallant VR, (2016) *Corporate Criminal Liability, the exception not the rule.* LLM (Commercial Law*)* [unpublished]: University of Johannesburg 12. Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Repository/uj:19603?site_name=GlobalView&view=null&f0=sm_identifier%3A%22http%3A%2F%2Fhdl.handle.net%2F10210%2F87631%22&sort=null (Accessed: 22 September 2019).

132 (n96) above, at 237.

133 Jacobus D. (2016) *Corporate Criminal Liability: Is it time to say goodbye to vicarious liability and hello to corporate ethos?* LLM (Commercial Law*)* [unpublished]: University of Johannesburg 31. Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Repository/uj:19931?site_name=Research&view=null&f0=sm_identifier%3A%22uj%3A19931%22&sort=null (Accessed: 17 August2019).

4.3. Alternative punitive measures for corporate offenders to be considered in South African law

As the imposition of a fine, as the only available punitive measure for corporate crimes, has received much critique over the years, it is imperative that the South African legislature considers other forms of penalties, in addition to or as a substitute for a fine, that seek to achieve the primary purpose of punishment, being deterrence.

Guidance on how to structure the punitive regime for corporate criminal liability in South Africa, may be found in the United States Federal Guidelines Manual (Sentencing Guidelines),[134] which provides for the sentencing of organisations (corporations). The Sentencing Guidelines provide general principles that must be considered by American courts when sentencing corporations, such as: (i) ordering the corporate offender to remedy any harm caused by the offence, as a means to make victims whole for the harm caused; (ii) if the primary purpose of the corporation was to conduct criminal activities, the fine imposed must be sufficiently high as to divest the corporation; (iii) the fine to be imposed should depend on the seriousness of the offence, whilst considering any aggravating and mitigating factors associated with the offence; and (iv) that probation will be an appropriate sentence for the corporate offender when needed to ensure that another sanction will be fully implemented, or to ensure that steps are taken within the organisation to reduce the likelihood of future criminal conduct.[135]

The Sentencing Guidelines further provide for other type of penalties that may be imposed on corporate offenders, such as: (i) the imposition of remedial orders; (ii) community service; and (iii) the implementation of an effective compliance and ethics programme of the corporation.

Below the author discusses alternative forms of punishment for corporate criminal liability, specifically focussing on (i) community service orders, (ii) adverse publicity orders, and (iii) corporate rehabilitation.

134 2018 Guidelines Manual, page 509 Retrieved from: https://www.ussc.gov/guidelines/2018-guidelines-manual (Accessed on: 19 November 2019).

135 (n134) ibid.

4.3.1. Community Service Orders

According to Fisse[136] imposing a community service order to a corporate offender may achieve a similar goal of deterrence through stigmatic punishment, which may be attained by the corporate offender internalising the social costs of a corporate crime. A corporate offender subject to a community service sentence may be required to undertake a useful programme of work, involving the re-allocation of its effort for a determinate period of time.[137]

South African law makes provision for the imposition of a community service order as a form of sentence in terms of Chapter VI of the Correctional Services Act.[138] Section 52(1) read with section 52(2) of the Act provides that when a court orders an offender to undertake community correction, the court may stipulate that the person: (i) does a community service in order to facilitate restoration of the relationship between the sentenced offender and the community;[139] and/or (ii) pays compensation or damages to victims;[140] and/or (iii) contributes financially towards the costs of the community correction to which he/she has been subjected;[141] and/or (iv) is subjected to monitoring.[142]

According to section 50(1)(a)(i), one of the objectives of Chapter VI of the Correctional Services Act is to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner. The author therefore submits that the provision of or provisions similar to Chapter VI of the Correctional Services Act should be considered by the legislature as a measure of punishing a corporate offender while allowing the corporate offender to reconcile themselves to the community. Extending the application of Chapter VI of the Correctional Services Act to corporate offenders will provide the judiciary with an additional punitive measure that may be considered by courts, in addition to or in supplement of section 332(2)(c) of the CPA.

4.3.2. Adverse Publicity Orders

Stigmatisation induced by adverse publicity orders may also be an efficient deterrent to corporate offenders as it has the ability to express disapproval of corporate crimes beyond the reach of monetary penalties.[143] In advocating for adverse publicity orders as a sentencing option, Clough[144] argues that as large corporations value their public image, loss of market confidence and regulatory attention caused by adverse publicity is a strong motivator for legislative compliance.

136 (125) ibid 1226.
137 (n125) ibid, 1226.
138 Correctional Services Act, 111 of 1998.
139 Section 52(1) (b) of the Correctional Services Act.
140 Section 52(1)(e) of the Correctional Services Act.
141 Section 52(1)(l) of the Correctional Services Act.
142 Section 52(1) (p) of the Correctional Services Act.
143 (n82) ibid, 9.
144 (117) ibid,123.

Adverse publicity might also be used to trigger government intervention which may range from formal enquiries to black-listing in respect of government contracts.[145] Although not formally legislated in South Africa, this has recently proven to be an effective punitive measure within the South African context, when looking at the recent corruption scandal involving the firm of auditors KPMG SA Proprietary Limited and VBS Mutual Bank. In this case KPMG was allegedly responsible for auditing irregularities by concealing the alleged mismanagement of funds by the shareholders of VBS Bank.[146] In retaliation to the alleged misconduct by KPMG and the adverse publicity caused by the allegations, the South African Government, through its Auditor-General, terminated all of its contracts with the auditing firm.[147] The adverse publicity and loss of market confidence sustained by KPMG resulted in the company losing other business and industry relationships as well as the mass retrenchment of employees due to loss of business.[148] The disqualification of entities from government contracts is considered to be a preventative sanction aimed at preventing a corporate offender from committing future crimes.[149]

According to Cartwright[150] the Financial Services in the UK also uses public censures as a formal disciplinary tool, alternative to financial penalties. There are factors that are considered in deciding whether to impose public censure as a form of deterrence rather than a financial penalty. In determining whether to issue an adverse publicity order against a corporate offender, the FSA considers five factors, being (a) whether deterrence can be achieved through a public censure, (b) whether a person has profited from the breach (c) the seriousness of the offence, (d) whether the breach has been brought to the attention of the regulator by the offender, and (e) whether the offender admits the breach, fully co-operates with the regulatory body and takes steps to ensure that those who lose out receive compensation.[151]

Therefore, in considering adverse publicity orders as a form of punishment against corporate offenders, the South African legislature may also take into consideration the factors listed by the FSA.

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145 Fisse *The Use of Publicity as a Criminal Sanction Against Business Corporations* Melbourne University Law Review 1971, Vol 8 118.

146 Advocate Motau T SC *The Great Bank Heist: Investigator's Report to the Prudent Authority,* page 18.

147 https://www.agsa.co.za/MediaRoom/Mediareleases/tabid/232/ArticleID/310/Auditor-General-of-South-Africa-terminates-its-auditing-contracts-with-audit-firms-KPMG-and-Nkonki-Inc.aspx (accessed on: 20 February 2020).

148 https://www.huffingtonpost.co.uk/2018/06/04/kpmg-shock-as-400-staff-to-be-retrenched-and-international-execs-take-charge_a_23450067/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANweR0wEvzc08TNGdwbRaMe_07Im-afvgwy8He_-9favINcxk0xPX9e_rDSkW7pvHyBE9PdayjCHKROFkUN-z7RTQ3vaGyBnNSNQQvQggZNib52y1oCk4GbJpM7FJyoa762PvpyGtw4FDLhzhBL4EOMvmlEmL5V73YWb7vB_qWoQ (Accessed on: 20 February 2020).

149 Jordaan L *Sentencing Corporations: the need for reform,* 190 http://uir.unisa.ac.za/bitstream/handle/10500/19469/Joubert_JJ_9781868884919_Section6.pdf?sequence=6&isAllowed=y (Accessed on 14 March 2020).

150 Cartwright *Publicity, punishment and protection: the role(s) of adverse publicity in consumer policy,* 2012 Legal Studies, Vol. 32, 189.

151 (n149) ibid, 189.

4.3.3. Corporate Rehabilitation

As alluded to by Borg-Jorgensen and Van der Linde, corporate decision making and the ultimate responsibility for policies and procedures are spread throughout a corporate body as a whole. As such an offence is likely to involve the participation of more than one section of a corporate body's operations. Therefore, another consideration that may be made by the South African legislature in enhancing punitive measures against corporate offenders is corporate rehabilitation. The concept of rehabilitation identifies a goal that should be crucial in all corporate sentences, being, changing an offender's behaviour so as to reduce the probability of further violations by that offender. Changing an offender's behaviour will require a restructuring of the internal operations and procedures in order to foster compliance with the law.[152]

In implementing corporate rehabilitation, a court may order the restructuring of a company, which will advance rehabilitative goals by rectifying internal problems that might be conducive to violations and reduce the burden placed on innocent parties such as consumers and shareholders when a court imposes a fine as a punitive measure.[153]

Another corporate rehabilitation initiative that is proposed by Meeks[154] is the use of Non-Prosecution Agreements, where the state agrees not to prosecute the corporate offender on condition that the corporate offender makes an admission of guilt, cooperates with the investigation and adopts recommended changes in its corporate structure.[155] Meeks further argues that the core principle of corporate rehabilitation through Non-Prosecution Agreements is the imposition of corporate internal controls and general corporate restructuring in order to increase transparency and foster a culture of law abiding behaviour, whilst protecting the corporation from ruins and shielding innocent third parties from collateral damages.[156] The implementation of the conditions of the Non-Prosecution Agreement may be undertaken by a court appointed agent.[157]

From a South African context, corporate conduct is by and large regulated by the Companies Act, as amended[158] as well as the King Code IV,[159] although the latter is not legally binding on companies. Section 72(5) of the Companies Act read with Regulation 43 of the Companies Act Regulations, requires state owned companies, public companies and certain private companies,[160] to appoint a social and ethics committee which will, amongst others,

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152 (n151) ibid 361.

153 (n151) ibid 365.

154 Meeks *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability*, 2006 Columbia Journal of Law and Social Problems Vol 40 77.

155 (n154) ibid 96.

156 (n154) ibid 97.

157 (n154) ibid 100.

158 Companies Act, 71 of 2008.

159 The Institute of Directors in Southern Africa King Code of Corporate Governance Principles for South Africa 2016 (hereinafter the King Code IV).

160 Regulation 43(1)(c) of the Companies Act Regulations states that any other company that has in any two of the previous five years, scored above 500 points for their public interest score in terms of regulation 26(2) of the Companies Act Regulations.

monitor good corporate citizenship, including the company's promotion of equality, unfair discrimination and reduction of corruption.

The King Code IV sets out the principles that may be followed by a company's governing body in regulating, amongst others, the ethical behaviour of the corporation. In terms of the King Code IV, the directors of a company should (a) lead ethically and effectively while acting in good faith and in the best interest of the company, (b) govern the ethics of the company in a manner that supports the establishment of an ethical culture, (c) approve codes of conduct and ethics policies that articulate and give effect to its direction on company ethics and (e) ensure that the codes of conduct and ethics policies provide for arrangements that familiarise employees and other stakeholders with the company's ethical standards.[161]

With the on-going investigation into alleged improper conduct, fraud and corruption within state-owned companies, by the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud, led by Deputy Chief Justice Raymond Zondo,[162] it has become apparent that, within state-owned entities, there is a need for directors to be transparent and comply with the provisions of the Companies Act and the King Code IV. Although the mandate of the State Capture Inquiry is restricted to office bearers and directors of the state-owned companies in question,[163] the ongoing proceedings have exposed the need for a rehabilitation of these entities through the restructuring of internal operations and re-enforcement of good corporate ethics from management and/or director level to the employees, in order to establish an ethical culture and foster compliance with the law.

Corporate rehabilitation as a punitive measure against state owned companies becomes even more appropriate as these are entities that have been established with revenue generated by the citizens of the country, and thus imposing a fine on such entities ultimately affects the general public and not necessarily the company itself.

4.4. **Concluding remarks**

The current regulatory framework governing corporate sentences require an amendment in order to provide the judiciary with alternative punitive measures that may also be applicable to corporate offenders as fines do not extensively achieve the objective of deterrence and retribution.

The Correctional Services Act, which is only applicable to individual offenders, provides other punitive measures that may also be extended to corporate offenders such as community service. There is also the option of corporate rehabilitation, which is more beneficial than fines in the sense that it eliminates the potential financial risk that is placed

161 (n159) ibid 43 44.

162 Terms of Reference for the appointment of a Judicial Commission of Inquiry to inquire into the allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state https://www.statecapture.org.za/uploads/Terms_Of_Reference.pdf (Accessed on: 08 November 2020) (hereinafter State Capture Inquiry).

163 (n162) ibid 5.

by fines on innocent third parties, while ensuring that the corporate entity is compelled to address its internal structures that could have been the cause of the corporate misconduct.

Fines may be retained as the primary punitive measure against corporate offenders; however, the legislature has to develop more alternative sentences that will assist in holding corporate offenders accountable and deter them from commit further crimes.

CHAPTER 4

5. CONCLUSION – WAY FORWARD

The development of corporate criminal liability in South Africa has been challenging, with minimal attention having being given to corporate sentencing. One of the greatest challenges in the development of the principles for corporate criminal liability was the fact that the courts struggled with demonstrating certain elements of a crime, such as culpability, which are required in order to hold a person criminally liable. However, this was addressed by attributing the *mens rea* of the directors to the company, through the principle of vicarious liability which provides that a master is liable for an act committed by his servant if the delict was committed in the course and scope of his servant.

From a legislative perspective, the Companies Amendment Act[164] read with the Criminal Procedure Act of 1917[165] introduced the concept of corporate criminal liability in South Africa and made it possible to hold a company liable for the conduct of its directors. This position was further developed when the legislature enacted the current CPA which, in terms of section 332, enables the courts to hold corporate offenders liable for offenses committed by its directors. However, the courts may not impose any other punishment other than a fine.

The comparative analysis of corporate criminal liability in the UK, Canada and the USA assessed how each jurisdiction, through the application of either the identification theory or the doctrine of *Respondeat Superior* in case law, developed their respective principles on corporate criminal liability. In developing and applying the principles of corporate criminal liability, there has been a movement in these jurisdictions toward considering other punitive measures such as community service orders and/or adverse publicity orders in terms of the Corporate Manslaughter and Corporate Homicide Act (UK), probation orders in terms of the Canadian Criminal Code and the USA Sentencing Reform Act, in conjunction with fines.

Within the South African legislative framework, section 332(2)(c) of the CPA prescribes that a fine is the only punitive measure that may be imposed to corporate offenders. This restriction on corporate sentencing has been extensively debated by scholars on the basis that it is not always effective in deterring crime, in that fines imposed are sometimes either too modest or too excessive, and that in the event of a fine being too excessive, this overkill may have unintended effect of dissolving the corporation, whether involuntarily or voluntarily so, or it may ultimately affect innocent third parties.

The decision of the Financial Sector Conduct Authority in the *Steinhoff* matter is a citable example of where a fine imposed on a corporate offender may be considered too modest in comparison to the crime committed by the corporation, hence it becomes imperative for the legislature to consider additional punitive measures.

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164 Companies Amendment Act 23 of 1939

165 Criminal Procedure Act 31 of 1917

Therefore, the South African legislature has to consider a possible amendment of section 332(2)(c) of the CPA, to make provision for other punitive measures that may be applicable to corporate offenders, such as community service orders, adverse publicity orders and/or corporate rehabilitation.

Community service orders are currently provided as a form of sentencing against individual offenders in terms of section 52 of the Correctional Services Act. A recommendation that may be considered by the legislature is to utilise the current provisions of the Correction Services Act to expand the scope of section 332(2) of the CPA.

Judging from the manner in which the South African government reacted to the VBS Bank scandal, which implicated the auditing firm KPMG, adverse publicity orders are also worth exploring as an alternative punitive measure against corporate offenders. The decision that was taken by the South African government to blacklist KPMG as a service provider due to the alleged misconduct by its management could serve as a precedent to assist the legislature and or the judiciary to further develop corporate sentencing principles.

Lastly, the current investigation into state capture has proven that, as corporate decision making and the responsibility for policies and procedures is spread throughout the corporate body, it may become imperative to rectify the internal structure of the corporation. This is opposed to ordering that the company pays a fine for its transgressions, especially in respect of public owned companies, where such fines might ultimately be the responsibility of tax payers and the government itself.

Further, the principles laid down in the King Code IV, although not binding legislation, are recognised as authority in governance structures. The King Code IV recommends that directors of companies should lead ethically and govern the ethics of a company in a manner that supports the establishment of an ethical culture whilst approving ethics policies that give effect to its direction on company ethics. The legislature should consider incorporating these principles as part of the companies legislative and regulatory framework, so that the rehabilitation of a corporate offender as a type of sentence may be effortlessly effected against the offender.

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