

# THE REGULATION OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA: A CLOSE LOOK\* (PART 1)

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## SUMMARY

Like many other countries South Africa is faced with the challenge of dealing with corporations that commit crimes. In this article the concept of corporate criminal liability in the South African context will be closely examined with the aim of highlighting its importance. The discussion will include, *inter alia*, the basis for corporate criminal liability in South Africa, the common law regulation of corporate criminal liability, the development of the statutory regulation thereof, as well as constitutional aspects of corporate criminal liability.

## 1 INTRODUCTION

"We are living in times of intense corporate activity which unfortunately is often accompanied by a proliferation of serious crimes like fraud by both corporations and directors. It is, in my view, of paramount importance that the social interest of seeing to the prosecution by the state of crimes such as fraud which are perpetrated by corporate bodies and directors be facilitated."<sup>1</sup>

This quote from Madala J highlights the fact that, like other countries, South Africa is riddled with corporate crime and that it is in the interest of the country to see to it that there are measures in place to deal with corporations that commit crimes. At first the common law played a pivotal role in regulating corporate criminal liability in South Africa,<sup>2</sup> but the legislature has gradually developed this concept. Today corporate criminal liability is mainly regulated by means of a statutory provision. The legislature first addressed the issue by enacting section 384 of the Criminal Procedure and Evidence Act 31 of 1917. This provision was later repealed and replaced. The present position is found in section 332 of the Criminal Procedure Act 51 of 1977. Under these statutory regulations there have been a number of convictions.<sup>3</sup>

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<sup>1</sup> Madala J in *S v Coetzee* 1997 1 SACR 379 (CC) 430H.

<sup>2</sup> Selikowitz "Corporations and their Criminal Liability" 1964 *Responsa Meridiana* 21.

<sup>3</sup> See *R v Van Heerden* 1946 AD 168; and *R v Bennett & Co (Pty) Ltd* 1941 TPD 194.

In terms of section 332 a corporation may be prosecuted and subsequently convicted for the criminal acts of its director or servant. In South Africa the basis for corporate criminal liability is not vicarious liability.<sup>4</sup> Corporate criminal liability in South Africa allows for juristic persons to be held criminally liable for statutory and common law offences committed by their directors and servants in *furthering or endeavouring to further*<sup>5</sup> the interests of the corporation. The director or servant's act is imputed to the corporation.<sup>6</sup> It further allows for the corporation's officers to be prosecuted together with the corporation for the said crimes.<sup>7</sup>

## 2 THE RATIONALE BEHIND CORPORATE CRIMINAL LIABILITY

Traditionally only a natural person was held criminally responsible for offences because a natural person has the physical ability to perform an unlawful act and to have a blameworthy state of mind.<sup>8</sup> Over the years this changed and South African criminal law now allows a juristic person to be held criminally liable for offences committed in its name, despite the juristic person's inability to think and to act for itself. The concept of corporate criminal liability conflicts with the common law rule that one ought not be held responsible for offences committed by another person, except where he has "authorised or procured its commission or took part in it".<sup>9</sup>

The question whether it is justifiable to hold a corporation criminally liable for offences committed by those who act as its brains and hands is raised. It is submitted that the answer to this is found in Clarkson's conclusion that usually the corporation itself is the actual offender.<sup>10</sup> Clarkson's assertion emphasizes the need for the corporation to be held criminally liable and punished accordingly. On the contrary, Snyman points out that the individuals who act as the hands and brains of the corporation should be the ones who are punished as the offences are physically committed by them.<sup>11</sup> Snyman emphasises the need for the individuals within the corporation to be held liable. South African law accommodates these two differing opinions by providing for the prosecution of both the corporation and of the individuals who commit the offence.<sup>12</sup>

By holding the corporation liable, the state is in fact punishing the offender. The offender is the corporation, as the individuals who commit the

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<sup>4</sup> Burchell *Principles of Criminal Law* (2005) 563.

<sup>5</sup> Own emphasis.

<sup>6</sup> Burchell 563.

<sup>7</sup> Snyman *Criminal Law* (2002) 251.

<sup>8</sup> Jordaan "New Perspectives on the Criminal Liability of Corporate Bodies" 2003 *Acta Juridica* 48.

<sup>9</sup> Burchell *South African Criminal Law and Procedure Vol. 1 General Principles of Criminal Law* 3ed (1997) 298.

<sup>10</sup> According to Clarkson *Understanding Criminal Law* 3ed (2001) 148, "in many instances it is truly the company that committed the offence and not the individuals within the company".

<sup>11</sup> Snyman 249.

<sup>12</sup> S 332 of the Criminal Procedure Act; and see also Snyman 251.

offence do so in the interest of the corporation. This, however, does not mean that in the instance where the individuals were aware of the fact that they were committing offences (albeit on behalf of the corporation) they will escape criminal liability. It is submitted that corporate criminal liability is in fact a way of ensuring that the common law rule that an offender should be liable, is enforced. This is clearly reflected in the fact that the liability of the corporation does not exclude the criminal liability of the individual involved. All offenders are held liable.

### **3 THE BASIS FOR CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA**

The rise in criminal activities committed by corporations has led to countries realizing the importance of imposing corporate criminal liability and ensuring that such liability is based on a clear and reasonable theory.<sup>13</sup> Globally the concept of corporate criminal liability has been in existence for many years<sup>14</sup> and various theories have been relied upon by various jurisdictions as their basis for corporate criminal liability.<sup>15</sup>

#### **3 1 Vicarious liability**

Vicarious liability (as found in the Netherlands) justifies holding a corporation liable for crimes committed by its directors, members and employees as long as it can be shown that they committed these crimes in the process of furthering the interests of the corporation. It is stated that the reason for holding the corporation liable is the master-servant relationship that usually exists between the two parties,<sup>16</sup> however, "the servant has to be at fault".<sup>17</sup> Vicarious liability is therefore not restricted to offences committed by servants; a corporation may be held criminally liable for criminal actions committed by anyone from the director to the senior management to the employee, provided that the crime was committed in the process of furthering or endeavouring to further the interests of the corporation.<sup>18</sup>

#### **3 2 The identification theory**

In terms of the identification theory (as found in England), the corporation is blamed for criminal acts committed only by its senior members in furthering or endeavouring to further the interests of the corporation.<sup>19</sup> These senior members are regarded as "the mind of the corporation".<sup>20</sup> The corporation

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<sup>13</sup> Burchell 562.

<sup>14</sup> In England as far back as the 19<sup>th</sup> century. See *Regina v Great North England Railway Co* [1846] 9 Q.B. 315.

<sup>15</sup> Pinto and Evans *Corporate Criminal Liability* (2003) 17, cite vicarious liability and the doctrine of identification.

<sup>16</sup> Burchell and Milton *Principles of Criminal Law* 2ed (1997) 322.

<sup>17</sup> *Ibid.*

<sup>18</sup> Pinto and Evans 18.

<sup>19</sup> Jordaan 2003 *Acta Juridica* 54.

<sup>20</sup> *Ibid.*

will thus be held liable only for the wrongful acts of its senior members.<sup>21</sup> The main problem with the identification theory, as Clarkson points out, is that in bigger corporations pinpointing a senior individual responsible for the commission of the offence is virtually impossible.<sup>22</sup> This has in fact been the case in England, where the identification theory has led to the unsatisfactory situation of corporations escaping criminal liability due to the fact that it is at times difficult to pinpoint a senior officer who is to blame for the crimes. *R v P & O European Ferries (Dover) Ltd* is an example of a case in which no senior officer could be pinpointed and blamed for the deaths, therefore liability could not be imputed to the corporation.<sup>23</sup>

### 3 3 The derivative approach

Under the derivative approach the wrongful acts of the directors and employees of a corporation are regarded as the wrongful acts of the corporation.<sup>24</sup> Corporate criminal liability in South Africa is based on the derivative approach.<sup>25</sup> It entails imputing the *mens rea* of the accused on the corporation.<sup>26</sup> Although it has similarities to vicarious liability,<sup>27</sup> a close examination of section 332 shows that the derivative approach goes further than that. Burchell explains that unlike vicarious liability, under the derivative approach the *mens rea* of an individual is imputed to the corporation even in situations where the individual has acted beyond the “course and scope of employment”.<sup>28</sup>

This approach has its shortcomings<sup>29</sup> but what is important is the fact that the statutory provision that provides for corporate criminal liability in South Africa makes it possible to hold a corporation liable for crimes that require *mens rea*, despite the fact that a corporation lacks a brain.<sup>30</sup>

## 4 CORPORATE CRIMINAL LIABILITY v CIVIL LIABILITY

When one has the right to sue the offending corporation it can be asked whether corporate criminal liability is a necessity. In both instances the end result is the payment of a sum of money by the corporation. In a civil claim this is in the form of damages payable to the aggrieved party and in criminal law it is in the form of a fine which goes to the state.

It is trite that a wrong can have civil and criminal consequences. De Koker

<sup>21</sup> Burchell 562.

<sup>22</sup> Clarkson 145.

<sup>23</sup> *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73.

<sup>24</sup> Kidd “Corporate Liability for Environmental Offences” 2003 18(1) *SA Public Law* 1 3. See also Bailes “Watch Your Corporation” 1995 3(1) *JBL* 24; and Burchell 562.

<sup>25</sup> Burchell 563.

<sup>26</sup> *S v Dersley* 1997 2 SACR 253 (C).

<sup>27</sup> *Ibid.*

<sup>28</sup> Burchell 563.

<sup>29</sup> This will be seen in the discussion of s 332 below.

<sup>30</sup> Burchell and Milton 386.

avers that “where a contravention exposes the offender to civil as well as criminal liability the risk of enforcement is heightened and the chances of compliance therefore increase”.<sup>31</sup> De Koker’s reasoning is logical. Based on his averment one would expect corporations to be more careful and to try by all means to avoid exposing themselves to both civil and criminal liability. This, however, is not always the case. This could be attributed to the fact that the end result of both actions is in the form of pecuniary loss for corporations, which usually have sufficient funds to pay the fine or damages.

Allowing corporations to be held civilly and criminally liable serves various purposes. Civil liability addresses the victim’s need for compensation for damages while criminal law or corporate criminal liability ensures that offenders are justly punished for the offences they commit against society.<sup>32</sup> It is thus submitted that both civil and criminal liability have an important role to play in our society and both must be used to their full capacity to deal with corporations’ wrongful activities.

In *R v Bennett*, Murray J has stated that even in circumstances where the corporation is free from civil liability, it is possible for such a corporation to be held criminally responsible for the injury caused to a person.<sup>33</sup> A corporation can be held criminally liable for the acts of its director or servant, despite the fact that such person is acting beyond the scope of duty, as long as it can be proven that he or she was furthering or trying to further the interests of the corporation.<sup>34</sup> As unfair as this may seem, it is important to ensure that corporations are prosecuted for offences committed in the process of furthering their interests.

Larkin and Boltar raise the important question as to whether regulating the behaviour of corporations *via* criminal law is appropriate.<sup>35</sup> One of the advantages of corporate criminal liability is that where a corporation is successfully held criminally liable this will give rise to a criminal record, which will inevitably have a direct negative effect on a corporation’s image. Generally people do not want to associate themselves with (corporate) criminals and for the corporation itself it is better to avoid the stigma attached to having a criminal record.<sup>36</sup> As Simpson puts it “the shame associated with criminal processing imposes additional inhibitory effects”.<sup>37</sup> Moreover, given the challenges that may be faced by victims of corporate offences<sup>38</sup> it is clear that if corporate criminal liability was not recognized in South Africa this would have resulted in the untenable situation of corporations totally escaping liability for the harm they cause. Corporate

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<sup>31</sup> De Koker “Personal Liability for the Debts of the Corporation” 1997 2 *Development in European Company Law* 149 163-164.

<sup>32</sup> *Ibid.*

<sup>33</sup> *R v Bennett & Co (Pty) Ltd supra* 198.

<sup>34</sup> S 332(1); and see Burchell 566.

<sup>35</sup> Larkin and Boltar “Company Law” 1997 *Annual Survey of South African Law* 403 435.

<sup>36</sup> Simpson 20.

<sup>37</sup> *Ibid.*

<sup>38</sup> Instituting a civil claim against another person is a costly exercise and in certain instances the aggrieved party may not be in a financial position to pursue the matter. Even where a party does actually pursue the matter there is no guarantee that such party will sue for damages successfully.

criminal liability ensures that corporations are compelled to assume responsibility for the criminal actions of their servants and/or directors, and are punished accordingly. It is thus submitted that corporate criminal liability is an indispensable asset to our criminal justice system.

## 5 THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

The earliest traces of a corporation under Roman law are that of a family under the rule of its patriarch.<sup>39</sup> He enjoyed rights and incurred duties, but the rights and the duties were those of the family or corporation.<sup>40</sup> At this early stage, criminal law was still developing and apparently did not deal with issues such as crimes caused by corporations. The criminal law was mainly concerned with matters affecting or threatening the security of the state.<sup>41</sup>

### 5 1 Roman law

In Roman law a legal entity could not be held criminally responsible.<sup>42</sup> This assertion is also supported by Kahn, who states that a corporation is incapable of committing an *actus reus* and of having *mens rea*, therefore it could not be criminally liable under Roman law and possibly Roman-Dutch law.<sup>43</sup> Selikowitz also states that in Roman law there was apparently no corporate criminal liability and where it appeared as though such liability did exist, a clear theory on which it was based cannot be found.<sup>44</sup> The situation changed under canonical and secular law which defended the idea that a legal entity could be prosecuted.<sup>45</sup>

### 5 2 Roman-Dutch law

In Roman-Dutch law a corporation was recognized as a legal persona capable of being a party to a civil suit.<sup>46</sup> It is, however, doubtful whether a legal entity was punishable under Roman-Dutch law.<sup>47</sup> Selikowitz states that during that time there was an apparent reluctance to accept that corporations could be criminally liable.<sup>48</sup> The development under Roman-

<sup>39</sup> In Maine's words, "the family, in fact, was a corporation; and he was its representative or ... its public officer" (*Maine Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1931) 153).

<sup>40</sup> *Ibid.*

<sup>41</sup> Maine 310.

<sup>42</sup> De Wet en Swanepoel *Strafreg* (1949) 18.

<sup>43</sup> Kahn "Can a Company Be Guilty of Murder? The Criminal Liability of a Corporation – I" 1990 *19 Businessman's Law* 146.

<sup>44</sup> Selikowitz 1964 *Responsa Meridiana* 22.

<sup>45</sup> De Wet and Swanepoel 8.

<sup>46</sup> "[A] corporation or collective body does seem in some degree identified with the members thereof, though by a fiction of law the acts of the majority acting in their corporate capacity are attributed, not to them, but to the corporation itself in such matters as it is competent to perform", De Villiers *Supplement to Roman and Roman Dutch Law of Injuries: A Translation of Book 47, Title 10 of Voet's Commentary on the Pandects, with Annotations* (1915) 61.

<sup>47</sup> De Wet and Swanepoel 8.

<sup>48</sup> Selikowitz 1964 *Responsa Meridiana* 22.

Dutch law seems to be in favour of a corporation being held liable for civil wrongs committed by its servants. De Villiers avers that “it is undoubtedly true that a corporation cannot entertain an *animus injuriandi* ...; but just as by the Roman law regulating the relations between a slave and his owner, the latter (unless he surrenders the slave to the injured party) could be held liable for the act committed *animo injuriandi* by the slave, so a corporation, where the law relating to corporations is such, may be held liable for the act committed *animo injuriandi* by the persons for whose acts it is by such law accountable”.<sup>49</sup> Although De Villiers is specifically referring to the law of injuries, this assertion gives the impression that Roman-Dutch law was moving towards the inclination of holding a corporation criminally liable.

### 5 3 The common law

There is very little evidence of the existence of corporate criminal liability in South Africa prior to the early 20th century.<sup>50</sup> The common law recognized a *universitas* formed by natural persons and this body was separate from the individuals that formed it.<sup>51</sup> The body was vested with legal personality and could be held liable for criminal actions it committed.<sup>52</sup> The common law position seems to rely on vicarious liability as the basis for corporate criminal liability.<sup>53</sup> In terms of the common law, where a corporation has committed an offence it is held criminally liable due to the fact that the corporation is the master of those individuals who committed the offence.

The exceptions that exist under the common law require a close examination. Firstly, in terms of the common law there are certain crimes, such as rape, incest, bigamy *etcetera*, which a corporation cannot commit as their nature is such that they can only be committed by human beings.<sup>54</sup> This raises the question, should the corporation, an entity formed by human beings really be excluded from the ambit of certain crimes?

In *S v Sutherland*<sup>55</sup> a company, which failed to comply with requirements for a licence to sell liquor, escaped conviction because the statute required natural persons to hold liquor licences. Burchell and Milton are of the opinion that certain crimes can only be committed by human beings.<sup>56</sup> On the contrary, however, Selikowitz provides an interesting example<sup>57</sup> which

<sup>49</sup> De Villiers 21.

<sup>50</sup> Selikowitz 1964 *Responsa Meridiana* 24.

<sup>51</sup> Lansdown, Hoal and Lansdown *Gardiner and Lansdown South African Criminal Law and Procedure Vol 1* 6ed (1957) 78.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> 1972 3 SA 385 (N).

<sup>56</sup> Burchell and Milton 387.

<sup>57</sup> “Mr A, a director of a limited company X, was approached by Miss B, who offered to lend his company the sum of money it so badly needed and further to place a record order with the company. A condition for the loan and the order was that Mr A should first marry Miss B. Mr A duly married Miss B with the consent of his co-directors, P and Q, who were in full knowledge of all the facts as well as that Mr A was already legally married”, Selikowitz 1964 *Responsa Meridiana* 28. This of course, as Selikowitz explains, could lead to the corporation

suggests that it is possible for a company to be held liable for a crime such as bigamy, which under normal circumstances is personal in nature and can only be committed by a natural person. It is submitted that the example made by Selikowitz<sup>58</sup> is not far-fetched as it illustrates the fact that there may be circumstances which require the court to hold a corporation liable for crimes that are personal in nature provided that they have been committed in the interest of the corporation.

In *R v Bennett and Co (Pty) Ltd*<sup>59</sup> and in *S v Joseph Mtshumayeli (Pvt) Ltd*<sup>60</sup> the corporations were charged with and found guilty of culpable homicide.<sup>61</sup> In both cases, the negligent acts of the employees were imputed to the corporation. In *Bennett*<sup>62</sup> the employee's negligent act resulted in the death of another employee. Both the negligent employee and the company were prosecuted and convicted of culpable homicide.<sup>63</sup> In *Joseph Mtshumayeli*<sup>64</sup> the driver of a bus acted negligently by allowing a passenger to drive the bus. This led to an accident which claimed the life of another passenger. The company was also prosecuted and found guilty of culpable homicide since the bus had been driven with the permission of an employee of the corporation.<sup>65</sup> Moreover the act of driving the bus was performed in endeavouring to further the interests of the transport company.<sup>66</sup>

Secondly, in terms of the common law, a corporation will not be held criminally liable where the legislature has confined the application of the law to human beings.<sup>67</sup> This particular exception refers to those instances where the statute specifically states which people or group of people are subject to that specific rule or regulation. The common law rule should not pose any problems because the statutory provisions are directed only at natural persons, thus excluding corporations from their operation.

Moreover, under the common law a corporation will not be held criminally responsible where the only punishment that may be imposed for the particular alleged offence is a form of punishment that may only be imposed on a natural person.<sup>68</sup> In situations where a crime committed could only be punishable via imprisonment, without the option of a fine, a corporation could escape liability.<sup>69</sup> It is submitted that this is a shortcoming. It is not sound to recognize artificial persons and then allow them to escape prosecution

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being held liable for bigamy as he clearly committed the crime in the interest of the corporation.

<sup>58</sup> *Ibid.*

<sup>59</sup> *R v Bennett & Co (Pty) Ltd supra* 194.

<sup>60</sup> 1971 1 SA 33 (RA).

<sup>61</sup> Kahn "Can a Company be Found Guilty of Murder? The Criminal Liability of a Corporation-II" 1990 19 *Businessman's Law* 175 176.

<sup>62</sup> *R v Bennett & Co (Pty) Ltd supra* 194.

<sup>63</sup> *Ibid.*; and see Kahn 1990 19 *Businessman's Law* 176.

<sup>64</sup> *Supra*. This was a case decided by the Rhodesian Supreme Court based on a statute which was the same as the South African statutory regulation at the time.

<sup>65</sup> *Ibid.*

<sup>66</sup> Kahn 1990 19 *Businessman's Law* 176.

<sup>67</sup> *S v Sutherland supra* 385.

<sup>68</sup> Lansdown *et al* 78.

<sup>69</sup> Selikowitz 1964 *Responsa Meridiana* 24.

merely due to the fact that the nature of the punishment prescribed for that particular offence is such that it “could not be suffered by an artificial person”.<sup>70</sup>

This shortcoming is, however, solved by the statutory regulation of corporate criminal liability which specifically states that a corporation will be held liable “for any offence, whether under any law or at common law”.<sup>71</sup> The term “any law” includes any statute or statutory regulation or by-law. Section 332 then prescribes a fine as punishment that may be imposed on such a corporation. It is submitted that where such an offence is committed by a corporation, as a person, albeit an “artificial” one, the corporation ought to be prosecuted and if convicted, the penalty be in the form of a fine. Where a statute only prescribes imprisonment as punishment, section 332 allows the courts to impose a fine.<sup>72</sup>

The common law regulates the criminal liability of the directors and servants for the crimes committed by the corporation.<sup>73</sup> In the past there was statutory regulation of the directors and servants’ criminal liability,<sup>74</sup> however, that provision was declared unconstitutional in *S v Coetzee*.<sup>75</sup> The current common law position is that a director may be held liable for offences committed by the corporation provided he participated in the commission of the offence “on the basis of vicarious liability or agency”.<sup>76</sup> This differs from s 332 (5) which allowed for a director or servant to be liable for crimes committed by other directors / servants where the director had not taken part in the offence, even where vicarious liability was not applicable.<sup>77</sup>

## 6 PREVIOUS STATUTORY REGULATION OF CORPORATE CRIMINAL LIABILITY

Section 384 (1) of the Criminal Procedure and Evidence Act, 1917 is the original statutory regulation that made provision for a corporation to be held liable for crimes committed by its directors or servants in furthering the interest of the corporation. This section was the legislature’s first attempt at regulating corporate criminal liability via a statute.<sup>78</sup> It has, however, been criticized for having been poorly drafted<sup>79</sup> and for being a procedural provision which does not address substantive law in corporate criminal liability.<sup>80</sup>

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<sup>70</sup> Lansdown *et al* 78.

<sup>71</sup> S 332(1) Criminal Procedure Act.

<sup>72</sup> Kahn 1990 19 *Businessman’s Law* 146.

<sup>73</sup> Kidd “Liability of Corporate Officers for Environmental Offences” 2003 18(2) *SA Public Law* 278; and see Burchell 568.

<sup>74</sup> S 332(5) of the Criminal Procedure Act, 1977.

<sup>75</sup> 1997 3 SA 527 (CC); and 1997 1 SACR 379 (CC).

<sup>76</sup> Burchell 567.

<sup>77</sup> Burchell 567.

<sup>78</sup> Kahn 1990 19 *Businessman’s Law* 145.

<sup>79</sup> Kahn 1990 19 *Businessman’s Law* 146.

<sup>80</sup> Lansdown *et al* 79.

It is submitted that with the promulgation of section 384 the legislature for the first time showed that it is aware of the importance of corporate criminal liability. It is further submitted that Selikowitz's assertion that even though section 384 was a procedural provision, it implied the state's acceptance of the concept of corporate criminal liability,<sup>81</sup> is correct. Had it not been for this implied approval by the state, one wonders how the development of this area of the law would have progressed in South Africa.

In terms of the provision, as long as the state was able to show that the crime committed was allegedly committed by an individual or individuals in the process of advancing or attempting to advance the said corporation, that corporation would be prosecuted. Moreover, the individual concerned could also be charged and personally punished for the offence.<sup>82</sup>

Section 384(1) had a number of shortcomings and for that reason it has been widely criticized.<sup>83</sup> One of the main criticisms of this provision is its presumptive nature in that the servant or director's guilt is presumed without being legally established.<sup>84</sup> This reverse onus is a problem because, instead of the prosecution bearing the onus to prove the guilt of the accused, the accused bears the burden of proving his innocence. This, it is submitted, is clearly not sound as a person is supposed to be presumed innocent until proven guilty.<sup>85</sup>

It is submitted that, despite the shortcomings of the section, the legislature's move in enacting section 384 is commendable as it laid the ground for the development of corporate criminal liability in South Africa.

The enactment of section 117 of the Companies Amendment Act 23 of 1939 further developed corporate criminal liability. In terms of section 117 the corporation could also be held liable for crimes committed "in furthering or endeavouring to further the interests of that corporate body".<sup>86</sup> Moreover, section 117 did not only provide for the criminal liability of the corporation, but it also provided that the director or servant of the corporation may be held liable personally, unless he failed to prove that he did not take part in the commission of the offence and could not have done anything to prevent the commission of the offence. In essence the section allowed for a director or servant to be held criminally liable for the unlawful action of another director or servant. It is therefore not surprising that the section has been described as "a legal straitjacket from which even a Houdini of the law could not escape".<sup>87</sup>

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<sup>81</sup> Selikowitz 1964 *Responsa Meridiana* 24.

<sup>82</sup> S 384(1).

<sup>83</sup> Du Plessis "Die Strafrechtlike Aanspreeklikheid van Regsperson: 'n Mensliker Benadering" 1991 *TSAR* 635.

<sup>84</sup> Where the accused is presumed guilty and the burden of proving his innocence is borne by him this is referred to as a reverse onus.

<sup>85</sup> S 35(3)(a) of the Constitution of the Republic of South Africa Act, 1996 (hereinafter "the Constitution").

<sup>86</sup> S 117.

<sup>87</sup> Kahn 1990 19 *Businessman's Law* 146.

In *R v Bennett & Co (Pty) Ltd*,<sup>88</sup> Murray J made an observation that the modifications to the common law that were brought about by the enactment of section 117 were radical.<sup>89</sup> Such a conclusion is probably due to the fact that the two-fold liability<sup>90</sup> of both the corporations and the directors seems to have originated in this statute. In other respects section 117 continued to reflect the common law position.

Section 381 of the Criminal Procedure Act 56 of 1955 came into being in 1955. Section 381 is, to some extent, a rewording of section 384(1) of the 1917 Act, as amended by section 117 of Act 23 of 1939. In terms of section 381 we again had a situation where the fault of a director or a servant would be regarded as the fault of the corporation. The director or servant would also be held liable for offences which were committed by the corporation, if he could not prove that he did not take part in the commission of the offence and could not have prevented the offence from being committed.

## **7 AN OVERVIEW OF THE CURRENT STATUTORY REGULATION OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA**

Corporate criminal liability is currently regulated by section 332 of the Criminal Procedure Act, 1977, which is headed "Prosecution of corporations and members of associations". From the heading it is clear that the section is not only aimed at juristic persons, but it also regulates the prosecution of crimes committed by persons belonging to associations that lack legal personality. In terms of section 332 the guilt of the individual within the corporation who committed the offence is imputed to the corporation itself.<sup>91</sup> In fact section 332 "embodies the ... principle ... that the guilt of the natural person is the guilt of the corporate body".<sup>92</sup>

Section 332 is a comprehensive section, with 12 subsections. It provides the circumstances in which a corporation will be held criminally liable for offences.<sup>93</sup> It also requires that an individual stand trial on behalf of the corporation.<sup>94</sup> In instituting criminal proceedings it must be clear in what capacity the accused is being prosecuted, that is, in his/her personal capacity as a director or servant or as representative of the corporation. In *Herold NO v Johannesburg City Council*<sup>95</sup> the charge was ambiguous and it was not clear whether the person charged was being charged in his

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<sup>88</sup> *Supra* 198.

<sup>89</sup> *Ibid.*

<sup>90</sup> "Briefly, the new legislation imposes a two-fold liability to criminal prosecutions. It holds a company liable for the criminal conduct of its directors and servant within a wide but specified field of activity. This liability is an absolute one and cannot be rebutted. Conversely, a director or servant of the company is held liable for the crimes of the company, but such liability is merely presumptive and may be rebutted." Barlow "The Criminal Liability of a Company, its Directors and its Servants" 1946 63 SALJ 502 503.

<sup>91</sup> Burchell 565-566.

<sup>92</sup> Kidd 2003 18(1) SA Public Law 3.

<sup>93</sup> S 332(1) of the Criminal Procedure Act.

<sup>94</sup> S 332(2).

<sup>95</sup> 1947 2 SA 1257 (A).

personal capacity or as a representative of the corporation.

The section also deals specifically with the issue of records that may be relied on as admissible evidence.<sup>96</sup> Subsection 3 provides that records that were made by or kept by a director, servant or agent within the scope of duty may be admissible as evidence in court. In *S v Harper*<sup>97</sup> such records were held to be admissible as evidence as it was proven that they were made with the accused director's authorization during the time the accused was still the director of the corporation. The provision also deals with the evidence that is admissible in criminal proceedings against the director/servant. Section 332 (6) provides that the same evidence that was used in the prosecution of the corporation is admissible in the prosecution of the directors, servants, *etcetera*.

As mentioned above, section 332 (5) which provided for the conviction of a director or servant of a corporate body for a crime committed by the corporate body (in other words by other directors/servants) unless he/she could prove that he/she did not take part in the commission of the crime and that she could not have prevented it, was challenged and found to be unconstitutional in *S v Coetzee*. This area is thus regulated by common law. Sections 332(7), (8) and (9) regulate the criminal liability of associations that lack juristic personality. Section 332(7) is important in that it deals with the liability of members of such associations. It provides that any person who was a member of an association of persons at the time of the commission of an offence committed by the "association", will in the same manner as in section 332(5) be found guilty of that offence. This will be the case unless he is able to prove that he did not take part in the commission of the offence and that he could not have prevented it. Where the association was governed by a committee or governing body, if that member was not a member of that committee or governing body at the time of the commission of the crime, he would escape liability. Nevertheless, the provision conflicts with the presumption of innocence and it remains to be seen whether it will survive a constitutional challenge.

In section 332(10) the word "director" is defined as "any person who controls or governs a corporate body or who is a member of a body or group of persons which controls or governs a corporate body or where there is no such body or group of persons, who is a member of the corporate body". The word director in the ambit of section 332 can thus be widely interpreted as it refers to any person who controls or governs the corporation, without explaining how the person gets the powers to control or govern.<sup>98</sup> The effect is that a person who at the time of the commission of the offence controlled or governed the corporate body will be regarded as a director and will be held criminally liable in terms of section 332 of the Criminal Procedure Act.<sup>99</sup>

<sup>96</sup> Subsections (3) and (4).

<sup>97</sup> 1981 1 SA 88 (D).

<sup>98</sup> "The connotation of the words 'control' and 'govern', as used in the definition of 'director' in subsection (10) of Act 56 of 1955, is wide enough to include the control of the company in any of its activities," *S v Marks* 1965 3 SA 834 (W).

<sup>99</sup> *R v Mall* 1959 4 SA 607 (N) 607.

Section 332(11) makes it clear that a corporation that is prosecuted under section 332 cannot escape liability under another law. In terms of section 332(11): “The provisions of this section shall be additional to and not in substitution for any other law which provides for a prosecution against corporate bodies or their directors or servants or against associations of persons or their members.” The legislature has thus taken into account the fact that the Criminal Procedure Act is not the only source of law dealing with the prosecution of corporations. Unlawful corporate activities range from the disregard of statutes regulating the maintenance of safety in the workplace, to corruption, theft, fraud, *etcetera*. These are regulated by common law and by various statutes. Corporations can be punished in terms of those laws and also in terms of section 332 of the Criminal Procedure Act. The last subsection<sup>100</sup> is a procedural provision which serves to ensure that the state deals with one individual, who is prosecuted on behalf of the corporation. It is thus necessary for the state to determine beforehand who that individual is, so that in the event of issuing a summons, it will be served on the correct person. Non-adherence to this subsection may lead to confusion.

## **8 THE ROLE OF THE CONSTITUTION IN THE REGULATION OF CORPORATE CRIMINAL LIABILITY**

The Constitution in section 8(3) provides that:

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

- (a) in order to give effect to a right in the Bill must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).”

Our Constitution specifically mentions juristic persons and specifically provides rights and protections to them. As an entity with legal personality, a juristic person is protected by and is also obliged to conform to the Constitution of South Africa.<sup>101</sup>

The fact that we have a Constitution makes it inevitable for us to question whether section 332 would pass the test if it were to be challenged. The Constitutional Court case of *S v Coetzee* has illustrated the fact that the section 332 provisions may in certain instances infringe upon guaranteed constitutional rights. There are other provisions within section 332 which, although they continue to be valid, may be challenged successfully:

- One such subsection is section 332(7). It is highly unlikely that that section would survive a constitutional challenge. The wording of section 332(7) is similar to section 332(5) which has already been found to be

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<sup>100</sup> S 332(12).

<sup>101</sup> S 8(4) of the Constitution.

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unconstitutional in *S v Coetzee*. Larkin and Boltar agree that, based on *Coetzee* it is probable that section 332(7) is not constitutional.<sup>102</sup>

- Section 332(1) deals specifically with directors and servants. Section 332(5) extended liability to servants and in *Coetzee* all the judges were in agreement regarding the fact that the extending of liability to servants in terms of section 332(5) was not justifiable. The question whether the Constitutional Court will find such reference to servants in section 332(1) justified is something to think about. Larkin and Boltar argue, though, that “even if section 332(1) were limited to those who make up the ‘directing mind’ of a company, it still provides for a form of vicarious criminal liability. As such, it must surely run into a serious constitutional question”.<sup>103</sup>

The other constitutional concern raised in *S v Coetzee* is the overbreadth of section 332. Section 332 does not limit its application to certain offences. Moreover, the section allows for a conviction to be made even when there is a reasonable doubt regarding the guilt of the accused. Unless the legislature intervenes, there is a likelihood that parts of section 332 will be constitutionally challenged.

## 9 CONCLUSION

It must be noted that in its original form section 384(1) of the 1917 Act was a brief provision which served merely to regulate in a statute, that which was already regulated by the common law. By the time we come to section 381(1) of 1955 the wording of the provision is longer and a clear attempt has been made at clarifying issues which could possibly give rise to confusions and misinterpretations. The current provision<sup>104</sup> reflects a development in the area of corporate criminal liability as the legislature explains clearly whose actions the corporation is to be held liable for; under what circumstances; the liability of directors and servants, *etcetera*. From the above it is clear that South Africa views the criminal activities of corporations (and entities which do not have legal personality) in a serious manner. The statutory regulation of corporate criminal liability is clear and the legislature has made an attempt to ensure that the major procedural aspects are included in the section. Moreover, apart from contributing towards the development of the concept of corporate criminal liability, the statutory regulation has also widened the scope of corporate criminal liability in South Africa.

However, given the fact that corporate activities continue to pose dangers to South African society, this begs the question “is enough being done to address the problem and also to discourage corporations from committing crimes”?

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<sup>102</sup> Larkin and Boltar 434.

<sup>103</sup> Larkin and Boltar 434-435.

<sup>104</sup> S 332.