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Corporate criminal liability in South Africa: why section 332 of the criminal procedure act may not be most effective way to regulate corporate crimes in South Africa

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TITLE: CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA: WHY SECTION 332 OF THE CRIMINAL PROCEDURE ACT MAY NOT BE THE MOST EFFECTIVE WAY TO REGULATE CORPORATE CRIMES IN SOUTH AFRICA

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Abstract

With the upsurge of corporate activity in the world many countries have incorporated ways in which to regulate corporate crimes. That has been achieved through ‘corporate criminal liability’. Companies are juristic persons, therefore criminal liability cannot be attached to a company through its direct conduct. Unlike natural persons, companies can only be found criminally liable through the conduct of their agents; through the concept of vicarious liability.

With all jurisdictions in the world governing corporate crimes through vicarious liability, there are different approaches that have been incorporated in regulating corporate criminal liability. The United States of America uses a system known as the principle of aggregation while the UK uses the doctrine of identification. With South Africa using the basics of vicarious liability and with potential problems being rooted in the constitutionality of the legislation governing corporate criminal liability, it is possible that section 332 of the Criminal Procedure Act is not the most effective approach to regulating corporate criminal liability.

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1. Introduction

Over the dawn of time, there has been an increase in corporate crimes which has led to many countries realizing that a comprehensive and coherent theory of corporate criminal liability is required.[1] Such breaches include those of health and safety regulations along with environmental degradation committed by companies.[2] As shown by a survey, South Africa is one of the countries that have implemented laws that attempt to thwart against the likelihood of corporate crimes becoming prevalent within the nation.[3] As a consequence of South Africa's vast corporate development and activity, corporate criminal concerns have become a reality meaning corporate criminal liability has become determinedly entrenched in the South African legal system and doing away with it at this time will give rise to great uncertainty.[4] It is necessary.

Arguably when people think of crimes they only refer to natural persons as those that can be held criminally responsible for offences and this is because a natural person has the requisite physical ability to commit an unlawful act and have the blameworthy state of mind.[5] However, this is not the case and the law allows for a juristic person like a company or corporation to be held criminally liable for offenses committed in its name, despite the obvious fact that the juristic person is unable to

[1] Jonathan Burchell *Principles of Criminal Law* 4 ed (2013) at 448.
[2] Ibid.
[3] Dave Loxton 'Criminal Liability of Companies Survey' 2008 *Lex Mundi Publication* 1.
[4] Vicky-Louise Borg-Jorgensen and Kathleen van der Linde 'Corporate criminal liability in South Africa: time for change? (part 1)' (2011) 2011 *TSAR* 452 at 465.
[5] Jonathan Burchell *Principles of Criminal Law* 3 ed (2005) at 563.

think or act by itself.[6] The concept of juristic persons being held criminally liable therefore goes against the common law rule that a person should not be held liable for offences committed by another person, unless in circumstances where the person accused authorised the crime's commission or took part in some way.[7] We now, however live in times where the increase in corporate activity has led to the increase in criminal activity like fraud from companies themselves and the great social interest of prosecuting such crimes should not be overlooked.[8] There is mounting consensus among corporate academics and criminologists who believe that corporate crimes are causing more damage to our society than all street crime.[9] This is a completely an understandable point to make especially when one considers how large a role corporate bodies play in the country's economy.[10] The economy is affected by crimes like fraud which has an affect of a tax, meaning companies' costs of production are raised and in turn prices for customers are higher.[11] If crime was to continue to fester within the corporate world and not be policed by the law in a criminal way it could lead to the collapse of a whole country.

Having established the importance of regulating corporate crimes, it is now important to evaluate the best way of regulating these crimes to ensure efficient prosecutions and to make sure the dangers they could potentially cause do not come to fruition. This is what this report will attempt to do. Corporate criminal liability is regulated in a lot of countries across the world. While there are jurisdictions like Bulgaria, Luxembourg and Brazil that do not recognise any form of corporate criminal liability,

[6] Dorothy Farisani 'The Regulation of Corporate Criminal Liability in South Africa: A Close Look (Part 1)' 2006 *Obiter* at 264.
[7] Ibid.
[8] *S v Coetzee* 1997 1 SACR 379 (CC) 430H.
[9] Op cit note 4 at 452.
[10] John R Lott, Jr 'Corporate Criminal Liability' 1999 *University of Chicago Law School* 492 at 493.
[11] Ibid.

on the other hand jurisdictions such as Greece, Germany, Sweden and Mexico, which address the problem through administrative penalties[12] As such there are several countries from which South Africa can be compared to explore whether South Africa has an adequate and efficient enough way of prosecuting these crimes. The United States system of corporate criminal liability has been understood to be the most extensive and developed system of corporate criminal liability so far.[13] The United Kingdom has been listed by a 2016 survey compiled by Clifford Chance as a country which the regulation of corporate criminal liability exists and is of high enthusiasm from enforcement authorities.[14] For the purpose of this thesis focus will be on the United Kingdom and the United States. Firstly, however, this thesis will examine the background of corporate criminal liability to try establish the rationale behind it and briefly state the various approaches used in trying to regulate it. This research will then move on to corporate criminal liability in South Africa and assess the current position in our law. We will then take a comparative look of how corporate criminal liability is governed in the United Kingdom and in the United States before assessing if there is need for reform in South Africa or is our current system the most efficient way to regulate corporate criminal liability.

[12] Vicky-Louise Borg-Jorgensen and Kathleen van der Linde 'Corporate criminal liability in South Africa: time for change? (part 2)' (2011) vol. 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 684 at 684.
[13] Anca Iulia Pop *Criminal Liability of Corporations – Comparitive Jurisprudence* (Submitted in partial fulfillment of the requirements of the King Scholar Program Michigan State University College, 2006) at 4.
[14] Luke Tolaini 'Corporate Criminal Liability April 2016' available at https://www.cliffordchance.com/briefings/2016/04/corporate_criminalliability.html, accessed on 20 February 2018.

1.2 Historical Background

The development of criminal law occurred as a device for responding to individual wrongdoing. This is why traditionally crimes are committed by human, moral agents who are held responsible and blamed for their actions.[15] However, the nature of corporate bodies was never taken into account when looking at the basic principles of criminal law[16], which is why the need for corporate criminal liability has become so necessary through the rapid increase of corporate bodies in the nineteenth century and during the twentieth century.[17] The problem of how a corporate body can commit a criminal offense, given the facts that it cannot think for itself nor act for itself, had to be addressed by courts and this resulted in in different approaches being suggested which are greatly influenced by theories relating to corporate personality.[18]

In the sixteenth and seventeenth century, it was globally believed that corporations could not be held criminally liable due to factors like juristic persons not being able to act for themselves, the lack of moral blameworthiness that is necessary for crimes of intent, judge's literal understanding of the criminal procedure like the accused being brought physically to court and the ultra vires doctrine; with corporations not mentioning such liability in their Memorandum of Association.[19]The biggest obstacle the courts struggled to grapple with the most was imputing acts and criminal intent to a juristic person such as corporations.[20] As a result, the common law had to expand

[15] Meaghan Wilkinson 'Corporate criminal liability – the move towards recognizing genuine corporate fault' (2003) *The Canterbury Law Review* 142 at 165.
[16] Sadhana Singh 'Corporate Crime And The Criminal Liability of Corporate Entities' (2008) 76 *United Nations Asia And Far East Institute Resource Material Series* 84.
[17] Op cit note 4 at 453.
[18] Ibid.
[19] Ananthi S. Bharadwaj 'Corporate Criminal Liability Vis-à-vis the Corporate Manslaughter and Corporate Homicide Act, 2007 (UK)' (2009) 3 *National University of Advanced Legal Studies Law Journal* 42 at 43-44.
[20] Ibid.

its concept of moral blame in order to include entities as potential wrongdoers.[21] Criminal procedure was revised giving rise to new requirements which spoke to the non-corporeal nature of corporations.[22] Due to these changes, courts gradually began implementing aspects of the criminal law such as hearings and sentencing to cases with corporate defendants.[23] The first cases in both the United Kingdom and the United States which saw courts impose criminal liability were cases of public nuisance and by the 1800s corporations could be held liable for such offence.[24]*The Queen v. Great North of England Railway Co.*[25] case was the first corporate criminal liability case in the United Kingdom which took place in 1846.[26] In the United States, it was not until 1909 that the Supreme Court extended the corporate liability principles into the criminal area of law[27] with the case of *New York Central & Hudson River R.R. Co v. United States case.*[28] The introduction of corporate criminal liability has come so far to the point that both the United States and United Kingdom have legislation that help govern the law. The United States incorporated the Sarbanes – Oaxley Act of 2002[29] after increased public outrage to corporate scandals.[30] The United Kingdom incorporated the Corporate Manslaughter and Corporate Homicide Act, 2007[31] in April 2008 after a long process of consultation and policy development.[32]

[21] Matthew E. Beck & Matthew E. O'Brien 'Corporate Criminal Liability *The Twelfth Survey*' (2000) 37 *American Criminal Law Review* 261 at 262.
[22] Ibid.
[23] Abigail H. Lipman 'Corporate Criminal Liability *The Twelfth Survey*' (2009) 46 *American Criminal Law Review* 359 at 360.
[24] Op cit note 19 at 44.
[25] *The Queen v. Great North of England Railway Co*., 115 Eng. Rep. 1294 (QB 1846).
[26] Op cit note 24.
[27] Op cit note 21.
[28] *New York Central and Hudson River R.R. Co. v United States*, 212 U.S. 481 (1909).
[29] Sarbanes-Oxley Act, Pub. L. No. 107-204, §§ 802-807, 116 Star. 745 (2002).
[30] Op cit note 23.
[31] Corporate Manslaughter and Corporate Homicide Act 19 of 2007.
[32] Op cit note 19 at 52.

Since the development of corporate criminal liability, it is not a surprise that there is need for such regulation with the increase of corporate crimes. An example of the how crime among corporate crimes has increased all over the world can be found in a story *Dan K. Webb* offers.[33] Furthermore, due to the emerging trend of using high technology and digital media, corporate crimes have taken a new dimension.[34] Technology has led to the possibility of more kinds of fraud; like e-commerce fraud, cloud computing fraud, crypto-currency fraud and social media fraud.[35] This highlights the importance of a need to continue regulating corporate crimes and making sure that is done so efficiently.

The dominant view today is now that corporate criminal liability is a vital part of regulatory processes and is based on the view that it would be gravely unjust to only punish individual corporate actors, like directors and shareholders, for criminal behaviour when the origin comes from the corporate culture.[36] Without corporate liability there would have been a situation whereby many crimes would be insufficiently punished due to the structure and size of corporations making it impossible to adequately allocate liability to individuals.[37]

[33] Kathleen F. Brickey 'Corporate Criminal Liability by Kathleen F. Brickey' (Reviewed by Dan K. Webb) (1986) Vol. 41, No.3 The Business Lawyer 1107. In 1970, Dan was a young federal prosecutor in the United States who was assigned a complex corporate fraud case which was complicated and after review along with superior approval, it was established to be a case not likely to lead to a guilty jury verdict. The case was closed and there was no further investigation. However, Dan notes this was the last time he would ever be able to avoid such a case due to shortly afterwards there being an aggressive corporate crime policy introduced by the federal government. This policy escalated over the years and as a result in 1986, Dan had used the past fifteen years prosecuting and defending the very kind of case he declined in 1970. This story best evokes the rationale for why corporate criminal liability is present because while the prosecution could afford to turn down corporate crimes in 1970, the federal government established the danger of doing so and introduced policy in the attempt to combat corporate crimes.

[34] Arti Aneja 'Multidimensional Aspects of Corporate Criminal Liability: An Indian Perspective' 2016 JLJ 34 at 37.

[35] Ibid.

[36] Sean Bajkowski and Kimberly R. Thompson ' Corporate Criminal Liability *The Twelfth Survey*' (1996-97) Vol. 34 *American Criminal Law Review* 445 at 445.

[37] Ibid.

Globally the concept of corporate criminal liability has been around for many years now and there are various theories that have been relied on to justify its existence in various jurisdictions like the United Kingdom and the United States.[38] Corporate criminal liability has traditionally been viewed from the perspective of the nominalist theory of corporate personality, which regards a corporate body as a fictional person that is a collection of individuals and therefore lacks independent identity.[39] There is no recognition of independent corporate fault and thus corporate criminal liability can only result from the guilty conduct of individuals who form part of the corporate body.[40] The approaches that stem from this derivative liability include vicarious liability and the doctrine of identification.[41]

Vicarious liability is a rule based on justifying a corporation being held liable for crimes committed by its directors, employees and members as long as it can be shown that these crimes were committed in the process of furthering the interests of that corporation.[42] These crimes committed by these individuals who are part of the company must also have been done so in the course of their duties, or in the scope of their employment.[43]

The doctrine of identification, on the other hand, blames the corporation for criminal acts committed only by its senior members and these acts must be committed in furthering or endeavouring to further the interests of the corporation.[44] These senior members of the corporation are referred to as the "directing mind and will" or the

[38] Op cit note 6 at 265.
[39] Op cit note 4 at 453.
[40] Ibid.
[41] Ibid.
[42] Guy Stessens 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *The International and Comparative Law Quarterly* 493 at 496.
[43] Jennifer H. Arlen and William J. Carney 'Vicarious Liability for Fraud on Securities: Theory and Evidence' 1992 *University of Illinois Law Review* 691 at 696.
[44] Op cit note 33.

"embodiment" of the corporation, meaning their states of mind and their conduct are attributed to the corporation.[45]

There are other approaches to corporate criminal liability found in the United States like the doctrine of constructive knowledge, also known as the principle of aggregation.[46] Those who advocate for this principle do not believe that a corporate body should be found criminally liable for the unlawful actions of one particular individual.[47] They argue that instead that the conduct, state of mind and culpability of individuals who represent the particular corporate body may be taken together (aggregated) so as to establish criminal liability of that corporate body.[48] Therefore this idea is based on an idea of collective responsibility.[49]

A comparative analysis of these various approaches is therefore needed to help in determining the most effective and fair way to regulate corporate criminal liability in South Africa.

2 Corporate Criminal Liability in South Africa

Before comparing the various ways to approach the regulation of corporate liability in South Africa, it is necessary to firstly evaluate how the South African system is governed and if it is not already effective as it is.

[45] Raed S.A. Faqir 'The Criminal Liability of Parent Corporations for Acts of Its Subsidiaries under Criminal Law in Jordan: A Comparitive Study' (2016) 7 *Beijing Law Review* 212 at 222.
[46] Eli Lederman 'Models for Imposing Corporate Criminal Liability: From Adaptaion and Imitation Toward Aggregation and the Search for Self- Identity' (2000) 4 *Buffalo Criminal Law* Review 641 at 662.
[47] Louise Jordaan 'New perspectives on the criminal liability of the corporate bodies' (2003) *Acta Juridica* 48 at 58.
[48] Ibid.
[49] Ibid.

Until 1917, corporate criminal liability was determined under the common law alone, meaning a company could be convicted under the approach of vicarious liability.[50] As early as 1939[51] however, the South African legislature produced a very wide form of corporate criminal liability which was continued with the principle of vicarious liability essentially.[52] Currently, corporate criminal liability is governed by section 332 of the Criminal Procedure Act (CPA).[53] According to section 332(1):

> "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 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 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 that corporate body."

[50] Op cit note 4 at 456.
[51] Companies Amendment Act 23 of 1939.
[52] Op cit note 47 at 49-50.
[53] Criminal Procedure Act 51 of 1977.

The operation of section 332(1) extends to crimes based on strict liability and fault (including negligence and intention).The intent or negligence of the director or servant is therefore deemed to be that of the corporation.[54] What stands out from this provision is the far-reaching effect because an employer of a corporation may incur criminal liability for its employee's acts even if they fall outside the scope of his employment, as long as the employee was attempting to further the interests of the company when they acted.[55] A corporation is also liable for any statutory and common-law offences, unless that particular statutory offence is confined to natural persons only.[56] Section 332(1) relies on a form of vicarious liability meaning it is influenced by the nominalist theory of corporate personality, however, the ambit of this section goes further than a traditional vicarious liability due to the fact that the fault of an individual is attributed to the corporation even in circumstances where the individual acted beyond the course of their duties (*ultra vires*) but with the intent to further the interests of the corporation.[57]

The meaning of 'director' is explained in section 332(10) as "any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body". The meaning of 'servant' is not defined in the CPA but it seems fair to assume the meaning used in civil liability cases containing the use of vicarious liability, which refers to any person who performs their work under the control of the corporation suffices.[58] A servant is

[54] Op cit note 4 at 456.
[55] Op cit 47 at 51.
[56] Ibid.
[57] Op cit 4 at 457.
[58] *Rex v Murray and Stuart* 1950 (1) SA 194 (C) at 199.

deemed to have acted within the scope of their employment if the servant was "about the affairs, or business, or doing work" for the employer.[59] So long as the employee is still carrying out some instruction of his employer, any deviation, intentional or not would still be found to be within the scope of employment.[60] For there to be a deviation from the scope of employment, the facts must show a deviation so great in respect of space and time that a reasonable judge would not hold that the servant was still carrying out some instruction of his employer.[61]

While it seems that section 332(1) is a codified vicarious liability provision, it means that the objections of vicarious liability can be attributed to this approach of corporate criminal liability. It has been argued before that vicarious liability creates liability without there being an enquiry into fault and this applies to corporate bodies too.[62] Therefore liability on a person, be it natural or juristic, is inferred without checking to see if there is anything that they did that could be attributed to fault whether by intention or negligence. This seems grossly unfair in cases for example where upper management had nothing to do with the occurrence of the offence perpetrated by the employee. If the employee was acting in the furtherance of the corporation but was not instructed to do so liability still attaches to the corporation, which seems harsh. The harshness goes even further when one considers about how liability is attached to the corporation even if it is a crime of intent. The director's intent is not questioned and whether the corporation was aware of it or not, or even if it could have been prevented is not taken into consideration.[63] Furthermore, the phrase mentioned in

[59] *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at para 5.
[60] *K v Ministry of Safety and Security* 2005 (3) 179 (SCA) at para 4.
[61] Supra.
[62] Op cit note 47 at 53.
[63] Constantine Ntsanyu Nana 'Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability' (2011) 55 *Journal of African Law* 86 at 86.

the CPA: “endeavouring to further the interests of that corporate body’[64] could potentially cause problems. This is especially in cases where the servant commits an unlawful act intentionally and that act is a deviation from their scope of employment.[65] What happens in an instance whereby the intention of the employee is to further his or her interests but in the process inadvertently furthers those of the company? Do we still impute liability onto the corporation without even looking at if they were to blame in the first place? It all seems very harsh for the corporation and that could mean a great injustice, and arguably that is not the intention of the law.

With the law being as harsh as it is with vicarious liability, there are some commentators like *Constantine Nana*[66] and *Kathleen van der Linde*[67] (whose ideas are cited in this paper) who believe that there needs to be a change in the way South Africa governs corporate criminal liability. The effectiveness in how corporate crimes are prosecuted has also been put to question for instance in the case that occurred on 11 April 2001 known as the Ellis Park Stadium disaster[68], 43 people died with many injured. The commission’s report afterwards stating that it due to mismanagement and organisational failure.[69] It was argued that the corporate criminal liability regime in South Africa would have in any event been unable to convict any corporate bodies involved in the tragic incident.[70] With the successful application of section 332(1) dependant on the liability of an individual within the potentially guilty organization, the commission in charge of investigation could not pinpoint any negligent act performed by any specific individual as the cause of

[64] Op cit note 51 section 332(1)(b).
[65] Ibid at 94.
[66] Op cit note 63.
[67] Op cit note 12.
[68] Op cit 4 at 452.
[69] Ibid.
[70] Op cit note 47 at 70.

death.[71] This is one tragic example that highlights the ineffectiveness of the South African corporate criminal liability regime and the need for reform.

2.1 Questioning the Constitutionality of Section 332(1)

According to section 8(4) if the South African Constitution (the Constitution)[72] " A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." This means that natural persons are not the only persons that can enjoy fundamental human rights, but juristic persons can enjoy those rights too. Section 8(4) is drafted in a flexible way due to the fact that some rights are not available to juristic persons as it is impossible to attribute the enjoyment of those rights to the juristic person. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributions*[73], it was stated that:

> "Privacy is a right which becomes more intense the closer it moves to the intimate personal sphere pf the life of human beings…the understanding of this right flows…from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy…Juristic persons therefore do enjoy the right to privacy, although not to the same extent as human beings."[74]

[71] Ibid.
[72] The Constitution of the Republic of South Africa, 1996.
[73] *Investigating Directorate: Serious Economic Offenses And Others v Hyundai Motor Distributions (PTY) LTD And Others* 2000 (2) SACR 349 (CC).
[74] Supra at para 18.

As noted earlier, a corporation may be held criminally liable through s332(1) which takes the vicarious liability approach, even if that corporation has taken reasonable precautions in place to prevent the occurrence of the crime and even if it had exercised the due diligence.[75] This means that a corporation cannot raise a defence that it acted with due diligence and consequently it would be criminally liable without having fault imputed on it.[76] Therefore, finding a corporation guilty for a crime on the basis that an individual who works for it was guilty and even though there is reasonable doubt as to the corporation's own blameworthiness creates an unfair balance and contravenes the section 35(3)(h) of the Constitution, which gives persons the right to be presumed innocent.[77] Due to section 8(4) of the Constitution, we are able to allow juristic persons the enjoyment of such a right seeing as they are the ones that are essentially on trial in cases of corporate criminal liability. Such prejudice would not be allowed when a natural person is on trial due to them having the enjoyment of such rights, therefore the same should apply for juristic persons.

3 Other Approaches to Corporate Criminal Liability

Having shown how corporate criminal liability is governed in South Africa and how it is harsh in its application and could possibly be unconstitutional, it is important to explore possible bases for the reform of section 332(1) of and in order to do that it is necessary to conduct a comparative analysis on how other jurisdictions govern corporate criminal liability. The two jurisdictions to be considered in this section are the United Kingdom and the United States. These two jurisdictions govern corporate

[75] Op cit note 4 at 458.
[76] Ibid.
[77] Ibid.

criminal liability by way of a derivative theory, meaning liability distinctly depends on the perpetration of an offense by a corporate organ or agent.[78] This means there will be a similarities to the South African approach but the differences explored in more detail to see if they are more effective than the current regime in South Africa.

3.1 Corporate Criminal Liability in the United Kingdom

In the United Kingdom, the general theory of corporate personality used is a derivative one. However, the main approach used is called the doctrine of identification. Although the doctrine of identification is the main approach, vicarious liability has traditionally been considered for statutory crimes which make no reference to *mens rea* and can easily be attributed to companies (an example being the prohibition of selling and polluting).[79]

3.1.1 The Doctrine of Identification

Alternatively referred to as the concept of corporate alter ego, the doctrine of identification takes the state of mind and the conduct of certain high-ranking officials at the corporation and attributes these to the corporate body.[80] The state of mind of the higher management is the state of mind of the company which is why it is said that these officials are the 'directing mind and will' of the company.[81] This doctrine is different from the vicarious liability used in South Africa; in that by equating the state of mind of the key personnel of the company to that of the conduct and state of mind

[78] Eric Colvin 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1 at 2.
[79] Op cit note 47 at 53.
[80] Op cit 47 at 54.
[81] *H L Bolton (Engineering) Co Ltd v T J Graham & Sons, Ltd* [1957] 1 QB 159 at 172.

of the company, the company itself commits the crime 'directly' and not vicariously.[82] The origins of the approach are said to be the 1915 civil case *Lennard's Carrying Co Ltd v Atlantic Petroleum Co Ltd* where it was stated that a corporation's active mind and directing will must be found in the person who is really directing the mind and will of the corporation.[83] The individuals that can be said to be the directing will of the company seem to be easy to locate especially if one looks at the centre of corporate power. These would include officials like the chief executive officer, directors or anyone tasked with the design of the policy of the company and supervisors of corporate activities.[84]

One of the leading cases of the doctrine of identification is *Tesco Supermarkets,*[85]in which Tesco, a supermarket in the United Kingdom was being prosecuted under the Trade Descriptions Act 1968 for displaying a notice that goods were being offered at a price which was actually less than the price that they were being sold for. After Tesco had distanced itself from the store manager by taking the position that it was the store manager's actions that had led to the breach, the court resorted to the doctrine of identification and held that the branch manager could not be considered as the controlling mind of the company. Likewise it was stated that the relevant personnel could only be 'the board of directors, the managing director and perhaps other superior officers of the company'[86]

[82] G R Sullivan 'The attribution of culpability to limited companies' (1996) 55 *Cambridge L J* 515 at 517.
[83] Op cit note 12 at 685.
[84] Ibid.
[85] *Tesco Supermarkets Ltd v Nattrass* [1957] 1 QB 159.
[86] Supra at 170-172.

3.1.2 Criticism of the Identification Doctrine

The doctrine of identification is not without its critics however, which includes an imbalance in treatment between large companies and smaller companies. If the standards used in the Tesco case are considered for example, it is clear that the individual that is said to be the directing mind and will of the company will have to be an individual who is either a director or an individual who is high up in the chain of command.[87] However, in large corporations, many of the crucial decisions are made at the level of middle management[88] and when applying the Tesco analysis it is clear that it is too far down the company hierarchy for their crimes to be attributed to the corporation and therefore a conviction will almost always never take place.[89] This is especially true for large corporations.[90] When it comes to smaller corporations on the other hand, the same cannot be said because individuals of senior standing in a smaller company are ones that directly work with or are in contact with the employees and the customers and therefore are most likely to be identified with the corporation and more likely be convicted.[91] This is unfair to the smaller corporations as the senior standing in the smaller companies are easier to identify in a smaller corporation than they are in a larger corporation.[92] Therefore there is likely to be more convictions for smaller companies when compared to convictions for larger companies and this creates an imbalance in the governing of corporate criminal liability.

[87] Op cit note 15 at 154.
[88] Hugo Uyterhoeven 'General Managers in the Middle' 1989 *Harvard Business Review*
[89] Ibid.
[90] Op cit note 12 at 686.
[91] Ibid.
[92] Ibid.

The difficulty in prosecuting corporate criminal liability cases with the use of the doctrine of identification approach was further shown in the case of *R v P&O European Ferries (Dove) Ltd*[93] When as the Zeebrugge ferry disaster occurred.[94] In this case a ship was put to sea with its doors open and when it capsized and nearly 200 people drowned.[95] The reason the prosecution was not successful, despite being obvious that there was a degree of sloppiness all over the corporate body, was because the state could not find and prove the specific individual within the organization who had the requisite culpability for a crime of manslaughter.[96] With the inability to find any person liable with the wrongdoing it was argued that the principle of aggregation could have been of assistance but was denied due to it not finding any application in the United Kingdom.[97]

What is important to see by the example of the of the Zeebrugge disaster is that it is possible to go through the process of searching for a person to attach blame for the crime and come up short. The prosecution of the crime will always be unsuccessful. The doctrine of identification is too narrow in nature and the case of *R v Redfern*[98] proves that too. Just as in the Zeebrugge disaster there were no successful prosecution of a corporation being charged with knowingly exporting combat equipment to territories under sanctions.[99]The reason for the unsuccessful prosecution was the failure to attach the blame on the sales manager, who was considered not be important enough to be identified with the company.[100] It follows therefore that even though there might be a person who is clearly in the wrong and

[93] *R v P&O European Ferries (Dove) Ltd* (1991) CR App R 73.
[94] Op cit note 47 at 59.
[95] Ibid.
[96] Ibid.
[97] Op cit note 15 at 163.
[98] *R v Redfern and Dunlop Ltd (Africraft Division)* [1993] *Crim* L R 43.
[99] Op cit note 47 at 55.
[100] Ibid.

can be identified, because of how narrow the application of the doctrine of identification is, liability cannot be attached to the corporation because the person who is part of the company and is clearly the perpetrator cannot be identified as being the mind and will of the company. This means that a smaller number of corporate convictions will be achieved and less possibility for justice.

So while vicarious liability may be very wide in application and can lead to convictions to corporations in unfair circumstances, the doctrine of identification is the polar opposite and is too narrow and leads to less convictions.

3.2 Corporate Criminal Liability in the United States

In terms of corporate criminal liability in the United States, it is argued believed that it is more extensive and less restrictive than the liability frameworks in other countries.[101] The way Criminal law in the United States of America operates is by way of splitting into two levels: federal and state level.[102] Under federal law, corporate criminal liability is governed under the regime of vicarious liability, also known as the doctrine of *respondeat superior*.[103] Under state law, however, there is a divergent of approaches with some states opting to use the doctrine of *respondeat superior*, whether entirely or partially; and other states opting to use the more restrictive provisions of the Model Penal Code (the Code).[104]

[101] V.S. Khanna 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) Vol. 109 *Harvard Law Review* 1477, at 1488.
[102] Ralph C. Ferrara and Diane Sanger 'Derivative Liability in Securities Law: Controlling Person Liability, Respondeat Superior, and Aiding and Abetting' (1983) 40 *Washington and Lee Review* 1007 at 1016.
[103] Ibid. The Respondeat Superior attaches liability in the same way vicarious liability would however there is no need for the employee who acts wrongful to do so with the intention or even direct these wrongful acts.
[104] Model Penal Code (1962).

In effect federal courts have adopted common law approach, which was based on corporations being held liable for the actions of their agents regardless of the agent's position within the corporation (vicarious liability).[105] For a corporation to be held criminally liable for the actions of its employees, there must be two conditions that need to be crucially satisfied; first all the actions must be for the benefit of the corporation and secondly the actions must be in the scope of the employee's employment.[106]

The definition of the 'scope of employment' is broad and includes actions done in performance of the employee's general line of work and on behalf of the corporation.[107] As long as the employee is tied to the corporation in some way, it satisfies the definition of 'scope of employment'. An example of this is found in the *New York Central* case[108], where an assistant traffic manager and the general paid rebates for shipments of sugar. The court found that the employees were sanctioned to establish rates at which freight would be carried, and by doing so were acting within the scope of authority conferred upon them by the corporation and could therefore be bind the corporation to criminal liability.[109]

The purpose of the requirement that the unlawful actions of the wrongdoer must be to benefit the corporation is in place to ensure that the corporation is protected from criminal sanctions for the actions taken solely for the benefit of the individual committing them.[110] A corporation will not be absolved of all liability, however, by

[105] Cynthia E. Carrasco & Michael K. Dupee 'Corporate Criminal Liability *The Twelfth Survey*' (1999) 36 *American Criminal Law Review* 445 at 449.
[106] Han Hyewon and Nelson Wagner 'Corporate Criminal Liability' (2007) 44 *American Criminal Law Review* 337 at 339.
[107] Ibid.
[108] Supra note 28.
[109] Supra at 494.
[110] Op cit note 36 at 447.

showing that it did not receive any benefit at all from the actions of the wrongdoer.[111] This shows that intent plays a key role, because if the employee intended to benefit the corporation by committing the crime but the actual benefit did not accrue, the corporation will still be held criminally liable. Furthermore, if the employee's primary intention is to solely benefit from the crime but a secondary benefit flows to the corporation, the corporation will be responsible for the acts of the employee's actions, so long as they were within the scope of his employment.[112]

Due to the *respondeat superior* approach being very similar to the vicarious liability used in South Africa, it is clear then that the same advantages and disadvantages attributed to the system in South Africa are the same as those attributed in the United States system. So although the system is an effective method of securing many prosecutions due to its wide application, it can also extremely harsh as it holds a company liable even if the company acted with due diligence.[113]

3.2.1 The Model Penal Code

The Model Penal Code works by distinguishing between four categories of criminal liability of corporations.[114]The first category finds its roots from the *respondeat superior* but adds a third requirement to the existing two, which is that the wrongdoing be "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."[115] This extra

[111] Op cit note 36 at 448.
[112] Ibid.
[113] Op cit note 12 at 649.
[114] Op cit note 12 at 692.
[115] Model Penal Code § 2.07(1)(c) (1962).

requirement is considered to be the third category of criminal liability.[116] It is therefore a sort of hybrid of vicarious liability and the doctrine of identification because while any employee on any level of employment can cause risk to the company being held liable for a crime committed by their actions, that commission of a crime must come from the mind and will of a senior official within the same corporation acting within his scope of employment.

The second category is one which applies exclusively to omissions.[117] So when corporation does not perform a certain conduct which it is obligated to do by corporation laws.[118] With this category, there is a law that imposes certain conduct to a corporation and failure to commit to that conduct would see criminal liability.

The fourth category is said to provide for strict liability. Under this category liability is attributed to the corporation where a statute imposes strict liability for the commission of said offence.[119]

The biggest advantage the Code provides is a defence for the corporation against criminal liability. Barring any statutory imposition, the Code allows for a corporation to escape liability if it can show that the senior officials who control the area in which the offence took place acted with due diligence to prevent the commission of the crime.[120] A commentator on this area of law makes a great analogy of upper-level managers being the 'mind' of the company and the lower-level employees being the 'hands' of the company.[121] So the rationale behind giving the company such a

[116] Op cit note 105.
[117] Ibid.
[118] Model Penal Code §2.07(1)(b).
[119] Model Penal Code §2.07(2).
[120] Op cit note 90 at 450.
[121] Gerhard W. Muellert 'Mens rea and the corporation' (1957-1958) 19 *University of Pittsburgh Law Review* 21 at 28-30.

defence is to avoid the injustice of punishing the company where by the hand has moved without 'instruction from the mind'.[122]

With the Code being a hybrid of *respondeat superior* and doctrine of identification, it limits the harsh, broad nature of vicarious liability while also maintaining the narrow but fault attachment qualities of the doctrine of identification. It gives the corporation a chance to be at fault by stating that the higher management official must have ordered the commission of the wrongdoing within the scope of their employment. However, the Code does not do away with the disadvantages of the doctrine of identification because smaller corporations are still more likely to be convicted of offences easier than the larger firms because decisions in larger firms are made by middle level employees rather than the most senior officials.

3.2.2 The Principle of Aggregation

To recap, the principle of aggregation is when the fault and the state of minds of the individual representatives of the company are taken together (aggregated) in order to attach criminal liability to the company.[123] Also known as the collective knowledge doctrine in the United States, in order for the aggregate knowledge of the employees to be attached to the corporation, the employees must have acted within the scope of their employment and with the intent to benefit the corporation.[124] For the doctrine of the aggregation to succeed it must first fulfil the same requirements of vicarious liability and this could be due to the fact that both approaches attach liability on a person who may necessarily not have the requisite fault to behold such liability. What

[122] Ibid at 41.
[123] Op cit note 43.
[124] Op cit note 36 at 454.

must be made clear as well is that it is the knowledge possessed by employees that is aggregated and imputed to the corporation and is not specific intent.[125]

The principle of aggregation has found its application in American federal law with the leading case being the *Bank of New England* case[126] in which a bank was convicted of knowingly failing to comply with currency reporting requirements. The jury was instructed that the bank's knowledge was the totality of what all the employees knew in the scope of their employment. Therefore if employee A knew one side of the currency reporting requirement, employee B knew another side of it, and with employee C knowing the third side of it, the bank could therefore be deemed to know all of the sides to the requirement.[127] Furthermore it was stated that the rationale of having the principle of aggregation was to do away with the likelihood of corporations escaping liability and convictions on the basis that knowledge in large corporations is necessarily compartmentalized.[128]

So when corporations compartmentalize and divide duties, there is no risk of the prosecution failing due to the corporation pleading ignorance because the collective knowledge of the corporation will attach criminal liability regardless.[129] The rationale of the principle and what it tries to protect against is similar to the criticism of the doctrine of identification in that larger corporations can escape liability easier with the doctrine of identification because it is harder to pinpoint the employee that is culpable. Perhaps a mixture of the two could see a more effective prosecution regime for corporate criminal liability.

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[125] Ibid.
[126] *United States v Bank of New England* N.A 821 F.2d 844 (1st Cir. 1987).
[127] Supra at 855.
[128] Supra at 856.
[129] Op cit note 90 at 453.

The principle is not without its critics and English writers such as J Smith and Hogan argue that it should not be possible to artificially create *mens rea* in this way because two innocent state of minds should not be added together to make a guilty state of mind.[130] This makes sense, especially when one considers how inept the employees would look by convicting a corporation using this approach. It stigmatises the employees by implying culpability on the parts of the individuals, which is undesirable when one considers that had the employees been prosecuted separately the chances that these employees would be acquitted for lack of the required culpability is extremely high due to there being a little to convict on.[131] This is unfair because blame is attached to the corporation when the employees are separately innocent and it goes to the original objection to criminal liability in the first place: finding a person guilty for another person's conduct - only in this scenario, the employees could be innocent.

4 The Way Forward in South African Corporation Criminal Liability

Having reviewed the various approaches to corporate criminal liability used in the United Kingdom and the United States, it is necessary to now see if incorporating those ideologies to South Africa's corporate criminal liability system will make the criminal prosecution of corporate criminal liability effective and fair.

4.1 Applying the Doctrine of Identification?

One of the most logical things to do is to not apply a change that would see the inclusion of the principle of identification predominantly used in the United Kingdom.

[130] Op cit note 47 at 59.
[131] Ibid.

This is the fact that it is too strong and leads to a very ineffective regime of corporate criminal liability. If South Africa were to apply the doctrine of identification and focus on imputing liability from higher management alone, it would lead to fewer convictions due to the fact that in large companies many of the crucial decisions are made at middle management. This also means smaller companies are treated unfairly compared to the larger companies with it being easier to prosecute the smaller company whose decisions are made by higher management more of the time. The fewer convictions and the unfairness to smaller companies means the doctrine of identification is highly ineffective as an approach to corporate criminal liability.[132] A standard whereby liability is dependent on the job title, like the doctrine of identification, leads to corporations escaping liability because the people in higher management may delegate decision making power to the lower echelon of employees like low tier managers. With the lower tier managers making the decisions it means the corporation cannot be found criminally liable because they do not fit the criteria of higher management for there to be liability attached on the corporation. It will be impossible to identify the director as the wrongdoer because his subordinate would have made the decision and therefore there will be no prosecution and no conviction.

The United States has avoided the doctrine of identification by ensuring that the majority of states which condition liability on job title of the perpetrator (States like Arizona, Arkansas, Kentucky and Utah) allow liability for lower level supervisor and managers too.[133] This is clearly to try deter from the criticism of the doctrine of

[132] Op cit note 76.
[133] Op cit note 36 at 451.

identification that a strict high managerial rule would make it really hard to convict a corporation.[134] By including the decisions of lower tier management to the criteria to attach liability, there is more chances of a conviction making it more efficient in regulating corporate criminal liability. South Africa could try do the same and change the identification of senior management of larger firms to include middle management as well. If this is not done we will continue to have the disparity between smaller companies being convicted more than the larger companies because it is harder to prosecute larger companies. If this was to occur, the question to be asked is can we still call that approach the doctrine of identification?

4.3 Addition of the Principle of Aggregation

A potential reform that could lead to a more effective regulation of corporate criminal liability is adding the principle of aggregation to section 332(1). For a corporation to be found criminally liable in terms of section 332(1) an offence committed must have been done so by a director or an employee of the corporation, no matter the job title.[135] However there is a possibility of a single individual's conduct on its own not carrying the requisite standards of criminal liability.[136] An example is if employee A, B and C breach an ordinary standard of negligence while working within the scope of their employment. When the negligent conduct of all three employees is combined together it results in the company's safety systems checks being broken and leads to the death of a customer or worker. If the conduct of employee A, B and C are not combined however, the requisite fault for the systems safety checks cannot be said

[134] Ibid.
[135] Op cit note 4 at 462.
[136] Ibid.

to have been broken.[137] In this example, if the law does not aggregate the knowledge of A, B and C, there cannot be a conviction, but there will be a dead customer and worker nonetheless, which defeats justice. However, if the law aggregates the knowledge, there is a breach of the safety systems checks and therefore there should be a conviction depending on the prosecution trying the case properly. Justice will be achieved with the application of the principle of aggregation.

In the case of *S v Suid-Afrikaanse Uitsaaikorporasie*[138] there is an example of whether aggregation may actually be applied.[139] In this case the South African Broadcasting Corporation (SABC) was charged for contravening section 44(1)(e)(iv) of the Prisons Act 8 of 1959 by taking a photo of a prisoner during a news segment. The person who took the photo was never found but it was stated that the person had acted unlawfully and negligently, and although the person may not have been asked to take the photo by the corporation, they had done so in an attempt to further the SABC.[140] Under section 332(1) of the CPA, this would lead to a conviction but the person was not traced and could not be found. This case shows that there may be a need for the principle of aggregation in South African law because even though the person responsible for taking the photo could not be identified, (another reason to not use the principle of identification) had the principle of aggregation been applied it could have still imputed liability on the South African Broadcasting Corporation and would have led to a conviction.

The criticisms of the principle of aggregation are however strong and should not be taken lightly. Attaching *mens rea* to a person who would be innocent but for

[137] Op cit note 15 at 161.
[138] *S v Suid-Afrikaanse Uitsaaikorporasie* 1991 (2) SA 698 (W).
[139] Op cit note 4 at 463.
[140] Supra note 115 at 700F-H.

aggregating their conduct to another's would be considered to be unjust and very unfair.[141] With that said, the principle of aggregation applied along with section 332(1) could be very effective and the legislature should intervene to see if it would be possible to apply without causing gross injustice and maintaining the effectiveness of corporate criminal liability prosecution.[142]

4.3 Maintaining the Same Approach

The other option South Africa can take is not to change a single thing and remaining under the same regime found in section 332 of the CPA. This could be the least popular decision of the lot but it is worth exploring.

The justification for this would be that no matter how you try to argue it, all corporation's liabilities are in a nutshell vicarious in nature.[143] The very nature of corporations means South Africa cannot escape elements of vicarious liability because corporations are artificial persons that can only act through their agents which are the management (directors and other high ranking officials) and employees.[144] So no matter what approach South Africa use, a company will always rely on the delegation of its powers to all its employees and therefore those employees will always be responsible for imputing criminal liability onto the corporation.[145]

By virtue of all the approaches discussed having vicarious liability characteristics, it means a doctrine like the doctrine of identification will always depend on the conduct

[141] Op cit note 15 at 162.
[142] Op cit note 116.
[143] Op cit note 63 at 99.
[144] Ibid.
[145] Ibid.

of an employee, just like section 332(1). However, as mentioned before, the doctrine of identification is harder to prosecute with due to the narrowness of the role the employee is required to be for liability to be attached on the corporation. Therefore section 332(1) leads to more convictions and is also more effective because it does not require the employee to be of a certain role within the company.

Section 332(1) and vicarious liability in general is broad and leads to harsh application which can be viewed as unjust or unfair as noted earlier in this paper.[146] However if all the approaches are just variations of vicarious liability then they all carry a hints of their own harshness and unfairness. They are all unjust in their own way. It becomes a balancing act into trying to gauge which approach produces the most amount of justice, for the least amount of injustice. What must be clear, however, is before South Africa can settle on section 332(1) with 100% determination, there must first be a review and rule on its Constitutionality.

Conclusion

Corporate criminal liability is a necessary part of our law and is too important to get rid of due to the vast corporate activity and development happening in South Africa. With corporate crimes more likely to occur than ever before it is important to regulate this area of law as effectively as we can and in the most unjust way as we can. It must be fair but firm.

South Africa use vicarious liability as codified in section 332(1) of the Criminal Procedure Act. Liability is attached to a corporation when any employee of that corporation commits a crime in the scope of their employment and does so with the

[146] Op cit note 63.

intention of benefiting the company. We have seen some success with this system but we have also seen some failures.

In order to see how best we can prosecute corporate crimes it is important to study the different approaches used across the world, in particular the United Kingdom and the United States.

In the United Kingdom, the most popular approach is that of the doctrine of identification. According to this doctrine, a corporation will be held criminally liable if a member of high management level can be identified as the wrongdoer. This approach is very biased to large companies as decisions in such corporations are dealt with at medium level of management. As a result smaller corporations are easier to prosecute and that is a great injustice.

In the United States, the common law is identical to the vicarious liability found in South Africa. The Modus Penal Code adds an extra requirement to that vicarious liability making it more restrictive in nature. The other approach found in the United States is the principle of aggregation, which is based on collective responsibility. The main criticism for this doctrine is that it imputes culpability on otherwise innocent employees which is also unfair.

The best way to regulate corporate criminal liability in South Africa will depend on which approach is the most effective, causing more likely success in convictions and also will be the least unjust and most fair. Due to the fact that the doctrine of identification is harder to prosecute it is the least likely addition to be added to our law. The principle of aggregation is the most likely to be added to section 332(1) because it accounts for more scenarios and will lead to more convictions. The other approach could be to remain with the current regulatory regime due to the fact that

all other approaches are a variation of it and every approach has its own injustices which cannot be escaped. The only thing that wold be left to do is to review section 332(1) to test its constitutionality.

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