



Strathmore
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**CORPORATE CRIMINAL LIABILITY: THE NEED TO
RECONCEPTUALIZE EXISTING CORPORATE CRIMINAL
LIABILITY LAWS IN KENYA.**

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Declaration

I, ISABELLA WAMBUTTA CLEMENTINA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Balla Galma.

DEDICATION

To God, for His grace and love, and to my parents and siblings for their support and inspiration during this journey.

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The Civil Procedure Rules (2010)

The Penal Code Cap 63 Laws of Kenya

The Constitution of Kenya (2010)

The Criminal Procedure Code, Cap 75 Laws of Kenya

List of abbreviations

GECS: Global Economic Crimes Survey

CPC: Criminal Procedure Code

ABSTRACT.

Corporate criminal liability is not a foreign concept in Kenya. Numerous legislations are in place and acknowledge its existence and importance in society. However, the statutes assume that there exists no distinction between natural and artificial persons hence imagines that the implementation of criminal law towards them is analogous. This poses interpretation and implementation challenges as a result of the wide discretionary gap left to judicial officers to decide on how to implement the concept without relying on natural persons. As a result, corporate crimes go without punishment despite the negative impact those actions pose to the society. It denies the implementation of a 'just regime of punishment' for crimes orchestrated by corporations. This paper seeks to examine the methods through which corporate criminal liability is addressed by the judiciary and how is established with regard to ascertainment of corporate mens rea. A proposition will be made on the need to create guiding rules and regulations for allocation of corporate mens rea to ensure efficient allocation of guilt.

CHAPTER 1

1.1 Background to the study

The application of derivative models of liability (nominalism), which locate the culpability of a corporation in its natural persons is the fundamental influence of this dissertation. Due to the literal understanding of criminal procedure there appears to be an indispensability of illustrating a causative link between the natural co-accused and the offence in question as per section 23 of the Penal Code of Kenya thus casting the net too wide. The adoption of corporate criminal liability laws in Kenya poses many challenges with regards to implementation of sanctions, interpretation of current legal provisions and models of attributing liability, as it is a new concept of law that remains unexplored in this jurisdiction.

The Constitution of Kenya guarantees the rights and freedoms of an individual and defines a “person” as including a company or association or body of persons, corporate or incorporate.¹ It is thus presumed that a corporation may, be convicted of any offence,² whether of strict liability or one requiring *mens rea*, more so where the statute creating the offence simply uses the term ‘person’ in the prescription of criminal responsibility and liability. In practice however, implementation of corporate criminal liability poses challenges due to the assumption that guilt cannot be ascribed to it without involving its members.³

The term ‘Corporate Crime’ is described as corporate activities which are perceived to involve a transgression of some aspect of criminal law.⁴In a bid to comply with the principles of criminal law so as to satisfy the threshold required for establishment of corporate crime, establishment of corporate *mens rea* is traceable to *Goodspeed v. East Haddam Bank*,⁵where the court reasoned that prohibiting lawsuits against a corporation due to lack of actual *mens rea* would defeat the enforcement of corporate liability in tort matters. The provision of corporate *mens rea* gives a corporation the capacity to commit a crime, hence the capacity to be held liable in its own right since establishment of *actus reus* and *mens rea* is possible. In Kenya however, statute fails to establish the means through which such establishment may be made possible.

¹ Article 260, The Constitution of Kenya, 2010.

² Section 23, *Penal code*, Act No. Cap 63 of 2014.

³ Dewey J, ‘The historic background of corporate legal personality’ 35 *The Yale Law Journal* 6, 1926, 655-673.

⁴Wells C, *Corporations and Criminal Responsibility*,2 ed, Oxford University Press, New York, 2001, 104.

⁵*Goodspeed Airport v East Haddam Inland Wetland* (2010), United States District Court, Connecticut.

In Kenya however, the challenge arises in that, most of the statutory provisions as well as substantial criminal law theories, practice and procedures do not envisage a wrong 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 when it comes to establishing *mens rea* and allotment of sanctions.

Corporate crime is on the rise in Kenya and is leading to the detriment of the general public as well as specific individuals.⁶ Studies carried out in Kenya indicate that the country is among the most highly-ranked corporate crime hub in consonance with the Global Economic Crimes Survey (GECS).⁷ The survey shows that most corporate crimes are of an economic nature and are facilitated by corporations due to the lack of proper deterrence measures such as successful corporate prosecutions and convictions.⁸ The poor rate of successful corporate prosecutions is attributed to the high threshold of establishing their criminal liability due to the implementation of the existing laws, with no clear guidelines to rely on. Kenya's position therefore goes against the rationale behind the concept of corporate liability; to enhance deterrence through holding corporations accountable. This is due to the fact that unrestricted corporate power normally amounts to great damage as corporations have a higher capacity of causing loss than an individual.⁹

1.2 Statement of the problem

Kenyan courts have proceeded as though corporate criminality is not any different from that of natural persons. The existing statutory provisions pertaining to corporate criminal liability have been adopted from The United Kingdom, their enforceability is however proving to be arduous due to the assumption that they are not specifically tailored to meet the circumstances of Kenya. This brings about the question of adequacy and applicability of the current legislations.

⁶ The GAN Business Anti-Corruption Portal, 'Kenya Corruption Report,' <https://www.ganintegrity.com/portal/country-profiles/kenya/> on 16th September 2019..

⁷ *Report of the task force on the review of the legal, policy and institutional framework for fighting corruption in Kenya*, 2015, 25-26.

⁸ Melnikov B, 'Combating corruption: A private Sector Approach' Reform toolkit ,2011, 4.

⁹ Walsh J and Pyrich A, 'Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?' *47 Rutgers Law Review* 605, 1995, 649.

Furthermore, there exists a presumption that the norm of applying the derivative model of ascribing corporate liability is the leading cause of lack of novelty when it comes to discerning the scope of corporate crimes and dispensing their equivalent sanctions.

1.3. Statement of objectives

The main objectives that this dissertation seeks to establish are:

- (i) To ascertain the level of enforceability, interpretation and regulatory capacity that Criminal laws in Kenya have with regards to corporate criminal liability prescription.
- (ii) To establish whether corporate *actus rea* and *mens rea* are effectively attributed in matters of corporate criminal liability and punishment.
- iii) To discern the nature and scope of offences a corporation may be held liable for and the applicability of the existing sanctions.

1.4 Hypothesis

There is a significant correlation between the available corporate criminal liability laws in Kenya and the success rate of deterrence through holding corporations accountable for their actions or omissions and imposing sanctions on them.

1.5 Research questions

- i) What are the procedural aspects and principles upon which criminal liability may be imposed on a corporation?
- ii) Why are corporations required to have mens rea before imposing liability as opposed to strict liability or negligence standards?
- iii) To what extent should the law take into consideration the acts of corporation agents when it comes to perceived criminal acts by a corporation?
- iv) How is the main function of criminal prosecution procured by the sanctions applicable to corporations?

1.6 Justification/significance of the study

A review of the existing corporate criminal liability legal provisions will expose the interpretation and enforceability challenges that require to be curbed. This will necessitate the emergence of novel laws, judicial principles, sanctions and mechanisms to ensure the development of the unexposed corporate criminal liability field in Kenya.

1.7 Theoretical framework

i) Identification theory

The theory is interpreted to illustrate that criminal violations normally entail two elements, *actus reus* and *mens rea* which may only be ascribed to corporations through its workers. Since corporations are considered to be purely incorporeal legal entities,¹⁰ they do not possess any mental state and the only way to impute intent to a corporation is to consider the state of mind of all its members. The theory encompasses a simple and logical method of attributing liability to a corporate offender,¹¹ if corporations do not have intention, someone within the corporation must have it and the intention of this individual as part of the corporation is the intention of the corporation itself.¹² In jurisdictions where the theory has been widely adopted, they have developed a three-part test to determine whether a corporation will be held vicariously liable for the acts of its employees.¹³ First, the employee must be acting within the scope and course of his employment. Secondly, the employee must be acting, at least in part, for the benefit of the corporation, yet it is irrelevant whether the company actually receives the benefit or whether the activity might even have been expressly prohibited. Thirdly, the act and intent must be imputed to the corporation.

ii) Realist theory.

The reality theory is that corporate bodies are real persons as opposed to the notion espoused by the fictionists that corporate bodies are legal creations. Gierke, the father of reality theory, states that “a *universitas* or corporate body is a living organism and a real person, with body and members and a will of its own. Itself can will and itself can act”¹⁴

The realist approach asserts that the responsibility of the corporation is primary and not dependent on the responsibility of any individual. The realist framework attaches responsibility to the corporation by looking at what the corporation itself acted or omitted as an organization, what it knew or ought to have known about its conduct, and what it did or ought to have done to prevent the harm from occurring. The realist models seek to reflect the corporation as an entity with its own distinctive goals, its own distinctive culture, and its own distinctive personality rather than focusing on individual fault. This personality or culture is unique and arises from several identifiable characteristics which include: the structure of the

¹⁰*Salomon v Salomon & Co Ltd* (1897), The United Kingdom House of Lords.

¹¹<https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/9/09_chapter%203.pdf> on 19th September 2019.

¹²<https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/9/09_chapter%203.pdf> on 19th September 2019.

¹³ Neild D, ‘Vicarious Liability and The Employment Rationale’44 *Victoria University of Wellington Law Review* 4, 2013, 714.

¹⁴ Dewey J, ‘The Historic Background of Corporate Legal Personality,’655-658.

corporation, existence of corporate goals, reaction to past violations and the existence of reasonable efforts to educate its employees about legal requirements.¹⁵

The realist theories proposed the application of a new direct liability model which seeks to dispense with the necessity of any connection between corporate and individual liability. The approach instead aims at constructing a scheme that recognizes the criminal liability of a corporation on the basis of its organizational conduct and fault regardless of whether or not any individual would have committed an offence.¹⁶

iii) 'Just deserts' theory

The "just deserts" theory, a variant of the traditional retributive approach is apt to justify the imposition of criminal punishment on corporations. This theory is based on the idea that the justification of punishment is to be found in its intrinsic character as a deserved response to crime. It asserts that in the allocation of sanctions for the distortion of moral order there must be proportionality between the gravity of the offence and the culpability of the offender.¹⁷ This account of retributivism would have a particular effect on corporate punishment. Considering that corporate crime can be much more serious than street crimes, according to this rationale, the punishment of corporations would consequently be harsher. If deterrence can never be regarded as the sole justification for criminal liability, it should not be seen as the only rationale for corporate criminal liability.¹⁸

The concept of just deserts seeks to preserve human dignity through punishment. It asserts that a person is a rational individual with the free will to make a moral choice whether or not to engage in conduct that is known to be prohibited. Retribution under a just deserts' principle treats a defendant as a dignified person by responding to his or her conduct in a way that respects his or her choice to engage in wrongful behaviour.¹⁹

¹⁵ Clough J, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' 18 *Criminal Law Forum* 4, 2007, 275-276.

¹⁶ Ochich G, *The Company as a Criminal: Comparative Examination of some trends and Challenges Relating to Criminal Liability of Corporate Persons*, 3.

¹⁷ Von Hirsch A, 'Proportionality in the Philosophy of Punishment' 16 *The University of Chicago Press Journals*, 1992, 55-98

¹⁸ Walsh C and Pyrich A 'Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?' 638.

¹⁹ Lewis C, 'The humanitarian theory of punishment' 13 *Association of Mormon Counselors and Psychotherapists Journal* 1, 1987, 148

1.8 Legal Framework

This dissertation will rely on legal provisions contained in the following laws:

The Companies Act Cap 486 Laws of Kenya

The Civil Procedure Act Cap 21 Laws of Kenya

The Civil Procedure Rules (2010)

The Penal Code Cap 63 Laws of Kenya

The Constitution of Kenya (2010)

The Criminal Procedure Code, Cap 75 Laws of Kenya

1.9 Literature Review

In the Kenyan context, George O. Otieno Ochich, posits that Kenya has a highly fluid default situation and there is need for the development of local principles on the criminality of corporate citizens.²⁰ The adoption of 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. In addition, the aggregate theory is also deemed to be illogical as it combines the state of mind of one person and the conduct of another undermining the fact that they are two distinct persons. The complexity behind these existing models of criminal liability, have created limitations in their implementation. This is due to the fact that the corporation's 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 usually acquitted as individual liability of the senior management is rarely proven. The author establishes that,²¹ 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 criminal liability from individual criminal liability.

Celia Wells, points out the theories that are applicable within the common law jurisdictions.²² She points out that English law, takes up the identification theory which directs the blame on the individual senior officials referred to as the 'brains' and renders the company liable only

²⁰Ochich G, The Company as a Criminal: Comparative Examination of some trends and Challenges Relating to Criminal Liability of Corporate Persons, *II Kenya Law Review*, (2018), 37-38.

²¹ Ochich G, The Company as a Criminal: Comparative Examination of some trends and Challenges Relating to Criminal Liability of Corporate Persons, *II Kenya Law Review*, (2018), 27.

²² Wells, Corporations and Criminal Responsibility, 156.

for their culpable transgressions. 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 because vicarious liability is restrictive while identification is deemed to be insensitive to the diversity of corporate organisation.

Sara Sun Beal 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.²³ This argument, however, is countered by the fact that it is inconceivable 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. The author states that in both civil and criminal cases against a corporation, the end result is that where found liable, the typical punishment for a corporation is a penalty fine.²⁴ The author provides a 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.

Andrew Weissmann 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 effects²⁵. 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 of how to distinguish between misconduct at the corporation and misconduct by the corporation. This distinction may provide the crucial

²³Beale S, 'A response to the critics of corporate criminal liability' 46, *American Criminal Law Review* 1481, 2009,1490-1500.

²⁴ Beale S, 'A response to the critics of corporate criminal liability,'1490-1500.

²⁵Weissman A, 'A New Approach to Corporate Criminal Liability' 44 *American Criminal Law Review* 4, 2013, 186-190.

perspective necessary to protect corporations. This is because at times, the corporation may be the victim, where it suffers for its agent's misconduct.²⁶

1.10 Research Design and Methodology

The dissertation will be based on the qualitative research method and a comparative study of relevant commonwealth jurisdictions as to the applicable models of corporate crime attribution of guilt and allotment of sanctions.

In the course of conducting this research, secondary sources shall be the main source of materials used and these include books, case law, statutes, international treaties, articles and journals. Collection of these materials shall include intensive library research and internet searches.

1.11 Assumption

The definition of the term 'crime' as requiring knowledge and intention in the commission or omission of an unlawful act for there to be a persuasive case capable of being remedied by sanctions.

1.12 Limitations of the study

Kenyan criminal law is underdeveloped when it comes to corporate criminal liability ascription, interpretation and implementation. The minimalist provisions regarding this area of law will therefore pose a great challenge. Furthermore, this dissertation will face time constraint as it is to be completed within three months.

1.13 Chapter breakdown

CHAPTER 1

This chapter provides the introduction and background of the study; the problem statement; justification and significance of the study; hypotheses; assumptions; research objectives; research questions; theoretical framework; literature review and limitations of the study.

CHAPTER 2

The chapter will look into the attribution of *actus rea* and *mens rea* in matters concerning corporate criminal liability. It will focus specifically on the challenge of establishing

²⁶Moohr G, 'On the Prospects of Deterring Corporate Crime' 2 *Journal of Business and Technology Law* 1, 2013, 34.

corporate *mens rea*. A comparative analysis on how other jurisdictions have implemented novel modes of liability attribution to establish corporate *mens rea*.

CHAPTER 3

An analysis of the development of criminal laws responsible for the existence of corporate criminal liability. This will include a review of the existing legal framework, case law on the matter and relevant statutes in Kenya.

CHAPTER 4

An assessment of the nature and scope of offences legal provision envision a corporation being held liable for. The interrelation of the envisioned offences and their corresponding sanctions.

CHAPTER 5

This chapter provides recommendations made in response to the issues tackled by the K, as well as a conclusion to the dissertation.

CHAPTER 2

AN ANALYSIS OF THE ATTRIBUTION OF CORPORATE ACTUS REUS AND MENS REA IN MATTERS OF CORPORATE CRIMINAL LIABILITY.

2.1 Introduction

The concept of corporate criminal liability is rapidly gaining recognition and incorporation but the process of attributing guilt to corporations remains a very controversial topic. This chapter delves into the controversies that arise when questions as to whether implementing corporate criminal liability serves any purpose by substantially enhancing the already existing civil redressal and whether there is an abstract clarification as to why the same criminal justice mechanism put in place for penalizing individuals for crimes is used for artificial entities with no physical being.²⁷

The chapter intends on examining the central models of attributing *actus reus* and *mens rea* to corporations and further highlights the deficiencies of each of the theories. As a former British colony, Kenya has its legal justification in the constitution of the United Kingdom. Kenya consequently implements the derivative model of corporate criminal liability as a common law jurisdiction, analogous to that applied in the United Kingdom.²⁸ This framework attaches the corporation's liability to the liability of an identified individual within the defined entity.

2.2 Brief history of corporate criminal liability

Common law did not initially envisage that a corporation could be held criminally liable. This was because of a corporations inability to form the essential intent due to the absence of its own mind and physical intent to accomplish the *actus reus*.²⁹ This was attributed to strict interpretation of the general criminal law rule which provides that a person is not liable for any offence unless it is demonstrated by factual evidence that the person voluntarily and knowingly committed the act or omission; hence the maxim '*actus non facti reum, nisi mens*

²⁷Stewart J, 'A Pragmatic Critique of Corporate Criminal Theory: Atrocity, Commerce and Accountability,' NYU School of law, Public Law Research Paper Number 12-54, 2012, 12-16
<https://www.corporatecrimereporter.com/wp-content/uploads/2012/10/stewart.pdf> on 3 December 2019.

²⁸Ochich G, 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> on 3 December 2019.

²⁹ Metzger M, 'Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects' 73 *Georgetown Law Journal* 1, 1984, 47-48.

sit rea.³⁰ Interpreted to mean that for a person to be convicted of a crime two fundamental elements that must be illustrated are the *actus reus* known as the commission of a guilty act and *mens rea* the presence of a guilty mind.

Criminal statutes are more often than not applicable to any 'person' who contravenes legal provisions in place. In the context of Kenya, the Constitution goes a step further to give the definition of the term person to include;

“...a company, association or other body of persons whether incorporated or unincorporated.”³¹

This thereby ascertains that a corporation ought not to be exempted from being the subject of criminal law.

Development of corporate criminal liability commenced upon the realization that if corporations autonomous and distinct from the individual human beings who constitute them, could be worthy of punishment, are corporations then not capable of being morally liable agents? With time therefore, different States have adopted and interpreted the principles and concepts of corporate criminal liability through establishment of certain theories that shall be discussed below. Despite the adoption of those concepts and principles, when it comes to the ascription of culpability to a corporation, the bone of contention remains developing a model capable of appropriately finding culpability in a legal person.³²

2.3 Models of ascribing corporate criminal liability

They are divided into the nominalist or commonly referred to derivative theories and the realist theories.

Nominalist or Derivative Theory

It is a theory of responsibility in which the liability of the legal person is derived and ascribed to it for crimes committed by an individual in its structure.³³ The model views a corporation as nothing more than an accumulation of individuals hence making the natural persons the subject of criminal law. That being the case, there exists some instances during which corporate criminal responsibility cannot arise because it is impossible to track back the

³⁰ Card R, *Card, Cross & Jones: Criminal Law*, 20 ed, Oxford University Press, The United Kingdom, 2012, 34.

³¹ Article 260, *Constitution of Kenya* (2010).

³² Kramer R, 'Corporate Criminality: The Development of an Idea' in Hochstedler E (ed), *Corporations as Criminals*, Sage Publications, Beverley Hills, 1984, 18

³³ Cavanagh N, 'Corporate Criminal Liability: An assessment of the model of Fault' 75 *Journal of Criminal Law* 5, 2011, 414.

offence in question to an individual.³⁴ The nominalist perspective is further broken down into the doctrine of vicarious liability and the identification doctrine.

Doctrine of vicarious liability

Lord Atkin in *Moussell Bros Ltd v London and North-Western Railway Co* enunciated the general law by stating:

*“Prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. The question whether a particular provision imposes vicarious liability is one of construction, depending upon the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstance be performed, and the person upon whom the penalty is imposed.”*³⁵

The doctrine states that the principal, in this case the corporation, automatically becomes liable for the actions or omissions of its employees, agents and officers owing to the master-servant relationship. This is because the corporation has no physical being hence it acts and forms intentions vicariously by way of the natural persons it employs regardless of their hierarchy in the corporation.³⁶

In is clearly illustrated in Kenya through the Penal code which states,

“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

³⁴ Ochich G, *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> on 3 December 2019.

³⁵ *Moussell Bros Ltd v London and North-Western Railway Co* (1917), The United Kingdom House of Lords.

³⁶ Ford H, Austin R and Ramsay I, *Ford's Principles of Corporations Law*, 9 ed, CCH Australia Limited, Butterworths, 1999, 673.

intended or about to be committed, or that he took all reasonable steps to prevent its commission”³⁷

Prior to holding a corporation criminally liable for acts of its employees, three fundamental requirements ought to be verified.³⁸ Firstly, an agent ought to have executed the illegal act or omission, *actus reus* with the required state of mind *mens rea*. Secondly, the actions of the agent ought to have been committed in the scope or course of their employment.³⁹ Express authority or instructions to execute the offense is not necessary for liability to arise, it is satisfactory to illustrate that the behaviour is within the field of operation accredited to the individual in question. Lastly, the agent ought to have committed the crime with the objective of advancing the corporation.

The main rationale behind this doctrine is loss distribution. That is, for every loss or damage induced by an agent of the corporation the burden should be placed on the corporation as it has better capacity to shoulder the losses as opposed to innocent third parties or the victims of the loss.⁴⁰ The challenge however is that losses incurred by the corporation are inevitably disseminated to the society through price inflation of goods and services being provided. Another rationale is the hope that holding corporations vicariously liable would incentivize a high threshold of safety always being put in place and being adhered to.

This model is however thoroughly criticized because it fails to illustrate and underpin organizational fault as it is too wide yet at the same time too narrow in scope.⁴¹ Its reliance on an individual’s criminal liability makes it too narrow in scope because in instances where it is crystal clear that organizational fault occurred, the corporation can escape liability merely because the crime in question cannot be attributed to a specific individual.

In contrast, the scope is viewed as being too broad because the liability of the individual is seen as being *prima facie* evidence that the corporation is liable for the crime. Therefore, there need not be any further inquiry into the latter's misfeasance or malfeasance to ascertain corporate culpability even if there was no corporate fault.⁴²

³⁷ Section 23, *Penal Code* (Act No 19 of 2014)

³⁸ https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/9/09_chapter%203.pdf on 3 December 2019.

³⁹ Goodhart A, *Essays in Jurisprudence and common Law*, Cambridge University Press, Cambridge, 1931, 91-109.

⁴⁰ https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/9/09_chapter%203.pdf on 3 December 2019.

⁴¹ Wells C, ‘Criminal Responsibility of Legal persons in common law jurisdictions’ 2000.

⁴² ‘Corporate Criminal Liability,’ Department of Justice, Government of Canada, 2002
<https://www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/dp-dt/iss-ques.html> on 3 December 2019.

Identification Doctrine

This doctrine consolidates the natural person and the corporation into a single entity for legal purposes. In that light, a corporation is held directly liable for wrongful conduct engaged in by senior officers and employees on the basis that, the state of mind of the senior employee is the state of mind of the corporation. Hence why it is synonymously referred to as the 'alter ego' or the 'directing mind and will' approach.⁴³ The natural person on whom liability is being derived from ought to be of a satisfactory high standing in the corporation for them to be viewed as acting on behalf of the corporation.

With time, satisfactory or the high standing sought, has been interpreted to include only those in the top echelon of the corporation's management such as the managing directors, Board of directors and CEOs. On account of their standing such individuals are viewed as being an embodiment of the corporation therefor the corporation can be held liable for offenses in its own right.⁴⁴

The progressive nature of the identification doctrine was further illustrated in *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd* where Lord Denning stated that;

*'A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. 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 these managers is the state of mind of the company and is treated by the law as such.'*⁴⁵

The provision is therefore an illustration that where criminal law mandates that a guilty mind is a precondition of attributing liability in criminal offences then the guilty mind of the "alter egos" including their knowledge, state of mind and intention shall render the corporation

⁴³ Wells C, 'Criminal Responsibility of Legal Persons in Common Law Jurisdictions,' 5.

⁴⁴ *Tesco Supermarkets Ltd v Natrass* (1972), The United Kingdom House of Lords.

⁴⁵ *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd* (1957), The United Kingdom House of Lords.

itself guilty.⁴⁶ This doctrine accordingly makes it possible for a corporation to held personally liable for *mens rea* offences as opposed to being vicariously liable.⁴⁷

A complication arises when it comes to meticulously construing the parameters of the notion of ‘directing mind.’ Courts have attempted to clarify the query by stating that for one to correctly identify the ‘directing mind’ one must,

*“Identify those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the corporation.”*⁴⁸

They ought to be the individuals mandated to issue orders and responsibilities to other employees.

This model is severely deficient and lacks merit when it comes to indicting medium to large corporations for crucial crimes, notably in matters concerning workplace deaths.⁴⁹ Another enormous challenge of the theory is that it is reliant on individual liability. Ascertaining a high-ranking official who not only has control over making corporate policy, but also actually committed an offence is more often than not problematic. This particularly poses a dispute in large corporations where it may be arduous to prove individual liability, given the complexities of modern-day corporate structures and the different models of organization. The simplistic analogy of ‘chain of command’ is not a realistic metaphor to apply anymore.

Wells further contends the concept that some individuals in a corporation act as the corporation, yet others do not. She states that the idea is utterly flawed since the boundary separating the two categories is draw arbitrarily.⁵⁰

Realist Theories.

The models strive to disregard any connection between the corporate and individual liability by reflecting the culpability on the corporation itself. It is fixated on the perception that corporations are free-standing bodies and should therefore be reprehensible for the policies

⁴⁶*R v I.C.R. Haulage Ltd* (1944), The United Kingdom House of Lords.

⁴⁷ Jefferson M, *Criminal Law*, 9 ed, Pearson Education Limited, Harlow, 2009, 25-30.

⁴⁸*Tesco Supermarkets Ltd v Natrass*, (1972), The United Kingdom House of Lords.

⁴⁹ Clough J, ‘A glaring omission? Corporate liability for Negligent manslaughter’ 20 *Australian Journal of Labour Law*1, 2007, 32-33

⁵⁰ Wells C, *Corporations and Criminal Responsibility* ,2 ed, Oxford University Press, Oxford, 2001, 134,

systems and procedures it puts in place.⁵¹ Recognizing the essential *mens rea* in corporate crime is the greatest challenge of the derivative model. Owing to the unreasonably confined association between the culpability of the corporation and that of a mere individual in its structure. The challenge with the realist model is the fear that it is a rebellious and novel concept according to society hence applying it appropriately and consistently is problematic.⁵²

Corporate Culture Doctrine

The requisite *mens rea* is derivative from the corporate culture of the corporation as opposed to in the mind of an individual working for the corporation. This is because it is conceptually reasonable to create a notion of corporate fault that, like the corporation itself, is not dependent on a natural person, but which is also differentiated from any individual.⁵³ The doctrine therefore permits the shift of focus in searching for guilt from individuals in the corporation to the corporation per se.

Over time, the working definition of the term ‘corporate culture’ that has incorporated the orthodox principle of corporate *mens rea* attribution has been,

*“...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.”*⁵⁴

This expressly implies that a thorough examination of the corporation’s structures, hierarchies, goals, unwritten rules of practice, cultures and processes is to be conducted, and then all linked together to establish whether there is a culture in place that accommodates and stimulates the commission of an offence or if there are sanctions against criminal conduct.⁵⁵

The model is conceptually sound because it does a good job in taking into consideration the realities of modern day to day decision making considering the rampant globalization which

⁵¹ Cavanagh N, ‘Corporate Criminal Liability: An assessment of the model of Fault,’ 415.

⁵² Clough J and Mulhern C, *The Prosecution of Corporations*, Oxford University Press, Melbourne, 2002, 144.

⁵³ Fisse B, ‘The Attribution of Criminal Liability to Corporations: A Statutory Model’ 13 *Sydney Law Review* 277, 1992, 289-90.

⁵⁴ Dewey J, ‘The Historic Background of Corporate Legal Personality,’ 660.

⁵⁵ Cavanagh N, ‘Corporate Criminal Liability: An assessment of the model of Fault,’ 432-433.

has led to growth and development of corporations and their structures. Furthermore, the model acknowledges that corporate culture is the cognitive element of the corporation hence making it possible to hold corporations personally liable.⁵⁶

Structural Negligence Doctrine

That is culpability for omission. Where the corporation has a legal duty to perform certain acts, failure to execute and accomplish that duty is to be identified without attributing fault from an individual. Evidence of the occurrence of negligence is 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.'⁵⁷

This model is ordinarily linked with the fault element such as negligence, or the defense of due diligence to reflect the organizational fault.⁵⁸

The culpability is however subject to a defense where the corporation can illustrate that satisfactory procedures were implemented and designed to deter such conduct.

2.4 A comparative analysis of the model applied in Australia

A comparison will be made between Kenya's model of ascribing liability and the Australian Criminal Code Act of 1995 which is one of the most remarkably contemporary statutory reform due to its incorporation of the holistic concept of 'corporate culture.'⁵⁹ The concept provides that a corporation is to be held criminally liable based on its corporate culture as opposed to individual offenders.

When dealing with offences that require *mens rea* that is intention, recklessness or knowledge as an element of fault, the *Act* attributes fault to the corporation where it tacitly, impliedly or expressly, permits or authorizes the commission of such offences. Authorisation or permission for the commission of an offence may be established on, inter alia, the four bases set out in section 12.3(2) which states that:

⁵⁶ Kanyuga C, 'Move towards a new paradigm of corporate criminal liability in Kenya' unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 33.

⁵⁷ Section 12(4) (3), *Australian Criminal Code*, (Act No 12 of 1995).

⁵⁸ Section 7, *Bribery Act* (2010) United Kingdom.

⁵⁹ Clough and Mulhern, *The Prosecution of Corporations*, 138.

*“The body corporate's 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; 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; a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance; or the body corporate failed to create and maintain a corporate culture that required compliance.”*⁶⁰

The act defines "corporate culture" as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred.⁶¹ The concept of 'corporate culture' is therefore contrary to the ordinary common law model of aggregate or individual, blameworthiness as it facilitates the examination of the managerial hierarchies as well as the entire corporate arrangement by the courts, to ascertain whether they created a scope for the commission of the crime. With regards to the scope by which to determine who a 'high managerial agent' is, the code defines the term to mean,

*“an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.”*⁶²

The code requires that for the fault element in offenses to be linked to a corporation it is fundamental to prove the existence of a corporate culture within the corporation which encouraged, directed, tolerated or induced dereliction of relevant statutory provisions or that the corporation declined to devise and maintain a corporate culture that compels people to confirm to law abiding orders.⁶³

Contrary to common law, 'The code' focuses on examining the corporation as a unitary body rather than the conduct of a specific individual. It examines how the corporation conducts its affairs, both in the past as well as in the present state. The law implements the drawing of an

⁶⁰Section 12 (3)(2), *Australian Criminal Code*, (Act No 12 of 1995).

⁶¹ Section 12, *Australian Criminal Code*, (Act No 12 of 1995).

⁶² Section 12(3)(6), *Australian Criminal Code*, (Act No 12 of 1995).

⁶³ Section 12(3), *Australian Criminal Code*, (Act No 12 of 1995).

inference as to whether the general corporate organizational structure stimulates the commission of a crime be it positively or implicitly.

The code bars corporations from escaping liability simply because liability cannot be attributed or underpinned to one specific individual. It inaugurates the use of the aggregation theory which provides that, in a bid to affirm the elements of a crime the acts, omissions and mental state of two or more natural persons within the corporation are aggregated and viewed as the corporations' conduct.⁶⁴

In instances where it is fundamental to ascertain the negligence of a corporation is in question, the test provided is that the negligence may be demonstrated by the fact that the prohibited act or omission is largely attributable to insufficient corporate management, monitoring or supervision of the employees or agents or by failure to put in place appropriate systems for the transmission of relevant information to the relevant individuals within the corporation.⁶⁵

To date, the most satisfactory model is the doctrine of corporate culture. However, it fails to completely focus on the issue of evidential uncertainty. There is a degree of evidential uncertainty similar to other models of fault attribution and it is certainly the main criticism of the doctrine. Prosecutors more often than not have a difficult time proving the existence of a certain culture within the corporation

Analogously, Hill states that,

*“the unwritten rules of an organisation may, admittedly, be difficult to prove.”*⁶⁶

2.5 Conclusion

Identification of corporate *actus reus* in matters of corporate criminal responsibility is proving to be one of the most straight forward concepts to apply. However, the applicability of the concept of *mens rea* and criminal intent onto culpable corporations remains the greatest challenge when dealing with the concept of corporate criminal liability

Overreliance on the traditional model applied in the United Kingdom is a clear constraint to our growth and development. State sovereignty ought to be demonstrated through the implementation of a holistic model capable of applying the various models of liability in

⁶⁴ Section 12 (4) (2), *Australian Criminal Code*, (Act No 12 of 1995).

⁶⁵Section 12 (4)(3), *Australian Criminal Code*, (Act No 12 of 1995).

⁶⁶Hill J, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' Vanderbilt Law School, Law and Economics Research Paper Series No. 03-10, 2003, 7.

unison since they all have merits and demerits. That will ensure effectiveness and successful corporate criminalization for it is one thing for a State to acknowledge the existence and applicability of corporate criminal liability and yet another to sufficiently prosecute corporations for crimes. In order to achieve that, an amendment that disregards the causative link between individual criminal liability and corporate criminal liability is necessary.

The complexity of criminal responsibility requires a balancing competing interest.⁶⁷ It is necessary to establish a balance between the interest to protect citizens vis a vis the harm inflicted by their fellow citizens.

⁶⁷Hasnas J, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' 46 *American Criminal Law Review* 4, 2009, 10.

CHAPTER 3

AN ANALYSIS OF THE APPLICATION OF THE EXISTING CORPORATE CRIMINAL LIABILITY LAWS IN KENYA.

3.1 Introduction

The law as applicable in Kenya was mainly derived from English law and the position in England, for many years, the projection was that corporations lay outside of criminal law. That is, “*It had no soul to damn and no body to kick.*”⁶⁸

This chapter delves into the level of enforceability, interpretation and regulatory capacity that criminal laws in Kenya have when applied to corporate criminal liability prescription. An analysis of the laws devised to deal with the day to day challenges of corporations engaging in crimes which are detrimental to people in society if not restrained.

Primarily driven by the need to conform with international treaties, corporate criminal liability is extensively acknowledged in a variety of jurisdictions and legal systems as is in Kenya.⁶⁹ Corporate criminal liability regulations therefore ought to be based on legal structures which envision the possibility of determining a legal person's culpability and enforcing appropriate penalties.⁷⁰ In order to determine the scope and recognition of corporate criminal liability within the Kenyan legal jurisprudence, it is of paramount importance that the concept of their existence be constructed strictly on the merit of applicable laws. The Judicature Act provides that The Constitution and all other applicable written laws provided for in Part I subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date shall the base of the jurisdiction of all Courts in Kenya.⁷¹

3.2 Current corporate criminal liability legal framework in Kenya

3.2.1 The Constitution of Kenya

The Constitution does not explicitly provide for corporate criminal liability, but it provides the basis for understanding specific terms in the practice of corporate criminal liability.

⁶⁸ Leigh H, *Criminal Liability of Corporations in English Law*, Weidenfeld and Nicolson Publishers, London, 1969, 4.

⁶⁹ Article 26, UN Convention Against Corruption, UN A/58/422 (31 October 2003).

⁷⁰ Clough J, ‘Improving the effectiveness of corporate criminal liability: Old Challenges in a Transnational World’ in Levy R, O’Brien M, Rice S, Ridge P and Thornton M (eds), 1st ed, *New Directions for Law in Australia: Essays in Contemporary Law Reform*, ANUE Press, Acton ACT Australia, 2017, 164.

⁷¹ Section 3, *Judicature Act* (Act No 10A of 2012).

Firstly, Article 260 of the Constitution defines a “person” as including,

*“a company, association or other body of persons whether incorporated or unincorporated.”*⁷²

The provision therefore stipulates the use of the term person as applying not only to natural persons but also juristic persons as in the case of corporations in a similar manner.

Secondly, there being no constitutional distinction between the individual and the juristic persons, both ought to equally enjoy the rights and freedoms enshrined in The Constitution. That is the right to a fair trial,⁷³ the right to own property⁷⁴ and the freedom of expression which guarantees a person the right to seek, receive and impart knowledge and ideas

In light of the provisions above, the rationale for implementing corporate criminal liability principle should be entrenched through the enjoyment of existing rights and fundamental freedoms as well as their corresponding duties. Corporations should therefore be held accountable when breach of duty occurs.

3.2.2 Companies Act

The companies Act,⁷⁵ is the prevalent act when it comes to comprehending matters concerning corporations. The Act amends and consolidates all legislations concerned with the incorporation, regulation and liquidation of companies and all relevant associations.

The general rule in Kenya is that incorporation occurs subsequently to certification by the registrar of companies.⁷⁶ Upon incorporation, separate and distinct legal personality from its shareholders emerges as the corporation is capable of owning rights in its own name, enforcing the rights and conversely it can be held accountable for its acts and omissions.⁷⁷

However, a company as a body corporate, is a *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents only until there are factors warranting a lifting of the veil.⁷⁸ In *Kolaba Enterprise Ltd v Shamsudin Hussein Varvanic & Another*, the court acknowledges that the separate corporate personality is the greatest legal

⁷² Article 260, Constitution of Kenya (2010).

⁷³ Article 50, Constitution of Kenya (2010).

⁷⁴ Article 40, Constitution of Kenya (2010).

⁷⁵ Cap 486 Laws of Kenya.

⁷⁶ Section 16(1), Companies Act, (Act No 17 of 2015).

⁷⁷ Section 17, Companies Act, (Act No 17 of 2015).

⁷⁸ *Victor Mabachi and Another v Nurnturn Bates Ltd* (2013) eKLR.

innovation ever in company law.⁷⁹ The concept cannot be departed from except in instances where the statute or law lays out circumstances under which lifting or piercing of the corporate veil may be done.⁸⁰ In Kenya instances under which the veil of incorporation will be lifted include; If a clause in the corporation's constitution or contract seeks to exclude a director from any liability especially when negligence is involved is null and void,⁸¹ if a corporation fails to keep its accounting records at its registered office and fails to ensure that the records are accessible for inspection then the corporation and each defaulting officers of the corporation is liable and will be sanctioned,⁸² and in instances of fraudulent trading.⁸³ Under such circumstances where the nature of the controlling mind is a crucial factor, the court is required to overlook the corporation's pure existence as a separate legal entity.

Although the intent of adopting an improved company law legislation was to lay down regulations that will tackle the everyday activities of a corporation, it fails to sufficiently provide for the culpability of a corporation. The legislation only provides for the probable liability of a corporation official who declines to adhere to the regulations of the act.⁸⁴

3.2.3 The Penal Code

The principal legislation that governs criminal law in Kenya is the Penal Code as it outlines offences and their corresponding penalties. The Act construes an offence as being an act, attempt or omission punishable by law.⁸⁵ The provision therefore makes it possible for a person, natural or juristic to be convicted of any act or omission deemed to be an offence under any recognized legal statute. That is, the Constitution, Companies Act, Judicature Act, Public Health Act, Occupation Health and Safety Act, Factories and Other Places of Work Act as well as the Forests Act.

Section 9(1) spells out the exceptional circumstances upon which a person shall not be held liable for an offence and it states that,

⁷⁹*Kolaba Enterprise Ltd v Shamsudin Hussein Varvanic & Another* (2014) eKLR.

⁸⁰*Kolaba Enterprise Ltd v Shamsudin Hussein Varvanic & Another* (2014) eKLR.

⁸¹ Section 194 (2), Companies Act, (Act No 17 of 2015).

⁸² Section 631, Companies Act, (Act No 17 of 2015).

⁸³Section 33 (1) Companies Act, (Act No 17 of 2015).

⁸⁴ Section 25(5), Companies Act, (Act No 17 of 2015).

⁸⁵Section 4, *Penal Code* (Act No 19 of 2014).

*“Subject to the provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for any act or omission which occurs independently of the exercise of his will, or for the event which occurs by accident.”*⁸⁶

One of the critical premises for this paper is Section 23 of the legislation which depicts the recognition of the corporate criminal liability principle.⁸⁷ It 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.”

The courts have often interpreted the provision to mean that if a person is charged with or engaging in, overseeing or controlling a corporation's affairs or operations and he justifies that he was not informed, by no act or omission on his part, that an atrocity was or is expected to be perpetrated or that he took all appropriate measures to deter the occurrence of the crime, he will not be convicted of an offence committed by the corporation, therefore, he shall not be sanctioned.⁸⁸

This was illustrated in *Republic v Lloyd Masika and Uchumi Supermarkets and 13 others*, where the accused persons were charged with conspiring to defraud Uchumi supermarket contrary to Section 317 of the Penal Code by fraudulently undervaluing its sale and also breach of trust against the general public contrary to Section 127 of the Penal Code. The accused on the contrary asserted that Uchumi had the right to purchase or dispose of land, sell and rent properties as per the companies act and confirmed that the resolution to sell the supermarket was endorsed by the administration and the State through the Ministry of Trade's Permanent Secretary, who was well apprised of the occurrences.⁸⁹ Notwithstanding the fact that the sale of the branch resulted in the collapse of the entire Uchumi supermarkets, in

⁸⁶ Section 9(1), *Penal Code* (Act No 19 of 2014).

⁸⁷ Section 23, *Penal code* (Act No 19 of 2014).

⁸⁸ *Clay City Developers Limited v Chief Magistrate's Court at Nairobi & 2 others* (2014) eKLR.

⁸⁹ *Republic v Lloyd Masika and Uchumi Supermarkets and 13 others* Criminal Case No. 900 OF 2008.

accordance with Section 23 of the Penal Code, the judge in his holding affirmed that the prosecution was unsuccessful in providing ample evidence to hold the corporation liable so as to validate putting the accused on their defense. The failure was due to lack of evidence that Uchumi was indeed defrauded through the sale of the property in question since there was no dereliction of any established procedures, rules nor regulations when the sale was concurred. The above case delineates yet another challenge when it comes to holding corporations liable to convict them since the burden of proof required to hold a corporation criminally liable is very difficult to contravene. It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."⁹⁰

Section 23 ought to be the basis upon which corporations are to be held criminally liable for offence as it recognises their capacity to commit an offence in the first place. On the contrary, the provision implies that when a corporation perpetrates an offence, the corporation can only be sued in tandem with natural persons within the corporation who have been entrusted with, or engaged with, the operation or administration of the corporation's affairs or operations.⁹¹ The disputes that this interpretation imposes is first, identifying who the directing mind is especially since corporations now have complex entanglements with delegation of authority to a board of directors, who transfer power to management in exchange and secondly, it automatically attributes to the corporation the immorality or criminal actions of an individual albeit the fact that the corporation itself, as an entity, has not committed any crime.

In light of this, the provision appears to be a complete negation of the recognition and enforcement of company law. The underlying principle of company law is that a company registered under the Companies Act is a distinct person regardless of whether it is a private or a public corporation. This provision, however, explicitly deviates and contradicts the application and recognition of the fundamental separate corporate personality principle by asserting that the directors of a corporation ought to bear the responsibility of a corporation's criminal actions.⁹² This is because it seems that the Kenyan legislation did not intend that corporations ought to shoulder the criminal burden on its own. While the clause recognizes

⁹⁰*Pius Arap Maina v Republic* (2013) eKLR.

⁹¹ Ochich G, *The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons*.

⁹²*Rebecca Mwikali Nabutola & 2 others v Republic* (2016) eKLR

that a corporation can perpetrate an offense on its own, it does not consider that the criminal charge can be brought against the corporation or that the criminal penalty can be enforced against the corporation on its own.⁹³ Section 23 therefore, shifts the burden of proof and liability for the offence to hinge directly and with no doubt on the management of the corporation that is directing mind and will of the corporation rather than the corporation. Accordingly, for a corporation to be held liable key individuals must be identified first.

The provision, therefore, does little to address how the corporation by itself is criminally liable, but rather focuses on the criminal liability of individuals who constitute the organization and act in the administration or command the corporation.

With regard to sanctioning those found to be guilty, the following punishments may be inflicted by a court death; imprisonment or, where the court so determines under the Community Service Orders Act, 1998, community service under a community service order; detention; fine; forfeiture; payment of compensation; finding security to keep the peace and be of good behaviour and any other punishment provided by this Code or by any other Act.⁹⁴ It is clearly evident that the Penal Act has merely provided for sanctions applicable to natural persons hence the only ones that may be inflicted on a corporation are payment of fines and compensation. The law is consequently exhibiting an inadequacy by failing to uphold the deterrence purpose of criminal law. This is because the use of fines and compensation may be ineffective in instances where the offence has severe effects on the society.

3.2.4 Criminal Procedure Code

Section 96 of the Criminal Procedure Code (CPC) provides that;

*'Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered letter addressed to the principal officer of the corporation in Kenya at the registered office of the company or body corporate; and in the latter case service shall be deemed to have been effected when the letter would arrive in ordinary course of post.'*⁹⁵

⁹³ Ochich G, The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons.

⁹⁴ Section 24, *Penal Code* (Act No 19 of 2014).

⁹⁵ Section 96, *Criminal Procedure Code* (Act No 27 of 2015).

The provision acknowledges the competence of a corporation to commit a crime and therefore lays out the process through which a party, in this case a corporation, can be apprised of a suit being initiated against it.

Section 207 (1) of the CPC states that, it is the accused person who must plead to the accusations. The provision is often interpreted to mean that an advocate is not ordinarily authorized to plead on behalf of the accused.⁹⁶ A drawback of the stringent utilization of such criminal law practice is illustrated when queries as to whom should take a plea on behalf or for the corporation and who is to bear the sanctions ensue. With regards to the procedure for taking pleas it is observed that the section is couched in the first person and does not envisage plea taking in the absence of the accused. The case remains the same even when dealing with juristic persons and the technicality of the procedure creates a hinderance in enforcing corporate criminal liability since a corporation is an abstract with no physical form.⁹⁷

This is illustrated in *Nanak Crankshaft Ltd v. Republic*, where the preeminent contentions in the petition included, whether a criminal offense could be committed by a corporation as an entity, and if so, who may take the plea and who is to be convicted.⁹⁸ In the case, the charge sheet illustrated that the applicant who was the company's director had been charged and summoned to take the plea on behalf of the corporation owing to his capacity. The argument that arose was thus, if a violation of law was certainly committed by a corporation, should it not be the corporation as the offender that should take the plea regardless of whether it is a juristic person or not. The charge against the company was held to be bad law therefore the plea taken by the director was a nullity because he was not the proper person to plead to a criminal charge on behalf of the corporation. The ruling accordingly leaves confusion as to how a corporation a legal person with no physical being can take a plea and who is the appropriate person to take a plea on behalf of the corporation.

Similarly, in *M. S Sondhi Ltd. v. R*, the problem of the appropriate representative to take plea on behalf of the corporation arose.⁹⁹ The court addressed the matter by referring to section 96 of the CPC, and stated that,

⁹⁶*Johnstone Kassim Mwandu and Another v Republic* (2015) eKLR.

⁹⁷*Clay City Developers Limited v Chief Magistrate's Court at Nairobi & 2 others* (2014) eKLR.

⁹⁸*Manager, Nanak Crankshaft Ltd v Republic* (2008) eKLR.

⁹⁹*M. S Sondhi Ltd. v. R*, (1950) 17 EACA 143.

“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 it was suggested that the court should follow the provisions of section 33 of the United Kingdom Criminal Justice Act, 1925 which states that; on arraignment of a corporation, the corporation may, enter in writing by its representative a plea of guilty or not guilty, and if either the corporation does not appear by a representative or, though it does so appear, fails to enter as aforesaid any plea, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of not guilty.”

It was consequently held that a court should satisfy itself before taking any plea from any person that is a representative of the corporation for the purpose of answering a charge.

The High Court of Kenya has since had the opportunity to adjudicate on the legal issue as to whether a company, which is a corporate entity, could be charged with a criminal offence. An illustration is the case of *Republic v Henry Rotich & 2 others*, where a contention of whether, even where proper documentation is brought before the plea court, it is proper for an advocate, acting as a legal representative of a corporation in the trial, to appear and take a plea on behalf of a corporation charged with a criminal offence under Kenyan statute.¹⁰⁰ The court acknowledged that there is no provision in the CPC that contemplates such a scenario. However, a corporation may be represented by a legal representative, provided that such representative is duly authorized, and the court considers and satisfies itself in this regard.¹⁰¹ However, the nature and seriousness of the offence should be taken into consideration in determining whether a corporation can plead through its legal representative. There is however no circumstance under which an advocate can play both roles of being a party in the matter and being a legal representative.¹⁰² This position then forms the critical foundation in the Kenyan jurisdiction, that criminal proceedings can be instituted against corporations, for criminal acts.

The challenge left behind remains that the law is silent when dealing with matters pertaining to plea taking by corporations as illustrated in the inadequacy of the CPC. The code creates a wide discretionary gap is left for judges to interpret divergent unlegislated laws in the

¹⁰⁰*Republic v Henry Rotich & 2 others* (2019) eKLR.

¹⁰¹ The Judicial Technical Committee, *Criminal Procedure Bench Book*, February 2018, para 66.

¹⁰²*Republic v Henry Rotich & 2 others* (2019) eKLR.

corporate criminal liability realm that is not yet well established, recognized nor successfully implemented in our jurisdiction.

3.3 Conclusion

The State acknowledges the existence of the corporate criminal liability principle, however, legislations regarding it requires immense enlightenment especially when dealing with the criminal process and applicability of sanctions.

The use of the term ‘person’ in Kenyan laws without drawing a distinction between natural and juristic persons creates the illusion that individual criminal liability and corporate criminal liability laws ought to apply in an analogous manner hence no application nor enforcement challenges. This is clearly not the case since at the legislative level, the issue on how to allocate responsibility, and how to structure their corresponding liabilities remains a glaring challenge. Whereas, at the enforcement stage, when a criminal offence transpires owing to either a misguided or poorly executed policy, the question is whether to prosecute the individual whose actions were the direct cause of the resulting harm, the employer or legal entity pursuant to whose orders or policies the individual was acting, both the individual and the legal entity or neither.

Clear rules and regulations as to the manner in which corporate criminal liability is arrived is in necessary to act a guiding principle and achieve the purpose of enacting criminal laws.

CHAPTER 4

THE NATURE, SCOPE AND APPLICABILITY OF EXISTING SANCTIONS IN KENYA.

4.1 Introduction

Criminal law is essentially penal law.¹⁰³ Penalty is its intent. It is not intended to settle disputes, reimburse wronged parties nor enforce administrative penalties. It is reserved for conduct deemed to be so repugnant as to necessitate the severest punishment.¹⁰⁴ Its punitive purpose, however, limits the scope of its sanctions against those persons and entities who may deserve punishment, those capable of acting in a morally reprehensible manner.

However, the emergence of unique crimes and the new roles that are redefining crimes in the contemporary world are forcing us to review and rethink regulations, dealing with crime and sanctions, both with respect to new forms of criminal activities and the new profile of the criminals, which includes corporations.¹⁰⁵

The controversy that ensues as to which sanctions are suitable for corporate crime remains a constant subject of doctrinal debates, and often, is the argument for rejecting corporate criminal liability as well as the sanctioning of corporations.¹⁰⁶ Perhaps, due to the misconstrued analogy that corporations are incapable of being guilty of crimes in the strict sense.

4.2 The rationale behind punishing corporate crime

Authors such as Alan Sykes and Daniel Fischel, are of the opinion that corporations are contractual associations, limited to contractual obligations.¹⁰⁷ Hence their argument that the imposition of criminal sanctions on corporations is a waste, due to the fact that corporations cannot suffer from moral stigma. They further contend that civil liability is sufficient, and that corporate criminal liability generates more harm through over deterrence as opposed to the intended benefit.

¹⁰³Hasnas J, 'The centenary of a mistake: One hundred years of Corporate criminal liability' Social Science Research Network, 2.

¹⁰⁴Brickey K, *Corporate criminal liability: A treatise on the criminal liability of corporations, their officers, and agent*, 6 ed, Clark Boardman Callaghan, Deerfield, 1994, 178.

¹⁰⁵ 'Punishing the corporate'

https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/12/12_chapter%206.pdf, 196, on 9 January 2020.

¹⁰⁶ Pop A, 'Criminal Liability of Corporations—Comparative Jurisprudence' Unpublished Thesis, Michigan State University College of Law, Michigan, 2006, 37.

¹⁰⁷ Fischel D and Sykes A, 'Corporate Crime' 25 *Journal of Legal Studies* 2, 1996, 319-322.

Numerous jurisdictions have however neglected such opinions and have gone a step ahead to essentially define corporate crime as acts which are prohibited, defined and punishable by law.¹⁰⁸ In interpretation of penal statutes, courts have therefore been liberal enough to include not only natural persons but also corporations in their coverage.¹⁰⁹ However, the nature of punishment is ordinarily fitted for natural persons only, hence the conceptual-technical barrier that arises against corporate criminality.¹¹⁰ For this reason, corporate prosecution, conviction and punishment continue to be a rare event. Since sanctions leveraged against corporations range from those whose effectiveness remain unproved, to those that are provably ineffective, to those that are practically and conceptually incoherent.

With regards to corporate crime, the objective of criminal law is to impede the occurrence of crime, to penalize those who conduct crime, rehabilitate corporate criminals and ensure justice and fairness is upheld in society.¹¹¹ This expressly illustrates the fundamentality of punishing corporations since corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief and are less amenable to disgrace or punishment. They neither feel shame, gratitude, remorse nor goodwill.¹¹² The punishment of corporations for criminal conduct can deter the specific offender from reoffending or deter other would-be offenders. Punishment also expresses the State's condemnation: it is imposed "to reflect the seriousness of the offense" and "to promote respect for the law." However, the question as to whether a specific punishment has any deterrent value is contingent on whether the costs of the criminal sanction to the corporation outweighs the benefits of continuing the illegality.¹¹³

¹⁰⁸ Stitt B and Giacomassi D, 'Assessing Victimization from Corporate Harms' in Blankenship M(ed), *Understanding Corporate Criminality*, Garland Publishing, New York 1993.

¹⁰⁹ Mueller G, 'Mens Rea and the corporation- A study of the modern penal code position on corporate criminal liability' 19 *University of Pittsburgh Law Review* 1, 1958,23.

¹¹⁰ Neumann S, Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent, 104 *Columbia Law Review* 2, 2004, 466.

¹¹¹ Kanyuga C, 'Move towards a new paradigm of corporate criminal liability in Kenya' unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 40.

¹¹²Wells C, *Corporations and Criminal Responsibility* 2 ed, 2001.

¹¹³Diamond P, 'Posner's Economic Analysis of Law' 5 *The Bell Journal of Economics and Management Science* 1,1974, 294-300.

4.3 Theories of punishment in the context of corporate criminality

As with any type of crime, no unitary and comprehensive theory exists explaining the intention of criminal sanctions for corporate crime.¹¹⁴ Rather, an interplay of the theories below is relied on.

4.3.1 Deterrence

Deterrence focuses on formal legal punishments and their influence on potential criminal conduct. If the certainty of conviction or the severity of punishment is increased, rational offenders will fear the penalty for future crimes and thus be deterred from committing the crime.¹¹⁵ This deterrent effect further serves as a warning to others to anticipate similar punishment should they violate the criminal laws put in place.

The deterrence theory is further divided into two components

i) Specific

In a bid to prevent or dissuade future commission of crime, it strives to incapacitate the offender. For a natural person this is done through imprisonment and for corporation it may take the form of dissolution of the corporation which is viewed as being equivalent to corporation death penalty or subjection to probationary period during which conduct is restricted and monitored by a court of law.¹¹⁶

ii) General

It refers to the effect that sanctions imposed on a particular criminal will have on other people who may be desirous of undertaking similar conduct. General deterrence is notably apt with respect to corporate criminal conduct that tends to be the antithesis of crimes of passion. Through legal counsel, directors and formal deliberative processes, corporations are keen on looking at precedence in order to ascertain the risks and rewards of contemplated acts or omissions.¹¹⁷

¹¹⁴ Yoder S, 'Criminal Sanctions for Corporate Illegality' 69 *The Journal of Criminal Law and Criminology* 1, 1978, 44.

¹¹⁵ Brown D, 'Street Crime, Corporate Crime, and the Contingency of Criminal Liability' 149 *University of Pennsylvania Law Review* 6, 2001, 1295.

¹¹⁶ 'Punishing the corporate'
https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/12/12_chapter%206.pdf, 211, on 9 January 2020.

¹¹⁷ 'Punishing the corporate'
https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/12/12_chapter%206.pdf, 211, on 9 January 2020.

4.3.2 Retribution

The term retribution has been taken to mean ‘vengeful rehabilitation.’¹¹⁸ In its most authentic definition, retribution is vengeance an eye for an eye.¹¹⁹ It compels sanctioning a criminal in a manner that mirrors the suffering, loss or harm caused, typically identified as *lex talionis*:

*“the principle of law of retaliation which requires that the sanction imposed ought to correspond in kind and degree to the offense of the criminal.”*¹²⁰

The belief in raw vengeance is seen in “just deserts” as the rationale for sanctioning offenders. Criminals ought to be sanctioned because they deserve it, not merely because punishing them would benefit the society.¹²¹ The quantum of their suffering ought to be proportional to the gravity of their crime, not according to any assessment of whether they have been rehabilitated nor whether they no longer pose a threat to the society.¹²² The theory advances that punishing a criminal is justified simply because the offender has committed a wrong. It rests solely on the premise that what the offender did was ‘*wrong*’.¹²³ The theory appears relentless but is very necessary especially in matters of environmental destruction and other heinous crimes that leave a devastating impact on the entire society. Furthermore, it satisfies the instinct of public outrage and vengeance for serious loss or suffering by casualties of corporate crime.

4.4 The current position of punishing corporate crime in Kenya

With regard to holding corporations criminally liable for the offences they commit and ensuring they are punished, the Penal codes provides 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

¹¹⁸ Markel D, ‘Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate’ 54 *Vanderbilt Law Review* 6, 2001, 2157-2158.

¹¹⁹ Robinson P, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* Oxford University Press, New York, 2008, 135.

¹²⁰ Markel D, ‘Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate,’ 2157-2158.

¹²¹ Robinson P, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* 135.

¹²² Von Hirsch A, *Doing Justice: The Choice of Punishments*, North-eastern University Press, Boston, 1986, 142-145.

¹²³ Brett P, *An Inquiry into Criminal Guilt*, Law Book Company of Australia, Sydney, 1963, 50-60.

intended or about to be committed, or that he took all reasonable steps to prevent its commission.”¹²⁴

It is evident that the statute envisions a situation whereby the corporation may be sanctioned accordingly. However, it is debatable that Section 23 of the Penal Code would result in a double sanctioning system. An instance is created where both the natural and artificial persons are convicted for the same offence.¹²⁵ Therefore, the convicted individuals who acted on behalf of the corporation are punished through the imposed individual penalty and also through the loss of income from the corporation.

The Penal code further provides for the implementation of the following sanctions by a court; death; imprisonment or, where the court so determines under the Community Service Orders Act, 1998, community service under a community service order; detention under the Detention Camps Act; fine; forfeiture; payment of compensation; finding security to keep the peace and be of good behaviour; any other punishment provided by this Code or by any other Act.¹²⁶

In so far as the law provides for both non-economic and economic sanctions that may be implemented by the court upon conviction, the lack of a distinction between natural and artificial persons palpable inability to enforce various models of punishment on a corporation. The issue with implementing corporate crime sanctions is that criminal laws traditional focus on the individual hence its corresponding inadequacy in countering corporate crime.¹²⁷

With regards to non-economic sanctions, by their very nature they are inapplicable to corporate entities. The threat to life or liberty inherent in those sanctions has significance and validity only within the context of natural persons since corporations have no physical corpus that can be incarcerated in a cell.¹²⁸ Owing to the limitation of implementing a penalty of imprisonment, fines and sequestration are the ordinarily imposed forms of punishment for corporations.¹²⁹

¹²⁴Section 23, *Penal Code* (Act No 19 of 2014).

¹²⁵Lederman E, ‘Criminal Law, Perpetrator and Corporation: Rethinking A Complex Triangle’ 76 *Journal of Criminal Law and Criminology* 2,1985, 309-310.

¹²⁶Section 24, *Penal Code* (Act No 19 of 2014).

¹²⁷ Maglie C, ‘Models of corporate criminal liability in comparative law’ 4 *Washington University Global Studies Law Review* 3, 2005, 563.

¹²⁸*Webster v Dominick*(2005), Scottish High Court of Justiciary, 65

¹²⁹ Kanyuga C, ‘Move towards a new paradigm of corporate criminal liability in Kenya’ 39.

Economic sanctions ordinarily encompass fines and supplementary economic measure such as revocation of licences, forfeiture of profits or property and permanent or temporary restraining orders. Since corporations are involved in economic activities and own property, no challenge arises as to the subjection of corporations to such punishment. However, effectiveness of the sanction, as well as the necessity, fairness or the extent to which the application advances the purpose of punishment is questionable.¹³⁰

A fine can be defined as

*"a sum of money that must be paid as a punishment for breaking a law of rule."*¹³¹

The imposition of fines is arguably the most defensible sanction.¹³² The author Gobert further asserts the position by stating that,

*"Whereas the greatest threat to an individual may be the loss of liberty, the greatest threat to a company is the loss of profitability. Because such a loss strikes at the essential purpose of the company, a fine holds the potential to be an effective deterrent."*¹³³

This is because the intent of forming a corporation is economic profit and business activities almost always profit, directly or indirectly, from the criminal operations within the corporation. It is contended that fines realise the penal system goals of both deterrence and retribution, as it acts as a suitable levy on the profits the corporation sought to gain as a consequence of the crime.¹³⁴ Non-profit organizations are also affected by the imposition of fines as they act economically and rationally.

However, a challenge arises when specific criminal provisions provide for a maximum penalty, as they are often relatively low.¹³⁵ A corporation may therefore find it economically feasible to risk conducting criminal activities as opposed to taking cautious steps to avert the breach of law. Furthermore, in some instances it is illogical to fine a corporation, however large and regardless of whether the crime had clear economic overtones. Generally,

¹³⁰Lederman E, 'Criminal Law, Perpetrator and Corporation: Rethinking A Complex Triangle,' 310.

¹³¹ Black's Law Dictionary, 3 ed.

¹³² Punishing the corporate'

https://shodhganga.inflibnet.ac.in/bitstream/10603/200004/12/12_chapter%206.pdf on 9 January 2020.

¹³³ Gobert J, 'Controlling Corporate Criminality: Penal Sanctions and Beyond' Web Journal on Current Legal Issues 1998,3.

¹³⁴ Metzger M, 'Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects,' 65-66.

¹³⁵ Williams G, *Criminal Law-The General Part*, 2 ed, Stevens & Sons Ltd, The United Kingdom, 1961, 863-864.

corporations have discovered new techniques through which they have managed to burden of the fines to their consumers by increasing the costs of the products and services they provide. In the absence of government supervision, corporations are thereby able to absorb the cost of the fine by a small increase in price per unit. A further deficiency of fines is seen through the lack of criminal punitive impact. With time corporations have started regarding monetary sanctions as the cost of conducting a business or as a licencing fee.¹³⁶

Statutes in Kenya explicitly recognize that a corporation is indeed a separate legal entity from its employees and employers of the corporation and should be treated separately from them too. However, the greatest lacuna is that the laws do not envisage that a corporation in its own right can have the necessary *mens rea* to execute a crime.¹³⁷ Owing to the fact that *mens rea* is a fundamental component of proving a criminal offence occurred and cannot be figuratively attributed to a corporation, holding corporations accountable remains an invincible challenge. This is partly because of the poor deterrent value of fines since corporate crime is infrequently prosecuted and that convicted corporations historically receive modest fines. A further challenge touches on the nature and kind of sanctions for the crimes the corporation commits emerges.

The current laws on corporate criminality and punishment in Kenya thereby need to be reviewed and redirected accordingly.¹³⁸ This is because over time, directors and agents have been prosecuted for the crimes of the corporation but the system still fails to create a deterrence for the multi-national corporations that operate in numerous jurisdictions as well as through numerous hands.

Lastly, the Companies Act silence as to the measures and procedures of conducting corporate crime sanctioning is a glaring and troubling omission, as the predominant justification for corporate criminal liability is its effectiveness as a necessary tool for combating organizational fault.

¹³⁶ Metzger M, 'Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects,' 65-66.

¹³⁷ Ochich G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 2008.

¹³⁸ Ochich G, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' 2008.

4.5 Conclusion

In as much as it is impossible for a corporation to be deterred or rehabilitated in a similar way as a natural person, that ought not to negate the application of criminal law concepts to corporations.

The criminal aggressiveness of corporations is at times so devastating that it necessitates the implementation of new control techniques superior to the sanctions for natural persons. Therefore, fundamentality of corporate criminal liability anticipates demonstration, because the imposition of fines on corporations simply comprises of punishing innocent creditors, shareholders and employees who may be made redundant or the general public which will ultimately be faced with the burden of the fine through increased prices of goods and services.¹³⁹ Without practical and compelling sanctions, criminal liability remains a largely symbolic gesture.

In light of this chapter's discussion, Kenya's legal system should reassess both the nature of the sanctions applicable to corporate offenders and the principles of attribution of criminal liability to corporations.¹⁴⁰ This is because the conviction of corporations has consistently been overlooked in law reforms due to lack of effective and imaginative sanctions

¹³⁹ Omerod D, *Smith and Hogan Criminal Law*, 10ed, OUP Oxford, New York, 2009, 365-397.

¹⁴⁰ Harding C, Criminal Liability of Corporations- United Kingdom' in Doelder H and Tiedemann K (eds.), *Criminal Liability of Corporations*, Kluwer Law International, Leiden, The Netherlands 1996, 382.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The intention of the study was to seek answers to following questions: what are the procedural aspects and principles upon which criminal liability may be imposed on a corporation? why are corporations required to have *mens rea* before imposing liability as opposed to strict liability or negligence standards? To what extent should the law take into consideration the acts of corporation agents when it comes to perceived criminal acts by a corporation? and lastly, how is the main function of criminal prosecution procured by the sanctions applicable to corporations?

This chapter therefore succinctly highlights the conclusion and proceeds to offer a few recommendations geared towards improving Kenyan statutes to ensure they are more receptive to the application of the corporate criminal liability concept.

5.2 Conclusion

The study has revealed that there exists a recognition of corporate criminal liability in Kenya owing to the separate legal entity concept that is in play. In light of the fact that every right has a corresponding duty, it is mandatory that corporations are held accountable for the negative consequences that may arise as a result of their acts or omissions.

The study has further established that although the corporate criminal liability concept is recognized in Kenya, it is still at its infancy stage. Firstly, the definition of the term ‘person’ includes not only natural person but also a company or association or body corporate. Statutes therefore assume that the application of criminal law to both natural and artificial persons is no different and fails to offer a distinction between the two. This in turn creates numerous implementation and enforcement challenges when it comes to matters of ascribing *actus reus* and *mens rea* as well as prescribing the appropriate punishment for crimes committed. Secondly, the rules and regulations that ought to govern the effective implementation and enforcement of corporate criminal liability are barely provided for by fundamental statutes such as The Constitution, The penal Code and The Companies Act.

The study has further affirmed that numerous corporate criminal liability cases result in acquittals. This is as a result of the identification model of liability we have adopted as a British colony without taking into consideration the country’s current status and what is compatible with the goals we seek to attain.

The Penal code ought to be the principal statute governing the procedures and measure to be taken in matters that involve prohibited conduct of persons. It is however inadequate when addressing how the corporation can be held criminally liable in itself.¹⁴¹ This is because in as much as it recognizes that a corporation is capable of committing a crime, the provision does not envision that the corporation should bear the criminal burden on its own. It necessitates the illustration of a causative link between the natural persons in the corporation and the corporation and leans toward holding them personally liable for the corporation's offence. Furthermore, legislations in Kenya have only extended the penal policies being applied to natural persons with minimal effort to develop a legal system that is more appropriate keeping in mind the peculiar nature and functioning of corporations.

5.3 Recommendations

The study proposes the following recommendations to enhance the application, implementation, enforcement and understanding of the corporate criminal liability concept.

5.3.1 Reconceptualizing of existing laws

In light of the extensive risk of unregulated corporate activity in any field, such as the challenge of criminal consequences that have not been redressed, the evolution of clear and sound statutory rules and judicial principles on all aspects of corporate criminality is an imperative matter.

The archaic statutes in place should create a distinction between the application of criminal laws to natural person and corporations, provides a definitions for the term corporate crime, recognize the fundamentality of a shift from the identification model of prescribing criminal liability to a holistic approach that contains not only derivative models but also realist approaches and finally lays out specific and coherent sanctions appropriate for corporations.

5.3.2 Implementation of a holistic model of ascribing corporate criminal liability

The notion that only particular individuals within the corporation are capable of acting as the corporation is extremely flawed since the separation is arbitrarily drawn.¹⁴² To curb the challenges associated with the identification model Kenya has incorporated, a hybrid system similar to the 'corporate culture' model in which the derivative and nominalist theories complement each other and can hold sway. The corporate culture model would be an

¹⁴¹ Section 23, *Penal Code* (Act No 19 of 2014).

¹⁴² Wells C, *Corporations and Criminal Responsibility*, 134.

expansive and more realistic approach as it endeavours to ascribe direct criminal liability to the corporation without necessitating that a natural person should be liable first.

5.3.3 Sanctions

The sanctions below not only look at deterring corporations from commission of crime but also ensures justice to the victims.

5.3.3.1 Adverse publicity

A deterrent impact may be realised on not only the corporation itself as well as other entities when the crimes they commit are published to the general public. The significant reputation they have to maintain will then act as a deterrence tactic.¹⁴³ Furthermore, it plays an educative role since other corporations are made aware of the illegality of certain criminal acts that they may commit knowingly or unknowingly.

5.3.3.2 Probation

Corporations ought to be subjected to comply with remedial undertakings as well as supervision over a period of time. The remedial conditions are aimed at making good the harm caused by their crime or even rehabilitative by ensuring steps are taken to promote organizational change.¹⁴⁴

5.3.3.4 Disqualification or corporate death

Upon the conviction for having committed a crime, corporations can be barred from engaging in certain activities or can even be barred from government funding and contracts.

Furthermore, an equivalent of capital punishment which is disestablishing the corporation may be enforced. In instances where the corporation has repeatedly committed a crime or in grave cases.

5.3.3.5 Confiscation

A complementary sanction that may be implemented is that of confiscation of the fruits of the crime.¹⁴⁵ When a corporation is deprived of the profits it gains from conducting illegal activities it not only acts as a security measure but also a punishment. The scope of the

¹⁴³Clough J, 'Improving the Effectiveness of corporate criminal liability; Old challenges in a Transnational world' 168.

¹⁴⁴Clough J, 'Improving the Effectiveness of corporate criminal liability; Old challenges in a Transnational world' 168.

¹⁴⁵ Stessens G, 'Corporate Criminal Liability: A Comparative Perspective' *43 International and Comparative Law Quarterly* 3, 1994, 515

criminal punishment, however, can only be achieved if confiscation is a complementary sanction.

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