

**MOVE TOWARDS A NEW PARADIGM OF CORPORATE CRIMINAL LIABILITY IN
KENYA**

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DECLARATION

I declare that ~~M~~Moving away from the identification model in corporate criminal liability; a case for corporate culture in deterring corporate crime~~ø~~ is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

The study advances the evolution of the existing model of corporate criminal liability, away from identification model towards a case for the direct model of liability via corporate culture in deterring corporate crime.

The study takes an in-depth look at the traditional models of corporate criminal liability with a focus on the identification model and pinpoints their shortfalls. In addition, it analyses the challenges of establishing corporate *mens rea* and the challenge of the corporation lacking a physical form, thus limiting available sanctions upon establishing liability. The study goes further to analyze the Kenyan situation pointing out the challenges that hold back the successful implementation of corporate criminal liability.

Lastly, the study looks at the Australian criminal code, the UK and the United States legislation with regards to corporate criminal liability and identifies the mechanism that make it successful in combating corporate crime.

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DEDICATION

I dedicate this thesis to parents my Mr. and Mrs. Kanyuga who inspired me to excel in everything that I do and to my loving and supportive siblings Lillian, Maina and Michelle.

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CHAPTER 1

1. OVERVIEW

1.1. Introduction

In the past few years there has been an increase in nefarious corporate activities resulting in offences against the environment, health and safety, labour and anti-corruption laws. Consequently, corporate criminal liability has become a global point of discussion. This interest has been ignited by the international debate on cases on corporate crime such as the Enron scandal¹, Olympic Pipeline, Exxon, Pfizer, Bayer, and Shering-Plough Corporation among others, where environmental, health and safety laws were broken. These corporate crimes resulted in great financial losses, unemployment and in some instances the loss of lives. Curbing this trend of criminal activity would require the establishment of the corporate criminal liability and effective sanctions.

Kenya's economic history shows a similar pattern through the closure by Central Bank of more than 33 banks in the 1980's and the collapse of corporations and parastatals such as Kenya Corporative Creameries (KCC), National Housing Corp and the Kenya National Assurance Co, Access insurance Co among others².

Kenya is one of the highest ranked regions with corporate crime from among seventy eight countries surveyed, with an incidence level of sixty six per cent (66%), which is almost twice the global average of thirty four per cent (34%). Evidence of this high corporate crime is seen in instances such as the Goldenberg scandal in Kenya, where the country lost approximately six billion dollars³. This was ten percent of its gross domestic product. These incidents of corporate crime and corruption, are detrimental as they distort fair competition on the market and affect the whole market system.

¹ Ken Silverstein, 'Enron, ethics and today's corporate values' (2013), <http://www.forbes.com/sites/kensilverstein/2013/05/14/enron-ethics-and-todays-corporate-values/>, accessed on 20th October 2013.

² Lois Musikali, 'The law affecting corporate governance in Kenya; a need for review' 2008.

³ John Kamau, 'The hatching of Goldenberg grand scheme' Nation Daily, (Nairobi, Monday, October 7, 2013).

The subsequent reaction to this increase in corporate crime has been the various models of corporate criminal liability to deter and punish corporate wrongdoing. Several models on corporate criminal liability exist, each with its own advantages and disadvantages, but with common goal of criminal law. These goals include deterring future crime, punishing those who carry out crime, rehabilitating corporate criminals and lastly, ensuring justice and fairness.

Several jurisdictions appear to have successfully established means of corporate liability thus reducing the rate of corporate crime. Currently Australia is leading in this arena through its Australian federal law –The Criminal code of 1995⁴ which touches on corporate criminal liability. This law sets out the elements of corporate offenses, which include; proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Most developing countries lose opportunity to develop from international investments as they have poor corporate governance, leading to high economic crime rates. These rates are caused by the lack of proper checks and balances of power in corporate governance. This is because the members and decision makers within the corporations lack proper accountability⁴. The lack of liability for poor corporate governance acts or omissions, leads to an increase in corporate crime, mismanagement and corruption.

In the past, the law has been reluctant to institute criminal proceedings against corporations, based on the definition of crime. The definition states that crime occurs where one with knowledge and intent carries out through omission or commission an unlawful act. Criminal corporate liability has been hindered by the necessity of establishing *mens_rea* in criminal prosecution. Furthermore, the lack of a physical body of a juridical person restricts implementation of sanctions meted out to a guilty party, such as imprisonment.

1.2 Scope and significance of the study

⁴ Faith Mbaire, “Why Kenya tops in economic crimes” <http://www.kim.ac.ke/management-magazine/article/1333627696/why-kenya-tops-economic-crimes>, Accessed on 11th November, 2013.

This study will endeavour to review the legal framework underpinning corporate criminal liability in Kenya. It will analyze the application of corporate criminal law on corporates in Australia, UK and the United States, with a focus on the Kenyan situation.

The scope of the research does not include the advantages of focusing on corporate liability as opposed to individual liability in matters of corporate crime. The study will simply provide an argument for adopting a direct form of attributing liability over, or as a complement to, the existing derivative model forms.

1.3 Statement of the problem

The lack of efficient corporate criminal liability is due to misconception that a corporation is a fiction abstraction thus imposing criminal liability for crimes committed, is impossible⁵. The problem arises in establishing liability. This is because criminal law is founded on two principles, *mens_rea* and *actus reus* by the offender. Establishing *mens_rea* of a corporation becomes a challenge thus relieving the corporation from the consequences of criminal liability as they are rarely convicted.

Traditional approach to corporate criminal liability has been via the identification model. This is where the corporation is held directly liable for the criminal acts of the directors and employees. The basis being that their state of mind amounts to the state of mind of the corporation⁶. However, the drawback for this model is that liability of the corporation is then pegged to establishing the liability of the identified individual who had the *mens_rea* behind the wrongful action. This becomes challenging and most often than not is futile and leads to the corporation evading criminal liability.

The limitation on *mens_rea* as a way of establishing culpability has resulted in the emergence of new modes of enforcing criminal liability on corporations based on ‘corporate culture’ or ‘organizational fault’. This paper will look into the use of ‘Corporate Culture’ in recognizing the true corporate or organizational fault. It shall endeavour to show that corporate liability will be

⁵ Sara Sun Beale ‘A response to the critics of corporate criminal liability’ http://www.law.yale.edu/documents/pdf/cbl/Beale_paper.pdf Accessed on 20th February, 2014.

⁶ ‘Corporate prosecutions’ http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/ Accessed on 10th December 2013.

more effective once the focus shifts from establishing the fault and *mens_rea* of individuals, to scrutinising faults of the corporations' structure and identity. The objective being to establish that corporations' corporate culture can direct, encourage, tolerate and lead to the commission of a criminal offence. Consequently, it is appropriate to ascribe liability based on the culture of the corporation.

1.4 Research Questions

This study will seek to answer three important questions:

- (1) What the current status of the law on corporate criminal liability in Kenya?
- (2) Does the identification model sufficiently provide for corporate criminal liability in Kenya?
- (3) If not can proper implementation of corporate culture theory, curb the menace of corporate crime?

1.5 Hypothesis

The study will show that an increase in efficient implementation of corporate criminal liability on corporations will result in a decrease in corporate crime.

1.6 Conceptual framework

(i) Corporate Culture

The direct liability model of corporate liability advanced by this study is based on the concept of *Corporate Culture*. The Australian code having embraced and implemented the notion in its statute laws, defines '*Corporate culture*', to mean an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place. This is according to section 12(6) of the Australian Criminal Code Act.

(ii) Corporate crime

The concept of corporate crime is essential in understanding and successfully implementing the concept of criminal liability. This concept stems from the separability principle, which acknowledges an incorporated company as a separate entity. This then bestowed rights, duties

and obligations on this juristic entity, meaning that they not only enjoyed rights but that they could be held accountable for breach of their duties.

However, the concept of corporate crime and the conduct that should be considered as corporate crime are a source of dispute and the task of defining corporate crime is considered to be an intellectual nightmare.⁷

History lays out the various challenges that have risen with the acknowledgement of the corporation as a legal personality. Initially, corporations were deemed incapable of being criminally liable, as evidenced in **Suttons Hospital Case**.⁸ Where, *Sir Edward Coke observed* that

*“a corporation cannot appear in person, be made a defendant, be held liable to corporal penalties, be committed to prison nor be excommunicated for it has no soul”*⁹

The courts rationale in earlier times was that a corporation could not be held liable for acts that were *ultra vires* its objectives¹⁰. Consequently, corporations were spared from criminal liability as they were limited to actions and objectives as per their memorandum and Articles of association.

These barriers to corporate liability have been overcome over time in several ways. The initial step began with the courts acceptance of the notion that companies could be represented by company representatives in court hearings to counteract the lack of physical form¹¹. This was soon followed by attaching the actions and thoughts of the director and management when establishing elements of criminal acts, thus leading to the derivative models of corporate criminal liability.

The issue of *ultra vires* actions is the foundation of the debate of the corporate liability and has been viewed in several ways. Some have viewed it as a non-issue, only applying in matters of contract law¹², while others have taken up existing divergent concepts of corporate crime on the debate on corporate liability. These divergent concepts work to either reinforce or weaken the

⁷Geis and Meier cited in David O. Friedrichs, “White Collar Crime and the Definitional Quagmire: A Provisional Solution” (1992).

⁸ 1612) 77 Eng Rep 960.

⁹ Blackstone, *Commentaries on the Law of England* (1769) Volume 1, 464-5.

¹⁰ John C. Coffee, JR., corporate criminal responsibility, in 1 encyclopedia of crime and justice 253, 253, 1983.

¹¹ L H Leigh, “*The Criminal Liability of Corporations in English Law*” 3-14, (1969).

¹² *Rex v. Fane Robinson Ltd.*, [1941] 2 W.W.R. 235, 76 C.C.C. 1961, [1941] 13D.L.R. 409 (Alta. c.A.).

attribution of criminal liability to corporations, based on their interpretation of the concept of the legal personality of corporations. Some of the terms used in reference to corporate crime include white collar crime, organizational crime, commercial crime, economic crime and occupational crime.

Corporate crime in most jurisdictions is defined as acts that are defined, prohibited and are punishable.¹³ The main issue behind the term is the proper appropriation of acts that would amount to corporate crime. Most jurisdictions define corporate crime to be a crime, where the court has officially determined that the person or entity has committed the criminal act, punished under administrative, civil or criminal law¹⁴. However, this research will be inclusive of both definitions, in determining corporate crime and attribution of corporate criminal liability.¹⁵

1.7 Literature review

Most corporations have developed from past simple structures of governance to complex hierarchal structures. Currently, a vast majority of books and articles on corporate criminal liability advocate and elaborate the derivative models of liability. However, due to complex modern structures, the derivative models become ineffective and outdated. Consequently, a gap for study and implementation of modern and new approaches in establishing corporate liability is created.

However, little study has been conducted on the efficiency of these modern models, such as the corporate culture model, on establishing corporate liability. The following books and articles shall provide a basis to this study.

Authors Amitai Etzioni and Derek Mitchell¹⁶ argue that, crimes require an element of *mens_ rea*. The means of attributing the *mens rea* and the legal means of establishing it forms the basis of controversy. Derek Mitchell adds to this by stating that the concept of corporate criminal liability

¹³ B. Grant Stitt, & David J Giacomassi,., "Assessing Victimization from Corporate Harms" in Michael B. Blakenship, ed., *Understanding Corporate Criminality* (New York: Garland Publishing, 1993).

¹⁴ M.B. Clinard & P.C. Yeager, *Corporate Crime* (New York: Free Press, 1980).

¹⁵ Julia Crisan, *The principles of legality "nullum crimen, nulla poena sine lege"* and their role. Published as part of the *Effectus Newsletter*, Issue 5, (2010).

¹⁶ Amitai Etzioni and Derek Mitchell, "Corporate crime" <http://www2.gwu.edu/~ccps/etzioni/documents/A366.pdf> Accessed on 3rd March 2014.

is a foreign concept in both corporate governance law and criminal laws. They delve into the challenges of establishing corporate liability, but offer little direction on reform.

Alan Sykes and Daniel Fischel¹⁷, view corporations as contractual associations, limited to contractual obligations. They are of the view that criminal sanctions on corporations are a waste, as corporations cannot suffer from moral stigma¹⁸. In addition, they argue that civil liability is sufficient and that criminal corporate liability produces more harm through over deterrence than the intended benefit. The nominalists theory is the foundation of the identification theory and the vicarious liability theory which are based on an individual's liability. These theories support the notion that the liability of individuals is attached to become that of a corporation.

Realists theory on corporate criminal liability¹⁹, argue for criminal prosecutions on the basis that corporations are a social entity with distinct personality. They argue that civil fines are a sufficient deterrence but nominalists argue that criminal sanctions through fines are a combination of both monetary fines and moral condemnation.

Celia Wells²⁰ in her book on corporations and criminal responsibility, states that corporate crime is defined as corporate activities that involve a breach of the set out criminal laws.²¹ The term is commonly used when referring to -Conventional Crime,ø that is breach of criminal laws set out in the jurisdictional laws. In addition, the term also refers to regulatory offences which normally include fraudulent activities and other illegal endeavours that are against laws of general application. Consequently, the term corporate crime may thus refer to the criminal conduct and liability of an agent of the corporation.²²

The book argues against the derivative models and provides some guidance on the modern theories including the implementation of corporate culture in corporate liability.

¹⁷ Daniel R. Fischel & Alan O. Sykes, "Corporate Crime," 25 *Journal of Legal Studies* 319- 49 (1996).

¹⁸ *Ibid.*

¹⁹ Jonathan Clough, 'Bridging the theoretical; the search for a realist model of corporate criminal liability' *Criminal law forum*, pg 268, 2007.

²⁰ Celia Wells, *Corporations and Criminal Responsibility*, (2nd edition, 2001).

²¹ *Ibid.*

²² Geraldine Szott Moohr, -On the Prospects of Deterring Corporate Crimeø (2007) *University of Houston Public Law and Legal Theory Series*.

Andrew Weissmann²³ in his paper on a new approach to Corporate criminal liability, argues that the rationale of vicarious liability is outdated and that its application can have far reaching effects. He states that the application of vicarious liability puts the government prosecution at an advantage over the corporations on corporate criminal cases. This is based on the fact that a low level employee's criminal act can trigger criminal liability on the corporation. The consequences of such prosecution would in some cases result in corporate death for the corporation in the market. This corporate death would arise from decrease in stock value due to negative publicity or loss of large sums due to settlement claims before prosecution. This raises the issue how to distinguish between misconduct at the corporation and misconduct by the corporation. This distinction may provide the crucial perspective necessary to protect corporations. This is based on the fact that at times, the corporation may be the victim, where it suffers for its agent's misconduct²⁴.

Celia Wells²⁵, points out the theories that are applicable within the common law jurisdictions. She points out that English law in specific, takes up the identification theory. This theory directs the blame on the individual senior officials and management of the company, who are referred to as the 'brains' and renders the company liable only for their culpable transgressions, not for those of other who do not have a code of criminal law or procedure for companies but have general principles. The principles are in relation to the minimum fault element in criminal offences, and to corporate liability.

The author opines that neither the agency nor the identification theory is deemed to be satisfactory. This is due to the fact that vicarious liability is restrictive while identification is deemed to be insensitive to the diversity of corporate organisation.

²³ "A New Approach to Corporate Criminal Liability - Weissman_paper.pdf" <http://www.law.yale.edu/documents/pdf/cbl/Weissman_paper.pdf> accessed 13 November 2013.

²⁴ Geraldine Szott Moohr, "On the Prospects of Deterring Corporate Crime - Viewcontent.cgi" <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1018&context=jbtl>> pg 34 accessed 17 November 2013.

²⁵ Wells_revised.pdf <http://www.coe.int/t/dghl/monitoring/greco/evaluations/seminar2002/Wells_revised.pdf> accessed 24 October 2013.

Furthermore, most modern corporations have decentralized organizational structures and consequently do not meet the image and structure of corporations in past time periods²⁶.

The author contends that new mechanisms based on the concept of corporate culture in attributing liability have been introduced in jurisdictions such as Australia. While other jurisdictions such as UK, have taken up the route of statute by statute construction.

Lawrence Ang²⁷ points out that Singapore employs the identification model of corporate criminal liability. The article lays out the various consequences of a poor system of corporate criminal liability. The author further discusses additional mechanisms to ensure that the company does not benefit from the actions of the identified individual through determined efforts to identify, seize, and confiscate proceeds of crime and/or return stolen property to the victims. Such action is provided for under set out legislation of the Corruption, Drug Trafficking and Other Serious Crimes Act Singapore (CDSA)²⁸

Jennifer Hill²⁹ discusses the derivative methods of corporate criminal liability. It reiterates that a corporation's liability is tied to the liability of an individual. This curtails the successful prosecution of corporations as the management structures ensure that individuals do not carry out all elements of the crime thus the case against the corporation fails. The journal introduces the ideology of corporate culture and organisational fault models. It establishes that these models are deemed to be founded on holistic theories of corporate criminal liability, which focus on the organisational conduct and fault of the corporation, in determining liability. However, the journal fails to elaborate on challenges of the modern models.

The author backs the concept behind the modern model, that corporate blame can be established in the procedures, operating systems or culture of a company. The author provides a case study

²⁶ Tesco V. Nattrass, 69 LGR 403, [1971] 2 All ER 127, [1971] 2 WLR 1166, [1971] UKHL 1, [1972] AC 153, <http://www.bailii.org/uk/cases/UKHL/1971/1.html>, Accessed on January 24th 2014.

²⁷ Lawrence Ang, "Effective measures against corporate crime and corporate liability in Singapore" http://www.unafei.or.jp/english/pdf/RS_No76/No76_06VE_Ang.pdf, accessed on 12th February 2014.

²⁸ , "Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act Singapore, Sections 10, 11 and 12, 2000.

²⁹ Jennifer Hill, "Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique" *Journal of Business Law*, p. 1, 2003, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220, Accessed on 12 May 2014.

of implementation of this model in the Australian Criminal Code Act 1995. As the code is founded on realist theories that a company is a unique entity having an existence independent of its members. The Australian Code examines a company's corporate policy and culture and its organisational structure in determining corporate fault or liability.

Sara Sun Beale³⁰ argues that some scholars such as Professor Alschuler, argue that the company is a fictitious entity and that punishing the company only leads to punishing the innocent shareholders who then bear the direct burden while the company employees and stakeholders bear the indirect burden of the criminal sanctions. This argument however is countered by the fact that it is impossible that the need to protect innocent shareholders would mean that they benefit from the corporation's successes, but do not feel the effects of any misconduct, poor managerial judgment or costs of breach of contract.

Author states that both civil and criminal cases against a corporation, the end result is that where found liable the typical punishment of a corporation is a penalty fine. The author provides valuable critique of corporate liability, but fails to provide any guidance on a way forward that would help prevent or curtail the rising rates of corporate crime.

David Omerod³¹ provides a critique to the existing model of corporate liability as a whole as well as the proposed modern models. The authors, Smith and Hogan are among some of the scholars that are not convinced of a need for change. They argue that the necessity of corporate criminal liability awaits demonstration, as the punishment of a corporation through the imposition of a fine simply constitutes the punishment of innocent shareholders, creditors and employees who might be made redundant, or the public which will ultimately be faced with the burden of the fine through higher prices.³² They argue that the implementation of criminal liability of corporations results in ineffective punishment of non-blameworthy persons such as the shareholders. They further assert that the prosecution of the corporation itself shifts focus from the corporate employees or managers who should be subjected to criminal sanctions. In

³⁰ op. cit. note 5

³¹ David Omerod, "Smith and Hogan criminal law" p9 365- 397, 10th edition, 2009.

³² J.C. Smith and B. Hogan, *Criminal Law* p. 190, (1996).

addition, they argue that the fines meted out on the corporations are not effective and are a mere burden on the corporations' shareholders, who normally are not responsible for the criminal actions. Furthermore, they argue that based on corporate structure, the shareholders are unlikely to be in a position that helps avert similar crimes in future.

George Ochich,³³ opines that the corporation is in a similar state in criminal liability as a natural person. The author states that the existing models of corporate liability have great limitation. For instance, the identification model is limited where the corporation is a state entity as they are agents of the state and prosecution would amount to the state prosecuting itself. While the aggregate theory is deemed to be illogical as it combines the state of mind of one person and the conduct of another. The complexity behind these existing models of criminal liability, have created limitations in their implementation. This is due to the fact that the corporations' liability is dependent on individuals' liability. However, though in most cases there is evidence of liability on the part of the directors and company personnel, the corporations are acquitted as individual liability of the senior management is rarely proven³⁴.

Author establishes that due to the limiting nature of the derivative models, there has been an increase in the search for new models of corporate criminal liability that depend on forms of direct corporate liability, rather than deriving corporate liability from individual criminal liability.

1.8 Theoretical Framework

This paper shall approach the study from a Realist theory approach. This theory is traced back to its founder, a German jurist, Johannes Althusius, and was greatly advocated by Otton Von Gierke, who is recognised for challenging Roman Jurisprudence.

“According to this theory, a legal person is a real personality in an extra juridical and pre-judicial sense of the word. The theory assumes that the subjects of rights

³³ George O. Otieno Ochich, *The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons* 2008, <http://kenyalaw.org/kl/index.php?id=1919#3> Accessed on November 24th 2013.

³⁴ See the Herald of Free Enterprise disaster in *R v P & O European Ferries (Dover) Ltd*, (1991) 93 Cr App Rep 72

are not limited to belong merely to human beings but to every being that possesses a will and life of its own. As such, being a juristic person and as 'alive' as the human being, a corporation is also subjected to rights. Under the realist theory, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. The realist jurists also contend that the law has no power to create an entity but merely having the right to recognize or not to recognize an entity³⁵."

The realist theory argues that corporations obtain their status as a legal entity through its daily transactions that are recognised and accepted by law. Consequently, according to the realist perspective, actions of a corporation are deemed to be carried out on its own, similar to the way of the normal person. The theory argues that just as a human use their organs to carry out an action, the corporation uses men in the same way, to fulfil its actions. The company therefore, according to this theory, can be held criminally liable and in addition, can face moral stigma as a legal person.

1.9 Research Methodology

This study was carried out in two phases of research. This was through the use of primary sources. This was inclusive of information from outstanding text books, journals, official publications and internet documents.

The second source of data was from decided cases, both international and local and legal reports on corporate criminal liability.

This is due to the fact that most of the information derived will be acquired from secondary sources. This will include the use of books, articles, international laws and both local and international case law on corporate liability.

1.10 Chapter breakdown

This project consists of five chapters. Chapter one, contains the introduction consisting of Background to the problem, statement of the problem, scope and significance, theoretical framework, literature review, research questions and the research methodology.

³⁵ Vineet Sharma, Corporate laws in India, <http://lawscorporate.blogspot.com/2010/08/theories-on-corporate-personality-real.html>, Accessed on 2nd November 2013.

Chapter two is a historical background of corporate criminal liability. It includes the conditions for corporate criminal liability, the models applicable and impediments of holding corporations liable.

Chapter three highlights the reality of corporate criminal liability in Kenya. This includes review of the legal framework, case law on the matter and relevant statute on corporate crimes and corruption in Kenya.

Chapter four is a comparative analysis of the Australian criminal code, the UK code and the United States legislation on corporate criminal liability case studies. This comparison identifies the differences that need to be addressed in the Kenyan jurisdiction.

Chapter five contains the findings and conclusion of the study.

CHAPTER 2

2. HISTORY OF THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

2.1. Introduction

Various jurisdictions have over time maintained the implementation of one of the corporate criminal liability theories applicable within their jurisdiction. The variation of theories in most instances is due to the varying historical developments that lead to the need for corporate criminal liability in the various jurisdictions.

This chapter will focus on the historical development of these theories, highlighting the factors that lead to their creation. In addition, the chapter will highlight the weaknesses of each theory that necessitated the need for development of other theories, leading up to the need for the creation and implementation of the modern age theories of corporate criminal liability.

2.1 Theory of corporate liability

Unrestricted corporate power normally amounts to great damage as corporations have a higher capacity of causing loss than an individual.³⁶ This is due to the large scale of the corporation, in comparison to an individual. These corporate crimes not only affect the physical and financial aspect, they affect the moral aspect of the society as a whole.

The rationale behind developing the requirement of corporate liability is deemed to have evolved from the need to hold accountable corporations for public harm done. This accountability via criminal liability provided a means of deterrence for criminal harm carried out by corporations.

2.2 Ancient and Roman law

History provides a glimpse of the development of corporate entities and the various attempts to regularize and control these entities that necessitated the need for implementation of corporate liability. The concept of corporate criminal liability is not modern as it dates back to Ancient Greece³⁷. During this period, corporate liability was in line with a *de facto* arrangement, whereby

³⁶ Charles J. Walsh and Alicia Pyrich, "Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?" 1995.

³⁷ The development of the corporation in England, with emphasis on limited liability, http://www.researchgate.net/publication/235293895_The_development_of_the_corporatio

a separate juristic entity was used to represent a family. The society then was not viewed as a collection of individuals but rather an aggregation of families.³⁸ The major characteristic of these juristic entities was that they had the ability to operate within certain markets; as an agent in the market³⁹.

In contrast, Roman law focused more on individual liability than the group liability. However, in order to keep up with the emerging corporate bodies, the Roman system introduced regulations on the rights, obligations and liabilities of the existing corporations.⁴⁰ These bodies though termed as corporations, had no rights associated with corporations. They were essentially associations of individuals⁴¹, holding property in common⁴².

As the number of corporations increased, Roman law began to embrace the change. The jurisdiction began by creating the concept of the 'juristic person.' The corporate groups were considered juristic persons, vested with rights of property, but incapable of making a declaration of intention. Consequently, they did not have intention and could not commit crimes⁴³.

The companies created⁴⁴ were recognized by the state, in return for service to the state. In addition, they remained relatively autonomous with unlimited liability on the risks undertaken by the company. However, with the decline of the Roman Empire, the emperors began to take control of the companies through compulsory acquisition. Later, in the 12th -14th centuries, the

n_in_England_with_emphasis_on_limited_liability/file/72e7e528a50764ac6a.pdf) Accessed on 12th April 2014.

³⁸ Sir Henry Sumner Maine, *Ancient Law*, 10thed. (London: John Murray, 1930).

³⁹ ÷ The development of the corporation in England, with emphasis on limited liability. http://www.researchgate.net/publication/235293895_The_development_of_the_corporation_in_England_with_emphasis_on_limited_liability/file/72e7e528a50764ac6a.pdf Accessed on 12th April 2014.

⁴⁰ F. W. F. McAuley, & J. P. McCutcheon, *Criminal Liability* (Dublin: Round Sweet & Maxwell, pg 273 (2000).

⁴¹ These associations included: municipalities (civitas, municipium, respublica, communitas), colleges of priests and vestal virgins, corporations of subordinate officials such as lectors and notaries (scribae, decuriae), industrial guilds such as smiths, bakers, potters, mining companies (aurifodinarum), social clubs and friendly societies.

⁴² F. W. F. McAuley, & J. P. McCutcheon, *Criminal Liability* (Dublin: Round Sweet & Maxwell, 2000) pg 143.

⁴³ Dewey, J. 1926. "The Historic Background of Corporate Legal Personality." *Yale Law Journal* 35 (6): 655-73.

⁴⁴ F. W. Walbank, A. E. Astin 'The Cambridge Ancient History: The rise of Rome' (1990).

concept of corporate criminal liability evolved as Roman law started to impose criminal liability on the legal entities, where its members were deemed to be acting collectively⁴⁵.

Max Gillman⁴⁶ points out that, the English jurisdiction only recognized individuals as having a guilty state of mind, while rejecting the concept of corporate criminal liability. This stand was evident via a declaration by the chief justice⁴⁷ that corporations could not be charged with crimes, but rather the particular members of the corporations could be indicted. However, due to the Industrial revolution, this position changed though liability was limited to nuisance and later to non-feasance offences.⁴⁸

Corporate liability evolved from corporations being held liable in tort law matters where they were prosecuted for nuisance in cases of non-feasance, for failing to fulfil statutory duties. Tort law continued to evolve and incorporated the ideology that a corporation could be vicariously liable for torts with an element of malice, committed by its servants. Eventually, the scope of liability extended to cover crimes of misfeasance. This was evident in *Cornford v. Carlton Bank*⁴⁹ where the corporation was held liable for malicious prosecution.

Corporate liability was firmly established when liability developed to include offences requiring proof of *mens_rea*. This occurred in revolutionary cases of *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd*⁵⁰ which held that a company could be charged with the offence of providing false information 'with intent to deceive' through the action of its agent, in this case the transport manager, providing returns he knew to be false.

Corporate liability is essentially dependent on one theory, '*actus non facit reum, nisi mens sit rea*' which translates to 'The intent and the act must both con-cur to constitute the crime.'⁵¹

⁴⁵ *Ibid.*

⁴⁶ Max Gillman, 'The development of the corporation in England, with emphasis on limited liability' www.researchgate.net Accessed on 2nd November, 2013.

⁴⁷ Anonymous Case [1701] 12 Mod 559.

⁴⁸ L.H Leigh, *The Criminal Liability of Corporations in English Law* (London: Lowe & Brydone, 1969). (1612) 10 Co Rep 23A, 32B.

⁴⁹ [1900] 1 QB 22.

⁵⁰ [1944] KB 146.

⁵¹ Sanford h. Kadish & Stephen j. Schulhofer, *criminal law and its processes* 204 (6th ed. 1995).

Corporate *mens_rea* is traceable to *Goodspeed v. East Haddam Bank*⁵², Where the Supreme court of Connecticut, held a corporation liable for a tort for filing a vexatious suit. This tort required malice, which acknowledged the corporate *mens_rea*. The court reasoned that prohibiting lawsuits against a corporation because of its lack of actual *mens_rea* would defeat enforcement of liability of corporations in tort matters.

The courts rationale was that directing a plaintiff to pursue the proposed remedy against the directors, would be similar to subjecting the plaintiff to mode of recourse. This is because many liable directors might be difficult to identify as according to the doctrine of separate corporate personality⁵³. Consequently, only corporate liability could provide an effective remedy.

There are several theories on corporate liability. Majority of these theories are typical of common law developments, created on a case-by-case basis. However, despite their importance, these theories have proved to be ineffective. Examples of these models are the identification and aggregation theories.

2.3 Evolving legal test of attribution of corporate criminal liability

The history, laws, economics, and politics unique to each country have had a remarkable influence on the adoption and development of the concept of corporate criminal liability. This influence resulted in different models of corporate criminal liability.⁵⁴

In identifying means of holding the corporations liable for their crimes, several theories have been implemented in varying jurisdictions over time. Examples of these models are the agency theory and, in a more elaborate form, identification and aggregation theories.

⁵² (*Conn. 530, 542-44 (1853)*).

⁵³ Payne J, "Lifting the Corporate Veil: A reassessment of the Fraud Exception" (1997) 56 *Cambridge Law Journal* 284 at 290.

⁵⁴ AncaLulia "Criminal Liability of Corporations ó Comparative Jurisprudenceö, Michigan State University, (2006)

2.4 Agency theory

The law governing the relationships between a corporation and other legal entities has been agency law and all corporate rights and duties have been moulded to fit into the substance and rationale of that law. Vicarious liability also referred to as respondeat superior, is commonly employed in the United States⁵⁵.

The agency theory is based on the premise that criminal violations normally entail two elements, *actus reus* and *mens_rea*. Corporations being artificial legal entities, do not possess any mental state, consequently, intent of the corporation, is dependent on the state of mind of its employees. The theory is based on a simple and logical method of attributing corporate liability. This logic is based on the fact that the corporation is not a living personality. Thus the corporation cannot have intention.

The attributable intention is dependent on the intention of someone within the corporation. Consequently, the three-part test applied in *Christy Pontiac* was created to determine whether a corporation would be held vicariously liable for the acts of its employees.

The respondeat superior doctrine holds that a corporation can be held liable for agents no matter what their place in the corporate hierarchy and regardless of the efforts on the part of the corporate managers to deter their conduct.⁵⁶ In this regard, the Supreme Court of Minnesota in *State v. Christy Pontiac – GMC, Inc.*⁵⁷ explained these three points thus;

... [W]e believe, first of all, the jury should be told that it must be satisfied beyond a reasonable doubt that the acts of the individual agent constitute the acts of the corporation. Secondly, as to the kind of proof required, we hold that a corporation may be guilty of a specific intent crime committed by its agent if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for corporation with respect to the particular corporate business which was conducted criminally; (2) the agent was acting, at

⁵⁵ Andrew Weissmann with David Newman, 'Rethinking criminal corporate liability'2007.

⁵⁶ *Ibid.*

⁵⁷ 354 N.W.2d 7,984 Minn.448.

*least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management.*⁵⁸

The American courts while applying the respondeat doctrine in the *Christy Pontiac – GMC, Inc.*⁵⁹ case held that a corporation may be convicted of theft and forgery which are crimes requiring specific intent and subsequently found that the evidence sustained the defendant corporation's guilt. In order to determine the scope of an employee's employment, the determinant is based on whether the employee was acting within their actual or apparent scope of employment, while carrying out the act. U.S.A courts⁶⁰ opine that a corporation may be liable for the actions of its agents regardless of the agent's position within the corporation. Consequently, regardless of the existence of company policy against the act or omission, an employee from any level within the organisation, can bind the corporation. However, the corporation may qualify to attain a reduced penalty. This interpretation has been taken even further to include non-employees, whose conduct can be attributed to be as the corporation's actions, as in *United States v. Parfait Powder*⁶¹, where it was held that independent contractors may act for the benefit of the corporation, thus have the capacity to expose it to criminal liability.

Actual authority is deemed to be in existence when a corporation knowingly and intentionally authorizes an employee to act on its behalf, as *New York Central and Hudson Rail Road v. United States*⁶². The agents acted within the scope of their actual authority and consequently deemed to be acting within the scope of authority conferred upon them by the corporation.

Similarly, apparent authority is defined as authority that has not been expressly agreed but can be understood by a third party, based on the position held by the agent within the organisation.

⁵⁸ *Per* Simmonet, J. The United States Court of Appeals, Ninth Circuit had earlier on, in *United States v. Hilton Hotels Corp.* 467 F.2d 1000 (1972) instructed the jury that a corporation is liable for the acts and statements of its agents "within the scope of their employment,ö..The court added: "A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies.ö"

⁵⁹ *op.cit.* note 56.

⁶⁰ *United States v. Bi-Co Pavers, Inc.*, 741 F. 2d 730, 737.

⁶¹ 163 F.2d 1008.

⁶² 22 Ill.212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613 (1909) .

This test is interpreted in varying ways in various jurisdictions. The corporations benefit from the act is the second element. The employee need not be primarily concerned with benefiting the corporation as most employees act primarily for their own personal gain.⁶³ In addition, the benefit may not be actual, as the employee's mere intention to bestow a benefit to the corporation, is viewed as sufficient.

The third element fulfilling the final test of the agency theory, is establishing that the corporation authorized, tolerated or ratified the action. Where there is any evidence that the corporation was aware of the criminal actions or intent, and took no action, it will be liable for actions of its employees.

2.5 Identification theory

The identification theory is a development of the Agency theory. Based on the weaknesses of the vicarious liability theory, the English courts, formulated this approach, as evident in *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd.*⁶⁴ where corporate liability for offences requiring fault known as the "identification" theory or the "alter ego" theory of responsibility was established. Similarly, in *DPP V. Kent and Sussex contractors ltd*⁶⁵ the identification theory was applied. The court held that a company's state of mind could be found in the state of mind of those empowered to act or speak for the company. Similarly, in *R v ICR Haulage Ltd*⁶⁶ a company, its managing director, and others were indicted for a common law conspiracy to defraud. The Court of Criminal Appeal upheld the indictment on the basis that although the charge required a state of mind and a corporation has no mind of its own, the state of mind of its managing director was imputed to that of the company.

This theory is based on deriving the corporation's liability from a select number of managerial staff within the corporation. It is commonly referred to as alter ego of vicarious liability, as in *Tesco Supermarkets Ltd. v. Natrass*⁶⁷. The purpose of the identification model is to establish

⁶³ Joseph Hall, "Corporate Criminal Liability-Thirteenth Survey of White Collar Crime", 1998.

⁶⁴ [1915] AC 705.

⁶⁵ K.B. 146, 1944 and 1 All E.R. 119; 170 L.T. 41, D.C. 1944 respectively.

⁶⁶ R v ICR Haulage Ltd [1944] 1 KB 551; [1944] 1 All ER 691.

⁶⁷ 2WLR 1166, 1971.

the guilty mind within the corporation, thus attribute the *mens_rea* of the corporation⁶⁸. This model is a restrictive version of vicarious liability, as the liability is limited to a specific class of individuals⁶⁹.

The theory compares the running of the company to the functioning of a human body. This then divides the various personnel into the various organs of the body, where the director takes the form of the brain, thus its willpower and rationale. This is derived from the famous quote in *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd*⁷⁰, distinguishing between the 'brains' and 'hands' of the company that

'A company may in many ways be likened to the human body. It has a brain and nerve centre which controls what it does. It also has hands and tools that act in accordance with the directions from the centre. Some of the people are the servants and agents who are nothing more than the hands to carry out the work...others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those individuals is the state of mind of the company.'

In addition, a challenge arises when establishing where the individuals fall within the brains and hands analogy. However, most often, the brains of the company are identified through the memorandum and articles of association of the company, in identifying those entrusted with powers of the company⁷¹.

Identifying the guilty mind in order to attribute corporate guilt of the corporation is the basis of the identification model. The individual with the guilty mind is taken to act as the corporation, thus their actions or omissions are translated as those of the corporation. The rationale being that directors are taken to act as the company and not on behalf of the company.

⁶⁸ John and Leonard Minks, 'corporate and white collar crime'2008.

⁶⁹ Ibid.

⁷⁰ CA 1957.

⁷¹ Laws of Kenya, Companies Act cap 486.

2.6 Aggregation Theory

The aggregation model involves matching the conduct of one individual, to the mind or will of another⁷². The model differs from both the vicarious liability model and the identification model, where liability is traced back to the corporation's agents or corporations managerial respectively. The aggregation theory aggregates the composite knowledge of different officers in order to determine liability.

The aggregation theory is deemed to be a reflection of the liability of corporations, as it's derived from a combination of two or more individuals within the corporation. Over Time, the corporation's structures have been altered and expanded, making them into complex structures of authority and power, with multiple power centres⁷³. The complexities in some companies are so great, that it is almost impossible to identify specific individuals responsible for the criminal acts. These complexities have created challenges in implementation of criminal liability to corporations under the traditional approaches. In an attempt to remedy the situation, the aggregation or collective knowledge doctrine was developed⁷⁴.

The aggregation theory is grounded in an analogy to tort law in the same way as the agency and identification doctrine. Under the aggregation theory, the corporation aggregates the composite knowledge of different officers in order to determine liability. The company consolidates all the acts and mental elements of the important or relevant persons within the company to establish whether in total they would amount to a crime if they had all been committed by one person⁷⁵. Aggregation could involve the matching of the conduct of one individual with the state of mind or culpability of another individual. Alternatively, where an offence requires a particular level of

⁷² Richard Mays, 'Towards corporate fault as the basis of criminal liability of corporations' pg 53(1998), http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf, accessed on 10th November 2013.

⁷³ Ibid

⁷⁴ Meaghan Wilkinson, 'Corporate criminal liability-the move towards recognising genuine corporate fault', <http://www.nzlii.org/nz/journals/CanterLawRw/2003/5.txt/cgibin/download.cgi/download/nz/journals/CanterLawRw/2003/5.rtf>, accessed on 10th November 2013.

⁷⁵ op.cit. note 55

knowledge or negligence this could be found in an aggregation of knowledge or negligence of several individuals.⁷⁶

Celia Wells⁷⁷, states that aggregation of employees' knowledge means that corporate culpability does not have to be contingent on one individual employee's satisfying the relevant culpability criterion⁷⁸. The theory is key step towards the notion of corporate fault; it represents a departure from the historical understanding that intention must come from a single individual. However, the departure from derivative model from individuals within the corporation is still a work in progress. The aggregation theory is understood as being the fault of the group and not of the corporation itself.

In all these theories, corporate fault is still traced back to an individual or a group of individuals, in the attribution of criminal liability of corporations. Corporate culture in attributing liability, seeks to move away from the derivative model, look towards the corporations liability as its own entity, through its set out cultures, policies among others.

2.7 Corporate Culture in attributing corporate criminal liability

The acceptance of culture as a social variable was imported from anthropology and has become prominent in organizational studies since 1970. This theory advances direct liability model, where corporations are directly liable in their own right for offences committed by the corporate entity⁷⁹. The model allows a shift in the focus in the search for a guilty mind, from the individual members to the Corporation itself⁸⁰.

Professor John V. Maanen⁸¹ provides a definition of corporate culture that is in line with corporate liability, and the attribution of corporate *mens_rea* as;

⁷⁶George Ochich, "Company as a criminal: Comparative examination of some trends and challenges and relating to criminal liability of corporate liability" 2008, <http://kenyalaw.org>, accessed on 10th December, 2013

⁷⁷ Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001) at 156.

⁷⁸ Ibid.

⁷⁹ Brent Fisse & John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" 1988, Accessed on 2nd November, 2013 <http://www.austlii.edu.au/au/journals/SydLRev/1988/3.pdf>.

⁸⁰ Ibid.

⁸¹ John V. Maanen, "Managing for the Future: Organizational Behavior and Processes." 2005 (3rd Ed.)

“...the knowledge members of a given group are thought to more or less share; knowledge of the sort that is said to inform, embed, shape, and account for the routine and not-so-routine activities of the members of the culture...A culture is expressed (or constituted) only through the actions and words of its members and must be interpreted by, not given to, a fieldworker...Culture is not itself visible, but is made visible only through its representation.”⁸²

The theory developed by Edgar Schein on organizational culture⁸³, has been essential in understanding the dynamics of organizational culture, which exist in three levels. Typical behaviour (artefacts), this is the most visible and accessible element of a culture. It consists of behaviour patterns and outward manifestations of culture, such as the benefits provided to executives, dress codes, the level of technology utilized, rites, ceremonies and organizational myths. Symbols or arte facts are considered important means of communicating corporate culture because they enable us to take aim directly at the heart of culture.⁸⁴

Stated values are the second level. They form the basis of the corporate culture. The values determine the behavior of the organisation. They affect the decision-making process and serve as the set of limits for individual behaviour. These values are not directly observable. They consist of both stated (formal) and operating values. Stated values are deemed to be values that are proposed and stated by the organisation as their fundamental corporate principles. They often consist of expectations and requirements, either written or unwritten, that are routinely associated with the pursuit of organizational purposes, activities, or goals that are perceived as legitimate or normal.

Operating values are values that are actually in use. Organizational values are frequently expressed through normsócharacteristic attitudes and accepted behaviors that might be called the unwritten rules of practiceóand every employee quickly picks them.

Fundamental beliefs and assumptions are the third and deepest level of an organisations culture. These values are subjective and vary from one organisation to the next. These assumptions are

⁸² John Dewey, *The Historic Background of Corporate Legal Personality*, 1926.

⁸³ Edgar H. Schein, *Organizational Culture and leadership* pg 23-34, 2010.

⁸⁴ op. cit note 82.

not easily identified and may even be unknown to some of the corporation's members. An organization's underlying assumptions grow out of the corporation's values.

Not all alternative models of corporate criminal liability share the same basis for allocating *mens_rea* to the corporate culture. Reactive Corporate fault and Constructive fault models rely on the notion of culture as a whole. While some philosophers, such as Peter French in his book on the Principle of Responsive Adjustment⁸⁵, applies the rules of behaviour approach to assess corporate mens rea.

The corporate ethos approach focuses on values as the appropriate vehicle to find mens rea. Most scholars refer to corporate culture, as a whole and have not chosen a specific manifestation of culture to be the proper place for the allocation of *Mens_rea*.

The essence of these modern models of attributing criminal liability of corporations to culture is based on the fact that these models recognize corporate culture as the cognitive element of the corporation. They move away from derivative models that reduce liability to individuals.

Not all alternative models of corporate criminal liability share the same basis for allocating mens rea in the corporate culture. Reactive Corporate fault and Constructive fault models rely on the notion of culture as a whole. In the Principle of Responsive Adjustment, French applies the rules of behaviour approach to assess corporate mens rea.

The corporate ethos⁸⁶ approach focuses on values as the appropriate vehicle to find mens rea. When legal scholars talk about corporate culture, they usually refer to the culture as a whole and have not chosen a specific manifestation of culture to be the proper place for the allocation of *Mens_rea*.

⁸⁵ Peter A. French, "A principle of responsive adjustment", 1984.

⁸⁶ Henry J. Amoroso, "Organizational Ethos and corporate criminal Liability", <http://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1281&context=clr> (1995) accessed on 2nd December 2013.

However, though the various modern models vary in their approach of corporate culture, ultimately, they conclude that organizational culture is a character of the corporation and it influences corporate behaviour. This corporate culture then forms the mind of the corporation, unlike derivative models that attach the corporate mind to individuals.⁸⁷

2.8 Conclusion

The life cycle of the corporation over time has grown to encompass not only the rights of a corporate entity, but to recognize that this juristic entity has duties and responsibilities as well. The corporation being a legal entity is limited to carrying out its objectives and functions via individuals working with and within it. This includes the commission of crimes by these corporations.

The various theories have provided various means of attributing the elements of crime to the juristic entity; however, the evolving nature of business into global markets has restricted the implementation of the older models of attributing corporate criminal liability.

Further, globalization has resulted in the creation of large multinational corporations that have complex hierarchies of management and governance. This has resulted in the need for modern theories that are able to accommodate these complex structures and move towards identifying the criminal liability of the corporation as an entity and not as individuals within the entity.

⁸⁷ Arthur P & Guzzo, Richard A., "The Role of Climate and Culture in Productivity" in Schneider, Benjamin, ed. *Organizational Climate and Culture*, 1990.

CHAPTER 3

3.0 THE LEGAL FRAMEWORK FOR CORPORATE CRIMINAL LIABILITY IN KENYA

3.1 Introduction

The Constitution of Kenya is the cornerstone of law in Kenya. Article 2, on supremacy of the constitution, states that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. It further acknowledges that the general rules of international law form part of the law of Kenya. The High Court, the Court of Appeal and of all subordinate courts are to be exercised in conformity with the constitution, legislation, which includes Acts of the Parliament of Kenya; specific Acts of the parliament of the United Kingdom and the Law of Contract Act⁸⁸; subsidiary legislation, the substance of the common law, the doctrines of equity and the Statutes of General Application in force in the United Kingdom on August 12, 1897 and the procedure and practice observed in courts of Justice in the UK at that date⁸⁹. The common law, the doctrines of equity and the statutes of general application in the UK apply so far as the circumstances of Kenya and its inhabitants permit.

Kenya as a former British colony has its legal foundation in the UK law. Consequently, as a common law jurisdiction, Kenya applies the derivative model of corporate criminal liability, similar to that applied in UK. This model pegs the liability of the corporation on the liability of an identified individual within the corporation. The focus of this chapter shall be to establish the legal framework of corporate criminal liability in Kenya. This will include a highlight of the statute laws governing corporate liability and sample case law.

3.2 Liability of Legal Persons

Companies in Kenya attain the status of a distinct legal entity upon incorporation as per the Companies Act, Cap 486. The success of incorporation is marked by the provision of an incorporation certificate by the registrar of companies.

⁸⁸ Chapter 23, Laws of Kenya.

⁸⁹ Chapter 8, Laws of Kenya.

Once the date of incorporation is affixed, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum of association, capable of exercising all the functions of an incorporated company, with power to hold land, have perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up.⁹⁰ as is mentioned in this Act.

This is the rule in *Salomon V. Salomon & Co Ltd*⁹¹ and is acknowledged in Kenya as evident in the case of *Carla Tarlazzi v Roberto Ciavolella*⁹² where the court held that the concept provides for a distinction between the liability and responsibility of directors and shareholders to that of the company⁹³.

The law recognizes that a company, though it has a separate entity distinct from its members, requires human agency to fulfil its objectives as provided for in its memorandum and articles of association. However, instances arise where the law holds the members of the corporation liable. This amounts to the 'lifting or piercing of the veil', consequently holding the members directly liable for the activities of the corporation as in the leading UK case of **Adams V. Cape Industries plc**⁹⁴, which held that "veil piercing" may take place when a company is set up for fraudulent purposes, or to avoid an existing obligation as in **Caneland Limited V. Dolphin Holdings Limited**.⁹⁵

There are however cases where the court will determine liability of the shareholders where there is evidence of a principal óagent relationship between the shareholder or director and the company. In **Gramophone & Typewriter Co. Ltd v. Stanley**⁹⁶ Buckley LJ stated that it was well established that holding of all the shares does not establish a relationship of principal and agent between the shareholder and the company. Similarly, **China Wu Yi co. ltd v. Edermann**

⁹⁰ Laws of Kenya, Cap 486, section 16(2).

⁹¹ [1897] AC 22.

⁹² Civil case No. 206 of 2013.

⁹³ *ibid*

⁹⁴ [1990] Ch 433.

⁹⁵ Civil Case No. 1135 of 2000.

⁹⁶ [1908] 2 KB 89; Also *Tunstall v Steigman* [1962] 2 QB 593; *Ebbw Vale UDC v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366.

Property Ltd⁹⁷ echoes similar sentiments through the words of Justice Ochieng that "This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for its fraud by saying '*I wish to make it clear that I am committing this fraud on behalf on someone else, and I am not to be personally liable.*'" Using this rationale that one cannot commit a crime on behalf of another is one of the principles behind the direct liability concept that embraces corporate culture as the company mens_rea. This then means that the corporation, recognised as a person and faces criminal liability distinct from its directors and shareholders.

3.4 Current situation of corporate crimes in Kenya

Kenya is among the most highly rated corrupt jurisdictions as according to the Global Economic Crimes Survey 2014⁹⁸. The survey shows that most of the economic crimes are facilitated by corporations. This is due to lack of proper deterrence measures such as successful corporate prosecutions.⁹⁹

The low level of successful prosecutions is pegged on the high threshold of establishing criminal liability of corporations. This is because most often, the liability of the company is attached to an identified directing mind. The challenge arises due to the complex company structures that distribute the decision making to various individuals at various levels. Consequently, the corporation as a juristic person remains to enjoy a privileged relationship to law relative to that of the individual.

3.3 Statutory Framework

Statute laws provide governance to Corporations in Kenya, through several provisions. The relevant statutes are the Companies Act of Kenya Cap 486, Civil Procedure Act and rules, the Proposed Companies Act Amendment Bill, the Penal Code and Criminal Procedure Code. The Constitution of Kenya 2010, also contains relevant articles on the same. In the following paragraphs the study outlines the relevant key provisions of these statutes and the Constitution.

⁹⁷ Civil Case 362 of 2012.

⁹⁸ 2014 Global Economic world survey, http://www.pwc.com/en_ke/ke/assets/pdf/2014-gecs-report.pdf, Accessed on 12th November, 2013.

⁹⁹ Combating corruption: A private Sector Approach, <Reform toolkit, January 2011> pg 4, <http://www.cipe.org/sites/default/files/publication-docs/AntiCorruptionToolkit0308.pdf#page=3&zoom=auto,0,68> Accessed on 10th October, 2013.

3.3.1 The Constitution

The Constitution¹⁰⁰ of Kenya 2010 is the corner stone of all law in Kenya. It guarantees the rights and freedom of individual. Article 260 of the Constitution, defines a "person" as including *'... a company, association or other body of persons whether incorporated or unincorporated.'* In defining these rights, the Constitution does not distinguish between the fundamental freedoms and rights of the individual and those applicable to juristic persons.

Nonetheless, some of the rights provided for apply naturally to both juristic persons and natural persons. Some of these provisions include the right to expression as per Article 33, which guarantees the individual the right to seek, receive or impart information or ideas, the right to fair labour practices as per Article 41, the right to a fair trial as per Article 50 and the right to own property as per Article 40. These rights are applicable to, both corporations and an individual.

The corporate culture model recognizes that persons, both juristic and natural, have a right to enjoy these rights. However, in the same light, the model argues that the same persons have an obligation to meet all the associated duties that are in tune with the provided rights. These duties apply vastly and are inclusive of criminal responsibility and liability for breach of duty. This rationale has led to the establishment of the corporate criminal liability theory.

3.3.2 The Companies Act

The Companies Act¹⁰¹ is the principal legislation, governing companies in Kenya. The preamble provides that it is an Act of Parliament to consolidate the law relating to the incorporation, regulation and winding up of companies and other associations, and to make provision for other matters relating thereto and connected therewith.

¹⁰⁰ The Constitution of Kenya, 27 August 2010.

¹⁰¹ Laws of Kenya, Chapter 486, 1962.

3.3.3 The Civil Procedure Act

The Civil Procedure Act¹⁰² and the Civil Procedure Rules, makes provision for civil matters. The act and rules provide that suits may be brought against a corporation or by a corporation. This reinforces the separability doctrine that acknowledges the corporation as a separate entity.

Corporations according to civil law are under the same expectation as natural persons to respect the court and uphold the rule of law. Contempt of Court, whether civil¹⁰³ or criminal¹⁰⁴, is defined as the conduct that defies the authority or dignity of court¹⁰⁵ as held in **Abbey barn Limited v Infinity Gemstones Ltd**¹⁰⁶. Criminal contempt, even by corporations, is viewed as being punishable by fine or imprisonment. Due to the limitation of imposing a penalty of imprisonment, corporations are punished through fines or through sequestration¹⁰⁷

Currently, corporations incur fines for criminal contempt. However, the proposed Contempt of Court Bill¹⁰⁸, calls for application of the identification model, where the alter ego of the company is imprisoned.

3.3.4 Penal Act and Criminal Procedure Act¹⁰⁹

The preamble of the Penal Act¹¹⁰ provides that it is an Act of Parliament to establish a Code of Criminal law. The Act creates offences and prescribes the punishment thereof. Though it does not offer any definition of the term "person" it nonetheless anticipates the commission of an offence by a corporate body and/or a juristic person. It is recognised that there are some crimes that the company cannot be held liable, due to its limitation of lacking an actual physical form. Such crimes include perjury and bigamy¹¹¹.

¹⁰² Chapter 21, laws of Kenya, 2010.

¹⁰³ Consists of disobedience of judgements, orders or other process of the court involving a private injury, Halsbury's Laws of England (4th edn, 1974) Vol,9 p. 3.

¹⁰⁴ Conduct that defies the authority or dignity of a court, by interfering with the administration of justice.

¹⁰⁵ Bryan A Garner, *Black's Law Dictionary* (9th edn, West Publishing Company: St Paul 2009) 313.

¹⁰⁶ [2000]KLR 248.

¹⁰⁷ "The action of taking legal possession of assets until a debt has been paid or other claims have been met." Legal dictionary, <http://legal-dictionary.thefreedictionary.com/sequestration>, Accessed on 6th October 2014.

¹⁰⁸ Contempt of court bill, laws of Kenya, 2012.

¹⁰⁹ Chapter 75, Laws of Kenya.

¹¹⁰ Chapter 63, laws of Kenya, 2012.

¹¹¹ Ibid

The rationale of criminal law is to deter crime through the imposition of sanctions such as imprisonment and fines among other restrictions. These sanctions work to decrease the rate of crime while restoring a sense of justice for any affected victim. In the same breadth, corporate crime would be bound to decrease, where there are more successful means of attributing the guilt of corporations that engage in crime.

However, the challenge arises in that, most of our statutory provisions as well as substantial criminal law theories, practice and procedures do not encompass a wrong as committed by a corporation. Consequently, though the Kenyan jurisdiction has adopted the concept of separate legal entity of corporations, which then allows for corporate criminal liability, the implementation of classical criminal law practice and procedure remains unchanged.

One of the earliest cases to attempt to address corporate criminal liability in Kenya was the case of **Stephen Obiro v. Republic**¹¹² where the dispute was whether the chairman of the union in question could appear and plead in court on behalf of the union. The basis of the dispute was the provisions of section 207 of the Criminal Procedure Code which states that, it is the accused person who must plead to the charge, and even an advocate is not ordinarily permitted to plead on behalf of the accused.

The decision in **East Africa Oil Refineries Ltd v. Republic**¹¹³ provides evidence of the drawback of the stringent application of these criminal law practices. In this case the court held the principle that not even an advocate for the accused person may be allowed to plead on behalf of a corporation accused of crime. This position then forms the heart of the problem, which is the question of who should plead for or on behalf of the company. In addition, the question of who should be liable for imposed sanctions, in case of conviction of a corporation still remains unresolved.

¹¹² [1962] E.A. 61.

¹¹³ 1981 KLR 108.

Similarly, in **M. S Sondhi Ltd. v. R**¹¹⁴, the problem of the appropriate representative to take plea on behalf of the corporation arose. The court addressed the matter by making reference to section 96 of the Criminal Procedure Code, and stated thus;

‘...there would appear to be no provision in the Criminal Procedure Code governing the reception of a plea from a company in a criminal proceeding and in its absence Mr. Kelly suggests that the court should follow the provisions of section 33 of the U.K. Criminal Justice Act, 1925...’

Consequently, the plea would be taken from any person that is a representative of the company for the purpose of answering the charge. This position then forms the critical foundation in the Kenyan jurisdiction, that criminal proceedings can be instituted against corporations, for criminal acts. The High Court of Kenya has since had the chance to rule on the legal issue as to whether a company, which is a corporate entity, could be charged with a criminal offence. In **Nanak Crankshaft Ltd v. Republic**¹¹⁵ the applicant sought to have the court call for and examine the trial court record, for the purpose of satisfying itself as to the correctness, legality or propriety of the sentence passed. The general findings on the application included among others that whether the company, a corporate entity, could be charged with a criminal offence, and if so, who could take plea and who may be convicted? In that case, the applicant had been charged in his capacity as the manager of the company and was called upon to take the plea. It was thus the applicant's submission that if an offence had been committed, then the company itself would have been the offender. Making reference to **Stephen Obiro v. R**¹¹⁶, the court observed that;

“...Section 165 of the Public Health Act¹¹⁷ stipulates that “...Where a contravention of any of the provisions of the Act is committed by any company or corporation, the secretary or manager thereof may be summoned and shall be held liable for such contravention and the consequences thereof...”

On the basis of the statutory provision, it was the manager who had been served with the Public Health Notice; and it is the manager who then had to be charged with the offence. This was contrary to the separate entity principle that is the basis of corporate criminal liability.

¹¹⁴ (1950) 17 EACA 143.

¹¹⁵ Criminal revision case No. 763 of 2007.

¹¹⁶ [1962] E.A. 61.

¹¹⁷ Chapter 242, Laws of Kenya.

Section 23 of the Penal Act is in sync with the derivative model and acknowledges the application of corporate liability in Kenya. The section states that

“Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission”

This position has been criticized due to the fact that there is great difficulty in accurately defining the parameters of the notion of directing mind¹¹⁸. This critique is in tune with the matter of *Tesco Supermarkets Ltd. v. Natrass*¹¹⁹ where the House of Lords accepted the defence of the Defendant and found that the manager was not a part of the "directing mind" of the corporation and therefore his conduct was not attributable to the corporation.

This principle was first implemented in Kenya in the case of *Nyakinyua & Kang’ei Farmers Company Ltd v. Kariuki & Gathecha Resources Ltd*¹²⁰ where the court held that a company registered under the Companies Act is a distinct person regardless of whether it is a private or a public company. This position has been acknowledged in current court decisions as evident in the matter of *Cane Land Ltd v.. Dolphin Holdings Ltd*¹²¹ where Justice Mbaluto reiterated the words of Lord McNaughtens in *Salomon v. Salomon & Co.*¹²² that;

“...The company is at law a different person altogether from the subscribers ; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the

¹¹⁸ Ruth Bonnici, “The principle of separate corporate personality” 2013, www.lawjournal.ghsl.org. Accessed on 12th April 2014.

¹¹⁹ Ibid.

¹²⁰ (No 2) [1984] KLR 110.

¹²¹ Ibid.

¹²² op.cit. note 91.

profits , the company is not in law the agent of the subscribers or the trustees for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act... ”

The challenge remains the same within our current jurisdiction as evident in **R v. Chris Kirubi and 13 others**,¹²³ where the accused persons ¹²⁴ were acquitted for the fraudulent undervalued sale of Uchumi. Chief Magistrate Mr. Gilbert Mutembei in his ruling stated that the prosecution failed to provide sufficient evidence against the corporation, to justify the court to put the accused on their defence on the matter.

Similarly, in **Omondi v. National Bank of Kenya and Others**¹²⁵ the court while tackling the principle of corporate personality held that the plaintiffs who had instituted the suit in their capacity as directors and shareholders were not privy to the dispute. The court pointed out that the company, as a separate entity could institute proceedings that related to alleged wrongs against the company as it had a separate identity from the shareholders and directors. The court stated that;

“... It is basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders. The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights...”

Consequently, the court ruled that the plaintiffs could institute proceedings in relation to the company only in the name of the company. Corporate culture approaches liability in the same light. The juristic person, as opined by the courts, has a right to seek out its legal rights. Similarly, it should be held accountable as a separate entity, for failing to fulfil its duties that are

¹²³ Criminal Case No. 900 of 2008.

¹²⁴ Kethi Kilonzo, “Uchumi sheds light on corporate governance in public companies” 2011 www.businessdailyafrica.com/Opinion-and-Analysis, accessed on 2nd March 2014.

¹²⁵ [2001] 1 EA 175.

accompanied by the privilege of these rights. In **Standard Chartered Bank Ltd v. Intercom Services Ltd and Four Others**¹²⁶ the court of appeal was emphatic that

“...a limited liability company has its own legal existence independent of its members and that it is not proper except in specific cases for a court of law to use its powers to pierce the corporate veil...”

In addition, the derivative model has difficulty in identifying the necessary *mens rea* in corporate crime.¹²⁷ The limited number of persons identified with the company, as having the capability to bind the company for criminal actions also substantially reduces the applicability of the criminal law. In the matter of *MS Herald Free Enterprise disaster*¹²⁸, the corporation was responsible for over 200 deaths from the capsizing of the ferry, but the corporation was acquitted as the investigation was unable to pin point the *mens rea* of the employees and directors, that led to the disaster. It is recognised by Courts that delegation and sub-delegation of authority by the directing mind of the corporation, even within different subsidiary entities, does not bar the application of the identification doctrine¹²⁹. However, complex structures with numerous levels of decision making, limit the success of criminal prosecution as identification of a single individual becomes nearly impossible. This limitation encourages senior officials to isolate themselves from decision making, to ensure they are unaware of any doubtful practices by the corporation¹³⁰.

Further, the derivative model is lacking in that, it makes an excessively narrow association between the guilt of the company and the guilt of a mere individual.¹³¹ This association in some instances may over shadow the fact that some offences may be committed as a result of systemic or organizational pressure originating directly from the corporate context. This is the case where the corporations culture, is the main source of pressure or basis to engage in the crimes by the

¹²⁶ [2004] 2 KLR 183.

¹²⁷ "Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions", (1978-79) 92 Harvard L.Rev. 1227, at 124.

¹²⁸ MV Herald of Free Enterprise Report of Court NO. 8074, Formal Investigation. UK Department of Transportation.

¹²⁹ C.D. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct", 90 Yale L.J, 1980.

¹³⁰ Anne-Marie Boisvert, 'Corporate Criminal Liability Discussion Paper' 1999, <http://www.ulcc.ca/en/criminal-section> Accessed on 6th March 2014.

¹³¹ C. Wells, "Corporate Liability and Consumer Protection: Tesco v. Natrass Revisited", 57 Modern L. Rev. 817.

corporation, in order to meet the set targets. This is evident in the *ZeeBrugee ferry disaster* with the *Herald of free enterprise*, where the report stated that¹³²,

*“...All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness...”*¹³³”

resulting in failure of management. The evidence provided was sufficient to show that the corporation had a bad corporate culture of inefficiency which resulted in the loss of human lives. The limitations of derivative model resulted in the acquittal of the company and other defendants, of the offence of manslaughter, for which they had been charged.

Similarly, the opposite position applies, where the derivative model implemented in Kenya, is criticized, for automatically attributing to the corporation the immorality or criminal actions of an individual, even though the organization itself, as an entity, has not committed any crime. This is a drawback, as it is not always the case. This determination is normally on a case by case basis, due to the variation of corporate structure. However, the situation is evident in the matter of *R. v. Safety-Kleen Canada Inc.*¹³⁴, where the Ontario Court of Appeal, acquitted a transportation company charged with filing a false shipping manifest covering hazardous wastes. The record indicated that the driver of the truck created the false manifest and was the company's sole representative over an extensive geographical territory. Further, the truck driver was the only one responsible for the collection of waste materials, the company's bookkeeping in the area and its relations with its customers. When this employee left, the company ceased its activities in the area. The court was of the view that the actions of the employee in that matter, did not amount to the criminal actions of the corporation.

¹³² Ibid.

¹³³ United Kingdom, Department of Transport, Mr. Justice Sheen, The Merchant Shipping Act of 1894: MV Herald of Free Enterprise - Report of the Court No. 8047 (1987).

¹³⁴ (1998) 16 C.R. (5th) 90, Ontario Canada.

3.3.5 Companies Bill 2014

The Companies Bill 2010¹³⁵ tackles several key issues and addresses the changing trends brought about by technological advancement and globalisation. Currently, the Companies Act section 324 and section 325 on directors' liability during winding up of a company is based on the renowned case of **Salomon v. Salomon Co. Ltd**¹³⁶, which provides for suitable instances of lifting the corporate veil. Cap 486, calls for a higher degree of proof in matters of company fraud than on any other civil matters, which makes the possibility of conviction that much more difficult. In amending this situation, most companies have resorted to the use of shareholders agreements, which are able to accommodate most of the issues including resolving the issues that would lead to disputes, litigation or winding up of the company. In addition, it aims to simplify the formation and operation¹³⁷ of companies.

One of the key provisions critical to corporate criminal liability from the proposed Act is Section 25(1), which states that *“Unless the articles of a company specifically restrict the objects of the company, its objects are unrestricted.”*

This is translated to mean that the objects of a company are unrestricted, unless its articles specifically impose restrictions¹³⁷. This amendment would dismiss the old age defence and conflict that a company cannot be liable for criminal activities as such activities do not fall within its objectives¹³⁸. This provision would have a great beneficial impact on the corporate culture model as corporate crime falls outside the company's set objectives.

The proposed Act makes provision for the creation of a one man company under section 72(1).

The provision states that

“If a limited company is formed under this Act with only one member, there shall be entered in the register of members of the company, the name and address of that member and a statement that the company has only one member...”

¹³⁵ Kenya Law reports, http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bills/2011/Companies_Bill_2010.pdf, Accessed on May 7th 2014.

¹³⁶ op.cit. note 91.

¹³⁷ Gower and Davies, Principles of Modern Company Law, 7th Edition, London: Sweet & Maxwell, 2003 130.

¹³⁸ Gower and Davies, refers to the case of Ashbury Railway Carriage & Iron Co. v. Riche (1875) LR 7 HL 653, Lord Cairns L.C clarified, though that the question was not as to the legality of the contract; the question is to the competency and power of the company to make the contract.

Based on the renowned principle from the case of *Salomon v. Salomon & Co Ltd*¹³⁹, the sole member will be distinct from the company. This provision, due to the numerous advantages of having a limited company as opposed to a sole proprietorship, will amount to a great increase in the number of registered companies. Due to the limited liability, these sole members will probably be willing to take greater risks with their companies, amounting to crimes due to injury of the environment, evasion of taxes and injury to natural persons among others. To deter this highly likely trend, corporations should be held accountable as distinct juristic persons. This accountability can only be successfully accomplished through implementation of the direct liability model, using the corporate culture model.

Though the purpose of the proposed Bill is to provide provisions that will address the modern day operations of a company, it fails to adequately provide for criminal liability of a corporation. The proposed Bill only makes provision under section 608(1) for the possible liability of a company officer who fails to comply with the provisions of the Bill. The section provides that

“Where, by any section of this Act, it is provided that a company and every officer of the company who is in default shall be liable to a default fine, the company and every officer shall, for every day during which the default, refusal or contravention continues, be liable to a fine not exceeding such amount as is specified in the section, or, if the amount of the fine is not so specified, to a fine not exceeding one hundred thousand shilling.”

Corporate crimes cause great negative impact especially the multinationals whose business affects majority of society for instance the Enron¹⁴⁰ case. Similarly, in **Ken Wiwa v. Shell petroleum Co.**¹⁴¹ caused great negative social and environmental impact on the society and physical terrain of the region.¹⁴²

¹³⁹ op. cit. note 91.

¹⁴⁰ op. cit. note 1.

¹⁴¹ Civ.8386(KMW)(HBP), <http://wiwavshell.org/the-case-against-shell/>, accessed on 20th November 2013.

¹⁴² Ibid.

3.5 Conclusion

The implementation of the derivative and aggregate models, as witnessed in the above mentioned cases, seems to fail due to two reasons. The first is that once liability is linked to a specific individual, the corporation, which benefits from the crime, find a means of evading liability and is able to detach itself from the matter. This is usually followed by a quick replacement of the fallen victims of the derivative model, and the corporations activities resume.

Second, the aggregation and derivative models have short comings as they fail in attaining the main function of criminal prosecution which is to deter individuals whether corporate or human beings from engaging in crime. This is due to the high rate of acquittals or convictions of individuals deemed to be the companiesø alter ego. The result is that deterrence on the part of corporate crime is thrown out the door. Due to this deficiency in corporate liability, there has been an increasing interest in formulating forms of direct corporate liability, such as the organisational and corporate culture theory, rather than derive corporate liability from individual criminal liability

Based on these findings, it is evident that the current derivative model of corporate criminal liability is not as efficient. Consequently, an effective means of accountability of these corporations needs to be established¹⁴³. This research thus calls for the implementation of modern models of corporate liability, in particular corporate liability by use of corporate culture model¹⁴⁴.

¹⁴³ P. Fauconnet, *La responsabilité: étude de sociologie* (Paris: Libraire Felix Alcan, 1920) as described by J.A Quiad, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis* (1998) 43, McGill L.J.

¹⁴⁴ B. Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions* (1983).

CHAPTER 4

A COMPARATIVE APPROACH TO CORPORATE CRIMINAL LIABILITY

4.1 Introduction

In order to resolve the problems raised in chapter three on application of the traditional models of corporate liability, various jurisdictions have implemented legal frameworks that accommodate the modern structure of corporations. Among the key jurisdictions are Australia which has incorporated provisions on corporate criminal liability within its legal framework, the United Kingdom via the 'Corporate Manslaughter and Corporate Homicide Act¹⁴⁵' and the USA which has established a Federal Sentencing Guidelines Manual that is adapted to cater for corporate defendants.

These jurisdictions implement the rationale that the application of corporate culture in attributing liability reflects the distributed nature of the decision-making process in large companies.¹⁴⁶ These jurisdictions embrace the notion that corporate culture can be used to convict a corporation even though no clear *mens rea* can be identified in a particular individual. The liability may be identified in an individual or based on distributed liability to encompass the corporation collectively as corporate or organisational fault.

The Australian Code, serves as an appropriate model¹⁴⁷. The model supports the idea that corporate *mens rea* can be found in a corporations culture, and need not be reliant on the culpability of individual actors. The model acknowledges the difficulty in proving the existence of an inadequate corporate culture, however, it is evident that it is just as difficult, to identify the directing mind as per the identification theory as in the Westray Mine tragedy in **Phillips v. Nova Scotia**¹⁴⁸. A consultation of the Inquiry Report¹⁴⁹ in this tragedy indicates that the identification theory was not a very effective basis for the liability of the company that owned the mine.

¹⁴⁵ Act 2007 (Commencement No. 3) Order 2011.

¹⁴⁶ Ibid.

¹⁴⁷ Anne marie bosvert, 'Corporate criminal liability', 1999, <http://www.ulcc.ca/en/criminal-section>, Accessed on 7th May 2013.

¹⁴⁸ [1995] 2 SCR 97.

¹⁴⁹ 1997, Weststray Story,

https://ece.uwaterloo.ca/~dwharder/epel/Lecture_materials/Westray.Mine.Public.Inquiry.pdf, Accessed on 22nd August 2014.

4.2 Historical background of Australian Legal framework

The main area of the Australian legal system that is crucial to this study is the statutory provisions delving into corporate criminal liability, on the basis of organisational liability via 'corporate culture'. Currently, these provisions are considered to be the most efficient direct liability model of corporate criminal liability worldwide.

Australian law implements the common law system, taking its cue from the United Kingdom, where it was developed in the 1940s as the basis of its jurisprudence. This legal framework is similar to the Kenyan situation, as they both derive their law from common law, based on their history as former British colonies.

4.3 Corporate Criminal Liability based on cultural model

Australia is the first jurisdiction to implement the direct liability model¹⁵⁰. Under this model, the corporation's liability is not fully dependent on the individual offenders but rather on the corporation's culture. The corporate liability is based on its 'culture', policies, practices, management or other characteristics that are encouraged or lead up to the commission of the offence¹⁵¹.

Australian development in corporate criminal liability is noteworthy as the legislation demonstrates a trend towards recognition of the concept of corporate criminal liability¹⁵², which is more consistent with an organizational, than a contractual, model of the corporation¹⁵³.

4.4 Genesis of corporate liability in Australia

The constitutional arrangement in Australia is that the general criminal law is a matter for the States and Territories and not for the Commonwealth. This arrangement gives rise to some problems as, both the Commonwealth and the individual states have varying interests to protect. The problem that arises due to this separation is that the States and Territories do not maintain consistency in their criminal law, criminal procedure and evidence.

¹⁵⁰ Mark Pieth, 'Article 26 The Responsibility of Legal Persons' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary*, 2006.

¹⁵¹ Allen-Arthur-Robinson, 'Corporate culture, a basis for corporate liability of corporations' 2008.

¹⁵² Mueller, "Mens Rea and the Corporation" (1957) 19 U Pitt L Rev 21, 22.

¹⁵³ Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (Canberra, 1994), ch 10.

The lack of a basic commonwealth criminal law has increased due to a lack of general principles on criminal law. Consequently, the applicable law where a criminal prosecution is instigated varies depending on where the proceedings arose under the Crimes Act or under another commonwealth statute.

In an attempt to resolve this situation, the Commonwealth Government established the 'Review of Commonwealth Criminal Law Committee' body commonly referred to as the Gibbs Committee, was established to analyze and make suggestions on how to deal with this problem. In July 1990, the standing Committee of Attorney General proposed a national model criminal code to aid in resolving the situation created by two systems¹⁵⁴. Consequently, a Model Criminal Code Officers Committee (MCCOC) was established to formulate a model law, which later became the Criminal Code Act.¹⁵⁵

4.4.1 The Criminal Code Act

In its Report and explanatory Memorandum to the Criminal Code Bill 1994¹⁵⁶ concluded that the derivative identification model of corporate criminal liability was not viable based on the evolution of corporate structures into complex affairs with greater delegation to relatively junior officers in modern corporations¹⁵⁷

The objective of the committee was to develop a framework of corporate criminal responsibility that was able to convert the principles behind individual criminal responsibility to accommodate the modern corporation. The Committee in its discussion concluded that although the term 'corporate culture' could be viewed as too broad, it was a very close analogy to intent in individual or personal responsibility. Furthermore, the concept of 'corporate culture' casts a much more realistic net of responsibility over corporations than the test set out in matter of **Tesco v. Natrass**¹⁵⁸. The test states that, the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. This approach has been criticised

¹⁵⁴ Mathew R. Goode, 'Constructing criminal law reform and the model criminal code', 2001, <http://www.isrcl.org/Papers/Goode.pdf>, Accessed on 7 November 2014.

¹⁵⁵ Criminal code act No. 12 of 1995.

¹⁵⁶ In Australia, bills are routinely supported by Explanatory Memoranda outlining the import and operation of the new legislation.

¹⁵⁷ Final Report, Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, Final Report: Chapter 2 ó General Principles of Criminal Responsibility(December 1992) 1046108 .

¹⁵⁸ Ibid.

because it restricts corporate liability to the acts of directors and a few high-level managers. This unfairly favours larger corporations because they will escape criminal liability for the acts of all the employees who manage the day-to-day activities of the corporations.¹⁵⁹

The committee argued that a corporation's culture determines the policies, regulations and institutionalized practices within the corporation. This culture could thus be the basis for evidence of the corporation's aims, intentions and knowledge of individuals within it. Consequently, such regulations and standing orders are authoritative, based on the fact that they have emerged from the decision making process recognised and accepted by the corporation.¹⁶⁰ The provisions make companies accountable for their general managerial structures and policies. It provides that negligence may be proven by analysis of these management structures and policies in criminal cases.

4.5 Scope of Organisational Liability Provisions

The Criminal Code Act applies to bodies corporate in the same way as it applies to individuals. It so applies with some modifications. The set out modifications are made necessary because criminal liability is being imposed on bodies corporate rather than individuals.

Further, the Code, acknowledge that a body corporate may be found guilty of any offence, including one punishable by imprisonment.

4.5.2 Determining the physical element of the corporation

Section 12(2) of the Criminal Code Act addresses the problem of determining the relationship between the individual who commits the crime and the corporation. The section expressly states that;

“If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.”¹⁶¹

¹⁵⁹ Marvin Rowe, 'The Approaches of Lord Diplock and Lord Reid in *Tesco Supermarkets Ltd v Nattrass*' 2013, https://www.academia.edu/5596427/Tesco_Supermarkets_Ltd_v_Nattrass, Accessed on 24th August 2014.

¹⁶⁰ Field and Jorg, 'Corporate Manslaughter and Liability: Should we be Going Dutch?' 1991.

¹⁶¹ Australia Criminal Code Act, Section 12. 2, on Physical element.

The section thus forms the foundation of the corporate culture model which links the criminal actions of the employees of a corporation to be the corporation's actions.

The implementation of the principle is evident in, *Christian Youth Camps Limited V. AG and two others*¹⁶² before the Australian Victorian Supreme Court. In this matter, the Christian youth camps corporation had denied accommodation to a group of individuals. The individuals seeking accommodation, had the intention of hosting a same sex group for a camp session, which was contrary to the Christian youth Camps (CYC) corporation's belief and principles. The question was whether the refusal for accommodation based on sexual orientation was the actions of the accommodation manager or those of the corporation? The Supreme Court responded by quoting section 34 of the Australian Equal Opportunity Act.¹⁶³ The section states that

“Subject to sub-section (2), where a person acts in contravention of this Act on behalf of another person either as his agent or employee, the person by whom the act is committed and the person on whose behalf the act is committed shall be jointly and severally liable under this Act in respect thereof. “

The court referred to a judgment in *SEC v Equal Opportunity Board*¹⁶⁴ where the court stated that the language of section 34 and the construction given to it by Smith J fixed the employer or principal with liability, regardless of whether its source was primary or derived.

This is in tune with organisational fault, where the corporation is held accountable, regardless of the position held by the employee who holds the *mens_rea*. Further, the principal is held accountable where no specific individual is accountable due to distributed system of decision making.

The second question was whether the corporation had the capacity to hold religious beliefs and lastly whether attribution necessarily implied ascertainment of corporation's religious belief? The court on this matter concluded that CYC was not a body established for religious purposes thus could not base its actions on religious beliefs or principles.

Similarly, the question of attributing criminal corporate liability arose in the Australian case of *ABC Developmental Learning Centres Pty Ltd v Wallace*¹⁶⁵. The appellant was the proprietor of

¹⁶² [2014] V.CA 75.

¹⁶³ 1984.

¹⁶⁴ [1989] VR 480.

a childcare centre, when one of the children climbed the playground fence and left the centre, despite there being two staff supervising the play area at the time. ABC was fined two hundred dollars for a breach of the Australian Children's Services Act 1996¹⁶⁶ section 27, for failing to provide adequate supervision. ABC then appealed against the fine.

Several questions arose. The first was on attributing the liability of the crime. Having established the failure of the employees to adequately supervise the children, the question was could this failure be attributed to the proprietor ABC?

The court concluded that the acts of the staff members could be attributed to ABC, and that their failure to ensure adequate supervision was attributable to the company. The court further stated that ABC, being a juristic person, could only discharge its statutory duties through its human agents. Regardless of its form, ABC had a duty to meet its statutory obligations as set out in the *Children's Services Act*¹⁶⁷. The Act aims to ensure the supervision, appropriate care of, and the wellbeing of, young children, who are considered to be an extremely vulnerable group. In this instance, ABC was in breach of this statutory obligation, consequently, the court upheld the decision of the trial court.

In its decision, the court described crimes arising out of the conduct of low-level employees as "the heart of the matter." The matter was put succinctly by Callaway JA¹⁶⁸

"Sometimes only the board of directors acting as such or a person near the top of the corporation's organisation will be identified with the corporation itself. On other occasions someone lower, and perhaps much lower, in the hierarchy will suffice. Where the employees are high-level, it may be possible to identify the company with their actions because they represent its directing mind and will. Where the employees are low-level, as in this appeal, the company can still be identified with their actions if this is required by the terms of the offence and the achievement of the policy objectives of the enabling statute."

¹⁶⁵ [2007] VSCA 138.

¹⁶⁶ Education and Care Services National Law Act No. 69 of 2010, [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/B73164FE5DA2112DCA2577BA0014D9ED/\\$FILE/10-069a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/B73164FE5DA2112DCA2577BA0014D9ED/$FILE/10-069a.pdf), accessed on 23rd June 2014.

¹⁶⁷ Ibid.

¹⁶⁸ Director of Public Prosecutions Reference (No 1 of 1996) (Vic) [1998] 3 VR 352; (1997) 96A Crim R 513.

Section 12(3) goes further to cater for circumstances that go beyond the basic element of fault to require intention, knowledge or recklessness as a fault element in relation to a physical element of an offence. The fault element must be attributed to the body corporate if that body corporate 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'. This permission or implied authorization is derived from the corporation's culture. The culture of the corporation would need to show that the corporation did not address the issue or did not condemn the issue once it arose. This curbs the automatic attribution to the corporation criminal activity through personal initiatives by its officials.

The section sets out the basis of determining whether authorization or permission for the commission of an offence, can be derived from the corporation's culture. The section begins by establishing whether 'the body corporate board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence';

However, the legislation moves further to encompass a larger population in attributing liability. The section requires the determination of whether, 'a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence'; This helps in encompassing situations where the corporation's directors delegate their duties to lower staff management, in order to avoid liability.

Lastly, the section seeks to determine whether 'a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance'; or determine whether 'the body corporate failed to create and maintain a corporate culture that required compliance'. This means of determining the corporate culture encompass the shortfalls of the derivative model, which is limited to identifying the liability within one specific individual in the corporation. These sections represent a new approach to corporate criminal liability, in that they are founded on the corporation's own wrongdoing, in the form of deficiencies in its 'corporate culture'.

4.5.3 Corporate fault based on negligence

The legislation provides specific provisions where the fault element of an offence is based on negligence. Essentially, the legislation provides that the fault element for a corporation, is the same as it is for an individual. However, for purposes of assessing whether a corporation was negligent: Section 12(4) (3) provides that negligence may be evident by the fact that the commission of the offence was substantially attributable to 'inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers', or failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate'.

Section 12(4) (2), further provides that the corporation may be found to have the requisite fault element, even though no one individual had that fault element, by viewing the conduct of the corporation 'as a whole'. This means that the aggregate conduct of the employees, agents or officers may amount to sufficient evidence of negligence.

4.5.4 Test of Negligence

Where the liability of the crime involves a determination of negligence, the test of negligence for a body corporate is set out under section 12(4). The provision states that where negligence is a fault element in relation to an offence and no individual employee, agent or officer of the body corporate has that fault element, then the negligence may exist on the part of the body corporate if the body corporate conduct is negligent when viewed as a whole.

The section provides that this negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or by failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

4.5.5 Fault elements other than negligence

Section 12(3) makes provision for instances where the fault element goes beyond negligence to include intention, knowledge or recklessness as a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

The section provides that such authorisation or permission may be established through several ways. The first is by proving that the body corporate board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence.

The fault element may also be shown by proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence. This provision goes beyond the directors as per the identification approach, to include all employees within the corporation, thus widening the scope of determining corporate fault. However, the provision does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission. Further, the fault element can be proved by showing that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.

Lastly, the fault element can be proved by providing evidence that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. In this regard, there are several factors that are considered. The first, is whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate. This would involve investigating the policy or corporate reaction over previous or similar incidents in its past.

In addition, it would call for an investigation as to whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence. Similarly, this would involve an analysis of the reaction of the corporation to past similar incidents.

Furthermore, if recklessness is not a fault element in relation to a physical element of an offence, subsection 5(2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

4.5.6 Trade Practices Act

In addition, the Australian system has made provision for corporate liability in various statutes such as in section 84 of the Trade Practices Act¹⁶⁹ 1974.

The section sets out the persons whose actions may be taken to represent the company as in *Trade Practices Commission v. Tubemakers of Australia Ltd*¹⁷⁰. The purpose of the section is to attribute liability to a body corporate for the acts of others. It is intended to facilitate proof of corporate responsibility beyond the position which would otherwise obtain at common law as in the case of *Houghton v. Arms*¹⁷¹ where Arms' appeal against was allowed on the basis that an employee acting within the scope of actual authority could be liable for misleading or deceptive conduct.

4.5.7 Limitation of the Australia corporate culture criminal liability model

In order to accommodate the new model, the Australian Law Reform Commission in 2006 (ALRC) made recommendation that the Government should expand the range of possible penalties for corporations to include orders for corrective action, community service and police supervision of the offence committed. In addition, the ALRC also recommended that section 16A(2) of the Crimes Act¹⁷², which sets out factors to be taken into account in sentencing, should be amended to include: the type, size, financial circumstances and internal culture of the corporation and the existence or absence of an effective compliance program designed to prevent and detect criminal conduct.¹⁷³ These recommendations were made on the basis that most civil regulatory regimes contain provisions stipulating that factors such as the deliberateness of the breach, the seniority of those involved, and the corporation's approach to compliance are relevant to the determination of an appropriate penalty. Further, even where such provisions are not expressly applied, courts tend to take these factors into account as in the case

¹⁶⁹ Laws of Australia, Trade Practices Act, 1974.

¹⁷⁰ (1983) 47 ALR 719 at 739-740.

¹⁷¹ [2006] HCA 59 .

¹⁷² Crimes Act of Australia, Act No. 12 of 1914 as amended.

¹⁷³ Australian Law Reform Commission, Same Crime, Same Time: The Sentencing of Federal Offenders (tabled 13 September 2006), Recommendation 30.

of **Trade Practices Commission v Dunlop Australia**.¹⁷⁴ However, these recommendations have not yet been implemented.

4.6 UK Corporate Manslaughter and Corporate Homicide Act¹⁷⁵

The Corporate Manslaughter and Corporate Homicide Act 2007 come into force in 2007, across the UK. The Act sets out a new offence for convicting corporations where the activities of the organisation result in a person's death and amount to gross breach of relevant duty of care owed by the organisation to the deceased. Under this approach, corporate liability will be dependent on the management systems and practices across the organisation.

According to the act the extent of a company's responsibility for the wrongful act will be determined by ascertaining whether the human person responsible for the physical commission of the wrongful act can properly be identified as part of the company's directing mind, as per the identification principle. This is as per section 1(1) of the act which provides that an organisation will be guilty of the offence of corporate manslaughter if the way in which its activities are managed or organized causes a person's death and amounts to gross breach of relevant duty of care owed by the organisation to the deceased.

This provision confirms that the act is a reaffirmation of the identification principle as liability is determined by examining the management or organisational failings of a company.

The variation arises through section 1(3), which states that a corporation will not be guilty of an offence unless the way in which its activities are managed or organized by its senior management is a substantial element in the breach of relevant 'duty of care'. Though it may be impossible to attribute responsibility for a breach of relevant duty to an individual senior manager, it may be possible to establish corporate liability through the cumulative conduct of senior manager of the company. However, the link between the actions of the management to the liability of the corporation results in a drawback as to some extent; it goes back to the identification principle.

174 (1980) 30 ALR 469 at 484-5.

175 Act 2007 (Commencement No. 3) Order 2011,

<http://www.legislation.gov.uk/ukpga/2007/19/crossheading/corporate-manslaughter-and-corporate-homicide>,

Accessed on 6th October 2014.

Consequently adopting the UK statute law on Corporate Manslaughter and Homicide would be futile as it offers limited and little amendment to the current situation on corporate liability.

4.7 United States Federal Law

4.7.1 Historical background of corporate criminal liability in US

Corporate criminal liability in the United States (US) developed in response to the industrial revolution and the rise in the scope and importance of corporate activities. In the United States, corporate criminal liability developed in response to the industrial revolution and the rise in the scope and importance of corporate activities.

After the civil war, the scope of federal criminal law was increased. This was due to the dramatic post war economic expansion and the growth in interstate commerce fuelled by the development of a national rail system. This growth leads to the need for more legislation. The Elkins Act was one of the legislations enacted in this regard.

Although some earlier state cases recognized corporate criminal liability, the renowned case in the development of federal criminal law was **New York Central & Hudson River Railroad Co. v. United States**¹⁷⁶. In the matter, the Supreme Court unanimously rejected New York Central's claim that the implementation of criminal liability was unconstitutional. The basis of their argument was that, corporate criminal liability punished innocent shareholders without due process.

The corporate liability principle that corporations are persons like any other individual has been emphasised in recent times, by the Supreme Court's decision in Citizens United versus Federal Election Commission. The court rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment based on the fact that such corporations or associations are not natural persons.

¹⁷⁶ 212 U.S. 481 (1909).

Though Australia has embraced the corporate culture model, the effect of the provisions is limited in Australia. This is due to the fact that the model is only relevant in determining the corporation's liability.

The American system, incorporates the concept of corporate culture, in a manner that impacts both at the liability stage in deciding on whether to institute criminal proceedings and the sentencing stage, on the appropriate sanctions for the corporation. The U.S. model of corporate liability, aims at both deterrence and retribution by setting out liability for corporations and issuing punishment for most of them.

Under the American doctrine of *Respondeat Superior*, three requirements must be met in order to impose liability to a corporation. These requirements are state as follows; First, a corporate agent must have committed an illegal act which is then referred to as the *actus reus*, while having with the requisite state of mind, the *mens rea*. If a particular agent, regardless of rank in the corporation, had the necessary state of mind, this *mens rea* can be imputed to the corporation.

Second, the agent must have acted within his scope of employment. The scope of employment includes any act that occurred while the offending employee was carrying out a job-related activity. In fact, this requirement is so broad that courts may hold corporations liable even when corporations have forbidden the wrongful activities.

Finally, the agent must have intended to benefit the Corporation. Under this easily met standard, the employee need not act with the exclusive purpose of benefiting the corporation and the corporation need not actually receive the benefit.

4.7.1.1 Means of imputing corporate intent

A corporation will not be liable for the act of its employees unless those actions are designed to benefit the corporation. A corporation's liability for the acts of its employees, must represent the intent of the individual to the corporation. This can be through several means.¹⁷⁷ One of the means is through conspiracies. This may be used to attribute a corporation's liability for a

¹⁷⁷ Hyewon, Han; Wagner, Nelson -Corporate criminal liability.(Twenty-Second Annual Survey of White Collar Crime) American Criminal Law Review (2007) .

conspiracy to commit a criminal act by its employees, or for conspiracies involving one employee and others not employed by the corporation. However, the theory is not fully embraced by the courts. Dispute regarding whether a corporation may conspire with its own employees, remains unresolved. The "Intracorporate conspiracy doctrine"¹⁷⁸ declares that because a conspiracy requires an agreement between two or more distinct persons, and because a company is a single entity made up of its employees, it may not be convicted of conspiring with its own employees. Consequently, application of the doctrine would shield the corporation from criminal liability in that respect.

The U.S. model recognizes that corporations can be criminally liable for the prior wrongdoing of a target corporation after a merger or consolidation. In order to determine whether a corporation can be liable for the acts of its predecessor, federal courts will apply state corporation law governing successor liability. In addition, many states provide statutorily imposed periods of time after dissolution during which the dissolved corporation can be held liable.

Further, a corporation may be held liable for misprision of felony¹⁷⁹, which is the offense of concealing and failing to report a felony. This requires proof that a principal committed a felony; the defendant knew of the felony; failed to notify authorities as soon as possible; and took affirmative steps to conceal the crime. To sustain a charge of misprision; an active part in concealing the crime is required. However, though the American system provides for felony and the same is firmly established for individual defendants, its availability for use against defendant corporations has not been conclusively resolved.

Corporations can also be criminally liable for deliberately disregarding criminal activity. This is through the "wilful blindness" doctrine where a corporate agent becomes suspicious of a criminal violation but deliberately takes no action in an attempt to mitigate or investigate potential criminal activity. According to this doctrine, the proof of either actual knowledge or conscious avoidance satisfies the knowledge requirement.

¹⁷⁸ Douglas Smith, "The Intracorporate Conspiracy Doctrine and 42 U.S.C. 1985(3)", 1996.

¹⁷⁹ Crimes and criminal procedure act, section 4, <http://www.gpo.gov/fdsys/granule/USCODE-2011-title18/USCODE-2011-title18-partI-chap1-sec4/content-detail.html> Accessed on 11th September 2014.

Lastly, a corporation's intent can be imputed through the "collective knowledge" doctrine¹⁸⁰. This doctrine imputes to a corporation the sum knowledge of all or some of its employees. This is effected through the aggregation of individual employee's knowledge for the purpose of creating the necessary guilty intent for the corporation¹⁸¹. Thus, a corporation may be liable even if there is no single employee entirely at fault. By recognizing that the acts of a corporation are "simply the acts of all of its employees operating within the scope of their employment," the collective knowledge doctrine prevents corporations from evading liability by compartmentalizing and dividing employee duties. The court also supported the notion that the intent required for the crime could be imputed from agents in much the same way that it is imputed in the civil context.¹⁸²

4.8 Impact of corporate culture provisions on criminal liability

The corporate culture provisions have made a significant impact in the Australian jurisdiction on the scope of criminal liability, due to the new approach in attributing corporate liability. This change is due to the fact that criminal liability is now relatively easier to implement as compared to the derivative model. The rationale being that the application of the concept of corporate culture as a means of attributing liability, greatly increases the success rate of holding corporations accountable for their corporate actions. This creates a ripple effect that motivates corporations to implement and set up stringent corporate policies, for fear of facing prosecution.

However, the effect of the provisions is limited in Australia, as they are only relevant at the liability stage, when determining the corporation's liability. The impact is not at its peak as Australia is still lacking the necessary legislation to determine the necessary sanctions to be imposed on the corporations. The American system, has managed to effectively incorporate the concept of corporate culture, to have an impact both at the liability stage in deciding on whether to institute criminal proceedings and the sentencing stage, on the appropriate sanctions for the corporation.

¹⁸⁰ Jonathan Schmidt and Kevin Daly, "Criminal Liability Theories Aimed at Companies & Officers" 2014.

¹⁸¹ Erenberg and Egan, "Corporate criminal liability" 2012, <http://www.ehrenbergeganlaw.com/> Accessed on 10th August 2014.

¹⁸² V.S. Khanna, "Is the notion of corporate fault a faulty notion?: The case of Corporate Mens Rea" (1999) 79 Boston University Law Review 366.

The use of corporate culture factors at the sentencing stage may be most effective as it provides a means of implementing unconventional remedial measures on a corporation such as the American remedial measures such as adoption of compliance policies and staff education¹⁸³. In addition, it would efficiently serve to deter corporate crime by the corporation as an entity or its employees due to the risk of criminal liability and the subsequent sanctions.

Moreover, taking corporate culture into account at the sentencing stage may offer more flexibility. This is due to the fact that corporations may have diverse circumstances affecting or determining their corporate culture, thus flexibility would be key in responding to the varying degrees of moral blameworthiness of the corporation. Direct liability models, focus on holding the corporation accountable for its failure in implementing appropriate and law abiding corporate culture. This culture can range from mere oversight and incompetence, to wilful disregard for human life. Consequently, sentencing practices would, accommodate these differences and allow the courts to seek the root of the corporations deficiencies that lead to the criminal conduct¹⁸⁴.

4.9 Conclusion

The implementation of the corporate culture provisions, whether at the liability stage or the sentencing stage is effective in deterring corporate crime. Though challenges still exist in implementing the corporate culture theory, the Australian jurisdiction has provided valuable guidance of its benefit. Furthermore, with the growth of globalization and the increase in reliance on corporations for the provision of goods and services, the change towards a more efficient mode of holding corporations for their crimes is inevitable. As evident in the case of **Re Caremark**,¹⁸⁵ where the court credited organizational guidelines with providing “*powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to make prompt, voluntary remedial efforts.*”

¹⁸³ Ibid.

¹⁸⁴ Stephen Cohen, “Compliance, Corporate Governance, and Ethics: The New Regime 2001.

¹⁸⁵ 698 A.2d 959 (Del. Ch. 1996).

CHAPTER 5

5.1 CONCLUSIONS AND RECOMMENDATIONS

5.2 SUMMARY OF FINDING

This study was carried out to provide a case for the implementation of the corporate culture model of attributing liability, as opposed to the current identification model implemented in Kenya and several common wealth states.

The study sought to answer three main questions which include; the current status of the law on corporate criminal liability in Kenya? the efficiency of the identification model in Kenya and whether proper implementation of corporate culture theory, can curb the menace of corporate crime?

The study revealed the following findings. The study shows that Kenya and most common wealth states have been tied to the identification model. The study shows that with the growth of the global market, corporations have become complex global institutions. These large scale operations translate into two things. One is that the corporations' actions have a greater impact on numerous people, thus negative or criminal action can lead to global negative impact. Second finding is that due to the size of the corporations, the past basic hierarchical system of management is not easily applicable thus limiting the identification model.

A review of the Kenyan case in chapter 3, reveals several issues. It establishes that Kenyan law recognizes the concept of separate entity of a corporation and criminal liability of corporations. However, this study has established that the Kenyan criminal laws contain minimalist provisions with regards to corporate criminal liability.

It is evident that corporations in Kenya face criminal charges. However, the study reveals that the prosecutorial arm of the legal system has faced challenges in identifying and deriving the required *mens_rea*, leading to numerous acquittals. In addition, due to the challenge on prosecution of corporations, most cases against corporations tend to be based on breach of regulatory offences. Consequently, most of the convictions that have been sustained in Kenyan

courts with regard to corporate crime have been brought under various statutory provisions other than the Penal Code which is the principal statute.

A review of corporate criminal liability in Australia, United States and United Kingdom revealed several issues.

A look at the United Kingdom and the recent enacted Corporate Manslaughter and Corporate Homicide Act¹⁸⁶ reveals that the principle behind the act is not a far difference from the principle behind the identification model. Consequently, the challenges that were faced in attributing corporate criminal liability under the identification model are the same challenges faced under the new act.

A review of the Australian law on corporate criminal liability reveals that Australia is among the few countries that have taken charge in implementing the new organisational fault model. However, the jurisdiction has not made provision for sanctions to be meted out on corporations that are eventually convicted of criminal activity.

Lastly, a review of the United States legislation on corporate criminal liability reveals that appropriate sanctions that take into consideration the nature of the defendant being a juristic person, are necessary.

5.3 CONCLUSIONS

The study establishes that the justification for treating corporations as accountable for the harms and wrongs they cause are found in the ability of the corporation to exist as a juristic independent entity. Fairness and justice dictates that these corporations while enjoying their rights, should also bear the negative consequences of their actions. This includes facing criminal liability where they carry out actions that are of a criminal nature.

Furthermore, this accountability is justified by the fact that the activities of these corporations have both a direct and indirect effect on the lives of the society as a whole.

¹⁸⁶ op. cit. note 145.

The decision to make corporations criminally liable and to find such liability on an appropriate basis is one of principle. The conclusion is that in addition to the complexity of investigations into the criminal liability of corporations, the traditional models of attributing criminal liability of corporations are inefficient when dealing with modern organizations and functioning of corporations.

This study concludes that the concept of corporate criminal liability in Kenya is inefficient due to the poor implementation of corporate liability via the identification model. In order to ensure reform, change has to be incorporated, which would lead to better checks on corporations in the society.

5.4 RECOMMENDATIONS

5.4.1 Adoption of corporate culture model

Kenya as a common wealth state is influenced by legal developments of the UK. Currently, in a bid to tackle corporate liability, the UK has established a new proposed draft criminal code. However, the code to a large degree codifies the Tesco decision that is based on the identification model.¹⁸⁷ This means that the English Draft code would be maintaining the existing derivative model of identification, thus no real change would occur. Having this in mind, it would be futile for Kenyan jurisdiction to adopt the UK proposed criminal code, with regards to corporate liability as it would be faced with the same restrictions as the current situation.

One of the main recommendations is not only to adopt corporate criminal liability via corporate culture, but to change this corporate criminal liability so that the burden of proof is on a corporation that prima facie has committed an offence. In order to reduce the investigative work required to identify a corporation's corporate culture, the legislation should be crafted in a manner that imposes a certain burden of proof on a corporation that prima facie has committed an offence. The Australian Code for instance, puts the onus on the corporation to prove that it exercised due diligence to prevent the commission of the offence. This rational should be considered within the Kenyan legal system. Though this is contrary to the renowned presumption

¹⁸⁷In section 30(3)(a) of the Draft Code, the "controlling officer" is defined as follows: "Controlling officer" of a corporation means a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was, or was validly, appointed to any such office).

of innocent until proven guilty, the rationale behind the concept should be considered for implementation within the Kenyan jurisdiction.

This study advances the proposal for the implementation of the corporate liability model applied in the Australian code. According to this model, a distinction is created between subjective fault elements and negligence. This ensures that corporations may be charged with offences involving intention, knowledge, recklessness or negligence. Similarly, the Kenyan jurisdiction in implementing the same should make the distinction in order to ensure that there is a difference between fault element and negligence when attempting to establish criminal liability.

5.4.2 Sanctions

The study points out that one of the main reasons for the increase of corporate crime in Kenya, is the lack of significant sanctions. The United States Sentencing Commission Guidelines manual¹⁸⁸ is a key source of best practice sanctions that can be applied to corporations that are charged and convicted of crime.

The manual provides for the sentencing of organizations under chapter eight. It provides that the aim of the punishment meted out by court is to remedy any harm caused by the offense, to divest any profits made by the organisation through the criminal act and generally to ensure that the guidelines offer an incentive to the organizations to reduce or ultimately do away with criminal conduct¹⁸⁹

5.4.3 Corporate fines

Currently, the sanctions imposed are fines. These fines in comparison to the profits gained from criminal activity are a small price to pay for the corporations thus no deterrence occurs. In addition, implementation of fines is limited within the statutory limits to ensure profits acquired through the criminal activities are divested. In this regard, this study recommends a review of sanctions on liable corporations by making them higher in order to achieve deterrence and foster desirable behaviour in the organisations. The courts may impose organisational probation, to secure restitution payments and to secure payment of penalties and fines.

¹⁸⁸United States Sentencing Commission Guidelines manual, <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2007/manual/GL2007.pdf>

¹⁸⁹ Ibid

5.4.4 Retribution

The principle of corporate criminal liability emphasizes on the goal of deterrence. Some of the penal sanctions imposed on the convicted corporations include restitution orders, where the organisation is obligated to compensate the victims for the harm caused. The basis being that the corporation committed a crime and consequently should be punished not only to deter future conduct, but to restore and reaffirm the society's core values. Hence the recommendation for the Kenyan courts to affirm retributive justice in the advancement of the doctrine.

5.4.5 Corporate Penalties

Corporate probation¹⁹⁰ is corporate sanction that can be implemented in order to create a system of corporate liability that deters corporate crime. Though Probation is not existent for corporate offenders, there may be circumstances in which probation would be appropriate to ensure organizations are deterred from crime. Corporate probation may include providing restitution to victims of the offence, requiring the corporation to inform the public of the offence for instance through running adverts, admitting to the criminal acts, containing the sentence imposed and the remedial measures being undertaken by the organization.

In addition, the courts may also impose remedial orders as a condition of probation. These orders require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.

5.4.5 Community service

Community service is one of the options that may be implemented by court against a corporation. The corporation may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense. The organisation has to provide free service through the use of its human resource to the community in a bid to remedy the damage caused.

¹⁹⁰-Criminal liability of organizations Department of justice Canada, <http://www.justice.gc.ca/> Accessed on 2nd September 2013.

5.4.6 Judicial activism

This study has since established that corporate criminal liability developed through the courts of the common law. It has further established that in Kenya the doctrine has yet to be fully embraced or developed.

This study recommends that the courts through judicial activism, participate in the development of this area of law, by implementing the modern theories and rationale of corporate liability. This will eventually result in an advancement of corporate criminal liability within the Kenyan jurisdiction.

5.4.7 Imposition of court rules

The establishment of a predetermined set of rules to be imposed by the courts is a means of corporate sanction. The courts set out conditions that are flexible enough to be incorporated into the structures of various corporations regardless of their complex corporate structures. Some of these conditions include obligation to implement policies and procedures to reduce the possibility of further criminal activity. Obligating the organisation to name a senior officer to oversee their implementation; and report on progress to a suitable overseeing body that is more suitable to supervise the organization.

5.4.8 A Model Compliance Program for Sector Specific Corporations

Effective compliance and ethics programs are a means of ensuring deterrence. This occurs where an organisation has to undertake due diligence to prevent and detect criminal conduct or promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

The corporation is obligated to establish a compliance program which the employee are encouraged to follow, thus taking reasonable measures to prevent crime. Where crime occurs, the prosecution is charged with the burden of proving the corporations failure to prevent crime in order to have the benefit of imputing the employee's conduct to the corporation. This will require proof that the corporations' culture was lacking thus leading to the occurrence of the crime.

In addition, this approach encourages self-policing while ensuring that corporations are not liable for the acts of rogue employees who despite the corporations best efforts, still commit crime.

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