

**An Environmental Analysis of the Privilege Against Self- Incrimination As A
Potential Problem For Environment Liability: With Particular Reference to
Corporations.**

By

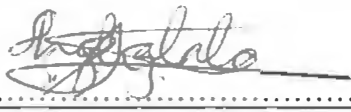
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**Submitted as the dissertation component (which counts for fifty (50%) percent of
the degree) in partial fulfillment of the requirements for the degree of Master of
Laws in Environmental Law in the School of Law, University of Natal,
Pietermaritzburg.**

January 2002.

Declaration

I declare that the whole of this dissertation, save as specifically admitted and acknowledged in the text, is my original work, and has neither been published elsewhere nor submitted in any other University.


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Acknowledgements

I wish to acknowledge the following people:

My supervisor, Professor Michael Kidd, whose seminars on pollution control helped to form the basis of this dissertation. Thank you for lending me your Environmental Crime textbook throughout the dissertation, and for your guidance and advises. Also I would like to thank Mr. Ed Couzens who always had time to answer my questions.

My parents for their support (morally, physically and financially) and confidence in me. Thanks La- Mbokane for everything. Not forgetting the support of my two younger brothers, Simangaliso and Themba, and my three younger sisters Zanele, Nompie and Gabisile. Ma- Pat thank you very much for your support.

My friends they are many I can't mentioned all of you. Particularly I would like to thank my best friend, Sanele, who has just lost his mother, and Itumeleng for their support. I would also like to thank the Law Library staff, specifically S'ma and Erwin for their help throughout the research of this paper.

And finally, but not in the very least, I wish to say thank you to my girlfriend, soon to be my fiance, Xolile for always been there for me. From our high school days to my undergraduate degree and now my Masters. Thank you. I love you very much my baby.

Dedication

This dissertation is dedicated in loving memory of my Mom, Julia Ndzambile Nobunga, who passed on in 1998. She is the source of my inspiration. May her soul Rest In Peace.

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Abstract

This paper is divided into two parts, namely, **Part I-** deals with two important concepts, namely, the Development of Corporate Criminal Liability (*Chapter Two*) and the Development of the Corporate Environmental Crime (*Chapter Three*). **Part II-** deals with the Privilege Against Self- Incrimination as a potential evidential problem in Corporate Environment Criminal Liability (*Chapter Four*). *Chapter Five* deals with recommendations and suggestions to our Environment Criminal Liability.

Our Final Constitution had massive impact In the different fields of law, and environmental law was not an exception to these developments. One such development or should be termed as a problem, in the context of this paper, is the privilege against self- incrimination afforded to corporate offenders in terms of our Final Constitution.

As a result this paper undertakes an environmental analysis on how the privilege, if extended to corporations, may pose an evidential problem in corporate environment criminal prosecution against corporate offenders. Thus a comparative study is also undertaken with an objective of viewing how other jurisdictions dealt with this issue, and also to recommend suggestions to our country on how to deal with this matter. By way of conclusion it is suggested that our judiciary, if the matter do end up in court, should clarify vividly whether the privilege is extended to corporations or not. This matter, it is suggested, should be decided from an environmental law perspective and not from a criminal law perspective.

Part I- The Development of Corporate Criminal Law in an Environmental Context.

Chapter One: Introduction.

Corporations occupy a central position in our modern society. As a result, in view of their immense power, their activities are coming under scrutiny. Hence most corporations, if not all, are making increasing use of environmental audits or self- auditing/ review processes in assessing or evaluating whether their activities are not directly or indirectly harming the environment.

In a general context environment self- auditing is a systematic and documented, periodic and objective examination involving interviews, analyses, tests and review of documentation to obtain relevant evidence on which to evaluate performance of a corporation¹. This review process is encouraging to corporations because it put the operations of corporations in line with the requirements of environmental legislation. As a result the increasing use of the self- auditing process has established it as a common practice among the corporations. The International Standards Organisation (ISO) sets the environmental audits standards used by the corporations, and this includes, but not limited to, the ISO 14010- 14012². Although one of the purposes of these environmental audits standards is to assist the corporations in complying with the different environment legislation of a country, it indirectly also assist the corporations in minimising their degradation of the environment.

¹ Glazewski J Environmental Law in South Africa 2000 at 294.

There is no doubt that this is a step in the right direction, but the usage of this review process also gives rise to some problems. One such problem is the incriminating evidence that may be discovered in those audit documents when checked by the government officials. This may be evidence showing that the corporation was negligent in preventing damage to the environment or that the corporation has a lax approach when it comes to compliance with environmental legislation.

Whatever the case may be, this problem, therefore, give rise to three important questions in situations where the government or state wants to institute criminal action against the corporation for the latter's alleged environmental crime:

- **Whether the right to a fair trial should be extended to corporations in cases of environmental criminal prosecution? if so;**
- **Are corporations compelled to produce their environmental auditing records for the purpose of environmental criminal prosecution? if so;**
- **Are the corporation's directors allowed to claim the privilege against self-incrimination in cases where such records will expose them to environmental criminal prosecution?**

And this is due to the fact that corporations, just like any natural person offenders, from a South African context, are entitled to the right to a fair trial (section 35(3) 1996 Constitution of the Republic of South Africa). These rights include, but not limited to, the right to remain silent and the right not to be compelled to give self-incriminating

² Ibid, at 295.

evidence³. This is evidenced by the fact that juristic or artificial persons are entitled to the rights contained in Chapter 2 of our Final Constitution⁴.

From the above, it may be seen that these rights when invoked by corporations may raise a serious evidential problem. Thus this problem is/ was not confined to our borders, other jurisdictions addressed this problem. Countries like the United States of America, Canada, New Zealand, United Kingdom and Australia tackled and addressed this problem. Hence we cannot escape the possibility that it may also be triggered here in our country.

Hence this paper will argue or show that the privilege against self-incrimination, at least from an environmental law context, should not be extended to corporations. As a result in Chapter Two and Three will focus and discuss in details the development of two concepts, namely, corporate criminal liability and corporate environmental crime respectively. Chapter Four will examine the privilege against self-incrimination within the context of corporations. The current state of the law in South Africa is also examined. A discussion indicating the possible conflict between access to information and the privilege against self-incrimination is also undertaken within the context of our Constitution and legislation. Lessons that can be learned from other jurisdictions, which dealt with this problem, are highlighted. Lastly, Chapter Five by way of a conclusion suggests recommendations and suggestions to our criminal environmental law.

³ Section 35(3)(h) and (j) 1996 Constitution of the Republic of South Africa.

Chapter Two: Examination of the Development of Corporate Criminal

Law in an Environmental Context.

a) Brief Overview.

In the Republic of South Africa, just like in any other jurisdictions, companies or corporations⁵ occupy a very significant position in our modern society. As a result most, if not all, of its activities are constantly under scrutiny either from the governmental authorities or non- governmental organisations concerned or responsible with the conservation and protection of the environment. This is because most, if not all, of the corporations' activities may harm the environment directly or indirectly. By this I refer to water pollution, air pollution, land pollution, unlawful waste disposal, the transportation of hazardous waste, and the production of chemicals.

However, with influence from other jurisdictions, most of our environmental statute were/ are drafted, implemented and enforced in favour of the 'command and control' paradigm. This meant that criminal law principles were incorporated into our environmental statute books. This resulted into the importation of the concept of environmental criminal law into our environmental statute books.

b) Development of the Concept of Corporate Criminal Liability.

At one time it was felt that a company could not be convicted of a criminal offence because, having no mind of its own, it would not have the mens rea or guilty intent

⁴ Section 8(4) 1996 Constitution of the Republic of South Africa.

⁵ In this entire paper the two words will be used interchangeably.

necessary to most crimes⁶, including and not limited to environmental crimes. However it is a fairly well established law today, as it will be discussed in this chapter, that corporations can be convicted of a criminal offence of which guilty intent is an essential element.

The above theory developed from an important company law principle that, on its formation a company, as a separate entity, acquires the capacity to have its own rights and duties⁷. The company, therefore, acquires legal personality and exists apart from its members⁸. This principle was exemplified in Salomon v Salomon & Co Ltd.⁹. The House of Lords decided that a company from its inception was legally separate from its members¹⁰.

Since companies are artificial persons and incapable of unlawful conduct or intention attribution of fault to companies has been the central difficulty at common law¹¹. As a result, approaches to the imposition of criminal liability on companies were developed.

i) Primary Corporate Criminal Liability.

A principal hurdle to the imposition of primary corporate criminal liability at common law was that common law offences insisted on proof of criminal fault, and that the courts

⁶ Yarosky H 'The Criminal Liability of Corporations' (1964) 10 McGill Law Journal at 142.

⁷ Cilliers HS and Benade ML Corporate Law 1987 at 6.

⁸ Ibid.

⁹ [1897] AC 22. See also Dadon v Krugersdorp Municipality Council 1920 AD 530.

¹⁰ Cilliers and Benade op cit note 7 at 6- 7.

¹¹ Lipman Z 'Corporations, Crime and the Environment' (1997) 4 SAJELP at 72.

could not see a clear way of saying that a company 'intended' something or 'knew' something¹².

This hurdle was to some extent overcome in Lennard's Carrying Co Ltd. v Asiatic Petroleum Co Ltd.¹³. The court held that a company could be convicted of a criminal offence where the requisite fault could be found in a corporate officer who is in effect the 'directing mind and will' of the company¹⁴. This principle has become to be known as the 'identification theory' or the 'alter ego' theory of responsibility.

The essence of this principle is that some officers of a company are much more than its agents or servants. in that their actions can bind the company not upon the basis of agency or vicarious liability but because these officers are so close to the 'very ego and centre' of the personality of the company that their actions are identified with it¹⁵. As a result, the identified person(s) who acts is not acting for the company but is acting as the company.

In Tesco Supermarkets Ltd. v Natrass¹⁶, the House of Lords held that the basis of primary corporate criminal liability was limited to the conduct and fault of the board of directors, the managing director, or persons to whom a function of the board had been wholly delegated. It may be said that the Tesco case restricted the nature of the employees who may be held to act as the company. Because in a situation where a

¹² Goode M 'Corporate Criminal Liability' in Gunningham et al Environmental Crime 1995 at 97.

¹³ [1915] AC 705.

¹⁴ Ibid, at 713.

¹⁵ Yarosky op cit note 6 at 142- 143.

company is prosecuted for environmental crime(s), the Tesco approach has many drawbacks, including opportunities for corporate evasion, particularly on the part of large corporations; and the fact that decisions that cause environmental degradation are often not confined to the top levels of management¹⁷. In short, the Tesco case totally misconceives the nature of corporate decision- making¹⁸.

It may, therefore, be suggested that corporate criminal liability need not be confined to only the top management of a corporation, because of the decentralisation of powers particularly in large corporations. This should also be done with the purpose of preventing corporate evasion.

ii) Vicarious Corporate Criminal Liability.

The common law took the position that, generally, there could be no vicarious criminal liability, but in the nineteenth century general statutory exceptions to vicarious liability led to statutory exceptions to the principle against criminal liability of corporations¹⁹. This theory operates by way of an exception to the common law principle (that there could be no vicarious criminal liability), and is usually imposed by statute either expressly or by necessary implication²⁰.

¹⁶ [1972] AC 153.

¹⁷ Lipman op cit note 11 at 73.

¹⁸ Ibid.

¹⁹ Goode op cit note 12 at 97.

²⁰ Lipman op cit note 11 at 73.

What this theory entails is that a corporation can incur criminal liability as a result of an offence by employee, agent or officer acting within the scope of their authority²¹. In other words, this theory rests on the premise that the corporation is an artificial entity that cannot and does not act on its own, instead, its agents are seen as acting for the corporation. Fisse argue that where vicarious criminal liability is imposed, the offender (or the corporation) is held liable not for the offence of his agent or employee but for the conduct of these people²².

This is evident from section 332(1) of the South African Criminal Procedure Act 1977 which provides that where a corporation is charged with a crime, the fault of the director or servant who committed or authorised the crime will be deemed to be that of the corporation. It must be noted that this provision extends to conduct as well as to intention. Moreover, it seems that the liability imposed is intended to be primary, since the actions of the director or servant are deemed to be that of the corporation²³. Hence the crucial distinction is that with primary liability the director's intentions are regarded as constituting that of the corporation, while vicarious liability involves imputing the intentions of others to the corporation²⁴.

²¹ Ibid.

²² Fisse WB *'The Distinction Between Primary and Vicarious Corporate Criminal Liability'* (1967) 41 Australian Law Journal at 205.

²³ Lipman Z *'Corporations, Crime and the Environment'* (1997) 4 SAJELP at 74.

²⁴ Ibid, at 73.

Nevertheless, Bowden and Quigley²⁵ summarizes the criticism of both approaches as follows:

- a) Vicarious liability is usually criticised on the ground that it is unjust to impute the conduct of an agent to the principal, because the corporation might be convicted even though it was not in any real sense at fault. However, they are not in favour of this objection and argue that a corporation might evade criminal responsibility if no particular individual agent can be identified to have been at fault. Particularly in large and diverse corporate structure, it might well be impossible to pin the fault on any particular individual; rather, it might be argued that the corporation should be responsible for the composite conduct of several individuals.
- b) A general criticism of primary criminal liability is that while it is perhaps less derivative than vicarious liability, it is nonetheless a theory that relies upon imputing fault from individuals to the corporation. It is therefore susceptible to the same criticisms often advanced against vicarious liability.

As a result, dissatisfaction has been expressed with both the primary and vicarious theories of corporate criminal liability because they rest on individual fault instead of organisational blameworthiness²⁶. These criticisms led to the development of a theory of truly primary corporate liability²⁷.

²⁵ Bowden MA and Quigley T 'Pinstripes or Prison Stripes? *(The Liability of Corporations and Directors for Environmental Offences)*' 8th international Conference Proceedings, Hong Kong (04 December 1992), at 18- 20.

²⁶ Lipman op cit note 23 at 74.

²⁷ Ibid.

This is a better approach, in my view, because it is based on corporate culture²⁸. Fisse has gone insofar as to advocate a particular statutory form for his theory, which has considerable merit²⁹. The basis of his proposal is the idea of organisational blameworthiness, that is, that the corporate culture may foster the commission of offences even if there is no conscious policy to do so.

This is a better approach, firstly, because it has the considerable merit of attributing fault independently to corporations in recognition that they can and do achieve a life of their own apart from their directors, officers, shareholders, and employees³⁰. In other words 'corporate culture' seems to be more in keeping with the idea that criminal liability should be based on fault³¹. Secondly, it also recognises that a corporation is more than the sum of individuals it comprises³², in that it is not dependent upon artificial attributions of fault having been committed by the same person.

In 1995 the Federal Government of Australia implemented the Criminal Code Act, which provides that a corporation will be taken to have authorised [the contravention] if it had a corporate culture, which 'directed, encouraged, tolerated or led to the commission of the

²⁸ See Fisse and Braithwaite *'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability'* (1988) 11 Sydney Law Review 468; Fisse B *'Corporate Criminal Responsibility'* (1991) 15 Criminal Law Journal 166; Fisse B *'The Attribution of Liability to Corporations: A Statutory Model'* (1991) 13 Sydney Law Review 277.

²⁹ "The Attribution of Criminal Liability to Corporations: A Statutory Model", *ibid.* See also Bowden and Quigley *op cit* note 22 at 23- 24.

³⁰ Bowden and Quigley *op cit* note 25 at 23.

³¹ Lipman *op cit* note 23 at 75.

³² *Ibid.*

offence' or 'failed to maintain a corporate culture that required compliance with the relevant provision'³³.

The Code defines 'corporate culture' as:

'...An attitude, policy rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place'³⁴.

Therefore, according to the Act, one of the ways in which corporate fault can be shown is by finding the requisite fault in the 'corporate culture' of the corporation³⁵.

c) The Advantages and Disadvantages of the Application of the Principles of Criminal Law to Environmental Crimes.

There is dissatisfaction in most jurisdictions as to what is perceived to be the failure of a system of regulation, based upon a cooperative relationship between regulators and polluters³⁶. One response to this concern has been the increase, by politicians and legislators in most jurisdictions, of criminal sanctions and the widening of criminal offences so that governments are seen to be acting to secure environmentally desirable outcomes³⁷.

³³ Criminal Code Act 1995, Schedule Pt 2.5 cl 12.3(2)(b), (c).

³⁴ Cl 12.3(6).

³⁵ Lipman op cit note 31 at 75.

³⁶ Pain N 'Criminal Law and Environment Protection- Overview of Issues and Themes' in Gunningham et al Environmental Crime 1995 at 19.

³⁷ Ibid.

In the United States of America severe penalties can be awarded under pollution control legislation, while the Canadian Environment Protection Act 1987 imposes substantial penalties for criminal behaviour against the environment and provides for the confiscation of pollution- related profits³⁸.

South Africa is not an exception, as any contravention of environment legislation is described as an offence³⁹. However, Kidd state that environmental criminal law in South Africa falls squarely within the 'command and control' paradigm⁴⁰, but seemingly most of our environmental legislation are characterised by a lot of command provisions and not much control is carried out.

The origin of environmental laws stem from the excesses of industrial revolution, the growing influence of middle- class "quality of life" values, and the increasing scientific understanding of the interdependence of eco- systems⁴¹. These developments, however, mushroomed together with environmental concerns and problems.

Therefore, from an environmental law context, the aim of environment law is the protection of the environment⁴². However the protection is not to be understood in an absolute sense, but rather as contingent on policy goals, both national and international policy goals⁴³.

³⁸ Ibid.

³⁹ For example, see Section 34 and Schedule 3 of the National Environmental Management Act 107 of 1998.

⁴⁰ Kidd M 'Environmental Crime- Time For A Rethink in South Africa' (1998) 5 SAJELP at 191.

⁴¹ Robinson B 'The Nature of Environmental Crime' in Gunningham et al Environmental Crime 1995 at 9.

⁴² Kidd op cit note 40 at 182.

⁴³ Kidd op cit note 40 at 182- 183.

The late 1960's and 70's saw a proliferation of environmental legislation together with the development of environmental crimes. The comprehensive nature of most of the legislation meant that activities not previously regulated or prohibited were also subjected to criminal penalties⁴⁴. What this meant was that the usage of criminal law in protecting the environment had to be justified.

However, the aims of criminal law are to forbid and prevent unjustifiably and inexcusably conduct; and also the punishment of harmful behaviour. As Kidd argues, environmental harm can often be substantial harm to the interests of individuals and the public at large, so, at first glance, it would appear that criminal law is a justifiable weapon to use for the goal of environment protection⁴⁵. Thus, if criminal sanctions are used for the purposes of deterrence, this requires a sufficient threat in order for the deterrent to be effective while at the same time ensuring that the seriousness of the threat corresponds with the seriousness of the harm sought to be prevented⁴⁶. So, if relatively minor offences are punished by heavy penalties, this will lead to disrespect of the law, especially in a society like ours where there is a perception that 'real' criminals are either avoiding arrest and prosecution altogether, or that they are being treated leniently by our legal system⁴⁷.

⁴⁴ Robinson op cit note 41 at 10.

⁴⁵ Kidd op cit note 40 at 183.

⁴⁶ Kidd op cit note 40 at 185.

⁴⁷ Ibid.

It is within this context that the advantages and disadvantages of the application of criminal law to environmental crimes are now discussed. As Pain states, there are certain inherent problems with the use of criminal law to achieve environmental outcomes that are caused by a conflict between the natures of criminal law as it currently stands, and the idea and ideals of environmental protection⁴⁸.

Advantages and Disadvantages of Criminal Law.

Firstly, if corporations are to be viewed as (mostly) rational value maximising entities, criminal sanctions that attach to values such as profit, prestige and stability are likely to have more of a deterrent effect than those that are largely irrelevant to the corporations except as another 'cost of doing business'⁴⁹. Punishments such as court- ordered adverse publicity, community service, and stock dilution through equity fines should be considered as new criminal sanctions.

Secondly, as Lazarus suggests, absent the possibility of criminal sanctions, particularly those directed at individuals, corporations might view sanctions for environmental laws as mere costs of doing business⁵⁰. Corporate probation orders and punitive injunctions against criminally liable corporations might go a long way in actively changing corporate behaviour.

⁴⁸ Pain N *'Criminal Law and Environmental Protection- Overview of Issues & Themes'* in Gunningham et al *Environmental Crime* 1995 at 21.

⁴⁹ Ibid, at 26.

⁵⁰ Lazarus RJ *'Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime'* (1994) 27 *Loyola LA Law Review* at 880.

And lastly, criminal law is the only process that can be used to impose severe penalties on offenders. In fact, it is through the criminal process that fines and imprisonment can be imposed.

The flip- side of the coin is that criminal law is not without disadvantages. Professor Kidd⁵¹ summarises the weaknesses as follows:

- Not Preventative by Nature: The criminal law is not immediately preventative by nature. It is designed to react to an offence that has already been committed, which might often be too late to prevent damage to the environment. It does not, therefore, prevent the occurrence of environmental harm, which should be the fundamental basis of environmental protection regimes.
- Costs Involved in Criminal Prosecutions: Disputes are settled in court, which takes up time and resources and may well delay the remediation of the harm for which liability is being debated. Because of the need to use expert evidence in some of the pollution trials, costs are higher than the frequently encountered common- law crimes. These costs may be more valuably directed towards upgrading harmful processes or remediating damage.
- Standard of Proof: The proof required in the commission of an offence, which is beyond reasonable doubt, is considerably more difficult than the balance of probabilities required in civil actions. This, it is submitted, is a universal problem.
- Constitutional Right to a Fair Trial⁵²: Juristic persons are entitled to the guarantees in the Bill of Rights 'to the extent required by the nature of the rights and the nature of

⁵¹ Kidd M '*Environmental Crime- Time For A Rethink in South Africa*' (1998) 5 SAJELP at 188- 191.

⁵² Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996.

that juristic person'⁵³. The courts, in considering these rights, have consistently insisted on their importance thereby suggesting that any limitation of these rights would have to be justified very strongly indeed⁵⁴. It is doubtful whether the reverse-onus provisions in our environmental legislation will survive the constitutional muster⁵⁵.

- Inadequate Policing: The shortage of inspectors and similar officials to monitor compliance with the law and to apprehend offenders is another contributing factor in one of the failures of criminal law. The administration of a number of environmental statutes has been assigned to provinces that are spending most of their budgets on matters that are seen as more pressing namely education, health, and welfare. Unfortunately, as Farrier says, 'successful deterrence depends not only upon severity of punishment but also on a perceived high risk of detection'⁵⁶. This, however, is not an inherent weakness in the use of the criminal law but rather a de facto shortcoming.
- Lack of Public Awareness: People who are aware that a certain conduct is wrong and prohibited by law may well assist officials by bringing those offenders to their notice. However the lack of public awareness of threats to the environment is often impeded by lack of information. This is exacerbated by the fact that many South African citizens attitudes towards even those offences which in most countries would be regarded as morally wrong as well as illegal, may well have been deadened by the

⁵³ Section 8(4) of the Constitution of the Republic of South Africa, Act 108 of 1996.

⁵⁴ See, O' Regan J in *S v Bhulwana, S v Gwadiiso* 1996 (1) SA 388 CC at para. 24: '(the presumption of innocence) is a pillar of our system of criminal justice'.

⁵⁵ See, *S v Bhulwana (supra)*, *S v Coetzee and others* 1997 (4) BCLR 437 CC. For a presumption in environmental legislation, which was struck down, see *S v Mumba* 1997 (1) SA 854 (W).

⁵⁶ Farrier D '*In Search of Real Criminal Law*' in Tim Bonyhady (ed.) Environmental Protection and Legal Change 1992 at 86.

widespread concern over rampant 'ordinary' criminal activities which most people regard as more serious than environmental offences.

- Lack of Expertise of Court Officials: Many prosecutors in our country are inexperienced when it comes to environmental law. In fact, most of them have no substantial background of environmental law. As a result, as environmental prosecutions are few and far between, there is no expertise in prosecuting these offences, which often require proof of difficult scientific facts. It is, moreover, difficult to escape the conclusion that, even where such cases are completely prosecuted, magistrates may sometimes be intimidated by the intricacies of the scientific evidence into requiring proof beyond any doubt rather than reasonable doubt.
- Inadequate Penalties: As Loots argues much of the criticism of criminal enforcement of environmental law in our country is leveled at the inadequate penalties provided for by legislation⁵⁷. The penalties provided for in legislation must be sufficiently serious to deter. Because the public has to see these penalties being utilised since ultimately, one cannot fear what turns out to be a paper threat⁵⁸.

Now given these drawbacks, there has been much discussion about whether civil law processes may be more effective and appropriate in dealing with environmental crimes. It

⁵⁷ Loots C *'Making Environmental Law Effective'* (1994) 1 SAJELP at 18.

⁵⁸ Farrier op cit note 56 at 86.

is; therefore, worth noting that section 30(9) of the National Environmental Management Act 1998 does provide for civil liability when it comes to environmental degradation⁵⁹.

But it is better, in my view, to have a mixture of civil and criminal processes in our environmental legislation. As Kidd argues, criminal liability should be reserved for serious offences only where fault would generally be present and possible to prove on the facts⁶⁰. Civil law would, therefore, regulate most aspects of environmental regulation, while criminal law operating outside of and in support of the civil law. This approach would provide a more coherent building of a moral imperative in favour of environmental protection by focusing on this goal through the criminal law, while more appropriately and effectively regulating polluting behaviour in the short term through the civil law⁶¹.

Chapter Three: Corporations or Companies.

a) Development of the Concept of Corporate Environmental Crimes.

The twentieth century witnessed tremendous explosion in the number and size of corporations, to the point that their activities are now under scrutiny. In view of the immense power exercised by them, there is a general recognition of the necessity for corporations to be subjected to criminal law⁶². As Lipman notes, that practical difficulties

⁵⁹ The section provides that 'a relevant authority may claim reimbursement of all reasonable costs incurred by it in terms of subsection (8) from every responsible person jointly and severally'. It is argued that this section also covers corporations that have caused harm to the environment.

⁶⁰ Kidd M 'Environmental Crime- Time For A Rethink in South Africa?' (1998) 5 SAJELP at 200.

⁶¹ Pain N 'Criminal Law and Environment Protection- Overview of Issues and Themes' in Gunningham et al Environmental Crime 1995 at 28- 9.

⁶² Lipman Z 'Corporations, Crime and the Environment' (1997) 4 SAJELP at 69. This view was also expressed in *R v Canadian Dredge & Dock Co Ltd. [1985] 1 SCR 662*, at 692, the court stated that '...the corporate vehicle now occupies such a large portion of the industrial, commercial, and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of a natural person'.

in applying the traditional principles of criminal law to environmental crimes led to the reform of the common law, in an attempt to mould it to the requirements of corporate environmental crimes⁶³.

Historically, wrongful activities of corporations were distinguished from those of individual criminals⁶⁴. For example: an individual defendant's mental state with which he or she committed an illegal act determines his moral culpability, but mental state has no meaning when it applied to a corporate defendant since a corporation possess no mental state⁶⁵.

But where company's activities causes environmental degradation, the application of criminal law, as stated in chapter one, becomes problematic as the activities complained of might be very close to legitimate business practices making it difficult to regard such offences as true crimes⁶⁶. These types of crimes are referred to as 'white-collar crimes'. Reasons draws a distinction between 'white-collar crimes that are committed by individuals against corporations for personal gains and 'corporate crimes' that are committed by corporations as organisations⁶⁷. It is in these latter crimes that the traditional general principles of criminal law fall short.

⁶³ Ibid.

⁶⁴ Lipman op cit note 62 at 70.

⁶⁵ Anonymous 'Developments in the Law- Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1997) 92 Harvard Law Review at 1241.

⁶⁶ Lipman op cit note 62 at 71.

⁶⁷ Reasons C 'Crimes Against the Environment: Some Theoretical and Practical Concerns' (1991) 34 Criminal Law Quarterly at 88.

As a result, in most countries, environmental crimes were regarded as being purely regulatory in nature. Hence, for example, pollution in most jurisdictions (including South Africa) is not illegal, but is regulated by way of issuing licences, certificates or permits. Most countries regulate the corporations' activities by way of regulatory schemes. Regulatory offences are generally punishable without proof of fault but the penalties are low and imprisonment not an option⁶⁸.

Unfortunately, by mid- 1980's it was evident that the existing approach was not effective: the slip between the environmental degradation cup and the regulatory protection lip was obvious⁶⁹. This was because of the changing nature of environmental problems⁷⁰. In addition, the regulatory schemes that had been applied in a decidedly subjective manner failed to consider the broader implications of less than rigorous implementation in exacerbating macro- environmental problems such as ozone depletion, climate change and soil depletion⁷¹. Furthermore, there has been growing recognition that environmental crimes do not always conform to the regulatory schemes because of the wider dangers that they may pose to the environment and that differential treatment is required for different types of environmental offences⁷².

Consequently the continued degradation of our planet and environment forced reconsideration of the approach to environmental protection, via the reform of environmental legislation and the re- tooling of practices associated with existing

⁶⁸ Lipman op cit note 62 at 71.

⁶⁹ Bowden MA and Quigley T *'Pinstripes or Prison Stripes? (The Liability Of Corporations and Directors for Environmental Offences)* 8th International Conference, Hong Kong (04 December 1992) at 9.

⁷⁰ Ibid.

regulatory schemes⁷³. The regulatory approach remained, but those charged with bureaucratic responsibility for the environment seemed more willing to aggressively enforce the legislation and to introduce the necessary measures to meet environmental goals⁷⁴.

The province of Ontario in Canada, 1986, through the Environmental Enforcement Law Amendment Act⁷⁵ substantially increased penalties for environmental offences committed under the Environmental Protection Act⁷⁶, the Ontario Water Resources Act⁷⁷, and the Pesticides Act⁷⁸ and also differentiated the level of fines as between individuals and corporate offenders. In addition, the Act established a hierarchy of offences based on the severity of the offence, separated corporate environmental liability from the liability of directors and officers, and introduced the possibility of jail sentences upon conviction of these individuals⁷⁹.

In Australia, the New South Wales Environmental Offences and Penalties Act 1989 was enacted as a separate legislation imposing high penalties and imprisonment for serious environmental crimes. This Act is an amalgam of criminal and regulatory approaches to environmental crimes within the same statute⁸⁰. Under this Act, penalties for corporate offenders are higher than those for individuals, this recognises the fact that corporations

⁷¹ Bowden and Quigley op cit note 69 at 9- 10.

⁷² Lipman op cit note 68 at 71.

⁷³ Bowden and Quigley op cit note 69 at 10.

⁷⁴ Ibid.

⁷⁵ *Environmental Enforcement Law Amendment Act, S.O. 1986, c. 68.*

⁷⁶ *Environmental Protection Act, R.S.O. 1980, c. 141.*

⁷⁷ *Ontario Water Resources Act, R.S.O. 1980, c 361.*

⁷⁸ *Pesticides Act, R.S.O. 1980, c 376.*

⁷⁹ Bowden and Quigley op cit note 69 at 10- 11.

generally are potentially the major sources of environmental degradation and that they have greater resources than individuals⁸¹.

In South Africa, Chapter 16 of the National Water Act provides for offences and remedies but does not stipulate the amount of the fines in cases of freshwater pollution. The court may enquire into the harm or loss suffered or into the damage caused to water resource and makes an award of damages accordingly against the offender⁸². While the National Environmental Management Act state that where any person is convicted of an offence under any statute listed in Schedule 3 of the Act, the court may enquire into the amount of loss or damage caused⁸³.

It is clear from the above illustrations that environmental legislation, in most jurisdictions, are changing from regulatory approaches to a more mixed approach where the velvet glove of a compliance approach is backed with the iron fist of sanctioning. And provisions that address corporate and executive environmental liability often share common characteristics, because, in many countries, the upper limits of fines for corporations convicted of environmental offences are higher than those set for individual non- corporate offenders⁸⁴.

⁸⁰ Lipman Z *'Corporations, Crime and the Environment'* (1997) 4 SAJELP at 72.

⁸¹ Ibid.

⁸² Sections 152 and 153 of the National Water Act 36 of 1998.

⁸³ Section 34(1)-(7) of the National Environmental Management Act 107 of 1998.

⁸⁴ Bowden MA and Quigley T *'Pinstripes or Prison Stripes? (The Liability of Corporations and Directors for Environmental Offences)'* 8th International Conference, Hong Kong (04 December 1992) at 12.

b) The Need for Corporate Environmental Crimes.

Notwithstanding the slow evolution of corporate environmental crimes, modern society's activities dictate the necessity to have corporate environmental crimes. This may be due to the fact that, in the past, there were relatively few corporations, but the increase in number and size of corporations and the ever-increasing difficulty of precisely ascertaining the responsible employee of the corporation necessitate change⁸⁵.

In addition, given the corporations position in our modern society, they are regarded as being responsible for most pollutants released into the environment. In other words, while it is recognised that damage to the environment emanates from varied sources, it is equally beyond doubt that the more serious cases of damage to the environment are caused by corporations⁸⁶. Thus, it is clear that the key to environmental protection is effective control over the environmental activities of corporations⁸⁷.

Moreover, it is a requirement of justice that everyone who breaches a penal law be subjected to prosecution. It is hardly fair that individuals committing rather petty crimes, almost always entailing only one or few victims, are subject to prosecution and imprisonment while a company causing harm on a far greater scale, yet escape punishment⁸⁸. Consider this example of a spill of effluent from a pipeline operated by a mining company. While admitting that criminal prosecution is not the only approach, in

⁸⁵ Okon EE 'Corporate Criminal Liability: Under Nigerian Environmental Law' (1993) 9 Lesotho Law Journal at 175.

⁸⁶ Ibid, at 171- 2.

⁸⁷ Bowden and Quigley op cit note 84 at 15.

⁸⁸ Fisse B 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 Southern California Law Review at 1150- 52.

these circumstances where, if the mine is located in a remote area so as not to cause damage to any particular individual or if the effects are so indeterminate as to make tortious liability difficult to establish, prosecution of the corporation for an environmental offence seems entirely appropriate and just.

Furthermore as corporations usually enjoy a wider array of resources, information, and expertise, they are better equipped to take measures to avoid the commission of criminal offences than are individuals⁸⁹. Thus when the cause of environmental crime is motivated either by profit or avoidance of economic loss, criminal prosecution is appropriate and just⁹⁰. In such circumstances, it is not unfair to encourage the corporation to avoid any environmental degradation on pain of criminal prosecution if they fail to do so.

The fourth argument is to look at the nature of the harm. The greater the risk to public health and safety, the greater the opportunities of criminal prosecution. In our country, section 24 of the Final Constitution guarantees every citizen an environment that is not harmful to their health or well-being. It follows that any corporation acting contrary to this section can be subject to punishment, in terms of environmental legislation⁹¹.

Lastly, Bowden and Quigley⁹² summarise a number of other reasons why corporations should bear legal responsibility for environmental crimes:

(a) Corporations are major sources of environmental degradation;

⁸⁹ Bowden and Quigley op cit note 84 at 15.

⁹⁰ Corporate Board '*Corporate Environmental Criminal Liability is Expanding*' (Sep/ Oct 1994) Vol. 15 Issue 88 at 28. <http://ehostview2.epnet.com/delivery.asp>

⁹¹ For more details, see Glazewski J *Environmental Law in South Africa* 2000 at 85- 88.

- (b) Larger corporations commit a disproportionate number of violations;
- (c) Corporations (as opposed to individuals) handle the most dangerous types of pollutants;
- (d) Corporations have the resources to reduce degradation, resources accumulated in part through untrammelled use of common resources;
- (e) Degradation by corporations tends to be concentrated in location and, arguably, in volume and is thus more likely to substantially harm the eco-system;
- (f) The localization and scale of pollution by corporations typically make it easier to address than corresponding volumes of pollution produced by individuals.

Clearly the mere fact that corporate bodies conduct a major part of all economic endeavour should lead to the realisation that criminal prosecution for environmental crimes must be a part of the arsenal deployed to protect the environment⁹². Therefore, from an environmental context, the concept of corporate liability for environmental crimes is a sound one.

⁹² Bowden and Quigley op cit note 89 at 15.

⁹³ Ibid.

Part II- Evidentiary Problems: the Privilege Against Self-Incrimination.

Chapter Four: The Nature of the Privilege Against Self- Incrimination and Current State of the Law in South Africa.

a) Introduction.

Waste products from industrial societies are entering the environment at a rate far greater than the rate of natural absorption, and much of the waste are in the form of substances which are either toxic to the environment or human health⁹⁴. Hence the regulatory framework that controls a company's environmental activities is complex, and the civil or criminal liabilities that may be imposed for breaches of such laws are troublesome and burdensome⁹⁵.

In addition, the focus on corporate accountability for environmental degradation is prompting companies to adopt a proactive approach to environmental management⁹⁶. Central to this approach is the growing use of internal environmental audits to detect or prevent potential breaches of environmental laws and regulations⁹⁷. Moreover, the very existence of the audit document could itself be incriminating if a breach occurs later, as it may provide evidence that the corporation had knowledge of the circumstances surrounding the later breach⁹⁸.

⁹⁴ Goldblatt M '*Registering Pollution: the prospects for a pollution information system*' in Bethlehem and Goldblatt (editors) *The Bottom-Line: Industry and the Environment in South Africa* 1997 at 120.

⁹⁵ McDonald J '*Confidentiality of Environmental Audit Documents*' in Gunningham et al *Environmental Crime* 1995 at 203.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

As a result, the results of such audits attracts two fundamental rights, namely, the right of access to environmental information⁹⁹ and the right not to be compelled to give self-incriminating evidence¹⁰⁰ (in situations where the state institute criminal prosecution against an offending corporation). Firstly, whether the latter right should be extended to corporations in environmental criminal prosecutions, is examined thereafter a discussion on the right of access to environmental information will follow.

b) What is the Privilege Against Self-Incrimination?

“As the common law developed, the rights of the individual were extended which, in many cases, made it increasingly more difficult to obtain evidence of wrong doing. Like other offenders, in most jurisdictions, corporations are afforded natural justice, the presumption of innocence and other protections. However given their powerful position that they hold in our modern society and their capacity for polluting the environment, the privilege against self- incrimination works greatly to the advantage of corporations and also hinder enforcement of environmental legislation”¹⁰¹.

In essence: what is this privilege against self- incrimination? Bearing in mind that, at least, from a South Africa perspective it is inextricably linked with the right to remain silent¹⁰².

⁹⁹ Section 32(2) of the Final Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁰⁰ Section 35(3)(j) of the Final Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁰¹ Lipman Z *‘Corporations, Crime and the Environment’* (1997) 4 SAJELP at 82.

¹⁰² Constitution of the Republic of South Africa 1996, section 35(3)(j) read with section 35(3)(h) protects the corporate offenders right to remain silent when facing a criminal prosecution.

“The phrase privilege against self- incrimination is sometimes used to mean any rule or aspiration facilitating silence. At other times it refers to the modern right to remain silent. It guarantees that no person can be required to answer a question tending to expose him to a criminal prosecution and also that a criminal defendant may refuse to testify altogether. This right is a strong one, in that any statement acquired in violation of the privilege is inadmissible at trial, and any evidence discovered because of such a statement is inadmissible generally”¹⁰³. This privilege is basically two fold, in that, it protects not only against evidence that may lead to criminal conviction, but also against information that would furnish a link in the chain of evidence that could lead to criminal prosecution¹⁰⁴.

Corporations’ right to remain silent basically provides that *corporations* are not obliged to assist the State to prove or disprove their guilt¹⁰⁵. This right basically means that corporations are not obliged, in any way, to assist the State in its environmental criminal investigation against the corporation. Accordingly, it is hard to avoid the conclusion that any pre- trial compulsion that focuses on *corporations to produce environmental audit documents* and answer questions, violates or at least compromises *corporation’s* right to remain silent¹⁰⁶.

¹⁰³ Smith HE *‘The Modern Privilege: its Nineteenth- Century Origins’* in Helmholz et al *The Privilege Against Self- Incrimination: its Origins and Development* 1997 at 145.

¹⁰⁴ Carr DA *Environmental Criminal Liability: Avoiding and Defending Enforcement Actions* 1995 at 89.

¹⁰⁵ Bruce D, Savage K, and De Waal J *‘A Duty to Answer Questions? The Police, the Independent Complaints Directorate and the Right to Remain Silent’* (2000) 16 SAJHR at 83. Italics own emphasis.

¹⁰⁶ Ibid. Italics own emphasis.

From a South African environmental context, the Republic's environmental authorities¹⁰⁷ are 'organs of the state'¹⁰⁸ and as such are bound, in terms of section 8(1) of the 1996 Constitution, by all provisions of the Bill of Rights¹⁰⁹.

As many corporations, in the Republic, conduct their own voluntary environmental auditing the purpose of which being to identify and remedy operational problems and environmental harm at an early stage, the problem arises where such audit documents reveal a past or present breach of an environmental statute or permit, which, in turn, may give rise to criminal or civil liability¹¹⁰. It is clear that the audit documents can provide evidence that the corporation had knowledge of the circumstances surrounding the breach¹¹¹, and consequently environment degradation. Not forgetting the fact that those documents can, in most cases, also be incriminating to both the corporation and its corporate officers.

On the flip- side of the coin exist two opposing interests, namely, the State wanting to discover the audit documents for the sole purpose of wanting to institute environmental criminal prosecution against the corporate offender, and the corporation demanding confidentiality for their voluntary audit documents. Corporations usually claim confidentiality by invoking the privilege against self- incrimination.

¹⁰⁷ For example, the Chief Air Pollution Control Officer and the inspectors appointed in terms of the Atmospheric Pollution Prevention Act 45 of 1965; Department of Water Affairs, Catchment Management Agencies established in terms of the National Water Act 36 of 1998; and the Department of Environmental Affairs and Tourism as instituted by the National Environmental Management Act 107 of 1998.

¹⁰⁸ In terms of section 239 of the Constitution, any functionary or institution that exercises a public power or perform a public function in terms of any legislation is an organ of state.

¹⁰⁹ Bruce, Savage and De Waal op cit note 205 at 81.

¹¹⁰ McDonald J 'Confidentiality of Environmental Audit Documents' in Gunningham et al Environmental Crime 1995 at 203.

How this works is that corporations (as non-accused corporate offenders) avail themselves of the privilege to prevent, firstly, the State from discovering the audit documents in bolstering their case against the corporation, and secondly prevent the introduction of the audit documents as evidence at a criminal trial (where such a breach may result in criminal prosecution)¹¹². The environmental authorities, in terms of the privilege, are not allowed to discover the audit documents from the corporations and also are prevented from using such documents in a criminal prosecution against the corporation.

Therefore, one may argue that environmental authorities are allowed to discover and peruse such documents, if its only purpose is to see how the corporation uses the audit information in environmental protection. Here the purpose for discovery is legitimate as the authorities are not searching for any statutory breaches or permit breaches. But the situation changes when the authorities, after perusal of the documents discovers a statutory or permit breach, decides to institute criminal prosecution against the corporation for the alleged breach. The corporation may use the privilege to claim back the audit documents from the environmental authorities. Then if the environmental authority refuses, there is violation of the corporate offenders' privilege against self-incrimination. If the environmental authority proceeds with its criminal prosecution against the corporate offender, the latter can also claim the privilege in that criminal proceeding. This is because section 35(3)(j) of our Final Constitution precludes evidence

¹¹¹ Ibid.

¹¹² De Waal J, Currie I and Erasmus G The Bill of Rights Handbook 4th Edition 2001 at 644.

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¹¹¹ Ibid.

¹¹² De Waal J, Currie I and Erasmus G The Bill of Rights Handbook 4th Edition 2001 at 644.

directly obtained from voluntary disclosure from use in subsequent criminal proceedings; so-called 'derivative evidence'¹¹³.

The right to remain silent, which does not oblige the corporation to assist the state to prove or disprove the corporation's guilt, further supports this¹¹⁴. As the audit documents can assist the State in proving its case against the corporation for the alleged breach and environmental degradation, it is the corporation's right to invoke the privilege against self-incrimination.

Moreover, it is the duty of the State to prove the guilt of the corporation without any assistance from the corporate offender, so, it is arguable, that the use of such documents as evidence against the corporate offender in a subsequent criminal prosecution, preceded by a voluntary disclosure to the environmental authorities of the audit documents, compromises both the corporation's privilege against self-incrimination and the right to remain silent¹¹⁵.

Thus in Ferreira v Levin NO Ackermann J¹¹⁶ expressed, the view with which the majority of the court appeared to agree¹¹⁷, that the trial judge in a subsequent trial is best placed to decide on the admissibility of derivative evidence. Ultimately, Ackermann J held, the

¹¹³ Bruce D, Savage K and De Waal J 'A Duty to Answer Questions? The Police, the Independent Complaints Directorate and the Right to Remain Silent' (2000) 16 SAJHR at 82. 'Derivative evidence' is evidence obtained as a result of the disclosure made during the inquiry, may, in principle, be used in subsequent criminal proceedings. In Ferreira v Levin NO 1996 (1) SA 984 (CC) at para 153, Ackermann J expressed the view that the presiding officer in the subsequent trial is best placed to decide on the admissibility of derivative evidence.

¹¹⁴ Ibid, at 83.

¹¹⁵ Section 35(3)(j) read with section 35(3)(h) of the Constitution of the Republic of South Africa 1996.

¹¹⁶ 1996 (1) SA 984 (CC) at para 153.

trial judge must ensure a fair trial and decide whether the admission of derivative evidence would undermine the Constitution's commitment to a fair trial on the facts of the case before him or her.

The Constitutional Court decision in this regard makes the internal audit documents of the corporation voluntarily discovered admissible, in principle, unless the use of such audits would make the trial unfair¹¹⁸.

The constitutional right against self-incrimination in our country is therefore nothing but a use-immunity, meaning that self-incriminating evidence may not be used against the corporation, either, when wanting to institute environmental criminal prosecution for alleged breach of permit or statute discovered from the voluntary disclosure by the corporation of its audits, or when wanting to use such audits as evidence in a subsequent criminal proceeding¹¹⁹. The reason is that while non-accused persons do not have the right against self-incrimination, they may invoke the privilege to prevent the introduction of the evidence at a criminal trial¹²⁰.

As a result, State power in taking action or prosecuting corporation for environmental crimes is hindered, if not limited. In addition, the State power in enforcing environmental legislation is to some extent limited. Because, although the corporation's internal environmental auditing has revealed breaches the State enforcement actions against the

¹¹⁷ The majority of the court (at para 187) appears to agree with Ackermann J's view.

¹¹⁸ Bruce, Savage and De Waal op cit note 113 at 82.

¹¹⁹ De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4th Edition 2001 at 644.

¹²⁰ Ibid.

corporation are limited. For example the State may only force the corporation to pay a fine for failing to comply with the permit or statute. Such a fine the corporation can absorb as a “mere cost of doing business”. The privilege against self- incrimination does not only prevent the State from ensuring that corporations do in fact comply with environmental statutes or permits, but also that corporations protect the environment in their activities.

Magner sets out other criticisms levelled against this privilege¹²¹:

- Firstly, that the privilege is fundamentally a human right. In its origin together with its continuing justification, it is a central fact that the privilege prevents torture and other abuses of human rights. It was first recognised as a human right in the High Court by Murphy J in Rochford v Trade Practices Commission where his Honour said, “the privilege against self- incrimination is a human right, based on the desire to protect personal freedom and human dignity”¹²². It, therefore, follows that corporations are, in deed, not and cannot be subjected to threats of such treatment. In addition, the privilege has developed against the backdrop of increasing statutory denial of the privilege to corporations¹²³;
- Secondly, that the privilege is against testimonial incrimination. This has been interpreted to mean that the privilege exists to protect the individual from self- disclosure either orally or in writing. Documents can be seen to fall into two categories, narrative accounts and operative instruments. Those documents that

¹²¹ Magner ES ‘Case and Comment: Caltex Refining Co. Pty Ltd. v State Pollution Control Commission’ (1992) 16 Crim.LJ at 121.

¹²² (1982) 153 CLR 134 at 150.

contain narrative accounts of events and might contain admissions would clearly serve a testimonial function and the view that those should be protected is clearly acceptable. But those that are operative instruments (like environmental audit documents), business documents, instructions, receipts, invoices and the likes do not serve a testimonial function and could be seen to be more analogous to real evidence; and

- Lastly, in Caltex Refining Co. Pty Ltd. v State Pollution Control Commission¹²⁴ the Court of Criminal Appeal highlighted that the privilege served three main purposes: First, it is an aspect of individual privacy and dignity...[second] it assists to hold a proper balance between the powers of the State and the rights and interests of citizens...[and, third] it is a significant element maintaining the integrity of the accusatorial system of criminal justice, which obliges the Crown to make out a case before the accused must answer¹²⁵.

Inextricably linked with the problem of the privilege against self-incrimination, is whether corporate officers retain a personal right to the privilege when required to produce the audit documents on behalf of the corporation that could incriminate them personally. Although the Caltex decision has important implications for corporate officers, the court, however, left this question open¹²⁶.

¹²³ Puls J 'Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13 EPLJ at 365.

¹²⁴ (1991) 74 LGRA 46.

¹²⁵ Ibid, at 53.

¹²⁶ Lipman Z. 'Old Wine in New Bottles: Difficulties in the Application of General Principles of Criminal Law to Environmental Law' in Gunningham et al Environmental Crime 1995 at 85.

Traditionally a corporation upon its formation acquired the capacity to have its own rights and duties¹²⁷. It acquires legal personality and exists apart from its members¹²⁸. The recognition of corporations as a separate entity from its members was judicially recognised in the leading case of Salomon v Salomon & Co Ltd. The House of Lords held that, from its inception, a company was legally separate from its members. It was further held that the facts provided no basis to hold Salomon personally liable for the debts of the company¹²⁹.

As a result, the “corporate veil” shielded corporate officers¹³⁰. The corporate veil was, however, susceptible to abuse and in order to prevent the corporate veil acting as a shield for corporate officers who, in practice, are responsible ultimately for the crimes of the corporations, the law has increasingly made corporate officers, as well as the corporations, liable for the acts of that corporation¹³¹. Corporations and their officers are now subject to a series of statutory regimes, which deem corporate officers liable for acts of that corporation¹³². Hence the last 20 years have seen a dramatic reduction in the protection offered to corporate officers by the treatment of corporations and their officers as separate legal persons¹³³.

¹²⁷ Cilliers HS and Benade ML Entrepreneurial Law 2nd Edition 2000 at 69.
¹²⁸ Ibid.

¹²⁹ Cilliers and Benade op cit note 127 at 69- 70.

¹³⁰ Puls J ‘*Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?*’ (1996) 13 EPLJ at 364. ‘Corporate Officers’ in this context, refers to company boards, directors and managers, but more generally to anyone who can be held personally liable for the activities of the company by which they are employed or of which they are a director.

¹³¹ Ibid. For example, see sections 50(3), 172 and 424 of the South African Companies Act 61 of 1973; also see Daimler Co. Ltd. v Continental Tyre and Rubber Co. [1916] 2 AC 307, Robinson v Randfontein Estates Gold Mining Co. Ltd. 1921 AD 168 [at 194- 195], The Shipping Corporation of India Ltd. v Evdomon Corporation 1994 (1) SA 550 (A), and the Cape Pacific Ltd. v Lubner Controlling Investments (Pty) Ltd. 1995 (4) SA 790 (A) for the “lifting or piercing of the corporate veil” by the courts.

¹³² Puls op cit note 130 at 364.

¹³³ Puls op cit note 130 at 366.

One of the most significant areas in which corporate officers are now personally liable for the actions of their company is in environmental law¹³⁴. It appears, at least from a South African context, that the privilege might be available to corporate officers. Because the privilege against self-incrimination only precludes incriminating evidence obtained from one person from being used against the same person in subsequent criminal prosecution¹³⁵. What this means is evidence (or audit records) if obtained from the corporate officer that incriminates the corporation as a legal person, may be used against the corporation in the alleged breach of legislation.

Therefore, it can be said that corporate officers are only allowed to invoke the privilege where such records (or evidence), are in fact incriminating the corporate officer into the alleged environmental crime. In essence, the records or 'incriminating' evidence must establish the guilt of the corporate officer concerned. It also goes without saying that the 'incriminating' evidence must be obtainable from the corporate officer concerned.

However, a situation may arise where the audit records incriminate both the corporation and its corporate officers. This is inevitable as corporate officers, in most cases, are acting on behalf or for the corporation. This may be a difficult problem to prevent, particularly in large corporations, where decisions that lead to environmental degradation are often not confined to the top levels of management¹³⁶.

¹³⁴ Puls op cit note 130 at 367.

¹³⁵ Bruce D, Savage K and De Waal J '*A Duty to Answer Questions? The Police, the Independent Complaints Directorate and the Right to Remain Silent*' (2000) 16 SAJHR at 81.

¹³⁶ Lipman Z '*Corporations, Crime and the Environment*' (1997) 4 SAJELP at 73.

c) The Current State of the Law in South Africa.

In South Africa, the Bill of Rights in our Final Constitution guarantees everyone the right ‘not to be compelled to give self- incrimination evidence’¹³⁷. Arguably, this guarantee should only be available to natural persons and not to juristic persons or corporations¹³⁸. Of course, this will depend on a lot of issues, notably the extent to which the guarantees in the Bill of Rights are interpreted as applicable to corporations¹³⁹. This is evidenced by a section in our Final Constitution, which provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person¹⁴⁰. In fact, the word “person” in the Bill of Rights is given its wider meaning as it is not limited to natural person(s) but also includes juristic person(s).

This means that corporations are guaranteed the right to a fair trial, section 35(3) Act 108 of 1996, which includes but is not limited to the privilege against self- incrimination¹⁴¹ and the right to remain silent¹⁴². These rights, in turn, hamper the enforcement of environmental legislation. In fact these rights pose an evidential problem, which will be discussed in detail below.

¹³⁷ Lipman Z *‘Corporation, Crime and the Environment’* 1997 4 (SAJELP) at 86. Constitution of the Republic of South Africa 1996, section 35(3)(j).

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Constitution of the Republic of South Africa 1996, section 8(4).

¹⁴¹ Constitution of the Republic of South Africa 1996, section 35(3)(j).

This is a problem from a South African Environmental perspective, because:

- Firstly, no South African court has decided on the constitutional application of the privilege against self-incrimination to corporations¹⁴³; and
- Secondly, no legislation has been introduced which removes the privilege with respect to corporations¹⁴⁴.

The question that needs to be clarified is: *how is this privilege an evidential problem in potential environmental criminal prosecutions?*

The growing trend of corporate accountability for environmental degradation prompted companies to adopt a voluntary proactive approach to environmental management¹⁴⁵. This approach entails the growing use of internal environmental audits to detect and prevent potential breaches of environmental laws and regulations¹⁴⁶. But most importantly to protect the environment against the degrading activities of corporations/ companies.

The existence of the audit documents could itself be incriminating if a breach occurs, as it may provide evidence that the company had knowledge of the circumstances surrounding the breach¹⁴⁷. Thus corporations' concern is whether this information can remain

¹⁴² Constitution of the Republic of South Africa 1996, section 35(3)(h).

¹⁴³ Lipman op cit note 137 at 86.

¹⁴⁴ Ibid.

¹⁴⁵ McDonald J 'Confidentiality of Environmental Audit Documents' in Gunningham et al Environmental Crime 1995 at 203.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

confidential, as the State and even civil action subject the environment to numerous regulations, a breach of which may lead to criminal prosecution¹⁴⁸. As a result, corporations, in most jurisdictions, when faced with the discovery of the audit documents, in a criminal prosecution, they invoke the privilege against self-incrimination.

Consequently, in South Africa, the State will encounter significant evidential difficulties in obtaining corporation's environmental audit records¹⁴⁹. Because the most obvious way in which corporations might seek to protect its records from discovery by the State is to claim the privilege against self-incrimination¹⁵⁰.

Kidd correctly states that environmental criminal law in South Africa falls squarely within the 'command and control paradigm'... with any contravention of the legislation declared to be an offence...¹⁵¹. The fact that the government does not have the resources to conduct its own monitoring and is largely reliant on environmental audits by corporations will be to their disadvantage¹⁵². If the corporations' environmental records cannot be discovered in criminal prosecutions, it will be extremely difficult for the State to prove its case¹⁵³. This would, in turn, lead to lax approach in dealing with corporate offenders in cases of environmental degradation and breaches of legislation.

¹⁴⁸ Spedding L, Jones D and Dering C *Eco- Management and Eco- Auditing: Environmental Issues in Business* 1994 at 185.

¹⁴⁹ Lipman Z *'Old Wine in New Bottles: Difficulties in the Application of General Principles of Criminal Law to Environmental Law'* in Gunningham et al *Environmental Crime* 1995 at 40.

¹⁵⁰ McDonald J *'Confidentiality of Environmental Audit Documents'* in Gunningham et al *Environmental Crime* 1995 at 204.

¹⁵¹ Kidd M *'Environmental Crime- Time For A Rethink in South Africa?'* (1998) 5 SAJELP at 191.

¹⁵² Lipman op cit note 149 at 4 i.

¹⁵³ Ibid.

Another concern, which is also linked to the privilege against self-incrimination, is the right of access to environmental information. The Promotion of Access to Information Act 2 of 2000 regulates the constitutional right of access to information, while the access to environmental information is regulated by section 31 of the National Environmental Management Act 107 of 1998 (NEMA)¹⁵⁴. The right to information in Act 2 of 2000 differs in certain aspects with the right to environmental information in NEMA¹⁵⁵. The Act of 2000 provides for a general right to information, except in sections 46 and 70 where an obligation is placed on a government official and the head of a private body to disclose information that may have an environmental risk or that may endanger the public, while section 31 of NEMA provides for a restricted right to environmental information¹⁵⁶. The number of grounds of refusal is greater in the Act of 2000 and their formulation differs from those formulated in NEMA¹⁵⁷.

However the right of access to information as contained in the 1996 Constitution, and given effect to by the Promotion of Access to Information Act 2 of 2000, is significant for environmental law because, in most cases, the relevant environmental legislation prevents the disclosure by an official of information and makes the unauthorized

¹⁵⁴ Section 6 read with Schedule 1 Act 2 of 2000 specifically preserves section 31 of NEMA. There is a assumption that the logic behind preserving section 31 of NEMA was for the Promotion of Access to Information Act 2 of 2000 to give effect to section 32 of the 1996 Constitution, while section 31 of NEMA regulating access to environmental information.

¹⁵⁵ Du Plessis W *'The Right to Environmental Information in the New National Environmental Management Bill'* (1998) 5 SAJELP at 402.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

disclosure of such information a criminal offence¹⁵⁸. Loots argues that there is no doubt that the validity of these clauses is subject to attack on the basis of section 32 of the Final Constitution, because if the corporation relies on the secrecy clause, that the public does not have access to such information, they will have to justify the limitation of the right of access to such information in terms of section 36 of the Final Constitution¹⁵⁹.

Nevertheless one ground of refusal, contained in the Promotion of Access to Information Act 2 of 2000, that raises some concerns in the quest of tightening environment enforcement is the mandatory protection of records (or privileged records) from production in legal proceedings¹⁶⁰. This provision mandates that requests for access to privileged records must be refused, unless there has been a waiver of the privilege by the person entitled to it¹⁶¹. While this provision is subject to the public interest override¹⁶², the privilege appears to cover materials or records whether or not legal proceedings have commenced¹⁶³. Since 'privileged from production in legal proceedings' is not defined in the Act¹⁶⁴, this basically means that corporations may either invoke this privilege or their constitutional privilege against self-incrimination, thereby giving corporations options as to which one of the two privileges they may invoke. This will hinder the enforcement of

¹⁵⁸ Loots C *'The Impact of the Constitution on Environmental Law'* (1997) 2 SAJELP at 66- 7. Examples of such 'secrecy clauses' are to be found in many environment- related statutes. *The Nuclear Energy Act 131 of 1993*, section 69, severely restricts the access of the public to information in connection with nuclear installations and sites; the *Hazardous Substances Act 15 of 1973*, section 17, limits disclosure of information concerning the analysis or examination of a sample in terms of the Act and the divulging of information relating to the business or affairs of any person; and the *Atmospheric Pollution Prevention Act 45 of 1965*, section 41, prohibit the disclosure of any information relating to any manufacturing process.

¹⁵⁹ *Ibid*, at 67.

¹⁶⁰ Section 40 (public bodies) and section 67 (private bodies), the Promotion of Access to Information Act 2 of 2000.

¹⁶¹ De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 2001 at 549.

¹⁶² Mandatory disclosure in public interest: section 46 (public body) and section 70 (private body), the Promotion of Access to Information Act 2 of 2000.

¹⁶³ De Waal, Currie and Erasmus op cit note 254 at 549.

environmental statutes and environmental protection, in that, although ‘privilege from production in the legal proceedings’ is subject to the public interest override provision¹⁶⁵, the constitutional privilege against self- incrimination seems not to be subject to such a clause, but merely the limitation clause¹⁶⁶.

Moreover, another privilege as contained in the Promotion of Access to Information 2 of 2000 creates a loophole in our environmental law. Because this Act does not effectively regulate access to environmental information but a general access to information, thus the privilege created opened a can of worms. In that, the privilege of records or material from production in legal proceedings is just another power given to corporations. This also affects the public in its enforcement actions against corporate offenders, in that the term ‘legal proceedings’ does not only cover criminal proceedings but also civil proceedings. This is evidenced by section 33 of the National Environmental Management Act 107 of 1998, which provides for private prosecution. The refusal of access to environmental audit documents can hinder the person who is acting in the public interest or in the interest of protecting the environment¹⁶⁷, in making up a case against the corporate offender. As the individual does not have the resources to accumulate enough information against corporate offenders, the two privileges will work against the individual.

¹⁶⁴ Ibid.

¹⁶⁵ Section 70 of the Promotion of Access to Information Act 2 of 2000.

¹⁶⁶ Section 36 of the Final Constitution 1996.

¹⁶⁷ Section 33(1)(a)- (b), National Environmental Management Act 107 of 1998.

This raises problems because the Promotion of Access to Information Act 2 of 2000 does not address the access to environmental information explicitly, nor does it go as far as the National Environmental Management Act 107 of 1998 in providing for access to environmental information¹⁶⁸. This means that the constitutional privilege against self-incrimination does not only pose an evidential problem in environmental criminal prosecution, but the problem is further exacerbated by the privilege in the Promotion of Access to Information Act 2 of 2000 that refuses a request of access to the relevant environmental audit information that may assist in establishing the guilt of corporate offenders. There is no doubt that the two privileges puts the corporations in a superior position, in that they will decide which information will be released for public perusal and which is not to be released.

d) Access to Environmental Information in South Africa.

It must be noted that the right of access to information is a valuable tool in the hands of environmental activists¹⁶⁹. This is confirmed by a court of law that noted that the right of access to information provided for in section 32 of the Interim Constitution "...is therefore, something more than a constitutional right to discovery, but is also a necessary adjunct to an open and democratic society committed to the principles of openness and accountability..."¹⁷⁰

¹⁶⁸ Kidd M *'The National Environmental Management Act and Public Participation'* (1999) 6 SAJELP at 26.

¹⁶⁹ Glazewski J *Environmental Law in South Africa* 2000 at 109.

¹⁷⁰ *Quozeleni v Minister of Law and Order 1994 (3) SA 625 (EC)*, at 642E- G.

However, in the United States (the US) the strongest bulwark against the right of access to environmental information was the introduction, in 1993, of the state “audit privilege” laws¹⁷¹.

Initially, the Environmental Protection Agency (the EPA) decided that all information generated by a self- audit can be obtained by the government and be used against the company for any purpose, including criminal prosecution, civil liability and enforcement action¹⁷². The EPA refused to give companies, which conducted self- audits, any actual benefits for doing so and, quite to the contrary, created serious risks to companies for such activity¹⁷³. Thus, any expectation of privacy a company may have had in the results of its investigation was conclusively removed¹⁷⁴.

The situation changed in 1993 when the Oregon State legislature passed the first- ever “audit privilege” law. In effect the essence of the audit privilege laws is as follows¹⁷⁵:

- Giving corporations immunity from punishment if they self- report violations of environmental laws; and
- Giving any documents related to the self- reporting, official secrecy, immunity from disclosure to the public, and immunity from discovery as evidence in any legal proceedings.

¹⁷¹ Carr DA *Environmental Criminal Liability: Avoiding and Defending Enforcement Actions* 1995 at 75; http://www.rachel.org/bulletin/bulletin.cfm?Issue_ID=571;

<http://www.finehummel.com/library/enviro/knowningmayhurt.htm>.

¹⁷² <http://www.finehummel.com/library/enviro/knowningmayhurt.htm>

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ http://www.rachel.org/bulletin/bulletin.cfm?Issue_ID=571.

Therefore, if a corporation conducts an environmental self-audit of its operations, the information in the self-audits cannot be used as evidence in any legal proceedings including lawsuits and/or regulatory actions¹⁷⁶. As a result, the audit privilege laws allow corporations to stamp documents "audit-related" and thus exempt it from public disclosure, discovery, or use as evidence in any legal proceedings¹⁷⁷. Thus, any information related to a self-auditing becomes "privileged"¹⁷⁸.

Moreover, the Texas audit-privilege law contains additional provisions that make it a crime for employees or government officials to divulge anything related to environmental self-audits¹⁷⁹. Thus, if a person divulges such information and it subsequently leads to penalties against the Polluter Company, the individual who divulged the information must pay the polluters' fines, penalties, and other costs¹⁸⁰. Rachel argue that this is a blatant "anti-whistle-blower" provision, clearly intended to silence individuals who might otherwise come forward with information about violations of law¹⁸¹.

What should also be noted is that the "audit privilege" laws apply not only to private corporations but also to the governments as well¹⁸². Thus citizens of a municipality can

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid. These laws have been passed in at least 21 States and are pending in 13 or 14 others. The States that have, so far, passed "audit privilege" laws include: Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Ohio, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, Oregon, South California, South Dakota, Texas, Utah, Virginia, and Wyoming.

¹⁷⁹ http://www.rachel.org/bulletin/bulletin.cfm?Issue_ID=571.

¹⁸⁰ http://www.osbornlaw.com/Publications/Managing_Environmental_Liability.html;
http://rachel.org/bulletin/bulletin.cfm?Issue_ID=571.

¹⁸¹ Ibid.

¹⁸² Ibid.

lose their right to know about pollution from their own local landfill when their State legislature passes an “audit privilege” law¹⁸³.

In the Republic, the constitutional right of access to information is regulated by both the Promotion of Access to Information Act 2 of 2000 (“the Act”), and the National Environmental Management Act 107 of 1998 (“NEMA”).

➤ **The Promotion of Access to Information Act 2 of 2000.**

Goldblatt¹⁸⁴ argued, “that the major impediment to environmental management in South Africa was a shortage of accessible information. Sometimes access to information was restricted, sometimes it was difficult to locate and sometimes it was in a format hard to use- but more often than not it simply did not exist. As a result, the absence of reliable environmental information posed a serious obstacle to effective environmental management”.

This is no longer the case, as the purpose of the Promotion of Access to Information Act 2 of 2000 is “to give effect to the constitutional right of access to any information held by the State and any information that is held by another person (*or corporations*) and that is required for the exercise or protection of any rights (*including the right to a healthy environment, section 24 Act 108 of 1996*)”¹⁸⁵. Glazewski¹⁸⁶ argues that the right of access to information is particularly important in the environmental context, as much

¹⁸³ Ibid.

¹⁸⁴ Goldblatt M. ‘*Registering Pollution: The Prospects for a Pollution Information System*’ in Bethlehem and Goldblatt (editors) *The Bottom-Line: Industry and the Environment in South Africa 1997* at 125- 6.

¹⁸⁵ Long title of the Promotion of Access to Information Act 2 of 2000. Italics, own emphasis.

governmental decision- making has direct or indirect consequences on the environment. For example, a particular industrial undertaking will typically require a permit to emit a particular type of pollutant or to conduct a specific activity, and in acquiring it will be required to monitor and report on its emissions¹⁸⁷. Hence, access to the nature of the pollutants emitted their quantum and impact on the environment is a vital tool in the hands of individuals or environmental groups affected by such emissions¹⁸⁸.

The Act is arranged in seven parts¹⁸⁹, but the discussion will be restricted to Part 3 that deals with access to records of private bodies (*corporations*). Before I proceed, the term “record” is defined as:

...In relation to, a public or private body, means any recorded information-

- (a) Regardless of form or medium;
- (b) In the possession or under the control of that public or private body, respectively; and
- (c) Whether or not that public or private body created it, respectively¹⁹⁰.

Part 3 of the Act provides for access to records of private bodies *or corporations*¹⁹¹. A requester (*either the public or government*) must be given access to any record of a private body if:

- That record is requested for the exercise or protection of any rights;

¹⁸⁶ Glazewski J *Environmental Law in South Africa* 2000 at 111.

¹⁸⁷ Ibid, at 111- 12.

¹⁸⁸ Ibid, at 112.

¹⁸⁹ Part 1 deals with the introductory provisions, including definitions and objectives of the Act; Part 2 deals with access to records of public bodies; Part 3 deals with access to records of private bodies; Part 4 deals with appeals; Part 5 grants the Human Rights Commission certain additional powers and functions; while Part 6 and 7 deals with transactional and general matters respectively.

¹⁹⁰ Section 1 Definitions.

¹⁹¹ Sections 50- 73. Italics own emphasis.

- That person complies with the procedural requirements in this Act relating to a request for access to that record; and
- Access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

However, grounds for refusal¹⁹², headed “Commercial Information of a Private Body”, provides for the head of a *corporation* to refuse a request for access to a record of the *corporation* if the record-

- Contains trade secrets of the *corporation*;
- Contains financial, commercial, scientific or technical information, other than trade secrets, of the *corporation*, the disclosure of which would be likely to cause harm to the commercial or financial interests of the *corporation*;
- Contains information, the disclosure of which could reasonably be expected, to put the *corporation* at a disadvantage in contractual or other negotiations, or to prejudice the *corporation* in commercial competition; or
- Is a computer program, as defined in section 1(1) of the Copyright Act 98 of 1978, owned by the *corporation*, except insofar as it is required to give access to a record to which access is granted in terms of this Act.

But a record may not be refused in terms of subsection (1) insofar as it consists of information about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of the *corporation* and its disclosure

¹⁹² Sections 62- 70.

would reveal a serious *public safety or environmental risk*¹⁹³. Nevertheless, this provision, along with certain others, can be trumped in certain circumstances, namely, where:

- a) The disclosure of the record would reveal evidence of-
 - i) A substantial contravention of, or failure to comply with, the law; or
 - ii) Imminent and serious public safety or environmental risk; and
- b) The public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question¹⁹⁴.

Although it is apparent from the above that no distinction is made in the Act between environmental and other information, it, however, includes reference to “public safety or environmental risks”¹⁹⁵. Hence the Promotion of Access to Information Act 2 of 2000 is welcome insofar as it fleshes out the constitutional right of access to information generally and includes environmental considerations, though it imposes onerous bureaucratic obligations on both public and private entities¹⁹⁶. However, the Act still faces serious challenge of how it will be applied in practice¹⁹⁷.

¹⁹³ Section 68. “*Public safety or environmental risk*” is defined as ...harm or risk to the environment or the public (including individuals in their workplace) associated with-

- a) A product or service which is available to the public;
 - b) A substance released into the environment, including, but not limited to, the workplace;
 - c) A substance intended for human or animal consumption;
 - d) A means of public transport; or
 - e) An installation or manufacturing process or substance, which is used in that installation or process.
- (Section 1 Definition).

¹⁹⁴ Section 70.

¹⁹⁵ Glazewski J *Environmental Law in South Africa* 2000 at 111.

¹⁹⁶ *Ibid*, at 115.

➤ **The National Environmental Management Act 107 of 1998.**

As regard access to environmental information under NEMA, every person is entitled to have access to information held by the State and organs of State which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances¹⁹⁸. This section when interpreted broadly gives citizens and juristic persons wide-ranging right of access to environmental information held by the government.

In addition, the government is entitled to have access to information relating to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste, held by corporations where that information is necessary to enable the government to carry out their duties in terms of the provisions of this Act or any other law concerned with the protection of the environment or sustainable use of natural resources¹⁹⁹.

However, a request for information contemplated in the former request can be refused only-

- If the request is manifestly unreasonable or formulated in too general manner;

¹⁹⁷ Ibid.

¹⁹⁸ Section 31(1)(a) NEMA.

¹⁹⁹ Section 31(1)(a) NEMA.

- If the public order or national security would be negatively affected by the supply of the information; or
- For the reasonable protection of commercially confidential information;
- If the granting of information endangers or further endangers the protection of the environment; and
- For the reasonable protection of personal privacy²⁰⁰.

However, with regard to the light of the words "...pending the promulgation of such statute, the following shall apply..." in section 31(1) of NEMA, it could be assumed that with the subsequent passing of the Promotion of Access to Information Act 2 of 2000 section 31 falls away²⁰¹. However, Glazewski states that this is not the case as section 6 read with Schedule 1 of the Promotion of Access to Information Act 2 of 2000 specifically preserves section 31 of NEMA²⁰². This means that the right of access to environmental information in South Africa is governed by two enactments, namely the Promotion of Access to Information Act 2 of 2000, and the National Environmental Management Act 107 of 1998.

➤ **Basic Conditions of Employment Act 75 of 1997**

Another enactment that deals with disclosure or access to information is the Basic Conditions of Employment Act 75 of 1997. In terms of the BCEA, the Director- General or Labour inspector may require any person in the corporation, either in writing or orally, to furnish or disclose any information, book, document or object that is material to an

²⁰⁰ Section 31(1)© NEMA.

²⁰¹ Glazewski J *Environmental Law in South Africa* 2000 at 118.

investigation or to which an employment law relates²⁰³. Moreover, these persons may not refuse to answer any relevant question by the Director- General or Labour inspector that he or she is legally obliged to answer²⁰⁴. The BCEA, therefore, allow the designated persons access to corporation's books, documents, information or object without any restrictions.

However, 'no answer' by any person to a question by the person conducting the investigation in terms of section 53 or by the labour inspector in terms of section 66 may be used against that person in any criminal proceedings²⁰⁵. This provision affords the privilege against self- incrimination to corporate officers. This is due to the fact that corporations cannot answer questions, but corporate officer's act or answer on its behalf. It, logically, follows that only those 'answers' that incriminate the corporate officers personally are privileged in any criminal proceedings. In this regard two concerns, in a form of questions, may be highlighted:

- Does the privilege, in the context of the above provision, also extend to corporations as juristic or artificial persons? If so;
- Does it includes the information, books, documents, or object disclosed on behalf of the corporation that does not incriminate corporate officers, but only serve as incriminate evidence against the corporation?

²⁰² Ibid.

²⁰³ Sections 53(1) and 66(1) of the Basic Conditions of Employment Act 75 of 1997.

²⁰⁴ Sections 53(2) and 67(1) of the Basic Conditions of Employment Act 75 of 1997.

²⁰⁵ Section 91 of the Basic Conditions of Employment Act 75 of 1997.

By way of illustration with two cases decided before the Act No. 2 of 2000, in Van Huyssteen NO and others v Minister of Environmental Affairs and Tourism and others²⁰⁶ where the applicant sought an order compelling the respondent Minister to furnish all available documentation concerning the construction of a steel mill plant at Saldanha Bay. The court acknowledged that the right of access to information is not absolute and unqualified²⁰⁷, and held that in the present case there was no question of a possible limitation under the limitation clause under the Interim Constitution²⁰⁸. The order sought was therefore granted.

While in Goodman Bros. (Pty) Ltd. v Transnet Ltd.²⁰⁹, where the applicant sought an order compelling the release of documents concerning the evaluation of the tender to supply wristwatches to the respondent. The court noted that an unrestricted right of access to documents in possession of a public body could easily lead to abuse but some protection had to be afforded against the oppressive consequences of State secrecy which previously existed²¹⁰. The court held that there had to be a reasonable basis for believing that the disclosure of documents in possession of the State would assist the applicant in protecting his or her right²¹¹. The court, further, emphasised that the right of access to information did not entitle the applicant to information to determine whether a right was

²⁰⁶ 1995 (9) BCLR 1191 ©.

²⁰⁷ At 1208E- F.

²⁰⁸ Section 33(1) of the Interim Constitution of the Republic of South Africa Act 200 of 1993.

²⁰⁹ 1998 (8) BCLR 1024 (W).

²¹⁰ As a result the court approved the SA Metal Machinery Co. Ltd. v Transnet Ltd. Unreported case (W) for Witwatersrand and local division dated 22 March 1998.

²¹¹ 1998 (8) BCLR 1024 (W), at 1034G- H.

threatened or infringed. More is needed than just an unsubstantiated apprehension of harm to invoke the right²¹². The application was dismissed.

As these cases were decided before the Promotion of Access to Information Act, the challenge in practice is which approach are the courts going to follow:

- a) Is it the one where the public bodies are exempted from disclosing certain information to the public or juristic person; or
- b) The one where both the public and private bodies are obliged to release any information relating to the degradation of the environment?

In any of the approaches that the court might choose in the near future, the most challenging question that they have to deal with is the privilege against self-incrimination contained in section 35(3)(j) of the Final Constitution of the Republic of South Africa. The question of whether or not this right is applicable to corporations is answered by section 8(4) of the Final Constitution, which provides that juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

An examination of the privilege against self-incrimination in relation to environmental crimes in other jurisdictions will now be discussed.

²¹² At 1036E.

e) Examination of the Position in Other Countries.

➤ The United States of America.

The consideration of the privilege against self-incrimination in the United States (US) has been in the context of the Fifth Amendment of the US Constitution²¹³. The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself...”²¹⁴. As a corporation cannot be a witness, this clearly could not apply to corporations²¹⁵. While the Fifth Amendment does protect corporate officers, it does not extend to corporations²¹⁶. As a result corporate offenders cannot prevent disclosure of incriminating information to government prosecutors, while corporate officers may invoke the privilege and refuse to testify, thereby depriving the corporation of the benefit of their testimony and generating adverse inferences from the fact finder²¹⁷. The corporation is required to appoint an agent who can, without fear of self-incrimination, furnish corporate documents (or environmental audit documents) requested by the government²¹⁸. If no such agent is available, the court will either stay the discovery or issue a protective order²¹⁹.

Importantly however is that the American Supreme Court is more realistic about the tangible effects for individuals of its decision to deny the privilege to corporations²²⁰. In Bellis v United States the court stated the accepted law that “an individual cannot rely

²¹³ Puls J ‘Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?’ (1996) 13 EPLJ at 370.

²¹⁴ US Constitution Amendment V.

²¹⁵ Puls op cit note 210 at 370.

²¹⁶ Carr DA Environmental Criminal Liability: Avoiding and Defending Enforcement Actions 1995 at 90.

²¹⁷ Ibid.

²¹⁸ United States v Kordel 397 U.S. 1, 8 (1970).

²¹⁹ Carr op cit note 213 at 90. See also Afro- Lecon, Inc. v United States, 820 F. 2d 1198. 1206- 07 (Fed. Cir. 1987).

upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally”²²¹. While in *Braswell v United States*²²² a company officer claimed he could not produce corporate documents for which he had been subpoenaed to produce on the basis that they would incriminate him²²³. As the company had no privilege he could not claim the privilege on the company’s behalf and so he sought it as his personal right, but the court upheld the *Bellis* decision²²⁴.

➤ Canada.

The Canadian Charter of Rights and Freedoms provides that “no accused person be required to act as a witness”²²⁵. The Charter also provides that “everyone has the right to life, liberty and security of person and the right not to be deprived of that except in accordance with the principles of fundamental justice”²²⁶. As a corporation cannot be a witness, this clearly could not apply to corporations²²⁷. The privilege under section 7 of the Charter may seem to apply in cases where denying it to a corporation would effectively deny it to individual corporate officers²²⁸.

²²⁰ Puls op cit note 213 at 370.

²²¹ 417 US 85 (1974) at 88.

²²² 487 US 99 (1988).

²²³ Puls op cit note 213 at 370.

²²⁴ Ibid.

²²⁵ Canadian Charter of Rights and Freedoms, S 11 ©.

²²⁶ Ibid, S 7.

²²⁷ Puls op cit note 220 at 370.

²²⁸ *R v Bata Industries Ltd. (No. 1)* (1992) 70 CCC (3 d) 391 at 392.

However, in R v Bata Industries Ltd.²²⁹ where the managing director and the company were charged with the same environmental offences, the managing director succeeded in having a report excluded in the company's trial because it incriminated him as well²³⁰. The court held that section 7 of the Charter provided a privilege against self-incrimination that does not extend to corporations unless it is necessary to protect the life, liberty or security of a human being²³¹.

➤ New Zealand.

In New Zealand Apple and Pear Marketing Board v Master & Sons Ltd.²³², the court stated New Zealand's position in the following statement:

"There seems no policy reason why a corporation should not avail itself of the rule (or the privilege). A Corporation acts and makes statements through certain responsible officers... It is identified in law with the acts and defaults of its directors and officers, and it may make admissions through them. Indeed, in this case...the actions and statements of the directors...led to the bringing of the charge... If then the prosecution may prove its case by the out of Court statements of its directors, it seems reasonable that the company should be entitled to claim self- incrimination when it speaks through them"²³³.

The court considered it "unrealistic" to deny the officers of those companies the privilege against self- incrimination "just because they have changed the legal status of the business for considerations which are irrelevant to the issue of self- incriminating

²²⁹ R v Bata Industries Ltd. (No. 1) (1992) 70 CCC (3 d) 391.

²³⁰ Puls J 'Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13 EPLJ at 370.

²³¹ Ibid.

²³² [1986] 1 NZLR 191.

²³³ Ibid, at 196.

admissions”²³⁴. The court appears very conscious of the “unreal” and artificial result which denying the privilege to companies could have²³⁵.

➤ United Kingdom.

In the United Kingdom the privilege against self- incrimination was dealt with in Istel Ltd. v Tully²³⁶.

The court argued: “the privilege can only be justified on two grounds, first that it discourages the ill- treatment of a suspect and secondly that it discourages the production of dubious confessions... It is difficult to see any reason why in civil [*or corporate criminal*] proceedings the privilege should be exercisable so as to enable a litigant [*or corporate offenders*] to refuse relevant and even vital documents which are in his possession or power and which speak for themselves... I regard the privilege against self- incrimination exercisable in civil [*or corporate criminal*] proceedings as an archaic and unjustified survival from the past...”²³⁷.

The court also acknowledged that Parliament has recognised in a piecemeal fashion that the privilege against self- incrimination is profoundly unsatisfactory when no question of

²³⁴ Ibid. at 197.

²³⁵ Puls J ‘*Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbeo Iceworks?*’ (1996) 13 EPLJ at 371.

²³⁶ [1993] AC 45. This was an appeal from the Court of Appeal. In an action by the plaintiff against various defendants, including Mr. and Mrs. Tully, Buckley J on 05 June 1991 granted the plaintiff ex parte injunctive relief requiring Mr. and Mrs. Tully, inter alia, to disclose all dealings relating to certain moneys (referred to in a schedule to the order and all sums and assets representing or derived from such moneys, and to exhibit copies of all documents which related to the receipt or transfer of all dealing with all such assets). By paragraph 33 of the order it was provided that no such disclosure should be used as evidence in the prosecution of an offence alleged to have been committed by Mr. and Mrs. Tully. On an application by Mr. and Mrs. Tully, Wright J made an order on 20 august 1991 setting aside the disclosure order on the ground that it infringed their privilege against self- incrimination, [at 47].

²³⁷ Ibid, at 53. Italics own additions and emphasis.

ill- treatment or dubious confessions is involved²³⁸ The court upheld the Court of Appeal decision because, the court reasoned, Mr. Tully was seeking to exploit the privilege against self- incrimination in order to frustrate the plaintiff's claims²³⁹.

➤ Australia.

The High Court of Australia in Environmental Protection Authority (EPA) v Caltex Refining Co. Pty Ltd.²⁴⁰ decided on whether the privilege against self- incrimination should be extended to corporations at common law, or not. In this case, the Caltex Refining Company had attempted to claim the privilege against self- incrimination to avoid production of documents required by notice under section 29(2)(a) of the Clean Waters Act 1970 of the New South Wales (NSW) and a similar notice to produce made under the rules of the NSW Land and Environment Court²⁴¹.

Stein J in the Land and Environment Court, by reference to US authorities, held that the privilege was not available to corporations at common law²⁴².

The NSW Court of Criminal Appeal, through Gleeson CJ with whom Mahoney JA and McLelland JA agreed, held that at common law the privilege against self- incrimination was available to corporations²⁴³, and the EPA appealed to the High Court.

²³⁸ Ibid.

²³⁹ Ibid, at 57.

²⁴⁰ (1993) 68 ALJR 127.

²⁴¹ Puls J 'Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13 EPLJ at 366.

²⁴² State Pollution Control Commission (SPCC, later renamed EPA) v Caltex Refining Co. Pty Ltd. (1991) 74 LGRA 212.

Lipman, correctly, argues that the decision of the Court of Criminal Appeal was somewhat startling, in that internal environmental auditing by corporations is the cornerstone of the current system of pollution control²⁴⁴. As the EPA or environmental authorities does not have the resources to conduct its own monitoring and is largely reliant on self- monitoring by corporations, accordingly the EPA or environmental authorities would be placed in a position of great difficulty in attempting to enforce pollution control statutes if corporations self- monitoring records were unavailable for use in criminal proceedings²⁴⁵.

The High Court of Australia, by a majority of four to three²⁴⁶, held that the privilege does not, at common law, extend to protect corporations. The majority examined the history and rationale for the privilege, and stated that the privilege is a human right designed to protect individuals from oppressive methods of obtaining evidence and should thus not be extended to artificial entities²⁴⁷. The court also pointed out that:

'Groups frequently are powerful and their illegal doings frequently are provable only by their records; and... economic crimes...are usually not even discoverable without access to business records'²⁴⁸.

The minority did not see the privilege as being exclusively related to notions of personal rights and freedoms²⁴⁹. Instead they emphasised the place of the privilege in the

²⁴³ *SPCC v Caltex Refining Co. Pty Ltd.* (1991) 74 LGRA 46, at 54.

²⁴⁴ Lipman Z '*Corporations, Crime and the Environment*' (1997) 4 SAJELP at 84.

²⁴⁵ Ibid.

²⁴⁶ The majority judges were Mason CJ, Toohey, Brennan and McHugh JJ. Deane, Dawson and Gaudron JJ formed the minority.

²⁴⁷ Lipman op cit note 241 at 85.

²⁴⁸ *EPA v Caltex Refining Co. Pty Ltd.* (1993) 68 ALJR 127, at 136 per Mason CJ and Toohey.

²⁴⁹ Puls J '*Corporate Privilege- Do Directors Really Have a Right of Silence Since Caltex and Abbco Iceworks?*' (1996) 13 EPLJ at 366.

adversarial system, reiterating the principle of common law that “those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself”²⁵⁰.

As a result of this decision, the Australian EPA is now placed in a very strong position in enforcing the various statutes in the control of corporate environmental crime(s)²⁵¹. However, a possible drawback is that the decision may discourage corporations from undertaking voluntary environmental audits because of the fear that it might reveal a breach on environmental statutes or permit, thereby exposing itself and its corporate officers to civil or criminal liability²⁵².

Although the High Court left open the question of whether corporate officers retain personal rights to the privilege when ordered to produce documents on behalf of the corporation which could incriminate them personally, the Court stressed that the outcome did not affect the right of natural persons to claim the privilege²⁵³. This view assumes that there is a clear legal separation of corporations and its officers²⁵⁴. Thus it fails to take into account provisions in most environmental statutes, which hold corporate officers personally liable for acts of the company²⁵⁵. It is, therefore, arguable that following the decision in *Caltex*, corporate officers could as a result of their corporation being

²⁵⁰ *EPA v Caltex Refining Co. Pty Ltd. (1993) 68 ALJR 127 per Deane, Dawson and Gaudron JJ.*

²⁵¹ Lipman op cit note 241 at 85.

²⁵² Ibid.

²⁵³ *EPA v Caltex Refining Co. Pty Ltd. (1993) 68 ALJR 127 per Mason CJ and Toohey J.*

²⁵⁴ Lipman supra.

²⁵⁵ Lipman supra.

compelled to discover incriminating evidence, be personally liable and exposed to criminal sanctions²⁵⁶.

Firstly, from common law perspective- of whether the privilege against self-incrimination should be extended to corporations? The Australian High Court decision in the case of EPA v Caltex Refining Co. Pty Ltd. seems to be accommodative of our common law. In that section 8(3)(b) of our Final Constitution permit our courts to develop the rules of our common law in limiting any right in the Bill of Rights, including but not limited to the privilege against self- incrimination, provided the limitation is reasonable and justifiable in terms of section 36(1). It is submitted that the limitation of the privilege when it comes to corporations may be reasonable and justified, because the privilege from its common law development was always developed within the context of being classified as a human right exercised only by natural persons and not juristic or artificial persons. This is evidenced by the majority decision of the Australian High Court in the above case, where it was held that, at common law, the privilege does not extend to corporations because, firstly, the privilege is a human right designed to protect individuals from oppressive methods of obtaining evidence, and secondly, groups [or artificial entities] frequently are powerful and their illegal doings frequently are provable only by their records...²⁵⁷.

With regard to the Constitutional perspective, lessons may be learned from both the United States of America and Canada approaches. Because in both these countries the

²⁵⁶ Lipman supra. See also Puls J 'Corporate Privilege- Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13 EPLJ 364.

privilege is contained and addressed in the context of the Fifth Amendment of the United States Constitution and the Canadian Charter of Rights and Freedom, which are as important documents in those countries as our Final Constitution.

From the United States approach, our courts, in limiting the privilege, may appoint any person to be agents who can without any fear of self- incrimination furnish the corporate documents requested by the State. The court should have discretion in designating such a person. This approach may, in turn, accommodate the Canadian approach that provides that the privilege against self- incrimination should only be afforded to individual corporate officers, as it is a human right.

This limitation may be reasonable and justifiable in terms of section 36(1) of our Final Constitution, because by limiting the extension of the privilege to corporations the right to a healthy environment (section 24) will not be compromised. Whereas, when extending the privilege to corporations will subject citizens of our country to an environment that is harmful to their health and well- being. Thereby hindering the State in performing its constitutional duty of affording every citizen an opportunity of enjoying a healthy environment.

Next are suggestions and recommendations for the enforcement of our Criminal Environmental Statutes.

²⁵⁷ EPA v Caltex Refining Co. Pty Ltd. (1993) 68 ALJR 127 at 136 as per Mason CJ and Toohey.

Chapter Five: Conclusion.

Recommendations and Suggestions for South African Criminal Environmental Legislation.

➤ Should the Constitutional Privilege Against Self-Incrimination be Extended to Corporations or Not?

Our country has a very unique and well-written Constitution that includes the Bill of Rights²⁵⁸, which guarantee both natural and juristic persons the right 'not to be compelled to give self-incriminating evidence'²⁵⁹. Adding to this, natural persons are entitled to an environment that is not harmful to their health or well-being²⁶⁰.

What this means is that the government and corporations must respect the right of natural person to enjoy a healthy environment²⁶¹. In Minister of Health and Welfare v Woodcarb (Pty) Ltd. and other²⁶², where Hurt J stated that: "[t]he generation of smoke in these circumstances, in the teeth of the law as it were, is an infringement of the rights of the respondents neighbours to 'an environment which is not detrimental to their health or well being...'" This dictum means that corporations are prohibited, by our constitution, in polluting the environment as a whole and if they contravene section 24 of the constitution, the State is obliged, in terms section 24(b) of our constitution, to take action

²⁵⁸ Chapter 2 Constitution of the Republic of South Africa 1996.

²⁵⁹ Section 35(3)(j) Constitution of the Republic of South Africa 1996.

²⁶⁰ Section 24(a) Constitution of the Republic of South Africa 1996.

²⁶¹ Commentators are now in agreement that the Bill of Rights does have horizontal effect but the extent of such horizontal application is still debated. Further see Glazewski J Environmental Law in South Africa 2000 at 88; Davis (et al) Fundamental Rights in the New Constitution Commentary and Cases 1997 at 43; Cockrell 'Private Law and the Bill of Rights: a threshold issue of horizontality' in Bill of Rights Compendium 1997 3A1-17; Cheadle and Davis The Application of the 1996 Constitution in the Private Sphere (1997) 13 SAJHR 44.

against the corporate polluter. This kind of action is taken either through reasonable legislative or “other measures” the State may deem fit against that corporate polluter. Moreover, this type of action should be taken with an objective of preventing pollution or industrial pollution on behalf of natural persons²⁶³.

As the words “other measures” are not defined in our constitution, therefore one cannot escape the fact that the State is given wide discretion with regard to dealing with corporate polluters. From an environmental context, it is submitted, that the words “other measures” be given wide interpretation when it comes to corporate polluters. This may, therefore, include the limitation of the corporate polluter’s privilege against self-incrimination²⁶⁴.

The limitation of the corporate polluter’s privilege is relevant when it comes to the prosecution of the corporate polluter for the alleged environmental crime. Where the corporate offender invoke the privilege against self- incrimination, with regard to the disclosure and discovery of environmental auditing documents, the court may weigh the two competing rights, namely the right to a healthy environment and the privilege against self- incrimination, and limit the corporate polluter’s privilege in this regard. Put differently, without these documents the State will not be able to prove its case against the corporate offender. Basically these documents, if discovered, can form the basis of the State case. It is for these reasons that the court should limit the privilege against self-incrimination in its application to corporations.

²⁶² 1996 (3) SA 155 (N).

²⁶³ Section 24(b)(i) Constitution of the Republic of South Africa 1996.

What is also crucial about this matter is that the courts should, when deciding on this matter, be cautious about the fact that this matter is an environmental matter and not a criminal matter. Therefore the courts should take note of the fact that the environment as whole is fragile and should be protected as such. Not only should the environment be, always, protected when the damage is done. But, the courts, in their decisions should promote co- operation between the State and corporations so as to allow both parties to come up with reasonable proactive measures that would prevent the degradation of our environment. This kind of co- operation can benefit both the State and the corporations, in that the State will be fulfilling its duty in terms of section 24(b) of our constitution while the corporations, by releasing their environmental audits for inspection to the State will help them identify whether their activities amount to a breach of either a statute or permit. If the audits are released early, the corporation can be able to take the necessary steps in avoiding the potential degradation of the environment as well as the potential breach. Therefore co- operation between the State and the corporations is vital in order for the natural individual to enjoy his or her constitutional right to a healthy environment.

²⁶⁴ This is to be done in terms of section 36 of our Constitution.

Conclusion

In our modern times environmental crime has been extended to the activities of corporations²⁶⁵. However, the criminal law was primarily developed in the context of individual offenders and many practical difficulties have arisen in its application to corporations²⁶⁶. One difficulty that has been identified and analyzed in this paper is that traditional protections afforded to natural persons may operate unfairly when applied to large well- resourced corporations²⁶⁷.

In South Africa, as submitted above, it is argued that the privilege against self-incrimination should not be extended to corporate offenders when it comes to serious environmental crime²⁶⁸. From an environmental context, the privilege of corporate offender may be justifiably limited for the protection of the environment and thus protecting the public's constitutional right to a healthy environment. However, a South African court may reach the same conclusion as the Australian High Court in relation to the extension of the privilege to corporate offenders. If the privilege is abrogated with respect to corporate offenders, it may be necessary for the court to clarify with certainty whether corporate officers are protected in circumstances where they are compelled to discover incriminating evidence on behalf of their corporations.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Lipman op cit note 361 at 90.

²⁶⁸ Lipman op cit note 361 at 86.

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