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# **CORPORATE CRIMINAL LIABILITY FOR ECONOMIC CRIMES**

**by**

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**OCTOBER 2017**

## DECLARATION

I Rose Mahala, student number 216010076, a registered student at the University of Johannesburg, declare that this is my original work and has not been presented or submitted at any seminar, or any other faculty except for the University of Johannesburg, References have been used to make this work concrete. This work is therefore submitted for the first time in partial fulfilment for the Masters Degree in Commercial Law at the University of Johannesburg in October 2017.



## ABSTRACT

This study focuses on corporate criminal liability for economic crimes. Economic crimes are increasing rather than decreasing and there is no increase in the rate of criminal convictions of corporate entities in respect of these type of offences. South Africa has lost an estimated R930 million per year on economic crime. Over the years corporations could not be prosecuted for criminal acts as they were not regarded as natural persons who could be prosecuted. However, corporations can now be prosecuted for crimes they commit as they are regarded as natural juristic persons. Corporate criminal liability in South Africa is mainly regulated by section 332 of the Criminal Procedure Act 51 of 1977. In summary, this section allows a corporate body to be held vicariously liable for crimes committed by directors or servants acting within the scope of their employment authority or while furthering the interests of the corporate body. In this discussion it will be highlighted that much still need to be done to ensure that corporate bodies are held criminally liable for crimes committed. A comparative analysis is undertaken to establish how corporate criminal liability in respect of economic crime is dealt with in the United Kingdom. Various pieces of legislation such as the Bribery Act, the Fraud Act and the Proceeds of Crime Act are utilized in the United Kingdom to address corporate criminal liability for economic crime. The research indicates that South Africa will have to take further steps in order to address corporate criminal liability for economic crime. One of the recommendations made is that South Africa should have regulatory legislation that should stipulate how corporations could be prosecuted for economic crime similar to the position in the United Kingdom.

## DEDICATION

I dedicate this work to my future husband and children.



## ACKNOWLEDGEMENTS

Thanks to God Almighty for His love and mercy.

Thank you to my parents for their prayers and support.

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## 1 Introduction

Economic crime is endemic in the global arena and recent economic crime statistics show that the problem is accelerating rather than reducing. The conviction rate of corporate entities involved in the commission of economic crime is also not increasing.<sup>1</sup> It has been indicated that South Africa has lost an estimated amount of R930 million a year on economic crime. Just recently a corporation was forced to close down after its financial clerk stole over R1 million from the company and thereby impacting negatively on its productivity and financial turnover.<sup>2</sup> Gillian Wolman, head of litigation at Risk Benefit Solutions (an independent insurance risk specialist) warns that as the economic conditions tighten in South Africa there is a risk of an increase in economic crime. Economic crimes are typically crimes which do not occur instantly or on the spur of the moment but are often a gradual process committed over a period of time and involving careful planning. As such it may have a devastating effect on the economy of a country. Hence it is of great importance to address the challenge not only of individuals who are involved in these types of offences but also corporate bodies<sup>3</sup> who are involved in the commission of economic crime.

One of the most difficult problems that South Africa is currently facing is the high rate of crime and the accompanying general sense of lawlessness.<sup>4</sup> In this regard the state is required to ensure that effective criminal prosecutions of both private and corporate entities involved in crime take place. It has been a challenge to subject a company to prosecution even though there were many calls from the public for corporations to be brought within the full scope of the criminal law.<sup>5</sup> This has been so because a corporate body is distinct from a natural person and the last mentioned is generally regarded as the perpetrators of crime. Many questions have been posed that corporations be held liable for offences which they committed. This made way for corporate criminal liability to be considered. Corporate criminal liability has been incorporated in legislation in many jurisdictions which indicate that it is of great importance for corporations to be prosecuted.<sup>6</sup>

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<sup>1</sup> Business Crimes and Investigations (<http://www.werksmans.com.legal-services-view/business-crime-forensic-law> (14-12-2016)).

<sup>2</sup> White Collar Crime Impending threat to South Africa Business (<http://www.rbs.co.za/white-collar-crime-an-impending-threat-to-sa-businesses> (24-04-2017)).

<sup>3</sup> Examples of corporate bodies are private or public companies and closed corporations.

<sup>4</sup> De Villiers and Nel "The opportunity cost of the upkeep of the Criminal law system in South Africa from 1980 to 2006" *SA JEMS NS* 13 (2010) 407.

<sup>5</sup> Cord *Criminal Law* (2016) 479.

<sup>6</sup> Cord (n 5) 479.

In South Africa there has also been an increasing awareness of the need to consider criminal prosecution in respect of corporate bodies.<sup>7</sup> There is a need to increase the ways in which corporations can be held criminally liable for offences due to the ever increasing growth in crimes committed by and through corporations. Legislative provision was made for the criminal liability of corporate bodies in the Criminal Procedure Act.<sup>8</sup> In South Africa under common law a company can be only held liable for an offence if the employee of the company was working within the course of her employment whilst committing the offence.<sup>9</sup> This necessitates a discussion of vicarious criminal liability later in this dissertation.

Ongeso states that in the United Kingdom "...courts have imposed vicarious liability on its employees in circumstances where a statute imposed strict liability for the commission of that offence."<sup>10</sup> A company could only be found liable under vicarious liability.<sup>11</sup> As a result the United Kingdom government enacted new legislation in order to broaden the scope of prosecution for corporate bodies.

As a general rule only a human being can perform an act as it is understood for purposes of criminal law. To this the exception exists that a corporate body can in certain circumstances engage in conduct and be liable for a crime.<sup>12</sup> A corporate body can be liable for a crime after it was proven that unlawful conduct and *mens rea* existed.<sup>13</sup> Due to this notion a challenge originated from distinguishing between a natural person and a corporation. A corporate body is a legal person, with constitutional rights just like a natural person as it is a separate person distinct from its members.<sup>14</sup> Courts are inundated with cases relating to economic and environmental crime. Criminal law was developed so as to punish and deter the wrongdoing of an individual moral person, whereas a company is traditionally and authoritatively said to be a fictitious or abstract entity incapable of physical knowledge or intention.<sup>15</sup>

Commonwealth jurisdictions have used various ways to approach the aspect of corporate criminal liability. For purposes of this dissertation there will be a comparison between the

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<sup>7</sup> Ongeso "Corporate accountability in South Africa: sharpening the role of criminal law" 2016 *SACJ* 225.

<sup>8</sup> Ongeso (n 7) 1; Initially s 384 of the Criminal Procedure and Evidence Act 31 of 1917 and in subsequent replacements of the act. Today it is regulated by s 332 of the Criminal Procedure Act 71 of 1977.

<sup>9</sup> Ongeso (n 7) 2.

<sup>10</sup> Ongeso (n 7) 3.

<sup>11</sup> Ongeso (n 7) 3.

<sup>12</sup> Borg-Jorgensen and Van der Linde "Corporate criminal liability in South Africa: Time for a change? (Part 2)" 2011 *TSAR* 684.

<sup>13</sup> Snyman *Criminal Law* (2014) 245.

<sup>14</sup> Cord (n 5) 479.

<sup>15</sup> Snyman (n 13) 245.

South African and United Kingdom legal positions. The main reason for comparing these two jurisdictions is that South African law originated from the Roman Dutch law and was later influenced by the English law.<sup>16</sup> Therefore it is of great importance to compare these two jurisdictions to ascertain where developments diverged.

The definition of economic crime and the impact thereof on corporate criminal liability and vicarious liability will be highlighted. The theories of corporate criminal liability upon which the two jurisdictions base their foundation for prosecuting corporate bodies will be considered. Recommendations shall be discussed so as to conclude the dissertation.

## 2 *Economic Crime*

To understand what economic crime is, it is of great importance to first define a crime. The word crime is derived from the Latin word *crimen* which means reproach or accusation.<sup>17</sup> The most commonly applied definition is expressed in legal terms. Crime is considered as an act which is prohibited by criminal law and it violates the prevailing legal code of the jurisdiction in which it occurs.<sup>18</sup>

Economic crimes are non-violent in nature and can be committed by corporate bodies as well as natural persons.<sup>19</sup> The term economic crime has however been found to be difficult to define as it is a broad term.<sup>20</sup> Economic crimes are however crimes which cause financial loss not only to a corporation but also to other entities as well and it has infiltrated all spheres of life.<sup>21</sup> It also has a cost implication in respect of the public purse, since the state will presumably spend at least some resources on the investigation and possible prosecution of the crime.<sup>22</sup> It is sometimes referred to as white collar crime or as financial crime in other texts.<sup>23</sup>

A useful definition of economic crime is the following:

“By economic crime is meant a crime committed to gain profit within an otherwise legal business. The crime may damage private citizens, business and/or the public sector. The definition thus includes tax

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<sup>16</sup> Burchell *Principles of Criminal Law* (2016) 8-9.

<sup>17</sup> De Villiers and Nel (n 4) 408.

<sup>18</sup> De Villiers and Nel (n 4) 408.

<sup>19</sup> Doig *Fraud Crime and Society Series* (2012) 229.

<sup>20</sup> Doig (n 19) 229.

<sup>21</sup> Doig (n 19) 230.

<sup>22</sup> Doig (n 19) 229.

<sup>23</sup> De Villiers and Nel (n 4) 408.

evasion as well as various forms of fraud and embezzlement in legal corporations. We disregard crime in organisations that have a criminal motive and an illegal thought for instances trade of drugs.”<sup>24</sup>

Economic crimes include fraud, corruption, tax evasion and money laundering.<sup>25</sup> Economic crimes have caused a difficult challenge in the corporate world as they are a great disadvantage to society as well as the economy of the country.<sup>26</sup> This is so because economic crimes cause financial constraints on a country. The types of crime classified as economic crime however differ from country to country. Due to an increase in new developments especially in the area of technology, countries have found the need to criminalise such economic crime. Perpetrators of economic crime may look for opportunities, to take advantage of perceived shortcomings and exploit the situation.<sup>27</sup> Economic crime may take on various forms such as fraud, tax evasion and corruption which impoverish the victim and enrich the perpetrator.<sup>28</sup> It is not only limited to corporate bodies but also involves other business regardless of its profit or status such as small entities which are not formally registered.

It has been noted by different authors that due to the growth of corporations in South Africa there is a need for these crimes to be criminalised. It can be argued that all crimes have an impact on the economy even if it does not cause direct economic loss.<sup>29</sup>

The essence of a criminal process is succinctly described in *Minister of Justice v Additional Magistrate Cape Town* as, the *lis* between the state and the accused as to whether or not he or she is guilty of the crime of which he or she is being accused of.<sup>30</sup>

The determination of guilt and innocence in a criminal matter is of great importance. With respect to economic crime, some commentators are of the opinion that because of the technical, practical, procedural and institutional shortcomings in the criminal justice system that causes criminal prosecution of economic crime to be ineffective, economic crime should be decriminalised altogether.<sup>31</sup> A prime example is the decriminalisation of several offences in the Companies Act 71 of 2008.

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<sup>24</sup> Doig (n 19) 230.

<sup>25</sup> United Nations Office on Drugs and Crime, The Eleventh United Nations Congress on Crime Prevention and Criminal Justice, (2005) Bangkok, Thailand (<http://www.unitednations/office-drugs-crime-eleventh-congress-on-crime-prevention-criminal.justice.html> (08-08-2016)).

<sup>26</sup> Doig (n 19) 229.

<sup>27</sup> Doig (n 19) 229.

<sup>28</sup> Doig (n 19) 229.

<sup>29</sup> Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* (2012) 401-402.

<sup>30</sup> 2001 2 SACR 49 (C).

<sup>31</sup> Doig (n 19) 229.

In South Africa it has been noted that statistics pertaining to economic crime has remained unchanged from 2014 to 2016, and 64% of all economic crime include corruption, fraud, tax evasion and bribery. The statistics are indicative that economic crime is at a high level in South Africa.<sup>32</sup> South Africa has been ranked one of the highest countries in respect of reported economic crime. The report further notes that economic crime affects corporate bodies in both developing and developed countries.

Fraud is one of the most prevalent economic crimes in both South Africa and the United Kingdom. Fraud is one of the crimes which can be committed by a corporate body. It has caused a significant negative impact on the South African Revenue Service in terms of tax and revenue collection for the government. Economic crime seems to have become part of the daily news involving people in the public and private sectors. Numerous media reports in various South African newspapers, financial magazines and television coverage confirm the existence of economic crime.<sup>33</sup>

Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.<sup>34</sup> Tax evasion is defined as an illegal activity deliberately undertaken by a taxpayer to free himself from a tax burden.<sup>35</sup>

In addition it is noted that economic crime causes a lot of financial loss as it discourages investment.<sup>36</sup> Useful recommendations have been formulated to prevent economic crime.<sup>37</sup> The United Nations Office on Drugs and Crime carries out appropriate studies on economic crime with the aim to prevent the commission of economic crime in corporations. The Eleventh Congress also considered the possibility of initiating negotiations on a draft United Nations convention against economic crime.<sup>38</sup> There has been a commercial code which has been introduced to promote transparency in the business of corporate bodies. These are some of the prevention methods suggested by different scholars to curb the commission of economic crime which have been taken up as proposals of the Eleventh Congress.<sup>39</sup>

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<sup>32</sup> White "Economic crime: a South African pandemic no sector or region is immune - Global Economic Crime Survey" 5<sup>th</sup> ed (<https://www.pwc.co.za/en/assets/pdf/south-african-crime-2016.pdf> (16-01-2017)).

<sup>33</sup> Du Toit "Sentencing the corporate offender in South Africa: a comparative approach" 2012 *SACJ* 235-251.

<sup>34</sup> Snyman (n 13) 523.

<sup>35</sup> Ostler Schoeman Attorneys 2013 (<https://www.schoemanlaw.co.za/wp-content/uploads/2013/01/website-article-luise-ostler-FINAL-15-01-2013.pdf> (25-04-2017)).

<sup>36</sup> Stevens *Crimes Under the Company Act 71 of 2008* (2016) 505.

<sup>37</sup> Stevens (n 36) 505.

<sup>38</sup> Eleventh United Nations Congress on Crime Prevention and Criminal Justice (n 25) 5.

<sup>39</sup> Eleventh United Nations Congress on Crime Prevention and Criminal Justice (n 25) 5.

Through the definition of economic crime one may pose a question on which corporate bodies can be held liable for economic crime. There have been different views on the proposal that corporate bodies be held liable for economic crime as corporate bodies are different from a natural person who can be held liable for crimes. This notion has however changed, and nowadays corporate bodies can be held criminally liable for any offence. Similar to individuals, corporate bodies have an identifiable persona and have the capacity to express moral judgements.<sup>40</sup> Corporate bodies have an identifiable persona in the sense that they have a unique presence in the community, different from their owners and managers they have an ethos that make them unique and different from individuals controlling or working for the corporate bodies.<sup>41</sup> Through this the corporate bodies are considered as legal subjects so they can be held criminally liable for an offence.

As corporate bodies have been said to be legal subjects they are subject to the criminal law. The question however arises whether they can be held criminally liable for any offence. In South Africa a company is defined by the Companies Act as a juristic person incorporated in terms of the act, a domesticated company or a juristic person that immediately before the effective date was registered in terms of the Companies Act or the Close Corporations Act 69 of 1984.<sup>42</sup>

In the United Kingdom there is no definition for economic crime even though there have been various definitions which have been advanced as the legislation was set for criminalisation of economic crime.<sup>43</sup> There is much difference between these two jurisdictions in terms of defining economic crime. It is unclear what constitutes an economic crime in the United Kingdom.<sup>44</sup> Economic crime is a global phenomenon, it is an important feature of the United Kingdom economy yet it attracts less attention from media, government and law enforcement agencies.<sup>45</sup> Economic crime as a label includes fraud and bribery which are enforced through prosecution by prosecutors and regulators.<sup>46</sup> These crimes are set out in Schedule 17 of the Crime and Courts Act, 2013. These crimes are found in the Financial Services and Markets Act, 2000 the Proceeds of Crime Act, 2002 the Companies Act, 2006 the Fraud Act, 2006 and

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<sup>40</sup> Stevens (n 36) 505.

<sup>41</sup> Snyman (n 13) 245.

<sup>42</sup> s 1 of the Companies Act 71 of 2008.

<sup>43</sup> Eleventh United Nations Congress on Crime Prevention and Criminal Justice (n 25) 5.

<sup>44</sup> Eleventh United Nations Congress on Crime Prevention and Criminal Justice (n 25) 5.

<sup>45</sup> Ryder 2011 *Financial Crime in the 21<sup>st</sup> Century: Principles and Policies* 1

(<http://eprints.uwe.ac.uk/16023/8/Ryder%2520firstproof.pdf> (08-08-2016)).

<sup>46</sup> Ryder (n 45) 1.

the Bribery Act, 2010. Legislation has been enacted so as to curb the ever increasing rate of economic crime.

There are models to determine corporate liability. The juristic person's liability is similar to that of an individual, a corporation being able to commit crimes. The second model requires the legislator to specify each crime in respect of which corporate criminal liability is possible. The first system was adopted by the United Kingdom and therefore corporations can be held criminally liable for any type of crime in the United Kingdom.

### *3 Corporate criminal liability versus vicarious criminal liability*

#### *3.1 Corporate criminal liability*

Corporate criminal liability in South Africa is based on vicarious liability because corporate bodies are liable for crimes committed by and through its employees.<sup>47</sup> It is liability which consists of different kinds of offences.<sup>48</sup> It is wide enough to include third parties that are corporate bodies and its functionaries.<sup>49</sup> South Africa has experienced vast corporate activity and development and it has been noted by different scholars that corporate crime inflicts more damage on society than all the street crime combined.<sup>50</sup> Corporate criminal liability in South Africa is mainly regulated by section 332 of the Criminal Procedure Act. In summary this section allows a body to be held vicariously liable for crimes committed by directors or servants acting within the scope of their employment, authority or while furthering the interests of the corporate body.<sup>51</sup>

According to Snyman only a human can perform an act as understood in criminal law.<sup>52</sup> The law distinguishes between a corporate body or corporation and a natural person. A corporation is an abstract entity or body of persons which can be a bearer of rights and duties without having a physical body.<sup>53</sup> There exists a need to prosecute a corporate body which unlike a natural person, is incapable of thinking for itself or of forming any intention of its own.<sup>54</sup> Holding a corporate body liable for an offence has posed several questions on who must be

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<sup>47</sup> Snyman (n 13) 242.

<sup>48</sup> Snyman (n 13) 245.

<sup>49</sup> Snyman (n 13) 245.

<sup>50</sup> Borg-Jorgensen and Van der Linde (n 12) 453.

<sup>51</sup> Borg-Jorgensen and Van der Linde (n 12) 453.

<sup>52</sup> Snyman (n 13) 245.

<sup>53</sup> Snyman (n 13) 245.

<sup>54</sup> Snyman (n 13) 245.

summoned and who must stand in the dock.<sup>55</sup> In South Africa this matter is regulated by section 332(1) of the Criminal Procedure Act. Section 332(1) of the Criminal Procedure Act removes the obstacle to fixing criminal liability upon an artificial person that could not be prosecuted since it has no mind of its own.<sup>56</sup> A corporate body can be charged for an offence it committed in conducting its business. The broad nature of liability of a corporate body was emphasised in *Ex Parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaaikorporasie*.<sup>57</sup>

Section 332(1) renders a corporate body liable for any offence that might have been perpetrated by a servant or employer in the process of furthering of the business of a corporation.<sup>58</sup> In this sense piercing of the corporate veil implies that companies cannot escape liability as they can be held criminally liable for their conduct. Due to this provision, companies can be prosecuted. Liability in this section therefore extends beyond the normal limits of vicarious responsibility where the principal or employer is liable only if the agent acted in the scope of his duties.<sup>59</sup>

### 3.2 Vicarious corporate liability

Vicarious corporate liability involves an accused being held liable even though he or she has not personally committed a crime or a prohibited act and is not at fault.<sup>60</sup> Vicarious liability can be described as the liability for the acts of another.<sup>61</sup> It developed in the English civil law of torts<sup>62</sup> where an employer was held liable for a delict committed by his employee, if done with the employer's authority and in the scope of the employer's employment.<sup>63</sup>

A corporate body is guilty of an offence in terms of vicarious liability even when it has neither acted nor formulated the intention for the offence, but another person has done so on its behalf.<sup>64</sup> In the English common law vicarious liability forms part of the law of tort which is not applicable in criminal law.<sup>65</sup> Two exceptions existed, namely common law cases of public

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<sup>55</sup> Snyman (n 13) 245.

<sup>56</sup> Snyman (n 13) 245.

<sup>57</sup> 1992 (4) SA 804 (A).

<sup>58</sup> s 332 (1) of the Criminal Procedure Act.

<sup>59</sup> Snyman (n 13) 242.

<sup>60</sup> Burchell (n 16) 460.

<sup>61</sup> Ashworth and Horder *Principles of Criminal Law* (2013) 149-150.

<sup>62</sup> Allen *Textbook on Criminal Law* (2013) 263-264.

<sup>63</sup> Simester, Spencer, Stark, Sullivan and Virgo *Simester and Sullivan's Criminal Law Theory and Doctrine* (2016) 267-268.

<sup>64</sup> Ashworth and Horder (n 61) 149; Allen (n 62) 264.

<sup>65</sup> Simester, Spencer, Stark, Sullivan and Virgo (n 63) 267.

nuisance and criminal libel where the employer could be held criminally liable for the acts of his employee. The employer was liable even if he was not aware of the actions of the latter.

In addition in *Somerset v Hart*<sup>66</sup> the court held that delegation means the employer is liable for the intention of the employee on imputation where there has been delegation of duties. An example of vicarious criminal liability can be found in *National Rivers Authority v Alfred Mc Alpine Home East Ltd*<sup>67</sup> where the company was convicted of contravention of section 85(1) of the Water Resources Act, 1991 in that its employees allowed wet cement to pollute the controlled waters. This offence was created to protect the environment by holding the company criminally liable for acts and omissions of its employees performed during the scope of their employment.

The courts have adopted the civil law doctrine that a master is vicariously liable for the acts of his servant performed during or within the scope of employment or authority.<sup>68</sup> It is required that at the time the employee contravened the statute concerned he or she must have performed the business of the employer.<sup>69</sup> Criminal courts in South Africa and overseas have recently elaborated on the application of the broad test which states that the employee will be convicted if the conduct is in connection with the business of the employer.<sup>70</sup>

There exists a limitation in respect of vicarious liability where the offence is not committed in furthering of or endeavouring to further the interest of the corporate body.<sup>71</sup>

In addition there are limitations which are posed by vicarious liability. These limitations are used by the courts to hold corporations liable for non-compliance with regulations which direct the business of corporations. There is a belief that, if liability is imposed on the employers, they in turn will stop their employees from contravention of the relevant statutes.

The main difference between corporate criminal liability and vicarious liability is that the theory of vicarious liability imputes the conduct of the officer, employer or servant to that of the corporation. Corporate criminal liability in South Africa dating back to 1977 relies upon a test wider than that of traditional vicarious liability of natural persons.<sup>72</sup>

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<sup>66</sup> *Somerset v Hart* 1884 12 QBD 360 362 per Lord Coleridge CJ.

<sup>67</sup> 1994 4 ALL ER 286 QB.

<sup>68</sup> Borg –Jorgensen and Van der Linde (n 12) 463.

<sup>69</sup> *Goldstein v Johannesburg Municipality* 1926 TPD 176; *R v Scholnick* 1939 CPD 327 330.

<sup>70</sup> Burchell (n 16) 460.

<sup>71</sup> *Gardner v Akeroyd* 1952 2 QB 743; *Coppen v Moore* 1898 2 QB 306.

<sup>72</sup> Burchell (n 16) 460.

#### 4 Theories underlying corporate criminal liability

There are different theories which have been propounded by different scholars so as to elaborate on how a company can be held criminally liable of any offence that it would have committed.<sup>73</sup> A corporate body like a company or close corporation is an association of persons, having a juristic personality which is separate from that of its members.<sup>74</sup> A corporate body is the bearer of rights and liabilities.<sup>75</sup> The principle of existence separate from its members was confirmed in *Salomon v Salomon & Co Ltd*<sup>76</sup> where the court held that Salomon, the shareholder in the company, was not personally liable for debts of the company. The court held that a company exists separately even when controlled by a person because it is legally incorporated and complies with requirements of the Companies Act.<sup>77</sup> The courts have no general discretion to disregard the separate legal existence of a company. The increase in corporate crime including economic crimes have lead countries to the increasing realisation that comprehensive criminalisation should be based on coherent criminal liability.

There are a number of theories underpinning corporate criminal liability such as the principle of identification and the principle of aggregation. The principle of identification attributes to the conduct and state of mind of certain high ranking officers in a corporation.<sup>78</sup> In terms of the principle of aggregation a conviction is based on a derivative but collective responsibility determined by the aggregation conduct of a state of mind within the corporation. The organisational model of liability determines fault by examining institutional practises and policies of the institution.<sup>79</sup>

##### 4.1 Nominalist theory and realist theory

Also due to the rapid rise of a number of corporate bodies in the late nineteenth century and throughout the twentieth century, the need for corporate criminal liability became apparent.<sup>80</sup> The main theories are however the nominalist theory and the realist theory.<sup>81</sup> The nominalist theory regards a corporate body as a “fictional or artificial person that is nothing more than a collection of individuals and that lacks a substantive independent corporate fault.”<sup>82</sup> This notion

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<sup>73</sup> Burchell (n 16) 460.

<sup>74</sup> Burchell (n 16) 460.

<sup>75</sup> Snyman (n 13) 245.

<sup>76</sup> 1897 AC 22.

<sup>77</sup> Companies Act, 1862.

<sup>78</sup> *H L Bolton (Engineering) Company Ltd v T J Graham and Sons Ltd* (1957) 1 QB 159 172.

<sup>79</sup> Borg-Jorgensen and Van der Linde (n 12) 462.

<sup>80</sup> Borg-Jorgensen and Van der Linde (n 12) 458.

<sup>81</sup> Borg-Jorgensen and Van der Linde (n 12) 454.

<sup>82</sup> Borg-Jorgensen and Van der Linde (n 12) 458.

is based either on vicarious liability or on the doctrine of identification.<sup>83</sup> The realist approach however regards a corporate body as a real entity that cannot simply be reduced to the individuals who compose it.<sup>84</sup>

More so a realistic approach makes it possible for a corporation to be held criminally liable for its acts and omissions. These theories also originated from other jurisdictions, they however also provide a basis upon which a corporation could be held criminally liable. This theory is generally aligned with the public view of corporations and entities, that they make a huge impact in the society just like humans. The notion that a corporate body has its own ethos or culture which distinguishes it from individuals and other corporate bodies is prevalent.<sup>85</sup> It can be noted that through the realistic theory corporations are regarded as entities that influence humans from conducting their business. With that notion corporations can be held criminally liable for economic crimes, or rather its wrongs or faults. This is however based on the corporate policies and conduct of corporations.

Corporations should ensure that the society is protected or rather that their business should not be a disadvantage to the society and to ensure that they follow the codes and procedures of the corporation and society, as failure to do so will cause a corporation to be held criminally liable for an offence.<sup>86</sup>

#### 4.2 Holistic theory

The holistic theory is influenced by the realistic approach.<sup>87</sup> This approach accepts the notion of exclusive corporate culpability, which notes that if a corporate body fails to take reasonable remedial measures in response to an act or omission by an individual such as an employee it will be at fault.<sup>88</sup> Reactive fault can be defined as an “unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offence.”<sup>89</sup> The remedial form is however noted as compensation, structural reform and implementation of a programme.<sup>90</sup> These theories have however contributed to

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<sup>83</sup> Borg-Jorgensen and Van der Linde (n 12) 458.

<sup>84</sup> Borg-Jorgensen and Van der Linde (n 12) 458.

<sup>85</sup> Pieth *Corporate Criminal Liability Emergence, Convergence and Risk* (2011) 20.

<sup>86</sup> Burchell (n 16) 460.

<sup>87</sup> Borg-Jorgensen and Van der Linde (n 12) 459.

<sup>88</sup> Burchell (n 16) 460.

<sup>89</sup> Borg-Jorgensen and Van der Linde (n 12) 459.

<sup>90</sup> Borg-Jorgensen and Van der Linde (n 12) 460.

corporate criminal liability. There are also other theories from other jurisdictions which have contributed to the approach in respect of South African corporate criminal liability.

#### 4.3 Derivative liability and non-derivative model

The derivative model establishes liability on the basis of individual conduct and fault of an employee of the corporation.<sup>91</sup> The non-derivative model is a model of organisational criminal liability which focuses on the liability of a corporation.<sup>92</sup> It therefore stipulates that a corporation is held criminally liable for an offence where it knew or ought to have known about its conduct, and what it would have done to prevent a harm from occurring.<sup>93</sup> It recognises a corporation as a natural person, hence it can commit an offence and can be prosecuted.

### 5 Theories in the United Kingdom

#### 5.1 Doctrine of identification

The United Kingdom in general follows the doctrine of identification, supplemented by vicarious criminal liability in respect of certain offences.<sup>94</sup> The doctrine of identification is also referred to as the “alter ego or the directing mind and will approach.”<sup>95</sup> Before corporations could only be held vicariously liable for statutory offences.<sup>96</sup> They could not be held liable for truly criminal offences which required proof of the mental element in the form of intention and negligence.<sup>97</sup> The doctrine was however redefined, stating that the conduct or rather the will directing an individual was termed as that of the corporation. The identification theory is very similar to vicarious liability.<sup>98</sup> The company blameworthiness is deduced from the human state of mind and conduct. This form of liability has no application in South Africa.

This doctrine has been criticised by many scholars because of its restrictive nature, as the narrow approach is only effective in respect of larger corporations.<sup>99</sup> It also focuses on the corporate body and its application is to a certain extent predictable.<sup>100</sup>

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<sup>91</sup> Ongeso (n 7) 3.

<sup>92</sup> Ongeso (n 7) 3.

<sup>93</sup> Ongeso (n 7) 3.

<sup>94</sup> Cavanagh “Corporate criminal liability: an assessment of the models of fault” 2011 *The Journal of Criminal Law* 414-440.

<sup>95</sup> Cavanagh (n 94) 414.

<sup>96</sup> Cavanagh (n 94) 414.

<sup>97</sup> Cavanagh (n 94) 416.

<sup>98</sup> Simester, Spencer, Stark, Sullivan and Virgo (n 63) 225.

<sup>99</sup> Pieth (n 85) 20.

<sup>100</sup> Simester, Spencer, Stark, Sullivan and Virgo (n 63) 225.

## 6 *The legal position in the United Kingdom*

Corporate criminal liability in the United Kingdom is in many ways similar to the South African position. It has been noted that the South African jurisdiction borrowed its theories of corporate criminal liability from the United Kingdom. As stated above corporate criminal liability started to be recognised in United Kingdom to curb the increase in economic crime. The general approach in the United Kingdom is the derivative doctrine of identification, but supplemented by vicarious criminal liability in respect of directing the mind and will approach.<sup>101</sup> Most of these theories have been discussed above in this dissertation stipulating how they have contributed to corporate criminal liability.

As stated above there have been challenges in South Africa on how a corporation should be held criminally liable for an offence committed. This issue has been addressed in various cases.

By the 14<sup>th</sup> century functional entities were well recognised in English law.<sup>102</sup> By the 16<sup>th</sup> -17<sup>th</sup> centuries the importance of corporations grew as industrialisation spread. By the mid-19<sup>th</sup> century prosecutions were conducted in English courts relying on corporate criminal liability for wrongful acts that have been committed.<sup>103</sup>

The development of corporate criminal liability in the United Kingdom is woven from a number of strands and the resulting cloth is uneven.<sup>104</sup> Vicarious liability however applies to both incorporated and unincorporated corporations. Corporate economic crime causes serious harm to its direct victims and it also causes a great damage to the economy of the country hence the need for corporations to be prosecuted for economic crime.

Economic crime enforcement in United Kingdom is dependent upon specific legislation and enforcement institutions. The specific legislation deployed to criminalise fraud, bribery and corruption are the Bribery Act, 2010 and the Fraud Act, 2006. Lord Woolf emphasised that bribery can paralyse the government and can undermine commerce. However the United Kingdom enacted legislation more than a century ago to deal with economic crime in corporations.<sup>105</sup>

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<sup>101</sup> Borg-Jorgensen and Van der Linde (n 12) 648.

<sup>102</sup> Grimes “Corporate Criminal liability in the UK: The Introduction of deferred prosecution agreements, proposals for further change and the consequences for offices and senior managers” 1 ([www.kingsleynapley.co.uk](http://www.kingsleynapley.co.uk)>plc (05-02-2017)).

<sup>103</sup> Grimes (n 102) 1-9.

<sup>104</sup> Grimes (n 102) 9.

<sup>105</sup> Public Bodies Corrupt Practices Act, 1889; Prevention of Corruption Act, 1906; Prevention of Corruption Act, 1916; Anti-Terrorism Crime and Security Act, 2001.

Since the Bribery Act came into force on 1 July 2011, the United Kingdom has made significant changes to criminal justice to accommodate the anticipated increase in serious economic crime cases by introducing deferred prosecution agreements and new sentencing guidelines. One rationale for the Bribery Act, 2010 was to replace the difficult Victorian legislation and make it easier for the Serious Fraud Office to bring enforcement proceedings.<sup>106</sup>

In 2010 the Bribery Act was promulgated and came into effect on 1 July 2011.<sup>107</sup> The act provides for offences and the criminal liability of corporate bodies. In relation to the offences considered there is the identification principle, under which a company can be prosecuted for an offence committed by an individual who is identified as having been the company's directing mind and will in the commission of the offence, this applies to offences under sections 1 and 2 of the Bribery Act, and under the old law.

The Attorney General noted that allegations of misconduct in the financial services have become too regular an occurrence.<sup>108</sup> Section 7 of the Bribery Act provided for a company to be prosecuted for an offence committed by a person who is "associated" with the company.<sup>109</sup> Section 7 of the Bribery Act, 2010 allows for prosecution of a corporate body so as to prevent economic crime. Section 7 is wider than the previous section which was in force for prosecuting corporations in the United Kingdom. A corporation may be prosecuted for failure to adhere to the provisions of the act.

Vicarious liability actions against a company in tort are overwhelmingly based on the acts of the agents or employees.<sup>110</sup> Being an employee does not however guarantee liability as there has to be a connecting factor between the conduct or act and the corporation.<sup>111</sup> In terms of fraud a corporation could not be held vicariously liable for fraudulent conduct on the part of an employee or agent when the conduct was committed for the purpose of the individual rather than the corporation.<sup>112</sup> In the case of *Uxbridge Permanent Building Society v Pickard*<sup>113</sup> the agent or employee was acting outside the scope of his authority when carrying out fraud and the corporation could not be held liable for a crime.

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<sup>106</sup> Bribery Act, 2010.

<sup>107</sup> Borg-Jorgensen and Van der Linde (n 12) 690.

<sup>108</sup> Grimes (n 102) 3.

<sup>109</sup> ss 1 and 7 of the Bribery Act.

<sup>110</sup> Gower *Principles of Modern Company Law* (2016) 175.

<sup>111</sup> Gower (n 110) 175.

<sup>112</sup> Gower (n 110) 175.

<sup>113</sup> 1939 2 KB 248 CA.

Due to the fact that the United Kingdom has been awakened by an embarrassing number of scandals over the past few decades modifications have been done to the law and regulatory bodies. This has drawn attention to the fact that the corporations should be held liable for their conduct. In 2012 the National Fraud Authority estimated that fraud committed by all types of offenders costs the UK seventy- three billion pounds sterling per year.<sup>114</sup> In 2011 the National Fraud Authority commenced with “Fighting Together” which is a national strategic plan aimed and reducing fraud. The government also created the National Crime Agency included the Economic Crime Command.<sup>115</sup>

The Proceeds of Crime Act, 2002 (POCA) was enacted which was hailed as a powerful new tool that would help prosecute those who indulge in corporate criminal activities. POCA is a wide-ranging piece of legalisation running to 462 sections and 12 schedules and economic crime offences created by this act are widely drafted.<sup>116</sup> POCA also gives the United Kingdom enforcement authorities jurisdiction over commercial organisations that are corporations having engaged in economic crime or serious economic crime which often have an international dimension.<sup>117</sup>

More so a company can be prosecuted for one or more economic crimes only when it can be proved that there was a directing of mind and will by the person working for a corporation or the director who is giving out instructions on behalf of the corporation.

The aim to criminalise actions amounting to economic crime is still ongoing in the United Kingdom.

### *7 The legal position in South Africa*

Until 1917 corporate criminal liability in South Africa had to be determined under the common law only. The original statutory provision in South Africa relating to corporate criminal liability was section 384 of the Criminal Procedure and Evidence Act.<sup>118</sup> It had shortcomings and was replaced by section 117 of the Companies Amendment Act<sup>119</sup> and later replaced with an

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<sup>114</sup> National Fraud Authority.

<sup>115</sup> Gower (n 110) 175.

<sup>116</sup> Alderman, “Bribery Act 2010: A new beginnings speech: Director of the Serious Fraud Office” (2010) 3 (<https://www.exdogy.com/library/details.aspx?g=324ee> (08-08-2016)).

<sup>117</sup> Alderman (n 116) 3.

<sup>118</sup> Act 31 of 1917.

<sup>119</sup> Act 23 of 1939.

amended provision.<sup>120</sup> A further development was section 381 of the Criminal Procedure Act<sup>121</sup> which basically restated the wording of section 384 as amended in 1939. Currently corporate criminal liability is regulated by section 322 of the Criminal Procedure Act.<sup>122</sup>

Economic crime may often cause business failure.<sup>123</sup> In this regard South Africa has however been guided by the National Prosecuting Authority Act<sup>124</sup> which states that all economic offences must be investigated. An initiative between the South African government and the business community represented by Business Against Crime (BAC) led to the establishment of specialised commercial crime courts in various centres, focusing on the prosecution and adjudication of commercial crime matters. This is a good indication that the South African government is striving to make the business sector free from economic crimes and as well so as to attract international investors.

Since the Company Act was enacted in 1973 fundamental legal development have taken place. The most important change was the adoption of the Constitution in 1996, it is the supreme law and companies are to act in accordance with it so as to uphold its ethos which is to promote human dignity and equality amongst others. It also regulates the relationship between economic citizens and has thus fundamental implications for company law.<sup>125</sup>

Section 332 of the Criminal Procedure Act provides a dual approach to corporate criminal liability. It provides for the criminal liability of the corporation for crimes committed in furthering or in endeavouring to further the interest of the corporation. It further provides for the criminal liability of individuals within the corporation who are responsible for committing crimes.

Section 332(1) provides as follows:

“[F]or 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 instructions 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 instruction 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

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<sup>120</sup> Borg –Jorgensen and Van der Linde (n 12) 690.

<sup>121</sup> Act 59 of 1955.

<sup>122</sup> 51 of 1977.

<sup>123</sup> De Villiers and Nel (n 4) 408.

<sup>124</sup> National Prosecuting Authority Act 32 of 1998.

<sup>125</sup> The Constitution of the Republic of South Africa, 1996.

(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 that corporate body.”

As stated above there are requirements which must be satisfied for a corporate body to be held criminally liable for a crime. The requirements are an act or omission and fault (intention or negligence) for corporations in economic crimes.

### 7.1 Unlawful conduct (act or omission)

For one to be convicted of a crime the accused must have acted or failed to act which resulted in an unlawful consequence. It is sometimes referred to as positive conduct or negative conduct.<sup>126</sup> When the legislature refers to this first basic element of liability it regularly speaks of an act or omission or uses an expression that “somebody who commits an act or fails to commit an act.”<sup>127</sup> Omission is the failure to act when there is a duty to act or where one is supposed to perform an active conduct.<sup>128</sup>

### 7.2 Fault

There are a few instances of liability without fault. Liability for wrongdoing has to correspond with the definitional elements of a crime in order to be culpable.<sup>129</sup> In order to be culpable, a person must have intention or have been negligent.<sup>130</sup> In terms of section 332(1) the corporate body is criminally liable for an act performed by its director or servant when performed with or without intent. The fault of the servant or employee is attributed to the corporate body since the corporation does not have a physical existence. Scholars such as Burchell<sup>131</sup> states that section 332(1) removes the obstacles to attach criminal liability to juristic persons and affirms that an artificial person could be convicted of a crime that requires fault.

### 7.3 Intention

Intention can either be in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*.<sup>132</sup> *Dolus directus* exists when a person directs his will towards achieving the prohibited act,<sup>133</sup> thus indicating that he desires the act or result.<sup>134</sup> *Dolus indirectus* implies that the prohibited act or result is not his or her goal but he realises that if he wants to achieve his goal the

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<sup>126</sup> Snyman (n 13) 51; Burchell (n 16) 69.

<sup>127</sup> Snyman (n 13) 51.

<sup>128</sup> Snyman (n 13) 58.

<sup>129</sup> Snyman (n 13) 246.

<sup>130</sup> Snyman (n 13) 177.

<sup>131</sup> Burchell (n 16) 460; Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (2017) 33-6.

<sup>132</sup> Snyman (n 13) 177.

<sup>133</sup> Snyman (n 13) 717.

<sup>134</sup> Ferreira 2004 2 SACR 454 (SCA) 475 c-d.

prohibited act will of necessity materialise.<sup>135</sup> *Dolus eventualis* is present when a person acts with intention and foresees that possibility of an unlawful result but reconciles himself to this possibility.<sup>136</sup> Section 332(1) provides that the particular intention of the director or servant is attributed to the corporate body. In *Ex Parte Minister of Justice: In re S v South African Broadcasting Corporation*<sup>137</sup> the court held the intended results should refer to any relevant intention with which the act was committed.

#### 7.4 Negligence

*Mens rea* includes both intention and negligence.<sup>138</sup> Negligence occurs when the offence has occurred unintentionally or accidentally.<sup>139</sup> Where a person did not act as a reasonable person is expected to act, he has fault in the form of culpability.<sup>140</sup> It is noted that for a corporation to be held liable for a crime the employees or rather the servant should have acted in a negligent manner in terms of furthering the business of a corporation.

#### 7.5 Express or implied permission

For a corporate body to be held liable its directors must give express or implied permission to its employees or servants to act in a specific way.<sup>141</sup> When an employer or servant of a corporation is given an instruction from a director or any other person in charge such a corporation is liable for an offence which flows from the specific act.<sup>142</sup>

#### 7.6 Furthering the interests of the corporation

The corporate body is liable for an offence committed by a servant furthering the interests of the corporate body.<sup>143</sup> According to the decision in *R v Meer*<sup>144</sup> if the corporate body, which was created for a lawful purpose, decides to follow unlawful ends it would be liable for the acts of a director or servant who exercised powers in the performance of their duties. Where the employee commits a crime in order to further the corporate body's interest, the latter is liable even when the employee acted beyond the scope of his employment.

When the above- mentioned requirements have been satisfied a corporate body can be held liable for an offence that was committed. It is of great importance to note that as corporate

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<sup>135</sup> Snyman (n 13) 178.

<sup>136</sup> Snyman (n 13) 178.

<sup>137</sup> 1992 4 SA 804 (A) 808-809.

<sup>138</sup> Snyman (n 13) 205.

<sup>139</sup> Snyman (n 13) 204.

<sup>140</sup> Snyman (n 13) 205.

<sup>141</sup> Burchell (n 16) 460; Kruger *Hiemstra's Criminal Procedure* (2017) 33-4.

<sup>142</sup> Burchell (n 16) 460.

<sup>143</sup> *S v African Bank of South African Ltd* 1990 2 SACR 585 (W) 648.

<sup>144</sup> 1958 2 SA 175 (N).

criminal liability in South Africa has increased there is a need to have laws which govern the prosecution of corporations.

### 7.7 Offence

Section 332(1) states that a corporate body is liable for an offence. There are authorities who agree that there is no offence both under common law and statutory law which cannot be committed by a corporate body.<sup>145</sup> There are common law and statutory offences that can be attributed to the corporate body.<sup>146</sup> There are however criticism of section of 332(1) of the Criminal Procedure Act. It is noted that the offence which would have been committed by the servants and employees during the course of their employment creates a burden on the corporation to be liable for all such offences.

Economic crime is becoming a more complex issue for organisations and economies. In South Africa more than two thirds of the population has experienced economic crime. Economic crime is also referred to by other scholars as white collar crimes. Due to the ever increasing number of economic crimes it has been noted that the local law enforcement agencies are failing to prosecute and punish economic crimes effectively.<sup>147</sup> It is further noted that the economic crime rate has increased which might be an indication that law enforcement agencies have failed to curb the ever growing rate of economic crime. Consequently it appears that despite the fact that South Africa has developed a framework to combat economic crime, it lacks the capacity to enforce it. As economic crime in South Africa covers a wide spectrum, it extends far beyond the private sector. As stated above economic crime includes *inter alia* the offences of corruption and fraud.

### 8 Sentence

The imposition of a fine is the only sentence option available when a corporate body has been convicted of a criminal offence.<sup>148</sup> The Companies Act 71 of 2008 also provides for measures that can be considered in cases where a company is linked to criminal behaviour. It is suggested that restraining a company's business activities or its dissolution are sentencing options in their own right.<sup>149</sup> In terms of the South African Companies Act a court, on application of the

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<sup>145</sup> *S v Deal Enterprises (Pty) Ltd* 1978 3 SA 302 (W); Hoctor, Cowling and Milton III *South African Criminal Law and Procedure: Statutory Offences: Offences Relating to Companies* (2012) 3.

<sup>146</sup> *R v City Silk Emporium (Pty) Ltd* 1950 1 SA 825 (GW) 835.

<sup>147</sup> Roodt "Legal analysis and commentary on white collar crime" available at [www.whitecollarpost-com/white-collar-crimes-south-africa-slow-rot-private-public-sector](http://www.whitecollarpost-com/white-collar-crimes-south-africa-slow-rot-private-public-sector) (04-02-2017).

<sup>148</sup> Du Toit (n 33) 237.

<sup>149</sup> Du Toit (n 33) 237.

commission or panel may also impose an administrative fine for the company's failure to comply with a notice issued in terms of the act.<sup>150</sup>

In terms of section 332(2)(c) of the Criminal Procedure Act a fine is the only criminal sanction that may be imposed on a corporate offender. There have been criticism of this sentencing option in that the fine imposed might be too low compared to the crime committed and therefore not effective.<sup>151</sup> The aim must be that the corporation should feel the pain of its criminal action.

The statutory regulation of corporate criminal liability has contributed towards the development of the notion of criminal liability. It has widened the scope of corporate liability in South Africa even though much is still to be done as unpunished criminal actions by corporate bodies are a danger to the South African society. The fact that corporate criminal liability has been regulated by the Criminal Procedure Act does not imply that all corporations are being prosecuted. There is still more to be done in the sense of ensuring that criminal activity is investigated and prosecuted.

In *Msane v S*<sup>152</sup> Mlambo JA stated that moral blameworthiness plays a critical role in the determination of an appropriate sentence. In business ethics and organisational theory opposing views exist on whether corporations can be regarded as entities with moral attributes.

In the United Kingdom legislation regulates business activity and corporate entities may be prosecuted for the commission of a wide variety of offences. A corporation may be convicted of committing most offences.<sup>153</sup> A foreign company which carries on any business in the United Kingdom can be prosecuted under the Bribery Act for failing to prevent bribery being committed by any of its employees.<sup>154</sup>

The ability to prosecute in the United Kingdom is not restricted to the prosecuting authority as a number of different authorities and regulatory bodies may investigate and prosecute offences committed by corporate entities.<sup>155</sup> Where there is enough evidence that a corporation is guilty of any offences in accordance with the Proceeds of Crime Act, 2002 a corporation will be

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<sup>150</sup>Du Toit (n 33) 237.

<sup>151</sup> s 332(2)(c) of the Criminal Procedure Act. For the position in respect of fining a corporate body in England see Wasik *A Practical Approach to Sentencing* (2014) 199-200 and Ashworth *Sentencing and Criminal Justice* (2015) 354-355.

<sup>152</sup> (96/2008)[2008] ZASCA 118 (26 September 2008) par 11.

<sup>153</sup> *Chance Corporate Criminal Liability in Europe* available at [www.cliffordchance.com/content/clam/Cliffordchance/PDFs/corporate-liability-in-Europe.pdf](http://www.cliffordchance.com/content/clam/Cliffordchance/PDFs/corporate-liability-in-Europe.pdf) (13/04/2017) 39.

<sup>154</sup> Du Toit (n 33) 238.

<sup>155</sup> Du Toit (n 33) 239.

prosecuted for such an offence. Penalties which corporations can face in the United Kingdom include fines, confiscation, compensation orders and debarment from public procurement.<sup>156</sup>

### *9 Recommendations and Conclusion*

The ability to prosecute a corporation for offences in the United Kingdom is not restricted to the prosecuting authority as a number of regulatory bodies may investigate and prosecute offences committed by corporations.<sup>157</sup> As stated above section 7 of the Bribery Act, 2010 assisted in amending the existing legislation on economic crimes by creating a new offence of failure to prevent economic crimes.<sup>158</sup> Section 7 is also based on “a model that correctly clarifies the actual wrongdoing committed by a company.”<sup>159</sup>

Scholars such as Gobert and Punch stated that:

“What is needed is a theory of criminal liability that captures the distinctive nature of corporate fault. Typically the corporation fault will be imputed on the failure to have to put into place protective mechanisms that would have prevented harm from occurring. It is for this failure that the corporation bears responsibility for the harm”<sup>160</sup>

Section 7 has encouraged corporations to put in place policies to prevent bribery. It has also been seen that introducing a criminal offence of failure to prevent economic crimes would significantly enhance good corporate governance.<sup>161</sup>

It is recommended that South Africa should also follow the approach that a regulatory body should be able to investigate economic crimes. As discussed above it can be noted that corporate criminal liability is regulated by section 332(1) of the Criminal Procedure Act. This section has been analysed and some shortcomings which exist are to be discussed briefly.

The wide net of liability that is cast by section 332(1) is a potential shortcoming.<sup>162</sup> A corporate body can be criminally liable for the conduct of a wide range of actors such as directors, servants and third parties acting on behalf of the corporation.<sup>163</sup> Such a wide range increases

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<sup>156</sup> Chance (n 153) 35.

<sup>157</sup> Off the Hook: Corporate Impunity and law Reform in the UK: Corruption Watch 6 ([http://www.cw.uk.org/up-content/uploads/2015/09/corruption-watch-off-the-hook-report-september-2015-\(25-04-2017\)](http://www.cw.uk.org/up-content/uploads/2015/09/corruption-watch-off-the-hook-report-september-2015-(25-04-2017))).

<sup>158</sup> Off the Hook: Corporate Impunity and law Reform in the UK: Corruption Watch (n 157) 6.

<sup>159</sup> Off the Hook: Corporate Impunity and law Reform in the UK: Corruption Watch (n 157) 6.

<sup>160</sup> Off the Hook: Corporate Impunity and law Reform in the UK: Corruption Watch (n 157) 6.

<sup>161</sup> Off the Hook: Corporate Impunity and law Reform in the UK: Corruption Watch (n 157) 6.

<sup>162</sup> Ongeso (n 7) 4.

<sup>163</sup> Ongeso (n 7) 4.

the probability of criminal liability.<sup>164</sup> This poses a problem in that it would lead to a higher risk of attracting criminal liability.<sup>165</sup>

A further shortcoming in section 332(1) of the Criminal Procedure Act is to be found in the fact that it does not fully cover all the crimes which can be committed by corporations. It can be noted that the main focus is on the aspect of culpable homicide as an offence that can be committed by corporations but less attention is placed on other crimes such as economic crime. Hence there is a need for more focus on economic crime.

Section 332(1) of the Criminal Procedure Act is based on a form of vicarious liability and it has been influenced by the traditional nominalist theory of corporate personality.<sup>166</sup> It has been argued that section 332(1) is a wide provision which does not stipulate a defence for corporations. It is noted that the right to a fair trial in section 35(3) and the right to be presumed innocent in section 35(3)(h) of the Constitution might therefore be infringed.

There is limited legislation which has been enacted so as to curb economic crime in South Africa and it has been proven to be rather ineffective.<sup>167</sup> These acts will help in making the corporations more aware of the implications for committing economic crimes as they are conducting their business. There are several lessons that South Africa can draw from the position in the United Kingdom. South Africa should in this regard consider introducing an offence which mainly deals with economic crime committed by a corporate entity.

It is also of great importance to look closely at the theories of corporate criminal liability. Both the principle of aggregation and vicarious liability have been criticised, the principle of aggregation has proven to be narrow in its application and on the other hand vicarious liability has been described as too harsh.<sup>168</sup> It can be noted that the principle of aggregation remains the basis of corporate criminal liability in the United Kingdom.<sup>169</sup>

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<sup>164</sup> Ongeso (n 7) 4.

<sup>165</sup> Ongeso (n 7) 4.

<sup>166</sup> Borg-Jorgensen and Van der Linde "Corporate criminal liability in South Africa: Time for a change? (Part 1)" 2011 *TSAR* 684 700.

<sup>167</sup> Even though s 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 makes it an offence for a person in authority who knows or ought reasonably to have known that certain crimes in the act have been committed to report the commission thereof to the police, it is submitted that such reporting does not take place generally or are not investigated after reporting. See Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg (n 29) 449.

<sup>168</sup> Borg-Jorgensen and Van der Linde (n 166) 700.

<sup>169</sup> Borg-Jorgensen and Van der Linde (n 166) 700.

Ongeso recommends that it should be set out in section 332(1) of the Criminal Procedure Act how conduct can be attributed to a corporation and how fault should be proven in order for liability to follow.<sup>170</sup>

In respect of sentencing it is recommended that South Africa should also include other ways of sentencing corporations which would assist in preventing corporations from committing economic crime. I recommend that corporations should be sentenced in ways that will ensure that the commission of economic crime is avoided. It is of great importance to introduce sentencing such as public orders where a corporation has become an habitual offender.



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<sup>170</sup> Ongeso (n 7) 8.

## 11 Bibliography

### 11.1 Journals

Borg-Jorgensen and Van der Linde “Corporate criminal liability in South Africa: time for a change?” 2011 *Journal of South African Law* 452 & 684

Cavanagh “Corporate criminal liability: an assessment of the models of fault” 2011 *The Journal of Criminal law* 414

De Villiers and Nel “The opportunity cost of the upkeep of the criminal law system in South Africa from 1980 to 2006” 2011 *South African Journal of Economic and Management Sciences* 12

Du Toit “Sentencing the corporate offender in South Africa: a comparative approach” 2012 *South African Journal of Criminal Justice* 235

“Economic crime: a South African pandemic no sector is immune” 2016 *Global Economic Crime Survey*

Ongeso “Corporate accountability in South Africa: sharpening the role of criminal law” 2016 *South African Journal of Criminal Justice* 225.

### 11.2 Textbooks

Allen, M *Textbook on Criminal Law*, Oxford University Press, United Kingdom (2013)

Ashworth, A *Sentencing and Criminal Justice*, Cambridge University Press, United Kingdom (2015)

Ashworth, A and J Horder *Principles of Criminal Law*, Oxford University Press, United Kingdom (2013)

Burchell, J *Principles of Criminal Law*, Juta Law, South Africa (2016)

Cord, R *et al Criminal Law* Oxford University Press, United Kingdom (2016)

Doig, A *Fraud Crime and Society Series*, United Kingdom (2012)

Du Toit, E, FJ de Jager, A Paizes, A St Q Skeen and S van der Merwe *Commentary on the Criminal Procedure Act*, Juta Law, South Africa (2017)

Gower, L and P Davies *Principles of Modern Company Law*, Sweet Maxwell, London (2012)

Herring, J *Criminal Law Text, Cases and Materials*, Oxford University Press, United Kingdom (2014)

Hector, SV, MG Cowling and JRL Milton III *South African Criminal Law and Procedure: Statutory Offences: Offences Relating to Companies* Juta Law, South Africa (2012)

Kemp, G, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie and A Steynberg *Criminal law in South Africa* Oxford University Press, South Africa (2015)

Kruger *Hiemstra's Criminal Procedure*, LexisNexis, South Africa (2017)

Pieth, M and R Ivory *Corporate Criminal Liability Emergence, Convergence and Risk*, Springer, United Kingdom (2011)

Ryder, N *Financial Crime in the 21<sup>st</sup> Century Principles & Policies*, Cheltenham, United Kingdom (2011)

Stevens, R *Crimes under the Company Act 71 of 2008*, Juta Law, South Africa (2016)

Simester, AP, JR Spencer, F Stark, GR Sullivan and GJ Virgo *Simester and Sullivan's Criminal Law Theory and Doctrine*, Hart Publishing, United Kingdom (2016)

Snyman, CR *Criminal Law*, LexisNexis, South Africa (2014)

Turner, T *Fraud Risk Management: A Practical Guide for Accountants* London (2016)

Wasik, M *A Practical Approach to Sentencing*, Oxford University Press, United Kingdom (2014)

### 11.3 Table of cases

#### 11.3.1 South Africa

*Ex Parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A)

*Goldstein v Johannesburg Municipality* 1926 TPD 176

*Msane v S* (96/2008)[2008] ZASCA 118 (26 September 2008)

*R v Scholnick* 1939 CPD 327

*R v City Silk Emporium (Pty) Ltd* 1950 1 SA 825 (GW)

*S v African Bank of South African Ltd* 1990 2 SACR 585 (W)

*S v Banur Investments (Pty) Ltd* 1969 1 SA 231 (7)

*S v Deal Enterprises (Pty) Ltd* 1978 3 SA 302 (W)

#### 11.3.2 United Kingdom

*Bolton Engineering Co v Graham* (1957) 1 QB 159

*Coppen v Moore* No 2 1898 2 QB 306

*Gardner v Akeroyd* 1952 2 QB 743

*H L Bolton (Engineering) Company Ltd v TJ Graham and Sons Ltd* 1957 1 QB 159

*Lennards Carrying Co & Asiatic Petroleum* (1915) AC 705

*Moussell Bros Ltd v London & North Western Railway Company* 1917 2 KB 836

*National Rivers Authority v Alfred Mc Alpine Home East Ltd* 1994 4 ALL ER 286 QB

*Salomon v Salomon & Co Ltd* 1897 AC 22

*Somerset v Hart* 1884 12 QBD 360

*Taff Vale RR Co v Amalgamated Society of RR Servants* 1901 AC 426

*Tesco Supermarkets Ltd v Nattras* 1972 AC 153

*Uxbridge Permanent Building Society v Pickard* 1939 2 KB 248

*Vane v Yiannopoulos* 1963 AC 486

#### 10.4 Internet Sources

Chance, C Corporate Criminal Liability in Europe

([https://www.cliffordchance.com/content/clam/Clifford chance/PDFs/ corporate-liability-in-Europe.pdf](https://www.cliffordchance.com/content/clam/Clifford%20chance/PDFs/corporate-liability-in-Europe.pdf) (24-04-2017))

Grimes, J *et al* “Corporate Criminal liability in the UK: The Introduction of defend prosecution agreements, proposals for further change and the consequences for offices and senior managers” Jurisdictional Guide (2013/14) [global.practicallaw.com/4-547-9466](http://global.practicallaw.com/4-547-9466)

Business Crimes and Investigations (<http://www.wermans.com/legal-services-view/business-crime-forensic-law> (14-12-2016))

Economic Crime: A South African Pandemic 5<sup>th</sup> ed PwC (2016) Global Economic Survey (<http://www.pwc.com/gx/en/services/advisory/consulting/forensics/economic-crime-survey.html> (March 2016))

Off the Hook: Corporate Impunity and law Reform in the UK. Corruption Watch ([www.cw.uk.org/up-content/uploads/2015/09/corruption-watch-off-the-hook-report-september-2015 6](http://www.cw.uk.org/up-content/uploads/2015/09/corruption-watch-off-the-hook-report-september-2015-6) (24-04/2017))

Ostler Schoeman Attorneys 2013 (<https://www.schoemanlaw.co.za/wp-content/uploads/2013/01/website-article-luise-ostler-FINAL-15-01-2013.pdf> (25-04-2017)).

Overy, A ([www.allenoverly.com/publications/en-gb/pages/Reform-of-corporate-criminal-liability-for-economic-crimes.aspx](http://www.allenoverly.com/publications/en-gb/pages/Reform-of-corporate-criminal-liability-for-economic-crimes.aspx) (13/04/2017))

Roodt, N “White Collar Post Legal analysis and commentary on white collar crime” (<http://www.whitecollarpost-com/white-collar-crimes-south-africa-slow-rot-private-public-sector> (08-08-2016))

Ryder 2011 *Financial Crime in the 21<sup>st</sup> Century: Principles and Policies* 1 (<http://eprints.uwe.ac.uk/16023/8/RYDER%2520firstproof.pdf> (08-08-2016)).

United Nations Office on Drugs and Crime, *The Eleventh United Nations Congress on Crime Prevention and Criminal Justice*, (2005) Bangkok, Thailand (<http://www.unitednations.org/office-drugs-crime-eleventh-congress-on-crime-prevention-criminal-justice.html> (08-08-2016))

White Collar Crime Impending threat to South Africa Business ([www.rbs.co.za/white-collar-crime-an-impending-threat-to-sa-businesses](http://www.rbs.co.za/white-collar-crime-an-impending-threat-to-sa-businesses) (24-04-2017))

White “Economic crime: a South African pandemic no sector or region is immune - Global Economic Crime Survey” 5<sup>th</sup> ed (<https://www.pwc.co.za/en/assets/pdf/south-african-crime-2016.pdf> (16-01-2017)).

## 10.5 Speeches

Alderman, R “Bribery Act 2010: “A new beginnings” Speech: Director of the Serious Fraud Office (2010)

## 11.6 Table of statutes

### 11.6.1 United Kingdom

Anti-Terrorism Crime and Security Act, 2001

Bribery Act, 2010

Companies Act, 2006

Financial Services Market Act, 2000

Fraud Act, 2006

Prevention of Corruption Act, 1906

Prevention of Corruption Act, 1916

Proceeds of Crime Act, 2002

Public Bodies Corrupt Practices Act, 1889

### 11.6.2 South Africa

Companies Act 71 of 2008

Constitution of Republic of South Africa, 1996

Criminal Procedure and Evidence Act 31 of 1917



Criminal Procedure Act 56 of 1955

Criminal Procedure Act 51 of 1977

National Prosecuting Authority Act 32 of 1998

Prevention and Combating of Corrupt Activities Act 12 of 2004

