

**AN ANALYSIS OF LEGISLATION ON CORPORATE CRIMINALISATION AND  
CRIMINAL SANCTIONS IN ZAMBIA**

**BY**

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**A dissertation submitted to the University of Zambia in partial fulfillment of the  
requirements of the degree of Master of Laws (Taught)**

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**DECLARATION**

I, **Bwalya Jennipher**, solemnly do hereby declare that this dissertation is my own work and that all the work of other persons have been duly acknowledged, and that this work has never been previously submitted at this University or any other university for similar purposes.

Signed: .....

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## APPROVAL

This dissertation of Bwalya Jennipher has been approved as fulfilling part of the requirements for the award of the degree of Master of Laws (Taught) by the University of Zambia.

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## ABSTRACT

The study investigated the current corporate criminal liability legal system in Zambia to analyse its effectiveness in serving as a deterrent instead of a conduit pipe for corporate crime. The current legislation recognises corporations as capable of committing criminal offences. However, these provisions appear to be more biased towards individual than corporate responsibility. The legislation make it easier to establish individual criminal liability than corporate criminal liability. As a result, the criminal justice players have faced numerous challenges in fighting corporate crime and deterring would be corporate offenders.

The overall objective of the study was to investigate the adequacy of corporate criminal liability laws in curbing corporate crime in Zambia. The specific objectives were to assess the strengths and weaknesses of corporate criminal liability laws in Zambia; determine the extent to which corporate criminal liability laws hold the corporate entity accountable; determine the extent to which shareholder, creditors and directors of a corporate entity liable to punishment are protected in their individual rights and how the corporation is protected from individual criminals; and to highlight domestic and international best practices favourable to the effective administration of corporate criminal liability.

The study used mixed methods of research encompassing doctrinal where both primary and secondary data were used; social legal where the legal concept of and legislation on corporate criminal liability was considered in the social context by looking at its implications; and qualitative methods used enabled the analysis of the data collected by transcribing it into the major themes which emerged. The study also used interviews and the data collected by this method was analysed by use of interpretative techniques.

The study found that corporate criminal liability is recognised in Zambia that its recognition is based on the fiction theory of corporate personality hence the derivative models of corporate criminal liability being the identification model with traces of the vicarious liability model. It found that there is a general inadequacy of capacity building for the criminal justice system and that this coupled with the limited corporate sentencing base make the overall corporate criminal liability law less efficient in holding corporate criminals sufficiently accountable for their crimes. The study also found that the shareholders, creditors and directors are not protected under law as the primary sentence of a fine on a corporation is ultimately borne by the shareholders and creditors who have little or no control over corporate activities. It fund that where statutory provisions provide for the sentence of imprisonment in addition to the fine, the prison term is served by the director of the corporation unless he raises due diligence defence, for which the law does not provide procedure. The study concluded that the existing corporate criminal liability laws are inadequate to curb corporate crime and deter would be corporate offenders.

This study recommends, among others, for the enhancement of corporate criminal liability by including corporate culture as a basis for corporate liability. It recommends the outlining of clear procedures on treatment of corporate criminals and enactment of specific offences' legislation targeted at the corporate form and the expansion of the corporate sentencing base to discourage recidivism and promote the deterrence purpose of punishment.

**Keywords:** *Corporate liability, corporate crime, legislation, criminal sanctions.*

## **DEDICATION**

To my baby sister Samantha Ndovi

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## ACRONYMNS

ACB	Anti-Corruption Bureau
ACC	Anti-Corruption Commission
ATM	Auto Teller Machine
BCCI	Bank of Credit and Commercial International
CID	Criminal Investigations Division
DEC	Drug Enforcement Commission
DPP	Director of Public Prosecutions
GBV	Gender Based Violence
MLA	Mutual Legal Assistance
MRA	Malawi Revenue Authority
NPA	National Prosecutions Authority
PACRA	Patents and Companies Registration Agency
PEACE	Preparation and Planning, Engage and Explain, Account Closure and Evaluate
UK	United Kingdom
US	United States of America
VSU	Victim Support Unit
ZRA	Zambia Revenue Authority

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Anti-Corruption Act No.3 of 2012

Bank of Zambia (regulations) Act No. 33 of 2012

Companies Act No. 10 of 2017

Constitution of Zambia, Chapter 1 of the Laws of Zambia

Criminal Procedure Code, Chapter 88 of the Laws of Zambia

English Law (Extent of Application) Act, chapter 11 of the Laws of Zambia

Environmental Management Act No. 12 of 2011

Financial Intelligence Centre Act No. 46 of 2010

Fisheries Act No. 22 of 2011

Forfeiture of Proceeds of Crime Act No. 19 of 2010

Health Professions Act No. 24 of 2009

Higher Education Act No. 4 of 2013

Immigration and Deportation Act No. 18 of 2010

Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia

Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia

National Prosecution Authority Act No. 34 of 2010

Occupational Health and Safety Act No. 36 of 2010

Patents and Companies Registration Agency Act No. 15 Of 2010

Penal Code, Chapter 87 of the Laws of Zambia

Plea Negotiations and Agreement Act No. 20 of 2010

Prisons Act, Chapter 97 of the Laws of Zambia

Probation of Offenders Act, Chapter 93 of the Laws of Zambia

Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010

Public Interest Disclosure (Protection of Whistleblowers) Act No. 10 of 2010

Securities Act No. 41 of 2016

Workers' Compensation Act. No. 10 Of 1999

Zambia Environmental Management Act, Chapter 204 of the Laws of Zambia

Zambia Revenue Authority Act, Chapter 321 of the Laws of Zambia

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United States v Olin Corp., No. 63-217, slip op. (S.D.N.Y. Sept 23, 1965); No. 78-30, slip op. (D. Conn. June 1, 1978); No. 73-38, slip op. (W.D.N.Y. Dec 10, 1979)

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Overview

This study seeks to give a comprehensive understanding of the concept of and existing legal framework for corporate criminal liability in Zambia. At present, most countries agree that corporations can be sanctioned under civil and administrative laws. However, whether and how they should be answerable under criminal liability laws and subjected to criminal sanctions has been more controversial. Zambia, like many other jurisdictions, has accepted and applied the concept of corporate criminal liability in its legal system as evidenced from such Acts of Parliament as the Penal Code<sup>1</sup>, the Companies Act,<sup>2</sup> the Prohibition and Prevention of Money Laundering Act,<sup>3</sup> the Anti-Corruption Act,<sup>4</sup> the Environmental Management Act,<sup>5</sup> the Forfeiture of Proceeds of Crime Act,<sup>6</sup> and the Workers Compensation Act,<sup>7</sup> under which the corporation is recognized as a subject of criminal liability for certain crimes. Corporate criminal liability laws are meant to protect the economy and its population from the negative effects of repeated criminal activities of various corporations.

In this chapter, the study gives a brief background to the concept of corporate criminal liability before stating the problems associated with its legal framework in Zambia. The chapter will give a brief outline of the theoretical framework informing this study. The aim and research objectives of the study are outlined before moving on to the research questions intended to be answered by the study. Thereafter, an outline of the significance of the study to the Zambian jurisprudence is given after which a review of various literature on the subject is made. The chapter concludes after giving the methodology employed in conducting the research as well as the scope and structure of the study.

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<sup>1</sup> Chapter 87 of the Laws of Zambia

<sup>2</sup> Act No. 10 of 2017 of the Laws of Zambia

<sup>3</sup> The Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010

<sup>4</sup> Act No. 3 of 2012

<sup>5</sup> Act No. 12 of 2011

<sup>6</sup> Act No. 19 of 2010

<sup>7</sup> Act No. 10 of 1999

## 1.2 Background to the Study

A corporation is “an artificial being, invisible, intangible, and exists only in contemplation of law. It possesses only those properties which the charter of its creation confers upon it.”<sup>8</sup> In contrast to a human being, a corporation, which is an unnatural artificial person, can act only through others.<sup>9</sup> Criminal Liability, on the other hand, is attached only to those acts in which there is violation of criminal law which prohibits certain acts or omissions.<sup>10</sup> This means that to hold one criminally liable, there must be culpability of the actor, which includes a person’s decision to flout community norms and disobey the existing law. It follows that if corporate criminal liability is to exist at all, then the corporation must be responsible for the actions of its employees through which it acts.<sup>11</sup> This is what some writers refer to as complicity; which is the “involvement of a person with an offence committed by another which renders the person criminally liable for that offence.”<sup>12</sup> Corporate criminal liability therefore refers to the legal responsibility or culpability of a corporation for criminal acts or omissions done on its behalf by individual human beings who have an employment or agency relationship with it.

The contrasting nature of corporations and of criminal law have given rise to a global debate on the necessity for and recognition of corporate criminal liability, this having regard to the challenges inherent in the nature of corporations and of criminal law. While some scholars are in support of the doctrine, others support it only in so far as its application is restricted and yet others are absolutely opposed to it while another school of thought holds the view that criminal liability for corporate entities should be substituted for civil liability. It follows that whereas some jurisdictions have clearly set out the law on the subject, others have completely left it out and still others have set clear parameters for its application. Accordingly, although corporate criminal liability is a recognized phenomenon in many domestic jurisdictions, it has no international recognition.<sup>13</sup> Therefore, this study concedes that although the issue of corporate

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<sup>8</sup> Trustees of Dartmouth College v Woodward (1819) 17 U.S. (4 Wheat.) 518

<sup>9</sup> Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime*, Journal of Business & Technology Law, Vol. 2, 2007-A-37 (University of Houston Law Center, 2007)

<sup>10</sup> Abhishek Anand, *Holding Corporations Directly Responsible for Their Criminal Acts: An Argument*, [www.manupatra.com](http://www.manupatra.com), (accessed March 2, 2006).

<sup>11</sup> Andrew Weissmann and David Newman, “Rethinking Criminal Corporate Liability,” Indiana Law Journal, 82: 2, Article 5, Maurer School of Law, Bloomington, (2007), pp. 411,417-23.

<sup>12</sup> Peter Butt, ed., *Butterworths Concise Australian Legal Dictionary*, 3<sup>rd</sup> ed., Chatswood, N.S.W.: LexisNexis/Butterworths, (2004).

<sup>13</sup> Anca Iulia Pop, *Criminal Liability of Corporations - Comparative Jurisprudence* (Michigan State University College of Law, 2006)

criminal liability is an age-old debate, the debate has not resulted in any established and universal position.

Zambia practices a dual legal system where both written and customary laws are applicable, although the applicability of customary law is only to the extent that it is consistent with the Constitution and the laws and statutes which apply or extend to Zambia as prescribed.<sup>14</sup> At present, the Zambian jurisprudence on corporate criminal liability has been greatly influenced by developments in English law. This is because Zambia, then Northern Rhodesia, was a protectorate of Britain and was applying the English law to the letter. With time, and an increased drive to make the law indigenous, some of the laws began to have a ‘Zambian face’ to them with various statutory provisions being enacted to provide for the local establishment, recognition and regulation of the corporate entity. As to how far the English law still influences the Zambian law, the English Law (Extent of Application) Act<sup>15</sup> provides that:

Subject to the provisions of the Constitution and to any other written law the common law; the doctrines of equity; the statutes which were in force in England on 17th August, 1911, being the commencement of the Northern Rhodesia Order in Council, 1911; and any statutes of a later date...in force in England, now applied to the Republic, or which shall apply to the Republic by an Act of Parliament, or otherwise; shall be in force in the Republic.<sup>16</sup>

When it comes to corporate criminal liability, the position in Zambia is that the criminal justice system recognises that an erring corporate entity is amenable to criminal sanctions. For instance, the Penal Code,<sup>17</sup> provides that where the person to be sentenced is a corporation, the sentence to be imposed may be a fine instead of imprisonment. A review of certain Acts of Parliament, like the Penal Code<sup>18</sup> and the Criminal Procedure Code<sup>19</sup>, also reveals that the current laws do not usually make specific reference to corporations when proscribing certain acts and outlining their punishments. In most instances, the criminal law statutes only make general provisions and leave law enforcers to decide where to fit in erring corporate entities.

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<sup>14</sup> Article 7 of the Constitution of Zambia, Act No. 2 of 2016

<sup>15</sup> Chapter 11 of the laws of Zambia as amended by Act No. 6 of 2011

<sup>16</sup> Section 2 of the English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia

<sup>17</sup> Chapter 87 of the Laws of Zambia

<sup>18</sup> Chapter 87 of the Laws of Zambia

<sup>19</sup> Chapter 88 of the Laws of Zambia

To this end, the Anti-Corruption Act<sup>20</sup> provides that a person who, directly or indirectly, whether on that person's behalf or any other person, knowingly enters into, or causes to be entered into, any dealing in relation to any proceeds of crime commits an offence.<sup>21</sup> The law provides for imprisonment for corporate individuals and fines for corporations for the same offence as evidenced from such Acts as the Environmental Management Act<sup>22</sup> where the general penalty provided for contravening the Act is a fine not exceeding three hundred thousand penalty units or imprisonment for a period not exceeding three years, or both.<sup>23</sup> It is provided that where the offence was committed by the corporation then every director or manager is liable, upon the conviction of the corporation, as if he had personally committed the offence, unless he proves to the satisfaction of the court that the act constituting the offence was done without his knowledge, consent or connivance or that he took reasonable steps to prevent the commission of the offence.<sup>24</sup> From the above provision, it follows that since the corporation has no physical body, a court passing a sentence of both a fine and imprisonment leaves the imprisonment to be borne by the corporate individual being the director or manager.

It is clear from the existing legislation in Zambia that corporate criminal liability is recognised. However, whether the requisite laws adequately reflect this recognition is an issue that remains to be resolved. This study therefore sets out to evaluate the current legal framework and enforcement mechanisms in Zambia and determine whether they are effective in serving as a deterrent instead of being a conduit pipe for corporate crime. In so doing, the study will also be contributing to the global corporate criminal liability debate on whether corporate criminal liability should be enhanced, restricted, substituted for civil liability or not exist at all.

### **1.3 Statement of the Problem**

The Acts of Parliament governing corporate crime and its procedures in Zambia reveal a significant bias towards individual responsibility as opposed to corporate responsibility. These corporate crime laws or statutes include the Penal Code,<sup>25</sup> the Prohibition and Prevention of

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<sup>20</sup> Act No.3 of 2012

<sup>21</sup> Section 37 (1) of the Anti-Corruption Act, 2012

<sup>22</sup> Act No. 12 of 2011

<sup>23</sup> Section 125 (1) of the Environmental Management Act No. 12 of 2011

<sup>24</sup> Section 126 of the Environmental Management Act No. 12 of 2011

<sup>25</sup> Chapter 87 of the Laws of Zambia

Money Laundering Act,<sup>26</sup> the Anti-Corruption Act,<sup>27</sup> the Environmental Management Act,<sup>28</sup> and the Criminal Procedure Code,<sup>29</sup> among others. They embody the identification and vicarious liability models of establishing corporate criminal liability, which models are derivative in nature as they require that if the offence is not one of strict liability then individual responsibility of the natural persons must be established before it can be imputable on the corporation. It is therefore common to find individuals being prosecuted and imprisoned for crimes done for the offence for which the major beneficiary was the corporate entity. It is also usual to find the courts meting out the more serious sentence of imprisonment on the individuals and subjecting the corporate entity to only the less deterrent sentence of a fine. When corporations weigh this against the gains they would otherwise derive from offending, they prefer to take payment of the fine as a mere cost of business.

The various corporate crime statutes therefore appear to be targeted against natural persons in the corporations such as directors, managers and employees than against the artificial legal entities with whom they have an agency or employment relationship. This makes the current corporate crime laws and procedures in Zambia problematic and a source of concern especially to persons such as investigators, prosecutors, adjudicators and ultimately the general public who are receivers of the law. The major problem is how to hold corporations criminally liable as corporations and what forms of punishment apart from fines can be imposed on the entity which is not a natural legal person. Given these concerns, the question emerges: to what extent are the existing laws and enforcement mechanism sufficient to curb corporate crime? This study seeks to answer this question by evaluating the current legal and institutional framework for corporate criminal liability and sanctioning. This is for purposes of identifying interventions that may be required to remedy any shortcomings that may be making the legal and institutional framework insufficient to control corporate crime in Zambia.

#### **1.4 Theoretical Framework**

Corporate criminal liability is anchored on two theories of corporate personality and these are the fiction or normalist theory which insists on identification of the actor with a position in the

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<sup>26</sup> The Prohibition and prevention of Money Laundering (Amendment) Act No. 44 of 2010

<sup>27</sup> The Anti-Corruption Act No. 3 of 2012

<sup>28</sup> The Environmental Management Act No. 12 of 2011

<sup>29</sup> Chapter 88 of the Laws of Zambia

corporation and the realist theory which emphasizes the distinct personality of the corporation. The codification of the corporate liability ideologies into legislation differs from country to country at three levels: the choice of which organizations are criminally liable; the typology of the offenses attributed to corporate entities; and the criteria for attributing responsibility to corporations. These jurisdictional models address the issues of how corporate entities can possess the requisite *mens rea*, how they are real entities and not legal fictions and how they can be punished. The models determine the questions of whose acts and mental states can be imputed to the corporation; the scope of the corporation's liability; and the criminal or quasi criminal sanctions that can be imposed on the guilty corporation. The common corporate liability models are the identification model, the vicarious liability model and the holistic models. The aggregative model and the corporate culture model are variants of the holistic model of corporate criminal liability.

#### **1.4.1 The Fiction or Normalist Theory**

According to the Fiction or Normalist theory of corporate personality, the corporation is nothing more than a legal construct, a term used to describe a group of individuals constituted at any one time.<sup>30</sup> This view entails that the corporation can only act through its human representatives; its operational staff being its "limbs" and its officers and senior managers its "brains" or "nerve center".<sup>31</sup> Therefore, there is a distinction between the workers and the decision makers in the corporation, which further means that the corporation may bear criminal guilt on the normalist view, but only because it can be identified with a natural human being. This view has its roots in the Roman law which imposed criminal liability on the *universitas* or corporation aggregates as long as its members were acting collectively and it is still reflecting in some jurisdictions like Zambia to date. According to this theory, it is only the acts identified with specific officers or decision makers that can be imputed on the corporation, hence the identification or alter ego model of corporate criminal liability and the vicarious liability model of corporate criminal liability.

**The Identification Model** of the imputation of corporate criminal liability is common in jurisdictions that take the normalist or fiction view of the corporate personhood. It is based on

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<sup>30</sup> Celia Wells, *Corporations and Criminal Responsibility*, 2<sup>nd</sup> ed. (Oxford University Press, 2001) 84

<sup>31</sup> H. L. Bolton (Engineering) Co. Ltd v T.J. Graham & Jones (1957) 1 QB 159 at 172, per Denning L.J.

the common law principle of Senior Management Test and is mostly used in the UK and Canada. Under this model, corporations are held directly liable for wrongful conduct engaged in by its senior officers and employees on the basis that the actions and state of mind of the senior employee are the acts and state of mind of the corporation in a given sphere of the corporation's activities. Therefore, unless an offence can be identified with the acts and thoughts of a director or senior officer or a person with actual authority within the corporation, no liability will be placed on the company itself. This is the predominant model of corporate liability in the Zambian legislation as will be demonstrated later in this study.

Unlike the restrictive approach in Zambia, the Canadian Supreme Court whose decisions can only have persuasive effect on Zambia, has expanded the identification liability by recognizing that companies may have more than one directing mind especially in the case of a corporation having different fields of operations and where individuals are assigned to specific fields. Such fields of operation may be geographic as in the case of multinational corporations; or functional as in accounts or engineering; or they can embrace the entire operations of the company. In the case of *Canadian Dredge and Dock Co. Ltd v the Queen*<sup>32</sup> where the Supreme Court convicted several corporations and senior officers in those corporations for the *mens rea* offence of conspiracy to defraud, the court held that the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person.

**The Vicarious Liability Model** of corporate criminal liability is common in jurisdictions that accept the realist notion of corporate personality and is based on the common law principle of Agency whereby the corporation which is the principal is indirectly liable on the basis that the state of mind of the individual who is the agent is, in certain circumstances, imputed to the corporation. Under US federal law, for instance, the corporation can be held liable for its agents' actions no matter what their place in the corporate hierarchy and regardless of the efforts in place on the part of the corporate managers to deter their conduct. This is what is referred to as the *respondeat superior* or *let the superior answer* principle. The English law on the other hand, limits the application of vicarious liability to certain regulatory offences. This means that the imputation of vicarious liability on corporations will stem from the particular statutes providing

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<sup>32</sup> (1985) 19 CCC (3d) 1 (SCC).



for the offence. This stance is appreciated by most Common Law countries, but there are many other countries which, either by statute or judicial doctrine, have rejected this federal approach in favour of a rationale that limits the vicarious corporate criminal liability to cases involving conduct by high managerial agents acting at least in part to benefit the corporation and within the scope of their employment or where the conduct has been engaged in, authorized, solicited, commanded or recklessly tolerated by a high managerial agent acting within the scope of his employment.<sup>33</sup>

Zambia has incorporated some traces of the realist model in its domestic legislation as will be discussed later in the study. The vicarious liability and identification models are both a derivative form of corporate liability because they both seek in different ways to equate corporate culpability with that of an individual and they do not appreciate the dissimilarities between individual human beings and group entities. The problems created by derivative liability are that from a prosecutorial perspective, corporations can only be culpable if the liability of an individual is established; from a practical perspective, it can be very difficult to identify the specific employee who committed the wrongful act or had the culpable state of mind; and from a conceptual perspective, this approach does not reflect the complex interactions between human actors and the corporate matrix.

#### **1.4.2 The Realist Theory**

The Realist theory of corporate personality recognizes the corporation as possessing a distinct personality in its own right, as well as being a person under law.<sup>34</sup> The theory views the corporation as itself being capable of committing offences and paying for it as a legal person under law. Its personality is distinct from those who make it. The culture of the corporation may exist independently of individual employees or officers and may continue to exist despite changes in the personnel of the corporation. This is the theory that has given rise to the holistic and aggregative models of corporate criminal liability.

**The Holistic Models** of corporate criminal liability take the non-derivative form of corporate liability. Under the Holistic models, there is no requirement for the imputation of human thoughts, acts and omissions to the corporation; rather, they regard the corporation as itself

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<sup>33</sup>See Model Penal Code ss. 2.07 (1) (c) and Ariz. Rev. Stat. Ann. ss. 13-305 (2004)

<sup>34</sup>Celia Wells, *Corporations and Criminal Responsibility*, 2<sup>nd</sup> ed. (Oxford University Press, 2001) 85

capable of committing crimes through established internal patterns of decision making such as corporate culture or corporate (dis)organization.<sup>35</sup> The corporation itself is the culprit and it is the corporation that must be punished. Corporate culture model which locates the culpability of the corporation in its organisational structure and aggregation model which put together the total of the mental states and illegal actions of various actors in the organization, are variants of the Holistic models of imputing criminal liability on corporations for purposes of this study.

Under the **corporate culture model** or corporate culture mechanism, corporate liability arises from the corporate culture or organisational features of the corporation. Corporate blame in this model is located in the procedures, operating systems or culture of the company. This kind of organizational liability is a relatively new basis for criminal liability of corporations contemplated by some jurisdictions. Australia, in particular, has introduced provisions holding corporations directly liable for criminal offences in circumstances where features of the organisation of a corporation, including its corporate culture, directed, encouraged, tolerated or led to the commission of the offence.<sup>36</sup> This ‘corporate culture’ can be found in an attitude, policy, rule, course of conduct, or practice within the corporate body generally or in the part of the body corporate where the offence occurred. Similarly, evidence may be led that the company’s unwritten rules implicitly authorized non-compliance or failed to create a culture of compliance. Specifically, the Federal law in Australia provides that, for offences of intention, knowledge or recklessness, the fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence.<sup>37</sup>

Under the **aggregative model** or principle, a corporation is treated as the principal offender but unlike the corporate culture model, the imputation of liability on the corporation is done by adding together the different acts, omissions and states of mind of individual stakeholders; particularly corporate officers and senior managers.<sup>38</sup> In other words, Aggregation “allows the acts, omissions and mental states of more than one person within a company to be combined in order to satisfy the elements of a crime”.<sup>39</sup> The Aggregative Models are therefore something of a compromise between the Vicarious and Holistic approaches to corporate criminal liability and

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<sup>35</sup> Celia Wells, *Criminal Responsibility of Legal Persons in Common Law Jurisdictions*, Paper Prepared for OECD Anti-Corruption Unit, (2000), 6

<sup>36</sup> Allens, Arthur Robinson, *Corporate Culture – A Basis for The Criminal Liability of Corporations*, for the United Nations Special Representative of the Secretary General on Human Rights and Business, February 2008, pp.1

<sup>37</sup> section 12.3 of the Australian Criminal Code Act of 1995

<sup>38</sup> Amanda Pinto & Martin Evans. *Corporate Criminal Liability*, Sweet & Maxwell, (3rd ed., 2003.)

<sup>39</sup> James, Gobert, *Corporate Criminality: 4 Models of Fault*, The Society of Legal Scholars, n 37 at 409 (1994)

they are the most distinguishing and bold element of the American model of corporate criminal liability. This model provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively but not individually met the requirements of *actus reus* and *mens rea* of the crime.

This study shall be informed by the corporate culture model as being the best practice to control corporate crime in Zambia. This is because of all the models discussed above, the corporate culture model appears to be more appropriate in securing corporate convictions in light of the existing and emerging complexities in corporate structures and operations and to ensure deterrence and control of corporate crime for the better protection of public interest.

### **1.4.3 Purpose of the Study**

The purpose of this study is to investigate the concept of corporate criminal liability in Zambia. This will be achieved by analysing the application of criminal laws, the institutional framework, and the practice and procedure on corporate entities in Zambia. The study is focussed on investigating the current legal framework and enforcement mechanism, with regard to corporations and corporate crime, and analysing its effectiveness or otherwise of serving as a deterrent instead of being an enabling tool for corporate crimes.

### **1.4.4 Research Objectives**

The General objective of this study is to:

- Investigate the adequacy of corporate criminal liability laws in curbing corporate crime in Zambia.

The Specific objectives of the study include to:

1. Highlight best practices favourable to the effective administration of corporate criminal liability in Zambia.
2. Assess the strengths and weaknesses of corporate criminal liability laws in curbing corporate crime in Zambia by analysing various pieces of legislation;

3. Determine the extent to which corporate criminal liability laws hold the corporate entity accountable;
4. Determine the extent to which shareholders, creditors and directors of a guilty corporation are protected in their individual rights and whether the lifting of the veil of incorporation offers protection to the corporation against guilty natural legal persons.

#### **1.4.5 Research Questions**

The key research question of this study is:

- How adequate are corporate criminal liability laws in curbing corporate crime in Zambia?

The specific research questions intended to be answered include the following:

1. What best practices are favourable to the effective administration of corporate criminal liability in Zambia?
2. What are the strengths and weaknesses of corporate criminal liability laws in curbing corporate crime in Zambia as contained in various pieces of legislation?
3. To what extent do corporate criminal liability laws hold corporate entities accountable in Zambia?
4. To what extent are the shareholders, creditors and directors of a corporate entity liable to punishment protected in their individual right and how does the lifting of the veil of incorporation offer protection to the corporation against the guilty legal natural persons.

#### **1.4.6 Significance of the Study**

The significance of this study is that the liberalisation of the economy has seen a significant increase in domestic and international corporate activity in Zambia especially from the year 2000. This has been matched with an increase in such corporate crimes as corruption and environmental pollution committed in the name of profit maximisation. Stemming from the fact that there is recognition of corporate criminal liability in the country, it is useful to examine how the legal framework can be enhanced in order for it to be sufficient to deter corporate offenders

and protect the economy and population of the country. It is therefore hoped that the results of this study will bring more insight into the existing laws with regard to the criminal liability of corporations in Zambia. It is also hoped that the investigation will clearly expose the adequacies or inadequacies in the current laws to curb crime perpetrated by corporate bodies. It is further hoped that the findings will inform the law and policy makers on whether there is need to enhance corporate criminal liability laws for purposes of better mitigating crime in corporate dealings.

#### 1.4.7 Literature Review

This study has been informed by a number of scholars and writers that have participated in the corporate criminal liability debate worldwide.

From the time of the case of *Salomon v Salomon & Company*,<sup>40</sup> a company is treated as a separate legal entity distinct from its promoters, directors, members, and employees.<sup>41</sup> According to Ahmad, although well recognised by the courts, the separate legal entity principle is not a sacrosanct legal principle in any jurisdiction as courts have rightfully assumed the power to identify certain compelling circumstances when it can pierce the veil and disregard corporate form to impose criminal liability on these individuals.<sup>42</sup> He observes that in most piercing cases in the past, the courts would disregard the corporate entity when there exists such unity between the corporation and individual that the corporation ceases to be separate and also when holding only the corporation liable would promote injustice.<sup>43</sup>

The rationale for piercing the corporate veil, as pointed out in the executive summary of a paper by OECD, is that the corporate entities may, under certain conditions, be misused for illicit purposes including money laundering, bribery or corruption, illicit tax practices, defrauding, circumvention of disclosure requirements, and other forms of illicit behaviour.<sup>44</sup> According to Chauhan, the piercing of the corporate veil is as such justified in all cases depending upon

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<sup>40</sup> (1897) A.C. 22

<sup>41</sup> This case established a century old principle that a corporation is a separate juristic person with perpetual succession which can sue and be sued, enjoy its own rights including property rights and bear its own duties and liabilities, hence limited liability and protection of shareholders' private assets. Company law embraced this principle in order to facilitate business development and international trade. However, modern company law has recognized that a rigid application of the rule may sometimes cause damage to the rights of parties dealing with the corporation, hence some exceptions to the principle.

<sup>42</sup> K.B. Ahmad, Piercing the Corporate Veil to Impose Criminal Liability on Corporations, available at <http://www.academia.edu/PIERCING>

<sup>43</sup> As was the case in *Mancorp Inc. v Culpepper*, 802 S.W.2d 226, 228 (TEX 1990), citing *Castleberry v Branscum*, 721 S.W.2d 270, 272 (TEX 1986). The latter case also recognized fraud as ground for piercing the corporate veil to uncover the sham.

<sup>44</sup> Anonymous, "Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes", OECD Report on the Misuse of Corporate Vehicles for Illicit Purposes" (2001) at p.7 also available at <http://www.oecd.org/corporate/corporateaffairs/43703185.pdf>

factors like relevant statutory or other provisions, object sought to be achieved, impugned conduct, involvement of public interest, and the interest of the affected parties.<sup>45</sup> The current study investigates the criminal liability of corporations which are a legal construct with separate personality, and this invites a consideration of circumstances under which the veil of incorporation may be lifted, if at all.

Cohen, in support of corporate criminal liability, has concluded that although a corporation as an entity cannot commit a crime other than through its representatives, it can be named as a criminal defendant.<sup>46</sup> Nana is another supporter of corporate liability who in his PhD thesis gives an evaluation of mechanisms for imputation of criminal liability to corporations.<sup>47</sup> The author opines that the aggregation doctrine, which puts together the various acts and mental states of various individuals in the corporation to satisfy the ingredients of the offence, is the least inappropriate among the existing mechanisms.<sup>48</sup> Other doctrines include the identification doctrine which emphasises the need to identify the offence with a senior person in the corporation and the vicarious liability doctrine where the corporation's liability is derived from the fault of its employees, officers or agents as will be seen later in the study. Beale also advocates for the expansion of corporate criminal liability and a more vigorous enforceability of existing offences.<sup>49</sup> His views have found favour in countries like France where the criminally charged corporations between the years 2000 and 2004 averaged 267 to 444.<sup>50</sup> The current study will seek to uncover the prevailing doctrine in Zambia through an analysis of the domestic laws and international practices to highlight best practices favourable for the expansion of and effective administration of corporate criminal liability.

Even where there are adequate jurisdictional laws on the imputation of criminal liability to corporations, it is common to find challenges in the processes of investigating, prosecuting and punishing corporations, especially where the entity is a multinational corporation. Therefore, Benson advocates for private prosecution in complex cases where specialisation may be

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<sup>45</sup> Madhvender Chauhan, Corporate Personality & Piercing the Corporate Veil, available at <http://jurisonline.in/?p=6237>

<sup>46</sup> Mark A. Cohen, "Corporate Crime and Punishment: An Update on Sentencing Practices in the Federal Courts," 71 Boston University Law Review, (1991), 247

<sup>47</sup> Ntsanya Constantine Nana, Corporate Criminal liability in the United kingdom: Determining the Appropriate Mechanism of Imputation, (The Robert Gordon University, 2009) (PhD Thesis)

<sup>48</sup> Constantine Ntsanya Nana, *Corporate Criminal Liability in the United Kingdom: Determining the Appropriate Mechanism of Imputation*, (The Robert Gordon University, 2009) (PhD Thesis)

<sup>49</sup> Sara Sun Beale, "Is Corporate Criminal Liability Unique?" 44 American Criminal Law Review 1503, (2007), 1504

<sup>50</sup> Thomas Weigend, *Soecietas delinquere no potest? A German Perspective*, 6J. International Criminal Justice 927 (2008), 928 (Citing statistics reported in F. De Sportes & F Le Gunehec, *Droit Penal General* 1132, 13<sup>th</sup> ed. 2006)

required.<sup>51</sup> He reasons that the private sector generally has narrowly focussed concerns and when their resources specialise in their area of comparative advantage, economic efficiency is enhanced. This study will concentrate on the current legal framework and will highlight some challenges faced in the existing legal system in Zambia while recognising the existence of specialised law enforcement agencies like the Anti-Corruption Commission in certain categories of corporate crime.

Bucy is one of the scholars who support corporate liability only to the extent that it is restricted, and he opines that corporate criminal liability is necessary but must be strictly limited.<sup>52</sup> Wells<sup>53</sup> shares this view and endorses restricted liability in her commentary on the case of *Tesco Supermarkets v Natrass*<sup>54</sup> where she states that the governing principle in the case is that only those who control or manage the affairs of a company are regarded as embodying the company itself. This is the case in which Tesco Supermarket was offering a discount on washing powder as advertised in-store. The store manager failed to take the signs down after the store had run out of the low priced product and began to replace it with the regularly priced stock and this led to a customer being charged at the higher price. Tesco was charged for the offence of falsely advertising the price of washing powder. In its defence, Tesco argued that the company had taken all reasonable precautions and all due diligence, and that the conduct of the manager could not attach liability to the corporation. The House of Lords accepted the defence and found that the manager was not part of the “directing mind” of the corporation and therefore his conduct was not attributable to the corporation which was as a result acquitted.

Wells explains that the underlying theory in the case is that company employees can be divided into those who act as the hands and those who represent the brains of the company, the so-called anthropomorphic approach.<sup>55</sup> In her analysis therefore, the identification principle enunciated in the above case essentially meant that a company would be liable for a serious criminal offence (only) where one of its most senior officers had acted with the requisite fault. Bucy and Wells focused on the common principles of limited liability for the corporation. The current study will take the common principles regarding the doctrine of corporate criminal liability and discuss

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<sup>51</sup> B.L. Benson, *The Enterprise of law: Justice Without the State*, Pacific Research Institute for Public Policy, (San Francisco, 1990)

<sup>52</sup> Pamela H. Bucy, “Corporate Criminal Liability: When Does It Make Sense?” 46 Am. Crim. L. Rev. 1437, (2009).

<sup>53</sup> Celia Wells, “Corporations and Criminal Responsibility,” 99-101 (2d ed. 2001).

<sup>54</sup> [1972] A.C. 153 (H.L.)

<sup>55</sup> Celia Wells, “Corporations and Criminal Responsibility,” 99-101 (2d ed. 2001).

their pros and cons in light of the developments that have taken place in certain jurisdictions after the case of *Tesco Supermarkets v Natrass*.<sup>56</sup>

Criminal punishment or sanction is a legal consequence of a conviction by a court of competent jurisdiction and yet not everyone supports criminal punishment of corporations. Alschuler finds corporate liability to be inefficient and argues that corporate criminal punishment is an ancient practice because the corporation is a mere fiction and it is an innocent shareholder wrongly forced to bear the direct burden of criminal sanctions.<sup>57</sup> This essentially is to say that the corporation, which acts only through its human agents, does not of itself commit crime to justify punishment. In agreeing with this position, Dix opines that the prosecution of the corporation itself tends to detract attention from the corporate employees or managers directly responsible and who should more justly be subjected to criminal sanctions.<sup>58</sup> To Moohr, punishment is justified only when one has chosen to disobey the law, which to him is not the case with corporations as they do not directly make choices.<sup>59</sup> The current study will explore the question of whether or not the corporation is indeed a mere fiction and innocent shareholder by investigating the theories of corporate personality as well as the rationale for imputation of corporate liability and as a consequence punishment of the corporate entity.

Lott defends the theory behind corporate criminal punishment by arguing that criminal penalties are required to ensure that offending firms internalise the losses imposed on buyers because fraud causes both consumers and firms to take costly defensive actions.<sup>60</sup> In supporting the concept of corporate punishment, Clarkson reasons that as many large corporations have complex structures which make it difficult for outsiders to determine who is responsible for a particular decision, the effective punishment of a corporation can trigger the most appropriate institutional response since the company is in the best position to identify and discipline its relevant employees.<sup>61</sup> In other words, the corporation must be punished for the corporate crime instead of lifting the corporate veil, which may be difficult for outsiders who are strangers to the existing organisational structures, and then the corporation can identify and punish the culpable

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<sup>56</sup> [1972] A.C. 153 (H.L.)

<sup>57</sup> Albert W. Alschuler, "Two Ways to Think About the Punishment of Corporations," 46AM. CRIM. L. REV. 1366-67, (2009).

<sup>58</sup> George E. Dix, *Criminal Law*, 17<sup>th</sup> ed., (2002)

<sup>59</sup> Moohr, *On the Prospects of Deterring Corporate Crime*, (University of Houston, 2007)

<sup>60</sup> John R. Lott Jr. *Corporate Criminal Liability*, (University of Chicago Law School, 1999)

<sup>61</sup> C. M. V. Clarkson, "Kicking Corporate Bodies and Damning their Souls," 59 Maryland Law Review 557 at 563, (1996)



individuals in its own organisation. The current study will look at the criminal responsibility and punishment of corporations and corporate individuals for some corporate crimes within the Zambian legislative context with regard to the principle of the veil of incorporation.

Dix advances that a fine is the only penalty that can meaningfully be imposed upon a corporation, and yet this makes the burden of a conviction to ultimately fall upon the corporation's shareholders, who will usually have no responsibility for the commission of the offence.<sup>62</sup> He explains that the reality of organisational behaviour is such that shareholders are unlikely as a practical matter to be in a position to prevent future crimes of the same sort that resulted in the punishment of a fine as it were. Therefore, for him, the case against criminal liability of a corporation rests on the proposition that liability results in ineffective punishment of the shareholders who are non-blameworthy persons and who as such need protection of the law. The current study intends to build on these views and bring out the realities of whether the shareholders are indeed blameless, whether there are any more reasons in support of corporate punishment and whether it is settled that fines are the only befitting punishment given the current trends in corporate activity.

In supporting corporate civil liability over criminal liability, Arlen and Kraakman hold the view that criminal liability for the corporate entity should be substituted with civil liability, and that criminal liability should be a preserve of individual corporate officers and agents.<sup>63</sup> They contend that it does not serve any purpose to hold a corporation criminally liable and yet only subject it to consequences that are civil in nature. Germany belongs to this school of thought as it strongly opposes the concept of corporate criminal liability and resists the idea of including it in its legal system.<sup>64</sup> The corporate criminal liability in Germany is still governed by the maxim *societas delinquere non potest*<sup>65</sup> which means 'corporations cannot commit a crime.' Its corporate misconduct is the subject of a very well developed system of administrative<sup>66</sup> and administrative-penal law.<sup>67</sup> The administrative-penal system is the successor of *Ubretungen*, a category of

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<sup>62</sup> Dix, *Criminal Law*, 17th ed., (2002)

<sup>63</sup> Jennifer Arlen and Reinier Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," 72 N.Y.U. L. REV. 687, 692 (1997)

<sup>64</sup> Leonard Orland and Charles Cachera, "Essay and Translation: Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (*Personnes Morales*) Under the New French Criminal Code (*Nouveau Code Penal*)," 11 Conn. J. Int'l L. 111 at 116 (1995).

<sup>65</sup> Translated to mean society cannot be wrong

<sup>66</sup> Orland and Cachera, "Essay and Translation: Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities" at 116 (1995).

<sup>67</sup> H.J. Hirsch, "La Criminalisation du Comportement Collectif – Allemagne, in *La Criminalisation du Comportement Collectif: Criminal Liability of Corporations*" 31, at 31 (H. de Doelder & Klaus Tiedemann eds., Kluwer Law Int'l, 1996).

petty offences.<sup>68</sup> Punishment in Germany is by administrative fines, which are sanctions imposed both to individuals and corporations by specialized administrative bodies which are part of the executive branch of the government; punitive sanctions can also be applied but this is only under the administrative-penal law.<sup>69</sup>

The main arguments in defense of the lack of corporate criminal liability in Germany are: corporations do not have the capacity to act, corporations cannot be culpable, and the criminal sanctions are appropriate, by their nature, only for human beings.<sup>70</sup> Italy, Portugal, Greece, and Spain follow the German model and refuse to hold corporations criminally liable.<sup>71</sup> However, the Italian doctrine argues that the system of administrative liability of corporations imposed through its Decree-Laws<sup>72</sup> is in reality criminal in nature because it is connected to the commission of a crime and is applied by using rules of criminal procedure.<sup>73</sup> The current study is aimed at making a case for corporate criminal liability over civil liability and as such will investigate the nagging concerns over a corporation's capacity to act and be held criminally accountable as well as the appropriateness of the sanctions available in Zambia.

In the case of Zambia, one has to look at a number of statutes in order to grasp the concept of corporate criminal liability. Ndulo's focus has been to look at the legal and jurisdictional framework within which the scourge of corruption is being fought in Zambia.<sup>74</sup> Upon considering the various legislations, institutional framework and case law surrounding the subject, he has concluded that the major obstacles to the prosecution of corruption cases in Zambia are weak investigative capacity, poor prosecution and delays in the courts system. His recommendation is therefore that Zambia should rigorously enforce existing laws and sanctions against corruption, provide training to staff in investigation and detection of corruption, and improve the standards of prosecution. Whereas Ndulo's focus is on the legal and jurisdictional framework for the specific offence of corruption, the current study is more inclined to the legal framework for the criminal liability of corporations as opposed to individuals in the area of corruption and other corporate crimes.

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<sup>68</sup> Gunter Heine, "New Developments in Corporate Liability in Europe: Can Europeans Learn from the American Experience — or Vice Versa?" 1998 St. Louis-Warsaw Transatlantic L.J. 174 (1998).

<sup>69</sup> Hirsch, "La Criminalisation du Comportement Collectif: Criminal Liability of Corporations" 31, at 48

<sup>70</sup> Hirsch, "La Criminalisation du Comportement Collectif: Criminal Liability of Corporations" 31, at 34

<sup>71</sup> Heine, *New Developments in Corporate Criminal Liability in Europe*, 1998 St. Louis-Warsaw Transatlantic L.J. 174 (1998).

<sup>72</sup> Decree-Law No. 231 of 8<sup>th</sup> May 2000 and Decree-Law No. 300 of 29<sup>th</sup> September 2000

<sup>73</sup> Streteanu & Chirita, at 77, citing G. Fiandaca & E. Musco, *Diritto Penale. Parte Generale* 146 (Zanachelli Ed., 2001).

<sup>74</sup> Muna Ndulo, *Review of the Anti-Corruption Legal Framework in Zambia*, (Southern Africa Institute for Policy and Research: 2014)

Mwenda has examined the legal, regulatory and institutional frameworks existing in Zambia with regard to combating certain financial crimes such as money laundering, insider trading and corruption.<sup>75</sup> He has made reference to corporate liability only when looking at the offence of insider dealing as provided in two specific statutes being the then Companies Act<sup>76</sup> and the then Securities Act.<sup>77</sup> His findings were that the Companies Act of 1994<sup>78</sup> made it possible for a shadow director, who is a *de facto* director or person not named as director but under whose directions or instructions the named directors of the company are accustomed to act, to be held liable for insider dealing. Mwenda also found that the Securities Act of 1993<sup>79</sup> excluded bodies corporate from the two categories of the offence of insider dealing provided for under the Act, being that of dealing with securities of a company known by the person to not be publicly available which would if publicly available materially affect the price of securities; and knowingly counselling or procuring another person to deal in such securities. Mwenda concluded that corporations can therefore not be held liable for the offence of insider dealing under the Securities Act. Mwenda's study was concentrated around the legal, regulatory and institutional frameworks for financial crimes, while the current study focuses on the current legal framework for the criminal liability of corporations with reference only to some corporate crimes, which crimes include financial crimes such as corruption.

The focus of this study is therefore to examine the existing legal and institutional framework for corporate criminal liability in Zambia, with reference to the existing corporate criminal liability models and some corporate crime laws, while greatly appreciating the works of the writers above.

#### **1.4.8 Methodology**

The research was undertaken in order to examine the corporate criminal liability legal framework in Zambia and assess its effectiveness or otherwise of deterring corporate crime. The study employed the mixed methods approach. It incorporated the social legal approach which is the

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<sup>75</sup> Kenneth Kaoma Mwenda, *Combating Financial Crime: The Legal, Regulatory and Institutional Frameworks*, (The Edwin Mellen Press, 2006)

<sup>76</sup> The Companies Act chapter 388 of the Laws of Zambia, enacted in 1994 and now repealed and replaced by the Companies Act No. 20 of 2017

<sup>77</sup> The Securities Act enacted in 1993 and now repealed and replaced by the Securities Act, 2016

<sup>78</sup> The now repealed Companies Act Chapter 388 of the Laws of Zambia which has been replaced by Act No. 20 of 2017

<sup>79</sup> The now repealed Securities Act Chapter 354 of the Laws of Zambia which has now been replaced by the Securities Act of 2016

study of law in the broader social context with the use of other methods taken from the disciplines in the social sciences and humanities.<sup>80</sup> This is because the study mainly focusses on a contextual analysis of the law in terms of how it operates in the Zambian society and what its implications are. In employing the doctrinal approach, the study reviewed primary sources such as statutes and case-law as well as secondary sources which included books, scholarly journals, World Wide Web sites and commentaries. The methodology is appropriate because the research sought to collate, organise and describe the law on corporate criminal liability as it is and to provide the reader with an overview of debates and conflicts about whether the criminal liability of corporations in Zambia should be enhanced.

The study also used qualitative research methods of data collection<sup>81</sup> because the goal of this research was to gain insight and explore the depth, richness and complexity inherent in the concept of corporate criminal liability as applied in Zambia. The interview approach was also used whereby a few key informants were selected through random sampling to represent the targeted population for interview purposes by use of interview guides. The study opted to include this approach for purposes of identifying the effectiveness, or otherwise, of the existing legal and institutional frameworks on the subject under study. The study further used interpretive techniques to analyse the data collected from the interview guides.

#### **1.4.9 Scope of the Study**

The focus of this study is the criminal liability of corporations in Zambia. However, this work does not attempt to say the final word on corporate criminal liability for the Zambian legal system, but to analyse the existing legal provisions and approaches and to unravel whatever advances that their implementation reveal. This study does not investigate the practical realities, such as political and financial considerations, which would need to be taken into account when attempting to hold national and multinational corporations accountable for violating the criminal laws of the land. The study intends to provide a frame through which Zambia can begin to examine its corporate criminal liability laws in the area of financial and other corporate crimes and in future research conducted in this area.

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<sup>80</sup> Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007) p.5

<sup>81</sup> Norman K. Denzin and Yvonne S. Lincoln, *Handbook of Qualitative Research*, 2<sup>nd</sup> ed. (London: Sage, 2005) at p.3 describe qualitative research as involving "...an interpretive naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of or interpret phenomena in terms of the meanings people bring to them."

#### **1.4.10 Ethical Consideration**

In order to adhere to the University of Zambia Research Ethics, all data collected during this study was used solely for the intended purpose. Only key informants were interviewed, and no personal data has been included in this research. Consent was sought from all key informants to whom their rights were explained before involving them in this study. The informants' names have been kept anonymous and confidential as per their request. Necessary steps, humanly possible, were taken not to violate intellectual property rights. Where information was obtained from a notable source, such source has been acknowledged. Plagiarism was avoided at all costs.

#### **1.4.11 Organisation of the Dissertation**

The study is divided into five chapters. Chapter one is the introduction. It gives a general background to the study, a brief statement about the problems associated with criminal liability laws and policies in Zambia with regard to corporations, the purpose and research objectives of the study, the research questions attempted to be answered by the study, the significance of the study to the Zambian jurisprudence, a review of various literature on the subject, the methodology employed in conducting the research, and the scope and structure of the study.

Chapter two provides a general overview of the concept of corporate criminal liability by giving a brief background to the global development of the concept of and the rationale for corporate criminal liability. Although there is no generally accepted principle of universal application, the chapter gives a brief account of some of the existing corporate personality theories in various jurisdictions as well as the resultant and varied corporate criminal liability models developed to ensure corporate accountability. The chapter analyses these models to show how they have defied the challenges inherent in the nature of criminal law and the nature of corporate personhood.

Chapter three discusses the concept and legal framework for corporate criminalization and sanctions in the local Zambian Jurisprudence. It examines the concept of corporate criminal liability by exploring some provisions of the Penal Code<sup>82</sup> and other Acts of Parliament in the

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<sup>82</sup> Chapter 87 of the laws of Zambia

area of corporate responsibility for certain corporate crimes like violation of environmental laws, corruption, insider dealing, fraud and theft. It further examines the legal framework by making reference to other jurisdictions so as to draw lessons and not for comparative purposes.

Chapter four analyses the prevailing legal processes for prosecuting corporate criminality in Zambia thereby presenting the findings and discussions of the study. The chapter does this by discussing the investigations, prosecution, and sentencing processes involving corporations in respect of identified corporate crimes; and the challenges faced in these processes. This analysis is extended to other jurisdictions like Malawi, Nigeria and South Africa which are African nations like Zambia and England from which the existing legal system in Zambia is modelled, and this is done for purposes of identifying lessons that the legal system obtaining in Zambia can learn from them and not as a comparative analysis. Chapter five is the conclusion and recommendations of the study.

#### **1.4.12 Summary**

This chapter gave a brief introduction to the concept of corporate criminal liability in Zambia. It did so by providing a background to the subject and giving a brief statement about the problems associated with the current criminal laws and policies in Zambia insofar as corporate liability is concerned. It outlined the aim and research objectives of the study as well as the research questions intended to be answered by the study. It also stated the significance of the study to the Zambian jurisprudence and gave a review of various literatures on the topic under study. The chapter further set out the methodology, scope and structure of the study. The next chapter deals with the general overview of the concept of corporate criminal liability.

## CHAPTER TWO

### OVERVIEW OF THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

#### 2.1 Introduction

The purpose of this chapter is to provide a general overview of the concept of corporate criminal liability. It will give a brief background to the historical development of the concept of corporate criminal liability from ancient times to the 21<sup>st</sup> Century where it is practiced differently in various jurisdictions like the United States of America, England, South Africa, Nigeria and Australia. These jurisdictions have been selected because of their contribution to the continuing development of the corporate criminal liability concept. The discussion of the history and development of corporate criminal liability is not intended to be a comprehensive history but is rather meant to provide a necessary backdrop to understanding the thesis of this study. The chapter will also provide the rationale for corporate criminal liability. These discussions are in an attempt to provide the content of the doctrine of corporate criminal liability so that the current doctrine is better understood. The chapter will begin by providing a summary of the concept of corporate crimes and financial crimes in an attempt to set a background to the succeeding chapters, which chapters are focused on analyzing the corporate criminal liability doctrine by using illustrations from these categories of crime.

#### 2.2 Corporate Crimes

Corporate crimes may be defined as illegal acts, omissions or commissions by corporate organizations themselves as social or legal entities, or by officials or employees of the corporations acting in accordance with the operative goals or standard operating procedures and cultural norms of the organisation, intended to benefit the corporations themselves.<sup>83</sup> Corporate crime is sometimes used interchangeably with white collar crime and the reason is that the two concepts are related in a profound way. The origins of the concept of corporate crime can be traced to the larger concept of white collar crime which was first introduced in the social sciences by American criminologist Edwin Sutherland in a 1939 presidential address to the

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<sup>83</sup> C. Reasons, *Crime against the Environment: Some Theoretical and Practical Concerns*. *Crim. L.Q.* Vol. 34 Nov. 1 (1991) 2

American Sociological Association.<sup>84</sup> He defined white collar crime as a crime committed by a person of respectability and high social status in the course of his occupation. Therefore, by white collar crime is understood to mean any crime committed by an individual of high status during the course of legitimate occupational activities for personal or organizational gain or by employees against their employers.

Ten years after delivering the presidential address, Sutherland later published a book in 1949, which concentrated almost exclusively on corporate crime.<sup>85</sup> It was written after Sutherland had conducted a research from which he found that all 70 of the corporations he examined over a 40-year period had violated at least one law and that many were recidivists or repeaters with an average of eight negative decisions issued for each corporation. Sutherland noted in his book that while crime in the streets captured the newspaper headlines, crime in the suites continued unnoticed. He found that while white collar crimes were far more costly than street crime, they were not even covered under criminal law but were rather treated as civil or administrative violations. It must be noted that despite Sutherland's pioneering study, little attention was focused on the white-collar variety until the first large scale comprehensive investigation of corporate crime or corporate violations of law by American criminologist Marshall Clinard and Peter Yeager in 1979,<sup>86</sup> which study found that most of the trends found by Sutherland were still existing. It examined the extent and nature of these illegal activities, the internal corporate structure and the economic setting in which the violations occurred. Since then, most criminologists divide white collar crime into two major types: corporate crime and occupational crime.

It is corporate crime if the beneficiary of the crime committed by the senior officer or the corporation is the corporation itself and it is occupational or white collar crime if the perpetrator of the crime is the senior officer within the corporation, and sometimes against the corporation, for his personal gain. White collar crimes may include tax evasion, credit card fraud, money laundering, bankruptcy fraud, pilfering, soliciting bribes or kickbacks, embezzlement, securities theft, medical or health frauds, and insider trading. From the foregoing, corporate or organizational crimes are those offences for which a corporation can be held legally liable as

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<sup>84</sup> Edwin H. Sutherland, *The White-Collar Criminal*. American Sociological Review 5:1 – 12. 1939

<sup>85</sup> E. H. Sutherland, *White Collar Crime – The Uncut Version*, New York: Dryden Press, 1949

<sup>86</sup> Marshall B. Clinard and Peter C. Yeager, *Illegal Corporate Behaviour, 1975 – 1976*, MI: Inter- University Consortium for Political and Social Research, 1992



recognized by the existing law of the land. They include offences committed by corporate officials in or on behalf of their corporation and offences committed by the corporations themselves for corporate gain. For instance, a corporation may be established expressly as a vehicle for crime whereby the founders assume the airs of a legitimate business while luring unsuspecting investors in before making out with their investments. An existing corporation may also blend into its regular business operations some illegal activities. The point worth noting is that the company becoming aware of or condoning such criminal activity is not what makes it a corporate crime. The main issue is that corporate crimes are for the most part committed for the benefit of the corporation.

Examples of corporate crimes include violence against consumers such as where the products being sold do not meet the set quality control standards; corporate pollution such as where effluence is released in the rivers from which local communities draw their water for daily use; price fixing which is an agreement amongst competitors to restrict competition by maintaining the buying and selling of a particular product at an agreed price thereby controlling supply and demand of that product; and false advertising where false, misleading or unproven information is used to advertise products to consumers. Corporate crimes are usually viewed as silent crimes because in most circumstances, the victims do not know that they have been victimized and this is what has led to the wrong notion that corporate crime is victimless. Also, it is often difficult or even impossible to pinpoint as to who should be blamed for the offence. This is why it was argued in the case of *Tesco Super Market v Natrass*<sup>87</sup> that making an employer criminally responsible, even when he had done all that he could to prevent an offence, affords some additional protection to the public because this will induce him to do more.

### **2.3 Financial Crimes**

Offences committed within the corporate set up are committed mainly for profit or financial gain and in some cases include an element of financial loss on some unsuspecting party and as such a reference in this study to financial crimes. There is no universally accepted or precise definition of what a “financial crime” is; what we have are different activities and structures that are referred to as financial crimes in different jurisdictions and contexts. What may be a financial crime in one jurisdiction may not be so in another. Most jurisdictions define the conduct

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<sup>87</sup> (1971) 2 ALL ER P. 129.

classified as a financial crime as opposed to the term itself and so this study concedes that it is one of those criminal conducts that one will recognise as a financial crime when the crime is actually committed. However, the International Monetary Fund has attempted to define the concept in the following words: “A financial crime can refer to any non-violent crime that generally results in a financial loss including financial fraud. It also includes a range of illegal activities such as money laundering and tax invasion”.<sup>88</sup>

This broad interpretation clearly classifies offences resulting in financial loss as financial crimes but then it stretches the definition to include “a range of illegal activities” without addressing what unique features make them fall into the category of financial crimes. Despite this weakness, the definition appreciates that not all financial crimes result in financial loss and as such they include crimes related to acts of concealing or protecting the benefit already obtained or facilitating the taking of a benefit. In spite of the fact that there is no precise and universal definition for financial crime, a look at history reveals that the concept existed as far back as two thousand years ago when forgery and counterfeiting posed regulatory problems for Roman and Zantine Administrations.<sup>89</sup>

There are certain offences that are commonly accepted as financial crimes. These include: different types of fraud cases, electronic or computer crime, money laundering, terrorist financing, bribery and corruption, market abuse and insider dealing, information security, forgeries, cheque cases, counterfeiting, credit card offences, fraudulent credit applications, and embezzlement, among others. They are mostly non - violent crimes involving some form of fraud, deceit, subterfuge or the abuse of a position of trust, and dishonesty and so they almost always involve an aspect of the mental state. When committed within the context of corporations, these offences are termed ‘financial corporate crimes.’ It is therefore the contention of this study that although there seems to be global uncertainty as to what the concept is, and a lack of specificity as to what offences constitute financial crimes, there is a somewhat clear understanding about what behaviours might be included under the concept of financial corporate crimes.

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<sup>88</sup> International Monetary Fund, *Financial System Abuse, Financial Crime and Money Laundering – Background Paper*, 2001, p.3

<sup>89</sup> H. Croall (1992), *White Collar Crime*, Open University Press, p.8

## 2.4 Brief Historical Background to the Concept of Corporate Criminal Liability

The endorsement of corporate criminal liability is a 20<sup>th</sup> Century judicial development influenced by a number of factors among them social and economic factors and it is a gradual development from practice to theory. As aptly put by Brickey, the history of the development of corporate criminal liability is, at bottom, the story of a practice in search of a theory.<sup>90</sup> The concept is as such a product of shifting trends in legal formalization as opposed to reasoned policy choice. Fischel and Sykes have correctly observed that nearly every scholarly article on this topic at some point makes concession that “the doctrine of corporate criminal liability has developed...without any theoretical justification.”<sup>91</sup> The account of Ancient law was adjusted to a system of small independent groups which were the clans or families, and the conduct of each member of the society was viewed as the conduct of the society as a whole.<sup>92</sup> To prevent communal guilt from being placed on a family or clan from where an offending individual came, the members of the clan or family took it upon themselves to collectively maintain order and control. There was as such a responsibility on society to ensure compliance of its members and to prevent the breaches of agreed norms.<sup>93</sup>

### 2.4.1 Ancient Times

The earliest forms of corporations were developed around the 3<sup>rd</sup> and 4<sup>th</sup> Century BC and their nature was such they were merely civil organizations or associations of individuals whose functions were essentially passive devices to hold property; sometimes real estate and sometimes special privileges.<sup>94</sup> Because of their fictitious nature, these *juristic persons* could not commit crimes due to their inability to form intention; a cardinal requirement for a wrongful act to qualify as a crime. During this period, and without any attempt to justify the development of the concept on the strength of the sources available, the Romans considered the possibility of attributing criminal liability to a collective entity such as a city.<sup>95</sup> The result was that corporate liability was imposed without the legal justification of how corporations were criminally liable in terms of the ingredients of a crime *vis a vis* intention. The only consideration was whether they

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<sup>90</sup> Kathleen F. Brickey, “Corporate Criminal Accountability: A Brief History and Observation,” 60 Wash. U. L. Q. 393 (1982)

<sup>91</sup> Daniel R. Fischel and Alan O. Sykes, “Corporate Crime,” 25 J. Legal Stud. 319, 320 (1996)

<sup>92</sup> Sir Henry Sumner Maine, *Ancient Law*, 10<sup>th</sup> ed. (London: John Murray, 1930), 142

<sup>93</sup> F. McAuley and J. P. McCutcheon, *Criminal Liability*, (Dublin: Round Sweet & Maxwell, 2000), 273

<sup>94</sup> Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour*, (New York: Harper & Row Publishers (1975), 11

<sup>95</sup> Webb Ullman, “The Delictual Responsibility of Medieval Corporations,” 64, *The Law Quarterly Review* 77, (1978):78

collectivity had breached the set rules and was liable to the prevailing infractions and punishments. It was as such possible to prosecute the *municipium* or city as the personification of the group of its citizens only on the strength that Roman law had instituted rules that precisely dealt with the rights, obligations, accountability, infractions and punishments applicable to collectivities, entities or cities.<sup>96</sup> Therefore, by the 12<sup>th</sup> – 14<sup>th</sup> Centuries, the concept of corporate criminal liability had evolved and the Roman law clearly imposed criminal liability on the *universitas* or corporation aggregates, but only when its members were acting collectively.<sup>97</sup>

### 2.4.2 Medieval Times

Medieval Society saw an increase in ordered groups such as villages, cities and universities and this called for development of a theory to address their place in society. Pope Innocent IV, who taught that the foundation of faculties and colleges was fiction, introduced the principle that corporate bodies were a fiction. By these teachings, he became “the father of the dogma of the purely fictitious and intellectual character of juridical persons”<sup>98</sup> and hence the theory *societas delinquere non potest*, which embraced the notion that “the corporate body is not in reality a person but is made a person by fiction of the law.”<sup>99</sup> This theory entailed that the corporation could not commit crimes as it was not a person but a fiction of the law. The theory was however not widely accepted because of the realities of the time and the prevailing 14<sup>th</sup> Century conception that all the corporations had their own willpower and should be liable both civilly and criminally for the acts committed by their members.

Consequently, the Emperors and Popes used to frequently sanction the villages, provinces and corporations<sup>100</sup> and the sanctions imposed included fines, the loss of specific rights, dissolution, and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or excommunication.<sup>101</sup> During medieval time therefore, the criminal liability of an individual belonging to a group was attributed to the group regardless of the fact that the crime had no connection with the scope of the corporation. The only way that a corporation could

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<sup>96</sup> Aquiles Mestre, *Les Personnes Morales et le Probleme de Leur Responsabilite Penale*, quoted in Fausto Martins, *De Sanctis, Responsabilidade Penal da Pessoa Juridica* (Sao Paulo: Saraiva, 1999), 26

<sup>97</sup> Florin Stretianu and Radu Chirita, *Raspunderea Penala a Persoanei Juridice* 7 (Rosetti ed.,2002) at 11, citing G. Richier, *De la Responsabilite Penale des Personnes Morlaes* 53 (1943) (dissertation).

<sup>98</sup> Gierke, 3 *Das deutsches Genossen-Schaftrecht* at 279-285, cited in J. Dewey, “*The Historic Background of Corporate Legal Personality*,” 35 *Yale Law Journal* (1926), 665

<sup>99</sup> W. M. Geldart, *Legal Personality*, 27 *The Law Quarterly Review* 90, (1911), 92

<sup>100</sup> Stretianu and Chirita, *Raspunderea Penala a Persoanei Juridice*, citing G. Richier, at 11

<sup>101</sup> Stretianu and Chirita, *Raspunderea Penala a Persoanei Juridice*, citing G. Richier, at 13-14

avoid condemnation was by capturing the individual wrongdoer and delivering him to the authorities.

At this time, it was generally but not unanimously accepted in France that the community had factual existence and groups could commit crimes and get punished independently of the nature of the groups. Therefore, the Criminal Code<sup>102</sup> provided for the criminal liability of corporations and stipulated that the crime committed must have been the result of the collectivity's decision. This was not seen as conflicting with the nature of the corporation as a legal fiction. And so, the French Criminal Ordinance<sup>103</sup> established the criminal liability of corporations on similar basis and in addition, provided that individuals were simultaneously criminally liable as accomplices for committing the same crimes.

### 2.4.3 The French Revolution

The French revolution brought a lot of changes to the French law and the notion of corporation was found to be incompatible with the individualist aspirations of the revolutionary government.<sup>104</sup> The new government needed immediate funds and finances were mainly owned by the corporations, and the easiest way of getting those funds was by eliminating the corporations followed by the confiscation of their goods and funds.<sup>105</sup> Therefore, the French Penal Code<sup>106</sup> stopped mentioning the criminal liability of corporations. Under the influence of the French Revolution ideals, the majority of the European countries changed their view regarding corporate criminal liability. Corporations lost their power and importance, and a number of doctrinal theories were developed to try and find a basis for the lack of criminal liability of corporations. The main argument was that a corporation was a legal fiction without soul or body and as such incapable of forming the criminal *mens rea* or to act on its own behalf and that corporate criminal liability would violate the principle of individual criminal punishment.<sup>107</sup> For instance, it was argued in Germany that corporations have a pure patrimonial

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<sup>102</sup> *Ordonnance de Blois* of 1579

<sup>103</sup> Grande Ordonnance Criminelle of 1670

<sup>104</sup> Florin Streteanu and Radu Chirita, *Raspunderea Penala a Persoanei Juridice* 7 (Rosetti ed.,2002) at 23, citing A. Gebara, *La Responsibilite des Personnes Morlaes en Droit Positif Français* 12 (1945) (dissertation)

<sup>105</sup> Streteanu and Chirita, *Raspunderea Penala a Persoanei Juridice*, citing A. Gebara

<sup>106</sup> The Code Penal of 1810

<sup>107</sup> L. H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 Mich.L.Rev. 1508, (1982), 1509

character, which is created for a particular commercial purpose and lacks judicial capacity, and that therefore corporations cannot be the subjects of criminal liability.<sup>108</sup>

#### 2.4.4 Common Law

Around the 17<sup>th</sup> century, the common law judges asked to apply criminal law of natural persons to a corporate “person” often found the analogy to be strained. The question they faced was whether a corporation being a juridical entity without physical form was capable of the requisite physical action to substantiate a prosecution for crimes with an element of physical action. They also faced other questions such as whether a corporation was capable of moral blameworthiness required for punishment under the criminal law; whether the corporation can be held liable where its agents acted outside the scope of the legal limits of its activities or beyond their authorized powers; and whether deploying criminal process against the corporate form is precluded by criminal procedure which gives the accused the right to be physically present at certain stages of trial to confront his accuser and to take the stand in his own defence. Such questions were deemed vexing and one of the reasons was because corporate liability, as a supplement to individual liability, was often thought to be unnecessary. This reasoning is presumably reflected in Lord Holt’s statement, preserved without fact, pattern or analysis, that a “*corporation is not indictable but the particular members of it are.*”<sup>109</sup>

Therefore, faced with the need to subject the corporation to criminal sanctions and with the conflicts inherent in both criminal law and corporate form, with the latter being the focus of the common law, the common law judges needed to take a position. As a way to resolve the problem, and at least as far back as 1635, the settled approach was to subject the corporation to liability only for crimes of nonfeasance, which is the failure to perform an act required by law, and immune from crimes requiring misfeasance, which is the willful or intentional incorrect action.<sup>110</sup> With this background, the 18<sup>th</sup> Century common law courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality<sup>111</sup> and

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<sup>108</sup> Stretianu and Chirita, *Raspunderea Penală a Persoanei Juridice*, at 25

<sup>109</sup> This statement of Lord Holt delivered in *Anonymous Case* (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701) has been passed down in legal discussions without availing the accompanying facts and analyses

<sup>110</sup> *Langforth Bridge case* 79 Eng. Rep. 919 (K.B. 1635)

<sup>111</sup> V. S. Khanna, “*Corporate Criminal Liability: What Purpose does it Serve?*” 109 *Harv. L. Rev.* 1477, (1996), 1479

so until the 19<sup>th</sup> – 20<sup>th</sup> Century; the focus of scholars on the subject of corporate criminal liability was on the corporate form. Corporations after all can act only through agents and there was never any question but that the errant corporation's agents, once found, could be tried and punished for their crimes.<sup>112</sup>

By the 19<sup>th</sup> Century, the number of corporations in Europe had vastly increased and their importance could no longer be undermined, especially with the increase in their mischief. Therefore, and in an effort to control corporate misconduct, the Council of Europe recommended to “those member states whose criminal law had not yet provided for corporate criminal liability to reconsider the matter.”<sup>113</sup> In response, France revised its Penal Code in 1992 and in it officially recognized the corporate criminal liability because, in the opinion of the French legislators, there was lack of other effective ways of sanctioning criminal corporate misconduct and also because it made judicial sense.<sup>114</sup> The French New Penal Code established for the first time in any civil law system, a comprehensive set of corporate criminal liability principles and sanctions.<sup>115</sup> It provided that, with the exception of the State, all the juristic persons are criminally liable for the offences committed on their behalf by their organs or representatives.<sup>116</sup> The example set by France was followed by many other European countries such as Belgium which modified article 5 of the Belgian Penal Code in 1999<sup>117</sup> and Denmark which also modified its Penal Code to include corporate liability for criminal offences in 2002.<sup>118</sup>

The 19<sup>th</sup> Century developments in civil law provided yet another dimension in the development of the concept of corporate criminal liability when it developed and assimilated the concept of vicarious liability into tort law. With this development, the English Courts began to hold corporations liable for the actions of their agents, having recognized that to cling to the nonfeasance/misfeasance distinction had led to ‘incongruous’ results that could not be justified.<sup>119</sup> Therefore, in the case of *Director of Public Prosecutions v Kent and Sussex Contractors Ltd and Another*<sup>120</sup> where the facts were that the responsible agent of the body

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<sup>112</sup> Beale and Safwat, “What Developments in Western Europe tell us about American Critiques of Corporate Criminal Liability,” at 89, 90

<sup>113</sup> Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, at 494

<sup>114</sup> Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, at 1520

<sup>115</sup> Orland and Cachera, *Essay and Translation: Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities*, 114

<sup>116</sup> Article 121-2 of The French Penal Code

<sup>117</sup> Streteanu and Chirita, *Raspunderea Penala a Persoanei Juridice*, 7, at 29-30

<sup>118</sup> Sara Sun Beale and Adam G. Safwat, “What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability,” 8 Buff. Crim. L.R. 89, (2004), 97

<sup>119</sup> James R. Elkins, “Corporations and the Criminal Law: An Uneasy Alliance,” 65 KY L.J. 73, (1976), 91-92

<sup>120</sup> [1944] 1 All ER 126

corporate put forward a document knowing it to be false and intending that it should deceive, the Court held that the knowledge and intention of the servants of a body corporate were to be imputed to the body corporate.

Despite this fundamental shift however, English Courts continued to be constrained by the limits of the *corporation-as-person* metaphor, which led to findings that corporations could only be guilty of misfeasance in the context of crimes of strict liability and could not be guilty of crimes with a “moral dimension” such as rape and murder, and crimes requiring *mens rea* such as trespass, which *mens rea* the corporation was presumed to be incapable of manifesting.<sup>121</sup> Also because of the applicable normal rules of agency, there was a distinction with the way strict liability offences were applied when it came to corporations. The difference was that the imputation of crimes requiring *mens rea* was inconceivable where the conduct was outside the scope of the agent’s employment. It is also worthy to note that in this period, the corporation was not “guilty” for acts done by just any employee; corporate liability was in the English Courts measured by the actor’s degree of participation in the company.<sup>122</sup> A case in point is the decision in the case of *Tesco Supermarkets v Natrass*,<sup>123</sup> which was essentially that a company would be liable for a serious criminal offence only where one of its most senior officers had acted with the requisite fault.

#### **2.4.5 The United States**

The United States (US) had adopted the English common law principle that a corporation could not be held criminally liable because it was a mere legal fiction incapable of forming the requisite criminal intent to be adjudged guilty. However, it reached a turnaround from this principle in 1909 when it took the position that there was no valid objection in law, and every reason in public policy, which would justify not holding corporations, which profits by the transaction, liable for the criminal acts of its agents and officers in whom it had entrusted authority to act on its behalf.<sup>124</sup> By the middle of the 20<sup>th</sup> Century, the United States federal

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<sup>121</sup> Khanna, “*Corporate Criminal Liability: What Purpose does it Serve?*” at 1484 n, 37

<sup>122</sup> See *Regina v Saunders* 75 Eng. Rep. 706 (K.B 1575)

<sup>123</sup> [1972] A.C. 153 (H.L.)

<sup>124</sup> This turnaround was reached in the case of *New York Central and Hudson River Railroad v United States*,<sup>124</sup> where the Court reasoned that the criminal acts of a corporate agent could be imputed to the corporation under the standard principles of *respondeat superior* because they saw no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its



courts had accepted that a corporation could be held liable even for acts committed against corporate policy or express instructions.<sup>125</sup> This meant that the fact that a company appeared to have undertaken extensive efforts to prevent its employees from engaging themselves in the very conduct that served as a basis for prosecution, did not exempt the company from liability where the employees went ahead and did the forbidden act.

The current corporate liability standard in the US, which is based on traditional agency law principles, is therefore that a corporation is liable for the actions of its agents whenever such agents act within the scope of their employment and at least in part to benefit the corporation. This principle is what is termed as *respondeat superior* meaning ‘let the superior reply’. For crimes requiring intent in the US, a corporation may be criminally liable where an agent’s illegal actions were authorised, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment, and where due diligence is allowed as a defense.<sup>126</sup> The due diligence defense is that one took all reasonable and necessary steps to prevent the commission of the crime. The prosecution and sentencing guidelines have therefore been amended to allow compliance programs to be taken into account.<sup>127</sup> The major point here is that with regard the requirement for intent and knowledge, the same can be imputed to the corporation if the employee acted within the scope of his authority and the knowledge relates to matters within the scope of that authority.

Therefore, an agent’s culpability and knowledge may only be imputed to the corporation where the agent was “acting as authorized and motivated at least in part by an intent to benefit the corporation.”<sup>128</sup> In analyzing the current principle of corporate criminal liability, Anarophy, Paxton and Byers, hold the view that the requirement that employees must be acting within the scope of their actual or apparent authority has been interpreted so expansively that it is practically invisible in many contexts.<sup>129</sup> The requirement that an employee acts to benefit the company has also been relaxed by a permissive interpretation because, and according to Drew

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agents and officers, shall not be held punishable by fine when the agents to whom it has entrusted authority to act have the knowledge, intent and purposes which may well be attributed to the corporation.

<sup>125</sup> See the case of *United States v Twentieth Century Fox Film Corp.* where the Court stated that Fox’s Compliance Program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree.

<sup>126</sup> Mark Pieth and Radha Ivory ed., *Corporate Criminal Liability: Emergence, Convergence, and Risk*, (New York: Springer, 2011), 12 at 23

<sup>127</sup> Annie Geraghty “*Corporate Criminal Liability*,” 39 AM Crim. L. Rev 327 (2002), 331

<sup>128</sup> See the case of *United States v 7326 Highway*, 45N, 965 F. 2d 311, 316 (7th Cir 1992)

<sup>129</sup> Joel M. Anarophy, Richard G. Paxton and Keith A. Byers, “*General Corporate Criminal Liability*,” 60 TX, B.J. (1997), 121 -122

and Clark, it is not necessary that the employee be primarily concerned with benefiting the corporation because Courts recognise that many employees act primarily for their own personal gain.<sup>130</sup> Like in the US, the concept of corporate criminal liability has continued to develop in many other jurisdictions although, as demonstrated above, it is not a universally accepted concept. The question that is raised now is; what is the justification for its existence in the first place?

#### **2.4.6 The Rationale for Corporate Criminal Liability**

The age-old debate of whether corporate criminal liability should be imposed at all stems from the issue of unfairness to shareholders as well as the nature of corporations and fundamental objections arising from the nature of criminal law. Individual liability has always been preferred and appears to be more appealing in criminal law. But it cannot be denied any longer that in the modern world, the strong effect of financial activities of corporations is incredible on the society and that many offences are committed during the course of such activities. This study therefore offers four reasons why criminal liability should be extended to corporations instead of confining it to the corporate individuals.

Firstly, subjecting corporations to criminal sanctions or regulatory mechanisms is necessary to indicate society's condemnation of the corporate wrongdoing.<sup>131</sup> Imposing corporate criminal liability on corporations engaged in business activities that inflict harm on society is one bold step taken by society to register its recognition of the corporate's wrongdoing and take a stand against it. For instance in Zambia, the Environmental Management Act<sup>132</sup> is enacted for the purpose of providing for the prevention and control of pollution and environmental degradation and also providing for public participation in environmental decision-making and access to environmental information; among others.<sup>133</sup> It therefore criminalises the pollution of the environment and contravention of any provision of the Act and provides that where an officer or agent of the company commits the offence in the exercise of their powers, functions or duties, it will be deemed that such offence was committed by the corporation.<sup>134</sup>

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<sup>130</sup> Kendel Drew and Kyle A. Clark, "Corporate Criminal Liability," 42 AM. CRIM. L. REV. 277, (2005), 282

<sup>131</sup> Beale and Safwat, *What Developments in Western Europe tell us about American Critiques of Corporate Criminal Liability*, 89, 103.

<sup>132</sup> The Environmental Management Act No. 12 of 2011

<sup>133</sup> Preamble to the Environmental Management Act No. 12 of 2011

<sup>134</sup> Sections 125(1) and 127(2) of the Environmental Management Act No. 12 of 2011

Secondly, imposing corporate criminal liability on corporations is necessary if society is to deter corporations from engaging in criminal activities. This deterrence is on two levels; specific deterrence is concerned with deterring the corporation from committing criminal offences again and general deterrence is concerned with deterring society from trying to engage in similar criminal conduct. It has been observed that sporadically or leniently imposed penalties are seen as the leading reason from the failure to deter corporations from engaging in criminal activities.<sup>135</sup> Therefore, deterrence calls for stiff corporate punishment including corporate death penalty or subjecting the entity to a probation period during which the court monitors its business activities.<sup>136</sup> In Zambia, the Penal Code<sup>137</sup> provides that where the person to be sanctioned is a corporation then the corporation must be sentenced to a fine instead of imprisonment.<sup>138</sup> The fine, in Zambia, is the most common punishment for corporations and whether this is sufficient to deter further crimes by corporations will be discussed in the subsequent chapters of this study. Other punishments provided for under the Zambian law include the confiscation or forfeiture order where the offender benefitted financially from the offence<sup>139</sup> and debarment from public procurement where a corporation benefitted from the offending act or contravened the provisions of the Public Procurement Act.<sup>140</sup>

Thirdly, imposing corporate liability would allow for sanctions against corporate assets thereby generating funds for victims or their beneficiaries. Going for the corporation because it has more money is sometimes referred to as the “Deeper Pockets” principle. This principle refers to the idea that the risk of an activity should be borne by a person who is in a relatively good position to handle it, which in the case of corporate crimes is the corporation. The practical view is that corporate entities are likely to have substantially more assets than corporate personnel thereby increasing the likelihood of securing funds when enforcing a court order.<sup>141</sup> In Zambia, most corporate crimes are resolved by way of administrative actions whereby the aggrieved party is administratively compensated by the corporation for the wrong done against them and the case does not make it to court. The legislature has also made provision for the recovery of assets

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<sup>135</sup> Sally S Simpson, *Corporate Crime, Law, and Social Control*, (Cambridge University Press, 2002) 45.

<sup>136</sup> Andrew Weismann with David Newman, “*Rethinking Criminal Corporate Liability*,” 82 *Indiana Law Journal* 411 (2007), 428.

<sup>137</sup> The Penal Code chapter 87 of the laws of Zambia

<sup>138</sup> Section 26 of the Penal Code chapter 87 of the laws of Zambia

<sup>139</sup> Section 10 and 19 of the Forfeiture and Proceeds of Crime Act No. 19 of 2010

<sup>140</sup> Section 80 of the Public Procurement Act No. 12 of 2008 of the laws of Zambia

<sup>141</sup> Mordechai Kremnitzer, “*A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*,” 8(3) *Journal of International Criminal Justice* 909, ((2010), 913.

which are proceeds of crime through orders of confiscation and forfeiture.<sup>142</sup> It is also usual to find the courts in Zambia ordering for the forfeiture of the vessels or items used in the commission of an offence at the close of a successful prosecution of a corporate or other crime.<sup>143</sup> Also, where a civil order of confiscation or forfeiture is made, it does not affect the outcome of a criminal prosecution.<sup>144</sup>

Fourthly, extending liability to corporate entities would be beneficial because culpable individuals are not always easily identifiable.<sup>145</sup> Corporate criminal liability as opposed to individual responsibility is beneficial and efficient because difficulties in identification of the culpable individual arise from the fact that sometimes undesirable conduct is carried out through the business form, and also corporate individuals come and go at different times and are easily replaced, especially in the global business operations of multinational corporations.<sup>146</sup> Multinational corporations, by definition, are commercial entities that are engaged in business activities in more than one state.<sup>147</sup> They operate in such a way that the headquarters could be located in one state while operations of business activities are in another state through subsidiaries or contractual relationships. Therefore, even identifying culpable enterprises within the same group becomes a challenge and involves such legal decisions by the courts to put aside limited liability and hold a corporation's shareholders or directors personally liable for the corporation's actions. In Zambia, the corporate veil is pierced by default as soon as a corporation is indicted for an offence. This is seen from the fact that as soon as a corporation is pronounced 'guilty' of an offence, its agents or employees, acting as the mind and will of the corporation, are deemed to be guilty of the same offence and liable to punishment.

One of the common arguments advanced by critiques of corporate liability is that to sanction corporate assets in punishing the corporation for corporate crime would be unfair on the shareholders whose role in the corporation is passive as they do not exercise control over the

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<sup>142</sup> See sections 10 and 19 of the Forfeiture and Proceeds of Crime Act No. 19 of 2010

<sup>143</sup> See section 129 of the Environmental Management Act No. 12 of 2011

<sup>144</sup> See section 31 of the Forfeiture and Proceeds of Crime Act No. 19 of 2010

<sup>145</sup> Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations*, (Oxford University Press, 2002) 6.

<sup>146</sup> Clough and Mulhern, *The Prosecution of Corporations*, at 6.

<sup>147</sup> Peter Fischer, *Transnational Enterprises*, in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (North Holland Publishing Company, 1985) Volume VII, 515.

corporate entity or its employees.<sup>148</sup> It is argued by other scholars that shareholders elect the board of directors and after that the corporate entity is run by the board and not the shareholders and so corporate liability punishes the blameless shareholders.<sup>149</sup> In reality however, there are competing views about the role played by shareholders. Some shareholders view themselves not as bystanders but as an integral part of the corporation's collective enterprise and morally entangled in its policies and practices.<sup>150</sup> It is therefore not strange that some perceive critiques of corporate liability as not taking into consideration the critical role that shareholders can and should play to monitor the corporate activities by overseeing corporate behaviour, selecting exemplary corporate personnel albeit board members, as well as positively influencing appropriate corporate policy.<sup>151</sup> Moreover, it is strongly argued that shareholders benefit from the positive and successful corporate activities and so it is only reasonable that they bear some of the costs resulting from corporate wrongdoing.<sup>152</sup>

Therefore, it is necessary to punish the corporation without the fear of unfair punishment on blameless shareholders because shareholders ought to be concerned about the activities of the corporation and take an active role in the direction of its business as best as they can, because after all, they do share its successes and benefits. Granted, there may be exceptional instances where the shareholders who benefit from the corporate wrongdoing may not necessarily be the ones who are left to bear the costs by losing out or delaying a return on their shares, for instance. This can happen say where the consequences of the offence are only effected after shares have exchanged hands.

Another argument advanced against corporate liability is that the nature of criminal law raises in itself objections against the concept of corporate liability. There are three theoretical objections voiced out. The first is that corporate entities are incapable of possessing the requisite *mens rea* as they are amoral and have no will of their own.<sup>153</sup> The second is that corporate entities are legal

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<sup>148</sup> Daniel J Morrissey, *Piercing all the Veils: Applying an Established Doctrine to a New Business Order*, 32 *Journal of Corporation Law* 529, (2007), 537

<sup>149</sup> Morrissey, *Piercing all the Veils: Applying an Established Doctrine to a New Business Order*, 537.

<sup>150</sup> Ian B. Lee, "Corporate Criminal Responsibility as Team Member Responsibility," 31(4) *Oxford Journal of Legal Studies* 755, (2011), 771.

<sup>151</sup> Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford University Press, 2nd ed., 2005) 358.

<sup>152</sup> Eric Colvin, *Corporate Personality and Criminal Liability*, (1995) 6(1) *Criminal Law Forum* 1, 29

<sup>153</sup> Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, (1994) 43 *International and Comparative Law Quarterly* 493, 495

fiction and they cannot function independently.<sup>154</sup> The third is that corporate entities, *per se*, cannot be punished.<sup>155</sup>

Corporations are legally deemed to be single entities, distinct and separate from all the individuals who compose them; yet they have no physical body or mind of their own. Criminal law on the other hand is pre-eminently concerned with standards of behaviour which largely relies on standards of fault proved through mental state except for strict liability offences which discard the need for mental state altogether. A crime therefore involves both *actus reus* which is a criminal act and *mens rea* which is a culpable mind. As a result of this, the key features in criminal culpability are the subjective mental states of intention, knowledge and recklessness. In some offences, the prosecution may be required to prove that the defendant realised that his actions would inevitably lead to a particular result and this is called intention. It may be required to prove that the defendant himself was aware of the particular circumstances, which is knowledge. The prosecution may be required to prove that the defendant himself was aware that his actions might have that result or that a circumstance might exist, this is what is known as recklessness. The offence may require proof that the defendant's behaviour fell short of that expected of a reasonable person even though he had not adverted himself to the relevant risk and this is termed negligence.

In a bid to overcome the above theoretical objections to the notion of corporate criminal responsibility, most domestic jurisdictions like the US, the UK and Australia have codified and refined the ideologies on the subject of corporate liability in their domestic legislation resulting in a trendsetting development of the concept. They have over the past few decades adopted what are called models of corporate liability and in that way make it possible for corporate entities to be held at fault and punished. Countries like Zambia, Malawi, Nigeria and South Africa have followed suit and included the corporate criminal liability ideologies in their legislation as well. The different models of corporate liability found in the different domestic jurisdictions have their genesis in the legal theories of corporate personality accepted by any particular country.

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<sup>154</sup> Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, (1994) 43 International and Comparative Law Quarterly 493, 495

<sup>155</sup> Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, (1994) 43 International and Comparative Law Quarterly 493, 495.

## **2.4.7 Conclusion**

This chapter gave an overview and history of the concept of corporate criminal liability by examining its development in different jurisdictions. It conceded that the concept existed even during ancient times and that it has been undergoing some changes through the years with the most robust having begun in the 20<sup>th</sup> century. The chapter went on to explore the rationale for the concept of corporate criminal liability by addressing the question: what is the point for imposition of corporate criminal liability? It looked at the arguments advanced against the development of the concept, which arguments are centred on the key conceptual problem faced by pronouncers of the concept throughout history. The chapter also gave a brief description of the concepts of corporate crimes and financial crimes which are referred to in the subsequent discussions on the subject of corporate criminal liability. The next chapter will discuss the local legislation on corporate criminalisation and criminal sanctions in the *Zambian Jurisprudence*.

## **CHAPTER THREE**

### **LOCAL LEGISLATION ON CORPORATE CRIMINALISATION AND CRIMINAL SANCTIONS IN ZAMBIA**

#### **3.1 Introduction**

The purpose of this chapter is to discuss the concept and legal framework for corporate criminalization and sanctions in the local *Zambian Jurisprudence*. This will be done by examining the law as it is for purposes of assessing how far the law and enforcement mechanism go in providing for corporate criminal liability and thereby expose the weakness and strengths of the existing legislature in the area of corporate crimes. The discussion will be aided by a reference to some general statutes on criminal liability and specific statutes in the area of some corporate and financial crimes. The discussion will also make a reference to some of the law and practice prevailing in England, Nigeria, South Africa and Malawi for purposes of drawing lessons from these jurisdictions that have in different ways included corporate criminal liability in their local jurisdictions.

### 3.2 Corporate Personality

Under any written law in Zambia, unless the contrary appears, a corporate body is as much a person as is an individual. To this end, although the Interpretation and General Provisions Act,<sup>156</sup> which is the general law on interpretation in Zambia, does not define a “corporation,” it does define a “person” to include a company or association or body of persons, corporate or unincorporated.<sup>157</sup> The Companies Act, which is the principal Act providing for the regulation of companies in Zambia, follows suit and clarifies what kind of “person” a body corporate is when it provides that a company shall have, subject to the Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual.<sup>158</sup> With this description, a corporation is both a group of individuals constituted at any one time and also a distinct personality in its own right, being a person under law. What this means is that a company has dual identity; as an association of persons which requires that for a company to be formed there should be an association of at least two persons, and a person distinct from its members.<sup>159</sup> It is recognised in the latter case that human agency is required for a corporate entity to fulfil its mission and carry out its business and that as such, while most activities of the company will be identified with the corporation as a person, there are instances where the law will hold its members or officers responsible for its actions as to hold otherwise would lead to absurdities.<sup>160</sup>

Furthermore, the Zambian Constitution provides for the rights of a person charged for any criminal offence under the laws of Zambia to defend himself and examine prosecution witnesses in person or by legal representation before court.<sup>161</sup> In respect of a corporation, it provides that the words “in person” should be omitted when applied to a body corporate<sup>162</sup> and that trial can lawfully proceed in the absence of a representative of the body corporate if the law under which such corporation is charged provides for it and the court has entered a plea of not guilty in respect of the charge.<sup>163</sup> What this means is that even without a physical body and mind, a corporation can, under the Zambian law, be charged for a criminal offence in its own name and

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<sup>156</sup> Chapter 2 of the Laws of Zambia

<sup>157</sup> Section 3 of the Interpretation and General Provisions Act chapter 2 of the Laws of Zambia

<sup>158</sup> Section 22(b) of the Companies Act No. 10 of 2017

<sup>159</sup> Section 4 of the Malawian Companies Act of 1984

<sup>160</sup> Hubert McSyd Chalunda, *Corporate Crime and the Criminal Liability of Corporate Entities in Malawi*, Resource Material Series No. 76

<sup>161</sup> Article 18(2) of the Constitution of Zambia, chapter 1 of the Laws of Zambia, as amended by Act No. 2 of 2016

<sup>162</sup> Article 18(14)

<sup>163</sup> Article 18(12) (e)



right and that a corporation has the right to cross examine prosecution witnesses and defend itself and call witnesses through its legal representation.

### **3.3 Corporate Criminalisation**

The general law on criminalization and sanctions in Zambia is embodied in the Penal Code which creates offences and prescribes the penalties thereof. In terms of corporate liability, the Act does not offer a definition for ‘person’ or ‘corporation’ but it nonetheless anticipates the commission of an offence by a corporate entity as will be seen in its provisions relating to penalties under the Act, later in this chapter. Apart from the Penal Code, the corporate entity can be held criminally liable for offences committed under such Acts of Parliament as the Prohibition and Prevention of Money Laundering Act,<sup>164</sup> the Anti-Corruption Act,<sup>165</sup> the Environmental Management Act,<sup>166</sup> the Forfeiture of Proceeds of Crime Act,<sup>167</sup> and the Workers Compensation Act.<sup>168</sup> It must be noted that corporate entities in Zambia are criminally liable for some offences and are not for others. For instance, a corporation cannot be held criminally liable for the felonious offences of fraudulently appropriating property or keeping fraudulent accounts or falsifying books of accounts as such kind of offences are a preserve of directors and officers of corporations or companies who are liable to imprisonment for seven years.<sup>169</sup> Further, in Zambia, a corporation can incur corporate criminal or quasi-criminal liability by two main techniques. These techniques of imputing the criminal acts and states of minds of corporate individuals to the corporate entity are the "identification model" and the “vicarious liability model”.

#### **3.3.1 The Identification Model in Zambia**

The identification model entails that “those who control or manage the affairs of a company are regarded as embodying the company itself”.<sup>170</sup> Generally, the board of directors, the managing director or other superior officers of a company, carry out the functions of management and speak and act as the company<sup>171</sup> and this generates primary criminal liability where the

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<sup>164</sup> The Prohibition and prevention of Money Laundering (Amendment) Act No. 44 of 2010

<sup>165</sup> Act No. 3 of 2012

<sup>166</sup> Act No. 12 of 2011

<sup>167</sup> Act No. 19 of 2010

<sup>168</sup> Act No. 10 of 1999

<sup>169</sup> Section 324 of the Penal Code chapter 87 of the laws of Zambia

<sup>170</sup> Law Commission Legislating the Criminal Code Involuntary Manslaughter (Law Com No 237, 1996) at [6.27

<sup>171</sup> Tesco Supermarkets Ltd v Natrass, above at 65, at 4.

corporation itself is held to commit the offence.<sup>172</sup> However, some argue that this model is essentially a form of vicarious liability limited to those who control or manage the corporation's affairs.<sup>173</sup> The identification doctrine applies equally to private companies, public companies and statutory corporations but there is some difficulty in applying it to government institutions, government departments and corporations that exist principally as agents of the government as these are what are referred to as being emanations of the State itself, which can be protected by the general immunity that exempts officers of the State from penal statutes when they are acting on behalf of the State. The State itself cannot be prosecuted by the State, for that would be *The People v The State*, which is thought to be impossible and works in favour of Government Departments and other Government Agencies. Also, the question of whether the identification model can be extended to individual employers remains unresolved on the global platform and the author did not at the time of this study come across any case in which it was so extended.

According to the strict application of the identification doctrine, a corporation can be criminally liable even where a senior officer has acted contrary to corporate policy.<sup>174</sup> In other words, a corporate entity may be indicted and convicted for the criminal acts of the directors and managers who represent the directing mind and will of the entity and who control what it does. This is in spite of measures put in place by the corporation to avoid such offences and without regard to whether the offence is against the corporation itself. Conversely, where the offence is not attributable to any such person, neither the corporation nor the senior officers will be held liable despite the clear evidence of the criminal act having been committed.<sup>175</sup> In the case of offences requiring the proof of *mens rea*, such as many corruption offences, it is possible to combine proof of the act itself, on the part of an employee or representative of the company who would not form part of the controlling mind, with proof of the mental element on the part of a person who does form part of the controlling mind.

Most of the Zambian laws, providing for any offence in the various Acts, reflect the identification principle by requiring that a corporation is held liable together with its directors

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<sup>172</sup> Neil Cavanagh “*Corporate criminal liability: an assessment of the models of fault*” (2011) 75 J Crim L 414 at 416.

<sup>173</sup> James Gobert, *Corporate Criminality: 4 Models of Fault*, The Society of Legal Scholars, n 62 at 67 (1994)

<sup>174</sup> Neil Cavanagh, “*Corporate criminal liability: an assessment of the models of fault*” (2011) 75 J Crim L 414 at 419

<sup>175</sup> This is what was held in the English case of *R v P&O European Ferries (Dover) Ltd* where even though the whole corporation was “infected with the disease of sloppiness” the prosecution failed because no individual had the requisite *mens rea* that could be attributed to the company.

and managers, to whom *mens rea* and *actus reas* are attributed, subject to the due diligence defenses. In point is the Health Profession Act<sup>176</sup> which provides that if such corporation is convicted, then every director or manager who knowingly authorized or permitted the offending act or omission is deemed to have committed the same offence and may be proceeded against and punished accordingly. The Bank of Zambia (Currency) Regulations<sup>177</sup> proceeds the same way and adds that unless the director or like officer proves that the act was done without his knowledge, consent or connivance he will be deemed to have committed the same offence. Further, the Banking and Financial Services (Bureau de Change) Regulations<sup>178</sup> provide that where a body corporate is convicted of an offence or is fined under the Regulations, any person who is a director of or who is concerned in the management of that body corporate is to be deemed as having committed the same offence and is liable to be fined as if he authorised or permitted the act or omission constituting the offence.

Like Zambia, the predominant corporate criminal liability model followed by South Africa is the identification model. The South African provisions relating to the identification model of corporate liability clearly states that whether the offence is a *mens rea* offence or not, the act imputed onto the corporation must be one that was done by the senior officer, or with his or her actual or apparent authority, in the course of the senior officer's duties, and for the benefit of the corporation.<sup>179</sup> In the Zambian case, the identification model is not so explicitly provided for under any of the Acts of general application such as the Penal Code<sup>180</sup> and the Criminal Procedure Code.<sup>181</sup> However, the Forfeiture of Proceeds of Crime Act<sup>182</sup> does in a way define the principle. The Act defines the 'state of mind' as including a reference to the knowledge, intention or purpose of the person and the person's reasons for the person's intention or purpose.<sup>183</sup> It further provides that the mental state and conduct of the director, servant or agent of the corporation acting within their actual or apparent authority will be imputed to the

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<sup>176</sup> Act No. 24 of 2009

<sup>177</sup> Section 6 (1) of the Bank of Zambia (Currency) Regulations, 2012

<sup>178</sup> Section 40 of the Banking and Financial Services (Bureau de Change) Regulations, 2003

<sup>179</sup> section 332(1) of the Criminal Procedure Act No. 51 of 1977 of the Republic of South Africa

<sup>180</sup> Chapter 87 of the laws of Zambia

<sup>181</sup> Chapter 88 of the laws of Zambia

<sup>182</sup> Act No. 12 of 2010

<sup>183</sup> Section 72(5)

corporation in the case of the commission of an offence under the Act.<sup>184</sup> More specifically, it provides that:

(1) Where it is necessary, for the purposes of this Act, to establish the state of mind of a body corporate in respect of conduct engaged in, or deemed by subsection (2) to have been engaged in, by the body corporate, it is sufficient to show that a director, servant or agent by whom the conduct was engaged in within the scope of the director's, servant's or agent's actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate-

(a) by a director, servant or agent of the body corporate within the scope of the director's, servant's or agent's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement, whether express or implied of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent; is deemed, for the purposes of this Act, to have been engaged in by body corporate.

It is worthy to note that unlike the South African position which has laid down clear perimeters for the application of the corporate criminal liability concept, the Zambian position is mute on whether an act that does not benefit the corporation will still bind the corporation if done by or with the authority of the directing mind. It is also not provided in clear terms what the status of the act that benefits the corporation but is not committed by or with the authority of the directing mind of the corporation is. There is need to clearly define the identification model in the Zambian legislation for better prosecution and mitigation of corporate crime.

### **3.3.2 The Vicarious Liability Model in Zambia**

The Vicarious Liability Model of corporate criminal liability allows a corporation to be convicted of a criminal offence by imputing the *actus reus* or performance of a legally prohibited act and the *mens rea* or criminal intent of an individual to a corporation. The corporation's

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<sup>184</sup> Section 72(1) and (2)

liability is derived from the fault of its employee, officer or agent.<sup>185</sup> Under the vicarious liability technique, even where an employer does not consent or authorise an act, it may be indicted or convicted for the criminal acts of its agent or employees who do not form part of the controlling mind of the corporate person. This technique is an exception to the general rule of the criminal law that a corporate entity may not be convicted for the criminal acts of its inferior employees or agents; and it most importantly applies to statutory offences as these impose an absolute duty on the employer.

Statutory offences or crimes created by statute are strict in nature in that they do not require proof of *mens rea* in the form of intention, recklessness, knowledge or even negligence; all that is needed is proof of *actus reus*. A breach of or non-compliance with a regulatory law in Zambia is an offence. In this regard, an offence is construed in the Interpretation and General Provisions Act<sup>186</sup> to mean any crime, felony, misdemeanour, contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided.<sup>187</sup> It has been argued that to punish a person for the commission of a strict liability offence is *per se* unjust.<sup>188</sup> However, this argument can be countered on the fact that strict corporate criminal liability is necessary where an offence cannot practically be attributed to any particular individual of significant standing with the company and in welfare offences like those covered under the Workers Compensation Act<sup>189</sup> which takes into account the welfare of a worker injured during work, and under the National Pension Schemes Authority Act<sup>190</sup> which looks at the welfare of the retired or otherwise separated worker. Under the Zambian law therefore, apart from the acts specifically described as offences, a breach of any legal regulatory provision for which a penalty is prescribed is an offence under law. The English court made a case for strict liability offences when it held in the case of *Sweet v Parsely*<sup>191</sup> that imposition of strict liability may be more justified where the defendant (company) is engaging in a profit-making activity which creates hazards for the public.

Like the UK, Zambia favours the principle that *prima facie* a principal should not be criminally responsible for the acts of its servants unless it is the intention of the legislature. In offences

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<sup>185</sup> Canadian Dredge & Dock Co v R [1985] 1 SCR 662 at [20].

<sup>186</sup> Chapter 2 of the laws of Zambia

<sup>187</sup> Section 2 of the Interpretation and General provisions Act chapter 2 of the laws of Zambia

<sup>188</sup> R v Larsonner (1933) 24 Gapp. R. 74

<sup>189</sup> Act No. 10 of 1999 of the Laws of Zambia

<sup>190</sup> Act No. 28 of 1996 as amended in 2005

<sup>191</sup> (1970) AC132

requiring proof of *mens rea*, therefore, the application of the vicarious liability model in Zambia is in such a way that criminal acts of any employee can be attributed to the corporation only if the accompanying *mens rea* can be attributed to a director or other officer of similar standing. This assertion is made from the fact that the legal provisions that provide for vicarious liability, apart from outlining which officer will share the corporation's responsibility, also include the defense of due diligence. Due diligence is a defense that one had put in place all reasonable and necessary measures for the prevention of the offence, or that he did all that he could to prevent the commission of the offence, or that the offence was committed without his awareness. By providing for due diligence defenses, the vicarious liability model entails that the criminal conduct must involve conduct by high managerial agents or the conduct must have been engaged in, authorized, solicited, commanded or recklessly tolerated by a high managerial agent acting within the scope of his employment.<sup>192</sup> For instance, under the Environmental Management Act,<sup>193</sup> it is provided that: "For the purposes of this Act, any act or thing done or omitted to be done by a director, officer, employee or agent of a body corporate or unincorporate body in the exercise of their powers, functions or duties is deemed to be an act or thing done or omitted to be done by the body corporate or unincorporate body."<sup>194</sup>

The same Act provides for the due diligence defense in the following terms:

Where an offence under this Act is committed by a body corporate or an unincorporate body, every director or manager of the body corporate or unincorporate body shall be liable, upon conviction, as if the director or manager had personally committed the offence, unless the director or manager proves to the satisfaction of the court that the act constituting the offence was done without the knowledge, consent or connivance of the director or manager or that the director or manager took reasonable steps to prevent the commission of the offence.

Such statutory provisions as above, however, appear to take it for granted that all corporations are of a clearly set out single management local business nature. They seem not to take into consideration the nature and operations of multi-national corporations and parent-subsidiary corporations or corporate groups, and may as such not be adequate to hold such corporations criminally liable. The complexity that arises with these privately or publicly owned multi-

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<sup>192</sup>See Model Penal Code ss. 2.07 (1) (c) and Ariz. Rev. Stat. Ann. ss. 13-305 (2004)

<sup>193</sup> Act No. 12 of the 2011

<sup>194</sup> Section 127(2) of the Environmental Management Act No.12 of 2011

national corporations is that they are not the principal perpetrators at the heart of most violations of the criminal law of the land. They instead tend to be complicit perpetrators in criminal law violations and as such pose practical difficulties to the enforcement of any finding of liability against them. This is because their role in the commission of the crime is usually in the form of aiding and abetting, and this generally by way of providing practical assistance for the commission of a crime through the provision of finance, infrastructure, materials, and logistic support. It is therefore difficult to show that the complicit perpetrator had knowledge that their actions would assist the commission of the crime.

### **3.3.3 Consideration of the Realist Theory's Corporate Culture Model**

From what has been demonstrated above, it can be seen that the corporate liability models adopted in Zambia are basically derivative in nature as the liability is derived from an individual's guilt save for strict liability offences. Further, the current models assume that the organizational structure of a corporation still corresponds to the hierarchical pyramid where there is strict allocation of tasks and roles and where compliance is ensured through control centered predictability and coordination within the corporation. There is need for the country's legislature to come to the realization that this structure no longer exists and that in its place there is decentralization of governance, diffused responsibility and fragmentation of liability within the corporation. This is why in determining corporate liability, it is now necessary to establish that the corporation itself is criminally liable by focusing on the organizational peculiarities and culture and not merely on an individual's guilt.

In order to effectively control corporate crime, therefore, there would be need to emulate certain jurisdictions that have gone further to enact penal laws that are specifically targeted at management systems and controls of a corporate entity. One such jurisdiction is the UK which recently passed the Corporate Manslaughter and Corporate Homicide Act of 2007<sup>195</sup> which is a criminal law statute targeted specifically at corporations. There are no such criminal law statutes in the Zambian jurisdiction, where specific criminal law legislation such as the Anti-Corruption Commission Act<sup>196</sup> have specifically targeted offences but are not directed specifically at corporations. An Act that is specifically targeted at corporations will make holistic provisions

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<sup>195</sup> This Act provides that a corporate entity is guilty of the offence of corporate manslaughter if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased

<sup>196</sup> Section 2 of the Anti-Corruption Act No. 3 of 2012

aimed at ensuring control of corporate crime. Apart from enacting criminal statutes of specific application to corporations, a shift in the applicable model of corporate criminal liability to one that is not derivative but rather focusses on the corporate culture and systems would better mitigate corporate crime. This can be achieved by law reform based on the holistic models of corporate liability which focus on the corporation as a whole in order to satisfy the requirements of criminal law.

Based on the realist theory of corporate personality, the Penal Code in Zambia can be amended to include provisions that would enable the courts to examine a company's corporate policy and culture and its organisational structure in order to find genuine corporate fault instead of focusing on derivative fault. The idea is that corporate blame can be found in the procedures, operating systems or culture of the company. According to the Australian Criminal Code Act, "corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place."<sup>197</sup> The corporate culture model of corporate criminal liability is a relatively new model in the imputation of corporate criminal liability, which allows the imputation of the *actus reus* of any employee regardless of ranking in the organisation and the fault element in the directing mind and will of the company as well as the company's practices and procedures that may be said to have directed, encouraged, tolerated or led to the non-compliance with the relevant provisions of the law. It is at this point important to look briefly at the views of the scholars that have followed its development.

In 1975, Christopher Stone spoke of the corporation as "a community" having its own attitudes, norms, customs, habits, and more."<sup>198</sup> And this stems from the widely acceptable notion that a corporation is a separate legal entity separate from the individuals that constitute it. In 1978, Wally Olins affirmed that corporations have their own distinct personalities and *ethos* by which they express their identity.<sup>199</sup> A few years later, Terrence Deal and Allan Kennedy specified what the elements that characterize this corporate culture are as being the environment in which the business is done, the values inspiring the corporation, the main actors of the corporation, and the cultural background.<sup>200</sup> With the sophistication of corporate activity being so evident, modern

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<sup>197</sup> Section 2 of the Criminal Code Act of Australia, 1995, c.2 Div. 12.3 (6) (Austl.)

<sup>198</sup> Christopher Stone, *Where the Law Ends; the Social Control of Corporate Behaviour* (Harper & Row, 1975) 228

<sup>199</sup> Wally Olins, *The Corporate Personality*, (Design Council, 1978)

<sup>200</sup> Terrence E. Deal & Allan A. Kennedy, *Corporate Cultures* 13-15 (Addison-Wesley, 1982)



scholars like Marshall Clinard have more recently explicitly affirmed the existence of a corporate *mens rea* and emphasised a connection between corporate blameworthiness and the structure of the organization. Clinard did this by focusing on both internal and external factors of the organization as affecting its illegal behavior.<sup>201</sup> Pamela Bucy has also added her voice in support of the corporate culture model. She speaks of the corporate *ethos* as positing the existence of corporate criminal liability when its *ethos* motivates corporate agents to commit crime, and she cites hierarchical structure, corporate goals, post-offence behavior, and the existence of a compliance program as being among the elements characterizing *ethos*.<sup>202</sup>

With these developments, Australia, in 1995, decided to adopt a modern and complex model of corporate culpability, expressly addressing the problem of corporate culture as a fault element. It is this model that many jurisdictions, like the United States of America, are now moving towards in order to ensure that corporations answer to their crimes. There is no reason why Zambia should be left behind in this global community, and it would be a positive step if the corporate culture model can be incorporated in the existing legal framework by law reform as above. Its incorporation would ensure elimination of the injustices caused by reason that the responsible corporate individual is not identifiable or is unreachable, even where the evidence of the commission of the crime is right there in plain sight.

### **3.4 Scope of Corporate Criminal Liability**

The Zambian Legal system which is fashioned along the same system as the English Legal system accommodates the position at Common Law to the effect that corporations could be criminally held liable but not for all offences. Generally, in Zambia, a company can be prosecuted for most criminal offences, unless a statute indicates otherwise or the offence is one for which imprisonment is the only penalty such as murder and treason, or the offence is one of which by its nature can only be committed by physical persons such as assault and rape. A corporation will normally not escape liability in the case of many regulatory offences that impose strict liability, but even this is subject to such concepts as “due diligence.” As already explained above, even where it is evident that an offence has been committed, the corporation will not be criminally liable if that offence cannot be identified with a senior officer of the company or there

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<sup>201</sup> Marshall B. Clinard, *Corporate Corruption: The Abuse of Power* (Praeger Publishers 1990)

<sup>202</sup> Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*. 75 MINN> L. REV. 1095, 1101 (1991)

is proof that the senior officers of the company exercised due diligence. There are other situations in which a corporation is exempted from liability or its liability is limited.

The Companies Act<sup>203</sup> limits the liability of corporations by providing that the company shall not exercise powers or conduct business that is contrary to or outside of or contrary to its Articles of Association.<sup>204</sup> This means that the company is not liable for actions done outside its capacity. However, section 23 qualifies this to say that where a person dealing with the company or has acquired rights from the company in good faith, that person shall not be prejudiced by reason only of the internal procedures and limitations that they did not know of or had no way of knowing by virtue of their relationship with the company. Therefore, under the Companies Act<sup>205</sup>, a corporation is held liable for offences committed within its capacity. It will also be held liable for offences outside of its Articles if the third party or victim did not have actual knowledge of the internal circumstances of the company as the company is precluded from imputing constructive knowledge on a third party as well as disclaimers on the basis of the contents of documents governing the internal affairs of the company even where the said documents are filed with the Registrar of Companies.<sup>206</sup> The third party must have actual knowledge of lack of capacity on the part of the corporation to do the act complained of, or that the senior officer who did the offensive act had no actual or apparent authority from the company so to act, if the corporation is to escape criminal or civil liability in this case. This is a positive provision and practice that protects the general public.

There are also some offences for which the criminal law in Zambia out-rightly precludes the corporation from potential criminal offenders. For instance, the Penal Code<sup>207</sup> prescribes a sentence of 7 years imprisonment for the offence of receiving stolen or feloniously obtained goods and for receiving stolen goods from outside Zambia, respectively.<sup>208</sup> These provisions do not give any option of a fine and the court has no discretion to mete out fines as punishment because the offences are not misdemeanors but rather felonies. Being an artificial person at law, the corporation cannot therefore be held liable for the specific offences of receiving stolen goods from within and outside Zambia. For the offences of fraudulent appropriation of property or

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<sup>203</sup> Act No. 10 of 2017

<sup>204</sup> Section 25(3) of the Companies Act No. 10 of 2017

<sup>205</sup> Act No. 10 of 2017

<sup>206</sup> Section 24 of the Companies Act No. 10 of 2017

<sup>207</sup> Chapter 87 of the laws of Zambia

<sup>208</sup> Sections 318(1) and 320 of the Penal Code chapter 87 of the laws of Zambia

keeping of fraudulent accounts or falsifying books of accounts, the law specifies that perpetrators are directors, officers, or members of a corporation or company.<sup>209</sup> For the offences of false statement, it is specific to promoters, directors, officers or auditor of a corporation or company.<sup>210</sup> The offence of fraudulent false accounting is limited to clerks or servants, or persons employed or acting in the capacity of a clerk or servant of a corporation or company.<sup>211</sup>

All these offences are felonies carrying a sentence of imprisonment for 7 years and they do not leave the court with any option of holding the corporation liable as they are felonies carrying no option of a fine. The common thing about these offences related to property is that they all involve dishonest or fraudulent deprivation of another of their property, material or monetary, thereby resulting in that other's material or financial loss and a material or financial gain on the part of the perpetrator. They are for all intents and purposes corporate or financial crimes, and the corporations is exempted from their liability even in spite of the reality that some corporations are created solely for the purpose of defrauding or stealing from other persons. The Zambian position in this regard differs from the Nigerian law which practices more of vicarious liability and holds corporations criminally responsible for such offences of fraud and theft committed by its employees thereby ensuring that corporations are punished for these offences if they are committed say for the benefit of the corporation.<sup>212</sup>

### **3.5 corporate and individual responsibility for some corporate crimes**

In terms of the relationship between the liability of the corporate entity and that of its directors and officers, the Zambian law provides in most corporate crime statutes that where a corporate entity has committed an offence, its officers are in certain circumstances to be deemed guilty of that offence. This is because as stated above, a corporation is both an association of individuals and a separate and distinct person under the Zambian laws. When it comes to liability, the corporate individual can as such be held liable for a crime committed within or for the benefit of the corporation without that liability extending to the corporation if one of the exemptions described above exists. However, a corporation cannot be held liable without that offence being

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<sup>209</sup> Section 324 of the Pnal Code chapter 87 of the laws of Zambia

<sup>210</sup> Section 325 of the Penal code chapter 87 of the laws of Zambia

<sup>211</sup> Section 326 of the Penal Code chapter 87 of the laws of Zambia

<sup>212</sup> In the Nigerian case of *Inspector General of Police v Mandilas and Karaberis and Anor*, Thomas J. held the company and its manager jointly liable for the offence of stealing and the company was sentenced to a fine of four hundred thousand naira while the second accused who was the employee was sentenced to one year imprisonment with hard labour.

attached to an identified individual constituting the ‘directing mind and will’ of the corporation; unless that is the intention of the particular Act under which the offence is provided.

The Penal Code in Zambia describes the principal parties of an offence under the Act as including the actual person who does the offending act or omission as well as the person who enables, aids, abets, counsels or procures another to commit the offence.<sup>213</sup> The company and the individual fall into one or other of these categories of offenders for the same offence. It is for this reason that the law provides that if an offence is committed by a company and it is proved to have been committed with the knowledge, consent or connivance of a director, manager or other senior person, that person is also guilty of the offence. It must be emphasized that the corporate entity and the senior person who consented or connived are both guilty of the main offence; there is no separate offence of ‘consent or connivance’. The Anti-Corruption Act provides that where the corporation is convicted for an offence, every director and manager will be liable as if he personally committed the offence unless he proves that the act was done without his knowledge, consent or connivance or that he took reasonable steps to prevent the commission of the offence.<sup>214</sup> This, in essence, shifts the burden of proof to the accused from the prosecution, who by law ought to ordinarily bear the burden of proof from start to finish of a criminal prosecution.<sup>215</sup> Other Acts proceeding in the same manner are the Anti-Corruption Act are the Higher Education Act,<sup>216</sup> the Fisheries Act,<sup>217</sup> the Agriculture Credits Act<sup>218</sup> and the Occupational Health and Safety Act,<sup>219</sup> among others. The rationale behind this provision is to enable the prosecution and punishment not only of the corporate entity but, where sufficiently culpable, those who control it. In other words, it provides a means of holding to account those who are complicit in offences committed by companies. While the above statutory provisions may be adequate where the culpable individual is easily identified and there is a clear hierarchy of management and supporting staff in single management company, it may not be so in the case of multi-national and other corporations where the management structures are complex.

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<sup>213</sup> Section 21 of the Penal Code chapter 87 of the Laws of Zambia

<sup>214</sup> Section 50 of the Anti-Corruption Act No. 3 of 2010

<sup>215</sup> *Mwewa Murono v The People* (2004) Z.R. 207 (S.C.)

<sup>216</sup> Act No. 4 of 2013

<sup>217</sup> Act No. 22 of 2011

<sup>218</sup> Act No. 35 of 2010

<sup>219</sup> Act No. 36 of 2010

### 3.6 Criminal Sanctions for Corporate Criminal Liability

In Zambia, both the corporate entity and the corporate individuals are punished for corporate crime depending on the circumstances of each case and the statutory provisions. The directors or senior officers could also potentially be liable for assisting or encouraging the commission of offences under the respective Acts of Parliament or the common law offence of aiding and abetting, or conspiring to commit crime, which would also leave them open to civil claims and regulatory action. The Penal Code provides that misdemeanours, under which category most of the corporate crimes will undoubtedly fall, are punishable with not more than 2 years imprisonment or with a fine or with both.<sup>220</sup> The general penalties for the offences under the Penal Code include death by hanging from the neck, imprisonment or community service, a fine, forfeiture, payment of compensation, finding security to keep the peace and be of good behaviour, deportation and any other punishment provided by the Act or other law.<sup>221</sup> Criminal sanctions and out of court deals that may be imposed against a criminally liable corporation in Zambia include the following:

#### 3.6.1 Fines

In terms of punishment for corporations, the Penal Code<sup>222</sup> provides that where such a person being sanctioned is a corporation, the corporation may be sentenced to a fine instead of imprisonment.<sup>223</sup> It further provides that if the amount of the fine is not specified in the Act prescribing the offence, the fine to be imposed is unlimited but it must not be excessive.<sup>224</sup> There is no guideline as to what would qualify the amount as excessive, especially with regard to a corporation. In practice and following the “must not be excessive” clause, most Acts of Parliament provide for minimal fines for the offences under them and this leads to the courts imposing amounts that are inadequate to compensate for the crime and to deter would be offenders. Other jurisdictions are moving away from meting out friendly or minimal fines on corporations.

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<sup>220</sup> Section 38 of the Penal Code chapter 87 of the Laws of Zambia

<sup>221</sup> Sections 24 and 25 of the Penal Code chapter 87 of the Laws of Zambia

<sup>222</sup> Chapter 87 of the Laws of Zambia

<sup>223</sup> Section 26 of the Penal Code chapter 87 of the laws of Zambia

<sup>224</sup> Section 28 of the Penal Code chapter 87 of the laws of Zambia

A fine imposed on the offending corporation under US law can be as much as to put the corporation out of business. English law is also making strides to follow suit in order to effectively deter would be corporate offenders as seen in the case of *R v Innospec Limited*,<sup>225</sup> where the UK company pleaded guilty to conspiracy to corrupt in relation to contracts secured in Indonesia and which was also facing charges in the US in relation to corruption in Iraq. On 11 May 2011, the Court of Appeal refused an application for leave to appeal against a sentence imposed in the first statutory corporate manslaughter case which had put the company out of business. It held that the fine imposed was appropriate and that to limit a fine to the level which the company was capable of paying would have resulted in a "ludicrous" penalty. Lord Justice Thomas stated in his ruling that he expected parity between the US and the UK where the facts allowed; he said that "*a fine comparable to that imposed in the US would have been the starting point*" and that "*it would [...] have been possible to impose a fine that would have resulted in the immediate insolvency of the company*". Such bold steps of imposing fines that fit the crime are what are needed in our domestic jurisdiction if the law is to achieve the deterrence purpose of punishment.

The Zambian Penal Code Act provides for imprisonment and/or warrant of distress as punishment in default of payment of a fine and specifies the prison term applicable in default of a fine. Some of the financial crime laws provide their own prison terms applicable in default and attached to the fines thereunder. As the corporation is without physical body, it is inferred that in default of payment of a fine, the court may order only warrant of distress and sale on the moveable and immoveable property of the corporation. A problem is created where the respective Act of Parliament does not provide for warrant of distress or sale but just imprisonment and fines. The question arises as to whether one must then send the director to prison or resort to the Penal Code and order warrant of distress or sale alongside as default sentence. The Penal Code further provides that the court may also in its discretion order that the convict pays the costs of and incidental to the prosecution or any part thereof.<sup>226</sup>

It is the contention of this study that though a common penalty for corporate criminalization in Zambia, fines are not adequate punishment for a guilty corporation and the reasons are more specifically explained in the next chapter. It is however worth mentioning here that if a fine is to

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<sup>225</sup> (2010) Crim LR 665

<sup>226</sup> Section 32 of the Penal Code chapter 87 of the Laws of Zambia

be adequate punishment, it must be of a level that it fits the crime and meets the deterrent principle of sentencing.

### **3.6.2 Forfeiture/Confiscation Order**

Where there is evidence that an offender, be it a corporation or individual, has benefited financially from the offending act done within or outside the country, the court must, in accordance with the Forfeiture of Proceeds of Crime Act,<sup>227</sup> consider whether to make a confiscation or forfeiture order. This may be imposed in addition to any other sentence meted against the offender. Forfeiture orders may also be made in cases where there is proof that some assets were obtained from money laundering transactions. In this regard, the Prohibition and Prevention of Money Laundering Act<sup>228</sup> provides for forfeiture of assets obtained from money laundering transactions. It is worthy to mention that a corporation is seldom prosecuted for the offence of money laundering. Further, there is need for the courts to employ forfeiture and confiscation orders where warranted as they sentence the corporate criminal.

### **3.6.3 Debarment from Public Procurement**

Suspension or debarment of a corporate criminal from participating in public procurement is a punishment that would to some extent make corporations think twice before re-offending as such orders affect the corporation's goodwill. This is so especially where the particular corporation solely depends on public procurement for its survival and operations. The Public Procurement Act in Zambia provides for a fine as the general penalty or sentence for the offending corporation.<sup>229</sup> It provides for further punishment of a corporation that has benefited from the offending or found to have contravened the Act. Such a corporation may, in addition to any other sentence the court may impose on it, be debarred from public procurement by the Procurement Authority which may also transfer the procuring entity's procurement function to a body or procurement agency appointed by the Authority, until the Authority is satisfied that the causes of

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<sup>227</sup> Act No. 19 of 2010 of the Laws of Zambia

<sup>228</sup> Act No. 44 of 2010

<sup>229</sup> Section 77 of the Public Procurement Act No.12 of 2008

the contravention have been rectified by the procuring entity.<sup>230</sup> It is worthy of note that this provision is seldom used in practice and that the Procurement Authority is reluctant to invoke it due to financial realities, political and other reasons that are beyond the scope of this study.

### **3.6.4 Non-Conviction Orders**

In cases where corporate entities are not prosecuted, the Forfeiture of Proceeds of Crime Act provides that a non-conviction forfeiture order or non-conviction confiscation order can be imposed if unlawful conduct of some description is proved on a balance of probabilities.<sup>231</sup> These civil recovery orders do not have the same consequences as convictions, and they are not affected by the outcome of the criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated. They are a way out for the corporate offender who avoids a conviction and the prosecution which is able to make recoveries without prosecuting the corporations.

### **3.6.5 Plea Agreements**

The provisions of the Plea Bargaining and Negotiations Act<sup>232</sup> provides that at any time before judgement and if the prosecution sees it fit to do so, the person charged with any offence, which may be a corporation since it is not expressly excluded, can negotiate and agree with the prosecuting authority and bargain on a withdraw of certain charges on undertaking to admit and face the punishment for lesser charges or fulfil any other obligations specified in the agreement. Also, the Anti-Corruption Act that an agreement may be made between the Anti-Corruption Commission and the suspected offender whereby the Commission undertakes not to prosecute the individual or corporation in exchange for full and true disclosure of all material facts related to the relevant corrupt and illegal activities and voluntarily payment, deposit or refund of all property or other thing connected to the suspected offence.<sup>233</sup> The agreement has the force of law only if the respective undertakings are registered into court.

With these provisions, very few corporations facing criminal charges are actually prosecuted because the law allows for the option of recovery of stolen or otherwise appropriated property

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<sup>230</sup> Sections 6 and 80 of the Public Procurement Act No. 12 of 2008

<sup>231</sup> Section 31 of the Forfeiture and Proceeds of Crime Act No. 19 of 2010

<sup>232</sup> Act No. 20 of 2010

<sup>233</sup> Section 80 of the Anti-Corruption Act No. 3 of 2010



such as money instead of prosecution. In this way, the technical challenges of prosecuting a corporation are avoided and the state makes its recoveries. The question however remains as to whether this has the force to deter future commission of the offence and it clearly does not. These out-of-court deals mean that if the company was to commit crimes in the future, it would not be recidivist or a repeat offender because after all, the company had avoided a conviction.

### **3.7 Considerations for Sentencing Corporations**

The considerations taken when meting out punishment for corporate crimes include the seriousness of the offence; whether the harm caused was intended or foreseeable; early acceptance of guilt; whether there were aggravating circumstances such as previous offending, planned activity, the offence resulting in high profits, failure to heed or respond to lawful warnings or concerns; and whether there are mitigating circumstances such as co-operation with the prosecution and regulatory authorities.

It cannot be over emphasized that what motivates any potential offender to refrain from committing an offence is the result they get after weighing the benefits of committing the offence against the consequences of being convicted for it. With fines being the most pronounced and practiced punishment for the offending corporations, and the fines being so minimal, the deterrent aim of corporate punishment is absent in the Zambian laws. A corporation is not deterred but is rather encouraged to offend as long as it avoids being caught, or is able to pay the minimal fine. The legal punishment provisions make it worthwhile to offend because once the fine is paid, corporate business and profit maximization is free to continue. This is unfortunate because fines and payments as a means of punishment must not create the perception that offenders, corporate or otherwise, can simply pay their way out of trouble, but it does.

### **3.8 Conclusion**

This chapter explored Zambia's jurisprudence on corporate criminal liability and revealed that the legal system on the subject is fashioned after the English common law. It showed that Zambia has adopted the derivative approach to corporate criminal liability, which is the more restrictive approach, being mostly the Identification model with traces of Vicarious liability

model and that it would be more appropriate in these times to incorporate the corporate culture mechanism of corporate criminalization. The chapter further looked at the punishment regime for corporate criminals, which is for the most part an imposition of a fine failing which a warrant of distress on the corporation's property is executed. It further revealed that there are other sanctions like forfeiture, confiscation and civil recoveries provided for under the law. It revealed that while the corporation is almost always subjected to the lesser and minimal fines, the corporate individuals are subjected to more extreme punishments like imprisonment, for the same offence, unless they prove that the offence was committed without their consent or connivance. This chapter also briefly looked at the various considerations taken when deciding on whether and what punishment to mete against a guilty corporation. The chapter took the view that corporate crime would be better mitigated if in addition to other measures, corporate culture forms the basis of corporate criminal liability; if plea bargaining included enhanced conditions depending on the gravity of the offence committed; if crime legislations specifically targeted at the corporate form were enacted; if express legal provisions can be made that enable the corporation to be prosecuted for such offences as theft and fraud; and if the sentencing base for corporations is expanded. The next chapter will discuss in more detail the prevailing legal processes involving corporate criminality and punishment in Zambia by focusing on the investigating, prosecuting, and sentencing processes for corporate criminal liability.

## **CHAPTER FOUR**

### **INVESTIGATING, PROSECUTING AND SENTENCING A CORPORATE CRIMINAL**

#### **4.1 Introduction**

Criminal law is aimed at punishing those who are guilty of blameworthy conduct. In modern society, corporate actions frequently result in grievous wrongs and social harm which includes damage to the environment, injury or death to employees in the workplace, or consumer losses from fraudulent financial or commercial conduct such as price-fixing and market manipulation. From the time that a complaint is received from such affected persons to the time that the corporate criminal is punished by the criminal justice system, there are a number of processes involved.

This chapter is aimed at analyzing the prevailing legal processes involving corporate criminality in Zambia. More specifically, it discusses the investigations, prosecution, and sentencing processes for corporate crimes. This is in an effort to determine the adequacy of the existing law and enforcement mechanism in ensuring accountability of the corporate criminal and the

protection of the shareholders and other persons connected to the corporation. The chapter will address these processes in turn before coming to a conclusion.

## **4.2 Investigating the Corporate Entity**

### **4.2.1 The Investigative Authorities in Zambia**

The principal criminal investigative authority in Zambia is the Zambia Police Service created by the Constitution of the Republic of Zambia.<sup>234</sup> It has several investigative departments such as the Criminal Investigations Division, the Anti-Frauds Unit, and the Victim Support Unit (hereinafter referred to as VSU). The latter two are specialized investigative units of the Zambia Police Service. Once a complaint is received by the Zambia Police, it is directed to the appropriate department that commences its investigation after which the matter may be prosecuted where the facts so require. The VSU hardly receives complaints against a corporation as the cases investigated there are those involving acts of victimization of particular groups of individuals such as women and children and generally Gender Based Violence (GBV). Crimes involving an element of fraud are investigated by the Anti-Frauds Unit and this is where corporate crimes mostly fall, although the most subjects investigated are individuals as opposed to corporate entities.<sup>235</sup> Most of the crimes investigated by the Anti-Frauds Unit are those in which documents were used in the commission of the specific offence. These offences include cyber-crimes such as theft from auto teller machines (ATM); issuing of cheques on insufficiently funded accounts; obtaining money or goods by false pretenses; forgery such as where money transfers are effected using forged letters of instructions from account holders; and tax evasion in which case the Unit has to work hand in hand with the tax collections institution being the Zambia Revenue Authority.<sup>236</sup>

### **4.2.2 Specialised Investigative Authorities**

The expansion of the criminal justice system in Zambia has seen an increase in the number of specialized authorities and regulatory bodies that have the responsibility of investigating and/or prosecuting (suspicious) financial transactions. In addition to the Zambia Police Service's

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<sup>234</sup> Article of The Constitution of Zambia, Chapter 1 of the Laws of Zambia

<sup>235</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

<sup>236</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

Criminal Investigations Division (CID), the following are recognized as Law Enforcement Agencies that have the mandate to conduct investigations of a financial nature as well as other offences: corruption related offences are mostly investigated and prosecuted by the Anti-Corruption Commission;<sup>237</sup> drug and financial malpractice related offences are investigated by the Drug Enforcement Commission;<sup>238</sup> tax related offences by the Zambia Revenue Authority through its Customs and Direct Taxes Divisions;<sup>239</sup> securities related offences by the Zambia Security Intelligence Service;<sup>240</sup> immigration related offences by the Department of Immigration;<sup>241</sup> and money laundering offences by the Anti-Money Laundering Investigations Unit.<sup>242</sup> The Finance Intelligence Act further provide that the Minister may from time to time designate any other law enforcement or investigative institutions.<sup>243</sup> This study opines that the increase in investigative authorities has not been met by a parallel and much needed sector expertise; there appears to not be any law enforcement or investigative body specialized in corporate criminal investigations and this leads to lapses when it comes to investigations into corporate crime.

#### **4.2.3 Training for Investigators in Zambia**

It must be noted that corporate crimes investigation is still a raw area in Zambia and it is for this reason that there is no corporate crimes investigations unit in any law enforcement agency. The closest is the financial crimes and money laundering units. Further, and apart from the Zambia Revenue Authority and the Anti-Corruption Commission, the rest of the law enforcement agencies require that their officers undergo a mandatory military and security training and thereafter some go for short courses with very few specialising in specific crimes' investigations relevant to corporate criminal liability such as computer forensic analysis, financial investigations, money laundering, banking fraud, and undercover operations and surveillance.<sup>244</sup> The need for training in the specialized topics relevant to corporate criminal liability cannot be

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<sup>237</sup> Established under the Anti-Corruption Act No.3 of 2012 of the Laws of Zambia

<sup>238</sup> Established under the Narcotic Drugs and Psychotropic Substances Act chapter 96 of the Laws of Zambia

<sup>239</sup> Established under the Zambia Revenue Authority Act chapter 321 of the Laws of Zambia

<sup>240</sup> Established under the Zambia Security Intelligence Service Act chapter 109 of the Laws of Zambia

<sup>241</sup> Established under the Immigration and Deportation Act of 2010

<sup>242</sup> Established under the Prohibition and Prevention of Money Laundering Act of 2001 as amended by Act No. 44 of 2010.

<sup>243</sup> Section 2 of the Financial Intelligence Centre Act of 2010

<sup>244</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

overemphasised if the scourge of corporate crime is to be controlled and for effective prosecution of corporate crimes.

#### **4.2.4 Co-operation between Investigative Authorities in Zambia**

The Financial Intelligence Centre Act designates the Zambia Police Service, the Zambia Security Intelligence Service, the Immigrations Department, the Drug Enforcement Commission, the Anti-Money Laundering Investigations Unit, the Anti-Corruption Commission, and the Zambia Revenue Authority, as Law Enforcement Agencies in Zambia.<sup>245</sup> It was established to be the sole designated agency responsible for the receipt, analyzing and dissemination of suspicious transaction reports to Law Enforcement Agencies and other foreign designated authorities pursuant to the Act which also provides for Mutual Legal Assistance (MLA).<sup>246</sup> What this means is that, once a complaint of suspicious (financial) transactions is received at the center, it is analysed to see whether it is worthy of investigations. Thereafter, a decision is made as to which Law Enforcement Agency would better handle the investigation. It is only then that the report of suspicious transaction is sent to that Agency. If the transaction is of a nature as requires an investigation in a foreign country, the center would send the report to that foreign designated authority with which it has entered into an agreement or arrangement necessary for the discharge of its functions, also known as mutual legal assistance, and for which it also conducts inquiries and notifies of the outcome.<sup>247</sup>

Once the report has been received from the center, the investigative authority will then carry out its investigations. Where a law enforcement agency is investigating a matter and its preliminary investigations show that the matter would be better investigated by another agency, or where during its investigations it comes across certain information that falls in the line of investigations specifically conducted by another agency, the investigating agency may refer that matter to that other agency for investigations. To that effect, the Anti-Corruption Act provides that: “The Commission may refer any offence that comes to its notice in the course of an investigation under subsection (2) to any other appropriate investigation authority or agency.”<sup>248</sup>

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<sup>245</sup> Section 2 of the Financial Intelligence Centre Act No. 46 of 2010

<sup>246</sup> Preamble to the Financial Intelligence Centre Act No. 46 of 2010

<sup>247</sup> Anonymous (officer, Financial Intelligence Center), interview by author, March 20, 2017

<sup>248</sup> Section 51(3) of the Anti-Corruption Act No. 3 of 2012

Ordinarily, in Zambia, various investigative authorities conduct their own investigations. However, there are instances when all or any number of the investigative authorities come together and investigate a particular case or they conduct a joint investigations operation into a person, group, institution, or place, by forming a task force (team). In Zambia, Joint Investigative Teams are formed mostly on *ad-hoc* basis, whenever need arises. A case in point is the Joint Investigations Team on Land Inquiry, which comprises of officers from the Anti-Corruption Commission (ACC), the Drug Enforcement Commission (DEC) and the Zambia Police Service. It is involved in the investigations of corrupt and other illegal activities involved in land transactions. In 2007, the Joint Investigations Team on Land Inquiry arrested an Estates and Valuation officer at the Ministry of Lands together with his wife for abuse of office and fraud. Samuel Daka and his wife Lucy Chalimba were more specifically charged with the offences of falsifying documents,<sup>249</sup> forgery,<sup>250</sup> uttering false documents,<sup>251</sup> and abuse of authority of office<sup>252</sup> and they first appeared in the Lusaka Subordinate Court on 17<sup>th</sup> May, 2007. By the close of the case, the duo were acquitted of all charges. It is very important to note that where a task force on investigations is formed, the success of its operations largely depend on the co-operation, co-ordination and information sharing that exists between the constituted investigative authorities. This unity of purpose and team work is of vital importance especially in corporate crimes which require various expertise.

#### **4.2.5 Acquisition of Information on Corporate Crime**

The mode of acquiring information on corporate crime at both the general and specialised investigative institutions is the same. The primary source of the information used in investigations is people who go to the institutions in person to lodge a complaint or give information if they suspect that a crime has been committed by any corporate entity or its directors or managers.<sup>253</sup> For this reason, the Anti-Corruption Act provides that: “A person who

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<sup>249</sup> Contrary to section 344 (a) of the Penal Code chapter 87 of the Laws of Zambia

<sup>250</sup> Contrary to section 342 and 347 of the Penal Code chapter 87 of the Laws of Zambia

<sup>251</sup> Contrary to section 352 of the Penal Code chapter 87 of the Laws of Zambia

<sup>252</sup> Contrary to the then section 37(1) (2) (a) and 41 of the Penal Code chapter 87 of the Laws of Zambia. Abuse of authority of office is since 2012 an offence under the Anti-Corruption Act No. 3 of 2012

<sup>253</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

alleges that another person has engaged or is about to engage in a corrupt practice may lodge a complaint with the Commission in the prescribed manner and form.”<sup>254</sup>

A person may also give information when they phone the institutions, write a letter, send an e-mail or send a fax on the allegation of the crime.<sup>255</sup> Another source is print media content where the media avails the information on any corporate crime that may have come to the attention of certain media houses. Information may also be received by the investigative authorities through their respective confidential informants who sometimes give them information about an alleged crime.<sup>256</sup> The Whistle-blowers are protected by the Public Interest Disclosure (Protection of Whistleblowers) Act,<sup>257</sup> which provides that a person is not subject to any liability for making a public interest disclosure, in good faith, to an investigating authority.<sup>258</sup> The Act further lists what disclosures amount to protected disclosures.<sup>259</sup> An investigative authority may sometimes move itself to commence an investigation. In that regard, The Anti-Corruption Act<sup>260</sup> provides that: “The Commission may investigate a matter under this Act on receipt of a complaint or on its own initiative.”<sup>261</sup>

The information received in any of the above ways may be used by the investigative institutions as a basis for commencing an investigation into the alleged corporate crime. Procedurally, if the information received is found to be cogent, a docket is opened and arrangements are made on actions required for purposes of gathering evidence. The investigation into corporate crime will almost always begin with obtaining a search warrant from the Courts of law to enable a legal search at the Patents and Companies Registration Agency (PACRA)<sup>262</sup> to ascertain the directorship of the corporation.<sup>263</sup> The rationale for this is to find out the directors of the corporation for purposes of identifying who should be charged if found connected to the

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<sup>254</sup> Section 51(1) of the Anti-Corruption Act No. 3 of 2012

<sup>255</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

<sup>256</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

<sup>257</sup> the Public Interest Disclosure (Protection of Whistleblowers) Act No. 10 of 2010

<sup>258</sup> Section 56 of the Public Interest Disclosure (Protection of Whistleblowers) Act No. 10 of 2010

<sup>259</sup> Section 22 of the Public Interest Disclosure (Protection of Whistleblowers) Act No. 10 of 2010, the Act also provides that (even where an agency does not have whistleblowers) people are still free to remain anonymous after giving information.

<sup>260</sup> The Anti-Corruption Act No. 3 of 2012

<sup>261</sup> Section 51(2) of the Anti-Corruption Act No. 3 of 2012

<sup>262</sup> Established under section 3 of The Patents And Companies Registration Agency Act No. 15 Of 2010

<sup>263</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.



commission of the particular offence.<sup>264</sup> This stance tends to be problematic in the case where such individual is not so easily identifiable such as in group companies.

If the case involves the fraudulent issuance or encashment of a cheque or movement of monies from a bank account, for instance, the investigators will extend their search to the bank to find out which ones of the directors are the signatories to the subject bank account and these are the ones who will be charged.<sup>265</sup> In the main, the target of the investigations is the directors and not the company and the rationale is that the corporation as an artificial person can only work through a human agent, and that human agent who has legal standing to bind the corporation is its director because he is taken as the mind and will of the corporation. In Zambia, the veil of incorporation is lifted the moment that a corporation is charged with a criminal offence as demonstrated by many statutory provisions like the Securities Act<sup>266</sup> which provides that every director or manager of the corporation is liable upon the corporation's conviction, unless he proves to the satisfaction of the court that the offence was committed without his knowledge, consent or connivance or that he took all reasonable steps to prevent the commission of the offence.<sup>267</sup> There are many issues involved in the acquisition of information on corporate crime including the following:

#### **4.2.5.1 Material and Electronic Evidence**

Corporate crimes are usually complex in nature and this modern time's advancement of technology entails that there is an increase in the use of electronic forms of doing business and storing of information. Sometimes the specialised aspects involved tend to go beyond the basic skills of identifying, obtaining and preserving electronic evidence. In such instances, such as involving recovery of deleted computer data and forensic analysis, which may be beyond the investigators' training, a need arises to involve computer experts, which usually means outsourcing expertise which may, and usually does, entail engagement of foreign or expatriate computer experts, which in turn has huge financial implications as the services are always

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<sup>264</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

<sup>265</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

<sup>266</sup> The Securities Act, 2016

<sup>267</sup> Section 219 of the Securities Act, 2016

expensive.<sup>268</sup> A more productive alternative would be for Zambia to train its own personnel in these expert skills so that where need arises, they can be sent around the country at a more economical amount.

#### 4.2.5.2 Documentary Evidence

In a typical prosecution for offences such as fraud or financial offences, most of the evidence will be in documentary format.<sup>269</sup> Documentary evidence is particularly important in corporate crime in that it provides a window into the affairs of a company which would otherwise be difficult to ascertain. It is for this reason that companies are obligated by law to keep proper books of account, to file annual returns and to submit a director's report each year.<sup>270</sup> However, it is not uncommon to find that different offices of the corporation store different documents in different formats and yet forming part of the same transaction.<sup>271</sup> The implication of this is that key information in paper or electronic form is, for instance, sometimes kept offshore and out of reach of local investigators especially when it comes to multinational corporations. Also, investigators may fail to access computer information because of very detailed password encryptions and because working out these passwords can be a time-consuming process, which in turn may impede access to key files. Further, the employees or other persons holding the requisite information may have left the company, which further inhibits access to the documentation. For these reasons, it becomes a challenge for investigators to find and follow a paper or electronic trail in a corporation during its investigations.<sup>272</sup>

To highlight some of these challenges and demonstrate how expensive and cumbersome a corporate crime investigation that thrives on documentary evidence can be, is the foreign case of *Re Bank of Credit and Commerce International SA*<sup>273</sup> involving the Bank of Credit and Commercial International (BCCI) which had 400 branches in 78 countries and came under the scrutiny of numerous financial regulators and intelligence agencies from around the 1980s due to

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<sup>268</sup> Hubert McSyd Chalunda, *Corporate Crime and the Criminal Liability of Corporate Entities in Malawi*, Resource Material Series No. 76

<sup>269</sup> Anonymous (senior investigator, Drug enforcement Commission, Anti Money Laundering Unit), interview by author, March 15, 2017.

<sup>270</sup> Refer to sections 247, 277 and 105 of the Companies Act No. 10 of 2017.

<sup>271</sup> Anonymous (senior investigator, Drug enforcement Commission, Anti Money Laundering Unit), interview by author, March 15, 2017.

<sup>272</sup> Anonymous (senior investigator, Drug enforcement Commission, Anti Money Laundering Unit), interview by author, March 15, 2017.

<sup>273</sup> *Re Bank of Credit and Commerce International SA (No.8) (1998) AC 214, (1997) 4 ALL ER 568*

concerns that it was poorly regulated. In this case, the BCCI Investigations, which is the largest bank fraud case in world history, there were over 3, 000 criminal customers with offences ranging from money laundering to terrorist financing. The investigation of the corporation involved about 100 million documents found in London; 9, 000 boxes containing several million pages of documents of which some were handwritten, found in New York and Miami; more documents found in the Grand Cayman Islands; and most of the documentation was found to be shredded, destroyed or removed from the bank's head office in London and flown to Abu Dhabi in 1990. This meant lengthy and expensive processes of collecting data, facing witnesses not willing to cooperate and the failure to access certain critical documents during the investigations. The results of the investigations include the claim by the liquidators Delloite & Touche that they had recovered about 90% of the creditors' lost money.<sup>274</sup>

In developing the investigative capacity of the country, it is important for Zambia to have foresight and anticipate the expansion of its economic activity base especially in the wake of the liberalised economy that is seeing an influx of many foreign corporations and complex corporate dealings. Therefore, it is important that Zambia intensifies its training programs for investigators in necessary skills like how to follow a paper or electronic trail in complex organisations as this will prepare them for if and when they do encounter complex cases.

#### **4.2.5.3 Statement Evidence**

Investigating a corporation largely depends on information obtained from the persons connected to or having dealings with that corporation. Such persons may be the suspects, victims or witnesses. Investigators are, during their training, taught techniques of how to obtain information that is relevant to an ongoing investigation in order to get the best result needed to prove the case in court or lead to a further line of inquiry during the investigations.<sup>275</sup> Statement evidence can be obtained through an interview or an interrogation. An interview is a conversation intended to elicit information, it is generally non-accusatory and involves the asking of open-ended questions

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<sup>274</sup> Jane Croft, Law Courts Correspondent, BCCI liquidators to Stand Down, The Financial Times, 17<sup>th</sup> May, 2012 at 9:09 pm

<sup>275</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

in an attempt to elicit as much information as possible.<sup>276</sup> The creation of a rapport between the interviewer and the interviewee is very cardinal in an interview if one is to obtain a lot of information and that is where skilled investigators come in.<sup>277</sup> An interrogation, on the other hand, is the process by which suspects are questioned in regard to their involvement in the activity that gave rise to the investigation, it is accusatory and the questions asked of the suspect will be more direct and less open ended.<sup>278</sup> Interrogative techniques include the Reid technique; the Preparation and Planning, Engage and Explain, Account, Closure and Evaluate (PEACE) method; and the Kinesic Interview method. When it comes to corporate crime, it must be noted that skill without knowledge is futile. There is therefore need for the investigators in Zambia to be well vested in corporate behaviour and corporate crime as well as interview and interrogative skills if they are to conduct meaningful interviews or interrogations, and this inevitably demands for specialised training of investigators.

#### **4.2.6 Immunity of Investigators**

In Zambia, investigators, more especially those from law enforcement agencies, enjoy some immunity from liability arising out of or during the course of their duty. The Anti-Corruption Act therefore provides that:

- (1) No proceedings, civil or criminal, shall lie against the Director-General, Deputy Director-General, Directors, Secretary, an officer or member of staff of the Commission for anything done in good faith in the exercise of the officer's or member of staff's functions under this Act.
- (2) Subject to the provisions of this Act, the Director-General, Deputy Director-General, an officer or member of staff of the Commission shall not be called to give evidence before any Court or tribunal in respect of anything coming to such person's knowledge in the exercise of such person's functions under this Act.<sup>279</sup>

This immunity is very important as it helps the investigator carry out their duties thoroughly without fear of litigation. It is important however for the investigators to be informed during their

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<sup>276</sup>Christopher D. Hoffman, *Investigative Interviewing: Strategies and Techniques*, CPO (Cand.), International Foundation for Protection Officers, August 2005, p.10

<sup>277</sup> Anonymous (Investigator, Zambia Police Service), interview by author, March 10, 2017.

<sup>278</sup> Christopher D. Hoffman, *Investigative Interviewing: Strategies and Techniques*, p.11

<sup>279</sup> Section 17 of the Anti- Corruption Act No. 3 of 2012 of the Laws of Zambia

training that this protection is not absolute but that they are only protected if they are acting in good faith.

#### **4.2.6.1 Challenges in Investigating Corporate Crimes**

Investigating a corporation is one of the most difficult tasks that can be taken in the justice system, it is no wonder most domestic jurisdictions prefer to go after the corporate individual as opposed to the corporation. The challenges involved in this process are many. One of the challenges faced in the investigation of a corporate entity is the lengthy procedures involved in investigating corporate crimes; not the least of which is identifying which director or senior personnel to charge for the offence. This is because, such identification is only feasible after obtaining a number of search warrants and searching a number of institutions and by then the perpetrators would be alerted and evidence tampered with.<sup>280</sup> Identifying culpable individuals within a large empire also takes a lot of time and the challenge is achieving the objective before such individuals become unidentifiable such as where the corporation removes all its directors out of the country and bring in a whole different directorship before the culpable director is identified.<sup>281</sup> It is important for investigations into a corporation that the individuals within the corporation cooperate. In the words of Adhyaksana, “Particularly, when (the offence) involves the element of state financial loss, investigators need information from insiders; hence, witnesses’ testimony will be important at the early stage of investigation.”<sup>282</sup> However, not many employees are willing to divulge information on the corporation they work for, for fear that they may lose their job or end up implicating themselves. Also, obtaining witness statements may take a long time for each person as some witnesses may be based abroad.

Some corporations under investigations may be dealing with foreign countries and it becomes imperative for the investigators to establish the money trail and other necessary financial intelligence in order to demonstrate the link between the proceeds of crime and the criminal conduct done by the corporate criminal.<sup>283</sup> It is in such instances that investigators need to take advantage of the developments in the area of international legal cooperation, to enable assistance

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<sup>280</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16’ 2017.

<sup>281</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16’ 2017.

<sup>282</sup> Muhammad Y. Adhyaksana, *Corruption Investigation and International Cooperation*, Attorney-General’s Office, Indonesia (2013) at 73

<sup>283</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16’ 2017.

from other countries; and the Mutual Legal Assistance (MLA) is an effective method of gathering evidence and conducting such criminal proceedings.<sup>284</sup> However, most law enforcement agencies in Zambia do not have a direct link with foreign investigative authorities who can assist in investigating its cases except through the Financial Intelligence Centre, which it uses to arrange that its officers be allowed access to information or entry and power to investigate in foreign countries.<sup>285</sup> In the Malawian case, Mutual Legal Assistance is provided by the Attorney General through the Ministry of Foreign Affairs and International Co-operation and any mutual legal assistance required from Malawi should also go to the Attorney General through the Ministry of Foreign Affairs and International Affairs and this process, it is bemoaned, is long and frustrating and can take up to a year before a request is honoured.<sup>286</sup> The process equally takes long in Zambia. Where the information from the foreign country has been obtained, the country still faces financial constraints in having persons come from foreign countries to testify in the Zambian courts over foreign transactions by corporations under investigations and this is in the area of paying for their travel, accommodation, upkeep and witness fees where applicable.<sup>287</sup>

#### 4.3 Prosecuting the Corporation

After collecting all the necessary information and collecting statements from the witnesses, required to prove a case against the corporation before a Court, the matter is taken from the investigations to the prosecutions team to do their part.

##### **4.3.1 Prosecutorial Powers**

Under the Zambian Constitution, the power to prosecute criminal matters is vested in the Director of Public Prosecutions (hereinafter referred to as DPP). The Constitution of Zambia provides as follows:

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<sup>284</sup> Muhammad Y. Adhyaksana, *Corruption Investigation and International Cooperation*, at 74

<sup>285</sup> The preamble to the Financial Intelligence Centre Act No. 46 of 2010 provides that the Centre is solely responsible for the receipt, analyzing and dissemination of suspicious transaction reports to foreign designated authorities pursuant to the Act

<sup>286</sup> Hubert McSyd Chalunda, *Corporate Crime and the Criminal Liability of Corporate Entities in Malawi*, Resource Material Series No. 76

<sup>287</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16' 2017.

The Director of Public Prosecutions shall have power in any case which he considers it desirable so to do

- (a) to institute and undertake criminal proceedings against any person before any court, other than a court-martial, in respect of any offence alleged to have been committed by that person;
- (b) to take over and continue any such criminal proceedings as have been instituted or taken by any other person or authority; and
- (c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.<sup>288</sup>

The DPP can exercise the above powers either in person or by such public officer or class of public officers as may be specified by him, acting, in accordance with his general or special instructions. Accordingly, Public Prosecutors are appointed by the DPP and thereby charged with the responsibility to “appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal”<sup>289</sup> and they remain subject to his or her directions. The DPP may also order in writing that all or any of the powers vested in him may be exercised also by the Solicitor-General, the Parliamentary Draftsmen and State Advocates and in so doing they operate as if they had been exercised by the Director of Public Prosecutions, provided that he has the power to also revoke such order in writing.<sup>290</sup>

Until recently, the Zambia Police Service, the DEC, the ACC, the ZRA, Immigrations Department, and other Law Enforcement Agencies, were each conducting their own prosecutions. However, from the enactment of the National Prosecutions Authority Act,<sup>291</sup> the National Prosecutions Authority (hereinafter referred to as NPA) is the principal authority for all prosecutions in the country. However, there are some institutions such as the ACC, which for now have special permission to conduct the prosecution of their own cases. Also, the Zambian law allows for private prosecution whereby a magistrate may permit a person to privately conduct the prosecution of a matter in person or by an advocate; if such person is not a public

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<sup>288</sup> Article 56(3) of the Constitution of the Republic of Zambia chapter 1 of the Laws of Zambia

<sup>289</sup> Sections 86 and 87 of the Criminal Procedure Code, Chapter 88 of the laws of Zambia

<sup>290</sup> Section 82 of the Criminal Procedure Code, Chapter 87 of the Laws of Zambia

<sup>291</sup> Act No. 34 of 2010

prosecutor or other officer generally or specially authorised by the DPP in that behalf.<sup>292</sup> Where such permission is granted, the person so permitted has the like power of withdrawing from the prosecution.

### **4.3.2 Indicting a Corporate Person**

A corporation is a person without a physical body, as already stated in this paper. It is this fictitious personality that made Lord Holt state in 1701 that: “A corporation is not indictable but its particular members are.”<sup>293</sup> This notwithstanding, it has been made very clear that though having no physical body, the company can acquire criminal or civil liability through the actions or inactions of its authorised agents and all other persons who are the mind and will of the particular company. It was thus held in the case of *R v ICR Haulage*,<sup>294</sup> by the Court of Criminal Appeal in the United Kingdom, that there is no reason in law why indictment alleging a common law conspiracy to defraud should not lie against a limited liability company. The court observed that:

The offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which must inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases in which, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person, cannot commit vicariously or otherwise. A further exception, but for a different reason, comprises offences of which murder is an example, where the only punishment the court can impose is corporal, the basis on which this exception rests being that the court will not stultify itself by embarking on a trial in which, if a verdict of guilty is resumed, no effective order by way of sentence can be made. In our judgment these contentions of the Crown are substantially sound and the existence of these exceptions, and it may be that there are others, is by no means inconsistent with the general rule.

In the premise, the company will be indicted in its own name either severally or jointly with some individual persons that may be indicted as personally involved in the commission of the

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<sup>292</sup> Section 89 of the Criminal Procedure Code chapter 88 of the Laws of Zambia

<sup>293</sup> *Anon* (1701) 12 Mod Rep 560; 2 B.R.L. 231

<sup>294</sup> (1944) 1 All ER 691



offence, and subject to the limitations above. In matters not triable by the Subordinate Court, or for which the High Court has ordered or directed that a preliminary inquiry be held, or which the Subordinate Court is of the opinion that it is not suitable to be disposed of by summary trial, the Subordinate Court can only conduct a preliminary inquiry into the matter and if it concludes that the evidence against the corporate entity is sufficient to put it on trial, then such corporation should be referred to the High Court for trial. The Criminal Procedure Code<sup>295</sup> thus provides: “A subordinate court may, after holding an inquiry in accordance with the provisions of Part VII, make an order certifying that it considers the evidence against an accused corporation sufficient to put that corporation on its trial and the corporation shall thereupon be deemed to have been committed for trial to the High Court.”<sup>296</sup>

### **4.3.3 Prosecutorial Judgment on Charging the Corporation**

Prosecutors are responsible for determining the charge in all but minor cases, advising the law enforcement agencies during the early stages of an investigation, reviewing cases submitted by the law enforcement agencies for prosecution, preparing cases for court, and presenting those cases at court. Generally, in determining whether to charge a corporation the same factors as do with respect to individuals are applied.<sup>297</sup> This means that prosecutors should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment such as the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; the adequacy of non-criminal approaches; and whether public interest factors in favour of prosecution outweighs those against prosecution.<sup>298</sup>

Other factors that need to be taken into consideration in deciding whether to indict a corporation, border on the nature of the corporate person. These include: the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of Crime; the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the

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<sup>295</sup> Chapter 88 of the laws of Zambia

<sup>296</sup> Section 356(5) of the Criminal Procedure Code chapter 88 of the Laws of Zambia

<sup>297</sup> See USAM ss 9-27, 220, et seq

<sup>298</sup> Press Release, U.S Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <https://justice.gov/archive/opa/pr/2008/August/08-odag-757.html>[<https://perma.cc/8N73-XPEA>].

wrongdoing by corporate management; the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it.<sup>299</sup> Further consideration is made of the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges; and the existence and adequacy of the corporation's compliance program.<sup>300</sup> The prosecution also takes into consideration the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.<sup>301</sup>

The above list is intended to provide guidance of what should be taken into considerations when deciding whether to charge a corporation or enter into plea negotiations, rather than to mandate a particular result. Further, the public interest, the requirement of various laws, and the nature of particular cases may demand that more or less weight be given to certain of these factors than to others. As a guiding principle in deciding whether to prosecute a corporation or enter into plea negotiation therefore, the prosecution must always take into account the special nature of the corporate “person” while ensuring that the general purposes of the criminal law are met and these include: assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities.<sup>302</sup>

#### **4.3.4 Taking Plea and Adducing Evidence before the Courts**

A corporation, being an intangible or abstract person, without physical body, cannot appear in person before a court to take plea and give evidence. Similarly, it cannot be imprisoned and as

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<sup>299</sup> Press Release, U.S Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <https://justice.gov/archive/opa/pr/2008/August/08-odag-757.html> [<https://perma.cc/8N73-XPEA>].

<sup>300</sup> Press Release, U.S Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <https://justice.gov/archive/opa/pr/2008/August/08-odag-757.html> [<https://perma.cc/8N73-XPEA>].

<sup>301</sup> Press Release, U.S Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <https://justice.gov/archive/opa/pr/2008/August/08-odag-757.html> [<https://perma.cc/8N73-XPEA>].

<sup>302</sup> Press Release, U.S Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <https://justice.gov/archive/opa/pr/2008/August/08-odag-757.html> [<https://perma.cc/8N73-XPEA>].

such, technically, it cannot be bonded, bailed or remanded in custody. In jurisdictions where a director is required to enter into a recognizance on behalf of the corporation, the prosecution collapses when the directors do not agree to enter such recognizance. There is no such requirement under the Zambian laws as the company's appearance, once indicted, is commanded by Summons and its status remains as such throughout the trial.<sup>303</sup> Once summoned, the company will identify and appoint the individual, regardless of position in the company, who shall stand in for it in a particular case. The individual so appointed is the one to whom the charge will be read out and who will take plea and adduce evidence on behalf of the corporation; and such plea and evidence will be taken as the plea and evidence of the corporation.<sup>304</sup> Where such representative does not appear for plea or trial on a date endorsed on the summons, the court will record a plea of "not guilty" and trial will proceed accordingly.<sup>305</sup>

#### **4.3.5 Legal Representation**

Where indicted, a corporate body cannot be represented other than by a legal representative who must be a qualified advocate. This is in line with the Rules of the Supreme Court which provides that: "Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor."<sup>306</sup> As an exception to the general prohibition above, a body corporate, including a limited liability company, can acknowledge service of a writ of summons and an originating summons and also give notice of its intention to defend, by a person duly authorised to act on its behalf as above. In such case, the company's address will be its registered or principal office. But, except as aforesaid or as expressly provided by any enactment, the corporation is prohibited from taking any other step in the action except by an advocate. The Criminal Procedure Code provides: "In this section, "representative" means a person duly appointed in accordance with subsection (9) by the corporation to represent it for the purpose of doing any act or thing which the representative of a corporation is by this section authorised to do, but a person so appointed shall not, by virtue only

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<sup>303</sup> Interview with Anonymous, Senior State advocate, National Prosecutions Authority, 20<sup>th</sup> March 2017

<sup>304</sup> Section 356(2) of the Criminal Procedure Code chapter 88 of the Laws of Zambia

<sup>305</sup> Section 356(6) of the Criminal procedure Code chapter 88 of the Laws of Zambia

<sup>306</sup> Order 5 rule 6(2) of the Rules of the Supreme Court (White Book, 1999 edition)

of being so appointed, be qualified to act on behalf of the corporation before any court for any other purpose.”<sup>307</sup>

The above provision means that even where such appointed employee or individual is a qualified legal practitioner, he cannot by virtue only of being appointed as *the face and mouth* of the corporation, act as legal representative on behalf of the corporation. As to the question whether it is allowable for the company to be represented by the director of the company where such director is an advocate, the Court in the case of *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd and others*,<sup>308</sup> referred to in the White Book, decided as follows:

Although the court can, pursuant to its inherent power to regulate its own proceedings, permit a director of a company to appear as an advocate on its behalf, the normal rule is that a body corporate must appear by counsel or a solicitor and it will only be in exceptional circumstances, such as where the company’s assets are frozen by a Mareva injunction so that it cannot instruct solicitors, that the court will depart from that rule. However, where a director is a party to litigation to which his company is also a party, the court may allow the director to appear in person for purposes which are also those of the company.

It must be noted that as a general rule, a company director has no right of audience on behalf of his company; therefore, the above-mentioned powers are discretionary and exercised only in exceptional circumstances. What may be exceptional circumstances justifying the exercise of the court’s discretion to allow a company director to appear on behalf of his company was considered by the Court of Appeal in the case of *Radford v. Freeway Classics Ltd*.<sup>309</sup> In that case, the lack of funds, the possibility that the company might have a good defence, the conduct of the plaintiff in the litigation, and damage to the director’s reputation caused by the litigation going by default, were all advanced as “*exceptional circumstances*” but were rejected by the court. The court stated that fairness and good sense require that those who trade in the privileged position conferred by incorporation should be subject to constraints in the interests of their potential creditors. In the court’s view, the rule that a limited company cannot act save through legal advisors is one of the constraints and part of the price that has to be paid for this privilege. Therefore, though this rule can be overridden by the court’s inherent power to allow any

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<sup>307</sup>Section 356(8) of the Criminal Procedure Code chapter 88 of the Laws of Zambia

<sup>308</sup> [1991] 1 All E.R. 591

<sup>309</sup> [1994] 1 B.C.L.C. 445

advocate to appear for a litigant, this should only be done in the most exceptional circumstances and it is also not the practice of the court to discretionarily permit employees of a company other than directors to appear as advocates on behalf of their companies.

#### **4.3.6 Plea Agreements with Corporations**

In Zambia, if before the case is taken to court the prosecution discovers that apart from evidence of one of the accused persons, it does not have other evidence to prove the case it may use one of the accused persons as a witness against the corporation or another person connected to the corporate crime, and when the chosen accused is charged, he enters a plea of not guilty and the charges are then dropped against him or her.<sup>310</sup> The prosecution usually uses this technique to help with their case, however, and in addition to this technique, plea bargaining is allowed under the Zambian statutes. Plea bargaining in Zambia is regulated under the Plea Negotiations and Agreements Act<sup>311</sup> and it requires that the accused person undertake to make a guilty plea to an offence which is disclosed on the facts on which the charge against the accused person is based and fulfils the accused person's other obligations specified in the agreement; and that the public prosecutor agrees to withdraw or discontinue the original charge against the accused person or accepts the plea of the accused person to a lesser offence, whether originally included or not, than that charged, as well as fulfil the other obligations of the State specified in the agreement.<sup>312</sup> Since the law treats a corporation as a person, this means that prosecutors may also enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons, and this further means that prosecutors seek a guilty plea to the most readily provable offence charged against such corporation. In other words, this agreement permits a corporation to civilly resolve a criminal investigation by agreeing to similar terms that might be included in a corporate criminal sentence, while the corporation avoids indictment, conviction, and any consequences that follow.

It must be borne in mind that the main aim of prosecution is to ensure punishment, deterrence, rehabilitation, and compliance and this paper opines that these aims must reflect in the plea agreement to discourage repeat offending by the corporation or taking the plea bargain as just an

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<sup>310</sup> Section 81B of the Malawian Criminal Procedure & Evidence Code.

<sup>311</sup> Act No. 20 of 2010 of the Laws of Zambia

<sup>312</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16' 2017.

easy way out of prosecution. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of oversight bodies like the Zambia Revenue Authority or Zambia Institute of Chartered Accountants. Where the corporation is a government contractor, for instance, permanent or temporary debarment may be appropriate for this purpose.<sup>313</sup> Rehabilitation and compliance requires that the corporation reforms and undertake to be law abiding in the future. It is therefore appropriate to require the corporation to further implement a compliance program or to reform an existing one and for this they might require to further consult with the appropriate law enforcement agencies, regulatory bodies and components of the criminal justice system to ensure that a proposed compliance program is adequate and meets industry standards and best practices.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the corporation is not seeking immunity for its employees and officers. Accordingly, even though special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees. They should consider the deterrent value of the prosecution of individuals within the corporation and not negotiate away individual criminal liability in a corporate plea agreement. Further, where the corporation was engaged in government contracting fraud, a prosecutor should desist from negotiating an agency's right to list the corporate defendant. The law providing for plea bargaining does not expressly exclude a corporation from persons that can avail themselves to the plea bargaining provisions and so it is safe to assume that through its authorised persons, a corporation can enter into plea agreements with the state when charged with a criminal offence. The Anti-Corruption Act,<sup>314</sup> provides that: "The Commission may tender an undertaking, in writing, not to institute criminal proceedings against a person who has given a full and true disclosure of all material facts relating to past corrupt conduct and an illegal activity by that person or others; and has voluntarily paid, deposited or refunded all property the person acquired through corruption or illegal activity."<sup>315</sup>

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<sup>313</sup> Debarment as a punishment is provided for under section 80 of the Public Procurement Act No. 12 of 2008

<sup>314</sup> The Anti-Corruption Act No. 3 of 2012

<sup>315</sup> Section 80(3) of the Anti-Corruption Act No. 3 of 2012

Under this provision, the Anti-Corruption Commission will notify the person under investigation, of its intention to institute criminal proceedings against them as well as the intended charge, which includes the statement of offence and particulars of offence.<sup>316</sup> An agreement may then be made between the intended accused person or corporation and the Anti-Corruption Commission whereby the said person or corporation makes full and true disclosure in writing that it willingly and voluntarily concedes to (and actually does) pay, deposit, refund, or forfeit the property subject of the intended charge to the State, and further undertakes to not take any action whatsoever arising out of or in connection with the matter against the Anti-Corruption Commission or the State. The said person makes this undertaking without making any admission that may be taken as evidence against them. On the other hand, the ACC, through its Director General, makes an undertaking in writing not to institute criminal proceedings against the said person. This settlement out of court will only have the force of law once it is registered in the courts of law.<sup>317</sup>

In order to get the best out of a plea agreement, the prosecutor may request that the corporation waive the attorney-client and work product privileges, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted.<sup>318</sup> Also, as with a natural person, a plea agreement with a corporation, should be carefully structured so that the corporation may not later claim a lack of culpability or even complete innocence, and this may require that a sufficient factual basis for the plea is placed on the record. Training and retraining of prosecutors and adjudicators in the specific area of plea bargaining cannot be over emphasised if the country is to avoid the abuse or misapplication of the principles underlying the very concept of plea bargaining especially when it comes to corporate crimes. This training is needed to equip them in taking plea bargaining as a way to ensure the corporations realize that pleading

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<sup>316</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16<sup>th</sup> 2017.

<sup>317</sup> Section 80(4) of the Anti-Corruption Act No. 3 of 2012

<sup>318</sup> Nicholas G. Hermann, *Plea Bargaining*, 3<sup>rd</sup> ed. Juris Publishing Inc. 2012

guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business.<sup>319</sup>

#### **4.3.7 Challenges in Prosecuting Corporations**

Just like in investigations, prosecuting a corporation in Zambia is faced with a lot of challenges. One of the challenges is that the prosecution of the corporation will require a reference to a number of Acts of Parliament as there is not one procedural law for such action. For instance, where a corporation is charged under the Anti-Corruption Act,<sup>320</sup> the procedure for the prosecution of such corporation will require reference to the Companies Act,<sup>321</sup> the Criminal Procedure Code,<sup>322</sup> and the Anti-Corruption Act.<sup>323</sup> It would be desirable to enact a law that outlines the whole procedure with regard to the treatment and procedure of a corporate criminal. The practice of chasing after the corporate executives also poses challenges for the prosecution such as deciding which corporate executive to charge for the offence. This is so especially in complex corporate offences as involve a lot of persons to commit. It is even worse for offences by Multinational Corporations where corporate and operation decisions are made by persons who may not be within the jurisdiction. There are also instances where before the prosecution moves in, or the prosecutorial process ends, the corporate executives are dismissed or leave the country and cannot be extradited because they are not the subject of the offence. Further, corporate executives would normally claim that they were not aware of the illegal behaviour going on in the corporation, and it is inconsequential whether they in fact chose not to know or did not want to know or told someone not to tell them. Also, where the prosecution goes after only the corporate executives, the question arises as to how they might have committed the offence without the corporation.

The corporate entity in Zambia is by virtue of the common law recognised as a separate legal personality from its members, shareholders and directors. It is for this reason that as espoused above, the company can nominate anyone to represent it regardless of position, and it can even change the representative at defence stage. But as revealed in chapter three of this paper, if the

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<sup>319</sup> Nicholas G. Hermann, *Plea Bargaining*, 3<sup>rd</sup> ed. Juris Publishing Inc. 2012

<sup>320</sup> Act No. 3 of 2012

<sup>321</sup> Chapter 388 of the Laws of Zambia

<sup>322</sup> Chapter 88 of the Laws of Zambia

<sup>323</sup> Act No. 3 of 2012 of the Laws of Zambia



corporation is convicted, the person to go to prison where the law so requires, is the person holding the position of director or senior manager at the time of the commission of the offence unless he demonstrates that the act was done without his knowledge, consent or connivance, or that he took reasonable steps to prevent the commission of the offence.<sup>324</sup> In essence, this means that corporate veil is immediately lifted upon the corporation being charged of any criminal offence and this is in a bid to protect the corporation against guilty natural legal persons where it may be revealed that the corporation was innocent and the offence was wholly the corporate individual's. The challenge, though, is that where the corporation is the subject of the offence, the directors and senior managers are only looked at after the corporation is convicted, and so the question arises: at what point does the director adduce evidence of having taken reasonable steps in the prevention of the offence? This question becomes a nagging one in the sense that if that director was not jointly charged with the corporation, it is only logical to infer that such a corporate executive did not adduce any evidence in his defence during the trying of the corporate criminal and, procedurally also, there is no amendment of charge to include the director after conviction of the corporation, nor can any evidence in defence be adduced at mitigation stage.<sup>325</sup> There is simply no law providing for the procedure to take and, as a result, the courts avoid the dilemma by just imposing a fine on the corporation on the strength of the legal provision that where the person sanctioned is a corporation then the corporation may be sentenced to a fine instead of imprisonment.<sup>326</sup>

#### **4.4 Sentencing the Corporation**

Sentencing is undoubtedly one of the most daunting tasks of a court as much as it is the real test of a court, as aptly put in the Magistrates Handbook; it is not usually difficulty to be certain whether the finding on the evidence should be one of guilty or not guilty. But the assessment of the proper sentence is difficult, and is a very real test of a Judge or a Magistrate.<sup>327</sup>

In as much as the above statement was made in relation to individual convicts and is coming from a handbook whose edit is long overdue, its reality is true today as it was then and the

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<sup>324</sup> See section 126 of the Environmental Management Act No. 12 of 2011

<sup>325</sup> Anonymous (chief legal officer, Anti-Corruption Commission), interview by author, February 16' 2017.

<sup>326</sup> Section 26 of the Penal Code chapter 87 of the Laws of Zambia

<sup>327</sup> Swarbrick, E.J., *Magistrates' Handbook* (6<sup>th</sup> Edition). National Institute of Public Administration: Lusaka, 1991. P.78

sentence of corporations is not any easier than the sentencing of an individual, especially when it comes to the quantum of fines to be imposed. The Judiciary is a relevant stakeholder in the fight against corporate financial crimes as it provides efficacy to the process by being an impartial arbiter in proceedings. After hearing the case for the prosecution and for the accused corporation, the Court weighs the evidence received from both parties and then makes a determination as to the guilt or innocence of the corporation, and this determination is contained in the judgment that also gives reasons for the decision. Where a guilty verdict is retained, the courts will pass sentence on the accused persons after hearing the prosecution on the antecedents and pleas in mitigation from Counsel representing the corporation.<sup>328</sup> If the corporation was jointly charged with some other persons, their mitigation is also entered before the Court pronounces its sentence. The court has a responsibility to ensure that the sentence imposed is not too heavy or too light but reasonable and proportionate to the offence so as to reflect the gravity of the offence and prevent the law from being brought into contempt. But with the current legal framework governing sentencing of the corporate convict, light and disproportionate sentences are the order of the day.

#### **4.4.1 Corporate Sentences**

Any court may pass any lawful sentence or make any lawful order combining any of the sentences or orders which it is authorised by law to pass or make.<sup>329</sup> The Penal Code gives a general outline of what these sentences and orders may be and that they include death; imprisonment or an order for community service; imposition of a fine; forfeiture; payment of compensation; finding security to keep the peace and be of good behaviour, or to come up for judgment; deportation; and any other punishment provided by the Penal Code or by any other law.<sup>330</sup> These punishments are imposed while giving due regard to the nature of the corporate criminals, which cannot feasibly undergo certain punishments like imprisonment.

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<sup>328</sup> Section 302 of the Criminal procedure Code, chapter 88 of the laws of Zambia

<sup>329</sup> Section 6 of the Criminal Procedure Code chapter 88 of the Laws of Zambia

<sup>330</sup> Section 24 of the Penal Code chapter 87 of the Laws of Zambia

#### 4.4.1.1 Fines

In the Zambian jurisdiction, the most common sentence, if not only sentence, imposed on corporations in practice is a fine, in default of which a warrant of distress is imposed or imprisonment of the director of the company. The proviso to the Penal Code section that provides for the sentence of imprisonment with and without hard labour on the persons found guilty, states that where such person is a corporation, the corporation may be sentenced to a fine instead of imprisonment.<sup>331</sup> The Penal Code further provides that where the sum to which the fine may extend is not expressed under any written law, then the amount that may be imposed is unlimited but shall not be excessive.<sup>332</sup> The result of this provision is that minimal fines get to be imposed on corporate convicts where the fine is not specified, thereby undermining the deterrence principle of punishment. Where specified in the applicable statute, those are the fines to be imposed. However, under the Zambian laws, these are usually very minimal. Under the Zambia Environmental Management Act,<sup>333</sup> for instance, it is provided that a person who pollutes the environment or contravenes any provision of the Act for which no penalty is provided shall be guilty of an offence and liable upon conviction to a fine not exceeding sixty thousand penalty units (K18, 000.00) or to imprisonment for a term not exceeding three years or to both.<sup>334</sup> For a corporate entity deriving financial gain out of commercial activities that pollute the environment, which pollution may lead to serious illness, injury or even death of members of the public, K18, 000.00 (US\$1, 398.93) is too minimal to have a deterrent effect. In cases where negligent amounts are prescribed under law, the corporation would weigh and find that the fines payable is less than the benefits derived from the offence and this increases their recidivism or reoffending prospects. To illustrate this is the foreign case of Olin Corporation which was fined \$30, 000 for filing false statements to conceal kickback payments in 1965, \$45, 000 for filing false reports to hide illegal shipments of arms to South Africa in 1978, and \$70, 000 for filing false statements to conceal the amount of mercury discharged into the Niagara River in 1979.<sup>335</sup>

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<sup>331</sup> Section 26 of the Penal Code chapter 87 of the Laws of Zambia

<sup>332</sup> Section 28(a) of the Penal Code chapter 87 of the Laws of Zambia

<sup>333</sup> The Zambia Environmental Management Act chapter 204 of the laws of Zambia

<sup>334</sup> Section 91 of the Zambia Environmental Management Act chapter 204 of the Laws of Zambia

<sup>335</sup> United States v Olin Corp., No. 63-217, slip op. (S.D.N.Y. Sept 23, 1965); No. 78-30, slip op. (D. Conn. June 1, 1978); No. 73-38, slip op. (W.D.N.Y. Dec 10, 1979)

Because of such statutory provisions and cases as above, the current literature on the subject of fines as a way of sentencing corporations is increasingly suggesting that fines are not an effective deterrent to criminal activity.<sup>336</sup> One of the reasons advanced for this is that the fine is ultimately borne by the creditor and shareholder as explained below. The other reason, which is a more popular reason, is that, it is now understood that fines are viewed by many corporations as merely a cost of doing business.<sup>337</sup> Therefore, if fines are to suffice as punishment, there is a need to make their measure high enough to deter the corporation from re-offending. To this end, the approach in the United States is to have the corporate fine Guidelines begin with the premise that a totally corrupt corporation should be fined out of existence, if the statutory maximum permits.<sup>338</sup> Another way to deal with the ineffectiveness of fines on corporations, as this study advocates, would be to consider additional or alternative and stiffer punishments to the fine. Among the sentences that may be considered for a corporate convict, as an addition or alternative to the fine, are corporate death penalty, community service for the corporation and criminal probation.

#### **4.4.1.2. Corporate Death Sentence**

A corporation is a person at law and it possesses the same rights and obligations as an individual person does save for what its corporate nature does not allow and what the law excludes it from. The *Zambian Criminal Procedure Code*<sup>339</sup> provides that “When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck till he is dead.”<sup>340</sup> This means that like in many jurisdictions, there is no corporate death penalty in the *Zambian criminal law* as the corporation is a fictitious person with no physical neck to be hanged. However, there are some jurisdictions that embrace the death sentence for corporations. As a preliminary matter, one may ask: how could a corporation be killed? The most straightforward manner would be to revoke its corporate charter.<sup>341</sup> In this regard, a law may provide that if a particular corporation commits a

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<sup>336</sup> Braithwaite & Geis, *On Theory and Action for Corporate Crime Control*, 28 *crime & delinquency* 292, 294 (1982)

<sup>337</sup> Orlando, *Reflections on Corporate Crime: law in Search of Scholarship*, 17 *Am. Crim. L. Rev.* 501 at 516 (1980)

<sup>338</sup> United States Sentencing Guidelines §8C1.1. The Guidelines, however, operate within the confines established by Congress.

<sup>339</sup> The Criminal Procedure Code Chapter 88 of the laws of Zambia

<sup>340</sup> Section 303 of the Criminal Procedure Code chapter 88 of the Laws of Zambia

<sup>341</sup> Elizabeth S. Miller, *The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities* (2015), <http://www.baylor.edu/law/faculty/doc.php/196822>

particular offence as a subsequent offender then it will be liable to a cancellation of its registration or certificate of incorporation.

The act of corporate death penalty by imposition of a financial penalty that effectively bankrupts a corporation, has been described by Gabriel Markoff, among others, as a ‘myth’.<sup>342</sup> This is because companies usually find a way of recovering from financial loss or avoiding the effects of a financial order by their borrowing and other operational powers. It is also a myth because ultimately, it is the creditors and shareholders who are bearing the punishment in that the creditors forego or delay to be paid their monies while the shareholders ultimately lose out on their benefits to accommodate the payment of the fines. The sending of key directors or officers of the corporation to prison, or directly punishing those responsible for monitoring the company’s activities, might severely damage a corporation, however, it is not uncommon to find that activist shareholders regularly vote out entire boards without killing the entity outright. The banning or suspending of a company from its main areas of business would also not necessarily kill it because the company could continue in some form as an advisor or consultant. By way of example, Michael Milken, who “reinvented” junk bonds at Drexel Burnham Lambert, continues to advise investment firms despite agreeing to a ban from securities trading as part of a criminal plea bargain.<sup>343</sup>

Therefore, deregistration of a corporation is the only sure way that a corporate death sentence may be imposed and this kind of sentence may be necessary in such cases as where the commercial activities of corporate entity lead to the loss of life of a lot of human beings. Further, corporate death sentence may help advance the incapacitation or separation principle of sentencing.

#### **4.4.1.3 Community Service**

The Penal Code defines community service in the following words; “unless the context otherwise requires, community service means form of punishment as a condition of suspension of a sentence of imprisonment requiring an offender to perform unpaid work within the community where the offender resides for the period specified in the order for community

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<sup>342</sup>Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, University of Pennsylvania Journal of Business Law, 2013, Vol. 15:3, at 797

<sup>343</sup> Edward Cohn, The Resurrection of Michael Milken, *The American Prospect* (Nov. 14, 2001), <http://prospect.org/article/resurrection-michael-milken>.

service.<sup>344</sup> The Criminal Procedure Code further provides that a court may make an order for the community service where in the case of an adult; the offence is a misdemeanour and is punishable with imprisonment.<sup>345</sup> What the two provisions mean is that in Zambia, Community service is a conditional sentence for suspending an imprisonment term for individual offenders. The Prisons Act<sup>346</sup> and the Criminal Procedure Code<sup>347</sup> give a detailed and rather cumbersome procedure for the order of community service that it makes it difficult for the courts to make a procedurally correct order of community service. It is important at this point to note that in Zambia, there is currently no Act of Parliament providing for the sentence of community service as an independent sentence.<sup>348</sup>

Because the Penal Code and the Criminal Procedure Code above ties community service to a prison term, and the corporate criminal cannot be given a custodial sentence, it means that in Zambia, the sentence of community service is not available to the corporate offender. This paper, however, opines that an order of community service on the corporate convict would go a long way in making corporations give back to the communities whom they have wronged and as such meet the reparation and retribution purpose of punishment while making the corporation accepted by the community once again.

#### **4.4.1.4 Criminal Probation**

Criminal probation is a rehabilitation-focussed order imposed by the courts on an offender. It may be a supervisory order imposed on a corporate convict whereby the court orders the company, in a tax offence, to be reporting to and submitting specified reports to the overseeing body, such as the Zambia Revenue Authority for a given period of time, which body will be conducting periodic checks to see that it complies with the legal requirements of the law before it can be allowed to carry out its business as normal. In the United States of America, the Probation

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<sup>344</sup> Section 2 of the Penal Code chapter 87 of the Laws of Zambia

<sup>345</sup> Section 306A of the Criminal Procedure Code as amended by Act No. 13 of 2000

<sup>346</sup> Sections 135A and 135B of the Prisons Act chapter 97 of the Laws of Zambia

<sup>347</sup> Sections 306A, 306B, 306E of the Criminal Procedure Code chapter 88 of the Laws of Zambia as amended by Act No. 13 of 2000

<sup>348</sup> Refer to sections 4, 24 and 26A of the Penal Code chapter 87 of the Laws of Zambia

Act<sup>349</sup> was fashioned to impose probation conditions requiring bakeries convicted of price fixing to deliver bread to the poor<sup>350</sup> and also polluters to develop environmental clean-up programs.<sup>351</sup>

Under the Zambian laws, a probation order is an order that is imposed by the courts where the offence committed does not have a fixed sentence under the law. It is mostly imposed on juvenile offenders, even where the offence has a fixed sentence, where the court deems it fit looking at the special circumstance of juveniles. The Probation of Offenders Act<sup>352</sup> provides the following:

Where a court by or before which a person is convicted of an offence, not being an offence the sentence for which is fixed by law, is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to do so, the court may, instead of sentencing him, make an order, hereinafter in this Act referred to as a “probation order”, requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years.<sup>353</sup>

From the above provision, the Zambian courts have power to avoid statutory penal sanctions and impose conditions of probation on individual criminal defendants in certain special circumstances as outlined. However, the law does not specifically provide for criminal probation for the corporate convict. To use the above authority to fashion sentencing alternatives for corporate convicts as was done in the United States cases above, might be described as being creative, innovative and imaginative but it would at the same time be producing varying results, which goes against the principle of consistency of the law and its application. This is to be expected because the current probation law does not address corporations and because there is generally a lack of definitive sentencing guidelines for corporations in the country. This paper opines that a criminal probationary order will invariably meet the rehabilitation principle of sentencing and enable the offending corporation to cease to be a threat to society and in turn become a positive participant in society.

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<sup>349</sup> Act of March 4 1925 ch. 521, 43 Stat. 1259

<sup>350</sup> United States v Danilow Pastry Co., 563 F. Supp. 1159, 1163 (S.D.N.Y. 1983)

<sup>351</sup> United States v Atlantuc Richfield Co., 465 F.2d 58, 59 (7<sup>th</sup> Cir. 1972)

<sup>352</sup> the Probation of Offenders Act chapter 93 of the Laws of Zambia

<sup>353</sup> Section 3(1) of the Probation of Offenders Act chapter 93 of the Laws of Zambia

#### 4.4.2 Considerations for Sentencing

Different considerations are taken into account by the courts before passing a sentence depending on the circumstances of the case. The statutes, therefore, only give what are maximum or minimum sentences to which the offender is liable but the actual sentence handed down takes into consideration the mitigation and/or aggravating circumstances existing in that particular case.

Aggravating factors, which are circumstances present in a case which warrant an increase in the penalty prescribed, may be expressly prescribed in laws or reflect in the jurisprudence of a given country. Also, what may have been an aggravating factor in one case need not necessarily be so in another. Further, the punishment for the aggravating conduct may differ from one defendant to another depending on the culpability and means of the particular defendant. A difference in sentence between the corporate individual and the corporation can therefore be justified by the application of this principle as the corporation has more means than the corporate individual in most cases. The Supreme Court stated in the case of *Simon Kapwepwe v Zambia Publishing Company Limited*<sup>354</sup> that:

...in cases where there has been aggravating conduct by the defendants, the only factor which falls to be considered separately is the means of the defendant. One defendant of modest means may well be adequately punished for his aggravating conduct by the award the court has in mind to make, whereas another defendant whose conduct was precisely the same, but who is very rich indeed, may require a very much larger award to be made against him before the court can be satisfied that he has been made to pay a sum of money which will mark the court's disapproval of his conduct and deter him from a repetition.

Some of the aggravating factors to be considered in sentencing corporations include previous convictions; multiple incidences or victims; deliberate attempts to obstruction of justice such as in money laundering offences; and exposure of victims to serious illness or injury such as in offences of illegal manufacturing, mining and agricultural processes which may expose the

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<sup>354</sup> (1978) Z.R. 15 (S.C.)



victims to the risk of injury or illness, particularly where equipment is dangerous or poorly maintained.

Mitigating factors are those existing facts in a case that warrant an imposition of a lesser sentence. The principles guiding the use of mitigating factors in sentencing were outlined in the case of *Simon Mbozi and Paul Nyambe v The People*,<sup>355</sup> where the court held that “Where an accused has made a commercial gain from stock theft there is a ground for increasing the mandatory minimum sentence” and went on to state the following:

...the first decision must always be; what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what the proper sentence is for the offence itself does the court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors. These principles are no less applicable when the offence is one for which Parliament has prescribed a minimum sentence; by doing so Parliament has expressed the intention that all offences of the particular type be treated more seriously than previously.

Mitigating factors to be considered in sentencing a corporate wrong doer include the facts that the corporate convict is a first-time offender; has shown good conduct since the offence was brought to the fore; had a minor role to play in the commission of the offence; and has made strides in amending the wrong. It must be noted that mitigating factors and aggravating factors, considered when sentencing a corporation, are both context specific and will be determined by having regard to the particular facts at play.

It was held in the case of *Golden Daka v The People*<sup>356</sup> that, “While mitigating factors are taken into account, it is also essential that the sentencing Court takes into account the aggravating factors of the crime committed.” It was further stated in the case of *The Attorney-General v Fred Chileshe Ngoma*<sup>357</sup> that:

...However, as we stated in the case of *Musonda v The People (1976) Z.R. 215*, the sentence of fine must be preferred unless there are aggravating circumstances which would render a fine inappropriate. We must perhaps say, at this point in time, that, while the level of fines under the

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<sup>355</sup>(1987) Z.R. 101 (S.C.)

<sup>356</sup> HJA/03/2011

<sup>357</sup> (1987) Z.R. 80 (S.C.)

various statutes would seem to be in urgent need of review and indeed the sentence in default of payment of a fine would also seem to require urgent attention, we cannot lose sight of the case now in hand and the question was whether the learned trial magistrate can be faulted, as suggested by Mr.Chashi.

The latter case seems to stress the urgent need to review the level of fines under the various statutes in Zambia and to give urgent attention to the prescribed sentence in default of payment of a fine. To this paper, legal reform in the area of sentencing and imposition of fines is particularly important as it relates to corporate offenders. Of equal importance is the need to train the adjudicators on sentencing principles and considerations when it comes to corporate criminality and sanctioning.

#### **4.4.3 Protection of Shareholders, Creditors and Directors**

As already stated above, the sentence most imposed on corporations in Zambia is the sentence of a fine. Because of the nature of the fines and the source from which they are paid, it has rightly been observed that the real cost of fines may be borne not by the company, but by shareholders and consumers,<sup>358</sup> who are the parties with little or no control over corporate decision making.<sup>359</sup> This cadre of individuals ultimately suffer the consequences of fining a corporation in that in order to accommodate the payment of the fine, the shareholder may have to forfeit or lose out on his benefits as the creditor gets to forego or delay the payment of his money. The effect of fining a corporation is therefore that fines are ultimately borne by the shareholders and creditors and that therefore, a fine as punishment leaves the shareholders and creditors unprotected from suffering the effects of an offence they may or may not have had anything to do with and which they could or could not have prevented.

As for directors, the corporation will be sentenced to a fine and, where necessary or required by law, the (default) prison sentence will be meted out against the director or senior manager at the time of the commission of the offence.<sup>360</sup> This approach clearly assumes that top management has control over those in middle level management<sup>361</sup> who frequently commit the crime.<sup>362</sup>

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<sup>358</sup> Orlando, *Reflections on Corporate Crime: Law in search of theory and scholarship*, 17 AM. Crim. L. Rev. 501 at 516 (1980)

<sup>359</sup> A. Bearle & G. Means, *The Modern Corporation and Private Property* 78-84 (rev. ed. 1968)

<sup>360</sup> See section 126 of the Zambia Environmental Management Act No. 12 of 2011

<sup>361</sup> R. Posner, *Economic Analysis of Law* ss.10.12, 236 (2nd ed. 1977)

However, some scholars have viewed it as an incorrect belief to assume that upper level management can and will always control lower-level criminal activity perpetrated by middle level officials who are concerned primarily with career advancement as opposed to the economic health of the corporate entity.<sup>363</sup>

In a nutshell, a director or senior manager is not protected once the corporation is convicted, and this is in spite of whether or not such individual was jointly charged with the corporation, and whether or not the said individual was the person representing the corporation as its mouth and body during the trial. Directors and senior managers may need protection of the law or at least an opportunity to be heard during trial before the conviction if they are to rightly suffer the consequences of the conviction of the corporation. This is because, though they are by law the decision makers in the company, there are times when the offence is committed without their knowledge. They need to be heard on whether there existed circumstances that could have made it impossible for them to control what was being done by their subordinates.

#### **4.4.4 Challenges in Sentencing and Enforcement against Corporate Criminals**

It has been demonstrated above that where a corporation is convicted of an offence, the person who was director or senior manager at the time of the commission of the offence is deemed to be guilty of the same offence and is liable to imprisonment in the absence of the available defences. In practice, however, the directors are mostly fired or they get out of the country before the trial process ends since the corporation can be physically represented by anyone nominated by the company for that purpose. The challenge therefore is how to enforce the sentence against such director or senior manager since they cannot be extradited because they are not the subject of the charge or conviction. In practice, and to avoid such dilemmas, the adjudicator simply sentences the corporation to a fine. This is what happened in the case of *The People v Zeles Kunja Zulu & Top Motors Limited*<sup>364</sup> which was heard in the subordinate and in which a company, Top Motors Limited, was jointly charged with an individual. On count two of the charge, the corporation was

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<sup>362</sup> Coffee, *No Soul to Damn: No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 397 (1981)

<sup>363</sup> Coffee, *No Soul to Damn: No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment*, 393-400

<sup>364</sup> 2SPC/123/2012

charged with the offence of corrupt practices with a public officer;<sup>365</sup> an offence whose punishment was imprisonment and did not carry an option of a fine.<sup>366</sup> By the time that the trial was concluded, all persons who were directors at the time of the commission of the offence had left the country and the new directors, as witnesses, had given sufficient evidence during trial that they had no knowledge of the offending acts at the time. In handing down the punishment, the learned Magistrate sentenced the corporation to a fine.<sup>367</sup>

Another challenge is the feasibility of sentencing a director or senior manager who was not initially indicted, unless they prove that the offence was committed without his knowledge, permission or connivance. The law does not give any procedural guidelines as at what stage the said individual is supposed to give his defence in terms of his involvement or negligence in the omission of the offence. In the case of a Multinational Corporation, where the director is not domiciled in the country, a further question arises as to how that person may be brought to Zambia to serve the sentence in the wake of extradition laws. Challenges also include a situation where it is the subsidiary which is convicted for the offence which was committed on the directive or policy of the parent company, the question is; on which director or senior person must such sentence be enforced?

#### **4.5 Conclusion**

This chapter took a closer look at the processes involved in bringing a corporate criminal to justice. It did so by analysing the investigations, prosecutions, and sentencing processes for corporate crimes in respect of corporations, all in an effort to determine the effectiveness of the existing law and enforcement mechanism in deterring corporate crime. It looked at the various investigative bodies existing in Zambia and outlined how they work independently and as a task force, as well as the challenges faced in investigating corporations. The chapter explored the prosecution process in corporate crime including how a corporation can be brought to court, factors that help determine whether to indict it in the first place, how it and by whom it appears in court, ways in which prosecution is sometimes avoided, and the challenges faced in the prosecution of a corporation. Lastly, the chapter looked at the sentencing regime for the guilty corporation and the challenges faced in this process and it pointed out the need for the

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<sup>365</sup> This was contrary to sections 19(2) and 40 of the then Anti-Corruption Act No. 38 of 2010

<sup>366</sup> *The People v Zeles Kunja Zulu & Top Motors Limited* 2SPC/123/2012

<sup>367</sup> He applied section 26 of the Penal Code chapter 87 of the laws of Zambia

development of sentencing guidelines, training of adjudicators on corporate sentencing, and expansion of the corporate sentencing base, if the law is to discourage recidivism. The next chapter provides the conclusions and recommendations of this research.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter presents the conclusions and proposes the recommendations arising from the findings of the study. Out rightly, it must be mentioned that the conclusions are not intended to undermine or underestimate the good commitment thus far shown by the government in curbing corporate crime by enacting laws and setting up enforcement mechanisms. Rather, having identified the gaps, and in tandem with the objectives of this study, the conclusions will lay a strong foundation for the proposal for further legal reform for the enhancement of the current legal framework and enforcement mechanisms in Zambia so as to make it effectively serve as a deterrent instead of being a conduit pipe for corporate crime. The recommendations will not only be for further action but also for future research and this is premised on the fact that although this study was built on other people's research gaps, it also has its own limitations.

#### **5.2 Summary and Conclusions**

The study has examined the concept of corporate criminal liability in Zambia. It has demonstrated that although the corporate entity is under the Zambian laws recognized as a subject of criminal liability, there is still latitude to enhance the law on the subject.

Chapter one gave a general introduction to the study of corporate criminal liability and what it means for Zambia. In this respect, chapter one considered whether corporate criminal liability is

a recognized concept in Zambia. The chapter demonstrated that the Zambian criminal justice system recognizes the criminal liability of corporations as seen from its legislature including the Constitution, Penal Code and Criminal Procedure Code. However, most financial and other corporate crime laws just make general provisions and leave the problems of the application of these provisions to the juristic persons, in the hands of the legal players in the criminal justice system.

The second chapter gave an overview of the concepts of corporate criminal liability and corporate crimes. The chapter did this by giving a brief background to the global development of the concept of and the rationale for corporate criminal liability. The chapter looked at the existing corporate personality theories and corporate criminal liability models, which are there for purpose of ensuring corporate accountability in spite of the challenges inherent in the nature of criminal law and the nature of corporate personhood. It revealed that there is no global position on the concept of corporate liability, which is a practice in search of a theory, just as there is no universal definition for the globally recognized concept of financial crimes. The chapter demonstrated that despite the lack of uniformity, most jurisdictions, including Zambia, have recognized and made provisions governing the concept in their respective domestic legislature.

Chapter three considered the concept and legal framework for corporate criminalization and sanctions in the Zambian Jurisprudence in an effort to identify the scope of the law providing for corporate criminal liability for corporate and financial crimes. It did so by analyzing the provisions of some general statutes in the area of criminal liability and some specify statutes governing corporate crimes in Zambia. The chapter revealed that the Zambian jurisprudence has for the most part been adapted to the derivative approach to corporate criminal liability *viz-a-viz* vicarious and identification models. It brought out the fact that a corporation is vicariously liable if a particular criminal statute provides for it and that apart from strict liability offences, a corporation can also be held liable, for most corporate crimes, if the offences is identifiable with a particular director or senior manager's culpability and that if such individual's culpability cannot be established then the corporation escapes liability.

Chapter three further demonstrated that this approach to corporate responsibility appears to be oblivious to the realities and complexities inherent in multi-national and group companies where there are complex organisational structures and internal control systems which make it difficult to identify ultimate decision-makers or the real controllers of the subsidiaries and their personnel. The chapter outlined the fine as being the main, and almost only, practiced punishment in the furtherance of corporate accountability in Zambia. It further revealed that this approach has resulted in the existing legal framework being generally under-detering, less-retributive and overall less efficient due to the fewer crimes being prosecuted; inadequacy of punishment of the corporate convict; inappropriate vengeance of the victim; and the inadequate satisfaction of the rehabilitative requirement for punishment.

Chapter four analyzed the prevailing legal processes of investigations, prosecution, and enforcement processes touching on corporations in Zambia in an effort to determine how far the law and enforcement mechanism goes in holding corporate entities accountable and providing for the protection of the creditors, shareholders directors and other persons connected to the corporation. It has been demonstrated in this chapter that there are a number of law enforcement agencies set up by legislation, which agencies individually or jointly conduct investigations into various corporate and financial crimes with the most targeted subject being corporate individuals as opposed to corporate entities. The chapter found that the investigative process is characterized by the lack of specialization on corporate crime, the lengthy and expensive investigative procedures, the lack of adequate capacity to conduct thorough investigations, and the misplaced practice of targeting corporate individuals as opposed to corporate entities, among others. It has been revealed that a corporation is indicted severally or jointly in its own name and that it must be represented by a practicing advocate in the courts of law.

The fourth chapter further showed that the prosecution process is characterized by the inadequate training of prosecutors and adjudicators in the area of corporate behavior, corporate crime and plea negotiations; the absence of a unified piece of legislation that governs the procedures and treatment of corporate crimes; and the evidentiary awkwardness of prosecuting a corporate individual without the corporate entity. It has further been shown that a corporate convict is almost always sentenced to a fine, which fine is often taken by corporations as a mere cost of business. The chapter revealed that the sentencing of a corporation to a fine affects the persons

connected to the corporation in that the creditors forego or delay to be paid their monies while the shareholders ultimately lose out on their benefits to accommodate the payment of the fines. The chapter also revealed that there is a legal tendency of sending the directors to serve the corporation's prison term even if the law has left a procedural gap on how and when the director can adduce evidence that the offense was committed without his knowledge, permission, or connivance in order for him to avoid prison in case the corporation is convicted. The chapter also revealed that the limited corporate sentencing base, coupled with the lack of or inadequate training of adjudicators on modern trends in corporate sentencing, is a recipe for corporate re-offending and as such falls short of the deterrent purpose of sentencing.

### **5.3 Recommendations**

Arising out of the study undertaken, this paper opines that there is a need to enhance the legal framework for corporate criminal liability. A number of measures are therefore recommended as necessary in this quest:

- i. It is not enough for the legislature to criminalize certain corporate or financial activities and provide that the corporation is as criminally liable as an individual and must be treated as an adult person; there is need for the Legislature to provide clear procedures on how corporate offenders must be treated under law. The Legislation should also consider enhancing the liability law for the corporations to include the non- derivative liability forms so that entities can be held liable themselves as culprits. It is in this regard recommended that the Legislature enacts a law that outlines the whole procedure with regard to the treatment and procedure of a corporate criminal by the investigations, prosecutors and the courts and also that they enhance the law to include corporate culture as a basis for the criminal liability of corporations.
- ii. A great need has arisen for stiffer corporate punishments and for the Legislature to expand the corporate sentencing base to include corporate death penalty, community service and criminal probation as alternative or additional sentences to the fine, if the law is to discourage recidivism and ensure accountability of corporation for their criminal acts and the consequences thereof. There is in this regard a need to amend the Penal Code, and other statutory provisions relating to corporate punishment, so as to increase



the adjudicators' capacity to punish corporations and effectively deter would-be corporate offenders. This is in addition to the much-needed development of sentencing guidelines in the area of corporate crimes.

- iii. There is need to enhance the protection of those persons connected to the corporation and this can only be done by way of legal reforms. The revisiting of the corporate punishment regime should be aimed at ensuring that the corporation gets to adequately pay for its offending as a corporation and that there is some protection for the shareholders, creditors and other innocent persons connected to the corporate convict. This can be achieved by moving away from insisting on fines as the only appropriate sentence for a guilty corporation and instead broadening the sentencing base and strengthening the additional and alternative sentences to a fine. The law should further be made explicit on the procedures to be followed to enable the director adduce evidence of his involvement, or lack of it, in the crime before he can be made to endure the prison sentence on behalf of the corporate convict.
  
- iv. Arising from the above, a great need has arisen to revise and stiffen corporate crime laws for purposes of better mitigating crimes committed in corporate dealings and this should be coupled with a deliberate policy to train and retrain law enforcement agencies, prosecutors and adjudicators in the area of corporate crimes, corporate behavior, plea negotiations and any new advancements related to their specific roles in the area of corporate criminal liability. The investigators and prosecutors, who are at the forefront of uncovering corporate crimes and prosecuting the corporate offenders, should be well equipped with the latest knowledge, skills, and forensics and other equipment to enable them do the job with utmost competency and ability. There should also be deliberate policies formulated to ensure increased and closer co-operation among the investigative and prosecution authorities. Adjudicators must also be fully equipped to understand the dimensions of corporate crime and corporate behavior, corporate liability, financial crimes, and corporate sentencing procedures, to ensure that they more competently

preside over corporate crimes in order for them to pass just decisions that will ensure that the undisputed corporate criminals are held accountable for their crimes and are deterred from habitual recidivism.

#### **5.4 Prospects for the Future**

The focus of this paper was corporate criminal liability in Zambia. It was aimed at providing a better insight into the current legal provisions on corporate criminal liability under the Zambian legal system in order to bring to light whatever advances that such a picture can provide. The dissertation did not take into consideration the practical realities, such as political and financial realities, which would need to be taken into account when attempting to hold certain corporations accountable for violating the criminal laws of the country. The dissertation has however, held a firm view that the current law and enforcement mechanisms are not effective in curbing corporate crime in Zambia. It is therefore expected that the laws relating to corporate criminal liability will in future be subjected to greater public debate and possibly reform. Overall, there is a dire need to enhance the corporate criminal liability laws to better mitigate crime in corporate dealings and avoid the law from being used as an enabling tool for corporate wrongdoing.

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