

Corporate Criminal Liability for Corporate Killing in Malaysia

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Abstract

The overwhelming majority of corporate killing cases in Malaysia have attracted no criminal justice attention. Are corporations free to kill? Unrestricted corporate power generates immeasurable social damage. What can be done to curtail the reckless, negligent, and immoral practices by these corporations? While legislative and regulatory mechanisms currently exist, they are simply insufficient and ill-fitting. This paper focuses on criminal liability for manslaughter arising out of work-related deaths caused by corporations, referred to as corporate killing. Specifically examining fatal accident cases in the Malaysian construction industry, the author seeks to assess the possible application of corporate killing in Malaysia. Ultimately, this paper argues that Malaysia should incorporate corporate killing legislation to pave the way for more accurate, effective, and fair prosecutions of corporations for their acts of killing.

Keywords: Corporate Killing - OSHA 1994 - Corporate Criminal Liability - Workplace Deaths - Construction Industry

1. Introduction

Society demands that perpetrators, living or artificial, suffer the requisite punishment.³⁴⁴ Corporations can and do kill,³⁴⁵ as numerous fatalities at workplaces have been ascribed to the failure of corporations in safeguarding working conditions and practices.³⁴⁶ The offence of 'corporate killing' refers to occurrences where culpability can be attributed to a corporation for the death of a human being.³⁴⁷ In Malaysia, corporate killing involves killing at workplaces, killing due to unsafe products, killing of third parties due to companies' negligent business operations, and killing involving public transportation.³⁴⁸ With ever-increasing economic growth and technological advancement, the problem of workplace accidents is increasingly alarming. Malaysia's Department of Occupational Safety and Health reported that there were 259 fatal accident cases in 2019, of which 84 were killed at construction sites - recording the highest number of deaths across the nation's economic

³⁴⁴ Sylvia Rich, 'Corporate Criminals and Punishment Theory' [2016] 29 CJLP 97.

³⁴⁵ Donald Miester, 'Criminal Liability for Corporations that Kill' [1990] 64 TLR 919.

³⁴⁶ Robin Edwards, 'Corporate Killers' [2001] 13 AJCL Law 231.

³⁴⁷ Ireland Law Commission, *Consultation on Corporate Killing* (LRC CP 26 - 2003).

³⁴⁸ Hasani Mohd Ali, 'Corporate Killing for Malaysia: A Preliminary Consideration' [2009] 13 JUM144.

sectors.³⁴⁹ The construction industry in Malaysia employs an estimated 1.2 million workers - close to 10 percent of Malaysia's workforce – and is a major contributor to the economy.³⁵⁰ While being one of the most important industries in terms of GDP contribution, it has long been recognised as one of the riskiest sectors and should not be left to its own devices.

Fatal accidents caused by corporations could be prevented through the enforcement of corporate killing. Thus, this paper focuses on the possible application of corporate killing liability in Malaysia, by critically assessing justifications for the doctrine of corporate killing and considering approaches that have been used by other common law countries. The general goal is to contribute to a more cogent framework of corporate criminal liability in Malaysia.

2. Basis of Corporate Criminal Liability

Corporate criminal liability refers to the legal responsibility of a corporation for criminal actions, or the failure to act in some cases, committed by the corporation's employees for the benefit of the corporation.³⁵¹ This section considers the basis of corporate criminal liability: first, by discussing the legal standing of a corporation and how it is separate from those who create it, and, secondly, by examining the common law attribution models for corporate criminal liability.

Companies are 'distinct and independent' entities that are separate from their members. The House of Lords' decision in *Salomon v Salomon & Co Ltd*³⁵² is the leading case that introduced the significance of the separate legal personality. There, Lord Halsbury stated "... it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself". French contends that corporations are more than a group of persons with a purpose, expounding a "theory that allows treatment of corporations as fully-fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings",³⁵³ namely recognising companies as distinct and separate entities.

³⁴⁹ Department of Occupational Safety and Health, 'Occupational Accident Statistic 2019' (*DOSH*, 2019) <<https://www.dosh.gov.my/index.php/statistic-v/occupational-accident-statistics-v?own=0>> accessed 10 May 2020.

³⁵⁰ Anon, 'NST Leader: Building death' *New Straits Times* (Kuala Lumpur, 17 February 2020) <<https://www.nst.com.my/opinion/leaders/2020/02/566175/nst-leader-building-death>> accessed 11 May 2020; Construction Industry Development Board (CIDB), *Construction Industry Review 1980-2009 (Q1)*.

³⁵¹ YBhg Datuk Tun Abd Majid b. Tun Hamzah, 'Extent of Responsibilities of Corporate Organisations for Bribery Acts of Their Employees' (*Legal Plus Sdn Bhd*, 2 Dec 2014) <<https://www.legalplus.com.my/extent-of-responsibilities-of-corporate-organisations-for-bribery-acts-of-their-employees/>> accessed 7 April 2020.

³⁵² [1897] AC 22 (HL).

³⁵³ Peter French, 'Collective and Corporate Responsibility' [1984] CUP 32.

Although corporations are artificial legal creations with no physical existence, conscience, beliefs, feelings, thoughts nor desires, it is argued that justice is generally not served by prosecuting some natural person who happens to work for the corporation. Thus, companies themselves should face justice.³⁵⁴ If corporations are legal personalities, corporations should be considered to have moral personalities. While companies have unlimited capacity,³⁵⁵ they should be able to be convicted of crimes such as manslaughter.

Companies as legal entities generally require *actus reus* and *mens rea* to be liable for crimes.³⁵⁶ The maxim *actus non facit reum nisi mens sit rea* is a distinctive feature of criminal law. It is translated as ‘an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence’. A common dispute that surfaces when attributing criminal liability to corporations is that corporations do not have minds nor wills of their own, thus being incapable of possessing the requisite *mens rea*. As Ferguson comments, “ ... the central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state (or *mens rea*) - a required element of most criminal offences - to non-human, artificial entities.”³⁵⁷ Theorists such as French, Fisse, Braithwaite, and Bucy established the concept that the mental element of corporate misbehaviour can be found in the corporation’s culture.³⁵⁸ This means that the court could be required to review the entire corporate arrangement within the managerial hierarchy, to see whether the corporation’s arrangement or operations created scope for the commission of the offence.

Common law models hold individuals liable for corporate crimes, and then attribute it to the company.³⁵⁹ The main forms of attribution are vicarious liability and the identification principle.³⁶⁰ The vicarious liability principle renders any act committed by an employee within the scope of corporate activity attributable to the company, be it the *mens rea* or *actus reus*, or both. It is wholly derivative.³⁶¹ Lord Atkins, in *Moussell Bros Ltd v London and Northwestern Railway Co*³⁶² held that an employer can be vicariously liable for the criminal

³⁵⁴ *Ibid.*

³⁵⁵ Companies Act 2016, s 21.

³⁵⁶ Maria Kelt and Herman von Hebel, ‘General Principles of Criminal Law and the Elements of Crime’ in Roy S K Lee ed, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc. 2001) 14.

³⁵⁷ Gerry Ferguson, “Corruption and Corporate Criminal Liability” in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998* (Freiburg: edition inscristum 1999) 153.

³⁵⁸ Brent Fisse and John Braithwaite, ‘Corporations, Crime and Accountability’ [1993] CUP 75.

³⁵⁹ Kathleen F Brickey, *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents* (2nd edn, CBC 1992) 8.

³⁶⁰ Aiman Nariman MohdSulaiman, Effendy Othman, *Malaysia Company Law: Principles and Practices* (2nd edn, CCHM 2018) 105.

³⁶¹ John Minkes and Leonard Minkes, *Corporate and White Collar Crime* (1st edn, Sage Publications Ltd 2008) 64.

³⁶² [1917] 2 KB 836.

conduct of its employee as long as said conduct was committed in the course of his employment and the relevant statutory provision criminalising such conduct does not state that it may only be committed by a natural person.

On the other hand, the main underlying principle of the identification principle is the derivation of the requisite *mens rea* from the company's 'directing mind and will'. This refers to an individual or individuals who are of sufficient standing that they are 'identified' with the company. This requires courts to determine if the crime was committed by a high position officer who might be considered an 'alter ego' of the company. It is also known as the directing mind theory, as seen in *Tesco Supermarkets Ltd v Natrass*,³⁶³ where the House of Lords held that a corporation can be held liable for an offence committed by its employee as long as the employee is considered as the 'directing mind' of the corporation.

To date, Malaysia has no workable doctrine for the imputation of criminal liability to corporations.³⁶⁴ While most Malaysian cases apply the identification principle,³⁶⁵ vicarious liability has been applied in several cases such as in *PP v Teck Guan Co Ltd*³⁶⁶ and *Kumpulan Wang Persaraan (Inc.) v Meridian Asset Management Sdn Bhd* - these cases have not been overruled.³⁶⁷ Both theories are muddled and problematic due to the difficulty in proving a causal link between the wrongdoer and the crime, mainly in cases where systemic errors are present.

3. Corporate Killing in Malaysia

Currently in Malaysia, there is a plethora of legislation that addresses different areas of criminal corporate liability.³⁶⁸ However, there is no single consolidated legislation in place for the offence of corporate killing in Malaysia, rendering it effectively unrecognised legally.³⁶⁹ Corporate crimes are not only physically or financially harmful, but can also disrupt the moral fabric of society,³⁷⁰ threatening the trust that is fundamental to community life.³⁷¹ Families of victims and employees without recourse lose their sense of security and hope in the flawed legal system, while corporations escape despite having unsafe working environments. This is partly due to the fact that existing laws which impose liability upon the corporation do not cover negligent manslaughter even though workplace deaths involving corporations continue to persist.

³⁶³ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

³⁶⁴ Ali (n 5) 144.

³⁶⁵ Ali (n 5) 146-148.

³⁶⁶ *PP v Teck Guan Co Ltd* [1970] 2 MLJ 141.

³⁶⁷ *Kumpulan Wang Persaraan (Inc.) v Meridian Asset Management Sdn Bhd* [2013] 9 MLJ 614.

³⁶⁸ Section 144 of the Securities Commission Act 1993, s 138(3); Consumer Protection Act 1999.

³⁶⁹ Ali (n 5) 145.

³⁷⁰ Sir Henry Sumner Maine, *Ancient Law*, (10th edn, London: J..M. Dent & Sons Ltd 1931) 16.

³⁷¹ Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (1st edn, San Francisco: Sierra Club Books 1989) 10.

3.1.1 Malaysian Legislation

Legislation enforced by the Department of Occupational Safety and Health to implement safety and health requirements for construction sites and regulate construction activities are found in the Occupational Safety and Health Act 1994³⁷² and Factories and Machinery Act 1967.³⁷³ The Factories and Machinery Act 1967 was enacted in 1967 to legislate matters relating to the safety, health, and welfare of persons in respect to the registration and inspection of machinery which are still applicable today.³⁷⁴ However, criticisms of the Act led to the enactment of the Occupational Safety and Health Act 1994, an Act that was based largely on the United Kingdom's Health and Safety at Work Act 1974.³⁷⁵ The main purpose of the Occupational Safety and Health Act 1994 is to secure the safety, health, and well-being of employees at work by providing the legislative framework to promote, stimulate, and encourage high standards of safety and health at work.³⁷⁶ Its enactment took on an approach of encompassing self-regulation which was based on the Robens Report, which states that the responsibility for managing safety and health lies with those who create the risks and those who work with the risks.³⁷⁷ The Occupational Safety and Health Act 1994 was a step forward for Malaysia due to its comprehensive approach in dealing with workplace accidents, where all related parties must participate in the efforts.

Under the Occupational Safety and Health Act 1994, responsibilities are clearly laid out in order to provide an opportunity for the enforcement division to better carry out enforcement procedures. Section 39 of the Act provides Occupational Health and Safety officers with various powers, such as the power to enter premises, to inspect, to investigate, to confiscate and to take samples. Section 52 provides for offences committed by a body corporate. In this context, a body corporate is like a person who is subject to sanctions of criminal law. However, since a corporation cannot be imprisoned, Section 56 provides that a body corporate or trade union that is convicted shall only be liable to the imposition of a fine only. Section 61 provides for prosecution by the Occupational Health and Safety officer or an officer specially authorised in writing by the Director-General. The power to prosecute cannot be undertaken without the consent of the Public Prosecutor of the Attorney General Chambers. In addition to prosecution, the Department of Occupational Safety and Health is authorised to issue notices, such as improvement and prohibition notices under section 48.

³⁷² Occupational Safety and Health Act 1994.

³⁷³ Factories and Machinery Act 1967 (FMA).

³⁷⁴ Roznah Ab Rahman, 'Safety and Health at Work Legislation in Malaysia: Current Direction and Challenges' [2011] 1 LNS 27.

³⁷⁵ Health and Safety at Work Act 1974.

³⁷⁶ Section 4 of the Occupational Safety and Health Act 1994.

³⁷⁷ Ismail Bahari, *Pengaturan Sendiri Di Dalam Pengurusan Keselamatan dan Kesihatan* (1st edn, McGraw Hill, 2002).

They may prosecute corporate entities if they fail to satisfy the requirements contained in notices, and directly prosecute these entities for offences committed under the Act.³⁷⁸

Under the Interpretations Acts 1948 and 1967, a person is defined to include a 'body corporate'.³⁷⁹ Strictly speaking, whenever the term 'person' is used in legislation - as often is the case - it would encapsulate a body corporate. A 'body corporate' is included within the definition of a 'company' and a 'corporation' as defined in sections 3 and 134 of the Companies Act 2016. Section 11 of the Malaysian Penal Code also defines the word 'person' to include any company or association or body of persons, whether incorporated or not.³⁸⁰ A person responsible for death may be charged either under sections 302 (for murder) or 304 (culpable homicide not amounting to murder) or 304A (causing death by negligence) of the Penal Code.³⁸¹ Though it is not very likely that industrial death will result in the charge of murder under Section 302, a charge for culpable homicide not amounting to murder under Section 304 or causing death by negligence under Section 304A is likely to be levelled against the offender. The question here is whether a corporation can be charged for death or fatality due to a workplace accident. There is no doubt that the meaning and status of corporations as a legal person is well developed under company law, however, the law is silent on the position of corporate liability for killing. The cases below will illustrate that none of the Malaysian cases have found corporate entities liable for the death of persons. In short, regulations in Malaysia have proven to be insufficient, under-enforced, and perceived as non-criminal matters, risking many going unpunished and unregulated.

3.2 Major Casualties in Malaysia

A report by the International Labour Organisation on the deaths of Nepali workers overseas stated that Malaysia had the highest number of deaths, followed by Saudi Arabia and Qatar.³⁸² The construction sector in Malaysia is responsible for a number of these deaths as it incurs higher accident risks in comparison to other sectors.³⁸³ This was evidenced by a report released in 2018 by the Construction Industry Development Board of Malaysia (CIDB), which stated that the fatality rate in the Malaysian construction industry is approximately 10 times higher than that in the United Kingdom. This may be attributed to how construction workers are unprotected from probable worksite threats such as treacherous heights, hazardous weights, sharp moving objects, electric currents, and

³⁷⁸ Section 61 of the Occupational Safety and Health Act 1994.

³⁷⁹ Section 3 of the Interpretations Act 1948 and 1967.

³⁸⁰ Section 11 of the Penal Code.

³⁸¹ Sections 302, 304 and 304A of the Penal Code.

³⁸² Maria Chin Abdullah, 'Treat Migrant Workers Right' *The Sun Daily* (Kuala Lumpur, 8 May 2019) <<https://www.thesundaily.my/opinion/treat-migrant-workers-right-FG855788>> accessed 2 May 2020.

³⁸³ The Department of Occupational Safety and Health (n 6).

chemicals.³⁸⁴The following are some instances of fatality cases in Malaysia: as recent as the 10 January 2020, a construction company manager died after slipping from a height of 3.9 meters while inspecting formwork, and on May 2019, an Indonesian couple was killed in a worksite incident at Gombak LRT station where a multi-storey car park under construction in Taman Melati collapsed.³⁸⁵

In 2016, a fatal accident in Bukit Bintang in which a failing crane killed a 24-year-old woman instigated a Department of Occupational Safety and Health crackdown on crane operators.³⁸⁶ Solutions to reduce crane accidents have been unsatisfactory due to the poor implementation of a secure approach by employees and the inadequately trained crane handlers.³⁸⁷For example, the QR code solution implemented to prevent the falsification of a crane operator certificates had proven itself to be inadequate.³⁸⁸ The *Jaya Supermarket* case illustrates that construction sites are not only danger zones to workers, but also the public.³⁸⁹ In the case, the building collapsed and killed company employees and other non-employees, resulting in both the company and director being charged under Section 17 of the Occupational Safety and Health Act 1994.³⁹⁰ In the case of *Bright Sparklers Explosion* 1991, the Royal Commission of Inquiry found the company responsible for the fatal accident but, nevertheless, the company and its officers were not prosecuted in court.

There are many other corporations in Malaysia that have failed to abide by regulations and policies designed to prevent harm. However, close to none of these cases will likely bring about the filing of homicide charges, much less a successful prosecution for the crime. This is upsetting because in most cases, the fear of prosecution may deter corporations from becoming offenders while encouraging an environment of compliance to laws and regulations.

Corporations have failed to provide safe work systems, such as safety practices and risk control. This is because many corporations sacrifice safety for profits by not establishing

³⁸⁴ Construction Industry Development Board (CIDB) (*CIDB Annual Report*, 2018) <<http://www.cidb.gov.my/index.php/en/corporate-info/annual-report>> accessed 4 May 2020.

³⁸⁵ Anon, 'Building collapse near Gombak LRT Terminal: Indonesian couple found in final embrace' *Malay Mail* (Kuala Lumpur, 23 May 2019) <<https://www.malaymail.com/news/malaysia/2019/05/23/building-collapse-near-gombak-lrt-terminal-indonesian-couple-found-in-final/1755830>> accessed 29 September 2019.

³⁸⁶ Royce Tan, Yee Xiang Yun, N. Trisha, 'Crackdown on Crane Drivers', *The Star Online* (Kuala Lumpur, 6 September 2016) <<https://www.thestar.com.my/news/nation/2016/09/06/crackdown-on-crane-drivers-dosh-to-order-stop-work-at-sites-with-unqualified-operators/>> accessed 20 September 2019.

³⁸⁷ Muhammad Ikhwan Rozali and Hazinah Kutty Mammi, 'Secure Crane Operator Certificate Using Encrypted QR Code' [2018] 3 UTM Computing Proceedings 1.

³⁸⁸ *Ibid.*

³⁸⁹ Anon 'Standard Keselamatan di Tapak Pembinaan Perlu Dipertingkatkan', *Bernama* (Kuala Lumpur, 31 March 2008) <<http://www.nccc.org.my/v2/index.php/nccc-di-pentas-media/2008/991-bernama--standard-keselamatan-di-tapak-pembinaan-perlu-dipertingkatkan>> accessed 20 October 2019.

³⁹⁰ Yuen Mei Keng, 'Jaya Supermarket Collapse: Director Yap Choon Wai' *The Star Online* (Petaling Jaya, 27 September 2010) <<https://www.thestar.com.my/news/nation/2010/09/27/jaya-supermarket-collapse-director-yap-choon-wai-charged>> accessed 27 September 2019.

wide-ranging accident prevention policies and instead focus on maximising profit.³⁹¹The top reasons for fatal construction accidents are unsafe techniques, job site conditions, human elements, ineffective management, unsafe equipment, etc.³⁹² Whereas the leading sub-causes are working at high elevation, incorrect or no work procedures, and failure of structures.³⁹³ The most ordinary non-compliance is the failure of corporations to grant adequate supervision and risk assessments under Section 15 of the Occupational Safety and Health Act 1994, causing deaths of employees.³⁹⁴To add, apart from public-listed companies, corporate social responsibility is not mandatory for most companies in Malaysia, thereby removing social accountability.³⁹⁵ Most companies also do not prioritise compliance with corporate governance standards and guidelines.³⁹⁶To solve these issues, it is proposed that the implementation of a cogent corporate killing framework would ensure a higher level of compliance by holding corporations liable and preventing them from escaping without repercussions.

3.3 Effectiveness of the Occupational Safety and Health Act 1994

Although the Occupational Safety and Health Act 1994 places emphasis on criminal sanctions for any breach or non-compliance, after 26 years, what remains to be seen is whether these sanctions are enough of a deterrent.³⁹⁷The usual actions taken against corporations are administrative in nature, such as suspending licenses and giving preference to individual liability.³⁹⁸ Furthermore, in most cases, corporations would rather pay fines than undergo criminal trials under the Occupational Safety and Health Act 1994 due to the comparatively low fines, risks of loss of reputation, and the intensity of a full trial.³⁹⁹ Current penalties in Malaysia are a maximum fine of RM50,000 and imprisonment of not more than 2 years.⁴⁰⁰ It is severely insufficient and will only promote the breach of laws as it is less costly to pay fines than to abide by the law and improve companies' health and safety procedures. In 2016, construction company Ireka Engineering was only fined RM15,000 for failing to provide a safe working system which resulted in a labourer falling to death. In the

³⁹¹ Abdul Abdul Hamid, Muhd Abd. Majid and Bachan Singh, 'Causes of Accidents at Construction Sites' [2008] MJCE 244.

³⁹² Abdul Rahim Abdul Hamid, *et al*, 'Causes of Crane Accidents at Construction Sites in Malaysia' [2019] IOPCS 220.

³⁹³ *Ibid*.

³⁹⁴ Abdul Rahim Abdul Hamid, *et al*, 'Noncompliance of the occupational safety and health legislation in the Malaysian construction industry' [2019] IOPCS 220.

³⁹⁵ Mohammed Abdullah Mamun, 'Corporate Social Responsibility Disclosure in Malaysian Business' [2017] 2 ASMJ.

³⁹⁶ Nadya Ngui, 'More than 180 Malaysian listed firms lack compliance' *The Star*, (Kuala Lumpur, 17 December 2015) <<https://www.thestar.com.my/business/business-news/2015/12/17/slack-on-governance>> accessed 20 October 2019.

³⁹⁷ Section 3 of the Occupational Safety and Health Act 1994.

³⁹⁸ Ali (n 5) 146-148.

³⁹⁹ Kamal Halili Hassan, 'Corporate Liability Under Malaysian Occupational Safety and Health Legislation' [2015] 16 IJBS 281, 291.

⁴⁰⁰ Section 19 of Occupational Safety and Health Act 1994.

same court, Asia One Management Development Sdn Bhd was fined RM15,000 for a similar offence.⁴⁰¹ With due respect to the Sessions Court, the penalty is measly and cannot correspond with the offences committed. Moreover, prosecution is not a core component of the regulatory process, and convictions mostly only result in sanctions that are less harsh compared to criminal law.

The success of any legislation depends on its execution and enforcement. In the case of the Occupational Safety and Health Act 1994, it has been proven that the implementation and enforcement of the law have been largely ineffective.⁴⁰² Section 29 of the Occupational Safety and Health Act 1994 states that in certain classes of industries, Safety and Health officers shall be appointed. These officers shall possess such qualifications or have received such training as the Minister may from time to time prescribe. The Occupational Safety and Health (Safety and Health Officer) Order 1997 states the classes of industry activity that are required to employ full-time Department of Occupational Safety and Health-registered Safety and Health officers, besides stipulating the qualifications for a person to register with the Department of Occupational Safety and Health as a qualified Safety and Health officer.⁴⁰³ Since these Safety and Health officers are employed by contractors, it is likely to cause them to lack autonomy, resulting in less stringent regulations to be implemented.⁴⁰⁴ Site inspections are often only done after significant incidents such as fatalities or complaints.⁴⁰⁵ The shortage of enforcement, monitoring, and safety audits on compulsory safety and health requirements is largely due to a lack of dedication, inadequate workforce, and low budget allocation.⁴⁰⁶ Enforcement and monitoring from the Department of Occupational Safety and Health seem to be lenient and inadequate for employers due to reasons like the shortage of enforcement officers.⁴⁰⁷ Annually, there are around 24,000 operating construction sites running but with only 110 Department of Occupational Safety and Health officers available, and only a third of the sites get scrutinized.⁴⁰⁸ Furthermore, the reluctance or failure to notify the Department of Occupational Safety and Health on accident cases results in unproductive investigations from the enforcement authority, causing inaccuracy in control measures of proposed improvement action plans.⁴⁰⁹

⁴⁰¹ Bernama, 'Construction firms fined over safety issues after workers' deaths' *Malaysia Kini* (Kuala Lumpur, 16 November 2016) <<https://www.malaysiakini.com/news/363067>> accessed 27 September 2019.

⁴⁰² Rohaida Affandi and Hock Tai Chia, 'The Weaknesses of OSHA 1994 Implementation in Malaysian Construction Industry' [2014] 4 UNIMAS JCE 1178.

⁴⁰³ Occupational Safety and Health (Safety and Health Officer) Order 1997.

⁴⁰⁴ Section 29 of Occupational Safety and Health Act 1994.

⁴⁰⁵ Dr Jefferelli Shamsul Bahrin, 'Self-Regulation and Occupational Safety and Health Act (OSHA) 1994' *DOSH* <<http://www.dosh.gov.my/index.php/list-of-documents/osh-info/occupational-health-3/2082-self-regulation-and-occupational-safety-and-health-act-osh-1994/file>> accessed 27 September 2019.

⁴⁰⁶ Affandi and Chia (n 61).

⁴⁰⁷ Hamid (n 51).

⁴⁰⁸ Heap Yih Chong, Thuan Siang Low, 'Accidents in Malaysian Construction Industry: Statistical Data and Court Cases' [2014] 20 JOSE503.

⁴⁰⁹ Hamid (n 51).

3.4 Malaysia's Theory on Corporate Criminal Liability

As mentioned, it is unclear if the identification principle or vicarious liability applies in Malaysia. However, cases show that Malaysia is more heavily shaped by the identification principle.⁴¹⁰ A recent development shows that the principle was expanded to include architects and employers instead of just the contractor, causing further confusion.⁴¹¹ In the case of *Yue Sang Cheong Sdn Bhd*, the Federal Court specifically stated that *mens rea* was essential in proving the guilt of the company and is to be ascertained from those entrusted with powers.⁴¹² The case of *Yap Sing Hock & Anor v Public Prosecutor* held that corporations can be held liable for offences where the officer or director can be regarded, from evidence, as the controlling will of the company.⁴¹³

However, the identification principle imposes severe limitations on the scope of corporate liability and has been subjected to a barrage of criticism by experts. Pinto and Evans submit that only a narrow class of corporate officers' acts in law are attributable to their employer.⁴¹⁴ Moreover, there is great difficulty in identifying an individual who embodies the company and who is culpable. It also limits the liability of corporations where the commission of crimes is beyond the power of the directing mind of corporations, as seen in *PP v Kedah & Perlis Ferry Service Sdn Bhd*.⁴¹⁵ In this case, the company was charged for 'being knowingly in possession' of disapproved goods without receiving clearance from the customs department. The Courts did not impose a finding of guilt on the company because the company officers and agents had no knowledge that the goods did not receive custom clearance. This illustrates that if they can prove that they have no knowledge of offences, the corporation can be considered not guilty, fleeing from its responsibility.⁴¹⁶ It has also been proven to be much harder to prosecute large corporations as the directing mind could not be found due to a more diffused structure, where overall responsibility for safety matters can be blurred and no one individual may carry that responsibility. This discriminates against small companies with identifiable designated responsibilities. This issue is central to our discussion, as larger corporations are usually the cause of major disasters and significant human casualties.

⁴¹⁰ *R v HM Coroner for East Kent, ex parte Spooner* [1989] 88 Cr App R 10.

⁴¹¹ Bernama, 'Amendments to OSHA to be tabled in Parliament this month' *The Star* (Taiping, 1 March 2019) <<https://www.thestar.com.my/news/nation/2019/03/01/amendments-to-osha-to-be-tabled-in-parliament-this-month>> accessed 20 October 2019.

⁴¹² *Yue Sang Cheong Sdn Bhd v Public Prosecutor* [1973] 2 MLJ 77.

⁴¹³ *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714.

⁴¹⁴ Amanda Pinto, Martin Evans, *Corporate Criminal Liability* (2nd ed, Sweet & Maxwell 2008) 39.

⁴¹⁵ *PP v Kedah & Perlis Ferry Services Sdn Bhd* [1978] 2 MLJ 221.

⁴¹⁶ Home Office, 'Reforming the Law on Involuntary Manslaughter: The Government's Proposal' (Home Office, May 2000) 13.

4. Corporate Killing: Australia and the United Kingdom

Corporate killing is statutorily recognised in the United Kingdom (UK) and some Australian states.⁴¹⁷ In Australia, the federal statute of the *Criminal Code Act 1995* significantly altered the Australian law of corporate criminal responsibility. The Act addresses issues of corporate criminal responsibility by introducing what it referred to as the "corporate culture" principle. The Act defines 'corporate culture' as an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred.⁴¹⁸ This principle enables the court to examine the entire corporate arrangement, especially within the managerial hierarchy, to see whether the corporation's arrangement or operations created scope for the commission of the offence. Section 12.3 of the Act provides that one of the ways of proving the fault element in an offence involving a corporate body is to prove that a corporate culture existed within the body corporate that directed, encouraged, tolerated, or led to non-compliance with the relevant provision, or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. This rule of attribution significantly departs from the identification principle - there is no longer a need to link the conduct of senior managers and the way the organisation was managed. It does not focus on the conduct of a particular individual as is done under common law but on the corporation as a whole.⁴¹⁹ Therefore, it is immaterial that the company had a policy in place aimed at preventing the occurrence of the offence if the "culture" as a whole, in fact, encouraged it. The law enables an inference to be drawn as to whether the overall organisational structure encourages positively or implicitly the commission of the particular offence.⁴²⁰

In the United Kingdom, the Corporate Manslaughter and Corporate Homicide Act 2007 was introduced as a product of public outcry, primarily due to the failed prosecution of the *Herald Free Enterprise*.⁴²¹ The Act can only prosecute corporate bodies. However, it leaves the liabilities of individuals under other laws unaffected. The principal purpose of the Corporate Manslaughter and Corporate Homicide Act 2007 is to protect workers' safety at work. The Act requires a substantial element of a gross breach of duty resulting from the way the organisation's activities were 'managed or organised by its senior management'. The senior management test in the Corporate Manslaughter and Corporate Homicide Act 2007 overcomes the limitations of the common law identification principle which requires a controlling mind to be guilty of gross negligence and now focuses on the overall management of the organisation's activities rather than the actions of individuals.

⁴¹⁷ Australian Capital Territory, Queensland, the Northern Territory and Victoria.

⁴¹⁸ Criminal Code Act 1995, (Cth) Part 2.4, s 12.3(6).

⁴¹⁹ Rick Sarre, 'Legislative Attempts to Imprison Those Prosecuted for Criminal Manslaughter in The Workplace' [2002] MurdochUeJLLaw 21.

⁴²⁰ Anthony O Nwafor, 'Corporate Criminal Responsibility: A Comparative Analysis' [2013] 57 JAL 98.

⁴²¹ *R v P&O European Ferries (Dover) Ltd (Herald Free Enterprise Case)* [1991] 93 Cr App R. 72.

The Corporate Manslaughter and Corporate Homicide Act 2007 provides that (1) conduct of corporations must fall below what is expected⁴²² and that (2) senior management must perform a substantial role in the breach.⁴²³ The dual requirement rebuts any argument that a corporate defendant might face liability solely on the basis of a low-level employee's unauthorised acts, nevertheless it will not let companies that were evidently involved in culpable behaviour to escape liability. In examining 'gross breach', it considers if the corporations failed to abide by any health and safety legislation, the severity, and the extent of risk of death imposed.⁴²⁴ Essentially, proving the negligent act of a corporation leading to a workplace death is all that is necessary to claim for damages. This is a noteworthy difference and development from the conventional approach where *mens rea* of the board of directors must be proven to hold a corporation liable for any crimes, including killing. It is to note that the Corporate Manslaughter and Corporate Homicide Act 2007 supplements the existing regulatory regimes by compelling compliance with the health and safety regulations and acting as a backstop against careless regulatory oversight. With its harsher moral and punitive sanctions, it tips the scales toward pre-emptive compliance.

5. Policy Rationales of Corporate Killing

This section considers whether the extension of corporate killing serves the best interest of society. It first states the justifications for criminal liability, then considers and rebuts several counterarguments, including the sufficiency of civil remedies, the potential for over-deterrence, and the duplication of laws. In Malaysia, individuals are more likely to be liable. This is a major flaw because corporations are at most times blameworthy and should be the appropriate cost bearer.⁴²⁵ Corporations are generally profit-driven, and knowingly most crimes are driven by profits. Thus, where financial penalties might be involved, there is a good socio-political case for digging into the company's deep coffers.⁴²⁶ Furthermore, if companies could benefit from the abilities of their human counterparts, they ought to also accept the burden of the criminal conduct of their human elements.⁴²⁷

In circumstances of systemic internal corporate recidivism, civil regulatory penalties are inadequate to support society's interest in making corporations liable.⁴²⁸ The deterrent effect of civil suits are minimal - while private lawsuits are settled for damages, structural reforms are lacking. On the contrary, the stigma as a killer may generate a huge deterrent

⁴²² Section 1(4)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007.

⁴²³ Section 1(3) of the Corporate Manslaughter and Corporate Homicide Act 2007.

⁴²⁴ Section 8(2) of the Corporate Manslaughter and Corporate Homicide Act 2007.

⁴²⁵ Ali(n 5) 144.

⁴²⁶ Miester (n 2) 919.

⁴²⁷ Pinto, Evans (n 71) 39.

⁴²⁸ James W. Harlow, 'Corporate Criminal Liability for Homicide: A Statutory Framework' [2011] 61 DJL 123.

effect of criminal liability.⁴²⁹ Although corporate entities cannot be sent to prison, heavy fines would be a deterrent to other corporations.⁴³⁰ Leigh argued that the social stigma associated with a conviction must be taken into account.⁴³¹ Criminal sanctions give rise to criminal stigma, which attacks the liable corporation's public image.⁴³² Arguments that corporations cannot be stigmatised by punishment are invalid. Fisse argues that business corporations commonly attach huge significance to having a good public image.⁴³³ As a result, corporations are more likely to react positively to criminal stigma by endeavouring to restore their images and reclaim public confidence. While fines impose an economic effect, criminal stigma adds non-financial effects that should be the target of corporate punishment as well. Therefore, criminal stigma deserves serious consideration as a device to deter corporations. On this basis, the argument that civil monetary penalties have the same function as criminal fines is defeated. It is the very essence of criminal law that can be the antidote against corporate misconduct. As Braithwaite stated, 'while a great deal of crime is committed for the sake of corporate profit, a great deal is not'.⁴³⁴ More than a mere financial loss to corporate offenders, a larger message is sent to the offender and to the community. Criminal sanctions are a bigger deterrent than civil fines as they carry a social stigma and present social and economic aspects not found in civil penalties.

The role of criminal law is to bring corporate powers to face criminal conviction for wrongdoing by making society aware of their crimes and by properly deterring them from committing crimes. Besides deterrence, there are other justifications of corporate criminal liability.⁴³⁵ The retributive character of criminal liability should also be recognised in order to break from the old conception that corporations have no personality. Criminalising corporations for killing also has a communicative aspect and therefore a symbolic significance.⁴³⁶ It carries a message for both the offender and the society - communicating to offenders the condemnation they deserve, while displaying to society the values protected.

⁴²⁹ Sara Sun Beale, 'Is Corporate Criminal Liability Unique?' [2007] 44 ACLR 1503, 1524.

⁴³⁰ Anita Ramasastry and Robert C Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law - A Survey of Sixteen Jurisdictions' [2006] Fafo Report 536.

⁴³¹ Leonard Herschel Leigh, *The Criminal liability of Corporations in English Law* (1st edn, Lowe & Brydone 1969) 159.

⁴³² Richard A. Posner, *Economic Analysis of Law* (4th edn, Little, Brown and Company 1992) 422.

⁴³³ Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' [1983] 56 SCLR 1141.

⁴³⁴ John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1st edn, Routledge Kegan Paul plc 1984) 331.

⁴³⁵ Charles Walsh & Alicia Pyrich 'Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?' [1995] 47 RLR 638.

⁴³⁶ N. D. Walker, "The Ultimate Justification: Varieties of the Expressive Theory of Punishment" in *Crime, Proof and Punishment: Essays in Memory of Rupert Cross* (1st edn, Butterworths 1981) 109-121.

There are arguments against criminal sanctions stating that over-deterrence leads to an overspill, as when a corporation catches a cold, someone else sneezes. Sanctions that are uncalibrated to the level of harm can have a quite pernicious effect when the target of a sanction is a corporation.⁴³⁷ The cost of high fines would have a propensity to spill over to stockholders, bondholders and other creditors. There are also concerns that successful convictions would bring adverse effects such as mass layoffs, a decline in taxes, products and services, and the shifting of the burden of sanctions to consumers. In order to address these concerns, it is crucial to consider the connection between excessive deterrence, shareholders, and consumers. Firstly, shareholders can benefit from undiscovered profits made from offences by the company. They too bear the responsibility for their risks in return for the right to eject management whom they find unsatisfactory.⁴³⁸ Furthermore, when they pay for shares, the potential fines are reflected in the price they pay. With regards to consumers affected by high fines, most companies in highly competitive industries will not be able to put up with the arbitrary prices lest it loses sales to its competitors. In the case of oligopolies, corporations have to absorb the cost of fines because they do not directly control the price of their products.

Admittedly, criminal fines are not flawless. It is tricky and intricate to calculate a fine which is both fair and effective. Gunter Heine stated that “ ... the law should more accurately define the intention of the penalty, and make explicit its underlying policy on deterrence and compliance ... ”.⁴³⁹ The methods to better calculate a fine must be in equilibrium, a point where the certainty and the amount to be paid together is an effective restraint. Another way to solve it would be to combine it with other sanctions. Other sentencing tools include remedial, publicity order, corporate probation, community service, corporate death penalty, and dissolution for habitual offenders.⁴⁴⁰

It is important that Malaysia should have in place corporate manslaughter legislation like the Corporate Manslaughter and Corporate Homicide Act 2007 to fill in the gaps. The arguments of duplications would be irrelevant as sentencing provisions within the corporate manslaughter laws are more appropriate and would supplement current regulatory rules by compelling violators to abide by health and safety regulations, functioning as a backstop against negligent regulatory oversight.⁴⁴¹ With legislation in place, companies and their officers will then observe a high standard of duty of care and be more vigilant in complying

⁴³⁷ Anon, ‘Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions’ [1979] 92 HLR 1226, 1366.

⁴³⁸ Braithwaite (n 91) 332.

⁴³⁹ Gunter Heine, ‘Sanctions in the Field of Corporate Criminal Liability’ in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities* (1stedn, International Colloquium Berlin 1998) 242.

⁴⁴⁰ Ireland Law Commission (n 4).

⁴⁴¹ Aida Abdul Razak, ‘Corporate Manslaughter and the Attempt to Reduce Work-Related Deaths: A Comparative Study of the United Kingdom, Australia and Malaysia’s Legislative Framework’ (DPhil thesis, Adelaide Law School 2018) 145.

with their duties to the employees, stakeholders and the public generally to prevent serious repercussions to the goodwill and reputation of the body corporate involved. A homicide prosecution, with its stricter moral and punitive sanctions, could alter the equation in remarkably egregious situations and tip the scales toward pre-emptive compliance.⁴⁴² This is because of a simple mathematical logic - corporations that are determined to work around regulations use a cost-benefit analysis, therefore the cost of punishment needs to exceed the expected cost of honouring regulations.⁴⁴³

With criminal legislation in place, the prosecution will bring offences before the judge on behalf of victims. This would relieve the deceased's kin of the responsibility to take legal action which requires financial commitment and the gathering of necessary evidence which would likely be beyond their means.⁴⁴⁴ With proper investigations conducted by a professional prosecutor, victims' families are more likely to claim appropriate legal responses and remedies from the company. The enhancement of the range of actions available to the regulators would relieve the victims and benefit the general public. With that, it is also hoped that public awareness pertaining to health and safety at work would increase. It is to note that to successfully curb the predicament of Malaysia, the legislation must work in conjunction with other health and safety laws. Other measures of improvement would include the discretionary power of the judiciary to make decisions regarding corporate killing, proper protocols for prosecution, training programs for policies, and at least one director in each corporation who specializes in Health and Safety.

6. The Road to Reform

6.1 A Critical Approach to the Common Law Experience

The success of the introduction of a completely new concept in the Malaysian legal realm is heavily dependent on the existence of a solid theoretical background. There must be an analytical view of the common law experience and not merely an adaptation of traditional theories. As mentioned, the identification theory adopted by Malaysia is drastically problematic and rooted in individualistic ideas, with a simple palliative effect at best. Although the identification theory is by far the most popular model of attributing corporate criminal liability, it is not in harmony with studies on large organisations like corporations. The search for the guilty mind is in most of the situations unfruitful and, in the end, no liability is attributed to the corporation. Furthermore, the identification theory does not incorporate a holistic view of the corporate entity, which better explains the reality of

⁴⁴² Harlow (n 85).

⁴⁴³ Anne D. Samuels, 'Reckless Endangerment of an Employee: A Proposal in the Wake of Film Recovery Systems To Make the Boss Responsible for His Crimes' [1987] UMJLR 873, 886.

⁴⁴⁴ Razak (n 98) 145.

corporations and corporate misconduct. The theory is superficial and neglects important features of corporations. These other corporate features like their nature, structures, decision-making processes, and internal culture, have a strong impact on theories about corporate criminal liability. It is important that the Malaysian legislature be aware of the limitations of the common law theories and be acquainted with what has been proposed as a solution and alternative to these limitations in order to avoid taking a problematic and flawed position.

6.2 A New Approach

Malaysia should look at alternative models of corporate criminal liability that considers the corporate life, organisation, and culture to construct a more compelling method of ascribing criminal liability to corporations. Every organisation's culture is closely intertwined with its leadership. The management may create a culture that sacrifices safety for profits, or it may create a safety-first culture. UK's senior management test will remove the requirement to prove fault by the directing mind of the company. Alternatively, the 'corporate culture' principle is a regulatory tool that would encourage an ethical environment of compliance which addresses the risk of work-related deaths. It would enable courts to examine the entire corporate arrangement, to see whether the corporation's organisations or procedures allowed room for the commission of the offence.⁴⁴⁵

6.3 The Role of Legal Scholars

No legislative change would come easy without an exhaustive doctrinal debate and a paradigm shift in our legal systems to accept the attribution of criminal liability to corporations. It is encouraged that Malaysian scholars trigger these changes by developing models and bringing into discussion all aspects related to corporate killing, including both conceptual and practical concerns. Basic questions such as the concept of corporate crime and the need to use criminal law to control corporate crime needs to be addressed. Therefore, for the seeds of corporate killing to grow in Malaysia, they must first come in the form of appraisals and legal research for it to evolve into a recognised legal concept in Malaysia.

⁴⁴⁵ Crimes (Industrial Manslaughter) Act 2003; Work Health and Safety Act 2011.

7. Conclusion

Leonard Leigh once stated that 'it is important that the public realises that powerful entities are not above the law'.⁴⁴⁶ It is therefore time to put to halt the apathy and behaviour of profit-driven corporations that show meagre concern for their employees' welfare and safety. Malaysia cannot simply rely upon existing legislation; there is a pressing need to focus on incorporating corporate killing legislation for the purpose of ensuring effective compliance with the law. This paper explained the theoretical basis of attributing corporate criminal liability and highlighted that Malaysia's adaptation of the identification principle suffers from conceptual problems. The amount and severity of fatal accident cases have shown the immediate need for a critical approach to put a stop to corporate criminality. This paper attempted to justify why criminal liability is needed for corporate killing and whether it can be used as an effective controlling device. It is proposed that corporate killing can only be effective when incorporated into law in order to balance concerns about excessive criminalization for a reasonable response to intolerable corporate conduct. Taking into account Malaysia's organisational culture and practices,⁴⁴⁷ Malaysia could look to other common law countries and introduce corporate killing legislation either by the insertion of a suitable corporate manslaughter provision in the Occupational Safety and Health Act 1994 which should be read together with the Penal Code, or by creating a new legal framework reserved exclusively for unlawful deaths caused by corporations.⁴⁴⁸ The latter would act as a stronger retributive, preventive, and reformatory tool as it could allow for alternative sanctions of sufficient magnitude.⁴⁴⁹ Before these legislative reforms can happen, Malaysian legal scholars need to trigger structural and legislative changes by developing theoretical constructions that will support the attribution of criminal liability to corporations that kill. We need the courts to recognise that killing is a grave injustice whether committed by an individual or corporation - this will be a crucial first step.

⁴⁴⁶ Leonard Herschel Leigh, 'The Criminal Liability of Corporations and Other Groups' [1977] 9 OLR 247, 287.

⁴⁴⁷ Md Zabid Abdul Rashid, Murali Sambasivam and Azmawani Abdul Rahman, 'The influence of organizational culture on attitudes towards organizational change' [2004] 25(2) LODJ 161.

⁴⁴⁸ The Occupational Safety and Health Act 1994.

⁴⁴⁹ Razak (n 98) 198.

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