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Sentencing Corporate Criminals - Beyond the imposition of fines

By

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Abstract

In sentencing a corporate criminal in South Africa the Criminal Procedure Act merely provides for a fine to be imposed as a sanction. In this dissertation I explore the numerous problems with fines, in order to portray how the use of fines as the sole method of punishment cannot truly attain the aims of punishment. I suggest that the aims of punishment could be more effectively obtained if a range of sanctions were to be pooled together to form an array of punishments from which the courts can choose. The legislature needs to further consider other preventative mechanisms and move towards a system of compliance which could be considered as supplemental to the punitive sanctions, thereby aligning South African sentencing with the recent global movement towards the aims of rehabilitative sentencing. Furthermore I illustrate how incorporating compliance into the criminal sphere will induce companies towards the adoption of self-regulation which is not to say that self-regulation should be solely relied on however, it would be a good spin-off of the new sanctioning regime.
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“. the forces of power, particularly corporate power, are impatient with what is adequate for a coherent community. Because power gains so little from community in the short run, it does not hesitate to destroy community for the long run.” Wes Jackson.

1 Introduction

Corporate criminal liability has for quite some time flummoxed scholars within the legal field. The problem is that criminal law was specifically designed for individuals and not for juristic persons, thus there are complexities involved in applying the principles of criminal law to corporations. The complexities arose due to traditional theories which perceived corporations as having “No soul to damn and no body to kick”. In following this viewpoint it is difficult to attribute inherently human qualities such as intention and responsibility to a corporation, when dealing with crimes involving mens rea.

Other scholars argue that due to their nature, corporations cannot be held criminally liable as they cannot be imprisoned and further that civil liability is more suited to the task of punishing corporate offenders. There may be merit in the arguments for civil liability, based on grounds of efficiency, and the fact that civil liability is the more convenient and cheaper option than criminal liability. But, the advocates of such viewpoints have clearly failed to appreciate that criminal liability does more than merely act as a deterrent, it also incorporates the crucially needed aspect of expressive retribution. Furthermore criminal liability has the ability to express society’s moral condemnation of a wrongdoer’s conduct.

Corporations have their own “identifiable persona” or “ethos” which is separate from the people working for it. Crimes committed by corporations can have, and have had a seriously detrimental impact on society. Due to their size, accumulation of economic power, rapid growth and integration in society, corporations have the potential of causing inordinate damage. It is for this very reason that there are so many deaths caused by corporations, and

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1 “Blaming and punishing individuals inevitably has a longer history than talk of corporate liability” Wells Corporations and Criminal Responsibility (2001) 29.

2 Coffee “‘No soul to damn no body to kick’: An unscandalized inquiry into the problem of corporate punishment” 1980 Michigan Law Review 386 386-387.

3 Rycroft “Corporate homicide” 2004 SACJ 141 149.


6 Friedman (n 5) 847-848.
these corporate killings cannot go unpunished.\textsuperscript{7} Imposing civil liability on corporate crimes \textit{per se} would amount to egregious consequences as corporations would not cease such behaviour due to the fact that there is no stigma attached to civil liability and it would be seen as mere slap on the wrist. Due to this reason, one cannot gainsay that corporate criminal liability is necessitated. This can be evidenced by the great ground which corporate criminal liability has gained over the years, as well as it becoming one of the most important mechanisms for restraining corporate conduct as it, unlike civil liability, is able to punish offenders and express society’s distaste for such criminal acts. This ensures that retributive, consequential and expressive benefits are procured simultaneously.\textsuperscript{8} Furthermore corporate criminal liability has been globally accepted, even certain civil law states have accepted the concept.\textsuperscript{9}

It can be seen that corporate criminal liability has come a long way since its inception and scholars and legislatures throughout have made remarkable contributions towards its development. Some jurisdictions, have almost eradicated the issues associated with moral blameworthiness and intention of corporations and moved on from the traditional individualistic methods towards more innovative methods such as corporate culture and organisational fault.\textsuperscript{10} South Africa however has lagged behind in this respect for quite some time now. This has sparked the interests of several scholars in solving these deficiencies through comprehensive comparative studies of global developments within corporate criminal liability.\textsuperscript{11}

Regardless of the inadequacies of the concept in South African law, the fact that a corporation can be held criminally liable has become common practice,\textsuperscript{12} thus it can be accepted that the ‘civil versus criminal liability’ debate is no longer truly relevant. Bearing this in mind, the attempts by scholars in assuaging the complexities of how corporate criminal liability should be applied have been noble indeed however, the same cannot be said

\textsuperscript{7} Farisani “Corporate homicide: what can South Africa learn from recent developments in English law” 2009 \textit{CILSA} 210 210-212. \\
\textsuperscript{8} Baer “Organizational liability” 2011 \textit{Journal of Law and Policy} 2011 \textit{Journal of Law and Policy} 1 2. \\
\textsuperscript{9} Aman “Capital punishment: corporate criminal liability for gross violations of human rights” \textit{Hastings International and Comparative Law Review} 2001 327 332. \\
\textsuperscript{10} For more information see Borg-jorgensen and Van der Linde “Corporate criminal liability in South Africa: Time for a change? (part 2)” 2011 \textit{TSAR} 684. \\
\textsuperscript{11} For example Farisani (n 7); Nana “Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability”2011 \textit{Journal of African Law} 86; Borg-Jorgensen and Van der Linde (n 10) above. \\
\textsuperscript{12} Farisani (n 7) 211.
for the sanctioning and sentencing of corporations. As it stands in South Africa, the only criminal sanction that may be imposed on a corporation is a fine. As I shall illustrate below, this form of sanction **per se** is no longer adequate to the task of punishing the criminal acts of corporations. It seems that the innovative contributions made by authors towards developing criminal liability of corporations such as the concept of organisational liability and corporate culture, will all be in vain unless more effort is made towards solving the problems of sanctions which has remained “relatively ignored”. It is of crucial importance that the legislature reconsiders the sentencing of corporations instead of leaving it as “an awkward afterthought”.

If the problems remain ignored companies will continue conducting their business in a reckless manner and innocent members of society will remain victim to the insurmountable harm caused by corporations. Although certain sanctions cannot, in their original form, physically be imposed on corporations (such as imprisonment), there is an array of other innovative sanctions which could be used to serve the aim of sentencing far better than that of solely relying on the imposition of fines. A central aspect when determining the most suitable forms of punishment is that the corporation must be dissuaded from thinking that the illegal act will be in its financial interests.

I shall begin by explaining the different theories of punishment and how these illustrate the importance of effectively punishing corporations for criminal acts and the difficulties faced in procuring the goals of these theories when dealing with corporations. I shall then discuss how corporation offenders are dealt with in South Africa which leads onto the use of fines as a sole form of sanction. I shall then discuss the inadequacies of the sentencing of corporations in South Africa and the disadvantages of using fines as the sole criminal sanction for corporate offenders. This will be followed by a discussion of some of the alternative methods which could be utilised in order to eradicate the problems associated with fines. Finally I shall look to methods beyond punishment such as compliance which could be used as a

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13 “Sentencing the corporate offender is an important and often overlooked subject in the administration of criminal justice” Keith “Sentencing the corporate offender: From deterrence to corporate social responsibility” Criminal law quarterly 2010 294.


15 Wells (n 1) 21.

supplemental mechanism to prevent the recidivism of corporate offences and to develop corporate criminal sentencing in South Africa in general.

2 Justifications for criminal law and punishment

From a purely academic viewpoint, there are many different theories of punishment but they all belong to two main groups.

These two groups are: the retributive theories and the preventative theories (utilitarian theories).\textsuperscript{17} As a point of departure it is necessary to explore these theories and their goals in order to fully understand the purpose and necessity of punishment.

2.1 The retributive theory

This is the oldest theory of punishment, its roots can be found in the biblical principles where the extent of punishment was determined through the concept of ‘an eye for an eye and a tooth for a tooth’ this was known as the principle of \textit{lex talionis.}\textsuperscript{18} According to this viewpoint, punishment is a warranted reaction to a criminal act. Thus a person, who has caused harm to another, must be punished to a similar degree.\textsuperscript{19} In basic terms, a punishment which is proportionate to the crime is seen to be justified as it is deserved.\textsuperscript{20}

The theory looks backwards to the crime, it revolves around the fact that the punishment imposed must have been deserved by the individual offender,\textsuperscript{21} thus the emphasis is on the punishment being in proportion to the harm sustained by the victim.\textsuperscript{22} This is the main distinguishing feature between the retributive theory and the utilitarian theory. The theory attempts to justify punishment through a cluster of moral concepts as opposed to social utility.\textsuperscript{23} The theory expresses public disgust in the offence committed by the individual offender. Retribution is seen as less important nowadays although it has been submitted that regardless of it falling out of favour, it should nonetheless be included in the modern approach as it tends to produce much ground on the aspects of prevention and correction.\textsuperscript{24}

\textsuperscript{17} Joubert “Criminal law–Theories of punishment” LAWSA (2010) par 6; Terblanche \textit{A Guide to Sentencing in South Africa} 2007 172-174 and Wells (n 1) 19.
\textsuperscript{19} see Terblanche (n 17) 172.
\textsuperscript{20} Terblanche (n 17) 172.
\textsuperscript{21} “‘just deserts.”’ Gobert and Punch \textit{Rethinking Corporate Crime}(2003) 216.
\textsuperscript{22} Terblanche (n 17) 172-174.
\textsuperscript{23} The moral concepts involved are: rights, desert, merit, moral responsibility and justice Wells (n 1) above 19.
\textsuperscript{24} Kerr “Objects of punishment” LAWSA (2010) par 504 and see \textit{R v Karg} 1961 1 SA 231 (A) 236A–C.
2.2 The prevention theory

As opposed to the retributive theory this theory finds that the justification of punishment is in the future. The central theme is that crimes are to be prevented in order to protect society.\(^{25}\) The utilitarian theory, being part of this group revolves around the idea of procuring the greatest amount of happiness for the greatest amount of subjects. Punishment is seen as an unpleasant event and is only justifiable if it leads to a decrease in pain elsewhere.\(^{26}\) It illustrates how punishment can deter a particular offender from re-offending through the imposition of punishment or the threat of punishment which constitutes individual deterrence, and it would further deter any prospective criminals as a general deterrent through the threat of punishment as opposed to the imposition thereof.\(^{27}\) In other words it strives to retain other persons as law abiding citizens, thus the imposition of punishment on one person shall serve as a deterrent for all other persons within society. Furthermore punishment also rehabilitates the offender and incapacitates him or her, so that he or she will not be able to reoffend in future. It is a forward looking theory in that it seeks to prevent the commission of future crimes.

There have been many doubts as to the effectiveness of deterrence as a justifying reason for punishment, the imposition of severe penalties on one individual merely to deter others has been heavily criticised.\(^{28}\) The Appellate Division on the other hand stated that deterrence is essential and a universally known object of punishment.\(^{29}\) In S v Williams the Constitutional Court held that there had been a shift of emphasis from retribution to rehabilitation in respect of the aims of punishment.\(^{30}\)

There have even been more radical movements away from the idea of retribution towards the adoption of restorative justice. The notion was created by John Braithwaite who believes that the criminal justice system needs a holistic reform whereby the consequences of an offence are solved through the collective participation of all the stakeholders concerned in the offence.\(^{31}\) The idea is that crime hurts thus justice should heal and not cause more harm.\(^{32}\)

\(^{25}\) Joubert (n 17).
\(^{26}\) Terblanche (n 17) 174.
\(^{27}\) Joubert (n 17).
\(^{28}\) Wells (n 1) 19.
\(^{29}\) S v Khumalo and others 1984 3 SA 327 (A) 330 D-E.
\(^{30}\) 1995 2 SACR 251.
\(^{31}\) Terblanche (n 17) 174 above and Shapland, Atkinson, Atkinson, Colledge, Dignan , Howles , Johnstone , Robinson and Sorsby “Situating restorative justice within criminal justice” 2006 University of Sheffield 505 506.
3 Criminal law justifications and how they apply to corporate offenders

The theories of punishment are important considerations as one needs to ascertain why we need to punish corporations and only then can we establish the best way of doing so.

Corporations present other problems when it comes to punishment and criminal law justifications.\textsuperscript{33} Criminal law was designed specifically with individuals in mind thus the penal statutes were not originally created for non-humans.\textsuperscript{34} There has accordingly been confusion in the past as to whether a corporation can be regarded as an entity able to express a moral blameworthiness. Du Toit submits that due to the trends in the King Code III of referring to a corporation as a corporate citizen with social and moral standing in South Africa,\textsuperscript{35} one cannot deny that companies have rights and responsibilities in society and such rights should guide the company in the manner in which it acts in society, and the rights should guide the way in which society views companies morally.\textsuperscript{36} Thus companies can have moral blameworthiness which can be determined in sentencing through society’s and the courts “moral evaluation” of corporate criminal conduct with reference to the aggravating and mitigating factors at hand.\textsuperscript{37}

Another problem exists due to the treatment of corporations as persons, which causes certain barriers when applying criminal law provisions directly on to corporations,\textsuperscript{38} as due to the nature of a corporation certain forms of punishments involved in the restraint and deterrent arguments may not be as effective in their original form when applied to corporations or different types of corporations.\textsuperscript{39} For example, a corporation cannot be incarcerated thus the imposition of long-term prison sentences would be irrelevant as a deterrent against corporate wrongdoing.\textsuperscript{40}

\textsuperscript{33} Wells (n 1) 20.
\textsuperscript{34} Walt and Laufer (n 16) 265.
\textsuperscript{35} Institute of Directors of Southern Africa King Report on Governance for South Africa (2009).
\textsuperscript{36} Du Toit (n 14) 240.
\textsuperscript{37} Du Toit (n 14) 240.
\textsuperscript{38} Walt and Laufer (n 16) 265-268.
\textsuperscript{39} Wells (n 1) 20 above and Gobert and Punch (n 21) 220.
\textsuperscript{40} “Corporations already enter the criminal justice process with the advantage of that they cannot have imposed on them the hardship and degradation which incarceration entails.” Wells (n 1) 20.
The other barrier is due to the “corporate mentality” of a company.\textsuperscript{41} A company may be deterred from committing crimes by a host of factors. However a company’s main motive is profit maximisation. Accordingly, prior to entering into any business dealings the only question a corporation shall ask itself is whether or not following such a course will make it financially better off.\textsuperscript{42} The same mentality would be maintained if the business dealing would involve a violation of the law, the company would then merely consider its potential profits and the chances of detection of the commission of the crime and the frequency of imposition of the penalty.\textsuperscript{43} It will then deduct the costs that may be incurred if it were prosecuted and convicted and simply weigh up its options on this basis.\textsuperscript{44} Thus there is no point in changing the methods of sanctions unless it will alter the corporation’s member’s way of thinking in that it will not be in the company’s financial interest if such sanction were to be imposed. The goal is to create a risk of apprehension which is great enough to persuade the corporation against the gain which it may obtain through an offence.\textsuperscript{45}

Certain authors believe that corporations cannot feel any sort of remorse and that the retributive value of punishment is futile as a justification for punishing corporations, instead they believe that the most important goals of punishing corporations are those associated with the utilitarian theory, that being deterrence and rehabilitation.\textsuperscript{46} Thus punishment should be used to prevent a corporate offender from re-offending. Due to the fact that corporate crimes generally ensue due to inadequate control and management systems, there has been widespread recognition of this more realist based approach in corporate sentencing.\textsuperscript{47} This approach is centred around the idea of rehabilitation through methods which are able to encourage companies to alter their internal policies and structures.

\textit{4 Sentencing in South Africa}

In general sentencing is the final stage of a criminal trial however, Gobert aptly submits that the issue of sanctions should be kept in mind from the outset.\textsuperscript{48} The reason is that a prosecutor who bears sanctions in mind from the start, will be well acquainted with the

\begin{itemize}
\item \textsuperscript{41}Gobert (n 14) 2.
\item \textsuperscript{42}Gobert (n 14) 2.
\item \textsuperscript{43}Rush “Corporate probation: Invasive techniques for restructuring institutional behavior” 1987 \textit{Suffolk University Law Review} 33 41.
\item \textsuperscript{44}Gobert (n 14) 2.
\item \textsuperscript{45}For a practical example of this see Rush (n 43) above.
\item \textsuperscript{46}Clough and Mulhern \textit{The Prosecution of Corporations} (2002) 185-187.
\item \textsuperscript{47}Du Toit (n 14) 241.
\item \textsuperscript{48}Gobert and Punch (n 21) 214.
\end{itemize}
objectives which are needed to be met through the sentencing of the offender, and shall be able to think in advance as to who should be charged and the nature of the crime at hand in order to establish the suitable penalties prior to conviction.

When sentencing an offender in a South African court, it is quite well settled that the triad of factors as established in S v Zinn,⁴⁹ should always be considered⁵⁰. These factors are the seriousness of the crime, the personal circumstances of the offender and the interests of society. Another factor which must be added is that of mercy which is not the same as empathy for the offender.⁵¹ Furthermore the court must consider the main purposes of punishment when determining the appropriate sentence.⁵² There are no guidelines as to what evidence needs to be adduced but the prosecutor, defence and presiding officer need to paint a fully complete picture in order for the burden of proof to be discharged by the parties.⁵³

The guidelines followed in sentencing are judge made rules and there is no concrete approach towards sentencing.⁵⁴ It seems that this approach is unsatisfactory as it allows judges far too much discretion.⁵⁵ The system of sentencing has been further criticised for not adequately dealing with certain crimes with the appropriate seriousness. The South African Law Commission proposed legislation containing basic principles towards sentencing to limit the wide discretion and to ensure a certain degree of certainty in sentencing, the commission further included victim participation and restorative initiatives.⁵⁶

4.1 Sentencing of corporations in South Africa

Although the principles may be quite settled with regard to individual offenders the same cannot be said for corporate offenders. Cases dealing with corporate accused usually only deal with the issue of liability and there is no certainty in how the principles of sentencing apply to corporations.⁵⁷

⁴⁹ 1969 (2) SA 537 (A) the details of these factors are far too prolix to be discussed in this dissertation, for more detail see the Zinn case also see Terblanche (n 17) 140.
⁵⁰ Makhoba v S 2013 ZAKZPHC AR 397/12 par 25.
⁵² n 51 above.
⁵³ Du Toit (n 14) 242.
⁵⁴ See S v Rabie 1975 4 All SA 723 (A) par 728-729; S v Zinn 1969 2 SA 537 (A) and Terblanche (n 17) 137.
⁵⁵ “In South Africa, sentencing is considered to be heavily dependent on the exercise of a judicial discretion.” Terblanche “Judgments on sentencing: Leaving a lasting legacy” 2013 THHR 95.
⁵⁷ Du Toit (n 14) 242.
The only provision regulating the sentencing of corporate crimes in South Africa is section 332 of the Criminal Procedure Act. The provision was drafted with the intention that it shall be used for the regulation of prosecution of corporations as well as unincorporated bodies.

One of the erstwhile problems involved with prosecuting corporations was due to the very nature of a corporation which renders it incapable of being physically present at trial and for criminal proceedings it is crucial that the accused appear in person. Section 332(2) addresses the issue by stating that, when prosecuting a corporate body, it shall be represented by a director or servant of that corporate body, this representative shall be cited as such and thereafter he or she shall be dealt with as if he or she were the person who committed the offence. It appears that this representative need not be the same person throughout, as the section allows the court to request from the prosecutor that said person be substituted for another director or servant of the corporation should the he cease to be a director or servant or if he is unable to attend the proceedings. Upon conviction the court may not impose upon this person, in his representative capacity, any punishment, direct or alternative, other than a fine. Certain crimes prescribe sanctions other than fines but this section explicitly states that a fine is the only allowable sanction even if the law does not make provision for a fine in respect of the offence at hand and this fine can only be recovered from the corporation itself.

The courts do not follow any set principles in sentencing corporate offenders, although many of the factors considered are equally applicable to individuals it is necessary that certain modifications are made, as will be seen below I argue that courts need to re-evaluate the factors which they consider to be mitigating or aggravating factors, of particular importance is a corporation’s affiliation with compliance for the law.

5 Fines as the main form of sanction for corporate crimes

From the above it seems that when drafting section 332 the legislature believed that the only viable method of punishing a corporation in terms of criminal law is through monetary

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58 51 of 1977 (hereafter referred to as the Criminal Procedure Act).
59 Farisani (n 7) 214.
60 Even in terms of s 35 (1) (e) of the Constitution of the Republic of South Africa Act 108 of 1996, an accused has a right to be present at trial.(hereafter referred to as the Constitution).
61 s 332(2)(a) of the Criminal Procedure Act, such plea of guilt shall only be valid if the corporate body authorized him to do so.
62 s 332(2)(b) of the Criminal Procedure Act.
63 s 332(2)(c) of the Criminal Procedure Act.
64 Terblanche (n 17) 162.
65 For more detail see Clough and Mulhern (n 46) 187-188.
66 See par 8 below.
sentencing penalties.\textsuperscript{67} This is an individualistic approach towards sentencing.\textsuperscript{68} Although there are other penalties contained in the Companies Act, they may only be implemented by specific role players and they are not criminally imposed by a criminal court.\textsuperscript{69} Thus fines as the main form of sanction for corporate crimes require exploration in order to establish whether it is on its own a sufficient form of punishment for corporate crimes.

5.1 Advantages of fines as a sanction

Fines are the most commonly imposed sentences for individual offenders and corporate offenders in South Africa. They are also in most jurisdictions the standard sanction for corporate misconduct.\textsuperscript{70} They can be very effective and can easily relate to the nature of a corporation.\textsuperscript{71}

Fines further carry the advantage of being the most cost effective method of administrating sanctions as their implementation does not require any expensive public resources and are relatively cost-free to administer. There are for example numerous costs involved with imprisonment such as the building and maintaining of a secure facility to house the offender, the employment of guards and personnel to carry out all the functioning within the prison.\textsuperscript{72} These costs are somewhat exorbitant in contrast to the costs involved in collecting fines. Although this not a concern when punishing corporations as they cannot be physically imprisoned.

If applied correctly, fines can accurately depict the harm done by certain corporate crimes in a proportionate manner. A good method of doing so was proposed by Alschuler whereby courts asses the amount of harm produced by a specific corporation’s criminal act through consideration of the frequency of the crime in general. The fines could then be proportioned in accordance with the frequency of such criminal acts as well as the harm that it has caused by the specific crime. This would ensure that the more prevalent crimes would carry much more burdensome consequences and hopefully eliminate thoughts of it being a mere cost of doing business.\textsuperscript{73}

\textsuperscript{67} S v Shaik 2007 1 SACR 142 (D) par 244F.
\textsuperscript{68} Du Toit (n 14) 241.
\textsuperscript{69} 71 of 2008 (hereafter referred to as the Companies Act) and see Du Toit (n 14) 237.
\textsuperscript{70} Terblanche (n 17) 261 and Rush (n 43) 40.
\textsuperscript{71} Rycroft (n 3) 152.
\textsuperscript{72} Gobert (n 14) 3.
\textsuperscript{73} Alschuler “Two ways to think about the punishment of corporations” American criminal law review (2009) 1369 1390.
Furthermore fines may be advantageous as they strike the company where it would hurt the most, that being loss of finances, and it is for this very reason that fines have the potential of being an effective deterrent.74 However this advantage also carries certain complications.75 Lastly fines are able to provide the capital to be used in compensating the victim for damages and restitution.76

5.2 Disadvantages of fines as a sanction

Through solely imposing fines on corporate offenders, section 332 has given corporate sentencing a very restricted view.77 One of the main problems is that fines are mainly directed at crimes of a less severe nature.78 In the majority of cases when a fine is imposed on a corporation the amount is too little to have any real punitive or deterrent effect thereon and is merely seen as a cost incurred through doing business.79 The reason for this is that courts usually set the fine to be imposed on corporations with individual offenders in mind. This is unsatisfactory as the net wealth of a corporation far exceeds that of an individual and a fine which would seem exorbitant to an individual would seem like very little to a large corporation.80 This illustrates why courts should not be so quick to equate natural persons and juristic persons in sentencing, although they may be trying to adopt a non-discriminatory approach towards sentencing they are in actual fact doing the opposite.

Even where statutory sanctions are created specifically for crimes committed by companies, the provisions fail to distinguish between small and large companies.81 The implication is that fines imposed on large wealthy companies have no real deterrent effect in relation to the company’s ample finances, thus the chances of eliciting apprehension towards the consequences of the corporation’s wrongdoing are far less than the company’s wealth.82 By imposing fines in this manner, only small corporations with smaller funds will feel the pain.

74 Gobert (n 14) 4.
75 See par 5.2.
76 Gobert (n 14) 3.
77 Rycroft (n 3) 152.
78 “a fine should not be imposed if the crime is too serious.” Terblanche (n 17) 262.
79 “Fines do not emphatically convey the message that serious corporate offences are socially intolerable. Rather they create the impression that corporate crime is permissible provided the offender merely pays the going price” O’Malley The currency of justice: fines and damages in consumer societies (2009) 69; Farisani (n 7) above; Rush (n 43) 40. It is however important to note that these types of ‘costs incurred through doing business’ are not tax deductible, see s 23 (o)(ii) of the Income Tax Act 58 of 1962.
80 Gobert (n 14) 5.
81 Gobert (n 14) 5.
82 Rush (n 43) 41 above.
whereas a larger wealthier company will merely absorb the fine as a cost of doing business.\textsuperscript{83} This is totally unsatisfactory as the most important aim of a fine is to punish the corporate offender in a way which reduces its financial ability, as well as to deter the offender from such unlawful acts.\textsuperscript{84} Sometimes the fact that the accused has limited funds causes problems as the courts have shown a reluctance towards imposing a fine which is beyond the means of an individual accused.\textsuperscript{85} However, it would be farcical to accept that a fine should only be imposed when the accused can afford it. This would mean that the fine would in certain instances be so imperceptible that it would not have any deterrent effect at all.\textsuperscript{86} Perhaps the courts should also consider the finances of the corporation when determining the appropriate fine,\textsuperscript{87} but they could also, for example, determine the extent of the fine in accordance with a sliding scale and where the accused cannot afford the fine the courts should consider whether such corporation could borrow money or raise the money to pay the fine or the fine could even be paid in instalments.\textsuperscript{88} Accordingly a larger corporation would receive much greater fines compared to that of a smaller corporation due to the sliding scale but a small corporation would not be able to use its lack of funds as an escape route. Thus both larger and small corporations would “feel the pain” as Farisani quite aptly puts it.\textsuperscript{89}

A further drawback associated with fines is that, if one were to imagine the perfect scenario where a fine would be successful against a corporate wrongdoer, the success further depends on the corporation and all of its agents acting as a single entity in committing the crime. In other words they all had the same idea of procuring profit for the company. The situation changes however, where the managers of the company committed the offence due to personal reasons. This would greatly affect the future deterrent value of the fine as there is very little connection between the conduct being punished and the actor of such crime, thus the managers would not seize any future offences as the fine would merely be imputed on the company and have no effect on the managers acting for their own interests.\textsuperscript{90} Unless the fine encourages the company to filter the fine down to the human source by disciplining the managers responsible, it seems there is a need for internal regulation in this respect.

\begin{flushright}
\textsuperscript{83} “if a company simply absorbs the fine as running cost, there has been little deterrence” Rycroft (n 3) 153.
\textsuperscript{84} Terblanche (n 17) 261.
\textsuperscript{85} “When a court has decided that a convicted person ought to be afforded the opportunity of staying out of gaol by giving him the option of paying a fine, it should not impose a fine which to its knowledge or belief is utterly beyond the means of such person to pay” S v Sithole and Another 1979 2 SA 67 (A) par 69 D-G.
\textsuperscript{86} S v Lekgoale and Another 1983(2) SA 175(B) par 176 C - 177 F.
\textsuperscript{87} Farisani (n 7) 218.
\textsuperscript{88} S v Mlalazi 1992 (2) SACR 673 (W) 674H.
\textsuperscript{89} Farisani (n 7) 218.
\textsuperscript{90} See Rush (n 43) 42.
\end{flushright}
Most of the solutions for the deficiencies of fines as a sanction entail raising the maximum ceiling for fines. This in itself brings about numerous egregious consequences, firstly there is the fact that such high fines may drive a company which is experiencing financial difficulties out of business, which would cause courts to be reluctant in imposing such a fine. This is referred to as the “deterrence trap”. Thriving companies on the other hand may not even notice the increased maximum. The consensus is that these corporate offenders deserve to be driven out of business due to their illegal acts. That may be so but one needs to further consider the secondary consequences of fines or the “spill-over effect”. There have been many criticisms levelled against fines due to these ‘spill-over effects’ as they have the ability to penalise other stakeholders of the company and it is argued that fines are prejudicial due to these harmful secondary effects caused by fines.

The first of these spill-overs is that fines have the ability to penalise the shareholders of a company as opposed to the executive employees who were responsible for the wrongful act. An attempt at the justification of shareholder burdens was expressed by McAdams, who introduced the law of enrichment into the issue. His argument was based on the premise that equity owners of a company are unjustly enriched by the illegal gains and the fine is merely a disgorgement of such illegal profits. Rush however points out that McAdams failed to note that disgorgement of profits is not the only purpose of imposing fines, the reason a criminal sanction is imposed is due to its deterrent value. Implementing McAdam’s theory would imply that the purpose of a fine is solely for restitution between parties, which would totally eliminate the deterrent value of the penalty as the amount of the penalty needs to be more than merely forfeiting the profits.

It would seem that any punishment imposed on a corporation would have such a negative impact on the shareholder but sentencing corporate offenders is of utmost importance and it may just have to be an accepted reality that shareholders may be adversely affected, as these crimes cannot go unpunished. This may not be such a harsh reality when one considers the

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91 Coffee (n 2) 389.
92 Gobert (n 14) 5.
94 Wells (n 1) 33.
95 Rycroft (n 3) 152.
96 McAdams “The appropriate sanctions for corporate criminal liability: An eclectic alternative” University of Cincinnati Law Review 989 994-995.
97 Rush (n 43) 43.
98 Rush (n 43) 43.
fact that shareholders are not innocent victims of corporate fines, they are in their position as shareholders knowingly having accepted the risk of fines. It is further argued that shareholders have the exact same goals as the corporation and thus from a deterrence perspective the indirect punishment shall deter all those having the similar goal and furthermore they are protected by limited liability. At most the option is always open to them to sell their shares at any moment. On the plus side it may act as a good deterrence as it may result in increased shareholder participation within the company due to fear of such adverse consequences.

A further problem with fines is that where the company receives a hefty fine, it will have to be paid out of the pool of funds which the employees of the company are paid out of. There is then a risk of a cut in labour costs, decreases in salaries and retrenchments of such lower ranking employees as the company will need to preserve the monies from that pool to cover the fine. The question is whether a fine should be reduced where it may cause the corporation to fail and innocent employees to lose their jobs. Alschuler is of the opinion that the fines should not be decreased as a company which has its sole reason of success due to criminal acts, should fail and the employees should then seek jobs in another company with more legitimate motives.

Finally there is the issue of the corporation deferring the costs of the fine onto the unsuspecting consumer by increasing prices of goods or services or by cutting costs to save funds for the fine thereby lowering its standard of services or goods. This is probably the most frowned upon secondary consequence of all as unlike the aforementioned stakeholders, the consumer is truly an innocent party. Although the consumer may be unsuspecting of such price increases, he or she is at will to contract with whom he or she wishes. The problem arises where the company has a monopoly in the market which means that the public would have no option but to accept the increased price. Gobert submits that the pass-on effect would be minimised if the fines were set sufficiently high to the extent that they cannot be

99 Rush (n 43) 44 and Gobert (n 14) 5.
100 Wells (n 1) 34.
101 Rycroft (n 3) 153.
102 Alschuler (n 73) 1391.
103 Rush (n 43) 45.
104 “market factors would affect a corporation’s ability to pass on the fines with competitive impunity” Rush (n 43) 45.
passed on without the company sustaining a significant loss in its market share.\textsuperscript{105} This however, entails harsh fines which is what caused the spill-over effect in the first place.

American author Sara Beale submits that the incarceration of individual offenders also affects innocent third parties, such as their families and children, although this may be the only way in which such person may be punished. That is not to say that innocent stakeholders must always suffer the consequences, where undeserved suffering can be avoided, it should be avoided.\textsuperscript{106} This is an interesting viewpoint as Beale acknowledged that the primary punishment is on the corporation itself whilst the secondary punishment may be against innocent human beings inside the corporation.

As was stated above fines have the ability to strike a company where it hurts- its finances. However certain complexities arise in this regard due to the fact that corporate crimes are mainly financially motivated. If the financial gains procured through illegal acts exceed the financial loss that could be sustained through prosecution and conviction the company would not be deterred from committing the offence. In order for it to have this deterrent effect the fine would have to be very onerous to actually have any effect on the company. This means that the court needs to consider what is referred to as the “cost-benefit calculation”\textsuperscript{107} thus in determining the appropriate fine, a court needs to consider the company’s calculations of its criminal actions being detected and its chances of it evading a successful prosecution.\textsuperscript{108} Thus the court needs to consider these factors as the company’s actions may have been going on undetected for a fair amount of time and the company could have obtained a lot of illegal profits during this period. Thus if it is detected and the maximum fine is imposed on it every now and then, there will be no deterrent effect as the illegally obtained gains over the long term will outweigh the loss it suffers from fines which are seldom imposed due to its low risk of detection. Thus, if the company’s estimate of its chances of being detected is low, the courts should include such considerations and then adjust the fine accordingly in order to effectively deter the company from continuing with the illegal acts.\textsuperscript{109} The problem is that this would merely entail a hefty fine again which again brings us back to the messy spill over effect.

\section{Alternative sanctions}

\textsuperscript{105} Gobert (n 14) 6.
\textsuperscript{107} Gobert and Punch (n 21) 223.
\textsuperscript{108} Gobert(n 14) 3.
\textsuperscript{109} See Gobert (n 14) 3 and Gobert (n 21) 223 for an example hereof.
6.1 Why is there a need for alternative sanctions?

As was illustrated above, the courts in South Africa do not follow any concrete guidelines in punishing corporations and the existing methods of punishing corporations are inadequate for the task of reaching the aims of punishment. Due to the lack of interest given to the punishment of corporate offenders, it seems as though corporations are not viewed as true criminals in the eyes of the law. This is rather questionable as corporations have become part of society and they play an integral part within society as they have an on-going role as employers, taxpayers, producers and consumers. Due to the “corporate mentality” companies sometimes become so engrossed in attaining their goals that they impact well beyond their own interests and cross the line by committing illegal acts which cause harm to society.

A recent example is the tragic event which occurred in Pinetown on September 2013, whereby a truck crashed into four taxis and three cars claiming the lives of 24 innocent people and further causing sixteen critical injuries. 23 year old Sanele May was the driver of the truck and is now awaiting the outcome of a case of 24 counts of murder and a charge of reckless or negligent driving against him. The South African minister of transport, Dipuo Peters stated that the driver should indeed be punished but so should the owner of the truck. Although the truck driver was negligent, there have been many allegations that the truck was not in a roadworthy condition, the brakes failed which was a contributory factor leading to the accident, furthermore the truck was unlicensed and the driver was an illegal immigrant in South Africa with no work permits and he had a fake South African traffic register certificate which was obtained with his illegal driving permit. The truck was owned by a company known as ‘Sagekal Logistics’ and there is still uncertainty as to whether or not the company or its owner will be charged and the chances of that happening are very slim. Although May was negligent in his actions, it would be unjust to purely hold him liable, the company and its management are equally liable for failing to ensure that its trucks were roadworthy and safe.

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110 Keith (n 13) 296.
111 Par 3 above.
112 Keith (n 13) 296.
for its employees to operate. It seems as though the company operates its business in a manner which depicts a history of cost saving shortcuts through a blatant disregard for the legal formalities required of it. If the company were to be held criminally liable in terms of the current legislation it would merely receive a fine. If the fine were great enough to have any effect on the company it could act as a deterrent but it is highly unlikely as the company could merely defer the financial loss to other stakeholders as was discussed above. In all likeliness it would cause retrenchments of other striving truck drivers of the company. Thus not only will one employee be subjected to a lifetime behind bars but many others who are earning an honest living as truck drivers will lose their jobs and be unable to support their families. If the fine were to be too little it would have no effect on the company at all and it would continue its business with a blatant disregard for the law whilst endangering the lives of many other innocent citizens. It seems that the imposition of fines is neither here nor there, it cannot strike a balance. Clearly the current punishment ‘methods’ or should I say ‘method’ is totally inadequate in deterring companies by persuading their “corporate mentality” and it is also incapable of rehabilitating them.

In S v Citizen Newspapers (pty) ltd en 'n ander; S v perskorporasie van sa bpk en 'n ander,\(^{115}\) two newspaper companies (the first appellant in each case) and their editors (the second appellant in each case), were convicted in the Magistrates court in terms of s 332 the criminal procedure Act.\(^{116}\) The appellants were convicted for revealing the identity of an accused person below the age of 18 in reports made by the newspaper companies.\(^{117}\) In the Magistrates court both the companies and their respective editors were given a fine of R100-00. On appeal to the Provincial division the fines in respect of the second appellants in both cases, were reduced to R10-00. The matter was again taken on appeal to the Appellant division which rejected the appeal and reversed the order of the provisional division by holding that a fine of R100 should be imposed on the second appellants.\(^{118}\)

\(^{115}\) 1981 4 SA 18 (A).

\(^{116}\) The first appellants were held vicariously liable in terms of s 332(1) and the second appellants were held liable in terms of s 332 (5). Although, the latter section was declared unconstitutional in S v Coetzee 1997 3 SA 527 (CC). This topic is however not relevant for current purposes, please see the Coetzee case for more information.

\(^{117}\) According to Section 154 ( 3 ) of the Criminal Procedure Act, “ No person shall in any manner whatsoever emige publish information which disclose the identity or may reveal an accused under the age of 18 years or of a witness in criminal proceedings under the age of 18 years: Provided that the presiding judge or judicial official publication of so much of such information, powerful as he thinks fit if the publication”

\(^{118}\) n 115 above p 28.
S v Citizen Newspapers illustrates how the existing provisions for corporate sentencing are very limited. The fines imposed on the editors were equal and no more onerous than the fines imposed on the newspaper companies regardless of the fact that the companies were much wealthier than the editors. Section 154 (3) allowed for a fine of up to R500-00 to be imposed yet the court,\footnote{119} mindful of its ability to increase fines \textit{mero motu}, nevertheless refrained from adjusting the fine upwards.

One of the main characteristics of incorporating a company in South Africa is that it has all the legal powers and capacity of an individual except to the extent that such juristic person is physically incapable of exercising such power or capacity or the company’s memorandum of incorporation provides otherwise.\footnote{120} This clearly reflects an intention by the legislature of bringing juristic persons and natural persons on par with each other. The Bill of rights further buttresses this intention by allowing a juristic person to be bound by all the rights contained therein, to the extent that it is applicable having regard to the nature of the right as well as the duty imposed by the right.\footnote{121} Thus the question I pose is, why is it that corporations are allowed to reap all the above benefits yet when they commit crimes they are merely perceived as ghosts amongst the living? This is not to say that a company which commits a crime should be strictly equated with an individual who commits a crime in every aspect, the emphasis is on the punishments of individual offenders and corporate offenders being the same in proportionality. It is a very complex situation as juristic persons and natural persons should be aligned as far as possible but by equating individuals and corporations too much, a viable theory of corporate sanctions cannot be developed.\footnote{122} The problem in this respect is that a court may be faced with a case where a corporation is clearly guilty of an offence but the form of punishment for such crime is not physically attributable to a corporation or the extent of the sanction would be miniscule if it were to be imposed on the corporation as opposed to the effect it would have on an individual offender. With regard to the former the Criminal Procedure Act cleared this hurdle by providing solely for the imposition of fines in all scenarios.\footnote{123}

6.2 Alternative sanctions which could be used for the sentencing of corporations

\footnote{119}{n 115 above p 27.}  
\footnote{120}{s 19 of the Companies Act .}  
\footnote{121}{Ch 2 of the Constitution of the republic of South Africa, 1996.}  
\footnote{122}{Gobert (n 14) 2.}  
\footnote{123}{See par 4.1 above.}
The Criminal Procedure Act is out of step with the practicalities of sentencing of corporate offenders. The process is usually retributive and there are no sanctions which allow for rehabilitation and restorative justice. This denies courts the ability to create creative solutions in the sentencing process.\textsuperscript{124} The trend of using severe monetary sanctions \textit{per se} is inadequate and it seems only logical that other suitable forms should be devised which promise an escalation in the multiplicity of retributive, deterrent and rehabilitative methods available against corporations.\textsuperscript{125} No sentencing regime will be perfect however.\textsuperscript{126} The inadequacies of fines justify a serious reform of the sentencing of corporations in South Africa. As it stands the courts are faced with a major dilemma as they have the onerous task of determining an appropriate which is proportionate to the seriousness of the crime committed by the corporation whilst attempting to limit the spill over effect to other stakeholders as well as protecting the interests of public all at the same time. It is clear that sentencing of corporate offenders would be more successful if the courts had an “arsenal of sanctions” at their disposal.\textsuperscript{127}

The following section will be exploring some of the alternatives that could be considered in reforming the existing legislation. Whilst exploring these alternatives the “corporate mentality” must be borne in mind there is no point in introducing a new punishment system unless it will alter the corporate mentality beyond the mere procurement of profit. An appropriate combination of sanctions would take the profit out of corporate crimes.\textsuperscript{128}

6.2.1 Quasi-monetary fines

The fines discussed above are those in the traditional sense being purely cash based penalties. As was mentioned these types of fines carry secondary harm to other stakeholders in certain instances. The following discussion shall look at two alternative types of fines namely Equity fines and pass through fines, which eliminate the difficulties that lie in the use of pure monetary fines. Even still they do not solve the problems associated with deterrence or rehabilitation.\textsuperscript{129}

(a) Equity fines

\textsuperscript{124} Keith (n 13) 300.
\textsuperscript{125} Wells (n 1) 35 and Keith (n 13) 299.
\textsuperscript{126} Clough and Mulhern (n 46) 193.
\textsuperscript{127} Gobert and Punch (n 18) 221 and see Du Toit (n 50) above.
\textsuperscript{128} Gobert and Punch (n 18) 214-215.
\textsuperscript{129} Rush (n 43) 46.
A solution to some of the complexities of cash based fines was proposed by Professor Coffee, the proposal was to issue “equity fines”. This entails a fine whereby the court orders that the company issues new shares or securities, in equal value to the fine that would have been imposed to the victims of the crime or to be sold in the open market in order to generate funds to cover the compensation of the victims. This would ensure that the company’s current finances would not be utilised for the payment of the fine which means that the consumers would be protected as the company would not have to raise its price when it is experiencing financial difficulties and employees would also be protected as the company’s operating capital would remain unaltered.

An obvious problem with this method is that it could only be imposed on companies who trade shares on the stock market. This method also does nothing to eradicate the spill-over effect on shareholders as a penalty which would be levied in equity securities as opposed to cash would impact on shareholders by decreasing the value of their stocks. Furthermore with additional shares on the open market the company would be open to a hostile takeover. Although equity fines do solve some of the issues with monetary fines, they do not solve the problems associated with deterrence nor do they contribute reform of corporation’s internal procedures, nor do they provide any method for disciplining individuals within the company. Thus they cannot be seen as the panacea that Coffee once envisaged.

(b) Pass through fines
This method allocates a pro rata share of a fine to the shareholders of a company, the amount of the fine is determined by the market value of the shareholders’ equity and the shareholders are allowed to decide how to pay the fine. This method limits the over-spill effect on some of the stakeholders as the stock prices are not directly affected. The shareholders however, take over the company’s responsibility to pay for the fine which was brought on by the company’s wrongdoing. Thus the shareholders would be in a worse position than they would have been if the company had just received a normal fine.

130 Coffee (n 2) 413.
131 Coffee (n 2) 413; Rush (n 43) 40 and Rycroft (n 3) 153.
133 Gobert and Punch (n 21) 232.
134 Pinto and Evans (n 132) above and Wells (n 1) 34.
135 Gobert and Punch (n 21) 232.
136 For more detail see Kennedy (n 93) 468-472 and Rush (n 43) 48.
Besides the abovementioned disadvantages, these methods are still fines which are merely punitive sanctions and do not accomplish any rehabilitative goals. That is not to say that the punitive effect is undesirable, it is indeed an important aspect but other options of sanctioning need to be adopted in order to attain the deterrent and rehabilitative aims as well.\textsuperscript{137}

6.2.2 Community service

Community service is often used as an alternative to imprisonment for individual offenders, it entails the court postponing the imposition of a sentence on condition that the offender performs compulsory work for the benefit of the community under the supervision or control of an organisation or institution. The work will be anything which in the opinion of the court promotes the interests of the community and such work is to be performed without payment or value.\textsuperscript{138} By employing this method it could be required of the company that, depending on its area of expertise, it utilises its workforce for constructive projects which would benefit the community.\textsuperscript{139} Although a court cannot instruct a corporation to do manual work, it could be ordered to provide a free public service or to fund community work.\textsuperscript{140} In certain instances the company may not have the necessary expertise in order to carry out the community service that is expected from the company, in such a case the court may order that the company also undertakes to procure the necessary research in order to develop that aspect in that specific field.\textsuperscript{141} For instance if one refers back to the Pinetown accident, the court could order as part of the sanction bundle that Sagekal Logistics must, at their own expense, undertake a research project which explores the various ways in which similar disasters caused companies in the same field could be prevented in the future. Rycroft criticises the use of community service as the\textit{pro bono} service that the company is giving to the community could have the effect of enhancing its reputational status as opposed to punishing the company.\textsuperscript{142} The public may view the company as having ethical standards when they witness the acts of selflessness carried out by the company but this situation could be avoided if an adverse publicity order (discussed below) is attached to the community service order.\textsuperscript{143}

\begin{thebibliography}{99}
\bibitem{137} Rush (n 43) 49.
\bibitem{138} See s 52(1)(b) of the Correctional Services Act 111 of 1998 read with s 297 of the Criminal Procedure Act (n 61) above also see Kerr “Community service orders” (2010) \textit{LAWSA} par 525.
\bibitem{139} Rycroft (n 3) 154.
\bibitem{140} See Rush (n 43) 16-15.
\bibitem{141} Gobert (n 14) 7.
\bibitem{142} Rycroft (n 3) 154.
\bibitem{143} Gobert (n 14) 9.
\end{thebibliography}
As a method of correctional supervision, community service is one of the best methods,\(^{144}\) it is a good alternative to the imposition of a hefty fine as it eradicates the complexities involved with the spill-over effects and it further eliminates the complexities involved in imprisoning a company.\(^{145}\) A court could use this method where a fine would affect the company’s finances in a way which would cause a spill-over effect or where an equity fine is not a feasible option or a combination approach could even be adopted.\(^{146}\)

6.2.3 Adverse Publicity Orders

Corporations value their prestige status and image very highly. This is due to the fact that they are dependent on such good image in their everyday dealings through their extensive use of brand-image in advertising.\(^{147}\) Any major disaster relating to the corporation would have certain detrimental consequences for their ‘clean’ image if the public were made aware thereof.\(^{148}\)

Adverse publicity is an old idea which could be used as a punitive accessory to any other sanctions which the court wishes to impose on a corporate offender.\(^{149}\) This form of sanction carries with it the important denunciatory function which is established through public awareness of corporate crimes.\(^{150}\) The idea behind this form of sanction is that the “naming and shaming” of corporate offenders shall cause a domino effect whereby consumers no longer wish to support a company which is breaching the law.\(^{151}\)

Although such a sanction would cause monetary loss to the company, it is not its primary objective. If this were the case the court would merely impose a fine. The main justification for this form of sanction is that it would affect the company’s prestige standing in the market and cause it to be insecure due to prolonged adverse publicity. This insecurity would then affect the company’s ability to do business with the public and also its ability to raise capital on public markets amongst other negative consequences.\(^{152}\)

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\(^{144}\) Terblanche (n 17) 297.
\(^{145}\) Gobert (n 14) 7.
\(^{146}\) Gobert (n 14) 7.
\(^{147}\) Clough and Mulhern (n 46) 194.
\(^{148}\) Wells (n 1) 36 and Gobert (n 14) 9.
\(^{149}\) Rycroft (n 3) 155.
\(^{150}\) Rycroft (n 3) 155.
\(^{151}\) Gobert and Punch (n 21) 220.
\(^{152}\) Clough and Mulhern (n 46) 197.
The problem is that corporate crimes generally go unreported except for those that cause death or injury. Courts need to consider the publication of a company’s criminal acts if they wish to procure the denunciatory effect of punishment, by making an order requiring the company to advertise its offence at its own expense. An adverse publicity order could be a much more effective method than that of a fine as the public is given a “voice” through its purchasing power thus it will not only act as a deterrent but also a method of inducing internal reforms. Furthermore this method could also be used to educate the community on what acceptable business practice is.

There may be a downfall to this method in that the adverse publicity could spark a consumer boycott of the company’s products which would result in running the company out of business due to the lack of consumers. Gobert argues that this problem is comparable to that of the spill over effect of fines. Although there is some merit in Gobert’s argument, I respectfully disagree as a company could always win back its erstwhile consumers by portraying its remorse to the public and righting its wrongs, although it will not be an easy task but it is a likely possibility which would eliminate the need to retrench innocent workers. On the other hand, where a company has been ordered to pay an exorbitant fine when it is not in the position for covering such fine, the only option it will have is to make staff cuts and price escalations. Although there are other disadvantages to the use of adverse publicity, the benefits of this method far outweigh those of fines and this method could be of great use to the courts when considering the sanction package to impose on the corporate offender.

6.2.4 Restraint Oriented Sanctions

Imprisonment as a form of sanction is a good method of protecting the public from the offender for the duration of the prison sentence but it is an extreme option. As I have mentioned above, imprisonment in its basic form is not a feasible option for corporate offenders. I italicised the words ‘basic form’ due to the fact that imprisonment is mainly associated with restraint being physically confining the offender. Perhaps restraint is not truly

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153 Rycroft (n 3) 154.
154 This could be done by requiring the company to advertise in a newspaper or to send a letter to the shareholders or to the members of the public concerned. See Gobert (n 14) 7.
155 Gobert (n 14) 10.
156 Clough and Mulhern (n 46) 197.
157 Gobert (n 14) 11.
158 These disadvantages are too numerous to discuss in this dissertation for more detail see Clough and Mulhern (n 46) 197-200.
159 Rycroft (n 3) 154.
attainable in this form but, it could be feasible if one were to consider it in the context of suspension of licenses or any other similar form of “activity-related” restraint.\(^{160}\)

It is not enough to imprison directors and officers of the company as they do not pose the same threat as a “hardened criminal” who inflict violent injuries on the public, the company however can cause continuous widespread damage and harm.\(^{161}\) Thus restraint methods should be redesigned to suit the nature of a corporation and thereafter adopted for corporate sentencing.

If a company commits a serious offence a court could make an order prohibiting the company from any activities which it is carrying out that could be causing the commission of the offences. This would eliminate the draconian effect that a hefty fine would have in running a company out of business. The period of such suspension on the company’s activities could be equal to the length of imprisonment that the court would have imposed if an individual had committed the offence.\(^{162}\) In certain cases the prohibition of the activities of the company may cause it to lose more than it would if a fine were imposed on it. If the company’s only way of making money is through such nefarious activities which constitute offences, they then perhaps deserve such losses.

Gobert and Rycroft propose a “restraint ladder” model whereby the extent of the restraint method increases depending on the severity of the crime.\(^{163}\) for example the ladder would begin with a warning being issued on a first time corporate offender, a more serious crime would be punished by the suspension of licenses or the restriction of a certain activity, if a company is reliant on government tenders these could also be temporarily or permanently withdrawn and the ultimate restraint which would be used as a last resort would be that the company shall be forcefully closed.\(^{164}\) The last mentioned is seen as one of the most drastic measures available and would definitely cause a spill-over effect, however it should only be used as a last resort option, certain jurisdictions use this method where companies have been incorporated for an illegal purpose.\(^{165}\)

6.2.5 Corporate probation

\(^{160}\) Rycroft (n 3) 154.
\(^{161}\) Gobert and Punch (n 21) 220.
\(^{162}\) Rycroft (n 3) 154.
\(^{163}\) Rycroft (n 3) 154 above and Gobert (n 14) 11.
\(^{164}\) Du Toit (n 14) above and Aman (n 9) 336-337.
\(^{165}\) Wells (n 1) 35.
A probation period is usually used against individuals in order to force or encourage them to change their behaviour in order to prevent future offences. During this period the offender must agree to undertake certain tasks set out by the court and to be supervised during this period. This would be a good method of ensuring that corporate offenders change their internal structures and do not re-offend. If the corporation breaches the conditions set, it will be brought back for re-sentencing and a harsher sanction shall be imposed. Probation could be a very powerful method which could attain both punitive as well as rehabilitative elements. Furthermore probation is a very advantageous form of sanction as it is flexible and it can be modified to suit the different corporate offences as well as the different corporations. The most important advantage of this form of sanction is that it avoids the problems of overspill and the deterrent trap as is found with the use of fines, thus the probability of crime is removed as a company will fear the unknown as a court can use its discretion in setting the conditions to be imposed on the company.

The United States sentencing commission introduced the organizational sentencing guidelines in November 1, 1991. These guidelines are designed to ensure that just punishment and deterrence are attained through the sentencing of corporations. The guidelines provide for probation orders against organisations and it allows for an array of conditions which may be imposed. Canada too makes use of probation orders. The Canadian Criminal Code provides that the court may order that the corporation must implement certain policies, standards and procedures and thereafter report to the court showing that these reforms have been properly communicated within the company and a senior officer has been elected to ensure compliance with the reforms. Probation orders generally fall within two categories, the first is remedial conditions and the second is rehabilitative conditions. The success of these methods is obviously dependent on the court’s ability to police the compliance with the reforms. South African courts are already overburdened with the amount of cases that they are allocated. Thus these methods would only work if the structure of the courts were altered to cater for the extra duties.

166 Clough and Mulhern (n 46) 200.  
167 Wells (n 1) 35.  
168 Clough and Mulhern (n 46) 201.  
169 Clough and Mulhern (n 46) 201.  
(a) Remedial conditions

A remedial order requires that a company make reparation for any harm it may have caused. This is done by ordering that the company must implement certain conditions or corrective steps. This method is usually used where financial restitution is inadequate for remedying the harm it caused or to reduce any possible future harm.\(^{173}\) There may be some overlap between the above sanction and community service orders however, it is important to note that they are not the same. The difference is that a community service order may be imposed in respect of any activity which would benefit the community, whereas a remedial order is imposed to make reparation only to the victim who had sustained harm due to the company’s wrongdoings.

It is submitted that a remedial condition should first be proposed by the company due to the fact that it is most familiar with its operations. The proposal will then be scrutinized by the court in order to determine whether such proposal will suffice in eradicating the harm or future harm caused by or which may be caused by the business. If the court is not satisfied with the proposal it could appoint an independent expert at the corporate offender’s expense in order to provide recommendations thereon.\(^{174}\) Once all of this has been completed the court could then prepare its remedial order, the conditions to be set can be so wide even as to require corporate decision-making to be restructured in order to prevent future harm. A problem with this method is that the management of a company may just defer the extra work onto their employees. Thus the management will not feel any pain from the imposition of such sanction.\(^{175}\) This issue could be solved by the courts using their discretion and implementing suitable conditions to eliminate such passing down of the punishment.

(b) Rehabilitative conditions

When applied to individuals rehabilitation programmes are advantageous in that they have the ability of alleviating the burden on the government for costs associated with incarcerating the offender and any future costs that may occur due to further criminal actions by the offender.\(^{176}\) Although there has been a global trend towards adopting the concept of rehabilitation, Harms JA feels that it may not be suited to South Africa where an extremely

\(^{173}\) Clough and Mulhern (n 46) 202.
\(^{175}\) Clough and Mulhern (n 46) 203.
\(^{176}\) Gobert and Punch (n 21) 217.
high level of violent crimes are committed by individuals.\textsuperscript{177} Furthermore the reasons for which individuals commit crimes are not truly understood thus it is difficult to see how they can be truly rehabilitated.\textsuperscript{178} That may be so for cases pertaining to individual offenders, but corporations only have a single motive which causes them to commit crimes and that is the procurement of profit.\textsuperscript{179} Corporations, unlike individuals, do not commit crimes due to hate, passion or economic despair.\textsuperscript{180} Accordingly if rehabilitation were to apply to corporations it would be much easier to rehabilitate a corporation as all that needs to be achieved is a reformation which will convince them that crime is not profitable thereby eliminating the “crime-conducive conditions”\textsuperscript{181} Thus rehabilitation is a viable form of sanction that should apply to corporate offenders.

Rehabilitation as a sanction ensures that steps will be taken within an organisation in order to reduce the possibility of future offences.\textsuperscript{182} This could be used where a company lacks a generally effective compliance program,\textsuperscript{183} instead of inducing a company to alter its internal structure or relying on it to implement its own compliance program, a court can order it to do so. It can be seen as both rehabilitative and punitive in nature, as the company has no option but to comply with the court intervention.

Through this method companies will be deterred from committing crimes from fear of the invasive periodic progress reports that could be required from the company as well as the unannounced inspections by inspectors.\textsuperscript{184} If the court is not satisfied with the company’s fulfilment of the terms of its order, even more invasive steps could be taken for example the CEO of the company could be substituted during the probation period.\textsuperscript{185} The temporary CEO would be afforded all the powers necessary to carry out the terms of the probation order which would be undertaken at the company’s expense. This method could be a good way of

\begin{itemize}
\item \textsuperscript{177} S v Mhlakaza 1997 1 SACR 515 (SCA) 519 D.
\item \textsuperscript{178} Gobert (n 14) 243.
\item \textsuperscript{179} par 3 above.
\item \textsuperscript{180} Coleman “Controlling corporate crime: An analysis of deterrence versus compliance” 2008 Northwestern interdisc law review 185 194.
\item \textsuperscript{181} “reformation of a company may be more feasible than rehabilitation of an individual” Gobert (n 14) 243 and see Gobert and Punch (n 21) 220 and 243.
\item \textsuperscript{182} Clough and Mulhern (n 46) 204.
\item \textsuperscript{183} See par 8 below.
\item \textsuperscript{184} Rycroft (n 3) 156 and Gobert (n 14) 12.
\item \textsuperscript{185} Gobert and Punch (n 21) 243.
\end{itemize}
inducing the company to fulfil the terms of the order on its own accord as it would fear the possibility of having a court-appointed CEO interfering in its affairs.\footnote{186}{Gobert (n 14) 13.}

The excess amount of intervention into the affairs of the company may be seen as extreme in certain instances. It is for this reason that such a penalty should be reserved for more serious offences or for repeat offenders who have not portrayed any willingness to alter their ways despite previous convictions.\footnote{187}{Clough and Mulhern (n 46) 205.}

7 Other punitive mechanisms for corporations contained in the Companies Act

The Companies Act provides for certain punitive measures which can be taken against corporate offenders,\footnote{188}{Du Toit (n 14) 236.} Section 81(e) provides that, upon application by a shareholder, a court may order that a solvent company be wound up if its directors, prescribed officers or other persons in control of the company are acting in a manner which is fraudulent or illegal.\footnote{189}{s 81(e)(i).}

The shareholders can also apply for such an order where it is just and equitable for the company to be wound-up.\footnote{190}{s 81(c) (ii).}

Furthermore Section 81(f) provides that the Companies and Intellectual Property Commission or the Takeover Regulation Panel may apply to court for an order to wind up the company, they may do so if after issuing a compliance notice on the company, it fails to abide by such notice and within the previous 5 years enforcement procedures in terms of the new companies Act or the Close Corporations Act,\footnote{191}{69 of 1984.} were taken against the company for similar conduct. The grounds that the court will grant such order are that the company, its directors, prescribed officers or other persons in control of the company are acting or have acted in a way which is fraudulent or otherwise illegal. If the order is granted it could result in an administrative fine being imposed on the company or conviction for an offence.\footnote{192}{s 81(f) (i) –(ii) and Du Toit (n 14).}

The new Companies Act also allows the Commission or Takeover Panel to impose an administration fine on a company when it has failed to comply with a compliance notice which was issued in terms of the Act.\footnote{193}{s 175(1) of the Companies Act read with s 171.}

8 Towards a system of compliance
The use of only fines against corporate offenders depicts an attitude that retributive justice is the sole aim of punishment for corporations and there is no room for restorative justice.\(^{194}\) This is unsatisfactory as corporate crime is generally attributable to “organisational and structural flaws within an organisation” as well as the inadequate monitoring systems and deplorable corporate cultures.\(^{195}\) In such cases the argument that the withdrawal of profits from the offence will act as an efficient deterrent is no longer self-sustainable and there is a strong need for internal discipline within the corporation.\(^{196}\) This opens the doors for compliance programmes which are concerned with preventing violations and remediying underlying problems whereas deterrence aims at detecting offences and punishing such offenders.\(^{197}\)

Most of the sanctions mentioned above are used as *ex post facto* forms of sanction, although compliance programs can also be *ex post facto* for example where a court orders the implementation of a compliance program as a remedial sanction, they can also operate as an effective preventative method which relies more on the threat of a sanction as opposed to the reality thereof which would induce a corporation to alter its future conduct.\(^{198}\)

The presence of an effective compliance program could be taken into account as a mitigating factor when sentencing a corporation.\(^{199}\) Gobert argues that the issue should be put beyond punishment in that positive reinforcement should be given to companies for not partaking in criminal activity and there would thus be no need for using negative reinforcement for crimes committed and thus no need for recourse to courts.\(^{200}\) The most innovative development in this regard is contained in the United States federal sentencing guidelines for organisations,\(^{201}\) the guidelines provide certain assistance as to the amount of the fine that may be imposed on a corporation. The fine begins with a base fine which is in general determined by the seriousness of the crime multiplied by the ‘culpability score’.\(^{202}\) The culpability score is an ingenious development. A company convicted of a crime is given a culpability score which is

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194 Although it is important to note that s 300 of the Criminal Procedure Act 51 of 1977 allows for the court, in criminal proceedings, to order that an offender must pay a person compensation for any damages or loss that he may have sustained due to the accused’s actions. Also see Keith (n 13) 300.
195 Gobert and Punch (n 21) 215 and see Du Toit (n 14) 241.
196 Du Toit (n 14) 241 and Rush (n 46) 57.
197 Wells (n 1) 26.
198 Clough and Mulhern (n 46) 187.
199 Du Toit (n 14) 244.
200 see Gobert (n 14) 13.
202 See s 8 C 2.4 and see Cutter “Organizational sentencing” 1994 *American Criminal Law Review* 731 734-736.
adjusted in accordance with any aggravating or mitigating factors in the given case.\footnote{Cutter (n 202) 736.} One of the most influential mitigating factors in this regard is whether there was an effective compliance program within the company which was used to prevent and detect criminal conduct at the time of the commission of the offence.\footnote{see (n 201) s8A1.2 and see Cutter (n 201) 737.} All-in-all the organisation must portray that it does not have a disregard for the law and that it has adopted a proactive plan in order to achieve compliance.

Gobert believes that this type of compliance is the way forward as a company is in a better position to monitor its activities than an external regulatory agency is.\footnote{Gobert (n 14) 14.} He however, argues that the guidelines then fail in light of the fact that it still applies the principles of negative reinforcement as a company is still punished for its wrongdoings even if it has an effective compliance program in place which means that it will be punished for the acts of a rogue individual within the company.\footnote{Gobert (n 14) 14.} The company is still convicted but the fine will be reduced, he argues that this form of ‘reward’ will not impress companies which are driven out of business due to a hefty base fine, the fact that the fine would have been more if the company had not adopted a compliance program is no consolation to the company.\footnote{Gobert however overlooks the fact that the guidelines used the words “generally effective compliance program”. This illustrates recognition of the fact that the program need not be wholly successful and the offence could have been due to a particular individual as opposed to a flaw in the company’s internal structure thus a court can take into consideration the fact that a crime was caused by a rogue individual within the corporation.\footnote{Clough and Mulhern (n 46) 188-189.} Gobert further suggests that the principles of negative reinforcement should be done away with where a company expresses a due diligence through the adoption of a compliance program. This would, in Gobert’s opinion, make self-reporting of a company’s crimes more likely as there would be incentives for it to avoid prosecution, conviction and punishment as a whole. He believes that a company should be rewarded so that it will police itself as this would be a better way to deter and detect misconduct.\footnote{Gobert (n 14) 14.} I believe that compliance programs and self-regulation are indeed useful although I do not believe that a company should be rewarded for abiding by the
law. Systems that operate on this basis fail as companies continually breach criminal or regulatory laws as there is no true threat for non-compliance.210

It seems unreasonable that a company should receive preferential treatment and be able to solely rely on the defence of due diligence in every matter. There are a multitude of factors which need to be considered and I believe it would be dangerous to create an irrebuttable presumption of innocence solely due to the fact that a company had an effective compliance programme in place. A better approach would be to follow the methods used in the United States Federal Sentencing Guidelines as the company, regardless of who used it, was used as an instrument to commit a crime which an individual cannot commit on his own and thus the company should be punished. This would act as a strong incentive for the company to upgrade its compliance programs to eradicate similar future conduct as well as to filter such punishment down to the responsible person or persons. The only issue with the guidelines is that they solely rely on fines in these scenarios which I have shown above is totally unsatisfactory.

There seems to be a trend in separating compliance and deterrence when they should rather be integrated. Deterrence revolves around the idea of preventing violations and remedying problems through punishing the violators whereas compliance rather operates by way of incentive mechanism with a *spes* that it will prevent future violations and remedy the problems. Thus the end goals of both of these aims are much the same as both are aimed at compliance but just at different stages.211 It is suggested that this integration could be achieved through the use of external regulators who could be used to advise, give directions and warnings to non-compliant companies, and when this fails the regulator could move up the ‘pyramid’ and deploy the deterrent measures at his or her disposal (such as notices and fines).212 This method was first proposed by Braithwaite through his works on the enforcement pyramid model which involves a range of sanctioning options, the initial level contains persuasive compliance methods whereas the final level contains the most drastic measures such as license revocation and prosecution would be used as a last resort.213 A problem arises in the pyramid theory with the ‘cost-calculators’ who have no interest in compliance and are only likely to comply and be deterred when the costs of non-compliance

210 Wells (n 1) 26.
211 Wells (n 1) 26-27.
212 Wells (n 1) 27.
outweigh the benefits. Due to the separation between compliance and deterrence, which means that the top half being deterrence, would only be referred to once the company has caused harm which gives the ‘rational calculators’ no reason to comply with their legal obligations.\textsuperscript{214}

I believe that the aspect of punishment should be left to the courts however, regulators would be very useful in that they could monitor whether proper compliance systems are in place and those companies which have to have mandatory compliance systems in place could be warned or issued administrative fines. Thereafter if the companies keep re-offending the matter should be handed over to the courts who can use the sanctions at their disposal to punish the corporate offenders for their non-compliance with the law. A further problem in using the pyramid method is the lack of alignment between natural persons and corporations, by treating crimes committed by corporations in a totally different manner and giving them the benefit of regulatory offences before subjecting them to the full extent of the law, it presupposes that these crimes are less worthy of condemnation than traditional crimes. To be over reliant on persuasive methods the declaratory effect or the stigma of criminal law enforcement seems to be belittled. A solution would be to incorporate regulation, as far as possible, as a type of enforcement of criminal law.\textsuperscript{215} The distinction between crime and regulation is a hampering factor that should be eliminated as far as possible.\textsuperscript{216} In the United States for example compliance programs have gained much ground and are encouraged in the U.S attorneys manual to federal sentencing guidelines as well the corporate law of Delware.\textsuperscript{217}

7.1 Compliance in South Africa

At present any state-owned company, listed public company or any company which has scored above 500 points in terms of its public interest score,\textsuperscript{218} must appoint a social and ethics committee,\textsuperscript{219} at its own expense.\textsuperscript{220} This committee is tasked with monitoring the company’s daily activities in order to ensure that it complies with any legislation, legal requirements or codes pertaining to an array of factors, of particular importance in the current discussion are those aimed at health and public safety, good corporate citizenship and the

\textsuperscript{214} Wells (n 1) 27.
\textsuperscript{215} Wells (n 1) 27.
\textsuperscript{216} Wells (n 1) 28.
\textsuperscript{217} Alschuler (n 84) 1390.
\textsuperscript{218} See regulation 26(2) of the Companies Act for further detail.
\textsuperscript{219} For further detail see s 72(4) of the Companies Act read with regulation 43(1).
\textsuperscript{220} see s 72(9) of the Companies Act.
impact of the company’s activities and of its products and services.\textsuperscript{221} Moreover the committee is required to draw certain matters to the board of director’s attention and to annually report to the shareholders, it has a wide array of powers in performing its functions which allow it to require necessary information from any director, prescribed officer or employee.\textsuperscript{222} The problem is that, although the committee has the above duties its powers are merely advisory and it has no authority to force the board of directors to comply thereto.

The King III report and code is based on the premise that ethics is the foundation of corporate governance and a company should be run ethically.\textsuperscript{223} The code provides that a board should ensure that the company is a good corporate citizen.\textsuperscript{224} The idea of good citizenship entails a reciprocal ethical responsibility between the company and the society in which it carries on its business.\textsuperscript{225} Another important aspect contained in the King report is that it requires that the board of directors ensure that the company complies with the applicable law, rules, codes and statutes.\textsuperscript{226} Furthermore it requires that such compliance should be incorporated in the company’s code of conduct to ensure a compliance culture.\textsuperscript{227} Even though compliance with the King III report and code is meant to be compulsory for companies listed on the JSE, the concept falls into the same problem as the social and ethics committee in that there are no consequences for non-compliance thereof. Regardless of these issues the practices contained in the King report and code are greatly recommended and have much influential force which are very enticing to all other entities.\textsuperscript{228}

These are all important developments in compliance methods and they could be used to better the sentencing of corporate offenders. The South African legislature could include these factors in the development of sentencing guidelines similar to that of the United States federal sentencing guidelines. They could for example provide that in the absence of any of the above mentioned forms of compliance programs or a social and ethics committee, the sentence will be heavier than it would with the presence thereof. Thus such compliance programs and internal control mechanisms would depict a good corporate ethos which will

\textsuperscript{221} see regulation 43(5) of the Companies Act.
\textsuperscript{222} see regulation 43(5) of the Companies Act.
\textsuperscript{223} Principle 1.1 of the King III report.
\textsuperscript{224} Principle 1.2 of King III Report.
\textsuperscript{225} Cassim Contempory Company Law (2012) 477.
\textsuperscript{226} Principle 6.1 of the King III Report.
\textsuperscript{227} Principle 6.4.of the King III Report.
\textsuperscript{228} Cassim (n 224) 476-475.
act as a mitigating factor and result in a lesser sentence being imposed on the offender who is striving to be a good corporate citizen.\textsuperscript{229}

The Companies Act further requires that every public company and state-owned company has a company secretary.\textsuperscript{230} Amongst many others the company secretary has the following duties:\textsuperscript{231}

(a) providing the directors of the company with guidance with regard to their duties, responsibilities and powers;

(b) bringing any laws which are relevant to the company to the director’s attention;

(c) reporting to the board on any failure by the company or a director to comply with the Memorandum of Incorporation or rules of the company or the Act;

(d) being responsible for the company’s compliance with the requirements of Part C of the Act.\textsuperscript{232}

All-in-all the secretary has a very important role in helping the board in achieving proper compliance and proper corporate governance.

The introduction of the abovementioned principles have been great developments in the compliance sphere. However, as I have mentioned they are not able to pose any real obligations on a company. A solution could be to introduce administration fines into the issue. Where the committee observes that a company has failed to comply with the instructions of the committee or the rules contained in the King III code, it should be able to issue a compliance notice on the company. If the company thereafter still fails to comply the committee should be able to impose an administrative fine on the company.\textsuperscript{233} For more serious crimes the matter could be referred to court for criminal prosecution. By introducing administrative fines in this manner the courts functions will also be alleviated as they would not have to handle cases which could be more effectively handled outside of court, such as minor issues of non-compliance.

\textsuperscript{229} Du Toit (n 14) 249-250.
\textsuperscript{230} s 84(4)(a) and s 86(1)
\textsuperscript{231} See Cassim (n 225) 419.
\textsuperscript{232} S33(3). The requirements mentioned are: transparency, accountability and integrity of companies.
\textsuperscript{233} The committee could be granted powers similar to those of the Companies and Intellectual Property Commission and the Takeover Regulation Panel. See par 7 above.
It is also important to note from a less theoretical viewpoint, that at present the South African court system is not sufficiently equipped to handle and police these newer forms of sanctions in the way that I have envisaged. Thus, before any new sentencing regime is adopted the courts will have to be upgraded to cater for such regimes.

**Conclusion**

Although presiding officers in South Africa are given a discretion as to which sanction they wish to impose on an individual offender during the sentencing stage, the only sanction that may be imposed on a corporate offender is a fine. Corporations commit crimes solely due to their ‘corporate mentality’ thus the only way to stop corporate crimes is to persuade corporations that crime is not profitable.

As I have highlighted in this dissertation, there are many problems associated with fines as the sole form of punishment for corporate offenders. It is abundantly clear that the aims of punishment and the persuasion of the corporate mentality are not truly attainable if the legislature insists on holding onto these archaic methods of sentencing for corporations. The existing methods employed by the Criminal Procedure Act depict an indifferent attitude towards corporate crime which is totally unsatisfactory as corporations, as was shown by the Pinetown accident, cause inordinate harm to society through their criminal acts.

The solution is to implement a separate comprehensive sentencing regime which is aimed purely at corporations and affords a judge a range of sanctioning possibilities in order for him or her to exercise their discretion in a manner which limits the spill-over effects and avoids the deterrent trap, whilst ensuring that the corporation is adequately deterred and rehabilitated. I have considered but some of the alternative forms of sanctions which could be utilised by the courts. Of these the restraint orientated sanctions and adverse publicity are perhaps the most likely sanctions to carry with them unwanted spill-over effects. Community service orders and probation orders on the other hand are unlikely to carry any over-spill. Furthermore the latter forms of sanctions are most beneficial to the community.

That may be so, however in developing a new sentencing regime the legislature needs to reflect not only on the *ex post facto* forms of sanction but also those beyond punishment which are aimed at the prevention of corporate offences. Companies need to be encouraged to alter their internal structures and to adopt certain codes of ethics and good practice in order to create good corporate citizens. Indeed a company is best equipped to regulate itself and the
adoption of compliance programs should be embraced in South Africa. However, the idea of rewarding companies for doing so as well as too much reliance on self-regulation would be naïve. Companies should abide by the law from fear of the array of criminal sanctions at a courts disposal.

The new Companies Act and the King Code III have opened the door for compliance in company law and it is high time that criminal sentencing should follow suit. Perhaps South Africa should consider the culpability score approach as is used in the United States Sentencing Guidelines. Courts could consider a multitude of factors which would influence such ‘score’ and certain factors would reduce the score.

I mentioned above that the matter should be left to the courts discretion, however I do believe that the legislature could provide certain minimum factors which the courts could consider in exercising their discretion. These factors could include the criminal history of the company, the degree of harm caused by the crime committed, the preventative steps taken by the company such as the implementation of a compliance program et cetera. This list however, should not be a closed list. Once the court is satisfied with the determination of the culpability score it would then be able to impose a proportionate combination sanction on the corporation from the array of possible sanctions which would have been provided by the new sentencing guidelines.

If one considers the Pinetown accident the ideal scenario in that case would have been that the company would have had a keen interest in implementing the correct safety mechanisms to ensure that its trucks were roadworthy, that it would implement training programs and evaluation programs to ensure that the truck drivers were up to the standards required of them. This perfect world scenario would be procured solely due to the fact that the company would have ensured that it complied with the law from fear of being subjected to the wrath of the new comprehensive corporate sentencing scheme which I have proposed.
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